



More

Save for Later

Reading List

The Volokh Conspiracy

How the legal system often ignores the constitutional rights of parents



By Ilya Somin April 21, 2015

In a [recent post](#) on the notorious Maryland case where authorities have repeatedly detained two children in order to force the Meitiv family to stop them from walking home alone, I noted that the parents have the Constitution and Supreme Court precedent on their side. At [Above the Law](#), experienced public interest lawyer Sam Wright agrees that the parents have the Constitution on their side, but cautions that bureaucrats and lower court judges routinely ignore such petty issues as constitutional rights when it comes to enforcing their conceptions of “the best interests of the child”:

Over at the Volokh Conspiracy, law professor Ilya Somin notes that the application of child welfare laws is subject to some (seemingly) robust constitutional constraints: there’s case law providing that the Fourteenth Amendment protects the rights of parents to raise their children as they see fit and that it also, in the words of Justice O’Connor’s plurality opinion in *Troxel v. Granville*, creates a “presumption that fit parents act in the best interests of their children.”

But the reality facing most parents in court is that that “presumption” isn’t actually a thing. Take the experience documented in [a well-publicized essay on](#)

[Salon last year](#): the author left her four-year-old unattended in a car for a few minutes on a mild day, the police were called, she found herself charged with a crime.... [Her lawyer] warned her that “juvenile courts are notorious for erring on the side of protecting the child” and suggested that fighting the case might lead her to lose her child. Faced with that possibility she, of course, folded. Anyone would...

And that’s been my experience as an advocate too. When I worked for a legal aid organization, one of my tasks was to represent parents in child welfare proceedings. No one in those sad, sequestered courtrooms cited Supreme Court cases; everyone just argued over what was in the best interest of the child....

So parents, be cautious: yes, there’s Supreme Court precedent on your side, but if you find yourself in court then the system’s conception of the “best interests of the child” will likely overrule yours.

Wright also notes that vaguely worded child welfare statutes give bureaucrats wide discretion that they sometimes exert in ways that punish perfectly reasonable and safe parenting practices, a problem I wrote about in [this 2012 post](#).

Wright’s note of caution is well-taken. When I wrote that the Maryland situation “should be a relatively easy case,” I meant that applicable precedent clearly supports the parents, and that they should ultimately prevail if the constitutional issue is raised and courts take Supreme Court precedent seriously. However, achieving such a victory against determined bureaucrats could require prolonged and costly litigation. Sometimes, seemingly novel constitutional issues won’t be taken seriously until a case reaches the appellate level, where judges are more used to addressing constitutional questions. Many parents understandably lack the time, resources, and emotional stamina for a lengthy legal battle. And even a small risk of defeat might be unacceptable if it could mean losing custody of your children or suffering continued official harassment. I don’t blame parents who decide that such a fight isn’t worth it. The purpose of my earlier post was to analyze the relevant constitutional issue, not give advice to parents facing a

potentially difficult legal battle with child welfare bureaucrats.

At the same time, it is important to recognize that, in the cases Wright cites, the constitutional issue mostly wasn't even raised, much less decided. Anxious parents generally give in without putting up a fight. If the issue were raised in a sufficiently egregious case, and effectively pursued by determined parents with strong legal representation, the chances of ultimate victory might well be good. And such a victory could create an important precedent that helps deter similar official misconduct in the future, especially if the government agency is forced to pay damages as well as cease its harassment of the parents.

The Meitiv family appears to be determined, the facts are on their side, and [they have excellent pro bono representation from Wiley Rein, one of the top law firms in the Washington, DC area](#). In addition, public opinion seems to be on their side, as well, at least if media coverage and reactions in the blogosphere are at all indicative (I have not seen any scientific public opinion polls on the subject). It's possible that the case will be settled, or even that the government will choose to give in rather than risk a precedent-setting defeat. But if that doesn't happen, the case could potentially set an important precedent protecting parents in the future.

If they do end up setting a valuable precedent, the Meitivs will have undergone a prolonged ordeal most of the benefits of which would accrue to other families rather than their own. Sadly, this sort of scenario is typical of many important constitutional cases. The people directly involved often endure considerable expense and suffering, whereas the benefits of setting a precedent accrue to the rest of us. Consider, for example, the pain endured by many of [the parents and children involved in school desegregation cases](#), or [the traumatic experience of the property owners in the *Kelo* case](#) (which [ended in defeat, but resulted in valuable gains for property rights nonetheless](#)).

Such unfairness may sometimes be an unavoidable aspect of the legal system. But we should at least recognize and honor those who make sacrifices to ensure that important constitutional rights get the protection they deserve.



Ilya Somin is Professor of Law at George Mason University. His research focuses on constitutional law, property law, and popular political participation. He is the author of "The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain" and "Democracy and Political Ignorance: Why Smaller Government is Smarter."

Share on Facebook

Share on Twitter

Comments

Most Read

1 David Brooks's choice words on Cruz — 'satanic,' 'pagan' — draw fire and a little brimstone



2 Emanuel ducks questions about teen shot 16 times by Chicago police

3 Islamic State claims role in Jakarta attacks as officials probe reach in Asia



4 Rowdy jubilation as \$1.6 billion Powerball jackpot winners reported in 3 states



5 There's finally a Hooters-style restaurant featuring men. It's called Tallywackers.



The Most Popular [All Over](#)

The Most Popular stories around the web

Our Online Games

Play right from this page



Mahjongg Dimensions

Genre(s): [Strategy](#)

It's 3D Mahjongg- you don't even need to wear 3D glasses!



The Sunday Crossword by Evan Birnholz

Genre(s): [Word](#)

Online crossword.



Spider Solitaire

Genre(s): [Card](#)

Spider Solitaire is known as the king of all solitaire games!



Daily Crossword

Genre(s): [Word](#)

Challenge your crossword skills everyday with a huge variety of puzzles waiting for you to solve.

washingtonpost.com

© 1996-2016 The Washington Post

[Help and Contact Us](#)

[Terms of Service](#)

[Privacy Policy](#)

[Print Products](#) [Terms of Sale](#)

[Digital Products](#) [Terms of Sale](#)

[Submissions and Discussion Policy](#)

[RSS Terms of Service](#)

[Ad Choices](#)

NEXT STORY

Video on the raisin takings case

Ilya Somin · April 21, 2015