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Producing Trousered Apes in Dwyer's Totalitarian State: A Review of "Vouchers Within Reason"

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PRODUCING TROUSERED APES IN DWYER'S TOTALITARIAN STATE

VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO
EDUCATION REFORM. James G. Dwyer. Ithaca, New York: Cornell
University Press, 2001. Pp. 256. \$32.50.

Reviewed by MICHAEL A. SCAPERLANDA*

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I. INTRODUCTION

The Supreme Court's recent placement of its imprimatur on Cleveland's school choice plan¹ makes it imperative to critique the various voucher proposals, including the one set forth in James Dwyer's *Vouchers Within Reason: A Child-Centered Approach to Education Reform*.² As his subtitle suggests, Dwyer favors a "child-centered" educational system,³ driven by consideration of what are, in Dwyer's view, the best interests of the child.⁴ For Dwyer, "[s]chooling is about shaping minds, fostering skills, providing socializing activities, and generally preparing young people for adult life."⁵ To help the child grow into an autonomous adult with "the capacity and disposition for reasonableness," he argues, a sound educational system should provide:

practice in analytical, synthetic, and creative thinking, regular opportunity for expression of one's ideas, intellectual empowerment, exercises in active listening and dialogue, emphasis on understanding the point of view of others who think differently and being open to revising one's own beliefs if they prove less rationally justifiable than [sic] alternative beliefs, testing of students' ability to muster evidentiary support for a position and to distinguish good and bad arguments, and encouragement of curiosity and inquisitiveness.⁶

He further emphasizes that this sort of education ought also to impart the concept that "men and women are inherently

1. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002). For an excellent primer on the legality and morality of educational choice, see Nicole Stelle Garnett & Richard W. Garnett, *School Choice, The First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301 (2000).

2. JAMES G. DWYER, *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* (2001) [hereinafter *VOUCHERS*].

3. *Id.* at 2. See also JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 1-6 (1998) [hereinafter *RELIGIOUS SCHOOLS*].

4. See *RELIGIOUS SCHOOLS*, *supra* note 3, at 179.

5. *VOUCHERS*, *supra* note 2, at 55. See also JACQUES MARITAIN, *EDUCATION AT THE CROSSROADS* 1 (1943) ("[T]he chief task of education is above all to shape man, or to guide the evolving dynamism through which man forms himself as man.").

6. *VOUCHERS*, *supra* note 2, at 195.

equal.”⁷ He sees this education enterprise as a “prerequisite . . . for realizing one’s human potential.”⁸

Although I might quibble with Dwyer as to emphasis and wording, I will adopt this view of a sound—or at least partially sound—education as my own for purposes of this review. None of these ideas is novel or radical. I suspect that people with vastly diverse worldviews could subscribe to this fairly general educational vision. But what do we mean by these words? Specifically, how do we interpret and implement this vision of education in a pluralistic society in which some (even most) of its members are committed to the idea that life, community, culture, and history possess inherent, universal, and transcendent meaning and purpose while other members of that same society are committed to the idea that these elements contain meaning and purpose only insofar as we ourselves create meaning and purpose?

Turning *Zelman v. Simmons-Harris* on its head, Dwyer’s answer is that the state (as opposed to parents, church, and community) should a) control “child-rearing norms”⁹ generally and the educational apparatus specifically, b) exercise its control to ensure that all students receive a sound secular liberal education that will allow the student to choose her own meaning and way of life, and c) control “the content even of the religious instruction in religious schools” to ensure these ends.¹⁰ In other words, in Dwyer’s conception of the liberal state, the state should not tolerate authentic pluralism in educational goals and methods. Instead, it should proceed in designing an educational system from the secular liberal premise that life, community,

7. RELIGIOUS SCHOOLS, *supra* note 3, at 130.

8. VOUCHERS, *supra* note 2, at 102.

9. RELIGIOUS SCHOOLS, *supra* note 3, at 179.

10. *Id.* at 171. Note to the reader: You have not misread this quotation! Dwyer’s vision includes limiting the free exercise of religion via state control of the content of religious instruction. The full sentence reads, “Considerations of justice for children, based on judgments about their temporal interests, therefore support state control over the content even of religious instruction in religious schools.” This proposal, if taken seriously, would radically alter the First Amendment. “Each of the mainstream theories extends robust protection to religious liberty . . . Dwyer’s regime, by contrast, would . . . minimize religious autonomy and maximize government influence. . . . [T]his theory is quite bereft of support in historical evidence, precedent, or constitutional theory.” Stephen G. Gilles, *Hey Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 195 (1999). Additionally, “[t]he religious speech of parents and the schools to which they entrust their children is plainly entitled to a high degree of First Amendment protection . . . Dwyer never acknowledges this formidable constitutional obstacle to his plan to subject religious speech to children to pervasive state censorship and control.” *Id.* at 209.

culture, and history contain only those meanings and purposes that each autonomous individual ascribes to them.¹¹

In his 1998 book *Religious Schools v. Children's Rights*, Dwyer argued that the state should pervasively regulate private schools to ensure that the curriculum and pedagogy are consistent with the state's (read Dwyer's) understanding of the child's temporal educational interest.¹² At that time, he saw potentially "insurmountable practical obstacles" to his project;¹³ but he held out hope that one day, even if "in the far distant future,"¹⁴ children attending religious schools would be protected from the harmful "authoritarian and repressive approach to education" some Catholic- and fundamentalist-run schools visited upon their young minds and psyches.¹⁵ He understood that implementation of his proposal would cause resistance, so he counseled caution, writing that "it is undoubtedly true that to protect the interests of children and avoid having to put parents in jail, states must take a very gradual approach to effecting change."¹⁶

With vouchers, Dwyer thinks he has found a practical and politically viable way to bring religious schools under state

11. See, e.g., BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11-12 (1980) (arguing for public neutrality among competing conceptions of the good life); RONALD DWORKIN, A MATTER OF PRINCIPLE 191 (1985) ("[G]overnment does not treat [people] as equals if it prefers one conception [of the good] to another."); CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 46 (1987) (noting that the state has no "right to foster or implement any conception of the good life that some people might reject."); JOHN RAWLS, A THEORY OF JUSTICE 186-87 (rev. ed. 1999) ("[G]overnment has neither the right nor the duty to do what it or a majority (or whatever) wants to do in questions of morals . . ."). See also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 5 (1983) ("Justice is a human construction, and it is doubtful that it can be made in only one way."). Dwyer recognizes that this public neutrality with respect to competing conceptions of the good life is not itself neutral. *VOUCHERS*, *supra* note 2, at 63.

12. See RELIGIOUS SCHOOLS, *supra* note 3, at 3. Dwyer sees his discussion of the "[r]egulation of religious schools [as] the topical focus of a broader analysis of the state's role in child rearing and the state's obligation to protect and promote the well-being of children." *Id.* In fact, he hopes that his arguments in the context of religious schools "will have even greater force when applied to other child-rearing situations." *Id.* at 4. In response, Gilles concludes that "Dwyer's claim that childrearing decisions must be based solely on children's temporal interests is bad political theory, not just bad constitutional law." Gilles, *supra* note 10, at 178.

13. See RELIGIOUS SCHOOLS, *supra* note 3, at 6.

14. *Id.* at 182.

15. *Id.* at 13. "In the eyes of James G. Dwyer, conservative religious schools compose a vast Gulag peopled by children unfortunate enough to be born into traditionalist religious families." Gilles, *supra* note 10, at 150.

16. RELIGIOUS SCHOOLS, *supra* note 3, at 180.

control.¹⁷ In *Vouchers Within Reason*, Dwyer concludes “that it is not merely *permissible*, morally and constitutionally, for states to enact voucher programs, but in fact *mandatory*” to protect the children already attending these schools.¹⁸ In his eyes, the “beauty of vouchers is that they create a mechanism for states to induce religious schools voluntarily to comply with academic standards and guidelines for treatment of students.”¹⁹ And all without having to put parents in jail.²⁰

Part II of this essay will provide a summary of the arguments made in *Vouchers Within Reason*.²¹ Part III will expose what I consider to be a fatal defect in Dwyer’s approach to the voucher question. Part IV will critically examine Dwyer’s conception of the state, arguing that his vision of the “liberal state” is actually an illiberal totalitarian vision. Part V.A will take a critical look at Dwyer’s conception of education, arguing that it stems from an impoverished conception of what it means to be human and that its aims are to create what C.S. Lewis called “trousered apes.”²² In Part V.B, I will conclude by offering an alternative conception of education drawn from Luigi Guissani,²³ Jacques Maritain,²⁴ and Clives Staples Lewis.²⁵ I contend that Guissani, Maritain, and Lewis succeed in presenting reasonable proposals

17. VOUCHERS, *supra* note 2, at 14 (“Creating a program of substantial financial assistance to religious schools, but conditioning participation on compliance with substantial regulatory strings, may be the only feasible way of accomplishing the ultimate end of ensuring a good secular education for, and otherwise safeguarding the welfare of, those children.”). See also RELIGIOUS SCHOOLS, *supra* note 3, at 181-82.

18. VOUCHERS, *supra* note 2, at 10.

19. *Id.* at 14. He recognizes that “[m]any religious leaders are ambivalent about vouchers precisely because they fear that this will happen.” *Id.* Justice Souter warns that “in the 21st century, the risk [associated with government aid/regulation] is one of ‘corrosive secularism’ to religious schools, and the specific threat is to the primacy of the schools’ mission to educate the children of the faithful according to the unaltered precepts of their faith.” *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2499 (2002) (Souter, J., dissenting) (quoting *Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

20. VOUCHERS, *supra* note 2, at 214 (“A well-designed voucher program . . . would not require state officials to padlock doors or to jail parents.”).

21. Since VOUCHERS builds on RELIGIOUS SCHOOLS v. CHILDREN’S RIGHTS, the earlier book will be engaged when relevant to the discussion. For reviews of that book, see, e.g., Richard Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000) [hereinafter *Taking Pierce Seriously*]; Gilles, *supra* note 10; Scott Idleman, *Religious Schools v. Children’s Rights*, 16 J.L. & RELIG. 451 (2001); Francis Schrag, *Religion, Education, and the State: The Contrasting Views of James Dwyer and Warren Nord*, 25 LAW & SOC. INQUIRY 933 (2000).

22. CLIVES STAPLES LEWIS, *THE ABOLITION OF MAN: HOW EDUCATION DEVELOPS MAN’S SENSE OF MORALITY* 16-17 (1955) [hereinafter *ABOLITION OF MAN*].

23. LUIGI GUISSANI, *THE RISK OF EDUCATION* (2001).

24. MARITAIN, *supra* note 5.

25. *ABOLITION OF MAN*, *supra* note 22.

for education where Dwyer fails precisely because their proposals correspond to the reality of the human condition.

II. A SUMMARY OF *VOUCHERS WITHIN REASON*

With the right strings attached, Dwyer favors using vouchers to support the education of children who attend private schools, including religiously affiliated schools. He examines the voucher question from the perspectives of two moral theories, concluding that a utilitarian approach²⁶ and a moral rights-based approach²⁷ both support (and make mandatory) his kind of “idealized” voucher program. He also examines this question from the perspective of two legal theories, concluding that the First Amendment’s Establishment Clause²⁸ does not prohibit his voucher program²⁹ and that an Equal Protection analysis should require vouchers.³⁰

Dwyer’s moral and legal analysis and conclusions rest on several assumptions:

- we live in a secular liberal state;³¹

26. See *VOUCHERS*, *supra* note 2, at 66. Dwyer also states that:

A voucher program that would aid only schools that strive to provide the best possible secular education, succeed in doing so to a substantial degree, and do not engage in practices harmful to children would, from a utilitarian perspective, be a very good thing. Moreover, if the state is obligated and not merely permitted to increase aggregate utility whenever it reasonably can, then such a program would actually be morally mandatory.

Id. at 98.

27. See *id.* at 99, 114. (“A well-designed voucher program is a moral entitlement of children who are in private schools that strive to provide a good secular education. Such a program would therefore be not merely permissible, but actually mandatory.”).

28. U.S. CONST. amend. I.

29. See *VOUCHERS*, *supra* note 2, at 115. Dwyer also notes that:

[s]tate support for secular education in religious schools is consistent with Establishment Clause principles and with the best interpretations of the no-aid and neutrality positions. Under a well-designed voucher program, all participating religious schools would provide essentially secular instruction in core subjects so none would be “pervasively sectarian” properly understood.

Id. at 147.

30. *Id.* at 148. “[A]pplication of the constitutional principle of equal personhood leads to the same conclusion reached by applying the two political morality approaches . . . to the voucher issue. A well-designed program of vouchers for private schools, including religious schools, is not only permissible but in fact mandatory” because students enrolled in these schools “possess an equality-based constitutional right to a fair share of the state’s expenditures on education.” *Id.* at 167.

31. See *id.* at 74.

- the only actors that count for constitutional purposes in this liberal state are the state and the autonomous individual;³²
- in a liberal state, each individual creates his or her own chosen ends;³³
- a child is a rights-bearing individual to whom the state owes protection from those persons, including parents, who would interfere with her development into an autonomous adult;³⁴
- the state has responsibility for the education of the young so that they can develop into autonomous adults with the ability to choose their own life's ends and the capacity to have a realistic chance at fulfilling those ends;³⁵
- the secular liberal state cannot be interested in the spiritual aspects of a child's development or education or even assume that the child has any spiritual interests;³⁶
- parenting and child-rearing are privileges licensed by the state;³⁷ and
- some parents are abusing their child-rearing privileges by sending their children to religious (Catholic and Fundamentalist) schools that subvert the state's educational goals in that, among other things, they stifle creative and analytical thinking, preach intolerance, and mandate unrealistic codes of behavior in a school environment that is authoritarian and repressive.³⁸

Operating from these assumptions, Dwyer sees a tension between what he describes as adult-centered thinking about child-rearing and a child-centered approach. He asserts that

32. Cf. RELIGIOUS SCHOOLS, *supra* note 3, at 119 ("A community right to educate, like a parental child-rearing right, is conceptually illegitimate. Treating children equally should mean that we deny the legitimacy of any purported rights residing in *any* person or group to direct our lives."); *id.* at 66 ("[I]nterests and rights [attach] to individuals rather than to relationships as unitary entities.").

33. E.g., VOUCHERS, *supra* note 2, at 83 (arguing that children "have a fundamental interest in eventually ordering [their lives] according to self-chosen ends.").

34. See, e.g., *id.* at 62 (establishing Dwyer's "basic assumption that any reasoning about who should possess authority over children's lives must recognize and give full effect to the distinct personhood of children"); *id.* at 87 (adding that the "rhetoric about parents' interests is nonsense").

35. *Id.* at 214.

36. See, e.g., RELIGIOUS SCHOOLS, *supra* note 3, at 15.

37. *Id.* at 64.

38. *Id.* at 14.

adult-centered reasoning dominates the debates over child-rearing policies generally and vouchers specifically.³⁹ In this environment, he contends, children's needs and interests are subordinated to adults' concerns, desires, and preferences.⁴⁰ He maintains that both voucher supporters and their opponents engage in adult-centered reasoning, treating the child as an instrumental means to other adult oriented goals.⁴¹

Some of his criticism is targeted toward liberals like John Rawls, who might counsel tolerance and neutrality toward religious conservatives whose "conceptions of the good" are at odds with the tenets of liberalism.⁴² "[I]n the context of children's education," Dwyer asserts, "the value of toleration is simply irrelevant. The failure of political theorists to recognize this may be attributable to their failure to see children as separate persons with distinct interests rather than as mere appendages or belongings of their parents or instruments of social reproduction."⁴³ A reorientation toward a child-centered approach to child-rearing, Dwyer asserts, would clear up misconceptions about neutrality and tolerance, allowing liberals to overcome their timidity and "take a stand" against those "religiously motivated child-rearing practices" that harm children.⁴⁴ In other words, if liberals were sufficiently child-centered they would not tolerate religiously inspired education that they consider harmful to the child's well-being.

As should be evident by now, his criticism in *Vouchers Within Reason* also targets voucher supporters who favor vouchers as means to empower parents to opt out of the state's secular educational system: "Most often, voucher supporters treat parental choice as the ultimate end, thus rendering irrelevant what the consequences are for children's education. Vouchers are about parental power, at least for those parents who prefer

39. See, e.g., *id.* at 4.

40. See, e.g., *id.* at 87.

41. See VOUCHERS, *supra* note 2, at 9.

42. RELIGIOUS SCHOOLS, *supra* note 3, at 152.

43. *Id.* See also VOUCHERS, *supra* note 2, at 51 (criticizing Amy Gutmann's view of liberal education that "asks how children's education can serve the interests of liberal society.").

44. See RELIGIOUS SCHOOLS, *supra* note 3, at 94. Dwyer never examines the possibility that "there are well-known and widely-held temporal justifications for many religious commands Dwyer attacks." Gilles, *supra* note 10, at 180-81 (adding "[i]f Dwyer thinks Hollywood is a better guide to human fulfillment than the Bible, he should explain why.").

religious schools.”⁴⁵ But, Dwyer cautions, “one must acknowledge that some parents simply have aims for their children’s education that are inconsistent with the state’s aims.”⁴⁶ In these instances, the “child’s right to a good education vanishes when it does not coincide with parents’ choices.”⁴⁷ In Dwyer’s view, a child-centered approach to child-rearing would not allow illiberal and harmful parental desires to interfere with the state’s obligation to provide a sound education for the child.⁴⁸ Attaching strings to a state’s voucher plan provides him with what he sees as a politically feasible way to minimize the harm illiberal parents cause.⁴⁹

Before critiquing Dwyer’s analysis in the next three sections of this essay, I will briefly summarize the book. Chapter One of *Vouchers Within Reason* provides a descriptive survey of proposed voucher programs, existing programs, lower court judicial decisions reviewing voucher programs, and legal scholarship and public policy analysis of vouchers.⁵⁰ In addition to a descriptive function, Chapter One serves to set the stage for development of the later arguments that a) in determining the constitutionality of vouchers, Establishment Clause concerns ought not trump, but should be balanced against, competing interests, including the best interests of the child;⁵¹ and b) the voucher debate is adult-centered.⁵²

Chapter Two is divided into three parts—the first reviewing and describing the “debate between proponents of ‘civic education’ and defenders of parents’ rights and pluralism,”⁵³ the second suggesting what is wrong with the current debate, and the third attempting to place the debate on Dwyer’s “child-centered” terms. The current debate among liberal political theorists arises precisely because of the clash of worldviews

45. VOUCHERS, *supra* note 2, at 42.

46. *Id.* at 42-43. Dwyer implies that religious parents sometimes use “their children’s lives to practice their own religion.” *See id.* at 65.

47. *Id.* at 43.

48. *See, e.g.,* RELIGIOUS SCHOOLS, *supra* note 3, at 98 (“But giving parents a right to control their children’s minds [might cause] many children to grow up as unthinking persons chained to a belief system and way of life that might not be at all suited to them.”).

49. VOUCHERS, *supra* note 2, at 14.

50. For a complete discussion of all of these topics and developments, see VOUCHERS, *supra* note 2, at 18-47.

51. *See id.* at 44-46.

52. *See id.* at 42-44.

53. *Id.* at 48.

between secular liberals and the religiously orthodox and the question of what to do with the so-called religious minority, or religious dissenters, who live within the liberal state. Dwyer divides the theorists into two camps: the liberal statist and the pluralists.⁵⁴ Liberal statist primarily focus on the intergenerational stability of liberal democratic institutions and thus give “primacy to creating the right kind of future citizens.”⁵⁵ Pluralists, by contrast, emphasize “the rights of parents and non-liberal cultural . . . minorities whose adult members wish to pass on their beliefs to their children and thereby preserve their particularist way of life.”⁵⁶

Dwyer criticizes both of these approaches for their adult-centered mentality, which uses a child’s education primarily as an instrument for perpetuating either the liberal state or adherence to the non-liberal culture.⁵⁷ He wonders why political theorists (who recognize the “distinct personhood of children”) do not give priority of place to the welfare of children when discussing child-rearing.⁵⁸ He speculates that for theorists who were educated to work within “contexts involving only competent, self-determining adults,”⁵⁹ old habits are hard to break: “Thinking about non-autonomous persons is unfamiliar terrain, and most political theorists likely find unattractive the prospect of revamping wholesale their intellectual apparatus, so they do not.”⁶⁰

Dwyer would replace the adult-centered analysis of the liberal statist and the pluralist with his child-centered approach. He argues that children’s educational interests ought to have “presumptive trumping power over conflicting adult interests” because the child is an independent person in society who has the most at stake in his or her own education.⁶¹ The rest of the chapter summarizes Chapters Three and Four of *Religious Schools v. Children’s Rights*, wherein he sets forth his theory of the state and the relationship between the state and those agents of the

54. *See id.* at 49-50.

55. VOUCHERS, *supra* note 2, at 50.

56. *Id.* at 49.

57. *Id.* at 55.

58. *Id.* at 62.

59. *Id.* at 57.

60. VOUCHERS, *supra* note 2, at 57.

61. *Id.* at 62.

state (including parents) charged with the care of non-autonomous persons.⁶²

Chapter Three opens with Dwyer hypothesizing an “idealized” voucher program that could extend to cover children attending religious schools. In the “idealized” program, “[a]ll participating religious schools teach subjects other than religion (which would be an elective course) from a secular perspective and with the same sort of curricular materials one would find in good secular schools.”⁶³ He hopes to test the morality and legality of distributing state funds to such an enterprise by “taking a very broad perspective . . . attempting to take into account the full range of human interests and moral and legal considerations,” with the hope that his assessment will aid legislators and courts.⁶⁴

Toward that end, Chapters Three and Four examine the justness of vouchers from utilitarian and moral-rights based perspectives, respectively. Dwyer “must write on a clean slate” because “[m]ost discussion of interests and moral rights in legal and policy writing about children’s education is simplistic and un-self-critical.”⁶⁵ He concludes that utilitarian and moral-rights based analyses both allow, and even demand, a form of his idealized voucher program.⁶⁶

Chapters Five and Six address the constitutional issues relevant to Dwyer’s “idealized” voucher program. Chapter Five explores vouchers in the context of the First Amendment’s Establishment Clause, and Chapter Six considers this issue through the prism of an equal protection argument. The main burden of Chapter Five is to demonstrate that “[s]tate support for secular education in religious schools is consistent with Establishment Clause principles.”⁶⁷ The Supreme Court’s recent decision in the *Zelman* case renders much of his Establishment Clause discussion and speculation moot.⁶⁸ Dwyer uses Chapter

62. *Id.* at 63-65. See also RELIGIOUS SCHOOLS, *supra* note 3, at 62-120. These topics are discussed *infra* at Part IV.

63. VOUCHERS, *supra* note 2, at 67.

64. *Id.* at 68.

65. *Id.* at 69. He also writes on a clean slate in the sense that he claims to have “no preconceptions about who has what sort of claims on the state” in the voucher debate. *Id.* at 64. Other participants in the debate, he adds, have “preconceptions they do not articulate or even recognize themselves.” *Id.*

66. See *id.* at 98.

67. *Id.* at 146.

68. Although Dwyer argued for the constitutionality of his “idealized” voucher plan, he cannot be pleased with the Court’s ruling. The majority’s emphasis on the “true

Six to argue that an equal protection analysis compels the implementation of a secularized voucher program. Consistent with his rejection of parents' rights, he rejects an equal protection claim emanating from a "parent's right to equal treatment."⁶⁹ Instead, he uses a *Plyler v. Doe*⁷⁰ rationale to argue for heightened scrutiny because, like the illegal alien children in *Plyler*, children whose parents assign them to religious schools "are not responsible for the fact that they are there rather than in public school."⁷¹ Financial incentives with regulatory strings requiring increased secularization will encourage many parents and schools to seek and provide the type of education that Dwyer's "state" deems best.⁷² Dwyer realizes that some children—the children sent to non-secularized religious schools—will fall through the cracks, but concludes that "unfortunately, there

private choice" nature of the Cleveland voucher program undercuts the primacy he would give to the state in child-rearing matters. See *Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2465 (2002). Since parental authority in making child-rearing decisions is subordinated to the power of the state in Dwyer's analysis, he had argued that "emphasizing private choice is itself specious." *VOUCHERS*, *supra* note 2, at 140. (His view of the state and its relation to parents and children is discussed in further detail *infra* in Part IV.) Additionally, the Court seemingly deferred to the state in deciding what restrictions to place on appropriated funds, and Justice O'Connor acknowledged that "a significant portion of the funds appropriated for the voucher program reach religious schools without restrictions on the use of the funds." *Zelman*, 122 S. Ct. at 2473 (O'Connor, J., concurring). This undermines his argument that the state can only fund the teaching of secular subjects taught from a secular perspective. Dwyer's educational vision is discussed in further detail *infra* in Part V.

69. *VOUCHERS*, *supra* note 2, at 149-159.

70. 457 U.S. 202 (1982). I see *Plyler* as a "constitutional anomaly." Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 749 (1996). For other articles discussing *Plyler*, see, e.g., Linda Carter, *Intermediate Scrutiny Under Fire: Will Plyler Survive State Legislation to Exclude Undocumented Children From School?*, 31 U.S.F. L. REV. 345 (1997); Phillip Cooper, *Plyler at the Core: Understanding the Proposition 187 Challenge*, 17 CHICANO-LATINO L. REV. 64 (1995); Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409 (1983); Kevin Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L. J. 42 (1995); Gerald Neuman, *Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425 (1995); Michael Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L. Q. 1019 (1995); Bill Piatt, *Born as Second Class Citizens in the U.S.A.: Children of Undocumented Parents*, 63 NOTRE DAME L. REV. 35 (1988).

71. *VOUCHERS*, *supra* note 2, at 160. To pursue their equal protection claim, "a suit would probably have to be initiated by a representative of the children other than their parents, since it would be awkward for parents to charge that their children should not suffer for their (the parents') choices." *Id.* at 164.

72. *Id.* at 163.

might simply be no politically (or judicially) feasible means of fulfilling our obligation to ensure them a good education.”⁷³

Having concluded that his “idealized” voucher program is not only permissible but morally and constitutionally mandatory, Dwyer uses Chapters Seven, Eight, and Nine purportedly to survey the state of religious education. He concludes that vouchers in the “real world” are both morally and constitutionally impermissible without the added safeguards of his regulatory scheme. He begins by describing a “Fundamentalist Christian ‘self-paced curriculum’ or ‘teacherless’ school.”⁷⁴ Building on his earlier book, Dwyer says that in this school the children work independently at study carrels, instructed only by workbooks “written by Bible college graduates, who shape the content in all subjects to fit religious doctrine.”⁷⁵ According to Dwyer, these workbooks teach hostility towards Catholics and Jews, the inferior nature of women, the wickedness of children, and the sinfulness of independent critical thinking.⁷⁶ Citing himself, he concludes that “Catholic schools . . . have a history of teaching sexism, fostering dogmatic attitudes, excessively restricting students’ freedom of thought and expression, thwarting development of critical thinking skills, and generating high levels of anxiety in students.”⁷⁷

73. *Id.* “The most straightforward way for states to fulfill their obligation to children in these schools is, of course, simply to impose the regulations on them. But . . . there is no political will today to do this.” *Id.* at 162.

74. *Id.* at 171.

75. *Id.*

76. VOUCHERS, *supra* note 2, at 172. I have little doubt that some Fundamentalist schools discourage “independent and critical thinking.” Is the alternative, as Dwyer suggests, an “autonomy-fostering liberal education,” or might it be a better Christian education? *Id.* In contrast to Dwyer, Maritain argues, “[t]he solution is surely not to get rid of the family or of the school, but to endeavor to make them more aware and more worthy of their call.” MARITAIN, *supra* note 5, at 24. See also *infra* Parts V and VI (extrapolating on this argument).

77. VOUCHERS, *supra* note 2, at 174 (citing discussion in RELIGIOUS SCHOOLS, *supra* note 3, at 22-44). In RELIGIOUS SCHOOLS, Dwyer bases his conclusions partly on his own personal experience. RELIGIOUS SCHOOLS, *supra* note 3, at 7. He also factors in a few anecdotal “ethnographic studies and personal testimonies” to provide what he considers “a holistic and textured view of the development and well-being of children in these schools.” *Id.* at 14. His “empirical conclusions” are drawn in part from JOANNE H. MEEHL, THE RECOVERING CATHOLIC: PERSONAL JOURNEYS OF WOMEN WHO LEFT THE CHURCH (1995) and EDWARD T. BABINSKY, LEAVING THE FOLD: TESTIMONIES OF FORMER FUNDAMENTALISTS (1995). In a section on psychological harm, for example, Dwyer states that many women in Meehl’s survey “reported continuing experiences of depression and anger in reaction to the recognition that they could have accomplished more in their lives if they had not been conditioned” RELIGIOUS SCHOOLS, *supra* note 3, at 40. Richard Rorty asserts that “detailed descriptions of particular varieties of pain and humiliation” (in, e.g., novels and ethnographies) are “the modern intellectual’s

Although he alleges that Fundamentalist and Catholic schools fail to provide an academically rigorous education,⁷⁸ his main concern appears to be the so-called “moral haranguing” taking place in these schools, which he says has “adverse psychological effects on many students, including diminished self-esteem, extreme anxiety, and pronounced and sometimes life-long anger and resentment.”⁷⁹ Dwyer deems it harmful, for example,

principal contributions to moral progress.” RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 192 (1989). Nonetheless, I doubt that these personal and subjective testimonies of ex-Catholics are the stuff from which a serious academic case can be made that Catholic schools inflict psychological harm on their students. Would it be fair to draw similar conclusions about alleged flaws in the public educational system from the personal testimonies of even angrier young men like shooters Eric Harris and Dylan Klebold who put Columbine High School on the map? In his unanswered criticism of Dwyer’s first book, Gilles says that “the authors on which Dwyer relies seem interested in condemning and discrediting traditionalist religion, not describing it in a careful and balanced way. . . . One could just as easily do a ‘study’ of ex-atheists and reach parallel conclusions about the lasting damage secularism caused them.” Gilles, *supra* note 10, at 181-82.

78. *E.g.*, *RELIGIOUS SCHOOLS*, *supra* note 3, at 14-15 (“Catholic and Fundamentalist schools . . . fail to promote, and in fact actively discourage, children’s development of the generalized capacity for independent and informed critical thinking . . .”). In reviewing *RELIGIOUS SCHOOLS*, Gilles states accurately that Dwyer does not:

discuss the impressive social scientific evidence that Catholic schools are more successful than public schools at both academic and civic education. He completely ignores two well-known comparative studies . . . in which the eminent sociologist James S. Coleman and his co-authors found that Catholic schools produce better cognitive outcomes and provide a safer learning environment than public schools. And while Dwyer does mention the large-scale 1993 comparative study of Catholic and public schools by Bryk, Lee, and Holland—a study confirming Coleman’s conclusions, while also finding that Catholic schools develop in children both a stronger sense of both community and self—he dismisses it out of hand on the absurd ground that “it aimed only to discover their virtues.”

Gilles, *supra* note 10, at 182. Once again, Dwyer makes the same claim without recognizing, much less addressing, his critic or these studies. He asserts that “Catholic schools . . . [thwart] development of critical thinking skills.” *VOUCHERS*, *supra* note 2, at 174. In an odd twist that may be a small concession to his critic and the evidence, after five pages of denouncing religious schools and two sentences after denouncing Catholic education for the damage it does to the “development of critical thinking skills,” Dwyer says that “[t]here is also no reason to believe that all or most voucher schools are academically inadequate. It might well be that most provide a better secular education than the public schools in their area, and provide a healthier environment than the public schools in many ways.” *Id.* at 169-74, 175. But he quickly retracts this concession with the assertion that only “anecdotal evidence” supports the claim that religious education is not inadequate and might be superior. *Id.* In addition to the slight he gives the non-anecdotal studies, Dwyer fails to reconcile his concession with his claim that Catholic schools hinder “development of critical thinking skills.”

79. *RELIGIOUS SCHOOLS*, *supra* note 3, at 14. He also notes that “Both Catholic and Fundamentalist schools . . . appear to impose on children, with warnings of divine retribution, the belief that *all* pre-marital sexual relations, even between consenting adults, homosexual relations in any context . . . are sinful. Such haranguing . . .

that fundamentalist schools teach that “any sexuality outside the context of heterosexual marriage” is sinful,⁸⁰ that Catholic schools “strongly promote denial of natural, especially sexual, inclinations,”⁸¹ and that both kinds of schools teach the sinfulness of homosexuality⁸² and abortion.⁸³ These schools “threaten children’s self-esteem” by teaching “children that they are sinful”⁸⁴ and by requiring them to meet “unreasonable, divinely ordained standards of conduct.”⁸⁵

After describing the loose regulatory framework surrounding real-world voucher programs, Dwyer once again takes up moral and legal analysis in an effort to assess existing voucher programs. In Chapter Eight, he concludes that “a utilitarian analysis yields the conclusion that current voucher plans are not morally required, and in fact are morally impermissible;”⁸⁶ and that a “rights-based theoretical analysis . . . yields the same conclusion.”⁸⁷ In Chapter Nine, he returns to a legal analysis under the Establishment Clause and Equal Protection Clause. He theorizes that there is “no secular purpose” in funding many schools that are currently eligible for vouchers because they are,

effectively prevent[s] many children from freely expressing themselves physically, exploring their sexuality.” *Id.* at 159.

80. RELIGIOUS SCHOOLS, *supra* note 3, at 22.

81. *Id.* at 23. Dwyer also theorizes that “The church’s denial of procreative freedom to women, the blatant sexism of the Bible itself, . . . and church teachings that [according to the women in Meehl’s study] portray female sexuality as evil . . . also deeply affected their self-image.” *Id.* at 39-40. He concludes that “Catholic schools . . . engender great anxiety in children by their moral teachings.” *Id.* at 42.

82. See VOUCHERS, *supra* note 2, at 184.

83. See RELIGIOUS SCHOOLS, *supra* note 3, at 171.

84. *Id.* at 37. See also VOUCHERS, *supra* note 2, at 199 (arguing that “constant reminders of their sinfulness” threaten children’s self-esteem). Dwyer seems to have a misconception about self-esteem. You do not help a fat child’s self-esteem by telling him that he is skinny; you do not help the self-esteem of a child with below-average intelligence and no aptitude in math by telling her that she can be an aerospace engineer; and you do not help a dwarf child’s self-esteem by telling him that if he works hard enough he can be an NBA star. Similarly, you do not help a child’s self-esteem by telling a utopian lie about his nature when our whole system of government, with its checks and balances, is built around an understanding of human depravity and corruptibility. See THE FEDERALIST NOS. 10, 51 (James Madison). Of all the claims of Christianity, the one that is most empirically verifiable, as many have said, is the doctrine of original sin; just open up any major newspaper on any day of the week and this should be self-evident. I am writing this note on September 11, 2002. Enough said. Self-esteem, if we must use this freighted term, is built in a community wherein those in authority speak honestly and act with unconditional love, letting the child know that he is valuable and has something to offer humanity no matter his limitations.

85. RELIGIOUS SCHOOLS, *supra* note 3, at 179.

86. VOUCHERS, *supra* note 2, at 192.

87. *Id.* at 197.

in his analysis, “pervasively sectarian.”⁸⁸ Schools that refuse to “impart mainstream views in core subjects,” that strive “to confine children’s minds,” and that instill “intolerant and dogmatic attitudes . . . quite simply, *must not receive financial support from the government.*”⁸⁹ With respect to the equal protection analysis, Dwyer states that “the state may not allow any amount of state funds to be used at schools that engage in practices it deems significantly harmful.”⁹⁰

“Your obligation as legislator should . . . be clear,” he concludes. “You may not allow vouchers to be used at a school” like the Catholic and Fundamentalist schools described in *Vouchers Within Reason*, and “[y]ou must ensure that vouchers go only to schools that will use them to improve secular education . . . and that are demonstrably committed to eliminating . . . harmful practices.”⁹¹

III. DWYER’S FATAL METHODOLOGICAL FLAW

With phrases like “Your obligation as legislator . . .,” Dwyer’s purposes are clear: he desires to influence the real-world legal and policy debate on vouchers specifically, religious education generally, and child-rearing even more generally.⁹² Simply put, he aims “to change the basic moral, political, and legal outlook that is brought to bear on education reform issues such as school vouchers.”⁹³ Given the magnitude of his task, Dwyer understands that he must “take into account the full range of human interests and moral and legal considerations at stake.”⁹⁴

88. *VOUCHERS*, *supra* note 2, at 199.

89. *Id.*

90. *Id.* at 209. He qualifies this by saying that:

[t]he state’s ultimate aims are for every child to receive a good secular education and for all schools to eliminate harmful practices. Denying aid to any school that is any respect sexist or overly authoritarian would mean sacrificing the first aim to serve the second. It would certainly be preferable to use vouchers to advance both aims if possible. And this would be possible if state were to require, not that schools be completely sanitized of all practices the states deem harmful before they can receive any aid . . . but rather simply that schools demonstrate a commitment to eradicating such practices in order to receive vouchers.

Id. at 209-10.

91. *Id.* at 210.

92. *See, e.g.*, *VOUCHERS*, *supra* note 2, at 210-11.

93. *Id.* at 17.

94. *Id.* at 68. Dwyer aims to fill a void in the literature, decrying the fact that “[f]ew participants in the debate recognize the full range of legitimate interests at stake, and

Toward that end, he says that he is beginning “at square one, with no preconceptions about who has what sort of claims on the state.”⁹⁵ Here he “must write on a clean slate” because “[m]ost discussion of interests and moral rights in legal and policy writing about children’s education is simplistic and unself-critical.”⁹⁶

Dwyer fails completely in his stated purpose precisely because he refuses to apply his own criterion and consider “the full range of human interests and moral and legal considerations at stake.” Dwyer disregards or marginalizes spiritual interests, moral and legal considerations concerning the role of the family in children’s lives, the role of religious institutions and other intermediary bodies in the public life of a society, and differing moral and legal conceptions of the state—including those that exist in real-world America.⁹⁷ If he chooses to continue his project of re-envisioning the child-rearing policies of our nation, he would be served well to heed his own words: “[f]ew participants in the debate recognize the full range of legitimate interests at stake, and few subject their own presuppositions

few subject their own presuppositions about what the most important considerations are to critical scrutiny.” *Id.*

95. *Id.* at 64. “I . . . undertake . . . to model the state’s reasoning about the content and importance of the human interests and rights at stake, from a starting point free of preconceptions.” *Id.* at 65.

96. *Id.* at 69. Dwyer elaborates:

It is no secret that people, including judges and legal scholars, are driven to adopt particular views on the constitutionality of vouchers by preconceptions they have about what human interests are at stake and which are most important, . . . preconceptions they do not articulate or even recognize in themselves. . . . It should be fruitful, therefore, to step back and reexamine beliefs about the interests and moral rights at stake, to try to think objectively. . . . I am not aware of any other work along these lines, and so I must write on a clean slate.

Id.

97. With his second book, Dwyer’s failure rises to the level of inexcusable. Not only does he fail to address the “full range of human interests and moral and legal considerations” that existed when he wrote *RELIGIOUS SCHOOLS*; he fails in *VOUCHERS WITHIN REASON* to address or even acknowledge the “human interests and moral and legal considerations” his critics raise. For example, Gilles, in his critique of *RELIGIOUS SCHOOLS*, questions Dwyer’s constrained notion of “temporal interests,” see Gilles, *supra* note 10, at 171-178; his exclusion of spiritual interests, see *id.* at 178-185; his concept of the family and parental rights, see *id.* at 158-161; and his concept of the state, see *id.* at 158-167. Dwyer acknowledges Gilles’ critique with one citation, although he fails to engage Gilles’ arguments. James Dwyer, *School Vouchers: Inviting the Public Into the Religious Square*, 42 WM. & MARY L. REV. 963, 996 n.85 (2001). Inexplicably, in *VOUCHERS WITHIN REASON*, Dwyer fails to even acknowledge Gilles’ critique.

about what the most important considerations are to critical scrutiny."⁹⁸

In the end, what Dwyer describes as a tension between adult- and child-centered reasoning is rather transparently a tension between his adult vision of child-rearing/education and his parents'⁹⁹ adult vision (along with that of other religiously conservative and/or orthodox parents).¹⁰⁰ He attempts to take the moral high ground with the claim that his reasoning is child-centered, and that he has the best interests of the child in mind.¹⁰¹ However, his reasoning is child-centered only if his preconceptions¹⁰² are correct. If Dwyer's assumptions are incorrect, as I think they are, then his adult reasoning about child-rearing/education is skewed and may lead to a form of education detrimental to the child.

Dwyer is involved in a clash of worldviews between secular liberalism and religious orthodoxy, the types of education each demands, and the values each seeks to inculcate.¹⁰³ Unfortunately, Dwyer chooses not to engage the religious party

98. See *VOUCHERS*, *supra* note 2, at 68. Joseph Carens models this for liberal theorists by attempting to contextualize liberal theory by exploring the actual ways that different communities, liberal and illiberal, live out their common lives together. JOSEPH CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 58-59 (2000) ("[A]n open-minded liberalism should not restrict itself to a single narrow conception of the good and should perhaps even find ways of appreciating the goodness of non-liberal ways of life.").

99. Dwyer claims "special insight" into "the particular ways in which some forms of religious schooling might be harmful to children" based on his "own conservative religious upbringing and by [his] early experience in elementary and secondary Catholic schools." *RELIGIOUS SCHOOLS*, *supra* note 2, at 7.

100. In resolving this tension, Dwyer "wrongly assumes that there is only one reasonable view—the secular, rationalist, egalitarian one—on a wide range of controversial issues about what is in children's temporal best interests." Gilles, *supra* note 10, at 155.

101. Dwyer's "attempt to claim the moral high ground (if such it be) of children's liberation is preposterous. . . . The only 'right' Dwyer thinks children should have is the inalienable right to be raised in accordance with whatever the state and its courts determine to be in their best interests." *Id.* at 163.

102. See my list of Dwyer's eight assumptions, *supra* notes 31-38 and accompanying text.

103. Dwyer understands that "[t]he hand that rocks the cradle rules the world. In other words, those who decide what children may and should learn thereby shape, if not determine, those children's character and commitments, as well as those of the community." *Taking Pierce Seriously*, *supra* note 21, at 121. See also EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 141 (1999) ("One large difficulty here is the contestability of any particular interpretation of the best interests of children. Our understanding of their best interests depends on our particular vision of the good life.").

directly in robust dialogue about the best interests of the child. He rigs the game, avoiding the healthy debate in three moves:

- first, he sweeps away the interesting and contested turf with a set of assumptions about the nature of the state and its relationship to its citizens;¹⁰⁴
- second, he operates within these preconceived assumptions, attempting to place the burden on people he calls “conservatives” to “show why the *state* should endorse *their* beliefs about the importance of parental interests or about what is best for children;”¹⁰⁵
- third, he claims that unlike the conservatives, he is operating “from a starting point free of preconceptions.”¹⁰⁶

It may be true that from his starting point (a point reached after all his assumptions are in place), he is operating free of preconceptions. And it may be equally true that the so-called conservatives are operating from odd preconceptions if one accepts his starting point. But the crucial question is why should we operate from a starting point that takes his conception of the liberal state as a given.

After all, the real state—the “federal, state and/or local government entities”¹⁰⁷—and society look vastly different from his depiction. Although there are those who fervently desire to evacuate the public square from all institutions that mediate between the individual and the power of the state—i.e., the family, the church, and other civic and culture-forming organizations—it is clear that they have not yet succeeded.¹⁰⁸

104. For example, his preconceived theory of the state forces the “inescapable” “conclusion” that parenting is a “*privilege*” granted by the state and, therefore, “the very notion of parental rights is illegitimate.” RELIGIOUS SCHOOLS, *supra* note 3, at 63-64.

105. VOUCHERS, *supra* note 2, at 65.

106. *Id.* at 65.

107. This is how Dwyer defines “state.” See RELIGIOUS SCHOOLS, *supra* note 3, at 3.

108. In discussing *Troxel v. Granville*, 530 U.S. 57 (2000), Professor Richard Garnett writes that:

[t]he family is a vehicle for expression, but it is also the ‘first and vital cell of society.’ Like other expressive associations, it not only mediates as it educates, it *competes* with the government for the character of children and citizens. It is not merely the translator of the state’s preferred messages, it is the state’s *rival*. *Troxel*—like *Pierce* before it—is a reminder that our Constitution accepts and protects this rivalry, and, as a general matter, neither authorizes nor permits government to revise, correct, or censor the associations’ expression simply because it prefers a competing message of its own.

Dwyer states that “[t]hose who would insist that parents have moral rights in connection with their children’s education should carry a heavy burden of demonstrating why.”¹⁰⁹ But in real-world, twenty-first century America, he has it backwards.

Pierce v. Society of Sisters,¹¹⁰ *Meyer v. Nebraska*,¹¹¹ *Wisconsin v. Yoder*,¹¹² and *Troxel v. Granville*¹¹³ all stand for the proposition that parents have constitutionally protected rights to direct the education and upbringing of their children.¹¹⁴ These and a myriad of other examples speak loudly of the limits of the state to shape the minds of the young, the centrality of parents in the educational enterprise, and the role mediating institutions play in assisting parents in the process.¹¹⁵ Dwyer’s argument would have been crisper if he had conceded that he is the one seeking a radical departure from tradition in advocating state control over shaping minds, hearts, and values and in arguing that parenting privileges exist at the sufferance of the state. It also would have been cleaner if he had acknowledged that some of

Richard Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1880-81 (2001) [hereinafter *Education and Expression*].

109. VOUCHERS, *supra* note 2, at 108. Accord RELIGIOUS SCHOOLS, *supra* note 3, at 79 (“There is an understandable tendency, given ingrained social attitudes about children, to say that the parent-child relationship is unique.”).

110. 268 U.S. 510 (1925).

111. 262 U.S. 390 (1923).

112. 406 U.S. 205 (1972).

113. 530 U.S. 57 (2000).

114. I cite the Court here with ambivalence, knowing a) that it can err, and b) that its role in shaping our society is or ought to be limited to interpreting the law, including the Constitution. See Michael Scaperlanda, *In Defense of Representative Democracy*, 54 OKLA. L. REV. 38 (2001) (responding to Erwin Chemerinsky, *Getting Beyond Formalism in Constitutional Law: Constitutional Theory Matters*, 54 OKLA. L. REV. 1 (2001)); Michael Scaperlanda, *Who is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587 (1997) [hereinafter *Neighbor*]. I cite the Court here merely to state a fact: the Constitution as interpreted by the Court today recognizes and protects a parent’s child-rearing authority. Our society has long viewed non—state institutions, especially the family and church, as the source of society’s values and morals. See, e.g., George Washington, Farewell Address (Sept. 17, 1796), in 35 THE WRITING OF GEORGE WASHINGTON 214, 229 (John Fitzpatrick ed., 1940). International human rights law also supports parental rights to educate their offspring. See UNITED NATIONS, UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 26, cl. 3, available at <http://www.fourmilab.ch/etexts/www/un/udhr.html> (last visited Nov. 11, 2002) (“Parents have a prior right to choose the kind of education that shall be given to their children.”). In the real world, those like Dwyer, who argue that parents have no moral rights in connection with their children’s education, are the ones who actually carry the heavy burden of persuading us that we ought to abandon an internationally recognized tradition that provides the foundation for our society.

115. See also *Troxel*, 530 U.S. 57 (2000) (reversing an order granting grandparents visitation rights to their grandchildren); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (allowing the Boy Scouts of America to ban homosexuals from the organization).

the religiously orthodox might operate sincerely from a child-centered perspective, albeit one very different from his given the radical differences in worldviews. Then, without the thinly veiled legerdemain by which he attempts to capture both the moral high ground and the definition of the state, he could have set out to persuade the reader that he offers a better conception of the state and/or a better understanding of the child's educational interests.¹¹⁶

IV. DWYER'S TOTALITARIAN STATE

Dwyer's state is totalitarian. First, it is the sole authority on questions of public good, as he envisions a liberal state that may concern itself only with its denizens' temporal interests. Competing conceptions of the state and society are impermissible. Second, he diminishes the role of all mediating and culture-forming institutions in society, including the church and the family, relegating them to the status of mere licensees of the state.¹¹⁷ His state licenses, on its terms, parents and others to engage in child-rearing and education as "agents" of the state. In

116. Dwyer's argument for vouchers is liberally laced with a polemic against religious conservatives. The polemic is ultimately unsatisfying because a) he caricatures the religiously orthodox; and b) by his rules of engagement, the religiously orthodox are required to justify their educational claims from within his worldview, when it is precisely the clash of worldviews that is at stake. I have nothing against a good polemical argument; but his argument would have been much more intellectually satisfying if he had more accurately characterized his adversary, and if he would have attempted to make his case on an even playing field in which the alternative concepts of the state were contested. If putting the concept of the state into play was beyond the scope of his book, and if he wanted to make a constitutional and moral argument for his "idealized" voucher program within the terms of his deeply contestable worldview, then it seems to me that his ambitions should have been much lower than trying "to change the basic moral, political, and legal outlook" on these very controversial issues.

Meira Levinson, for example, attempts to limit her book in this way. See MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* (1999). Levinson holds deeply troubling and deeply contested views of education that are similar to Dwyer's. And like Dwyer, she assumes a certain type of liberal state. But unlike Dwyer, she is writing specifically to other liberals with the purpose of fleshing out the interplay between liberal political theory and education. She knows that "education lies at the heart of the liberal project." *Id.* at 5. Thus, she is attempting to articulate a "coherent liberal political theory of children's education." *Id.* at 3. In her conclusion, she writes, "readers who were not liberals when they started reading this book will have been given few reasons to become liberals in the meantime. . . . Second, the number of self-identifying liberals may well go down, because of readers' discomfort with the educational implications expounded here." *Id.* at 168 (remarking that some "may decide that the liberal educational ideal represents the *reductio ad absurdum* of liberal principles. 'If this is what liberalism is about,' such readers may think, 'then I want no part of it.'").

117. "[F]amilies and schools, no less than clubs, unions, and political parties are mediating institutions that form, shape, and educate us by their expression." *Education and Expression*, *supra* note 108, at 1845.

other words, his state controls the mechanisms for the formation and transmission of its values to successive generations. Third, since his state rejects the concept of inalienable rights given by a Creator (it lacks an adequate anthropology of the human person¹¹⁸), it actually licenses not only child-rearing rights but all private freedom by statute, constitutional provision, or judicial interpretation. In the end, liberal “freedoms” in Dwyer’s state exist at the sufferance of the state.

This reliance on the continued benevolence of the state as the foundation of our freedom is tenuous at best, with no guarantee that the liberal state represents the end of the historical development of statehood. Even if we naively assume the staying power of the liberal state, there is no guarantee that the state will not attempt to destroy some freedoms that earlier generations had thought inalienable. Dwyer’s desire to limit a parent’s freedom to raise a child in his or her tradition demonstrates the possibility of this sort of illiberal denial of freedom by the liberal state.

118. “Every system of law reflects certain foundational assumptions about what it means to be human,” and we can refer to these as “anthropological assumptions.” Rev. John Coughlin, *Law and Theology: Reflections on What it Means to be Human From a Franciscan Perspective*, 74 ST. JOHN’S L. REV. 609, 610 (2000). See also, e.g., Jean Bethke Elshtain, *The Dignity of the Human Person and the Idea of Human Rights*, 14 J. L. & RELIGION 53 (1999-2000) [hereinafter *Dignity*] (noting that Michael Perry holds that “certain anthropological presuppositions, necessarily ground any sustainable human rights argument.”); David Fitzgerald, Note, *Let Justice Flow Like Water: The Role of Moral Argument in Constitutional Interpretation*, 65 FORDHAM L. REV. 2103, 2114 (1997) (observing that Judge Reinhardt’s language in *Compassion in Dying* “indicates his larger moral anthropology: Human beings exercise their ‘spiritual nature’ and render judgments about their ‘thoughts’ and ‘beliefs’ in solitude.”); Kevin Hasson, *God and Man at the Supreme Court: Rethinking Religion in Public Life* (1997), available at <http://www.leaderu.com/socialsciences/hasson.html> (last visited Nov. 18, 2002) (contrasting the “two very different public anthropologies contending for place in America’s public philosophy”); John Roos, *Unger and Aquinas on Universals and Particulars*, 38 AM. J. JURIS. 63, 82 (1993) (exploring the contrasting moral anthropologies of Roberto Unger and Thomas Aquinas); Richard Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty* (unpublished manuscript) (on file with the author) (“[M]oral problems . . . are anthropological problems, because moral arguments are built, for the most part, on anthropological presuppositions.”).

Coughlin states that “[t]he concept of justice operative in the legal culture of the modern liberal state” manifests “the anthropological assumptions of the classical liberal political theory,” with its emphasis on “individual autonomy.” Coughlin, *supra*, at 610. He sees that “the anthropological assumption of a radically autonomous individual may enshrine certain values as foundational to the law at the cost of excluding other significant human values.” *Id.* at 613. Specifically, this anthropology lacks criteria for objectively determining “what constitutes harm.” *Id.* It dislocates the person from “history and tradition,” *id.* at 615; it undervalues or dismisses the concept of “common good,” *id.* at 625; it might produce hostility “to the family unit,” *id.* at 626; it tends to alienate the isolated individual from the community, *id.* at 625; and it might alienate the individual from himself by dis-integrating “body and soul,” *id.* at 621.

Dwyer assumes a liberal state that is neutral as to religious matters and as to private conceptions of the good life. He concedes though that “this principle of state neutrality is not itself ideologically neutral” because as to “the higher-order normative questions of whether the state *should* be strictly secular in this way, it reflects a partisan liberal position.”¹¹⁹ As secular and liberal, his state can only concern itself with its citizens’ “temporal interests,” because to concern itself with “spiritual interests,” Dwyer suggests, “would require *it* to assume the truth of particular religious beliefs—that [humans] *have* spiritual interests in the first place, that those interests are of a certain nature, and that living in a certain way best serves those interests—and therefore to endorse a particular religious view.”¹²⁰

I must confess that I understand neither Dwyer’s connection with reality nor his leap in logic at this point in his argument. To ignore the obvious fact that persons, adults or children, *have* spiritual interests is to ignore the human condition. What those spiritual inclinations are, where they come from, and how they should be acted upon are all very different questions from that of whether human beings have spiritual interests.¹²¹ A secular

119. RELIGIOUS SCHOOLS, *supra* note 3, at 82. See also *Neighbor*, *supra* note 114, at 1614-1618 (discussing the non-neutrality of a strictly secular public square). David Schindler adds that:

[t]he point, then, is that simple neutrality toward God, in any moment of the creature’s being, action, or thought, implies just so far a finite God: and a finite God is not really a God at all. Any such moment of simple neutrality, in other words, already and in principle implies the absence of God—implies, at least in that (logical-’onto-logical’) moment, the death of God.

David Schindler, *Modernity, Postmodernity, and the Problem of Atheism*, 24 COMMUNIO 563, 567 (1997). See also Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 317 (1990) (“This privatization of religion may or may not be a sound constitutional policy, but it is decidedly not neutral among competing religious beliefs; it flatly rejects the position of those who believe that religion serves an essential public role and therefore cannot be purely private in character.”). For an insightful look at the ways that government currently promotes a view that religion is a private matter, see Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001).

120. RELIGIOUS SCHOOLS, *supra* note 3, at 82.

121. Kevin Hasson states that:

choosing the traditional anthropology allows the government to be genuinely neutral on cosmic questions. To say human beings thirst for the transcendent is not to say anything about who—or, logically, even if—the transcendent is. It is merely to say something important about who human beings are. But that is not so for the existentialist position. . . . It necessarily assumes that there is no

state might take into account the spiritual interests of its citizens merely by respecting the cultural autonomy of religious organizations and families to shape and form the faith and morals of its members without itself hazarding a commitment to the truth or falsity of any particular religious doctrine.¹²² Since his state, as described in the last two paragraphs, could implicitly provide the cultural space for non-state entities to transmit non-state and even spiritual values to future generations, I would not yet label it totalitarian. But there is more to Dwyer's state.

From a liberal statist standpoint, "[t]here is in theory a single standpoint—that of the state—from which all issues are assessed."¹²³ Dwyer would like this single standpoint of the state to impose "substantive criteria for majoritarian deliberation about education" because "there is certainly reason for concern that local adult majorities will reason on the basis . . . of interests other than those of children."¹²⁴ In his view, "the state must ultimately decide what the interests of children, individually and collectively, are."¹²⁵ Toward this end, "[i]t is the state that confers on parents rights to control certain child-rearing matters."¹²⁶

transcendent, but only alienated individuals who are anguished by false claims of one.

Hasson, *supra* note 118.

122. The secular state denies the importance of the spiritual interests of its citizens at its peril, ignoring Washington's admonition that "Religion and Morality" are "indispensable supports" of "political prosperity." Washington, *supra* note 114, at 229 (adding, "let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle."). See also MARITAIN, *supra* note 5, at 19 ("[T]he democratic ideal more than any other requires faith in and the development of spiritual energies . . .").

123. VOUCHERS, *supra* note 2, at 53.

124. *Id.* at 54.

125. *Id.* at 65. Furthermore, Dwyer says, it is "naïve to think that parents are always more competent to judge their child's best interests than are state agency personnel who spend their lives studying and thinking about what is best for children." RELIGIOUS SCHOOLS, *supra* note 3, at 86. In reply, Richard Garnett argues,

[s]urely, the attitude toward a child that best reflects an appreciation for her dignity as a human person is not the disembodied paternalism of a government functionary, or even the genuine concern a well-meaning case-worker, but the love of a parent. A parent loves this child; the Government, its experts, and well-meaning third parties, try as they might, likely do not. . . . Parental control is a this-child centered, truly personalist, value, while state control, it seems to me, respects the personhood of children only if one believes that there is something dignified about being regarded by a hubristic state as a policy datum to be manipulated by third parties in accord with best-interests generalities.

It is at this juncture in Dwyer's project that the specter of totalitarianism raises its ugly head.¹²⁷ Dwyer proposes creating:

a legal framework [conferring] on parents simply a child-rearing *privilege* limited in its scope to actions and decisions not inconsistent with children's temporal interests. A parental privilege would legally *permit* certain adults to act as parents—that is, to form an intimate relationship with a child and to perform child-rearing functions such as housing, feeding, clothing, bathing, instructing, and disciplining . . . but it would not accord those adults any legal claims of their own against state efforts to restrict their child-rearing practices or decision-making authority.¹²⁸

Thus, parents are “their children's agents,”¹²⁹ and parenthood is “a benefit enjoyed contingent upon fulfillment of attendant responsibilities, like other fiduciary positions such as trustee or attorney.”¹³⁰

In Dwyer's mind, limiting the parental role in raising children is necessary to the liberal understanding “of the purpose of rights,” which is “to protect self-determination and personal integrity, of the separateness of persons, and of what it means to respect persons.”¹³¹ Liberal freedom allows “individuals to perform their own balancing of religious and temporal interests,” but this “extends only to an individual's *self* determination” and “does not entail allowing individual citizens to perform that balancing for *other* persons.”¹³² Since children are non-autonomous persons—other persons separate from their parents—“the state should protect [their] temporal interests no matter what the parents believe until the child becomes an adult capable of making his own self-determining choices.”¹³³ In Dwyer's state, this ability to make “self-defining

Taking Pierce Seriously, *supra* note 21, at 132. Unfortunately, Dwyer does not respond to Garnett, or the argument that Garnett makes, in VOUCHERS WITHIN REASON.

126. RELIGIOUS SCHOOLS, *supra* note 3, at 45.

127. “[I]f the school, conceived according to some totalitarian pattern as an organ of the political state, were to replace the free and normal agencies provided by nature and by God for the upbringing of man, then the common good . . . would be betrayed.” MARITAIN, *supra* note 5, at 91-92.

128. RELIGIOUS SCHOOLS, *supra* note 3, at 64.

129. *Id.*

130. *Id.*

131. VOUCHERS, *supra* note 2, at 101.

132. RELIGIOUS SCHOOLS, *supra* note 3, at 83.

133. *Id.*

choices" is the ultimate end toward which man is oriented.¹³⁴ Since the state can only be interested in the child's "temporal interests," its agents, the parents and schools, cannot act in a manner inconsistent with the state's secular interests.¹³⁵

To "protect" the development and future autonomy of the child from "harm," Dwyer's state must limit the other societal voices that offer competing conceptions of the meaning and purpose of life. Toward that end, he evacuates family, community, and church from the public square, leaving "only two actors in it—the state and the individual."¹³⁶ Dwyer asserts that "rhetoric about parents' interests is nonsense"¹³⁷ because "interests and rights [attach] to individuals rather than to relationships as unitary entities."¹³⁸ Therefore, "[t]reating 'the family' as an indivisible unit is misleading and suspect."¹³⁹ Casting the net more broadly, he adds that "[a] community right to educate, like a parental child-rearing right, is conceptually illegitimate. Treating children equally should mean that we deny the legitimacy of any purported rights residing in *any* person or group to direct their lives."¹⁴⁰

The circle is now closed. One ideology prevails, backed by the state's power. All other institutions must subordinate their wills

134. As Richard J. Neuhaus observed nearly twenty years ago, "[b]ecause government cannot help but make moral judgments of an ultimate nature, it must, if it has in principle excluded identifiable religion, make those judgments by 'secular' reasoning that is given the force of religion." RICHARD J. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* 82 (1984). Dwyer's state not only makes a moral judgment of an ultimate nature, but attempts to impose its conception on the rest of society by force of law.

135. "The state should [not] allow parents to balance their child's spiritual and temporal interests." *RELIGIOUS SCHOOLS*, *supra* note 3, at 83. *See also id.* at 88 (granting parents "a legal privilege to engage in parenting practices not incompatible with their children's temporal interests"); *id.* at 100 (same); *VOUCHERS*, *supra* note 2, at 42-43 ("[O]ne must acknowledge that some parents simply have aims for their children's education that are inconsistent with the state's aims.").

136. NEUHAUS, *supra* note 133, at 82.

137. *VOUCHERS*, *supra* note 2, at 87.

138. *RELIGIOUS SCHOOLS*, *supra* note 3, at 66.

139. *Id.* *See also* *VOUCHERS*, *supra* note 2, at 60 ("Sometimes the elision of parent-child separateness is manifest in an ontologizing of families. . . . Speaking of family rights and family decisions allows theorists to ignore the fact that child-rearing is a matter of the state's supervising what some private individuals (parents) do to other private individuals (children).").

140. *RELIGIOUS SCHOOLS*, *supra* note 3, at 119. This statement is nonsensical, as even Dwyer realizes: "No one would dispute that . . . some adult must be in a position to direct [children's] lives and make important decisions for them." *Id.* at 81. What he seems to mean is that no one other than the secular liberal state has a right to direct the lives of children.

to this ideology. The state, which can only concern itself with “temporal” interests, is the sole institution charged (charging itself!) with the responsibility of deciding which values to transmit to future generations. It cannot carry out this monumental task alone, so it licenses certain “agents” to assist it; but these agents—parents and private religious schools—must implement the educational enterprise in a manner consistent with the “principal’s” vision. This, by Dwyer’s definition, excludes the spiritual: “Religion as a mediating structure—a community that generates and transmits moral values—is no longer available as a countervailing force to the ambitions of the state.”¹⁴¹

The genius of Dwyer’s voucher plan, if it were to succeed, is that parents, churches, and educators of this generation would be paid for their silence as the state’s new ideology seeps into the minds of the young. Without putting parents in jail, and without the brutality of the twentieth century’s totalitarian regimes, the state, with monetary payments, can “over time weaken parents’ sense of entitlement and inclination to do battle with the state,” if it also makes “clear to parents that [it] will not shirk its responsibilities to protect children’s temporal interests, regardless of parental opposition.”¹⁴²

Dwyer is aware that his project might be labeled “totalitarian.” In his book, *Liberal Purposes*, William Galston wrote of the limits of civic education in a liberal state, arguing that the liberal state “must not throw its weight behind ideals of personal excellence . . . and must not give pride of place to understandings of personal freedom outside the shared understanding of civic freedom;” otherwise, it “will prescribe—as valid for, and binding on, all—a single debatable conception of how human beings should lead their lives.”¹⁴³ Dwyer responds:

141. NEUHAUS, *supra* note 133, at 82. “The ‘well ordered society’ means that the key spheres and institutions of society work harmoniously and effectively in consort with the highest qualities of human nature, including the promotion of responsible freedom. It follows that no one part can be allowed to encroach upon and diminish the other parts . . .” T. William Boxx, *Building the Well-Ordered Society: Subsidiarity and Mediating Structures*, in *BUILDING A COMMUNITY OF CITIZENS* 252, 257 (Don Eberly ed., 1994).

142. RELIGIOUS SCHOOLS, *supra* note 3, at 141.

143. WILLIAM A. GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 256 (1991). See also, e.g., Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L. J. 423, 436 (1996) (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 12 (2d ed. 1962)) (“Even liberal ideology was dangerous, [Bickel] believed, because it had ‘pretensions to universality’ and was therefore inclined to become intolerant and oppressive. . . . ‘Our

With respect to Galston's concern about totalitarianism, the notion that teaching children to think for themselves has the effect of creating a more ideologically homogeneous population is ludicrous. . . . Liberal education does not rule out any conceptions of the good, [but] simply gives more children some chance of having a real choice among ways of life and conceptions of the good as they mature.¹⁴⁴

In the next two sections, I argue that Dwyer's view of education is flawed. Here, I will say simply that he either ignores or misunderstands Galston's point. Dwyer's proposal involves one dominant and authoritarian institution—the state—imposing its conception of the public good—temporal interests—on the whole of society. To be sure, his totalitarian project differs from past efforts in that the public good that this state seeks is the glorification of the self-creating individual as defined by certain so-called temporal interests; but it is still totalitarian in nature.

V. EDUCATION FOR FREEDOM

Laudably, Dwyer, tapping into a vital core of human existence, passionately desires a child-centered approach to learning wherein the child is educated for freedom. He sees deficiencies in Fundamentalist and Catholic education, and his proposed solution involves state-mandated secularization of these systems. To the extent that a Fundamentalist or Catholic school fails to educate the child for freedom, I agree wholeheartedly with Dwyer that it stands in need of reform. But I could not disagree more with his proposed secularization of religious schools as a means to achieving that end. The solution (not state-mandated but internally generated) is not secularization of these schools but a better and more rigorous Christian education.

In *Vouchers Within Reason*, Dwyer issues a challenge: "What advocates for nonliberal religious groups need to argue is that *the state* should conclude that *the children* are harmed by [his version of] a liberal education. They have yet to do so."¹⁴⁵ Without taking on the baggage incident with the label

problem,' he wrote, 'is the totalitarian tendency of the democratic faith.'"); Nomi Maya Stolzenberg, "He Draw a Circle that Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993) ("[A]ssimilation, that insidious cousin of totalitarianism . . .").

144. VOUCHERS, *supra* note 2, at 94-95.

145. VOUCHERS, *supra* note 2, at 63.

“nonliberal” and without conceding the need for such groups to make the argument, I will take up the challenge. Or, more precisely, I will summarize a case that has been made effectively many times before. Dwyer has not seen this case against his version of a liberal education, I suspect, because like the rest of us, he suffers from myopia brought on by living and learning within a fallible intellectual community.¹⁴⁶ In other words, I suspect that the common mentality and the currently fashionable ideas of his academic community blind him.¹⁴⁷ Part

146. See *Dignity*, *supra* note 118, at 58 (“The view of the self as an ‘autonomous and sovereign chooser is so deeply entrenched that in late twentieth century America, at least, it is simply part of the cultural air that we breathe.’”). This myopia demonstrates another reason why the totalitarian nature of Dwyer’s education proposal is wrongheaded. Assume for a moment that the conventional wisdom of the day accepts his idea of a sound education as the best practice for education. Are we confident that he is right? Are we sure that further study and reflection will reveal no better solutions to the problems posed by education? If we are sure that a secular liberal education that takes into account only the non-spiritual temporal interests of children is the best type of education and that it will stand the test of time, we still would face the question of whether to limit parental freedom so as to prevent deviation from this best educational solution. Putting the freedom question aside, if we were sure that Dwyer’s educational system was the best, then we could at least wish or hope that it could be implemented universally. But then we remember our myopia and recall that the solutions that Dwyer wants to impose grow out of a philosophical movement that Meira Levinson says is no more than 150 (and really only 30) years old. LEVINSON, *supra* note 116, at 6. In the history of thought, this movement is still in its infancy or early childhood. Could it be that its proponents have failed to see reality in its totality? Could it be that they have emphasized particular aspects of our humanity to the exclusion and neglect of other aspects? Could it be that future generations will think it wise to emphasize other aspects of our humanity, or attempt to bring education back into balance? A total educational solution, like the one Dwyer proposes, means that we would intentionally attempt to pass on to the next generation the myopia of the secular liberal state through the questions that are asked; the answers that are given; and more importantly, the questions that are never asked. Richard Rorty starkly and frankly explains the goal of education for a liberal society:

[I]n its ideal form, the culture of liberalism would be one which was enlightened, secular, through and through. It would be one in which no trace of divinity remained, . . . culminat[ing] in our no longer being able to see any use for the notion that finite, mortal, contingently existing human beings might derive the meanings of their lives from anything except other finite, mortal, contingently existing human beings.

RORTY, *supra* note 77, at 45. In Rorty’s “ideal liberal society,” the non-intellectuals “would see themselves as contingent through and through, without feeling any particular doubts about the contingencies they happened to be. . . . Such a person would not need a justification for her sense of human solidarity, for she was not raised to . . . [ask] and [get] justifications for that sort of belief.” *Id.* at 87. Levinson also reveals the stakes involved in gaining and maintaining control over education: “[e]ducation lies at the heart of the liberal project, it is upon the realization of liberal educational goals that the success of liberalism itself depends.” LEVINSON, *supra*, at 5.

147. I give Dwyer the benefit of the doubt here. Neither VOUCHERS nor RELIGIOUS SCHOOLS address the types of arguments made by Guissani, Maritain, or Lewis. It is excusable, in my opinion, to fail to address an argument that resides outside of one’s

A surveys some of the problems associated with Dwyer's proposed education system. Part B offers an alternative, sketching an outline for an educational system that aims toward the student's authentic freedom.

A. Dwyer's Trousered Apes

Dwyer's proposal sucks the marrow out of education.¹⁴⁸ "Education," Maritain notes, "is an art, and an especially difficult one."¹⁴⁹ According to him, the art of the educator is analogous to the art of the medical doctor, because like medicine, education "is *ars cooperativa naturae*, an art of ministering, an art subservient to nature."¹⁵⁰ To teach, we must know whom we are educating or what we are training. In short, we must have an understanding of the child's nature. But this Dwyer lacks. He states, "[i]n my view, any basis for attributing personhood is arbitrary, so the most I can do is show the implications of believing that children are persons rather than objects to be treated as property."¹⁵¹ His lack of commitment to a particular concept of the human person inherently flaws his educational enterprise. In short, he does not know who is being educated, or in the alternative, what is being trained.

Dwyer chooses (arbitrarily, by his own account) to reduce the human person for educational purposes to her "temporal" interests, attempting to divorce the temporal from the spiritual.¹⁵² For example, one issue Dwyer addresses is:

field of vision. The other possibility, which I would find inexcusable, is that he is aware of these arguments and simply did not take them seriously, thinking they were beneath comment.

148. One caveat: *VOUCHERS WITHIN REASON* principally concerns itself with "distribution issues (how education benefits should be distributed)" and not with "curricular issues (the content of a good secular education)." *VOUCHERS*, *supra* note 2, at 63. Therefore, Dwyer does not purport to offer a comprehensive view of the content of liberal education, pointing the reader instead to other books. These include HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* (2000); LEVINSON, *supra* note 116; and MICHAEL PRITCHARD, *REASONABLE CHILDREN* (1996). In both *VOUCHERS WITHIN REASON* and *RELIGIOUS SCHOOLS v. CHILDREN'S RIGHTS*, Dwyer provides enough of his own thought about the content of a good liberal education to allow for a preliminary assessment.

149. MARITAIN, *supra* note 5, at 23 ("Education is an *ethical* art (or rather a practical wisdom in which a determinate art is embodied).").

150. *Id.* at 30.

151. *RELIGIOUS SCHOOLS*, *supra* note 3, at 67.

152. See, e.g., *id.* at 15 (arguing that the state may not even assume that children have spiritual interests).

whether parents' religious views about sexuality should dictate the normative framework in which the empirical issues are discussed, or whether instead assumptions about appropriate levels of physical affections between consenting adults should be determined solely by reference to their temporal interests, such as their educational needs, career opportunities, and physical and psychological health.¹⁵³

He states further that "parents' judgment is particularly suspect when it arises primarily from religious commands, given the disjunction between parents' religious beliefs and children's temporal interests."¹⁵⁴ Unless Dwyer is referring to what most of us would consider improper contact between teacher and student or employer and employee, it is unclear to me how educational needs or career opportunities supply criteria for determining the appropriate level of physical affection. And even though physical and psychological health may supply criteria for judgment, they cannot be divorced from issues of a spiritual nature because the human person is by nature a spiritual creature.

The person cannot be reduced merely to her animal or materialistic nature without destroying what is human in her.¹⁵⁵ She is a spiritual creature endowed with reason, and her answers to the great spiritual questions largely will decide her life's direction:

[A] cursory glance at ancient history shows clearly how in different parts of the world, with their different cultures, there arise at the same time the fundamental questions which pervade human life: *Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life?* These are the questions which we find in the sacred writings of Israel, as also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles, as they do in

153. *Id.* at 24.

154. *Id.* at 86.

155. See, e.g., MARITAIN, *supra* note 5, at 2 ("Man is not merely an animal of nature, like a skylark or a bear. He is also an animal of culture, whose race can subsist only within the development of society and civilization."); Coughlin, *supra* note 118, at 621 ("Art requires the harmonious relationship of every part to the whole. To strike a single word from a poem . . . impairs or even destroys the whole. So too it is with the complex and dynamic unity of spirit and matter, body and soul, that comprises the human person.").

the philosophical writings of Plato and Aristotle. They are questions which have their common source in the quest for meaning which has always compelled the human heart.¹⁵⁶

These are universal questions, cutting across cultures and time. These are spiritual questions. These are the central questions of our lives because in freedom each of us must answer these questions and shape our lives around those answers. Serious and rigorous exploration of these questions is precisely what Dwyer would exclude in his insistence that educators only take into account the students' "temporal (i.e., secular worldly)" interests.¹⁵⁷

In reducing the child to her "temporal well-being," Dwyer and his proposed state actually form a hypothesis about ultimate reality and thereby make their own spiritual/religious commitment. As John Paul II remarks, "*Does life have a meaning?* . . . No one can avoid this questioning, neither the philosopher nor the ordinary person. The answer we give will determine whether or not we think it possible to attain universal and absolute truth; and this is the decisive moment of the search."¹⁵⁸

Dwyer's answer—his religious commitment to ultimate reality—seems to be that the only universal truth is that there is no accessible universal truth; the only meaning, the meaning we make for ourselves.¹⁵⁹ Furthermore, he desires to use the state to impose his insight on the rest of society. From this working hypothesis of ultimate meaning, the state must educate to maximize the child's ability to choose between and among the various private "ways of life and conceptions of the good."¹⁶⁰ The

156. POPE JOHN PAUL II, *ENCYCLICAL LETTER, FIDES ET RATIO* 1 (1998).

157. *E.g.*, RELIGIOUS SCHOOLS, *supra* note 3, at 15. This also demonstrates the impossibility of separating the temporal and spiritual sphere in education because the temporal choices depend on the answers to the spiritual questions.

158. POPE JOHN PAUL II, *supra* note 154, at 26-27.

159. What are the consequences of such a philosophy for education? Maritain, quoting former Yale University president Robert Hutchins, suggests that:

'[t]he crucial error,' he also said, 'is that of holding that nothing is any more important than anything else, that there can be no order of goods and no order in the intellectual realm. There is nothing central and nothing peripheral, nothing primary and nothing secondary, nothing basic and nothing superficial.' In such conditions, 'the course of study goes to pieces because there is nothing to hold it together.'

MARITAIN, *supra* note 5, at 54.

160. VOUCHERS, *supra* note 2, at 95. "But what are the standards for judging the purposes and values thus successively emerging in the pupil's mind?" MARITAIN, *supra* note 5, at 17. Maritain adds:

beauty of Dwyer's proposal is that the student will be trained to think that she is getting a liberal education open to various ways of life when in fact she is being conditioned to accept one meta-narrative as she drinks from the bosom of the relativist.

The power that Dwyer's education establishment will have over its students depends on the fact that students will think they are getting a non-dogmatic education free of religious commitment when in fact they are receiving an education freighted with a dogged commitment to one view—the anti-foundational, non-absolutist view—of the meaning and purpose of life.¹⁶¹ This commitment appears in Dwyer's statement that "[l]iberal education does not rule out any conceptions of the good."¹⁶² And the subtle power of Dwyer's method is that this relativism will not be put into the child's mind as a theory, but as "an assumption, which ten years hence, its origins forgotten and its presence unconscious, will condition him to take one side in a controversy which he has never recognized as a controversy at all."¹⁶³ This is not educating for freedom and autonomy because the child will be conditioned to reject, without rigorous analysis, any conceptions of the good that are universal in nature.

The dangers of this educational system abound. Like the continuously shifting staircases confronting the residents of

If the teacher himself has no general aim, nor final values to which all this process is related; if education itself is to grow 'in whatever direction a novelly emerging future renders most feasible,' . . . then it teaches educational recipes but gets away from any real art of education: for an education which does not have any goal of its own . . . is no more an art than an art of architecture which would not have any idea of what is to be built.

Id. Finally, he notes, "[A] mere unfolding of potentialities without an object [an objective aim] to be grasped, or a mere movement for the sake of movement . . . is sheer nonsense . . . A movement without aim is just running around in circles and getting nowhere." *Id.* at 11.

161. ABOLITION OF MAN, *supra* note 22, at 16.

162. VOUCHERS, *supra* note 2, at 94. Without a commitment to a conception of the good emanating from the child's culture and tradition, where does the teacher get his or her moral authority to teach?

The plastic and suggestible freedom of the child is harmed and led astray if it is not helped and guided. . . . The right of the child to be educated requires that the educator shall have moral authority over him, and this authority is nothing else than the duty of the adult to the freedom [rightly understood] of the youth.

MARITAIN, *supra* note 5, at 33.

163. ABOLITION OF MAN, *supra* note 22, at 16-17.

Hogwarts in the *Harry Potter* series,¹⁶⁴ Dwyer's educational system deprives students of a steady place from which to explore and judge the world around them. The young wizards can embrace the moving staircases with a sense of awe and joy even when peppered with a little healthy fear because they know that solid ground lies at both ends of the staircase. They have a safe reference point from which to enter and explore the unknown. But imagine a Hogwarts in which nothing was stable; the classrooms, staircases, doors, windows, dorm rooms, and dining hall were constantly in motion without rhyme or reason. As the young student's head spins, confusion; paralyzing fear; and ultimately, resignation set in. Depending on temperament, she might lapse into indifference or fight back with unfocused rage. She feels deep alienation from reality because she knows, at the core of her being, that this new world of Hogwarts is not right; but she lacks the intellectual tools and the life experience that would serve as her guide to safer ground. In this hypothetical, the teachers, the very people charged with the task of skillfully developing the student's intellectual tools, have turned the school into a torture chamber for the mind.¹⁶⁵

This mad Hogwarts asylum is exactly what Dwyer proposes. The student will yearn from the depth of her being for some stability, along with meaning and coherence. Her deepest longings elude her when, instead of a hypothesis of meaning drawing from the deep wellsprings of *her* family's culture (be it

164. See generally J. K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 132 (1999).

165. According to Elshtain, Hannah Arendt:

remind[s] us that the legitimate authoritative figure historically—whether parent, teacher, or legislator—was one who was bound by law, by tradition, and by the force of past example and experience. Being bound in particular ways guaranteed a framework for action and helped to create and to sustain particular public spaces—whether the church, polity, or other institutions of social life. Bounded freedom, constituted by authority, is the only way human beings have to guarantee creation of those spaces of public freedom—civil society—Arendt so cherished, spaces within which our action is both nurtured yet constrained.

Jean Bethke Elshtain, *Civil Society, Religion, and the Formation of Citizens*, in *MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY* 263, 269 (Diane Ravitch & Joseph Viteritti eds., 2001) (referring to and quoting HANNAH ARENDT, *WHAT IS AUTHORITY? IN BETWEEN PAST AND FUTURE* 95 (1980)) ("Minus authority, claimed Arendt, we lose a sense of the past and of tradition, as 'the permanence and durability' of the world seems to melt away. This loss is 'tantamount to the loss of the groundwork of the world, which indeed . . . has begun to shift, . . . [until] everything at any moment can become almost anything else.'").

Christian, Muslim, Jewish, Hindu, or Buddhist), she is exposed to multiple forms of meaning and ways of life and told that her task will be to find the one that suits her best.¹⁶⁶ She is told to engage in critical thinking and analysis, but is given no first principles from which to reason. She is told to live out her desires and preferences, but she is given no criteria for judging between conflicting desires, no yardstick to measure when desire should give way to duty. She is told to live an independent life, but she is sent the conflicting message that her autonomy must be tempered by conformity for the sake of her self-esteem.¹⁶⁷

Without a working hypothesis of ultimate meaning—or rather, with a working hypothesis that suggests that there is no meaning—the student will be mired in confusion, alienated from herself and her deep desire for meaning and coherence, and alienated from others by her inability to live an authentic autonomy within the larger community. She will lack criteria adequate for determining when she ought to conform and when she ought to stand her ground.¹⁶⁸ In the end, Dwyer's

166. Thomas Aquinas "warned teachers . . . in front of the steps of the students, 'never to dig a ditch that you fail to fill up.' He knew that to raise clever doubts, to prefer searching to finding, and perpetually to pose problems without ever solving them are the great enemies of education." MARITAIN, *supra* note 5, at 50.

167. Dwyer sees a "connection between moral autonomy and self-respect," but in an odd reversal he says that self-respect depends partly on being "confirmed by others." Self-respect and moral autonomy are "therefore dependent to a substantial degree upon one's social environment; whether we value our own aims turns in large part on what others whose opinion matters to us appreciate, value, and respect." RELIGIOUS SCHOOLS, *supra* note 3, at 172. Furthermore, he says, "[i]t is also important to a person's self-esteem that her plan of life not be scorned by the bulk of the larger society to which she belongs." *Id.* What an odd concept of freedom and autonomy! Moral autonomy is contingent on what others think of us, and freedom consists of slavery to conformity. I do not think the solitary figure standing in front of the tanks in Tiananmen Square in 1989 learned this lesson.

168. See, e.g., ABOLITION OF MAN, *supra* note 22, at 84-85, in which Lewis states:

Either we are rational spirit obliged for ever to obey the absolute values of the Tao, or else we are mere nature to be kneaded and cut into new shapes for the pleasures of masters who must, by hypothesis, have no motive but their own 'natural' impulses. Only the Tao provides a common human law of action which can overarch rulers and ruled alike. A dogmatic belief in objective value is necessary to the very idea of a rule which is not tyranny or an obedience which is not slavery.

See also MARITAIN, *supra* note 5, at 47 ("If a man does not overcome the inner multiplicity of his drives and especially of the diverse currents of knowledge and belief and the diverse vital energies at play in his mind, he will always remain more a slave than a free man."). Guissani concurs:

Life forces us to make judgments and choices; feeling the urgency, the student will judge and choose. But with the loss of a healthy and natural acceptance of

educational system will leave the student confused, alienated, and/or indifferent.¹⁶⁹ Far from enhancing freedom, Dwyer's education will leave the poor student enslaved within a fragmented life straddling two worlds: the world of modernity, with its foundation rooted in the power to reason to truth; and the world of postmodernity, wherein truth, and then reason, loses its force.

Dwyer's educational project also has some practical problems and inconsistencies. I will briefly discuss two of these before moving on in Part V.B to an alternative conception of an education for freedom. First, Dwyer wants to promote "the capacity for independent and informed critical thinking"¹⁷⁰ while rejecting its antitheses, "authoritarian indoctrination"¹⁷¹ and "dogmatic, inflexible modes of thought and expression."¹⁷² At the same time, he wants to eliminate sexism on the theory that "men and women are inherently equal."¹⁷³ He is in a bind. Having said that "any basis for attributing personhood is arbitrary,"¹⁷⁴ he cannot very well assert that equality of the sexes is inherent in personhood except by authoritarian and dogmatic insistence.¹⁷⁵

Second, Dwyer wants to create a school system where children are not "constantly torn between desire and conscience,"¹⁷⁶ contending that "it is certainly important to [children] now to

objective criteria, his judgments and choices will rely on rigid prejudices dictated by instinct, idiosyncrasies, narrow viewpoints, or by criteria that are the result of a skewed and limited experience.

GUISSANI, *supra* note 23, at 61.

169. "[T]rue freedom subsists not in the assertion of individuality alone, but from participation and solidarity with others in a common endeavor. This is the antidote to the alienation, which is a poisonous byproduct of anthropology focused on the radically autonomous individual." Coughlin, *supra* note 118, at 625.

170. RELIGIOUS SCHOOLS, *supra* note 3, at 14-15.

171. VOUCHERS, *supra* note 2, at 184-85.

172. RELIGIOUS SCHOOLS, *supra* note 3, at 14.

173. *Id.* at 130.

174. *Id.* at 67.

175. 7 THE OXFORD ENGLISH DICTIONARY (1989) (2d ed. 1989) defines "inherent" as "belonging to the intrinsic nature of that which is spoken of; indwelling, intrinsic, essential." A theist or a natural law philosopher can argue that men and women are inherently equal because their worldview encompasses universal truths regarding the nature of humanity, but this avenue is not open to Dwyer. THE OXFORD ENGLISH DICTIONARY also defines "inherent" as "vested in or attached to a person . . . as a right or privilege." *Id.* Under this definition, men and women are inherently equal because the state says so, but is not that conclusion subject to the criticism that the state is imposing its dogmatic view of the sexes in an authoritarian manner?

176. RELIGIOUS SCHOOLS, *supra* note 3, at 41.

be able to act on their preferences and desires and to express who they are as five-year olds, ten-year olds, or six-year olds.”¹⁷⁷ This makes no sense and runs exactly counter to two of the true purposes of education, which are to awaken the reasoning capacity in the person, so that it may rule the passions helping the child choose between conflicting desires; and to strengthen character, so as to conform the will to reason.¹⁷⁸ Do we truly want a six-year-old to follow his desire for food into gluttony? Do we want the sixteen-year-old to act on her desire for her boyfriend to the neglect of the baby sibling in her care? What about the twelve-year-old’s slothfulness? In fact, Dwyer does not believe that children should have unfettered freedom to follow their unformed bliss, admitting that “[c]hildren require some governance and discipline for their healthy development.”¹⁷⁹ But having ruled out traditional learning about virtues, morality, and authority, he lacks coherent criteria for assessing how to shape conscience to properly check desire.

Dwyer wants children to accept that men and women are equal as an article of his dogmatic but anti-foundationalist faith. He wants children to be disciplined and governed, but not by the principles of Christianity or natural law. Having denied an intrinsic human nature, Dwyer’s educational system “must set [itself] to work to produce, from outside, a sentiment” that girls and boys are equal; and that following certain desires is inappropriate, while other desires need not be checked.¹⁸⁰ Lewis contrasts the “old” education system that adhered to natural law principles, or what he refers to as the *Tao*, and the “new” education system that rejects these principles:

Where the old initiated, the new merely “conditions.” The old system dealt with its pupils as grown birds deal with young birds when they teach them to fly: the new system deals with them more as the poultry-keeper deals with young birds—making them thus or thus for purposes of which the birds know nothing. In a word, the old was a kind of propagation . . . the new is merely propaganda.¹⁸¹

177. *Id.* at 20.

178. *Accord*, MARITAIN, *supra* note 5, at 11 (“Thus the prime goal of education is the conquest of internal and spiritual freedom to be achieved by the individual person, or, in other words, his liberation through knowledge and wisdom, good will, and love.”).

179. RELIGIOUS SCHOOLS, *supra* note 3, at 64.

180. ABOLITION OF MAN, *supra* note 22, at 32.

181. *Id.* at 32-33.

The burden for Dwyer is to show why we should not be sexist when he has ruled off-limits the only objective criteria for reaching that conclusion. Likewise, he has the burden of showing why a teenage girl whose conception of the good is immediately gratifying her desire for her boyfriend should check that passion in deference to her duty to babysit her younger sibling, a duty her self-centered authoritarian parents imposed against her will.¹⁸²

Finally, Dwyer's own criteria condemn his educational enterprise. In attacking religious schools, he says that "[s]chools that deny their students access to a substantial body of information, such as standard views on scientific, sociological, and historical matters, or that distort those views seriously handicap students."¹⁸³ An educational system like his, which attempts to address only the "temporal" needs of its students, denies the irrefutable psychological, sociological, historical, and anthropological fact that children have spiritual natures. And to present all subjects from a purely secular standpoint must distort the teaching of history and culture, "seriously handicapping students."¹⁸⁴

For better or worse, the story of western civilization is intimately tied to the story of Christ and the spread of Christianity. Much of our art, literature, and music is inaccessible without an attempt to understand Christianity. If we study Michelangelo's paintings in the Sistine Chapel, the great cathedrals of Europe, Handel's "Messiah," da Vinci's "Last Supper," and Sienkiewicz's "Quo Vadis" solely from a non-spiritual temporal perspective, they become incoherent. In fact, from a solely temporal perspective, the architects, builders, and artisans who built the great cathedrals of Europe appear to be madmen. Within this perspective, it would seem lunacy for someone to devote his whole life to one building that would not even be complete until centuries after he had exited the scene. Is this temporal perspective correct? Were these men, in fact,

182. Lewis examines this question from the point of someone who is being asked to potentially sacrifice his life for others. "But on what ground are some men being asked to die for the benefit of others?" *Id.* at 42. "Even if it were true that men had a spontaneous, unreflective impulse to sacrifice their own lives for the preservation of their fellows, it remains a quite separate question whether this is an impulse they should control or one they should indulge. . . . Our instincts are at war," and outside of the Tao (traditional learning) we have no criteria for choosing between instincts. *Id.* at 47-48.

183. RELIGIOUS SCHOOLS, *supra* note 3, at 170.

184. *Id.*

mad? Or could it be that the temporal perspective is off-target, or at least incomplete?

If we transcend the temporal to embrace the spiritual nature of these historical actors and take their Christian commitments seriously, a whole different light casts itself on the subject. In studying our history, the Mayflower voyage, Lincoln's Second Inaugural, and Martin Luther King Jr.'s life cannot be understood fully from a purely temporal, secular perspective.¹⁸⁵ As George Weigel so ably demonstrates, we miss much in analyzing the downfall of communism if we focus only on the geo-political and economic factors to the exclusion of the spiritual.¹⁸⁶ By excluding a serious exploration of the spiritual and the theological in these areas and others, Dwyer's education fails by its own criteria.

185. Maritain puts it this way:

[T]heological problems and controversies have permeated the whole development of Western culture and civilization, and are still at work in its depths, in such a way that the one who would ignore them would be fundamentally unable to grasp his own time and the meaning of its internal conflicts. Thus impaired, he would be like a barbarous and disarmed child walking amidst the queer and incomprehensible . . . ruins, and buildings still under construction, of the old park of civilizations. The intellectual and political history of the sixteenth, seventeenth and eighteenth centuries . . . and the further events in world history have their starting point in the great disputes on nature and grace of our classical age. Neither Dante nor Cervantes nor . . . even Oscar Wilde . . . nor Nietzsche nor even Karl Marx . . . is actually understandable without a serious theological background.

MARITAIN, *supra* note 5, at 73-74. See also, e.g., HAROLD BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 44 (1983) ("[L]egal systems began to be constructed in the West in the late eleventh and twelfth centuries, and . . . some of the basic characteristics of those legal systems have survived . . . [T]he first modern Western legal system was the canon law of the Roman Catholic Church."); PHILIP JENKINS, *THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY* 1 (2002) ("Before too long, the turn-of-the-millennium neglect of religious factors may come to be seen as comically myopic.").

186. Weigel states:

The human rights resistance that had swept away the communist system posed a fundamental challenge to those who read a secular trajectory in Europe's civilizational history. The events they had all just lived through had demonstrated the exact opposite of the secularist claim: *religion and the Church have shown themselves to be among the most effective means to liberate man from a system of total subjugation.*

GEORGE WEIGEL, *WITNESS TO HOPE: THE BIOGRAPHY OF POPE JOHN PAUL II* 646 (2001).

B. *A Realistic Education for Freedom*

To educate, we must know who we are educating. In other words, we must have an answer or at least a working hypothesis to the question “What is the human person?” This is not a question looking toward an idle abstraction; it is one that demands a radical and concrete engagement with reality. Awakening what is human in us lies at the heart of education.¹⁸⁷

To educate toward the goal of autonomy, we must know what or who it is that we seek to set free. Getting this wrong can be deadly! Suppose, for example, that Mr. Dryland was recently placed in charge of caring for fish living in a salt-water tank. He does not know much about fish, but he watches them day after day with a sense of awe and wonder. He thinks he has grown to love them and begins to mourn their life in what he perceives as a wretched prison. He ponders whether they might be happier in a fresh-water tank or perhaps no tank at all. This idea grows on him, and he becomes obsessed with the idea of freeing them from the confines of their salty existence. From our vantage point, we can see that Mr. Dryland had an abstract understanding of freedom utterly divorced from reality. He had an inadequate understanding of what it meant to be a fish, which resulted in deadly recipe for freedom.

Freedom for the human person is no different! If the human person has a transcendent destiny, then authentic freedom lies in loosening all the bonds that hold us back and inhibit our journey toward that Infinite and Personal Other.¹⁸⁸ If this is reality, then a freedom from the spiritual and a freedom for the purely material/temporal, as Dwyer proposes, is deadly, cutting us off from our Destiny.¹⁸⁹ The Fundamentalist and Catholic

187. MARITAIN, *supra* note 5, at 9.

188. Accord Hasson, *supra* note 118 (“[A]ccording to the [traditional] anthropology, human beings come with a built-in thirst for the transcendent and a built-in desire to live in community. They therefore require freedom to do two things: first, to search with authenticity for the transcendent; and second, to express in the full measure of their humanity—in the arts, in public worship, and in political discourse—what it is they believe they’ve found.”).

189. Notice that the converse is not true. Dwyer might argue that if there is no transcendent destiny toward which our freedom ought to be ordered, then he is right and education in freedom demands helping the child determine her own self-chosen ends. But if we are merely material/temporal beings with no supernatural origin, purpose, or destination, then the very notion of freedom is arbitrary and illusive. It is illusive because we are utterly dependent: none of us chose to come into the world; much of the world’s population lives in poverty; even those of us in the wealthier countries cannot even control the stock market; and finally, death will greet us all one

schools that Dwyer would like to silence make just such a proposal; our Destiny in this life and the life after, they propose, lies in a radical relationship with an Infinite Other, which they call the Triune God. Those holding this Christian worldview would look at Dwyer as the fish would look at Mr. Dryland. To them, Dwyer is someone with a deadly misperception of reality whose misguided compassion seeks to remove the human from its life-sustaining environment.¹⁹⁰

Three quarters of a century ago, the Supreme Court acknowledged the right of parents in a pluralistic society to educate their children within their religious traditions.¹⁹¹ And

day. It is arbitrary because if there is no inherent dignity in the fact of our humanity, freedom for Individual A might be having a stable of slaves to make his life more comfortable; for Individual B, in the safety and security of his master's house where he is sheltered and fed; and for Individual C, in risking life and limb to escape the bonds that B so relishes. Without access to objective Truth, Power decides which conception of freedom holds sway at a given time and place, and it is the job of the Education Ministry to train people to view freedom from Power's perspective. In an elite-dominated society, A's concept of freedom might prevail; in a communist system, B's might prevail; and in a society controlled by liberal egalitarians, C's vision prevails. Having thrown out objective Truth, there exists no morally correct answer:

Totalitarianism arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people. Their self-interest as a class, group or nation would inevitably set them in opposition to one another. If one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others

POPE JOHN PAUL II, *VERITATIS SPLENDOR* para. 99 (1993), available at <http://www.newadvent.org/docs/jp02vs.htm> (last visited Nov. 11, 2002). See also RORTY, *supra* note 77, at 53 (noting that without truth, we must give up "the idea that liberalism" is objectively morally superior to Nazism or Marxism).

190. Advocates of Christian schooling will also demonstrate that Dwyer's educational methods are a radical departure from human tradition. Dwyer's companion in educational vision, Meira Levinson, suggests that the philosophical movement giving rise to this vision is between 30 and 150 years old. LEVINSON, *supra* note 116, at 6. In his inaugural lecture from the Chair of Medieval and Renaissance English Literature at Cambridge in 1954, C.S. Lewis viewed this transition, which involves the un-christening of the West, as the most profound cultural shift in history, even more so than the christening of the West. He noted, "Christians and Pagans had much more in common with each other than either has with the post-Christian. The gap between those who worship different gods is not so wide as that between those who worship and those who do not." C.S. LEWIS, *DE DESCRIPTIONE TEMPORUM* 7 (1955). Lewis continues, "[a] post-Christian man is not a Pagan; you might as well say that a married woman recovers her virginity by divorce. The post-Christian is cut off from the Christian past and therefore doubly cut off from the Pagan past." *Id.* at 15. Both the Pagan and the Christian worlds are marked by an openness to the transcendent nature and destiny of the human person, a concept foreign to Dwyer, and this will make all the difference to one's concept of education and freedom.

191. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

this past term, the Court concluded that the Establishment Clause is not an impediment to the state's sharing of the monetary burden of such an education.¹⁹² I reject Dwyer's vision of a sanitized religious education for the reasons enumerated in Part A of this section. In this section, I briefly explore an alternative vision and invite all who are serious about private religious education to seriously consider it as they also contemplate the future of religious education in the wake of *Zelman*.

I will explore this vision within the context of Christian schools because those schools were the objects of Dwyer's scorn, the vast majority of religiously affiliated private schools in the United States are Christian, and a majority of Americans identify themselves as Christian. But this proposal would apply equally as well for those within the Jewish, Muslim, Hindu, Buddhist, Platonic, or Aristotelean traditions. All of these traditions, unlike Dwyer's, propose to the student a transcendent answer to the great question, "Who am I?" They all have a firm starting place from which the child can explore and judge the myriad of moving staircases around him. Finally, the best education within these great traditions will prepare the child, ultimately in freedom, to turn around and judge the validity of her starting point: her own tradition.

Guissani says that "*to educate means to help the human soul enter into the totality of the real.*"¹⁹³ For adolescents who are in the "age of verification," Guissani proposes the following educational method:

- the correct setting up of a *hypothesis* of a total meaning of reality (we call this the offer of "tradition"), as the only condition of giving *certainty* to the teenager
- the presence of a clear and real *authority*, a person as the "location" of the hypothesis, as the sole condition of *coherence* in the educational process
- stimulating the adolescent to personally commit to the

192. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

193. GUSSANI, *supra* note 23, at 105. "The mental atmosphere for adolescence should be one of truth to be embraced. Truth is the inspiring force needed in the education of the youth . . . all-pervading truth. . . . Here we are confronted with a natural and instinctive impulse toward some all-embracing truth, which must be shaped little by little to critical self-reflection." MARITAIN, *supra* note 5, at 62.

verification of the hypothesis in his own life, as the sole condition for true *conviction*

- the acceptance of a gradual, balanced *risk* as the adolescent independently tests and weighs this hypothesis against reality, as the sole condition for the coming of age of his *freedom*.¹⁹⁴

Tradition, or a working hypothesis of reality, provides stability and the initial certainty that allows the student to explore the universe from a secure base. It is stillness in the face of moving staircases. "Unless young people are taught about the past and tradition," Guissani argues, "they will grow up either unbalanced or skeptical. If young people have nothing to guide them in choosing one theory, one 'working hypothesis,' over another, they will either invent skewed ones or embrace skepticism."¹⁹⁵ Guissani illustrates:

[t]he student is like a child who finds a large clock in a room. Smart and curious, he picks up the clock and slowly takes it apart. In the end, he has fifty or one hundred pieces before him. He was really clever, but now he feels lost and begins to cry, for the clock is all there, but it's no longer there: he lacks a unifying idea that would allow him to put it back together again.¹⁹⁶

From tradition, though, the child will be educated "to embrace a single criterion, which the student can then compare with other views with a sincere, open attitude. The student can be genuinely open and truly sympathetic to difference only if he feels, even unconsciously, a sense of total security."¹⁹⁷ Within this tradition, the student can begin to ask, "[i]f the criterion you are offering me is true, then why and to what extent do other ideologies reject it? If the attitude you are suggesting is the

194. GUISSANI, *supra* note 23, at 84. "Without these factors—*tradition*, a hypothesis of meaning; a *life experience* that offers the reasons for this hypothesis; and *criticism*—young people will be like fragmented leaves separated from a tree . . . They will be victims of the strongest wind and its ever-changing shape, a public opinion shaped by the élites who hold real power." *Id.* at 11.

195. *Id.* at 8.

196. *Id.* at 58-59.

197. *Id.* at 62. "[A] premature confrontation with conflicting fundamental ideas on how to interpret life," however, "will disorient rather than direct the student." *Id.* at 60. See also MARITAIN, *supra* note 5, at 45 ("[T]he whole work of education and teaching must tend to unify, not to spread out; it must strive to foster internal unity in man:").

correct one, then how and why do others behave differently?”¹⁹⁸ Guissani asserts that “[t]hese questions would be lost in the mind of the skeptic or cut short by the mind of the fanatic, [but in] the mind of those who are taught that there are solutions to these types of questions, they become the beginning of a passionate and attentive quest for answers.”¹⁹⁹ This leads us into the process of verification, but first we must look at the need for authority—an authoritative voice to be contrasted with an authoritarian voice.

According to Guissani, the teacher—the master—comes to the student as the living embodiment of the hypothesis:²⁰⁰ “To educate means to suggest a proposal, but the proposal must be in response to a lived question. . . . Unless the issue is lived and felt by the educator, the response being offered will be a sham.”²⁰¹ In the end, “to educate is to communicate one’s self, to communicate one’s way of approaching reality, for a person is a living mode of *relating to reality*.”²⁰² This cannot be an abstraction, but must be a lived encounter with reality, providing coherence emanating from the teacher’s life.

In adolescence, the master must urge the student to take responsibility for his own education and to be “stimulated to *personally confront his own origin*.”²⁰³ A true education that desires

198. GUSSANI, *supra* note 23, at 62.

199. *Id.* at 62.

200. *Id.* at 64-65.

201. *Id.* at 108.

202. *Id.* at 111. Guissani addresses specifically Dwyer’s type of school:

In an agnostic or neutral school, the fact that the teacher no longer offers meaning strips him of his quality of being master and turns the pupil into his own master, leaving him to codify all provisional impressions and reactions. He will do so with the presumptiveness, impertinence, and iron-clad prejudices that so often cloud the open, frank attitude proper to youth. Sometimes, when the absurdity and impossibility of such a system becomes obvious, the solution is to expose the student to the widest possible range of conflicting authorities in the belief that he will spontaneously and maturely select what is best. I believe this is the “dis-educational” method *par excellence*.

Id. at 66-67.

203. GUSSANI, *supra* note 23, at 67-73. Adds Maritain:

No doubt the child’s “open mind” is still unarmed, and unable to judge “according to the worth of the evidence”; the child must believe his teacher. But from the very start the teacher must respect the dignity of the mind, must appeal to the child’s power of understanding, and conceive of his own effort as preparing a human mind to think for itself.

MARITAIN, *supra* note 5, at 26.

“to present a complete worldview” will “want to teach students the habit of comparing their positions not only with those of others but especially with the tradition they have received.”²⁰⁴ This requires attentiveness; patience; and ultimately, love of life and love of learning.²⁰⁵ “True education,” Guissani says,

must be an *education in criticism*. . . . [T]hose who love the child instinctively offer him, and fill his knapsack with, the best of their experiences, the best choices they made in their lives. There comes a point, however, when nature gives the child the instinct to take this knapsack and look at it. . . . What one has been told must become a *problem*! Unless this happens, it will either be irrationally rejected or irrationally kept but will never mature. . . . The young student will now explore the contents of his knapsack, critically comparing what’s inside of it—his received tradition—with the longings of his heart. The final standard of judgment must be found inside of us, for otherwise we are alienated. The ultimate, inner standard of judgment is identical for all of us: it is the need for the true, the beautiful, and the good.²⁰⁶

This leads us to the risk of education. Education is a risk because the “purpose of education is to fashion a new human being.”²⁰⁷ Will my child reject my way of life or embrace it within his own unique circumstances? Will I lose him to another worldview? I love him so and only want what is good. If I am honest, I also probably have some ego and pride invested in this educational enterprise. This is the moment of crisis for the educator. If I shelter him from all that may harm him in the larger environment, what have I accomplished? “What we want,” explains Guissani, “is to free the young generation from mental slavery and from the tendency to conform, which mentally enslaves them to the forces in society.”²⁰⁸ If I do not take the “risk” of educating for freedom, he may be safe from others in the broader society, but he will be enslaved to my worldview.

Therefore, “[t]he teenager must be guided gradually as he matures toward a personal and independent encounter with the

204. GUISSANI, *supra* note 23, at 68.

205. *Id.* at 69.

206. *Id.* at 9 (“Once the child has this knapsack in his hands, he rummages around inside, examining its contents. In Greek, this action is called *krinein*, *krisis*, from which the words ‘critique,’ ‘criticism’ are derived. Therefore ‘to criticize’ . . . does not necessarily have a negative meaning.”).

207. *Id.* at 80.

208. *Id.* at 11.

reality that surrounds him. . . . It is here that he develops his *freedom*.”²⁰⁹ Guissani reminds the teacher (including the parent) that he “must entrust to God, to the mystery of Being, . . . must entrust to him alone the ever wider spaces that the surprising paths of the pupil’s freedom open up in his dialogue with the universe.”²¹⁰ In the end, a true education for freedom requires a working hypothesis of meaning, a loving teacher who embodies that hypothesis, verification by the student at the proper age, and willingness on the part of the educator to take the risk for his pupil’s freedom.

Dwyer finds disturbing what he sees as the rigidity and closed-mindedness of Fundamentalist and Catholic schools. And although his data set appears extremely flawed, I suspect that he has caught at least a kernel of truth with respect to some Fundamentalist and Catholic schools. Fear that children might reject the faith or succumb to the allure of the secular culture might cause some of these schools to indoctrinate rather than educate, harming the child’s dignity and freedom in the process. Guissani sees the same problem: “Here, the situation of many educators, both in families and in schools, is painfully clear; their ideal is to risk nothing.”²¹¹ This fear, like the distorted “love” of an overbearing parent, might keep the child within the fold, but with a greatly diminished capacity to embrace her destiny, which the Christian views as communion with God, who is Love.²¹² There is no need to fear. As Guissani notes:

By their very nature, Christianity and Christian faith are ecumenical. Because it professes to be the truth, Christian faith is not only not afraid of being tested but it also extracts from every event what is true. . . . On the one hand, those who realize that they do not possess truth but only a debatable, arguable image of it will necessarily be defensive about their

209. GUSSANI, *supra* note 23, at 81.

210. *Id.* at 82.

211. *Id.*

212. “An education based on the view that the person has total ‘autonomy’ will leave the teenager at the mercy of his likes and dislikes, his instincts, deprived of any standard of development.” *Id.* This is the problem with Dwyer’s educational method. “But an education dominated by the fear of confrontation with the world and which aims only at avoiding a collision with it will either create a person incapable of affirming his personality in relationship with the real or a rebellious and potentially unbalanced person.” *Id.* This is one problem that Dwyer perceives as present in Fundamentalist and Catholic educational circles. Guissani, Maritain, and Lewis offer adequate solutions to both problems; Dwyer does not.

beliefs and at best tolerate everything else. We, on the other hand, [should be] used to looking for whatever sliver of goodness there is in *each and every thing*.²¹³

VI. CONCLUSION

There is truth and goodness in Dwyer's desire for an education in freedom. There is also some truth, I am sure, in his observation that some Christian schools are not delivering a full education in freedom. Echoing the words that have shaped John Paul II's pontificate, I would urge Christian parents and schools to embrace what is true in Dwyer's argument and to "be not afraid"²¹⁴ as they educate their young. If you love Truth more than your own beliefs about what is True, if you believe based on human experience that Christianity is reasonable, if you believe further that Christianity is True, if you believe in the dignity and freedom of the human person, then take the risk to educate your children rigorously within your tradition and educate them for freedom, so that in freedom they can either reject or accept the Tradition into which they were born. Hopefully, they will accept the Tradition as True and appropriate it for their own lives as they began to live as adults in true freedom.²¹⁵

213. *Id.* at 26.

214. See, e.g., POPE JOHN PAUL II, CROSSING THE THRESHOLD OF HOPE 4 (1994).

215. For a recent insightful article on the nature of freedom, see George Weigel, *A Better Concept of Freedom*, FIRST THINGS, Mar. 2002, at 14.

IF HAMILTON COULD SEE THEM NOW

FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE.
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I. INTRODUCTION

When I was a new associate at Kirkland & Ellis, Kenneth W. Starr introduced me to the United States Supreme Court by putting me on one of his cases and graciously permitting me to sit at counsel table while he argued (and won) the case in the Supreme Court. That is, of course, exactly what happened: I sat, making sure my mouth was not actually hanging open at the awe-inspiring sight of the Supreme Court in session, while Starr handled the arguing and winning. Now that Starr has written down his reflections on the Court for all to read,¹ you can receive the same edification without worrying about the position of your jaw.

That is, in fact, one of the purposes of Starr's book: to bring the Supreme Court home to people who are interested in the Court's work but have not had the opportunity to study the Court up close. The book, which moves along at a crisp, readable pace, is divided into three parts. The first describes the Court's history and the current justices. The second walks through the Court's cases that have had the greatest impact on our daily lives over the past thirty years: free speech, religion, privacy, civil rights, and (to a lesser extent for most of us) criminal justice cases. After showing how the Court has time and again resolved vital issues regarding everyday life, Starr argues in the third part of his book that the Supreme Court has become "first among equals," the most powerful of the three putatively co-equal branches of our national government. For those of us who resist the latter conclusion, Starr concludes with a discussion of *Bush v. Gore*² that makes the point hard to deny.

Starr's book is well worth reading because it provides an accurate assessment of the current justices and the forces that have shaped their decisionmaking. Starr critiques the Court's leading cases from a right-of-center approach that is not only enlightening, but also helps to show where and how the Court has sometimes jumped the track. In addition, Starr's thesis—that the Burger and Rehnquist Courts have largely stayed the course

1. KENNETH W. STARR, *FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE* (2002).

2. 531 U.S. 98 (2000).

laid down by the Warren Court, and thereby established the judiciary as the most powerful branch of our federal government—is too important to ignore.

Before elaborating on these matters, however, it is worth pointing out that Starr's book is worth reading not only because of its subject matter, but because of who wrote it. While Starr is best known of late for serving his country as an independent counsel investigating President Clinton's misdeeds, his Supreme Court background is impressive. As a private practitioner; government lawyer; D.C. Circuit judge; and above all else, Solicitor General, Starr has studied the Court extensively over the past quarter century. He has argued a number of vitally important cases before the Court, on issues such as religious liberty³ and flag burning;⁴ and he sat with Justices Scalia and Ginsburg on the D.C. Circuit, which has (deservedly) been dubbed the "second highest court in the land."⁵ Starr is eminently qualified to write this book, and he has written it well.

II. THE SUPREME COURT IN EVERYDAY LIFE

Happily, Starr leaves the bulk of the Court's business—such as government contracts, corporate tax, and civil procedure cases—to the treatise writers. He focuses instead on the Court's most controversial decisions, those that affect everyday life. And he gets his points across, whether describing the Warren Court's "almost missionary zeal to reshape society,"⁶ the "unspeakably unacceptable *Roe v. Wade*,"⁷ or the Burger Court's penchant for "wandering about directionless" in affirmative action cases.⁸

Starr views the Burger and Rehnquist Courts' constitutional law decisions as motivated by sweeping principles, such as equality among speakers and races, neutrality among religious viewpoints, respect for tradition on culturally sensitive matters, and reluctance to depart from precedent when the public's attention is engaged.⁹ To Starr, it is at once a principled and

3. *E.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

4. *E.g.*, *United States v. Eichman*, 496 U.S. 310 (1990).

5. *See, e.g.*, Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1550 (1993); Garry Sturgess, *Fighting for Second*, LEGAL TIMES, July 8, 1991, at 7 (quoting President George H.W. Bush).

6. STARR, *supra* note 1, at xix.

7. *Id.* at 21 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)).

8. *Id.* at 153-54.

9. *See id.* at xxvii-xxviii, 69, 118-19, 205-06.

political Court. The Court is principled because it is comprised of “methodical, lawyerly” justices¹⁰ who genuinely strive to articulate and follow legal doctrines, such as those stating that government must not discriminate among races (even when the discrimination at issue is “reversed” in favor of minority groups),¹¹ or among speakers (even when the speakers are religious organizations seeking access to public fora).¹²

But the Court is also political because a small number of centrist Justices, who seemingly have an eye squarely on their places in history, ultimately dictate its most controversial decisions. Because some Justices generally can be counted on to support conservative or liberal positions, the middle of the Court wields tremendous power. Starr views Justice Powell, “the gentlemanly apostle of moderation,” as the principal culprit on the Burger Court: “The outside world could have a siren song on a justice especially sensitive to his place in history, and Justice Powell was very mindful of history.”¹³ On the current Court, he views Justices O’Connor and Kennedy as the “philosophical progeny of Justice Powell,”¹⁴ especially in light of their decision not to overrule *Roe v. Wade* in *Planned Parenthood v. Casey*,¹⁵ which he describes as pure “judicial statecraft” and “not constitutional analysis.”¹⁶

The irony is hard to miss. Starr recounts his longstanding opposition to the innocuously named Ethics in Government Act,¹⁷ which authorizes the appointment of special prosecutors outside of the Executive Branch to investigate and if necessary prosecute sitting Presidents and other high-ranking officials of the Executive Branch.¹⁸ As Starr sees it, this is without question an unconstitutional intrusion on the fundamental Executive Branch prerogative to enforce the laws.¹⁹ But the Supreme Court

10. *Id.* at 130.

11. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

12. *See, e.g.,* *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

13. STARR, *supra* note 1, at 189.

14. *Id.*

15. 505 U.S. 833 (1992).

16. STARR, *supra* note 1, at 135.

17. 28 U.S.C. §§ 49, 591 *et seq.* (Supp. V 1982).

18. *See* *Morrison v. Olson*, 487 U.S. 654, 660 (1988) (describing the Act and holding that it does not violate the Constitution).

19. STARR, *supra* note 1, at 259-60.

upheld the statute in 1988 under an amorphous balancing test;²⁰ and when Starr was asked to act as a special prosecutor six years later,²¹ he accepted the responsibility and took a savage beating in the popular press.²² In the meantime, the Court's approval of the statute had enabled it to avoid precisely such criticism. (At the time of the Supreme Court's decision, the media was focused on Lawrence Walsh's Iran-Contra investigation, and would have been outraged by the demise of the Act.²³) Starr is far too gracious to draw this connection himself. But the fact is that if Justice Scalia's principled dissent had carried the day,²⁴ the Court (not Starr) would have drawn the media's ire, and the country would have avoided what ultimately proved to be a protracted series of contentious and divisive investigations into Republican and Democratic administrations alike.

This is not to say, however, that the Court lacks backbone. As Starr stresses, the most surprising (and to me, impressive) aspect of the Supreme Court's decision in *Bush v. Gore*,²⁵ which effectively decided the presidential election in 2000, is that the Court even agreed to hear the case.²⁶ The Supreme Court hand-selects virtually all of the cases that come before it, and recently has reviewed as few as 76 of the more than 6,000 cases that are presented to it every year.²⁷ Thus, the Court easily could have

20. See *Morrison*, 487 U.S. at 695 ("[W]e do not think that the Act . . . 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally defined functions.'" (quoting *Nixon v. Admin. of Gen. Servs.*, 443 U.S. 425, 443 (1977))).

21. See Susan Page et al., *Judges Name a New Prober*, *NEWSDAY* (N.Y.), Aug. 6, 1994, at A8.

22. See, e.g., Richard Cohen, *Trail of Lies*, *WASH. POST*, Dec. 1, 1998, at A25; Maureen Dowd, *Ken Starr, Begone*, *N.Y. TIMES*, Feb. 10, 1999, at A25; Jamie Stiehm, *Lessons from The Scarlet Letter*, *BALT. SUN*, Jan. 7, 1999, at 13A.

23. See, e.g., William F. Lauber, *Scrap the Independent-Counsel Law*, *ST. LOUIS POST-DISPATCH*, Aug. 18, 1992, at 3B (noting the media's focus on Walsh's indictments and continued enthusiasm for unearthing the next Watergate); Diana Simmonds, *Scandals in the Wind*, *WKEND. AUSTRALIAN*, Aug. 7, 1999, at R14 (reviewing BOB WOODWARD, *SHADOW: FIVE PRESIDENTS AND THE LEGACY OF WATERGATE* (1999)) (quoting Woodward as noting that after Watergate, the media resolved to "dig deep and incessantly" with regard to special prosecutors' investigations).

24. See *id.* at 733-34 (Scalia, J., dissenting) ("[W]e conclude that the power taken away from the President here is not really *too much*. . . . [T]he text of our Constitution seems to require [that] all purely executive power must be under the control of the President.").

25. 531 U.S. 98 (2000).

26. STARR, *supra* note 1, at 264-65.

27. See Margeret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 *WASH. & LEE L. REV.* 737, 740 (2001) (noting that the seventy-six cases reviewed in 1999 represented a low for the last half-century).

denied review of the Florida Supreme Court's decision. Instead, it stepped up to the plate, reversed the Florida Supreme Court's attempt to rewrite Florida election law in order to hand the election to Al Gore,²⁸ and took a heavy beating from many in the media.²⁹

To Starr, however, the question is not one of heroism or blame but of understanding the current Court and its role in American life. In his view, the post-Warren Court "has become increasingly dedicated to stability and moderation."³⁰ Thus, it is inclined to adhere to even the most indefensible Warren Court precedents, especially when public attention is engaged, but to refrain from making significant expansions on them. The result is that there is now a constitutional right to abort a fetus³¹ but not to take one's own life with the assistance of a physician;³² to use a condom³³ but not to engage in consensual sodomy.³⁴ To Starr, this is all perfectly logical when one recognizes that the Burger and Rehnquist Courts have followed a policy of "moderation, not counterrevolution against the Warren Court."³⁵ Starr points out that even *Bush v. Gore* fits this paradigm of moderation, because there the Supreme Court reversed the Florida Supreme Court's efforts to reach out to decide a popular election in a patently unlawful manner ("absurd," in Chief Justice Rehnquist's words³⁶) that one cannot help but compare

28. See, e.g., *Gore v. Harris*, 772 So. 2d 1243, 1262-68 (Fla. 2000) (Wells, C.J., dissenting) (cataloguing politely the Florida Supreme Court majority's "extraordinary" departures from Florida election law), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

29. See, e.g., Sheryl McCarthy, *Five Grinches Stealing the Spirit of Justice This Time*, *NEWSDAY* (N.Y.), Dec. 11, 2000, at A30; *Rivera Live* (CNBC television broadcast, June 25, 2001); *CBS Evening News* (CBS television broadcast, Dec. 13, 2000).

30. STARR, *supra* note 1, at xvi.

31. *Roe v. Wade*, 410 U.S. 113 (1973).

32. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("[O]ur decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause.").

33. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a Connecticut law banning married couples from using contraceptives "cannot stand in light of the familiar principle . . . that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964))).

34. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' is, at best, facetious.").

35. STARR, *supra* note 1, at 185.

36. *Bush v. Gore*, 531 U.S. 98, 119 (2000) (Rehnquist, C.J., concurring).

to the Warren Court's excesses.³⁷ It was as though the current Court had the opportunity to nip a Warren Court opinion in the bud, and did so. The gross excesses of the past remain, but that is no reason to tolerate new ones.

III. FIRST AMONG EQUALS

Nonetheless, the fact that the U.S. Supreme Court effectively decided the election brings us to by far the most disturbing part of Starr's book—his thesis that the Supreme Court has become “first among equals, the branch of government with the authoritative role in vital issues that deeply affect American life.”³⁸ Starr even calls this “the modern Court's most abiding characteristic.”³⁹

The mere fact that this claim can be made with a straight face shows how much the Court's role in our government has changed. Alexander Hamilton thought the judiciary would be “the *least* dangerous” branch, “*beyond comparison* the weakest of the three departments of power,” in part because it lacks a police force or army to carry out its orders.⁴⁰ Andrew Jackson apparently mistook Hamilton's observation for admonition when, as President, he reportedly reacted to a Supreme Court decision intended to protect the Cherokee Indian tribe by saying that the Chief Justice “has rendered his decision, now let him enforce it.”⁴¹ Not long thereafter, the Cherokees found themselves on the Trail of Tears.⁴²

Now, of course, such a response is unthinkable. When the Supreme Court created a constitutional right to abortion, the States complied.⁴³ When the Supreme Court ordered Richard Nixon to produce tapes of internal White House communications,⁴⁴ he complied.⁴⁵ When the Supreme Court

37. STARR, *supra* note 1, at 268, 277-78.

38. STARR, *supra* note 1, at xxviii.

39. *Id.* at xvi.

40. THE FEDERALIST NO. 78, at 393-94 (Bantam ed. 1982) (Alexander Hamilton) (emphasis added).

41. Ordinance 59 Ass'n v. Babbitt, 970 F. Supp. 914, 924 n.3 (D. Wyo. 1997) (quoting ALVIN M. JOSEPHY, JR., 500 NATIONS 327-29 (1994)). There is a scholarly debate on whether Jackson really made this statement. As a mere lawyer, I take no position on that question.

42. *See id.*

43. *Roe* overturned laws against abortion that existed in forty-eight states. ANN COULTER, SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT 200-01 (2002).

44. *See* United States v. Nixon, 418 U.S. 683 (1974).

effectively declared George Bush the winner of the presidential election, Al Gore and the country complied.⁴⁶

The Court's willingness to place itself front and center in American life shows no signs of abating. As Starr stresses, "one thing that may not be said about the Court today is that it has abandoned its central role in American life, which was established so firmly by the Court under Earl Warren."⁴⁷ Instead, "the Court today still aggressively chooses to assert power over virtually the same range of subjects as the Warren Court. It remains very much in business in the most divisive areas of our national life."⁴⁸ Thus, in the past year alone, the Supreme Court has determined the validity of a Cleveland school voucher program,⁴⁹ a congressional prohibition of "virtual" child pornography on the Internet,⁵⁰ and drug testing in local schools.⁵¹ Over the past decade, the Court has struck down numerous federal statutes on the grounds that they exceed Congress' authority under the Commerce Clause,⁵² violate the free speech guarantees of the First Amendment,⁵³ or run afoul of the federalist principles underlying the Tenth and Eleventh Amendments.⁵⁴ Congress has become so resigned to aggressive judicial oversight that when it enacts important social or political

45. Bob Woodward, *Justices and Presidents*, WASH. POST, Nov. 25, 2000, at A19 (noting that after the Court's decision, "Nixon soon complied and began turning over the tapes . . .").

46. Gore conceded the election the day after the Supreme Court's decision. Mark Sherman & Ken Herman, *"Together, We Can Unite": Bush, in Victory, Vows to Guide Nation to Common Ground*, ATLANTA J. & CONST., Dec. 14, 2000, at 1A.

47. STARR, *supra* note 1, at xvi.

48. *Id.*

49. *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002).

50. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002).

51. *Bd. of Educ. v. Earls*, 122 S. Ct. 2559 (2002).

52. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (declaring that Congress lacked the authority to implement a statutory remedy for victims of gender-instigated violence); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990).

53. *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (holding, on free speech grounds, that a public school unconstitutionally discriminated against a religiously-oriented club); *Republican Party v. White*, 122 S. Ct. 2528 (2002) (holding unconstitutional Minnesota's canon of judicial conduct, which denied candidates in judicial elections the right to state publicly their views on certain political and legal issues).

54. *E.g.*, *New York v. United States*, 505 U.S. 144 (1992) (declaring the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 to be beyond the scope of Congress' enumerated powers); *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress cannot require states to enforce a federal firearms regulation program).

legislation, like the recent McCain-Feingold campaign finance reform bill, it frequently specifies a method for judicial review.⁵⁵

How did this come to pass? Starr focuses on the Supreme Court's increasing lack of deference to the other branches of government. While I view this as only half of the story, there is no denying it is a critical half. The Warren Court established a pattern of "interpreting" the Constitution to mean whatever the Court thought it should say. Thus, it imposed a "one person, one vote" political theory on the States⁵⁶ that is fundamentally inconsistent with the manner in which the United States Senate itself is elected, in that all States have two Senators regardless of their population.⁵⁷ How could the Warren Court interpret the Constitution to mandate a political theory that is inconsistent with the specific directives of Article I of that very same Constitution? Easily. It was the Supreme Court, and it did what it wanted.

Since then, the Burger and Rehnquist Courts have been considerably more moderate, but have shown an undeniable willingness to impose their own opinions on political and cultural matters with little or no deference to those of the Legislative and Executive Branches. As Starr notes, before Justices Kennedy and O'Connor provided the critical votes holding the Gun-Free School Zones Act to be unconstitutional as outside of Congress' Commerce Clause powers, they politely but unmistakably chided Congress for not adequately considering the constitutionality of its actions.⁵⁸ In particular, they pointedly noted that *prior* Congresses had "accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design."⁵⁹ The upshot is that Justices Kennedy and O'Connor appeared to be treating Congress like an administrative agency. If Congress lives up to the justices' view of reasoned decisionmaking by acknowledging the relevant factors and making an effort to take those factors into account, the

55. Pub. L. No. 107-155, § 403, 116 Stat. 81, 113-14 (2002).

56. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (mandating substantial equality in the population size of voting districts within a state).

57. U.S. CONST. art.1, § 3.

58. STARR, *supra* note 1, at 244-45.

59. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy & O'Connor, JJ., concurring).

justices might defer to Congress' judgment. If not, all bets are off.

The Court has made this pattern of decreasing deference explicit in its treatment of Executive Branch agencies. While the courts have long deferred to administrative agencies, the Burger and Rehnquist courts have cut back in that regard. As Starr notes, this pattern is reflected even in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,⁶⁰ which is often considered to mandate deference to agencies.⁶¹ While *Chevron* required judicial deference to reasonable administrative interpretations of truly *ambiguous* statutes, it made clear that courts should not defer to administrative interpretations of *unambiguous* statutes, and should employ all available tools of statutory construction in determining the plain meaning of a statute.⁶² It thereby carved out a significant category of agency interpretations from judicial deference. Just last year, in *United States v. Mead Corp.*,⁶³ the Court scaled back *Chevron*-mandated deference even further by limiting it to a specific category of agency rulings—those in which an agency acts pursuant to a statutory provision authorizing it to make rules carrying the force of law.⁶⁴ While Starr focuses on the Court's unanimous decision in *Chevron*,⁶⁵ *Mead* may be more significant, in part because it cuts back on *Chevron* and in part because a resounding 8-1 majority decided to do so. The lone dissenter, Justice Scalia, dissented primarily for doctrinal reasons.⁶⁶ In the Supreme Court, deference is not ascendant.

Deference is only one half of the equation, however. The other half is our willingness to permit the Supreme Court to impose its political and cultural judgments on us. One almost

60. 467 U.S. 837 (1984).

61. STARR, *supra* note 1, at 219-20.

62. See *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

63. 533 U.S. 218 (2001).

64. *Id.* at 226-27; see also *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

65. STARR, *supra* note 1, at 219-20.

66. *Mead*, 533 U.S. at 239-40 ("We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come. I would adhere to our established jurisprudence . . .").

wonders whether Andrew Jackson could have gotten away with sending Earl Warren on a trail of tears back in the 1830s. But today, while angry protesters picket the Court and demand that it change some of its most controversial decisions, even they appear to accept the supremacy of the Supreme Court's rulings on pivotal political and cultural matters; they just disagree with those rulings.

There exist, no doubt, a number of factors that have led to Americans' acceptance, or at least tolerance, of the increasingly important role the Supreme Court has assumed in American life. An abiding commitment to the rule of law is undoubtedly the most important factor. But in my view, we cannot overlook another consideration: we probably have become the most litigious society in history; and as such, we have come to look to the judiciary as our leader.

Remarkable lawsuits are being brought in America today. People who had been forced to work in German factories during the Second World War recently sued German corporations in New Jersey, based on events that occurred during wartime, more than half a century ago, on a different continent, between people who were not even United States citizens.⁶⁷ The only conceivable explanation for this is that our litigiousness has spun so far out of control that for the first time ever, we have a court system that (the plaintiffs thought) would adjudicate such political matters. Similarly, descendents of American slaves are now bringing "lawsuits" based on activities that occurred more than a century ago and were (regrettably) lawful at the time.⁶⁸ On a lighter note, two Miss America contestants recently litigated which of them should be permitted to represent the State of North Carolina.⁶⁹

In this society, which looks to courts to adjudicate everything from monumental human tragedies to television contests, it can only be described as fitting that the courts have emerged as the most powerful branch of government. Just as Jews have looked to Moses and Christians to Christ, we look to Judge Judy and her brethren on the Supreme Court. There is an undeniable

67. See, e.g., *In re Nazi Era Cases Against German Defs. Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001) (dismissing one of the suits).

68. See Lyle Denniston, *Reparations Lawyers Eye Fla. Decision*, BOSTON GLOBE, Sept. 22, 2002, at A1.

69. See Jeffrey Gettleman, *A Miss North Carolina Loses Her Court Bid*, N.Y. TIMES, Sept. 13, 2002, at A24.

parallelism to it: our increasingly litigation-driven society has an increasingly litigation-driven system of government. But if Hamilton could see us now

IV. CONCLUSION

My own musings aside, Starr has written an accessible book on an important topic—the role of the Supreme Court in everyday life. By doing so, he has provided a valuable look at arguably the most powerful, and certainly the least understood, branch of our federal government. My advice? Read it.