

TEXAS PUBLIC POLICY FOUNDATION

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**LEGISLATOR'S
GUIDE**
to the issues



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Parent's Rights, Children's Best Interests

The Issue

Since its 1923 *Meyer v. Nebraska* ruling, the U.S. Supreme Court has consistently confirmed the fundamental rights of parents and families. In *Meyer*, the Court recognized “the right of the individual ... to marry, establish a home and bring up children” is protected by the U.S. Constitution. Two years later, in *Pierce v. Society of Sisters*, the Court reinforced “the liberty of parents and guardians to direct the upbringing and education of children.”

Likewise, the Supreme Court of Texas has held that “the natural right which exists between parents and their children is one of constitutional dimensions” (*Wiley v. Spratlan*). However, in *In re C.H.*, it found that “while parental rights are of constitutional magnitude, they are not absolute.”

The natural rights of parents presume the obligation to protect children and not harm them. State intervention is appropriate as a last resort when parents pose a risk to their children's health or safety. Nevertheless, the proper balance of power between citizens and the state requires a narrow definition of harm. Coercive state intervention in the family should be limited to cases where (1) serious physical or emotional harm to the child is imminent and (2) the intervention is likely to be less detrimental than the status quo.

Rather than requiring imminent harm, family courts utilize the “best interests of the child” when called upon to make decisions affecting children. Section 153.002, Texas Family Code, provides that “the best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”

The use of the best interest standard in custody cases is problematic but not as pernicious as when the standard is employed against parents by others. In *Reno v. Flores*, Justice Scalia clarified that, unlike in cases between parents, “the best interests of the child” is not the legal standard that governs parents’ or guardians’ exercise of their custody” in cases brought by third parties.

The best interest standard not only leads to arbitrary decision-making but also raises significant concerns about social engineering. The standard introduces “bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child” (*Smith v. Organization of Foster Families*). In *Parham v. J.R.*, the U.S. Supreme Court established a legal presumption that “the natural bonds of affection lead parents to act in the best interests of their children.”

Until 2000, the U.S. Supreme Court reliably applied strict scrutiny to questions involving the upbringing of children. Strict scrutiny demands the state prove that the objective it seeks is compelling (i.e., undeniably necessary) and that the means employed to achieve that objective are the least restrictive available.

In *Troxel v. Granville*, a plurality of the Court failed to apply the strict scrutiny to a Washington visitation law; instead subjecting parents to a case-by-case balancing test. Some have viewed the ruling as softening the Court's parental rights doctrine, resulting in conflicting interpretation, including by Texas appellate courts.

Interpreting the effect of *Troxel* in 2004, then-Attorney General Greg Abbott declared “state statutes that infringe upon a parent's right to control the care and

custody of his or her children are subject to strict scrutiny. A court may not, in visitation cases, substitute its own judgment in such a way as to infringe upon this fundamental liberty interest.”

Ten states—Arizona, Colorado, Kansas, Idaho, Michigan, Nevada, Oklahoma, Utah, Virginia, and Wyoming—have responded to *Troxel* by enacting statutes that define and protect parental rights by declaring that parents possess a fundamental liberty interest in the upbringing of their children, to be protected at all costs against state intervention.

The Facts

- Since 1923, the U.S. Supreme Court has declared the fundamental rights of parents and has applied strict scrutiny to state intrusions into the family.
- In 2000, the Court in *Troxel v. Granville* applied a balancing test rather than strict scrutiny to third-party claims against parents for visitation.
- Since *Troxel*, 10 states have enacted legislation that defines and protects parental rights.
- In 2004, a Texas attorney general opinion confirmed that parents possess a fundamental liberty interest subject to strict scrutiny analysis.

Recommendations

- Enact parental rights legislation which recognizes that parents have a fundamental liberty interest in the upbringing of their children, giving rise to a right to raise children as parents see fit.
- Adopt a legal presumption that parents act in the best interests of their children.
- Limit government intervention in the parent-child relationship to cases in which physical or emotional harm is imminent and state intervention is less detrimental than the status quo.

Resources

[*Family Privacy and Parental Rights as the Best Interests of Children*](#) by Brandon Logan, Texas Public Policy Foundation (Feb. 2018).

[*In Re C.H.*](#), 89 S.W.3d 17 (Tex. 2002).

[*Meyer v. State of Nebraska*](#), 262 U.S. 390 (1923).

[*Parham v. J.R.*](#), 442 U.S. 584 (1979).

[*Pierce v. Society of Sisters*](#), 268 U.S. 510 (1925).

[*Reno v. Flores*](#), 507 U.S. 292 (1993).

[*Smith v. Organization of Foster Families For Equality & Reform*](#), 431 U.S. 816 (1977).

Texas Attorney General Opinion [GA-0260](#) (Tex. A.G. 2004).

[*Troxel v. Granville*](#), 530 U.S. 57 (2000).

[*Wiley v. Spratlan*](#), 543 S.W.2d 349 (1976).

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