

***THE RIGHT OF PARENTS TO RAISE THEIR CHILD***  
*(and conversely the right of the child to be raised by his/her family)*

***Do the courts see this right as***  
***FUNDAMENTAL or NON-FUNDAMENTAL?***

**SB 314 as amended**

- 1. The liberty interest of a parent in the care, custody and management of the parent's child is a fundamental right.**
- 2. Nothing in this section shall be construed to:**
  - (a) Authorize a parent to engage in any unlawful conduct or to abuse or neglect a child in violation of the laws of this State.**
  - (b) Prohibit courts, law enforcement officers or employees of an agency which provides child welfare services from acting in their official capacity within the scope of their authority.**
- 3. Except as otherwise provided by specific statute, the provisions of this section apply to any statute, local ordinance, or regulation and the implementation of such statute, local ordinance or regulation regardless of whether such statute, local ordinance or regulation was adopted or effective before, on or after October 1, 2013.**
- 4. As used in this section, "agency which provides child welfare services" has the meaning ascribed to it in NRS 432B.030.**



Parental and Children's  
Rights

Governmental  
Interests

Security and Liberty

Fairness &  
Justice

Communal Stewardship

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### **1 \* In a nutshell, what does SB 314 do?**

SB 314 is intended for the courts, and defines the right of parents to raise their child as a fundamental right. A fundamental right requires all governmental agencies to honor that right unless there is a compelling and specific reason not to. Unless specifically excepted by another statute, this law would pertain to all Nevada laws, ordinances and regulations. This law would not predetermine the outcome of any particular case, but instead it tells Nevada courts that the legislature is in agreement with existing U.S. and Nevada Supreme Court decisions.

### **2 \* Isn't it already a "fundamental" right to raise your child?**

For ninety years the U.S. Supreme Court has repeatedly ruled that the right of parents to raise their child is fundamental,<sup>1</sup> giving it the same legal protections as free speech and freedom of the press. In recent years, however, some lower courts and government officials have resisted compliance with those rulings, reducing the parental right to "a collection of numerous mini-rights, each to be afforded different degrees of scrutiny."<sup>2</sup> Parents need a law in order to be secure in their liberty so the court doesn't have to ponder constitutional law every time an intrusion into family life occurs, making such cases daunting and expensive. A state law will also help deter government officials from attempting to transform "parental rights into parental responsibilities - responsibilities that the state is willing to enforce."<sup>3</sup>

### **3 \* If this is on a par with free speech and freedom of the press, shouldn't Congress pass a law or Constitutional Amendment?**

Some Courts and legal scholars have acknowledged that the U.S. Constitution already protects parental liberty through a variety of provisions, including the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. Further, some have observed that additional protections and remedies might be afforded by a Constitutional



amendment or federal statute. Accordingly there have been attempts in the last three Congresses to pass a Parental Rights Amendment. But there are others who consider this a state issue, not a federal issue. When considering the "Parental Rights and Responsibility Act" in 1995, Congressman Barney Frank said: "Is the Federal Government smarter than the States and has a better set of values and, therefore, you can't trust the States to protect the family rights, but the Federal Government has to do it?"<sup>4</sup> Even if a federal statute were to be passed, it would probably not preserve the fundamental right of the parent in the same way that a state statute could do.

**4 \* Is the fundamental parental right to raise children a partisan issue?**

No. Historically, both parties have recognized the right of parents to raise their children. In 1992, Democratic nominee Bill Clinton stated "Because governments don't raise children; parents do,"<sup>5</sup> and he repeated that in his 1995 State of the Union speech.<sup>6</sup> A past Democratic Party national platform,<sup>7</sup> as well as some current Republican Party state platforms,<sup>8,9</sup> describe fundamental parental rights.

In 2010 Zogby<sup>10</sup> asked the question: "In general, parents have the constitutional right to make decisions for their children without governmental interference unless there is proof of abuse or neglect. Do you agree or disagree with this view of parental rights?"

	Agree	Disagree
Democrats	92.4%	5.7%
Republicans	97.5%	1.9%
Independents	90.8%	4.8%



**5 \* If there is already a parental right to raise children, does it matter whether Courts call it “fundamental” or “non-fundamental”?**

Yes. The phrase "fundamental right" is a legal term of art that makes it more difficult for government to arbitrarily interfere with citizens. In one famous set of 1993 cases, decided on the same day at a time when Michigan did not have a statute to define parental rights as

fundamental, the Michigan Supreme Court ruled in favor of DeJonge,<sup>11</sup> and against Bennett.<sup>12</sup> The two cases had nearly identical circumstances, but the DeJonges made an additional claim of religious conviction, whereas the Bennetts did not. Because the DeJonges included their religious claim they had a "fundamental right", causing the court to apply a "strict scrutiny test" that the DeJonges passed. The court ruled that the Bennetts, however, had only a non-fundamental parental right, causing the court to apply a "rational basis" test that the Bennetts did not pass.

### **6 \* How do "strict scrutiny" and "rational basis" differ?**

"Strict scrutiny" is a test applied by the courts that "would require the state to provide compelling evidence to justify state interference," and that "a compelling state interest ... be truly compelling".<sup>13</sup> Furthermore, the state bears the burden of showing that the regulation or law is "the least intrusive means of discharging its interest".<sup>14</sup>

"Rational basis" is a test applied by the courts that "forces parents to provide conclusive evidence that the state's interference has no rational possibility" of satisfying a legitimate state interest,<sup>15</sup> and allows the state to prevail if it can show even one "at least debatable" state interest.<sup>16</sup> Furthermore, the parent bears the burden to prove that the state is being unreasonable.<sup>17</sup>

### **7 \* Is "strict scrutiny" or "rational basis" hard to prove in court?**

Strict scrutiny that employs compelling interest "is not an unreasonably difficult standard for government to meet".<sup>18</sup>



Rational basis allows the government to interfere if officials can articulate any coherent basis for doing so, and it is "extremely difficult" for parents to stop government intrusion when such a test is applied.<sup>19</sup>



## 8 \* What difference does it make who bears the burden?

The burden refers to who has to "make the case."

Fundamental rights that employ strict scrutiny and compelling interest require the government to make their case at the government's expense, which is not hard to do in clear-cut objective cases. This is the high standard used for freedom of the press, free speech, and freedom of religion. "Fuzzy" cases based on mere suspicion or hearsay allegations do not meet those standards. The interests of the state, such as a newspaper publishing a story that is embarrassing to the state, are subordinate to the fundamental right.



Non-fundamental rights that employ rational basis and state interests require parents to make their case at their own expense. The parents have to prove that every single one of the state's actions were indisputably egregiously wrong, which is nearly impossible since the "best interest of the child" test can be subjectively employed to override nearly any parental decision.

## 9 \* Does having a fundamental right mean a person can do whatever he or she wants?

No. Just as there are limitations on free speech, such as yelling "fire!" in a crowded theatre, having a fundamental parental right does not mean freedom to abuse or neglect a child. Current laws regarding the protection of children still apply, and any agency responding to reports of child endangerment still have the legal authority to act in accordance with their regulations. This law will, however, require the state to change any regulation that does not meet the high standard of "compelling interest", so that lacking any present or immediate danger, or any evidence of abuse or neglect, the fundamental right of the parent to direct the upbringing of their child must be honored.



**10 \* Does this mean that "best interests of the child" standards won't apply in child custody cases?**

No. Best interests laws will still apply in child custody cases, allowing the court to make physical and legal custody decisions where parental fault can be found on the part of a parent. If parental fault cannot be found for either parent, a joint custody arrangement will still be determined by the court. Parental fault is a compelling reason for governmental intervention between child and parent.

**11 \* How does Nevada currently interpret parental rights?**

Two Nevada Supreme Court cases from 2002 and another from 2013 indicate that Nevada is adhering to a high "clear and convincing evidence" standard when it comes to the

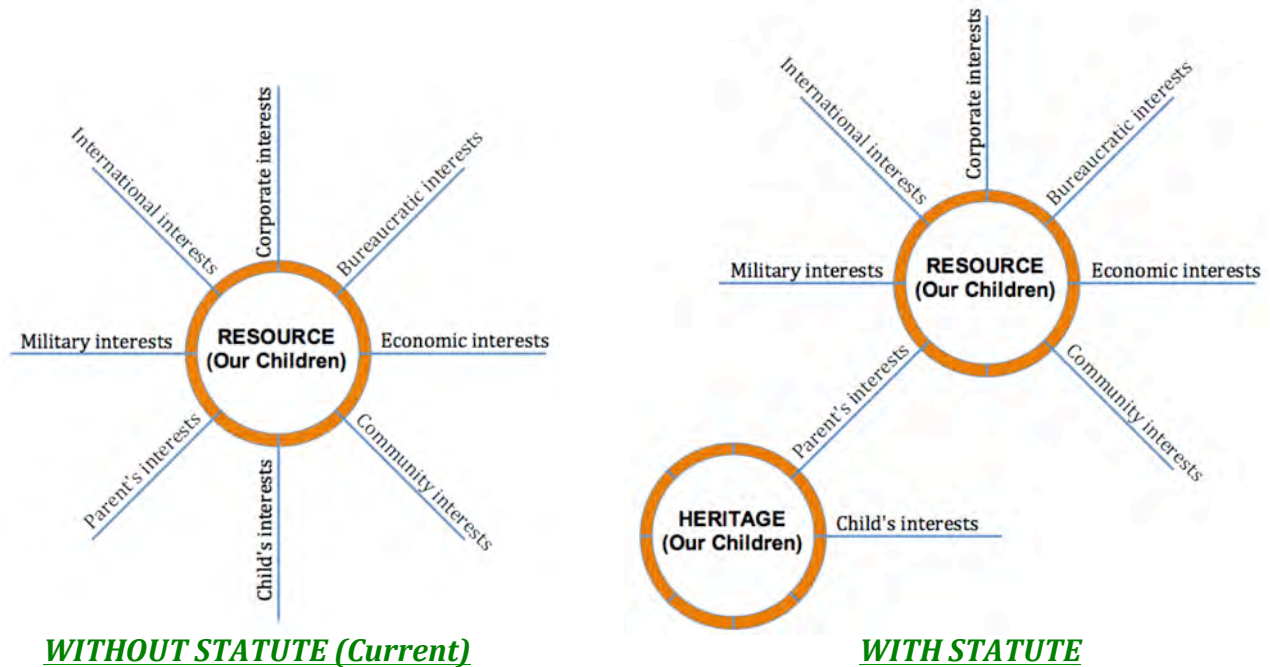


termination of parental rights (TPR). In the first TPR case: "[T]he parent-child relationship is a fundamental liberty interest' and the Due Process Clause of the Fourteenth Amendment protects parents' fundamental right to care for and control their children. Statutes that infringe upon this interest are thus subject to strict scrutiny and must be narrowly tailored to serve a compelling interest."<sup>20</sup> The second TPR case stated: "(I)n conformance with NRS 128.105, we adopt a best interests/parental fault standard ... and both standards must be proven by clear and convincing evidence."<sup>21</sup> In 2013 the Court recognized the paramount concern for the child's health and safety, but asserted that "A parent's fundamental liberty interest in the care, custody, and control of his child does not 'simply evaporate' because the parent has not been a model parent or may have lost temporary custody of his child to Social Services."<sup>22</sup>

Nevada cases with lower profiles than TPR cases currently may not enjoy the same high standard. Likewise Nevada agency regulations and policies may not fully comply with this fundamental right standard.

## 12 \* How would this law help Nevada's parents?

Litigation over constitutional law is too expensive and cumbersome to use each and every time parents wish to act with respect to their own child. Without a specific Nevada statute that holds parental rights as fundamental, competing outside interests<sup>23</sup> can lay legal claim to "the



best interests of the child", allowing the court to treat our children as any other valued state resource.

"The United States Congress realized that the "best interest" standard could be easily abused ... and enacted a higher statutory standard pioneered by Native American advocates to provide an extra layer of legal protection. Ironically, many Native American families on Reservations now enjoy a higher level of practical protection for parental liberty than many white American state residents."<sup>24</sup>

Having a statutory statement of the fundamental nature of the parental right to raise children would ensure that Nevada courts always apply the high "strict scrutiny" standard, thereby recognizing that "Government officials and majoritarian populations simply do not have interests which are as closely aligned to a seized child as the interests



of that child's parent."<sup>25</sup> This law would ensure the parent's legal right to protect the "best interests of the child,"<sup>26</sup> allowing intervention only for a compelling government interest that is of the highest order. Once that compelling interest been met, then the existing "best interests of the child" standards can be used by the courts to determine custody and other matters. Further, this law would clarify the parental role in matters such as optional medical decisions, reasonable disciplinary actions, school choice decisions, and the myriad of other responsibilities that come with parenthood.



### **13 \* How would this law help Nevada's children?**

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Just as strengthening a community's law enforcement helps protect the citizens within that community, this law would "protect children by empowering parents".<sup>27</sup> The parent-child bond "is often framed as a 'parental rights' issue," but it can also be framed as a children's rights issue.<sup>28</sup> The Ohio Supreme Court noted the right of children to be raised by their parents: "...prior and fundamental right of a parent to rear his child; and concomitantly, of the right of the child to be reared by his natural parent."<sup>29</sup> Thus, this law would protect Nevada children's right to be raised by their parent within the time-honored bonds of the family unit.

### **14 \* Will this law jeopardize the welfare of children?**

No. We know this because various other states have already enacted similar statutes. The laws have been in place for a number of years without any of the catastrophic effects to child welfare initially predicted by those opposed to a fundamental parental liberty.



**15 \* Will public school discipline, curriculum selection, and other matters be affected by this law?**

While competing rights may always have the right to be brought to court, the Federal Circuit Courts have consistently sided with public school districts even when fundamental parental rights are at issue. Parents lost a case when the Ninth Circuit stated that their fundamental parental right allows a parent "their choice of the educational forum," but once enrolled in a public school that right "does not extend beyond the threshold of the school door."<sup>30</sup> A statute in Texas defining the fundamental right of parents<sup>31</sup> was in place when the Fifth Circuit ruled against parents who claimed "their right to control their children's education is a fundamental right" while objecting to mandatory school uniforms.<sup>32</sup> It is unlikely that challenges to existing case law would be successful unless new laws were passed to address the issues.

**16 \* If Nevada is not having a current problem, do we need this law?**

Yes. Nationwide many government officials are making continuous efforts to expand government intrusion at the expense of family autonomy and parental prerogatives. This proposed law will prevent the erosion of fundamental parental rights from infecting Nevada's courts. Although Nevada's courts currently appear in general to be upholding a high standard as a matter of judicial interpretation, that could easily change when new Nevada Supreme Court justices are elected. The underpinnings of parental rights are currently established through jurisprudence, and do not enjoy the additional layer of protection afforded through legislative enactment.





## Notes

- <sup>1</sup> See *Troxel v. Granville*, relying on the Court's earlier *Pierce* and *Meyer* decisions. Historically the fundamental right to raise your child has been an American presupposition, "so generally admitted," that the Framers didn't enumerate it with other fundamental rights in the Constitution such as freedoms of speech and the press because "it probably never occurred ... that parental rights could, as a practical matter, ever be called into question..." (Witte, 1996, p. 219).
- <sup>2</sup> Witte, 1996, p. 216
- <sup>3</sup> Parentalrights.org, n.d., p. 3
- <sup>4</sup> PRRA, 1995, p. 24
- <sup>5</sup> Clinton speech, 1992
- <sup>6</sup> Clinton speech, 1995
- <sup>7</sup> Democratic Party, 1892 "We are opposed to State interference with parental rights and rights of conscience in the education of children as an infringement of the fundamental Democratic doctrine that the largest individual liberty consistent with the rights of others insures the highest type of American citizenship and the best government"
- <sup>8</sup> Utah, 2009 "...parents have the fundamental right and primary responsibility to direct the upbringing of their children..."
- <sup>9</sup> Wyoming, 2012 "...parents have the fundamental right and responsibility to rear, guide, discipline, provide for, and make medical decisions..."
- <sup>10</sup> On the [www.parentalrights.org](http://www.parentalrights.org) website, do full site search on term "Zogby poll", select Parental Rights Zogby Poll
- <sup>11</sup> PRRA, 1995, p. 108 (exhibit *People v DeJonge*, 501 N.W.2d 127 (Mich. 1993))
- <sup>12</sup> *ibid*, p. 87 (exhibit *People v Bennett*, 501 N.W.2d 106 (Mich. 1993))
- <sup>13</sup> Witte, 1996, pp. 187, 202
- <sup>14</sup> *ibid*, p. 203
- <sup>15</sup> *ibid*, p. 190
- <sup>16</sup> PRRA, 1995, p. 97 Citation is from the *Bennett* decision which is Exhibit 2 of the PRRA hearing (p. 116 of the record 501 N.W.2d 106 (Mich. 1993))
- <sup>17</sup> Witte, 1996, p. 202
- <sup>18</sup> PRRA, 1995, p. 167, Prof. George W. Dent testimony
- <sup>19</sup> Witte, 1996, p. 190
- <sup>20</sup> *State of Nevada v. Diana N.*, 2002
- <sup>21</sup> *State of Nevada v. Richard J.K.*, 2002
- <sup>22</sup> *Washoe County v. Kory L.G.*, 2013 In Re: Parental Rights as to A.G., 295 P.3d 589 (Nev, 2013)
- <sup>23</sup> For example, the job description for a State of Nevada Education Programs Professional requires the ability to "obtain pertinent information from parents, professionals, and other stakeholders..." regarding our children. Parents are but one of many "stakeholders" who claim direct access to our children. (Nevada NCES Application, p. e121)
- <sup>24</sup> Witte, n.d.
- <sup>25</sup> *ibid*
- <sup>26</sup> *Parham v. J. R.*, 442 U. S. 584 (1979) "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."
- <sup>27</sup> Motto of Parentalrights.org
- <sup>28</sup> Witte, 1996, FN4
- <sup>29</sup> In re *Perales*, 369 N.E.2d 1047, 1051 (Ohio 1977), quoted in Witte, n.d.
- <sup>30</sup> *Fields v. Palmdale School District PSD*, No. 03-56499 (2005) "Brown and Blau compel the conclusion that what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive." And, "In sum, we affirm that the *Meyer-Pierce* right does not extend beyond the threshold of the school door."
- <sup>31</sup> Tex. Fam. Code § 151.003: "A state agency may not adopt rules or policies or take any other action that violates the fundamental right and duty of a parent to direct the upbringing of the parent's child."
- <sup>32</sup> *Littlefield v. Forney* (2001) The court stated: "It has long been recognized that parental rights are not absolute in the public school context and can be subject to reasonable regulation."

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-Frank Schnorbus

## References



- Clinton speech (1992) - Presidential nomination acceptance speech, July 16, 1992, retrieved from <http://www.presidency.ucsb.edu/ws/index.php?pid=25958>.
- Clinton speech (1995) - State of the Union speech, January 24, 1995, retrieved from [http://www.let.rug.nl/usa/presidents/william-jefferson-clinton/state-of-the-union-1995-\(delivered-version\).php](http://www.let.rug.nl/usa/presidents/william-jefferson-clinton/state-of-the-union-1995-(delivered-version).php)
- Democratic Party. (1892, June 21). *Democratic Party Platform of 1892*. Retrieved from <http://www.presidency.ucsb.edu/ws/index.php?pid=29585>
- Fields v. Palmdale School District PSD (2005), <http://caselaw.findlaw.com/us-9th-circuit/1051665.html>
- Littlefield v. Forney (2001), <http://caselaw.findlaw.com/us-5th-circuit/1408648.html>
- Nevada NCES Application for Grants Under the Statewide Longitudinal Data Systems, Grants.gov Tracking #: GRANT11026239. Retrieved from <http://nces.ed.gov/programs/slds/pdf/nevada2012.pdf>
- Parentalrights.org. (n.d.). Parental rights: The fight of our lifetime [Pamphlet]. Retrieved from <http://parentalrights.org> (Resources, Print Materials = Print, Further Information).
- Parham v. J. R., 442 U. S. 584, 602 (1979), <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=442&invol=584>
- PRRA. (1995). Parental Rights and Responsibilities Act, H.R. 1946, 104th Cong. § Judiciary Hearing of October 26, 1995 [http://ia700302.us.archive.org/28/items/parentalrightsre00unit/parentalrightsre00unit\\_bw.pdf](http://ia700302.us.archive.org/28/items/parentalrightsre00unit/parentalrightsre00unit_bw.pdf).
- Ramey, M. T. (n.d.). *The perfect storm* [Pamphlet]. Retrieved from <http://www.parentalrights.org/> (Do search on full site, Perfect Storm)
- State of Nevada v. Diana N., No. 38100 (Nevada Supreme Court Oct. 18, 2002), <http://caselaw.findlaw.com/nv-supreme-court/1077119.html>.
- State of Nevada v. Richard J.K., No. 38816 (Nevada Supreme Court Dec. 3, 2002), <http://caselaw.findlaw.com/nv-supreme-court/1259836.html>.
- Tex. Fam. Code § 151.003 (1999) <http://www.statutes.legis.state.tx.us/Docs/FA/htm/FA.151.htm>
- Troxel v. Granville, 530 U.S. 57 (2000), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=530&page=57>
- Utah. (2009). Republican Party State Party Platform 2009, Retrieved from <http://utgop.org/pdf/Utah%20Republican%20Party%20Platform%202009.pdf>
- Washoe County v. Kory L.G, In Re A.G., 295 P.3d 589 (Nev, 2013) <http://caselaw.findlaw.com/nv-supreme-court/1624687.html>
- Witte, D. E. (1996). Comment, People v. Bennett: Analytic approaches to recognizing a fundamental parental right under the ninth amendment. Brigham Young University Law Review, 183-280. Retrieved from <http://www.quaqua.org/Analytic.htm>
- Witte, D. E. (n.d.). Fundamental right to direct the upbringing of one's child [Pamphlet]. Retrieved from <http://www.quaqua.org/standardreview.htm>
- Wyoming. (2012). 2012 Wyoming Republican Party Platform, Retrieved from [http://wygop.org/wp-content/uploads/2012/05/2012.platform.and.\\_resolutions.pdf](http://wygop.org/wp-content/uploads/2012/05/2012.platform.and._resolutions.pdf)

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