

## THE DEVIL IS IN THE DETAILS: OR, WHY I HAVEN'T YET LEARNED TO STOP WORRYING AND LOVE VOUCHERS\*

DENISE C. MORGAN\*\*

For all that has been said about school vouchers<sup>1</sup> in recent years—both in their favor and in opposition to them—I am still dissatisfied with the debate. Although most voucher proponents claim that urban children of color will be the primary beneficiaries of voucher programs, and many voucher opponents argue that those same children will suffer the most as a result of the implementation of voucher programs, the dialogue on this issue between Black and Latino parents and academics of color is surprisingly muted.<sup>2</sup>

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\* With apologies to Stanley Kubrick.

\*\* Professor, New York Law School; B.A., Yale College, 1986; J.D., Yale Law School 1990. Thanks to Eric Wold, Ivan Aubergon, John Farago, Anthony Fletcher, Tanina Rostain and Peter Schuck for arguing with me about the details; and to Matthew Smalls, NYLS '04 and Chloe Murphy, NYLS '05, for very helpful research assistance.

1. By “school vouchers” I mean programs that use state revenues to send children to any public, private, or parochial school that will accept them. I use the term “school vouchers” instead of “school choice” because vouchers are not necessary for students to be able to choose among a variety of educational options including public magnet schools, charter schools and public schools in other school districts.

2. But see Hugh B. Price, *The True Value of School Vouchers*, *THE BLACK WORLD TODAY* (July 10, 2002), at <http://athena.tbwt.com/content/search.asp?id=1155> (opposing vouchers); Earl Ofari Hutchinson, *Supreme Court School Voucher Decision Uncovers Deep Schism Among Blacks*, *THE HUTCHINSON REPORT* (July 1, 2002), at <http://www.thehutchinsonreport.com/070102feature.htm> (discussing attitudes towards vouchers among African Americans); Byron A. Ellis, *Opportunities Embedded in Educational Vouchers*, *THE BLACK WORLD TODAY* (Mar. 20, 2002), at <http://athena.tbwt.com/content/search.asp?id=252> (supporting vouchers); Barbara Miner, *Vouchers and the False Promise of Academic Achievement*, *THE BLACK WORLD TODAY* (Feb. 24, 2002), at <http://athena.tbwt.com/content/search.asp?id=15> (opposing vouchers); Joyce Jones, *The Problems With Education Coupons: Why the CBC Opposes School Vouchers*, *BLACK ENTERPRISE MAGAZINE* (Feb. 2001), at <http://www.blackenterprise.com/Archiveopen.asp?source=/Archive2001/02/0201-05.htm>. See generally Symposium, *The Education Divide: Gauging the Impact of Legal Challenges to School Vouchers and Parental Choice on America's Children*, 45 *How. L.J.* 247 (2002).

This paucity of discussion may, in part, be attributable to the way that the voucher debate is typically framed. The White Republicans and libertarians who are the most visible face of the voucher movement present those programs as the best (perhaps only) way for Black and Latino parents to pursue their children's individual best interests. In response, many of the predominantly White organizations that oppose vouchers, like teachers' unions and those concerned with the separation of church and state, argue that voucher programs do not promote the collective good, either because they divert public money to religious institutions or because by individuating what is inherently a public good they harm our democracy.<sup>3</sup> Unfortunately, this framing focuses the discussion on relatively abstract legal and societal issues like "What is the proper place of religion in our society?" and "Is public space essential to democracy?" Worse yet, it effectively forces parents to weigh these issues against their own self-interest. In other words, this framing turns the discussion of vouchers into a conversation about how Black and Latino Americans should sacrifice yet more for their country. That is not a conversation that I, or any other academic of color who is skeptical about vouchers, is going to be anxious to join.

This is not to say that I believe that the Establishment Clause issues raised by vouchers are unimportant—I do not even think that they are abstract.<sup>4</sup> Nor is it irrelevant that private and parochial school vouchers will greatly diminish our public space:

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3. See JEFFREY R. HENIG, *RETHINKING SCHOOL CHOICE: LIMITS OF THE MARKET METAPHOR* 200 (1994) ("We need to focus on the differences between private and public institutions and processes as vehicles for deliberation, debate, and decision making. The real danger in the market-based proposals for choice is not that they might allow some students to attend privately-run schools at public expense, but that they will erode the public forums in which decisions with societal consequences can democratically be resolved."); CAROL ASCHER ET AL., *HARD LESSONS: PUBLIC SCHOOLS AND PRIVATIZATION* 9 (1996) ("Public education is more than a simple mechanism for delivering a commodity to consumers. Like other public institutions, it is a 'vehicle for deliberation, debate and decision-making.' Through these processes, education becomes a public service that contributes to the comparative well-being and strength of both local communities and the nation as a whole."); John A. Powell, *The Tensions Between Integration and School Reform*, 28 *HASTINGS CONST. L.Q.* 655, 680 (2001) (arguing that education must be understood to be a social good rather than a private commodity, as well as a site of constitution of the self, and a vehicle for racial and economic integration).

4. See Gary J. Simson, *School Vouchers and the Constitution: Permissible, Impermissible, or Required?*, 11 *CORNELL J.L. & PUB. POL'Y* 553, 570 (2002) ("Endorsement is only one of various reasons why state funding of religion is constitutionally problematic. Most obviously, it coerces individual taxpayers to support religions and religious beliefs with which they may deeply disagree, it tends to have a corrupting effect on the religion that it subsidizes, and it fosters social conflict along religious

Public schools are one of the few institutions in the United States where people from different backgrounds come together to negotiate common values and to determine the course of our shared future. It is public spaces, such as those schools, that give meaning to citizenship because it is in those spaces that we are all equal.<sup>5</sup>

However, neither separation of church and state nor public space are adequate answers to a parent whose immediate concrete concern is finding any way to send his child to any school, including the neighborhood Catholic school (which is tantalizingly close, but just out of reach), that could be his child's path away from academic failure and away from things that are much worse than academic failure.

So, while I do not support the Supreme Court's newly minted Establishment Clause jurisprudence,<sup>6</sup> the one good thing about having *Zelman v. Simmons-Harris* behind us (and the fact that the Blaine Amendment questions<sup>7</sup> have yet to catch the public's attention) is that now we can talk about the issues that are central to the principle stakeholders in this debate—the parents of children in

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lines; Derek H. Davis, *Mitchell v. Helms and the Modern Cultural Assault on the Separation of Church and State*, 43 B.C. L. REV. 1035, 1068 (2002) (Religion with its hand out [for government funds] can never speak with a prophetic voice. It will acquiesce to government requirements in order to insure its continued funding . . . ); see also Ruti Teitel, *Vouchsafing Democracy: On the Confluence of Governmental Duty, Constitutional Right, and Religious Mission*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 409 (1999) (discussing the privatization of traditional government functions and the movement of religion into the public sphere).

5. Denise C. Morgan, *Deregulating Education in the United States, from Vouchers to Home Schooling to the End of Voluntary Desegregation: Is the Cost Too High?*, FINDLAW'S WRIT (Sept. 17, 2002), at [http://writ.news.findlaw.com/commentary/20020917\\_morgan.html](http://writ.news.findlaw.com/commentary/20020917_morgan.html).

This assertion is not based on the naive belief that public schools are integrated along racial and socioeconomic lines. Rather, it reflects the cynical acceptance that the United States military and our public schools are among a handful of institutions in this country that even rhetorically strive to achieve those types of integration.

6. Compare *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1 (1947), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), with *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Wash. Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Sch. Dist.*, 509 U.S. 1 (1993), *Agostini v. Felton*, 521 U.S. 203 (1997), *Mitchell v. Helms*, 530 U.S. 793 (2000), and *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002).

7. See David H. Monk & Samid Hussain, *Policy Implications of Increased High School Graduation Expectations*, 1998 ANN. SURV. AM. L. 245 (1998); Michael Rebell, *Commentary Rodriguez Revisited: An Optimist's View* 1998 ANN. SURV. AM. L. 289 (1998).

urban public schools.<sup>8</sup> These parents want to talk about the circumstances under which vouchers have the potential to provide good educational choices, and they want to discuss whether voucher plans are being set up so that they are likely to produce those benefits. I am much happier with this framing of the issue.

In the first section of this essay, I discuss the seemingly inconsistent data on African American attitudes towards school vouchers and offer an explanation that reconciles those results. In the second and third sections, I review the systemic reasons that urban public schools in the United States too often fail to improve the life chances of their students, and explain what school voucher programs can and cannot do to address those systemic issues. I conclude that although private and parochial school vouchers may improve our education system in marginal ways, the truly revolutionary potential of vouchers lies in public school voucher plans that open predominantly middle class suburban public schools to urban children of color.

## I. AFRICAN AMERICAN ATTITUDES TOWARDS SCHOOL VOUCHERS<sup>9</sup>

Many people were surprised to hear that a number of prominent Black Democratic politicians—including Kurt Schmoke, a former mayor of Baltimore; Andrew Young, a former mayor of Atlanta; and Reverend Floyd Flake, a former Congressman from New York

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8. I disagree with James Ryan and Michael Heise, who have written that suburbanites are the "most important stakeholders" in the voucher debate. *The Political Economy of School Choice*, 111 *YALE L.J.* 2043, 2045 (2002). Because of their political power, suburbanites are undoubtedly the most powerful players; but parents of urban school children have the most to gain or to lose.

9. This essay focuses on the attitudes of African Americans towards school vouchers because, although Latino public school enrollment is rapidly approaching that of Black public school enrollment (together the groups account for a bit over one-third of the public school population nationwide), national opinion polls do not report Latino parents' opinions about school voucher programs. Moreover, the statewide surveys that have been taken have been inconclusive. A phone survey of Latino registered voters in California conducted prior to the 2000 election showed that 42.8% of respondents favored Proposition 38, which would have established a statewide voucher program, 38.8% of respondents opposed the measure, and 18.4% were undecided. William C. Velasquez Institute, *Phone Survey of Latino Registered Voters California*, (Sept. 27-Oct. 4, 2000), at [http://www.wcvi.org/latino\\_voter\\_research/polls/ca\\_total\\_n560.html](http://www.wcvi.org/latino_voter_research/polls/ca_total_n560.html). However, Californians rejected Proposition 38 by a margin of 71% to 29% and exit polls showed that 66% of Catholic voters, who are largely Latino, voted against the measure. Edd Doerr, *Latino Support for Vouchers*, *WASH. POST*, May 22, 2001, at A20.

City<sup>10</sup> have said that they support school vouchers.<sup>10</sup> Whoever was surprised by this news was probably even more surprised to hear that those Black politicians only wanted what their constituents wanted. Polls show that 57% of all Black Americans,<sup>11</sup> and 75% of Black Americans under the age of thirty-five,<sup>12</sup> say that they support school voucher programs.

I imagine that people were surprised by those poll results because they seem to put a significant segment of African Americans on "the same side" of the voucher debate as both conservative Republicans and free-market worshipping libertarian ideologues with whom our community has not traditionally seen eye to eye. Despite this "strange bedfellow" phenomenon, I was not particularly surprised to hear those poll results, and neither should anyone who has studied the history of race and education in the United States. The Black community simply continues to be interested in the same thing that we have been interested in throughout American history: high quality education for our children.<sup>13</sup> By that, I mean schools that can enhance intergenerational mobility<sup>14</sup> giving

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10. See Good Counsel Given, *FLA. TIMES UNION*, Sept. 14, 1999, at B6 (describing Young's remarks in favor of vouchers at an NAACP dinner in Tallahassee); Kurt L. Schmoke, Why School Vouchers Can Help Inner-City Children, *CIVIC BULLETIN* (Aug. 1999), at [http://www.manhattan-institute.org/cb\\_20.pdf](http://www.manhattan-institute.org/cb_20.pdf) (speech at the Manhattan Institute in support of school vouchers); Rev. Floyd Flake, Panel Two Commentary, 1998 ANN. SURV. AM. L. 215 (1998) (explaining that he supports school vouchers because "it is important to force the system to respond [to student need] as opposed to leaving it to its own devices"); Samuel G. Freedman, The Education Divide, *SALON* (Sept. 30, 1997), at <http://archive.salon.com/sept97/news/news970930.html> (discussing Rev. Floyd Flake's support for school vouchers); see also Catherine Gewertz, Reporter's Notebook: Growth and Expansion Highlighted at BAEO's Second Symposium, *EDUC. WK.*, Mar. 13, 2002, at 9 (describing the second annual symposium of the Black Alliance for Educational Options which favors school vouchers).

11. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 2002 NATIONAL OPINION POLL: POLITICS 20 (2002), available at [http://www.jointcenter.org/whatsnew/2002\\_NOP\\_text&tables.pdf](http://www.jointcenter.org/whatsnew/2002_NOP_text&tables.pdf) (asking, "would you support a voucher system where parents would get money from the government to send their children to the public, private, or parochial school of their choice?").

12. DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 2000 NATIONAL OPINION POLL: POLITICS 9 (2000), available at [http://130.94.20.119/DB/table/NOP/reports/2000\\_politics\\_report.pdf](http://130.94.20.119/DB/table/NOP/reports/2000_politics_report.pdf).

13. See Denise C. Morgan, What's Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education, 8 *HARV. BLACK LETTER L.J.* 99 (1991) (describing the history of equal educational opportunity litigation in the United States).

children access to greater social, political and economic power than their parents have.<sup>14</sup>

So, I did not take those poll results as an indication that Black parents are particularly interested in "choice," meaning increased parental autonomy. Since there is a long history of empty choices in the African American community,<sup>15</sup> "choice" without substance is a hard thing to sell to our community. "Choice" exists when someone says to you: "Here's a rock, here's a hard place" choose. Rather, if history is any indication, what Black parents want is not "choice," but "good choices" — good educational choices, now.

The polls support my intuition on this. While it is true that a majority of African Americans say that they support vouchers when asked the question in a yes-or-no form, when asked to select their preferred school reform measure out of a list of five options, not only did "providing parents with school vouchers" come in last, but African Americans chose "reducing class size" over vouchers by a 7-to-1 margin.<sup>16</sup>

## II. THE SYSTEMIC REASONS THAT TOO MANY URBAN PUBLIC SCHOOLS FAIL TO PROMOTE INTERGENERATIONAL MOBILITY

Those poll results raise at least two questions. The first is, can we use vouchers to help to improve the life chances of urban minority children? The second is, what else, in addition to vouchers, do we have to do to ensure that the American educational system works for everyone? To even approach the first question, I have to step back and give a short history of equal education opportunity in the United States. Then, I will discuss where I see school vouchers fitting into that history.

We have to start by facing facts: Americans like the inequality in our education system. At the same time that most Americans be-

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14. See Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, 1998 ANN. SURV. AM. L. 267, 276-78 (1998) (defining intergenerational mobility).

15. See, e.g., *Green v. County Sch. Bd.*, 391 U.S. 430 (1968); *CONSTANCE CURRY, SILVER RIGHTS* (1995) (documenting an African American family's fight to send its children to the segregated White schools of Drew, Mississippi); see also Powell, *supra* note 3, at 671-82 (2001) (discussing how the term "choice" is used in the current discussion of racial integration and school reform).

16. See NSBA/ ZOGBY INTERNATIONAL POLL, *School Vouchers: What the Public Thinks and Why* (2001), available at [http://www.nsba.org/novouchers/vsc\\_docs/zogby\\_sum.pdf](http://www.nsba.org/novouchers/vsc_docs/zogby_sum.pdf) (last visited Feb. 9, 2003).

lieve that children are entitled to the kind of educational opportunity that will allow them to succeed or fail on their own merits, we just as firmly believe that their parents should be rewarded for their hard work and success. And, as Jennifer Hochschild has said: "One has not really succeeded in America unless one can pass the chance for success on to one's children."<sup>17</sup> So, while we have a strong egalitarian tradition in the United States, we also have a strong tradition that points in the opposite direction—towards replicating existing hierarchies. You can see evidence of both traditions in our public schools and in the Supreme Court's education law jurisprudence.

If the only education law you knew was *Brown v. Board of Education*,<sup>18</sup> the 1954 case in which the Supreme Court declared that racially segregated public schools are unequal, then you would probably be under the impression that the United States Constitution guarantees substantive educational equality for all children. You would be wrong. There are three principal Supreme Court cases that ensure that the children of relatively wealthy and powerful parents will have an educational leg up on everyone else: *Pierce v. Society of Sisters*,<sup>19</sup> *San Antonio Independent School District v. Rodriguez*,<sup>20</sup> and *Milliken v. Bradley*.<sup>21</sup>

My point in discussing these three cases is not to argue that they are legally unsupportable. My point is more subtle than that—it is to show that the failure of urban public schools in the United States is not just a matter of random misfortune. There are systemic reasons why those schools fail to encourage intergenerational mobility. These systemic reasons are what vouchers, or any other education reform strategy that aims to equalize opportunity in the United States, must address.

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17. Quoted in WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 194 (1996). See also JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 2 (2003) ("Most Americans believe that everyone has the right to pursue success but that only some deserve to win, based on their talent, effort, or ambition. . . . The paradox stems from the fact that the success of one generation depends at least partly on the success of their parents or guardians . . . . The paradox lies in the fact that schools are supposed to equalize opportunities across generations and to create democratic citizens out of each generation, but people naturally wish to give their own children an advantage in attaining wealth or power, and some can do it.").

18. 347 U.S. 483 (1954).

19. 268 U.S. 510 (1925).

20. 411 U.S. 1 (1973).

21. 418 U.S. 717 (1974).

### A. *Pierce v. Society of Sisters*

In *Pierce*, the Supreme Court held that because the owners of private and parochial schools have federal substantive due process rights to conduct their businesses, states cannot compel all children to attend public schools.<sup>22</sup> This decision did two important things. First, it recognized the real and important interest that parents have in directing the education and upbringing of their children; and second, it ensured that there would be inequality in this country's education system. Public schools would be available to all children, and private schools would be available for those parents who have the financial wherewithal to pass their success (or religious or cultural beliefs) on to the next generation.<sup>23</sup>

Of course, *Pierce* did not say anything about the relative quality of public and private education. And, indeed, there are many high quality public schools that rival the best private and parochial schools in this country. But, more importantly, the existence of private education is a bit of a red herring in any conversation about equal educational opportunity. Approximately ninety percent of children in the United States are educated in public schools.<sup>24</sup> So, it is not really fair to blame private schools for the inequalities that run deep in this country's education system.

### B. *San Antonio Independent School District v. Rodriguez*

*Rodriguez* is the case that we have to blame for these continuing inequalities. In this 1973 case, the Supreme Court held that, because education is not a fundamental constitutional right, and because discrimination against the poor is not deserving of the same strict scrutiny as discrimination on the basis of race or religion, the inequitable distribution of funding for public education does not violate any federal constitutional rights.<sup>25</sup> The Supreme Court said

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22. 268 U.S. at 534-36.

23. See, e.g., Stephanie Strom, *Private Preschool Admissions: Grease and the City*, N.Y. TIMES, Nov. 16, 2002, at C1 (describing how Jack Grubman, a wealthy analyst at Smith Barney, used his powerful connections to get his children into a competitive private preschool); see also ANDREW M. GREELEY, CATHOLIC HIGH SCHOOLS AND MINORITY STUDENTS 15-16 (1982) (Catholic school secondary students come from much more affluent families [than public school students] . . . ; 42 percent of whites (as opposed to 29 percent of the public school whites), 28 percent of blacks, and 24 percent of Hispanics (as opposed to 11 percent of public school minorities) report more than \$25,000 a year in family income).

24. See NATIONAL CENTER FOR EDUCATION STATISTICS, *Public and Private and Secondary Enrollment, Teachers, and Pupil/Teacher Ratios: Fall 1955 to Fall 2001* (2001), at <http://nces.ed.gov/quicktables/Detail.asp?Key=692>.

25. 411 U.S. at 54-55.



that its decision was necessary to allow parents to be able to exercise control over the local public schools that their children attend.<sup>26</sup> However, this case also allowed wealthy parents in property-rich school districts to continue to fund their local schools at levels that parents in property-poor school districts could not achieve—no matter how much they taxed themselves. Money may not buy everything, but it can buy smaller class sizes, it can help to woo more sought-after, highly qualified teachers, and it can pay for state-of-the-art equipment and well-maintained physical facilities (all of which are associated with better educational outcomes).

### C. Milliken v. Bradley

Finally, there is Milliken. Rodriguez may not have had such a tremendous racial impact if desegregation litigation had successfully integrated children of color from property-poor school districts and White children from property-rich school districts into the same public schools. But, in 1974, desegregation litigation was crippled by Milliken.

Everyone knows that cities in the United States are marked by the de facto segregation of poorer students of color in urban centers and wealthier White students in the surrounding suburbs.<sup>27</sup> And, most often, school district lines are drawn along the boundaries between the city centers and the suburbs. However, the Milliken Court set those demographic facts in stone by holding that, in most cases, federal courts have no power to order desegregation across those geographic boundaries.<sup>28</sup> That holding made court-ordered desegregation of urban and suburban public schools virtually impossible.<sup>29</sup> More importantly, that decision concentrated

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26. *Id.* at 49.

27. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

28. *Milliken v. Bradley*, 418 U.S. 717, 745-47 (1974).

29. See Erica Frankenberg, et. al, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT 23 (Jan. 2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (describing the significant resegregation of public schools in the United States that has taken place since the 1980s).

Recently, voluntary integration plans have also come under attack. See *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1254 (11th Cir. 2001) (striking down the University of Georgia's race-based affirmative action program); *Eisenberg v. Montgomery County Pub. Sch.*, 197 F.3d 123, 133 (4th Cir. 1999) (prohibiting consideration of race in transfers to public magnet school for purpose of promoting racial diversity); *Wessmann v. Gittens*, 160 F.3d 790, 792 (1st Cir. 1998) (prohibiting use of race and ethnicity as admissions criteria at the public Boston Latin School); *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (striking down

poverty, the factor most closely associated with educational failure, in our urban schools.<sup>30</sup> As a result, Milliken magnified and gave a racial cast to the inequality that Pierce and Rodriguez sanctioned.

### III. WHAT VOUCHERS CAN AND CANNOT DO TO REDRESS THE SYSTEMIC REASONS WHY TOO MANY URBAN PUBLIC SCHOOLS FAIL TO PROMOTE INTERGENERATIONAL MOBILITY

What can vouchers do to alter the present educational landscape? More specifically, because the devil is in the details, how would we have to set up voucher programs in order to change this

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affirmative action program at University of Texas School of Law); see also Regents in Florida Bar Race and Sex as Admission Factors, N.Y. TIMES, Feb. 18, 2000, at A18 (reporting that Florida barred the use of race and sex as considerations for admission to state's ten public universities); Tom Brune & Joe Heim, New Battle Begins: Interpreting Law, SEATTLE TIMES, Nov. 4, 1998, at B1 (reporting that 58% of voters support initiative 200, which would end affirmative action in Washington State); Bill Stall & Dan Morain, Prop. 209 Wins, Bars Affirmative Action, L.A. TIMES, Nov. 6, 1996, at A1 (reporting that California voters pass initiative eliminating government-sponsored affirmative action programs).

30. See Gary Orfield & John T. Yun, Resegregation in American Schools, The Civil Rights Project, at [http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation\\_American\\_Schools99.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf) (June 1999) (School level poverty is related to many variables that effect a school's overall chance at successfully educating students, including parent education levels, availability of advanced courses, teachers with credentials in the subject they are teaching, instability of enrollment, dropouts, untreated health problems, lower college-going rates and many other important factors.); see also GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 53 (1996) (One of the most consistent findings in research on education has been the powerful relationship between concentrated poverty and virtually every measure of school-level academic results.); RICHARD D. KAHLBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE, 25 (2001) (listing studies showing that the socioeconomic status of classmates has a powerful effect on academic achievement).

This is not to say that public schools with high concentrations of poverty cannot be academically successful. However, that phenomenon is difficult to achieve and even more difficult to replicate. See, e.g., DEBORAH MEIER, THE POWER OF THEIR IDEAS: LESSONS FOR AMERICA FROM A SMALL SCHOOL IN HARLEM (1995); JAY MATHEWS, ESCALANTE: THE BEST TEACHER IN AMERICA (1988) (showing how public school teacher Jaime Escalante inspired disadvantaged Latino students at an East Los Angeles high school to earn top scores in the Advanced Placement Calculus test); LEAN ON ME (Warner Brothers 1989) (the story of New Jersey high school principal Joe Clark); see also KAHLBERG, *supra* at 86 (2001) (relating stories of high performing high poverty public schools).

landscape in a more than trivial fashion? I do not doubt that vouchers will improve educational opportunity for some small number of children. They almost certainly will. My fear is that we will sell vouchers short and fail to harness their truly revolutionary potential□ which is not to be a stealth method of privatizing our education system or breaking the teachers' unions. The revolutionary potential of vouchers, as Richard Kahlenberg has written, is that they may be a way to make school district lines more porous and, therefore, to reduce the concentration of poverty in urban public schools.<sup>31</sup> In other words, vouchers may be a way to reverse the effects of Rodriguez and Milliken, as opposed to merely expanding Pierce.

It follows that most voucher proponents are off the mark about how and why vouchers can most effectively equalize educational opportunity. Voucher proponents say that vouchers will add private schools to the options that are currently available to low income urban students. They are correct, but neither parochial schools nor the yet-to-be-developed □schools of choice□are more than just a band-aid on the problems that our urban public school systems face. And, even assuming that some public schools improve in response to competition from voucher plans, that competition will inevitably also produce losers: public schools that simply get worse. At least as they are currently set up, vouchers will not seriously challenge the systemic reasons that urban public schools fail.

#### A. Parochial Schools

The Zelman decision added parochial schools to the mix of those available to parents through voucher programs. Their addition invigorated the voucher movement because parochial schools are among the few private schools that are affordable to a parent armed with a voucher worth \$2500.<sup>32</sup> Indeed, 96.6% of the voucher recipients in the Cleveland program used the money they received to send their children to parochial schools (many of which

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31. See KAHLBERG, *supra* note 30, at 1 (arguing that □every child in the United States□ whether rich or poor, white or black, Latino or Asian□ should have access to the good education that is best guaranteed by the presence of a majority middle-class student body.□); Richard Kahlenberg, *Socioeconomic School Integration Through Public School Choice: A Progressive Alternative to Vouchers*, 45 *How. L.J.* 247 (2002) (arguing for increased access to □majority middle class□schools).

32. Among the voucher programs currently in operation, Cleveland's voucher is worth up to \$2500, Florida's is worth up to \$4000, and Milwaukee's is worth up to \$5300. See Ryan & Heise, *supra* note 8, at 2083.

were affiliated with the Catholic church).<sup>33</sup> The inclusion of parochial schools in voucher programs also gives a boost to proponents who claim that those schools are inherently better than public schools. There is, in fact, a lively debate about whether more teaching and learning goes on in private and parochial schools than in public schools.<sup>34</sup> There is also dispute as to whether any benefits that may derive from vouchering urban public school students into parochial schools will diminish as the concentration of poverty in those schools increases.

However that may be, the major problem with treating parochial schools as the solution to the problems of urban education is capacity.<sup>35</sup> Parochial schools currently educate not quite 9% of the students in this country. Even if parochial schools were to double their capacity—which is highly unlikely—we would still have to figure out what to do with the other 80% of the student population. Of course, the fact that parochial school vouchers will not help the vast majority of children is not a reason to prohibit them. But, it is a reason to say that parochial school vouchers do not give us enough good educational choices to solve the problems that our urban public schools face.<sup>36</sup>

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33. *Zelman v. Simmons-Harris*, 122 S.Ct. 2460, 2494 (2002) (Souter, J., dissenting). While the average tuition of Catholic elementary schools was \$1572 in the 1993-94 school year, the average tuition of other religious schools was \$2213 and of nonreligious private schools was \$3773. Much of that disparity is attributable to the fact that Catholic schools are significantly subsidized by their parishes. *Id.* at 2495-96 n.15.

34. Compare *LUIS BENVENISTE ET AL., ALL ELSE EQUAL: ARE PUBLIC AND PRIVATE SCHOOLS DIFFERENT?* 190 (2003) (The main division we found in the schools that we visited was not between sectors—private versus public—but between schools, both private and public, serving different socioeconomic communities. The personnel in a private elementary school in a low-income community teach children and deal with parents much like the teachers and staff of a public school in the same community. Likewise, it is difficult to distinguish a private school classroom from a public in a high-income suburb. But there are major differences in what is taught in private or public schools in high- and low-income neighborhoods.), with Daniel P. Mayer et al., *School Choice in New York City After Three Years: An Evaluation of the School Choice Scholarships Program Final Report*, MATHEMATICA POLICY RESEARCH, INC. (Feb. 19, 2002), at <http://www.mathematica-mpr.com/PDFs/nycfull.pdf> (finding that private and public schools within a single geographic area focus on different aspects of the educational experience).

35. See, e.g., INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION, *Students for Sale—The Use of Public Money for Private Schooling 5* (1999), at <http://idra.org/Research/voucher.pdf> (Texas private schools could absorb no more than 1 percent (30,000 of the 3.4 million) of students enrolled in public schools.).

36. At the risk of sounding like a proponent of privatization, I have to admit that this may be a good example of government trying to do something that private institutions can do better. In contrast to public voucher programs, private

## B. For-Profit Schools of Choice

Voucher proponents have an answer to the capacity problem. They say that new high quality for-profit schools of choice will spring up as soon as state subsidies for education are available. Their faith in market forces leads them to believe that if we pay for it, good schools will come. I am suspicious about that assertion because I have not been impressed by the for-profit companies, like Edison, Tesseract/ Education Alternatives, and Chancellor Beacon Academies, that have taken over and run public schools so far. Despite market forces, these schools are no more effective, and are less efficient, than most public schools.<sup>37</sup> Indeed, none of these education management organizations have been able to turn a profit to date.<sup>38</sup> I am not alone in my skepticism: in 2001 parents in New York City overwhelmingly rejected an attempt to turn five failing public schools over to Edison.<sup>39</sup>

I also worry because market forces do not always supply people of color with what we demand.<sup>40</sup> One of the most notorious examples of this is the story of grocery stores in Harlem. Until Pathmark opened a store on 125th street in 1999, it was almost impossible to find fresh fruit and vegetables on the north end of Manhattan. The problem certainly was not a lack of demand, nor was it that there was not enough money to be made by opening a store in the area, but it still took decades for that demand to be answered. I fear that the same phenomenon could affect the promised schools of choice. Of course, this possibility is not a reason to prohibit such

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scholarship programs, like A Better Chance, often send their recipients to elite private schools. See A Better Chance Scholars Program: The College Preparatory Schools Program, at <http://www.abetterchance.org/cpsp.htm> (last visited Apr. 15, 2003).

37. See Peter Schrag, Edison's Red Ink Schoolhouse, *THE NATION*, June 25, 2001, at 20, 22 (Edison frequently spends more per child than the publicly run school down the street); Benveniste, *supra* note 34, at 45 (2002) (Edison has had some successes, but in many of its schools test scores do not rise more rapidly than competing publicly run schools).

38. See William C. Symonds, Edison: An 'F' in Finance, *BUS. WK.*, Nov. 4, 2002, at 52 (Last year, Edison's spending on education and operating expenses still outpaced revenues by 10%. As a result, Edison's operating losses including charges jumped 88%, to \$76.7 million).

39. See Lynette Holloway, Parents Explain Resounding Rejection of Privatization at 5 Schools, *N.Y. TIMES*, Apr. 13, 2001, at B1 (While most parents did not vote, 80 percent of those who did voted to reject Edison).

40. See, e.g., Ian Ayres, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 *HARV. L. REV.* 817 (1991) (offering empirical evidence that competitive market forces do not eliminate race and sex discrimination); see also Ian Ayres, Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause, 94 *MICH. L. REV.* 109 (1995).

for-profit ventures. However, it should give some pause to anyone who believes that market forces by themselves are a solution to the problems of urban education.<sup>41</sup>

### C. Competition

Even assuming that religious schools double in capacity and that some new, high quality "schools of choice" come along, we still have to consider the rest of the children who will remain in the public schools. Voucher proponents have an answer here too: competition. Competition will improve the remaining public schools and it will cause the ones that do not improve to shut down. Here again, I am dubious.

First, there are conflicting studies about the ability of public schools to respond positively to competition from nearby educational institutions.<sup>42</sup> But, more importantly, actual experiences with voucher programs demonstrate that there have to be losers in competitions. I fear that competition among schools in the United States will end up looking like it looks in New Zealand or in Chile.<sup>43</sup> Helen Ladd found that in those countries, universal voucher programs reinforced existing socioeconomic and racial hierarchies because the better schools, not the parents, exercised choice.<sup>44</sup> The

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41. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 217 (1990) (advising that "reformers would do well to entertain the notion that choice is a panacea").

42. Compare Eric Bettinger *The Effect of Charter Schools on Charter Students and Public Schools* (1999), available at [http://ncspe.org/keepout/papers/00004/182\\_OP04.pdf](http://ncspe.org/keepout/papers/00004/182_OP04.pdf) (showing the "extremely small" effect of competition on the test scores of children in public schools located within five miles of a charter school), Blair R. Zanzig, *Measuring the Impact of Competition in Local Government Education Markets on the Cognitive Achievement of Students*, 16 *ECON. EDUC. REV.* 431, 439 (1997) (concluding that the presence of four school districts within a county generates gains in student achievement, but additional competition generates no further gains), and Shawna Grosskopf et. al., *On the Determinants of School District Efficiency: Competition and Monitoring*, 49 *URBAN ECON.* 453, 471 (2001) (finding no evidence that competition is related to the technical inefficiency with which school resources are used), with Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 *AM. ECON. R.* 1209, 1236-37 (2000) (finding that metropolitan areas with many competing school districts have higher test scores and lower costs); see also HELEN F. LADD, *MARKET-BASED REFORMS IN URBAN EDUCATION* 8-10, 47B51 (2002), available at <http://www.epinet.org/books/educationreform.pdf> (summarizing the research and critiquing Hoxby's research methodology).

43. See HELEN F. LADD, *supra* note 42, at 10-14; EDWARD B. FISKE & HELEN F. LADD, *WHEN SCHOOLS COMPETE: A CAUTIONARY TALE* (2000).

44. This phenomenon is familiar to anyone who has tried to get his or her child into preschool in New York City. See Amy Westfeldt, *Competition Tough for Nursery Schools; Admission Process Zaps N.Y. Parents*, *SAN DIEGO UNION-TRIB.*, Dec. 1,

schools picked and chose from the applicants only those they thought would be most likely to succeed (they were in a competition, and could not risk hurting their reputations). In addition, Ladd discovered that the bad schools did not shut down. As long as compulsory attendance laws require that all children go to school, bad schools cannot be forced to shut down unless the children who attend them have some other option. In other words, compulsory attendance laws interfere with the market forces that the proponents of competition are counting on to make vouchers work.

#### IV.

#### WHAT WE NEED: LESS THAN VOUCHERS AND MORE THAN VOUCHERS

So, why don't I just say that I oppose vouchers? Well, because I don't. I know that vouchers can work well in the housing market.<sup>45</sup> But, in that context, no one has touted vouchers as a replacement for urban renewal.<sup>46</sup> Similarly, in the education context, private school vouchers alone will not be enough. In fact, private school vouchers may not even be necessary to improve education in the United States. This is because vouchers will do the most to equalize educational opportunity in this country if they give poor students and students in failing public schools access to middle-class suburban public schools. In other words, the type of voucher program that

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2002, at A21 (□The odds for admission [to the most competitive New York City preschools] are often 10 to 1 among the applicants, comparable to top Ivy League colleges.□; see also Carol Ascher, □ . . . And It Still Is News□ The Educational Inequalities that Have Brought Us Vouchers, 1998 ANN. SURV. AM. L. 205, 213 (□S]tudent choice is not what makes a successful private school. Instead, nonsectarian and Catholic schools have always kept a firm hand on both admissions and exits.□).

45. See LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 39 (2000) (describing the Gautreaux program, which helped 7,100 poor minority families to secure housing in the predominantly White middle class suburbs of Chicago between 1976 and 1998); Jens Ludwig et al., *Urban Poverty and Educational Outcomes*, in *BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS* 2001, 147 (William G. Gale & Janet Rothenberg Pack eds., 2001) (describing the Moving to Opportunity program, a national housing voucher program, with sites in Baltimore, Boston, Chicago, Los Angeles, and New York); see also Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L.L. REV. 289, 319-23 (2002) (discussing the history and success of the Gautreaux and Moving to Opportunity programs).

46. See RUBINOWITZ & ROSENBAUM, *supra* note 45, at 173 (asserting that programs like Gautreaux □must be part of comprehensive strategies that address the problems of deteriorating communities, improve the life chances of the people who live there, and give families realistic choices of where to live□ (emphasis added)).

could most quickly help the largest number of urban students is the type that we do not need vouchers for at all. All we need is the political will to make it happen. This, of course, is where our conservative Republican and free-market libertarian allies, who say they favor choice, need to put their political might where their mouths are. This has not yet happened. Of the voucher plans that currently exist, none involves suburban public schools (when invited, they have declined to participate).<sup>47</sup> That has to change.

We also need to be sure that vouchers are backed up with a promise of free transportation. In Miami, more than a quarter of the students who originally accepted vouchers have returned to public schools. One of the main reasons cited for their return was transportation problems.<sup>48</sup>

In addition, we need to acknowledge that universal voucher plans are incompatible with the notion that vouchers will redress inequality.<sup>49</sup> In one outrageous example, the Low-Income School Choice Demonstration Act, proposed by Senator Orrin Hatch, would have given larger tuition grants to students living in wealthier neighborhoods than to those living in poorer areas.<sup>50</sup> However, if vouchers do not give poor children and children in failing schools some competitive advantage over everyone else, they will just reinforce existing hierarchies.

My final point is that, whatever their benefits, we cannot allow vouchers to distract us from the urgent project of improving our public schools. Both proponents and opponents of vouchers imagine that vouchers will result in the demise of public schools. I think that this is about as likely to happen as the state is to wither away come the communist utopia. As long as public schools serve some children well and make no mistake, government monopoly

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47. See Ryan & Heise, *supra* note 8, at 2047.

48. See Fla. Paper: 1 in 4 Pupils Give up Vouchers, *WASH. POST*, Nov. 4, 2002, at A20; Ryan & Heise, *supra* note 8, at 2069.

49. Voucher proponents are fond of blaming the failure of the initiatives that would have instituted universal voucher programs in California and Michigan on the political might of the teachers' unions. In fact, it is possible that voters understood that those programs were poorly designed and rejected them on the merits.

50. Under the Hatch proposal, the maximum value of the voucher could not have exceeded the average per-pupil expenditure at the public school that the child would otherwise attend. The Hatch plan would inevitably have given more money to richer students than to poorer ones, since poorer people tend to live in districts that cannot afford to spend as much on education as the districts in which wealthier parents live. See 138 *CONG. REC.* 366-67 (1992).



schools□serve suburban middle-class children very well<sup>51</sup>□public schools are going to exist. And as long as there are schools like Stuyvesant, Bronx Science, and Hunter in our cities, public schools should exist.

So, what we need is less than vouchers and more than vouchers. Vouchers are not good schools. They are simply a tool that we need to learn to use to our advantage. Therefore, we should support voucher plans to the extent□and only the extent□that they improve our children's life chances. Public school vouchers, it turns out, are the type likely to do this most effectively. But, even public school vouchers alone will not automatically promote intergenerational mobility□they have to be part of a larger educational improvement plan that includes ensuring adequate funding for public schools, improved teacher training, and urban revitalization.<sup>52</sup> If we care about children more than we care about ideology, we will continue to study and experiment to find ways to improve our educational system. There may not be any easy answers to the problems of urban education, but if we really care about our children that will not deter us.

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51. Although 61% of Americans reported that they were either somewhat or completely dissatisfied with the quality of education K-12 students receive in the United States, 78% of survey participants said that they were either completely or somewhat satisfied with the education that their own children were receiving. Public Agenda Online (Aug. 24□27, 2000), at [http://www.publicagenda.org/issues/pcc\\_detail2.cfm?issue\\_type=education&concern\\_graphic=pccn3.gif](http://www.publicagenda.org/issues/pcc_detail2.cfm?issue_type=education&concern_graphic=pccn3.gif). The questions asked were □Overall, how satisfied are you with the quality of education students receive in grades kindergarten through grade twelve in the U.S. today□ would you say completely satisfied, somewhat satisfied, somewhat dissatisfied or completely dissatisfied?□and, □How satisfied are you with the quality of education your oldest child is receiving? Would you say completely satisfied, somewhat satisfied, somewhat dissatisfied or completely dissatisfied?□

52. See Robert Reich, The □Liverwurst Solution□ A Growing Consensus on School Choice, Address Before the Manhattan Institute New York City Conference on School Choice (Dec. 2000), available at <http://www.manhattan-institute.org/html/mics4.pdf> (advocating the use of vouchers, but acknowledging that □vouchers alone□ if you are not giving more money to poor children than children of higher-income parents, if you are not setting standards for schools to achieve to be eligible for vouchers□ are just going to end up sorting American children even more□); Robert Reich, The Case for 'Progressive' Vouchers, WALL ST. J. (Sept. 6, 2000) at A26.

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