

The Supreme School Board

A view from inside the courtroom by PAUL E. PETERSON

The waiting line to hear oral argument before the U.S. Supreme Court formed the night before February 20. Anyone joining after 5 A.M. never got in—except those given special seating, including such notables as Senator Edward Kennedy, Health and Human Services secretary Tommy Thompson, and former White House counsel C. Boyden Gray. It was well worth the wait. Persistent questioning, passionate debate, direct self-contradictions, an electric atmosphere—all were there. As the 80-minute conversation came to an end, a pro-voucher resolution seemed to have just barely emerged, the outcome turning as much on educational facts as constitutional questions.

The Court seemed as much a national school board as an interpreter of the Constitution's Establishment Clause. Questions seldom focused on past jurisprudence—probably because earlier decisions have constructed a wall of separation between church and state as serpentine as the one Thomas Jefferson designed for the University of Virginia's campus. Instead, the day's focus was on vouchers, charter schools, and the woeful state of public education in Cleveland. The justices seemed to realize that they were discussing the future of low-income, inner-city children, not just fine points of legal doctrine.

It was Justice David Souter who first posed the central question to Ohio assistant attorney general Judith French: "Isn't it true that something like 99 percent of the students who were receiving these vouchers are in religious schools?" Such restricted choice was very different from the "choice from [among] the great universe of colleges and universities," where federal aid to religious institutions has been generally regarded as constitutional.

To some of the justices, the choices in Cleveland appeared even more restrictive than the 99 percent figure suggests. In their eyes, the high performance of parochial schools relative to the public schools was damning, at least from a con-

stitutional perspective. "The better the parochial school," said Justice Stephen Breyer, "the less the freedom of choice. . . . If it were my children and I saw these comparisons, I'd say, send them to the parochial school. . . . That's not my religion, but it's very important my child get the best education, and therefore I would be feeling I had to send them there, if that's what I want."

Yet just as it seemed the Court was about to conclude that parochial schools are so good that school choice in Cleveland is meaningless, charter schools—known as community schools in Ohio—were called on to save the pro-voucher argument. In the words of Justice Antonin Scalia, "I assume Justice Breyer could send his child to one of the community schools, which [are] entirely nonsectarian. . . . [These] schools get more money than the sectarian schools." Scalia also noted that the more established and better funded voucher program in Milwaukee has been attracting secular schools in steadily increasing numbers.

When it came time for the anti-voucher forces to make their defense, Robert Chanin of the National Education Association stepped forward. (Curiously, when veteran reporter Linda Greenhouse's story appeared in the *New York Times* the next day, it failed to state Chanin's NEA connections, identifying him only as the attorney for the Cleveland residents who had challenged the program.)

Chanin's most difficult task was to show that the community schools in Cleveland were irrelevant because, in Chanin's view, the justices were legally required to look not at the entire situation in Cleveland but only at the specific statute creating the voucher program. When the attorney restricted his legal vision in this way, he was able to argue, "It is a mathematical certainty that almost all of the [voucher] students end up going to religious schools."

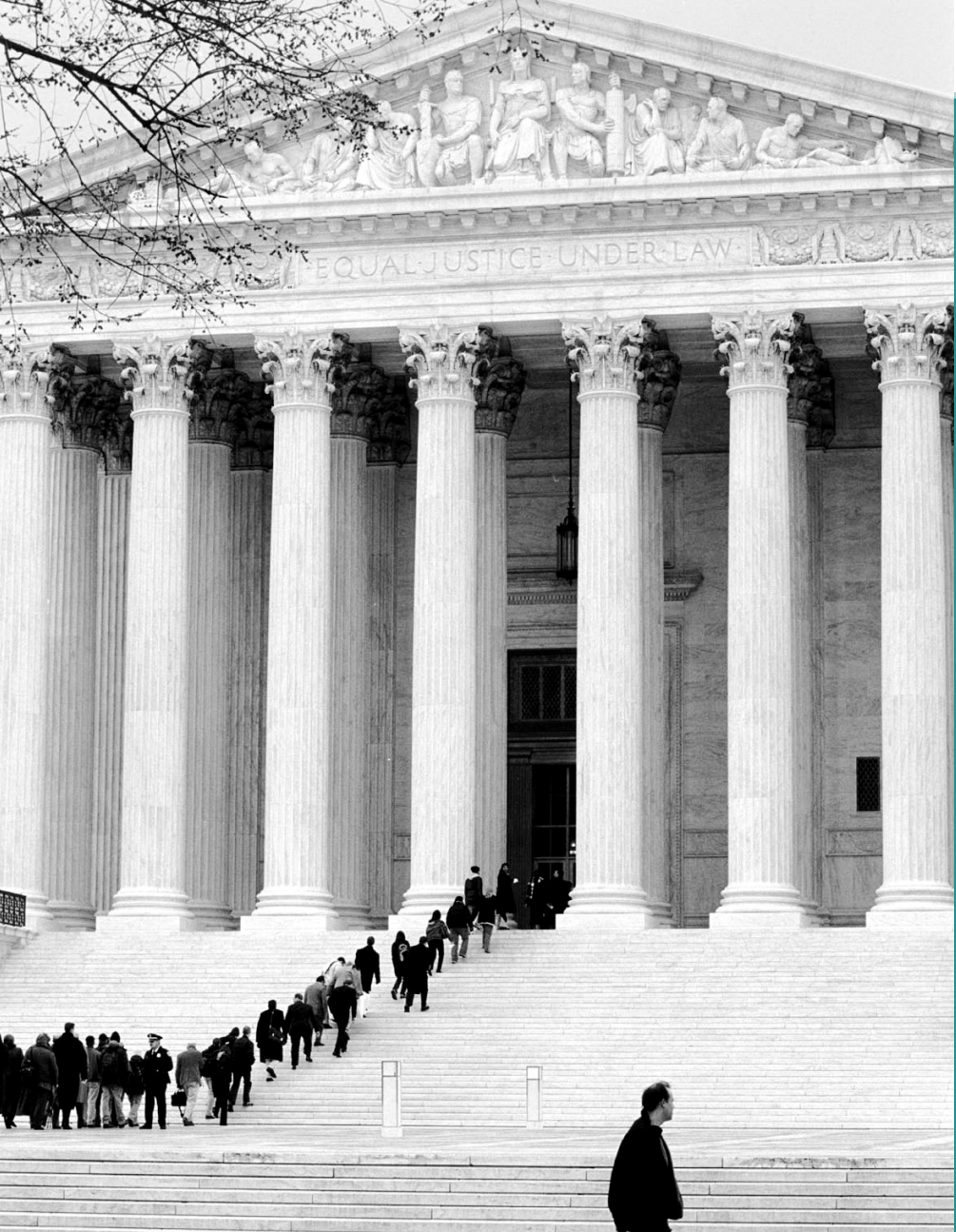
No sooner were these words enunciated than the most dramatic moment of

the morning arrived—a clear, decisive intervention by Justice Sandra Day O'Connor. It was not just what she said—though this was powerful enough—but the fact that O'Connor is expected to cast the decisive vote in this case, as in so many others. For months, even years, it has been evident that the outcome could easily turn on her vote—and the scope of the opinion might well depend on her views. Justices Souter, Ruth Bader Ginsburg, and John Paul Stevens were unlikely to find the law constitutional, and Breyer may have tipped his hand when he observed, rather whimsically, that parochial schools may become increasingly unconstitutional the more they outshine their public-school counterparts. Meanwhile, pro-voucher groups are taking heart from the comments—as well as previous opinions—of Justices Scalia, Clarence Thomas, Anthony Kennedy, and Chief Justice William Rehnquist.

The justices themselves were keenly aware of O'Connor's decisive position. Both sides made subtle appeals to her. Said Souter: "What's bothering me . . . and, I suspect, O'Connor, too," is that the law must be not only neutral on its face but also in its effect, and "at the end of the day, the effect is a massive amount of money [going] into religious schools. . . . That is the sticking point here."

O'Connor had indicated that the voucher program might resemble a New York State tuition-reimbursement program struck down in the 1973 *Nyquist* case. Though this observation must have given hope to the NEA attorney, when he began insisting on mathematical certainties, he encountered tough, if patient, resistance: "Well, wait just a minute," said O'Connor. "Do we not have to look at all of the choices open to the students, the community schools, the magnet schools, et cetera?" Chanin did his best: One must legally ignore all the other schools in Cleveland because "this court has always been program-specific in its financial-aid cases."

"But I'm not sure that's proper," replied O'Connor. "That's what I'm asking you. Why should we not look at all of the options open to the parents?" Doing so, Chanin argued, "mixed together programs



that are quite qualitatively different in both function and purpose.” But, persisted O’Connor, “is it not true that parents can choose to have their children educated in a community school and, if they do, that school gets more money from the State than if they had chosen the religious school? If anything, it’s skewed against the religious schools.” When Chanin iterated, “We now have this year 99.4 percent of the students going to religious schools,” Justice Kennedy, making his own appeal to O’Connor, dropped the acid observation: “So far, you’re doing a very good job of not answering Justice O’Connor’s question.” Laughter temporarily broke the tension in the air.

But within minutes, Chanin was in

trouble again: “Supposing there are 10 schools out there, 10 private schools, nine of which are nonreligious and one of which is religious,” imagined Chief Justice Rehnquist. “Is that . . . consistent with the Establishment Clause?” Replied the NEA attorney: “Oh, that’s clearly unconstitutional, Your Honor.” Pressing hard, Rehnquist observed: “The interesting thing . . . your view is, if any one [religious] school gets the money, it’s unconstitutional?” “No, no, your honor,” replied the hapless attorney. “Oh, I thought you said yes,” said the Chief Justice. “No, I’m sorry if I—I did not,” Chanin replied. “Or, I may have, but I didn’t mean to.”

Though the drama then began to subside, the Supreme School Board still had

educational points to make. Late in the morning, Justice Kennedy asked: “Is it unconstitutional for [the State of Ohio] to . . . have a structure in which different school systems, different curriculums, curriculums that do not inflict terminal boredom on students, can begin to flourish? And . . . you say they cannot do it?”

Chanin could only reply: “There is no evidence that competition improves the lot for the 96 percent of the students who remain in the troubled Cleveland public school system with less resources and even worse problems.” Even this did not remain unchallenged. “The studies that I’m familiar with say that the inner-city parochial schools, which spend much less per child on education, do a better job than the public schools that spend much more,” said Scalia, adding “so I just don’t think it follows that . . . more money [will] solve the difficulty that the people of Cleveland found with their public schools.”

When told that the only evidence about parochial schools was anecdotal, Scalia added, “Oh, I don’t think it’s anecdotal at all. I mean, there are extensive studies that show the parochial schools do a better job.”

Still, questions posed in oral argument do not necessarily translate into opinions on judgment day. But if the tenor of the discussion on February 20 is an indicator of what is to come, then the future of school choice will take a new twist. If Cleveland’s charter schools are the key to making vouchers constitutional, must future voucher schemes also include a charter component? And must the vouchers be large enough that, as in Milwaukee, they invite increasing participation by secular schools? If vouchers are found constitutional only if charters are available and secular private schools open themselves to voucher recipients, the result could profoundly affect the future of school choice in ways neither side anticipated. The Court may turn out to be the Supreme School Board in deed as well as in the words it voiced in the oral argument.

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