

REVIEW OF PETER H. SCHUCK'S *DIVERSITY IN AMERICA: KEEPING THE GOVERNMENT AT A SAFE DISTANCE*

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As part of a 1983 consent decree settling a lawsuit alleging racial segregation in the San Francisco public schools, the San Francisco Unified School District created a “diversity index.”¹ The diversity index assigns students among the city’s public schools so that all schools have racial, ethnic, and socioeconomic balance.² Six factors are considered in the placing of a child including: socioeconomic status, academic achievement, the mother’s educational background, standardized test scores, and the language spoken in the home.³ Until 1999, no school could have a student population in which one racial or ethnic group exceeded 45%, and no school could have fewer than four racial groups represented.⁴ In 1999, however, another federal court settlement barred the use of race in school assignments and these provisions were dropped from the index.⁵ Although the San Francisco student population is so ethnically and racially diverse that no one group dominates, residential segregation is still a problem. A report in 2003 found a pattern of resegregation developing in many of the district’s schools.⁶ In particular, San Francisco’s Chinese-American community, which tends to be concentrated in certain neighborhoods, is finding that many of their neighborhood schools are closed to their children, who must be bussed to other areas of the city in order to keep those schools “diverse.”⁷

The quest for diversity in the San Francisco schools is but one example of what Peter Schuck describes in *Diversity in America: Keeping Government at a Safe Distance*⁸ as an American society in which:

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1. See Tiffany Maleshefski, *Diversity Index Could Be Kaput: Chin’s Resolution Quietly Submitted*, at http://sfindependent.com/article/index.cfm/i/103003n_index (last visited Mar. 14, 2005).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See *Profile: Attempt to Integrate Schools in San Francisco Being Called Discriminatory* (National Public Radio Broadcast, Apr. 5, 2004).

8. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING THE GOVERNMENT AT A SAFE DISTANCE* (2003).

diversity is so pervasive, so deeply embedded in everyday life, that we tend to ignore it until our attention is called to it We overlook how diversity shapes our primary relationships, affecting the kinds of people with whom we work, converse, compete, do business, shop, attend school, reside, and worship. We also forget how recently we came to value it and how fragile our commitment to it might prove to be.⁹

Of particular interest to Schuck is the role of law in American diversity discourse and how the law “manages” diversity. As one might be able to guess from his title, Schuck is skeptical about the ability of government to promote or manage diversity through blunt instruments like the law:

The harder the law tries to create or promote diversity, the more law magnifies and highlights its own weaknesses, and the more law reveals as inauthentic, illegitimate, and disvalued the diversity that it fashions.

. . . .

In truth, government and law are natural enemies of diversity, especially when they are most eager to create it. . . . Public law’s hope is to use simplistic categories to facilitate legislators’ control of regulators and regulators’ control of the rest of us. . . .

Even at the most formal level, then, it is more problematic for public law to define, certify, and promote diversity than it is to protect (and, in some cases, exploit) a diversity that has already been defined, authenticated, and valorized by civil society. Genuine diversity value is a product of an opaque, complex, dynamic, mysterious realm of human meaning and identity that we call culture. Where the goal of generating diversity value is concerned, law is seriously disabled. This disability, moreover, cannot be overcome or accommodated. We can only hope to understand its sources and minimize its worst effects.¹⁰

The complex issues surrounding the desegregation of the San Francisco schools lends some credence to Schuck’s view that governmental attempts to create meaningful diversity are doomed to failure, if only because the law has trouble keeping up with the changing social dynamics that are a fundamental part of defining what we mean when we talk about diversity. Yet, despite his lack of confidence in the ability of law and government to manage and sustain diversity, Schuck exhibits a strong respect for the diversity ideal, primarily due to the high regard in which he holds the values of individual choice and personal autonomy. For Schuck, a respect for diversity, rightly understood, allows individuals to flourish in ways that they find most personally authentic, and in a society with strong respect for individual rights, this type of diversity will thrive without government involvement. What, then, does Schuck believe we are talking about in the United States when we discuss diversity?

Schuck defines diversity as “those differences in values, attributes or activities among individuals or groups that a particular society deems salient to the social

9. *Id.* at 10–11.

10. *Id.* at 322–24.

status or behavior of those individuals or groups.”¹¹ Ultimately, what is particularly significant for Schuck is the ongoing, albeit recent, development of diversity as a positive social and political ideal in the United States. Historically, ethnic and religious diversity have been a key source of social conflict and political instability around the world. Why are Americans so certain that diversity will not cause such problems here? Schuck is not convinced that most Americans are at all certain. Indeed, he believes that many are hostile to diversity. Nevertheless, a certain “liberal guilt,” particularly among the nation’s elites, has allowed diversity to entrench itself through “immigration and other preferential policies as a way to acknowledge and rectify past wrongs perpetrated by the U.S. and its allies.”¹² It is from this background that Schuck frames a position in which he argues that attempts to impose and manage the diversity ideal through public laws are misguided.¹³

Schuck traces the current American understanding of diversity to the African-American civil rights struggle, most particularly to the ideological influence of the black nationalist movements during the 1960s.¹⁴ The identity-building strategies initiated by black Americans in an effort to combat negative and destructive racial stereotypes were soon used as a model for the struggles of numerous other groups. Ultimately, this developed into identity politics which, combined with the Supreme Court’s approval of the concept of affirmative action, set a new tone for discussions of American identity:

The new politics of black identity in the 1960s, as well as the adoption of affirmative action programs favoring nonwhite minorities, cast the pursuit of the diversity ideal in a more assertive, even belligerent light. This helped to energize in white ethnic groups their own identity politics, which celebrated their continuing “unmeltability,” underwrote their opposition to affirmative action, and weaned many of them away from the Democratic party. Three decades later the tremors from this political convulsion are still being felt.¹⁵

The American diversity ideal also meshes well with the versions of liberalism that tend to glorify individual freedom and personal autonomy, and which are so prevalent in American political and social life. Central to any comprehensive understanding of Schuck’s opinion of diversity is recognizing that he takes a sympathetic view of the American bias toward a highly autonomous understanding of the human person. This becomes important in his assessment of the effectiveness of law and government in promoting the diversity ideal through, for

11. *Id.* at 7.

12. *Id.* at 49.

13. *See id.* at 14. Schuck notes:

The belief in the diversity ideal, then, appears to be a distinctively, if not uniquely, American (at least North American) theme. Even in the United States . . . this ideal is a very recent invention; many Americans still oppose it, as many always have. Many others, moreover, support it only because they assume that it will be a merely temporary condition.

Id.

14. *See id.* at 51–52.

15. *Id.* at 53.

instance, affirmative action:

[A] threshold question is whether these [claims] are best understood as liberal claims on behalf of persons who seek to exercise their freedom as autonomous individuals, or instead as group claims that are not really intelligible on a liberal, individualistic account of value. I take the former, liberal view, at least insofar as a democratic society like the United States is concerned. In the most individualistic and market-friendly societies like the United States, people intensively crave—and must fashion for themselves—the affective and solidaristic ties to others that individualism inhibits and that people in more communitarian societies simply inherit and take for granted.¹⁶

The history of the United States as an immigrant society is another essential underpinning to any coherent understanding of why the concept of diversity finds so much resonance in American culture. Immigration continues to be a key source of American ethnic, racial, and religious diversity. But the idea that the diversity produced by immigration is a good thing is primarily a product of the social, political, and cultural changes that began in the 1960s. As Schuck points out, prior to a major reform of immigration law in 1965, American immigration policy was blatantly racist and filled with restrictions based on ethnic origin and gender.¹⁷ The animating cultural ideal prior to 1965 was not diversity but assimilation, and certain groups, primarily those of northern European origin, were viewed as more suitable than others. The 1965 reforms ended discrimination based on country of origin, although Schuck provides compelling evidence to suggest that the liberalization of immigration quotas passed the Congress based on assumptions that the reform would favor “white” immigrants from southern and eastern Europe.¹⁸ There was little thought of opening the country up to people from Asia, Africa, and Latin America, but it is the immigrants from these areas that have transformed the ethnic make-up of American society over the last forty years. This has created a “demographic diversity” that few anticipated in the 1960s:

[I]mmigration and citizenship policies combine with illegal migration to produce high levels of demographic diversity. By itself, this diversity-in-fact is merely that, a fact; it is simply a matter . . . of counting and classifying. But it is a fact whose greatest significance is normative, not empirical. What matters most are the social values diversity serves, not the bare facts denoted by ethnic statistics. We want to know how diversity does and should affect how Americans think of themselves as a political community, the political values they share, the rights they demand and the duties they accept, what they expect of new members, and how they design their institutions, including law, to serve those expectations.¹⁹

16. *Id.* at 61–62.

17. *Id.* at 75, 83.

18. *See id.* at 87–88. Schuck also notes that it was not until the 1990s that American immigration law completely shed its Eurocentric bias. For instance, the Irish had enjoyed preferential treatment throughout the late 1980s and early 1990s. *Id.* at 124–27.

19. *Id.* at 98.

Schuck's preference for liberalism strongly protective of personal autonomy helps him answer these questions:

[T]he law should, insofar as possible, leave minority cultures to their own devices, consistent with the overriding need to maintain public order and uphold constitutional values. This position means, among other things, that government should not promote or even preserve cultural diversity beyond what is necessary to vindicate individuals' constitutionally guaranteed autonomy, freedom of speech, and equal protection of the laws.²⁰

But this approach does not get to the heart of the problem that diversity creates for American society. Are these abstract ideals sufficient for creating the kind of unity that will sustain a society over the long-term? Schuck himself notes that being American seems less central to citizens' identities than it has ever been.²¹ The culture to which most immigrants are expected to assimilate is "fueled by market incentives, the need and desire to learn English, the allure of sports, and a powerful, mass-media-shaped national culture."²² More and more immigrants seem to be maintaining ties with the "old country" in order to shield themselves and their children from the destructive and dysfunctional aspects of the self-centered and materialistic values that are so central to American identity.²³

Schuck believes the immigration laws, at least as currently structured, are a poor tool for encouraging diversity because their classifications are too simplistic, and they are too easily manipulated for political purposes and by groups seeking competitive advantage.²⁴ The latter case is best exemplified by the battle over bilingual education, which Schuck believes has for the most part failed large numbers of students.²⁵ Nevertheless, these programs have been kept alive by certain political interests that have manipulated diversity rhetoric to entrench bilingual education programs and the patronage jobs, funding, and authority they provide.²⁶

Schuck also looks at affirmative action, residential neighborhood integration, and religion to provide examples of other areas where public law has attempted to promote and manage diversity with, at best, mixed results.²⁷ He gives his most detailed attention to affirmative action and residential neighborhood desegregation, and he draws some interesting lessons from legal activism in those areas to support his generally unfavorable disposition toward government action designed to promote diversity.

At first blush, the controversy surrounding affirmative action in the United States seems to support Schuck's contention that imposed diversity through legal

20. *Id.*

21. *See id.* at 100.

22. *Id.* at 101.

23. *See e.g.*, Lynette Clementson, *For Schooling, A Reverse Emigration to Africa*, N.Y. TIMES, Sept. 4, 2003, at A21.

24. SCHUCK, *supra* note 8, at 132.

25. *Id.*

26. *Id.* at 133.

27. *See id.* at 203–308.

and government mandates creates more problems than it solves.²⁸ He notes, “[t]he diversity rationale has transformed a temporary, limited tactic into an almost theological orthodoxy that skin color per se confers diversity value, an orthodoxy confirmed by many elites who should, and do, know better.”²⁹ Even Schuck admits that African-Americans may have a unique moral claim in the context of American society for some sort of acknowledgment of past wrongs.³⁰ But Schuck is no fan of affirmative action. He argues quite persuasively that the social construction of race is in major flux in the United States today, due in large part to waves of immigration from the Third World. But what really seems to bother him is the way that affirmative action distorts the allocation of benefits in a society that places a high value on individual achievement as defined by a principle of merit:

[A]ffirmative action, although well intended, is hard to square with liberal ideals in general, and with the diversity ideal (properly understood) in particular. The social benefits are too small, too arbitrarily and narrowly targeted, and too widely resented to justify the costs that it imposes—its unfairness to other individuals, its propensity to corrupt and debase public discourse, its incoherent programmatic categories, and its reinforcement of the pernicious and increasingly meaningless use of race as a central principle of distributive justice rather than the other distributive principles, particularly merit, with which most Americans, whites and minorities alike, strongly identify.³¹

Schuck places a great deal of emphasis on the concept of merit, and he believes that affirmative action is largely responsible for giving spots in elite institutions of higher education to large numbers of African-Americans for which, under a principle of merit as it is generally understood in American society, they are not really qualified and do not otherwise deserve. He points to studies that demonstrate that black applicants to highly selective institutions of higher education have a huge advantage over similarly situated white applicants.³² One

28. *Id.* at 134. Schuck states:

Affirmative action policy is even more divisive and unsettled today than at its inception forty years ago. This is a remarkable sociopolitical fact. I know of no other public policy since the rise of the administrative state during the New Deal that has remained so intensely unpopular among whites and among many minority individuals, yet has survived so long.

Id.

29. *Id.* at 202.

30. *See id.* at 201. Schuck argues:

My point, emphatically, is not to deny that appalling inequalities of opportunity persist; no informed person could possibly do so with a straight face. Rather, it is to insist that race today is a poor proxy for the conditions affirmative action is supposed to remedy and that it is steadily becoming an ever cruder and more misleading proxy as the number of multiracial Americans increases and as intragroup differentiations proliferate.

Id.

31. *Id.* at 135.

32. *Id.* at 147–48 (“There is little disagreement about the actual magnitude of the preferences enjoyed by black applicants . . . [B]y any objective standard, the preference is very large—one might say *immense*—although its precise magnitude probably cannot be determined.”)

perceives a barely concealed sense of outrage here, and Schuck seems to be particularly concerned with the unfairness to other applicants to elite universities who are denied admission due to the preferential treatment black applicants receive. But Schuck runs into some trouble on this issue. He admits that black graduates of these schools tend to perform well as professionals and members of the broader community, and that affirmative action, particularly in higher education, has been a significant factor in black social and economic progress.³³ He also admits that the potential for harm to an individual white applicant because of affirmative action preferences is quite small.³⁴ Indeed, one need only look at the small number of blacks in elite higher education to see why this is so.³⁵

Are current white applicants to elite institutions any more burdened by affirmative action today than their predecessors were by the presumptions favoring certain private preparatory schools and legacies forty years ago? It is probably easier for middle or working class white students from public high schools to get into Yale or Harvard now than it was when George W. Bush and John Kerry were applying to college.³⁶ One explanation is that the same values and social changes that helped support affirmative action for African-Americans have also broken down social class barriers that inhibited upward mobility for lower-status whites in

It is interesting to note, however, that new research shows the benefit minorities receive in admissions to elite colleges and universities is about the same as the one accorded to athletes:

Among students with comparable SAT scores, recruited athletes were about 30 percentage points more likely to be admitted to one of the colleges studied [in an analysis of admissions data by William Bowen, president of the Mellon Foundation]. Underrepresented minority students were about 28 percentage points more likely to be admitted.

Peter Schmidt, *Noted Higher-Education Researcher Urges Admissions Preferences for the Poor*, CHRON. OF HIGHER EDUC., Apr. 16, 2004, at A26.

33. See SCHUCK, *supra* note 8, at 149–50; 158–59; 174–75.

34. *Id.* at 172.

35. For instance, in 2000, blacks made up about 11% of all students in American degree-granting institutions. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2003-067, *The Condition of Education 2003* at 246 (2003). Black students were about 9% of all students enrolled in professional degree programs. *Id.* at 24. Schuck cites the highly regarded Bowen-Bok study on affirmative action in higher education and notes the authors' finding that affirmative action really matters little once admissions to highly selective schools are excluded from analysis—most institutions of higher learning accept all of their applicants. See SCHUCK, *supra* note 8, at 147 (citing WILLIAM G. BOWEN AND DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998)).

36. New evidence now suggests, however, that more and more of the spots at elite institutions of higher learning are going to students from the nation's wealthiest households:

In 2000, about 55 percent of freshman at the nation's 250 most selective colleges, public and private, were from the highest earning fourth of households, compared with 46 percent in 1985. . . . The number from the bottom fourth slipped slightly over that period, while those from the middle 50 percent fell sharply.

David Leonhardt, *As Wealthy Fill Top Colleges, New Efforts to Level the Field*, N.Y. TIMES, Apr. 22, 2004, at A1. Data like this suggest significant growth in income inequality in this country and a decline in social mobility for significant numbers of Americans, yet it is affirmative action and the benefits it confers on a relatively small number of black students that seems to be the major focus of concerns about distributive justice in higher education.

American society. Schuck's main concern seems to be that the existence of affirmative action impedes the development of a "pure" meritocracy in American elite higher education. Although he believes that private institutions should be free to use preferences, he does not think that these policies are appropriate for the state.³⁷ Thus, affirmative action should be forbidden at elite state schools such as California–Berkeley, Texas, Michigan, and Virginia. These are, however, the types of "elite" schools that are most accessible to minority students from traditionally disadvantaged groups.

Schuck next takes on residential diversity. He argues that attempts to promote diversity within neighborhoods through legal mandates forbidding housing discrimination have met with limited success. Of particular interest here is his view that attempts to diversify residential neighborhoods run up against a general acceptance among Americans of an economic or class discrimination in the nation's housing markets.

This "classism," to use Schuck's term,³⁸ basically boils down to the view that inability to pay the market rate for housing in a particular neighborhood is a reasonable, one might even say morally permissible, barrier to entry in the housing market. In other words, Schuck believes that racism and ethnic prejudice may not necessarily be major causes of ongoing residential segregation in the United States, economic class bias may be. Of course, in many instances it is difficult to separate race and class prejudice. Given the nation's history, high concentrations of African-Americans and Latinos have never been associated with "better" neighborhoods for most whites. Anti-discrimination laws were an attempt to break through this prejudice and the negative stereotypes it tends to nurture. Schuck, however, would prefer to see "personal predilection" drive residential diversity.³⁹ Yet, housing segregation, particularly the ongoing isolation of large numbers of African-Americans, is a huge social problem in the United States, and there is convincing research that shows that minorities fare better when they live in integrated settings.⁴⁰

37. SCHUCK, *supra* note 8, at 135–36. The author notes:

For sound *policy* reasons, then, I would bar government from sponsoring affirmative action, as distinguished from non-discrimination In contrast the law should allow private institutions that are associational in nature . . . to use affirmative action for diversity, exclusivity, or other associational purposes so long as the association meets the larger community's most fundamental normative commitments, including non-discrimination against minorities.

Id.

38. *Id.* 206–7; 213–14.

39. *Id.* at 218.

40. Sheryll Cashin has demonstrated how the solidly middle-class heavily African-American suburbs suffer from discrimination and economic underinvestment, and argues that African Americans fare better in terms of access to government services and economic and education opportunities when they live in integrated settings. See Sheryll D. Cashin, *Middle Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729 (2001). She notes:

[A]ffluent, largely white suburban communities tend to garner the majority, sometimes an overwhelming majority, of a region's economic growth. Suburban communities with large black populations—communities that attract less economic growth and more social service burdens—tend to have higher tax rates, higher public debt, and

Schuck looks at three attempts by the courts to force the integration of lower income minorities into middle-class residential communities.⁴¹ This aspect of housing desegregation relates directly to his contention that most Americans accept economic discrimination as an appropriate form of sorting in American life, and he is particularly interested in the case of *Yonkers*, New York.⁴² In *Yonkers*, the court mandated a scattered site low-income housing plan primarily directed at the more affluent areas of the city. It was never well received by the community, and it provoked lasting animosity on all sides. On the other hand, Schuck notes with approval the results of the *Gautreaux* litigation in the Chicago metropolitan area, where there had long been strong resistance to the racial integration of residential neighborhoods:

Gautreaux has improved housing options for thousands of low-income minority families who now enjoy some of the hoped-for social, economic, and educational benefits of integration. In contrast, endless litigation in *Mount Laurel* and *Yonkers* has yielded little housing improvement and even less genuine integration. What accounts for the different outcomes?⁴³

Schuck believes the role of the market in housing is a powerful constraint on the government's ability to shape housing choices, and that the tools available to the government impose diversity on neighborhoods are crude at best.⁴⁴ Furthermore, American approval of economic class discrimination means that the culture rejects the notion of a right to live in any neighborhood one chooses, and many communities will mobilize against a governmentally mandated idea of diversity that is counter-cultural in this regard.⁴⁵ Schuck may, however, be trying to prove too much with his reliance on the negative experience of *Yonkers*:

Seldom, if ever, has so much judicial power been exerted for so long against so many officials and produced so little progress as in *Yonkers*. The culprit, of course, has always been the city government itself, not the judge who sought tirelessly, if often fecklessly, to uphold the law But neither this fact nor the fact that *Yonkers* is an unusually pathological case should blind us to the deeper, more structural problems that arise when the law defines, promotes, and mandates diversity in certain ways.⁴⁶

If *Yonkers* is an "unusually pathological" case, why does it serve as a compelling example for Schuck's point? Indeed, *Gautreaux* proves government

substantially different patterns of expenditures for local services than do other suburbs. Empirical studies also suggest that blacks receive better government services from consolidated metropolitan government than from segregated, majority-black government.

Id. at 758.

41. SCHUCK, *supra* note 8, at 218–57.

42. *Id.* at 231–57.

43. *Id.* at 258.

44. *Id.*

45. *Id.*

46. *Id.* at 259.

and court involvement in residential neighborhood diversity can be quite successful. Does the fact that large numbers of Americans have accepted a morally dubious equation of wealth with privilege mean that the government should support them in this belief? Is the market the fairest arbiter of how resources like decent schools and public services should be distributed within our society? This is not to say that neighborhoods should be bludgeoned into accepting diversity as defined by others, but when the market enhances destructive cultural norms like racism or isolation of the poor, why is it inappropriate to fashion public remedies to counter the market's effects? There are many examples of relatively successful government intervention to diversify residential neighborhoods which, had the market been left to its own devices, were destined to become racially or economically segregated.⁴⁷

CONCLUSION

Peter Schuck has written an extremely well-documented book on a topic of immense importance, not only to the future of American society but also to the stability of liberal democracies around the world. Although his distrust of government and his admiration for the highly autonomous notion of individual freedom in American liberalism is consistent with the views of many people in this country, one is tempted to ask whether this position ultimately limits the potential of the book as a scholarly resource. Many Americans have embraced diversity because they recognize that a logical result of American understandings of individualism and liberal autonomy is that a shared notion of the collective identity of the American population, such as it exists, provides a weak platform for social cohesion. The United States has no choice but to embrace diversity because, notwithstanding attempts to pretend otherwise, diversity has been the nation's reality from its inception. In our democracy, it is the federal government and the legal system that provide a common point of civic reference, engendering a degree of broad-based respect that few other institutions in American life can claim. Given these realities, relying on the collective wisdom of individuals to produce diversity from the ground up seems a bit risky, although it may work from time to time to produce a grass-roots diversity that achieves wide popular support. Nevertheless, American history is rife with examples of fear of and disdain for those who were different, fears typically nurtured by deeply held "personal predilections." These tendencies have been a much greater threat to the dignity of human beings in this country than any attempts by the government to use its authority to create a civic culture that respects human difference.

47. The Moderately Priced Dwelling Unit Program (MPDU) in Montgomery County, Maryland, near Washington, DC, is one example. Since the 1970s, Montgomery County has maintained a mandatory inclusionary zoning law that requires 12–15% of the total number of units in every subdivision or high-rise building of thirty-five or more units to include "moderately priced" units as defined by the county government. See MONTGOMERY COUNTY PARK & PLANNING, MD., *Overview of Moderately Priced Dwelling Program*, available at www.mcnccppc.org/research/analysis/housing/affordable/mpdu.shtml (last visited Mar. 7, 2005).