

The Family vs. the State: *Protecting the Rights of Parents to Raise and Educate Their Children*

CHARLOTTE P. HOPSON*

ABSTRACT

Societies once almost universally respected the rights of parents to raise and educate their children, but that era is ending. Governments are increasingly mandating how parents should raise their children, a troubling precedent. In order to combat this trend, this Article proposes that the United States should pass a constitutional amendment protecting the rights of parents. Ireland provides a model for such an amendment in Articles 41, 42, and 42A of the Irish Constitution.

This Article examines the U.S. and Irish Constitutions and judiciaries in order to show why the U.S. should adopt such an amendment. The U.S. and Ireland have similar constitutional histories and judicial approaches, making Ireland uniquely qualified to serve as a constitutional example to the U.S. In recent years, the U.S. has witnessed a number of recent battles that depict the need for an amendment such as this. That said, this Article does not suggest that the route to a constitutional amendment is easy. Instead, it recognizes the difficulty of passing such an amendment and explains why the attempt is nevertheless important.

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* J.D., Georgetown University Law Center, 2020; B.S.B.A., Georgetown University, 2015. My many thanks to the editors of the Georgetown Journal of Law and Public Policy and my husband for fielding ideas. © 2020, Charlotte P. Hopson.

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INTRODUCTION

Governments around the world are increasingly questioning the rights of parents to raise their children as they see fit. For instance, last year, a German court ruled that the state could legally force parents to place their children in public education rather than allowing them to homeschool.¹ More recently, a Harvard Law School professor called for a presumptive ban on homeschooling in the United States.² Troublingly, today the American Constitution offers no enumerated protections for parents. However, the Irish Constitution offers a solution. In particular, Articles 41, 42, and 42A of the Irish Constitution recognize the family as the essential unit of society, guarantee parents' rights to determine how to educate their children, and protect the rights of children, respectively. The U.S. should draw inspiration from these provisions and amend its constitution to protect the rights of parents, while balancing the rights of children. This Article

1. *Home Education: Court Rules Against German Christian Family*, BBC (Jan. 10, 2019), <https://www.bbc.com/news/world-europe-46823793> [<https://perma.cc/9TZP-5QQK>].

2. Erin O'Donnell, *The Risks of Homeschooling*, HARVARD MAGAZINE (June 2020), <https://www.harvardmagazine.com/2020/05/right-now-risks-homeschooling>.

provides an outline for what this constitutional amendment should look like. Although an amendment would best address this issue, it admittedly has practical problems. Even if a constitutional amendment should fail, however, proposing one still holds value.

This Article proceeds in several parts. First, it provides the historical background of the founding of the Irish and U.S. Constitutions. Second, the Article will address how each country's constitution currently approaches religion, education, and the family. This section will also include a discussion of several state constitutions. Third, the Article will explore each country's judicial approach to these issues. Fourth, the Article will analyze why the U.S. needs a constitutional amendment and what the amendment should look like. Fifth, the Article will discuss the practical difficulties of passing a constitutional amendment, before then arguing why there is still utility in attempting to do so. Finally, the Article will conclude by reviewing and analyzing the alternative options available should an amendment fail.

Given the depth of similarities between Ireland and the U.S., Ireland offers an excellent case study.³ The constitutions of the two countries have similar origins and lay out similar forms of government that have continued to this day. The judiciaries in both countries also operate in especially similar ways, making judicial interpretation of the Irish constitution pertinent to a U.S. setting. Because of the many similarities between the U.S. and Irish systems, Ireland can help inform us as to what the inclusion of a constitutional provision protecting the rights of parents might look like in the U.S.⁴

I. FOUNDING OF THE IRISH AND U.S. CONSTITUTIONS

The Irish and American Constitutions share very similar founding-era histories. Both constitutions arose after the countries gained independence from Great Britain. Similarly, neither constitution was the original governing document of its newly autonomous nation: Ireland eradicated its initial constitution of 1922, and the U.S. abandoned the Articles of Confederation in favor of the U.S. Constitution. Religion and British common law also influenced the drafting of the current U.S. and Irish Constitutions. Finally, the drafters of both constitutions made them difficult to alter, so both have changed little in their histories. These similarities make Ireland a particularly relevant case study for the U.S.

A. *Founding of the Irish Constitution and Evolution*

Ireland, like the U.S., gained its independence from the British.⁵ In 1919, a group of Irish politicians met and declared Ireland a free nation, leading to the

3. See Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 134 (2005).

4. See *id.*

5. *Ireland Independence: Why Jan 1919 Is an Important Date*, BBC (Jan. 21, 2019), <https://www.bbc.co.uk/newsround/46480953> [<https://perma.cc/6LXU-U5XZ>].

Irish War of Independence.⁶ The war ended in 1921, at which point Ireland and the U.K. signed the Anglo-Irish Treaty, breaking Ireland into Ireland and Northern Ireland.⁷ In 1922, the Irish Free State established its first constitution in accordance with guidelines set out in the Anglo-Irish Treaty.⁸ These guidelines required an oath of allegiance to the British king, the appointment of a British Privy Council as the final court of appeals for Irish cases, and the vesting of executive authority in a representative of the king.⁹

Many Irish citizens disliked the new constitution and its basis in the Anglo-Irish Treaty, so they slowly worked to dismantle it. Fianna Fáil, a party that opposed the Constitution, slowly rose to power in the years following 1922.¹⁰ In the 1933 election, the party finally claimed a majority of the seats in the Irish Parliament, the Dáil.¹¹ Éamon de Valera, the party's leader, was elected president of the Executive Council and quickly began to deconstruct the 1922 Constitution.¹² De Valera and his government began to pass amendments to dismantle the Constitution,¹³ but de Valera wanted to go one step further and abandon the Constitution completely.¹⁴ The Constitution could be changed merely by passing ordinary legislation in the Dáil, and de Valera's government continued to alter it until they created an entirely new constitution in 1937.¹⁵

Both British law and Catholicism came together to influence the 1937 Constitution. Devout Catholics composed the majority of the constitutional drafters.¹⁶ Catholic encyclicals, such as *Rerum Novarum*, held particular sway over the constitutional articles dealing with family and education.¹⁷ As a result, the Irish Constitution mentions religion several times over, and even acknowledges Christ as the Lord.¹⁸ Likewise, despite the 1937 Constitution's effort to separate itself from the U.K., it still had British common law influences. Ireland was, in fact, the first country outside of England to employ common law,¹⁹ and the Irish legal system today is still grounded in common law.²⁰

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. DERMOT KEOGH & ANDREW J. MCCARTHY, *THE MAKING OF THE IRISH CONSTITUTION* 1937 43, 62 (2007).

11. *Id.* at 49.

12. *Id.* at 43, 62.

13. Thomas Mohr, *Embedding the Family in the Irish Constitution*, in *LAW AND THE FAMILY IN IRELAND 1800–1950* 214, 215 (Niamh Howlin & Kevin Costello eds., 2017).

14. KEOGH & MCCARTHY, *supra* note 9, at 62.

15. *Id.* at 63–64.

16. Mohr, *supra* note 12, at 215.

17. KEOGH & MCCARTHY, *supra* note 9, at 113–17.

18. Constitution of Ireland 1937, pmbl.

19. JOHN BAKER, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME VI 1483–1558* 108 (2003).

20. *The Legal System*, *THE SUPREME COURT OF IRELAND*, <http://www.supremecourt.ie/supremecourt/sclibrary3.nsf/pagecurrent/D5F78352A387D74480257315005A419E?opendocument&l=en> [https://perma.cc/MC4G-XVGE].

Since 1937, the Irish Constitution has changed little.²¹ Both a vote of the two houses of Ireland's legislature and a referendum by the people are required to amend the Irish Constitution.²² A referendum itself only requires a simple majority.²³ The Oireachtas, the legislature of Ireland, has approved forty-one amendments, and the people have only approved thirty.²⁴ This difficult amendment process empowers the courts because judicial decisions on constitutional issues cannot easily be evaded.²⁵

B. *Founding of the American Constitution and Evolution*

The American Constitution was founded on the heels of the Revolutionary War. In 1774, the First Continental Congress met to discuss a colonial response to what the attendants believed were coercive acts by the British parliament.²⁶ After the First Continental Congress, but before the second, several skirmishes took place at Lexington and Concord.²⁷ On July 4th, 1776, the Second Continental Congress adopted the Declaration of Independence, proclaiming the U.S. an independent nation.²⁸ Fighting continued between the colonies and the British for the next five years.²⁹ Two years prior to the official end of the war in 1783,³⁰ the states ratified the Articles of Confederation.³¹

The Articles of Confederation quickly concerned the Founders. Under the Articles, the new national government had no enforcement powers, it could not regulate commerce, and it could not print money.³² Disputes over taxation, trade, war pensions, and territory made the flaws in the Articles increasingly obvious.³³ In May 1787, delegates gathered in Philadelphia at the Constitutional Convention in order to revise the Articles.³⁴ Instead, the delegates spent the summer creating an entirely new constitution, which they passed in September and which the states ratified soon after.³⁵

21. ORAN DOYLE, *THE CONSTITUTION OF IRELAND: A CONTEXTUAL ANALYSIS* 191 (2018).

22. Constitution of Ireland 1937, art. 46.

23. DOYLE, *supra* note 21, at 195.

24. *Constitution of Ireland*, GOVERNMENT OF IRELAND, (Nov. 1, 2018), <https://www.gov.ie/en/publication/d5bd8c-constitution-of-ireland/> [<https://perma.cc/9XPT-3FFE>]; DOYLE, *supra* note 20, at 198. Ireland passed two more amendments under a law that was in place at the founding of the Irish Constitution of 1937, bringing the total to thirty-two amendments. DOYLE, *supra* note 20, at 198.

25. DOYLE, *supra* note 21, at 199.

26. *Continental Congresses*, in *THE READER'S COMPANION TO AMERICAN HISTORY* (Eric Foner & John A. Garraty eds., 2014).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Peace of Paris 1783*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Peace-of-Paris-1783> [<https://perma.cc/P9AM-WS9F>].

31. *Continental Congresses*, *supra* note 25.

32. *The Constitution: How Did It Happen?*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/constitution/how-did-it-happen> [<https://perma.cc/QB2Z-A5UZ>].

33. *Id.*

34. *Id.*

35. *Id.*

In drafting the new Constitution, the founders drew inspiration from several sources. During this era, Americans were largely a religious people, and they relied heavily on religious ideas.³⁶ Puritan and Evangelical views generally dominated in the colonies and in early America.³⁷ These views led the founders to include traditional Protestant ideas in drafting the early American documents. For instance, underpinning the perceived need for checks and balances in the constitution was the religious notion of the inherent sinfulness of man.³⁸ Similarly, Jefferson's language in the Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain unalienable rights" reflects religious notions.³⁹ That said, the U.S. Constitution does not make religion a focal point. In addition to religious influences, the constitution drew ideas from British common law. The colonies frequently used common law forms of action⁴⁰ and this remained largely unchanged even after the American Revolution.⁴¹ The U.S. Constitution thus reflects both religious and British common law ideas.

Due to the difficulty of doing so, the U.S. has passed few amendments to the Constitution since ratification. Both the House and the Senate must pass the amendment in order to propose it, which takes a two-thirds vote in each chamber.⁴² Most amendments die in either committees or subcommittees without ever reaching a House and Senate vote.⁴³ Two-thirds of the states can also call a convention to propose amendments, but this has never occurred in U.S. history.⁴⁴ After Congress or the states officially propose an amendment, the states have an opportunity to vote.⁴⁵ Three-fourths of the states must ratify the amendment in order for it to pass.⁴⁶ This process has been successful only twenty-seven times in the nation's history.

36. Thomas F. Farr, *The Ministerial Exception: An Inquiry into the Status of Religious Freedom in the United States and Abroad*, in RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 25, 26 (Brett G. Scharffs et al. eds., 2019).

37. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 39 (4th ed. 2016).

38. Farr, *supra* note 35, at 27.

39. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

40. WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA: VOLUME IV: LAW AND THE CONSTITUTION ON THE EVE OF INDEPENDENCE, 1735–1776 7 (2018).

41. *Id.* at 151.

42. Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RESEARCH CENTER (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/> [<https://perma.cc/EG48-2AHN>].

43. *Id.*

44. *Id.*

45. *Constitutional Amendment Process*, NATIONAL ARCHIVES, <https://www.archives.gov/federal-register/constitution> [<https://perma.cc/2FQX-B76J>].

46. *Id.*

C. Similarities and Differences in the Constitutions

The Irish Constitution offers a unique juxtaposition to the US Constitution, as both arose out of similar circumstances. The writers of both constitutions drafted these documents in the wake of a revolutionary war with Great Britain. Just as Ireland began with the 1922 constitution, the U.S. started with the Articles of Confederation. Neither document, however, lasted more than twenty years. Instead, both young countries decided to create something new.

In drafting these new constitutions, Ireland and the U.S. drew on similar influences. Both constitutions had mainly Christians involved in the drafting of the Constitutions. Although the Irish drafters were primarily Catholic, and the U.S. drafters were largely Protestant, religion played a role in both constitutions. The main difference involves the extent of this influence. Whereas the Irish Constitution highlights Christianity as a central focus, the Christian influence on the U.S. Constitution is subtler. Both countries, however, relied heavily on English common law. They both had traditions steeped in the common law, which has continued to affect the governance of each country to this day.

Both countries also created constitutions that allowed for change, but only when a large consensus occurred in the nations. The difficult and tedious steps required for amending each constitution mirror each other. The drafters of each constitution ensured that very few amendments would ever pass, and they have been successful. This vests more power in the judicial branches of both countries because their decisions can only be circumvented in very rare cases. The similarities between these two constitutions make Ireland a natural example when considering any changes to the U.S. Constitution.

II. RELIGION, EDUCATION, AND THE FAMILY IN THE IRISH AND U.S. CONSTITUTIONS

This section will address how the Irish and U.S. constitutions approach the intersection of religion, education, and the family. As previously discussed, Christian notions influenced both constitutions, but this section will more deeply explore the actual application of religion in both constitutions. It will first examine the Irish Constitution, with a particular focus on Articles 41, 42, and 42A. Then the section will study the U.S. Constitution, with an emphasis on the First Amendment. Since the U.S. Constitution has a limited discussion of religion, family, and education, this section will then study the constitutions of Montana and New York, as many of the battles over these issues take place at the state level. Finally, this section will compare and contrast the religious provisions in the constitutions of Ireland, the U.S., and the states.

A. The Irish Constitution: Articles 41, 42, and 42A

Religion, education, and the family intersect in Articles 41, 42, and 42A of the Irish Constitution. Article 41 centralizes the family as the core societal unit, stating that, “[t]he State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and

imprescriptible rights, antecedent and superior to all.”⁴⁷ Article 42 takes this idea a step further, providing that, “the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.”⁴⁸ Article 42 goes on to further state that the government will “give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.”⁴⁹ That said, it also provides that the state shall require that “children receive a certain minimum education.”⁵⁰ Finally, the newest provision considered here, Article 42A, “recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.”⁵¹ Article 42A also emphasizes that “the best interests of the child shall be the paramount consideration,” when examining adoption issues.⁵²

Catholicism largely influenced these provisions. De Valera thought the word “home” had special, sacred properties, a notion based in Catholic social teaching.⁵³ The papal encyclicals, *Sapientiae Christianae* and *Rerum Novarum*, particularly supported the notion that the family was the oldest, and one of the most important, human communities.⁵⁴ Similarly, the papal encyclical *Divini Illius Magistri* further reinforced the role of parental education.⁵⁵ When Ireland enacted the constitution, religious denominations, with a vast Catholic majority, ran almost all primary school education and most secondary school education.⁵⁶ Today, the Catholic Church still runs over ninety percent of the primary schools in Ireland.⁵⁷ That said, provisions such as these are not unique to the Irish Constitution or even documents inspired by Catholicism. These provisions actually mirror rights found in the European Convention of Human Rights⁵⁸ and the UN International Covenant on Civil and Political Rights.⁵⁹ Both acknowledge

47. Constitution of Ireland 1937 art. 41, § 1.1.

48. *Id.* at art. 42, § 1.

49. *Id.* at art. 42, § 4.

50. *Id.* at art. 42, § 3.2.

51. *Id.* at art. 42A, § 1.

52. *Id.* at art. 42A, § 4.1.

53. Mohr, *supra* note 12, at 217.

54. *Id.*

55. *Id.* at 224.

56. Desmond M. Clarke, *Education, the State, and Sectarian Schools, in IRELAND’S EVOLVING CONSTITUTION, 1937–97: COLLECTED ESSAYS 66* (Tim Murphy & Patrick Twomey eds., 1998).

57. Carl O’Brien, *Catholic Grip on Education Being Loosened*, THE IRISH TIMES, May 9, 2018, <https://www.irishtimes.com/news/education/catholic-grip-on-education-being-loosened-1.3488928> [<https://perma.cc/GT95-SEJR>].

58. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8.1, 8.2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

59. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 23.1 (Mar. 23, 1976).

the importance of respect for the family unit and recognize family as a fundamental institution of society.⁶⁰

More recently, Irish citizens have begun to contest these provisions. In the 1990s, Ireland formed a Constitution Review Group in order to analyze Articles 41 and 42.⁶¹ The final report suggested the Articles' use of the words 'inalienable' and 'imprescriptible' had the potential to place too much emphasis on the rights of parents.⁶² Furthermore, the report acknowledged that the Articles recognized and protected families based solely on marriage.⁶³ The Review Group suggested that the provision change to apply to all non-marital parents, as long as they had appropriate connections to the child.⁶⁴

Sentiments against Articles 41 and 42,⁶⁵ which focused mainly on parental rights, eventually led to the enactment of the 31st Amendment, which introduced Article 42A to the Irish Constitution.⁶⁶ Under this new provision, any legal proceedings that the Irish State brings must consider the best interests of the child.⁶⁷ As this Article will discuss in greater detail later, the language of Articles 41 and 42 resulted in cases where the Irish Supreme Court adopted a parent-centric view of constitutional rights, sometimes at the expense of the child.⁶⁸ That said, the amendment failed to fully address the "primacy of parental rights under the Constitution."⁶⁹ As of now, this conflict remains in the Irish Constitution.

B. The American Constitution: The First Amendment

Other than the First Amendment, the U.S. Constitution is largely areligious. In fact, the U.S. constitution in fact makes no reference to God, unlike the Declaration of Independence.⁷⁰ The states officially ratified the new constitution on July 2, 1788, but the omission of a Bill of Rights caused a great deal of controversy.⁷¹ This controversy led the First Congress, guided by James Madison, to pass the first ten amendments to the constitution.⁷² The First of these amendments, the main constitutional provision that addresses religion, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

60. European Convention on Human Rights, art. 8.1, 8.2; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 23.1 (Mar. 23, 1976).

61. Jaime Aspell, *Children's Best Interests? A Constitutional Question*, TRINITY C. L. REV. ONLINE, <https://trinitycollegelawreview.org/childrens-best-interests/> [http://perma.cc/X8SN-FV92].

62. *Id.*

63. MICHAEL FARRY, *EDUCATION AND THE CONSTITUTION* 73 (1996).

64. *Id.* at 74.

65. Aspell, *supra* note 61.

66. GERARD HOGAN ET AL., *KELLY: THE IRISH CONSTITUTION* 2268 (5th ed. 2018).

67. *Id.* at 2303.

68. Aspell, *supra* note 61.

69. *Id.*

70. LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 79 (2nd ed. 1994).

71. WITTE & NICHOLS, *supra* note 36, at 72.

72. *Id.* at 74; LEVY, *supra* note 70, at 94.

exercise thereof.”⁷³ Americans commonly refer to these two clauses as the Establishment Clause and the Free Exercise Clause, respectively.⁷⁴ The word “establishment” does not have a clear definition within the constitution itself.⁷⁵ The U.S. courts have decided numerous cases defining both “establishment” and “free exercise,” which the next section will explore more deeply. The U.S. constitution does not offer any discussion of the role of the family, education, or a combination of religion, family, and education.

The First Amendment, as the First Congress initially wrote it, did not apply to the states, but this changed with incorporation. The Fourteenth Amendment Due Process Clause states that no state shall “deprive any person of life, liberty, or property, without due process of law,”⁷⁶ and the judiciary has now used it to incorporate a majority of the rights found in the Bill of Rights.⁷⁷ In this way, the First Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states.⁷⁸

C. State Constitutions: New York and Montana

Although the U.S. constitution deals with religion only briefly and does not mention the family or education, some state constitutions discuss these issues in greater detail. This paper will discuss conflicts that have arisen in both Montana and New York in recent years, so the constitutions of these states provide relevant case studies. Like the U.S. Constitution, the Constitution of Montana prohibits the establishment of religion and guarantees the free exercise of religion.⁷⁹ The New York Constitution similarly protects the free exercise of religion.⁸⁰ Neither the New York nor the Montana constitutions mention the role of the family. Likewise, Montana does not protect the rights of parents, but it explicitly protects the rights of children, designated as individuals under 18.⁸¹ The provision states that children have “all the fundamental rights of this Article, [the Declaration of Rights], unless specifically precluded by laws which enhance the protection of such persons.”⁸²

Both states explicitly address education in that they have both adopted Blaine amendments. This means that the constitutions forbid the government to provide any direct or indirect aid to religious schools.⁸³ James G. Blaine served as Speaker of the U.S. House of Representatives and proposed a constitutional

73. U.S. CONST. amend. I.

74. *First Amendment and Religion*, UNITED STATES COURTS, <https://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion> [<https://perma.cc/5FN6-AC2Q>].

75. *Id.*

76. U.S. CONST. amend. XIV.

77. LEVY, *supra* note 69, at 225.

78. LEVY, *supra* note 69, at 224–25.

79. MONT. CONST. art. II, § 5.

80. N.Y. CONST. art. I, § 2.

81. MONT. CONST. art. II, § 15.

82. MONT. CONST. art. II, § 15.

83. MONT. CONST. art. X, § 6.

amendment prohibiting the government from providing any funding for religious schools.⁸⁴ The proposed amendment passed the House, but it failed to garner the two-thirds vote in the Senate necessary to reach the states.⁸⁵ Although the proposed amendment did not pass, it held a great deal of influence, as at least thirty states, such as New York and Montana, eventually decided to pass similar provisions.⁸⁶ Some believe these amendments arose out of anti-Catholic sentiments, while others debate this history.⁸⁷ In this way, the New York and Montana state constitutions stand in stark contrast to the Irish Constitution, which was founded in Catholic values.

D. Constitutional Provisions in Comparison

The constitutional provisions involving religion, the family, and education in these documents have little in common. Whereas the Irish Constitution provides clear constitutional protections for the rights of parents to raise their children as they see fit, the U.S. and state constitutions make no mention of the family unit at all. Likewise, the Irish Constitution offers aid to religious institutions when in the public good to do so, but the state constitutions of both New York and Montana expressly forbid this practice, and the U.S. Constitution fails to mention education. The closest similarities are that the U.S. and state constitutions protect the free exercise of religion and that Montana protects the rights of children, like Article 42A. The nature of these discrepancies between the Irish, U.S., and state constitutions has led to many judicial battles in the U.S., which this Article will explore in the next section.

III. THE JUDICIAL APPROACH TO RELIGION, EDUCATION, AND THE FAMILY

Just as Ireland and the U.S. share very similar constitutional histories, they share similar legal systems. De Valera, like the U.S. founders, sought to create a Supreme Court with significant powers of judicial review.⁸⁸ The court systems in both countries enjoy judicial supremacy, meaning that the courts have the final say in interpreting the constitution.⁸⁹ The similarities between the judiciaries in both countries again make Ireland a perfect case study for the U.S. This section will first examine judicial decisions in Ireland that intersect with religion, education, and the rights of families. It will then turn to how U.S. courts have interpreted these issues. Finally, it will compare the Irish and U.S. court decisions.

84. ROGER C. HARTLEY, *HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE* 83 (2017).

85. *Id.* at 83–84.

86. *Id.* at 84.

87. DOUGLAS F. JOHNSON, *FREEDOM OF RELIGION: LOCKE V. DAVEY AND STATE BLAINE AMENDMENTS* 5 (2010).

88. THOMAS MURRAY, *CONTESTING ECONOMIC AND SOCIAL RIGHTS IN IRELAND: CONSTITUTION, STATE AND SOCIETY, 1848–2016* 161 (2016).

89. Eoin Daly, *Reappraising Judicial Supremacy in the Irish Constitutional Tradition*, in *JUDGES, POLITICS, AND THE IRISH CONSTITUTION* (Laura Cahillane et al. eds., 2017).

A. Irish Judicial Decisions

In various cases, the Irish judiciary has interpreted Articles 41, 42, and a predecessor to 42A. These cases reveal some of the larger issues of these articles that a U.S. constitutional amendment would need to address. This sub-section will first analyze Irish decisions regarding the rights of parents and children and how the court has balanced these issues. Then, the sub-section will examine the intersection of the family and education.

The Irish cases reveal that these articles have produced confusion over which parents have the constitutional right to raise their children. In *Re Tilson*, for instance, the court held that the Irish Constitution grants Article 42 rights to both parents, not fathers alone.⁹⁰ In *Re Tilson*, the mother was Catholic, the father was a member of the Church of Ireland.⁹¹ Both parties signed a pre-marital agreement, known as a *Na Temere* decree, which said they would raise the children Catholic.⁹² While his wife was at work one day, the father removed his children from their home and deposited them in a home where they would be raised as members of the Church of Ireland.⁹³ The mother brought suit against the father, and the Irish Supreme Court held in her favor, abandoning the previous rule of paternal supremacy, saying that it did not align with Article 42.⁹⁴ As this case illustrates, the Irish judicial approach to the rights of parents has been subject to a great deal of controversy.⁹⁵ Particularly, the Court's definition of family has been a point of controversy. The Irish Supreme Court has decided that the definition of family, as used in Articles 41 and 42, is centered on those families connected by marriage.⁹⁶ As discussed in the previous section, Irish citizens have fought this interpretation in recent years, and the 1990s Review Board suggested changing it.⁹⁷

Similarly, many in Ireland have worried that Article 42 has emphasized the rights of parents too much, sometimes at the expense of the child.⁹⁸ These concerns ultimately led to the enactment of Article 42A, as discussed in the preceding section. Prior to the enactment of Article 42A, cases dealing with the rights of adoptive parents versus biological parents did not always focus on the best interests of the child. Take *N v. Health Service Executive*, for instance, better known as the *Baby Ann* case.⁹⁹ The infant's parents gave her up for adoption, but they later changed their minds.¹⁰⁰ The Supreme Court ruled that the biological parents

90. KEOGH & MCCARTHY, *supra* note 9, at 21.

91. Gerard Hogan, *A Fresh Look at "Tilson's" Case*, 33 IRISH JURIST 311, 311 (1998).

92. *Id.*

93. *Id.* at 313.

94. *Id.* at 325.

95. GERARD HOGAN ET AL., KELLY: THE IRISH CONSTITUTION 2284 (5th ed. 2018).

96. *State (Nicolaou) v. An Bord Uchatala* [1966] IR 567 (Ir).

97. FARRY, *supra* note 62.

98. HOGAN ET AL., *supra* note 63, at 2284.

99. KEOGH & MCCARTHY, *supra* note 9, at 25.

100. Carl O'Brien, *Baby Ann Ruling Fuels Move Towards Children's Rights*, IRISH TIMES (Nov. 14, 2006), <https://www.irishtimes.com/news/baby-ann-ruling-fuels-move-towards-children-s-rights-1.1028514> [https://perma.cc/YFT5-Y75L].

deserved custody, as there was a constitutional presumption that the child's best interest was to live with its biological parents.¹⁰¹

The Irish Supreme Court has grappled with how to protect the rights of children in light of these constitutional provisions and these past court cases. Though the Irish Supreme Court applied a best interests standard for children in some cases prior to the enactment of Article 42A, it was generally hesitant to do so. In fact, the court only applied this test in exceptional circumstances.¹⁰² For example, in *North Western Health Board v HW*, a doctor wanted to perform a minimally invasive medical test on an infant that was generally accepted to be in the child's best interests.¹⁰³ The court ruled against the doctor because the procedure went against the express wishes of the parents.¹⁰⁴ Although Article 42A preempts many of the cases described above, these cases still show some of the problems that might arise when constitutional provisions try to balance the rights of parents and children.

Regarding education, the Supreme Court has analyzed what qualifies as the minimum education standard as outlined in Article 42, Section 3 of the Irish Constitution. The modern state requires that its citizens meet a minimum education level that allows them to participate "meaningfully in the democratic institutions which underpin it."¹⁰⁵ The court has furthermore described education as a "natural and imprescriptible right of" every child.¹⁰⁶ Two cases in particular, *Re Article 26 and the School Attendance Bill 1942* and *Director of Public Prosecutions v. Best*, outline how the court has approached this issue. In the former case, the court held that the state may set a certain minimum education standard regarding secular education, as distinct from a religious one.¹⁰⁷ In *Best*, the court elaborated on what qualifies as the minimum standard.¹⁰⁸ It held that the education provided during homeschooling had to meet the standard of "suitable elementary education," and that this minimum standard was based on contemporary standards of education, which can change and must be geared to the individual child.¹⁰⁹ The Irish cases described here help to illustrate some of the interpretive issues that may arise with a U.S. constitutional amendment of this type, and the cases also provide some answers for how the Irish constitutional provisions should change within a U.S. setting.

101. *Id.*

102. HOGAN, *supra* note 63, at 2306.

103. *North Western Health Bd. v. HW* [2001] 3 IR 622 (Ir.); HOGAN, *supra* note 63, at 2306.

104. *North Western Health Bd. v. HW* [2001] 3 IR 622 (Ir.).

105. Clarke, *supra* note 55, at 68.

106. *KRA v. Minister for Justice and Equality* [2016] IEHC 289.

107. *In Re Article 26 and the School Attendance Bill 1942* [1943] 1 I.R. 334 (Ir.).

108. *Director of Public Prosecutions v. Best* [2000] 2 I.R. 17 (Ir.).

109. *Id.*

B. U.S. Judicial Decisions

The U.S. court system has a long history of protecting the rights of parents to educate their children how the parents see fit. Courts have largely used a substantive due process analysis in order to guarantee parental rights. More recently, however, courts have sometimes struggled to draw the line between church and state when it comes to parental choices in the education of a child.

A constitutional analysis of substantive due process shows that it has largely protected the rights of parents in the U.S. In *Meyer v. Nebraska* for instance, the U.S. Supreme Court invalidated a law that prohibited teaching children below the eighth grade languages other than English.¹¹⁰ The Court held this in part because the law interfered “with the power of parents to control the education of their [children].”¹¹¹ Just two years later, in *Pierce v. Society of Sisters*, the Court struck down an Oregon law that required every child between eight and sixteen-years-old to attend public school.¹¹² The Court, citing *Meyer*, found that the law “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control.”¹¹³ The Court held similarly in *Troxel v. Granville*. In that case, a Washington state law allowed any person to petition for visitation rights if in the child’s best interest.¹¹⁴ A single mother challenged the law, and the Court ultimately held that it was unconstitutional because it “infringe[d] on that fundamental parental right” to guide the upbringing of a child.¹¹⁵

The more recent cases dealing with these issues center on whether state support of religious education contradicts the establishment clause. *Lemon v. Kurtzman*, a hotly debated case, still technically controls whether a law conflicts with the establishment clause. *Lemon* established a three-part test for constitutionality where 1) the law must have a secular purpose; 2) its primary effect can neither inhibit nor advance religion; and 3) the statute must not foster “an excessive government entanglement with religion.”¹¹⁶ Since deciding *Lemon*, the Court has found school vouchers constitutional, even where families can use them towards religious education.¹¹⁷ The court has also found it unconstitutional for a state to deny religious institutions from otherwise neutral and secular aid programs.¹¹⁸

C. Similarities and Differences in the Judicial Decisions

A primary difference between the U.S. and Irish systems is that Ireland has constitutional provisions dealing with issues of the family, education, and

110. *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

111. *Id.* at 401.

112. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 530 (1925).

113. *Id.* at 534–535.

114. *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

115. *Id.* at 67.

116. *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971).

117. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

118. *See Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

religion, and the U.S. does not. Whereas the U.S. courts base the decisions mainly on the Due Process Clause and the First Amendment, Ireland looks directly to its constitutional provisions regarding the family. Although these Irish provisions have clearly faced no shortage of interpretive issues, the rights discussed are firmly based within the constitution. The U.S., on the other hand, has had to examine the intersection of these issues to determine whether there may be some vague insight through the combination of various constitutional provisions. The lack of a clear right in the U.S. has also caused numerous issues due to tensions with the Establishment Clause. Although the courts in both the U.S. and Ireland have established similar parental rights, the U.S. has had to rely on inferences while the Irish courts have anchored their opinions in the constitutional text.

IV. A CONSTITUTIONAL AMENDMENT

The U.S. should pass a constitutional amendment to protect the rights of families and children, especially regarding religious education. This amendment needs to incorporate the rights of parents, the rights of children, and the needs of the State, and must respond to the most recent battles that have taken place over these issues. This section will first examine these battles and then explore the need for a constitutional amendment in response. This section will then highlight the main aspects that this constitutional amendment should include.

A. Recent Battles

Despite numerous cases on the subject, the U.S. has not resolved how to treat the intersection of families, religion, and education. Problems regarding these issues have continued to arise, especially recently. These issues have come up in both Montana and New York, two states that have Blaine amendments, as previously discussed.

This January, the Supreme Court heard the case arising out of Montana, *Espinoza v. Montana*. In Montana, the state legislature passed a law to provide tax credits up to \$150 for contributions to a privately-run scholarship program.¹¹⁹ Citing the state's Blaine Amendment, however, the Montana Department of Revenue created a rule for the scholarship program that excluded religiously-affiliated private schools from the program, which parents then challenged.¹²⁰ The Montana Supreme Court found that the tax credit, as written by the legislature, was illegal given the Blaine Amendment, but it also found that the Department of Revenue inappropriately exceeded its authority in creating the rule.¹²¹ This battle raises the question of whether states should be able to use Blaine Amendments to discriminate against parents who choose religious education for their children.

119. *Espinoza v. Montana*, 435 P.3d 603, 605–606.

120. *Id.*

121. *Id.* at 614.

In New York, the Education Department is seeking to implement new rules regarding substantially equivalent education.¹²² The proposed rules clarify what a substantially equivalent education entails, seeking to ensure that private schools offer an education that is at least as good as public schools.¹²³ The new rules would require schools to teach certain subjects like math, English, and science and to specify the number of classes each student must fulfill.¹²⁴ The Education Department would then inspect whether the schools meet the requirements.¹²⁵ Jewish schools have largely led the fight against these regulations because they would have to change their curriculums, alter schedules, and de-emphasize religious study in order to meet the new standards.¹²⁶ This battle emphasizes the conflict between society's need for educated citizens and a parent's right to educate his child.

B. Constitutional Amendment

Given the U.S. history surrounding the intersection of religion, family, and education, a constitutional amendment would settle many of the issues that have arisen, but it must be carefully worded to address these issues. First, the constitutional amendment should protect the rights of parents, but it should not give parents absolute control over their children. The amendment needs to also address the rights of children in some way. Although the parents should have the greatest say in how their children are raised, the amendment needs to acknowledge that the state has an interest in educating its citizens. Finally, the amendment should address the problems surrounding state funding of religious institutions.

Although U.S. courts have dealt with this issue in part, a constitutional amendment is still necessary. An amendment process generally serves one of three functions.¹²⁷ It 1) allows a constitution to change and respond to new societal needs and circumstances; 2) provides for ongoing participation in forming the Constitution, lending legitimacy to the document; and 3) offers a means of overriding existing judicial interpretations.¹²⁸ The proposed amendment here fits best within the first category, but does not fully reflect even this category. It responds to changing views of the family and parental rights, but as a way to stagnate these views from changing further. Since it does not necessarily represent the flow in

122. Josefina Dolsten, *NY Jewish Schools Are Fighting a Proposal That Would Force Many Yeshivas to Increase Secular Education (and They're Not Alone)*, JEWISH TELEGRAPH AGENCY (Aug. 13, 2019), <https://www.jta.org/2019/08/13/united-states/ny-orthodox-schools-are-fighting-a-proposal-that-would-force-them-to-increase-secular-education> [https://perma.cc/L2GN-KAZE].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 95 (David Dyzenhaus & Malcolm Thorburn eds., 2016).

128. *Id.*

which these perspectives are heading, it may be unlikely to pass, which this Article will address in more detail later.

In recent years, society has shifted to focus more on the rights of children, but the rights of parents and families are crucial. The family has been the nucleus of society since the dawn of civilization. In his *Politics*, Aristotle argued that families served as the fundamental social unit of society.¹²⁹ Children learn responsibility, virtue, and socially-accepted practices from their parents.¹³⁰ Society has continued to recognize the truth of this throughout history. In his commentaries, Blackstone noted that “the most universal relation in nature . . . [is] that between parent and child.”¹³¹ This relationship has been one of the most important connections throughout history. More recent studies back up this historical perspective. Within the first 1,000 days of life, before a child even enters school, a baby’s brain develops the foundations for its lifelong learning.¹³² The familial influence is key during this crucial period of brain growth. Too much state control over the family risks the U.S. becoming the “utopia” depicted in works such as *Brave New World*.¹³³

The amendment should pull language directly from the Irish Constitution. The amendment should use Article 41’s language and say that “The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing rights, antecedent and superior to all positive law.” This pulls out some of the more absolute language of “inalienable and imprescriptible.” Furthermore, the amendment should include the language of Article 42 that “The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children,” which again removes the language of “inalienable.”

The drafters also need to address who qualifies as a parent for the purposes of this amendment. The amendment should provide a broad definition of parents, so as to incorporate all of those figures who are key in a child’s life, including adopted parents and stepparents. I propose that the language state that “the parents of the child, including biological, adoptive, and step-parents,” have control over the child’s upbringing and education. Furthermore, given cases that have arisen in Ireland, the amendment should clarify that the decisions of legally recognized adoptive parents should have priority over birth parents when in conflict. Although this definition of parents may leave some parental figures out, it

129. Todd L. Goodsell & Jason B. Whiting, *An Aristotelian Theory of Family*, 8 J. OF FAM. THEORY & REV. 484, 484 (2016).

130. *Id.*

131. 2 WILLIAM BLACKSTONE, COMMENTARIES *308.

132. *Why 1,000 Days*, 1,000 DAYS, <https://thousanddays.org/why-1000-days/> [<https://perma.cc/DV3W-LAW3>].

133. *See generally* ALDOUS HUXLEY, BRAVE NEW WORLD (1932), where the state took control over childbearing and childrearing entirely at the expense of personal freedoms.

will ensure that only parents that are stable in a child's life will be a part of the decision-making process.

Although the amendment should give broad protections to parents, it should also recognize the needs of children. That said, it should not give too much power to the State in deciding what those needs are. The U.S., for instance, has not signed the U.N.'s Convention on Children's Rights in part because it could undermine parental authority in educating children.¹³⁴ The amendment should draw inspiration from Article 42A, but not directly copy it. This provision should state that "The State recognizes and affirms the natural rights of all children and shall, by its laws protect and vindicate those rights when the parents have failed to do so." This provides some protection to children, but the language guarantees that it could only be applied in extreme circumstances.

The amendment must further address the needs of the American State by providing for a minimum education level. Article 42, Section 3 of the Irish Constitution offers language that provides a solution. The amendment to the U.S. Constitution should state that "The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum secular education, but only where such education does not conflict with religious education." This would solve issues such as the proposed New York regulations because it would exempt the Jewish schools in which teaching both the minimum standards and religious education is impossible. This provision admittedly places greater importance on religious education than state education. That said, religion holds a distinct place in society that is worthy of greater respect. Allowing states to set the secular standards for religious schools could quickly start to interfere with religious values. For instance, a state may eventually require that schools teach about state healthcare services available for transsexual individuals. While it may seem secular on its face, many religious institutions believe that men and women are perfectly formed, and that gender is more than just a societal construct. For some individuals, choosing to comply with stringent regulations could mean that they either break the law or risk their immortal soul in the afterlife, according to their religion. This risk is far too great.

One could counter that it is not in the best interests of the child to be educated in a religious environment, but this issue fundamentally comes down to who should make that decision. Unless a child's health is at risk, the parents are far more likely to be in a position to make an informed decision about what is best for the child. The judiciary has found privacy to be a core notion encapsulated in the Constitution. This implies that parents who are not actively harming their children should also have the individual autonomy to raise their children in a setting outside of government control. While this idea of constitutional privacy could be debated, it is at least abundantly clear that the First Amendment protects

134. S.C., *Why Won't America Ratify the UN Convention on Children's Rights?*, THE ECONOMIST (Oct. 7, 2013), <https://www.economist.com/the-economist-explains/2013/10/06/why-wont-america-ratify-the-un-convention-on-childrens-rights> [<https://perma.cc/D66V-6792>].

religious liberty. A key aspect of religious liberty is the ability to share your religion with others in private settings. And there is no relationship in which it is more important to share your religion than with your family.

Finally, the amendment should address what funding, if any, a state should provide to religious institutions. The amendment should say that where a state provides a benefit to parents or institutions for educational purposes, it cannot exclude parents who choose religious education or religious institutions. This would reinforce the holdings in cases such as *Trinity Lutheran Church* and *Zelman*, while also providing a definite answer to issues that arise such as in *Espinoza*.¹³⁵ Likewise, the amendment would not pose a conflict with the Establishment Clause, as the court has clearly described in these cases. It is not guaranteeing funding for religious institutions or parents who choose religious education but would ensure that these institutions and parents do not lose out on benefits merely because they believe in religious education. The amendment would, of course, invalidate Blaine Amendments throughout the country. Parents should have the ability to choose religious education if they think that is best, and not have to choose between a financial benefit and their child's education.

Although interpretive issues will still arise, the language suggested above would guarantee the protection of parental rights while also acknowledging the needs of the child and the state, and it would allow parents to choose religious education without having to sacrifice a financial benefit.

V. THE PRACTICALITIES OF A CONSTITUTIONAL AMENDMENT

A constitutional amendment offers the best solution to protect the rights of both parents and children, but there are practical difficulties with such an amendment. This section will first address the complications associated with trying to pass a constitutional amendment. It will then discuss why the legislature should propose a constitutional amendment of this variety even if it should fail because even a failed constitutional amendment can produce change.

A. *Difficulties of a Constitutional Amendment*

Although an amendment to the U.S. Constitution provides the optimum solution for this issue, there are many practical difficulties. The constitutional writers created a constitution that is incredibly difficult to amend, as discussed in Section II.¹³⁶ Given this difficult process, the amendment proposed in this paper is unlikely to pass. In fact, only thirty-three amendments have made it to the states for ratification even though about 12,000 have been proposed in Congress in the nation's history.¹³⁷ The last time that both the House and the Senate achieved the two-thirds vote necessary to propose an amendment to the states for ratification

135. See *Trinity Lutheran Church*, 137 S. Ct. 2012; *Zelman*, 536 U.S. 639; *Espinoza*, 435 P.3d 603.

136. Desilver, *supra* note 41.

137. *Id.*

was 1978.¹³⁸ Of the thirty-three amendments proposed to the states, only twenty-seven have become constitutional amendments.¹³⁹ The role of religion is currently hotly debated in the U.S., and any interaction between education and religion has been incredibly contentious as of late. The vote, which is highly unlikely to occur, would almost certainly fall along partisan lines in both houses of Congress. Similarly, the amendment does not fit into one of the categories generally accepted for amending the Constitution.¹⁴⁰ For these reasons, the proposed amendment is unlikely to garner the necessary two-thirds vote in both the House and the Senate.

B. Purpose in the Face of Failure

Although this amendment is likely to fail, it is not without any effect. Even failed amendments can have a large impact on society, Congressional politics, and executive policy.¹⁴¹ Failed amendments can “movement-build,” thereby mobilizing supporters of an issue.¹⁴² A failed amendment movement-builds by providing greater media coverage and overall awareness of a cause.¹⁴³ Supporters are also more likely to take a cause seriously when it is well organized, as is necessary to propose a constitutional amendment.¹⁴⁴ By naming an issue, failed amendments give supporters a platform “to coalesce around a mutually shared understanding of some perceived injustice.”¹⁴⁵ A cause is also more likely to garner financial support once named and covered by the media, which could lead to change at the local level.¹⁴⁶ We have already seen this with the discussion of the Blaine Amendment in Section III.C. Although the Blaine Amendment never made it into the U.S. Constitution, many states have incorporated it into their own constitutions. In this case, that could mean statutory change regarding families, education, and religion, or it could mean a constitutional amendment at the state level.

Failed constitutional amendments can help to alter the meaning of the Constitution through an attempt to amend it.¹⁴⁷ Sometimes, the arguments in favor of a constitutional amendment can shift how the court systems perceive and interpret a current constitutional amendment.¹⁴⁸ In this case, it could mean that the judiciary looks to the Free Exercise Clause or the penumbra of the Constitution to ensure that parents can raise their children as they see fit in terms of both secular and religious education.

138. *Id.*

139. *Id.*

140. *See* Dixon, *supra* note 126.

141. *See generally* HARTLEY, *supra* note 83.

142. *Id.* at 9.

143. *Id.* at 12.

144. *Id.* at 11.

145. *Id.* at 12.

146. *Id.* at 13.

147. *Id.* at 34.

148. *Id.*

Additionally, failed amendments can lead to changes in legislative and executive policy.¹⁴⁹ For reasons I will discuss further in the next section, a proposed amendment such as this is unlikely to cause legislative change at the federal level, but it could cause legislative change at the local level. A proposed amendment could fuel a conversation about the proper role of the government when it comes to respecting the family, religion, and education.¹⁵⁰ It may also prompt state governments to reexamine how their own constitutions treat religious education, alter the law to be more accommodating, or create new laws that expressly give rights to parents. A failed amendment of this kind could also change executive policy, in that the executive branch may begin to interpret the Establishment and Free Exercise Clauses differently. For these reasons, even if the amendment should fail, it is worth pursuing.

VII. ALTERNATIVE OPTIONS

A constitutional amendment offers the best protection in this case, but assuming an amendment is not possible, other options exist. A constitutional amendment would preempt any previous federal or state laws, state constitutional provisions, or judicial decisions, ensuring the rights of families throughout the country. Although a federal statute with similar language would preempt state statutes and constitutional provisions, the judiciary could overturn it. This would almost certainly be the case here, since a federal statute of this nature would likely transgress the limited powers of Congress. This statute would not fall under one of the express powers granted to Congress under Article I, Section 8 of the U. S. Constitution.¹⁵¹ Nor does a statute such as this seem “necessary and proper” for carrying out one of these powers.¹⁵² A federal statute is thus not an option in this case.

At the local level, states could enact either statutes or constitutional provisions that mirror the language of the suggested amendment, but the latter option is better. Like a U.S. Constitutional amendment, a state constitutional amendment is harder to change than a mere statute. The judiciary cannot overrule a constitutional amendment unless it conflicts with a federal constitutional provision or statute, which means the amendment is more likely to last. Conversely, the next legislature or the state judiciary can more easily overturn a state statute. As the family unit deserves the most protection, a state constitutional amendment is a better option than a state statute. Judiciaries will continue to interpret this language, of course, but they would be interpreting a state constitutional amendment that clearly outlines the rights of parents. States with Blaine Amendments would be unlikely to pass language that overturns the amendment, but they may still be willing to do so.

149. *Id.* at 109.

150. *Id.* at 113.

151. U.S. CONST. art. I, § 8.

152. *Id.*

Finally, the U.S. could do nothing and continue to leave choices regarding the intersection of family, religion, and education up to the judiciary. Given the plethora of recent judicial battles surrounding these issues, as discussed in Section IV, the choice to leave all decision-making to the courts is sub-optimal. The potential erosion of the rights of parents and children should not be at the discretion of a few judges, especially given the hostility towards religion in some parts of the country. As before mentioned, however, the judiciary will be involved in interpretation whether an amendment like this passes or not. If an amendment did pass, the judiciary would act more like that of Ireland. It would have to provide greater respect for the rights of parents because it would be clearly enumerated in the Constitution. For these reasons, a state constitutional amendment offers the next best option to a U.S. constitutional amendment.

CONCLUSION

The U.S. should pass a constitutional amendment that protects the rights of parents and families, but even if such an effort is likely to fail lawmakers should still try. The founding and history of the Irish constitution makes it a particularly useful comparison with the U.S. Constitution. Although both constitutions touch on religion, the Irish Constitution makes it a focal point, whereas the U.S. Constitution does not. The Irish Constitution offers an appropriate intersection of religion, family, and the rights of parents and children from which the U.S. Constitution could benefit. The Irish judicial analysis of these provisions provides a sense of how the U.S. courts may interpret them and offers ideas of how the U.S. could change those provisions for the better. The U.S. should pass a constitutional amendment that protects the vital rights of parents in choosing how to raise their children, but that also acknowledges the rights of the children involved. Although this suggestion has practical difficulties, there is still value in proposing the amendment should it fail. Even a failed amendment brings awareness to an issue, it can alter the interpretation of the Constitution and lead to policy change. Should the amendment fail, states may still individually adopt the amendment, which would offer protection to families. Ultimately, the goal is to ensure the protection of both parents and children. Family is the fundamental unit of society, and religion has distinct importance amongst all rights. Where the two intersect, the state should do all it can to protect these values.