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Beyond the Free Market: The Structure of School Choice

Terry M. Moe*

I. INTRODUCTION

School choice is the most controversial reform in American education. When parents are given the right to choose, critics argue, children from advantaged families reap the rewards of new educational opportunities, while the less advantaged are left behind in the regular public schools—which, because of the outflow of good students and much-needed resources, are even less capable of serving them.¹

These claims and others like them deserve to be taken seriously. If they are true, an expansion of parental choice threatens to undermine the public schools, lower academic achievement, and worsen problems of class and race that our nation has been struggling for decades to overcome. If they are not true, however—because undesirable effects can be addressed and mitigated, or because choice can actually have very positive impacts on academic quality, social equity, and even the public schools themselves—then the case for choice would obviously be far more attractive.

Which of these possibilities is correct? The answer is that they can each be correct, depending on how choice programs are designed. The simple way to think of it is that school choice always operates within a structure—a framework of governmental rules—which in turn shapes the kinds of outcomes that choice will ultimately generate. In some structures, choice will lead to serious

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1. See, e.g., PETER W. COOKSON, JR., *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* (1994); Bruce Fuller, Richard Elmore & Gary Orfield, *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, 11 (Bruce Fuller & Richard F. Elmore eds., 1996); AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY* (1993).

problems, just as the critics claim. In others, its effects will be so small that they are hardly noticeable. And in still others it will have effects that are very positive. Different structures, different outcomes.

The debate over school choice almost always revolves around simplified claims that fail to recognize the key role of structure. Participants are well aware that there are different kinds of choice, from vouchers to charter schools to magnet schools, and that different rules apply to each. But beyond these broad categories, much of the debate is generic and structure-free. Even academics find themselves talking about whether vouchers promote student achievement, or whether charter schools have competitive effects on regular public schools, without recognizing that these and other types of choice can all be structured in very different ways, leading to very different outcomes—and that it usually makes little sense to ask whether vouchers or charter schools *in general* have particular effects. The effects of vouchers and charter schools depend on the specific structures in which they are embedded, and they can only be understood and evaluated in that way.

Precisely because this is so, the great challenge for educational reformers—and the great opportunity—is to choose the right structures. With the right structures, the problems sometimes associated with choice can be minimized or reversed. And the power of markets, which is not always and everywhere a good thing, can be harnessed for the promotion of important social values. As a practical matter, of course, decisions about structure get made through the political process. And politics being what it is, there is no guarantee that policy makers will actually adopt the structures that are judged best on analytical grounds. Even so, opportunities abound for them to make good decisions about structure and to use markets to social advantage within the education system.

The aim of this article, then, is to highlight two simple topics that lie at the heart of the choice issue, but are only rarely the subject of serious discussion or study. The first has to do with the structure of choice. The second has to do with the choice of structure. These are the keys to understanding the role of choice in American education.

II. THE ECONOMY, STRUCTURE, AND THE FREE MARKET

A voucher system for American education was first proposed in 1955 by Milton Friedman, a libertarian economist whose

contributions to economic theory and social policy have made him one of the most influential thinkers of the last century.² Friedman and other libertarians believe that when markets are allowed to work freely with a minimum of government interference, society will be maximally productive and efficient.³

It is tempting to imagine that the free market is without structure, unconstrained by an overarching set of governmental rules. But even libertarians do not see it this way. They recognize that, for markets to work properly, a society needs to have well-defined property rights backed by a legal system that enforces contracts and the rule of law.⁴ These are structures imposed by government. It is not markets alone, but markets embedded in such a (minimal) governmental structure that yield the wondrous results they ascribe to the free market.

Within education circles, there is a tendency to equate economics with the free market, and to discuss proposals for greater choice and competition in American education as though they are efforts to replace public education with the free market. But this perspective on economics and market-based reforms is unwarranted. The fact is, few economists are proponents of truly free markets. Friedman's libertarianism is hardly the norm. The vast majority of economists would argue that, while markets are powerful means of promoting social welfare, their performance depends on the real-world conditions under which they operate; under some conditions, economists know, markets produce far from optimal results. This can happen, for instance, if consumers are poorly informed, if the goods in question are public goods, if competition is inherently limited, if producers can conspire to fix prices or create monopolies, or if information-based problems of moral hazard or adverse selection undermine market transactions.

Accordingly, much of mainstream economics is devoted not to the study of markets per se, but to the conditions that affect how

2. Milton Friedman, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123 (Robert A. Solow ed., 1955). Friedman's best-known statement of the case for vouchers can be found in MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) [hereinafter *FRIEDMAN, CAPITALISM*].

3. See especially *FRIEDMAN, CAPITALISM*, *supra* note 2; MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980).

4. In addition to Friedman's work, see for instance, *THE LIBERTARIAN READER: CLASSIC AND CONTEMPORARY WRITINGS FROM LAO-TZU TO MILTON FRIEDMAN* (David Boaz ed., 1997).

markets work, to the problems these conditions can produce, and to how these problems can be addressed so that the power of markets can better promote the social good. There is widespread agreement among economists that the solution to market imperfections rests with an appropriately designed framework of governmental rules, a structure that imposes basic (but not onerous) regulations on economic decision makers.⁵

In broad outline, at least, the reality of modern government is a reflection of this professional consensus about how markets can best be put to use. The United States is an aggressive regulator of economic transactions along a whole host of dimensions, ranging from antitrust to environmental protection to deceptive practices to labor relations to employment discrimination to securities trading to consumer protection and more. A detailed structure of regulation, moreover, while varying in content from country to country, is typical of the way nations in the Western world have organized their economies. The modern market economy is not in any meaningful sense a free market. It is a mixed system of government and markets in which governmental rules constrain and channel how markets work.⁶

While economists applaud the emergence and international dominance of these mixed systems, the specific regulations that governments adopt are not always (or even usually) optimal from an analytical standpoint. The reasons are largely political. Government regulations are inevitably adopted through the democratic political process rather than the analytic steering of economists, and thus, are subject to influence by powerful political interests and parochial constituencies that may be little concerned with what is best for society. Because this is so, a mixed system may have regulations that are excessive, stacked in favor of special interests, and poorly designed to put markets to their most effective social uses.⁷

5. See STEVEN E. RHOADS, *THE ECONOMIST'S VIEW OF THE WORLD: GOVERNMENT, MARKETS, AND PUBLIC POLICY* 61 (1985); JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* (3d ed. 2000); LESTER C. THURLOW, *THE ZERO-SUM SOCIETY* 191-214 (reprint, Penguin Books 1981)(1980); DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* (3d ed. 1998); CHARLES WOLF, JR., *MARKETS OR GOVERNMENTS: CHOOSING BETWEEN IMPERFECT ALTERNATIVES* (2d ed. 1993).

6. See, e.g., CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977) [hereinafter LINDBLOM, *POLITICS*]; MURRAY L. WEIDENBAUM, *BUSINESS, GOVERNMENT, AND THE PUBLIC* (4th ed. 1990).

7. See, e.g., LINDBLOM, *POLITICS*, *supra* note 6; THEODORE J. LOWI, *THE END OF*

Most economists would no doubt prefer a simpler, less politicized regulatory structure than governments actually create. But there is not much they can do to change the nature of politics. And there is no indication that, even if they could change things, they would prefer a true free market system to the kind of regulated system we have now. The fact is, the system we have performs remarkably well despite its flaws, and there is widespread support for it within the profession.

It is a mistake, then, for educators to see economists as proponents of free markets, and to see proposals for school choice and competition as part of an agenda to replace the public school system with a free-market alternative. This is the agenda of Milton Friedman and a small band of libertarians.⁸ But it is not anyone else's agenda. When most economists and market advocates think about education, just as when they think about the economy, the fundamental question that directs their inquiry is: how can markets be *used* to social advantage? They recognize the great power of markets to promote incentives and efficiency—but they also recognize that, if markets are to promote desired social values in the most effective ways, they must often be constrained and guided by a set of governmental rules that are chosen with that in mind.⁹

III. CHOICE WITHOUT DESIGN: THE CURRENT EDUCATION SYSTEM

From its modern origins in the early decades of the 1900s, America's public education system was designed to be a purely governmental system in which markets play no role at all. There was simply no attempt to take advantage of what markets might have to offer. Instead, the idea was that educational services would be produced by government-run schools, which would act as local monopolies within their own geographic areas. Children would be assigned to their local schools. And the schools, along with every aspect of educational policy, organization, and practice, would be

LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989); WOLF, *supra* note 5.

8. See FRIEDMAN, *CAPITALISM*, *supra* note 2; see also ANDREW J. COULSON, *MARKET EDUCATION: THE UNKNOWN HISTORY* (1999).

9. See, e.g., ERIC A. HANUSHEK, *MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS* (1994).

democratically controlled through a complex hierarchy of political officials and educational bureaucrats.¹⁰

For the most part, this same top-down structure has prevailed ever since. The details have changed in many respects over the years, however, and the choice movement has made a degree of headway. There are now ten public voucher programs in operation around the country, all of them for low-income or special-education kids, and most of them quite small. There are ten tax credit programs, which either give parents tax credits for education expenses at private schools or (more commonly) allow businesses and individuals tax credits for contributing to scholarship organizations that provide vouchers to (usually low-income) children. There are some 4000 charter schools, enrolling more than a million kids—this is the real growth industry within the choice movement—and there are also magnet schools in many urban areas, as well as programs of inter-district and intra-district choice. But while choice-based reforms have made considerable progress over the years, they can only be regarded (for now) as a small drop in a very large bucket. Public education remains a top-down system of government control.¹¹

Even a purely governmental system, however, does not eliminate all forms of choice. In the case of American education, parents are typically denied the right to choose their children's public schools, but they are still free to make all sorts of *other* choices that affect the education of their children. In effect, there is an implicit choice system at work both inside and outside the formal governmental school system. This choice system was not designed by anyone, but there is nonetheless a distinctive structure to it that shapes the way parental choices get made. And while its outcomes for society are accidental and unplanned, they are hugely important. They are also

10. See COULSON, *supra* note 8; LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL: PROGRESSIVISM IN AMERICAN EDUCATION, 1876-1957* (1961); DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* (1974).

11. For data on voucher and tax credit programs, see MILTON & ROSE D. FRIEDMAN FOUND., *THE ABCS OF SCHOOL CHOICE* (2007), available at <http://www.friedmanfoundation.org/friedman/downloadFile.do?id=102>. For data on charter schools, see THE CTR. FOR EDUC. REFORM, *ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS 2* (2007), available at http://www.edreform.com/_upload/ceer_charter_survey.pdf. On the growth of choice more generally, see Jeffrey R. Henig & Stephen D. Sugarman, *The Nature and Extent of School Choice*, in *SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW* 13 (Stephen D. Sugarman & Frank R. Kemerer eds., 1999); Paul E. Peterson, *Choice in American Education*, in *A PRIMER ON AMERICA'S SCHOOLS* 249 (Terry L. Moe ed., 2001).

perverse, generating widespread equity problems that have worsened and entrenched the class and racial problems of American society.

The reasons are readily apparent from a brief look at two familiar properties that, by any account, are the implicit choice system's most basic structural features.

Structure #1: Public school parents are (typically) not allowed to choose which public school their kids attend, but they are allowed to choose where their families will live.

Operating within this rule, parents know that they can buy themselves a good public school by buying or renting a house in the right school district or neighborhood. Exercising this kind of choice is often expensive, mainly because the cost of housing in areas with good schools tends to be much higher than elsewhere (as a result of parents bidding up the prices). Not surprisingly, then, the people who exercise residential choice tend to be those who are higher in income. They are also the ones who are the most motivated by education concerns and the most educated themselves. The upshot is that residential choice injects a serious social bias into the current education system: the best schools tend to be filled with advantaged children, the worst schools with disadvantaged children. This is perhaps the most fundamental creaming problem in American education today and the most socially destructive.¹²

Structure #2: Public schools are provided free of cost by the government. Parents can choose to send their kids to private schools, but private schools are costly.

Under this rule, all parents have the option of leaving the public system and going private in search of better schools for their kids—at least in principle. But this rule also ensures that certain kinds of parents are in a far better position than others to take advantage of what the private sector has to offer. Private options are more accessible, obviously, to parents who are financially well off. The same is true for the well educated because educated parents tend to be more motivated by educational concerns. For these reasons, the current system promotes a class bias in the types of parents who go

12. For data on the social biases of residential choice, see TERRY M. MOE, *SCHOOLS, VOUCHERS, AND THE AMERICAN PUBLIC* (2000) [hereinafter MOE, *SCHOOLS*]. For analyses of the connection between school quality and housing values, see, e.g., G.R. Meadows, *Taxes, Spending, and Property Values. A Comment and Further Results*, 84 J. POL. ECON. 869 (1976); Harvey S. Rosen and David J. Fullerton, *A Note on Local Tax Rates, Public Benefit Levels, and Property Values*, 85 J. POL. ECON. 433 (1977).

private, which is especially apparent in school districts with the worst public schools. When public schools are performing poorly, advantaged kids flee to the private sector (and the suburbs, via residential choice), and poor and minority kids are left behind, concentrated in schools unable to serve them. Here again, educational choices produce a creaming effect that adds to social inequities.¹³

The defenders of the public schools tend to attribute these effects to choice *per se*. They argue that if more choice is introduced into the current public school system—through vouchers, say—the equity problems that plague this system will only get worse.¹⁴ While the equity problems are real, however, it is a mistake to think that they are simply due to choice. They are actually due to the way choice happens to operate *within a particular structure*—a structure that exists because the current system of top-down control does *not* grant parents a choice of schools and makes it costly for parents to exercise choice by going private.

There is great irony here. The reason choice often operates perversely within the current education system is precisely that this system was not designed to take advantage of choice, nor of markets generally, but rather to keep markets out of education entirely. By trying to keep markets out, however, the system's designers unwittingly created a structure in which parental choice is a forceful influence anyway—but a perverse one (in some ways) that undermines the system's most fundamental goals.

IV. ON THE NEED FOR CHOICE—AND DESIGN—IN AMERICAN EDUCATION

The Progressives who designed our education system were guided by ideas prevalent nearly a hundred years ago, when markets were not well understood and when bureaucracy and the direct governmental supply of services were regarded as innovative, even revolutionary, reforms. They can be excused for building a top-down system of public education when they did. Today, however, there is no good reason why Americans should be content with this structural relic of the past. Its ideals—of common schooling, of social

13. For data on the social biases of private school choice (under the current system), see MOE, SCHOOLS, *supra* note 12.

14. See, e.g., sources cited *supra* note 1.

equity, of democratic governance—are inspiring, but they are poorly met in practice. If a century of theory, research, and experience has anything to teach us, it is that purely top-down governmental structures are extreme forms of social organization that are often overly costly and ineffective; and also that, where practical to do so, a greater reliance on markets—which is very different from a radical shift to free markets—can make good sense and prove beneficial for society.¹⁵

Why would a greater reliance on markets be good for education? Reams have been written about this, so I won't launch into an extended discussion here.¹⁶ But two simple points, both based on parent choice, are worth underlining.

The first point is that choice itself is valuable. It has a direct impact on families by allowing parents to seek out better schools for their kids and improve their educational opportunities. Under the current system, parents are prevented from doing this. Children are assigned to their local public school, and if that school is of poor quality or provides a kind of education families do not like, they have nowhere to go—unless they want to pay for the privilege of leaving. In practice, this means that parents with money can escape the trap by changing their residence or going private, but poor parents cannot. Thus, a major advantage of choice is that it expands the opportunities of parents who are in greatest need and who currently have little or no control over their children's educations. It also provides opportunities for parents who, on religious, moral, or pedagogical grounds, simply want a different kind of education for their children. It allows them to express and pursue their own values.

The second point is that choice transforms incentives, and in so doing, promises to transform the system as a whole in a positive way. Under the current top-down arrangement, public schools are guaranteed students and resources regardless of how well they perform. The inevitable result is that they have few incentives to

15. See CLIFFORD WINSTON, *GOVERNMENT FAILURE VERSUS MARKET FAILURE* (2006) for a review of theory and evidence. For an overview and analysis of the New Public Administration which reflects these same ideas and has played a prominent role in governmental reform across the world since the 1980s, see, CHRISTOPHER POLLITT & GEERT BOUCKAERT, *PUBLIC MANAGEMENT REFORM: A COMPARATIVE ANALYSIS* (2000).

16. See, e.g., JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* (1990); JOHN E. COONS & STEPHEN D. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); COULSON, *supra* note 8; FRIEDMAN, *CAPITALISM*, *supra* note 2.

produce high-quality education, to respond to parents, to allocate their funds efficiently, or to innovate in socially productive ways—for nothing bad happens to them if they do not, and nothing good happens to them if they do. When parents are allowed to choose, however, the situation is very different. Parents are no longer a captive clientele, but are able to leave schools they consider undesirable and seek out schools they think are better. As a result, schools have to compete with one another for parental support, and this competition puts all schools on notice that, if they do not perform, they stand to lose students and resources to other schools that can do a better job. This gives them stronger incentives to educate, to be responsive, to be efficient, and to innovate. Those that respond to these incentives tend to prosper, while those that do not tend to lose their clienteles and be weeded out—leading over time to a more effective, more innovative population of schools.

For these and other reasons, markets have much to contribute to the improvement of the American education system, if implemented wisely. Yet it would be wrong to think that markets are always beneficial and never lead to problems. To take an egregious example: during the late 1960s, “freedom of choice” plans were widely adopted in the South as a way of allowing whites to avoid going to school with blacks.¹⁷ And de facto segregation is precisely what happened: many whites used their newfound choices to seek out all-white schools, while the vast majority of blacks were either denied entrance or chose to avoid the risks of entering bastions of white solidarity. At that time and in that context, then, choice promoted segregation. It allowed parents the freedom to pursue their own values, a seemingly good thing, but these values happened to be racist.¹⁸

Critics argue that choice would unleash the same sorts of racist motivations today. And as they see it, race is hardly the only problem. Parents who are affluent and better educated would use the new choice opportunities to greatest advantage: abandoning the public schools; getting their kids into the best, most exclusive private schools; and leaving the poor behind. Parents would also separate themselves off by class and religion, further Balkanizing our culture.

17. See, e.g., WELLS, *supra* note 1.

18. See GARY ORFIELD, *MUST WE BUS? SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978); WELLS, *supra* note 1.

And private schools would discriminate against poor and minority kids, refuse to enroll the disabled, hire unqualified teachers, offer weak programs, mislead parents with deceptive advertising, fail to socialize kids to democratic norms, and more.¹⁹

It is only reasonable to be concerned about these possibilities, and the critics are right to direct our attention to them. Freedom of choice plans did in fact lead to bad social consequences in the South of years ago. And there are situations in which forms of school choice have generated some of the problems the critics talk about. Studies of existing voucher programs, for example, have shown that parents who are better educated are usually the ones most likely to take advantage of choice opportunities.²⁰ Similarly, studies of public school choice have shown that parent choices in certain programs are often made on the basis of race or class, producing a tendency toward more segregated schools and a less equitable distribution of opportunities.²¹ As extensive reviews of the research literature well demonstrate, however, the critics tend to overstate the true extent of the problems.²² This is particularly so, given that most choice programs are limited to the disadvantaged and are clearly promoting social equity by giving them—and only them—opportunities they would not otherwise have. If there are inequities, they almost always arise because some poor families are better able to take advantage of these opportunities than other poor families. This is regrettable (and reversible, through alternative designs), but it hardly justifies claims that these programs are somehow inequitable on the whole.

Even more important, given the central themes of this paper, critics almost always portray these problems as somehow inherent in choice per se—and they jump to the conclusion that, with such problems supposedly inevitable, reform proposals to seriously expand

19. See COOKSON, *supra* note 1; Fuller, Elmore & Orfield, *supra* note 1; WELLS, *supra* note 1.

20. See, e.g., R. KENNETH GODWIN ET AL., FINAL REPORT: SAN ANTONIO SCHOOL CHOICE RESEARCH PROJECT (1997); JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION: AN ANALYSIS OF AMERICA'S FIRST VOUCHER PROGRAM 59–62 (2000).

21. See, e.g., Jeffrey R. Henig, *The Local Dynamics of Choice: Ethnic Preferences and Institutional Responses*, in WHO CHOOSES? WHO LOSES?, *supra* note 1, at 95; J. Douglas Willms & Frank H. Echols, *The Scottish Experience of Parental School Choice*, in SCHOOL CHOICE: EXAMINING THE EVIDENCE 49 (Edith Rasell & Richard Rothstein eds., 1993).

22. See R. KENNETH GODWIN & FRANK R. KEMERER, SCHOOL CHOICE TRADEOFFS: LIBERTY, EQUITY, AND DIVERSITY (2002); Henig & Sugarman, *supra* note 11; HERBERT J. WALBERG, SCHOOL CHOICE: THE FINDINGS (2007).

parental choice (and thus competition) must be opposed. What the critics rarely consider is that all forms of choice come with a particular structure, that some of these structures are not well designed, and that, through the conscious design of more appropriate structures, the problems they are most concerned about can be addressed and mitigated. Indeed, through appropriate design, choice plans can become vehicles by which social equity, common schooling, and other basic social values can be aggressively pursued—and far more successfully, it is reasonable to expect, than they are being pursued under the current system, which is clearly failing in these regards, and is the baseline against which all reforms must be judged.

V. THE CHOICE OF STRUCTURE

New vistas open up once we recognize that a choice system can depart rather substantially from a free market, and in ways consciously designed to promote social equity and other important social values. To get a better sense of what is possible, let's take a closer look at some of the general dimensions of structure that policymakers have available to them in designing a voucher system—the most controversial of all forms of choice—and consider some of the options and arguments that go along with each. A similar logic would apply in assessing tax credits, charter schools, and other forms of choice, all of which can be structured in a variety of ways.²³

A. Who Should Qualify for a Voucher?

The free-market ideal is a universal voucher system in which all children qualify. Such a system would presumably extend a maximum of choice and freedom to America's families and generate a maximum of healthy competition among schools. It may also promote social equity because the strongest demand for vouchers and private schools comes from poor and minority families who are stuck in low-performing schools. To be sure, well-off families are likely to be better educated and informed and in better positions to take advantage of vouchers. But they are also less inclined to use them. Most have already used their money and social leverage to get

23. For a detailed discussion of the various elements that might make up the design of a choice system, see JOHN E. COONS & STEPHEN D. SUGARMAN, *MAKING SCHOOL CHOICE WORK FOR ALL FAMILIES: A TEMPLATE FOR LEGISLATIVE AND POLICY REFORM* (1999).

their kids placed in desirable public schools, and they have little incentive to change.²⁴

There are two major arguments against a universal system. The first is that it leaves equity to the uncertainties of the marketplace and cannot guarantee that disadvantaged kids (or at least some of them) will not get short shrift. Why, critics argue, should people who do not need a voucher be eligible for them in the first place? To promote equity with force and certainty, a voucher system might simply be targeted at people who *are* in need, starting with the neediest. When this is done, there is little worry that choice will lead to equity problems because everyone who gets to choose will be poor.

The second argument—which may be persuasive even to people who favor universalism as a long run goal—is that adopting a universal system from the get-go is too risky, involving a massive, all-at-once shift that could involve vast upheavals and uncertainties. It would be much more prudent, given the risks, to start out with small pilot programs, see how they work in practice, and move incrementally from there. If the place to start is with small pilot programs, moreover, it makes perfect sense to focus these programs on the neediest kids in society, who are poor and minorities. This is where society clearly gets the most benefit, and where the risks of failure—because things are currently so bad for these kids—is exceedingly small and well worth bearing. Considerations of risk, then, just like considerations of equity, argue for programs that are targeted at the disadvantaged.

Even if targeting is preferred over universalism, though, this is not the only structural decision to be made. There are different types of targeting and thus still other structural options to be considered and compared. In Milwaukee and Cleveland, for example, vouchers are only available to children from low-income families. Florida, on the other hand, made its first voucher program—since declared unconstitutional by the state supreme court (for reasons peculiar to the state's constitution)—available to kids who attend “failing” schools, where “failing” is defined by the schools' performance on state tests. Virtually all of the kids in these schools are from low-income families because well-to-do families do not allow their kids to

24. For data on the popularity of school choice among poor and minority parents, see MOE, SCHOOLS, *supra* note 12.

wind up in the state's worst schools. More recently, Ohio has adopted a similar program statewide for children outside of Cleveland. Another variant on targeting is exercised in Florida, Arizona, Georgia, and Utah, which have programs that extend vouchers to children with disabilities or special needs.²⁵

While universalism and targeting are the two basic alternatives, they need not be viewed as mutually exclusive. In 2007, Utah's legislature adopted a voucher program that was subsequently struck down by the voters in a referendum.²⁶ Had this program gone into effect, Utah would have established the nation's first universal system, in the sense that all children would have qualified for a voucher. But the size of the voucher would also have been means tested: the proposed vouchers ranged in size from \$500 to \$3000, with the poorest families getting the largest vouchers. Thus, the Utah program would have provided something for everyone, but targeted disadvantaged kids for the greatest infusion of financial support.²⁷

Each of these approaches has its own pluses and minuses, on which reasonable people may differ, and there is no objectively correct way to go. The point is simply this: giving every child a voucher is just one option in the design of a choice system. There are many others, and they offer a great deal of flexibility in promoting important social values.

B. What Should the Amount of the Voucher Be?

The standard free-market solution is to give all kids vouchers of the same amount. This is simple and straightforward, whether the program is universal or targeted, and many Americans would see it as the fairest way to proceed.

But other approaches are also reasonable, especially in the context of a universal voucher program, when kids from diverse backgrounds are all eligible for vouchers. It is well known, for instance, that disadvantaged kids are more costly to educate than

25. See MILTON & ROSE D. FRIEDMAN FOUND., *supra* note 11, at 14–15, 20–23, 38–39, 44–45.

26. See Erik W. Robelen, *Utah's Vote Raises Bar on Choice*, EDUC. WK., Nov. 14, 2007, at 1.

27. See THE HEARTLAND INST., UTAH'S PARENT CHOICE IN EDUCATION ACT (Mar. 2007).

other kids; the same is true for kids with learning disabilities, behavior problems, and other difficulties.²⁸ From the standpoint of economics alone, therefore, it makes sense to give bigger vouchers to these kids than to others, both to compensate schools for the true costs of educating them, and to make these children more attractive as clients so that schools will actually compete to serve them. It also makes sense from an equity standpoint because it recognizes that children have different educational needs and it allocates resources on that basis. This is more equitable, many would say, than "equal treatment."

As a practical matter, of course, it might be difficult to set vouchers equal to the underlying costs of education, but there are simple ways to approximate such an ideal. One way is to give all kids a base voucher, and then to voucherize the compensatory and special education funds currently supplied by federal and state governments so that each child who qualifies for these programs would have additional amounts added to the base voucher. Another alternative is to have some sort of sliding scale—as Utah originally adopted—with the value of the vouchers being quite high for the poor and dropping slowly and steadily until at some level of family income the funding reaches some minimal level. These and other alternatives would have to be evaluated for their ease and cost of administration—and for whether, at least in the short run, it might make more sense to target vouchers solely at the poor.

However these issues are resolved, the absolute amount of the voucher is also critical. The bigger the voucher, the more schools families will be able to consider, and the more choice and opportunity they will have (particularly if they are poor). This is true from the outset, but it is especially true over the long run as the private sector has time to adjust—for the bigger the voucher, the greater the incentive for new schools to emerge, and the larger the supply of schools will ultimately be.

For now, most voucher programs are too small and too new to allow definitive assessments of whether the voucher amounts are large enough to provide adequate choice and to stimulate a sufficient supply-side response by schools over time. In Milwaukee, which has the oldest of the nation's voucher programs, the vouchers are now

28. See, e.g., ALLAN R. ODDEN & LAWRENCE O. PICUS, *SCHOOL FINANCE: A POLICY PERSPECTIVE* (1992).

over \$6500 per child, which is more than enough to pay for tuition at virtually all private schools in that city, and enough to ensure that some 17,000 children were able to attend 121 private schools in 2006–07.²⁹ In Washington, D.C., where the vouchers can be as large as \$7500 depending on school tuition, the program enrolls more than 1800 low-income children—the most it can rake, given the size of its congressional appropriation—and these kids attended sixty-six different private schools in 2006–07.³⁰ On the surface, at least, it appears that the vouchers in these two programs are large enough to be truly consequential, both on the demand side and on the supply side.

But in other programs with smaller voucher amounts, that is not so clear. In the Cleveland program, for instance, the poorest parents—who take up three-fourths of the program's vouchers—are allowed to choose private schools charging tuitions up to a maximum of \$3450, and the voucher they receive for schools at the top end of the range is \$3105. The parents are then required to make up the difference. As of 2006–07, more than 6000 students attending forty-five different schools participated in the program³¹—but it is reasonable to fear that the size of the voucher, which is just half as large as those in Milwaukee and Washington, D.C., has kept both the number of participating families and the number and quality of participating schools at lower levels than they could be. If policymakers really want choice and competition to work for the poor, they need to think seriously about offering vouchers that are large enough to do the job, which would allow parents to choose among large numbers of high-quality schools.

29. Data were obtained from the Website of the Wisconsin Department of Public Instruction, MILWAUKEE PARENTAL CHOICE PROGRAM (MPCP): MPCP FACTS AND FIGURES FOR 2006–2007, AS OF FEBRUARY 2007, *available at* <http://dpi.wi.gov/sms/doc/mpc06fnf.doc>.

30. Washington Scholarship Fund, <http://www.washingtonscholarshipfund.org> (last visited Mar. 4, 2008).

31. Information on the Cleveland program was obtained by contacting the Cleveland Scholarship and Tutoring Program directly. Ohio Department of Education, <http://www.ode.state.oh.us> (last visited Mar. 4, 2008) (look under “school options” for the name of the program).

C. Should Parents Be Allowed to Add On?

The free market solution is to allow parents to add onto their vouchers if they want to select high-tuition schools. This approach simply gives parents more freedom and more choice. But the downside is that it might produce inequities; the more affluent parents would be better able to add their own money to the voucher in buying their way into expensive schools, leaving the poor behind to choose among the inexpensive ones, thus encouraging a two-tiered system that reinforces class cleavages.

One obvious solution is for policy designers to adopt a rule prohibiting parents from adding on, and requiring any school participating in the program to accept the voucher as full payment. This would equalize the purchasing power of all parents who use vouchers, and it would prevent parents who insist on spending more from receiving vouchers as a subsidy. Such an approach might even be considered necessary in programs targeted solely at the poor, because even among the poor there will be some families who are better able than others to afford the extra money, and thus some families who will be left behind.

A prohibition of add-ons, then, is a reasonable structural response to the equity problem. And not surprisingly, it has been the favored approach in most voucher programs. In the defeated Utah program, however, parents were going to be allowed to add on. In Ohio's statewide program, parents with incomes below 200% of the poverty level are not allowed to add on (or to put it differently, schools are not allowed to charge them tuition beyond the voucher), while parents with incomes above 200% of the poverty level can add on (schools can charge them tuition beyond the voucher).³²

While the prevention of add-ons offers protection for the poor, there are certain problems with it that need to be recognized. It would prevent some parents, perhaps many, from choosing a school they really want for their children, assuming they could come up with the money out of their own pockets, with help from relatives, or through scholarships. This in itself is a negative. It could also create equity problems rather than preventing them. In Ohio, for instance, schools operating at tuition levels above the voucher amount—tuitions some voucher parents may be quite willing and

32. See MILTON & ROSE D. FRIEDMAN FOUND., *supra* note 11.

able to pay with the help of their subsidies—could well decide not to participate in the voucher program at all because they are obliged to accept children from the poorest families at the lower voucher amount too.³³

More generally, limitations on parent add-ons put an upper bound on the tuition that can be charged by all schools participating in the voucher program; unless the amount of the voucher is high, the danger is that only schools offering a basic, low-cost education could participate. A \$2000 voucher would call forth a population of \$2000 private schools, while schools wanting to offer more costly and elaborate—or simply more adequate—programs would be excluded. This outcome would reduce variety and choice for children, as well as competition, and it would threaten to produce a population of low-performing schools. The larger the voucher, however, the less these problems would arise.

D. Should Private Schools Control Their Own Admissions?

The free market ideal is that private schools should be allowed to make their own decisions about which children to admit, based on their own criteria. But the danger exists that private schools might favor children who are easier to educate, who have more affluent parents, or who belong to the right religion or social group—leaving poor and minority kids without much access to desirable schools.

This danger is worth recognizing, but it tends to be overstated. It is a mistake to think that all private schools will somehow be competing for gifted, well-behaved kids from wealthy families. Some schools may do this, but most will have to find their niches among the broader population of children and appeal to the needs and interests of ordinary families. When voucher systems are limited to the poor, moreover, there is even less reason to worry about discrimination in admissions, as all the kids with vouchers are disadvantaged and schools cannot shunt them aside in favor of the affluent. There may, of course, be a measure of discrimination among types of poor children—in favor of those who are well behaved, for example, or who have better test scores. But the voucher experience so far—in Milwaukee, Cleveland, Florida, Ohio, and Washington, D.C.—suggests that this has not been a problem in

33. *Id.*

practice: low-income kids in these programs use vouchers to attend a vast array of local private schools, which have so far been happy to admit them. There have been few complaints by parents of any discrimination.³⁴

Still, discrimination could still occur, even in programs for the poor. And in a universal program with a diverse population of students, some from families that are well off, the possibilities are magnified. What are the design options for dealing with them?

Two options stand out. One is that, as a condition of participating in the voucher program, private schools can be required to select their students on a random basis. This rule is employed in Milwaukee,³⁵ and was also a part of the now defunct Florida voucher program for “failing” schools.³⁶ Random admissions ensure that poor and minority kids have a shot at getting into the schools they prefer. A second possibility is that a certain percentage of each school’s new slots can be set aside each year for low-income kids. This too would give them access to all schools, including the most desirable. No program has yet to employ such a rule.

There are costs, however, associated with the regulation of private school admissions. One of the reasons many private schools are so successful is that they have the autonomy to define their own missions and programs as they see fit, and selecting appropriate students is an integral part of that. By imposing a randomly selected student body on private schools, an important foundation of their strength may be lost. Any admissions restrictions, therefore, should be carefully considered—and in response to a perceived problem. So far, problems in the admissions process have been minimal.³⁷

E. Should Private Schools be Held Accountable by Government?

In a free market, private schools would not be regulated to ensure that they meet performance standards or spend their money appropriately. The idea is that such regulation would be unnecessary and counterproductive, violating the autonomy schools need for

34. See WILLIAM G. HOWELL ET AL., *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* 60–76 (2002); WITTE, *supra* note 20, at 58–62.

35. WIS. STAT. ANN. § 119.23 (3)(a) (West 2004).

36. Fla. Laws 4275 (codified as amended at FLA. STAT. ANN. § 1002.38 (4)(c) (West 2004 & Supp. 2007)), *invalidated by* Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

37. See HOWELL ET AL., *supra* note 34, at 64–68; WITTE, *supra* note 20, at 58–62.

high performance. In the educational marketplace, private schools are automatically held accountable from below by parents who leave bad schools, seek out better ones, and thus provide schools with the right kinds of incentives to keep them performing effectively.

Not everyone has as much faith in markets, however. This is true of many liberals, of course, but it is also true of many people who have no ideological take on markets at all and are simply moved by very practical concerns. Government officials and taxpayers, for instance, are footing the bill for education, and they tend to want concrete assurances—not assurances derived from the theory of markets—that public money is being put to good use. They also tend to be risk averse and worried that something could go wrong. For example, they may worry that some private schools will offer substandard programs, indoctrinate children, or steal public funds.³⁸

A natural response is to design rules of accountability to protect against these dangers and promote desirable outcomes. Among other things, these rules may set out requirements regarding curriculum, standards, teacher qualifications, annual audits of finances, periodic testing of students, and information about the school that must be made public. The rules may take various forms and can be as detailed as policymakers like. The Milwaukee program, for example, requires schools to be audited annually and to give their students nationally normed tests. The Washington, D.C., program does not require audits, but it does require that student performance be assessed as part of an overall evaluation of the program.³⁹

It is important to keep in mind that the autonomy of private schools is pivotal to their strength, and that avoiding bureaucracy and its stultifying effects is a key aim of a choice system to begin with. These are good reasons for keeping accountability regulations simple and basic—as voucher programs typically have—and for steering clear of onerous restrictions.

F. Should Religious Schools Be Included in a Voucher System?

The free market answer is that religious schools of all types should be included, as part of the general aim of providing families with the kind of education they want and giving them as much

38. For data on the attitudes of public citizens toward the regulation of voucher-receiving private schools, see generally MOE, SCHOOLS, *supra* note 12.

39. See MILTON & ROSE D. FRIEDMAN FOUND., *supra* note 11.

choice and diversity as possible. Polls show the American people are quite supportive of religion, and they overwhelmingly agree that, if a voucher system were to be created, religious schools should be part of it.⁴⁰

But not everyone is so disposed. One argument is that religion should be kept out of education, particularly when it is funded with taxpayer money. A related but quite separate argument is that government funding of religious schools violates the Establishment Clause of the First Amendment and is thus unconstitutional.⁴¹ This argument was settled at the federal level by the Supreme Court's *Zelman v. Simmons-Harris* decision in 2002,⁴² but it remains a live issue at the state level, as many states have Blaine amendments (a product of anti-Catholicism at the turn of the last century) that forbid public money from going to religious schools.⁴³

As far as the principle is concerned, people can be expected to differ. But it is important to recognize that, as a practical matter, the exclusion of religious schools has enormous consequences. Under the current system, the vast majority of private schools are religious. The reason is simple: public schools offer a nonreligious education for free, and nonreligious private schools have a difficult time competing with that. Religious private schools offer something the public schools cannot offer, which is why there are so many of them. With a full-blown voucher system, this would presumably change, as there would be a greater demand for nonreligious private schools—and over the long run (assuming the vouchers were big enough), there would be an increase in their supply. But in the short run, which could mean many years, most options in the private sector will take the form of religious schools. And if religious schools are excluded from a voucher system, there will be little for most families to choose from. In effect, to exclude religious schools is to eliminate most choice.

The original Milwaukee voucher program, enacted in 1990 as the nation's first, did indeed exclude religious schools—an indication of how strong its political opposition was and how successful they

40. See MOE, SCHOOLS, *supra* note 12, at 294–97.

41. See U.S. CONST. amend. I.

42. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

43. See, e.g., Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 573–76 (2003).

were in limiting the scope of the program.⁴⁴ The result was that, until the program was legislatively expanded in 1995 to include religious schools (the real expansion took place in 1998 when the Supreme Court refused to rule against it), three-fourths of all voucher students were enrolled in just three private schools. In the years since, with the inclusion of religious schools, the number of private schools participating in the program has soared to 121.⁴⁵ Needless to say, the difference is dramatic. Indeed, while much attention was paid to the original Milwaukee voucher program, it offered virtually no choice or competition—and didn't until the religious schools were included.

The early Milwaukee program, in any event, turns out to have been a national exception. All other voucher programs created over the years have included religious schools.⁴⁶

G. How Should Government Funds Be Divided Between Public and Private Schools?

The free-market answer is that the money should follow children to their schools of choice, whether public or private. Thus, when kids leave public schools for private schools, the public schools would lose the full amount of funding for those kids, and the private schools would gain that amount. This dynamic is what produces the incentive effects of competition. It is precisely because public schools don't want to lose money that they have incentives to improve their performance.

Not everyone is persuaded by this line of reasoning. A standard argument—indeed, the most often recited argument against vouchers—is that they drain money out of the public schools, sapping their strength and making it even more difficult for them to improve. How can they improve with less money? A related argument is that the public schools have high fixed costs—in buildings, maintenance, administration, and the like—and cannot simply cut back on their inputs to make up for all the resources they lose when kids leave and take their total funding with them.⁴⁷

44. See generally WITTE, *supra* note 20, at 58–62.

45. For recent figures on schools and enrollments, see the program's Website at <http://dpi.state.wi.us/sms/choice.html>.

46. See MILTON & ROSE D. FRIEDMAN FOUND., *supra* note 11.

47. A corollary financial issue has to do with the budgetary impact of providing

The first of these arguments is something of a red herring. It is true that the public schools would get less money in the aggregate—but this is misleading because they would also have fewer kids to educate. Even if the total funding followed each child, the public schools would continue to get paid for every child that stays in the public sector, and they would be paid just as much as before. The second argument is more legitimate. The public schools do have fixed costs, and, especially if only a small number of kids go private (which is guaranteed if the program itself is small by design), the districts may find it difficult to achieve many cost savings. Over the long run, this would change if the choice programs expand and large numbers of kids go private. But in the short run, the fixed cost issue is real.

These issues can be handled in various ways. If a revenue-neutral solution is desired—that is, one that requires no additional spending—then the vouchers can be set at a value below the average per pupil expenditure, and the residual funds can remain with the public schools. The latter would thereby get paid for children they are not responsible for educating, but the money would make up for fixed costs that the districts must still incur after the children leave. Some policymakers may want to go further than this, however. They may reason that, once fixed costs are taken care of, the schools need additional money to ensure that they will be able to improve and meet the new competition. In such cases, the state may decide to increase its total educational spending—which either requires new taxes or the diversion of funds from other state programs—in order to both fund the vouchers and keep the public schools at least as well

vouchers to kids who are currently in private schools. As things now stand, these kids get educated at no expense to the government. Under a voucher system, any of these kids qualifying for a voucher would require additional expense by the government, and thus—it would seem—bigger education budgets (and more taxes to pay for them). Two factors mitigate this problem. The first is that, because the voucher is usually much smaller than average per-pupil spending by the public schools, the government may save money when children switch from public to private; and if enough kids switch, the surplus may more than cover the private students who were not previously being funded. The second factor is that virtually all voucher plans being proposed these days focus on poor children, and proportionately few of these children go to private schools under the current system. Thus, with a targeted voucher plan, the existing private school kids represent a small financial burden that can easily be overcome by the savings that occur as public kids go private. Still, the right structural choices must be made to ensure desired budgetary outcomes. Designers must determine the proper size of the vouchers, and at what times and in what numbers existing private school students will become eligible for vouchers.

funded as before. A market advocate would argue that this is counterproductive, as it essentially rewards schools for losing kids, and thus rewards them for poor performance and lack of responsiveness—but again, the critics of markets don't see it this way. They think improvement can only come with additional resources, and they want to see the public schools have as much funding as possible.

In practice, the funding arrangements that states have actually adopted for their voucher programs have varied considerably, and they are too complex to describe in a brief paragraph. It has universally been the case, though, that state legislatures have kept the value of the voucher well below the average per pupil expenditure in the public schools. In Milwaukee, for example, the voucher for 2004–05 was \$5943, but the per-pupil spending for the Milwaukee City School District was \$12,130. In Cleveland, the maximum value of the voucher for 2004–05 was \$3450, but per-pupil spending in the Cleveland City School District was \$13,162.⁴⁸ And in Washington, D.C., the maximum value of the voucher for 2004–05 was \$7500 while the per-pupil spending in the D.C. Public Schools was \$17,809. Given these funding gaps, there is obviously no need for the districts to lose full funding (at public school cost levels) when kids leave with vouchers; and they typically lose much less.⁴⁹ Indeed, if additional funding is involved, they may not lose anything, or may even gain. When the U.S. Congress formulated a voucher program for the District of Columbia, for instance, it actually guaranteed the District's public schools that they would receive \$2 in extra funding for every \$1 spent on student vouchers.⁵⁰ In general, the political process tends to yield compromise solutions that—

48. For information on voucher amounts for various programs, see MILTON & ROSE D. FRIEDMAN FOUND., *supra* note 11. For information on per pupil spending in American public school districts, see the National Center for Education Statistics Web site at nces.ed.gov/edfin/finance_data.asp (last access: January 8, 2008). It is worth adding that charter schools are not funded at the same level as regular public schools either. See Eric Osberg, *Charter School Funding*, in CHARTER SCHOOLS AGAINST THE ODDS 45–69 (Paul T. Hill ed., 2006).

49. For a description of the financial arrangements for the Milwaukee voucher program and how they have changed over time, see generally Rajashri Chakrabarti, *Can Increasing Private School Participation and Monetary Loss in a Voucher Program Affect Public School Performance? Evidence from Milwaukee* (Fed. Reserve Bank of N.Y. Staff Report No. 300, Sep. 2007), available at http://www.newyorkfed.org/research/staff_reports/sr300.html.

50. See Spencer S. Hsu, *How Vouchers Came to D.C.*, 4 EDUC. NEXT 44, 45 (2004).

whether well advised or not from an incentives standpoint—shield the public schools from the full financial consequences that, in a more market-like setting, would normally be associated with having their students attracted away by competitors.

VI. IS THERE A BEST STRUCTURE?

These are just some of the options that come into play when a choice system is being designed. Even from this brief discussion, however, it should be clear that a voucher system may in fact bear little resemblance to a free market—and may rather easily, through the conscious choice of appropriate rules, be designed to meet the needs of disadvantaged kids, to promote fairness and social equity, to pursue accountability, and to protect the public schools from unwarranted harm. There are many permutations, many possible designs.

But what kind of choice system is best? This is a question that has no objective answer. In the first place, different people may give priority to different social values, and thus have entirely different interpretations of what it means for a choice system to work to social advantage. Some may put greatest emphasis on student achievement, others on social equity, others on personal freedom, still others on the common school ideal—and these differences cannot be settled scientifically. We cannot say that some values are better than others, that some people are right and others wrong.

Even if people could agree on the values to be pursued, they may still have very different expectations about what will actually happen when a choice system is designed in one way rather than another. Will Structure A lead to better student performance? Will Structure B promote Balkanization along religious or racial lines? And which one will create better opportunities for disadvantaged kids? These are essentially questions about cause and effect: questions that, at least in principle, do have objective answers. But the problem is that, given the current state of social science theory and research, the answers are not always clear, and there is often plenty of room for legitimate debate.

For both these reasons, then—different values, different assessments of cause and effect—there will inevitably be disagreement over what a desirable choice system ought to look like. This is quite normal, though, and the same could be said for almost any type of public policy. Precisely because there are so many aspects

of structure that go into the design of a choice system, and thus so many permutations that can be mixed and matched, there are tremendous possibilities for compromise among decision makers who are well intentioned and dedicated to finding a workable solution that is satisfactory—if not best—for most everyone. A free-market supporter may prefer a universal voucher system with no restrictions on private schools, but may be willing to accept a program that targets needy children and imposes certain regulations. A liberal who is suspicious of unregulated choice may be willing to accept such a program as well, seeing it as a way to promote social equity while protecting against the uncertainties of the free market.

A targeted system is not, of course, the only compromise that might work. What the availability of multiple designs really does, more generally, is to allow communities to build whatever kinds of choice systems seem to make the most sense *for them*, given their own unique mixtures of values and expectations and their own ways of hammering out compromises and making political decisions. There can be as many different choice systems as there are communities.

VII. THE POLITICS OF STRUCTURAL CHOICE

I should emphasize, once again, that the point of all this is to *use* the power of markets to the benefit of society, and thus to inject new options, stronger incentives, greater dynamism, and more equity into a heavily bureaucratic education system that has long done almost nothing to take advantage of what choice and competition have to offer. There are many ways to do this, many designs on which reasonable people might agree. But it is important to keep this fundamental goal in mind because some designs are better at achieving it than others, and some can be so restrictive that they prevent choice and competition from working at all.

Designers need to recognize the trade-offs they are making. They may have legitimate concerns about equity, democratic accountability, public school finances, and other matters; and they may design structures that protect and promote such values. That is an essential part of their job. But if these structures get too burdensome or are overly constraining—for example, in restricting the supply of private schools, imposing costly and complex regulations, keeping the size of the voucher very small, or totally protecting the public schools from the consequences of poor

performance—then much of the power of choice and competition may be lost in the process. The challenge is to strike the right balance: to unleash what choice and competition can contribute, but to channel them in socially desirable directions.

In principle, this is a straightforward objective that well-intentioned designers could readily pursue. In practice, however, the design of a choice system is an exercise in the making of public policy, and virtually every decision is determined through the political process, which is heavily shaped by power and self-interest. All too often, the very nature of politics makes it difficult for communities, states, and the nation as a whole to design and adopt choice systems that work as well as they could.⁵¹

This kind of problem afflicts many areas of public policy, but it is especially acute in education because of the extraordinary political power of the teachers unions. The teachers unions have a strong self-interest in preserving the purely governmental system of top-down control that has prevailed since the Progressive Era. This is a system that works to their great advantage. By keeping the system as it is, they are guaranteed a safe, noncompetitive environment in which to organize teachers and engage in collective bargaining; they are assured substantial levels of membership and resources; they are able to convert their huge memberships and deep financial pockets into tremendous political clout with elected officials; and they use this clout to wield massive influence over educational policy, at all levels of government, in pursuit of union interests and the occupational interests of teachers—which often come into conflict with what is best for children and effective schools.⁵²

School choice, and especially vouchers, would upset the union applecart. A voucher system would allow money and children to flow from public to private, threatening a sharp drop in union membership and resources. It would disperse teachers to private schools where they would be much harder for unions to organize. It

51. See DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); Moe, *supra* note 7; Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3:2 J.L. ECON. & ORG. 243, 243-77 (1984).

52. For a more detailed discussion of the political power and organizational interests of the teachers unions, and the role they have played in the politics of school choice, see generally Terry M. Moe, *Union Power and the Education of Children*, in COLLECTIVE BARGAINING IN EDUCATION (Jane Hannaway & Andrew J. Rotherham eds., 2006); Terry M. Moe, *The Politics of the Status Quo*, in OUR SCHOOLS AND OUR FUTURE (Paul E. Peterson ed., 2003); and MYRON LIEBERMAN, THE TEACHER UNIONS (1997).

would promote competition among schools, which would put union schools at a disadvantage (because of their higher costs and organizational rigidities). And it would create a more decentralized, less regulated system in which the unions would have less power and control. Not surprisingly, then, the teachers unions are flatly opposed to vouchers—even when they are only available to the poorest children in the worst public schools.⁵³

It would be nice to think that, with a choice system giving policymakers such a vast range of options, well-intentioned decision makers would find many ways of using choice and competition to improve upon the existing top-down system. The reality of politics, however, is that the teachers unions are by far the most powerful actors in the world of education policy, and they employ their power to protect the existing system and prevent vouchers and other types of choice systems from being adopted at all. Moreover, when they don't have quite enough power to stop some version of choice from being adopted, they use what power they have to insist on structural designs that minimize the amount of choice and competition the system will actually deliver—by, for example, limiting the size of the vouchers, the numbers of children who are eligible, and the types of schools that can participate.⁵⁴

The upshot is that serious, thoroughgoing proposals for school choice are usually defeated in American politics. And those that succeed in getting adopted—the real-world choice systems now in operation—are often burdened with structures that do *not* put choice and competition to fully effective use in promoting important social values, and indeed are intended to stifle their impacts.

Consider, for example, the original design of the Milwaukee voucher program. In this first breakthrough for the voucher movement, the unions and their allies weren't able to stop a choice system from being adopted for low-income kids in Milwaukee.⁵⁵ But

53. See, e.g., CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* (2003); HUBERT MORKEN & JO RENÉE FORMICOLA, *THE POLITICS OF SCHOOL CHOICE*, (1999); National Education Association, <http://www.nea.org/vouchers/index.html> (last visited Mar. 4, 2008); American Federation of Teachers, <http://www.aft.org/topics/vouchers/index.htm> (last accessed Mar. 4, 2008).

54. For a detailed discussion of the politics of vouchers, including the unions' role in it, see MOE, *SCHOOLS*, *supra* note 12. See also MORKEN & FORMICOLA, *supra* note 53; WITTE, *supra* note 20, at 58–62; BOLICK, *supra* note 53.

55. See BOLICK, *supra* note 53.

they did succeed (among other things) in restricting eligibility to just 1000 kids in a district of 100,000, prohibiting vouchers for religious schools, and prohibiting even secular schools from participating if more than half their kids would use vouchers. As a result, just seven schools initially signed up to be part of the program, and these schools did not have nearly enough slots to handle even the 1000 kids who were eligible to receive vouchers. The number of students exercising choice was thus kept quite low, to a mere 341 in the first year. And during the first six years of the program, as noted earlier, these built-in limitations on the supply side led to a situation in which fully three-fourths of the voucher students attended just three private schools.⁵⁶

Meantime, Milwaukee was being portrayed as a critical test of the efficacy of vouchers. For almost anyone with an interest in the issue, it seemed, evidence from the Milwaukee experience was awaited with great anticipation, and it was the subject of much publicity and controversy.⁵⁷ But most of the hullabaloo was quite uncalled for. The fact is that Milwaukee was not a critical test at all. The program gave vouchers to very few children. It allowed families very few private schools to choose from. It provided the public schools with almost no competition. And the question that mesmerized everyone's attention—whether kids actually learned more as a result of vouchers—was hardly worth exploring. What difference does it make if the kids in three private schools do or do not outperform the kids in the public schools? In this case, comparisons of student achievement could tell little about what choice and competition are capable of contributing because the enemies of the program did everything they could to keep choice and competition to a minimum.

The teachers unions and their allies have done the same in trying to limit other forms of school choice as well.⁵⁸ Charter schools, for

56. See WITTE, *supra* note 20, for details of the Milwaukee program.

57. See, e.g., Lynn Olson, *Math Gains Noted for Students in Voucher Program*, *EDU. WK.*, Feb. 19, 1997, http://www.edweek.org/ew/articles/1997/02/19/21choice.h16.html?qs=mach_gains_noted; Mark Walsh, *Picture Still Found Mixed for Choice Program in Wisconsin*, *EDU. WK.*, Jan. 20, 1993, http://www.edweek.org/ew/articles/1993/01/20/17choice.h12.html?qs=picture_still_found_mixed.

58. On the history and characteristics of charter schools, see CHESTER E. FINN, JR. ET AL., *CHARTER SCHOOLS IN ACTION: RENEWING PUBLIC EDUCATION* (2000); JOE NATHAN, *CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION*, (1996); and PAUL T. HILL, *CHARTER SCHOOLS AGAINST THE ODDS: AN ASSESSMENT OF THE*

example, are public schools of choice that are granted substantial autonomy from district control and offer parents alternatives to the regular public schools. Unlike a voucher program, charter schools do not allow money and children to flow from public to private, but they are still threatening to union interests. They draw money and kids away from the regular public schools where union members teach, and their teachers usually need not be part of the district collective bargaining contract. In attracting students away, moreover, the charters have an advantage because they have greater freedom to design programs that appeal to parents, and they are less burdened by the costs and organizational rigidities of the regular schools. The greater the number of charter schools, therefore, the greater the threat to the size and financial well-being of the unions. And as charters spread, the unions and the districts will simply have less control over public education, and less power over the things they care about.

As we ought to expect, the teachers unions have battled to prevent charters from succeeding. And when they have failed to stop the adoption of a charter plan—or when they have “supported” charters as a means of heading off vouchers, which they fear even more—they have consistently pressured for structures that limit the program’s scope and impact. Among other things, they lobby for low ceilings on the number of charters that can be created, for requirements that charter teachers be unionized and part of the district bargaining agreement, for low levels of funding, for no assistance with building or set-up costs, and for the extension of as many district regulations and controls as possible.⁵⁹ Since the first charter law was enacted in Minnesota in 1991, charters have been on the rise, and they now enroll some 1.2 million students. But due to the power of the unions and their allies, most of the forty states that allow charters sharply restrict how much choice and competition the new schools can really bring.⁶⁰

KORET TASK FORCE ON K-12 EDUCATION (2007). On their politics, see especially MORKEN & FORMICOLA, *supra* note 53.

59. See, e.g., FINN, *supra* note 58; NATHAN, *supra* note 58. For quantitative studies of charter laws showing that teachers unions have negative (restrictive) impacts, see Christina Stoddard & Sean Corcoran, *The Political Economy of School Choice*, 62 J. URB. ECON. 27 (2007); and Arnold F. Shober et al., *Flexibility Meets Accountability: State Charter School Laws and Their Influence on the formation of Charter Schools in the United States*, 34 POLY STUD. J. 563 (Nov. 2006).

60. For data on charter schools and their enrollments, see generally Center for

What are we to make of this situation? As mentioned earlier, economists certainly recognize that the political process often produces regulations that are too numerous, too burdensome, and counterproductive. Even so, they view our nation's imperfect economic system as far preferable to a centrally controlled economy in which markets play little or no role. And in their prescriptive advice for policy, they generally push for more rational and productive frameworks of economic regulation and for an efficient-as-possible balance between markets and government.⁶¹

We have to approach school choice in much the same way. Real-world choice systems are not built by well-intentioned designers who simply want to put choice and competition to their best possible social uses. They are products of politics and are subject to influence by their political enemies, who want to them to be limited and even to fail. Nonetheless, even these imperfect choice systems are preferable to a purely governmental system that makes no use of markets whatever. And if more power can be mobilized behind the choice movement, these imperfections can be addressed over time through increasingly better designs that allow choice and competition to expand considerably and better realize their potential.

VIII. THE PERFORMANCE OF CHOICE SYSTEMS

There is now a fair-sized body of research literature on the effects of school choice. Unlike most research literatures in social science, this one is constantly embroiled in both public and academic controversy. Part of the reason is that the subject matter is complex and difficult to study in a controlled way that leads to definitive conclusions. But mostly, it is because choice is a politically contentious reform that involves big stakes and is highly partisan. Both sides in the political struggle know that research findings can affect who wins and loses in the policy making process—so their political struggle extends to the research itself, with every data set, method, and conclusion subject to intense dispute.

Education Reform, <http://www.edreform.com> (last visited Mar. 4, 2008). On the legal limits to choice and competition, see especially John E. Chubb, *Should Charter Schools Be a Cottage Industry?*, in CHARTER SCHOOLS AGAINST THE ODDS, *supra* note 58.

61. See, e.g., ALAN S. BLINDER, *HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY* (1989); W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* (4th ed. 2005); Peter Van Doran, *Should Congress Listen to Economists*, 51 J. POL. 319 (1989).

A simple aggregation of these studies, counting each of them equally, would suggest that the literature's overall research findings are mixed: some studies show that choice has positive effects, others do not—and all are disputed. But on scientific grounds, the fact is that all these studies are not all equally meritorious. Some are better designed and more sophisticated than others, and their results have more credibility.⁶² In my own judgment, here is what the best studies of choice have shown thus far:

Vouchers and student achievement. Paul Peterson and associates carried out a series of eight random-assignment studies of targeted voucher programs—a methodology that is the gold standard in this kind of research—comparing low-income students who received vouchers and attended private schools to other low-income students who applied for vouchers but (via random lottery) did not receive them and wound up back in the public schools. The results show that vouchers have positive effects on the academic achievement of African-American students, who are the most numerous students in these urban programs. There were no comparable effects for Hispanic students (and there were very few white students), but it is unclear why.⁶³

Vouchers, competition, and achievement in the public schools. Caroline Hoxby compared the specific public schools in Milwaukee that face the most competition (outflow of students) from vouchers with other public schools in Wisconsin that have comparable student bodies, and showed that the achievement gains were greater in the schools facing competition. When students had vouchers to attend private schools, in other words, the competition led to greater improvement in the nearby public schools.⁶⁴ Chakrabarti, using a similar methodology in a follow-up study of Milwaukee, shows that changes in program rules which led to big increases in the numbers of students leaving for vouchers and increases as well in the per-student costs to the district—and thus should have given the district

62. This is well discussed in recent, comprehensive reviews of the research literature. See especially HERBERT J. WALBERG, *SCHOOL CHOICE: THE FINDINGS* (2007), which discusses the literature on both vouchers and charters; and Patrick J. Wolf, *School Voucher Programs: What the Research Says About Parental School Choice*, 2008 *BYU Law Review* 415, which focuses on vouchers.

63. For an overview of the Peterson research project and a summary of its findings, see generally HOWELL ET AL., *supra* note 34.

64. See Caroline Hoxby, *How School Choice Affects the Achievement of Public School Students*, in *CHOICE WITH EQUITY* 152–62 (Paul T. Hill ed., 2002).

greater incentives to improve its own schools in response—did indeed lead to an improvement in district schools. The change in rules led to stronger incentives, which in turn led to greater improvement.⁶⁵

Charter schools and student achievement. Caroline Hoxby and colleagues carried out two separate studies comparing charter schools to regular public schools, one of schools in Chicago and another of schools in New York, both using a random assignment methodology similar to Peterson's. Analysis showed that students randomly chosen to attend charter schools had greater achievement gains than those who were randomly chosen to attend public schools.⁶⁶ Bryan Hassel conducted a review (in 2005) of twenty-six "rigorous" studies of charter school effects on student achievement gains. He found that sixteen showed charter schools to have greater gains than regular public schools, that six showed them to have comparable gains, and that four showed them to have smaller gains.⁶⁷

Charter schools, competition, and achievement in the public schools. Following the same method she employed in her study of voucher-induced competition, Caroline Hoxby studied the competitive effects of charters in Michigan and Arizona by comparing the achievement gains of public schools that are faced with competition from charters to the achievement gains of public schools that are not—showing that the schools faced with competition have the larger gains.⁶⁸ A study of Texas charter competition by Kevin Booker and colleagues, using a very different methodology that focuses on the degree of charter "penetration" affecting each district and public school, arrives at the same basic conclusion: competition from charters leads to greater achievement gains within the public schools.⁶⁹

65. See generally, Chakrabarti, *supra* note 49.

66. Caroline Hoxby & Jonah Rockoff, *The Impact of Charter Schools on Student Achievement* 40 (Harv. U. Manuscript, 2004); Caroline Hoxby & Sonali Murarka, *Charter Schools in New York City: Who Enrolls and How They Affect Their Students' Achievement*, 2007 Technical Report 30–32 (N.Y.C. Charter Sch. Evaluation Project, 2007).

67. BRYAN C. HASSEL, *CHARTER SCHOOL ACHIEVEMENT: WHAT WE KNOW* (Charter School Leadership Council, 2005).

68. Hoxby, *supra* note 64, at 152–62.

69. Kevin Booker et al., *The Effect of Charter Schools on Traditional Public School Students in Texas: Are Children Who Stay Behind Left Behind?*, 20 (Sep. 2005), available at http://ncspe.org/publications_files/OP104.pdf.

Abstractly viewed, these positive results are not surprising, although a closer look would show that the impacts are usually rather modest in size. Choice ought to have positive effects on student learning by allowing families to put their children in better, more appropriate schools. And because choice gives rise to competition, it ought to promote improvement in the public schools. But the brute reality is that all these choice programs were creations of the political process, and their structures were typically not designed to take greatest advantage of what choice and competition can really offer. On the contrary, they were often designed to limit choice and to ensure that the public schools are as unaffected as possible by any competition. Thus, it is rather remarkable that the evidence on choice—which is based on studies that largely ignore structure and make little attempt to estimate its impact on program performance⁷⁰—is as positive as it is.

IX. CONCLUSION

Whatever one's values may be, and even if one puts almost exclusive emphasis on social equity, it is difficult to argue that American education should not move toward a greater reliance on choice and competition. The system that we have now was designed in the early 1900s and has been frozen in time, a legacy of the past that traps "modern" education in an antiquated iron cage. As a form of organization, it is at the extreme end of the continuum: a system of top-down control by public officials and administrators that makes no serious attempt to take advantage of what choice and competition might have to offer. Eons ago, such an extreme form of organization might have seemed reasonable. But today there is a mountain of social science evidence demonstrating that market forces are powerful engines of efficiency, incentives, and social welfare. To make no use of them at all in education is simply a mistake.

It is also a mistake, however, to think that the only alternative to top-down government is the free market, in which the entire education system is privatized and schools and families are thrown into the marketplace to fend for themselves. While public discussions of the choice issue (including academic research) have often been oriented by the logic and metaphor of the free market, the fact is

70. Chakrabarti is the exception here. See Chakrabarti, *supra* note 49.

that almost no one outside a small group of libertarians is actually calling for reforms that would shift American education all the way to the other end of the continuum. What choice advocates almost always have in mind, and what choice critics would be wise to consider (for their own social purposes), are forms of organization that lie in-between the extremes and involve important elements of both government and markets.

Because this is so, the most useful way to think of any system of school choice is not simply in terms of markets per se, but in terms of how much and what kinds of government they involve—and thus in terms of their structures. Issues of structure are usually ignored or given short shrift in the public debate over school choice, but they are actually the key to the whole thing.

Two points are fundamental. The first is that there is always a structure to any choice system—a specific framework of basic governmental rules, and the details of this structure determine how choice and competition operate, how well the system performs, and what social values it promotes. One voucher system may make all children eligible, provide vouchers of equal value to all kids, allow parents to add on, and impose no rules of fairness or accountability on the private schools. Another voucher system may extend vouchers only to poor children in low-performing school districts, prevent parents from adding on, and require private schools to follow basic rules to ensure that students are treated equally and fairly, that curricula and teachers meet certain standards, that students are learning, and that money is properly handled. Both are choice systems—but this alone does not tell us much about what to expect from them. Clearly, our expectations are very different from one system to the next. And the difference is due to structure.

The second point is that, just as there is a structure of choice, so there is a choice of structures. In-between the extremes of pure governmental control and the free market, there are countless structures that might be adopted for any given choice system. And the people who are in a position to design the system have a great deal of flexibility in putting together combinations of structural features that give them the kind of system they want. How choice works, and toward what ends, is not something that simply happens as a result of the automatic functioning of the market. It is largely a matter of conscious design. When policy makers know what social values they want to achieve, they can choose the structural features

that, by virtue of the specific ways they constrain and direct the power of choice and competition, best promote those values.

As things now stand, these advantages cannot be realized. Real-world choice systems are designed in the political process, and there are strong forces of self-interest and parochialism lobbying for structures that strictly limit what choice and competition can do. The designs that actually get adopted, as a result, are usually not what well-intentioned designers would prefer, and are but a pale reflection of what is possible. But they are at least a beginning, and they represent important and necessary steps toward designs that put markets to effective social use in education. Further steps can only be taken as the choice movement grows in political power—and as the policy makers, who respond to power, make greater efforts to use choice and competition to social advantage.

In the meantime, it is important for people of good faith to see the choice issue in a less simplistic and more constructive light. The fact is that choice is a social force of tremendous power, but how that power is used—which values it promotes and how well it promotes them—depends entirely on the structures in which it is embedded: structures that we as a society are able to choose. The challenge for American education, at this juncture in history, is to get beyond ideological battles over markets versus government and instead to think pragmatically about markets *and* government—and how both can be used, in strategic combination, to yield the results we want for our children and our society.