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The Constitutional Future of the Bill of Rights: A Closer Look at Commercial Speech and State Aid to Religiously Affiliated Schools

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THE CONSTITUTIONAL FUTURE OF THE BILL OF RIGHTS: A CLOSER LOOK AT COMMERCIAL SPEECH AND STATE AID TO RELIGIOUSLY AFFILIATED SCHOOLS

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INTRODUCTION

I am pleased to be here to participate in this celebration of the bicentennial of the United States Constitution. It is also particularly pleasing to be a part of the event honoring Professor Eugene Gressman on the occasion of his retirement. And finally, I am equally honored to be asked to be involved in a celebration that includes so many distinguished representatives from academia, the judiciary, and the legislative branch. I am reminded of the autobiography that the young daughter of Senator Taft wrote when she was in early grammar school: "My grandfather was Chief Justice and President; my father is a United States Senator; and I am a Brownie." I am just a Brownie compared to the speakers you have heard today.

Because the topic on which I have been asked to speak today—the Constitutional Future of the Bill of Rights—is hardly self-limiting, I hope you will excuse me if I do not purport to be exhaustive. Nor do I intend to make detailed and specific predictions of all that the future holds, for that will serve only to prove my fallibility. Instead I would like to focus on a general theme that will face the Supreme Court as it enters the twenty-first century: the need to protect civil liberties through the reasoned and *consistent* elaboration of prior case law. I plan to illustrate the Court's failure to offer consistency by briefly considering two first amendment case studies, one involving commercial speech, the other dealing with state financial aid to private schools when some of those schools are religiously affiliated.

Historical celebrations are a good time to step back and take a good look at our historical heritage. When our Government first saw the dawn of the new Constitution, the Supreme Court was hardly a powerful legal or political entity. It was not until September 24, 1789, that President George Washington signed the first judiciary act into law and then sent to the Senate his nominations to the high court.[1]

The first Chief Justice was John Jay, then only forty-four years old. Jay had very little judicial experience prior to his appointment, and while he was Chief, he spent much of his time abroad, involved in diplomatic duties. In 1795

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1. Law of Sept. 24, 1789, 1 Stat. 73, 73-93.

he would resign to become Governor of New York. John Rutledge of South Carolina, another nominee, never attended a formal session of the Court. He would resign after three years. Washington also nominated Robert Hanson Harrison, who rejected the honor in order to become Chancellor of Maryland. To fill that slot, in the following year Washington nominated James Iredell of North Carolina, then only thirty-eight years of age. Iredell would resign in 1799. He was the only member of the first Court who moved his family to New York, then the Capitol. Washington also nominated John Blair of Virginia, who had been a delegate to the Constitutional Convention. Blair attended Court sessions irregularly and resigned in 1796 because of ill health. James Wilson of Pennsylvania was another nominee. He served on the Court until he died in 1798. The only Washington nominee to serve past 1800 was William Cushing of Massachusetts.[2]

At first the new Court, which was full strength with only six members, had very little business. The first term lasted only about a week. All the Court did was to set up house, appoint a clerk, and admit a few attorneys. The second term lasted only two days.[3] It was not until February of 1793 that the Court reached its first really major decision. The beginning was inauspicious. The case, *Chisolm v. Georgia*,[4] was soon overruled by the eleventh amendment.[5]

The year following *Chisolm*, Jay accepted the position as a special ambassador to England, while remaining Chief Justice, although many contemporaries criticized Jay's dual appointments as a violation of the American principle of separation of powers. About one year later Jay resigned from the Court.[6] Jay's replacement was Senator Oliver Ellsworth—the Senate rejected Washington's first choice, and his second declined the offer. In 1799 Ellsworth became Ambassador to France; he resigned from the Court the next year.[7]

The new President, John Adams, asked Jay to reassume his position, to become not only the first Chief Justice but also the third. The Senate confirmed Jay, but he declined. Adams eventually turned to John Marshall, who was (and remained) his Secretary of State.[8]

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2. *See* R. BARRY, MR. RUTLEDGE OF SOUTH CAROLINA (1942); 1 L. FRIEDMAN & F. ISRAEL, THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 3-22 (John Jay, by Irving Dillard); 33-49 (John Rutledge, by Leon Friedman); 57-70 (William Cushing, by Herbert A. Johnson); 79-96 (James Wilson, by Robert G. McCloskey); 109-115 (John Blair, Jr., by Fred Israel) (1969); 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 552-54, 663-65, 749 (1971); GUIDE TO THE U.S. SUPREME COURT 8, 9, 11 (Congressional Quarterly, Inc. 1979) [hereinafter GUIDE]; R. MORRIS, JOHN JAY: THE NATION AND THE COURT (1967); C.P. WILSON, JAMES WILSON, FOUNDING FATHER: 1742-1798 (1956); Connor, *James Iredell: Lawyer, Statesman, Judge 1751-1799*, 60 U. PA. L. REV. 225 (1912); Rugg, *William Cushing*, 30 YALE L.J. 128 (1920).

3. GUIDE, *supra* note 2, at 8.

4. 2 U.S. (2 Dall.) 419 (1793); *see* J. GOEBEL, *supra* note 2, at 734-41.

5. U.S. CONST. amend. XI. Congress proposed this amendment on September 5, 1794. 3 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 677 (1986).

6. J. GOEBEL, *supra* note 2, at 747-48.

7. J. GOEBEL, *supra* note 2, at 749-78; GUIDE, *supra* note 2, at 11. For a general discussion of Ellsworth's life, see W. BROWN, LIFE OF OLIVER ELLSWORTH (1970) (first published 1905).

8. 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 5, § 1.2, at 3; R. ROTUNDA, CONSTITUTIONAL LAW: PRINCIPLES AND CASES 3-4 (1987).

Marshall was technically a lawyer, but he had very little legal training, though he actually had argued one case before the Supreme Court (which he lost).[9] Marshall was really a politician, and he used his political skills to make the Supreme Court much of what it is today.

In the beginning, the Court's exercises of power were very tentative. We sometimes forget that after *Marbury v. Madison*[10]—in which Marshall first articulated the doctrine of judicial review—the Marshall Court would never again invalidate an act of Congress. Yet under Marshall's guidance, the Court's prestige and influence grew.

Marshall's successor, Roger Taney, drank deeply of the judicial power that Marshall had slowly accumulated. Today we remember Taney mainly because of *Dred Scott v. Sanford*.[11] In that case, as you recall, he held that it was unconstitutional for Congress to forbid slavery or to seek to contain it. He ignored adverse historical evidence in his rush to write an unconvincing opinion and to "solve" the slavery crisis by coming down firmly on the side of slavery.[12]

Dred Scott was only the second time in our history that the Court invalidated an act of Congress. The second effort was not nearly as successful as the first. The decision has become called one of the Court's great "self-inflicted wounds."[13]

If we stand back, we can see that Marshall slowly added to the prestige and power of the Court as it embarked on the great task of nation-building during the first third of the Court's history.[14] If Marshall acted like a miser in the exercise of judicial review, Taney was a spendthrift. With *Dred Scott* Taney squandered the treasure chest of prestige that Marshall had carefully accumulated.[15]

For several decades after *Dred Scott*, the Court was relatively quiet. Then, around the turn of the century, the pendulum shifted again, and the Court began its long campaign to protect economic due process. The deluge probably began with *Lochner v. New York*;[16] it ended with the Court Packing Plan of 1937.[17] Once again, as the Court became too active, as the decisions looked more and more unprincipled, the Court faced a crisis, and lost valuable public confidence.[18]

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9. J. GOEBEL, *supra* note 2, at 748-52.

10. 5 U.S. (1 Cranch) 137 (1803). For a general discussion of *Marbury v. Madison*, see Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

11. 60 U.S. (19 How.) 393 (1857).

12. R. ROTUNDA, *supra* note 8, at 150, 155.

13. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 50 (1928).

14. *See* R. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960).

15. *See* Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrine*, 17 AM. HIST. REV. 52 (1911).

16. 198 U.S. 45 (1905) (holding unconstitutional the efforts of New York to enact maximum hour legislation for bakers).

17. 1 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 5, at §§ 2.7, 4.7; R. ROTUNDA, THE POLITICS OF LANGUAGE 75-78 (1986).

18. Though Congress, led by members of the President's own party, rejected the Court Packing Plan, the Congressmen were painfully aware of the increased activeness of the Court. A list of

Following the Court Packing Plan, the Court once again appeared to lie in wait, catching its breath. During the McCarthy years it was not at the forefront protecting rights of speech and association.[19] Then, after 1953, with Earl Warren's assumption of the Chief Justiceship, the judicial pendulum began to shift towards activism.[20]

Rather than focusing on nation-building or economic due process, the modern Court theme since the middle 1950s appears to be individual rights. The Court, of course, decides constitutional cases involving many other provisions of the Constitution, but the main theme is still individual rights and civil liberties.

Will the modern judicial activism lead to excesses, to another self-inflicted wound? Will the pendulum shift once again? Will the modern Court become so active that it finds itself squandering its carefully built-up prestige?

I make no claim to predict the future. The Court's future is not predestined. But I do submit that to the extent that the Court's activism leads to decisions that appear to be void of any sort of principle, or inconsistent with principles that the Court contemporaneously embraces, the Court flirts with the dangers of the past. The body politic does not necessarily react negatively to judicial activism. The last three decades furnish proof of that, for the Court, during much of this time, has been both active and popular. Yet important judicial decisions that are based on fundamentally inconsistent principles portend trouble. The body politic found it difficult to accept cases like *Dred Scott* and *Lochner* because they were more unrestrained raw exertions of political power than reasoned, consistent developments of prior principles.

There is, in a sense, a certain geometry to judicial review. The Constitution is a postulate; the Court takes it as a given. There are other postulates as well. The judge should look to "text, history, structure, and precedent"[21] in order to find core values, or major premises. The judge then supplies "the minor premises in order to protect the constitutional freedom in circumstances the framers could not foresee."[22] As Chief Justice Marshall said nearly one and three-quarters of a century ago, the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. . . . [and to] exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."[23]

The Court, after analyzing the structure of the constitutional text, relevant history, and its own precedents, develops new principles, new postulates. The

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Supreme Court decisions invalidating acts of Congress to 1936 may be found at 80 CONG. REC. 9251-54 (1936).

19. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Barsky v. United States, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948).

20. While 1954 saw the dramatic opinion in Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I), the new activism of the Court did not develop overnight. As late as 1958, Warren could write: "In some 81 instances since this Court was established it has determined that Congressional action exceeded the bounds of the Constitution." Trop v. Dulles, 356 U.S. 86, 104 (1958).

21. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383, 394 (1985).

22. Bork, in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION at 46 (The Federalist Society 1986).

23. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819).

Court reasons from these basic postulates. The Court is supposed to engage in reasoned elaboration of the principles it has developed—applying them to new fact situations. In this manner the law can grow. These principles should also provide guidance to the lower courts and the executive and legislative branches of both the state and federal governments. The lower courts, and those officials responsible for implementing and enforcing rights, cannot do their job effectively if the Court decisions appear unprincipled.

Of course, not every case will necessarily present, full-blown, the principle or minor premise that the Court is developing. Common-law reasoning, including (perhaps, especially) constitutional reasoning, often proceeds inductively. In some instances it may take several years before a later Court, or an academic, steps back a bit, looks at the trees, and sees the forest. Constitutional scholars perform a very useful service when they help justify and rationalize earlier decisions.

When different Supreme Court decisions are not consistent—if the principles developed in one case are inconsistent with those developed in others—it is also a useful service to point this problem out as well. When we subject the Court to this criticism, we hopefully will encourage the Court to look more carefully at its reasoning. We often tritely observe that although the Court has neither the power of the purse nor the sword, we still obey its judgments. Yet, to the extent that the decisions are well-reasoned, our obedience is easier, because it is less an act of faith than an act of reason.

In recent years the Court appears to be much more content with relying on our faith. More and more of its decisions appear to be based on principles fundamentally inconsistent with other cases. The problem is not that the new law appears different from old, almost forgotten law. It is more serious than that. Often the cases that are inconsistent were decided by the same justices in the space of a few years. To be sure, the problem of inconsistency, even if it has gotten worse, is not one which the modern Court invented. The difference, you may say, is only one of degree, not of kind. Yet differences of degree, when great enough, become differences in kind. It is as if the Court is performing Euclidian and non-Euclidian geometry problems together and not acknowledging that the postulates are internally inconsistent.

In the short time remaining I will only be able to look at two major areas to illustrate the problem. First, let us consider the area of commercial speech. Then, we shall turn to some of the recent cases involving financial aid to non-secular education.

COMMERCIAL SPEECH

As we all know, a few years ago the Supreme Court finally decided that commercial speech is entitled to first amendment protection. A majority of the Court agreed on a four-part test in the *Central Hudson* decision.[24] In that case, the Court invalidated a regulation of the New York Public Service Commission

24. Central Hudson Gas Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); *see* 3 R.

that had completely banned all public utility advertising which promoted the use of electricity. The Commission argued that all such promotional advertising was contrary to the national policy of conserving energy. The Court, in an opinion authored by Justice Powell, applied a four-part analysis to the question:

> At the outset we must determine whether the expression is protected by the First Amendment. [1] For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.[25]

Applying this test, the *Central Hudson* Court invalidated the New York regulation. The Court reasoned that promotional advertising was not misleading and concerns lawful commercial speech;[26] it is legal in New York to use inefficient electric hair dryers, electric toothbrushes, heat pumps, and so on. The state does have substantial interests in energy conservation, the Court acknowledged, and the ban on promotional advertising does advance this ban. But the state's complete suppression of speech was more extensive than necessary to further energy conservation,[27] because some promotional advertising would cause no net increase in energy use. For example, advertising promoting the use of electricity that diverts demand from less efficient sources, or advertising promoting a product that consumes the same amount of energy as do alternative sources causes no net increase in energy usage. Much more significant is the fact that other restrictions might equally promote conservation. The state could "require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future."[28] The cure for "bad" speech is more speech, not less. Also, the state has other means that do not implicate free speech at all. Thus, the state can ban, or heavily tax, inefficient heat pumps.

The four-part test of *Central Hudson* is based on a two-step method of analysis synthesized from the modern commercial speech cases. First, a court must determine whether the speech is truthful, nonmisleading speech concerning a lawful commercial activity. Promotion of an illegal activity—such as violating

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ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 5, at §§ 20.26-20.30; Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L. FORUM 1080.

25. *Central Hudson*, 447 U.S. at 566.

26. *Accord* Consolidated Edison Co. of New York, Inc. v. Public Serv. Comm'n, 447 U.S. 530 (1980); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983) (law prohibiting mailing of unsolicited advertisements for contraceptives invalid).

27. *Compare* NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) (store boycott organized to influence government practices protected by first amendment) *with* NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 618 (1980) (Powell, J., joined by Burger, C.J., Stewart, and Rehnquist, JJ.) (Congress, consistent with first amendment, may prohibit secondary picketing calculated "to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or put pressure upon, the primary employer"; such coercive picketing spreads labor discord by coercing neutral party to join the dispute and furthers an unlawful objective).

28. *Central Hudson*, 447 U.S. at 571.

sex-discrimination laws by advertising for "men only" jobs, when gender is not a bona fide occupational qualification—is not protected advertising.[29] In fact, the government's interest in protecting the public from false or genuinely misleading advertising is so great that the Court has held that the government, when it prohibits false or misleading commercial speech, will not be subjected to overbreadth analysis and will not be required to demonstrate that its law is no more extensive than necessary to achieve that goal.[30]

If the government regulation restricts nonmisleading commercial advertising, then a court must determine whether the state restriction directly advances a substantial government interest without unnecessary restrictions on free speech. The regulation will fail if the interest is not sufficiently substantial to justify a restriction on speech or if the means used to advance a substantial interest either do not directly advance the government interest or do so with an unnecessary burden on the ability to communicate the commercial message.[31]

So far, so good. But then came *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*.[32] Justice Rehnquist, the sole dissent in *Central Hudson*, authored the five-to-four opinion in *Posadas*. The broad language of *Posadas* is either fundamentally at odds with *Central Hudson*, or *Posadas* itself is a sport, of almost no significance.

In *Posadas*, Justice Rehnquist upheld a facial constitutional attack on a Puerto Rico statute interpreted to restrict local advertising that invited the residents of Puerto Rico to patronize gambling casinos; however, the statute did not restrict local advertising targeted at tourists, even though the local advertising aimed at the tourists may incidentally reach the hands of a resident.

The Court purported to apply the general principles identified in *Central Hudson*. In fact, *Posadas* frequently cited *Central Hudson* as controlling precedent. The *Posadas* Court gave no hint that it was in any way undermining *Central Hudson*, a precedent only six years old. Justice Powell, who authored *Central Hudson*, joined in the majority opinion in *Posadas*.

The commercial speech in *Posadas*, conceded the Court, "concerns a lawful activity and is not misleading or fraudulent."[33] Casino gambling in Puerto Rico is a lawful activity. However, the governmental interest in reducing the demand for casino gambling by Puerto Rico residents was substantial, the Court said, because the legislature apparently believed that excessive casino gambling would

29. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973).

30. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462-65 (1978).

31. In Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983), the justices were unanimous in striking down a federal statute prohibiting the unsolicited mailing of contraceptive advertisements. The majority opinion argued that the interest in shielding mail recipients from offensive materials was not sufficiently substantial to burden speech, and that the regulation did not directly and narrowly promote a substantial interest in aiding parents' efforts to discuss birth control methods with their children. Justices Rehnquist and O'Connor, 463 U.S. at 75-80 (concurring), and Justice Stevens, 463 U.S. at 80-84 (concurring), would have considered a government interest in protecting persons from receiving material they find offensive in their homes to be substantial. However, they believed that the law before them did not sufficiently promote that interest. All justices appeared to agree with the two-step methodology inherent in the four-part test put forth in *Central Hudson*.

32. 106 S. Ct. 2968 (1986).

33. *Id.* at 2976.

seriously harm the health, safety, and welfare of Puerto Rico citizens.[34] Also, the challenged restrictions "directly advance" Puerto Rico's asserted interest because "the legislature's belief is a *reasonable* one."[35]

In spite of the legislature's apparent concern over the evils of casino gambling if engaged in by Puerto Ricans, the legislature freely allowed advertising involving other forms of gambling, such as horse racing, cockfighting, and the lottery.[36] Nonetheless, the Court majority found no inconsistency or underinclusiveness. First, the advertising restrictions that do exist " 'directly advance' the legislature's interest in reducing demand for games of chance,"[37] and second, the apparent legislative interest "is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling."[38] The Court argued that the legislature must have felt that the risks associated with casino gambling are greater because these other forms of gambling " 'have been traditionally part of the Puerto Rican's roots.' "[39] Finally, the challenged law was said to have met the fourth test of *Central Hudson*: the restriction, limited to advertising aimed at residents of Puerto Rico, is no more extensive than necessary to serve the governmental interest, which was to dampen demand for casino gambling by Puerto Rican residents.[40]

In earlier cases, such as *Carey v. Population Services International*,[41] the Court had held that advertising of contraceptives is protected commercial speech. In *Bigelow v. Virginia*[42] the Court similarly had held that advertising of an abortion clinic is constitutionally protected. But, said *Posadas*, in those cases the "underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the state. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether."[43] Then the *Posadas* majority announced: "In our view the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite."[44] The Court thus cited with approval lower court cases approving of advertising restrictions on smoking and alcohol.[45]

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34. *Id.* at 2977.
35. *Id.* (emphasis added).
36. *Id.* at 2977, 2978 n.8.
37. *Id.* at 2977.
38. *Id.*
39. *Id.* (quoting the trial court). An equally likely interpretation of legislative intent is that Puerto Rico prefers that its residents spend their gambling money on the state run lottery. *Id.* at 2983 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). It is not unusual that speech restrictions exist for less than noble reasons. The federal ban on cigarette advertising has all but eliminated anti-cigarette ads, and it has served to protect existing market share. "It made it more difficult for makers of low tar and nicotine brands to make headway in the market by advertising their superior products." Wall St. J., May 18, 1976, at 18, col. 2.
40. *Posadas*, 106 S. Ct. at 2977-78.
41. 431 U.S. 678 (1977).
42. 421 U.S. 809 (1975).
43. *Posadas*, 106 S. Ct. at 2979.
44. *Id.*
45. *Id.* at 2980 n.10.

Let us more carefully compare *Posadas* with *Central Hudson*. The majority in *Posadas* says that the "underlying conduct"—gambling "by the residents of Puerto Rico"—was not constitutionally protected and could have been banned completely. Is that true? Could Puerto Rico allow casino gambling for nonresidents, and yet prohibit it to residents of Puerto Rico? If the majority assumption is wrong, then *Carey* and *Bigelow* are hardly inapposite. Let us assume that the majority's assumption is correct, although it may raise questions under the equal protection clause and the dormant commerce clause.[46]

Consider now the majority principle of *Posadas*, that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." What about the advertising restriction invalidated in *Central Hudson*? No one has a constitutional right to waste electricity. New York, in *Central Hudson*, could have simply banned the use of all electric hair dryers, or all energy inefficient heat pumps, or all electric toothbrushes. Yet *Central Hudson* teaches us that New York could not, under the first amendment, prohibit advertising that promotes the wasteful (but lawful) use of electricity. If New York cannot constitutionally dampen New Yorkers' demand for electricity by prohibiting promotional advertising, can Puerto Rico dampen Puerto Rican demand for casino advertising by prohibiting promotional advertising?

In spite of what Justice Rehnquist said, *Posadas* cannot mean that the government has the power to ban all advertising for a product or service if the government also had the power to make the product or service illegal. If it meant that, it would overrule *Central Hudson*. Yet *Posadas* relied on *Central Hudson*.

Perhaps one might argue that the gambling in *Posadas* is really different from the energy waste in *Central Hudson*, because gambling can be harmful and energy waste is not. The Court did not draw this distinction, perhaps because *Virginia Pharmacy*[47] foreclosed it. That case held that it was unconstitutional for the state to restrict advertising promoting *prescription* drugs. Prescription drugs can be harmful. That's why they are not freely available. Indeed, the

46. Puerto Rico is discriminating on the basis of residency in an activity that is a big business. That discrimination may restrain commerce among the states. The Court has said that, in engaging in a commerce clause analysis, it is "immaterial" that a political unit also discriminates against its own state residents. Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 n.4 (1951); *cf.* Brimmer v. Rebman, 138 U.S. 78, 82-83 (1891) (Virginia statute imposing fees for inspection of various meat products, still invalid even though it applied to Virginia citizens). There is also an issue raised under the comity clause. United Bldg. & Constr. Trades Council v. Mayor, 465 U.S. 208 (1984). Someone might respond that casino gambling is only recreation, but the Puerto Rico Legislature considered casino gambling to be big business. *Posadas*, 106 S. Ct. at 2977. The issue may also raise equal protection questions of discrimination between residents and nonresidents. *See* Zobel v. Williams, 457 U.S. 55 (1982). Of course, Puerto Rico is discriminating against itself but the Court, in other cases, has found that that fact does not make a crucial difference. *See* Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964).

Some might also argue that the Puerto Rico law may possibly raise freedom of association questions because it seeks to prevent Puerto Rico residents from associating with non-Puerto Rico residents in casinos. The *Roberts* decision suggests that such an argument is unlikely to be greeted with success. Roberts v. United States Jaycees, 468 U.S. 609, 619-22 (1984).

47. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 478 (1976).

harm from prescription drugs is much more certain than the assumptions the Court made regarding the supposed unique harm flowing to Puerto Ricans who engage in lawful casino gambling.

We have all seen advertisements that say something like: "Are you feeling down? Have a headache? Try Excedrin." After *Virginia Pharmacy* a pharmacist has a constitutional right to run an advertisement that says: "Feeling blue? Ask your doctor to prescribe valium. And when he does, buy it here. We're cheaper."

A pharmacist has a constitutional right to promote (push) valium, but *Posadas* draws a very different line when dealing with advertising of casino gambling directed to Puerto Ricans. Unfortunately, the Court did not bother to explain why.

Let us look more carefully at the law upheld in *Posadas*. The Puerto Rico statute provided: "No gambling room shall be permitted to advertise, *or otherwise offer their facilities to the public of Puerto Rico*; or to admit persons under 18 years of age."[48] *Posadas* may only mean that it is legal to prohibit advertising designed to induce people to do what the law already forbids.

The *Posadas* case began when a casino attacked the very extensive regulations that implemented this statute. The Puerto Rico courts agreed that the total ban was unconstitutional. They called it "capricious" and "arbitrary."[49] Then the lower courts adopted a very narrowing reinterpretation of the regulation. It allowed all casino advertising in Puerto Rico or elsewhere, so long as the advertising did not "invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident."[50] In fact, during oral argument the counsel for Puerto Rico said that a casino advertising in a *Spanish Language Daily* with ninety-nine percent local circulation would be permitted, so long as the advertising "is addressed to tourists and not to residents."[51]

Recall that Puerto Rico law already prohibited casinos from admitting persons under eighteen or from offering their facilities to the public of Puerto Rico. If it is illegal in Puerto Rico for casinos to admit persons under eighteen, then casino advertising cannot invite minors to enter the casinos. Such advertising would not concern lawful activity; it would solicit the commission of an illegality. If the law in fact prohibited Puerto Ricans from engaging in casino gambling, we should not be too surprised that the Court upheld a ban on advertising that invited Puerto Rican residents to enter the casino.

Unfortunately the Court majority, apparently more concerned with result than reasoning, does not make clear what is its rationale. If the casino advertising restriction is valid because it prohibits advertising that concerns an unlawful activity, why was it necessary for the Court to proclaim that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban

48. P.R. LAWS ANN. tit. 15, § 77 (1972) (emphasis added).
49. *Posadas*, 106 S. Ct. at 2973.
50. *Id.* at 2974.
51. Transcript of Oral Argument at 26, *Posadas*.

advertising of casino gambling . . . ."?[52] Perhaps the Court meant that this greater ban had in fact been exercised. But then why did the majority appear to state that it is *legal* for residents of Puerto Rico to frequent casinos?[53] And why did the Court cite with approval lower court cases upholding advertising restrictions on smoking? Although smoking may not be legal in certain areas at certain times, tobacco products still may be legally purchased and consumed.

Yet if the United States Supreme Court was fully embracing its dictum (the power to ban a product includes the "lesser" power to ban speech advertising that product), why did it only hold that the limited restrictions in *Posadas* were constitutional on their face? The Court explicitly left open the possibility of invalidating the regulations if they were applied too restrictively.[54] The Court also emphasized the narrowness of its ruling by noting that the legislative ban on certain types of casino advertising was because of the unique cultural history of Puerto Rico.[55] I certainly do not adopt the argument, but the Court appeared to be saying that just as it used to be illegal to sell whiskey to the Indians, it can be illegal to offer casino gambling to Puerto Ricans. The Court did not demand any evidence to support its unusual factual assumption, but that assumption also appeared to form the basis of its unusual holding.

In dictum, Justice Rehnquist for the *Posadas* majority also appeared to uphold the ban on advertising of cigarettes on television, the electronic media. This conclusion may indeed be the result the Court eventually chooses if the issue is brought before it. Though the Court's record regarding the regulation of the electronic media is ambivalent, in a variety of other cases, the Court has approved of special restrictions on the electronic media (because the Court views it as uniquely powerful),[56] while it has banned similar regulation of newspapers, magazines, or handbills.[57] On the other hand, Justice Rehnquist only a few years earlier had concluded that, in light of the modern commercial speech cases, the Government could not completely ban television cigarette advertising.[58] In *Posadas* Rehnquist does not explain why his view has changed.

Some people read *Posadas* quite broadly, to support a total ban on tobacco advertising. Congressman Synar of Oklahoma has proposed that Congress ban

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52. *Posadas*, 106 S. Ct. at 2979.

53. The Court stated as follows: "[T]he Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. . . .

Appellant also makes the . . . argument that, *having chosen to legalize casino gambling for residents of Puerto Rico* . . . ."

Id. (emphasis added).

54. *Id.* at 2976 n.7.

55. *Id.* at 2977-78; *cf. id.* at 2976 n.6 (deference to Puerto Rico court's interpretation of local law); *id.* at 2978 n.8 (legislative intent gauged from history of legalized gambling in Puerto Rico).

56. *Compare, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 748-50 (1978) (broadcast medium has the most limited first amendment protection of all forms of communications) and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ("fairness doctrine," requiring broadcasters to allow for rebuttal, embodied in FCC rules, held constitutional) *with* FCC v. League of Women Voters, 468 U.S. 364 (1984) (ban on "editorializing" by television and radio stations receiving funds from Corporation for Public Broadcasting held violative of first amendment).

57. *E.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

58. Virginia State Bd. of Pharmacy v. Citizens Consumer Counsel, Inc., 425 U.S. 748, 781 (Rehnquist, J., dissenting).

all advertising of tobacco products, "even window displays by stores that sell them."[59] *Posadas* is said to justify such a ban. If cigarettes were illegal to purchase, then a ban on all advertising of cigarettes would be quite constitutional. But *Posadas* does not endorse a ban on all advertising of a product legally available. Recall that the Court did not face a total ban; it emphasized the narrowness of its holding and it only judged the law on its face after it had been narrowly interpreted in an effort to save its constitutionality. Even the lower courts in *Posadas* agreed that a total ban on casino advertising would be unconstitutional.[60]

Some people argue that any tobacco advertising is inherently misleading, and that is why the government can prohibit all tobacco ads. The Supreme Court has allowed prohibition of truly misleading speech but the mere charge that speech is misleading is not enough. The organized bar argued that advertising of legal fees was inherently misleading. *Bates* rejected that position.[61] The organized bar argued that it was misleading for a lawyer to advertise that he was a member of the United States Supreme Court Bar, because such an advertisement wrongly implied better quality. *In re R.M.J.*,[62] another case, rejected that argument as well.

Nor can we prohibit all tobacco or casino advertising by arguing that advertising is inherently misleading. *Posadas* does not even suggest that such advertising is inherently misleading. As the United States Court of Appeals for the Fifth Circuit has noted: "Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells."[63]

The Government can certainly forbid gambling or tobacco advertising urging young people to gamble or smoke, when it is illegal for the minors to do so. But the Government cannot forbid all advertising of tobacco because children may hear or read it. The "government may not 'reduce the adult population . . . to reading only what is fit for children.' "[64] The government could always prohibit casino gambling, or tobacco (or foods rich in cholesterol), in order to discourage demand, but it cannot discourage use by tampering with free speech.

If my narrow interpretation of *Posadas* is correct, the case is—to say the least—opaquely written. If the case really means that states can ban advertising in an effort to dampen demand for a legally offered product, then *Posadas* is another example of unprincipled decision-making, for it relies on a principle

59. Scheibla, *Not Just Blowing Smoke*, Barron's, Mar. 2, 1987, at 11, col. 1.

60. *See Posadas*, 106 S. Ct. at 2973-74. The Supreme Court said that it was bound by this narrowing construction, *id.* at 2976, and that it was considering only the facial constitutionality of the statute and regulations, *id.* at 2972.

61. Bates v. State Bar, 433 U.S. 350 (1977).

62. 455 U.S. 191 (1982). For a general discussion of Supreme Court decisions on commercial speech, see 3 R. ROTUNDA, J. NOWAK & J. YOUNG, *supra* note 5, at § 20.31.

63. Dunagin v. City of Oxford, 718 F.2d 738, 743 (5th Cir. 1983) (en banc).

64. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1952)).

rejected in *Central Hudson*, the case on which *Posadas* purported to rely, not to undermine.

FINANCIAL AID TO RELIGIOUS SCHOOLS

For all the confusion in the commercial speech area, it is a calm sea compared to the case law concerning financial aid to religiously affiliated schools. It is understatement to note that the Supreme Court decisions in this area are difficult to understand. The decisions often have no majority opinion; several of the justices have changed their viewpoints over the years; and the holdings follow no consistent principle.[65] We know, for example, that the state can lend secular textbooks to students who attend parochial schools, if it also lends textbooks to students who attend public schools.[66] Yet while the state can lend the students books of maps, it cannot lend the school a map.[67]

The distinction might appear to turn on the fact that the books are given to the students, and the maps to the school.[68] But in other cases the Court has invalidated aid which goes directly to the students—such as tax credits[69]—yet has upheld aid which goes directly to the school—such as aid to compensate teachers for the time it takes to take attendance, or grade state-prepared standardized tests.[70]

The inconsistencies are dramatically put in focus if we consider a proposal that various commentators have made through the years: a tuition voucher system.[71]

When one looks at the cases, it at first appears unlikely that the Court would validate any state or federal system that gave all school age children a voucher which could be redeemed at a certified school.[72] The voucher, if redeemed at the local public school, would pay for all the costs of a public school education. If redeemed at a certified private school, (whether a religiously affiliated or nonreligiously affiliated school) the voucher would be worth a percentage of the value of the voucher at the local public school. The percentage need not be 100%. For example, if the local public school spends 5,000 dollars per year to educate a child, the state-paid "tuition" is 5,000 dollars. The student could always go to the local school and receive his or her "free" public education. In an effort to foster diversity and pluralism in our democratic society, the state could give each student a tuition voucher. This voucher when paid to the private school might be worth 100% of its value at the public school, or a lesser

65. For a general discussion of this issue, see 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 5, at §§ 21.2 - 22.4.

66. Board of Educ. v. Allen, 392 U.S. 236 (1968).

67. *See* Meek v. Pittenger, 421 U.S. 349, 362-66 (1975).

68. *See* Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) (articulating this distinction).

69. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780-89 (1973).

70. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

71. *See, e.g.*, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Nowak, *The Supreme Court, the Religion Clauses, and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976).

72. *See, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 472 U.S. 402 (1985); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

amount, for example, three-fifths. In that case, if the public school could redeem its voucher to the state in exchange for 5,000 dollars, the private school could redeem its voucher for only 3,000 dollars. Public schools could then still have a competitive advantage, but parents would have much more of a choice as to where to send their children.[73]

Some parents might choose to send their children to religiously affiliated schools, but we would expect others to choose schools that emphasized foreign language, or ballet, or music, or vocational training, or some other area of learning. If some students found it difficult to do well in a particular school because of a discipline problem, the parents might decide to try sending their children to a different school, one that emphasized discipline.[74]

A voucher system should encourage some parents to vote for school tax increases. Now, those parents who send their children to parochial schools—and in some areas of the country the proportion is large[75]—are not anxious to vote for tax increases because they forfeit any direct benefits when they choose to send their children to parochial school. In those areas parents who choose to send their children to public school suffer from the low public expenditures. A tuition voucher system will give an incentive to the parochial school parents to vote for tax increases because these people will see a reasonable proportion of the money raised coming back to them in the form of tuition vouchers. Conversely, the parents who do not send their children to parochial school will benefit because the parochial school parents will be less reluctant to vote against tax increases.

The Supreme Court, when it considers aid to school cases, often notes that, in fact, the bulk of the state aid primarily benefits children in parochial schools, and that is apparently a reason why this aid is unconstitutional.[76] This fact is supposed to indicate that the aid has, and will promote, a nonsecular purpose. Yet such reasoning suffers from the flaw of static thinking. The question is not "Who benefits from the law today?"; it is rather "How will the law change the educational landscape in the next few years?" If tuition vouchers were constitutionally permissible, we should see the development of competition, of new diversity, and educational opportunity for the school children of the next decade.[77]

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73. See J. COONS & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Clark, *Alternative Public School Systems*, in EQUAL EDUCATION OPPORTUNITY (Harv. Educ. Rev. 1969); *cf.* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (money grants to nonpublic schools not to exceed 50% of the comparable expenses in public school system invalidated).

74. *See generally* M. FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1962) (discussing the role of the government in education).

75. *See* Lemon v. Kurtzman, 403 U.S. 602, 608 (1971) (25% of Rhode Island students attend nonpublic elementary schools); *see also* M. FRIEDMAN, *supra* note 74, at 91 (parochial schools disadvantaged by existing system of funding).

76. Lemon v. Kurtzman, 403 U.S. 602, 610 (1971) (96% of students attending private schools in Rhode Island were in church-related schools, most of which were Roman Catholic).

77. M. FRIEDMAN, *supra* note 74, at 85-107; *see also* Magnet, *America's Underclass: What to do?*, FORTUNE, May 11, 1987, at 130, 150 (Westside Prepatory School is a Chicago private school for 244 mostly poor black children; the three year olds read at first grade level and 100% of the graduates go on to college); Davidson, *Private Schools for Black Pupils are Flourishing*, Wall St. J.,

Before we debate the wisdom of a tuition voucher system, we really must see whether the proposal passes constitutional muster. If we look at the bottom line, it is not difficult to find Supreme Court case law which concludes that no aid is allowed.[78] Yet if we look at the recent case law more carefully, it seems that the opposite conclusion is equally tenable.

We know that if a state created tuition vouchers, the parents could not redeem them at a private school that practices racial discrimination, because it would violate the equal protection clause for the state to facilitate racial segregation in this manner.[79] But what if the school practices racial discrimination because of a purported belief that the racial discrimination is religiously compelled? The state should simply forbid the use of the voucher at such schools. Such a state restriction does not require any unconstitutional "entanglement" between church and state, nor does the restriction on such use of the vouchers unconstitutionally burden religions with racially discriminatory beliefs. As the Supreme Court held in the *Bob Jones*[80] case, the state's special interest in not fostering racial discrimination allows it to refuse to subsidize such religious sects.

In *Bob Jones*, the federal government refused to grant tax exempt status to Bob Jones University. If a person gave money to Bob Jones University, he or she could not deduct the contribution as a charitable donation. If the federal government can refuse to allow the subsidy of allowing the deduction of a charitable donation, a subsidy which the Court has called "indirect,"[81] a fortiori the federal government or a state can refuse to subsidize directly, with tuition dollars, those religious schools that practice discrimination.

But, say others, the Supreme Court cases make clear that the state cannot pay even a portion of a private school teacher's salary if that private school is religiously affiliated.[82] Yes, that is true, yet the Supreme Court has also held that the state can pay a portion of a parochial school teacher's salary when the teacher engages in so-called mandated state activities, like taking attendance or grading state-mandated examinations such as achievement tests.[83] What is the *marginal* cost to the school when it complies with the state-mandated requirement of taking attendance? The cost must be fairly close to zero. The school has the teacher on the payroll anyway. The attendance effort takes a few minutes from the school day, but it may well occur whether or not the state mandates it. Even if the attendance-taking is added to the day's work, the school is

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Apr. 15, 1987, at 33, col. 3 (Low cost private schools flourishing "as many black parents, dissatisfied with public education, seek affordable alternatives.").

78. *E.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

79. *See* Norwood v. Harrison, 413 U.S. 455 (1973).

80. Bob Jones Univ. v. United States, 461 U.S. 574 (1983); *cf.* United States v. Lee, 455 U.S. 252 (1982) (religious claim to exemption from social security system rejected); Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (no religious exemption from minimum wage laws).

81. *E.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 675-76 (1970) (tax exemption is indirect benefit, and different from direct money subsidy).

82. Lemon v. Kurtzman, 403 U.S. 602 (1971).

83. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

unlikely to raise the teacher's salary in order to compensate him or her for the added minutes of work: after all, if the teacher is not taking attendance, he or she is doing something else. Similarly, if the teacher is not grading a state-mandated examination, the teacher would still be grading another examination. And that "other" examination may even be a similar achievement test, because parents (and teachers) like to know how their students compare with the national average.

When the Court upheld this state financial aid, it noted that the " 'lion's share' " of the state " 'reimbursements' " were for " 'attendance-reporting.' "[84] That fact would suggest that the state is not really paying the *marginal* cost but the *average* cost. For example, if the teacher works six hours a day, and attendance responsibilities and examination duties average 30 minutes a day, the state will pay 8 1/3% of the teacher's salary. Stated another way, the state is paying a percentage of the private school's educational costs. That is all a tuition voucher system does; it pays a given percentage of a school's expenses.

One might carry the logic a step further. The state not only mandates attendance-taking; it mandates the teaching of reading, writing, and arithmetic. Why should the state not pay for these mandated activities as well? There is no "excessive entanglement" problem when the state requires the private schools—parochial or otherwise—to offer the "three-R's." In order to be properly certified by the state, schools have had to comply with such requirements for years. The state must go through the extra effort and expense it takes to certify private schools as meeting the state standards for secular education. Indeed, it would be unconstitutional for the state to do otherwise. As the Supreme Court held years ago, the states must allow parochial schools to exist and compete with public schools.[85]

The Supreme Court has been quite generous in allowing states to give financial assistance directly to religious institutions when schools are on the college or graduate level.[86] The rationale has always been the factual assumption that higher education is not as permeated with religion as the grade schools and high schools. The Court's factual assumption may often be true, but sometimes it does appear strained, as when the Court allows state financial assistance to religiously affiliated schools with theology departments that appear to emphasize the study of religious doctrine in a nonobjective manner.[87]

The factual assumption of less religious permeation in higher education certainly cannot apply to the case of *Witters v. Washington Department of Services for the Blind*.[88] There the recipient of state aid was going to attend a private

84. *Id.* at 657 n.5 (quoting the district court opinion in Committee for Pub. Educ. & Religious Liberty v. Levitt, 461 F. Supp. 1123, 1126 (S.D. N.Y. 1978)).

85. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

86. *E.g.*, Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (direct state funding in form of annual subsidy to accredited private institutions of higher learning in Maryland upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (grants to religiously affiliated universities for construction for buildings used for secular purposes upheld).

87. Roemer v. Board of Pub. Works, 426 U.S. 736, 773-74 (1976) (Stewart, J., dissenting).

88. 106 S. Ct. 748 (1986).

Christian College in order to become a pastor, missionary, or youth director. Certainly Mr. Witters' education was permeated with religious symbolism. The very purpose of his education, was to pursue " 'a career or degree in theology or related areas.' "[89]

Yet the Supreme Court has also held that similar aid is forbidden even when directly given to the student who freely chooses to attend a religiously affiliated grade school or high school.[90] Perversely, the Court has allowed tax *deductions* for the parents' money spent for such religious schooling.[91] I say that the decision is perverse because deductions benefit the rich more than the poor, while tax credits (or alternatively, a tuition voucher system) do not share that bias.

Some argue that if the state removes the economic roadblocks it sets to the development of a diverse private and parochial school system, there will be economic discrimination: the rich will all go to the same schools. Actually, the present system causes much more economic isolation. The very rich can already afford to go to private academies. They realize the importance of education, and they have the means to pay for it.[92] Those who are not in the very rich category but still are well to do, often live in upper middle class houses in areas that are economically well off. One reason these houses are worth a lot is because they are in the areas with good, or very good, public schools.

With a voucher system, a middle class, lower middle class, or even low economic class person would be able to afford to send his or her child to a different school outside of the district. Housing may even possibly become more integrated economically, because the value of a house will no longer in large part be a function of the worth of the local public school district in which the house is located. The tuition voucher system would make house location a less important factor in choosing a good education.

Yet the Supreme Court has not moved in this direction. Indeed, the results of some of its cases—for example, the rulings making cross district school busing a very unusual occurrence;[93] the ruling permitting great disparities in the funding of public school districts within the same state[94]—have not fostered economic integration. A tuition voucher system may encourage more economic integration, not less.

To be sure, the very rich could always use a tuition voucher to help them subsidize the tuition costs of very posh high schools, closed to the middle or lower economic classes because the tuition (even with a tuition voucher system)

89. That is why the State of Washington denied him aid. *Id.* at 750 (quoting the Washington Commission for the Blind Policy Statement).

90. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

91. Mueller v. Allen, 463 U.S. 388 (1983).

92. Fierman, *What It Takes to be Rich In America*, FORTUNE, Apr. 13, 1987, at 22, 25 (families with incomes above $75,000 per year spend four times more on education and three times more on books than those below $75,000).

93. *See* Hills v. Gautreux, 425 U.S. 284 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

94. Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

would still be very high. If experience dictated that a tuition voucher system exacerbated economic isolationism, the legislature could always deny the tuition voucher to the most affluent. One might add that very posh schools would not provide a better education, just a more expensive one. Spending more money on grade and high school education helps produce better results, to a point. After that point, the money spent has no correlation with better education as measured by any objective data, such as achievement scores. The very rich would not therefore have better schools, only more expensive ones. And such very expensive private schools already exist today.

What the tuition voucher system may do is provide more choices for everyone, rich or poor. To the extent that the tuition voucher system creates a greater diversity of private schools, to the extent the system fosters competition, it should improve education for everyone.

Whether or not a tuition voucher system is a wise policy decision, the constitutionality of that system in fact finds strong support in the case law. Yet, it also faces strong barriers created by other case law. The same Supreme Court—indeed, some of the same justices—have written these cases that appear to be fundamentally inconsistent. We might also say these cases are unprincipled, because the principles that run through one set of cases is simply at odds with whatever principles run through the other set. If we think of cases as building blocks that can be used to reach to higher law, the Supreme Court has given us some poor building blocks. If I may mix metaphors, the cases in this area are more like the childhood game of chutes and ladders. Some cases are ladders that lead to a tuition voucher system; others are the chutes. The roll of the dice may decide whether a carefully drafted tuition voucher system lands on a square leading to a chute, or a ladder.

CONCLUSION

Winston Churchill, when he came to this country to give his famous "Iron Curtain" speech, visited much of our land by rail. It is said that in the dining car one evening, he offered a toast with a glass of cognac. He remarked that in the course of his long life, he had probably drunk enough cognac to fill the railroad car. One of his friends disputed that. With some quick mathematical computations he figured out that Churchill could not have drunk more than half a railroad car of cognac. The aged Churchill's response, as he lifted the glass, was: "So little time; so much to do."

In the short time I have had, I cannot begin to explore the apparent fundamental inconsistencies of too many of the modern Court's rulings. Unfortunately, the justices have given a lot of fodder to commentators who focus on such problems. The justices should focus on these problems as well.