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# Brown's Promise, Blaine's Legacy

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# CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY. By Joseph P. Viteritti.[1] Brookings Institution Press. 1999. Pp. 284. $29.95.

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If nothing else, this Review Essay, like Professor Viteritti's book, should be timely. As I write, the United States Supreme Court in *Mitchell v. Helms*[3] has just decided that publicly funded computers and other educational materials may be loaned to private and religious schools. The decision is widely viewed as signaling, if not determining, the constitutional fate of school-choice experiments like those in Cleveland and Milwaukee.[4] As it happened, just one week before *Mitchell*, the Sixth Circuit heard oral arguments in *Simmons-Harris v. Zelman*[5] (the Ohio voucher case) as hundreds of voucher supporters chanted "freedom, freedom!" across the street from the federal court in downtown Cincinnati.[6] A challenge to Florida's statewide voucher

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3. 530 U.S. 793 (2000).

4. See, e.g., Jodi Wilgoren, *Court Ruling Fuels Debate on Vouchers for Education*, N.Y. Times A21 (June 29, 2000); Chester E. Finn, Jr., and Charles R. Hokanson, Jr., *Court Ruling Augurs Well for Vouchers*, Wall. St. J. A26 (June 29, 2000).

5. The author of this Review Essay helped write the *amicus curiae* brief filed by the Center for Education Reform in support of the Cleveland choice program.

6. Francis Griggs and Sharon Moloney, *While Lawyers Arguing, Rally Touts School Choice*, Cin. Post 7A (June 21, 2000). In *Zelman*, Ohio is asking the Court of Appeals to reverse a district-court ruling that the Ohio Pilot Scholarship Program violates the Establishment Clause. See *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999). Just before this Essay went to press, the United States Court of Appeals for the Sixth Circuit affirmed the decision in *Zelman*, reasoning that the Cleveland school-choice program "has the primary effect of advancing religion and that it constitutes an endorsement of religion and sectarian education in violation of the Establishment

program is pending before a state appeals court, and choice proposals will be on the ballot this November in Michigan and California.[7] It is, one activist reports, "High Noon" for vouchers.[8] Enter Joseph Viteritti (cue spaghetti-western-style, ominously poignant whistling), who has written a readable and reasonable, measured yet inspiring, argument for educational choice.[9]

## I

"Vouchers" is, for many liberals and progressives, a dirty word; such a nasty word, in fact, that when the Vice President and his campaign staff were making the talk-show rounds last winter to critique Senator Bradley's health-care plan, they were careful to note, over and again, their horror barely concealed, that Bradley was proposing "vouchers."[10] What's more—as was illustrated last February during the Bradley-Gore debate at the Apollo Theater—it is evidently thought to be politically safer to risk snubbing the many African American parents who favor school choice than even to appear sympathetic to voucher proposals.[11]

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Clause." *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000). In my view, the Sixth Circuit's ruling coheres neither with controlling precedent nor common sense, and should be reviewed and reversed by the United States Supreme Court. See, e.g., *Judgment Day*, Wash. Post A26 (Dec. 18, 2000) ("The good news is that no one, least of all the court itself, really expects this to be the last word").

7. Editorial, *School Is Out*, Wall St. J. A46 (June 26, 2000). As this Essay is going to press, the protracted 2000 presidential election has finally ended, and voters in Michigan and California resoundingly rejected the school-choice initiatives proposed in those states. See, e.g., *Voters Approved School-Funding Proposals in Referendum Voting*, Wall St. J. A17 (Nov. 9, 2000) ("By more than 3-to-1, ... voters in California and Michigan turned down proposals that would have committed their states to offering school vouchers").

8. Ron Unz, *High Noon for Vouchers*, Nat'l Rev. Online, June 20, 2000 ("Now, suddenly, a chain of unconnected events will decide the triumph or collapse of the voucher movement—by the end of the year") (see <http://www.nationalreview.com>).

9. Professor Viteritti has developed these ideas in earlier works. See generally Joseph P. Viteritti, *Reaching For Equality: The Salience of School Choice*, 14 J.L. & Pol. 469 (1998); Joseph P. Viteritti, *Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol. 657 (1998); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity Under Constitutional Federalism*, 15 Yale L. & Pol'y Rev. 113 (1996).

10. Debra J. Saunders, *Gore Masters Psychological Warfare*, S.F. Chron. A25 (Jan. 28, 1999) ("In debate after debate, Gore hit Bradley's 'voucher' plan that was 'capped' at $150 per month. It was a double misrepresentation. The Bradley plan would operate through tax credits, not vouchers—a loaded word among Democrats who might hear the word and think school vouchers").

11. During the Apollo Theater debate, one journalist asked the Vice President, given that so many African Americans support school choice and that the Vice President and his children are products of private schools, "why should ... parents [who support vouchers] have to keep their kids in public schools because they don't have the financial

This makes no sense to Joseph Viteritti, an "old school" liberal who offers in *Choosing Equality* what some might call a "bleeding heart" argument for choice in education. The book opens not with a libertarian nugget from Hayek or the Cato Institute; and not with red-meat-for-conservatives anecdotes about mandatory condom-distribution programs, Gaia worship, or public-school secularism run amok; but instead with the story of Linda Brown: "Nearly half a century has passed since the parents of a little black girl from Topeka, Kansas, entered a federal court room to argue that every child in America has an equal right to a decent education." (p. 1) Still, "[n]otwithstanding Linda Brown's courageous efforts to fulfill the promise of equality and a range of well-intentioned government actions, race and class remain the most reliable predictors of educational achievement in the United States." (Id.) *This*, Viteritti insists, is the "most compelling argument" for school choice. (p. 223)

Viteritti admits, of course, that there are many reasons why people support (and oppose) school choice.[12] When Milton Friedman first proposed a "full-fledged system of school vouchers" that "would minimize the role of government in education and replace public schools with privately run institutions supported by taxes," (p. 53) many libertarians cheered, and many still do.[13] In the early 1970s, progressive social scientists like Christopher Jencks, John Coons, and Stephen Sugarman turned to vouchers as an income-redistribution and empowerment device,[14] themes that many education-reform and civil-rights activists still invoke today.[15] And more recently, many religious conservatives have embraced school choice as a way to challenge

resources that you do?" Another questioner inquired of both candidates, why shouldn't parents conclude that the Democratic Party's opposition to choice is supporting a special interest rather than their interest?" Both candidates were unmoved. See Editorial, *No Choice for Democrats*, Wall St. J. A22 (Feb. 23, 2000); see also Floyd H. Flake, *Gore's Achilles Heel*, N.Y. Times A15 (Mar. 12, 2000) (claiming that "Mr. Gore did not answer [the] question in any real way. That won't do").

12. For a fairly representative snapshot of the debate, see Gary Rosen, *Are School Vouchers Un-American?*, Commentary 26, Feb. 2000; Gary Rosen & Critics, *Are School Vouchers the Answer?*, Commentary 16, June 2000.

13. Milton Friedman, *The Role of Government in Education*, in Robert A. Solo, ed., *Economics and the Public Interest* (Greenwood Press, 1955).

14. See, e.g., Christopher Jencks, *Education Vouchers: A Report on Financing Education by Payments to Parents* (1970); John E. Coons, William H. Clune and Stephen D. Sugarman, *Private Wealth and Public Education* (Belknap Press, 1970); John E. Coons and Stephen D. Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 Cal. L. Rev. 321 (1971).

15. See, e.g., Floyd H. Flake, *How Do We Save Inner-City Children?*, Pol'y Rev. 48 (Jan-Feb. 1999).

what they regard as the increasingly aggressive secularism of the public schools' curriculum and culture. (pp. 56-57)

The *leitmotif* of *Choosing Equality*, though, is Linda Brown's lawsuit, and the book's animating goal is to "explain how choice might be applied . . . to advance the goal of equality." (p. 2) In Viteritti's view, *Brown* promised "not only equality of educational opportunity for blacks, but full partnership in the American experiment." (p. 3) He aims to show that school choice holds out the best hope for making good on that promise. And he suggests that, given the support for choice programs among those to whom the *Brown* Court most clearly made its pledge, (pp. 5-9)[16] it is appropriate to place the burden of persuasion on those who oppose such reforms. As one of Viteritti's apparent converts put it, "[a]s a parent of an urban public high-school student, I flinch at anything that drains resources from public schools. But I have a choice. Keeping them from others because of a vague threat seems increasingly hard to justify."[17]

*Choosing Equality* is about a big idea—"equality." In the legal academy, though, school-choice discussions tend to focus on the fine points and various "prongs" of First Amendment doctrine and "tests." And so, one could be forgiven for thinking of the book, "Not *another* tour through the Supreme Court's Establishment Clause mess?" Fear not. *Choosing Equality* is an engaging contribution both to the education-reform arena and to the broader dialogue about the place of religion and religious institutions in public life. Particularly in a political season, the case for (and against) choice in education can too easily "morph" into partisan posturing and interest-group gamesmanship. In Viteritti's view, it doesn't have to be this way. For him, school

16. Low-income citizens and racial minorities are more likely to support choice in education than are middle- and high-income whites. See, e.g., David A. Bositis, *1999 National Opinion Poll: Education*, Joint Center for Political and Economic Studies, at Table 5 (available at <http://www.jointcenter.org/selpaper/poll_edu99.htm>); Jeff Jacoby, *The Poor Favor School Choice*, Boston Globe A19 (Dec. 27, 1999); Michael W. Lynch, *Rampaging Toward Choice*, Reason 24, 26 (Jan. 2000) ("Polls show that school choice is far more popular with minorities than with whites, and most popular with low- and modest-income minorities"); James Brooke, *Minorities Flock to Cause of Vouchers for Schools*, N.Y. Times A1 (Dec. 27, 1997). But see William Raspberry, *A Little Knowledge Can Be a Meaningless Thing*, Wash. Post A23 (Nov. 29, 1999) (suggesting that parents' support for school-choice is generally uninformed).

17. Geneva Overholser, *Coming Around on Vouchers*, Wash. Post A15 (Sept. 20, 1999) ("It's getting harder every day to be an informed and compassionate opponent of vouchers. A new book called 'Choosing Equality' just may spell the end of my opposition").

choice makes sense as a matter of shared constitutional and moral ideals that are too important to be left to political junkies.

Here is Viteritti's argument, in a nutshell: *First*, the *Brown* decision was not just about de-segregating public schools; it also held out the more ambitious promise of meaningful racial equality in society. After *Brown*, Viteritti insists, equal educational opportunity should be regarded as a fundamental right. (pp. 23-28)[18]

*Second*, fifty years of government-centered tinkering and several hundred billion dollars in well-intentioned spending have failed to make good on *Brown*'s promise. It's time, Viteritti thinks, to try something else. (pp. 28-52)

*Third*, choice-based reforms are often hamstrung by excessive regulatory controls. Magnet schools, charter schools, and public-school-only choice programs are clearly steps in the right direction, but they are not likely to capture the full creative potential of educational choice. (pp. 53-79)

*Fourth*, religious schools—particularly Catholic schools—are the key to school choice. These schools equip disadvantaged children for success in educational environments that are more integrated, diverse, and consonant with the best of our common-school ideals than are many of the public schools that purport to serve the same children. (pp. 80-116)

*Fifth*, the Constitution permits governments to include religious schools in school-choice programs. Indeed, inclusive school-choice programs better serve the religious-freedom values at the heart of the First Amendment than does strict "no-aid separationism,"[19] and they avoid the discrimination against religion that is no less offensive to the Constitution than is state-sponsored orthodoxy. (pp. 117-44)

*Sixth*, the strict no-funding provisions that were injected into many States' constitutions during the late nineteenth and early twentieth centuries—in large part as a result of nativist prejudices and suspicions toward the Catholic Church[20]—are the more formidable obstacles to school choice. A re-appraisal of

18. But cf. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S 1 (1973) (education not a "fundamental right" under the Equal Protection Clause).

19. See, e.g., Carl Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 285 (1999).

20. See *Mitchell v. Helms*, 530 U.S. 793, 2000 WL 826246, at *24 (2000) (plurality opinion) ("Consideration of the [Blaine] Amendment arose at a time of pervasive hostility to the Catholic Church and Catholics in general").

these provisions, their history, their continuing discriminatory effects, and of the common-school movement itself, is needed. (pp. 145-79)

*Seventh*, school choice will not only promote educational equality but also enrich the public square.[21] Far from being balkanizing or insular, many neighborhood parochial and private schools are valuable participants in the enterprise of creating public-minded citizens, healthy mediating institutions, and a thriving civil society. (pp. 180-208)[22]

*Eighth*, and finally, Viteritti proposes that governments implement broad choice programs for low-income children in failing public schools. These programs should include religious schools (while requiring that these schools not discriminate on the basis of race or religion in admissions) and at the same time require that government-run schools remain secular. (pp. 209-24) In the end, Viteritti concludes,

> As with all crucial political issues, choice is a moral question. It speaks to who we are as a people and to our capacity to think beyond ourselves. The most compelling argument for school choice in America remains an egalitarian one: education is such an essential public good for living life in a free and prosperous society that all people deserve equal access to its benefits regardless of race, class, or philosophical disposition. There should be no exceptions to the rule or excuses for the contrary. (p. 223)

## II

Viteritti observes early on in *Choosing Equality* that "discussions on the merits of school choice operate on two different levels. As intellectuals engage in esoteric discourse on the abstractions of distributive justice, market dynamics, religious liberty, and civil society, the poor understand on a more visceral level that it is their children who are trapped in inferior schools."

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21. See generally Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* (W.B. Eerdmans, 1984).

22. See generally, e.g., Paul E. Peterson, *School Choice: A Report Card*, 6 Va. J. Soc. Pol'y & L. 47, 72-73 (1998) ("Despite the rhetoric and scare tactics, choice critics have failed to offer much evidence that school choice will balkanize America"); Christian Smith and David Sikkink, *Is Private School Privatizing?*, First Things 16 (April 1999); Jay P. Greene, *Civic Values in Public and Private Schools*, in Paul E. Peterson & Bryan C. Hassel, eds., *Learning from School Choice* 83, 95-98 (Brookings Institution Press, 1998).

(p. 11) In fact, "choice already exists for many if not most Americans" and "those who do not enjoy choice really want it for their own children." (pp. 11-12) *Choosing Equality* asks, given these givens, whether school choice is something that those who want it *should* want; whether it is something the Constitution permits government to provide; and whether it is something that, in light of our Constitution and democratic ideals, we should be eager to embrace. In other words, is school choice sensible? Is it constitutional? Is it just?

Having identified "equality"—as opposed to, say, "efficiency," "competition," or "family values"—as the school-choice endgame, Viteritti reviews nearly fifty years of post-*Brown* policymakers' efforts first to define and then to achieve that equality. (pp. 23-52) The story is familiar and depressing.[23] Although Viteritti does not downplay the achievement of outlawing *de jure* segregation, it remains true that, hundreds of billions of dollars later, "most children who attend public school in the United States today do so in a segregated setting" (p. 49) and black and Latino students persistently lag behind whites in academic performance. If *Brown*'s aim was to "realize racial equality through educational opportunity. How this promise might be translated into concrete public policy turned out to be a more daunting challenge than anyone at the time could have imagined." (p. 27)

What went wrong? *Choosing Equality* traces several "false starts" (p. 28) at "realizing racial equality," starting with the tumultuous implementation of the Court's "all deliberate speed" mandate, continuing through the attempts to remedy the effects of segregation through busing, and turning then to the gradual retreat in the legislatures and in the courts from court supervision of school districts as a school-reform tool. (pp. 29-34)[24] Viteritti reports that, in the mid-1970s, researcher James Coleman concluded that the government's desegregation efforts were actually *increasing* segregation (by prompting "white flight") without corresponding gains in student performance.[25] And by

23. For provocative and quite different take on this problem, see James Traub, *What No School Can Do,* N.Y. Times (Magazine) 52, 54 (Jan. 16, 2000) ("[E]ducational inequality is rooted in economic problems and social pathologies too deep to be overcome by school alone").

24. See, e.g., *Board of Education v. Dowell,* 498 U.S. 237 (1991); *Freeman v. Pitts,* 503 U.S. 467 (1992); *Missouri v. Jenkins,* 515 U.S. 70 (1995).

25. James S. Coleman, et al., *Trends in School Desegregation 1968-1973* (Urban Institute, 1975).

1998, "80 percent of black parents said that they would prefer schools to focus on achievement rather than integration." (p. 33)

Just as efforts to achieve "equality as racial integration" fizzled, so too did attempts at "equality as more spending" (pp. 34-42) and "equality as political power." (pp. 42-49)[26] The "immense outpouring" of "well intentioned" dollars that began with the 1965 Elementary and Secondary Education Act "did not prove to be effective in closing the achievement gap for disadvantaged children." (p. 35)[27] Nor has the "equal money" approach worked much better than the "more money" strategy. In 1973, the Supreme Court in *San Antonio Independent School District v. Rodriguez* turned back an effort to constitutionalize—through the Equal Protection Clause—parity in public-school funding.[28] In so doing, though, the Court inspired state-law-based equal-funding litigation in at least thirty-three States. This litigation continues today and has resulted in substantial change in the way many States fund public education. (pp. 37-42)[29] Still, "the preponderance of the research evidence continues to support the findings that Coleman uncovered more than thirty years ago: there is no consistent relationship between education spending and student achievement." (p. 42)[30]

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26. Viteritti describes in some detail the Great Society's "Community Action Program," which was designed to "bypass the traditional governmental institutions elected citywide and to funnel money directly into communities where new units of power, elected by community residents, determined how resources [were] to be disbursed." (p. 44)

27. One 1997 study concluded that over *one hundred billion dollars* in Title I spending had failed to produce "any difference in performance between program participants and a control group." (p. 35) As Viteritti notes, however, Title I was hamstrung for more than a decade by the Supreme Court's decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that public-school teachers could not provide federally funded remedial education on parochial-school grounds. The Court abandoned *Aguilar* in *Agostini v. Felton*, 521 U.S. 203 (1997).

28. 411 U.S 1 (1973). The California Supreme Court had held, in *Serrano v. Priest*, 5 Cal. 3d 584 (1971), that California's school-funding system discriminated against the poor. But the Supreme Court in *Rodriguez* insisted that "the Equal Protection Clause does not require absolute equality or precisely equal advantages" in education. 411 U.S. at 24. Viteritti believes that *Serrano* was a "reasonable interpretation of the U. S. Constitution in the wake of *Brown*, which had deemed equality of opportunity a fundamental right" and concludes that, in *Rodriguez*, the Court "appeared to be stepping back from *Brown*." (p. 37)

29. The school-funding cases have also prompted vigorous debates over the point" [at which] redistributive politics carried out in the name of equity begin to bunk up against the liberty and property rights of those who are required to make a greater personal sacrifice." (p. 39) On school-funding litigation generally, see, e.g., James E. Ryan, *Schools, Race, and Money*, 109 Yale L.J. 249 (1999).

30. See Traub, *What No School Can Do* at 55 (cited in note 23) ("Head Start, Title I and a host of other programs have gone a long way toward proving one of Coleman's central claims, which is that money does not buy educational equality").

And so, Viteritti concludes, notwithstanding half a century of experiments with political decentralization, new spending programs, school-funding reform, and busing, the answer to the "crucial question"—"whether [our] children are adequately learning"—is, at least with respect to the most disadvantaged, disappointing but clear: "Our public schools have failed miserably." (p. 51)

So, what about choice? Viteritti traces the evolution of the school-choice idea from Milton Friedman's 1955 universal-voucher proposal through the current debates in Milwaukee, Cleveland, Congress, and the courts. Friedman favored public education but was "troubled by the dominance of a government-run bureaucracy in education that he believed perpetuated mediocrity." (p. 53) Although he spoke out of a philosophical tradition that claims not to be concerned with equality of results and that purports to tolerate only a minimalist state, Friedman (like Viteritti) "was unequivocal in his position that government had an obligation to provide decent schooling to all at public expense." (p. 54) He understood that "without fostering equality in *educational* outcomes, there could be no real equality of opportunity in a larger social context." (emphasis added) (pp. 55) "Education" was for Friedman "the irreplaceable link that ties the two together, an essential ingredient for both liberty and equality in a democratic society." (p. 55)[31] Friedman's market libertarianism, oddly enough, can therefore be seen as not only contemporaneous but also consonant with the ideals expressed in *Brown*.

But Friedman was ahead of his time. Although a few social scientists embraced vouchers in the late 1960s and 1970s as part of ambitious redistributive programs, (pp. 55-57)[32] and President Ronald Reagan submitted several voucher bills to Congress in the mid-1980s, the idea failed to attract broad-based support. Instead, vouchers "increasingly became identified with conservative politics and the Christian coalition" and, worse, with the

31. See Milton Friedman and Rose Friedman, *Free to Choose: A Personal Statement* 162 (Harcourt Brace Sovanovich, 1980); Milton Friedman, *Capitalism and Freedom* 86-87 (U. of Chicago Press, 1962).

32. See generally, e.g., Jencks, *Education Vouchers* (cited in note 14); Coons and Sugarman, *Family Choice in Education* (cited in note 14); Coons, Clune, and Sugarman, *Private Wealth and Public Education* (cited in note 14). See also John E. Coons and Stephen D. Sugarman, *Education by Choice: The Case for Family Control* (U. of California Press, 1978).

"choice academies" that had hamstrung the implementation of *Brown*. (p. 57)

Educational-choice supporters turned instead—some might say they lowered their sights—to magnet schools, private management of government schools, charter schools, and public-school-only choice. (pp. 57-79) But, as Viteritti sees it, the problem with these controlled-choice programs—notwithstanding their successes—has been "not enough choice, too much control." (p. 59)[33] Charter schools, for example, are "hot."[34] Thirty-four States enacted charter laws in the last decade, making these schools "the most revolutionary idea in education for the 1990s." (p. 64)[35] The hope is that the competitive incentives and diversity promised by comprehensive, Friedman-style school choice can be achieved within a more decentralized, but still public, system of charter schools.[36] And, on the political front, one advantage of charter schools is that they appear to enjoy bipartisan support. Indeed, "[f]or Democratic politicians aligned with teachers unions and other education groups, [the charter-school movement] represented a convenient compromise on choice: no funding for private schools, no church-state entanglements, a mechanism for increased accountability." (p. 71) Still, the teachers' unions are skeptical enough about decentralization that many States' charter-school laws reflect accommodations to union concerns more than whole-hearted acceptance of choice. (p. 70) As a result, Viteritti complains, charter schools are often undermined by the very regulatory burdens they were designed to circumvent. (pp. 71-72)[37]

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33. See Christine H. Rossell, *Controlled-Choice Desegregation Plans: Not Enough Choice, Too Much Control*, 31 Urb. Aff. Rev. 43 (Sept. 1995).

34. See generally, e.g., Marilyn Brown, *Whatever Else They Are, Charter Schools Are Hot*, Tampa Trib. 6 (Nov. 21, 1999); *Charter Schools to Receive Aid; Clinton Lauds Idea, Grants $95 Million*, Wash. Post A12 (Aug. 29, 1999); June Kronholz, *Gore 10-Year, $115 Billion Schools Plan Includes Aid for Teachers in Poor Areas*, Wall St. J. A16 (Dec. 17, 1999) ("Mr. Gore also called for tripling the number of charter schools, which are publicly funded schools that aren't part of the regular school-district bureaucracy").

35. See Chester E. Finn, et al., *What If All Schools Were Schools of Choice?*, Weekly Standard 26 (June 19, 2000) ("[Charter schools] are looking like a possible alternative to the [public-school] system itself, foreshadowing a far different public-education system than we now know").

36. For an excellent summary of where things stand today with charter schools, see the United States Department of Education's report, *The State of Charter Schools 2000: Fourth-Year Report* (Jan. 2000) (available at <http://www.ed.gov/pubs/charter4thyear/>).

37. See, e.g., Editorial, *Charter Hypocrisy*, Wall St. J. A26 (Oct. 20, 1999) ("When it comes to actual treatment of the nation's fledgling charter schools, the Clinton Administration follows another policy: It tortures them"); David A. DeSchryver, *Strong Charter School Laws: A Necessary Condition for the "Ripple Effect,"* 11 Stan. L. & Pol'y Rev. 311 (2000). It would seem to be a mistake to be too dour about the promise of charter

"Controlled choice"—like the other post-*Brown,* government-centered efforts—seems doomed to fall short of its potential. Free choice, Viteritti insists, can do better. As James Coleman found in the early 1980s, and as has been re-confirmed again and again, private schools—particularly Catholic schools—by and large work well for disadvantaged inner-city children. (pp. 80-116) Coleman found, for example, that even controlling for students' family background, private schools produce better cognitive outcomes; provide a safer, more disciplined, and more racially integrated learning environment; offer more academically focused courses; and better cultivate self-esteem than do public schools. (pp. 80-81)[38] Sociologist Andrew Greeley has reached similar conclusions, leading him to tout the benefits of the "Catholic school effect." (pp. 82-86)[39] As best-selling author

schools, though. See, e.g., Finn, *What If All Schools Were Schools of Choice* (cited in note 35); Scott Milliman, et al., *Do Charter Schools Improve District Schools? Three Approaches to the Question,* in Robert Maranto, et al., eds., *School Choice in the Real World: Lessons from Arizona Charter Schools* (Western Press, 1999).

38. James S. Coleman, et al., *High School Achievement: Public, Catholic and Private Schools Compared* (Basic Books, 1982). To be sure, as Viteritti recounts, Coleman's methodology and findings were, and continue to be, vigorously disputed. (p. 81-82) See, e.g., Jeff Neurauter, *On Educational Vouchers: Revisiting the Assumptions, Legal Issues, and Policy Perspectives,* 17 Hamline J. Pub. L. & Pol'y 459, 462-469 (1996) (collecting and summarizing work of Coleman's critics). That said, Coleman confirmed his findings five years later in a study whose methodology was designed to respond to his critics. See James S. Coleman and Thomas Hoffer, *Public, Catholic and Private Schools: The Importance of Community* (Basic Books, 1987); see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship,* 62 U. Chi. L. Rev. 131, 183 (1995) ("A review of the literature, however, suggests that the dispute [between Coleman and his critics] is less substantive than the participants make it out to be"); Thomas B. Hoffer, *Catholic School Attendance and Student Achievement: A Review and Extension of Research,* in James Youniss and John J. Convey, eds., *Catholic Schools at the Crossroads: Survival and Transformation* (Teachers College Press, 2000).

39. Andrew Greeley, *Catholic High Schools and Minority Students* (Transaction Books, 1982). See also Anthony S. Bryk, et al., *Catholic Schools and the Common Good* (Harvard U. Press, 1993); Youniss and Convey, *Catholic Schools at the Crossroads* (cited in note 38). For a very different and provocative take on Catholic schools, see generally James G. Dwyer, *Religious Schools v. Children's Rights* (Cornell U. Press, 1998). Although Professor Dwyer's arguments against parents' rights and his defense of children's welfare as he sees it are powerful, his tendentious portrait of Catholic schools, and his claim that these schools—and, evidently, Catholicism generally—are often *harmful* to children is fatally undermined by his reliance on highly polemical accounts of Catholic education. See also Stephen L. Carter, *Parents, Religion, and Schools: Reflections on* Pierce *70 Years Later,* 27 Seton Hall L. Rev. 1194, 1209 (1997) ("[S]uch arguments as these rest on questionable empirical propositions about what values children learn, and where, supported principally by anti-religious stereotypes rather than by any hard analysis of how religions operate"). For a detailed critique of Dwyer's book, see Stephen G. Gilles, *Hey, Christians! Leave Your Kids Alone!,* 16 Const. Comm. 149 (1999).

and "lapsed Presbyterian" Tom Wolfe put it, "I'm not Catholic, but I have eyes."[40]

The success of Catholic schools might seem reason enough to experiment with inclusive school-choice programs,[41] but the "paradoxical politics of choice" are not so simple. (pp. 86-92) Viteritti captures this paradox well, describing the defeat of congressional Republicans' attempt to enact school choice in (or, impose choice on) the District of Columbia (p. 90):

> The bill died, but not before treating the nation to a political spectacle that dramatized the paradox and irony behind the choice debate. A Republican House majority had drafted a law that was more consistent with the redistributive politics of liberal sociologist Christopher Jencks than with the market model of conservative economist Milton Friedman. It was defeated by a Democratic majority in the Senate at the behest of a Democratic president who had just enjoyed a resounding reelection victory with strong support from black voters. Clinton epitomized one of the great dilemmas of liberal Democratic politics: on the one hand, sympathetic to the plight of the disadvantaged, concerned with the tragic condition of public education in cities; on the other hand, deeply indebted to the education establishment and the powerful teachers unions.

Still, despite the stalemate in Washington, D.C., inclusive school-choice programs are underway in Milwaukee (pp. 98-108)[42] and

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40. John Burger, *Tom Wolfe: Catholic Schools Are The Right Stuff*, Nat'l Cath. Reg. 3 (Mar. 19-25, 2000). Indeed, voucher opponents appear to agree—at least for litigation purposes—that religious schools out-perform public schools. After all, as Viteritti has observed, one constitutional argument against choice is that it "provides parents with a compelling incentive to attend religious schools." The premise of this argument, of course, is that "parochial schools are so academically superior to public schools that when given a choice to send their children to religious institutions, parents find the offer irresistible." Joseph P. Viteritti, *School Choice and American Constitutionalism*, Paper Presented at the Conference, "Charter Schools, Vouchers, and Public Education," Program on Education Policy and Governance, John F. Kennedy School of Government, Harvard University (Mar. 10, 2000) (on file with author); see also *Simmons-Harris v. Zelman*, 234 F.3d 945, 959 (6th Cir. 2000) ("This program provides incentives for parents to choose schools other than mainstream public ones. . .")

41. Although Coleman's study focused on Catholic *and* non-Catholic private schools, *Choosing Equality* has little to say about—nor am I aware of research detailing—the performance of inner-city and low-income students in non-religious and non-Catholic private schools. So, it is not clear how much force the "Catholic school effect" argument for school choice should have in areas with no or few Catholic schools. Because a government-sponsored school-choice program could not, of course, limit private-school participation to Catholic schools, one might reasonably insist that more study of the non-Catholic private schools likely to participate in choice programs is needed.

42. The Wisconsin Supreme Court upheld the Milwaukee program—which includes religious schools—in *Jackson v. Benson*, 578 N.W.2d 602 (1998), cert. denied, 525 U.S. 997 (1998).

Cleveland; (pp. 108-113)[43] a sweeping state-wide program was enacted in Florida;[44] and these efforts have been complemented by an array of private initiatives sponsored by religious groups, business organizations, and philanthropists. (pp. 92-98)[45]

Viteritti concedes that the jury is out on whether pilot school-choice programs can produce consistently the kind of marked improvements in participating students' performances that the "Catholic school effect" would suggest are possible. (pp. 113-16) But given what we know about the troubles facing urban public schools, the success of Catholic schools, the early indicators from the choice programs that have been permitted to inch forward,[46] and the apparent wishes of poor parents, there are, in Viteritti's view, no good reasons not to press ahead. True, we do not yet *know* how well school choice will work. Still, Viteritti has insisted, "the most compelling argument for choice remains a plea for fairness. We don't need numbers to prove that."[47]

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43. The Ohio Supreme Court concluded that the Cleveland program did not violate the Establishment Clause, although it did violate a technical provision of the Ohio Constitution. *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999). The program was quickly re-enacted, and its opponents just as quickly convinced a federal judge that it *did* violate the Establishment Clause after all. *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (N.D. Ohio 1999). Just as this Essay was going to press, the Sixth Circuit affirmed. *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

44. See generally, e.g., *Florida Begins Voucher Plan for Education*, N.Y. Times (Abstracts) 15 (Aug. 17, 1999). Florida Governor Jeb Bush signed the new religious school voucher program in law on June 21, 1999. A legal challenge to the program is pending. See *Holmes v. Bush*, No. CV 99-3370, 2000 WL 526364 (Fla. Cir. Ct., Mar. 14, 2000) (invalidating program on state-law grounds); see also Jodi Wilgoren, *School Vouchers Are Ruled Unconstitutional in Florida*, N.Y. Times A20 (Mar. 15, 2000).

45. For a detailed, current account of school-choice developments across the Nation, see Nina Shokraii Rees, *School Choice: What's Happening in the States 2000* (The Heritage Foundation). This publication is updated regularly at <http://www.heritage.org>.

46. For more on the effectiveness of school-choice programs, see generally, e.g., Peterson, 6 Va. J. Soc. Pol'y & L. (cited in note 22); Paul E. Peterson, et al., *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation* (1996); Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program* 4 (Dec. 1996). For a more mixed—but still generally positive—review of the Milwaukee program, see John F. Witte, Jr., *The Market Approach to Education: An Analysis of America's First Voucher Program* (Princeton U. Press, 2000). Witte recently concluded that school choice is a "useful tool to aid low-income families." Joe Williams, *Ex-Milwaukee Evaluator Endorses School Choice*, Milw. J. & Sent. 1 (Jan. 9, 2000). But see, e.g., Bruce Fuller, et al., *School Choice: Abundant Hopes, Scarce Evidence of Results* 84 (Policy Analysis for California Education, 1999) ("The scarcity of sound evidence on . . . choice is troubling").

47. Joseph P. Viteritti, *School Choice: Beyond the Numbers*, Educ. Week 38 (Feb. 23, 2000).

Maybe not. But still, even if reforms in education *are* needed, and even if school choice *could* work, and *is* fair—are vouchers constitutional? More generally, is there a danger, as some charge, that school choice will "take from the *pluribus* to destroy the *unum*"?[48] Is it true that "public, not private, schooling is . . . the primary means by which citizens can morally educate future citizens"?[49] Is "[p]ublic education [really] one of our most cherished institutions"[50] and, if so, does school choice threaten that institution? In the end, is school choice good policy for a diverse, liberal, and secular society?

## III

"Opponents of school choice continue to argue that, notwithstanding its merits as a vehicle for fulfilling the promise of educational equality articulated in *Brown*, the expenditure of public funds for students to attend religious schools violates federal . . . constitutional law." (p. 116)[51] Viteritti insists that it doesn't. (pp. 117-44)[52] He agrees with those who say that exces-

48. Michael Kelly, *Dangerous Minds*, New Republic 6 (Dec. 30, 1996).

49. Amy Gutmann, *Democratic Education* 70 (Princeton U. Press, 1987).

50. *Minersville Bd. of Educ. v. Gobitis*, 310 U.S. 598 (1940), overruled, *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It's safe to say that Justice Frankfurter's conclusion in *Gobitis* that West Virginia could force Jehovah's Witnesses to salute the school flag would not likely prove as popular today with public-school champions as does his common-school rhetoric.

51. I assume that Professor Viteritti means to say, "notwithstanding the arguments that school choice could be an effective vehicle . . . ." I am not aware of school-choice opponents, or of First Amendment strict-separationists, who concede that school choice would realize *Brown*'s promise.

52. To barely scratch the surface of the debate, see, e.g., Steffen N. Johnson, *A Civil Libertarian Case for the Constitutionality of School Choice*, 10 Geo. Mason Univ. Civ. R. L.J. 1 (1999/2000); Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 341 (1999); Martha Minow, *Choice or Commonality: Welfare and Schooling After the End of Welfare as We Knew It*, 49 Duke L.J. 493 (1999); Ira C. Lupu, *The Increasingly Anachronistic Case Against School Vouchers*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 375 (1999); Abner S. Greene, *Why Vouchers Are Unconstitutional, and Why They're Not*, 13 Notre Dame J.L. Ethics & Pub. Pol'y 397 (1999).

The upshot of this scholarship *seems* to be an emerging consensus that "the Court would uphold an educational voucher scheme that would permit parents to decide which schools, public or private, their children should attend." Laurence H. Tribe, *American Constitutional Law* § 14-10, at 1223 (Foundation Press, 2d ed. 1988). The Supreme Court's recent decision in *Mitchell v. Helms*—both Justice Thomas's plurality opinion and Justice O'Connor's concurring opinion—will likely shore up this consensus. See, e.g., 530 U.S. 793, 2000 WL 826256, at *25 (2000) (plurality opinion) ("Chapter 2 does not result in governmental indoctrination, because it determines eligibility for aid neutrally, allocates that aid based on the private choices of the parents of schoolchildren, and does not provide aid that has an impermissible content"); id. at *31 ("[W]hen government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, no reasonable

sive devotion to the "wall of separation" metaphor has resulted in a skewed understanding of the First Amendment. He argues that the egalitarian pluralism embraced by James Madison, (pp. 121-26)[53] considered in light of the Framers' own religious views, (pp. 126-29)[54] provides a solid foundation for a coherent, nondiscriminatory Establishment Clause jurisprudence. (pp. 135-43)[55] Viteritti concludes that "[t]he Rehnquist Court has promulgated a set of legal principles that makes it possible for the government to provide tuition assistance to parents of children who attend religious schools so long as such aid is administered in a neutral fashion and students attend such schools as a matter of parental choice." (p. 143)[56]

But here's the more difficult question: even if legislators *may*, consistent with the First Amendment, include religious schools in school-choice programs, does it follow that they *must*? Viteritti reports, without elaboration,[57] that "any government action that specifically excludes religious institutions from participation in a publicly sponsored choice program open to nonreli-

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observer is likely to draw... an inference that the State itself is endorsing a religious practice or belief") (O'Connor, J., concurring).

53. On James Madison's views concerning religious freedom, see generally John Noonan, *The Lustre of Our Country: The American Experience of Religious Freedom* (U of California Press, 1998).

54. See, e.g., Volokh, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 351 (cited in note 52) ("[M]y sense of the Framers' worldview is that they did not think the government was required to discriminate against religion").

55. Just such a jurisprudence is developing. See, e.g., *Jackson v. Benson*, 578 N.W.2d 602, 613 (1998) ("Although the lines with which the Court has sketched the broad contours of this inquiry [into a statute's effects] are fine and not absolutely straight, the Court's decisions generally can be distilled to establish an underlying theory based on neutrality and indirection"), cert. denied, 525 U.S. 997 (1998); *Kotterman v. Killian*, 972 P.2d 606, 614-15 (1999) (following *Jackson* and upholding Arizona's $500 tax credit for donations to "school tuition organizations"), cert. denied, 528 U.S. 921 (1999); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 209-10 (Ohio 1999) (relying on neutrality of program criteria and role of independent parental choice in holding that program does not violate the Establishment Clause). But see *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834, 864-65 (N.D. Ohio 1999) (invalidating Cleveland program because "it cannot be said that aid only flows to religious institutions as a result of the independent and private choices of recipients"), aff'd, *Simmons-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

56. Again, the Court's recent decision in *Mitchell* seems to confirm Viteritti's analysis, although Justice O'Connor was careful in her concurring (and controlling) opinion to insist that the "neutrality" of government aid—while an "important" factor to consider—might not be sufficient, in every case, to overcome an Establishment Clause challenge. *Mitchell*, 530 U.S. 793, 2000 WL 826256, at *28 (O'Connor, J., concurring).

57. Viteritti notes later that several recent state supreme court decisions "leave unresolved" the question "whether a state can discriminate against parochial schools in a publicly supported program open to other private schools" and predicts that "the Court will... strike down laws that specifically exclude religious schools or their students from benefits provided on a universal basis." (p. 179)

gious private schools is likely to raise questions of discrimination before the Court." (p. 143) I think he's right, but it's worth explaining why.

The theme that "government may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits"[58] pervades constitutional law. More and more, it is urged that various constitutional provisions work together, complementing each other, to guarantee religious liberty by forbidding discrimination—that is, by requiring "equality"—in matters of religion. Viteritti's chapter on school choice and the First Amendment is titled "Equality as Religious Freedom;" perhaps it could have been called, "Religious Freedom Through Equality." In any event, the upshot of this emerging synergetic view is that excluding religious schools from otherwise general and neutral education-benefits programs presumptively violates the Free Speech, Establishment, *and* Free Exercise Clauses of the First Amendment, as well as the Fourteenth Amendment's Equal Protection Clause.[59]

*First*, the Establishment Clause itself protects individuals' ability to exercise freely, or refrain from exercising, their religion by mandating that government not use its power to skew the decision for (or against) religious faith and practice.[60] That is, the government may not "establish" religion, not because religion is suspect or to be feared—quite the contrary—but because it is a good thing for people to exercise religion *freely*.[61] And so, just

58. *McDaniel v. Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment).

59. I can provide only an outline of these arguments. For more detailed scholarly discussions, see, e.g., Volokh, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 365-73 (cited in note 52); see also, e.g., Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on 'Equal Access' for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 675-700 (1996); Michael Stokes Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Litigation*, 61 Notre Dame L. Rev. 311, 326-50 (1986). And in the courts, compare, e.g., *Peter v. Wedl*, 155 F.3d 992, 996-97 (8th Cir. 1998) ("Government discrimination based on religion violates the Free Exercise Clause of the First Amendment . . . .the Free Speech Clause of the First Amendment . . . .and the Equal Protection Clause of the Fourteenth Amendment"), with *KDM v. Reedsport Sch. Dist.*, 196 F.3d 1046 (9th Cir. 1999) (Oregon regulation which denied educational services available to private-school students to student in a religious school did not violate First or Fourteenth Amendments).

60. See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (government may not make "adherence to a religion relevant . . . to a person's standing in the political community").

61. Put slightly differently, we protect religious liberty through the Religion Clauses because religion is a positive good, and worth protecting. See John Garvey, *What Are*

as surely as the Establishment Clause prohibits government conduct that promotes, advances, or endorses religion, it guards with equal vigor against any government discrimination toward, or official disapproval of, faith. The state may neither advance *nor inhibit* religion;[62] it should neither favor *nor display hostility toward* faith;[63] it may not endorse *or disapprove* religion.[64]

*Second*, the Free Exercise Clause affirmatively prohibits governments from "impos[ing] special disabilities on the basis of religious views or religious status."[65] That is, the state may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[] conduct because it is undertaken for religious reasons."[66] It is no less discriminatory, the argument goes, to deny otherwise-generally-available benefits—school vouchers, for instance—on the basis of religion than to single out religious conduct for prohibition or disfavor. The Free Exercise Clause would not permit government to say, "every retiree gets $30,000 per year, unless they plan on spending any of that money on Bibles," nor should it permit government to say, "education is so important to our community that every child is entitled to a publicly funded education at the public or private school of his or her parents' choice, unless the parents select a *religious* private school."[67]

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*Freedoms For?* (Harvard U. Press, 1996); see also Michael Stokes Paulsen, *God Is Great, Garvey Is Good: Making Sense of Religious Freedom*, 72 Notre Dame L. Rev. 1597, 1597 (1997) ("Garvey's claim is that we protect religious freedom for the sake of religion .... [He] argues that the religion clauses reflect a religious premise, exist for the sake of protecting religion, and ought to be read in that light"). This claim—which strikes me as a powerful one—would seem to call into question the Court's newfound habit in First Amendment cases of treating and protecting faith as just another form of expression, and religion as just another "viewpoint" to be tolerated. See, e.g., *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

62. See, e.g., *Agostini v. Felton*, 521 U.S. 203, 218 (1997).

63. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

64. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). As Professor Volokh observes, statements like these—implying a positive Establishment Clause "evenhandedness" requirement—"have largely been *dicta*." Volokh, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 369 (cited in note 52). One reason why it might be difficult to frame a case where government conduct was hostile to or inhibited religion in violation of the Establishment Clause is that any such conduct would most likely be analyzed under the *Free Exercise* Clause. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

65. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

66. *Church of the Lukumi Babalu Aye, Inc.* 508 U.S. at 532.

67. See *Hartmann v. Stone*, 68 F.3d 973, 977-79 (6th Cir. 1995) (excluding religious day-care centers from general program that permits child-care providers to use government housing on military bases is discrimination that violates the Free Exercise Clause).

*Third*, the Free Speech Clause is now understood to prohibit the government from discriminating against religious speech or expression.[68] How might a school-choice program implicate the Free Speech Clause? There are (at least) two possibilities. For starters, when schools express ideas and values to students and to the world through their curricula, programs, and teachers, they engage in core First Amendment "speech."[69] What's more, parents' decisions about where and how to educate their children, and about the messages, information, and values that will be imparted to their children, are for many parents among the most important "expressions" of their lives. Indeed, for many low-income parents (and for their children), educational choices may be one of the few available vehicles for expressing their beliefs—and, in a sense, for *publicizing*, through their educational choices, those beliefs—about matters of ultimate concern.[70] In other words, the Free Speech argument for non-discriminatory choice programs has two parts: the government may not discriminate against schools based on the religious content of their "speech," i.e., their curricular programs; nor may it discriminate against the religiously motivated educational decisions—again, the "expression"—of parents and students.

*Finally*, discrimination on the basis of religion violates the Fourteenth Amendment's Equal Protection Clause.[71] That

68. See, e.g., *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (state university that funded student activities generally could not single out religious newspaper for denial of funds); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (following *Widmar* in elementary-school context); *Widmar v. Vincent*, 454 U.S. 263 (1981) (if college opens classrooms to secular meetings it must open them to religious meetings). See generally Paulsen, 29 U.C. Davis L. Rev. at 653-62 (cited in note 59) (summarizing and analyzing the *Widmar* line of cases).

69. See generally Johnson, 10 Geo. Mason Univ. Civ. R. L.J. at 31-36 (cited in note 52). Cf. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("[N]ude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection").

70. See generally Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1012-33 (1996) (arguing that "parents have a free-speech right to communicate their values to their children both directly and through the speech of teachers and schools"). Some have argued, though, that this line of argument and the instrumental view of children upon which it is thought to rest are profoundly illiberal, and even offensive, at least to the extent that parents' interests in communicating values to their children are allowed to trump the children's own temporal interests (as determined by third parties). See, e.g., Dwyer, *Religious Schools v. Children's Rights* at 90-96 (cited in note 39). But see Gilles, 63 U. Chi. L. Rev. at 951-60, supra, (arguing that a "parentalist" allocation of rights *is* in children's best interests).

71. See, e.g., *Peter v. Wedl*, 155 F.3d 992, 997 (8th Cir. 1998) ("Government discrimination based on religion violates the . . . Equal Protection Clause of the Fourteenth Amendment"); cf. *Bagley v. Raymond Sch. Dept.*, 728 A.2d 127, 137 (Me. 1999) (exclusion of religious schools from tuitioning program *would be* unconstitutional under the

Clause requires that "certain traits, including religion and . . . religiosity, should not be bases for governmental classifications."[72] Once government elects to provide a public-welfare benefit—education—it may not single out religious people and religious institutions for a shoddier version of that benefit, any more than it could decide to reduce the Fire Department's budget by telling it not to bother with "house calls" to churches.[73]

These four provisions, working together, provide the basis for a formidable argument that the exclusion of religious schools from otherwise-generally-available school-choice programs—that is, from programs that are open to *non-religious* private schools—is unconstitutional *discrimination* against religion and religious expression. Under this approach, such exclusion is *not* simply a "refusal to subsidize" religion.[74] It is, instead, a decision to specially disadvantage religion in the context of a decision to fund education—public and private—generally.[75] Of course, the States are not required—at least, not until the Court is convinced by Professor Viteritti that *Brown*'s promise requires otherwise!—to enact school-choice programs.[76] But if they do, they can no more single out religious choices, persons, or institutions for special disadvantage in the context of those programs than they could prevent otherwise-eligible Mass-going Catholics from running for office.[77]

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Equal Protection Clause were it not justified by the government's "compelling" interest in complying with the Establishment Clause"), cert. denied, 528 U.S. 947 (1999); *Strout v. Albanese*, 178 F.3d 57, 64 (1st Cir. 1999) (rejecting equal-protection challenge to exclusion of religious schools from tuitioning program schools because "the state's compelling interest in avoiding an Establishment Clause violation requires that the statute exclude sectarian schools from the tuition program"), cert. denied, 528 U.S. 931 (1999). See generally, Paulsen, 61 Notre Dame L. Rev. at 356-59 (cited in note 59) (applying "Equal Protection Model" to school vouchers).

72. Volokh, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 371 (cited in note 52).

73. Id. at 370-71 & n.60.

74. Cf. *Strout*, 178 F.3d at 60; *Bagley*, 728 A.2d at 135.

75. See, e.g., *Wedl*, 155 F.3d at 1001-02; *KDM*, 196 F.3d at 1053 (Kleinfeld, J., dissenting) ("Handicapped children at secular private schools get special education in their schools, but handicapped children at religious private schools must leave school to get the same special education. This law violates the Constitution because it distinguishes between people and burdens some of them on account of their religious practices").

76. Topeka, Kansas was not *required*, in 1954, to operate public schools. But once it had chosen to operate such schools, it was not permitted to discriminate on the basis of race in their operation. As the Court observed in *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), "[we have] made clear that even though a person has no 'right' to a valuable government benefit for any number of reasons, there are some reasons upon which the government *may not* rely" (emphasis added).

77. Cf. *McDaniel v. Paty*, 435 U.S. 618 (1978) (invaliding on free-exercise grounds a Tennessee constitutional provision barring "ministers of the Gospel or priests of any denomination whatever" from serving as delegates to a constitutional convention).

## IV

Viteritti contends—persuasively, in my view—that the federal Constitution permits States to experiment with religion-neutral school-choice programs. However, Viteritti warns, "[M]any states have provisions within their constitutions that set strict separationist standards and prohibit direct or indirect aid to religious institutions." (p. 144) These provisions—many of which were inserted into States' constitutions *specifically* to prevent students from using public money to attend Catholic schools—probably pose more significant barriers to choice-based reform than does the First Amendment. (pp. 168-79)

Viteritti's discussion of these state laws, of the nativist fears that often inspired them, and of the Blaine Amendment that was in many cases their model, is perhaps *Choosing Equality*'s most important contribution. (pp. 145-68) It is important because many who today oppose school choice invoke the claimed achievements and ideals of our common-school tradition, contending—at least implicitly—that the homogenization and monopolization by government of American education should be credited with building our modern, diverse, liberal, and literate society.[78] But one need not deny the successes, and even the strengths, of American public education to recognize that the common-school movement and its later Progressive reincarnations were in large part animated—even in respectable circles—by the anti-Catholicism that historian Arthur Schlesinger, Sr., once called the "the deepest bias in the history of the American people."[79]

Viteritti sets out the often overlooked (in courts and law schools, anyway) story of how Horace Mann and his followers used the common schools to impose on Catholic immigrants and

78. See, e.g., Ted Forstmann, *Break Up the Education Monopoly*. Wall St. J. A26 (Sept. 9, 1999) ("The U.S., we are led to believe, was founded upon a system of government-provided education; tinker with it, and you tinker with the underpinnings of our democracy. In reality, government-delivered education—a.k.a. 'public education'—wasn't established until roughly a century after our country's founding. The system it replaced—the system of education our country *was* founded upon—was characterized above all by diversity, competition, and choice"). See generally Andrew J. Coulson, *Market Education: The Unknown History* (Transaction Publishers, 1999).

79. John Tracy Ellis, *American Catholicism* 151 (2d ed. 1969); see also Peter Steinfels, *Of Bob Jones U., American Culture, and Anti-Catholicism*, N.Y. Times B17 (Mar. 4, 2000) ("[O]pposing anti-Catholicism in the United States by denouncing Bob Jones is about as relevant to today's reality as combating medical errors by condemning leeches and snake oil. The Catholic Church takes more nasty hits weekly on cable television than yearly from Bob Jones").

other religious minorities the "non-sectarian"[80] values of the "*de facto* Protestant Establishment";[81] how fears about immigration, the overwrought rantings of nativist ministers, and goofy paranoia about "nunneries"[82] contributed to the rise of the Know Nothings;[83] how the political calculations of James G. Blaine and President Grant nearly resulted in a constitutional amendment aimed at fixing the "defect"—namely, the *lack* of a clear prohibition on aid to religious schools—in the United States Constitution;[84] and how, notwithstanding Blaine's failure, by 1890, twenty-nine States had "baby Blaine" amendments in their constitutions.[85] Another anti-aid wave, and then the pragmatic secularism of Mann's descendant, John Dewey, (pp. 157-61) swept through the statute books in the early twentieth century. (pp.

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80. See *Mitchell v. Helms*, 530 U.S. 793, 2000 WL 826256, at *24 (2000) (plurality op.) ("[I]t was an open secret that 'sectarian' was code for Catholic"). See generally, e.g., Richard A. Baer, *The Supreme Court's Discriminatory Use of the Term 'Sectarian,'* 6 J. L. & Pol. 449 (1990); Carter, 27 Seton Hall L. Rev. at 1199 (cited in note 39) ("The common school, which was sold to the public on expressly religious grounds, simply cannot be understood except as an effort to Protestantize the immigrant children"). But see Stephen Macedo, *Diversity and Distrust* 88 (Harvard U. Press, 2000) ("It is too simple to say that the early common schools were in the business of 'Protestantizing' Catholic immigrants.... To a significant degree, the common schools represented a shared civic vision. Convergence on that vision could not... be taken for granted").

81. Mark DeWolfe Howe, *The Garden and the Wilderness* 31 (U. of Chicago Press, 1965).

82. Lloyd P. Jorgenson, *The State and the Non-Public School 1825-1925* at 88 (U. of Missouri Press, 1987) (describing Massachusetts' "Nunnery Investigation Committee"); see also Maria Monk, *The Awful Disclosures of Maria Monk, as Exhibited in a Narrative of Her Sufferings During a Residence of Five Years as a Novice and Two Years as a Black Nun, in the Hotel Dieu Nunnery in Montreal* (Maria Monk, 1836).

83. Abraham Lincoln once observed of the Know Nothings that "[w]hen the Know-Nothings get control, [the Declaration of Independence] will read 'all men are created equal except Negroes and foreigners and Catholics.'" Letter from Abraham Lincoln to Joshua Speed (Aug. 24, 1855), reprinted in R. Basler, ed., 2 *The Collected Works of Abraham Lincoln* 320, 323 (Rutgers U. Press, 1953).

84. The amendment's sponsor, Representative James G. Blaine of Maine, "fully understood the wide political appeal of the nativist and anti-Catholic rhetoric that accompanied [President U.S. Grant's] agenda and intended to take full advantage of it." (p. 152) Viteritti writes that Blaine's "name would live in perpetuity as a symbol of the irony and hypocrisy that characterized much future debate over aid to religious schools: employing constitutional language, invoking patriotic images, appealing to claims of individual rights. All these ploys would serve to disguise the real business that was at hand: undermining the viability of schools run by religious minorities to prop up and perpetuate a publicly supported monopoly of government-run schools." (p. 153)

85. Arizona's Supreme Court noted recently that "[t]he Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing Catholic menace." *Kotterman v. Killian*, 972 P.2d 606, 624 (Ariz. 1999), cert. denied, 528 U.S. 921 (1999); see also *Mitchell v. Helms*, 530 U.S. 793, 2000 WL 826256, *24 (2000) (plurality op.) ("Consideration of the [Blaine Amendment] arose at a time of pervasive hostility to the Catholic Church and to Catholics in general").

154-55)[86] Viteritti concludes that, rather than a model for community-building education in a diverse society, "the history of the common school movement is a telling story of the risks involved when a political majority is allowed to establish a monopoly over education and impose its values on other people's children." (p. 150) In fact, Viteritti observes, "there is no episode in the American chronicle that better illustrates the inherent dangers of majority rule that so preoccupied Madison than the history of the common school." (p. 145)[87]

The point of this history is that the federal constitutional issues surrounding school choice are like "level one" of the typical Nintendo or Sega video game: Super Mario, for example, avoids calamity after calamity only to face still other, even more formidable challenges—here, the congealed nativism still entrenched in many States' constitutions.[88] And so, Viteritti is concerned that "the relief that advocates of school choice can expect to derive from the High Court will prove to be circumscribed and unsatisfying.... For this reason, the monopoly that government-operated institutions enjoy over public funding remains secure." (p. 179)

I'm not so sure. *First*, if the argument outlined above is correct—i.e., if the Constitution not only *permits* the inclusion of religious schools in school-choice programs but also *forbids* their discriminatory exclusion—then this federal equal-treatment mandate cannot be trumped by state constitutional provisions that purport to require discrimination. As Justice Brennan once emphasized, the States are free through their own constitutions to provide greater protection to individuals from government than does the Bill of Rights.[89] But while it is fairly easy to see

86. Viteritti sees some liberal theorists—Bruce Ackerman, Amy Gutmann, Stephen Macedo, and others—as continuing in this mold (pp. 164-68). See, e.g., Gutmann, *Democratic Education* at 21 (cited in note 49) (education must "convert children away from the intensely held beliefs of their parents").

87. See generally Charles Leslie Glenn, Jr., *The Myth of the Common School* (U. of Massachusetts Press, 1988); Jorgenson, *The State and the Non-Public School* (cited in note 82); Diane Ravitch, *The Great School Wars* (Basic Books, 1974); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. Am. Hist. 97 (1997).

88. See generally, Toby J. Heytens, *School Choice and State Constitutions*, 86 Va. L. Rev. 117 (2000). This is not to say that the Supreme Court's Establishment Clause case-law gets a "pass" on anti-Catholicism. See *Mitchell v. Helms*, 530 U.S. 793, 2000 WL 826256, at **23-24 (2000) (plurality opinion). See generally Lupu, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 385 (cited in note 52 (describing place of anti-Catholicism and negative stereotypes about Catholic education in the development of modern Establishment Clause doctrine).

89. William J. Brennan, Jr., *State Constitutions and the Protection of Individual*

how this "floor, not ceiling" idea plays out in the context of, say, a search-and-seizure case, it is not so obvious that the States may provide extra "protection" from "establishments" of religion if, in so doing, they purport to forbid the equal treatment of religion that the First Amendment and the Equal Protection Clause require. That is, no State's anti-aid provision or "baby Blaine" amendment can license, let alone demand, what the United States Constitution forbids.[90]

*Second*, there is ample evidence that many States' anti-aid provisions were motivated by bigotry—by discriminatory "animus"[91]—to support an argument that these laws violate the Equal Protection Clause, as well as the various clauses of the First Amendment. Several parents are claiming as much in *Boyette v. Galvin*,[92] a case challenging Massachusetts' 1854 "Anti-Aid" Amendment (a precursor to the Blaine Amendment(s)).[93] The "legislative history" and anti-Catholic purpose of the Massachusetts Amendment—and of the *additional* amendment that purported to prevent the Anti-Aid Amendment from ever being changed by ballot initiative—are well established. (pp. 148-51)[94] The *Boyette* plaintiffs believe that these Massachusetts provisions "unfairly shut out people with religious interests from the electoral process by barring a citizen ballot initiative on the aid issue, while allowing other groups to use ballot initiatives to change state laws."[95]

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*Rights*, 90 Harv. L. Rev. 489 (1977).

90. See U.S. Const., Art. VI ("This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); see also, e.g., *McDaniel v. Paty*, 435 U.S. 618 (fact that unconstitutional discrimination against clergy was authorized by state statute did not save the statute); *Widmar v. Vincent*, 454 U.S. 263 (1981) (rejecting argument that compliance with the State of Missouri's arguably more restrictive Establishment Clause-type provisions justified discrimination against student groups and speakers on the basis of their religious speech and activity); cf. *Chittenden Town School Dist. v. Department. of Educ.*, 738 A.2d 539 (Vt. 1999) (holding that Vermont Constitution required the exclusion of religious schools from tuitioning program and that the United States Constitution was not violated by such exclusion), cert. denied, 528 U.S. 1066 (1999).

91. *Romer v. Evans*, 517 U.S. 620 (1996); see also Jeremy Rabkin, *Partisan in the Culture Wars*, 30 McGeorge L. Rev. 105, 109 (1998) ("What is the difference between a state Blaine amendment and the Colorado amendment rejected in *Romer*?").

92. No. 98-CV-10377 (D. Mass. filed Mar. 3, 1998) (Complaint available at <http://www.becketfund.org>).

93. See Editorial, *Erasing Historic Error*, Bos. Herald 12 (Mar. 7, 1998). For more on the Massachusetts provisions in question, see Jorgenson, *The State and the Non-Public School*, at 159-86 (cited in note 82).

94. See generally, Complaint, *Boyette v. Galvin*, supra note 92, at ¶¶ 7-23.

95. Diego Ribadeneira, *School Aid Suit Cites a History of Bias*, Bos. Globe B1 (Nov. 12, 1998); Complaint, *Boyette v. Galvin*, supra note 92, at ¶ 2 ("The Anti-Aid

Now, it is not clear that either the "federal supremacy" or "historical animus" arguments against the States' muscular anti-aid amendments will succeed. Still, it's hard to see why they should not.[96] Viteritti's conclusion that, in light of the "baby Blaines," "religious liberty in America" is "a limited freedom" in the education context might therefore be a bit too pessimistic, or at least premature. (p. 179) Perhaps the "promise of *Brown*" will one day trump the legacy of Blaine.

## V

*Choosing Equality* closes with a provocative response to the "school choice divides, but public schools unite" argument. (pp. 180-208) As Viteritti observes, most would agree that "a well educated citizenry is among the most critical factors for ensuring the stability of a democracy." (p. 180) And so, he concedes that "[p]ublic education indeed serves as a foundation for American democracy as we know it." (p. 181) He insists, though, that the radical disengagement of public education from religious values and traditions has handicapped it in performing its task of "teach[ing] each of us how to live together amicably and productively in a pluralist society." (Id.) And in response to those concerned that private-school choice, and private schools generally, undermine the *res publica* and threaten the health of participatory democracy,[97] Viteritti praises the role that such mediating

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Amendment bars [plaintiffs] from seeking, through the normal democratic process, any form of state aid to assist them in meeting the cost of tuition and other expenses at non-public schools"). The *Boyette* plaintiffs also allege violations of the Free Speech, Free Exercise, Right to Petition, Establishment, and Equal Protection Clauses. Id., at ¶¶ 35-51. Cf. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982) (holding that a school-busing-related initiative violated the Equal Protection Clause because it removed "the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body in such a way as to burden minority interests").

96. One interesting question is the extent to which the anti-Catholic motives behind the various States' Blaine-type provisions should control the question whether these provisions are, today, unconstitutional. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("Without deciding whether [Section] 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"). These provisions' unsavory purpose should not obscure the fact that, *whatever their purpose*, many of them are *facially* discriminatory against religion, and therefore presumptively violate the Free Exercise Clause.

97. See, e.g., Minow, 49 Duke L.J. at 495 (cited in note 52) ("Reliance on vouchers for schooling and welfare indeed can promote competition, pluralism, and at least the appearance of private choice. However, such reliance risks diminishing the sense of 'we,' the collective to which everyone in the country should feel connected or responsible").

institutions have played in "advancing the democratic ethos:" (p. 183)

> Research shows that adults who have attended parochial schools display high levels of patriotism, tolerance, and civic involvement.... If designed appropriately, school choice programs would be particularly beneficial to poor communities, not only extending educational opportunities, but also invigorating civic life and addressing the larger problem of political inequality that besets economically disadvantaged people. (p 183)[98]

Viteritti's argument that school choice could help to reengage Americans with their communities, to counter our pervasive cynicism about public institutions, to empower politically the currently disenfranchised, and to get us bowling together again,[99] is a powerful one. (pp. 183-208) But in his enthusiasm for demonstrating that religious schools are "safe," and for reassuring skeptics that religious institutions do not threaten the civic enterprise, he does not, in my view, respond as forcefully as he could to the "flip side" problem, that is, to the challenges that some liberal views of the civic enterprise pose to religious liberty. Although Viteritti assures us that "[i]t is [our] pluralism—political, legal, demographic—that will always remain the most significant safeguard against the threat of an established church," (p. 195) more should be said about the need for "safeguards against the threat of [the liberal state]."

In the first place, as Viteritti recognizes, such safeguards will be needed *within* the context of any school-choice program. Religious schools do strengthen the fabric of civil society and can provide important secular goods, but it is crucial that they not be co-opted by or absorbed into the state, and that they not lose their ability to stand *outside* of, to challenge, and—if necessary—to subvert the state.[100] And so, while religious schools that par-

98. Viteritti emphasizes that "[t]here is no discernible evidence that the implementation of public or private school choice would have a negative influence on civil society in America." (p. 207) See generally Peterson, 6 Va. J. Soc. Pol. & Law at 72-73 (cited in note 22); Smith and Sikkink, *Is Private School Privatizing?* (cited in note 22); Greene, *Civic Values in Public and Private Schools* at 95-98 (cited in note 22).

99. See Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000).

100. See, e.g., Stephen L. Carter, *Religious Freedom As If Religion Matters: A Tribute to Justice Brennan*, 87 Cal. L. Rev. 1059, 1060 (1999) ("As long as religion avoids the temptation to join its authority to the authority of the state, it can indeed play a subversive role, because it focuses the attention of the believer on a source of moral understanding that transcends both the authority of positive law and the authority of human

ticipate in voucher programs could reasonably be required to accept some degree of performance-related oversight, these schools and their religious missions must be protected from overly intrusive, message-garbling government regulations. (pp. 221-22)[101]

There are also other, perhaps more amorphous, threats to religious education and to the autonomy of religious schools posed by contemporary liberalism that are not countered by Viteritti's confident references to "our pluralism." As he puts it, "because so few Americans live their lives according to the strict dictates of their faith," and therefore "the majority of us do not appreciate the strength of the moral obligations that compel devout observers," there is the "danger" of "oppression by the majority" of "people of conscience." (p. 208) Now, I cannot possibly do justice here to the "Deliberative Democracy, Liberal Civic Education, and Religion" debate. Suffice it to say that more than a few leading liberal scholars—perhaps following the example of some Supreme Court Justices[102]—appear increasingly wary of traditional religious beliefs and willing to question the extent to which a diverse society grounded in a norm of tolerance can tolerate the perpetuation of "intolerant" beliefs through religious education.[103] This line of thinking is, of course,

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moral systems").

101. See, e.g., Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 Chi-Kent L. Rev. 417, 432 (2000) ("Although there is nothing we can do to altogether allay concerns about a voucher system that includes religious schools, there are things that we can do to help insure that voucher recipients tend to conform with public purposes. I want to defend the strings that will come attached to vouchers, and argue for their significance"). Indeed, the threat of intrusive "strings" has lead some to oppose school choice, precisely to protect authentic religious education. See Scott W. Somerville, *The History and Politics of School Choice*, 10 Geo. Mason U. Civ. Rts. L.J. 121 (1999/2000). This is not an idle concern. See, e.g., Dwyer, *Religious Schools v. Children's Rights* at 180 (cited in note 39) ("That Fundamentalist and Catholic schooling as presently constituted would no longer [i.e., after regulation] exist should not . . . be cause for mourning, at least not for anyone who respects the personhood of children"). For an argument that the Constitution limits the extent to which regulatory "strings" may interfere with religious schools' missions, see Paulsen, 29 U.C. Davis L. Rev. at 710-17 (cited in note 59).

102. See, e.g., *Board. Of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 244-47 (1971) (Douglas, J., dissenting); *Lemon v. Kurtzman*, 403 U.S. 602, 635 n.20 (1971) (Douglas, J., concurring).

103. See, e.g., Macedo, *Diversity and Distrust* at 147 (cited in note 80) ("Some religious beliefs are at odds with liberalism itself. We should tolerate the intolerant . . . but we need not bend over backwards to make life easy for them"); id. at 152 ("The hard fact is that we cannot make everyone happy. Trying to do so can sell short liberal ideals and practices that are and will remain partisan and controversial"); Carter, 87 Cal. L. Rev. at 1082 (cited in note 100) (citing and criticizing arguments against religious education

antithetical to Viteritti's view that religious freedom is inseparable from the central liberal value—equality—and that religious schools must be key players in the efforts to vindicate that value. Given the centrality of religious freedom to Viteritti's argument, *Choosing Equality* could perhaps have benefitted from a more muscular defense of religious education against the claims of "liberal statism."[104]

Two final *addenda*—and each deserves a more detailed treatment than I can provide here—to Viteritti's discussion might be useful. First, perhaps because *Choosing Equality* bends over backwards to make the "bleeding heart" case for empowering parents (or perhaps simply because of its title), the book's arguments are couched in "equality" terms—i.e., "poor parents should be no less able to make choices for their children than rich parents"—rather than "liberty" terms—i.e., "*all* parents have the *right* to decide, without financial penalty, how to raise and educate their children." As a result, when Viteritti sets out his policy proposals, he stops short of full school choice. He recommends, for example, that "[p]articipation in the private (and parochial) school choice program should be limited to families that can meet a predetermined objective standard of economic need" and that those "who would opt out of their regular public schools for academic reasons should be given a preference over those who would choose another school for philosophical or religious reasons." (pp. 219-20)[105]

Putting aside (quite reasonable) concerns about political palatability, it is not clear why such limits are needed or justified.[106] True, limiting school-choice programs to low-income

made by Gutmann, Macedo, and Suzanna Sherry); Carter, 27 Seton Hall L. Rev. at 1208-09 (cited in note 39) (same). It is worth emphasizing that, notwithstanding his extremely negative view of traditional religious education, James Dwyer does not appear to ground his arguments in theories about the needs of liberal civil society, but rather in his view of children's temporal best interests. See Dwyer, *Religious Schools v. Children's Rights* at 79-101 (cited in note 39).

104. Stephen G. Gilles, *Liberal Parentalism and Children's Educational Rights*, 26 Cap. U. L. Rev. 9, 11 (1997); Carter, 87 Cal. L. Rev. at 1065 (cited in note 100) ("When I say statism, I do not simply mean, as the formal definition would suggest, a preference for state solutions; I have in mind a sense of the state's rightness, or goodness—an empirical belief that the state is less likely than the individual to make a moral error. Since the Enlightenment, the entire liberal political project has rested on this idea").

105. I certainly do not mean to suggest that Viteritti denigrates the choices of religiously motivated parents (see p. 220) or that he in any way advocates "watering down" the religious identity of religious schools (p. 10) ("[T]hese schools should not be forced to compromise the generally pervasive religious climate that makes them what they are").

106. But see John E. Coons, *School Choice as Simple Justice*, First Things 15 (Apr. 1992) (endorsing proposals similar to Viteritti's).

parents, or to children in failing schools, is consistent with the idea that school choice is *instrumentally* valuable in the struggle to remedy economic disadvantage and advance *Brown*'s promise of equality. But what about another, perhaps even stronger, argument for school choice, namely, that in a free and pluralistic society, decisions about education should be left to parents and the role of the government limited for the most part to supporting those choices on an equal and nondiscriminatory basis?[107] Viteritti does not seem to *disagree* with this more liberty-based argument for choice, so unless restrictions on the scope of choice programs are, in his view, *necessary* to achieve his social-justice ends and equality ideals, perhaps they should be discarded.

This leads to a second, related, *Choosing Equality* codicil: In my view, the case for school choice is strongest when tied even more explicitly than it is in *Choosing Equality* to the fundamental right of parents to direct and control the upbringing and education of their children. This right was most famously recognized, of course, in *Pierce v. Society of Sisters*.[108] Viteritti notes that *Pierce*'s language "would echo for generations to come, at once affirming the right of parents to control the upbringing of their children and the commensurate permissibility of private and parochial schools to exist as viable alternatives available to parents." (p. 130) Unfortunately, "[a]s important a victory as *Pierce* was for parents, it was only a limited one" (id.), and Viteritti later expresses regrets that "the promise of.... *Pierce*"—that is, the promise that parents could "send their children to schools that reflect their own values"—"remains a hollow promise, conditioned to a large degree by the economic position of parents." (p. 143)

This is important. More needs to be said about the "promise of *Pierce*" and its relevance to the school-choice debate.[109] But Viteritti's focus is more the long road to the equality promised in *Brown* than the near-term threats of statism to *Pierce*-style liberty, and so he does not confront squarely the fact that the problem with *Pierce* is not simply that its "promise" is hard to realize without money. Rather, it is that the aspect of liberty

107. For such an argument, see generally, e.g., Gilles, *Liberal Parentalism and Children's Educational Rights* (cited in note 104).

108. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The existence of this fundamental right was re-affirmed most recently in *Troxel v. Granville*, 530 U.S. 57 (2000) ("The liberty interest at issue in this case ... is perhaps the oldest of the fundamental liberty interests recognized by this Court").

109. See generally, e.g., Carter, *Parents, Religion, and Schools* (cited in note 39).

that case recognized has been slowly eroding, as many courts have embraced a "poor relation"[110] theory of the right and permitted arguable infringements upon it without applying the strict scrutiny that incursions upon fundamental freedoms are usually thought to deserve.[111]

Just recently, in *Troxel v. Granville*,[112] the Supreme Court invalidated an application of Washington's "breathtakingly broad"[113] third-party-visitation law. The law purported to authorize "any person" to petition a court for visitation rights "at any time," and it permitted courts to award such rights, over a parent's objection, whenever, in the court's view, "visitation [would] serve the best interest of the child."[114] As Justice O'Connor emphasized in her plurality opinion the law "accorded no deference" to a parent's decision that third-party visitation would *not* be in the child's best interests: "[S]hould the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails."[115] In light of the constitutionally grounded presumption that "natural bonds of affection lead parents to act in the best interests of their children"[116]—a presumption that the Washington scheme ignored[117]—the Court

110. See *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment . . . should be relegated to the status of a poor relation").

111. See, e.g., *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 462 (2d Cir. 1996), cert. denied, 519 U.S. 813 (1996) ("[W]here, as here, parents seek for secular reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the 'upbringing' of their child, rational basis review applies"); *Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419, 423 (6th Cir. 1996), cert. denied, 520 U.S. 1104 (1997) (stating that "rational basis review, not strict scrutiny," governs "wholly secular limitations on private school education"); *Herndon v. Chapel Hill-Carrboro City Bd. Of Educ.*, 89 F.3d 179 (4th Cir. 1996), cert. denied, 519 U.S. 1111 (1997) (concluding that because parents' "interest is not religious, . . . we must reject their position if the [challenged regulation] bear[s] some rational relationship to legitimate state purposes"); *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), cert. denied, 516 U.S. 1159 (1996) ("We need not decide here whether the right to rear one's children is fundamental"). The Court's decision in *Troxel* should lead to a greater appreciation for the *Pierce* right in lower courts. Still, Justice O'Connor's plurality opinion was noteworthy in its failure to identify clearly the required standard of review. See *Troxel*, 120 S. Ct. at 2068 (Thomas, J. concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights").

112. 530 U.S. 53, 57, 120 S. Ct. 2054 (2000).

113. 120 S. Ct. at 2061.

114. Id. (quoting Wash. Rev. Code § 26.10.160(3)).

115. Id.

116. Id. (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)); see also Gilles, 63 U. Chi. L. Rev. at 951-60 (cited in note 70) (examining parents' incentives to act in the best interests of their children).

117. 120 S. Ct. at 2062 ("The decisional framework employed by the Superior Court

concluded that the visitation order in that case "was an unconstitutional infringement on [the parent's] fundamental right to make decisions concerning the care, custody, and control of her two daughters."[118]

*Troxel*'s re-affirmation of the right recognized in *Pierce* is particularly noteworthy given that the latter case is—Viteritti notwithstanding—increasingly criticized both on children's-rights and political-theory grounds.[119] At the same time, *Pierce* is seen by many as the touchstone for the school-choice question. Justice Souter's *Troxel* concurrence, in particular, was explicit in reminding us that education-related decisions are at the heart of the liberty protected by *Pierce*. As he observed, "[T]he strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. . . . Even a State's considered judgment about the preferable political and religious character of schoolteachers is not entitled to prevail over a parent's choice of private school."[120] This observation seems true to the Court's famous statement in *Pierce* itself that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[121]

*Troxel*—like *Pierce*—is a challenge and a stumbling block to those whose opposition to school choice derives from a commitment to the state's prerogative to employ and standardize education as a means of citizen creation and the development of a sufficiently "democratic character."[122] What's more, though,

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directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child").

118. Id. at 2063.

119. See, e.g., Dwyer, *Religious Schools v. Children's Rights* at 62-101 (cited in note 39); Greene, 13 Notre Dame J.L. Ethics & Pub. Pol'y at 406-08 (cited in note 52) (arguing that *Pierce* violates key principles of our constitutional structure); Barbara Bennett Woodhouse, *"Who Owns the Child?:* Meyer *and* Pierce *and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1992).

120. 120 S. Ct. at 2067 (Souter, J., concurring).

121. *Pierce*, 268 U.S. at 535.

122. See, e.g., Gutmann, *Democratic Education* at 64-70 (cited in note 49) ("The problem with voucher plans is not that they leave too much room for parental choice but that they leave too little room for democratic deliberation"); Sherry, 62 U. Chi. L. Rev. at 160-61 (cited in note 38) ("[L]eaving most educational choices to parents or the de-

these cases strike me as the basis for a strong moral argument—just as strong as the equality-based argument that Viteritti roots for in *Brown*—for pluralism and parental choice in education and for the autonomy of religious schools.[123] The school-choice debate is—as Viteritti recognizes (pp. 117-44)—an argument about more than education reform; it is also about religious freedom.[124]

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Viteritti makes a convincing case that school choice need not divide the polity nor undermine civil society. Even were he mistaken, though, a *little* bit of balkanization might just be the price we pay for allowing individuals to orient their own lives, and those of their children, toward the Good as they see it. *Choosing Equality* makes a strong case that school choice would advance the cause of equality, but *Pierce* and *Troxel* suggest why we might support school choice even if Viteritti is wrong. My hope is that Viteritti will not be read to argue that instilling and shoring up democratic values and public mindedness is a *requirement* for, and not just a happy side effect of, educational choice.

Viteritti makes the egalitarian argument for educational choice with such reasoned and measured passion—as Eugene Volokh put it to me, Viteritti is "in your face with a breath mint"—that I feel a bit churlish even hesitating before embracing it. He could well be right—given political realities, particularly when it comes to convincing those predisposed for racial-justice reasons to be suspicious of educational choice—to believe that equality-based arguments for choice are the most compelling. Still, rhetorical force notwithstanding, it's not clear that *Brown* and its "promise" of equality are up to the legal and moral work that Viteritti demands. While the themes set out in *Brown* could well carry the day in the courts of public opinion—and *Choosing Equality* is an excellent brief for those courts—

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mocratic process . . . assumes, probably erroneously, that parents . . . will not make serious, virtue-threatening, education-stifling mistakes").

123. The "parentalist" argument for parental choice and control in education has been put in play by others. See generally, e.g., Gilles, *Liberal Parentalism and Children's Educational Rights* (cited in note 104); Gilles, *Liberal Parentalism and Children's Educational Rights* (cited in note 70). But see Dwyer, *Religious Schools v. Children's Rights* at 62-101 (cited in note 39).

124. See Carter, 27 Seton Hall L. Rev. at 1205 (cited in note 39) ("[W]hat *Pierce* ultimately represents is the judgment that in order to take religious freedom seriously, we must take the ability of parents to raise their children in their religion seriously").

religious schools and parents would do well in the meantime to guard jealously the liberty guaranteed in *Pierce*.