HEY, CHRISTIANS, LEAVE YOUR KIDS ALONE!

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RELIGIOUS SCHOOLS v. CHILDREN'S RIGHTS. By James G. Dwyer.[2] Cornell University Press. 1998. Pp. 204.

INTRODUCTION

The end may at last be in sight for the long-running establishment clause battle over state aid to families who send their children to religious schools. Earlier this year, in *Jackson v. Benson*, the Wisconsin Supreme Court held that the Establishment Clause permits states to provide parents of school-age children with tuition vouchers redeemable at the private school of their choice—even if that school provides a religious education.[3] Although the Supreme Court has denied certiorari in *Jackson*,[4] the fact that similar cases are pending in three other states suggests that the Court will probably issue a definitive ruling on the constitutionality of vouchers sometime within the next few years.[5]

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3. See *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wis. 1998).

4. *Jackson v. Benson* (No. 98-376, 1998 WL 596682), cert. denied, 67 USLW 3322 (Nov. 9, 1998).

5. In the Ohio case, the Ohio Court of Appeals struck down Cleveland's voucher plan, *Simons-Harris v. Goff* (Ohio App. 10th Div.), 1997 WL 217583 (May 1, 1997) (unpub.) and that ruling is currently on appeal to the Ohio Supreme Court. In the Vermont case, the trial court held that Vermont's rule that towns without public schools may reimburse families for tuition payments to private schools, but not religious ones, was required by the Establishment Clause and not forbidden by the Free Exercise Clause.

The constitutional controversy over vouchers is not simply a referendum on whether religious schools are good or bad. The conflicting interests of taxpayers, teachers, subgroups of differently situated parents, and other groups play a large part, as do principled disagreements about how best to interpret the Establishment Clause. Clearly, however, the ways in which people understand both their own interests and the meaning of the Establishment Clause are very much influenced by their divergent judgments about the merits of religious schools compared with secular public ones. As voucher proponents see it, religious schools (unfettered by the Establishment Clause) are better at providing much-needed moral and character education, and the low-cost exit option vouchers give parents will force public schools to become better, safer, and less wasteful. In contrast, voucher opponents worry that vouchers will result in the flight of education-conscious families from public schools and lead to the proliferation of divisively sectarian religious schools. Despite their reservations about a system in which religious schooling is the norm rather than the exception, however, mainstream opponents of vouchers accept—or at least do not explicitly question—the legitimacy and constitutionality of parentally-chosen religious schooling as it now exists throughout the United States. None of the major groups in the anti-voucher coalition calls for the abolition of parents' constitutional rights to decide whether and what kind of religious education their children shall receive. And although thoughtful observers continue to debate whether our ongoing educational crisis is essentially confined to low-income, inner-city public schools, or also includes more affluent suburban and rural school districts, it has not occurred to anyone to suggest that the real crisis lies in the religious schools that educate the overwhelming majority of children who attend non-public schools.

Until now. 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.[6] It is high time, he argues in *Religious Schools v. Children's Rights*, that we deploy the force of law to prevent religious parents from

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Chittenden Town School District v. Vermont Dept. of Ed., No. SO478-96 (Rutland County Superior Court, June 27, 1997). In the Maine case, the trial court rejected free exercise and equal protection challenges to Maine's tuitioning plan, reasoning that the Establishment Clause forbids payment of tuition at religious schools. *Bagley v. Maine Dept. of Ed.*, Docket No. CV-97-484 (April 20, 1988).

6. Throughout this essay, I will use "conservative" and "traditionalist" interchangeably when speaking of religion and religious persons.

robbing their children of the high-quality secular education that citizenship in our society entitles them to.[7] Indeed, Dwyer claims that the Constitution requires states to intervene to protect children from the harmful practices of traditionalist religious schools (and parents). He contends, among other things, (1) that parental childrearing rights are illegitimate and should be abolished, (2) that states must regulate childrearing solely by reference to what is in children's best interests, (3) that the Establishment Clause requires states to determine children's best interests by focusing exclusively on their temporal interests, (4) that states must therefore forbid parents to make religiously-based childrearing decisions that run counter to their children's temporal interests, (5) that the Equal Protection Clause requires states to apply all child-welfare legislation to every child, regardless of the religious beliefs of the child or the child's parents, (6) that all state education regulation that seeks to advance children's best interests must therefore be applied to religious schools, (7) that the practices of conservative religious schools (and parents) are harmful to children's temporal interests in a variety of important ways, and (8) that the Constitution therefore requires states to intervene to dismantle these practices. Specifically, religious schools should be forbidden to employ uncertified teachers, to use corporal punishment, to teach that premarital sex is categorically wrong, to espouse traditional gender roles or other "sexist teaching," to teach secular subjects from a religious perspective, to disparage persons of other faiths, and to teach children that they will be "saved" only if they conform to "unreasonable" religious standards of conduct.[8]

Dwyer recognizes that these proposals would "so radically alter" the nature of religious schools "as to make them unrecognizable."[9] But he declares this to be "cause for celebration, because any form of schooling that systematically violates the rights of children should not exist."[10] Moreover, he suggests that there is a silver lining for religious schools: provided they abide

7. Portions of Dwyer's book draw on and develop arguments he initially presented in two earlier law review articles. See James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. Rev. 1321 (1996); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 Cal. L. Rev. 1371 (1994).

8. James G. Dwyer, *Religious Schools vs. Children's Rights*, 179 (Cornell U. Press, 1998).

9. Id. at 180.

10. Id.

by his prescriptions, they can continue to offer religious instruction and ceremonies—so long as these are truly optional.[11] Best of all, once religious schools have been suitably purged of all "practices inconsistent with the temporal well-being of their students, the state should be free to let public funds be used to pay for children to attend these schools."[12] Thus, provided the state forces religious schools to conform to its judgments about children's temporal best interests, vouchers for religious education (that is, what's left of it) are perfectly constitutional!

Now, whatever the Supreme Court ultimately decides to do about vouchers, we can be quite sure it will not lift this page from Dwyer's radical playbook. Dwyer—who pulls no punches in his criticisms of the Court's childrearing jurisprudence—knows this full well. In making the case for his various revolutionary proposals, he is pursuing a long-run strategy, seeking to persuade an academic audience that will in turn influence the rising generation of lawyers, judges—and law clerks. To that end, he has written a forceful, spirited, and creatively argued book that deserves serious and rigorous evaluation.

Moreover, at least within the academy, Dwyer's cause is by no means a hopeless one. His theses will strike a receptive chord with law professors, many of whom are deeply suspicious of religious conservatives (and very few of whom actually *are* religious conservatives).[13] Law professors commonly think that religious traditionalists are either outright hostile to fundamental liberal values such as the rule of law, democratic governance, and civil and political equality, or grudgingly profess allegiance to them for prudential reasons. The widespread belief in legal academic circles about religious traditionalists roughly parallels what political conservatives have long said about Communists: these people will take advantage of liberal democratic freedoms until they come to power, and then they will commence the elimination of those freedoms. Moreover, many law professors see religious traditionalists—especially Christian Fundamentalists—as extremists whose beliefs and practices are irrational, without value, and positively dangerous to themselves and oth-

11. Id.

12. Id. at 181.

13. According to the 1998 General Social Survey conducted by the National Opinion Research Center, 28.5% of adult Americans identify themselves as religious traditionalists. It seems safe to assert that the percentage of American law professors who would place themselves in that category is closer to zero than to 28.5%. Thanks to James Lindgren for alerting me to this data.

ers. The dispositions these opinions induce are not limited to preventing religious traditionalists from gaining government power; they also include *using* government power to counter and undermine religious traditionalism as a movement. The gist of this sentiment is, "Why tolerate the intolerant?" In a sense, therefore, Dwyer is simply saying explicitly, and attempting to provide a theoretical foundation for, what many academics (and other intellectuals) have long felt about 'the Religious Right.'

Yet a strong countervailing tendency is also evident in much liberal thinking. The principle that government should be tolerant and neutral in its treatment of competing reasonable conceptions of the good life—and slow to conclude that a widely-practiced way of life is *un*reasonable—has led many scholars, including the influential political and legal philosopher John Rawls, to seek ways of accomodating and tolerating religious traditionalists in matters of childrearing.[14] Even Amy Gutmann, who advocates a strong conception of democratic education that clashes with conservative religious education on many issues, is prepared to recognize a large realm within which religious schools and parents are free to instruct children in accord with their religious values and beliefs.[15] Similarly, while there is plenty of controversy among constitutional scholars about the scope of parents' constitutional rights to control the religious education of their children, it is safe to say that the core holdings of the Court's leading parental-rights cases—*Pierce v. Society of Sisters*[16] and *Wisconsin v. Yoder*[17]—still enjoy widespread support among constitutional scholars.

Dwyer argues that this liberal tendency to favor pluralism and toleration, whatever its merits as applied to the self-regarding behavior of religious adults, has no proper application to decisions by religious parents concerning their children's lives: "the value of toleration is simply irrelevant, in the context of children's education."[18] In his view, Rawls and other liberals have fallen into the same fundamental error that infects the Supreme Court's childrearing decisions: failing to see children as distinct persons whose interests are entitled to equal weight with

14. John Rawls, *Political Liberalism* 199-200 (Columbia U. Press, 1993).

15. See Amy Gutmann, *Democratic Education* 41-43, 69-70, 115-23 (Princeton U. Press, 1987); Robert K. Fullinwider, ed., *Public Education in a Multicultural Society: Policy, Theory, Critique* 156-79 (Cambridge U. Press, 1996).

16. 268 U.S. 510 (1925).

17. 406 U.S. 205 (1972).

18. Dwyer, *Religious Schools* at 152 (cited in note 8).

those of adults.[19] By exploring the implications of recognizing children's best interests as the proper foundation for regulation of childrearing, Dwyer hopes to show that Rawls's minimalist view of what society can demand from traditionalist parents violates Rawls's own principle of equal respect for persons.[20]

In this review essay, I offer a critique and refutation of each of Dwyer's main theses. Readers should know up front that my previous writings stake out a position diametrically opposite to Dwyer's about what type of childrearing regime is in children's best interests.[21] Rather than abolishing parental rights and subjecting the decisions of religious parents to extensive regulation and oversight, I have argued that it is in children's best interests to preserve—and even expand—parents' traditional constitutional rights to direct and control the education of their children. In a nutshell, the "liberal parentalism" to which I subscribe holds that states should defer to parental childrearing decisions unless the parents' view of their child's best interests is plainly unreasonable. Thus, in the run of parent-state conflicts over childrearing—in which the state and the parents hold conflicting but reasonable views of the child's best interests—the parents' judgment should prevail.[22]

My principal goal in this essay, however, is not to restate my own views (though there is inevitably some of that) but to engage Dwyer's arguments and examine his premises. The essay is divided into four parts, each of which addresses one of Dwyer's central theses. Part I addresses Dwyer's arguments for abolishing parental rights and moving to a regime of limited parental privileges, subject to *de novo* judicial review based on the child's temporal interests. I argue that Dwyer misunderstands the scope and purpose of traditional parental rights, which authorize parents to decide what is in their child's best interests, not to wield arbitrary power over them; that he mistakenly assumes that government agents, including judges, can be trusted to discover and pursue children's best interests; and that he fails to grasp the implications of the fact—which he does not dispute—that parents generally know their children better, and care more

19. Compare id. at 152 (criticizing liberal theorists) with id. at 138 (criticizing the Supreme Court).

20. Id. at 175.

21. See Stephen G. Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 Capital U. L. Rev. 9 (1997); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 (1996).

22. See Gilles, 26 Capital U. L. Rev. at 19-20 (cited in note 21); Gilles, 63 U. Chi. L. Rev. at 945-72 (cited in note 21).

hat parents generally know their children better, and care more about their well-being, than public officials can or do.

Part II evaluates Dwyer's claim that traditionalist religious education is incompatible with the best understanding of children's temporal interests. I argue that Dwyer's attempt to derive a conception of children's temporal interests from a Rawlsian Original Position analysis fails, because he 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. Dwyer fails to grasp the powerful secular reasons that support the religiously-ordained childrearing practices he condemns. (For example, teaching children that premarital sex is categorically wrong is perfectly defensible in terms of the long-run best interests of young men and women.) Thus, his claim that his account of children's best interests will rely only on "more-or-less uncontested" secular values[23]—a claim that is essential to the Rawlsian mode of reasoning he employs—is simply false.

Part III considers Dwyer's claim that the Establishment Clause forbids states to allow religious parents—or their children—to choose traditionalist religious education as presently constituted. His fundamental mistake here is to treat a state's neutral decision to allow *all* parents, religious or secular, to decide what kind of education their children shall receive, as a form of forbidden aid to religion. Although Dwyer writes as if this bizarre interpretation of the Establishment Clause is self-evidently correct, in fact it has no support in Supreme Court precedent or constitutional scholarship. And his assertion that the Establishment Clause forbids states to allow parents (or children) to make religiously-based choices contrary to children's temporal interests rests on precisely the sort of judgment the Establishment Clause *does* bar states from making—namely, that a widely-practiced religious way of life is "clearly irrational."

Part IV takes up Dwyer's contention that the Equal Protection Clause prohibits religious exemptions from state educational laws that are intended to promote children's best interests. I argue that the demands of formal equality are satisfied because each child's parents are authorized to decide which sort of education is in that child's best interests—one that accepts the state's substantive educational standards or one that rejects them

23. Dwyer, *Religious Schools* at 151 (cited in note 8).

for religious reasons. Dwyer's further assertion that religious schools should be forbidden to engage in what he calls "sexist teaching" (namely, the view that traditional gender roles are best) is wrong because he fails to show that such teaching is harmful to girls or boys, let alone that it is the sort of invidious discrimination with which the Equal Protection Clause is concerned—or for which states can fairly be held responsible. Finally, state censorship of "sexist teaching," like most of Dwyer's specific proposals for regulating religious education, plainly constitutes content-based regulation of the speech of religious schools, teachers and parents to the children they are educating. The First Amendment, however, flatly prohibits government from forbidding the teaching of ideas with which the majority disagrees.

I. SHOULD PARENTAL RIGHTS AND THE PARENTALIST PRESUMPTION BE ABOLISHED?

A. AN OVERVIEW OF DWYER'S ARGUMENT FOR ABOLISHING PARENTAL RIGHTS

Dwyer's first major thesis is that traditional parental rights are illegitimate because they give parents plenary power to control the lives of other persons (namely, their children). He recognizes that some scholars think parental rights are necessary to protect children's interests, and he appears to agree with two of the reasons they cite: that young children need adult governance, and that the "optimal upbringing for a child involves an intimate, continuous relationship with a single set of parents that is largely insulated from interference by third parties."[24] He is more cautious about the third reason—he describes it as the "conventional wisdom" that "parents are in the best position to know what is best for their children and are likely to care more than anyone else about their children's well-being"[25]—but he does not deny that it is true.

Instead, he argues that even assuming that all three reasons are unqualifiedly true, they do not justify giving parents the arbitrary power to control the lives of their children in harmful ways.[26] Yet, he says, that is precisely what parental rights have

24. Id. at 81.
25. Id.
26. Id. See also id. at 47-54.

traditionally meant, and still mean today. Parents' fundamental rights under the Due Process Clause entitle them to make decisions about their children's lives even when they hold a selfish or mistaken view of their children's temporal best interests.[27] Parents' rights under the Free Exercise Clause are even more inimical to children's welfare: religious parents are routinely allowed to inflict temporal harm on their children in order to comply with otherworldly religious beliefs.[28]

Parental rights of this kind, Dwyer argues, are inconsistent with the principle that "no individual is *entitled* to use another, nonconsenting person as an instrument to advance his own interests, free from interference by the state or other third parties."[29] This principle applies with full force to children, because they are equal persons entitled to be treated as ends, not means, and to have their interests given equal weight with those of other persons in all decisions affecting them.[30] What is needed, he says, is a child-centered approach that will fully protect children's interests without the need for parental rights. Instead of balancing parental rights against society's interests, courts resolving parent-state conflicts over childrearing should ask whether parental decisions are in the child's best interests.[31] Parents would retain *privileges* to nurture, educate and discipline their children, provided they did so in ways consistent with the state's judgments about children's best interests;[32] and children would enjoy the right—which their parents could assert on their behalf—to be free from inappropriate state interference with parents' childrearing decisions.[33] But rather than presuming that parental decisions are in the child's best interests, as they do now, courts would "determine as best they could which outcome—that which the parent recommends or that which the state recommends—is more consistent with the rights and temporal interests of the child, taking into account any costs to the child arising from the state's restricting parents' freedom."[34]

27. Id. at 47.
28. Id. at 59-60.
29. Id. at 67.
30. Id.
31. Id. at 65.
32. Id. at 64.
33. Id.
34. Id. at 86.

B. PARENTAL RIGHTS PROMOTE CHILDREN'S BEST INTERESTS, NOT ARBITRARY PARENTAL POWER

Dwyer's call for the abolition of traditional parental rights is premised on a gross mischaracterization of their scope and rationale. Neither state common law nor federal constitutional law gives parents the "plenary power" Dwyer alleges they wield over their children.[35] Parental authority to make decisions about the child's life even over the child's objections ends when the child attains majority, and is limited by the ubiquitous prohibitions on parental abuse and neglect. It has never been the law that parental childrearing rights constitute "an entitlement to control another person simply for the sake of exercising such control—that is, abstracted from any particular objectives that such control might serve."[36] On the contrary, as the Supreme Court explained in *Parham v. J.R.*, our legal tradition endorses parents' authority to direct the upbringing of their children precisely because it "historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children."[37] Parental rights are a means to the end of protecting the best interests of children, not a license for parents arbitrarily to control their children's lives.

The common law judgment that parents are the persons most likely to act in their children's best interests[38] also underlies what the *Parham* Court approvingly referred to as the "traditional presumption that the parents act in the best interests of their child."[39] I call this the "parentalist presumption," because it gives parents the lion's share of childrearing authority: the state may not override a parental decision unless it overcomes the presumption and demonstrates that the parents' choice is in fact harmful to the child. In the famous *Pierce* trilogy,[40] the Supreme

35. Id. at 68.

36. Id.

37. 442 U.S. 584, 602 (1979). See also Note, 126 U. Pa. L. Rev. 1135, 1142 (1978) (common law presumed that the religious [or other] preferences of the parents constitute the child's best interest).

38. See, e.g., James Kent, 2 *Commentaries on American Law* 159 (O. Halsted, 1827) ("[t]he wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person").

39. 442 U.S. at 604. See, e.g., Joseph Story, 2 *Commentaries on Equity Jurisprudence* § 1341 (Cambridge U. Press, 1836 ed.) (parental custody and control of children is based on "the natural presumption, that the children will be properly taken care of, and brought up with a due education").

40. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Farrington v. Tokushige*, 273 U.S. 284 (1927).

Court constitutionalized one version of the parentalist presumption by giving parents a substantive due process right to direct and control the education of their children. And in *Wisconsin v. Yoder*,[41] the Court constitutionalized a narrower but stronger version of that presumption by upholding parents' free exercise right to direct and control the *religious* upbringing of their children.[42]

The rationale of these two lines of Supreme Court parental-rights cases is not, as Dwyer asserts, "simply that parents have traditionally held such control."[43] As we have already seen, that tradition rests on the clearly-articulated judgment that parental control is in children's best interests—a judgment the Supreme Court expressly endorsed in *Parham*. Consistent with that rationale, the Court's cases make clear that parents' constitutional childrearing rights may not be exercised in ways that are plainly harmful to children's welfare. In *Meyer*, the Court reasoned that for children to learn a foreign language at their parents' behest "has been commonly looked upon as helpful and desirable," and "cannot reasonably be regarded as harmful."[44] In *Pierce*, the Court struck down Oregon's compulsory public education law because it effectively banned private primary schooling—an "undertaking not inherently harmful, but long regarded as useful and meritorious"—and therefore invaded parents' right to direct their children's education.[45] In *Farrington*, the Court struck down intrusive state regulations of private schools because they "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."[46] In *Yoder*, the Court stated that parental rights would be subject to limitation "even when linked to a free exercise claim . . . if it appears that parental decisions will jeopardize the health or safety of the child," and ruled in favor of the Amish parents only because the "record strongly indicate[d] that ac-

41. 406 U.S. 205 (1972).

42. I have argued that because parentally-chosen education consists in communicating messages and ideas to children, in many educational contexts state interference with parents' educational choices infringes their free speech rights. See Gilles, 63 U. Chi. L. Rev. at 1012-33 (cited in note 21). Because the state bears the heavy burden of justifying content-based regulation of free speech, parental free speech rights can also be seen as a constitutionalization of the parentalist presumption.

43. Dwyer, *Religious Schools* at 80 (cited in note 8).

44. 262 U.S. at 400.

45. 268 U.S. at 534.

46. 273 U.S. at 298.

commodating [their] religious objections . . . will not impair the physical or mental health of the child." [47]

Dwyer turns a blind eye to these consistent and unambiguous pronouncements. He complains that in *Yoder* children's best interests were "clearly subordinated to parental preferences and in fact had no place in the Court's moral and legal reasoning."[48] It is true that the *Yoder* Court did not frame the issue in terms of the best interests of Amish children. But it is a glaring *non sequitur* to infer that children's welfare was irrelevant to the decision. As we have just seen, *Yoder* expressly rests on a finding that the state failed to demonstrate that Amish children were harmed by receiving an Amish education rather than a conventional one. As such, *Yoder*, along with the Court's other parental rights cases, can be seen as an application of the parentalist presumption: parents' educational judgment prevails unless the state demonstrates harm to the child with sufficient convincingness to overcome that presumption. The purpose of that presumption, however, is to enhance the overall welfare of children, not to license parental mistakes.[49]

Dwyer's failure to identify and address the actual rationale for strong parental rights is compounded by his failure to distinguish between parental authority and parental power. Parental rights do not *entitle* parents to subject their children to arbitrary, selfish, harmful parental choices, even if they possess the raw power to do so. Parents are supposed to exercise their childrearing rights in their children's interests as they conceive them; and the law supposes that parents generally will honor this obligation.[50] Inevitably, some parents will misuse their childrearing rights in ways harmful to their children, and the parentalist presumption makes it less likely that these wrongs will be corrected. But by the same token the parentalist presumption makes it

47. 406 U.S. at 233-34.

48. Dwyer, *Religious Schools* at 51 (cited in note 8).

49. Nor do parental rights deny the "equal personhood" of children, defined as "the basic assumption that children are persons and that morally they are equal persons," endowed with "a right to be treated as ends in themselves, rather than as mere means to the fulfillment of others' ends, and a right to have their interests considered equally with interests of other persons in the formation of laws and social policy." Id. at 67. The parentalist presumption is entirely compatible with treating children as ends rather than means, and giving equal weight to their interests. If anything, it is a denial of children's equal personhood *not* to entrust their upbringing to the persons most likely to treat them as ends and give equal weight to their interests: their parents.

50. Parents should, of course, also give appropriate consideration to the interests of other family members, including the parents themselves. Dwyer agrees that this qualification is appropriate. Id. at 85.

more likely that the wrongs done to children by misguided state intervention in parental decisionmaking will be avoided. The relevant question is not whether robust parental rights are perfect when measured by the yardstick of children's best interests, but whether they are superior to alternative regimes that give the state more control over children's upbringing.[51]

To this question, the longstanding answer of our legal tradition has been that state authority over childrearing is more to be feared than comparable authority in the hands of parents. "[P]arents as the natural guardians of their children [are] the persons under natural conditions having the most effective motives and inclinations and being in the best position and under the strongest obligations to give to such children proper nurture, education, and training."[52] The parentalist presumption reflects an underlying societal judgment about how best to enforce the child-centered purposes for which both parental childrearing authority and state child-protecting authority exist. In light of the likelihood that intrusive state oversight of family life would on balance reduce children's welfare, our society's enforcement strategy relies primarily on parents' love for their children, on the child's voice within the family, and on persuasion by public and expert opinion (e.g., legions of parents consulting the latest edition of Dr. Spock), and only secondarily on courts and child welfare agencies. Contrary to Dwyer's complaints, in childrearing cases the courts *have* "focused on whether, for the child, the costs of such state action would exceed the costs of leaving parents unconstrained."[53] The answer they have consistently given, however—that state intervention is likely to do more

51. The character of parents' incentives to act in their children's best interests may vary depending on a variety of factors, including cultural norms, legal rules, and economic and social circumstances. For example, parents today are less likely to be dependent on their children in old age than they were before Social Security, and hence in this respect their incentives have weakened. I cannot here pursue the important question of what we can and should do to optimize parents' incentives. My point is simply that, taking parenting as it is currently structured in our society, parents generally have better incentives to act in the best interests of their children than do agents of the state, be they teachers, social workers, or judges.

52. *Wisconsin Indus. Sch. for Girls v. Clark County*, 79 N.W. 422, 428 (Wis. 1899). The Wisconsin Supreme Court emphatically reaffirmed this reasoning in its recent decision permitting parents to use vouchers for religious schooling. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998) cert. denied, 67 USLW 3322 (Nov. 9, 1998). See also, e.g., *Trustees of Schools v. The People*, 87 Ill. 303, 308 (1877) (the parent's "natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare").

53. Dwyer, *Religious Schools* at 81 (cited in note 8).

harm than good in light of parents' superior incentives to act in the child's best interest—is not the one he wants to hear.

C. THE REAL ISSUE: PARENTAL OR STATE CONTROL OF CHILDREARING?

Despite his stubborn refusal to admit that courts believe parental rights are necessary to protect children's best interests, Dwyer acknowledges that some legal scholars have made precisely this argument. [54] In response, he argues that protection for children could be achieved without relying on parental rights: children could be given "positive rights" to care and education from their parents, and "a negative right" (which their parents could assert on their behalf) against state interference that would adversely affect their interests.[55] As a technical matter, I am inclined to agree—though it does not follow that parental rights should be abolished, because they may also be needed to protect the best interests of *parents*.[56] But why attach such overriding importance to this formality? Dwyer himself points out that "eliminating parents' rights would not in and of itself permit or encourage *any* increase in the level of restrictions [on parents]."[57] We could approximate the current legal distribution of childrearing authority (while simultaneously abolishing parental rights) by giving children a "right" to be governed by their parents' judgments absent a showing of harm strong enough to overcome the parentalist presumption.[58]

As this analysis suggests, Dwyer's real quarrel with our existing childrearing regime concerns parental authority versus governmental authority, not children's rights versus parent's rights. We currently have a regime in which parents presump-

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54. Id.

55. Id. at 84-85.

56. Far more than fiduciaries, trustees, and others responsible for advancing the best interests of another person, parents may have rights of their own in what is, after all, a mutually beneficial relationship, and those rights may be good against various forms of interference by the state or third parties. Full exploration of this question is beyond the scope of this essay. But to get a sense for its importance, consider Robert Mnookin's observation that most people would consider it "monstrously unjust" to transfer custody of an infant from competent, loving biological parents to would-be adoptive parents on the grounds that "the child's 'life chances' would be greater" if placed with the latter. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 268 (Summer, 1975).

57. Dwyer, *Religious Schools* at 89 (cited in note 8).

58. I do not claim that the rhetorical differences between legally equivalent "parental rights" and "children's rights" would make no difference at all. It might well be, as Dwyer surely hopes, that switching to the language of children's rights would tend, over time, to erode support for broad parental authority over children.

tively get to decide what is best for their children, and in which the state intervenes only to prevent parents from making plainly harmful choices on their behalf. Dwyer wants a regime in which the state plays a primary role in deciding what is best for children, intervening whenever parents make choices at odds with the state's judgments about childrearing.[59] To that end, he proposes that courts should decide disputes between parents and the state without presuming that parents' decisions are in the best interests of their children.[60]

Dwyer claims to have steered a middle course between traditional parental rights and making children "'creatures of the state,'" thereby effectuating "the belief that children are no one's creatures."[61] But by authorizing courts—that is, one branch of the government—to determine *de novo* whether parental childrearing decisions are in children's best interests, his proposals would make the state, not parents, the dominant player in childrearing.[62] And his attempt to claim the moral high ground (if such it be) of children's liberation is preposterous. Far from allowing children to control their own lives, Dwyer wants courts to override parental childrearing choices even if the children agree with them, and he urges that children *not* be allowed to make such decisions for themselves.[63] 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.

These positions are deeply inconsistent with Dwyer's assertions that parental rights entail anomalous and illegitimate control over children's lives. Our legal system does not give the state rights arbitrarily to control the lives of persons, any more

59. See id. at 65 ("courts would require a showing not that parents have inflicted grievous harm on a child but that the benefits to the child of restricting the parents outweigh any costs to the child of intruding upon family life"). On its face, Dwyer's test recognizes that overriding parental decisions may impose costs on children, and purports to take those costs into account. In practice, however, it is difficult to believe that courts—having already concluded that parents are acting contrary to the child's best interests—will often refuse to intervene in order to avoid the "costs to the child of intruding upon family life." Consequently, although Dwyer's position is marginally less harmful with this qualification than without it, the central problem—zero deference to parental judgment—remains.

60. Id. at 86.

61. Id. at 178.

62. Dwyer agrees that his approach would "likely alter to a substantial degree the limits of parental freedom and authority and the boundaries of permissible state action." Id. at 65.

63. See id. at 143-44, 164.

than it gives such rights to individuals.[64] If it is anomalous for parents to control the lives of their own children, it must be equally anomalous for the state (including the state's judiciary) to control the lives of 'its' children.[65] In fact there is no anomaly in either case: adult childrearing authority is legitimate precisely because it is in children's best interests to be nurtured, disciplined and educated by responsible adults.

One wishes, therefore, that Dwyer would stop selectively denouncing parental control, and address the issue that truly separates parentalists from statists: which *type* of control—private and parental, or public and governmental—is more likely to be in the children's best interests.[66] The parentalist answer is that parental control should be presumed superior unless the parents' choices are clearly unreasonable. That presumption does not rest on the naive belief that parents unfailingly do what is good for their children. Rather, it reflects the comparative judgment that the fallible human agents through whom government must act are less likely to do what is good for other people's children than fallible individual parents are to do what is good for their own.[67]

But what is Dwyer's answer? He suggests that it is "naive to think that parents are always more competent to judge their child's best interests than are state agency personnel."[68] The relevant question, however, is not whether parents are *always* more competent than state officials, but whether they generally are. Dwyer never takes a definite stand on how that question should be answered. He seems to believe he can bypass it by

64. Cf. id. at 119 ("Treating children equally should mean that we deny the legitimacy of any purported rights residing in *any* person or group to direct their lives").

65. See Gilles, 26 Capital U. L. Rev. at 18-19 (cited in note 21).

66. Id. at 19. Dwyer makes this very point, but fails to grasp its implications. Dwyer, *Religious Schools* at 176-77 (cited in note 8) ("In one way or another, the law determines the contours of a child's life, either by authorizing agents of the state to assume responsibility for certain aspects of that life or by explicitly or implicitly granting parents control over it").

67. Gilles, 26 Capital U.L. Rev. at 19 (cited in note 21). See also Mary-Michelle Upson Hirschoff, *Parents and the Public School Curriculum: Is There A Right To Have One's Child Excused From Objectionable Instruction?*, 50 S. Cal. L. Rev. 871, 888-89 (1977) (in the context of education, "the common law right of parental control" was based on "two assumptions: first, that the parent had equal or superior knowledge of the child's 'physical and mental capabilities and future prospects,' compared to the teacher or other school authorities; and second, that because of the parent's 'natural affections,' the parent was more likely to act for the best interest of the individual child than the teacher or other school authority who, by contrast, had a 'mere temporary interest in the welfare of the child.'").

68. Dwyer, *Religious Schools* at 86 (cited in note 8).

showing that parental rights (as contrasted with parentally-asserted children's rights) are not necessary to protect children's best interests. But if parents are better guardians of children's best interests than the state, the parentalist presumption will enhance children's welfare whether the law is couched in terms of parent's rights or children's rights.[69]

Nevertheless, Dwyer rejects the parentalist presumption in favor of having courts decide whose opinion—parents' or the state's—is "more consistent with the rights and temporal interests of the child."[70] The flaw in this approach is its blithe assumption that state agencies, and above all courts, will expertly and disinterestedly pursue the best interests of children.[71] A moment's reflection will show that courts are neither as well-placed as parents to discern the child's best interests nor as interested in ensuring that the child's welfare is in fact advanced. Unlike parents, judges will never have the time or the day-to-day contact necessary to acquire an intimate understanding of the procession of children who would come before them. Nor will they have to live with the many-faceted ramifications of their childrearing decisions.

Dwyer thinks these problems can be solved by urging judges, when determining children's best interests, to take appropriate account of parents' love for and special knowledge of their children.[72] But courts are far too likely to substitute their judgment for that of parents without troubling to understand the parents' values, the child's character, and the family's situation. Dwyer finds it naive to give presumptive weight to parents' judgments when they conflict with the views of "state agency personnel who spend their lives studying and thinking about what is best for children."[73] I find it naive to describe the run of state employees in such idealistic terms, let alone to believe that they will more often be better judges of a child's best interests than that child's parents. State agency personnel may spend years thinking about what is best for children—but parents spend decades *doing* what they think is best for their own chil-

69. Id. at 81.

70. Id. at 86.

71. Dwyer's adoption of this assumption is especially odd in light of his refrain that courts unjustifiably pay more attention to the interests of adults than they do to the interests of children. It never seems to occur to him that this might be because courts and agencies have weak incentives to champion children's interests, rather than because legal doctrine proceeds in terms of parental rights rather than children's rights.

72. Dwyer, *Religious Schools* at 86 (cited in note 8).

73. Id.

dren, and living with the consequences. Parents are far more likely to get it right, even if they have fewer course-credits in child development or education theory.[74] Yet courts engaged in *de novo* review are more likely to credit the views of state agencies, both because the agencies are repeat players and because (in the case of state courts) they are part of the same government.[75]

There is every reason to think, therefore, that Dwyer's plan for *de novo* judicial review of parental childrearing decisions will harm far more children than it helps. Indeed, Dwyer himself retreats from its full implications: he suggests that there are some categories of cases in which it is "beyond the competence of the courts" to decide the child's best interests,[76] and proposes that in these contexts courts should create presumptions based on "which party is, in general, in the better position to make the kind of decision at issue . . . in a manner consistent with the child's temporal interests."[77] Subject to one important qualification, I agree that this is the right criterion for deciding whether the childrearing presumption runs in favor of parents or the state.[78] But why confine its use to cases that are "beyond the competence of the courts"?[79] If our paramount concern is chil-

74. Indeed, some would say that coursework in these fields makes people *less* able to discern the best interests of children. This suggestion may have considerable merit, in light of the many trendy but unsuccessful educational initiatives schools of education have promoted in recent decades, ranging from New Math to whole-language reading to the self-esteem movement.

75. Under Dwyer's approach, federal courts would play a major role in determining children's best interests, because many childrearing issues would involve children's constitutional rights. But state courts would be heavily involved as well, both because their jurisdiction encompasses federal constitutional claims, and because many child-welfare issues would continue to arise under state statutory and common law. *De novo* review by state courts is even more problematic than I suggest in the text, because their interests tend to be aligned with the agencies and officials who speak for the state in parent-state conflicts—and whose agendas often have little to do with pursuing the best interests of children. Beyond that, because most state-court judges are elected, their decisions will tend to reflect the preferences and prejudices of those who have the most influence on judicial elections: lawyers, local politicians, and the media. There is no reason to suppose these groups are a reliable barometer of the best interests of individual children.

76. Dwyer, *Religious Schools* at 86 (cited in note 8).

77. Id. Dwyer also concedes that "in many aspects of children's lives this approach would support a presumption of parental decision-making authority." Id. at 87. This concession does not inspire much confidence, however, because in the only examples he mentions (teacher certification and "sexist education") he says the presumption should favor the state. Id. at 87.

78. The qualification is that I disagree with Dwyer's exclusive focus on the child's *temporal* interests, and with the interpretation of the Establishment Clause on which it rests. I deal with these issues in Part III below.

79. Dwyer, *Religious Schools* at 86 (cited in note 8). Dwyer does not explain by what standard he would determine the issue of judicial competence.

dren's welfare, we should apply this criterion to the courts themselves by asking who—the child's parents or the court—is *more* competent to determine the child's best interests. The existing legal rules, of course, implicitly answer that question in favor of individual parents: courts have jurisdiction over childrearing disputes between state and parents, but the parentalist presumption effectively insulates specific parental decisions from *de novo* judicial review.[80]

D. THE PROBLEM OF DEFINING HARM TO CHILDREN

At bottom, what is at stake in allocating childrearing authority between parents and the state is who decides what is in children's best interests and, on the other hand, what is harmful to children. These two issues can be seen as two sides of the same coin: any choice that is not in a child's best interests must, by hypothesis, be harmful to the child as compared to whatever choice *is* in the child's best interests. But in everyday life we do not normally equate harm to children with "everything other than what is best for children." Rather, in light of the difficulties of reaching consensus on what is best for children, most people reserve the word "harmful" for choices that seem drastically inferior to what they perceive to be the best choice (or choices—in cases where no one choice seems to them clearly best). We do something similar in the law of childrearing: as a very rough approximation, state family law and federal constitutional law let parents decide where their children's *best* interests lie, subject to the state's power to override parental choices that are harmful in some strong sense—that are 'destructive' or 'abusive' and therefore warrant legal intervention, not just raised eyebrows.

The crucial question for constitutional law, however, is to decide what are the limits on the state's power to classify childrearing practices as legally harmful to children. This question is functionally equivalent to asking what level of scrutiny courts should apply to childrearing laws, for that determines how strong the state's justification for interfering with constitution-

80. Although I have framed them in terms of state and federal courts, the foregoing arguments also apply, *mutatis mutandis*, to proposals to transfer primary authority over childrearing to state legislatures, education officials, or child-welfare agencies. For example, a statutory childrearing code that tried to define children's best interests would reduce judicial discretion, but create new problems of its own. Such legislation would inevitably be heavily influenced by affected interest groups; legislators have no special insight into or concern for children's welfare; and the generality of legislation would necessarily result in errors in many individual cases.

ally protected conduct must be. If childrearing laws need have only a rational basis, states have enormous latitude to decide what practices are harmful to children. Indeed, a state could presumably decide that any childrearing behavior that deviates from the state's conception of children's best interests is harmful to children, and should be prohibited. Provided the state's view of children's best interests were itself rational (that is, not patently unreasonable), the prohibition could be enforced against parents on the ground that deviating from what the state has decided is best for children necessarily reduces the child's overall welfare. If, on the other hand, some form of heightened scrutiny applies, states could not simply rely on their unsupported judgments about what is in children's best interests. They would be required to satisfy the reviewing court that overriding the parents' decision is necessary to avoid harm to the child—and what counts as "harm" for these purposes would ultimately be a question of federal constitutional law.

The parentalist answer to these questions is that heightened scrutiny should apply, and the constitutional test of what is harmful to children should be whether the evidence of overall harm is so strong as to preclude reasonable disagreement. Reasonable people disagree both about the nature of the good life and about how to prepare children to lead it.[81] Consequently, although there is consensus that certain practices are harmful to children, it is much more common to find that a practice is controversial but reasonable: many parents think it harmful, many others think it beneficial, and there are reasoned arguments on each side. Because individual parents, not states or political majorities, are ordinarily the best guardians of children's best interests, the state is more likely to do harm than good to children when it overrides the reasonable choices their parents make on their behalf. If parents starve or brutalize their child, or prevent the child from acquiring foundational skills such as reading, writing, and calculating, there is consensus that they are doing harm, and state intervention is entirely appropriate.[82] But rea-

81. This is "the fact of reasonable pluralism," that is, the fact that persons in our society adhere to "reasonable though incompatible . . . doctrines" about ultimate ends and values. Rawls, *Political Liberalism* at xvii-xviii (cited in note 14).

82. Given undeniable harm to the child, the debate is not about the propriety of state intervention, but about whether to interpret the Constitution affirmatively to require it. On that issue, although *DeShaney v. Winnebago Cty. Dept. of Social Services*, 489 U.S. 189 (1989), is to the contrary, many constitutional theorists would endorse a constitutional norm requiring the state to protect children from what it knows (or predicts) to be serious impending violence at the hands of their parents.

sonable disagreements between parents and the government about what is harmful to children—or best for them—belong in the realm of persuasion, not state coercion.[83]

Dwyer rejects the parentalist approach because it enables parents who reject his views on childrearing to educate their children in ways he deems contrary to their best interests. He argues that "[c]hild-rearing conduct should be viewed the same as other conduct affecting nonconsenting persons—as subject to legal restriction when it causes what the state regards as harm,"[84] and he thinks any practice that deviates from the child's best interest should count as harmful. Indeed, that is the premise from which he deduces that courts should decide parent-state childrearing conflicts in accord with their view of the child's best interests.

Standing alone, these views might suggest that he favors a majoritarian childrearing regime in which state legislatures, courts and agencies would decide what constituted children's temporal best interests, and in which parents would have no constitutional rights to act differently. In fact, although gaps in his presentation make it impossible to be sure, Dwyer's position seems at bottom highly countermajoritarian. Although he wants to abolish parental rights as such, he also indicates that children should have rights to be free from harmful state interference with their parents' childrearing decisions.[85] Because the rights he is concerned to abolish are principally the federal constitutional rights of parents, it seems clear that the children's rights he proposes to replace them with would likewise enjoy federal constitutional standing. In order to enforce these rights, courts would need independently to determine, as a matter of federal constitutional law, who is correct about the child's best interest—the state, in which event the child would have no complaint, or the child's parents, in which case state intervention would be unconstitutional.

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83. The philosophy underlying our childrearing norms is broadly pluralist: whatever may be the best way to raise a child, there are many good ways, any of which can develop the child's basic capacities and equip the child for some reasonable conception of the good life. The presumption that parents act in the best interests of their children is of a piece with this pluralism; for if that presumption is correct, then the fact that conscientious parents raise their children in many different ways implies that different children have different best interests.

84. Dwyer, *Religious Schools* at 94 (cited in note 8).

85. Id. at 64 ("children would possess a right against any state interference with their parents' child-rearing practices or choices that would not, on the whole, improve the children's well-being, and parents would be authorized to act as agents for their children and assert the children's rights against any inappropriate state action").

Furthermore, as I discuss in Part II, Dwyer uses Rawlsian techniques to develop a comprehensive theory of children's temporal best interests that furnishes his standard for evaluating traditionalist religious education. Although he never spells out the precise connection between this theory (which he describes as a theory of "children's positive rights") and the federal Constitution,[86] presumably state laws defining children's best interests in ways consistent with his theory would be deemed beneficial to children for purposes of constitutional analysis. On the other hand, a state childrearing law that clashes with his theory presumably infringes children's constitutional rights by preventing parents from acting in children's best interests. Thus, Dwyer's theory of children's temporal best interests seems to serve as a binding constitutional norm that, at a minimum, determines which state childrearing laws are permitted and which are not. It is even possible, though Dwyer does not quite say so that states would be constitutionally *required* to enact childrearing laws designed to implement his theory of children's positive rights.[87]

If correct, this analysis of Dwyer's approach sheds a different light on what separates it from liberal parentalism (and, to a lesser extent, parents' constitutional rights under current law). Dwyer would give the government sweeping power to enforce a particular conception of children's best interests. But that conception would be neither majoritarian, nor variable from state to state. It would be a federal constitutional conception of children's best interests, based on the theory of children's positive rights Dwyer constructs. Whatever its precise home in the Con-

86. Surprisingly, Dwyer nowhere explains whether his argument is that children actually *do* have the positive rights his theory recognizes, or merely that they *should*. He tells us that his conclusions about children's substantive rights "suggest that states not only must extend current regulations governing public schools . . . to cover religious schools . . . [but] must also fashion new regulations to deal with harmful practices that exist . . only in religious schools." Id. at 179. But he stops short of explicitly claiming that the positive rights his theory would give children are binding constitutional norms, not just moral obligations or theoretical policy prescriptions.

87. In light of Dwyer's willingness to advance a radical new interpretation of the Equal Protection Clause (pursuant to which states would generally be forbidden to exempt religious schools from state educational regulation), his failure to address whether equal protection also requires states to conform to his conception of children's temporal best interests seems especially odd. The argument I would have expected him to make is that a state's failure to secure basic liberties for children to the same degree as for adults, or to secure basic opportunities for children from traditionalist religious families to the same degree as for children of other parentage, states a cognizable claim under the fundamental-rights branch of equal protection analysis, and as such merits heightened scrutiny.

stitution, and whatever the precise extent to which it is binding on the states, the fundamental question is whether Dwyer's theory is a persuasive explication of the just principles of a constitutional order for childrearing. In Part II, I will answer that question in two stages. First, I will argue that Dwyer's theory fails even if we accept its initial assumptions—including his especially controversial claim that all childrearing decisions must be based solely on children's temporal interests. Second, I will argue that Dwyer fails to make the case for the proposition on which many of his judgments and conclusions depend: that conservative religious education is bad for children when judged by secular standards.

II. IS TRADITIONALIST RELIGIOUS EDUCATION INCOMPATIBLE WITH CHILDREN'S TEMPORAL BEST INTERESTS?

A. AN OVERVIEW OF DWYER'S CONCEPTION OF CHILDREN'S TEMPORAL BEST INTERESTS

The second stage of Dwyer's project is to develop a conception of children's temporal best interests that can be enforced through law. He proceeds by employing the Rawlsian device of the Original Position: behind a veil of ignorance as to our circumstances and endowments, we must imagine living as a child, becoming an adult, and becoming a parent under various possible childrearing regimes.[88] In using this decisionmaking device, however, we must also assume that we remain committed to certain basic moral principles: for Dwyer, the relevant principles are that no person is entitled to control the life of another person, and that (as required by the Establishment Clause) the state may act only on the basis of widely held secular values and beliefs about the temporal consequences of various childrearing regimes.[89]

Dwyer argues that two fundamental principles emerge from this reflective inquiry: equal liberty and equal opportunity. The principle of equal liberty requires that children (to the extent their developing abilities permit) enjoy an equal share of basic liberties, including freedom of the person, freedom of thought

88. Dwyer, *Religious Schools* at 148-52 (cited in note 8).

89. Id. at 151. Dwyer offers no argument for this assumption apart from his interpretation of the Establishment Clause.

and expression, freedom of religion, and basic political rights.[90] The principle of equal opportunity requires that all educational, social, and career opportunities be equally available to all children who have the native talents and abilities needed for them.[91] As Dwyer interprets it, the equal liberty principle allows restrictions on the liberty of children (like that of adults) to prevent harm or wrong to others;[92] but paternalistic restrictions on children's liberty are legitimate "*only* to the extent *necessary* to promote [children's] temporal well-being on the whole and in the long run."[93] In turn, the equal opportunity principle requires that all schools ensure that children's intellectual, social, and vocational capacities are equally well-developed regardless of irrelevant characteristics such as their race, their gender, or the religious beliefs of their parents.[94]

Dwyer then argues that the practices of traditionalist religious schools—in particular, Christian Fundamentalist and Roman Catholic schools—are pervasively inconsistent with both equal liberty and equal opportunity.[95] For example, these schools violate children's personal liberty by inflicting corporal punishments and condemning all premarital sexual activity;[96] they violate children's freedom of thought and expression by requiring them to attend religious activities;[97] and they violate their political liberty by inculcating sexist views and intolerance for other ways of life.[98] They also violate the principle of equal opportunity by depriving their students of an education at least roughly equal to what states aspire to provide to children in public schools.[99] For example, rather than developing children's ability to think critically, they discourage it; rather than teaching children standard views on scientific and historical issues, they reject these accepted truths; and rather than fostering self-esteem and positive attitudes toward their minds and bodies, they foster a negative self-image in children by denigrating them as sinful persons.[100]

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90. Id. at 155.
91. Id. at 166.
92. Id. at 154.
93. Id.
94. Id. at 166-67.
95. Id. at 162.
96. Id. at 158-59.
97. Id. at 160-61.
98. Id. at 162.
99. Id. at 167.
100. Id. at 166-74.

B. WHY DWYER'S THEORY FAILS EVEN GRANTING ITS PREMISES

For argument's sake, let us grant Dwyer his initial assumptions that states may consider only children's temporal interests, and that no person is entitled to control the life of another. On those assumptions, he claims that the Original Position device allows him to derive his conception of children's educational rights while "rely[ing] . . . only on substantive secular values that I believe are broadly accepted."[101] This assurance—which, unless Dwyer is engaged in Clintonesque hairsplitting, must also mean that the values in question are *not* broadly rejected—is critical to the entire enterprise. Without it, Dwyer could manipulate the outcome of his Rawlsian thought-experiment by relying on values he prefers, but as to which there is no consensus in our society. For example, if we assume behind the veil that everyone prefers pleasure to health, our hypothetical social arrangements will call for much less state regulation of smoking, drinking, or 'unsafe' sex than if we make the opposite assumption. In fact, neither assumption would be appropriate, because persons in our society differ widely in the relative values they place on pleasure and health.

At the first stage of his argument, Dwyer keeps his promise to rely only on widely shared values. Behind the veil, we would clearly want a childrearing regime that would maximize our well-being over our entire lifetime; liberty would be an important component of our well-being even during our childhood; and we could therefore all agree that paternalistic restrictions on children's liberty should be based on some "substantial" children's interest.[102] We might even reach consensus in favor of Dwyer's rule that paternalistic constraints are permitted "*only* to the extent *necessary* to promote [children's] temporal well-being on the whole and in the long run."[103]

It does not follow, however, that we could reach agreement concerning which restrictions on our liberty would maximize our overall well-being, how much weight our liberty as children should carry in calculating our well-being (as compared to our liberty as adults), or which temporal interests qualify as "substantial." Within the realm of children's temporal interests, there is enormous room for reasonable disagreement about what

101. Id. at 151.
102. Id. at 154.
103. Id.

is beneficial and what is harmful to children. Dwyer refuses to acknowledge this stubborn fact. At the second stage of his argument, in which he applies the general rule that paternalistic restrictions must promote children's overall temporal well-being, his specific conclusions on issue after issue depend on highly controversial value judgments.

Three examples will illustrate the point. First, Dwyer wants to ban corporal punishment on the grounds that "physically striking a child is not justifiable because it is not a necessary means to the desired end of self-discipline."[104] Many committed, experienced parents, however, have found that corporal punishment (like persuasion, verbal correction, loss of privileges, and physical restraint) *is* an effective and appropriate technique for disciplining their children (and teaching them self-discipline). Indeed, some would argue that parents who categorically refuse to engage in corporal punishment, even when their children have engaged in egregious acts of defiance or aggression, harm their children by failing to convey the seriousness of their misbehavior, and by misleading them about the way human beings typically react to behavior such as they are exhibiting. In any event, moderate corporal punishment is legal and commonplace in homes and schools throughout the United States.

Second, Dwyer would forbid schools to teach adolescents that premarital sex is categorically wrong, on the grounds that this policy places unnecessary restrictions on their sexual freedom.[105] But a flat ban on premarital sex is not a denial of children's sexual freedom: it is a denial of sexual license for the sake of future sexual and personal fulfillment in marriage. Or so thoughtful critics of sexual permissiveness reasonably argue on perfectly secular, pragmatic grounds.[106] Few people doubt that the sexual permissiveness of recent generations is closely connected with our society's skyrocketing rates of sexually transmitted diseases, divorce, and unwed motherhood—and that these changes have been disastrous for children. Dwyer's insistence that we can protect adolescents from the immediate risks of sexual activity by teaching them to engage in "intercourse with ap-

104. Id. at 158.

105. Id. at 159.

106. See, e.g., Leon R. Kass, *The End of Courtship*, 126 The Public Interest 39 (Winter, 1997). Kass marshals a variety of arguments and evidence for the proposition that premarital sex has long-run harmful effects, and urges young feminists to "advanc[] the truest interest of women (and men and children) by raising (again) the radical banner, 'Not until you marry me'[.]" Id. at 63. See also Sarah E. Hinlicky, *Subversive Virginity*, First Things 14 (Oct., 1998).

propriate precautions,"[107] many would argue, recklessly disregards the fragility of adolescent self-control and the strength of adolescent hormones.[108] It also ignores the risk that, even if disaster doesn't strike, premarital sexual activity will make it harder for children to find lasting happiness and commitment in marriage. For all these reasons, the case for teen chastity is a strong one—as an increasing number of adolescents agree.[109]

Third, Dwyer contends that religious schools must be required to employ only certified teachers, on the grounds that trained teachers are more effective educators.[110] Yet, as the leading case *upholding* the application of a state teacher-certification law to religious schools concedes, "there is a lack of empirical evidence concerning the relationship between certified teachers and a quality education."[111] That should come as no surprise: the most convincing explanation for teacher-certification laws is that they are anti-competitive measures designed to restrict the supply of new teachers, with teacher quality serving as a convenient fig-leaf.[112] Even if, all else equal, certified teachers were marginally superior to non-certified ones, it would still be perfectly reasonable for parents to suppose that non-certified teachers who share their values will do a better job educating their children than certified ones who don't.[113]

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107. Dwyer, *Religious Schools* at 159 (cited in note 8).

108. A recent report analyzing the Longitudinal Study on Adolescent Health finds that "perceived parent disapproval" of adolescent sexual activity is a stronger deterrent to teen pregnancy than "effective contraceptive use." Michael D. Resnick, M.D., et al, *Protecting Adolescents From Harm: Findings From the National Longitudinal Study on Adolescent Health*, JAMA, 823, 830 tbl.8 (Sept. 10, 1997).

109. Id. (noting that nearly 16% of females and 10% of males in the LSAH sample reported making pledges of virginity, and finding that a "higher level of importance ascribed to religion and prayer" and a "pledge to remain a virgin" are factors associated with a delayed sexual debut). See also Richard Nadler, *Glum and Glummer*, National Review 26, 28 (Sept. 28, 1998) reporting recent declines in the percentage of 15-19 year old males and females with sexual experience).

110. Dwyer, *Religious Schools* at 87 (cited in note 8). Dwyer's motives on this issue are not confined to concern with educational effectiveness. In his conclusion, he suggests that teacher-certification requirements are an especially useful way for states to assert control over the actual practices of religious schools. Id. at 181.

111. *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 494 (8th Cir. 1987) (rejecting free exercise challenge).

112. On this hypothesis, the fact that every state requires public school teachers to be certified, while most states exempt teachers at private and religious schools, is not (as Dwyer would have it) further proof that states cavalierly sacrifice the interests of children in religious schools. Rather, these laws, and the exemptions to them, simply reflect the power of teachers' unions in the public sector, and their weakness in the private (and especially the religious) sector.

113. Certified teachers are also more expensive than non-certified ones. Budgetary considerations are plainly a legitimate consideration for religious families forced to pay state and local taxes to subsidize public schools to which they cannot in good conscience

These examples (and many others like them) belie Dwyer's promise that his theory will rely only on "broadly accepted" and "more-or-less uncontested" secular values.[114] The appeal of Rawlsian Original Position analysis, however, lies precisely in its promise that only consensus-backed judgments will determine the fundamental law and bring coercive state power to bear on individuals. The failure of Dwyer's Original Position analysis in this respect is therefore fatal to his theory of children's rights. Anyone who takes seriously the Rawlsian concern for toleration and neutrality in the legal treatment of competing reasonable conceptions of the good must acknowledge that Dwyer's controversial secular value judgments should not be forced on parents who reasonably disagree with them.

Dwyer knows he has a problem here, and he tries to solve it by taking the offensive. He sharply criticizes Rawls and other liberal theorists, insisting that "the value of toleration is simply irrelevant, in the context of children's education," because childrearing is "essentially other-determining" rather than a matter of self-determination.[115] This criticism misunderstands the grounds on which Rawlsian theory endorses toleration. The Rawlsian claim is that those who control the coercive power of the state (whether an ordinary political majority or the framers and interpreters of a constitution) cannot legitimately impose their conception of the good life on those who subscribe to other views (a political minority or future generations of citizens). The argument on which it rests is that the rulers have no need to write their conception of the good into law, because they will enjoy the freedom to live as they think best even if they refrain from legislating. Should the rulers nonetheless do so, they unjustly deprive other persons of a basic freedom while preserving that very freedom for themselves.

In the case of childrearing, the argument is precisely the same, except that the freedom in question is other-determining rather than self-determining. Children's upbringing will be determined by adults whether childrearing authority belongs to the government or to individual parents. Thus, the question is not whether our childrearing regime will entail other-determining governance of children by adults; it is *which* adults will enjoy the freedom to engage in this other-determining behavior. Under

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send their children.

114. Dwyer, *Religious Schools* at 151 (cited in note 8).

115. Id. at 152.

Dwyer's approach, the adults who are empowered ultimately to decide what is in children's best interests (whether the majority or the courts) wield other-determining authority over *all* children—including their own—while dissenters are denied other-determining authority over *any* children—even their own. This is a blatant violation of equal liberty.

Dwyer is therefore wrong in thinking that the other-determining character of childrearing makes toleration irrelevant. What *would* make toleration irrelevant—at least by Rawlsian standards—would be a successful resort to the Original Position device. Because the conclusions arrived at in the Original Position are reached by hypothetical consensus, there is no injustice in equally obliging every parent to comply with them—even if the consequence is that some parents' actual preferences are frustrated while others' are reinforced. Therefore, if Dwyer could establish an Original Position consensus in favor of his conception of children's positive rights, he could justify state coercion of parents who disagree. Dwyer's attack on Rawlsian toleration and pluralism thus stands or falls with his Original Position analysis. As I have already shown, however, that analysis breaks down because there is no consensus on which practices will maximize children's well-being over the course of their lifetimes. The norms Dwyer announces rest on controversial values that cannot legitimately be imposed on other persons by force of law, and thus his project fails on its own Rawlsian terms.

Indeed, the general standard Dwyer derives from the Original Position—the child's overall temporal well-being—is quite consistent with the parentalist presumption. To say that this standard should govern childrearing decisions leaves open the question who should be entrusted with the responsibility for applying that standard. Dwyer simply assumes that this crucial question of authority-allocation has been settled in favor of the state. But that question should itself be part of the Original Position inquiry. Whom would we want to have the authority to decide what specific restrictions on our freedom are necessary to advance the best interests of the children we turn out to be? Dwyer is certainly right that "parties behind the veil of ignorance would not limit legal protection of their liberties to rights against the state, as the Constitution does, but would also wish to guard against incursions on their freedom by private parties, as statutes and common-law rules do . . ."[116] This generalization,

116. Id. at 153.

however, does not tell us which protections we would want against our own parents, and which protections we would want against the state. Behind the veil, we should assume that state oversight of parents will be costly in child-welfare terms: it will diminish children's freedom from the state, and subject them to the risk of errors by the state. Because parents are on average the best guardians of their children's temporal best interests, our overall well-being—both as children and parents—will be better served if our childrearing regime authorizes parents, rather than the state, to determine what restrictions on children's liberty are necessary to promote their long-run temporal well-being.

C. DWYER FAILS TO SHOW THAT TRADITIONALIST RELIGION IS HARMFUL TO CHILDREN'S TEMPORAL INTERESTS

Dwyer's claim that childrearing decisions must be based solely on children's temporal interests is bad political theory, not just bad constitutional law (as I'll argue in Part III). Dwyer says he is justified in importing his secularist interpretation of the Religion Clauses into the Original Position because it is "a model of state decision making, and one of the higher-order fixed points in our liberal democratic culture is that the state should not decide theological issues . . . ."[117] But the purpose of the Original Position inquiry he undertakes is to decide what childrearing regime is best for children (and the adults they will become). If it would be better for children to make an exception to this alleged "fixed point," the logic of Dwyer's own argument requires him to do so.[118]

Although Dwyer never squarely confronts this question, there is little doubt that he would answer it by asserting that traditionalist religion is irrational, repressive, and bad for both children and adults.[119] He charges that traditionalist religious com-

117. Id. at 151. Notice that Dwyer makes no mention of that other "fixed point"—freedom of speech—instead endorsing pervasive content-based regulation of religious speech to children by schools and parents. As I discuss in Part IV, these proposals run counter to settled free speech principles.

118. A similar inconsistency surfaces when Dwyer notes that some religious groups (such as Christian Scientists) believe prayer is more efficacious in restoring health than modern medicine, and proceeds to deny that this is "an argument that the state can accept as true or even reasonable." Id. at 60. But why not, if the temporal well-being of children is the benchmark? The question should be what evidence the Christian Scientists can produce in support of their belief, and how it stacks up against the evidence in favor of medical intervention.

119. Although Dwyer's focus is on Roman Catholic and Christian Fundamentalist schools, he makes clear his expectation that similar conclusions would apply to Orthodox Jewish and Islamic schools as well. See id. at 130 (describing the "sexist socialization"

munities seek to "repress the minds of children so that they are incapable of rejecting the community's beliefs or pursuing a life outside the community as adults,"[120] and make "children's sense of security and self-worth depend on being 'saved' or meeting unreasonable, divinely ordained standards of conduct,"[121] Obviously, these charges also pertain to the *adult* members of traditionalist religious communities—for they too are threatened with damnation, required to comply with "unreasonable" religious commands, and pressured to reject the secular culture in favor of life within the community. Dwyer concedes that the Free Exercise Clause entitles adults to adhere to traditionalist religions, however irrational they may be.[122] But he thinks it legitimate, indeed imperative, for the state to try to prevent religious traditionalists from passing their beliefs on to their children, by guaranteeing those children "an education that counteracts this effort, that makes it possible for [them] to choose and live successfully within other ways of life and systems of belief."[123] Thus, referring to children growing up in fundamentalist Christian families, he writes: "Knowing that these children will incur the scorn of mainstream America if they grow up to be like their families, why do we not act to prevent that, for their sake, rather than expect mainstream Americans to develop a respect for people who argue dogmatically for reactionary policies based upon religious premises we do not share?"[124]

These charges—some of which amount to outright bigotry—are unpersuasive even in wholly secular terms. Dwyer badly underestimates the worldly resources and rewards of religious traditionalism. He assumes that there is no good secular rationale for the vast majority of religiously-commanded childrearing practices, and that once we limit our focus to children's secular interests a consensus in favor of his progressive, rationalist approach to childrearing practices will rapidly and inevitably emerge. (As if the only conviction separating religious con-

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Orthodox Jewish girls receive), id. at 180 (recognizing and endorsing the possibility that the extensive regulation of religious schools he proposes "would so radically alter their nature as to make them unrecognizable as Fundamentalist or Catholic (or Jewish or Muslim) institutions"). His explanation for not evaluating the practices of Orthodox Jewish and Muslim schools is that "there is so little published information about their practices that it is not possible for outsiders to form much of an impression of what goes on inside them." Id. at 13.

120. Id. at 168.
121. Id. at 179.
122. Id. at 83.
123. Id. at 168.
124. Id. at 173.

servatives from secular progressives were belief in heaven and hell!) In fact, there are well-known and widely-held temporal justifications for many of the religious commands Dwyer attacks. For example, the whole matrix of traditional Christian restrictions on sexual activity can be seen as protecting the marital family as an institution in which men, women, and children can flourish *in this world*, while seeking salvation in the next.[125]

Dwyer asserts that even if these sexual restrictions would benefit children, it isn't necessary to implement them "by threat of divine retribution rather than by respectful discussion of the practical consequences."[126] Yet there is a perfectly respectable secular argument that fear of otherworldly consequences is necessary to persuade many people to respect the rights of others and even to pursue their own long-run self-interest. On this view, it is a short step from Nietzche's triumphant declaration that "God is dead"[127] to the nihilistic view that "If God is dead, then everything is permitted."[128] Dwyer blithely assumes that a robust secular morality will take the place of the traditionalist religious faith he is so eager to subvert. No doubt some children can be instilled with both good moral values and atheism or agnosticism. It is far from clear, however, that such an education would be feasible for *all* (or even most) children.[129] The default way of life in our mass culture is not moral philosophy (Kantian, Millian, Rawlsian, or whatever) as preached by secular intellectuals—it is materialistic hedonism as practiced by ordinary people. Many thoughtful observers, of all persuasions, see such lives as selfish, slavish, and superficial. If Dwyer thinks Hollywood is a better guide to human fulfillment than the Bible, he should explain why. If he thinks a robust secular morality can take root in the society at large (rather than just among the intelligentsia), he

125. See, e.g., Richard A. Posner, *Sex and Reason* 243-44 (Harvard U. Press, 1992). ("The history of public policy toward sex since the beginning of the Christian era is one of efforts to confine sexual activity to marriage," thereby promoting "a substantive conception of the marital relationship—that of companionate marriage—which [the Church] has bequeathed to modern people in the West regardless of their religious beliefs"). This acknowledgement of the secular importance of Christian sexual morality carries particular weight, coming as it does from a scholar who tends to be strongly libertarian in matters of adult sexual behavior.

126. Dwyer, *Religious Schools* at 159 (cited in note 8).

127. Walter Kaufmann, ed., *The Portable Nietzche* 124 (Viking Press, 1954).

128. Patrick Glynn, *God: The Evidence: The Reconciliation of Faith and Reason in a Postsecular World* 13 (Forum, 1997).

129. See George Washington, Farewell Address, September 17, 1796 ("Whatever may be conceded to the influence of fine education on minds of peculiar stature, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle").

should explain how.[130] Until then, anyone who thinks moral values are among children's most important temporal interests will find his attack on traditionalist Christianity unconvincing.

Dwyer also insists that religious ways of life be temporally justifiable on each and every issue in isolation. But what is the justification for this demand? Any tradition worth the name, be it religious or secular, offers a comprehensive way of life—an organic whole, not a menu from which one picks and chooses some eclectic mix of optimal solutions. For this very reason, every tradition—including the tradition of Enlightenment rationalism in which Dwyer's liberal egalitarianism places him—has its awkwardnesses and problems.[131] It doesn't follow, however, that persons who adhere to a tradition are acting contrary to their overall best interests, temporal or otherwise. The more likely secular explanation is that most people who situate themselves within a tradition, and seek to raise their children in accord with it, do so because in their experience that tradition's benefits plainly outweigh whatever burdens and constraints it imposes.

Unsurprisingly, Dwyer is not interested in the testimony of the millions of Americans who would endorse this explanation—who would say that traditionalist religion 'works' for them. He focuses exclusively on hostile sources: "studies" of traditionalist religious schools by highly unsympathetic academics, a survey of women who have left the Catholicism in which they were raised, and a study of textbooks in religious schools by two prominent strict separationists. These "ethnographic studies and personal testimonies," he assures us, "provide a holistic and textured view of the development and well-being of children in these schools."[132] Quite the contrary, the authors on which Dwyer relies seem interested in condemning and discrediting traditionalist religion, not describing it in a careful and balanced way. For example, Joanna Meehl characterizes the difficulties her sample of ex-Catholic women experienced in leaving Catholicism as the problem of "Catholic shrapnel—the damage of thinking of yourself as 'bad' goes deep, causes grave injury, and takes a lifetime to work itself out, if ever."[133] Well, what would you expect a

130. Cf. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 Harv. 1637 (1998) (arguing that modern normative moral philosophy lacks the intellectual cogency or emotional power to change people's beliefs or behavior).

131. See generally Alasdair MacIntyre, *Whose Justice? Which Rationality?* (U. of Notre Dame Press, 1988).

132. Dwyer, *Religious Schools* at 14 (cited in note 8).

133. Id. at 38.

group of women who rejected Catholicism to say? One could just as easily do a "study" of ex-atheists and reach parallel conclusions about the lasting damage secularism caused them. Completely absent, of course, is evidence that children raised as Catholics are more likely to be unhappy in adulthood about their upbringing than children raised as secularists. Or consider Peter McLaren's claims—which Dwyer takes at face value—that students at the Catholic middle school he studied "'wore' the hegemonic culture of the school in their very beings: in their wrinkled brows, in their tense musculature, in the impulsive way they reacted to their peers, and in the stoic way they responded to punishment," and that there was "a distinct eros-denying quality about school life, as if students were discarnate beings, unsullied by the taint of living flesh." [134] This is social science? Someone should explain to McLaren that the "living flesh" of teenagers is responsible for a distressingly large fraction of this country's populations of "at-risk" children, single mothers, and victims of sexually transmitted diseases.

Nor does Dwyer 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 (based on the High Schools and Beyond data set) 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.[135] 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[136]—he dismisses it out of hand on the absurd ground that "it aimed only to discover their virtues."[137]

Dwyer's partisan attempt to document "evidence of harm"[138] to children in religious schools is matched by the equally partisan standard by which he proposes to judge relig-

134. Id. at 23.

135. James S. Coleman, Thomas Hoffer, and Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* (BasicBooks, 1982); James S. Coleman and Thomas Hoffer, *Public and Private High Schools: The Impact of Communities* (BasicBooks, 1987).

136. Anthony S. Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* (Harvard U. Press, 1993).

137. Dwyer, *Religious Schools* at 14 (cited in note 8).

138. Id. at 20.

ious codes of behavior: whether "they are likely to repress, to a degree greater than any mainstream child development expert would regard as healthy, significant aspects of [children's] physical and social natures."[139] To privilege child development experts in this way is obviously to side with their social scientific understanding of human beings, and against the traditional Judeo-Christian understanding of sinful human nature. Perhaps (though I think it far from clear) that is a fair implication of Dwyer's postulate that only children's temporal well-being may be considered. Even if so, before conferring this enormous authority on the discipline of child development we need reliable grounds for thinking that its pretensions to expertise are well-founded. After all, even among psychologists and child developmentalists there is considerable skepticism about how much this body of research and scholarship adds to our understanding of human beings,[140] and scientists from other fields have challenged the underpinnings of much child development theory.[141] Dwyer takes it on faith that child development experts know what is beneficial and harmful to children, when what is needed is a careful (and skeptical) analysis of the evidence for that proposition.

Dwyer's unwillingness to take a hard look at our secular culture is, if anything, even more evident in his treatment of public schools. Although he offers a lengthy critique of religious schools, Dwyer declines to undertake "an evaluative comparison with public schools."[142] This is an indefensible omission. His proposals would transform religious schools from largely unregulated institutions into heavily regulated, quasi-public entities. Given the violence, moral malaise, and low academic achievement levels that afflict many public schools, it is incum-

139. Id. at 22.

140. See, e.g., Judith Rich Harris, *The Nurture Assumption: Why Children Turn Out the Way They Do* (Free Press, 1998) (challenging much of the received wisdom (and much of the research methodology) of child development experts); Jerome Kagan, *Three Seductive Ideas* (Harvard U. Press, 1998) (arguing that many widely held ideas in child development can neither be proved nor disproved—that is, are not falsifiable). As Ann Hulbert notes in her review of both these books, Harris and Kagan are not alone in their skepticism; "plenty of scientists" have been led "to caution that 'child development is a product of social needs that had little to do with science qua science.'" Ann Hulbert, *The Influence of Anxiety*, The New Republic 28, 31 (Dec. 7, 1998).

141. See, e.g., Michael C. Jensen and William H. Meckling, *The Nature of Man*, 7 The Bank America J. Applied Corp. Finance 4-19 (1994) (arguing for an economic understanding of human nature and against the view, originally associated with Maslow and nowadays widely accepted by child psychologists, that there is a hierarchy of human needs).

142. Dwyer, *Religious Schools* at 15 (cited in note 8).

bent on him to show why reinventing religious schools in the image of public ones would make children from religious families better off. Rather than undertake that daunting task, he resorts to a double standard, describing the practices of traditionalist religious schools as seen by their secular academic critics, while describing the ideals and aspirations of public schools as they see themselves.[143] Consider his thumbnail description of public schooling as "an education that fosters higher-order thinking skills, promotes self-esteem, and provides the knowledge that most other children in society are acquiring." [144] This conception of a good education may be popular in progressive educational circles, but it is subject to serious secular objections. Children indoctrinated in the progressive manner often grow up without any significant exposure to the great religious traditions that billions of human beings have lived and died by.[145] Moreover, critics of progressive education argue that its pupils are flattered at every turn in the name of self-esteem; are deprived of their innocence in the name of sophistication and relevance; and are taught to "clarify" their values while being shielded from any but the most superficial views about what values are good.[146] In short, they are taught—or at any rate, they learn—to be conformists, hedonists, even nihilists.

Many of these children also have spiritual yearnings that are frustrated and stunted by their educations. As the proliferation of New Age and other eclectic spiritual fashions attests, those who turn away from the shallow secularism of the public schools often have trouble finding what they seek. And if they do find a religious faith, they may have to struggle hard to keep it, because their progressive education has left them without good habits, self-discipline, and humility. Their difficulties and frustrations may be at least as great as those experienced by children who reject the traditionalist religious faith their parents have tried to impart to them through religious schooling.

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143. In passing, Dwyer announces late in his book that "[u]ndoubtedly many public schools also violate one or more of their students' liberties, and they should be taken to task for it." Id. at 162. Taken to task by whom? The state, which creates, operates, and maintains them?

144. Id. at 146.

145. See Warren A. Nord, *Religion and American Education: Rethinking A National Dilemma* (North Carolina, 1995).

146. See, e.g., Charles Sykes, *Dumbing Down Our Kids: Why America's Children Feel Good About Themselves But Can't Read, Write, or Add* (St. Martin's Press, 1995); William Kilpatrick, *Why Johnny Can't Tell Right From Wrong: Moral Illiteracy and the Case for Character Education* (Simon & Schuster, 1992).

In presenting these criticisms of progressive education, I am of course *not* claiming that traditionalist religious education is demonstrably superior to progressive education. Rather, my claim is that the secular objections to progressive education are no less plausible and powerful than the secular objections to traditionalist education. While traditionalist religious education deprives children of the arguable benefits of progressive ideology, by the same token progressive education deprives them of the arguable benefits of religious tradition.[147] If one deprivation counts as a harm, so should the other. For surely neither side in the ongoing debate between traditionalists and progressives can be assumed to have a monopoly on reason, truth, or wisdom. Precisely for this reason, the far better view is that neither of these quintessentially debatable types of "harm" should suffice to overcome the presumption that parents are acting in their child's best interest when they choose an education—religious or secular, traditionalist or progressive—on their behalf.

III. DOES THE ESTABLISHMENT CLAUSE FORBID STATES TO AUTHORIZE PARENTS (OR CHILDREN) TO CHOOSE TRADITIONALIST RELIGIOUS EDUCATION?

A. AN OVERVIEW OF DWYER'S INTERPRETATION OF THE RELIGION CLAUSES

Dwyer's third major thesis is that the Establishment Clause forbids states to give parents (or children) the authority to choose traditionalist religious education that is contrary to children's temporal best interests. In his view, under the "principle of state neutrality on religious questions that [the Establishment Clause] embodies, temporal interests are the only interests with which *the state* can properly concern itself in carrying out its responsibility to protect the well-being of children and other incompetent persons. For the state to take account of children's supposed spiritual interests would require *it* to assume the truth of particular religious beliefs—that children *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, which the Con-

147. The character of confessional religious education is clearly explained, and its legitimacy and importance ably defended, in Elmer John Theissen, *Teaching for Commitment: Liberal Education, Indoctrination, and Christian Nurture* (McGill-Queen's U. Press, 1993).

stitution prohibits it from doing."[148] Thus, when a court adjudicates a childrearing dispute between parents and the state, in determining whose view represents the child's best interests the court must focus exclusively on the child's temporal interests, and disregard any reasons the parents offer concerning otherworldly matters such as salvation, damnation, and the like.

Dwyer thinks parents' free exercise rights (rightly understood) are not inconsistent with this analysis. Although the Religion Clauses leave individuals "more or less free to determine for themselves what they believe about religion and the role religious considerations should have in their lives—including whether they will sacrifice their temporal interests in some cases to further what they regard as their spiritual interests,"[149] this freedom does not allow individuals to balance the temporal and spiritual interests of *other* persons: "The state should no more allow parents to balance their child's spiritual and temporal interests and decide that they will sacrifice the latter than it should allow me to do this in relation to my neighbor (or my parents, even if they become incompetent.)"[150]

Moreover, Dwyer says, the same conclusion follows when we consider *children's* supposed religious interests: for courts to assume that children have a need to grow up within a religious belief system would be to assume the truth of particular religious beliefs, in violation of the Establishment Clause.[151] As for children's free exercise rights,

> there are obvious problems with attributing to children an interest in religious liberty that would justify allowing them to make major life decisions . . inimical to their overall well-being and especially to their liberty and opportunities throughout the rest of their lives. Most children lack the cognitive abilities, knowledge, psychological and emotional independence, and self-control necessary for making such momentous life-determining choices, and this is especially true of those growing up in an authoritarian, restrictive environment. Moreover, placing on children the burden of making such decisions could itself be quite traumatic for them and would no doubt induce many parents to take coercive measures to ensure that children made the 'right' choice. Thus the consistent practice of courts not to base decisions in custody, medical

148. Dwyer, *Religious Schools* at 82 (cited in note 8).
149. Id. at 83.
150. Id.
151. Id. at 143.

> care, school regulation, and other situations on the 'religious liberty' of younger children makes a great deal of sense.[152]

In sum, according to Dwyer, the Constitution requires states to protect children's temporal interests no matter what the parents believe[153]—indeed, no matter what the *children* believe—until they become adults. The state may consider otherworldly beliefs, if at all, only insofar as those beliefs affect the child's temporal well-being. For example, state intervention forcing the parents or the child to do something they believe will cause the child to be damned might cause psychological harm to the child.[154] As Dwyer makes plain, however, it would be a rare case in which this sort of psychological harm outweighed the harms he alleges traditionalist religious education inflicts on children.

B. PARENTAL AUTHORITY TO BALANCE TEMPORAL AND SPIRITUAL INTERESTS IS NOT ANOMALOUS

Before turning to Dwyer's novel interpretation of the Establishment Clause, I want to deal with his argument that parents' free exercise rights to balance their children's temporal and spiritual interests are anomalous and illegitimate. Dwyer reasons by analogy from the fact that one adult has no free exercise rights to balance another's temporal and spiritual interests to the conclusion that parents shouldn't be allowed to make such tradeoffs on behalf of their children. But one adult isn't allowed to balance another's various and sometimes conflicting *temporal* interests, either. Parents, however, *are* allowed and expected to balance their child's temporal interests, and even Dwyer wouldn't forbid this practice—he'd just make it much easier for the state to reverse these parental judgments if it disagreed with them. If the analogy between parents and strangers doesn't hold for temporal-temporal balancing, why should it hold for temporal-spiritual balancing? Parents are generally the best guardians of their children's best interests, and if spiritual interests are real they are obviously of the greatest importance. It is therefore in children's best interests to allow their parents, rather than the state, to decide whether they have spiritual interests and if so what weight they should carry. That is the parentalist intuition behind *Pierce*'s assertion that parents have both the right and the "high duty . . . to recognize and prepare [children] for additional

152. Id. at 144.
153. Id. at 83.
154. Id. at 83-84, 145.

obligations"—including, as *Yoder* spells out, "the inculcation of moral standards [and] religious beliefs . . . ."[155]

Parental rights of this kind not only do not contravene the Establishment Clause as it has generally been understood in our legal culture, they avoid major establishment clause problems. Under the traditional parentalist approach, the state neutrally abstains from deciding whether and if so what kind of religious upbringing the child shall receive, leaving that decision to the child's parents. Just as the Religion Clauses leave both religious and secular adults free to pursue the good life as they understand it, so too they leave both religious and secular parents free to raise their children by their own best lights. Parents of all persuasions thus retain the authority to decide what if any spiritual or otherworldly interests their child has, and how (within limits) these interests should be balanced against (or whether they should trump) the child's temporal ones.

The state, of course, is not responsible for these parental choices, any more than it is responsible for all the other child-drearing decisions parents make. The state does not endorse religion by permitting religious parents to raise their child religiously, any more than it endorses atheism by permitting atheists to raise their child atheistically. The state has adopted a neutral, nondiscriminatory rule that gives the same authority to parents of any faith, or no faith. By doing so, the state avoids the Establishment Clause dilemma that would arise were the state to wield this authority itself: the state would either have to decide that children's best interests should be defined exclusively in secular terms (thereby favoring secularism) or that children's best interests should include their religious and otherworldly interests (thereby favoring religion).[156]

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155. 268 U.S. at 535; 406 U.S. at 233. The *Yoder* opinion adds, "and elements of good citizenship." I believe the *Yoder* Court erred in including civic education within the meaning of "additional obligations" as that term was used in *Pierce*. The more likely reading is that "additional obligations" refers to obligations states may not themselves legitimately impose: that covers religion but not good citizenship. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (referring to educational obligations "the state can neither supply nor hinder").

156. Consider also legal disputes over decisions concerning formerly competent adults. In deciding what the adult would have chosen were he or she still competent, the courts use the adult's value system *whether or not it was religious*. For example, when a court determines whether a comatose person would have wanted life-support efforts to cease, it attempts to determine the person's actual preferences, including preferences based on religious beliefs. If the court refused to do so, it would plainly be discriminating against religious persons. Yet under Dwyer's approach, the Establishment Clause might well require this sort of discrimination.

Dwyer is forced to confront this dilemma because he takes the position that state courts should subject parental childrearing decisions to *de novo* review at the state's behest, even if the decision in question is religiously based. Because, under this approach, the court is making its own independent judgment about the child's best interests, the court must either treat spiritual interests as real or unreal. It has escaped Dwyer that *both* options seem inconsistent with the neutrality the Establishment Clause requires. But that is simply one more reason (in addition to those discussed in Part I) why we should reject the *de novo* approach and retain the parentalist presumption. As the Supreme Court put it in *Prince v. Massachusetts*, under *Pierce* parents' "function and freedom include preparation for obligations *the state can neither supply nor hinder.*"[157]

To be sure, even under the parentalist presumption a similar—albeit smaller and far more manageable—problem arises insofar as that presumption is rebuttable. In a case in which parents rely solely on temporal reasons, a court might find the presumption rebutted if the parents' view was plainly unreasonable. But how is a court to apply that approach to a dispute in which parents' religious beliefs about their child's spiritual interests play a decisive role in their decisionmaking? The conventional wisdom, repeatedly endorsed by the Supreme Court, is that courts cannot decide which religious beliefs are unreasonable and which pass muster.[158]

One possible solution to this problem is a neutral, bright-line rule that any parental decision occasioning serious physical harm to the child must be overturned, no matter how the parents seek to justify it.[159] Under this approach, for example, religious parents could not refuse to allow their child to receive a lifesaving blood transfusion. But neither could environmentalist parents refuse to allow their child to receive a lifesaving drug obtainable only from an endangered species. Because the category

157. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis added).

158. In other writing, I have tentatively suggested that there may be extreme cases in which the conventional wisdom is wrong, but I shall assume for present purposes that it is unqualifiedly correct. See Gilles, 26 Capital U.L. Rev. at 22-24 (cited in note 21).

159. An alternative approach would be to require the child's consent before giving effect to any life-threatening parental choice. This rule would avoid the need for a debatable substantive judgment about children's spiritual interests. As applied to young children, however, it seems little different from a rule leaving these matters to the good-faith judgments of parents. I suspect that a regime using parental good faith for young children and the child's consent for older children is a good deal more defensible than most people think, but a full inquiry into its merits and demerits is beyond the scope of this essay.

of serious physical harms includes only temporal injuries, even this rule is non-neutral to some extent, and therefore in some tension with the Religion Clauses. It amounts to a judgment that children have no spiritual interests that outweigh serious threats to their lives—a judgment that some religions reject (and that some religious adults have rejected when their own lives were at stake). Although the question seems very close, such a judgment may be defensible on the grounds that there is a consensus in its favor in our society (that is, almost everyone would agree with it), and that it is the least bad solution to an intractable difficulty.[160]

In any event, this narrow judgment, confined to rare cases presenting a large risk of serious physical injury or death, is a far cry from what Dwyer proposes—a global judgment privileging temporal interests over religious ones. Unlike death and irreparable physical injury, the temporal harms Dwyer alleges traditionalist religious schools inflict on their students (e.g., repressed sexuality, low self-esteem, and sexist attitudes) are plainly reversible. Children can and do reject their religious upbringing (or these aspects of it) as teenagers or, perhaps more commonly, as adults. Equally important, many reasonable people believe that the religious values and commands Dwyer condemns are beneficial, even (but not only) in temporal terms. There must be some limits on parents' authority to occasion temporal harm to their children for the sake of spiritual benefits, and it is not easy to specify exactly what those limits should be. But that difficulty must not be used as a pretext for eradicating parental religious authority altogether, on the strength of a highly partisan judgment that children have no spiritual interests that ever outweigh their temporal ones. Both relevant policies—maximizing children's best interests and minimizing state partiality as between religion and secularism—converge in support of a robust parentalist presumption that recognizes parents' authority to balance children's temporal and spiritual interests.

160. I do not mean to suggest that a consensus standard is problem-free. To begin with, although a court applying a consensus standard would be neutrally evaluating the distribution of opinions in the society as a whole, not making a judgment of its own, the fact remains that a consensus standard amounts to a supermajoritarian trump on a countermajoritarian (free exercise) right. Moreover, a consensus standard raises difficult questions such as what constitutes a consensus (does almost everybody mean 90%, 95%, 98%, 99%, or 99.9%?), and deciding how the question is to be framed (e.g., is the question whether blood transfusions are spiritually permissible, whether the Jehovah's Witnesses' are clearly wrong in treating blood transfusions as spiritually defiling, or whether their position is clearly wrong as applied to children?).

C. THE ESTABLISHMENT CLAUSE DOES NOT FORBID STATES TO RECOGNIZE PARENTS' AUTHORITY TO BALANCE CHILDREN'S TEMPORAL AND SPIRITUAL INTERESTS

Although there are many inconsistencies in the Supreme Court's Religion Clauses jurisprudence, the Court has steadfastly maintained that the Establishment Clause forbids states either to promote religion or to subvert it. The Establishment Clause adopts a principle of neutrality among religions, and between religion and secularism. Yet on its face, Dwyer's interpretation of the Establishment Clause is overtly hostile to religion. By asserting the authority to decide where children's best interests lie, while simultaneously positing that children's temporal interests always trump their spiritual interests, the state would be directing children's lives on the assumption that children's spiritual interests are either spurious or superfluous.[161] Furthermore, by assuming that children are incapable of making major religiously-based life choices until they become adults, the state would be taking the position that all children must live secular lives, whatever they and their parents may believe. Taken together, these prescriptions would establish secularism as the official state conception of the good life for children.

In defense of this interpretation of the Establishment Clause, Dwyer offers no argument from text, history, or precedent. Instead, he tries to justify the obvious non-neutrality of his approach by reciting the familiar observation that the Establishment Clause "principle of state neutrality is not itself ideologically neutral," because it takes a partisan, liberal position "directly opposed to those religious views that favor state involvement in promoting religious values and causes."[162] The particular conclusions he reaches, he says, are simply implications of

161. Though he does not offer it as a theological proposition, it is illuminating to consider Dwyer's temporal-interests-only rule in theological terms. One obvious possibility is that Dwyer's rule is an implication of the theological proposition that God does not exist. But this need not necessarily be the case. A salient alternative explanation runs as follows: if there is a God, and if God establishes rules about how human beings should behave, one of those rules is that no child's temporal interests should ever be sacrificed except to achieve some greater temporal good. God may or may not require adults to sacrifice their own temporal interests for spiritual or otherworldly reasons, but God would never require a child to do so. (As for the boundary line between adults and children, one must hope our society's legal understanding corresponds to God's.) While some religious persons would find this an appealing characterization of God's laws, it is clear that others would not. From their standpoint, to claim that God expects no temporal sacrifice from children constitutes a profound denial of the very proposition Dwyer insists is fundamental—the equal personhood of children.

162. Dwyer, *Religious Schools* at 82 (cited in note 8).

this proposition.[163] Remember what those conclusions are: the state must regulate childrearing exclusively by reference to children's temporal best interests, and therefore any childrearing regime that permits parents to make religiously-based decisions adversely affecting their children's temporal welfare, or in which children enjoy the freedom to choose a traditionalist religious education, violates the Establishment Clause. The core of Dwyer's argument, therefore, turns out to be the claim that furnishing these free exercise rights to parents or children constitutes forbidden "state involvement in promoting religious values and causes."

The truth or falsity of that proposition, however, depends on what the baseline is for determining whether the state is "promoting" religion. Dwyer fails to explain what he thinks the appropriate baseline is, let alone offer a reasoned defense of it. In fact, none of the three mainstream conceptions of establishment clause neutrality—the "no-aid" theory, the "nondiscrimination" theory, and the "substantive neutrality" theory[164]—supports Dwyer's claims, and all of them are entirely consistent with traditional parental authority over children's religious education. Dwyer's position represents a new, fourth theory—what we might call the 'substantive nonneutrality' theory—which appears to rest solely on Dwyer's passionate (and unproven) conviction that traditionalist religion is irrational.

1. The No-Aid Theory

A strong no-aid theory would take as its baseline government refusal to extend any form of protection, including ordinary civil and political rights and liberties, to religious institutions or religious people. However, as the Supreme Court recognized in *Everson v. Board of Education*[165] (and has often reaffirmed since), this extreme version of the no-aid theory is patently at odds with the Free Exercise Clause. The no-aid theory has *never* been thought—by the Court, by constitutional scholars, or by groups such as the ACLU that have long adopted it as their litigating position—to require states to withhold the protection of their laws, courts, police, fire departments, or other

163. Id. at 82-83 ("I will not endeavor to defend this nonneutral principle of state neutrality embodied in our federal Constitution but instead simply assume it and explicate its implications for those who endorse it").

164. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 45, 48 (1997).

165. 330 U.S. 1 (1947).

instrumentalities from religious institutions or individuals. Rather, the no-aid baseline of government inactivity has been interpreted to mean that affirmative government financial support of religious institutions—especially religious schools—constitutes forbidden aid to religion. Nondiscriminatory government financial support to religious *individuals*, on the other hand, has not been seen as aiding religion. As the Court put it in *Everson*, the Free Exercise Clause forbids a state to "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."[166]

Indeed, although the no-aid theory has been especially influential in its cases dealing with state aid to religious schools, the Supreme Court has been increasingly unwilling to characterize nondiscriminatory state benefits to students or parents, who may elect to use those benefits to help obtain a religious education, as "aid" to religion.[167] The crucial factor is that the ultimate decision to expend these subsidies on religious rather than secular education lies with the beneficiary, not the state. Proponents of the no-aid theory have strenuously objected to this trend, which is part of the Court's overall shift in recent years in the direction of the nondiscrimination theory. Their objections, however, have centered on the dangers of allowing public tax dollars to flow in large quantities to religious schools. To the best of my knowledge, Dwyer is the first scholar to suggest that the state impermissibly "aids" religion merely by refusing to deprive parents of the authority to decide whether their child shall receive a religious or secular education, and whether their child's best interests shall be determined with religious interests in mind, or exclusively in secular terms.

2. The Nondiscrimination Theory

The nondiscrimination theory takes as its baseline the government's treatment of analogous secular activities, and treats any discrimination—whether in favor of religion or against it—as

166. Everson, 330 U.S. at 15-16.

167. See *Mueller v. Allen*, 463 U.S. 388 (1983) (state tax deduction for educational expenses, including tuition at religious schools, does not violate the Establishment Clause); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) (state assistance to blind college student pursuing training for religious ministry, as part of general vocational assistance program for blind college students, does not violate the Establishment Clause).

a departure from neutrality.[168] It is readily apparent that traditional parental authority involves no departure from this conception of establishment clause neutrality. The analogous secular activity to religious childrearing is secular childrearing; the traditional approach treats both activities alike by conferring on all parents the authority to decide what set of interests constitutes *their* child's best interests, and how those interests are to be ranked or balanced in cases of conflict. If the parents think the child's paramount interests are secular, the state defers to their secularism. If they think the child's paramount interests are spiritual, the state defers to their piety. Indeed, because eliminating parental authority to decide what role religion shall play in a child's life would require the state to prefer secular childrearing to religious childrearing (or vice-versa), the nondiscrimination theory may even imply that parental authority over children's religious upbringing is constitutionally required by the Establishment Clause.

3. The Substantive Neutrality Theory

The substantive neutrality theory, for which Douglas Laycock and Michael McConnell argue, holds that the Religion Clauses should be read as a single, coherent provision whose goal is to minimize government influence on religious choices, thereby maximizing individual autonomy in matters of religious belief or disbelief.[169] Thus, the substantive neutrality theory looks to the incentives that government creates to determine whether state action is consistent with the Religion Clauses. Because evenhanded aid to both religious and secular beneficiaries—whatever form it takes, financial or otherwise—does not skew incentives one way or the other, the substantive neutrality theory treats it as permissible. Under the substantive neutrality theory, therefore, traditional parental authority, creating as it does no incentives for parents to choose any particular religion or to choose religion over secularism, is unquestionably constitutional.

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168. Laycock, 46 Emory L.J. at 48 (cited in note 164).

169. See, e.g., Michael W. McConnell, *Religious Freedom At a Crossroads*, 59 U. Chi. L. Rev. 115, 117 (1992) ("the purpose of the Religion Clauses is to protect the religious lives of the people from unnecessary intrusions of government, whether promoting or hindering religion. It is to foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism").

4. A New Theory of Substantive Non-neutrality?

Each of the mainstream theories extends robust protection to religious liberty in *some* major sphere of state action.[170] And all three of these regimes would allow nonmonetary, nondiscriminatory acknowledgements of parental authority to make religiously-motivated childrearing decisions contrary to the child's temporal best interests (subject to a neutral rule forbidding serious bodily injury to the child). Dwyer's regime, by contrast, would not only forbid "aid" to religion in the form of parental childrearing authority; direct or indirect financial aid to religious schools would be banned insofar as their practices are "inconsistent with the temporal well-being of their students,"[171] and states would be barred from granting exemptions from their educational and childrearing laws to religious parents (or their children). Thus, in direct opposition to the substantive neutrality theory, Dwyer's account of the Religion Clauses seems designed to *minimize* religious autonomy and maximize government influence over religious choices in our society. We might call it the "substantive non-neutrality" theory. But whatever we call it, this theory is quite bereft of support in historical evidence, precedent, or constitutional theory.

D. CHILDREN'S FREEDOM OF RELIGION INCLUDES THE RIGHT TO MAKE DECISIONS CONTRARY TO THEIR TEMPORAL BEST INTERESTS

Dwyer mounts two distinct attacks on the idea that children have an interest in religious liberty that justifies allowing them to make decisions contrary to their temporal best interests for religious reasons. In his chapter on equal protection, he argues that children are incompetent to exercise such rights because they lack the capabilities and knowledge necessary for making major, life-determining choices.[172] But if children are incompe-

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170. Although the no-aid theory restricts the use of financial aid for religious purposes, it often requires accomodation of religion on the grounds that regulation would be burdensome. See Laycock, 46 Emory L.J. at 70 (cited in note 164). The nondiscrimination theory would "produce a regime of nondiscriminatory financial [and nonfinancial] aid and no regulatory exemptions." Id. The substantive neutrality theory would produce a regime of nondiscriminatory aid and of regulatory exemptions for religious practices (unless a religious exemption would create strong incentives to adopt the religion(s) in question) —thereby combining the more religion-friendly aspects of the no-aid theory and the nondiscrimination theory. Id. at 68-73.

171. Dwyer, *Religious Schools* at 181 (cited in note 8).

172. Id. at 144. See also id. at 53 (criticizing Justice Douglas for suggesting that the choice in Yoder should have been left up to the Amish children, in light of "the psycho-

tent to make these major decisions, then obviously it is necessary and appropriate that some adult act on their behalf. Parents are the right choice for that role, because they are generally more faithful and knowledgeable agents for their children than the state, and because the Free Exercise Clause is directed against interference with religious liberty by the state, not individuals. The argument from incompetence leads to a regime of strong parental rights, not to Dwyer's preferred regime of vestigial ones.

In his Original Position analysis, Dwyer takes a different tack. He concedes that, giving liberty its ordinary meaning, it is "difficult to deny that children are capable of exercising religious liberty at a very early age."[173] Moreover, he acknowledges that even if children don't adequately understand what is at stake, "we do not think it appropriate for the state to override adults' religious preferences solely because they are based on ignorance or incompetence, and it is not clear why we should treat children differently in that respect."[174] Nevertheless, he argues that children's religious preferences should be overridden when they are "clearly irrational, in the sense that effectuating them would result in their suffering greater harm than denying them would cause," and contends that a preference for traditionalist religious education is irrational.[175] But why doesn't that argument, too, apply with equal force to the choices of adult believers in traditionalist religions? An elderly woman gives most of her income to the church, insisting on living in squalor and shortening her life. A Jehovah's Witness refuses a blood transfusion that would save his life. These choices seem plainly irrational if the only relevant considerations are secular goods.[176] Consequently, if the elderly woman's child seeks to challenge her 'excessive charity,' or if the attending physician seeks permission to transfuse the

logical harm that could have resulted from placing these children in the position of having to make such a momentous decision, as well as the fact that thirteen-year-olds, particularly those who have spent their entire lives in an insular, illiberal religious community, are probably not capable of making an informed, rational decision about whether they should go to school").

173. Id. at 164.

174. Id.

175. Id.

176. It is possible to argue that a religious person's fear of divine sanction (or desire to please God) may be so powerful that the person is temporally better off complying with God's law as he or she understands it. If so, that would supply yet another reason to reject Dwyer's conclusions. The text assumes, as does Dwyer, that religiously-based sentiments or emotions do not trump (although they may sometimes outweigh) major temporal interests in life, health, and liberty.

Jehovah's Witness, Dwyer's argument implies that the state should rule in favor of these claimants.

But why stop there? Once we begin overriding the express, religiously-based choices of individuals—children or adults—on the basis of a secular "irrationality" test, there is no logical stopping point. If the state can override a person's religiously-based choices any time it thinks them irrational in secular terms, why not address the most fundamental choice of all—the choice to belong to a traditionalist religious community? As we have already seen, Dwyer's indictment implies that religious traditionalism is harmful to *adult* believers as well as to their children. Under his approach, even if the Free Exercise Clause forbids the state to penalize persons for subscribing to these irrational beliefs, the state should be able to disband religious *congregations* that threaten their members with damnation should they defect.

No doubt Dwyer would disavow these consequences, which are utterly alien to our constitutional tradition of religious liberty. The point, however, is that his secular "irrationality" criterion sets up the state as arbiter of whether religious beliefs and practices are in the self-interest of persons of faith (adults and children alike). Whatever else it means, the Free Exercise Clause unquestionably precludes the state from engaging in purely paternalistic regulation of religiously-based conduct.[177]

Dwyer might reply that the state causes severe psychological injury when it overrides the religious choices of competent adults on paternalistic grounds, and that this temporal harm explains why states refrain from pressing paternalism that far. The same reasoning, however, should also apply to state interference with children's religiously-based decisions. Indeed, Dwyer admits it is "indisputable that forcing a child to do something that he believes will displease God can be traumatic."[178] He tries to wriggle out of this problem by denying that most regulation of religious schools will have this effect, on the grounds that the regulation is directed at teachers and parents, not at children.[179]

177. If there are any exceptions to this generalization, they involve situations in which it would be very hard to sort out a purely paternalistic justification from a harm-to-third-parties justification. For example, a ban on religious human sacrifice, even if the persons to be sacrificed were adults who believed they would benefit by being sacrificed, might rest on a judgment that these persons are deluded about their own best interests. But that judgment is difficult to separate from a judgment that cruel practices of this kind could spawn copy-cat behavior, or a judgment that the discomfort of others with such practices is so great that they should be forbidden.

178. Dwyer, *Religious Schools* at 145 (cited in note 8).

179. Id.

But the consequence of those regulations would be to hinder traditionalist religious children from learning the precepts of the faith they are seeking to embrace, and require them to be taught values contrary to that faith. Such conflicts would be pervasive under Dwyer's scheme of regulation. Children who want sexual modesty would be forced to endure graphic sex education.[180] Children who want to deepen their understanding and appreciation of the traditional family would be taught that traditional families are sexist and unjust.[181] Children who want to learn the Biblical account of creation would be taught that it has been superseded by a scientific one.

Even Dwyer admits that problems such as these will sometimes arise (though, as we have just seen, he understates their frequency and importance). He responds that religious parents will "act to alleviate the children's concerns, reassuring them that they are not responsible for things that the state compels."[182] This rationale, however, would support intrusive paternalistic regulation of religious adults as well: their suffering is minimal, the argument would go, for they can console themselves with the reflection that God will not punish them for violating his commands under threat of force. One can imagine Torquemada embracing this reasoning with gusto.

180. See *Hot, Sexy and Safer v. Brown*, 68 F.3d 525 (1st Cir. 1995).

181. See *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

182. Dwyer, *Religious Schools* at 146 (cited in note 8).

IV. DOES THE EQUAL PROTECTION CLAUSE PROHIBIT EXEMPTIONS FROM STATE EDUCATIONAL REGULATIONS FOR RELIGIOUS SCHOOLS AND PARENTS?

A. AN OVERVIEW OF DWYER'S EQUAL PROTECTION ANALYSIS

Dwyer's fourth main thesis is that the Equal Protection Clause prohibits states from exempting religious schools and parents from state child-welfare laws, including state education laws. Currently, he says, states grant regulatory exemptions to religious schools and parents in three ways: some state educational requirements apply only to public schools; others exempt religious schools; and yet others extend only to schools that receive specified types of state aid.[183] He views each type of exemption as equivalent to a failure to regulate the choices and practices of religious schools and parents—and thus necessarily also a failure to extend to children in religious schools the same educational protections and entitlements afforded to children in public schools. For despite the fact that "education is an essential good that states undertake to guarantee to all children,"[184] these exemptions give parents "the right to decide whether the children will attend a school to which the statutory protections extend or one to which they do not."[185] Thus, Dwyer suggests, a proper analogy to state education law would be a hypothetical welfare assistance law giving religious leaders the legal right to decide whether their adult followers will receive the welfare benefits or will instead receive some private alternative that may be markedly inferior.[186] Like this hypothetical law, religious exemptions to education laws illegitimately empower some persons to deprive other persons of benefits the state guarantees to all other similarly situated individuals.[187]

Dwyer also argues that state sex discrimination laws that apply only to public schools present an additional equal protection problem. It would clearly be unconstitutional, he says, for public schools to engage in the sexist practices conservative religious schools display.[188] States provide substantial material as-

183. Id. at 122.
184. Id. at 125.
185. Id.
186. Id.
187. Id. at 126.
188. Id.

sistance to religious schools, ranging from tax-exempt status to providing textbooks and transportation. He argues that this state aid, when coupled with states' failure to prohibit gender discrimination and gender bias in religious schools, amounts to encouragement of these discriminatory practices:[189] indeed, he says, the Supreme Court reasoned in *Norwood v. Harrison*[190] that merely providing textbooks to private schools that engaged in race discrimination constituted forbidden state encouragement.

Having argued that religious exemptions to education laws amount to discriminatory state action, Dwyer then turns to the question of what level of equal protection scrutiny courts should apply. He urges that strict scrutiny is appropriate. "Children of religious objectors arguably have less political power than any other group in this country, less than even illegitimate or alien children"—groups to whom the Supreme Court has applied heightened scrutiny.[191] Like all children, children of religious objectors cannot influence the political process themselves. In addition, their parents, who would ordinarily be expected to represent their temporal interests in the public sphere, in fact advocate against those interests for religious reasons.[192]

Finally, Dwyer argues that none of the possible justifications for religious exemptions from education and child welfare laws is compelling—and some are not even legitimate. As he sees it, the actual purpose of these exemptions is to gratify parents' religious preferences regardless of children's welfare; that constitutes an illegitimate naked preference for parents over children.[193] Nor can legislatures claim they are merely respecting parents' constitutional rights, because many exemptions go beyond what courts have held to be constitutionally required.[194] Most importantly, he says, the Supreme Court has recognized that the Equal Protection Clause is "a higher-order constraint on judicial interpretation of substantive constitutional rights."[195] But the Court has failed to heed that command in the context of childrearing, where it has deferred to the interests of parents in religious liberty rather than ensuring that the interests of their children receive equal protection under law. "An equal protec-

189. Id. at 127.
190. 413 U.S. 455 (1973).
191. Dwyer, *Religious Schools* at 133 (cited in note 8).
192. Id.
193. Id. at 137.
194. Id.
195. Id.

tion perspective thus leads to the startling conclusion that the *Yoder* decision, that icon of liberalism and free exercise jurisprudence . . . was actually itself unconstitutional. It is for children of religious objectors what *Plessy v. Ferguson* was for African-Americans—the Supreme Court's imprimatur upon discriminatory laws that foster subordination and social isolation, made to seem reasonable by a perfunctory dismissal of the interests of the disfavored class."[196]

B. THE EQUAL PROTECTION CLAUSE PERMITS RELIGIOUS EXEMPTIONS FROM STATE EDUCATION LAWS

1. DISCRIMINATORY STATE ACTION?

Dwyer's claim that religious exemptions from state education laws constitute discriminatory state action is based on a clearly erroneous characterization of these statutes. The bulk of state education law is designed to specify the contents and practices of public education, and as such is inapplicable to *all* private education, religious or not. Thus, except in the relatively unusual cases in which a state law applies to both public and private schools—but exempts religious schools—there is no discrimination on the basis of religion.

In addition, contrary to what Dwyer assumes, state regulation of public education need not—and typically does not—incorporate a legislative judgment that every child's education should conform to the public-school model.[197] Consider a law requiring sex education in public schools. The scope of this law can be explained by other, narrower judgments: the legislature may have believed that most parents who send their children to public schools want them to receive sex education as part of their formal education; it may have believed that a majority of the public wants children to receive sex education, and is entitled to have its preferences carried out because it is footing the bill for public education; or it may simply have decided to defer to

196. Id. at 138.

197. Indeed, it is far from clear that most laws and regulations determining the content and character of public education reflect a legislative judgment about children's best interests—as contrasted with the best interests of education bureaucrats, teachers, public-school parents, publishers, and other producer and consumer interests. Dwyer never tells us how it is that the same legislators who callously disregard the welfare of children in religious schools vigilantly strive to advance the welfare of children in public schools.

the judgment of public school educators and administrators that sex education is a good thing for their students. In none of these cases could it fairly be said that the legislature has determined that sex education is in every child's best interests.

By contrast, some education laws—for example, compulsory schooling laws and statutes specifying subjects that every child shall learn (regardless of what kind of school the child attends) —do rest on a judgment that their requirements are in every child's best interest. These laws, however, typically contain no exemptions for religious schools or religious objectors—or, if they do, the exemptions merely duplicate the constitutional protections religious parents are entitled to under *Pierce* and *Yoder*.[198]

So Dwyer vastly exaggerates the extent to which state legislatures voluntarily exempt religious parents and their children from state educational requirements that the legislature judges to be to be in every child's best interests. Nevertheless, it may sometimes be the case that a state education law reflecting such a legislative judgment exempts religious schools and parents from compliance even though requiring compliance would not be unconstitutional under current law.[199] If we focus on these elective state exemptions, is Dwyer correct that they constitute discrimination against children of religious objectors? Not if the statutory exemptions are read in light of the parentalist presumption (which, although constitutionalized by *Pierce*, has its origins in state common law): the demands of formal equality are satisfied because each child's parents are authorized to decide which sort of education is in his or her best interest—a public one that complies with the state's substantive educational standards or a religious one that does not.[200] Looking at state law

198. See, e.g., Iowa's "Amish exemption," which provides for exemption "from compliance with any or all requirements of the compulsory education law and the educational standards law" for children belonging to religious denominations that profess "principles or tenets that differ substantially from the objectives, goals, and philosophy of education embodied in [state educational] standards." Iowa Code Annotated § 299.24 (West, 1996). The Iowa Supreme Court has construed this exemption as available only to persons constitutionally entitled to accomodation under *Yoder*. See *Johnson v. Charles City Community Schools Bd. of Ed.*, 368 N.W. 2d 74, 83-85 (Iowa 1985).

199. Of course, if Dwyer's interpretation of the equal protection clause were accepted in its entirety, the Constitution would *never* require states to exempt religious schools or parents from compliance with state educational requirements that seek to advance children's welfare.

200. As for Dwyer's welfare-benefits hypothetical, the decisive difference is that some adult must make choices on each child's behalf, and it is both legitimate and wise to assign that role to parents. There is no such necessity to empower religious leaders to make binding choices about state-provided benefits on behalf of their adult followers. If

as a whole, rather than at one statute in isolation, the legislative judgment that emerges is that the statutory requirements are in children's best interests *unless their parents disagree*. That is not discriminatory state action—it is a sensible judgment that parents are better placed than the legislature to make the ultimate determination about their own child's best interests.

2. Strict scrutiny?

Even if we assume that religious exemptions constitute discriminatory state action vis-a-vis children of religious objectors, Dwyer fails to make the case for heightened scrutiny. As he recognizes, children's interests are represented in the public sphere by their parents—and it certainly cannot be said that parents are a powerless minority. Thus, Dwyer's argument boils down to the claim that conservative religious parents should be seen as unfaithful representatives for equal protection purposes because they put their children's spiritual interests above their temporal ones. As I showed in Part II, however, a good case can be made that the religious childrearing commands with which Dwyer takes issue are in fact in children's temporal best interests. Even if a particular religious doctrine entails some sacrifice of children's temporal interests, that consequence is problematic only if the Constitution compels states to assume that children's only true interests are temporal ones. Dwyer does not contend that the Equal Protection Clause speaks to that question; his argument for that secularist proposition rests entirely on the Establishment Clause. But as I showed in Part III, his interpretation of the Establishment Clause is untenable. The Religion Clauses do not forbid (and may in fact require) states to recognize parents' authority to take their children's spiritual welfare into account in determining their overall best interests.

C. RELIGIOUS EXEMPTIONS FROM LAWS BANNING SEX DISCRIMINATION IN EDUCATION DO NOT VIOLATE EQUAL PROTECTION

In order adequately to appreciate how extreme Dwyer's position on "sexist education" and "sexist teaching" is, it is necessary to understand what he means by these terms. According to Dwyer, education qualifies as "sexist" if children are taught that the traditional sexual division of labor, in which the husband is

religious followers think it is in their best interests to give their religious leaders this sort of authority, they are free to do so by private agreement.

breadwinner and the wife is childrearer and homemaker, is best for men and women—and for their children.[201] To be sure, Dwyer also claims that many religious schools go farther—for example, teaching children that "females, though equal before the law and capable of being self-supporting, are inferior to males in God's eyes."[202] Now, if Dwyer had evidence that some religious schools teach that women should *not* be equal before the law, he would presumably present it. We can therefore assume that traditionalist religious schools, across the spectrum of belief, acknowledge the civil and political equality of women. Where's the sexism in that?

As for the proposition that women are inferior to men in God's eyes, it is hard to see how that can be tenable within any Christian community. Every traditionalist Christian denomination of which I am aware holds that both women and men are endowed with free will, immortal souls, and the capacity to attain eternal salvation. Are we supposed to believe women are nevertheless inferior in God's eyes because, to take two salient examples, Southern Baptist wives are called upon to obey their husbands, or because women cannot be ordained as Catholic priests? The Southern Baptists and the Catholic Church deny that any such implication follows,[203] and it would be more than a little odd to substitute Dwyer's judgment for theirs on a theological issue of this kind.

Dwyer's true concern is not with God's perspective, but with man's. Dwyer believes that traditional gender roles lead women to perceive themselves as inferior to men, and men to perceive themselves as superior to women; and he would no doubt cling to that judgment no matter what the traditions that endorse these roles might say. Thus, he would label "sexist" any religious teaching that endorses what he calls "traditional subordinate roles for women"[204]—even if it simultaneously declared

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201. Dwyer, *Religious Schools* at 16 (cited in note 8). See also id. at 87.

202. Id. at 176 (criticizing Rawls for tolerating such practices).

203. The controversial resolution on marriage adopted by the Southern Baptist Convention on June 9, 1998, provides, in pertinent part: "The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to his people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation." Baton Rouge Advocate, 1998 WL 4910361 (Aug. 29, 1998).

204. P. 16.

that females are equal to males. But this pejorative label does not rest on evidence that being a full-time mother and homemaker in a conservative religious family is *intended* to involve subordination. Certainly that is not the teaching of Fundamentalist-Protestant Christianity, Roman Catholicism, or Orthodox Judaism. For all their diversity, these religions share a common emphasis on the centrality (indeed, the holiness) of family life. From their perspective, the work people do in the marketplace, or the influence they exert in political affairs, is in no way superior to or more important than the work parents do in the home, especially childrearing.[205] Fairly interpreted, the traditionalist assignment of childrearing and home economics primarily to mothers, and paid work and political activity primarily to fathers, is predicated on the understanding that both roles are of great intrinsic worth and dignity. We might call this view "traditionalist" (not "traditional"!) feminism." It celebrates childrearing and homemaking, and asserts that although our society may have wronged women by discriminating against them in the workplace, it wrongs them even more when it devalues the work they have traditionally done in nurturing their children and providing a home for their families.

No doubt conventional feminists would raise a variety of objections to this position, as they surely would to the related claim that, on the whole, their brand of feminism has made children in our society significantly worse off. To my mind, few debates are more interesting and important than this one, and there are important and substantial arguments on both sides. Rather than engage those arguments, however, Dwyer simply treats the conventional feminist position as axiomatically correct on one issue after another, ranging from the foundational premise that traditional gender roles constrain women "to a life of subordination"[206] to the predictable conclusion that "sexist education" leads to "diminished self-esteem, inhibited cognitive development, passivity, reduced aspirations, and lower achievement on the part of female students."[207] This is ideology posing

205. Midge Decter has memorably summarized this traditionalist ideal of childrearing: "*Every child is born to two people, one of his own sex and one of the other, to whom his life is as important as their own and who undertake to instruct him in the ways of the world around him.* Can you name the social reformer who could dream of a better arrangement than that?" *The Madness of the American Family*, Policy Review 33, 37 (Sept.-Oct., 1998) (emphasis in original).

206. Dwyer, *Religious Schools* at 146 (cited in note 8).

207. Id. at 10 (emphasis added).

as empiricism.[208] If you define wanting a career (or a career and a family) as a higher aspiration than just wanting a family, you will have no trouble proving that girls who are taught to avoid careerism suffer from "reduced aspirations."

In short, in order to establish that traditionalist religious education is either "sexist" or "harmful" to girls, Dwyer is forced to rely on feminist standards that many (if not most) people in our society do not accept. His discussion of existing state and federal laws concerning sex discrimination in education tries to solve this problem by suggesting that Congress and many state legislatures have already decided to forbid "sexist education" broadly and stringently conceived. But the attempt fails, once again because Dwyer mischaracterizes the legal position. To support his contention that states regulate sexist teaching, he notes that some states (six, according to his accompanying footnote) have mandated that public schools eliminate sex discrimination in textbooks and instructional materials.[209] Taken at face value, this means that forty-four states have no such provisions even for their public schools. Even in states that do, the statute proves no more than that the legislature has decided to forbid public schools to adopt a policy of steering girls toward marriage, motherhood, childrearing and homemaking. The relevant question, however, is whether the legislature believed that the *parents* of children in public schools should be forbidden to engage in precisely that kind of steering—and no state has a law to that effect. If parents may instruct their children in traditional gender roles at home, why may they not send them to a private school that will provide equivalent instruction in the classroom?

Dwyer's errors in describing federal law are even more serious. He asserts that there is a federal "prohibition against sex discrimination *and sexist teaching* in elementary and secondary schools" that accept federal aid (emphasis added).[210] The statute

208. Dwyer claims that "[v]oluminous research" supports the judgment that "sexist education and denial of equal opportunity based on gender are harmful to female students," (id. at 10) and he cites a number of studies in an accompanying footnote. (Id. at 184 n.9) But he tells us nothing about the methodology of these studies, the magnitude of the effects they found, how they defined harm to female students, and what specific sexist or discriminatory teachings and practices were being studied. Especially in light of the well-documented abuses to which self-esteem "studies" have proved vulnerable in the hands of feminist advocacy groups, see Christina Hoff Summers, *Who Stole Feminism? How Women Have Betrayed Women* 137-56 (Simon & Schuster, 1994), readers are entitled to know why these sources qualify as "research" rather than as advocacy pieces.

209. Dwyer, *Religious Schools* at 183 n.7 (cited in note 8).

210. Id. at 9.

in question—Title IX of the Education Amendments of 1972—forbids sex discrimination, and Dwyer claims that its language is "broad enough to encompass sexist teaching."[211] Buried in a footnote, however, is his acknowledgment that the "implementing regulations . . . exclude sexist textbooks and curricular materials from their coverage."[212] In the face of vague statutory language, of course, the implementing regulations are ordinarily dispositive of a provision's legal meaning, and Dwyer cites no case rejecting the regulations on this point. Thus, under Title IX even *public* schools may engage in "sexist teaching" without forfeiting federal aid—and Title IX specifically exempts from its coverage any "educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization."[213]

Accordingly, Dwyer's claim that current state and federal laws express a legislative judgment that "sexist education" is harmful to female students is plainly wrong. But that still leaves his contention that "it would clearly be unconstitutional for state schools to engage in sexist practices" such as sexist education, even if they did so on purely secular grounds.[214] (Were this true, Title IX would violate the equal protection component of the Fifth Amendment's due process clause, because it permits federal funds to flow to public schools that engage in sexist teaching.) The nub of this argument is that "sexist education"—i.e., teaching children in public schools that traditional gender roles are in their best interests—constitutes invidious discrimination in violation of the Equal Protection Clause. That proposition is wrong because, as we have already seen, Dwyer cannot show that traditional gender roles are harmful to girls (or boys); opinion on that value-laden question remains deeply divided in our society. The Constitution permits the majority, and the public schools, to endorse traditional gender roles, to endorse feminist attacks on those roles, or to adopt some compromise position.

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211. Id.

212. Id. at 183 n.5.

213. 20 U.S.C. § 1681(a)(3) (1994). Dwyer implies that this provision of Title IX is unconstitutional. See Dwyer, *Religious Schools* at 123 (cited in note 8).

214. Dwyer, *Religious Schools* at 126 (cited in note 8). Dwyer's claim here rests on the Equal Protection Clause, not on the Establishment Clause. Obviously public schools could not encourage girls to accept traditional gender roles by inculcating the religious doctrines that support those positions. The question is whether public schools are forbidden to endorse traditional gender roles on secular grounds.

Suppose, however, that "sexist teaching" in public schools should be treated on a par with *racist* teaching in public schools, which the Equal Protection Clause may well forbid.[215] It still would not follow that private and religious schools cannot engage in sexist teaching. To Dwyer's extravagant claim that the effects of "sexist instruction" on girls are comparable to the effects of racially segregated schooling on African-American children, there is a simple answer: *Runyon v. McCrary*.[216] In *Runyon*, the Supreme Court struck down the racially discriminatory admissions policies of a private school (though on the basis of section 1981, rather than on equal protection grounds). But in reaching that conclusion, the Court unequivocally "assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions."[217] The plain message of *Runyon*—a decision Dwyer does not see fit to mention—is that racist teaching is constitutionally protected. *A fortiori*, sexist teaching must be constitutionally protected as well.

Runyon also demonstrates why Dwyer's reliance on *Norwood v. Harrison* is unavailing. Even on the dubious assumption that *Norwood* applies outside the context of intentional racial discrimination, that decision suggests only that states would be forbidden to provide aid such as free textbooks to children attending religious schools that engage in sexist teaching. The private schools in *Norwood* were free to continue their racist practices; they simply could not do so while receiving this type of state support. Thus, *Norwood* provides no support for Dwyer's proposals, which would require religious schools to abandon the teaching of sexist beliefs even if they accepted no state aid of any kind.

Mention of *Runyon*—and of the First Amendment—leads me to a larger point about both Dwyer's equal protection analy-

215. The qualification is necessary because most individual-rights provisions of the Constitution limit coercive government action, but do not limit government speech. For example, the government cannot censor political speech, but it can endorse some political views and criticize others. The principal exception is the Establishment Clause, which forbids governments to endorse religious views even in the absence of coercive effects. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962); see also Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986). It may be that the Equal Protection Clause is another exception, at least in the case of racist government speech in the context of education, on the ground that such speech would have gravely harmful effects on minority children.

216. 427 U.S. 160 (1976).

217. 427 U.S. at 176.

sis and his other arguments for extensive state regulation of the content of religious education. Most of his specific proposals involve content-based restrictions on the speech of religious schools and religious parents to their students and children. States would, inter alia, impose "curricular and teaching guidelines," forbid sexist teaching and the teaching of chastity, outlaw "teaching secular subjects from a religious perspective," and enjoin schools from teaching students "unreasonable, divinely ordained standards of conduct."[218] Moreover, Dwyer would extend at least some of these restrictions to direct speech by parents to their children.[219] Both types of restrictions are, in the end, restrictions on the educative speech of parents: as I have argued elsewhere, the speech of parentally-chosen schools and teachers is simply indirect educative speech running from parents to children through the parents' agents and intermediaries.[220]

The religious speech of parents and the schools to which they entrust their children is plainly entitled to a high degree of first amendment protection. The category of religious educative speech implicates not only free speech,[221] but also freedom of association and the free exercise of religion. Indeed, this category of speech can be seen as a subcategory of political speech, because it involves the formation of children's beliefs and opinions, and hence their future character as citizens. But whether we label it political or simply religious, it is clear that government cannot impose viewpoint-based restrictions on what parents (and their proxies) say to their children (or on what the children say to them). Viewpoint-based regulation of high-value speech is subject to a stringent compelling state interest test that makes it virtually per se unconstitutional.[222]

Dwyer never acknowledges this formidable constitutional obstacle to his plan to subject religious speech to children to pervasive state censorship and control. If he had, he would presumably have responded that there is a compelling state interest

218. Dwyer, *Religious Schools* at 179 (cited in note 8).

219. See id. at 158 (suggesting that schools and parents "might justifiably be proscribed from expressing sexist views in the presence of children in a way that damages children's self-esteem (i.e. such expression could be deemed to fall within legal definitions of psychological and emotional abuse in child welfare laws now in place)").

220. Gilles, 63 U. Chi. L. Rev. at 1015-19 (cited in note 21).

221. See *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2446 (1995) ("private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression").

222. See *Rosenberger v. Rector and Visitors*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." (internal citation omitted)).

in preventing harm to children, whether that harm is inflicted by means of speech or otherwise. Provided the harm in question is sufficiently serious and clear-cut, of course, this point is entirely correct: for example, a state might be justified in defining child abuse to include an unrelenting parental campaign of cruel and hateful speech directed at a child. As we have seen again and again throughout this essay, however, the problem is that Dwyer defines harm in broad ideological terms with which it is eminently possible reasonably to disagree. This approach is impossible to reconcile with the standard first amendment view that "to permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees."[223] If the government can forbid parents and teachers to communicate any message it decides (based on value-laden and highly debatable criteria) is "harmful to children," then the government can control the transmission of ideas to future generations. Government power of that kind flatly contradicts the first amendment principle—announced in a case involving the education of religious children—that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[224]

CONCLUSION

Religious Schools v. Children's Rights was plainly written out of concern for children's best interests and conviction that children suffer serious harm when they receive a traditionalist religious education. But although Dwyer's insistence on children's best interests as the benchmark for regulation of child-rearing is illuminating at times, the radical reforms he proposes would disserve the best interests of children while trampling on their parents' religious liberty and freedom of speech. Making aggressive, coercive use of government power to subvert traditionalist religious education would be imprudent as well as intolerant. When, in a liberal democracy, one side's deepest values and commitments clash with the other's on a wide range of public issues, the result is culture war. When one side tries to take away the other side's *children* by force—whether of arms or law,

223. *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976).

224. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). For the argument that even as currently constituted our system of public education contravenes the *Barnette* principle, see Stephen Arons, *Compelling Belief: The Culture of American Schooling* 189-221 (U. of Massachusetts Press, 1986).

and whether by abducting or indoctrinating them—the result is all too likely to be battles of a less metaphorical kind.