

INPUT FOR THE COUNTRY VISIT TO USA

**Input of Distinguished Professor Emeritus William Wagner
In Response to Call for Contributions:
Country Visit to the United States of America (29 April – 10 May 2024)
Issued by United Nations Special Rapporteur on the Right to Education**

Special Rapporteur Ms. Farida Shaheed:

Thank you for providing me the opportunity to provide input for your country visit to the U.S.A.

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I also served as an American Diplomat and Senior Advisor to the United States Department of State.

I respectfully present the following input on “*academic freedom and safety at all levels of education and access to public education from kindergarten to 12th grade without discrimination.*”

USA CULTURE, PARENTAL RIGHTS, AND EDUCATION CHOICE

The deeply rooted historical and legal tradition of the U.S. culture recognizes that a parent is in the best position to know what is in the best interest of their child. Historically, the constitutional law of this nation and its states therefore hold that parents have an inalienable fundamental right to direct and control the upbringing of their children.¹ This constitutional liberty right is especially applicable in the area of education choices. As a legal limit on the exercise of government power, this fundamental liberty enables broad educational choices for families, without discrimination, tailored to each child's needs.

Under United States Supreme Court precedent, a Court applies *strict scrutiny* when reviewing government actions that substantially interfere with a citizen's fundamental rights. U.S. Supreme Court case law articulates a "strict scrutiny" standard that limits the exercise of government power.

"The essence of all that has been said or written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of [a fundamental right]."²

Courts at various levels of the federal judiciary used this same terminology in at least 125 cases since its introduction in 1972. Its meaning, therefore, is well established and clear. Using the fundamental right strict scrutiny standard, our laws protect parental decision-making concerning education choices while

¹ *Meyer v Nebraska* 262 US 390 (1923); *Pierce v Society of Sisters*; 268 US 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

² *Wisconsin v. Yoder*, 406 U.S. 205 (1972); See also *Adarand v. Peña*, (1995), *Widmar v. Vincent*, (1982), and *Church of the Lukumi Babalu Aye, Inc., v. Hialeah*, (1993).

preserving a state's compelling government interest in passing laws protecting children from abuse by unfit parents. Indeed, state laws that provide for child safety and protection are upheld under a strict scrutiny standard because the government has a compelling interest in protecting children where unfit parents threaten their welfare. For example, states have a compelling interest in protecting children against the physical abuse of a child committed by an unfit parent.³

The fundamental rights standard as applied to various state laws also preserves a fit parent's fundamental liberty to control and direct the upbringing of their children, especially in the education sphere. After all, who is in the best position to know what is in the best interest of a child? The fit parents who raised the child or a government authority (well-intentioned or not) who did not? The deeply rooted historical and legal traditions of this nation recognize what every parent knows the moment they hold their child for the first time. It has been given to them the duty, responsibility, and right to control and direct the upbringing of their child. This liberty right properly serves as a limit on the exercise of government power. I encourage the international community to understand these deeply rooted historical and legal traditions as part of the rich culture of the United States, and to understand this cultural and legal limit on the exercise of state power.

³ See, e.g., §14:403 La Criminal; Art. 609 & 603 Children's Code (Acts seriously endangering the physical health of child, including infliction of physical injury; exploitation by overwork; or sexual abuse). Thus, it is worth noting, that every State protecting parental rights in its state code, also continues to fully prosecute child abuse and neglect cases, and still properly holds the power to terminate parental rights (i.e., when the government shows a compelling state interest to do so and no less restrictive means to protect the child exist). Likewise, a compelling state interest would prevent parents from disrupting teachers teaching class during the school day.

Indeed, in addition to the U.S. Supreme Court holding parental rights to be a fundamental constitutional liberty applicable to the states as the Supreme Law of the Land, many States have additionally re-confirmed parental rights as a fundamental right in their state laws: (e.g., West Virginia prior to 1931, Kansas and Michigan in 1996, Texas in 1999, Utah in 2000, Colorado in 2003, Arizona in 2010, Nevada and Virginia in 2013, Oklahoma in 2014, Idaho in 2015, Wyoming in 2017, Florida and Montana in 2021, and Georgia in 2022⁴)

BEYOND CURRENT CONSTITUTIONAL PROTECTION:
A PROPOSED PARENTAL RIGHTS AMENDMENT
TO THE UNITED STATES CONSTITUTION

Reaffirming the continuing relevance of the deeply held historical and legal tradition is a proposed amendment to the U.S. Constitution. Pending before the U.S. Congress is a proposed amendment to the U.S. Constitution that inoculates against international interference with state constitutional and statutory provisions protecting parental decision-making (e.g., on education choice).

The proposed Amendment to the U.S. Constitution is designed, in part, to protect the authority of the various states over matters reserved to them under the Tenth Amendment, which might otherwise be ceded to the federal government

⁴ West Virginia (W. Va. Code § 44-10-7, as extended by *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (WV 1973); *see also* W. Va. Code § 49-1-1(a) and W. Va. Code § 49-6D-2(a)); Kansas (Kan. Stat. Ann. § 38-141(2)(b); *see also* Kan. Stat. Ann. § 60-5305(a)(1)); Michigan (Mich. Comp. Laws § 380.10); Texas (Texas Family Code § 151.003); Utah (Utah Code Ann. § 62A-4a-201; *see also* Utah Code Ann. § 30-5a-103); Colorado (Colo. Rev. Stat. § 13-22-107(1)(a)(III)); Arizona (Ariz. Rev. Stat. § 1-601); Nevada (Nevada Rev. Stat. Ann. § 126.036); Virginia (Va. Code Ann. § 1-240.1); Oklahoma (Okla. Stat. tit. 25, § 2001—2005); Idaho (Idaho Code § 32-1012 – 1013); Wyoming (Wyo. Stat. Ann. § 14-2-206); Florida (Fla. Stat. § 1014.03); Montana (Mont. Code Ann. § 40-6-701); Georgia (Ga. Code Ann. § 20-2-786).

through a properly executed treaty. In this regard, Article VI of the United States Constitution expressly provides that:

“... all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”(emphasis added)

Moreover, in *Reid v. Covert*, 354 U.S. 1 (1957), the U.S. Supreme Court confirmed that:

“To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.”

The proposed Amendment to the U.S. Constitution reflects an informed citizenry desiring to preserve the longstanding traditional standard of parental rights protection recognized in U.S. constitutional law (while at the same time protecting children from abuse).

In conclusion, deeply rooted historical and legal traditions in the U.S.A. provide strong constitutional protection for parental educational choices. This legal environment powerfully ensures academic freedom and safety at all levels of education, with access to education choice from kindergarten to 12th grade, without discrimination.