

## Choosing Equality: School Choice, the Consitution, And Civil Society by Joseph P. Viteritti

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### Recommended Citation

Brian P. Marron, *Choosing Equality: School Choice, the Consitution, And Civil Society* by Joseph P. Viteritti, 1 U. Md. L.J. Race Relig. Gender & Class 115 (2001).

Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol1/iss1/7>

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# BOOK REVIEW

**CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY.** By Joseph P. Viteritti. Washington, D.C.: Brookings Institution Press. 1999. Pp. x, 284. \$29.95

*Reviewed by Brian P. Marron\**

## I. INTRODUCTION

In the groundbreaking case of *Brown v. Board of Education*,<sup>1</sup> the Court recognized the importance of education in the lives of all Americans:

Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>2</sup>

Since the time of the *Brown* decision in the 1950s, education has become an even more essential vehicle for economic and social mobility.<sup>3</sup>

Unfortunately *Brown's* vision of equal educational opportunity has not been realized.<sup>4</sup> Although explicit racial segregation by law

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1. *Brown v. Board of Education*, 347 U.S. 483 (1954).

2. *Id.* at 493.

3. DAVID L. KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* 6 (1982).

4. *Brown*, 347 U.S. at 492 "Here unlike *Sweatt v. Painter*, there are findings that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn merely on a comparison of these tangible factors." *Id.* This implies that equality in the "tangible" factors is a necessary component of a system of equal educational equality along with, as the Court found in *Brown*, the absence of stigmatization caused by de jure racial segregation.

has been eliminated, children from lower socioeconomic backgrounds remain trapped in insufficient schools. Racial minorities and the poor attend substandard urban public schools at disproportionate rates. While only twenty-four percent of all American students attend urban schools, thirty-five percent of the poor and forty-three percent of racial minorities attend urban schools.<sup>5</sup> Numerous measures of school performance illustrate the inadequacy of urban schools. A recent study found that only forty percent of fourth- and eighth-grade students attending city schools met minimum basic standards on national exams in reading math and science.<sup>6</sup> In contrast, the same study found that nearly two-thirds of students in suburban and rural districts met these standards.<sup>7</sup>

Predictably, a clear disparity is also found when the performance of various races is compared. Despite significant progress since the 1970s, the average African American still scores below seventy-five percent of whites on almost every standardized test.<sup>8</sup> Because education is so vital to upward mobility, a disproportionate number of non-Asian minorities receive unequal education dooming them to life in the underclass.<sup>9</sup>

Recent political policy debates involve the topic of education reform. As a result much has been written over the struggle to create effective schools for all. In *Choosing Equality: School Choice, the Constitution, and Civil Society*, first published in 1999, Joseph P. Viteritti examines the movement to reform schools and describes the advantages of a reconstructed educational system based on giving power to the parents to choose to send their children to a better school.<sup>10</sup>

Viteritti claims that the best way to improve educational opportunity for underserved populations is by making schools compete for students (and funding) by giving families in need their share of the state's education funds to send their children to the school of their choice.<sup>11</sup> This would give lower-income families some control over

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5. JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION AND CIVIL SOCIETY 7 (Advanced Copy 1999).

6. *Id.*

7. *Id.*

8. Christopher Jencks and Meredith Phillips, *The Black-White Test Score Gap*, in THE AFRICAN AMERICAN PREDICAMENT 63 (Christopher H. Foreman, Jr. ed., 1999).

9. KIRP, *supra* note 3 at 31 (explaining the link between education and mobility).

10. VITERITTI, *supra* note 5.

11. *Id.* at 14.

the quality of education received by their children, a privilege taken for granted by wealthier families. A choice system also requires schools to deliver quality educations or to close due to declining enrollments. Viteritti notes that a choice system would be supported by a wide range of options for parents, including private, parochial, charter, and schools set up by entrepreneurs.<sup>12</sup>

The book opens with a discussion of the ongoing debate over choice as an option for school reform.<sup>13</sup> Viteritti then turns to other methods of educational reform that have been proposed and implemented over the years.<sup>14</sup> Then he presents an examination of reform efforts that have involved the concept of choice.<sup>15</sup> The discussion shifts to highlighting the effectiveness of non-public schools and voucher programs in improving educational outcomes for minorities and the poor.<sup>16</sup> The following chapters examine the legal problems associated with including religious schools among the options of a broad-ranging school choice system.<sup>17</sup> Viteritti finishes the book with a discussion of education in promoting civic involvement and provides some general principles for legislatures in constructing school reform based on choice.<sup>18</sup>

Viteritti's examination of education reform in this book breaks down into three parts: 1) an analysis of previous reform efforts, 2) a presentation of the problem concerning the separation of church and state, and 3) an outline of what he believes is an effective system of education based on parental choice that will alleviate the inequities faced by minorities and the poor. Each part is summarized below followed by a critique of Viteritti's entire argument.

If one were to construct a society and school system from scratch, Viteritti's proposed plan would be effective and just. The plan, however, underestimates the effects the current system has on the children currently conscribed to inadequate schools. Finally, while Viteritti notes the strong political opposition to change, he fails to adequately discuss a method of overcoming these barriers.

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12. *Id.* at 4.

13. *Id.* at 1-22.

14. *Id.* at 23-52.

15. *Id.* at 53-79.

16. *Id.* at 80-116.

17. *Id.* at 117-79.

18. *Id.* at 180-224.

## II. EDUCATION REFORM EFFORTS

Viteritti opens the discussion of various reform efforts by presenting the ideas of economist Milton Friedman.<sup>19</sup> Friedman believed that the key to improving education is the free market theory. He proposed replacing public schools with privately-operated schools funded by a system of vouchers given to every child.<sup>20</sup> Friedman noted that the public school system was a government-run monopoly that only allowed freedom of choice to those few families able to afford private schools.<sup>21</sup> Friedman's plan called for the government to set minimum standards of operations for education providers. The institutions would only survive if they were able to attract enough "customers" to bring their government-issued vouchers.<sup>22</sup>

Viteritti continues his account of the development of the choice innovation noting that more than a decade after Friedman, the dean of the Harvard Graduate School of Education, Theodore Sizer, offered a modified version of Friedman's voucher plan.<sup>23</sup> Sizer, concerned with liberal causes, included a voucher plan targeted at poor families within his proposal for a "poor children's bill of rights."<sup>24</sup> He noted that a universal plan would perpetuate inequality as the middle class would evacuate the public schools, leaving the poor behind.<sup>25</sup>

Viteritti then explains that two years after Sizer, sociologist Christopher Jencks created a highly regulated choice plan.<sup>26</sup> Jencks's plan required that choice schools accept all applicants and fill their seats through a lottery system.<sup>27</sup> Most importantly, the plan required that the school accept the government-issued voucher as full payment of tuition.<sup>28</sup> Following the Jencks proposal, educational groups, including teachers unions, mobilized and lobbied Congress in opposition to any voucher plan.

In 1971, legal scholars John Coons and Stephen Sugarman approached the reform issue by examining the disparities in funding

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19. *Id.* at 53.

20. *Id.*

21. *Id.*

22. *Id.* at 54.

23. *Id.* at 55.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The plan was only tested on a limited basis and in only one city.

between richer and poorer school districts.<sup>29</sup> They proposed a plan to overcome the disparities by distributing funds directly to parents.<sup>30</sup> Coons and Sugarman's plan attempted to infuse poor families with the empowerment enjoyed by middle-class families who are free to choose the schools that "reflected their own educational values."<sup>31</sup> Viteritti notes that while the concept of choice began to be popular among free market economists, liberals, and cultural and religious minorities, it had yet to catch on with the general public; ballot initiatives were defeated in Michigan in 1978 and Washington, D.C., in 1981.<sup>32</sup>

Viteritti then proceeds to describe the development and implementation of some public school choice plans beyond the voucher concept. Viteritti begins with a discussion of the creation of magnet schools to further desegregation efforts in the late 1970s.<sup>33</sup> Magnet schools are specialized public schools designed with "enriched academic programs" to attract a diverse racial mix of students.<sup>34</sup> Viteritti points out that mostly whites and more advantaged minorities attend magnet schools resulting in the displacement of the more talented students from the nearby schools.<sup>35</sup> Also, minority students are often denied admittance to magnet schools in order for the school to maintain the intended racial balance.<sup>36</sup>

Viteritti next discusses public school reform programs designed to allow for some parental choice while simultaneously protecting the desegregation goal.<sup>37</sup> Under a controlled choice program, if certain standards of racial balance are not met, the administration will assign students to a particular school regardless of their wishes.<sup>38</sup> The Cambridge, Massachusetts, school system was the first district to adopt a controlled choice plan.<sup>39</sup> Cambridge removed assignment zones, allowed families to rank their preferences for which school they wanted their children to attend, and retained the possibility

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29. *Id.* at 56.

30. *Id.*

31. *Id.*

32. *Id.* at 56-57.

33. *Id.*

34. *Id.*

35. *Id.* at 58.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

of mandatory assignments for schools lacking racial balance.<sup>40</sup> Although controlled choice plans resulted in positive effects on integration and academic performance, some programs had problems with the large increase in transportation costs and parents' general preference for neighborhood schools.<sup>41</sup>

Viteritti describes the choice-based reform plan of the schools in East Harlem in the 1970s.<sup>42</sup> East Harlem's plan consisted of creating alternative schools by erasing assignment zones, allowing schools to specialize around curricular themes, and giving the individual schools almost complete autonomy that allowed schools to innovate.<sup>43</sup> A 1998 study of the system found that student performance improved significantly during the 1980s.<sup>44</sup> Viteritti mentions that the Harlem plan became more partisan as the idea of alternative schools became associated with an argument for choice, a topic identified with conservative politics.<sup>45</sup>

Viteritti next mentions the idea of allowing parents to choose to send their children to schools in different districts.<sup>46</sup> First adopted by Minnesota in 1985, interdistrict choice allowed at risk students in need of remedial instruction to cross district lines and attend any school with available space.<sup>47</sup> By 1992 there were 8,500 students exercising this option.<sup>48</sup> Since 1987, seventeen states have implemented similar plans.<sup>49</sup> In 1992, the Carnegie Foundation issued a report examining the increasing school choice trend.<sup>50</sup> The Carnegie report argued that interdistrict choice plans funneled money from poorer districts into more advantaged districts with a higher number of desirable schools.<sup>51</sup> Viteritti rejects this argument by illustrating "that while state funds

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40. *Id.*

41. *Id.* at 59. The Richmond, California, school district went bankrupt from the increased cost of transportation and specialized programs. "[M]ost parents seek to avoid extensive travel unless there is an extraordinary academic benefit derived in the form of a magnet or specialized program . . ." *Id.*

42. *Id.* at 60-62.

43. *Id.* at 60.

44. *Id.* at 61. The reading and math scores improved greatly in comparison to other nearby school districts.

45. *Id.*

46. *Id.* at 62-64.

47. *Id.* at 62.

48. *Id.* at 63.

49. *Id.*

50. *Id.*

51. *Id.*

followed students to other locations, home districts were not expected to contribute any support for those of their residents who were being educated elsewhere . . . interdistrict choice made more per capita dollars available for students who remained behind.”<sup>52</sup>

The next innovation in school choice discussed is the founding of charter schools. Charter schools result when the state or local governing body grants permission (through a charter) for a group to create a new school (or convert an old one) that will run nearly independent of the state.<sup>53</sup> Charter schools operate at the school level where school personnel have wide discretion in budget, personnel, and school policies.<sup>54</sup> In exchange for this freedom, the charter school faces a higher level of accountability as they must meet state-established academic and financial standards as required by their charter.<sup>55</sup> Charter schools that fail to meet these standards are shut down.<sup>56</sup> As of 1999 there were about 1,200 charter schools operating across the nation.<sup>57</sup>

Viteritti notes that the concept of charter schools allows for entrepreneurs to enter the education market.<sup>58</sup> He gives the example of the Edison Project, a private entity begun by communications executive Chris Whittle, which cooperates with local districts in the management of schools.<sup>59</sup> Since 1995, Edison has invested \$70 million in public education, but since it operates the Edison schools as charter schools and receives public financing, the schools must accept students on a first come, first served basis and remain accountable to public authority.<sup>60</sup> Viteritti notes that despite the successes of the Edison Project, it faces serious opposition from teachers unions at the opening of most new schools.<sup>61</sup>

Viteritti then describes the political controversy over charter school legislation.<sup>62</sup> Supporters of charter schools faced opposition

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52. *Id.*

53. *Id.* at 65. Charters are released from all regulations except those concerning civil rights, health, and safety.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 67.

58. *Id.* at 68.

59. *Id.*

60. *Id.* at 69.

61. *Id.*

62. *Id.* at 69-72.



from local school boards unwilling to give up any power and teachers unions fearing teachers would begin to negotiate contracts independently with charter schools.<sup>63</sup> As the Clinton administration began to warm to the idea of a modified charter school concept,<sup>64</sup> the battle over the charter school concept shifted from whether charter school laws should be allowed to what restrictions should be placed on charter schools.<sup>65</sup> Viteritti notes that the American Federation of Teachers released a report complimenting the Rhode Island charter system, which happens to be one of the most restrictive in the nation, limiting charters to existing public schools, allowing conversion only with approval of two-thirds of the teachers and half the parents, and mandating that all teachers in charter schools remain employees of the school district.<sup>66</sup> Viteritti explains that such restrictive charter school laws undermine the free-market effects of a system of choice based on charter schools.<sup>67</sup>

Viteritti stops to examine the effectiveness of charter schools in improving student performance.<sup>68</sup> He warns that determining the effectiveness of charter schools remains difficult because they are by nature very diverse.<sup>69</sup> Given this warning about generalizing the results, Viteritti goes on to describe charter schools as typically much smaller than public schools, with similar racial balance, and greater levels of parental satisfaction.<sup>70</sup> He also notes that most states authorize charter schools with laws that undermine their effectiveness.<sup>71</sup> Often the approval of the local school board is required for the granting of a charter and the charter schools receive only a portion of the per-pupil operating costs as the local district keeps the remainder.<sup>72</sup>

The next chapter of *Choosing Equality* tracks how private and parochial schools have produced higher educational quality than public

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63. *Id.* at 70.

64. As a compromise between Democratic politicians and teachers unions, charter schools are an acceptable choice reform as they involve no public funding for private schools, avoid church-state entanglements, and potentially provide for greater accountability. *Id.* at 71.

65. *Id.*

66. *Id.*

67. *Id.* at 72.

68. *Id.* at 72-77.

69. *Id.* at 72.

70. *Id.* at 72-73.

71. *Id.* at 75.

72. *Id.*

schools.<sup>73</sup> Viteritti argues that any effective choice plan should include private and parochial schools in order to promote competition—forcing public schools to improve or collapse—and to give parents a broader range of choices.<sup>74</sup>

Viteritti then examines the school choice experiments in Milwaukee and Cleveland.<sup>75</sup> In Milwaukee, after a tough political battle in the Wisconsin legislature, a weakened choice law passed in 1990.<sup>76</sup> The number of scholarships was limited to one percent of the city public school enrollment and were only available on a lottery basis to families below a certain poverty level.<sup>77</sup> Almost immediately after the bill was signed into law, the plan was bombarded with legal challenges resulting in a 1995 ruling preventing parents from using the scholarships to send their children to religious schools.<sup>78</sup> Interpretation of the results of the choice effort in Milwaukee differed along political lines.<sup>79</sup> In 1998 the Wisconsin Supreme Court overturned two lower court decisions and found that allowing parents to use scholarships at private and parochial schools did not violate the state or federal constitutions.<sup>80</sup> The United States Supreme Court declined to hear the appeal of this ruling, and the following fall approximately 6,200 students attended the private school of their choice.<sup>81</sup>

The Cleveland plan granted scholarships on a lottery basis favoring low-income families.<sup>82</sup> The amount given varied by family income and initially students could use the funds at any school within the city.<sup>83</sup> Again, lawsuits followed the passage of the law and eventually an appellate court found the use of the funds at religious schools unconstitutional.<sup>84</sup> The studies of the effects of the choice

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73. Viteritti illustrates this point by describing the success of Catholic schools in detail. *Id.* at 82-86.

74. *Id.* at 114.

75. *Id.* at 98-113.

76. *Id.* at 101.

77. *Id.*

78. *Thomas v. Jackson*, 536 N.W. 3d 140, 142 (Wis. 1996).

79. VITERITTI, *supra* note 5, at 102-107.

80. *Jackson v. Benson*, 578 N.W. 2d 602, 632 (Wis. 1998).

81. *Jackson v. Benson*, 525 U.S. 997 (1998) (writ of certiorari denied).

82. VITERITTI, *supra* note 5, at 110.

83. *Id.*

84. *Simmons-Harris v. Goff*, No. 96APEO8-982, No. 96APEO8-991, 1997 Ohio App., LEXIS 1766, at 27 (Ohio App. 10d May 1, 1997). The Simmons court stated: "Because the scholarship program provides direct and substantial, non-neutral government aid to sectarian

plan on student performance varied with the sponsorship of the research.<sup>85</sup> One study reported improvement and parental satisfaction while another found no improvement.<sup>86</sup>

The battle over implementation of the school choice plans in Milwaukee and Cleveland shows the importance of the issue of whether extending parental choice to religious schools violates the concept of separation of church and state prescribed in the federal and state constitutions. Viteritti devotes the next section of the book to discussing the inappropriateness of such a strict separationist policy.

### III. SCHOOL CHOICE AND THE SEPARATION OF CHURCH AND STATE

In order for the school choice philosophy to be successful in promoting competition and raising the quality of education provided, the system must offer a sufficient number of options for parents. A large number of private schools are run by religious institutions. This fact raises significant First Amendment issues when parents seek to use government-granted education funds at parochial schools. The First Amendment to the United States Constitution provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>87</sup> Viteritti argues that the First Amendment was not intended to preclude any government aid that even indirectly benefits religious institutions and that such restriction is a violation of parents' free exercise rights.<sup>88</sup> He supports his argument by outlining the history of the concept of separation of church and state.<sup>89</sup>

Viteritti first explains how the founders did not fear all connection between government and religion.<sup>90</sup> He cites Madison's belief that a pluralistic political culture including many groups protects

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schools we hold that it has the primary effect of advancing religion in violation of the Establishment Clause."

85. VITERITI, *supra* note 5, at 111-12.

86. *Id.* One study finding positive results was conducted by choice advocate Professor Paul Peterson of Harvard. Professor Kim Metcalf of Indiana University conducted a study commissioned by the Ohio Department of Education. VITERITI, *supra* note 5, at 112.

87. U.S. CONST. amend. 1.

88. VITERITI, *supra* note 5, at 117-18.

89. *Id.* at 118-129.

90. *Id.* "By the time the framers sat down to draft the Bill of Rights, a clear pattern of religious toleration had begun to appear." *Id.* at 128.

against tyranny of the majority.<sup>91</sup> Viteritti notes that given Madison's vision of plurality and equality, nonreligion should not be given priority over religion.<sup>92</sup>

Viteritti then examines the interpretation of the Establishment Clause and the Free Exercise Clause by the Supreme Court.<sup>93</sup> The recognition of a strict separation between church and state in the context of aid to schools flows from the 1947 decision in *Everson v. Board of Education*.<sup>94</sup> In *Everson*, the Court upheld a New Jersey statute that provided reimbursement of transportation costs to parents of children that attended parochial schools.<sup>95</sup> In doing so the decision noted the existence of a delicate balance necessary in deciding state aid to religious institutions and individuals:

New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.<sup>96</sup>

In striking this balance in *Everson*, the Court recognized that people of faith cannot be denied welfare services that are granted to the public at large.<sup>97</sup> The Court noted that the Free Exercise clause protects parents who send their children to schools reflecting their particular religion and, thus, cannot be denied the aid and services granted to others.<sup>98</sup>

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91. *Id.* at 121-126.

92. *Id.* at 126.

93. *Id.* at 129-44.

94. 330 U.S. 1 (1947).

95. *Id.*

96. *Id.* at 16.

97. *Id.*

98. *Id.* at 17. The Court noted that "[m]easured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares

Viteritti notes that, unfortunately, subsequent courts have shifted the balance toward including any aid to religious schools as restricted by the First Amendment's Establishment Clause. In *Abington School District v. Schempp*,<sup>99</sup> the Court outlined a new stricter standard of what government action violates the Establishment Clause:

[The Court] has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.<sup>100</sup>

Eight years later, the Court in *Lemon v. Kurzman* adopted the "purpose and effect" reasoning and expanded it into a restrictive and imprecise test.<sup>101</sup> The "Lemon test" states that government action violates the Establishment clause when it 1) has no "secular purpose," 2) has a "primary effect" of advancing religion, and 3) fosters "excessive entanglement" between church and state.<sup>102</sup> This strict separationist standard would soon inhibit state aid to students attending parochial schools.<sup>103</sup>

Viteritti notes that in 1973 in *Committee for Public Education and Religious Liberty v. Nyquist*,<sup>104</sup> the Court struck down a New York statute that, *inter alia*, granted tax relief to help parents who sent their

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of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." *Everson*, 330 U.S. at 17.

99. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

100. *Id.* at 222.

101. VITERITTI, *supra* note 5, at 135 (citing *Lemon v. Kurzman*, 430 U.S. 602 (1971)).

102. *Lemon v. Kurzman*, 430 U.S. 602, 643 (1971) (Brennan, J., concurring).

103. VITERITTI, *supra* note 5, at 136.

104. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

children to parochial school.<sup>105</sup> It found that even such indirect aid programs “cannot be squared with the principle of neutrality” and run counter to the Establishment Clause.<sup>106</sup> The Burger Court continued to perceive religious interests as suspicious and construed the Establishment Clause strictly denying choice to many who wished to benefit from public assistance for educational needs.<sup>107</sup>

In the past eighteen years the Court has relaxed the standard somewhat and keeps alive the hope that a program may be established to allow impoverished students to choose to attend parochial schools with state assistance.<sup>108</sup> In *Meuller v. Allen*,<sup>109</sup> the Court drew a distinction between direct and indirect aid to religious institutions.<sup>110</sup> In *Meuller*, a Minnesota statute granted a tax deduction to parents of public and non-public school students to help pay for books, tuition, and transportation.<sup>111</sup> The Court found that the Minnesota statute met the three prongs of the *Nyquist* test even though the funds indirectly went to religious schools.<sup>112</sup>

It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota’s arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children.<sup>113</sup>

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105. *Id.* at 793. The Court found that “[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable affect are to aid and advance those religious institutions.” *Id.*

106. *Id.*

107. See *Leutkemeyer v. Kaufman*, 419 U.S. 888 (1974); *Wolman v. Watters*, 443 U.S. 229 (1977); *Franchise Tax Board v. United Americans for Public Schools*, 419 U.S. 890 (1974); *Byrne v. Public Funds For Public Schools*, 442 U.S. 907 (1980).

108. VITERITTI, *supra* note 5, at 138-43.

109. *Id.* at 395.

110. *Meuller v. Allen*, 463 U.S. 388 (1983).

111. *Id.* at 391.

112. *Id.* at 395. In finding the secular purpose of the Minnesota statute the Court stated: “A state’s decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state’s efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state’s citizenry is well-educated.” *Id.*

113. *Id.* at 399.

This is a significant change from the 1973 holding of *Sloan v. Lemon* where any sign of an indirect benefit received by a religious institution violated the Establishment Clause.<sup>114</sup>

In *Witters v. Washington Department of Services for the Blind*, a student used a public scholarship to attend a Bible college.<sup>115</sup> The Court held that since the aid was offered to all students, the fact that some individuals choose to exercise their faith and attend parochial schools did not cause the program to run afoul of the Establishment Clause.<sup>116</sup>

Viteritti continues his discussion of the legal barriers facing choice plans, including parochial schools, with a presentation of the treatment of the issue by state law.<sup>117</sup> In contrast to the federal courts' tolerance of school choice programs that include the religious school option, many state constitutions contain provisions for explicitly strict separation.<sup>118</sup> The so-called Blaine Amendments, adopted in the mid-nineteenth century, bowed to anti-Catholic fervor by forming a requirement for new states' admission to the union.<sup>119</sup> Thirteen states still have constitutional provisions restricting public funds solely for public school use.<sup>120</sup> As a result, school choice opponents often seek to litigate in state courts using state constitutional arguments.<sup>121</sup>

Viteritti argues that the exclusion of parochial schools from school choice programs causes unique difficulties for minority and urban communities. Given the important role that churches play in the black community, the effects of a strict separationist policy are multiplied.<sup>122</sup> Many black leaders emerge from the local clergy and

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114. VITERITTI, *supra* note 5, at 137 (citing *Sloan v. Lemon*, 413 U.S. 825, 834 (1973)).

115. 474 U.S. 481 (1986).

116. *Id.* at 488. The Court noted that “[a]s far as the record shows, vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington’s program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.” *Id.*

117. VITERITTI, *supra* note 5, at 168-77.

118. *Id.* at 17.

119. *Id.* at 152-53. Blaine’s amendment sought to undermine “the viability of schools run by religious minorities.” *Id.* at 153.

120. *Id.* at 169.

121. *Id.* at 168.

122. *Id.* at 20. Viteritti explains that the “[s]eparation of church and state is a white middle class legal and social construct that is out of step with the ethos of the black community and undermines the black community’s most significant local institution.” *Id.*

are subsequently denied permission to start charter schools.<sup>123</sup> The few clergy members who have been granted permission to open charter schools have shown separationists' fears to be unfounded as there is no evidence that they have used their schools to promote religion.<sup>124</sup>

Impoverished members of religious minority groups are also denied equal educational opportunity by a school choice program excluding parochial schools.<sup>125</sup> While middle-class parents make value-based choices for which school their child will attend, less affluent families may be trapped in a public school that promotes ideas contrary to their religious beliefs.<sup>126</sup> In that way, Viteritti explains, it is easy to see how the denial of Free Exercise argument is valid.

Viteritti ends his discussion of the barriers against including religious schools in a choice plan on a pessimistic note. He explains that no state is under any constitutional requirement to provide public funding for choice outside of the public schools and therefore expanding the range of options to include parochial schools remains a matter of politics.<sup>127</sup>

#### IV. VITERITTI'S PROPOSED SCHOOL REFORM POLICY

Viteritti concludes his book by listing some principles for policymakers to use to build an effective policy of equal education through school choice.<sup>128</sup>

*Market Principles in School Choice:* Viteritti explains the diverse demand in school choice programs as some parents exercise choice to escape poor quality schools while others seek a school with a particular philosophy, theme, or instructional approach.<sup>129</sup> Many want a school that reflects their religious beliefs.<sup>130</sup> A limited demand also exists for participation in school choice programs as most families are

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123. *See id.* at 206.

124. *Id.*

125. *Id.* at 120.

126. *Id.* Viteritti gives an example of how some sexual education lessons in public school conflict with the beliefs of Roman Catholics. *Id.* at 120-26.

127. *Id.* at 179.

128. *Id.* at 213-24.

129. *Id.* at 213.

130. *Id.*



satisfied with their schools (they have already exercised choice).<sup>131</sup> Presently there is an inadequate supply of schools to support a broad, effective school choice system.<sup>132</sup> Due to limited classroom space and already long waiting lists, a choice plan should foster the creation of many new charter schools.<sup>133</sup> Viteritti claims that demand created by a choice program will induce a greater supply of school options.<sup>134</sup> Giving parents free choice will provide incentives for private schools to expand enrollments and induce entrepreneurs to open new schools—a claim based on sound economic reasoning concerning normal market functions.<sup>135</sup>

Competition spurred by the availability of many options for education will improve the public schools.<sup>136</sup> To support this assertion Viteritti gives the example of Giffen Elementary School in Albany, New York.<sup>137</sup> At Giffen, philanthropist Virginia Gilder offered to pay ninety percent of the private school tuition costs of any student who wanted to leave a failing school.<sup>138</sup> In response to this offer twenty percent of the students accepted the subsidy and the school system replaced a principal, two administrators, and twelve teachers. The newly invigorated staff immediately began a range of innovations.<sup>139</sup> Viteritti argues that in situations like Giffen, competition will motivate professionals to do a better job.<sup>140</sup> Viteritti notes that in jurisdictions with experimental choice plans, policymakers have limited the number of choices available.<sup>141</sup>

*Advantages of Private Schools:* Private and parochial schools minimize the impact of a student's socioeconomic background on his or her academic performance and display an inherent sense of community.<sup>142</sup> Private schools function as voluntary associations of professionals, parents, and children in a caring supportive community, while public schools have operated as massive bureaucracies based on

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131. *Id.* at 214.

132. *Id.* at 214-15. A waiting list exists for both charter schools and select public schools.  
*Id.* at 215.

133. *Id.* at 215.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 215-16.

138. *Id.*

139. *Id.* at 215-16.

140. *Id.* at 216.

141. *Id.*

142. *Id.*

principles of hierarchy, order, predictability, control, and uniformity.<sup>143</sup>

*Eligibility for School Choice Program:* Education policy must be designed to benefit the most disadvantaged members of society.<sup>144</sup> Putting educational resources in the hands of parents provides economic and political empowerment for disadvantaged communities.<sup>145</sup> Poor families should be given the widest range of options including public, private, and religious schools.<sup>146</sup> Charter and public schools should be available on first come, first served basis, but where demand exceeds supply, priority should be given to students who attend failing schools, then excess demand should be met through a lottery.<sup>147</sup> Participation in the private school choice program should be limited to families with economic need.<sup>148</sup> Children opting out of regular public schools for academic reasons should be given priority over those opting out for religious or philosophical reasons.<sup>149</sup>

*Charter Schools:* A choice law should promote the quantity and diversity of charter schools.<sup>150</sup> Charter schools should be given the maximum degree of autonomy.<sup>151</sup> Charter schools, in exchange for autonomy, should meet high academic standards set by the states.<sup>152</sup> In measuring standards, states should initially factor in the fact that children's earlier education occurred at failing schools.<sup>153</sup> There should be no cap on the number of charter schools and they should receive equal funding as traditional public schools.<sup>154</sup>

*Admission to Nonpublic Schools:* Schools that participate in the choice program must accept all students without regard to race, ethnicity, or religion.<sup>155</sup> Single-sex schools may remain the same.<sup>156</sup> Private schools must accept the voucher as full payment for tuition.<sup>157</sup>

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143. *Id.* at 217.

144. *Id.* at 219.

145. *Id.* at 224.

146. *Id.* at 219.

147. VITERITTI, *supra* note 5, at 219.

148. *Id.*

149. *Id.* at 219-20.

150. *Id.* at 220.

151. *Id.*

152. VITERITTI, *supra* note 5, at 220.

153. *Id.* at 221.

154. *Id.*

155. *Id.*

156. *Id.* at 222.

157. *Id.*

Families should not be required to contribute additional money as requirement for admission or retention.<sup>158</sup>

*Religion in Schools:* Religion can be mentioned but not promoted in public schools.<sup>159</sup> “Any organized activity that appears to promote religious beliefs must be deemed impermissible.”<sup>160</sup> School choice plans that include parochial schools as options should reduce pressure to include prayer in public schools.<sup>161</sup> A state ban on funds to parents who wish to send children to parochial school creates serious issues under the federal Free Exercise clause.<sup>162</sup> In parochial schools, families should be given the option to opt out of religious instruction and exercises.<sup>163</sup>

#### V. ANALYSIS OF VITERITTI’S APPROACH TO SCHOOL REFORM

Viteritti’s ambitious plan of school reform, based on a system of school choice, relies on basic market forces. His plan fails to take into account two important factors which may likely result in the demise of his proposal. The first factor assumes a cooperative, benign laissez-faire government. This pre-condition is unlikely to occur as strong political forces have aligned against choice plans for the preservation of the status quo.

The second factor is that, assuming a choice system can be implemented, its effectiveness will be undermined by the first generation of students taking advantage of choice. Since first generation students come from failing schools, their performance will improve at levels lower than expected. This will give further ammunition to choice opponents fighting against such reforms.

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158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 218. For additional analysis of these barriers as well as a construction of school choice that may overcome them, see Brian P. Marron, *The Final Reform: A Centrist Vision of School Choice*, 8 GEO. J. POVERTY L. & POL’Y (forthcoming June 2001).

163. *Id.* at 222.

*A. Viteritti Underestimates the Support for the Status Quo*

While there may be hope for reform efforts to overcome the barriers placed by the courts, adequate reform measures also face daunting obstacles from the political process and the institution of education itself.<sup>164</sup> In order to be implemented, a broad, effective school choice system must pass through the legislature, facing all of the impediments of any other piece of legislation. Supporters of most legislation must mobilize their political muscle to the fullest to force their proposal through a body of representatives with varying political goals, often *beyond the proposed measure itself*.

The first major political obstacle faced in pushing for Viteritti's proposed school choice system is the section of the populace it targets has limited influence on the political process. People living in poverty traditionally are unable to generate a large effective political movement.<sup>165</sup> For years studies have shown the link between the level of political activism and social variables such as education and class.<sup>166</sup> Such socioeconomic research essentially illustrates that "personal resources determine who participates in politics and how well they do."<sup>167</sup> Therefore, impoverished urban minorities have little political muscle to push for changes in education. This political disadvantage is compounded when one considers that the more politically potent white middle-class suburbanites tend to believe that their schools are satisfactory and may be less sensitive to the discontent of urban parents.<sup>168</sup> As these dissatisfied parents call out to their legislators for reform it is easy to see how the relatively weak voices of the poor urban residents get drowned out by a cacophony of a broad coalition of large well-financed interests opposing structural education reform.

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164. VITERITTI, *supra* note 5, at 38-39.

165. Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, in FINANCING OUR FUTURE: EDUCATION IMPROVEMENTS FOR THE 21ST CENTURY, 1998 ANN. SURV. AM. L. 267, 281 (1998) Morgan notes that "[p]eople in these communities of concentrated poverty are not well positioned to bring about change. [They] lack mid-class and working class families necessary to spearhead political activism or maintain institutions that provide quality services." *Id.*

166. VITERITTI, *supra* note 5, at 45.

167. *Id.* at 188.

168. *Id.* at 214. Opponents of choice have caught on to this fact. They are able to mobilize opposition to change by scaring the suburbanites with claims that reform proposals will take away funds from more affluent schools to funnel them to underperforming schools. *Id.*

The perpetual American partisan battle for power assists in impeding school reform efforts.<sup>169</sup> The Democratic Party, currently regarded as the party strongly favored by minorities and the poor, opposes most choice-centered school reforms, while the Republicans, the party of big business and “small government,” generally support choice-based school reforms.<sup>170</sup> This further complicates reform efforts as the typically strong Democratically-loyal minority community’s partisan leanings make them skeptical of any reform plan offered by members of the Republican Party.<sup>171</sup> At the same time, members of the Democratic Party reject out of hand a reform plan that may be beneficial to urban minorities to a significant part because it is a plan offered by the opposition. Former Berkley law professor John E. Coons, a Democrat, remarked:

Here is an educational system which prides itself on being “public” but which provides access to the best schools only for the rich, meanwhile herding the workers and the poor into the state schools that operate in those neighborhoods where they can afford to live... [where] were the Marxist theorists whose vocation it is (or at least was) to expose such nasty instruments of class warfare? For that matter, where were—and where are—those Democratic politicians who so constantly assure us of their deep concern for the not-so-rich? So

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169. A recent example of partisan politics infecting the school choice debate occurred during the 2000 election over Michigan’s Proposition 1 concerning a voucher system. Republican governor Jim Engler voiced strong opposition to the proposal primarily because supporting it would draw Democratic voters to the polls and thus harm other Republican candidates on the ballot. Tom Bray, *Debacle at the Voucher Frontiers*, WASH. TIMES, November 10, 2000, at A21.

170. Gary Rosen, *Are School Vouchers Un-American?*, COMMENTARY, February 1, 2000, at 26. Rosen explains that “[w]hile leading Republicans and conservatives speak out for the educational interests of the urban poor, liberal and Democratic standard-bearers continue to stonewall for a status quo that even they must admit is unacceptable—a stance no less embarrassing to the traditions of the Democratic party than to the democratic traditions of the country.” *Id.*

171. This skepticism may also be due to the fact that school choice originally developed in the South as a white response to integration orders. Years later it again became popular in the 1980s among political conservatives who sought to “advance the cultural and political homogeneity of particular communities.” Bruce Fuller and Richard F. Elmore, *Policy Making in the Dark: Illuminating the School Choice Debate*, in WHO CHOOSES? WHO LOSES?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 1, 3 (Bruce Fuller and Richard F. Elmore eds., 1996).

far as I can tell, the Democrats (my own party) are either running these state schools that warehouse the poor or—with the help of the teachers' unions—are busy in the legislatures and Congress making sure that nothing in this system changes except its ever-expanding cost. The rich choose; the poor get conscripted.<sup>172</sup>

Viewing the choice debate from an electoral politics perspective one could also reasonably doubt the sincerity of some Republicans; their support of school choice may simply be for the purpose of drawing minority votes away from the Democrats without the intention of fully implementing a broad, effective choice plan once elected.<sup>173</sup> Others also point out that a powerful Republican constituency, the "Religious Right," intending to increase attendance and funding at parochial schools, strongly supports some school choice plans.<sup>174</sup> In this partisan tug-of-war politicians frame the school choice issue to their best political advantage at the expense of blurring the truth about various school choice plans.<sup>175</sup> As a result the misinformation infects the general public who likely vote according to party preferences rather than conduct independent analysis of the issue.<sup>176</sup> The effects of this can be seen as various referenda concerning matters of school choice have been placed on the ballot in many states.<sup>177</sup> The issue of whether and how choice-based school reforms should be implemented is being held captive as the two major parties struggle for power.

The adoption of Viteritti's school choice system faces an enormous obstacle from the influence of powerful, well-funded

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172. Peter Schrag, *The Voucher Seduction: The Issue Liberals Can't Ignore*, THE AMERICAN PROSPECT, November 23, 1999, at 46.

173. Once in office their failure to implement choice can be easily blamed on Democratic opposition.

174. Lynette Clemetson, *A Ticket to Private School*, NEWSWEEK, March 27, 2000, at 30.

175. Salim Muwakkil, *School Choice: Do Vouchers Help or Harm Black Children?*, IN THESE TIMES, January 11, 1998, at 11.

176. Tom Bray, *Debauch at the Voucher Frontiers*, WASH. TIMES, November 10, 2000, at A21. "Michigan's Proposal 1 was more narrowly drafted but fell victim to politics: The state's influential Republican governor, John Engler, turned his back on the measure out of fear it might lure hordes of Democrats to the polls and doom the re-election chances of his close friend and ally, Sen. Spencer Abraham." *Id.*

177. Thomas D. Elias, *School Vouchers Set Back at Polls; Billionaire Backers Ready to Try Again*, WASH. TIMES, November 8, 2000, at A16.

interest groups. These groups are able to successfully lobby legislatures and contribute large sums to the campaigns of legislators.

The most powerful and direct opponents of school reform are the groups with a vested interest in the current educational system: teachers' unions, school boards, superintendents, and administrators.<sup>178</sup> One would normally expect teachers' unions to favor efforts to improve schools; however, the unions oppose choice reform efforts for reasons other than education quality. The unions primarily seek to protect the jobs of their members and to prevent the diversion of funds from the public schools. When confronted with a hypothetical choice-based reform plan that maintains and even increases the funding of public schools, union opposition remains firm. In a recent interview for *Atlantic Monthly*, reporter Matthew Miller proposed to Bob Chase, President of the National Education Association—the nation's largest teachers' union with over 2.2 million members<sup>179</sup>—a choice plan that the union representative should have found appealing:

Miller proposed an experiment in which funding for education would be raised by 20 percent in several cities; every student would receive a voucher for his share of the newly enlarged budget, to be used as he and his parents saw fit. By this means, students who chose to remain in public schools would be guaranteed generous financial support. Chase rejected the idea outright—and did so again even when Miller suggested doubling or even tripling the amount of money.<sup>180</sup>

The teachers' unions continue to advance the interests of their members often at the expense of the quality of education received by their students. For example, in 1998 the NEA defeated a proposal by

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178. VITERITTI, *supra* note 5, at 87; James A. Peyser, *School Choice: When not if*, 35 B.C. L. REV. 619, 622 (1994) Viteritti explains that "[t]he loudest critics of choice are the teachers unions and school district administrators, who together with school committees and university education departments comprise the core of the education establishment . . . [T]hey have a vested interest in the status quo. Public school systems have a virtual monopoly on elementary and secondary education in this country, and like all monopolists they want to protect their franchise." VITERITTI, *supra* note 5, at 87.

179. Christopher D. Pixley, *The Next Frontier in Public School Finance Reform: A Policy and Constitutional Analysis of School Choice Legislation*, 24 J. LEGIS. 21, n.56 (1998).

180. Gary Rosen, *Are School Vouchers Un-American?*, COMMENTARY, February, 1, 2000, at 26.

the superintendent of the Dayton, Ohio, schools to turn over management of five underperforming schools to the Edison Project, a for-profit school management corporation.<sup>181</sup> The union articulated fears that Edison would require teachers to work longer hours, extend the school year, and promote contractual agreements between teachers and schools outside of those negotiated by the union.<sup>182</sup> The teachers' unions, armed with budgets in the millions, present a formidable obstacle that must be overcome to promote school choice programs.<sup>183</sup>

Local political actors also assert a similar vested interest in preventing broad, structural changes to the educational system. Viteritti underestimates the complex problems presented by the educational system at the local level. Superintendents, school boards, and administrators are all subject to local political pressure. The average term of a superintendent in large cities lasts less than three years.<sup>184</sup> Since they are not typically in office long enough to implement long-term changes, superintendents often reject any structural changes in favor of short-term "fad" initiatives in order to show some improvement to avoid being replaced.<sup>185</sup> This high turnover rate makes it virtually impossible to rely on the leadership of superintendents to implement structural reform. Even when a superintendent's reform plan begins to show positive results, after the superintendent leaves his or her reform programs are quickly dismantled or superceded.<sup>186</sup>

School boards also contribute to the opposition of school reform plans that include choice. In many inadequate urban school districts, the boards have been vulnerable to capture by the educational

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181. VITERITTI, *supra* note 5, at 69.

182. *Id.*

183. The National Education Association alone has an annual budget of \$750 million and annual political action fund of \$22.5 million. Pixley, *supra* note 179, at 33 n.56.

184. FREDERICK M. HESS, *SPINNING WHEELS: THE POLITICS OF URBAN SCHOOL REFORM* 14 (1999).

185. *Id.* Small school-based programs have become the dominant and continuing response. The constant implementation of "fad" initiatives may be adding to the problems faced by failing schools. "A natural concomitant to the multiplicity of the programs, however, is that they are often uncoordinated and may even be counterproductive in terms of student learning. The addition of new programs on top of old ones may result in a disjointed and fragmented set of experiences for students. . . . Much of school life seems to follow an endless cycle of soliciting funds, implementing new initiatives, and then going out to solicit more funds for even newer initiatives to replace current ones." JEFFREY R. HENIG ET AL., *THE COLOR OF SCHOOL REFORM: RACE POLITICS AND THE CHALLENGE OF URBAN EDUCATION* 13 (1999).

186. PAUL T. HILL AND MARY BETH CELIO, *FIXING URBAN SCHOOLS* 3 (1998).



establishment.<sup>187</sup> Many school boards focus on “the employment and career needs of administrators and employees” to the detriment of the quality of education offered to the children of their district.<sup>188</sup> For example, in districts where legislatures allowed the founding of charter schools with the approval of the school board, the board gave charters to few that applied.<sup>189</sup> This maintains the current system by further repressing formidable competition to the public schools.

Viteritti also overlooks the bureaucratic organization of public school systems.<sup>190</sup> The traditional bureaucratic structure in education, like other bureaucracies, has a built in bias favoring the status quo that works against any proposed structural changes such as school choice. Daniel Levine explains this feature of bureaucracy:

Associated with the problems of institutional complexity and overload are those of goal displacement in the operation of large-scale rational bureaucracies. Since bureaucratic organizations have been established to impose a degree of order on an otherwise unplanned and chaotic environment, there is a certain drive toward permanency and self-perpetuation at the heart of rational bureaucracy. When the goal of self-perpetuation begins to outweigh other purposes, we have one type of goal displacement. A second type occurs then staff members become more concerned with or adept at retaining their positions than with furthering the organization’s stated goals.<sup>191</sup>

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187. Aaron Saiger, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1869 (1999) (citing WILBUR C. RICH, BLACK MAYORS AND SCHOOL POLITICS 4-5 (1996)).

188. *Id.*

189. VITERITTI, *supra* note 5, at 70, 72, 75. Neal R. Pierce, *Charter Schools – and Those Who Resist Them*, BALTIMORE SUN, November 6, 1996, at 11A. “In state after state, local school boards and teacher unions are trying to quash charters. The reason: The spirited, upstart charter schools—usually created by groups of teachers, parents or local colleges—are a threat to established school bureaucracies and unions’ exclusive bargaining rights.” *Id.*

190. Daniel U. Levine, *Concepts of Bureaucracy in Urban School Reform*, in TRANSFORMING URBAN EDUCATION 99 (Joseph Kretovcis and Edward J. Nussel, eds. 1994).

191. *Id.* at 101.

The bureaucratic educational system therefore seeks to protect itself from change often at the expense of its main goal: to provide children with a quality education.

Viteritti also disregards the importance of the schools as employers in the urban community. In many cities the public school system supplies most of the decent-paying jobs for African American workers.<sup>192</sup> Recent studies of large cities show that the school system has essentially become a job program under a system of political patronage where the local government rewards campaign supporters with administrative jobs in the public schools.<sup>193</sup> For example, during the 1970s and the 1980s in Baltimore, an alliance between black professional educators, City Hall, and the school system developed. Mayor Schaefer sought to solidify his support among black voters by appointing his African American supporters as administrators, principals, janitors, secretaries, teachers' aides, and other positions.<sup>194</sup> Evidence of rampant patronage was recently reported in the Washington, D.C., public school system. *The Washington Post* conducted a study of the family and personal relationships among school employees finding "a host of connections," between principals, assistant principals, administrators, and other employees.<sup>195</sup> It is no

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192. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 295 (1999) (citing Amy Stuart Wells & Robert L. Crain, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 130 (1997)). "For example, Williard H. Murray, an African-American Democrat who represented Compton, California, for eight years until he retired in 1996, believes that school boards in some poor minority communities have become centers of patronage because they are one of the only large employers in town. As a result, Murray suggests, 'the focus becomes political, not educational.'" *Id.* at n.202.

193. *Id.* at 295; Saiger, *supra* note 187, at 1858-59, n.137. "District officials, dependent on and close to the local electorate, but functioning with relatively little visibility or media attention, thus face demands for employment, and sometimes for patronage and nepotism, that can be at least as strong as demands for quality education. Temptations and opportunities for corruption may also be greater at the district than at the state level." *Id.* at 1858-59; Peter Applebome, *Failure Calls Illinois City Home Turf*, N.Y. TIMES, October 30, 1994, at A16 (noting that "contracts and jobs [are] apportioned to friends or relatives of school board members" in East St. Louis, Illinois).

194. JEFFREY R. HENIG ET AL., THE COLOR OF SCHOOL REFORM: RACE POLITICS AND THE CHALLENGE OF URBAN EDUCATION 123-24 (1999). Henig explains that "[i]ncreasingly, the school district resembled a patronage base. Personnel that orchestrated mayoral activities were put on the school system's payroll." (quoting Kenneth Wong, CITY CHOICES 115 (1990)).

195. *Id.* (citing Sari Horwitz and Valerie Strauss, *A Well-Financed Failure: System Protects Jobs While Shortchanging Classrooms*, WASH. POST, February 16, 1997, at A1). "[S]chool board member Angie Corley, who made \$15,000 a year was joined on the [D.C. Public Schools] payroll by her daughter, Gwenellen, a \$49,096-a-year vice principal, and her son, William, a \$35,054-a-year science teacher." *Id.* at 124.

wonder that those interested in distributing the spoils of the election protest the broad-ranging structural changes to the public school system.

Various civil rights organizations also oppose school choice for poor and minority students.<sup>196</sup> Civil rights groups, including the NAACP, the National Urban League, the Southern Christian Leadership Conference, and the Rainbow/PUSH Coalition, criticize school choice as draining money from the public schools, not holding choice schools accountable, including schools that do not accept all applicants, and leading to resegregation as white families take advantage of the options.<sup>197</sup> Unfortunately, these civil rights groups disagree with the very people they are fighting for as recent polls show that poor urban parents support choice plans.<sup>198</sup>

Another set of powerful interest groups that would strongly oppose Viteritti's school choice plan are groups that oppose government support for any form of religious education. Such groups adopt a philosophy of strict separation of church and state under the First Amendment. While Viteritti correctly points out that strict separation is not necessarily what the drafters intended and the courts may be more tolerant of indirect government aid to parochial schools, he again underestimates the strength of these groups

Two notable groups opposing school choice efforts on a separationist basis are the ACLU and People for the American Way. People for the American Way, which, next to the teachers' unions, has become the nation's leading opponent of vouchers, often claims that choice schools violate voucher laws by discouraging some applicants on the basis of their religion or by telling parents their children would be required to participate in prayer and religion classes.<sup>199</sup>

The ACLU has adopted the policy of opposing choice plans as one of their most important issues. To further this goal, the ACLU sponsors numerous lawsuits against school choice-based education

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196. Muwakkil, *supra* note 175.

197. *Id.*

198. Rosen, *supra* note 170. "Unsurprisingly, given these results, interest in school choice has risen greatly over the last few years among inner-city families. One survey found that 85 percent of the urban poor now favor vouchers; another put support for the idea at 59 percent among blacks and 68 percent among Latinos. As if to prove these figures, when the Children's Scholarship Fund, the largest of the private voucher programs, recently announced its first national lottery for 40,000 scholarships, applications poured in from an astonishing 1.25 million children, all from low-income households." *Id.*

199. Schrag, *supra* note 172.

legislation and is very active in the political debate against choice programs. A regional director of the ACLU in Texas recently wrote in *The Dallas Morning News*, “the American Civil Liberties Union of Texas opposes any government voucher scheme that would fund private schools with public money. There are well-organized and well-funded groups that would like to see the end of public education. Those organizations already have begun to sway public opinion. To ensure they don’t sway our public officials, we urge you to call or write your state and federal representatives and urge them to vote against voucher schemes.”<sup>200</sup>

Viteritti fails to adequately explain how his proposed school choice program will overcome these formidable political barriers to implementation.

### *B. Limited Initial Effects of a School Choice Program*

Viteritti neglects to point out that enacting his proposed system of school choice may not achieve its intended results for several years. Many reformers fail to explain that the effectiveness of any reform effort will be diminished significantly by the fact that the current generation of students, especially those from lower socioeconomic backgrounds which the plan may specifically be designed to help, have unfortunately been under the auspices of an inadequate educational system for years. The longer students stay in inadequate schools, the less likely they are to succeed educationally.<sup>201</sup> Being educated under an inadequate system pollutes a student’s ability to accept and perform under a “new” educational method. Patrick James McQuillan illustrates this point in *Educational Opportunity in an Urban American High School*, where he describes the reaction of students when teacher’s attempted a new educational method.<sup>202</sup>

McQuillan observed the efforts of three teachers in implementing a United States history class that differed significantly

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200. Diana Philip, *School Voucher Plan Has Many Flaws*, THE DALLAS MORNING NEWS, January 25, 1999, at 13A.

201. HENIG ET AL., *supra* note 185, at 67 (noting the findings of the District of Columbia Financial Responsibility and Management Assistance Authority’s report on the failure of D.C.’s public schools.).

202. PATRICK JAMES MCQUILLAN, *EDUCATIONAL OPPORTUNITY IN AN URBAN AMERICAN HIGH SCHOOL* 23-56 (1998). *Id.* at 23-58.

from the students' previous educational experience.<sup>203</sup> He observed that the students actively resisted the new program by drawing collectively on their shared sense of "real school" and their definition of reasonable teacher expectations.<sup>204</sup> McQuillan concluded that by resisting changes the students "enacted their informal power so as to implicate themselves in their own educational failure—in terms of the grades they received, the skills they never developed, and how their actions reinforced faculty perceptions of student indifference."<sup>205</sup>

Such resistance by students moving into choice schools should initially diminish the positive results of the school choice program proposed by Viteritti. This will, in effect, provide heavy ammunition to choice opponents seeking to curb the spread of such a plan to other states. Viteritti fails to accurately explain that the effectiveness of his proposed school choice plan needs to be judged on a long term basis by measuring the performance of those students not exposed to inadequate public schooling.

Aside from the two major defects of Viteritti's argument, he provides a promising proposal for improving the education of students from lower socioeconomic backgrounds. By providing the best education to every student, America can move much closer to real equality.

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203. *Id.* at 23.

204. *Id.* at 24.

205. *Id.*