

## REMARKS OF PETER SCHUCK†

Affirmative action is not the issue with which we ought to be preoccupied. It seems to me that the great challenge that we must meet is not how to admit more students of color into institutions of higher education, but how to improve kindergarten through twelfth grade education in ways that make students eligible for admissions on merit standards.

No one doubts that access to education for those who want to pursue it is a compelling social ideal. Governments, at all levels, have spent trillions of dollars under Title I and other programs aimed at closing the educational achievement gap between low-income children and their more economically fortunate peers. However, more than thirty-five years later, and after countless policies, studies, and programmatic reforms designed to equalize pre-college educational opportunity, the chasm between the quality of inner-city public schools and their suburban counterparts remains almost as large as before. This gap exists despite inner city-per-pupil expenditures that sometimes equal or exceed those in the suburbs, for example, as in the case of Washington D.C. After all these efforts, Harvard Educational Psychologist Howard Gardner can still say, “[t]ell me the zip code of a child and I will predict her chances of college completion and probably income.”<sup>1</sup>

I contend that we cannot hope to improve the quality of elementary and secondary education until we give parents the power, not just the right, to send their children to schools other than the ones to which their local school boards now assign them. If parents had this choice and were able to exercise it, many, perhaps most of them, would continue to send their children to the assigned public school. Others would opt for alternative public schools, such as magnets or operationally

---

† Simeon E. Balwin Professor of Law, Yale Law School. B.A., Cornell University; M.A., J.D., Harvard University; LL.M., New York University.

<sup>1</sup> Howard Gardner, *Paroxysms of Choice*, N.Y. REV. BOOKS, Oct. 19, 2000, at 49 (book review).

independent charter schools, and still others would choose private schools, secular or religious.

Many private schools, and, most relevantly, those with tuition low enough to be affordable to low-income families, are religious in educational mission, institutional sponsorship or both. Therein lies both the opportunity and the problem.

The opportunity arises because some religious schools, particularly Catholic parochial ones, have demonstrated comparative success in educating the same kinds of low-income children that public schools have manifestly failed to reach—whether the students are Catholic or non-Catholic, minority or white, immigrant or American, urban or suburban. The sociologist James Coleman<sup>2</sup> and his colleagues documented the Catholic schools' remarkable record of educating socially and educationally disadvantaged children in his classic 1982 study. Researchers have long speculated that this "Catholic school effect" could be biased by the types of children that attend the schools, but efforts to account for this possible selection bias have not yet fully accounted for the effect.

The problem arises because only the government can create the conditions under which educationally disadvantaged children have genuine opportunities to attend better schools, including religious ones. Even the most generous private funding for this purpose, and there is much of it now supporting about 60,000 low-income students throughout the United States, can reach only a small fraction of these children. In reality, parents cannot exercise genuine choice unless government provides assistance in one form or another.

Yet in each of the four main kinds of government-sponsored choice plans—intra-district choice, inter-district choice, charter schools, and private schools—tuition support is hobbled by legal, political, and practical obstacles that seriously reduce their availability and potential effectiveness. Although all four of the

---

<sup>2</sup> James Coleman (1927–1995) was a world-renowned sociologist who received his Ph.D. from Columbia and taught for most of his career at the University of Chicago. Coleman published nearly thirty books and over 300 articles on sociology theory, the sociology of education, and public policy. *See Obituary: James Coleman, Sociology, UNIV. CHI. CHRON.*, Mar. 30, 1995, available at <http://chronicle.uchicago.edu/950330/coleman.shtml> (last visited Mar. 20, 2004).

school choice mechanisms are important, my discussion will focus on tuition support and vouchers, which can also take the form of tax credits.

The idea of vouchers is an old one that has new salience in an era with widespread libertarian, egalitarian, anti-bureaucratic, religious revivalist, parental authority, and family-choice ideals. The vast majority of vouchers are used in religious schools. (Maine and Vermont, however, bar their high school students from using them at such schools.) Catholic schools' share of private school enrollment has declined since the 1960s, but they still account for almost half the total, while other religious schools account for another 35%, and non-religious schools account for only about 16% of the enrollments. This is why vouchers, unlike other choice forms, remained under a federal constitutional cloud until June of last year, when the Supreme Court upheld the Cleveland program that gives vouchers to parents who can use them in schools of their choice.<sup>3</sup> The failure of most states to adopt voucher programs can be explained by their possible invalidity under some state constitutions. This stigma, that is to say the federal constitutional cloud that has been largely dispelled, is rich in irony.

First, public support for Catholic and other religious schools was a common practice historically, ending only in the mid-nineteenth century due, among other things, to virulent, nativist, anti-Catholic politics conducted in the name of liberal ideology and values. As one historian of the period puts it, "the disinheritance of the church-related schools [was] a doctrine . . . born of bigotry at the state level [and] transmuted by the U.S. Supreme Court into high constitutional principal."<sup>4</sup>

A related irony is political. Religiously conservative Protestants, who once fiercely opposed public aid to religious schools (because those schools were Catholic) now support it because they fear Catholicism less and have established their

---

<sup>3</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (holding that the school voucher program was one of choice, and thus did not violate the Establishment Clause).

<sup>4</sup> Diane Ravitch, *American Traditions of Education*, in *A PRIMER ON AMERICA'S SCHOOLS* 1, 11 (Terry Moe ed., 2001) (quoting LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL, 1825-1925*, at 69 (1987)).

own academies since the 1960s, originally to avoid integration and busing.

A third irony is economic. By the time vouchers' political viability is accepted, there may be few inner-city parochial schools to accept them. Because these schools are under great financial pressure, Father Andrew Greeley's prediction a decade ago that "the first voucher will arrive on the day that the last Catholic school closes" must be taken seriously.<sup>5</sup>

A final irony is comparative. Many other liberal democracies, including those where religious ties are historically deeper than those in the United States, have long funded private school tuition for numerous students.

The political success of voucher opponents to date has limited the amount of empirical evidence on vouchers' effectiveness. Still, new studies are appearing, and vouchers show much promise. Researchers assessing the publicly-funded programs in Milwaukee, Cleveland, and Florida that extend to religious schools, and the privately funded programs in Washington, D.C., Charlotte, Dayton, New York City, and San Antonio, have reached what one education policy scholar calls a consensus about their positive effects on pupils, parents, and public schools, although some more recent studies find inconclusive effects on academic achievement.

Because voucher applicants are typically selected by lottery, random assignment studies, unique in educational policy research, have been possible. These studies "unambiguously and overwhelmingly" find improvements in both parental satisfaction and standardized test scores. This surely is why almost half of all blacks support vouchers generally, with higher support among young blacks. Cleveland's experience is typical. Nearly 50% of the parents of the 4,000 participating students reported being very satisfied with the academic program, safety, discipline, and teaching of moral values in their private schools compared to 30% of those in the public schools. As to test scores:

---

<sup>5</sup> Diane Ravitch, *The Right Thing: Why Liberals Should Be Pro-Choice*, NEW REPUBLIC, Oct. 8, 2001, at 31 (quoting Greeley), available at <http://www.brookings.edu/views/articles/ravitch/20011008.htm> (last visited Mar. 20, 2004).

There have been seven random assignment and three non-random assignment studies of school choice programs in the last few years. The authors of all ten studies find at least some benefits from the programs and recommend their continuation, if not expansion. No study finds a significant harm to student achievement from the school choice programs. The probability that ten separate studies would find benefits, and no significant harm, if there were no benefit from school choice is astronomically low. Furthermore, the participating private schools tend to have per pupil expenditures (PPEs) that are nearly half those in the public schools. The policy finds support because parents like it and it costs half as much money to produce the same level of academic achievement.<sup>6</sup>

In fact, it often costs less than half. For example, Cleveland's vouchers are worth only \$2,250 per year, which is 25% of the PPE in its public schools. The amounts in Florida—\$4,000—and in Milwaukee—\$5,300—are also low compared to the public schools' PPEs.

As a policy matter, then, the case for funding further experiments with vouchers is compelling. Both the Bush Administration, which proposed vouchers but did not fight very hard for them, and the Democrats, who generally oppose even small experiments with vouchers, should be strongly condemned for failing to authorize them in the education legislation enacted in December 2001. No one has explained why the government should prevent low-income parents from gaining access to better educational terms for their children just as more affluent families who send theirs to good suburban and private schools can—especially if this access, as in existing programs, does not necessitate higher public outlays and may actually cost less.

Although voucher opponents advance a number of policy and political arguments against them, none is at all convincing. We have seen that low-income parents think that vouchers improve their children's educational experience, although the data on academic performance is not yet conclusive. Nevertheless, opponents say, vouchers will destroy the public schools by "creaming off" the best students and moving them into private

---

<sup>6</sup> Jay P. Greene, *The Hidden Research Consensus for School Choice, in VOUCHERS, AND PUBLIC EDUCATION 90* (Paul E. Peterson & David E. Campbell eds., Brookings Institution Press 2001).

schools, thus concentrating the neediest ones in the public systems and abandoning the civic ideal, according to which children in common schools learn secular values, a trans-ethnic, trans-class citizenship, and a familiarity with different cultural traditions.

The research on voucher programs refutes this argument in all of its particulars. It is rather late in the day to lament creaming. After all, higher-achieving students from better-off families have long chosen public or private alternatives; almost 60% of all students now attend "chosen" schools, including at least 25% of public school students.

In any event, voucher users are decidedly disadvantaged in terms of family income, averaging \$10,860 in the Milwaukee program, and even less in New York. They are also disadvantaged with respect to family composition. About 75% are single, female-headed households. Voucher users generally are in the bottom third academically. It is true that many low-income parents whose children would be eligible do not even bother to sign up for the voucher lottery, but those who do sign up are unquestionably poor. "The most damaging thing one could say with respect to creaming," education researcher Jay Greene notes, "is that voucher programs probably attract the more capable of the disadvantaged poor. But if this is 'creaming,' then virtually all anti-poverty programs engage in creaming."<sup>7</sup>

Harvard economist Carolyn Hoxby studied how the prospect of vouchers affected the public schools and the children who remain in them. She found that "if private schools in an area receive sufficient resources to subsidize each student by \$1,000, the achievement of *public* school students rises."<sup>8</sup> When public providers must compete with private ones for scarce dollars, the public providers' performance tends to improve. This is one reason why public colleges are now good and cheap enough to attract 80% of U.S. college students. Still, competitive effects have been, and are likely to remain, small until the amount of choice—and thus the threat it poses—increases.

---

<sup>7</sup> *Id.* at 91.

<sup>8</sup> Caroline M. Hoxby, *Analyzing School Choice Reforms That Use America's Traditional Forms of Parental Choice*, in *LEARNING FROM SCHOOL CHOICE* 148 (Paul E. Peterson & Bryan C. Hassel eds., Brookings Institution Press 1998).

For people who enjoy choice to argue that low-income children must be denied choice and locked into the public schools in order to save those schools is simply wrong as an empirical matter (as we have just seen, choice can improve these schools) and as an historical matter (choice was common until the mid-nineteenth century). It is also morally perverse, at least in the context of a public entitlement like education. Those taking this position seem to prefer the welfare of an institution (the school system) to that of the children it is meant to serve. They would allow parents with choice to impose the burdens of non-choice on the families who can least bear them and would violate the basic moral premise of most social programs, which opposes wealth-placed barriers to essential public services. For example, most Medicaid recipients go to private health-care providers, and many low-income families use housing vouchers to rent private units.

Most Americans think of public schools as sites where young people of different social, ethnic, and racial backgrounds can come together to learn a common liberal citizenship. Many who invoke this ideal recognize that the reality in low-income urban areas falls far short of it. The illiteracy, innumeracy, indiscipline, violence, and astronomical dropout rates in these schools explain why a steadily rising share of black children, now about 10%, attend private schools; why 52% of public school parents and 67% of inner city ones would choose a private school if they could afford it; why 77% of the latter, especially black parents, favor the voucher approach when it is explained to them; and why young black adults are even more pro-voucher than older ones.

As it happens, the research on vouchers indicates that the risk to civic ideals is not at all a problem. It is claimed that a public school monopoly is necessary to promote these ideals, but that claim has no empirical support and is repudiated by the experiences of other democracies where governments pay private school tuition for large numbers of students: 76% in the Netherlands; 58% in Belgium; 30% in the United Kingdom; and 25% in Australia, to name a few. The available evidence in the United States indicates that private and religious schools are *more* successful than public schools at teaching civic virtues, community service, tolerance, and even feminism!—and that

these teachings seem to persist into students' adult years. Even more striking, and perfectly predictable, is the fact that private schools in communities with choice are more integrated, both racially and by income, than the public schools there. After all, public schools both reflect and reinforce the racial isolation of neighborhoods. Choice systems, in contrast, aim to decouple good schooling from residence. By detaching schooling from housing, school choice makes it easier for wealthier families to stay in economically mixed neighborhoods. Moreover, by reducing the financial premium placed on housing in areas with good schools, vouchers make it easier for poor families to move into those areas.

No wonder that vouchers are most strongly supported by poor inner-city residents and most vigorously opposed by well-to-do suburbanites. Ohio, for example, invited suburban public schools to accept Cleveland's voucher students, but not a single one agreed to do so. This opposing coalition of suburbanites, teachers, and civil rights groups has defeated, at this writing, every single proposal for large-scale voucher programs by wide margins. It has prevailed even when voucher proponents outspent it, and even when Republican governors, not beholden to those interests, seemed open to vouchers. The power of this coalition was most evident in 2001, when, with bipartisan support, it defeated even a very limited private program.

Poor plan design has added to vouchers' political vulnerability. The problem is not that voucher values are too low. Although existing vouchers do not cover the tuition at Andover or elite New York City academies, they suffice to cover full tuition in the vast majority of private schools in America. Voucher amounts, moreover, could be raised significantly without even approaching the PPE in most urban and suburban public schools. Any remaining gap (whose precise size depends on how the public system's fixed costs are allocated) would still leave the public schools with more money to spend per pupil than before—another reason, if one is needed, why vouchers should help them, not destroy them. A greater problem is that the most prominent voucher proposals, like the ones rejected in Michigan and California, were universal rather than being targeted, as they should be, at the most needy children in the worst-performing public schools. Universality greater magnifies a



plan's cost, diffuses its rationale, and weakens its likely impact. For the foreseeable future, at least, vouchers should be means or school-tested. They should also be only one part of a much wider choice program that includes public schools through out-of-district options and charter schools, as well as efforts (vain so far in Cleveland's program) to secure suburban communities' participation.

Finally, the private schools where publicly-funded vouchers are used must be accountable for public standards of fiscal responsibility, transparency, due process, and the like. (Public schools, for their part, are hardly accountable to those who cannot afford to exit from them.) There are many different ways to combine public and private standards, resources, and energies. In general, government should not demand too much control and standardization of education in exchange for its funds. Perhaps the most alluring promise of voucher programs is their capacity to draw on private schools' diverse missions, values, curricula, and educational techniques, yet exploiting this diversity requires that they be free to disregard certain orthodoxies of public institutions. Just as the government has a right and the duty to enforce public standards of legality and safety, it can properly insist that the schools it supports meet minimal levels of curricula coverage (including civic instruction) and educational effectiveness. Regulation should focus on disclosure of information about schools, and on educational outcomes like student achievement, not on input or process measures like teacher certifications that often bear little or no relations to those outcomes.

A school probably cannot be effective, however, unless it or its sponsor remains free to define its mission and to propagate its values, including some that the majority may deplore. For example, a Catholic school's performance may depend on its power to send clear moral signals condemning premarital sex, divorce, homosexuality, and other conduct that most non-Catholics (and some Catholics) accept. But a genuine respect for diverse moral visions and educational ideas would allow public funds to be used in a school promoting such values to the children of informed, consenting parents, if it meets secular educational standards and neither endangers third parties, nor

violates norms to which our Constitution is unequivocally committed, such as racial equality.

Beyond this, a voucher law should be substantively agnostic, allowing the use of religiously driven admissions or hiring criteria if the school can show that the criteria advance a genuine, legitimate educational mission. It is difficult to imagine how an all-white school could qualify under the standard, but a single, secular all-black program, or one that will not hire unwed mothers to teach, might qualify, depending on the strength of its rationale.

Diversity is not the same as excellence. Many religious schools where parents would use vouchers, like the secular schools they reject, will be mediocre or worse, and some of them will propound values that many in the community find repellent. Some schools will engage in fraud or fail financially. Not all parents will make wise educational choices, nor will vouchers free their families from crime, substandard housing, and limited economic opportunities in declining neighborhoods. In addition, many religious schools may fear that government funding will subject them to controls and monitoring that they deem inimical to their autonomy. In short, the design of specific voucher programs and of their regulatory safeguards is crucial to their success. The same is true, of course, for public school programs.

What vouchers *can* do is to enlarge the sadly limited options of low-income families, enabling them to seek schooling that may redeem their children's lives—choices that other Americans routinely make for their children. Still, vouchers are by no means the only way to provide such choices. Indeed, as I noted earlier, a healthy respect for diversity values means that the state should support, under appropriate regulation, a variety of other approaches to school choice, including charter and magnet schools, choice among public schools, home schooling, and other forms of subsidized access to private schools. Accomplishing this would be no small thing, and we cannot afford to foreclose it by demanding an educational orthodoxy that defies our normative diversity and that, so far, has failed its own minimal civics test.