1. **Does the PRA improperly create a theory of parental rights when, in fact, parents only legitimately have responsibilities toward their children?**

In law, rights are limitations on the power of government. Responsibilities are duties that one person owes to another.

The most fundamental principle of constitutional law is that the Constitution only controls the actions of government. A constitutional provision cannot directly regulate private action including that of a parent vis-à-vis his or her child.

Thus, parental responsibilities are derived from either common law or state statutes and never arise from any constitution whether state or federal.

Some have made theological arguments concerning the nature of parental responsibilities. No law (constitutional or statutory) can reach this domain. The PRA cannot and does not purport to rearrange a parents’ duty to his or her child before God.

It is absolutely appropriate to protect parental rights in the Constitution just as we have protected religious freedom, freedom of speech, and the right to bear arms—all of which the Founders held to be inalienable rights which originally come from God.

The Declaration of Independence gets it right: God is the source of rights, and it is the duty of government to protect those God-given
rights. America has chosen to do this through constitutional provisions.

2. **Does the PRA improperly shift jurisdiction over parental issues from the states to the federal government?**

No. State law controls the vast majority of issues concerning the parent-child relationship. This will not change under the PRA.

Some rely on the fact that the PRA is originating in Congress as evidence of an effort to assert improper federal jurisdiction.

This argument confuses ordinary federal legislation with a constitutional amendment. If Congress were to consider a “parental rights statute” there would be plausible merit to the argument because Congress alone (with the President’s signature) would enact the provision.

But constitutional amendments are not federal legislation. The President does not sign constitutional amendments because of this fact. Instead, constitutional amendments must be ratified by the states. No amendment becomes law until the states act.

In this process, constitutional theory is that “We the People,” through the super-majority of our representatives required at both the congressional and state level, are the actors. Strictly speaking, then, the PRA is a proposed act of the People and not the act of either Congress or the states.

It is possible, of course, to shift power from the states to Congress via a constitutional provision. However, under our system of enumerated powers this can only happen with explicit language. The 13th, 14th, 15th, 19th, 23rd, 24th, and 26th Amendments contain language specifically granting additional jurisdiction to Congress. (“Congress shall have the power to enforce this article by appropriate legislation.”) The proposed PRA contains no such
language—and this is on purpose to avoid changing the relative authority of Congress or the state legislatures.

The PRA grants no power to any government; rather, it limits the existing power of all governments so that no government may use its otherwise legitimate legislative authority in a manner that would invade parental rights.

This is exactly how all other fundamental freedoms work. Government may regulate health care, for example. However, no government may legitimately use its power to regulate health care in a manner that violates the religious freedom of a person or organization.

3. **Is there a danger in enumerating our God-given rights in the text of the Constitution? Wouldn’t we be better off just directly asserting our God-given rights?**

This was a battle that was waged in the first years of the Republic. Some claimed that if we enumerated our rights, it would ultimately work to disparage our rights. We would be better off, some of that era contended, if we simply left all of our rights undefined in the Constitution.

Whatever the theoretical merit of this position, the United States has definitively chosen another path. We have the Bill of Rights. We have other constitutional provisions which protect our rights.

If we had 200-plus years of jurisprudence building upon a theory of God-given rights, then the situation might be different. But, again, we have chosen a different path as a nation. We have preferred to have textual guarantees of our most important rights. (See *Reid v. Covert*, 354 U.S. 1, 6 (1957): “The rights and liberties which citizens of our country enjoy are not protected by custom and tradition alone, they have been jealously preserved from encroachments of Government by express provisions of our written Constitution.”)
Some in the judiciary also are willing to protect implied rights. But no responsible constitutional scholar would ever contend that an implied right is superior to an enumerated (textual) right. It is clear that textual rights are preferred in our system.

In fact, one of the principal reasons for the PRA is that Justice Scalia has written that even though he believes that parental rights are inalienable from our Creator, they are not judicially protectable because they are not found in any text of the Constitution. *Troxel v. Granville*, Justice Scalia, dissenting, 530 U.S. 57, 91-3 (2000).

Other justices recognize parental rights as a legitimate implied right but hold that parental rights do not demand a high level (“strict scrutiny”) of protection. Instead, they contend, parental rights are only a low-level right which may be easily invaded by the government. *Troxel v Granville*, Justice Thomas, concurring, at 80 (“I agree with the plurality that this Court’s recognition of a fundamental right of parents to direct the upbringing of their children resolves this case.... The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.”)

4. **Is the language of Section 1 imprecise and vulnerable to the tendency of the judiciary to legislate from the bench?**

The drafting theory of the PRA was to employ recognized terms of art that have a long judicial history. The most vulnerable path that we could possibly pursue is to create absolutely new legal standards that would, in fact, be especially vulnerable to judicial manipulation.

While no constitutional provision can prohibit judges who intend to abuse their offices, it is proper draftsmanship to limit the potential for judicial manipulation by employing recognized terms of art.
Every key phrase from Section 1 of the PRA was carefully chosen from existing case law so that it is a recognized term with a fixed meaning.

"The liberty of parents to direct the upbringing, education, and care of their children..."

In the 1925 decision of Pierce v. Society of Sisters, the U.S. Supreme Court struck down a compulsory attendance act that required all parents to send their students to public schools, instead of private or religious schools. The court concluded that the act was unconstitutional because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

"...is a fundamental right."

In 2000, the Supreme Court cited a long train of previous cases which showed that the right of parents to direct the education and upbringing of their children is a fundamental right. The following passage, taken from Troxel v. Granville, highlights the rich history of this fundamental right:

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements" (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Quilllon v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 99 S.Ct.
2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra*, at 720, 117 S.Ct. 2258 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

5. Does the use of the word “reasonable" in Section 2, create an opportunity for overriding parental rights as a matter of judicial whim?

No. Section 2 is pointedly aimed at a series of federal court of appeals cases which hold that parents whose children attend the public schools have no ability to have any say over any action of the school vis-à-vis their child. (See, e.g, *Fields v. Palmdale*, 427 F.3d 1197 (2005) and *Parker v. Hurley*, 474 F.Supp.2d 261 (2007).)

The term “reasonable” in Section 2 only refers to the public school context and is not applicable vis-à-vis private school or homeschooling issues.

It is true that the “reasonableness” standard is the easiest standard to prevail upon in constitutional litigation. The “compelling interest” standard is the most difficult standard.

But, it is absolutely essential that we understand who must prove what proposition in this context.
A parent would be the one who is being required to prove that his or her choice for their child was “reasonable.” This is the easiest standard to fulfill in constitutional law. We have given parents the easy route.

The government’s burden of proof is contained in Section 3. That section requires the government to satisfy the legal standard commonly known as strict judicial scrutiny.

Thus, we have given parents an easy standard and the government a difficult standard. This is not anti-parent in the least; it is careful drafting to protect parental rights as broadly as possible.

6. **Does Section 3 improperly balance the rights of the parents and the duty of the government to intervene on behalf of children?**

There are only four possible ways to balance the rights of parents and the duty of government to intervene on behalf of children:

a. Parental rights are absolute and the government may never intervene;

b. Parental rights are fundamental and the government may only intervene after the application of strict judicial scrutiny;

c. Parental rights are non-fundamental and the government may intervene as it wishes subject only to minimal judicial scrutiny; or

d. Parents have no rights vis-à-vis the government and their child.

No responsible person believes that parental rights should be absolute. And no freedom-loving person believes that government power should be absolute.

Thus, we are left with only two options: a high level right coupled with strict judicial scrutiny, or a low-level right coupled with minimal judicial scrutiny.
State and federal courts are currently divided between these two choices. (See, e.g, *Proctor v. Green*, 2008 WL 2074069, 4 (W.D.Va 2008): (“Furthermore, the precise confines of the right to familial privacy are nebulous. *See Hodge v. Jones*, 31 F.3d 157, 164 (4th Cir.1994)(“There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate government interests.”); *Anderson v. Waddle*, WL 4561467, 4-5 (E.D. Mo. 2008), (“The Eighth Circuit Court of Appeals has recognized that parents have an important, but limited, substantive due process right in the care and custody of their children.”); *Ex parte E.R.G. and D.W.G. (In re: E.H.G. and C.L.G. v. E.R.G. and D.W.G.)*, 2011 WL 2279206 (Ala.) at 6, 8: (“The right of parents to direct the upbringing of their children has long been recognized as fundamental by the United States Supreme Court and, therefore, as a right protected by the Fourteenth Amendment.... State action that limits a fundamental right is generally subject to strict scrutiny.”).

The PRA ends the confusion and firmly places parental rights at the top end of our constitutional system on an equal plane with religious freedom, freedoms of speech and press, and the right to bear arms. None of these rights are absolute. All are fundamental. Parental rights should be added to this list.

7. **Does the language of Section 4 give the judiciary new power to intervene in end-of-life decisions for a child?**

No. The key phrase in Section 4 is this: ”This article shall not be construed to apply to” end of life decisions (emphasis added).

Thus, whether the issue is abortion or medical treatment of a terminally ill child, the meaning of this provision is clear: the PRA has *no applicability* to such matters.
This leaves all such issues in the same position they would be in without the PRA. If our law on abortion changes, then it will change on its own and the PRA will have no impact one way or the other. This is true as well concerning the issue of terminally ill children.

Other law, and not the PRA, will control all such issues.

8. **Does the language of Section 5 authorize Congress to adopt treaties that are contrary to the protections of the PRA?**

No. The general principle of constitutional law is this: In American courts the Constitution always prevails over an inconsistent treaty provision. (*Reid, supra*, at 17: “This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty.”) However, the Supreme Court has begun using treaties—including treaties we have not even ratified—to interpret the meaning of our Constitution. (See *Roper v. Simmons*, 543 U.S. 551, 21 (2005) and *Graham v. Florida*, 560 U.S. ___ at 30 (2010).)

The impact of the PRA on the use of international law in American courts is just this—it will end any possibility that an American court could use international law as a basis for interpreting the rights of parents under the PRA.

However, the law is different in international courts. Section 5 serves a very important purpose in that context. In international courts, the rule is that treaties override a nation’s domestic law including the nation’s Constitution. However, under the Vienna Law of Treaties there is an exception to this rule. If a constitutional provision deals with the capacity to enter into a treaty, then if a treaty is adopted contrary to that capacity, the treaty is void and the constitutional provision prevails.

Section 5 prevents the United States from entering into treaties which contradict the rights protected by the PRA.
Thus, if a future president and Senate worked together to ratify a treaty that violated the rights protected by the PRA, that treaty would be unconstitutional and void—in both U.S. courts and international courts.

**Conclusion**

The Parental Rights Amendment has been reviewed by many respected lawyers including former Attorney General Ed Meese and Princeton Professor Robert George—both of whom endorse the PRA. It is carefully worded to accomplish its purported aim – the protection of parental rights.