

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Children, Families, and Elder Affairs Committee

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BILL: SM 954

INTRODUCER: Senator Flores and others

SUBJECT: Parental Rights Amendment

DATE: March 22, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Boland</u>	<u>Maclure</u>	<u>JU</u>	<b>Favorable</b>
2.	<u>Preston</u>	<u>Walsh</u>	<u>CF</u>	<b>Favorable</b>
3.	_____	_____	<u>GO</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

This Senate Memorial petitions the United States Congress present to the states for ratification an amendment to the United States Constitution establishing an enumerated fundamental parental right.

Although the right of parents to direct the upbringing and education of their children has long been recognized by the United States Supreme Court, this memorial, if the amendment therein proposed were to be enacted, would solidify the fundamental parental right as a constitutionally enumerated right. By enumerating a fundamental parental right, rather than relying on doctrine of the United States Supreme Court, this amendment seeks to ensure that the fundamental parental right is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

**II. Present Situation:**

**Fundamental Rights, Penumbra, and Non-Enumerated Rights**

There are certain rights that the United States Supreme Court has deemed “fundamental” to every American citizen. In the broadest view, those fundamental rights are enumerated in the Bill of Rights. However, the Court has found that fundamental rights are not limited to those specifically enumerated in the United States Constitution. There are other, non-enumerated,

fundamental rights that emanate from the “penumbras” of the enumerated rights. In *Griswold v. Connecticut*, the Court held that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”<sup>1</sup> Many long-established and highly regarded fundamental rights are founded in penumbras formed by emanations from enumerated rights, and the Court, generally, treats these like any other fundamental rights.

The association of people, the right to educate a child in a school of the parents’ choice, and the right to study any subject that one chooses are all rights not mentioned in the Constitution or the Bill of Rights. However, the First Amendment has been interpreted to include those rights. Likewise, the right to educate one’s child as one chooses is not specifically enumerated in the Constitution or Bill of Rights. Rather, it stems from the force of the First and Fourteenth Amendments.<sup>2</sup> In *Griswold*, the Court stated, “Without those peripheral rights the specific rights would be less secure.”<sup>3</sup>

These penumbral rights are often derived from history and tradition. This derivation from history and tradition, while logical, creates a more malleable right than could be achieved by enumeration. Because of these characteristics, non-enumerated rights, by their very nature, are subject to revision based on the ebb and flow of differing American and legal ideologies.

### **Case Law Concerning Parental Rights**

In *Wisconsin v. Yoder*, the United States Supreme Court first recognized a fundamental right to parent one’s child.<sup>4</sup> There, the Court stated:

this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.<sup>5</sup>

The Court recognized the state’s role as *parens patriae* (“parent of his or her country”) to save children from abusive or unfit parents, but recognized that this state interest must be balanced with an understanding that, absent such abuse or danger, parents do traditionally retain certain fundamental rights to direct the upbringing of their children.<sup>6</sup> However, the Court’s decision in *Yoder* was somewhat limited by the fact that the Court based its holding on a combination of a fundamental parental right and the right to free exercise of religion.

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<sup>1</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>2</sup> *Id.* at 482.

<sup>3</sup> *Id.* at 482-83.

<sup>4</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 230.

In *Troxel v. Granville*, the Court further defined, and definitively established, a fundamental parental right.<sup>7</sup> The Court stated, “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”<sup>8</sup> The Court recognized a cardinal tenant that the parents’ function and freedom “include preparation for obligations the state can neither supply nor hinder.”<sup>9</sup> In defining the extent and boundaries of the fundamental parental right, the *Troxel* Court noted that as long as a parent is fit and sufficiently cares for his or her children, the state will have no reason to inject itself into the private realm, nor shall it further question a parent’s ability to make decisions in the best interest of the child.<sup>10</sup>

Yet, even with such seemingly established precedent, Justice Souter noted in his concurrence to the *Troxel* decision, “Our cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child.”<sup>11</sup> The lack of exact boundaries pointed to by Justice Souter highlights the possibility that the fundamental parental right, as it now stands, is subject to shifting views, legal interpretations, and ideologies. Currently, there exists a fundamental parental right; however, it may be argued that the right and its exact parameters have not been solidified as firmly as they might be if the fundamental parental right were to become an enumerated right.

### **Methods of Proposing Amendments to the U.S. Constitution**

The Constitution of the United States prescribes two methods for proposing amendments to the document. Under the first method, Congress – upon the agreement of two-thirds of both houses – may propose an amendment itself. Under the second, Congress – upon application from legislatures in two-thirds of the states – “shall call a convention for proposing Amendments.”<sup>12</sup> Under either method, Congress is authorized to specify whether the amendment must be ratified by the legislatures of three-fourths of the states or by convention in three-fourths of the states.<sup>13</sup>

### **III. Effect of Proposed Changes:**

This Senate Memorial petitions the United States Congress to propose and submit to the states for ratification an amendment to the United States Constitution enumerating a fundamental parental right. In accompanying “whereas clauses,” the memorial expresses an intent to ensure that the fundamental parental right recognized in case law by the United States Supreme Court is preserved as it now stands and protected from future revision or interpretation due to shifting ideologies of the United States Supreme Court. The memorial contemplates the creation of a new article of the United States Constitution.

Section 1 of the proposed amendment states that the liberty of parents to direct the upbringing and education of their children is a fundamental right. This provision would have the effect of

<sup>7</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>8</sup> *Id.* at 65.

<sup>9</sup> *Id.* at 65-66.

<sup>10</sup> *Id.* at 68-69.

<sup>11</sup> *Id.* at 78.

<sup>12</sup> U.S. CONST. art. V.

<sup>13</sup> *Id.*

making the fundamental parental right a constitutionally enumerated right. This designation would afford the right the greatest degree of protection from infringement and put the fundamental parental right on the same level with rights such as freedom of speech and the right to bear arms.

Section 2 of the proposed amendment provides that no state, nor the United States itself, may infringe on this right without a showing that such infringement is the only way of achieving a governmental interest of the highest order. This section essentially codifies the standard of strict scrutiny that courts impose when determining whether or not a law that infringes on a fundamental right is constitutional. As a matter of course, most laws or governmental actions analyzed under strict scrutiny will fail on constitutional grounds and be struck down by the courts.

Section 3 of the proposed amendment further solidifies the sanctity of the fundamental parental right. It ensures that no court can apply any international law, nor may the United States adopt any treaty, which would supersede, modify, interpret, or apply to the rights guaranteed by this article. Courts will sometimes interpret the Constitution or laws of the United States by looking to the traditions and laws of other countries as the applicable “history or tradition” on which the United States’ Constitution or law is based. This final provision of the proposed amendment would ensure that the above practice is not permitted.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.