



2005

Choice, Conflict, and the Zero-Sum Game of Identity Politics

Peter Skerry

Follow this and additional works at: <https://digitalcommons.law.yale.edu/ylpr>



Part of the [Law Commons](#)

Recommended Citation

Peter Skerry, *Choice, Conflict, and the Zero-Sum Game of Identity Politics*, 23 *YALE L. & POL'Y REV.* (2005).
Available at: <https://digitalcommons.law.yale.edu/ylpr/vol23/iss1/9>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in *Yale Law & Policy Review* by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Choice, Conflict, and the Zero-Sum Game of Identity Politics

Peter Skerry[†]

Peter Schuck's *Diversity in America: Keeping Government at a Safe Distance* is an impressive capstone to an extraordinary career. Schuck's work has included consumer advocacy, public service, residence at a Washington think tank, law-school teaching, and scholarship on issues ranging from product liability and cost-benefit analysis to citizenship and race, ethnicity, and immigration. A former Nader's Raider¹ and aide to Joseph Califano,² Schuck has written what might be construed as a latter-day neoconservative manifesto at a time when the neoconservatives themselves have abandoned social policy, not to mention their original convictions about the limits of governmental action. Echoing but hardly parroting Ronald Reagan's slogan, "Getting gov'ment off our backs," Schuck's subtitle points to a politically astute, but intellectually rigorous perspective that an independent soul like the late Daniel Patrick Moynihan³ might have endorsed.

Yet this ambitious, insightful work goes further. Schuck embraces diversity with the enthusiasm of a multiculturalist, emphasizing "the fluid, forward-looking political identities that a robust democratic spirit inspires and requires."⁴ But more thoughtfully than almost any multiculturalist, Schuck

† Professor of Political Science, Boston College; Senior Fellow, The Brookings Institution. B.A. Tufts University, 1973; Ed.M., Harvard University, 1974; Ph.D., Harvard University, 1991.

1. This epithet came to apply to the young law students and lawyers who worked with Ralph Nader in the 1960s and 1970s. See Wikipedia, *Ralph Nader*, at http://en.wikipedia.org/wiki/Ralph_Nader (last modified Nov. 15, 2004).

2. Secretary of Health, Education and Welfare during the Carter Administration.

3. Moynihan represented New York for four terms in the U.S. Senate from 1976 to 2000. He died in 2003. Early in his career, Moynihan was at the center of the circle of policy intellectuals who, during the 1960s, dissented from the strain of liberalism which, in their view, was stridently critical of America's role in Vietnam and blindly supportive of the War on Poverty and other social programs. Emphasizing the importance of confronting the threat of Soviet communism across the globe and of acknowledging the legitimacy of the public's anxieties about crime and social disorder, whether on campuses or in inner cities, these former liberals were dubbed "neoconservatives" by their detractors. Writing in journals like *Commentary* and *The Public Interest*, Moynihan emerged as their most visible and ubiquitous voice—as a professor at Harvard, as Domestic Counselor to President Richard Nixon, as Ambassador to India, as United Nations Ambassador, and then as U.S. Senator. But over the course of his career in the Senate, Moynihan drifted from the neoconservatives, though he never completely embraced—nor was he embraced by—the liberals who came to dominate the Democratic Party. See ROBERT A. KATZMANN, DANIEL PATRICK MOYNIHAN: THE INTELLECTUAL IN PUBLIC LIFE (1998).

4. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 199 (2003).

traces the motive force of diversity to our individualistic, limited-government, and market-oriented values and institutions. This leads Schuck to a deep appreciation of the overwhelming power of individual choice in American life, and he consequently advocates policies that work *with* choice, not against it. He is critical of affirmative action, bilingual education, and the kind of racial engineering attempted in the infamous *Yonkers* housing case.⁵ At the same time, Schuck interprets diversity to allow the Boy Scouts and other private associations to exclude homosexuals, and advocates vouchers and similar choice schemes that would permit religious schools and other faith-based organizations to teach and manage themselves according to religiously inspired morality.

While demonstrating how America has always been diverse, Schuck owns up to the many times in our history that we have failed to live up to our ideals.⁶ He argues persuasively, however, that since the 1960s we have succeeded such that we are now truly unique among nations of the world.⁷ And in his words, "There is now no turning back."⁸ Yet here again, Schuck is no misguided multiculturalist spouting tolerance in one breath, speech codes in the next. According to Schuck, America's "turbulent, vibrant, feisty, competitive, jostling society of diverse strangers"⁹ calls for "thicker skins" and more candor, not to mention "constructive engagement, forceful rebuke, [and] pointed rebuttal."¹⁰ But Schuck also calls for individual restraint, for an "internal shrugging of shoulders and biting of tongues" in order to promote "deeper tolerance, reserving the law and other heavy artillery for dealing with incitements to violence, traditional defamation, and other extreme cases."¹¹

In emphasizing the limits of the law, Schuck again echoes the neoconservatives. But in embracing the dynamism of diversity, he sounds more like sociologist Robert Park. Early in the twentieth century, Park and his associates at the University of Chicago took issue with Progressives like Teddy Roosevelt, who were then inveighing against "hyphenated Americans,"¹² and rejecting ethnicity as a legitimate basis for civic inclusion.¹³ Like Park, Schuck understands that ethnic and religious institutions have served as staging grounds for immigrant integration into the mainstream.

5. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987).

6. *See* SCHUCK, *supra* note 4, at 40-56, 75-87.

7. *Id.* at 12-14.

8. *Id.* at 55.

9. *Id.* at 335.

10. *Id.* at 332-35.

11. *Id.* at 335.

12. THOMAS G. DYER, *THEODORE ROOSEVELT AND THE IDEA OF RACE* 133 (1980).

13. *See* GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 53-57 (2001); MORRIS JANOWITZ, *THE LAST HALF-CENTURY: SOCIETAL CHANGE AND POLITICS IN AMERICA* 453-55 (1978).

Park once pithily observed to a colleague in the aftermath of the 1943 Detroit riot: "I am not quite clear in my mind that I am opposed to race riots. The thing that I am opposed to is that the Negro should always lose."¹⁴ Like Park, Schuck understands that diversity implies fierce inter-group competition, perhaps at times open conflict.

The one analyst Schuck does *not* sound like is Samuel Huntington, whose recent book, *Who Are We? The Challenges to America's National Identity*,¹⁵ points with alarm to many of the developments that Schuck accepts as inevitable and seeks to harness. While the two do agree on some points (for example, rejecting bilingual education and embracing America's religiosity), Schuck's insight that diversity points to America's assimilative capacities—not their absence or failure—is not only more appealing, it is in my view more accurate. Nevertheless, as I will note below, Huntington is not so easily dismissed.

Central to Schuck's analysis is the idea that while diversity in America is partly the result of our immigration history, it is also the result of the on-going interplay among America's individualism, market-driven values, and decentralized governmental structures. His chapter on religion is the most apt example. Noting that "the religious market" is far more diverse than suggested by Will Herberg's trichotomy of "Protestant, Catholic, Jew,"¹⁶ Schuck demonstrates that this is not simply because we now have increasing numbers of Sikhs, Buddhists, Bahá'ís, Zoroastrians, and Muslims. It is also because Herberg's three broad categories are themselves "far more heterogeneous liturgically, doctrinally, organizationally, demographically, and in their geographic distributions than the same groups are elsewhere in the world."¹⁷ Schuck further notes that

this diversification is accelerating. For each church that amalgamates with others today, many more are born afresh or separate from their parent organizations . . . Here, as elsewhere in American life, technological and market forces have played their part in spawning diverse forms of worship—tele-churches, mega-churches, and pastoral teachings on the Internet.¹⁸

This means that assimilation itself, with its myriad possibilities of intermarriage and geographic and social mobility, leads to more diversity, not less. Indeed, Schuck argues that contemporary America is more diverse—ethnically, racially, religiously—than even the most dedicated advocates of diversity understand. This is why he argues that "race today is a poor proxy for

14. See FRED H. MATTHEWS, *QUEST FOR AN AMERICAN SOCIOLOGY: ROBERT PARK AND THE CHICAGO SCHOOL* 189 (1977).

15. SAMUEL P. HUNTINGTON, *WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (2004).

16. WILL HERBERG, *PROTESTANT—CATHOLIC—JEW: AN ESSAY IN AMERICAN RELIGIOUS SOCIOLOGY* (1955).

17. SCHUCK, *supra* note 4, at 266.

18. *Id.* at 266-67.

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.”¹⁹ His opposition to affirmative action, bilingual education, racial quotas to avoid tipping points (as at Starrett City²⁰), and even the racial and ethnic categories used by the U.S. census are based in his conviction that “[a]t some point, the arbitrariness of the traditional race-as-proxy-for-egregious-disadvantage becomes so unmistakable and insupportable that it must fail legally, politically, and morally.”²¹

Not only should government and law get out of the way of this unstoppable process, Schuck maintains, they should work with it. He rejects governmental intervention to the extent evident with the Kiryas Joel Satmar Hasidic community,²² but he is generally supportive of government subvention of faith-based organizations—even Catholic schools “condemning premarital sex, divorce, homosexuality” or excluding unwed mothers from the teaching staff, as long as they “advance a genuine, legitimate educational mission.”²³ Schuck acknowledges that it would be hard to see how an all-white school would meet such a test, but he is fully prepared to debate what specific sort of test ought to exist. And the more robust that debate—the more it involves a contentious and spirited give-and-take—the more Schuck would seem to welcome it.

Schuck is surely correct about the depth and vibrancy of diversity in America. And in my view, both his policy perspective and his specific proposals are on the right track. Nevertheless, I fault him for paying too little attention to how problematic diversity and choice are in the context of contemporary American politics.

At the heart of Schuck’s argument is the notion that the tensions and conflicts generated by diversity are moderated by our political system: “Federalism and a decentralized party system manage much political conflict by channeling it to the states and localities rather than elevating it to the federal level where it would be magnified by the higher stakes in a single national solution.”²⁴ He emphasizes that “[t]his muting of political conflict is essential to the survival of a polity as diverse and competitive as twenty-first-century America,”²⁵ and adds approvingly that “[m]any activities that in other countries

19. *Id.* at 201.

20. *United States v. Starrett City Assocs.*, 840 F.2d 1096 (2d Cir. 1988); *see also* SCHUCK, *supra* note 4, at 210-11.

21. SCHUCK, *supra* note 4, at 201.

22. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *see also* SCHUCK, *supra* note 4, at 285.

23. SCHUCK, *supra* note 4, at 307.

24. *Id.* at 329.

25. *Id.* at 328.

are matters for political decision are privatized in the United States.”²⁶

Now, it is true that American politics is more decentralized than in many other liberal democracies. Yet over the last several decades our politics has become much *less* decentralized. So it is surprising when Schuck asserts that “American political parties, for example, are largely organized on a state and local basis; even today, the national parties wield little power except during presidential election years.”²⁷ Not only would most political scientists disagree, they would likely add that politics and policymaking have become more nationalized.²⁸

Our political parties in particular are, more than ever, dominated by highly bureaucratized headquarters in Washington and bound by complicated rules and regulations that are either self-imposed for purposes of diversity or externally imposed by campaign finance regulations. Writes Gerald Pomper, the two major parties have been “torn from their local roots and transformed into national bureaucratic competitors.”²⁹ Timothy Conlan argues that while the states have been carving out a more assertive role for themselves in policymaking, “the direction has generally been toward a more nationalized and less mediated political system, attenuating in the process state and local governmental representation in national politics.”³⁰ And although Conlan observes that state parties have been revitalized, he stresses that this is because the national parties raise funds for and provide technical support to the states between the presidential conventions.³¹

So the story is a complicated one. But there is no need to quibble about the degree to which our politics has become centralized. Suffice it to say that American politics is now considerably more centralized than ever before, and that we consequently enjoy much less “political conflict reduction.”³² Indeed, most observers find our politics more contentious than ever.³³

There are several factors at work here, not the least of which is the rights revolution, which Martha Derthick places at the center of “the strongly nationalizing effects of twentieth-century reforms.”³⁴ As she points out, egalitarianism is the “enemy of federalism. It exalts the autonomous individual,

26. *Id.* at 329.

27. *Id.* at 35.

28. See, e.g., WILLIAM H. LUNCH, *THE NATIONALIZATION OF AMERICAN POLITICS* (1987).

29. Gerald M. Pomper, *An American's Epilogue*, in *PARTIES AND DEMOCRACY IN BRITAIN AND AMERICA* 255, 271 (Vernon Bogdanor ed., 1984).

30. Timothy J. Conlan, *Politics and Governance: Conflicting Trends in the 1990s?*, 509 *ANNALS AM. ACAD. POL. & SOC. SCI.* 128, 129 (1990).

31. *Id.* at 131-32.

32. SCHUCK, *supra* note 4, at 328.

33. See, e.g., Morris P. Fiorina, *Extreme Voices: A Dark Side of Civic Engagement*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY* 395 (Theda Skocpol & Morris P. Fiorina eds., 1999).

34. Martha Derthick, *How Many Communities? The Evolution of American Federalism*, in *DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY* 125, 126 (Martha Derthick ed., 1999).

whereas federalism, in honoring communities, implies acceptance of distinctions among and even within them.”³⁵

An important vehicle for the rights revolution has been the many public interest and other “citizen groups”³⁶ arising since the 1960s. Because they represent diffuse, difficult-to-organize interests, these rely less on individual membership dues than on third-party funding from wealthy patrons, corporations, and especially foundations. Hence, Theda Skocpol writes of “associations without members.”³⁷ When such organizations do have members, they tend to be widely dispersed, with weak ties to one another and to the leaders. Jeffrey Berry calls this “cheap” membership, because it requires no more time and energy than it takes to write an annual check.³⁸ Robert Putnam describes such checkbook organizations as low on “social connectedness,” with most members “unlikely ever (knowingly) to encounter any other member.”³⁹ Bound together by abstract appeals and symbols rather than face-to-face interaction, the members of public interest organizations are likened by Putnam to Red Sox fans who rarely (in Albert Hirschman’s terms)⁴⁰ exercise “voice” or “loyalty.” When dissatisfied, they simply “exit.”

Such weak membership affords the leaders and staff of public-interest organizations considerable discretion. But it also obliges them to sustain the interest of members and patrons through “outside strategies” aimed at attracting public—especially media—attention. Writing about public interest law firms, Neil Komesar and Burton Weisbrod conclude that their goal is to maximize publicity, not profits. Favorable media attention stimulates funding, especially in a nonmarket environment where the effectiveness of public interest activities can be difficult to assess.⁴¹

Public interest organizations may not dominate American politics, but they certainly set the tone of the policy arenas that Schuck is writing about. They also have a lot to do with the highly contentious nature of contemporary political life. Lacking strong selective incentives to attract and retain individual members, these organizations often rely on ideas and symbols to maintain loyalties. One result is that bargaining and compromise get downplayed. As a clever journalist quipped, “Symbols can not be split in two.”⁴² And as Michael

35. *Id.* at 135-36.

36. JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* (1999).

37. Theda Skocpol, *Associations Without Members*, AM. PROSPECT, July-Aug. 1999, at 66.

38. JEFFREY M. BERRY, *THE INTEREST GROUP SOCIETY* 55 (2d ed. 1989).

39. Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65, 71 (1995).

40. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

41. Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, in *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 80-101 (Burton A. Weisbrod et al. eds., 1978).

42. Dan Schnur, *Everybody's Mad at Davis on Prop. 187*, L.A. TIMES, Apr. 29, 1999, at B9.

Walzer notes, the “thin politics” characterizing public interest organizations unites people not around common commitments but against common enemies.⁴³ Donald Brand underscores the point: “It is highly likely . . . that public-interest groups will always be more combative than their interest-based counterparts because conflict generates publicity and allows public-interest groups to mobilize their constituents.”⁴⁴

Commentators increasingly recognize these dynamics. Less appreciated is the connection between public interest organizations and identity politics, which figures importantly in Schuck’s analysis of diversity. Public interest organizations do not focus on delivering selective material rewards to strongly committed members (as, for example, labor unions once did). Rather they focus on attracting and keeping the wavering attention of weakly attached adherents more likely to “exit” than to exert “voice” or “loyalty.” In this respect, these organizations spring from the same social-structural realities that give rise to identity politics—our highly mobile, individualistic, role-segmented society.⁴⁵ And both public interest politics and identity politics work against the moderation of conflict lauded by Schuck.

Many of the organizations representing racial and ethnic groups in America today exhibit these public interest characteristics. Even the venerable NAACP, which certainly began as a locally based membership organization, has become a staff-dominated national advocacy organization heavily reliant on foundations and other third-party funders. An organization like the Mexican American Legal Defense and Education Fund (MALDEF) is a pure example of what I describe here: an organization completely reliant on third-party funders without any members whatsoever. This means that the organization is not constrained to deliver benefits to individual members but instead pursues policy-oriented litigation strategies devised in consultation with foundation supporters. It also means that organizations like MALDEF can afford to posture and often reject compromise.⁴⁶ So instead of “channeling” the conflicts generated by diversity to the local level, where they can be “muted” and “privatized” through bargaining, such organizations elevate conflicts to the federal level, where (in Schuck’s words) they get “magnified by the higher stakes in a single national solution.”⁴⁷

43. MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 17-18 (1994).

44. See Donald R. Brand, *Reformers of the 1960s and 1970s: Modern Anti-Federalists?*, in *REMAKING AMERICAN POLITICS* 27, 38 (Richard A. Harris & Sidney M. Milkis eds., 1999).

45. For an enlightening theoretical discussion of contemporary American society, see GERALD D. SUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* (1972).

46. See Peter Skerry, *Political Institutions and Minority Mobility in the United States*, in *ETHNICITY, SOCIAL MOBILITY, AND PUBLIC POLICY: COMPARING THE U.S. AND THE U.K.* (Glenn C. Loury et al. eds., forthcoming Jan. 2005)

47. SCHUCK, *supra* note 4, at 329.

Schuck understands many of the problems with identity politics, arguing that the clash of diversities “is often a zero-sum game.”⁴⁸ And in a long paraphrase of K. Anthony Appiah, Schuck observes that

the stridency of cultural identity claims may be *inversely* proportional to the robustness of their cultural content and their actual salience for the claimants; that this stridency is often greater for a group’s rising and integrating middle-class members than for their poorer, more isolated co-ethnics; and that these assertions of cultural identity are sometimes nostalgic exercises concealing the erosion of the social infrastructure that supported and invigorated the culture in the past.⁴⁹

Summing up, Schuck quotes Appiah directly: “The new talk of ‘identity’ offers the promise of forms of recognition and of solidarity that could make up for the loss of the rich, old kitchen comforts of ethnicity.”⁵⁰

But when linking identity politics to contemporary American political institutions, Schuck misses a beat. He acknowledges the problems identity politics pose but assumes that they will be worked out in the time-honored fashion of American pluralism. As I have been suggesting, however, pluralistic bargaining is much less in evidence than it used to be. Pluralism assumes that interests—at the individual and at the group level—are multiple, fluid, and cross-cutting. These characteristics allow for relatively smooth, non-conflictual bargaining, because political actors can empathize with the interests of others and therefore moderate their attachments to their own, while perceiving both their own and others’ interests as competing and changeable.

Identity politics directly undermines this key dynamic of pluralism. If my interests are bound up in my identity as a person, then they are not so easily divided up. On the contrary, they are coinciding and cumulative, and they define me as a human being. As Michael Piore observes, identity groups “seem to represent the whole person.”⁵¹ Needless to say, this makes non-conflicting bargaining much more difficult, because compromises feel like challenges to or diminishments of who the bargainer is—of his or her authenticity as an African American, a Latina, a Christian, etc. And despite the primacy of individual choice in America emphasized by Schuck, perceived interests rooted in identity are not readily changed. The individual is likely to say either “I don’t want to let go of my identity” or “Society won’t let me forget my identity” or both.⁵² The result is not the productive give-and-take described by Schuck, but rather an uncompromising rigidity that may not readily change—hence, the volatility of identity politics.

48. *Id.* at 312.

49. *Id.* at 21 (paraphrasing K. Anthony Appiah, *The Multiculturalist Misunderstanding*, N.Y. REV. BOOKS, Oct. 9, 1997, at 30, 32-33).

50. Appiah, *supra* note 49, at 33, *quoted in* SCHUCK, *supra* note 4, at 21-22.

51. MICHAEL J. PIORE, *BEYOND INDIVIDUALISM: HOW SOCIAL DEMANDS OF THE NEW IDENTITY GROUPS CHALLENGE AMERICAN POLITICAL AND ECONOMIC LIFE* 21 (1995).

52. *Id.* at 9-28.

Schuck counsels us to toughen our skins and enter the fray, which will be all the more intense as Americans debate his policy proposals. Fair enough. But I would ask how he reconciles his faith in good old American rough-and-tumble with the zero-sum quality of identity politics. In the contemporary institutional context, expanding individual choice is not likely to result in diminished tension and conflict. Quite the opposite, for conflict is how the relevant political actors maintain themselves. Indeed, the public interest organizations that dominate the policy and political arenas where “diversity issues” play out would have a field day attacking the most thoughtful and courageous of Schuck’s proposals—for example, public funding of religious schools that teach and enforce conservative morality. And we must not overlook that conservative-advocacy organizations, which partake of these same public interest characteristics, would similarly benefit from such cultural warfare.

Which brings us back to Samuel Huntington. Ultimately, Schuck’s brilliant and fascinating book does not pay enough attention to the other aspect of American society that preoccupied Chicago sociologists like Robert Park and now concerns Huntington – namely, the problematic nature of social order. What is going to hold American society together? Schuck warns us, wisely, that the law cannot do this by itself. But neither can individual choice, at least in the present institutional context. Schuck is probably correct that with the kinds of choice-maximizing policies he advocates firmly in place, we would experience diminished tensions and conflicts. But it is not clear how we can get to that point without the sort of gut-wrenching controversies generated by identity politics and public interest advocacy.

The way that “choice” has played out in the context of abortion policy is certainly not an encouraging example. Indeed, over the past thirty years advocacy groups and public interest lawyers on both sides of the issue have sustained a polarized debate that most other advanced democracies have either avoided or long since settled.⁵³ Perhaps even more to the point, during the early 1960s—before the current conflict-prone regime was fully in place—abortion reform was being sorted out at the state level in our then much more decentralized political system.⁵⁴ If the politics of abortion is what Schuck would have us thicken our skins for, then we will have to make them very thick, indeed.

53. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987).

54. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 180-84 (1991).

