

THE LAST FREEDOM: RELIGION FROM THE PUBLIC SCHOOL TO THE PUBLIC SQUARE. By Joseph P. Viteritti. Princeton University Press 2007. Pp. 294. \$27.95. ISBN: 0-691-13011-6.

In *The Last Freedom*, Joseph Viteritti addresses what he sees as the dual religion problem in America: “on the one hand protecting the rights of the many from the designs of religious extremists, on the other protecting the rights of the devout minority from the designs of extreme seculars.” (205) Although this dual problem has always plagued America, Viteritti sets his sights primarily on the latter aspect of the problem. He sets out to show how, even as America has become more religiously and politically moderate, the degree of protection provided to its most religious citizens has declined.

To Viteritti, the devoutly religious occupy a tenuous position in contemporary society. He notes, for instance, that many individuals who describe themselves as multiculturalists, and who sincerely support the causes of various minority groups that have been the victims of discrimination, nonetheless exhibit a genuine hostility toward the devoutly religious. (4) According to Viteritti, the real key to understanding how secularism now threatens deeply religious people lies in what he calls the “hollow middle” of American society.

Viteritti argues that this “larger, passive, undecided, and ambivalent” sector of society, deeply enmeshed in a ubiquitous secular culture, effectively sets the terms of religious freedom in America. As he describes it, the hollow middle encompasses the great majority of Americans who express a belief in God and attest to some form of congregational affiliation, but whose faith shapes neither their lives nor their politics. Though they believe in God and go to church, for the most part they live secular lives. They believe that religion can have a positive effect on public life, but are suspicious of it as an organizational force in politics. They also tend to be suspicious of those members of society who are deeply religious. They are not inclined to banish religion from the public square as are adamant secularists; yet, according to Viteritti, they have stood silently by as the courts and other branches of government have invoked the Constitution to engineer the secularization of public life and public schools. Largely centrist in their politics and somewhat ambivalent toward religion, members of this hollow middle are most tolerant of religious viewpoints when those

viewpoints are without consequence and without effect in the larger public life. As Viteritti argues, this ambivalence has permitted the secular tendencies of governmental decision-makers to prevail because the resulting policies affect only a small minority of people who want to live their lives according to their faith. (89)

To exemplify how the religious ambivalence of the hollow middle works against the rights and interests of the most deeply religious, Viteritti cites *Mozert v. Hawkins County Public Schools*,¹ in which a small group of religious parents claimed that the material in certain textbooks used in the public schools offended their religious beliefs. Because the secular humanist perspective in the books contradicted their fundamentalist Christian beliefs, the parents filed a lawsuit seeking to allow their children to use alternative books. Though prevailing at the district court level, the parents lost when the school board appealed to the Sixth Circuit Court of Appeals.

Viteritti criticizes the Sixth Circuit decision in *Mozert* as being completely indifferent to the free exercise rights of the parents. He illustrates the unfairness of *Mozert* by contrasting it with other Supreme Court decisions which have struck down laws prohibiting the teaching of evolution and requiring school children to recite the Pledge of Allegiance. In those latter cases, the Court held that the schools had to accommodate the dissenting parents. In *Mozert*, however, not only were the parents not trying to impose their beliefs on other people's children, but they were only demanding that a worldview they had renounced for religious reasons not be imposed on their own children. (61) In *Mozert*, the required textbooks offended the religious sensibilities of the aggrieved parents the same way that the Pledge of Allegiance offended parents who objected to their children being required to recite it. (65)

Viteritti uses the *Mozert* case to argue that the legal protections offered by the Establishment Clause to ensure an individual's freedom from religion are more secure than the protections provided by the Free Exercise Clause to ensure the freedom of religion. (62) Contrary to what had happened in the cases involving the teaching of evolution, there was no public outcry in *Mozert* from legal scholars or opinion-makers that the government should be more sensitive to the needs of the dissenting parents. Thus, the expectation is that religious parents should be expected to abide by secular standards in the upbringing of their children, whereas nonreligious parents should not be expected to abide by religious standards in the upbringing of their children. (63)

1. *Mozert v. Hawkins County Public Schools*, 827 F.2d 1058 (6th Cir. 1987).

According to Viteritti, the Courts have placed more focus on the Establishment Clause than on the Exercise Clause, and in this way the Courts have actually restricted the degree of religious freedom. Viteritti rightly observes that Establishment Clause doctrines have evolved from a view of religion as a divisive force in society. The separationist stance reflected by the *Lemon* test,² for instance, incorporates a belief that religious conflict is particularly harmful to society and that the Establishment Clause was meant to keep secular society safe from such conflict. However, this view of the Establishment Clause in particular and of religion in general has caused the courts to use the clause to disadvantage the free exercise interests of religious believers. (97)

As Viteritti insightfully argues, the Court's Establishment Clause jurisprudence has worked against free exercise rights by serving as a vehicle for guaranteeing freedom from religion, rather than freedom of religion. (120) Ever since the *Everson*³ decision in 1947, the Court has treated the two First Amendment clauses as though they were in tension, with the Exercise Clause designed to protect the rights of religious believers and the Establishment Clause designed to protect the rights of the non-believers. Moreover, with the emergence of a Supreme Court jurisprudence that embraced secularism as a prevailing philosophy, Establishment Clause concerns have overshadowed all other concerns, including those associated with free exercise. As proof of how the secularism concerns of the Establishment Clause have trumped the liberty concerns of the Free Exercise Clause, Viteritti cites the case of *Lee v. Weisman*,⁴ in which the Court struck down a school's practice of having a rabbi deliver a nondenominational prayer at a high school's graduation ceremony. In *Lee*, the Court used the Establishment Clause to protect dissident parents from the policies enacted by the school board; yet in *Mozert*, the Exercise Clause did not protect dissident parents from the religiously insensitive practices of the school board.

Viteritti recognizes that there has been significant progress in the Court's Establishment Clause jurisprudence. Over the past twenty years, he notes, the Court has modified its restrictive standard of church-state relations as defined in the *Lemon* test. In doing so, the Court's Establishment Clause doctrines became less hostile to religion and more accommodationist, as reflected in the 2002 school voucher case. But this liberalization of Establishment Clause doctrines, largely occurring through a free speech strategy, has not prompted any corresponding

2. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

3. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

4. *Lee v. Weisman*, 505 U.S. 577 (1992).

move in the Court's free exercise jurisprudence. In fact, over the same time period, as reflected in the *Smith*⁵ case, Viteritti argues that the Court was moving in the opposite direction, restricting rather than expanding the rights of religious believers.

In its religion clause jurisprudence, according to Viteritti, the Court remains fixated on what the Establishment Clause permits rather than what the Free Exercise Clause protects. (210) Consequently, religious freedom has become least satisfying for those to whom it matters the most, the devoutly religious. Conversely, it works best for those to whom it matters the least, namely the great majority who occupy the hollow middle. (213) As revealed by *Mozert*, the judicial insensitivity towards the devoutly religious contrasts sharply with the sensitivity shown to free speech dissidents. But as Viteritti argues, the parents in *Mozert* deserve the same kind of accommodation afforded conscientious objectors who refused to salute the flag.

To better protect the rights of the devoutly religious, Viteritti essentially proposes a return to the pre-*Smith* standard—e.g., using a strict scrutiny standard to evaluate governmental infringements on religious freedom. Viteritti also argues that forcing parents to assume a financial penalty for educating their children in an environment that supports their faith is an unacceptable form of discrimination. (232) Thus, an economically disadvantaged family that chooses to forego a public school education as a matter of conscience ought to be provided with a level of public support equal to the amount they would receive in public school.

However, whereas Viteritti is acutely sensitive to the religious exercise rights of individuals, he seems somewhat less sensitive to the freedoms of religious institutions. For instance, Viteritti is cautious about whether fundamentalist Christian denominations should be exempt from the enforcement of anti-discrimination laws, including discrimination against gay individuals, even if enforcement of those laws infringes on the religious freedom of the institution.

The Last Freedom is a valuable contribution in many ways. In it, Viteritti provides a comprehensive survey of religion and American society, using social science data to give us a picture of what he calls the "hollow middle." Through his analysis of First Amendment religion cases, he also reveals the fallacy concerning secularism and neutrality. As Viteritti demonstrates, secularism is not a neutral force; it tends to work against the interests and needs of the most religious members of

5. *Empl. Div. v. Smith*, 494 U.S. 872 (1990).

society. Moreover, operating under the influence of cultural secularism, the courts have become increasingly insensitive to the freedoms of the devoutly religious. Viteritti insightfully shows how courts are much more sensitive to free speech claims than to free exercise claims. And finally, perhaps Viteritti's greatest contribution is his demonstration of how courts more strongly enforce the Establishment Clause than the Free Exercise Clause, and how this disparity of enforcement has diluted the protections provided by the Free Exercise Clause.

*Patrick M. Garry**

* Associate Professor of Law, The University of South Dakota School of Law, Vermillion, South Dakota.