

Case No. B192878

**IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE**

In re RACHEL L. et al.,

Persons Coming Under the Juvenile Court Law.

JONATHAN L. and MARY GRACE L.,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES,

Respondent,

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Real Party in Interest.

Rehearing after vacated opinion of February 28, 2008 from Court of Appeal of the
State of California Second Appellate District, Division Three, pursuant to an
Appeal from the Judgment of the Los Angeles County Superior Court, Case No.
JD00773 (Honorable Stephen Marpet, Commissioner).

**APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF
AND AMICI CURIAE BRIEF OF THE SUTHERLAND INSTITUTE
IN SUPPORT OF PETITIONERS JONATHAN L., MARY GRACE
L., AND THE BONA FIDE INTERESTS OF THEIR MINORS**

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CONDITIONALLY UNDER SEAL (Rule 8.212(c)(2)(A-B))

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE
ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 29.3(c), *amici curiae* the Sutherland Institute (“Sutherland”) hereby submits the following brief in support of Petitioners Jonathan L. and Mary Grace L. and the bona fide interests of their minors. Sutherland respectfully requests permission to file the accompanying brief in support of Petitioners and their minors.

Amicus curiae Sutherland Institute is a non-profit, non-partisan, non-sectarian 501(c)(3) public policy research institute based in Salt Lake City, Utah, whose goal is to protect and preserve parental liberty, educational choice, and home education. In this case, Sutherland is primarily concerned that an alleged discrete family tragedy may be exploited to secure Court authorization for unwarranted wide-scale prosecution and extermination of all home educators throughout California.

Unfortunately, legal or political endorsement of a sweeping policy prohibiting home education in California would likely have negative impacts in other states. As this brief will explain in more detail, it was in Los Angeles that Richard Henry Pratt and government educators first formally announced a nationwide effort to “civilize” Native Americans, demographic minorities, and alternative educators. It was at Alcatraz, the federal prison in San Francisco, that a coercive imprisonment scheme was implemented to force Native Americans from

Utah (and elsewhere) into government schools which were designed to trample family autonomy and parental rights. It was in California, during World War II, that government officials sought to close down private Japanese-American schools, an effort that directly lead to internment and mass government education of thousands of Japanese-American citizens in such places as Topaz, Utah.

In light of history, Sutherland is concerned that if California targets home educators as a class for extermination, prosecution, and deprivation of custody, the resulting political and legal precedent could encourage other states to authorize similar restrictive policies. Alternatively, should this Court choose to affirm the modern, progressive concept of “liberty” by acknowledging the preeminence of the fundamental Parental Liberty Doctrine, California will leave behind some very dark chapters in its history of civil rights and instead become a beacon of liberty for families across the United States (and around the world).

Sutherland believes there are critical precedents and facts that this Court should consider before reaching beyond the narrow facts of the present case to impose an unwise de facto ban on all home education. We respect and appreciate the Court’s effort to order a rehearing and consider all relevant information.

DATED: May 18, 2008

Respectfully submitted,

By: _____/s_____
DANIEL E. WITTE
Attorney for Amici Curiae

AMICI CURIAE BRIEF IN SUPPORT OF THE PETITIONERS
JONATHAN L. and MARY GRACE L. AND THEIR MINORS

I.

INTRODUCTION

The fundamental liberty of parents to direct the upbringing and education of children—otherwise known as the Parental Liberty Doctrine—is the oldest (and some would say, most precious) of the liberty interests recognized by the United States Supreme Court and American society.¹ As explained in this brief, the Parental Liberty Doctrine implicates strict scrutiny protection for home education.

Of course, no right is absolute, and the government does have a compelling state interest in preventing material child abuse. If bona fide child abuse is shown to exist by clear and convincing evidence,² appropriately-tailored government intervention will survive the strict scrutiny test and should be taken. Moreover, it should be noted that the vast majority of home educators abhor child abuse,

¹ *Troxel v. Granville*, (2000) 530 U.S. 57, 65–66, 80.

² *Santosky v. Kramer*, (1982) 455 U.S. 745, 1396-97, 1402-03 ; *Alsager v. District Court*, (S.D. Iowa 1975) 406 F. Supp. 10, 24-25, opinion adopted by (8th Cir. 1976) 545 F.2d 1137; *In re Monnig*, (Mo. Ct. App. 1982) 638 S.W.2d 782, 785-86; *In re J. P.*, (Utah 1982) 648 P.2d 1364, 1375 n.10.

regardless of its alleged public school or home education setting, and fully support appropriate measures to stop such activity.³

Opponents of parental liberty and home education would have this Court believe that child abuse can be prevented only by eliminating the Parental Liberty Doctrine and home education. This hard case involving one allegedly troubled family should not be an occasion to make bad law condemning all the law-abiding home educators in California.

In truth, there is an extensive body of legal precedent and scholarly work explaining how the Parental Liberty Doctrine and the practice of home education properly co-exist with government prevention of bona fide child abuse. No court should posit a false dichotomy between the two activities, because both activities typically serve the best interests of children. Through use of proper analytic constitutional scrutiny, adequate procedures, correct burdens of proof, and credible scientific evidence, it is readily possible to draw an appropriate legal line between illegal child abuse and constitutionally-protected home education.

Unfortunately, the unusual procedural history of this case initially operated to stifle robust examination of all relevant issues, competing perspectives, important contextual facts, and larger community interests. It also appears that the government officials involved with directly litigating this case either a) failed to

³ Unfortunately, some instances of child abuse arise within every demographic group. However, this fact would not justify, for example, prosecuting or banning every Catholic, or Native American, or Republican, or home educator, simply because some limited number of people claiming such affiliations had engaged in illegal activity. Individualized review is required.

consult with their own state government superiors and policymakers prior to making unverified representations in court, or b) had information about authorized official state government policy regarding home education, but failed to accurately disclose such information in court. As a result, local government attorneys may have asserted an alleged government interest to eliminate home education that was (and is) directly and improperly⁴ at odds with the authorized official position of Governor Arnold Schwarzenegger and California State Superintendent of Public

⁴ Unlike children, organs of state, local, and municipal government are “creatures of the state,” automatically bound by the policy directives of the state’s chief executive. E.g. *City of Trenton v. State of New Jersey*, (1923) 262 U.S. 182, 185-87 (“The city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it. . . . A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.”).

To the extent that a local government official solicits or voluntarily accepts an opinion or order from this Court or any other court purporting to authorize or endorse prosecution of *all home educators in California*, that local official is acting *ultra vires* and without proper standing. Since there is no bona fide dispute about the constitutionality and legality of home education as between the sovereign State of California (as properly headed by Governor Arnold Schwarzenegger) and any private litigant or the home education community, this Court is not confronted with the kind of bona fide “controversy” needed to support a holding against the general constitutionality or legality of home education.

Quite apart from all other reasons set forth in this brief, these core procedural deficiencies should cause this Court to explicitly refrain from issuing any adverse determination against the general legality or constitutionally-protected status of home education.

Instruction Jack O’Connell.⁵ This Court deserves credit and appreciation for taking the time to carefully and adequately reconsider this matter.

Section II of this brief explains that under the most current and controlling constitutional precedent, the Parental Liberty Doctrine is fundamental, strict scrutiny applies, and home education is a protected activity under numerous constitutional provisions and doctrines.⁶ Section II also sets forth the proper burden of proof, which is clear and convincing evidence, and explains what evidentiary standards for educational neglect must be met to satisfy the Daubert test.⁷ Finally, section II explains, arguendo, that a de facto ban on home education would fail even a “rational basis” or “reasonableness” standard of review.

Section III of this brief discusses the key precedents erroneously invoked in the vacated *In re Rachel L.* opinion dated February 28, 2008 (“Opinion”). The oversights in the Opinion are quite understandable because it appears that no litigating party ever adequately informed this Court or any lower court about other

⁵ See, e.g., *Press Release GAAS:121:08*, <http://gov.ca.gov/press-release/8951/> (March 3, 2008); *School Chief: ‘Parents Still Have Right to Homeschool’*, <http://www.hsllda.org/hs/state/ca/200803121.asp>.

⁶ One of the other key liberty interests protecting home education is free exercise of religion under Cal. Const. art. I, § 4. The application of this protection and the standard of review is a question of first impression in California. If the issue is reached in this case, this Court should considered adopting the approach used by the Michigan Supreme Court. *People v. DeJonge*, (Mich. 1993) 501 N.W.2d 127, 144 (applying strict scrutiny free exercise analysis to conclude that home educators could not be prosecuted for failing to utilize certified teachers when the practice was pursuant to religious conviction).

⁷ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993) 509 U.S. 579.

important historical facts and legal precedent relevant to the prior obsolete California state court cases about home education.

As is true with so many other areas of civil rights law, old civil rights cases cannot be properly understood or applied without considering the comprehensive arc of pertinent historical and legal developments. Accordingly, Section III will briefly set forth some of the key historical and legal developments surrounding the Parental Liberty Doctrine from 1776 to the present day. The discussion will discuss previous dark chapters in the history of California civil rights that have a direct bearing on this current case. During the historical discussion, this brief will also demonstrate that old cases advocating a de facto ban on home education are legally and politically obsolete, in much the same way that *Plessy v. Ferguson*⁸ is now obsolete relative to the modern legal standards governing racial discrimination.

Section IV contains a conclusion.

II.

HOME EDUCATION IS A CONSTITUTIONALLY PROTECTED ACTIVITY

As discussed below, home education is constitutionally protected as a fundamental liberty protected by strict scrutiny. But even under, *arguendo*, a rational basis analysis, a de facto ban on home education is still unconstitutional.

⁸ (1896) 163 U.S. 537.

A. The Liberty of Parents to Direct the Upbringing and Education of Children is Fundamental and Subject to Strict Scrutiny.

One of the crucial oversights in the vacated *In re Rachel L.* opinion dated February 28, 2008 (“Opinion”) is that it makes no mention of *Troxel v. Granville*.⁹ The most recent and controlling guidance from the United States Supreme Court about the Parental Liberty Doctrine was set forth in *Troxel v. Granville*, with a majority¹⁰ (a plurality of O’Connor, Rehnquist, Ginsburg, and Breyer, along with a concurring Thomas) describing the unitary¹¹ interest of parents¹² in the “care,

⁹ (2000) 530 U.S. 57, 65–66, 80.

¹⁰ In dissent, Justice Scalia took the same position adopted in the Opinion for Rachel L. In fact, Scalia vehemently asserted that there is no federal constitutional protection for parental liberty of any kind, whether in the education context or any other. *Id.* at 91-93. In the momentous showdown over the nature of constitutional parental rights that was *Troxel*, Scalia’s position was correctly rejected by all eight of the other justices.

¹¹ Daniel E. Witte, Comment, *People v. Bennett, Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 B.Y.U. L. REV. 183, 212-17 (hereinafter “Analytic Approaches”)(explaining and documenting the “unitary” right).

Very basically, the concept of a “unitary right” can be illustrated as follows. There is no constitutional right to “post internet pages,” “broadcast television programs,” “distribute leaflets on the sidewalk,” “display a sculpture,” or “hold a study group about environmental issues.” Instead, all of these activities are component exercises of freedom encompassed within the protection of a much broader, conceptual, unitary First Amendment liberty that protects “speech.” Some exercises of freedom actually qualify for overlapping protection under other clauses besides “speech,” such as the right to “assemble” or enjoy a free “press”).

In like manner, the Constitution does not frame the matter as a specific “constitutional right to home-school,” because the Constitution articulates overarching unitary protection for “liberty” and “due process.” Home education is one of numerous facet exercises of parental authority enshrined within the “liberty of parents . . . ‘to direct the upbringing and education of children’” and to supervise the “care, custody, and control of their children.” In addition to

“liberty” and “due process,” home education is simultaneously protected by other provisions such as (but not limited to) First Amendment “free exercise” of religion and the right “peaceably to assemble.” Daniel E. Witte and Paul Mero, *Removing Classrooms from the Battlefield: Liberty, Paternalism, and the Redemptive Promise of Educational Choice*, 2008 B.Y.U. L. REV. 377, 391 n. 64 (hereinafter “Liberty, Paternalism”) (listing various relevant federal constitutional provisions).

Finally, it is important to remember that concepts such as “due process” can be properly applied only through an understanding of implied principles and common law protections. For example, the federal constitution does not specifically mention any “right of an accused to be deemed innocent until proven guilty,” but this principle is clearly required by “due process” as mentioned in the Fifth and Fourteenth Amendments.

¹² Children have a concomitant fundamental right to the state of well-being which derives from “the continuity of affectionate care from those to whom [they are] attached through bonds of love.” *Roe v. Conn*, (M.D. Ala. 1976) 417 F. Supp. 769, 776 (cite omitted); see also *In re J.P.*, (Utah 1982) 648 P.2d 1364, 1369, 1377 n.13 (citation omitted)(“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”); *In re Perales*, (Ohio 1977) 369 N.E.2d 1047, 1051. The right described in *Roe* is sometimes called the Child Liberty Doctrine, for it is a right describing a child's right to be free from harmful and arbitrary state confinement. Cf. *In re Lelah-Pucka-Chee*, (N.D. Iowa 1899) 98 F. 429.

A child cannot represent him or herself, and thus has a right to be represented by those who have the most similar alignment of familial, biological, property, and economic interests. When the state interferes with the parent-child bond, it imposes a disinterested caretaker upon the child. Over a long period of time, the service rendered by a caretaker who is motivated by the bonds of affection and/or a close alignment of interests with the child is likely to be quite different than the service rendered over the long term by a disinterested party. Caretakers with professional expertise in some specialty may have a more refined clinical approach to some facet of a child's development, but professionals have no special systemic motivation to apply their services to obtain the maximum benefit for a particular child when assistance requires a significant personal, emotional, or financial investment or risk. Analytic Approaches, at 186 n.4 (explaining this reality in more detail).

The same concept applies to other de facto concerns when parental rights are litigated. For example, parents who are forced to defend against improper state interference often must expend tremendous quantities of time, money, and emotional energy in the effort. Yet if parents' financial resources are depleted defending against state interference, the children of those traumatized parents are also likely to have a lower standard of living and a depleted inheritance. *Id.* There

custody, and control of their children,” “the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own,’” and the “‘liberty of parents and guardians’ . . . ‘to direct the upbringing and education of children’” as “fundamental.”¹³ Protection for home education as a free exercise of

is also an unavoidable moral hazard that appointed attorneys may impose their own ideological, economic, and political interests upon the minors being “represented,” instead of ensuring that the Court is fully informed about contrary views held by the minors and countervailing considerations about “best interest.”

Consequently, “while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds.” *In re J.P.*, 648 P.2d at 1377 n.13 (quoting *Santosky v. Kramer*, (1982) 455 U.S. 745, 766); see also *Parham v. J.R.*, (1979) 442 U.S. 584, 600-03, 610-11; *Dickson v. Lascaris*, (N.Y. 1981) 423 N.E.2d 361, 363 (“rule fosters both [parents’ and child’s] interests by recognizing that they ordinarily converge”); *Parens Patriae*, <http://www.quaqua.org/parens patriae.htm> (discussion of the doctrine).

¹³ (2000) 530 U.S. 57, 65–66, 80. As the *Troxel* Court noted,

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, (1923) 262 U.S. 390, 399, 401, we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534–535, we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control” We returned to the subject in *Prince v. Massachusetts* and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. . . .

. . . 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.

Id. (citation to *Prince* omitted).

religion is also protected by strict scrutiny.¹⁴

A “fundamental” right is a constitutional law term of art. “Classifications based on race or . . . affecting fundamental rights are given the most exacting scrutiny.”¹⁵ Put another way, “A measure which is found to adversely affect a ‘fundamental right’ will be subject to the strict scrutiny test.”¹⁶

The strict-scrutiny test upholds state intervention against assertion of a fundamental liberty only if (1) an authorizing state regulation exists that can be justified by a compelling state interest, (2) the means chosen are essential to

¹⁴ One of the other key liberty interests protecting home education is free exercise of religion under Cal. Const. art. I, § 4. The application of this protection and the standard of review is a question of first impression in California. If the issue is reached in this case, this Court should consider adopting the approach used by the Michigan Supreme Court. *People v. DeJonge*, (Mich. 1993) 501 N.W.2d 127, 144 (applying strict scrutiny free exercise analysis to conclude that home educators could not be prosecuted for failing to utilize certified teachers when their practice was pursuant to religious conviction).

¹⁵ *Clark v. Jeter*, (1988) 486 U.S. 456, 461(citations omitted).

¹⁶ *In re Valenti*, (Cal. Ct. App. 1986) 224 Cal. Rptr. 10, 12 (citing *Sail'er Inn Inc. v. Kirby*, (Cal. 1971) 485 P.2d 529 (en banc)); *see also Doe v. Heck*, (7th Cir. 2003) 327 F.3d 492, 517–19 (noting that *Troxel* requires fundamental rights to be protected by strict scrutiny or at least “heightened” scrutiny); *Doe v. Doe*, (Haw. 2007)172 P.3d 1067, 1077–79 (combining Justice Thomas’ concurring *Troxel* opinion with the four-justice plurality opinion to recognize that a parent’s right to direct the upbringing of a child as “fundamental,” and “infringement of [the parent’s] fundamental right to direct the upbringing of [a child] triggers a strict scrutiny analysis, requiring that the statute be narrowly tailored to further a compelling governmental interest,” and therefore the Hawaii statute unconstitutionally interfered with parental autonomy); *In re D.W.*, (Ill. 2005) 827 N.E.2d 466, 481 (noting that *Troxel* identified the rights of parents in their children’s upbringing as a fundamental right protected by strict scrutiny); *In re J.P.*, 648 P.2d at 1372–74 (“For example, in *Santosky v. Kramer*, (1982) 455 U.S. 745, the majority refers to the ‘fundamental liberty interest of natural parents in the care, custody, and management of their child’ The Court was unanimous on this point.”).

furthering that interest, (3) there is a clear and present danger to the interest the state may lawfully protect, and (4) the tactic used is narrowly and the least restrictive means of discharging the government's compelling interest.¹⁷ Whenever an individual can show that the government is interfering with an exercise of a "fundamental" civil liberty, the *government* has the burden to prove to a court that the government action can survive the "strict scrutiny" standard of court review.¹⁸

Applying strict scrutiny to the home education context, it is clear that California *does* have a compelling interest in seeing that minors are not abused or deprived of a basic education. But the *government* must also prove that any de facto *ban on home education* through mandatory teacher certification is *essential* to preventing child abuse and ensuring the education of children. The *government* must prove that any ban or challenged regulation upon home education is the *least restrictive means* for achieving the welfare and safety of minors. The *government* must prove by clear and convincing¹⁹ evidence that the accused parents have

¹⁷ See *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

¹⁸ See *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).

¹⁹ The federal Due Process Clause requires that in proceedings designed to terminate or substantially curtail parental rights, the state must prove its case by clear and convincing evidence. *Santosky v. Kramer*, (1982) 455 U.S. 745, 1396-97, 1402-03; *Alsager v. District Court*, (S.D. Iowa 1975) 406 F. Supp. 10, 24-25, opinion adopted by (8th Cir. 1976) 545 F.2d 1137; *In re Monnig*, (Mo. Ct. App. 1982) 638 S.W.2d 782, 785-86; *In re J. P.*, (Utah 1982) 648 P.2d 1364, 1375 n.10.

actually abused or neglected²⁰ their children and that deprivation of custody is an

²⁰ Proper evidence of abuse requires a "showing" of imminent physical harm, or of clear, present, and actual nontangible harm, before an action against parental rights can successfully proceed. The state should not be permitted to intrude upon family autonomy via self-initiated speculation about theoretical possibilities for harm to a child's interest. Establishment of clinical facts should utilize a theory or technique that 1) is of a kind that "can be (and has been) tested," 2) "has been subjected to [scholarly] peer review and publication," 3) has an acceptable "known or potential rate of error," and 4) has "[w]idespread acceptance." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993) 509 U.S. 579, 593-596 (1993).

Credible scientific and statistical methodology must be used by the government to demonstrate alleged educational neglect. Symptoms of alleged dysfunctional situations should be defined in advance, in a manner compatible with other professional practice. E.g., see generally AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (4th ed. 1994).

To properly prove educational neglect, the government must demonstrate that a child is far enough below the statistical mean for peer academic performance that the discrepancy is statistically significant. Statistical significance is generally understood to be two standard deviations below the mean, with an alpha of between .05 and .15. Thus, unless a child is in the lowest 15% of his statistical peer group in terms of academic performance, there is a per se absence of any credible evidentiary basis for concluding that actionable educational neglect has occurred. Even when the child is in the lowest 15% of her class, the government must make an additional showing that there is no non-criminal/abusive explanation for the statistically-significant underperformance, such as, for example, unique pediatric developmental or medical challenges. See generally *Analytic Approaches*, at 232 n.185.

Generally speaking, of course, home education students as a population tend to *exceed* the performance of the public school student population. See Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998* 7 *EDUCATION POLICY ANALYSIS ARCHIVES* No. 8 (March 23, 1999) at <http://epaa.asu.edu/epaa/v7n8/>; Patrick Basham, John Merrifield, and Claudia R. Hepburn, *Home Schooling: From the Extreme to the Mainstream*, 2d ed. *STUDIES IN EDUCATION POLICY* (Fraser Institute Oct. 2007) at http://www.fraserinstitute.org/COMMERCE.WEB/product_files/Homeschooling2.pdf.

essential, narrowly-tailored²¹ response. The *government* must show that the considerable danger to children from being in foster care or government care actually outweighs the alleged danger associated with continued care from the natural parents.²²

There is no indication that the government has even attempted to make such showings with respect to the minors.²³ Instead, the Opinion relies upon a *non sequitur*, insisting that a basic government interest in education must be vindicated

²¹ Other alternatives that should be explored prior to total and permanent deprivation of custody include, for example, special governmental supervision of the traumatized family; kinship placement; or care and education of the children by fit, competent third-party adults who are acceptable to the parents.

²² In many cases, the danger and harm to children while in foster care, government care, or government schools is actually far worse than any mild abuse they may have suffered at the hands of their natural parents. See, e.g., *Analytic Approaches*, at 186 n.4, 224-34 n. 173-89, 228 n. 34, 250 n.218-19; *Systemic Civic Dysfunctions*, <http://www.quaqua.org/systemiccivildysfunctions.htm>.

²³ Quite to the contrary, Governor Arnold Schwarzenegger and California State Superintendent of Public Instruction Jack O’Connell have embraced the existence of home education and identified a need to protect parents’ “right to decide what’s best for their children.” *Press Release GAAS:121:08*, <http://gov.ca.gov/press-release/8951/> (March 3, 2008); *School Chief: ‘Parents Still Have Right to Homeschool’*, <http://www.hslda.org/hs/state/ca/200803121.asp> (containing O’Connell’s March 12, 2008 statement repudiating the Opinion and indicating “Education policy will not change in any way as a result of this ruling. Parents still have the right to homeschool in our state. . . . [S]ome parents choose to send their children to private schools or to homeschool, and I respect that right.”).

This Court should not impute an official policy position to California that California’s properly-elected executive officials have explicitly rejected. Local government officials in the Los Angeles apparently placed this Court in an unfortunate bind by submitting unsubstantiated court filings that asserted an official position not actually authorized by their own state government superiors. See also note 4 of this brief.

with a wholesale ban²⁴ on home education and an automatic termination of all parental rights for parents accused of educational neglect. Since numerous other states have demonstrated for many years that the government interest in education can be successfully vindicated while allowing home education, it is simply not credible from either a logical or empirical standpoint to maintain that a ban or severe restriction upon home education is *essential* to fulfilling a governmental interest in education or welfare. In most cases where serious family dysfunction is actually present, criminal prosecution or termination of parental rights is more extreme than the remedy actually required.

B. A De Facto Ban on Home Education and Home Educators also Fails the “Rational Basis” or “Reasonableness” Test

Even if, *arguendo*, this Court should determine that only a rational basis or reasonableness test must be met, rather than strict scrutiny, a ban on home education and home educators would still be unconstitutional.

In 2003, the United States Supreme Court reversed its own prior case law and case law throughout the nation, determining that the concept and protection associated with “liberty” is even more broad than the definition the Framers would have imputed in their day on the basis of the common law. Specifically, the Court noted that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression liberty of the person both in its spatial and more

²⁴ Requiring all home education parents to be certified public educators is a both a de facto ban and a burdensome, unreasonable regulation.

transcendent dimensions.”²⁵ Moreover,

[M]atters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. . . .*

. . . .

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and *later generations can see that laws once thought necessary and proper in fact serve only to oppress*. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.²⁶

Home education was both a widespread cultural practice and a legally-protected activity at the time the Framers drafted both the United States and California constitutions, both in terms of the common law and in other ways.²⁷ But even if that were not the case, the United States Supreme Court’s expansive modern definition of “liberty” clearly encompasses both home education and home educators. It would be incongruous and discriminatory to acknowledge a right of

²⁵ *Lawrence v. Texas*, (2003) 539 U.S. 558, 562 (emphasis added).

²⁶ *Id.* at 574, 578-79.

²⁷ See, e.g., *Evolution and Dissemination of the Parental Liberty Doctrine*, <http://www.quaqua.org/commonlaw.htm>; *History of Alternative Education in the United States*, <http://www.quaqua.org/utah.htm>; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>; *Jeffersonian Education*, <http://www.quaqua.org/Jefferson.htm>; *Madisonian Explanation of Educational History*, <http://www.quaqua.org/madison.htm>.

some demographic minorities to enjoy “an autonomy [and dignity] of self that includes freedom of thought, belief, expression” without “compulsion of the State,” but then selectively deny that same right to members of the home education community.

Indeed, home education is a demographic minority community united by creed and often sharing other minority religious, racial, and/or ethnic commonalities. Home education entails far more than just a pedagogical mode of instruction. Home education involves association, interaction, and cooperation within a vibrant and diverse home education community. Typical home educators do not cloister themselves in their home twenty-four hours a day. Instead, students and families network and live within the framework of a vast local and national community bound by a unique culture and creed. The home education community shares a common society of workshops, conventions, sports leagues, political gatherings, tutorial sessions, social events, books, websites, literature, religious rituals, and other anthropological trappings of a culture. Home educators share a community just as surely as the various Mennonite sects who form religious sub-components of the home education community. The fact that most home educators tend to rely much more heavily on the internet and other cutting-edge technologies does not make them any less members of a demographic minority community than their home-educating Mennonite cousins or the plaintiffs in *Lawrence*.

Even if, *arguendo*, home educators do not constitute a suspect classification and do not exercise any fundamental right, an effort to ban home education and

exterminate home educators through criminal prosecution and cultural genocide is still unconstitutional under existing precedent. “[I]f a law neither burdens a fundamental right nor targets a suspect class, [a Court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”²⁸ But even where *rational basis scrutiny* is applied, a law will be struck down if the law “has the peculiar property of imposing a broad and undifferentiated disability on a single named group” or if “its sheer breadth is so discontinuous with the reasons offered for it that the [law] seems inexplicable by anything but animus toward the class that it affects.”²⁹ Regardless of what one may choose to think about the inherent substantive merits of *Evans* and *Lawrence*, there is no principled basis for extending this deferential governing standard to some demographic minority groups while denying similar protection for home educators.

Home educators are part of a unique group, community, creed, and tradition. Home education has been successfully conducted for hundreds, indeed thousands, of years. In the modern era, numerous other states have demonstrated that the government interest in education can be successfully vindicated while allowing home education. The government has not demonstrated that home educators as a class are statistically more likely to experience child abuse or poor educational performance than parents who put children in government facilities under the

²⁸ *Romer v. Evans*, (1996) 517 U.S. 620, 631.

²⁹ *Id.* at 632.

supervision of government educators and government social workers.³⁰ The government has not demonstrated any statistical correlation between student performance and teacher certification. It is simply not rational or legitimate to ban home education *regardless of its actual performance or documented benefits to individual children.*

The vindictive effort to prosecute all home educators and take away their children *merely because each family falls within a general class of home educators* is inexplicable by anything other than a historic, economic, and political animus harbored by some government officials and educators against demographic minorities.³¹ This longstanding persecution³² stems from a dislike of educational

³⁰ Quite to the contrary, virtually every study and statistical analysis shows that home educated students do as well or better than public school students on a wide range of standardized tests and other evaluations. See, e.g. *Analytic Approaches*, at 225, nn. 177-79; brief at note 20. This pattern explains why government educators and social workers are reluctant to actually produce any scientifically-valid data or research results comparing public education to home education. If the data showed that home education tended to be *inferior* to public education, instead of the other way around, this Court can be sure that these results would have been presented in this case.

³¹ See generally section III of this brief.

³² Incidentally, many other tactics besides teacher certification mandates, which are not at issue in this case but currently used to harass home educators, are similarly unconstitutional and have not been tolerated in other settings.

It is a violation of the liberty protected by the United States Constitution, as interpreted by the United States Supreme Court, for public educators or government officials to compel home educators to register, submit information for databases, forsake anonymity, or otherwise cooperate with officials' efforts to assemble tools designed to derogate First Amendment association, First Amendment expression, and familial privacy. See, e.g., *Boy Scouts of America v. Dale*, (2000) 530 U.S. 640, 656 (Boy Scouts could not be compelled to use leader

choice, economic competition, and competing cultural voices in education, not from any bona fide concern for the best interests of children within the home education community.³³

III.

PROPER UNDERSTANDING OF THE PARENTAL LIBERTY DOCTRINE REQUIRES AN ACCURATE HISTORICAL PERSPECTIVE ABOUT THE EVOLUTION OF CIVIL RIGHTS LAW

The guidance afforded in *Troxel* is clear, recent, and controlling for purposes of this present case. Nevertheless, as the Opinion observes, there are some pre-*Troxel* cases at both the state and federal level that can be read to be adverse to parental liberty, family autonomy, and home education. What is the proper

exemplifying undesired values); *McIntyre v. Ohio Elections Comm'n*, (1995) 514 U.S. 334 (freedom to publish anonymously is protected by the First Amendment, and extends beyond the literary realm to the advocacy of political causes); *Brown v. Socialist Workers '74 Campaign Comm.*, (1982) 459 U.S. 87 (First Amendment prohibits a State from compelling disclosures by a minor political party that will subject those persons identified to the reasonable probability of threats, harassment, or reprisals); *Shelton v. Tucker*, (1960) 364 U.S. 479 (state statute requiring every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing every organization to which he has belonged or regularly contributes deprives teachers of their right of associational freedom protected by the Due Process Clause of the Fourteenth Amendment); *Bates v. Little Rock*, (1960) 361 U.S. 516 (compulsory disclosure of the membership lists of the National Association for the Advancement of Colored People disallowed because it would unjustifiably interfere with the members' freedom of association); *N.A.A.C.P. v. Alabama*, (1958) 357 U.S. 449 (compelled disclosure of National Association for the Advancement of Colored People's membership lists disallowed as effective restraint on freedom of association).

³³ See generally, e.g., Liberty, Paternalism, at 386 n.31, 392 n.67, 405 n.121, 410 n.137, 411 n.140; Analytic Approaches, at 225, nn. 177-79, 227 n.181, 240 n.201; *Protégé Award*, <http://www.quaqua.org/protetegerec.htm> (examples of outstanding home education graduates from California and elsewhere).

modern understanding of these cases? If parental liberty is constitutionally protected, what errors have led Justice Scalia and some other jurists to conclude otherwise?

A complete answer is not possible in this filing, but the short answer is that parental liberty is a historically-contextual civil right. Sound interpretation of civil rights law requires an understanding of the contemporary historical society and custom associated with constitutional provisions and legal decisions. The history of animus towards home education must be understood in terms of a longstanding historical relationship between home education and liberation of oppressed demographic minorities. The precedents relied upon in the vacated Opinion will also be discussed below within the context of a chronological legal history.

A. The Parental Liberty Doctrine and Home Education as Understood by the Framers of the United States and California Constitutions (1776-1867)

Prior to 1853, no state in the Union had any form of compulsory government education. Home education and private schools were both pervasive, and use of any governmental schooling was as voluntary as use of modern public libraries or community centers.³⁴ Parents enjoyed broad discretion to control the educational instruction of their own children. Thus, when Article IX, section 1 of California's

³⁴ See, e.g., *Analytic Approaches*, at 190-93, 217-20; *Liberty, Paternalism*, at 386 nn.29-32, 392 n.67, 397 n.98, 399 n.101; *Evolution and Dissemination of the Parental Liberty Doctrine*, <http://www.quaqua.org/commonlaw.htm>; *History of Alternative Education in the United States*, <http://www.quaqua.org/utah.htm>; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>; *Jeffersonian Education*, <http://www.quaqua.org/Jefferson.htm>; *Madisonian Explanation of Educational History*, <http://www.quaqua.org/madison.htm>.

Constitution was drafted, home education was considered one proper means for “diffusion of knowledge” and a ban or interference with parental liberty would not have been considered a “suitable means” for “improvement.”³⁵

Echoing numerous opponents of the traditional family, Justice Scalia has complained about “[j]udicial vindication of ‘parental rights’ under a Constitution that does not even mention them.”³⁶ But his analysis is neither originalist nor textualist, and fails to explain away numerous provisions of the federal Constitution.³⁷

³⁵ See also *Northwest Ordinance*, <http://www.quaqu.org/northwest.htm>.

³⁶ *Troxel*, 530 U.S. at 91-93. Justice Scalia’s position was correctly rejected by all eight of the other justices.

³⁷ The Thirteenth and Fourteenth Amendments reaffirm the principle that some individual liberties sheltered by the “liberty” and substantive “due process” clauses are beyond the legitimate interference of any government, including state government. U.S. Const. amend XIII; U.S. Const. amend XIV §1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law.”); *see also* U.S. Const. art. I §9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); U.S. Const. art. IV §2 (“Privileges and Immunities”); U.S. Const. amend I (“no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, . . . or the right of the people peaceably to assemble”); U.S. Const. amend III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”); U.S. Const. amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated, and no Warrants shall issue, but upon probable cause, . . . and particularly describing . . . the persons or things to be seized.”); U.S. Const. amend V (“liberty”); U.S. Const. amend IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); U.S. Const. amend X (“powers . . . reserved to . . . the people”).

For example, prior to the modern widespread use of 28 U.S.C. 1983, the versatile “Privilege of the Writ of Habeas Corpus” was the preferred procedural avenue for vindicating parental liberty.³⁸ At the time of the Framers and throughout most of America’s history, a federal or state habeas corpus petition was typically used to abrogate confinement or custody of a minor that had been improperly accomplished by any government or private party in violation of parental liberty. Relief was available against any derogator of parental rights, regardless of the derogation originated from a government entity, a prison, a mental institution, a religious official, a school, a military unit, a private party, or some other agent of interference and confinement. The parameters of parental liberty were defined by reference to pro-parent principles of the common law, as well as any additional protection for the family that might be specially afforded by statutes or American constitutional provisions.³⁹

Many of the Framers of the federal Constitution (and of the California Constitution) were accomplished attorneys who would have fully understood the versatile, comprehensive, expansive, potent common-law qualities of the Writ.

³⁸ Liberty, Paternalism, at 386 n.32; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>.

³⁹ Liberty, Paternalism, at 386 n.32; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>; see also *In re Lelah-Puc-Ka-Chee*, (N.D. Iowa 1899) 98 F. 429 (Indian student released from Pratt-system school under Writ of Habeas Corpus).

The Writ was considered so precious that it was protected in the body of the federal Constitution, rather than in the deferred Bill of Rights later developed and adopted to protect most other individual liberties.⁴⁰ Just as the Fifth Amendment Due Process Clause rendered it unnecessary to articulate the common-law principle that a person is “presumed innocent until proven guilty,” the Constitutional endorsement of the Writ made it unnecessary for the Framers to articulate every possible way that the Parental Liberty Doctrine presumes parental fitness in absence of specific proof to the contrary.

B. Reaffirmation of the Parental Liberty Doctrine in the Reconstruction Amendments, and the Regressive Era of Richard Henry Pratt (1868-1922)

Prior to the Reconstruction Amendments, the American legal order indulged involuntary servitude and selective denial of habeas corpus protection to demographic minorities. If a parent was African-American, or an atheist, or a racial minority, or a religious minority, that parent was not considered a “free man” or a “full citizen” entitled to family integrity and autonomy.⁴¹ Indeed, one of the primary political arguments successfully used by abolitionists to enact new protection for “Liberty” and “Due Process” was that America must not continue to tolerate state-sanctioned majoritarian disintegration of minority families through

⁴⁰ See U.S. Const. art. I, § 9.

⁴¹ Liberty, Paternalism, at 391 n.64; see also, e.g., *Evolution and Dissemination of the Parental Liberty Doctrine*, <http://www.quaqua.org/commonlaw.htm>; *History of Alternative Education in the United States*, <http://www.quaqua.org/utah.htm>; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>.

the denial of access to habeas corpus.⁴²

But after taking three steps forward on civil rights, America temporarily took two steps back.⁴³ In connection with the Indian Wars, an army officer named Richard Henry Pratt transported American Indian prisoners of war to Fort Marion in St. Augustine, Florida. Pratt used his Indian captives as subjects to develop refined school-based techniques for compelling cultural genocide.

Pratt subsequently took the techniques he had refined and persuaded the United States government (often in cooperation with state governments) to implement his deconstruction and assimilation techniques on a nation-wide compulsory basis against American Indians, Mexicans, Puerto Ricans, African-Americans, and other demographic minorities, many of whom naturally preferred educational choice or home education.⁴⁴ Pratt forced minority children into his schools by starving, imprisoning, and physically assaulting minority parents and families.⁴⁵ He made an example of the most resistant parents by utilizing incarceration in federal

⁴² *Id.*; Liberty, Paternalism, at 391 n.64.

⁴³ This is not unlike the history of racial discrimination per se, in which the full promise of the Thirteenth and Fourteenth Amendments was resisted during the era of *Plessy v. Ferguson*, (1896) 163 U.S. 537, notwithstanding plain language that appeared to run counter to the notion of legally-enforced racial segregation.

⁴⁴ Extended detail about this is set forth throughout Liberty, Paternalism.

⁴⁵ Liberty, Paternalism, at 392 n.67, 397 n.98-99, 399 n.101, 400 n.107, 411 n.140.

prison, most notably the federal prison at Alcatraz.⁴⁶

Pratt's political triumph was consummated at the 1899 National Education Convention in Los Angeles, with the aid of the same political theories that have now re-emerged to oppress home educators in connection with *In re Rachel L.* Pratt drafted a set of paternalistic resolutions that were then sponsored by Dr. Merrill E. Gates and enthusiastically adopted by the entire Convention:

RESOLVED, that the true object of the Indian schools and of Indian management is to accomplish the release of the Indian from the slavery of tribal life and to establish him in the self-supporting freedom of citizenship to take his place in the life of the nation, and that whatever in our present system hinders the attainment of this object should be changed. . . .

RESOLVED, that the public schools of the United States are fundamentally and supremely the Americanizers of all people within our limits and our duty to the Indian requires that all Indian school effort should be directed toward getting the Indian youth into these schools. . . .⁴⁷

It was actually Pratt, not Framers of the United States or California constitutions, who successfully championed the educational canard that all children require compulsory government oversight to assure “knowledge and intelligence” and

⁴⁶ For example, the home educating Hopi Tribe in Arizona fiercely resisted compulsory education en masse and attempted to conceal their children. Indian Agents initially attempted persuasion, then cut off government rations in the middle of a freezing winter, and then imprisoned nineteen Hopi men at the Alcatraz military prison for “sedition” from January 3 to August 7, 1895. Wendy Holliday, *Hopi History: The Story of the Alcatraz Prisoners, Part 2*, 1998, <http://www.nps.gov/archive/alcatraz/tours/hopi/hopi-h2.htm>. The Hopi men were treated to a Fort Marion-style experience complete with forced labor involving sawing timber into lumber. *Id.*; see also BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES 1900–1940, 13 (1998); Liberty, Paternalism, at 399 n.101.

⁴⁷ Liberty, Paternalism, at 397 n.97 and surrounding text.

“good citizenship, patriotism, and loyalty to the state.”⁴⁸ This rationale was used to target Native Americans, African Americans, Latinos, Atheists, Catholics, Mormons, Asian Americans, Mennonites and many other demographic minorities.⁴⁹

A century later, it is clear that Pratt’s paternalist philosophy terrorized people from New England to the edge of the Pacific Rim; resulted in widespread cultural genocide; caused improper permanent removal of thousands of children; destroyed thousands of families; exacerbated racial, ethnic, cultural, and religious tensions; caused sexual abuse; and harmed the health and educational attainment of millions of students (especially minority students) forced into government schools.⁵⁰

C. The *Meyer/Pierce* Court Reaffirms Parental Liberty (1923-1928)

Eventually the United States Supreme Court began to curtail the abuses initiated by Pratt and his post-Civil War generation, which Pratt designed in a misguided attempt to foster a homogenous people with American ideals. In *Meyer*

⁴⁸ Opinion at 5, 11 (citations omitted).

⁴⁹ See, e.g., *Liberty, Paternalism*, at 384 nn.18-19, 387 n.35, 392 n.67, 397 n.98, 398 n.99, 399 n.103, 400 n.105, 400 n.107, 401 n.109, 405 n.121, 407 n.126, 408 n.129, 411 n.140; *Evolution and Dissemination of the Parental Liberty Doctrine*, <http://www.quaqua.org/commonlaw.htm>; *History of Alternative Education in the United States*, <http://www.quaqua.org/utah.htm>; *Habeas Corpus Protection of Parental Liberty*, <http://www.quaqua.org/hurd.htm>; *Jacksonian Paradigm: Treaty of New Echota*, <http://www.quaqua.org/chokeee.htm>; *Road to Wisconsin v. Yoder*, <http://www.quaqua.org/mennonites.htm>; *Treaty of Guadalupe Hidalgo*, <http://www.quaqua.org/guadalupehidalgo.htm>.

⁵⁰ See sources in brief note 49, and also *Analytic Approaches*, at 250 nn.217-18.

v. Nebraska,⁵¹ handed down during the intensified xenophobia and racism associated with World War I, the Court struck down a Nebraska law forbidding private education curriculum from including instruction in a foreign language, on the ground that Fourteenth Amendment “liberty” “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”⁵²

⁵¹ (1923) 262 U.S. 390, 399, 402. Despite public educator resistance, similar decisions issued in *Bartels v. Iowa*, (1923) 262 U.S. 404, *Pierce v. Society of Sisters*, (1925) 268 U.S. 510, and *Farrington v. Tokushige*, (1927) 273 U.S. 284.

⁵² The Meyer court noted, as a *procedural* matter, that the case “controversy” before it did not include any broad-based challenge to a state’s power to regulate school curriculum or “make reasonable regulations for all schools.” *Meyer* at 402-03. As a similar *procedural* expression of commendable judicial restraint, the court observed in *Pierce v. Society of Sisters*, (1925) 268 U.S. 510, 534, that the case before it did not present a legal question about the general scope of the state power “reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school.” Contrary to the assertion in the Opinion at 5, the Court’s *procedural* statements about what the Court was *not* deciding cannot properly serve as *dicta* in substantiation of the very alleged state powers identified to be outside the scope of judicial review. See also note 4 of this brief.

Even if, *arguendo*, such statements are enforceable *dicta* in the way the Opinion contemplated, and a “reasonableness” standard does somehow still instead of the “fundamental” right strict-scrutiny standard that was announced in superseding constitutional jurisprudence such as *Troxel*, the functional and legal operation of home education in numerous states empirically confirms that a ban on home education is too extreme and restrictive to have a rational basis or be “reasonable.”

In *Pierce v. Society of Sisters*,⁵³ the Court struck down an Oregon statutory ban against all private and home education.⁵⁴ The Court reiterated the “fundamental” “liberty of parents . . . to direct the upbringing and education of children” and declared that the federal Constitution “excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”⁵⁵ The Court added that a child “is not the mere creature of the state,”⁵⁶ a legal phrase reflecting that a family cannot be regulated in the same arbitrary manner as corporations, municipalities, adoptions, and other institutions subject to the state sovereign and state legislature.⁵⁷

D. *Hoyt, Hiribayashi*, and the Second Era of Regression (1929-1971)

Not unlike the courts of the Old South who continued to indulge segregation even after major United States Supreme Court decisions to the contrary, the state courts and state educators of New England and California continued to defiantly

⁵³ (1925) 268 U.S. 510, 534-35.

⁵⁴ The law was politically fueled by public educators acting in cooperation with the Ku Klux Klan, and was primarily motivated by an 1853-1925 Know-Nothing movement to close down all Catholic schools and thereby turn Catholics into “real” Americans. See generally, David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, (1968) 74 THE AM. HIST. REV. 74 (describing the Oregon mandatory education law passed at the behest of the Ku Klux Klan and the factual background of the *Pierce* decision).

⁵⁵ (1925) 268 U.S. 510, 534-35 (1925).

⁵⁶ *Id.*

⁵⁷ *Creature of the State*, <http://www.quaqua.org/creature.htm> (explaining the origin of the phrase and its use in other cases).

cling to the Pratt paradigm. In New Hampshire, a political benefactor of Richard Henry Pratt and the geographical home of a major college originally founded to ethnically cleanse and civilize Native Americans (Dartmouth College), the New Hampshire Supreme Court handed down *State v. Hoyt*⁵⁸ to endorse functional non-compliance with the recent federal parental rights cases. The subsequent social and legal disruption caused by the Great Depression and World War II redirected the spotlight away from the public educators' continued derogation of parental liberty.

One Californian politician who effectively harnessed the xenophobia, racism, and economic resentment associated with the Great Depression and World War II was California Attorney General Earl Warren.⁵⁹ Warren understood that “[t]he[] [Californians] brought the Japanese in . . . for farm labor” but the immigrants “were too smart, and they started owning the farms.”⁶⁰ Warren led a cultural suppression effort, which actually began in the form of private school closures, but he knew the effort operated under the shadow of *Farrington v. Tokushige*,⁶¹ a

⁵⁸ (N.H. 1929) 146 A. 170; *see also* *State v. Hoyt*, <http://www.quaqua.org/hoyt.htm> (discussing the case).

⁵⁹ E.g. Gerald Schlenker, *The Internment of Japanese of San Diego County During the Second World War*, (1972) 18 J. OF SAN DIEGO HISTORY No. 1, at <http://www.sandiegohistory.org/journal/72winter/internment.htm>.

⁶⁰ G. EDWARD WHITE, EARL WARREN, A PUBLIC LIFE (1982) 68 (quoting from R. DANIELS, CONCENTRATION CAMPS USA 6-9; Warren, *Untitled Interview*, ROHO, June 22, 1972, at 302-03).

⁶¹ (1927) 273 U.S. 284.

United States Supreme Court case protecting educational choice for Asian Americans who wanted high-quality Asian-style private schools in the United States.

Warren was not to be deterred. Over the objections of J. Edgar Hoover and Senator Robert Taft (who indicated there was no bona fide national security need), General Earl Warren and President Franklin D. Roosevelt utilized wartime fear to persuade the United States Supreme Court that the internment scheme was needed in order to dismantle the Japanese-Americans' private "Japanese language schools," which the Court characterized as "a source[] of irritation and . . . isolation" that prevented the "social intercourse" of Japanese-Americans and "prevented their assimilation as an integral part of the white population."⁶²

The private Japanese-American schools were permanently closed. Japanese-Americans from California, Oregon, and Washington were interned across the nation in militarized internment camps placed on or near existing Indian Reservations, then subjected to an ethnically-cleansing regimen of compulsory schooling and forced labor that was administered jointly by the War Relocation Authority and the Bureau of Indian Affairs.⁶³ In a reprise of General Richard

⁶² *Hirabayashi v. United States*, (1943) 320 U.S. 81, 96-98; Liberty, Paternalism, at 405 n.121; Daniel E. Witte, Comment, *Getting a Grip on National Service: Key Organizational Features and Strategic Characteristics of the National Service Corps (AmeriCorps)*, 1998 BYU L. Rev. 741, 721 n.215.

⁶³ PAUL BAILEY, *CITY IN THE SUN* (1971) 62-62, 79-80, 104, 107, 123; ALLAN R. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* (1967) 137, 145, 178-79. While

Henry Pratt's bureaucratic disputes with the Bureau of Indian Affairs, Dillon Myer of the War Relocation Authority lobbied for forced dispersal of the Japanese-Americans across the entire United States, while John Collier of the Indian Bureau advocated continued concentration of the population in isolated communities resembling Indian Reservations.⁶⁴

The obsolete California cases⁶⁵ relied upon in the Opinion were handed down in the aftermath of World War II and the Korean War, during the legal era of *Hirabayashi* and *Korematsu*⁶⁶ when civil rights, racial relations, and alternative

their children were in government-sponsored captivity, the Japanese-American community noticed increased rates of unwed pregnancy, alcohol abuse, and family disintegration. PAUL BAILEY, *CITY IN THE SUN* (1971) 172, 197.

⁶⁴ PAUL BAILEY, *CITY IN THE SUN* (1971) 122-23; ALLAN R. BOSWORTH, *AMERICA'S CONCENTRATION CAMPS* (1967) 163, 207, 211. Although Asian alternative education has never fully recovered from the historic pressure to disband, Japanese-Americans were fortunate to avoid the permanent reservations, permanent relocations, and permanent federal government education that applied to Native Americans. After World War II, some of the internees decided to take up permanent residence in Utah and other states rather than returning to the Pacific Coast. Many Californians still despised the internees on the basis of class identity.

⁶⁵ *Turner v. People of the State of California*, (1953) 121 Cal.App.2d Supp. 861, *cert. denied*, (1954) 347 U.S. 972; *In re Shinn*, (1961) 195 Cal.App.2d 683. The bizarre notion in these cases that home education can be banned "regardless of its worth" to students and families, see Opinion at 9, is completely contrary to the holdings and legal analysis set forth in more modern cases such as *Troxel*, *Yoder*, *Lawrence*, and *Romer*. There is nothing rational, reasonable, or compelling about banning home education "regardless of its worth" to the best interest of a relevant child, simply because some have done this because of an animus toward alternative educators and demographic minorities. Citing *Turner*, *Shinn*, and *Allen* (1968) 392 U.S. 236, in a home education case is roughly equivalent to citing *Plessy v. Ferguson*, (1896) 163 U.S. 537 in a case about race discrimination.

⁶⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

education were all at a particularly low ebb. Throughout his legal career, Warren would continue to excuse his internment effort and would continue to champion the Pratt concept of using government schools for cultural cleansing and social engineering. Shortly before Chief Justice Earl Warren's retirement, the Warren Court released some tangential dicta suggesting possible ongoing disdain for alternative education, parental liberty, and *Pierce*-era precedent.⁶⁷

F. *Yoder, Troxel, and the Modern Age of Enlightenment (1971-Present)*

Earl Warren's career effort was devastating to racial, ethnic, and religious minority families, including Native Americans, Japanese Americans, Mennonites, and others. Emboldened, officials in the Midwest intensified their efforts to incarcerate and culturally cleanse the Mennonites and Amish, who were despised by public educators because of "primitive" Christian lifestyles and home education programs.⁶⁸ In *Wisconsin v. Yoder*,⁶⁹ the post-Warren Supreme Court stepped in to re-affirm *Meyer* and *Pierce*, uphold Mennonite home education, and prohibit

⁶⁷ *Board of Education v. Allen*, (1968) 392 U.S. 236, 245-47, 247 n.8. To the extent that *Allen* dicta or other Warren-Era opinions might be read to encourage a ban on home education, an abolition of parental liberty, or severe regulation of alternative education, such precedent has been superseded by more modern holdings in *Yoder*, *Evans*, *Troxel*, *Lawrence*, and other cases.

⁶⁸ *Road to Wisconsin v. Yoder*, <http://www.quaqua.org/mennonites.htm> (summary of *Yoder* background facts, including Mennonite home education activity, based upon personal interview and documentation from one of the attorneys who presented the *Yoder* case to the United States Supreme Court).

⁶⁹ (1972) 406 U.S. 205, 213-14.

systemic multi-state prosecution⁷⁰ of Mennonites that was designed to compel government school attendance.⁷¹

During the modern *Yoder-Troxel*⁷² era, political leaders and jurists reversed many of the Pratt-inspired atrocities against Native Americans, demographic

⁷⁰ In addition, as set forth in brief notes 25-28 and accompanying text, the post-Warren United States Supreme Court subsequently affirmed an expansive interpretation of “liberty” not utilized by the Warren Court, and for the first time also expressly forbade efforts to target people for broad legal disability on the basis of a non-suspect class identity. *Romer v. Evans*, (1996) 517 U.S. 620, 631; *Lawrence v. Texas*, (2003) 539 U.S. 558, 562, 574, 578-79. The politics of selective sympathy has no proper place in federal or state constitutional law, and there is no principled reason for according a lower level of constitutional protection to California home educators than has already been extended to the Wisconsin Mennonite home educators in *Yoder* or the demographic minority represented in *Evans* and *Lawrence*.

⁷¹ *Wisconsin v. Yoder*, (1972) 406 U.S. 205, 213:

[T]he power of a State . . . to impose reasonable regulations for the control and duration of basic education. . . was, in *Pierce*, made to yield to the right of parents to provide an equivalent education in a privately-operated system. . . [A] State’s interest in universal education . . . is not totally free from a balancing process when it infringes on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children, so long as they, in the words of *Pierce*, “prepare [them] for additional obligations.”

In this present case, it is the *government’s* burden to prove by clear and convincing evidence that the minors are suffering physical or sexual abuse, severe neglect, or education that is inadequate and significantly worse than what is actually available at the local government school. The government has not made such a showing, and in fact has expressly conceded for official purposes that it does not even make such an assertion. Cf. notes 4-5 of this brief.

⁷² (2000) 530 U.S. 57, 65–66, 80.

minorities, and alternative educators. Most of the offensive boarding schools were closed. The Indian Child Welfare Act⁷³ was enacted to curtail child abductions and social worker abuses. Most states explicitly acknowledged home education as a proper exercise of parental prerogative, and home education flourished in California and many other states. Opponents of parental liberty fought the trend for three decades and continued to exist that constitutionally-protected parental liberty was non-existent or non-fundamental. Ultimately the legal debate culminated in a *Troxel* showdown about whether parental liberty of broad and meaningful scope was protected as a fundamental constitutional interest. After carefully weighing a broad range of competing interpretations, the *Troxel* Court turned aside the attempt to reverse *Meyer*, *Pierce*, and *Yoder*, reaffirming instead that those cases reflect an ongoing fundamental federal constitutional right.

IV.

CONCLUSION

As an integral aspect of civil rights legal history in California and the United States, the Parental Liberty Doctrine has borne the scars of American society's love-hate relationship with civil liberties and social reconciliation. But although our society has occasionally fallen down, we have also fallen forward and pulled ourselves back up. There is no need for California to fall back into the historical

⁷³ 25 U.S.C. 1912(e-f) (1978)(articulating evidentiary standard of proof required in connection with Native American parental rights).

pitfalls associated with Richard Henry Pratt, Alcatraz, and *Hiribayashi*.

Respectfully, this Court should embrace the modern principles of *Yoder-Troxel* and refrain from interfering with the policy judgments of Governor Arnold Schwarzenegger and California State Superintendent of Public Instruction Jack O'Connell, who have both embraced the existence of home education and acknowledged the need to protect parents' "right to decide what's best for their children."⁷⁴

The proper course of action in this present case is to acknowledge parental liberty as a fundamental constitutional interest under both the federal and California⁷⁵ Constitutions, apply the strict scrutiny test, and if necessary, remand this case with proper instructions. If the accused parents in this case are (or will be) actually proven guilty of severe abuse or neglect by clear and convincing evidence, an appropriately tailored solution⁷⁶ can be implemented without

⁷⁴ *Press Release GAAS:121:08* <http://gov.ca.gov/press-release/8951/> (March 3, 2008); *School Chief: 'Parents Still Have Right to Homeschool'*, <http://www.hslda.org/hs/state/ca/200803121.asp> (containing O'Connell's March 12, 2008 statement repudiating the Opinion and indicating "Education policy will not change in any way as a result of this ruling. Parents still have the right to homeschool in our state. . . . [S]ome parents choose to send their children to private schools or to homeschool, and I respect that right.").

⁷⁵ Including, but not limited to, Cal. Const. art. I, § 4, all federal constitutional provisions set forth in, inter alia, brief note 37, and all California constitutional provisions analogous to the federal provisions set forth in brief note 37.

⁷⁶ Even if abuse or neglect actually exists, an appropriately-tailored solution might fall short of terminating all parental rights or elimination of home education for the two younger children. Temporary intervention and supervision, kinship placement, and education in a safe substitute home education or private school

derogating the parental liberty of all law-abiding home educators or defaming the alternative education community of California.

Dated: May 18, 2008

By: _____/s_____
DANIEL E. WITTE
Attorney for Amici Curiae⁷⁷

environment are all solutions that should be ruled out before imposition of foster care and/or government schooling. Appropriate hearings and fact-finding should be conducted by the trial court.

⁷⁷ Daniel E. Witte gratefully acknowledges the contributions of William C. Duncan, Esq., Director of the Marriage Family Law Foundation, with respect to research, writing, and citation efforts required in connection with this amicus brief.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief, from page 1 through and including the signature lines that follow the brief's conclusion, contains 10,291 words. I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on May 18, 2008.

By: _____/s_____
DANIEL E. WITTE
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I CERTIFY that on or about May 18, 2008, in addition to an electronic copy and an original and four hardcopies to this Court, a copy of the foregoing brief was served by first-class mail, postage prepaid to the following:

Supreme Court of California 350 McAllister Street San Francisco, CA 94102 [one electronic copy, pursuant to Rule 8.212(c)(2)(B)]	Clerk of Court Los Angeles Superior Court Central Juvenile District Edmund D. Edelman Children’s Court Juvenile—Dependency Court 201 Centre Plaza Drive Monterey Park, CA 91754 [one copy for delivery to the Honorable Stephen Marpet, Commissioner]
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APPENDIX A

**Official Position of Governor Arnold Schwarzenegger and
California State Superintendent of Public Instruction Jack
O'Connell**

APPENDIX B

**Removing Classrooms from the Battlefield: Liberty, Paternalism,
and the Redemptive Promise of Educational Choice,
2008 B.Y.U. L. Rev. 377**