Chapter 2

Constitutional Law

Case 2.1

C.A.7 (Ind.),2013.
Doe v. Prosecutor, Marion County, Indiana
--- F.3d ----, 2013 WL 238735 (C.A.7 (Ind.))
Only the Westlaw citation is currently available.
United States Court of Appeals,
Seventh Circuit.
John DOE, Plaintiff–Appellant,
v.
PROSECUTOR, MARION COUNTY, INDIANA, Defendant–Appellee.
No. 12–2512.
Argued Nov. 27, 2012.
Decided Jan. 23, 2013.
FLAUM, Circuit Judge.

A recent Indiana statute prohibits most registered sex offenders from using social networking websites, instant messaging services, and chat programs. John Doe, on behalf of a class of similarly situated sex offenders, challenges this law on First Amendment grounds. We reverse the district court and hold that the law as drafted is unconstitutional. Though content neutral, we conclude that the Indiana law is not narrowly tailored to serve the state's interest. It broadly prohibits substantial protected speech rather than specifically targeting the evil of improper communications to minors.

I. Background
A. Legislative Background

Indiana Code § 35–42–4–12 prohibits certain sex offenders from "knowingly or intentionally us[ing]: a social networking web site" [FN1] or "an instant messaging or chat room program" [FN2] that "the offender knows allows a person who is less than eighteen (18) years of age to access or use the web site or program." § 35–42–4–12(e) (violation constitutes a Class A misdemeanor but subsequent violations constitute Class D felonies). The law applies broadly to all individuals required to register as sex offenders under Indiana Code § 11–8–8, et seq., who have committed an enumerated offense. § 35–42–4–12(b)(1)–(2). The law does not differentiate based on the age of victim, the manner in which the crime was committed, or the time since the predicate offense. Subsection (f) provides an express defense if the individual did not know the website allowed minors or upon discovering it does, immediately ceased further use. § 35–42–4–12(f). Subsection (a) exempts persons convicted of so-called Romeo and Juliet relationships where the victim and perpetrator are close in age and had a consensual relationship. § 35–42–4–12(a).

B. Procedural Background

1. John Doe's Suit

In 2000, Doe was arrested in Marion County and convicted of two counts of child exploitation. Although he was released from prison in 2003 and is not on any form of supervised release, he must register as a sex offender on Indiana's registry. And because child exploitation is an enumerated offense, section 35–42–4–12 prohibits Doe from using the covered websites and programs. Doe filed suit against the Marion County Prosecutor alleging the law violates his First Amendment rights (as incorporated under the Fourteenth Amendment). [FN3] The district court granted his request to proceed anonymously and later granted his motion to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(2). It defined the class as:

> all Marion County residents required to register as sex or violent offenders pursuant to Indiana law who are not subject to any form of supervised release and who have been found to be a sexually violent predator under Indiana law or who have been convicted of one or more of the offenses noted in Indiana Code § 35–42–4–12(b)(2) and who are not within the statutory exceptions noted in Indiana Code § 35–42–4–12(a).

Doe filed a motion for preliminary injunction, but the parties agreed it should be treated as a motion for a permanent injunction and decided after a full bench trial. The district court ordered as much. *See* Fed.R.Civ.P. 65(a)(2). The parties further agreed no additional discovery was required and there would be no live evidence at trial. Accordingly, the bench trial consisted of the introduction of four affidavits—two from Doe and two from social media experts—as well as arguments from counsel.

2. Lower Court Decision

After the bench trial, the district court upheld the law and entered judgment for the defendant. It found the law implicates Doe's First Amendment rights but held the regulation is narrowly tailored to serve a significant state interest and leaves open ample alternative channels of communication.

Although the court noted that the statute "captures considerable conduct that has nothing to do" with the state's legitimate interest in protecting children from predators, it asserted "Doe never furnishes the Court with workable measures that achieve the same goal (deterrence and prevention of online sexual exploitation of minors) while not violating his First Amendment rights." The district court reasoned that the law is narrowly tailored because it "only preclude[s] ... using web sites where online predators have easy access" to children, but "the vast majority of the internet is still at Mr. Doe's fingertips." The district court concluded that the law is not "substantially broader than necessary" because social networking sites without minors, e-mail, and message boards present alternative methods to communicate as Doe wished.

Doe offered another Indiana law that already prohibits online solicitation of children as evidence that the law is not narrowly tailored. The district court rejected this argument stating that "the statutes serve different purposes": "[o]ne set of statutes aims to *punish* those who have *already committed* the crime of solicitation," while the "challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors." (emphases in original). The district court concluded by noting the statute furthers the state's "strong interest in ensuring that sex offenders do not place themselves in these potentially dangerous situations."

On the issue of alternative channels of communication, the district court listed several social network alternatives, namely: "the ability to congregate with others, attend civic meetings, call in to radio shows, write letters to newspapers and magazines, post on message boards, comment on online stories that do not require a Facebook [account], email friends, family, associates, politicians and other adults, publish a blog, and use social networking sites that do not allow minors."

Doe timely appeals this decision.

II. Discussion

[1][2] We review a denial of a permanent injunction for abuse of decision, accepting all factual determinations unless they are clearly erroneous. *3M v. Pribyl*, 259 F.3d 587, 597 (7th Cir.2001). However, this case presents a single legal question, which we review de novo.[FN4] The statute clearly implicates Doe's First Amendment rights as incorporated through the Fourteenth Amendment. It not only precludes expression through the medium of social media, *see* *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) ("the usual rule [is] that governmental bodies may not prescribe the form or content of individual expression"), it also limits his "right to receive information and ideas," *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); *see* *Procunier v. Martinez*, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) ("[T]he addressee as well as the sender of direct personal correspondence derive[ ] from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication."). The Indiana law, however, is content neutral because it restricts speech without reference to the expression's content. *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 641–42, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). As such, it may impose reasonable "time, place, or manner restrictions." *Clark v. Comm. for Creative Non–Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). To do so, the law must satisfy a variant of intermediate scrutiny—it must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Because we conclude the law is not narrowly tailored, we need not reach the alternative channel inquiry.

The state initially asserts an interest in "protecting public safety, and specifically in protecting minors from harmful online communications." Indiana is certainly justified in shielding its children from improper sexual communication. Doe agrees, but argues the state burdens substantially more speech than necessary to serve the intended interest. Indiana naturally counters that the law's breadth is necessary to achieve its goal. On this point, the Supreme Court's cases on narrow tailoring are instructive.

[3] "A complete ban [such as the social media ban at issue] can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *See* *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). In *Frisby*, the Court upheld an ordinance that prohibited picketing focused on a particular residence. *Id.* at 477, 108 S.Ct. 2495. The regulation sought to stop a recent pattern of abortion protesters that surrounded abortion doctors' homes. The Court found that the state had a significant interest in protecting "residential privacy," and a "complete prohibition" was the only way to further this interest. *Id.* at 484–86, 108 S.Ct. 2495. The Court reasoned that "the evil of targeted residential picketing ... is created by the medium of expression itself." *Id.* at 487–88, 108 S.Ct. 2495 (internal quotations omitted). A ban on all picketing would have gone too far because only the focused residential protests threatened the state interest. *Id.* at 486, 108 S.Ct. 2495. Similarly, in *City of Los Angeles v. Taxpayers for Vincent*, a city ordinance prohibited posting signs on public property. 466 U.S. 789, 792, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). The Court concluded these signs constituted "visual blight" and the regulation furthered the city's legitimate interest in esthetic values. *Id.* at 805, 104 S.Ct. 2118. The Court upheld the complete ban reasoning the "substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Id.* at 810, 104 S.Ct. 2118.

In contrast to *Frisby* and *Vincent*, the Supreme Court has invalidated bans on expressive activity that are not the substantive evil if the state had alternative means of combating the evil. In *Schneider v. Town of Irvington*, the Court struck down various blanket prohibitions against distributing handbills. 308 U.S. 147, 162–64, 60 S.Ct. 146, 84 L.Ed. 155 (1939). The laws in that case furthered a legitimate interest in preventing litter. But unlike the ordinances in *Frisby* and *Vincent*, the expressive activity—handing paper to people in public—did not produce the evil. The recipients' incidental decision to drop the paper did. As such, the Court required the cities to prevent littering by enforcing littering laws; they could not

prohibit activity that might incidentally result in littering. *Id.* at 162–63, 60 S.Ct. 146. Similarly, in *Martin v. City of Struthers,* the Court invalidated an ordinance that prohibited all door-to-door distributions or solicitations because "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors." 319 U.S. 141, 147, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). For example, those who did not want to receive a stranger could post no trespassing signs, and states could permissibly punish those who disobeyed the warnings. *Id.*

Turning to the Indiana statute, the state agrees there is nothing dangerous about Doe's use of social media as long as he does not improperly communicate with minors. Further, there is no disagreement that illicit communication comprises a minuscule subset of the universe of social network activity. As such, the Indiana law targets substantially more activity than the evil it seeks to redress. Even the district court agreed with this sentiment, stating the law "captures considerable conduct that has nothing to do" with minors. Indiana prevents Doe from using social networking sites for fear that he might, subsequent to logging on to the website or program, engage in activity that Indiana is entitled to prevent. But like the states in *Schneider* and *Martin,* Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders. For instance, it is a felony in Indiana for persons over twenty-one to "solicit" children under sixteen "to engage in: (1) sexual intercourse; (2) deviate sexual conduct; or (3) any fondling intended to arouse or satisfy the sexual desires of either the child or the older person." Ind.Code § 35–42–4–6 (it is also a felony for person between the ages of eighteen to twenty-one to solicit children under fourteen). A separate statute goes further. It punishes mere "inappropriate communication with a child" and communication "with the intent to gratify the sexual desires of the person or the individual," Ind.Code § 35–42–4–13 (applies to persons over twenty-one communicating with children fourteen or younger). Significantly, both statutes have enhanced penalties for using a computer network and better advance Indiana's interest in preventing harmful interaction with children (by going beyond social networks). They also accomplish that end more narrowly (by refusing to burden benign Internet activity). That is, they are neither over- nor under-inclusive like the statute at issue here.[FN5]

In conducting this analysis, however, we must be most careful not to impose too high a standard on Indiana. The Supreme Court has continually reminded us that the state's regulation "need not be the least restrictive or least intrusive means of" combating the state's legitimate interests, *Ward,* 491 U.S. at 798, 109 S.Ct. 2746, and post-hoc analyses, like the one we are engaging in, are particularly susceptible to running afoul of this principle. At first glance, this standard seems in tension with language in *Frisby* noting a law must "target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy," *Frisby,* 487 U.S. at 485, 108 S.Ct. 2495, and indeed, that is what the dissenters in *Ward* alleged, *see Ward,* 491 U.S. at 804–07, 109 S.Ct. 2746 (Marshall, J., dissenting). However, *Ward* scales back *Frisby* in a limited number of situations. On the one hand, *Ward* adds a quantitative component to the *Frisby* language by noting the law must not be "*substantially* broader than necessary." *Id.* at 800, 109 S.Ct. 2746 (emphasis added). On the other hand, *Ward* also embodies an administrability exception in stating "the requirement of narrow tailoring is satisfied 'so long as the [state interest] would be achieved less effectively absent the regulation.' " *Ward,* 491 U.S. at 799, 109 S.Ct. 2746 (original quotations and alterations omitted). In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil.

Hill v. Colorado is illustrative. 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). There, the state, concerned about abortion protests, passed a statute that prohibited approaching individuals within a 100–foot radius of a healthcare facility "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with [an]other person" on public property. *Id.* at 707, 120 S.Ct. 2480. The Court acknowledged that in furthering the state's interest in providing unimpeded access to healthcare facilities and shielding patients from potentially traumatic encounters, the state's blanket prohibition on approaching individuals would "sometimes inhibit a demonstrator whose approach in fact would have proved harmless." *Id.* at 729, 120 S.Ct. 2480. But this over-inclusiveness was "justified by the great difficulty" in creating a law that "targets and eliminates no more than the exact source of the 'evil.' " *See id.*; *Frisby,* 487 U.S. at 485, 108 S.Ct. 2495. The Court hypothesized that the ideal statute would prove convoluted, potentially protecting "a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing) of each individual movement within the 8–foot boundary." *Hill,* 530 U.S. at 729, 120 S.Ct. 2480. Thus, the statute at issue in *Hill* was constitutional because (1) the prohibited expression that did not further the state interest was minimal, and (2) its inclusion stemmed from the difficulty in carving a rule that covered precisely the evil contemplated by the legislature.

The Indiana statute's over-inclusiveness, however, cannot be justified by the administrability concerns described in *Hill.* With little difficulty, the state could more precisely target illicit communication, as the statutes above demonstrate. *See* Ind.Code §§ 35–42–4–6; 35–42–4–13. To be sure, other sex-offender or social media statutes might present different administrability questions. For instance, a hypothetical law banning all communication between minors and sex offenders through social media burdens less speech but nevertheless creates problems. Such a law frees most expression from regulation but still prohibits substantial harmless speech—e.g., at a very basic level, it would prohibit conversations between a parent and child if the parent is a sex offender. But as additional exceptions make a law more precise, the over-inclusiveness concerns decrease until the *Hill* administrability concerns dominate. Where that point lies, however, is for another case.

The district court also suggested the law was narrowly tailored to serve purposes different from the existing solicitation and communication laws. It stated the existing laws "aim[ ] to *punish* those who have *already committed* the crime of solicitation," while the "challenged statute, by contrast, aims to *prevent and deter* the sexual exploitation of minors by barring certain sexual offenders from entering a virtual world where they have access to minors" (emphases in original). The state continues this argument on appeal. The immediate problem with this suggestion is that all criminal laws generally "punish" those who have "already committed" a crime. The punishment is what "prevent[s] and deter[s]" undesirable behavior. Thus, characterizing the new statute as preventative and the existing statutes as reactive is questionable. The legislature attached criminal penalties to solicitations in order to prevent conduct in the same way decade-long sentences are promulgated to deter repeat drug offenses. Perhaps the state suggests that prohibiting social networking deprives would-be solicitors the opportunity to send the solicitation in the first place. But if they are willing to break the existing anti-solicitation law, why would the social networking law provide any more deterrence? By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation—indeed, those laws already have enhanced penalties if the defendant uses a computer network. *See* Ind.Code §§ 35–42–4–6(b)(3); 35–42–4–13(c).

The state also makes the conclusory assertion that "the State need not wait until a child is solicited by a sex offender on Facebook." Of course this statement is correct, but the goal of deterrence does not license the state to restrict far more speech than necessary to target the prospective harm. Moreover, the state never explains how the social network law allows them to avoid "waiting." "That the [state's] asserted interests are important in the abstract does not mean ... that [its regulation] will in fact advance those interests." *See Turner,* 512 U.S. at 664, 114 S.Ct. 2445. The state "must do more than simply posit the existence of the disease sought to be cured," and "the regulation [must] in fact alleviate these harms in a direct and material way." *Id.* (internal quotations omitted). The state bears this burden, and it does not explain how the law furthers this interest.

Despite the infirmity of the statute in this case, we do not foreclose the possibility that keeping certain sex offenders off social networks advances the state's interest in ways distinct from the existing justifications. For example, perpetrators may take time to seek out minors they will later solicit. This initial step requires time spent on social networking websites before the solicitation occurs. In the future, the state may argue that prohibiting the use of social networking allows law enforcement to swoop in and arrest perpetrators before they have the opportunity to send an actual solicitation. This argument remains speculative. And it is uncertain whether such a law could advance this interest without burdening a "substantially broader" than necessary group of sex offenders who will not use the Internet in illicit ways. [FN6] *See Ward,* 491 U.S. at 800, 109 S.Ct. 2746. But perhaps such a law could apply to certain persons that present an acute risk—those individuals whose presence on social media impels them to solicit children. Currently, the state presents no evidence that covered individuals present this sort of risk. We speculate only to make clear that this decision should not be read to limit the legislature's ability to craft constitutional solutions to this modern-day challenge.

The district court also cited *Kansas v. Hendricks,* 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), for the proposition that the state may "ensur[e] that sex offenders do not place themselves in these potentially dangerous situations." [FN7] However, *Hendricks* is inapposite. It rejected a substantive due process challenge to a Kansas statute permitting the state to commit persons that are "likely to engage in sexually violent behavior." *Id.* at 351, 117 S.Ct. 2072 (quoting Kan. Stat. Ann. § 59–29a01 (1994)). The case did not present a First Amendment challenge. Notwithstanding, the

Hendricks statute proceeds cautiously and is far more targeted than the Indiana statute here. The *Hendricks* law provided respondents a number of procedural safeguards before a trial in which the state had to prove beyond a reasonable doubt that petitioners had a "mental abnormality" that made them "likely to engage in the predatory acts of sexual violence." *Id.* at 352, 117 S.Ct. 2072. They were also entitled to regular review after their confinement to ensure they still met the act's criteria. *Id.* at 353, 117 S.Ct. 2072. We do not suggest that these procedures are a prerequisite to a First Amendment deprivation; *Hendricks*-style civil commitment presents a far greater deprivation of liberty than banning social networking. But *Hendricks* nevertheless illuminates the imprecision of the Indiana statute. Unlike the individualized assessment that ensured each respondent was "likely" to commit the redressable evil, the Indiana legislature imprecisely used the sex offender registry as a universal proxy for those likely to solicit minors. There may well be an appropriate proxy, but the state has to provide some evidence, beyond conclusory assertions, to justify the regulation.

This case also differs from our decision in *Doe v. City of Lafayette*, 377 F.3d 757 (2004) (en banc). That case involved an individual with an extensive history of sex offenses against children, who admitted he was going to the city parks "cruising" and "looking" for children. *Id.* at 759–60. The city issued a unilateral order banning the plaintiff from the city parks without a hearing. *Id.* at 760. Unlike this case, the regulation did not implicate the First Amendment so we upheld it under the deferential rational basis review. *Id.* at 764, 773. Other laws restricting sex offenders' proximity to schools or parks have been similarly upheld under rational basis review because courts have found they do not implicate the First Amendment or involve a fundamental right. *See, e.g., Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (holding that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) (holding that the public disclosure provision of Connecticut's sex offender registration law did not violate the Due Process Clause); *Doe v. Miller*, 405 F.3d 700 (8th Cir.2005) (holding residency restriction within two thousand feet of school or child care facility constitutional under rational basis review).[FN8]

Finally, this opinion should not be read to affect district courts' latitude in fashioning terms of supervised release, 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]"), or states from implementing similar solutions. Our penal system necessarily implicates various constitutional rights, and we review sentences under distinct doctrines. Terms of supervised release, for instance, must be "reasonably related to the [sentencing] factors" and "involve[ ] no greater deprivation of liberty than is reasonably necessary." § 3583(d)(1)-(2). Thus, in assessing the need for incapacitation, *see* § 3553(a)(2)(C), a court could conceivably limit a defendant's Internet access if full access posed too high a risk of recidivism. *United States v. Scott*, 316 F.3d 733, 736–37 (7th Cir.2003). The alternative to limited Internet access may be additional time in prison, which is surely more restrictive of speech than a limitation on electronics. This option is not without limits, *see United States v. Holm*, 326 F.3d 872, 878–79 (7th Cir.2003) (holding total Internet ban was too broad and compiling similar cases from other circuits), but terms of supervised release or parole may offer viable constitutional alternatives to the blanket ban—imposed outside the penal system—in this case.

We conclude by noting that Indiana continues to possess existing tools to combat sexual predators. The penal system offers speech-restrictive alternatives to imprisonment. Regulations that do not implicate the First Amendment are reviewed only for a rational basis. The Constitution even permits civil commitment under certain conditions. But laws that implicate the First Amendment require narrow tailoring. Subsequent Indiana statutes may well meet this requirement, but the blanket ban on social media in this case regrettably does not.

III. Conclusion

For the foregoing reasons, we REVERSE the district court's decision, and REMAND with instructions to enter judgment in favor of Doe and issue the injunction.

FN* The Honorable John J. Tharp Jr., United States District Court for the Northern District of Illinois, sitting by designation.

FN1. A " 'social networking web site' means an Internet web site that: (1) facilitates the social introduction between two or more persons; (2) requires a person to register or create an account, a username, or a password to become a member of the web site and to communicate with other members; (3) allows a member to create a web page or a personal profile; and (4) provides a member with the opportunity to communicate with another person. The term

does not include an electronic mail program or message board program." § 35–42–4–12(d).

FN2. An " 'instant messaging or chat room program' means a software program that requires a person to register or create an account, a username, or a password to become a member or registered user of the program and allows two or more members or authorized users to communicate over the Internet in real time using typed text. The term does not include an electronic mail program or message board program." § 35–42–4–12(c).

FN3. He sued the City of Indianapolis as well, but it was dismissed by stipulation.

FN4. The state argues that the district court's citation to a report (that was not in the record) deserves deference on appeal. However, only adjudicative facts are entitled to the clearly erroneous standard of review. Adjudicative facts concern the parties' conduct and are the facts that normally go to a jury. They constitute the facts that appellate courts do not disturb on appeal. The report, on the other hand, contains legislative facts. They are facts in the literal sense, but they come from outside the case and bear on the prudence or meaning of a legal rule. *See* Fed.R.Evid. 201(a); Fed.R.Evid. 201 Advisory Committee Note to Subdivision (a) of 1972 Proposed Rules.

FN5. To be sure, the ages in the existing statutes are different. But Indiana could adjust that aspect of the laws as it sees fit.

FN6. This example brings the law's overbreadth concerns to the surface. Today, we facially invalidate the Indiana law because it is not narrowly tailored to serve the state's interest and any plaintiff could show as much. *See Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n. 13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) ("[L]egislation repeatedly has been struck down 'on its face' because it was apparent that any application of the legislation would create an unacceptable risk of the suppression of ideas." (second quotation omitted)); *e.g., United States v. Playboy Entm't Grp.*, 529 U.S. 803, 806–07, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). But assuming arguendo that Doe's (or a different plaintiff's) speech is unprotected or the law could constitutionally be applied to them, it still inexplicably applies to sex offenders whose crimes did not involve the Internet or children. As such, a plaintiff could still bring a successful facial challenge because the law "applie[s] unconstitutionally to others, in other situations not before the court" *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); *e.g., United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010).

FN7. The district court actually cited *United States v. Comstock*, —— U.S. ——, 130 S.Ct. 1949, 1954, 176 L.Ed.2d 878 (2010), but *Comstock* was merely an extension of *Hendricks* and its progeny to the federal government.

FN8. The only court (as far as we know) to analyze a sex offender statute under the First Amendment was the Tenth Circuit in *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir.2012). The court struck down a local library rule banning registered sex offenders after concluding the library was a limited public forum and the ban implicated the First Amendment. The case is unique, however, in that the city offered no evidence supporting its ban. Instead, it erroneously argued that it had "no burden" under *Ward*. *See id.* at 1131–32. Thus, the court left open the possibility that other restrictions could survive First Amendment scrutiny.

Case 2.2

134 F.3d 87
(Cite as: 134 F.3d 87)
BAD FROG BREWERY, INC., Plaintiff-Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY, Anthony J. Casale, Lawrence J. Gedda, Edward F. Kelly, individually and as members of the New York State Liquor Authority, Defendants-Appellees.

No. 1080, Docket 97-7949.
United States Court of Appeals,Second Circuit.
Argued Oct. 22, 1997.
Decided Jan. 15, 1998.

JON O. NEWMAN, Circuit Judge:

A picture of a frog with the second of its four unwebbed "fingers" extended in a manner evocative of a well known human gesture of insult has presented this Court with significant issues concerning First Amendment protections for commercial speech. The frog appears on labels that Bad Frog Brewery, Inc. ("Bad Frog") sought permission to use on bottles of its beer products. The New York State Liquor Authority ("NYSLA" or "the Authority") denied Bad Frog's application.

Bad Frog appeals from the July 29, 1997, judgment of the District Court for the Northern District of New York (Frederic J. Scullin, Jr., Judge) granting summary judgment in favor of NYSLA and its three Commissioners and rejecting Bad Frog's commercial free speech challenge to NYSLA's decision. We conclude that the State's prohibition of the labels from use in all circumstances does not materially advance its asserted interests in insulating children from vulgarity or promoting temperance, and is not narrowly tailored to the interest concerning children. We therefore reverse the judgment insofar as it denied Bad Frog's federal claims for injunctive relief with respect to the disapproval of its labels. We affirm, on the ground of immunity, the dismissal of Bad Frog's federal damage claims against the commissioner defendants, and affirm the dismissal of Bad Frog's state law damage claims on the ground that novel and uncertain issues of state law render this an inappropriate case for the exercise of supplemental jurisdiction.

Background

Bad Frog is a Michigan corporation that manufactures and markets several different types of alcoholic beverages under its "Bad Frog" trademark. This action concerns labels used by the company in the marketing of Bad Frog Beer, Bad Frog Lemon Lager, and Bad Frog Malt Liquor. Each label prominently features an artist's rendering of *91 a frog holding up its four-"fingered" right "hand," with the back of the "hand" shown, the second "finger" extended, and the other three "fingers" slightly curled. The membranous webbing that connects the digits of a real frog's foot is absent from the drawing, enhancing the prominence of the extended "finger." Bad Frog does not dispute that the frog depicted in the label artwork is making the gesture generally known as "giving the finger" and that the gesture is widely regarded as an offensive insult, conveying a message that the company has characterized as "traditionally ... negative and nasty." [FN1] Versions of the label feature slogans such as "He just don't care," "An amphibian with an attitude," "Turning bad into good," and "The beer so good ... it's bad." Another slogan, originally used but now abandoned, was "He's mean, green and obscene."

FN1. The gesture, also sometimes referred to as "flipping the bird," see New Dictionary of American Slang 133, 141 (1986), is acknowledged by Bad Frog to convey, among other things, the message "fuck you." The District Court found that the gesture "connotes a patently offensive suggestion," presumably a suggestion to having intercourse with one's self.

Hand gestures signifying an insult have been in use throughout the world for many centuries. The gesture of the extended middle finger is said to have been used by Diogenes to insult Demosthenes. See Betty J. Bauml & Franz H. Bauml, Dictionary of Worldwide Gestures 159 (2d ed.1997). Other hand gestures regarded as insults in some countries include an extended right thumb, an extended little finger, and raised index and middle fingers, not to mention those effected with two hands. See id.

Bad Frog's labels have been approved for use by the Federal Bureau of Alcohol, Tobacco, and Firearms, and by authorities in at least 15 states and the District of Columbia, but have been rejected by authorities in New Jersey, Ohio, and Pennsylvania. In May 1996, Bad Frog's authorized New York distributor, Renaissance Beer Co., made an initial application to NYSLA for brand label approval and registration pursuant to section 107-a(4)(a) of New York's Alcoholic Beverage Control Law. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a) (McKinney 1987 & Supp.1997). NYSLA denied that application in July. Bad Frog filed a new application in August, resubmitting the prior labels and slogans, but omitting the label with the slogan "He's mean, green and obscene," a slogan the Authority had previously found rendered the entire label obscene. That slogan was replaced with a new slogan, "Turning bad into good." The second application, like the first, included promotional material making the extravagant claim that the frog's gesture, whatever its past meaning in other contexts, now means "I want a Bad Frog beer," and that the company's goal was to claim the gesture as its own and as a symbol of peace, solidarity, and good

will. In September 1996, NYSLA denied Bad Frog's second application, finding Bad Frog's contention as to the meaning of the frog's gesture "ludicrous and disingenuous." NYSLA letter to Renaissance Beer Co. at 2 (Sept. 18, 1996) ("NYSLA Decision"). Explaining its rationale for the rejection, the Authority found that the label "encourages combative behavior" and that the gesture and the slogan, "He just don't care," placed close to and in larger type than a warning concerning potential health problems,

foster a defiance to the health warning on the label, entice underage drinkers, and invite the public not to heed conventional wisdom and to disobey standards of decorum.

Id. at 3. In addition, the Authority said that it considered that approval of this label means that the label could appear in grocery and convenience stores, with obvious exposure on the shelf to children of tender age id., and that it is sensitive to and has concern as to [the label's] adverse effects on such a youthful audience.

Id. Finally, the Authority said that it has considered that within the state of New York, the gesture of "giving the finger" to someone, has the insulting meaning of "Fuck You," or "Up Yours," ... a confrontational, obscene gesture, known to lead to fights, shootings and homicides ... [,] concludes that the encouraged use of this gesture in licensed premises is akin to *92 yelling "fire" in a crowded theatre, ... [and] finds that to approve this admittedly obscene, provocative confrontational gesture, would not be conducive to proper regulation and control and would tend to adversely affect the health, safety and welfare of the People of the State of New York.

Id.

Bad Frog filed the present action in October 1996 and sought a preliminary injunction barring NYSLA from taking any steps to prohibit the sale of beer by Bad Frog under the controversial labels. The District Court denied the motion on the ground that Bad Frog had not established a likelihood of success on the merits. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, No. 96-CV-1668, 1996 WL 705786 (N.D.N.Y. Dec. 5, 1996). The Court determined that NYSLA's decision appeared to be a permissible restriction on commercial speech under Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), and that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment.

The parties then filed cross motions for summary judgment, and the District Court granted NYSLA's motion. See Bad Frog Brewery, Inc. v. New York State Liquor Authority, 973 F.Supp. 280 (N.D.N.Y.1997). The Court reiterated the views expressed in denying a preliminary injunction that the labels were commercial speech within the meaning of Central Hudson and that the first prong of Central Hudson was satisfied because the labels concerned a lawful activity and were not misleading. Id. at 282. Turning to the second prong of Central Hudson, the Court considered two interests, advanced by the State as substantial: (a) "promoting temperance and respect for the law" and (b) "protecting minors from profane advertising." Id. at 283.

Assessing these interests under the third prong of Central Hudson, the Court ruled that the State had failed to show that the rejection of Bad Frog's labels "directly and materially advances the substantial governmental interest in temperance and respect for the law." Id. at 286. In reaching this conclusion the Court appears to have accepted Bad Frog's contention that marketing gimmicks for beer such as the "Budweiser Frogs," "Spuds Mackenzie," the "Bud-Ice Penguins," and the "Red Dog" of Red Dog Beer ... virtually indistinguishable from the Plaintiff's frog ... promote intemperate behavior in the same way that the Defendants have alleged Plaintiff's label would ... [and therefore the] regulation of the Plaintiff's label will have no tangible effect on underage drinking or intemperate behavior in general.

Id.

However, the Court accepted the State's contention that the label rejection would advance the governmental interest in protecting children from advertising that was "profane," in the sense of "vulgar." Id. at 285 (citing Webster's II New Riverside Dictionary 559 (1984)). The Court acknowledged the State's failure to present evidence to show that the label rejection would advance this interest, but ruled that such evidence was required in cases "where the interest advanced by the Government was only incidental or tangential to the government's regulation of speech," id. at 285 (citing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, ---- - ----, 116 S.Ct. 1495, 1508-09, 134 L.Ed.2d 711 (1996); Rubin v. Coors Brewing Co., 514 U.S. 476, 487-88, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428, 113 S.Ct. 1505, 1516, 123 L.Ed.2d 99 (1993); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73, 103 S.Ct. 2875, 2883-84, 77 L.Ed.2d 469 (1983)), but not in cases "where the link between the regulation and the government interest advanced is self evident," 973 F.Supp. at 285 (citing Florida Bar v. Went for It, Inc., 515 U.S. 618, 625- 27, 115 S.Ct. 2371, 2376-78, 132 L.Ed.2d 541 (1995); Posadas de Puerto Rico Associates v. Tourism Co., 478 U.S. 328, 341-42, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986)). The Court concluded that common sense requires this Court to conclude that the prohibition of the use of the profane image on the label in question will necessarily limit the exposure of minors in *93 New

York to that specific profane image. Thus, to that extent, the asserted government interest in protecting children from exposure to profane advertising is directly and materially advanced.
973 F.Supp. at 286.
Finally, the Court ruled that the fourth prong of Central Hudson--narrow tailoring--was met because other restrictions, such as point-of-sale location limitations would only limit exposure of youth to the labels, whereas rejection of the labels would "completely foreclose the possibility" of their being seen by youth. Id. at 287. The Court reasoned that a somewhat relaxed test of narrow tailoring was appropriate because Bad Frog's labels conveyed only a "superficial aspect of commercial advertising of no value to the consumer in making an informed purchase," id., unlike the more exacting tailoring required in cases like 44 Liquormart and Rubin, where the material at issue conveyed significant consumer information.
The Court also rejected Bad Frog's void-for-vagueness challenge, id. at 287-88, which is not renewed on appeal, and then declined to exercise supplemental jurisdiction over Bad Frog's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994), id. at 288.
Discussion
I. New York's Label Approval Regime and Pullman Abstention
Under New York's Alcoholic Beverage Control Law, labels affixed to liquor, wine, and beer products sold in the State must be registered with and approved by NYSLA in advance of use. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a). The statute also empowers NYSLA to promulgate regulations "governing the labeling and offering" of alcoholic beverages, id. § 107-a(1), and directs that regulations "shall be calculated to prohibit deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field in so far as possible," id. § 107-a(2).
Purporting to implement section 107-a, NYSLA promulgated regulations governing both advertising and labeling of alcoholic beverages. Signs displayed in the interior of premises licensed to sell alcoholic beverages shall not contain "any statement, design, device, matter or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste" or "any illustration which is not dignified, modest and in good taste." N.Y. Comp.Codes R. & Regs. tit. ix § 83.3 (1996). Labels on containers of alcoholic beverages "shall not contain any statement or representation, irrespective of truth or falsity, which, in the judgment of [NYSLA], would tend to deceive the consumer." Id. § 84.1(e).
NYSLA's actions raise at least three uncertain issues of state law. First, there is some doubt as to whether section 83.3 of the regulations, concerning designs that are not "in good taste," is authorized by a statute requiring that regulations shall be calculated to prohibit deception of consumers, increase the flow of truthful information, and/or promote national uniformity. It is questionable whether a restriction on offensive labels serves any of these statutory goals. Second, there is some doubt as to whether it was appropriate for NYSLA to apply section 83.3, a regulation governing interior signage, to a product label, especially since the regulations appear to establish separate sets of rules for interior signage and labels. Third, there is some doubt as to whether section 84.1(e) of the regulations, applicable explicitly to labels, authorizes NYSLA to prohibit labels for any reason other than their tendency to deceive consumers.
[1][2] It is well settled that federal courts may not grant declaratory or injunctive relief against a state agency based on violations of state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). "The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts." Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir.1996) (citing Pennhurst). Moreover, where a federal constitutional claim turns on an uncertain issue of state law and the controlling state statute is susceptible to an interpretation that would avoid or modify the federal constitutional *94 question presented, abstention may be appropriate pursuant to the doctrine articulated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477, 97 S.Ct. 1898, 1902-03, 52 L.Ed.2d 513 (1977); Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir.1995). Were a state court to decide that NYSLA was not authorized to promulgate decency regulations, or that NYSLA erred in applying a regulation purporting to govern interior signs to bottle labels, or that the label regulation applies only to misleading labels, it might become unnecessary for this Court to decide whether NYSLA's actions violate Bad Frog's First Amendment rights.
[3][4][5][6] However, we have observed that abstention is reserved for "very unusual or exceptional circumstances," Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir.1995). In the context of First Amendment claims, Pullman abstention has generally been disfavored where state statutes have been subjected to facial challenges, see Dombrowski v. Pfister, 380 U.S. 479, 489-90, 85 S.Ct. 1116, 1122-23, 14 L.Ed.2d 22 (1965); see also City of Houston v. Hill, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512-13, 96 L.Ed.2d 398 (1987). Even where such abstention has been required, despite a claim of facial invalidity, see Babbitt v. United Farm Workers National Union, 442 U.S. 289, 307-12, 99 S.Ct. 2301, 2313-16, 60 L.Ed.2d 895 (1979), the plaintiffs, unlike Bad Frog, were not challenging the application of state law to prohibit a specific example of allegedly protected

expression. If abstention is normally unwarranted where an allegedly overbroad state statute, challenged facially, will inhibit allegedly protected speech, it is even less appropriate here, where such speech has been specifically prohibited. Abstention would risk substantial delay while Bad Frog litigated its state law issues in the state courts. See Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397-98, 19 L.Ed.2d 444 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964).

II. Commercial or Noncommercial Speech?

[7] Bad Frog contends directly and NYSLA contends obliquely that Bad Frog's labels do not constitute commercial speech, but their common contentions lead them to entirely different conclusions. In Bad Frog's view, the commercial speech that receives reduced First Amendment protection is expression that conveys commercial information. The frog labels, it contends, do not purport to convey such information, but instead communicate only a "joke," [FN2] Brief for Appellant at 12 n. 5. As such, the argument continues, the labels enjoy full First Amendment protection, rather than the somewhat reduced protection accorded commercial speech.

FN2. Bad Frog also describes the "message" of its labels as "parody," Brief for Appellant at 12, but does not identify any particular prior work of art, literature, advertising, or labeling that is claimed to be the target of the parody. If Bad Frog means that its depiction of an insolent frog on its labels is intended as a general commentary on an aspect of contemporary culture, the "message" of its labels would more aptly be described as satire rather than parody. See generally Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580-81, 114 S.Ct. 1164, 1171-73, 127 L.Ed.2d 500 (1994) (explaining that "[p]arody needs to mimic an original to make its point").

NYSLA shares Bad Frog's premise that "the speech at issue conveys no useful consumer information," but concludes from this premise that "it was reasonable for [NYSLA] to question whether the speech enjoys any First Amendment protection whatsoever." Brief for Appellees at 24-25 n. 5. Ultimately, however, NYSLA agrees with the District Court that the labels enjoy some First Amendment protection, but are to be assessed by the somewhat reduced standards applicable to commercial speech.

The parties' differing views as to the degree of First Amendment protection to which Bad Frog's labels are entitled, if any, stem from doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved. In particular, these decisions have created some uncertainty as to the degree of protection for commercial advertising that lacks precise informational content.

*95 In 1942, the Court was "clear that the Constitution imposes no [First Amendment] restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). In Chrestensen, the Court sustained the validity of an ordinance banning the distribution on public streets of handbills advertising a tour of a submarine. Twenty-two years later, in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Court characterized Chrestensen as resting on "the factual conclusion [ ] that the handbill was 'purely commercial advertising,' " id. at 266, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921), and noted that Chrestensen itself had "reaffirmed the constitutional protection for 'the freedom of communicating information and disseminating opinion,' " id. at 265-66, 84 S.Ct. at 718 (quoting Chrestensen, 316 U.S. at 54, 62 S.Ct. at 921) (emphasis added). The famously protected advertisement for the Committee to Defend Martin Luther King was distinguished from the unprotected Chrestensen handbill:

The publication here was not a "commercial" advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. at 266, 84 S.Ct. at 718 (emphasis added). The implication of this distinction between the King Committee advertisement and the submarine tour handbill was that the handbill's solicitation of customers for the tour was not "information" entitled to First Amendment protection.

In 1973, the Court referred to Chrestensen as supporting the argument that "commercial speech [is] unprotected by the First Amendment." Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 384, 93 S.Ct. 2553, 2558, 37 L.Ed.2d 669 (1973). Pittsburgh Press also endeavored to give content to the then "unprotected" category of "commercial speech" by noting that "[t]he critical feature of the advertisement in Valentine v. Chrestensen was that, in the Court's view, it did no more than propose a commercial transaction." Id. at 385, 93 S.Ct. at 2558. Similarly, the gender-separate help-wanted ads in Pittsburgh Press were regarded as "no more than a proposal of possible employment," which rendered them "classic examples of commercial speech." Id. The Court rejected the newspaper's argument that commercial speech should receive some degree of First Amendment protection, concluding that the contention was unpersuasive where the commercial activity was illegal. See id. at 388-89, 93 S.Ct. at 2560-61.

Just two years later, Chrestensen was relegated to a decision upholding only the "manner in which commercial advertising could be distributed." Bigelow v. Virginia, 421 U.S. 809, 819, 95 S.Ct. 2222, 2231, 44 L.Ed.2d 600 (1975) (emphasis added). Bigelow somewhat generously read Pittsburgh Press as "indicat[ing] that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal." Id. at 821, 95 S.Ct. at 2232. However, in according protection to a newspaper advertisement for out-of-state abortion services, the Court was careful to note that the protected ad "did more than simply propose a commercial transaction." Id. at 822, 95 S.Ct. at 2232. Though it was now clear that some forms of commercial speech enjoyed some degree of First Amendment protection, it remained uncertain whether protection would be available for an ad that only "propose[d] a commercial transaction."

That uncertainty was resolved just one year later in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Framing the question as "whether speech which does 'no more than propose a commercial transaction' ... is so removed from [categories of expression enjoying First Amendment protection] that it lacks all protection," id. at 762, 96 S.Ct. at 1825-26, the Court said, "Our answer is that it is not," id. Though Virginia State Board interred the notion that "commercial speech" enjoyed no First Amendment protection, it arguably kept alive the idea that protection was available *96 only for commercial speech that conveyed information:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.

Id. at 765, 96 S.Ct. at 1827; see id. at 763, 96 S.Ct. at 1826-27 (emphasizing the "consumer's interest in the free flow of commercial information").

Supreme Court commercial speech cases upholding First Amendment protection since Virginia State Board have all involved the dissemination of information. See, e.g., 44 Liquormart, 517 U.S. 484, 116 S.Ct. 1495 (price of beer); Rubin, 514 U.S. 476, 115 S.Ct. 1585 (alcoholic content of beer); Central Hudson, 447 U.S. 557, 100 S.Ct. 2343 (benefits of using electricity); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (availability of lawyer services); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (residential "for sale" signs). In the one case since Virginia State Board where First Amendment protection was sought for commercial speech that contained minimal information--the trade name of an optometry business--the Court sustained a governmental prohibition. See Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). Acknowledging that a trade name "is used as part of a proposal of a commercial transaction," id. at 11, 99 S.Ct. at 895, and "is a form of commercial speech," id., the Court pointed out "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time...." Id. at 12, 99 S.Ct. at 895. Moreover, the Court noted, "the factual information associated with trade names may be communicated freely and explicitly to the public," id. at 16, 99 S.Ct. at 897, presumably through the type of informational advertising protected in Virginia State Board. The trade name prohibition was ultimately upheld because use of the trade name had permitted misleading practices, such as claiming standardized care, see id. at 14, 99 S.Ct. at 896, but the Court added that the prohibition was sustainable just because of the "opportunity" for misleading practices, see id. at 15, 99 S.Ct. at 896-97.

[8] Prior to Friedman, it was arguable from language in Virginia State Board that a trademark would enjoy commercial speech protection since, "however tasteless," its use is the "dissemination of information as to who is producing and selling what product...." 425 U.S. at 765, 96 S.Ct. at 1827. But the prohibition against trademark use in Friedman puts the matter in considerable doubt, unless Friedman is to be limited to trademarks that either have been used to mislead or have a clear potential to mislead. Since Friedman, the Supreme Court has not explicitly clarified whether commercial speech, such as a logo or a slogan that conveys no information, other than identifying the source of the product, but that serves, to some degree, to "propose a commercial transaction," enjoys any First Amendment protection. The Court's opinion in Posadas, however, points in favor of protection. Adjudicating a prohibition on some forms of casino advertising, the Court did not pause to inquire whether the advertising conveyed information. Instead, viewing the case as involving "the restriction of pure commercial speech which does 'no more than propose a commercial transaction,' " Posadas, 478 U.S. at 340, 106 S.Ct. at 2976 (quoting Virginia State Board, 425 U.S. at 762, 96 S.Ct. at 1825-26), the Court applied the standards set forth in Central Hudson, see id.

Bad Frog's label attempts to function, like a trademark, to identify the source of the product. The picture on a beer bottle of a frog behaving badly is reasonably to be understood as attempting to identify to consumers a product of the Bad Frog Brewery. [FN3] In addition, the label serves to propose a commercial transaction. Though the label communicates no information beyond the source *97 of the product, we think that minimal information, conveyed in the context of a proposal of a commercial transaction, suffices to invoke the protections for commercial speech, articulated in Central Hudson. [FN4]

FN3. The attempt to identify the product's source suffices to render the ad the type of proposal for a commercial transaction that receives the First Amendment protection for commercial speech. We intimate no view on whether the plaintiff's mark has acquired secondary meaning for trademark law purposes.

FN4. Since we conclude that Bad Frog's label is entitled to the protection available for commercial speech, we need not resolve the parties' dispute as to whether a label without much (or any) information receives no protection because it is commercial speech that lacks protectable information, or full protection because it is commercial speech that lacks the potential to be misleading. Cf. Rubin, 514 U.S. at 491, 115 S.Ct. at 1593-94 (Stevens, J., concurring in the judgment) (contending that label statement with no capacity to mislead because it is indisputably truthful should not be subjected to reduced standards of protection applicable to commercial speech); Discovery Network, 507 U.S. at 436, 113 S.Ct. at 1520 (Blackmun, J., concurring) ("[T]ruthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection."). Even if its labels convey sufficient information concerning source of the product to warrant at least protection as commercial speech (rather than remain totally unprotected), Bad Frog contends that its labels deserve full First Amendment protection because their proposal of a commercial transaction is combined with what is claimed to be political, or at least societal, commentary.

[9] The "core notion" of commercial speech includes "speech which does no more than propose a commercial transaction." Bolger, 463 U.S. at 66, 103 S.Ct. at 2880 (citations and internal quotation marks omitted). Outside this so-called "core" lie various forms of speech that combine commercial and noncommercial elements. Whether a communication combining those elements is to be treated as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication. See id. at 66-67, 103 S.Ct. at 2879-81. Bolger explained that while none of these factors alone would render the speech in question commercial, the presence of all three factors provides "strong support" for such a determination. Id.; see also New York State Association of Realtors, Inc. v. Shaffer, 27 F.3d 834, 840 (2d Cir.1994) (considering proper classification of speech combining commercial and noncommercial elements).

[10] We are unpersuaded by Bad Frog's attempt to separate the purported social commentary in the labels from the hawking of beer. Bad Frog's labels meet the three criteria identified in Bolger: the labels are a form of advertising, identify a specific product, and serve the economic interest of the speaker. Moreover, the purported noncommercial message is not so "inextricably intertwined" with the commercial speech as to require a finding that the entire label must be treated as "pure" speech. See Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 474, 109 S.Ct. 3028, 3031, 106 L.Ed.2d 388 (1989). Even viewed generously, Bad Frog's labels at most "link[ ] a product to a current debate," Central Hudson, 447 U.S. at 563 n. 5, 100 S.Ct. at 2350 n. 5, which is not enough to convert a proposal for a commercial transaction into "pure" noncommercial speech, see id. Indeed, the Supreme Court considered and rejected a similar argument in Fox, when it determined that the discussion of the noncommercial topics of "how to be financially responsible and how to run an efficient home" in the course of a Tupperware demonstration did not take the demonstration out of the domain of commercial speech. See Fox, 492 U.S. at 473-74, 109 S.Ct. at 3030-31.

We thus assess the prohibition of Bad Frog's labels under the commercial speech standards outlined in Central Hudson.

III. The Central Hudson Test

[11][12][13] Central Hudson sets forth the analytical framework for assessing governmental restrictions on commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly*98 advances the government interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. The last two steps in the analysis have been considered, somewhat in tandem, to determine if there is a sufficient " 'fit' between the [regulator's] ends and the means chosen to accomplish those ends." Posadas, 478 U.S. at 341, 106 S.Ct. at 2977. The burden to establish that "reasonable fit" is on the governmental agency defending its regulation, see Discovery Network, 507 U.S. at 416, 113 S.Ct. at 1509-10, though the fit need not satisfy a least-restrictive-means standard, see Fox, 492 U.S. at 476-81, 109 S.Ct. at 3032-35.

A. Lawful Activity and Not Deceptive

We agree with the District Court that Bad Frog's labels pass Central Hudson 's threshold requirement that the speech "must concern lawful activity and not be misleading." See Bad Frog, 973 F.Supp. at 283 n. 4. The consumption of beer (at least by adults) is legal in New York, and the labels cannot be said to be deceptive, even if they are offensive. Indeed,

although NYSLA argues that the labels convey no useful information, it concedes that "the commercial speech at issue ... may not be characterized as misleading or related to illegal activity." Brief for Defendants-Appellees at 24.

B. Substantial State Interests

NYSLA advances two interests to support its asserted power to ban Bad Frog's labels: (i) the State's interest in "protecting children from vulgar and profane advertising," and (ii) the State's interest "in acting consistently to promote temperance, i.e., the moderate and responsible use of alcohol among those above the legal drinking age and abstention among those below the legal drinking age." Id. at 26.

Both of the asserted interests are "substantial" within the meaning of Central Hudson. States have "a compelling interest in protecting the physical and psychological well-being of minors," and "[t]his interest extends to shielding minors from the influence of literature that is not obscene by adult standards." Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836-37, 106 L.Ed.2d 93 (1989); see also Reno v. American Civil Liberties Union, --- U.S. ----, ----, 117 S.Ct. 2329, 2346, 138 L.Ed.2d 874 (1997) ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.").

The Supreme Court also has recognized that states have a substantial interest in regulating alcohol consumption. See, e.g., 44 Liquormart, 517 U.S. at ----, 116 S.Ct. at 1509; Rubin, 514 U.S. at 485, 115 S.Ct. at 1591. We agree with the District Court that New York's asserted concern for "temperance" is also a substantial state interest. See Bad Frog, 973 F.Supp. at 284.

C. Direct Advancement of the State Interest

[14] To meet the "direct advancement" requirement, a state must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 771, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993) (emphasis added). A restriction will fail this third part of the Central Hudson test if it "provides only ineffective or remote support for the government's purpose." Central Hudson, 447 U.S. at 564, 100 S.Ct. at 2350. [FN5]

FN5. In Central Hudson, the Supreme Court held that a regulation prohibiting advertising by public utilities promoting the use of electricity directly advanced New York State's substantial interest in energy conservation. See Central Hudson,447 U.S. at 569, 100 S.Ct. at 2353. In contrast, the Court determined that the regulation did not directly advance the state's interest in the maintenance of fair and efficient utility rates, because "the impact of promotional advertising on the equity of [the utility]'s rates [was] highly speculative." Id.

(1) Advancing the interest in protecting children from vulgarity. Whether the prohibition of Bad Frog's labels can be said to materially advance the state interest in protecting minors from vulgarity depends on the extent to which underinclusiveness of regulation is pertinent to the relevant inquiry. The *99 Supreme Court has made it clear in the commercial speech context that underinclusiveness of regulation will not necessarily defeat a claim that a state interest has been materially advanced. Thus, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the Court upheld a prohibition of all offsite advertising, adopted to advance a state interest in traffic safety and esthetics, notwithstanding the absence of a prohibition of onsite advertising. See id. at 510-12, 101 S.Ct. at 2893- 95 (plurality opinion). Though not a complete ban on outdoor advertising, the prohibition of all offsite advertising made a substantial contribution to the state interests in traffic safety and esthetics. In United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), the Court upheld a prohibition on broadcasting lottery information as applied to a broadcaster in a state that bars lotteries, notwithstanding the lottery information lawfully being broadcast by broadcasters in a neighboring state. Though this prohibition, like that in Metromedia, was not total, the record disclosed that the prohibition of broadcasting lottery information by North Carolina stations reduced the percentage of listening time carrying such material in the relevant area from 49 percent to 38 percent, see Edge Broadcasting, 509 U.S. at 432, 113 S.Ct. at 2706, a reduction the Court considered to have "significance," id. at 433, 113 S.Ct. at 2706-07. [FN6]

FN6. Though not in the context of commercial speech, the Federal Communications Commission's regulation of indecent programming, upheld in Pacifica as to afternoon programming, was thought to make a substantial contribution to the asserted governmental interest because of the "uniquely pervasive presence in the lives of all Americans" achieved by broadcast media, 438 U.S. at 748, 98 S.Ct. at 3040. The pervasiveness of beer labels is not remotely comparable.

On the other hand, a prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest "to a material degree." Edenfield, 507 U.S. at 771, 113 S.Ct. at 1800. Thus, In Bolger, the Court invalidated a prohibition on mailing literature concerning contraceptives, alleged to support a governmental interest in aiding parents' efforts to discuss birth control with their children, because the restriction "provides only the most limited incremental support for the interest asserted." 463 U.S. at 73, 103 S.Ct. at 2884. In Linmark, a town's prohibition of "For Sale" signs was invalidated in part on the ground that the record failed to indicate "that proscribing such signs will reduce public awareness of realty sales." 431 U.S. at 96, 97 S.Ct. at 1620. In Rubin, the Government's asserted

interest in preventing alcoholic strength wars was held not to be significantly advanced by a prohibition on displaying alcoholic content on labels while permitting such displays in advertising (in the absence of state prohibitions). 514 U.S. at 488, 115 S.Ct. at 1592. Moreover, the Court noted that the asserted purpose was sought to be achieved by barring alcoholic content only from beer labels, while permitting such information on labels for distilled spirits and wine. See id. [FN7]

FN7. Posadas contains language on both sides of the underinclusiveness issue. The Court first pointed out that a ban on advertising for casinos was not underinclusive just because advertising for other forms of gambling were permitted, 478 U.S. at 342, 106 S.Ct. at 2977; however, compliance with Central Hudson 's third criterion was ultimately upheld because of the legislature's legitimate reasons for seeking to reduce demand only for casino gambling, id. at 342-43, 106 S.Ct. at 2977-78, an interest the casino advertising ban plainly advanced.

In the pending case, NYSLA endeavors to advance the state interest in preventing exposure of children to vulgar displays by taking only the limited step of barring such displays from the labels of alcoholic beverages. In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, [FN8] barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree.

FN8. Appellant has included several examples in the record.

We appreciate that NYSLA has no authority to prohibit vulgar displays appearing beyond the marketing of alcoholic beverages, but a state may not avoid the criterion of materially advancing its interest by authorizing only one component of its regulatory *100 machinery to attack a narrow manifestation of a perceived problem. If New York decides to make a substantial effort to insulate children from vulgar displays in some significant sphere of activity, at least with respect to materials likely to be seen by children, NYSLA's label prohibition might well be found to make a justifiable contribution to the material advancement of such an effort, but its currently isolated response to the perceived problem, applicable only to labels on a product that children cannot purchase, does not suffice. We do not mean that a state must attack a problem with a total effort or fail the third criterion of a valid commercial speech limitation. See Edge Broadcasting, 509 U.S. at 434, 113 S.Ct. at 2707 ("Nor do we require that the Government make progress on every front before it can make progress on any front."). Our point is that a state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity. [FN9]

FN9. Though Edge Broadcasting recognized (in a discussion of the fourth Central Hudson factor) that the inquiry as to a reasonable fit is not to be judged merely by the extent to which the government interest is advanced in the particular case, 509 U.S. at 430-31, 113 S.Ct. at 2705- 06, the Court made clear that what remains relevant is the relation of the restriction to the "general problem" sought to be dealt with, id. at 430, 113 S.Ct. at 2705. Thus, in the pending case, the pertinent point is not how little effect the prohibition of Bad Frog's labels will have in shielding children from indecent displays, it is how little effect NYSLA's authority to ban indecency from labels of all alcoholic beverages will have on the "general problem" of insulating children from vulgarity.The District Court ruled that the third criterion was met because the prohibition of Bad Frog's labels indisputably achieved the result of keeping these labels from being seen by children. That approach takes too narrow a view of the third criterion. Under that approach, any regulation that makes any contribution to achieving a state objective would pass muster. Edenfield, however, requires that the regulation advance the state interest "in a material way." The prohibition of "For Sale" signs in Linmark succeeded in keeping those signs from public view, but that limited prohibition was held not to advance the asserted interest in reducing public awareness of realty sales. The prohibition of alcoholic strength on labels in Rubin succeeded in keeping that information off of beer labels, but that limited prohibition was held not to advance the asserted interest in preventing strength wars since the information appeared on labels for other alcoholic beverages. The valid state interest here is not insulating children from these labels, or even insulating them from vulgar displays on labels for alcoholic beverages; it is insulating children from displays of vulgarity.

(2) Advancing the state interest in temperance. We agree with the District Court that NYSLA has not established that its rejection of Bad Frog's application directly advances the state's interest in "temperance." See Bad Frog, 973 F.Supp. at 286. NYSLA maintains that the raised finger gesture and the slogan "He just don't care" urge consumers generally to defy authority and particularly to disregard the Surgeon General's warning, which appears on the label next to the gesturing frog. See Brief for Defendants-Appellees at 30. NYSLA also contends that the frog appeals to youngsters and promotes underage drinking. See id.

The truth of these propositions is not so self-evident as to relieve the state of the burden of marshalling some empirical evidence to support its assumptions. All that is clear is that the gesture of "giving the finger" is offensive. Whether viewing that gesture on a beer label will encourage disregard of health warnings or encourage underage drinking remain matters of speculation.

NYSLA has not shown that its denial of Bad Frog's application directly and materially advances either of its asserted state interests.

D. Narrow Tailoring

[15] Central Hudson 's fourth criterion, sometimes referred to as "narrow tailoring," Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705; Fox, 492 U.S. at 480, 109 S.Ct. *101 at 3034-35 ("narrowly tailored"), [FN10] requires consideration of whether the prohibition is more extensive than necessary to serve the asserted state interest. Since NYSLA's prohibition of Bad Frog's labels has not been shown to make even an arguable advancement of the state interest in temperance, we consider here only whether the prohibition is more extensive than necessary to serve the asserted interest in insulating children from vulgarity.

FN10. The metaphor of "narrow tailoring" as the fourth Central Hudson factor for commercial speech restrictions was adapted from standards applicable to time, place, and manner restrictions on political speech, see Edge Broadcasting, 509 U.S. at 430, 113 S.Ct. at 2705 (citing Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989)).

In its most recent commercial speech decisions, the Supreme Court has placed renewed emphasis on the need for narrow tailoring of restrictions on commercial speech. In 44 Liquormart, where retail liquor price advertising was banned to advance an asserted state interest in temperance, the Court noted that several less restrictive and equally effective measures were available to the state, including increased taxation, limits on purchases, and educational campaigns. See 517 U.S. at ----, 116 S.Ct. at 1510. Similarly in Rubin, where display of alcoholic content on beer labels was banned to advance an asserted interest in preventing alcoholic strength wars, the Court pointed out "the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech." 514 U.S. at 491, 115 S.Ct. at 1594.

In this case, Bad Frog has suggested numerous less intrusive alternatives to advance the asserted state interest in protecting children from vulgarity, short of a complete statewide ban on its labels. Appellant suggests "the restriction of advertising to point-of-sale locations; limitations on billboard advertising; restrictions on over-the-air advertising; and segregation of the product in the store." Appellant's Brief at 39. Even if we were to assume that the state materially advances its asserted interest by shielding children from viewing the Bad Frog labels, it is plainly excessive to prohibit the labels from all use, including placement on bottles displayed in bars and taverns where parental supervision of children is to be expected. Moreover, to whatever extent NYSLA is concerned that children will be harmfully exposed to the Bad Frog labels when wandering without parental supervision around grocery and convenience stores where beer is sold, that concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant's products may be displayed within such stores. Or, with the labels permitted, restrictions might be imposed on placement of the frog illustration on the outside of six-packs or cases, sold in such stores.

NYSLA's complete statewide ban on the use of Bad Frog's labels lacks a "reasonable fit" with the state's asserted interest in shielding minors from vulgarity, and NYSLA gave inadequate consideration to alternatives to this blanket suppression of commercial speech. Cf. Bolger, 463 U.S. at 73, 103 S.Ct. at 2883-84 ("[T]he government may not 'reduce the adult population ... to reading only what is fit for children.' ") (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)) (footnote omitted).

E. Relief

[16] Since we conclude that NYSLA has unlawfully rejected Bad Frog's application for approval of its labels, we face an initial issue concerning relief as to whether the matter should be remanded to the Authority for further consideration of Bad Frog's application or whether the complaint's request for an injunction barring prohibition of the labels should be granted.

NYSLA's unconstitutional prohibition of Bad Frog's labels has been in effect since September 1996. The duration of that prohibition weighs in favor of immediate relief. Despite the duration of the prohibition, if it were preventing the serious impairment of a state interest, we might well leave it in force while the Authority is afforded a further opportunity to attempt to fashion some regulation of Bad Frog's labels that accords with First Amendment requirements. But this case presents no such threat of serious impairment *102 of state interests. The possibility that some children in supermarkets might see a label depicting a frog displaying a well known gesture of insult, observable throughout contemporary society, does not remotely pose the sort of threat to their well-being that would justify maintenance of the prohibition pending further proceedings before NYSLA. We will therefore direct the District Court to enjoin NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion.

[17] Though we conclude that Bad Frog's First Amendment challenge entitles it to equitable relief, we reject its claim for damages against the NYSLA commissioners in their individual capacities. The District Court's decision upholding the denial of the application, though erroneous in our view, sufficiently demonstrates that it was reasonable for the commissioners to

believe that they were entitled to reject the application, and they are consequently entitled to qualified immunity as a matter of law.

IV. State Law Claims

Bad Frog has asserted state law claims based on violations of the New York State Constitution and the Alcoholic Beverage Control Law. See Complaint ¶¶ 40- 46. In its opinion denying Bad Frog's request for a preliminary injunction, the District Court stated that Bad Frog's state law claims appeared to be barred by the Eleventh Amendment. See Bad Frog, 1996 WL 705786, at *5. In its summary judgment opinion, however, the District Court declined to retain supplemental jurisdiction over the state law claims, see 28 U.S.C. § 1367(c)(3), after dismissing all federal claims. See Bad Frog, 973 F.Supp. at 288.

[18] Contrary to the suggestion in the District Court's preliminary injunction opinion, we think that at least some of Bad Frog's state law claims are not barred by the Eleventh Amendment. The jurisdictional limitation recognized in Pennhurst does not apply to an individual capacity claim seeking damages against a state official, even if the claim is based on state law. See Ying Jing Gan v. City of New York, 996 F.2d 522, 529 (2d Cir.1993); Wilson v. UT Health Center, 973 F.2d 1263, 1271 (5th Cir.1992) ("Pennhurst and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities."). Bad Frog purports to sue the NYSLA commissioners in part in their individual capacities, and seeks damages for their alleged violations of state law. See Complaint ¶¶ 5-7 and "Demand for Judgment" ¶ (3).

[19] Nevertheless, we think that this is an appropriate case for declining to exercise supplemental jurisdiction over these claims in view of the numerous novel and complex issues of state law they raise. See 28 U.S.C. § 1367(c)(1). As noted above, there is significant uncertainty as to whether NYSLA exceeded the scope of its statutory mandate in enacting a decency regulation and in applying to labels a regulation governing interior signs. Bad Frog's claims for damages raise additional difficult issues such as whether the pertinent state constitutional and statutory provisions imply a private right of action for damages, and whether the commissioners might be entitled to state law immunity for their actions.

In the absence of First Amendment concerns, these uncertain state law issues would have provided a strong basis for Pullman abstention. Because First Amendment concerns for speech restriction during the pendency of a lawsuit are not implicated by Bad Frog's claims for monetary relief, the interests of comity and federalism are best served by the presentation of these uncertain state law issues to a state court. We thus affirm the District Court's dismissal of Bad Frog's state law claims for damages, but do so in reliance on section 1367(c)(1) (permitting declination of supplemental jurisdiction over claim "that raises a novel or complex issue of State law").

Conclusion

The judgment of the District Court is reversed, and the case is remanded for entry of judgment in favor of Bad Frog on its claim *103 for injunctive relief; the injunction shall prohibit NYSLA from rejecting Bad Frog's label application, without prejudice to such further consideration and possible modification of Bad Frog's authority to use its labels as New York may deem appropriate, consistent with this opinion. Dismissal of the federal law claim for damages against the NYSLA commissioners is affirmed on the ground of immunity. Dismissal of the state law claim for damages is affirmed pursuant to 28 U.S.C. § 1367(c)(1). Upon remand, the District Court shall consider the claim for attorney's fees to the extent warranted with respect to the federal law equitable claim.

Case 2.3

Iowa,2012.

Mitchell County v. Zimmerman

--- N.W.2d ----, 2012 WL 333777 (Iowa)

Only the Westlaw citation is currently available.

Supreme Court of Iowa.

MITCHELL COUNTY, Appellee,

v.

Matthew Hoover ZIMMERMAN, Appellant.

No. 10–1932.

Feb. 3, 2012.

MANSFIELD, Justice.

Members of the Old Order Groffdale Conference Mennonite Church are forbidden from driving tractors unless their wheels are equipped with steel cleats. A Mitchell County road protection ordinance forbids driving such vehicles on the highways. The question we must decide is whether the ordinance violates the religious rights of these church members under either the United States or the Iowa Constitution.

Although the issue is a close one, we conclude the ordinance as applied to church members violates the Free Exercise Clause of the First Amendment of the United States Constitution.[FN1] For the reasons stated herein, we find the ordinance is not of general applicability because it contains exemptions that are inconsistent with its stated purpose of protecting Mitchell County's roads. We also find the ordinance does not survive strict scrutiny because it is not the least restrictive means of serving what is claimed to be a compelling governmental interest in road protection. We therefore reverse and remand for entry of an order of dismissal.

I. Facts and Procedural History.

On February 1, 2010, Matthew Zimmerman was cited for operating a Massey Ferguson tractor in violation of a Mitchell County road protection ordinance. The tractor had steel cleats or "lugs" on its wheels. The lugs, which comprise "the bar that makes contact with the highway as the tractor moves forward," were several inches long and approximately an inch wide, and were attached to a rubber belt mounted on the wheel.

The ordinance in question was adopted by Mitchell County in September 2009. Its stated purpose is "to protect Mitchell County hard surfaced roads." The ordinance provides:

> No person shall drive over the hard surfaced roadways, including but not limited to cement, concrete and blacktop roads, of Mitchell County, or any political subdivision thereof, a tractor or vehicle equipped with steel or metal tires equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind or steel or metal wheels equipped with cleats, ice picks, studs, spikes, chains, or other projections of any kind.
>
> Mitchell County, Iowa, Mitchell Cnty. Road Prot. Ordinance (Sept. 22, 2009).

Zimmerman moved to dismiss the citation on the ground that his constitutional rights to free exercise of religion under the First Amendment to the United States Constitution and article I section 3 of the Iowa Constitution had been violated. A hearing was held before a magistrate, who found Zimmerman guilty of violating the ordinance and denied the motion. Zimmerman appealed the ruling to the district court. Because no recording of the hearing before the magistrate was available, a new hearing was held.

Eli Zimmerman, a fellow member of the Old Order Groffdale Conference Mennonite Church, testified at the district court hearing in support of the motion to dismiss. He explained the use of steel wheels is a religious practice and a church rule of the Old Order of Groffdale Mennonite Conference. Zimmerman cited Romans 12:2 as the biblical passage from which the rule derives.[FN2] The practice of using steel wheels on tractors dates back at least forty years. The church determined farm tractors could be used in addition to the traditional horse and buggy, but would have to be refitted with steel wheels to maintain small-scale farming and a close-knit community. If a church member drove a tractor that did not have steel wheels, he or she would be barred from the church. The steel wheel rule helps insure that tractors are not used for pleasure purposes and thereby displace the horse and buggy.

Zimmerman testified that it is permissible for church members to hire other persons to drive them for business purposes in vehicles with rubber tires. Also, a church member could hire someone with a rubber-tired tractor to haul his or her farm wagons to market.[FN3] However, this leads to "a lot of inconveniences." In addition, a church member could use horses for hauling purposes, if it were possible to make a living doing so. In short, it has long been a religious requirement of the Old Order of Groffdale Mennonite Conference that any motorized tractor driven by a church member be equipped with steel wheels. According to Zimmerman, "The religious

practice, it has to be steel hitting the surface, [be] it soil, [be] it highway, [be] it concrete."

The prohibition on driving motorized vehicles with rubber tires is not the only church rule affecting modern conveniences. Zimmerman testified that the use of radio, television, and computers is also forbidden in his religious community.

Over the years, to minimize possible road damage, the steel cleats and lugs have been made wider and have been mounted on rubber belts to provide cushioning. In Mitchell County, the Mennonites use county roads mainly when they need to haul their produce to the produce market. Both parties conceded that for some time the Mennonites and the County had peacefully coexisted, and the County did not object to the Mennonites' use of steel wheels. However, in 2009, the County embarked on a $9 million road resurfacing project, where the existing roads were "white-topped," or covered with concrete. The County had never used this new method of repaving before.

Two Mitchell County officials testified at the hearing that the steel wheels have damaged their newly white-topped roads by causing cracks and taking paint off them. Photos introduced by the County showed some cracks as well as markings where the steel wheels had come into contact with the road surface. As explained by the county engineer, "Because the steel is harder than the aggregates in that material—in the concrete surfaces and the asphalt surfaces, ... it will wear that surface off." [FN4]

Accordingly, in September 2009, the County adopted its road protection ordinance. The ordinance provides that violators are subject to a maximum fine of $500 or 30 days in jail, or both, and a civil penalty may also be imposed "equal to the amount necessary to repair the damage to the road."

Under existing state law, no tire on a vehicle moved on a highway is allowed to have "any block, stud, flange, cleat, or spike or any other protuberances of any material other than rubber," except for:

1. Farm machinery with tires having protuberances which will not injure the highway.

2. Tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid.

3. Pneumatic tires with inserted ice grips or tire studs projecting not more than one-sixteenth inch beyond the tread of the traction surface of the tire upon any vehicle from November 1 of each year to April 1 of the following year, except that a school bus and fire department emergency apparatus may use such tires at any time.

Iowa Code § 321.442 (2009). However, a Mitchell County supervisor testified that "the penalty there is only a $10 fine, which ... isn't prohibitive really, ... so we enacted ... this ordinance to protect our roads." The County concedes that its ordinance, which expressly states "Iowa Code § 321.442 shall continue to remain in full force and effect," is intended to mirror the Iowa Code provision substantively, while imposing a stiffer sanction for violations. Mitchell Cnty. Road Prot. Ordinance.

The district court overruled Matthew Zimmerman's motion to dismiss. It found "the use of steel wheels on tractors is a matter of religious conviction for members of the GC church." It also determined that the Mitchell County ordinance

> substantially burdens this religious practice.... These tractors are used to do field work, transport grain and produce to market, and are shared amongst neighbors and family members. All of these activities require that the tractors be driven on hard surfaced county roads. While it is admitted that other practices could be adopted to accomplish these same tasks, this ordinance will substantially burden the Mennonites ... by requiring them to find other modes of transporting both their goods to market and their tractors to fields.

However, the court held the Mitchell County ordinance was both neutral and generally applicable. It was not motivated by religious animosity but "to protect Mitchell County's investment in resurfacing their roads," and "it treats secular and religious conduct equally." The court therefore sustained the ordinance against Zimmerman's First Amendment challenge, citing *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).[FN5]

The district court then turned to Zimmerman's arguments based on article I section 3 of the Iowa

Constitution. The court held that even if, hypothetically, that provision required the ordinance to be supported by a compelling state interest, such an interest had been established here. As the court stated, "protecting the integrity of the county's roads" from damage is a compelling state interest, and the ordinance is "the least restrictive means" because it only disallows steel wheeled vehicles "on the hard surfaced roads."

We granted Zimmerman's application for discretionary review.

II. Standard of Review.

[1] We review constitutional claims de novo. *Zaber v. City of Dubuque,* 789 N.W.2d 634, 636 (Iowa 2010).

III. The First Amendment Claim.

Zimmerman contends the district court erred in denying his motion to dismiss based on the First Amendment to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof;* or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

U.S. Const. amend. I (emphasis added). The highlighted language, the Free Exercise Clause, was part of the original Federal Bill of Rights and was made applicable to the states through the Fourteenth Amendment in *Cantwell v. Connecticut.* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217–18 (1940).

[2] In America, one has "the right to believe and profess whatever religious doctrine one desires." *Smith,* 494 U.S. at 877, 110 S.Ct. at 1599, 108 L.Ed.2d at 884. Yet the Free Exercise Clause does not guarantee the government's absolute noninterference with religion.

Two landmark cases under the Free Exercise Clause were *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). In *Sherbert,* the United States Supreme Court held that a Seventh Day Adventist could not be denied unemployment benefits because she refused to work on Saturday for religious reasons. 374 U.S. at 409–10, 83 S.Ct. at 1797, 10 L.Ed.2d at 973–74. The Court found a substantial burden on the free exercise of her religion because the appellant was "force[d] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404, 83 S.Ct. at 1794, 10 L.Ed.2d at 970. The Court then turned to whether "some compelling state interest" justified this "substantial infringement of appellant's First Amendment right" and found none. *Id.* at 406–07, 83 S.Ct. at 1795, 10 L.Ed.2d at 972. Therefore, the Court concluded, "South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Id.* at 410, 83 S.Ct. at 1797, 10 L.Ed.2d at 974.

In *Yoder,* the Court decided that Wisconsin's compulsory school attendance law could not be applied to members of the Old Order Amish religion whose religion forbids school attendance after the eighth grade. 406 U.S. at 207–08, 234, 92 S.Ct. at 1529–30, 1542, 32 L.Ed.2d at 20–21, 36. The Supreme Court seemed to say that government could not compel conduct that interferes with the practice of a legitimate religious belief except based upon "interests of the highest order." *Id.* at 214–15, 92 S.Ct. at 1533, 32 L.Ed.2d at 24–25. Ultimately, it rejected the state's contention that "its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way." *Id.* at 221, 92 S.Ct. at 1536, 32 L.Ed.2d at 28.

A decade later, however, the Supreme Court observed that when a citizen engages in a commercial activity, it may not be possible for him or her to avoid, on religious grounds, the effects of laws regulating that activity:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127, 134–35 (1982), *superseded by statute on other grounds,* Exemption Act of 1988, Pub.L. No. 100–647, Title VIII, § 8007(a)(1), 102 Stat. 3781.

In *Lee,* a member of the Old Order Amish objected to the payment of employer Social Security taxes. He maintained that his faith already imposed an obligation on members to provide for fellow members. Both payment and receipt of Social Security benefits, he contended, were religiously forbidden. The Supreme Court did not dispute these points. *Id.* at 257, 102 S.Ct. at 1055, 71 L.Ed.2d at 132. It acknowledged, rather, that there was a conflict between the Amish faith and the requirements of the Social Security system. But the Court cited "the broad public interest in maintaining a sound tax system" and found it would be difficult to "accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs." *Id* . at 259–60, 102 S.Ct. at 1056–57, 71 L.Ed.2d at 134. "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* at 261, 102 S.Ct. at 1057, 71 L.Ed.2d at 135. Hence, the Court rejected Lee's free exercise claim.

This case arguably bears some similarities to *Lee.* The tenets of Zimmerman's religion require him to engage in a commercial activity, i.e., hauling farm products, on a different basis from others. But the highways belong to everyone, and there is a public interest in preserving and protecting those highways.

[3][4] Eight years after *Lee,* in *Smith,* the Supreme Court made clear that the First Amendment's Free Exercise Clause does not prohibit a state from enforcing "a neutral, generally applicable regulatory law," and cited *Lee* as its "most recent decision" involving such a law. *Smith,* 494 U.S. at 878–80, 110 S.Ct. at 1600–01, 108 L.Ed.2d at 885–86. A regulatory law that is both neutral and generally applicable passes constitutional muster under the *Smith* line of authority, even though it may require performance of an act—or abstention from conduct—in contradiction to an individual's religious beliefs. *Id.*[FN6] *Smith* distinguished *Yoder* on the ground it was not purely a free exercise case but involved an additional right—"the right of parents ... to direct the education of their children." *Id.* at 881, 110 S.Ct. at 1601, 108 L.Ed.2d at 887. *Smith* distinguished *Sherbert* as an unemployment case. *Id* . at 882–84, 102 S.Ct. at 1602–03, 108 L.Ed.2d at 888–89.

[5] On the other hand, laws that are not neutral or of general applicability require heightened scrutiny. They "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531–32, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472, 489 (1993).

[6] *Smith* and *Lukumi* illustrate the two poles of Federal Free Exercise Clause analysis. In *Smith,* the individuals were denied unemployment benefits because they had been fired for using peyote, in violation of a neutral and generally applicable regulatory law. 494 U.S. at 874–76, 110 S.Ct. at 1597–98, 108 L.Ed.2d at 882–84. The Supreme Court found no violation of their free exercise rights. *Id.* at 886–87, 110 S.Ct. at 1604, 108 L.Ed.2d at 890–91. By contrast, in *Lukumi,* the church challenged ordinances that targeted the killing of animals for "sacrifice" but not for food. 508 U.S. at 527–28, 113 S.Ct. at 2223–24, 124 L.Ed.2d at 486–87. The Supreme Court concluded that "each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief," *id.* at 545, 113 S.Ct. at 2233, 124 L.Ed.2d at 498, applied strict scrutiny, and found the ordinances did not pass a strict scrutiny test, *id.* at 546–47, 113 S.Ct. at 2233–34, 124 L.Ed.2d at 498–99. Mitchell County argues that its ordinance is a neutral and generally applicable regulatory law and, therefore, *Smith* is the more relevant precedent.[FN7]

In *Smith,* the Supreme Court did not define general applicability or expressly distinguish it from neutrality, but merely referenced "neutral law of general applicability" and "neutral, generally applicable law" as valid limits on free exercise. 494 U.S. at 880–81, 110 S.Ct. at 1600–01, 108 L.Ed.2d at 886–87. *Smith* did not explore the details of general applicability because it dealt with a uniformly applicable law that contained no exemptions. [FN8] *Lukumi* provided some clarification of the contours of general applicability but, because of the extreme degree of gerrymandering involved, did not provide sufficient specificity to guide lower courts in cases where fewer exemptions are allowed. *See Lukumi,* 508 U.S. at 543, 113 S.Ct. at 2232, 124 L.Ed.2d at 497 ("In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.").[FN9] *Lukumi* did make clear that although neutrality and general applicability were overlapping

concepts they were nevertheless distinct, and therefore a law could fail the separate test of general application even if it satisfied the neutrality criteria. *See id.* at 542, 113 S.Ct. at 2231–32, 124 L.Ed.2d at 496 (referring to general applicability as a "second requirement of the Free Exercise Clause" and devoting Section IIB of the opinion to a separate analysis of this issue). *Lukumi* separated the neutrality and general applicability criteria which in *Smith* were loosely treated as a single inquiry. Still, the *Lukumi* Court recognized the two requirements were "interrelated," and "failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531, 113 S.Ct. at 2226, 124 L.Ed.2d at 489.

[7][8][9] **A. Facial Neutrality.** We must first determine whether the ordinance is facially neutral. The most basic requirement of neutrality is "that a law not discriminate on its face." *Id.* at 533, 113 S.Ct. at 2227, 124 L.Ed.2d at 491. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Here the ordinance reads as follows:

> No person shall drive over the hard surfaced roadways, including but not limited to cement, concrete and blacktop roads, of Mitchell County, or any political subdivision thereof, a tractor or vehicle equipped with steel or metal tires equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind or steel or metal wheels equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind.

Mitchell Cnty. Road Prot. Ordinance. The ordinance's language is devoid of any religious references. Furthermore, Mitchell County gave the ordinance the official title of the "Mitchell County *Road Protection* Ordinance." *Id.* (emphasis added). Moreover, the first section of the ordinance, entitled "Purpose," states:

> The *purpose* of this ordinance is *to protect Mitchell County hard surfaced roads,* including but not limited to cement, concrete and blacktop roads, from damage caused by a tractor, vehicle or implement equipped with steel or metal tires equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind or steel or metal wheels equipped with cleats, ice picks, studs, spikes, chains or other projections of any kind.

(emphasis added). Thus, we agree with the district court that "[t]he language of the statute refers to the use of steel wheels in a secular and nonreligious context." Therefore, the ordinance is facially neutral.

[10] **B. Operational Neutrality.** Our next inquiry is whether the ordinance is operationally neutral. Because the Supreme Court has recognized that "[f]acial neutrality is not determinative," we must examine the ordinance for "governmental hostility which is masked, as well as overt." *Lukumi,* 508 U.S. at 534, 113 S.Ct. at 2227, 124 L.Ed.2d at 491 (recognizing that "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality"). We look beyond the language of the ordinance to determine whether there is "impermissible targeting" of the Old Order of Groffdale Mennonite Conference. *Id.* at 535, 113 S.Ct. at 2228, 124 L.Ed.2d at 491–92 (referring to a " 'religious gerrymander' " (citation omitted)). In other words, we ask whether "religious practice is being singled out for discriminatory treatment." *See id.* at 538, 113 S.Ct. at 2229, 124 L.Ed.2d at 493.

[11] We agree with the district court that religious practice is not being intentionally discriminated against. The record supports the district court's conclusion that Mitchell County enacted the ordinance, not to persecute members of a particular faith, but to protect its $9 million investment in newly repaved roads. The ordinance was passed by Mitchell County only after its engineers detected apparent damage caused to the roads by steel wheels. That damage had not occurred prior to 2009 because the repaving project that year was the first time the "white-topping" method had been used by the County. Moreover, the prohibitions of the ordinance essentially buttress existing state law requirements. *See* Iowa Code § 321.442.

At the same time, we must recognize the ordinance was adopted specifically to address use of the resurfaced concrete roads by steel wheel tractors. This is not a case where new activity brushed up against a preexisting ordinance, but where an ordinance was passed to deal with a longstanding religious practice. *See Yoder,* 406 U.S. at 219, 226, 235, 92 S.Ct. at 1535, 1538, 1543, 32 L.Ed.2d at 27, 31, 36 (noting that "[t]he requirement for compulsory education beyond the eighth grade is a relatively recent development in our history," whereas the Old Order Amish faith has a "history of three centuries").

C. General Applicability. We now turn to the more difficult question whether the ordinance is "generally

applicable." *Lukumi* found that Hialeah's ordinances violated the principle of general applicability because "the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs." 508 U.S. at 524, 113 S.Ct. at 2222, 124 L.Ed.2d at 484. The Court further made clear that an ordinance could violate the principle of general applicability even if religious conduct were not the only activity it prohibited, so long as religious adherents ultimately bore most of the burden of compliance. *See id.* at 535–37, 113 S.Ct. at 2228–29, 124 L.Ed.2d at 492–93 (noting that "almost the only conduct subject to Ordinances ... is the religious exercise" and "[t]he net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice" while "most other killings fall outside the prohibition"). The Court emphasized that Hialeah's ordinances imposed restrictions on Santeria worshippers the city was not willing to impose in other contexts, noting that this was the "precise evil ... the requirement of general applicability is designed to prevent." *Id.* at 545–46, 113 S.Ct. at 2233, 124 L.Ed.2d at 498. The Court objected to Hialeah's "devalu[ation of] religious reasons ... by judging them to be of lesser import than nonreligious reasons." *Id.* at 537, 113 S.Ct. at 2229, 124 L.Ed.2d at 493. It recognized that although "[a]ll laws are selective to some extent, ... categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542, 113 S.Ct. at 2232, 124 L.Ed.2d at 496.

The *Lukumi* Court found that the Hialeah ordinances were underinclusive in terms of serving the purposes they were designed for—protecting public health and preventing cruelty to animals—in that they "fail[ed] to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does." *Id.* at 543, 113 S.Ct. at 2232, 124 L.Ed.2d at 497. This underinclusion was held to be substantial because the overwhelming majority of activity that the ordinances targeted was religious. *See id.* Two types of underinclusiveness were identified: (1) secular activities that equally threatened the purposes of the ordinances but were not prohibited (and therefore were approved by silence), and (2) some equally deleterious secular activities that were granted express approval. *See id.*

Thus, according to *Lukumi,* the Free Exercise Clause appears to forbid the situation where the government accommodates secular interests while denying accommodation for comparable religious interests. Hialeah could not constitutionally treat religious sacrifice as less worthy of protection than secular animal killings that posed the same type and degree of potential harm.

Smith dealt with a law containing no exemptions. The ordinances in *Lukumi* had a wide array of exemptions. Because there has been no subsequent word from the Supreme Court on the meaning of "general applicability," other courts have had to wrestle with its definition in specific cases.[FN10] *Lukumi* tells us that underinclusion is problematic when it is "substantial, not inconsequential." *Id.* Other courts have had to refine the meaning of these rather general terms.

One prominent discussion of general applicability was authored by Supreme Court Justice Alito when he served on the Third Circuit. *See Fraternal Order of Police Newark Lodge v. City of Newark,* 170 F.3d 359 (3d Cir.1999). In *Fraternal Order,* Sunni Muslim police officers refused to comply with department regulations requiring them to shave their beards for the purpose of establishing uniform appearance to the public and morale within the police force. *Id.* at 366. This regulation did not allow for a religious exemption but did permit two secular exemptions, one for a very limited number of officers who could not shave for medical reasons and one for undercover officers. *Id.* at 360. The court found the undercover exemption did not undermine the purpose of the rule and therefore did not impact its general applicability. *Id.* at 366. However, the secular medical exemption was considered sufficiently parallel to the requested religious exemption such that if the former were accommodated, the latter must also be in order to maintain general applicability. *Id.* at 364–66. The City of Newark was not able to explain why "religious exemptions threaten important city interests but medical exemptions do not." *Id.* at 367. Therefore, heightened scrutiny applied and the city was required to grant the requested religious accommodation.[FN11]

The Third Circuit followed a two-step analysis to evaluate the potential underinclusiveness or nongenerality of the challenged ordinance. It first identified the governmental purposes that the ordinance was designed to

promote or protect and then asked whether it exempted or left unregulated any type of secular conduct that threatened those purposes as much as the religious conduct that had been prohibited. *Id.* at 366–67. If a law allowed secular conduct to undermine its purposes, then it could not forbid religiously motivated conduct that did the same because this would amount to an unconstitutional "value judgment in favor of secular motivations, but [against] religious motivations." *Id.* at 366. However, if the governmental entity could show that exempted secular conduct was sufficiently different in terms of its impact on the purpose of the law, the exemption would not render the law underinclusive. *Id.* (noting that "the Free Exercise Clause does not require the government to apply its laws to activities that it does not have an interest in preventing").

[12] *Fraternal Order* makes it clear that not every secular exemption automatically requires a corresponding religious accommodation. The undercover police exemption did not undermine the purposes of the no-beard policy, and therefore, had it been the only exemption, general applicability would not have been violated and no religious accommodation would have been required (assuming that there was a rational basis behind the ordinance). Thus, the central question under *Fraternal Order* is whether the secular exemptions threaten the statutory purposes to an equal or greater degree than a religious exemption. Although there may be many secular exemptions to a statute, if none of them undermines the statutory purpose, then even their cumulative weight does not establish underinclusiveness. Yet, in *Fraternal Order,* only a single narrow health exception was held to be sufficient to establish a violation of general applicability, thus triggering heightened scrutiny, because it was deemed to threaten the secular purpose.

The Third Circuit has applied its *Fraternal Order* precedent in several subsequent decisions. In *Tenafly Eruv Ass'n v. Borough of Tenafly,* the court found that the free exercise rights of Orthodox Jews were likely violated when Tenafly prohibited them from affixing "lechis" (thin black strips designating an "eruv" where pushing and carrying is permitted on the Sabbath) to utility poles while allowing other materials such as house numbers to be affixed. 309 F.3d 144, 152, 178 (3d Cir.2002). The exemptions undermined the borough's apparent purpose of preventing visual clutter. *Id.* at 172. In *Blackhawk v. Pennsylvania,* the court held that Pennsylvania violated the Free Exercise Clause by refusing a fee waiver to a Native American who kept a bear for ceremonial purposes when the law, among other things, categorically exempted zoos and nationally recognized circuses from such fees. 381 F.3d 202, 210–11, 214 (3d Cir.2004) (Alito, J.). Although the state argued that exemptions could be justified because they provided a tangible benefit to Pennsylvania wildlife, the court found the challenged fee provisions substantially "underinclusive" with respect to this alleged benefit. *Id.* at 211–12. In sum, the court concluded:

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.
>
> *Id.* at 209.

The Eleventh Circuit applied similar reasoning in holding that a limited secular exemption failed the general applicability test. In *Midrash Sephardi, Inc. v. Town of Surfside,* the town passed a zoning ordinance " 'to provide for retail shopping and personal service needs of the town's residents and tourists' " with the goal of protecting "retail synergy" in the business district. 366 F.3d 1214, 1233, 1235 (11th Cir.2004) (citation omitted). The ordinance excluded religious assemblies from the area, but an exemption was allowed for private clubs and lodges. *Id.* at 1235. The court found this policy to be underinclusive with respect to the town's goal of retail synergy because it was "pursued only against religious assemblies, but not other non-commercial assemblies, thus devaluing the religious reasons for assembling." *Id.* at 1234. Echoing the reasoning in *Fraternal Order,* the court found that these limited exceptions "violate[d] the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues." *Id.* at 1235. As in *Fraternal Order,* only a single categorical secular exemption was enough to establish underinclusiveness and require heightened scrutiny.

In another case, a federal district court found a University of Nebraska policy with three categorical secular exemptions was not of general applicability and therefore subjected it to strict scrutiny which it ultimately failed. *See Rader v. Johnston,* 924 F.Supp. 1540 (D.Neb.1996). The university had a parietal rule for freshmen that required them to live on campus, but allowed exemptions for students who were nineteen years or older, married, or living with their parents. *Id.* at 1546. These categorical exemptions, combined with a general discretionary exemption, together covered more than one third of all freshmen. *Id.* at 1553. Nonetheless, the university refused to grant an exemption to a religious student who wanted to live off campus at a Christian Student Fellowship house because he believed that on-campus dorms were immoral and would endanger his spiritual life. *Id.* at 1544–45. This decision was found to violate Rader's free exercise rights and the university was ordered to refrain from enforcing its policy against him. *Id.* at 1558; *see also Stinemetz v. Kan. Health Policy Auth.,* 45 Kan.App.2d 818, 252 P.3d 141, 154–56 (Kan.Ct.App.2011) (holding that the First Amendment Free Exercise rights of a Jehovah's Witness Medicaid beneficiary were violated when she was denied a request for an out-of-state bloodless liver transplant because, although the regulations generally did not cover out-of-state services, they allowed for individual exemptions on a case-by-case basis); *Horen v. Commonwealth,* 23 Va.App. 735, 479 S.E.2d 553, 557 (Va.Ct.App.1997) (finding a violation of the First Amendment Free Exercise Clause when a Native American medicine woman and her husband were convicted of illegal possession of owl feathers and the statute exempted possession of such feathers by "taxidermists, academics, researchers, museums, and educational institutions").

By contrast, federal courts have generally found laws to be neutral and generally applicable when the exceptions, even if multiple, are consistent with the law's asserted general purpose. Thus, in *Stormans, Inc. v. Selecky,* the Ninth Circuit upheld certain Washington regulations requiring pharmacists to fill all prescriptions over a pharmacist's objection that providing the Plan B contraceptive would violate her religious beliefs. 586 F.3d 1109, 1115–17 (9th Cir.2009), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 22 129 S.Ct. 365, 376, 172 L.Ed.2d 249, 262 (2008). Although the regulations contained exemptions where the customer did not pay, supplies were limited, or the pharmacist had a legitimate belief the prescription was fraudulent, the court reasoned that these exceptions did not undermine the goal of "increasing safe and legal access to medications" and thus did not affect the general applicability of the rules. *Id.* at 1135. In *Swanson ex rel. Swanson v. Guthrie Independent School District No. I–L,* the Tenth Circuit upheld a school district policy forbidding part-time attendance even though it allowed secular exemptions for fifth-year seniors and special education students. 135 F.3d 694, 697, 701 (10th Cir.1998). The plaintiffs there were parents who wanted their child to learn Christian principles at home but who wished to send their homeschooled daughter to the local public school part-time so she could benefit from classes such as foreign languages, music, and science that her parents felt less competent to teach. *Id.* at 696. The policy against part-time attendance applied equally to all homeschooled children, regardless of the reason for home schooling. *Id.* at 698. Although the court emphasized this last point in rejecting the plaintiffs' claim, it also noted the exemptions in the law (fifth-year seniors and special education students) were consistent with the school district's overall purpose of not taking on students for whom there was no corresponding state aid. *Id.* at 698 n. 3. Because state aid was based on the number of full-time students in the district, and only the two exempted categories of part-time students were counted as full-time for state-aid purposes, there were no exemptions for students who did not qualify for state aid, and general applicability was met. *Id; see also Combs v. Homer–Ctr. Sch. Dist.,* 540 F.3d 231, 242 (3d Cir.2008) (finding a homeschooling law to be neutral and of general applicability because it imposed the same standards on everyone who was being homeschooled); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253, 266 (3d Cir.2007) (indicating that "the relevant comparison for purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that *has a similar impact on the regulation's aims* ").[FN12]

With the foregoing authorities in mind, we turn to the ordinance at issue. Zimmerman contends the Mitchell County ordinance is not generally applicable because it carries over exceptions from Iowa Code section 321.442

that undermine the ordinance's purpose and demonstrate its underinclusivity. [FN13] The state law exemptions are as follows:

1. Farm machinery with tires having protuberances which will not injure the highway.

2. Tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid.

3. Pneumatic tires with inserted ice grips or tire studs projecting not more than one-sixteenth inch beyond the tread of the traction surface of the tire upon any vehicle from November 1 of each year to April 1 of the following year, except that a school bus and fire department emergency apparatus may use such tires at any time.

Iowa Code § 321.442. Zimmerman asserts these exceptions "undermine the County's purpose of preventing damage to the roads."

[13] Upon our review, we find the County's ordinance lacks sufficient general applicability to bring this case under *Smith*. Section 321.442(1) is not a problem; it exempts farm machinery tires with protuberances, but only so long as they "will not injure the highway." Such an exception is consistent with the stated purpose of protecting the County's roads.[FN14] One could argue that sections 321.442(2) and (3) do not defeat the general applicability of the ordinance either. Although they allow the use of tire chains, ice grips, or tire studs, the exemptions are limited in scope ("reasonable proportions," "not more than one-sixteenth inch beyond the tread of the traction surface of the tire"), and except for buses and emergency vehicles, in timing ("when required for safety because of snow, ice, or other conditions," "from November 1 of each year to April 1 of the following year"). One could construct an argument, therefore, that the ordinance really serves a *mixed* purpose: It protects the roads from damage except when necessary for safety reasons.

Yet we believe the effort ultimately fails. School buses are allowed to use ice grips and tire studs year round. It is difficult to see how this secular exemption serves either of the foregoing dual purposes. Moreover, the County declined in September 2009 to regulate various *other* sources of road damage besides steel wheels. Rather, it chose to prohibit only a particular source of harm to the roads that had a religious origin. For example, although state law contains various limits on the overall weight of vehicles and also limits weight per inch of tire width, *see* Iowa Code §§ 321.440(2), .463, Mitchell County elected not to cover these matters in its ordinance.

The underinclusion of the ordinance undermines its general applicability. *See Blackhawk,* 381 F.3d at 209 (noting that a law "fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts *or does not reach* a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated" (emphasis added)). We are convinced the underinclusion is "substantial, not inconsequential." *Lukumi,* 508 U.S. at 543, 113 S.Ct. at 2232, 124 L.Ed.2d at 497.[FN15]

[14][15][16][17] **D. Application of Strict Scrutiny.** Of course, an ordinance can fail the general applicability test and still not amount to a Free Exercise violation. However, the ordinance must then "undergo the most rigorous of scrutiny." *Id.* at 546, 113 S.Ct. at 2233, 124 L.Ed.2d at 498. That is, it "must advance ' "interests of the highest order" ' and must be narrowly tailored in pursuit of those interests." *Id.* (citation omitted). The County has the burden to show that the ordinance serves a compelling state interest and is the least restrictive means of attaining that interest. *See Thomas v. Review Bd. of Indiana Emp't Sec. Div.,* 450 U.S. 707, 718, 101 S.Ct. 1425, 1432, 67 L.Ed.2d 624, 634 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). [FN16]

The district court found that the County has a compelling interest "in protecting the integrity of the county's roads. This interest not only includes the economic costs of repairing roads, but also the safety and drivability of the roads for all." We do not decide this issue. *See United States v. Oliver,* 255 F.3d 588, 589 (8th Cir.2001) (recognizing a compelling governmental interest in preserving the bald eagle population despite a claim that possession of eagles was necessary to the practice of the Sioux faith); *Satawa v. Bd. of Cnty. Road Comm'rs,* 687

F.Supp.2d 682, 699–700 (E.D.Mich.2009) (holding that highway safety concerns amounted to a compelling state interest justifying the denial of a permit for a Nativity display on a median in the center of a major traffic artery); *but see Blackhawk,* 381 F.3d at 213–14 (stating it is "doubtful" whether "maintaining the fiscal integrity" of a permit fee system is a compelling state interest); *United States v. Hardman,* 297 F.3d 1116, 1127 (10th Cir.2002) (stating that "a desire for federal funds is not a compelling interest").

We are not persuaded, however, that the ordinance is narrowly tailored to achieve the stated objective of road preservation. The photographic evidence does show examples of cracking and marking that, according to the County's witnesses, resulted from the steel lugs. The county engineer testified that steel wheels hasten deterioration of the County's roads. He said that "the steel is harder than the aggregates ... in the concrete surfaces and the asphalt surfaces, and it will wear that surface off." On the other hand, the County agreed that Mennonite tractors had driven over hard-surfaced county roads, including both concrete and asphalt roads, for years before the ordinance was enacted. The county engineer admitted that various factors lead to road deterioration,[FN17] and he could not quantify the impact of steel wheels on the County's normal schedule of road repair or resurfacing . [FN18]

Given the lack of evidence of the *degree* to which the steel lugs harm the County's roads, the undisputed fact that other events cause road damage, and the undisputed fact that the County had tolerated steel lugs for many years before 2009, it is difficult to see that an outright ban on those lugs is necessary to serve a compelling state interest. A more narrowly-tailored alternative might allow steel wheels on county roads in some circumstances, while establishing an effective mechanism for recouping the costs of any necessary road repairs if damage occurs. Indeed, an adjoining county reached an agreement with the Mennonite community to accept a financial deposit in a trust arrangement to cover possible road damage, in lieu of banning steel wheels. *See* www.co.howard.ia.us/bosinfo/minutesarchive.htm (minutes of December 7, 2009 Board of Supervisors Meeting); Jean Caspers–Simmet, *Howard County Crafts Agreement Over Steel–Wheel Tractors,* Agri News, Dec. 1, 2009, http:// www.agrinews . com/howard/county/crafts/agreement/over/steelwheel /tractors/story–1056.html. As the United States Supreme Court has indicated in a statutory case arising under the Religious Freedom Restoration Act, the compelling interest test must focus on "the harms posed by the particular use at issue here." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 432–33, 126 S.Ct. 1211, 1221–22, 163 L.Ed.2d 1017, 1032–33 (2006) (finding the compelling interest test would not sustain application of the Controlled Substances Act to approximately 130 American members of a Christian Spiritist sect who used hoasca, a tea containing a hallucinogen, for communion).

A comparison can be drawn between the present case and a series of cases that have arisen over state-law requirements for special signage on slow moving vehicles. In *State v. Hershberger,* 444 N.W.2d 282 (Minn.1989), *cert. granted, judgment vacated,* 495 U.S. 901, 110 S.Ct. 1918, 109 L.Ed.2d 282 (1990), and *State v. Miller,* 202 Wis.2d 56, 549 N.W.2d 235 (Wis.1996), members of the Old Order Amish faith challenged state laws that required their horse-drawn buggies to display fluorescent red and orange "slow moving vehicle" signs.

Hershberger was a pre-*Smith* case. There the court applied a compelling state interest test and acknowledged for purposes of the case that highway safety was a compelling interest, but invalidated the sign requirement after concluding that the use of silver reflective tape and lighted red lanterns, as proposed by the church members, would adequately address the same safety concerns. *Hershberger,* 444 N.W.2d at 288–89. In *Miller,* interpreting the Wisconsin Constitution rather than the United States Constitution, the court also applied a compelling state interest test. Similar to the Minnesota court, the Wisconsin court concluded that "the State has failed to demonstrate that public safety on the highways cannot be served by the Respondents' proposed less restrictive alternative of the white reflective tape and the red lantern." *Miller,* 549 N.W.2d at 242.

While the analogy between those cases and the present steel wheels case is not a perfect one, the same basic analytical framework applies here. The question here is whether the County's goal of road preservation can be accomplished less restrictively without banning the tractors used by the Mennonites. On this record, we believe it can be. We therefore hold that the application of the Mitchell County road protection ordinance to Matthew

Zimmerman violates his rights of free exercise of religion under the First Amendment to the United States Constitution. We need not and do not reach the question whether Zimmerman's rights under article I section 3 of the Iowa Constitution have also been violated.

IV. Conclusion.

Cases involving religious rights present challenging issues. Here, a conflict has arisen between longstanding religious practice and a county's legitimate desire to protect its investment in roads. On this record, we find the religious rights prevail.

We reverse and remand to the district court for entry of an order of dismissal.

REVERSED AND REMANDED.

FN1. We do not reach the question whether the ordinance violates the Iowa Constitution.

FN2. According to the King James Bible, this passage reads:

And be not conformed to this world: but be ye transformed by the renewing of your mind, that ye may prove what is that good, and acceptable, and perfect, will of God.

Romans 12:2 (King James) (emphasis added). The New American Standard Version translates this passage as follows:

And do not be conformed to this world, but be transformed by the renewing of your mind, so that you may prove what the will of God is, that which is good and acceptable and perfect.

Romans 12:2 (New American Standard) (emphasis added).

FN3. The wagons may have rubber tires because people do not ride on them.

FN4. Zimmerman maintained that the steel lugs only caused "white marks" that "disappear[ ] as soon as it rains a little bit."

FN5. Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in response to the Supreme Court's ruling in *Smith.* Pub.L. No. 103–141, 107 Stat. 1488. Under RFRA, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that ... interest." 42 U.S.C. § 2000bb–1 (2006). In *City of Boerne v. Flores,* the Supreme Court held RFRA unconstitutional as applied to the states. 521 U.S. 507, 536, 117 S.Ct. 2157, 2172, 138 L.Ed.2d 624, 649 (1997).

FN6. We applied *Smith* in *Planned Parenthood of Mid–Iowa v. Maki,* 478 N.W.2d 637, 640 (Iowa 1991) (holding an injunction against a trespassing protester did not violate the protester's free exercise rights).

FN7. The County also argues that the use of steel wheels is a "rule" rather than a "religious belief or practice." We disagree. Eli Zimmerman testified that the use of steel wheels is a longstanding church requirement and that someone who does not follow that precept "will be barred from the church." *See Lukumi,* 508 U.S. at 531, 113 S.Ct. at 2225, 124 L.Ed.2d at 489 (observing that " 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection' " (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624, 631 (1981))).

FN8. The Oregon law at issue was a criminal law forbidding possession of a controlled substance unless prescribed by a medical practitioner. *Smith,* 494 U.S. at 874, 110 S.Ct. at 1597, 108 L.Ed.2d at 882.

FN9. Hialeah enacted a series of ordinances with a long list of carefully crafted exemptions that allowed for just about every conceivable secular form of animal killing while precluding similar activity in a religious context. *See Lukumi,* 508 U.S. at 535–37, 113 S.Ct. at 2227–29, 124 L.Ed.2d at 491–93. Collectively these ordinances "f[e]ll well below the minimum standard" required by the Free Exercise Clause. *Id.* at 543, 113 S.Ct. at 2232, 124 L.Ed.2d at 497.

FN10. In *Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004), the Supreme Court upheld the State of Washington's failure to make state scholarship aid available for students pursuing theology

degrees. The Court held the *Lukumi* line of cases was inapplicable because the state simply had made a decision not to fund certain activity and imposed "neither criminal nor civil sanctions on any type of religious service or rite." *Locke,* 540 U.S. at 720, 124 S.Ct. at 1312, 158 L.Ed.2d at 9.

FN11. In a footnote, the Third Circuit noted that "*Smith* and *Lukumi* speak in terms of strict scrutiny," but it assumed that "an intermediate level of scrutiny applies since this case arose in the public employment context." *Fraternal Order,* 170 F.3d. at 366 n. 7.

FN12. We do not want to convey the impression that post-*Lukumi* cases are monolithic. In *Primera Iglesia Bautista Hispana of Boca Raton v. Broward County,* cited by the district court below, the Eleventh Circuit seemed to indicate that a regulation or ordinance would be considered generally applicable unless it burdened "almost only" religious uses. 450 F.3d 1295, 1309 (11th Cir.2006). That case involved statutory interpretation of the Religious Land Use and Institutionalized Persons Act (RLUIPA). The zoning regulation there contained no exemptions. *Id.* at 1310.

FN13. As noted above, the ordinance provides that "Iowa Code § 321.442 shall continue to remain in full force and effect and no provision of that Code Section shall be deemed to have been eliminated by this ordinance." Mitchell Cnty. Road Prot. Ordinance. Hence, Zimmerman argues—and the County does not dispute—that the exemptions set forth in section 321.442 are also preserved as exemptions in the Mitchell County ordinance. We need not address whether state law would preempt the ordinance if it sought to prohibit uses permitted under section 321.442. *See* Iowa Const. art. III § 38A; Iowa Code § 321.235; *City of Davenport v. Seymour,* 755 N.W.2d 533, 538–39 (Iowa 2008).

FN14. Although Zimmerman maintained at the hearing that the steel lugs did not harm the county's roads, he did not argue that this exemption applied.

FN15. The County argues this case is unlike *Blackhawk* and *Fraternal Order* because there are no exemptions: The ordinance "does not permit anyone to use steel wheels on the road." But the ordinance is not directed at "steel wheels," nor could it be, if the County wanted it to be considered "neutral." The ordinance is directed at metal projections of any kind, and it provides for exemptions.

FN16. Assuming without deciding that the church members must show the ordinance places a substantial burden on their religion, that requirement has been met here. Although Eli Zimmerman testified it is "possible" to comply with the ordinance and still follow his religion, this would require the Mennonites to pursue one of two impractical alternatives: Either they would have to use horses and buggies to haul their produce to market (if they even had enough horses) or they would have to hire persons of another faith to do their hauling. We agree with the district court's finding "from the record that the Mitchell County ordinance substantially burdens this religious practice." *See Sherbert,* 374 U.S. at 404, 83 S.Ct. at 1794, 10 L.Ed.2d at 970 (finding an unconstitutional burden even though South Carolina did not require the appellant to give up her Saturday Sabbath Day but merely denied her unemployment benefits because "the pressure upon her to forego that practice is unmistakable"); *see also Thomas,* 450 U.S. at 717–18, 101 S.Ct. at 1432, 67 L.Ed.2d at 634 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.").

FN17. For example, he admitted that one of the newly white-topped roads has experienced longitudinal cracking even though no steel wheels have been driven on it.

FN18. Although both we and the parties use the shorthand "steel wheels," the attachments are more accurately described as lugs, cleats, or slats. Eli Zimmerman testified that they have been redesigned and placed over rubber to reduce their potential to cause damage.

Supplemental Case Printout for: *Beyond Our Borders*

539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508, 71 USLW 4574, 03 Cal. Daily Op. Serv. 5559, 2003 Daily Journal D.A.R. 7036, 16 Fla. L. Weekly Fed. S 427

John Geddes LAWRENCE and Tyron Garner, Petitioners,

v.

TEXAS.

No. 02-102.

Argued March 26, 2003.

Decided June 26, 2003.

***562** Justice delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, officers of the Harris County Police Department were dispatched to a private residence in response to a reported weapons disturbance. They entered an apartment where one of the petitioners, John Geddes Lawrence, ***563** resided. The right of the police to enter does not seem to have been questioned. The officers observed Lawrence and another****2476** man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace.

The complaints described their crime as "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." App. to Pet. for Cert. 127a, 139a. The applicable state law is . It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

"(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or

"(B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

The petitioners exercised their right to a trial *de novo* in Harris County Criminal Court. They challenged the statute as a violation of the Equal Protection Clause of the Fourteenth Amendment and of a like provision of the Texas Constitution. . Those contentions were rejected. The petitioners, having entered a plea of *nolo contendere,* were each fined $200 and assessed court costs of $141.25. App. to Pet. for Cert. 107a-110a.

The Court of Appeals for the Texas Fourteenth District considered the petitioners' federal constitutional arguments under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. After hearing the case en banc the court, in a divided opinion, rejected the constitutional arguments and affirmed the convictions. . The majority opinion indicates that the Court of Appeals considered our decision in , to be controlling on the federal due process aspect of the case. then being authoritative, this was proper.

***564** We granted certiorari, , to consider three questions:

1. Whether petitioners' criminal convictions under the Texas 'Homosexual Conduct' law-which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples-violate the Fourteenth Amendment guarantee of

equal protection of the laws.
2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.
3. Whether should be overruled. See Pet. for Cert. i.
The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.
II
We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in
There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including , and ; but the most pertinent beginning point is our decision in .
In the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or **2477 aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and *565 placed emphasis on the marriage relation and the protected space of the marital bedroom.
After it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In , the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:
"It is true that in the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
The opinions in and were part of the background for the decision in . As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.
*566 In , the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both and as well as the holding and rationale in confirmed that the reasoning of could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered
The facts in had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); **2478 (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).
The Court began its substantive discussion in as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so *567 for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places,

the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the Court said: "Proscriptions against that conduct have ancient roots." In academic writings, and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions ***568** in Brief for Cato Institute as *Amicus Curiae* 16-17; Brief for American Civil Liberties Union et al. as *Amici Curiae* 15-21; Brief for Professors of History et al. as *Amici Curiae* 3-10. We need not enter this debate in the attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance by the Reformation Parliament of 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. See, *e.g., King v. Wiseman,* 92 Eng. Rep. 774, 775 (K.B.1718) (interpreting "mankind" in Act of 1533 as including women and girls). Nineteenth-century commentators similarly read American sodomy, buggery, and crime-against-nature statutes as criminalizing certain relations between men and women and between men and men. See, *e.g.,* 2 J. Bishop, Criminal Law § 1028 (1858); 2 J. Chitty, Criminal Law 47-50 (5th Am. ed. 1847); R. Desty, A Compendium of American Criminal Law 143 (1882); J. May, The Law of Crimes § 203 (2d ed. 1893). The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of ****2479** person did not emerge until the late 19th century. See, e.g., J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of ***569** homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra,* at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.

To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e.g.,* F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic ***570** punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have

been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14-15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. ****2480** Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also (sodomy law invalidated as applied to different-sex couples). Post-even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g.,* ; ; ; ***571**; see also 1993 Nev. Stats. p. 518 (repealing).

In summary, the historical grounds relied upon in are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.

It must be acknowledged, of course, that the Court in was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." .

Chief Justice Burger joined the opinion for the Court in and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge, . In all events we think that our laws and traditions in the past half century are of ***572** most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (KENNEDY, J., concurring).

This emerging recognition should have been apparent when was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, , Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. ****2481** Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15-16.

In the Court referred to the fact that before 1961 all 50 States had outlawed sodomy, and that at the time of the Court's decision 24 States and the District of Columbia had sodomy laws. Justice Powell pointed out that these prohibitions often were being ignored, however. Georgia, for instance, had not sought to enforce its law for decades. ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction. A committee advising the British Parliament recommended in 1957 repeal of laws ***573** punishing homosexual conduct. The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963). Parliament enacted the substance of those recommendations 10 years later. Sexual Offences Act 1967, § 1.

Of even more importance, almost five years before was decided the European Court of Human Rights considered a case with parallels to and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom,* 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in that the claim put forward was insubstantial in our Western

civilization.
In our own constitutional system the deficiencies in became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. .
Two principal cases decided after cast its holding into even more doubt. In , the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The decision again confirmed ***574** that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."
****2482** Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in would deny them this right.
The second post- case of principal relevance is . There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.
As an alternative argument in this case, counsel for the petitioners and some *amici* contend that provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude***575** the instant case requires us to address whether itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.
Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.
The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. ; . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing to ; La.Code Crim. Proc. Ann. § § 15:540-15:549 ***576** West 2003); to (Lexis 2003); to (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.
The foundations of have sustained serious erosion from our recent decisions in and When our precedent has been thus weakened, criticism from other sources is of greater significance.****2483** In the United States criticism of has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution-A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see ; ; ; ; .
To the extent relied on values we share with a wider civilization, it should be noted that the reasoning and holding in have been rejected elsewhere. The European Court of Human Rights has followed not but its own decision in *Dudgeon v. United*

Kingdom. See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary ***577** Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' " (quoting)). In we noted that when a court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. see also ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on of the sort that could counsel against overturning its holding once there are compelling reasons to do so. itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of does not withstand careful analysis. In his dissenting opinion in Bowers Justice STEVENS came to these conclusions:

"Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional***578** attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." (footnotes and citations omitted).

****2484** Justice STEVENS' analysis, in our view, should have been controlling in and should control here.

was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume ***579** to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

The judgment of the Court of Appeals for the Texas Fourteenth District is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Supplemental Case Printout for: *Adapting the Law to the*

Online Environment

N.D.Ind.,2011.
T.V. ex rel. B.V. v. Smith-Green Community School Corp.
807 F.Supp.2d 767, 275 Ed. Law Rep. 826
United States District Court,
N.D. Indiana,
Fort Wayne Division.

T.V., a minor child, by her parents, legal guardians and next friends, B.V. and T.V., and M.K., a minor child, by her parents, legal guardians and next friends, G.K. and R.K., Plaintiffs,

v.

SMITH– GREEN COMMUNITY SCHOOL CORPORATION and Austin Couch, Principal of Churubusco High School, Defendants.

No. 1:09–CV–290–PPS.
Aug. 10, 2011.

OPINION AND ORDER

PHILIP P. SIMON, Chief Judge.

Not much good takes place at slumber parties for high school kids, and this case proves the point. During a summer sleepover, plaintiffs—16 year old T.V. and 15 year old M.K.—posed for some raunchy photos which they later posted online. When school officials caught wind of the saucy online display, they suspended both girls from extracurricular activities for a portion of the upcoming school year. This lawsuit, brought by T.V. and M.K. through their parents, seeks to vindicate their First Amendment rights. The defendants are the Smith–Green Community School Corporation and Austin Couch, the principal of Churubusco High School. Both sides now seek summary judgment. The case poses timely questions about the limits school officials can place on out of school speech by students in the information age where Twitter, Facebook, MySpace, texts, and the like rule the day. The school argues that they ought to be allowed to regulate this speech while the students claim that their First Amendment rights are being violated.

Let's be honest about it: the speech in this case doesn't exactly call to mind high-minded civic discourse about current events. And one could reasonably question the wisdom of making a federal case out of a 6–game suspension from a high school volleyball schedule. But for better or worse, that's what this case is about and it is now ripe for disposition.

FACTS

The parties agree that there are no facts in dispute that are material to a determination of liability. DE 65, p. 1; DE 92, p. 2. Here's what the record reveals: during the summer of 2009, T.V. and M.K. were both entering the 10th grade at Churubusco High School, a public high school of approximately 400 students. Both T.V. and M.K. were members of the high school's volleyball team, an extracurricular activity, and M.K. was also a member of the cheerleading squad, also an extracurricular activity, as well as the show choir, which is a cocurricular activity. Cocurricular activities provide for academic credit but also involve activities that take place outside the normal school day.

Try-outs for the volleyball team for the coming year would occur in July. A couple of weeks prior to the tryouts, T.V., M.K. and a number of their friends had sleepovers at M.K.'s house. Prior to the first sleepover, the

girls bought phallic-shaped rainbow colored lollipops. During the first sleepover, the girls took a number of photographs of themselves sucking on the lollipops. In one, three girls are pictured and M.K. added the caption "Wanna suck on my cock." In another photograph, a fully-clothed M.K. is sucking on one lollipop while another lollipop is positioned between her legs and a fully-clothed T.V. is pretending to suck on it.

During another sleepover, T.V. took a picture of M.K. and another girl pretending to kiss each other. At a final slumber party, more pictures were taken with M.K. wearing lingerie and the other girls in pajamas. One of these pictures shows M.K. standing talking on the phone while another girl holds one of her legs up in the air, with T.V. holding a toy trident as if protruding from her crotch and pointing between M.K.'s legs. In another, T.V. is shown bent over with M.K. poking the trident between her buttocks. A third picture shows T.V. positioned behind another kneeling girl as if engaging in anal sex. In another picture, M.K. poses with money stuck into her lingerie—stripper-style.

T.V. posted most of the pictures on her MySpace or Facebook accounts, where they were accessible to persons she had granted "Friend" status. Some of the photos involving the lollipops were also posted on Photo Bucket, where a password is necessary for viewing. None of the images identify the girls as students at Churubusco High School. Neither T.V. nor M.K. ever brought the images to school either in digital or any other format. In their depositions, both T.V. and M.K. characterized what they did as "just joking around" and disclaimed that the images conveyed any scientific, literary or artistic value or message, but testified that the photos were taken and were shared on the internet because the girls thought what they had done was funny and "wanted to share with [their] friends how funny it was." DE 65–4, p. 24; DE 65–6, p. 13. [FN1]

FN1. Cites to the record are to the page number of the document as filed with the Court, rather than to the potentially different internal page number of the document, as in the case of deposition excerpts, where, *e.g.,* page 86 of T.V.'s deposition is found at page 24 of 35 of the court-filed document 65–4.

Around August 4, a parent brought printouts of the photographs to Steve Darnell, the Superintendent of Smith–Green Community School Corporation. The parent reported that the images were posted on Facebook and Photo Bucket and that the photographs were causing "divisiveness" among the girls on the volleyball teams, because "two camps" had formed—girls that were "in favor ... of what was going on with the pictures" and "girls that just wanted to have no part in it." DE 75–4, p. 3. Evidently, this woman's daughter did not play volleyball in the fall of 2009. Superintendent Darnell immediately took the pictures to Principal Couch, reported that the photos were "causing a disruption in extracurricular teams," and told him to "follow code with this." *Id.* at p. 4.[FN2] Separately, but on the same day as Superintendent Darnell provided the photographs to Principal Couch, the principal was contacted by a second concerned parent, one who happened to work at the school as an athletic department secretary, about the photographs posted on the internet.

FN2. The record is not entirely clear which of the photos submitted as exhibits were brought to the principal & superintendent, and so were the basis for their actions and decisions. By a process of elimination, I proceed on the understanding that all the photos submitted were considered by defendants, except for several that the briefing describes as having been taken at earlier times and not in the same slumber party context. These are Exhibits I and S, and possibly L.

The Churubusco High School Student Handbook for 2008–2009 contains an "EXTRACURRICULAR/CO–CURRICULAR CODE OF CONDUCT AND ATHLETIC CODE OF CONDUCT." DE 65–2, p. 40. On page 25, this code provides:

> The purpose of the "Extra–Curricular Code of Conduct" is to demonstrate to students at Churubusco High School who participate in organized extra-curricular activities that they not only represent themselves, but also represent Churubusco High School, as well. Therefore, those students who choose to participate in extra-curricular activities are expected to demonstrate good conduct at school and outside of school.... This code will be in force for the entire year including out of season and during the summer.

Id. Separately, under the heading "EXTRA–CURRICULAR/CO–CURRICULAR ACTIVITIES" on page 24, the Student Handbook states: "If you act in a manner in school or out of school that brings discredit or dishonor

upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year." *Id.*

After confirming the identities of the girls in the images, and discussing the matter with the Athletic Director and the Assistant Principal, within a day of Principal Couch's receipt of the photographs, he informed M.K. and T.V. that they had violated the athletic code and faced suspension from extracurricular and cocurricular activities. At the time, T.V. and M.K. were both participating in volleyball practices and M.K. was attending rehearsals for the show choir. Principal Couch did not discuss the situation with any member of the volleyball coaching staff, other than approaching the volleyball coach to confirm that the girls were playing volleyball and to inform the coach that he needed to speak with the girls because of an extracurricular violation. Principal Couch did not speak with the director of the show choir until after M.K. was suspended, and then simply to advise the teacher of the suspension.

Defendants explain the basis for Principal Couch's decision as his "determination that the photographs were inappropriate, and that by posing for them, and posting them on the internet, the students were reflecting discredit upon the school." DE 75, p. 3. In addition, Principal Couch determined that the photographs had the potential for causing disruption of school activities. Discussing the context of his decision-making with respect to M.K. and T.V., Principal Couch cites two other recent incidents. One was the death of two students in a car accident two weeks earlier. The other was an incident from the spring of 2009, in which photos on the internet of students drinking alcohol were the subject of what the principal characterized as disruptive talk at school in the hallways and gymnasiums. Against this background, Principal Couch wanted the new 2009–2010 school year "to get off on the right foot," and "needed to do something before this blew up." DE 65–2, p. 13. The conclusion that the photographs represented a violation of the Student Handbook coupled with the anticipation of potential school disruption from the situation served as the basis for the discipline imposed.

Principal Couch informed T.V. and M.K. that they were being suspended from extracurricular and cocurricular activities for a calendar year pursuant to the school's 2008–2009 policy, for bringing discredit on themselves and the school. The portion of the policy cited provided that "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extracurricular activities for all or part of the year." It was explained to the girls that, under the policy, they could obtain a reduction of their punishment by making three visits to a counselor and then meeting with the school's Athletic Board to apologize for their actions. When he was contacted by T.V.'s parents, Superintendent Darnell indicated that he supported Couch's decision.

Both T.V. and M.K. opted to visit the counselor, and completed those requirements by August 13, 2009. Subsequently, the girls each appeared separately before the Athletic Board, a panel consisting of Principal Couch, the Athletic Director, the Assistant Principal and the coaches. As a result, the punishment was modified and the girls were excluded from only 25% of their fall extracurricular activities, which meant that T.V. missed six volleyball games and M.K. missed five games and a show choir performance.

ANALYSIS

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). If no reasonable jury could find for the nonmoving party, there is not a genuine issue of material fact. *Van Antwerp v. City of Peoria, Ill.,* 627 F.3d 295, 297 (7th Cir.2010). On summary judgment, facts and inferences are construed in favor of the non-moving party. *Trentadue v. Redmon,* 619 F.3d 648, 652 (7th Cir.2010). However, in order to benefit from this view of the facts, the non-moving party must provide evidence to support any essential element that it has the burden of proving at trial, and conclusory allegations are not sufficient. *Montgomery v. American Airlines, Inc.,* 626 F.3d 382, 389 (7th Cir.2010). Here, where there are essentially no disputed facts, I must decide "whether either party 'is entitled to a judgment as a matter of law.' " *Automobile Mechanics Local 701 v. Vanguard Car Rental USA, Inc.,* 502 F.3d 740, 748 (7th Cir.2007).

Threshold questions

In setting this matter for oral argument, I directed the parties to address certain threshold questions. Order

of May 12, 2011 [DE 95]. I wanted to know "whether and why the photographs taken and posted to the internet by T.V. and M.K. constitute expression protected by the First Amendment." *Id.* at 1. The presumption built into that inquiry led to a subsidiary question, namely whether the basis of the girls' punishment was the conduct shown in the photos, or the taking and posting of the images to the internet. Following the argument on May 27, the parties have filed supplemental memoranda on these questions.

Both at oral argument and in the subsequent memoranda, Smith–Green has stated that T.V. and M.K. were punished for both the behavior shown in the images and for posting the pictures to the internet. Here's what the defendants said in their brief: "The basis for the suspension was the determination that the photographs were inappropriate, and that by posing for them, and posting them on the internet, the students were reflecting discredit upon the school." DE 72, p. 6, citing Couch Dep. [DE 71–1] at 48:1–11. At argument, Smith–Green's counsel asserted that the school could have imposed the same punishment based merely on the conduct, if for example other students had seen and reported the conduct but no photos were taken. Post-argument, Smith–Green reiterated that "the activities depicted in the snapshots are conduct distinct from publishing them to the internet and that these activities constitute a violation of the extracurricular code." DE 101, p. 5.

Somewhat predictably, the parties are at odds as to whether the girls' conduct is protected by the First Amendment. T.V. and M.K. argue that the conduct depicted in the images was itself protected by the First Amendment because it meets the intent-plus-perception test for expressive conduct. Indeed, the Supreme Court has held that pure conduct possesses sufficient communicative elements to implicate the First Amendment if the "intent to convey a particularized message was present" and if "the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson,* 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington,* 418 U.S. 405, 410–11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). It is for this reason that things like burning a flag, wearing a black arm band, defacing a flag, and participating in a silent sit-in—all expressive conduct—receive First Amendment protection. *See United States v. Eichman,* 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) (burning flag); *Texas v. Johnson,* 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (same); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing black arm bands); *Spence v. State of Washington,* 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (defacing flag); *Brown v. State of Louisiana,* 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) (participating in silent sit-in).

[1] For its part, the school district does not directly address whether the conduct itself is entitled to First Amendment protection, instead shifting its focus to the photographs, contending that plaintiffs are merely attempting to "shroud their conduct in First Amendment protection" and that "[u]nder the Plaintiffs' argument, then *any* conduct which is the subject of photographic recording would be beyond the scope of school authorities to regulate." DE 101, p. 2. This characterization is inaccurate, as it fails to recognize plaintiffs' application of the *Texas v. Johnson* standard for determining whether conduct is protected. So the school district has waived its argument on this point. *Gross v. Town of Cicero, Ill.,* 619 F.3d 697, 705 (7th Cir.2010); *Judge v. Quinn,* 612 F.3d 537, 557 (7th Cir.2010). In any event, T.V. and M.K. have the better of the argument.

[2] The record supports the conclusion that, although juvenile and silly—and certainly not a high-minded effort to express an idea such as burning a flag or wearing a black arm band—the conduct depicted in the photographs was intended to be humorous to the participants and to those who would later view the images. In fact, the humor (such as it is) derives from the fact that the conduct, featuring toy props and "joke" lollipops, is juvenile and silly and provocative. No message of lofty social or political importance was conveyed, but none is required. *See Zacchini v. Scripps–Howard Broadcasting Co.,* 433 U.S. 562, 578, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 65, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (live entertainment falls within the First Amendment guarantee). As the Seventh Circuit observed in *Eberhardt v. O'Malley,* 17 F.3d 1023, 1026 (7th Cir.1994): "The First Amendment protects entertainment as well as treatises on politics and public administration. Suppose Eberhardt had written not a novel set in a prosecutor's office but a love song, or

a short story about a talking mouse, or a script for television sitcom. Any of these works would be protected by the First Amendment."

Ridiculousness and inappropriateness are often the very foundation of humor. The provocative context of these young girls horsing around with objects representing sex organs was intended to contribute to the humorous effect in the minds of the intended teenage audience. As I noted when setting the oral argument, the Supreme Court has said that "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The sexual tableau created by the plaintiffs was obviously staged with the intention to entertain themselves (and the later audience of their peers who viewed the pictures) with what they considered silly lighthearted humor. That some particularized message was intended is demonstrated by the fact that the scenes were obviously staged and not entirely spontaneous.

The fact that adult school officials may not appreciate the approach to sexual themes the girls displayed actually supports the determination that the conduct was inherently expressive. *See IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University,* 993 F.2d 386, 392 (4th Cir.1993) (finding the First Amendment protected a crude "low-grade" fraternity skit billed as an "ugly woman contest" because it was inherently expressive entertainment, as the University's objections themselves demonstrate).

On the record before me, I conclude as a matter of law that the conduct in which M.K. and T.V. engaged, and that they recorded in the images which led to their punishment by Smith–Green School Corporation, had a particularized message of crude humor likely to be understood by those they expected to view the conduct, and so was sufficiently expressive as to be considered within the ambit of the First Amendment.

[3][4][5] The subsequent levels of analysis are whether the photographs themselves, and the posting of the images to the internet, were also protected by the girls' rights of free speech. In light of the analysis as to the underlying conduct, these layers seem more straightforward. The photographic recording of the staged event and the uploading of the images to the social networking sites are both efforts to memorialize and further communicate the expression engaged in by the conduct depicted in the images. "The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures." *ETW Corp. v. Jireh Publishing, Inc.,* 332 F.3d 915, 924 (6th Cir.2003) (citing *Hurley,* 515 U.S. at 569, 115 S.Ct. 2338, *inter alia*). "Art, even of the questionable sort represented by erotic photographs in 'provocative' magazines—even of the artless sort represented by 'topless' dancing—today enjoys extensive protection in the name of the First Amendment." *Douglass v. Hustler Magazine, Inc.,* 769 F.2d 1128, 1141 (7th Cir.1985).

Nothing in *State v. Chepilko,* 405 N.J.Super. 446, 965 A.2d 190 (N.J.Super.Ct.App.Div.2009), the principal case relied upon by Smith–Green in support of it position, favors a different result. There a street vendor took photographs of people walking on Atlantic City's Boardwalk, and then attempted to sell them to the subjects. When he was charged with a municipal violation for hawking on the Boardwalk without the required permit, he asserted that the First Amendment protected his photographic operation. The commercial context clearly distinguishes the analysis from the context here. The New Jersey Supreme Court found that the First Amendment issue turned on whether Chepilko's business activity and photographs were predominantly expressive. *Id.* at 461, 965 A.2d 190. Free speech principles were not implicated because it was evident that the photographer's principal purpose was to make money. *Id.* at 463, 965 A.2d 190. By contrast, there was no commercial purpose to the photographs in this case.

The law readily supports the conclusion that the images constitute protected expression, for the same reasons that the underlying conduct has been found to be expressive for First Amendment purposes, supplemented by the girls' intention to preserve the scenes they created for further viewing. *Beard v. Banks,* 548 U.S. 521, 543, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (Stevens, J., dissenting); *Kaplan v. California,* 413 U.S. 115, 119–20, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *White v. City of Sparks,* 500 F.3d 953, 956 (9th Cir.2007); *ETW Corp.,* 332 F.3d at 924 (6th Cir.2003); *Bery v. City of New York,* 97 F.3d 689, 696 (2nd Cir.1996)

("paintings, photographs, prints and sculptures .... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment Protection.")

The next step, the publication of the images to the social networking sites, functioned in effect as a public display of the photographs, and thereby itself expressed an intention to communicate the expression inherent in the girls' conduct and the images of it. *Burnham v. Ianni,* 119 F.3d 668, 674 (8th Cir.1997) ("First, however, we note that the expressive behavior at issue here, i.e., the posting of the photographs within the history department display, qualifies as constitutionally protected speech.") As for the use of the internet, which has become the billboard to the world, "[t]he Supreme Court has also made clear that First Amendment protections for speech extend fully to communications made through the medium of the internet." *Doe v. Shurtleff,* 628 F.3d 1217, 1222 (10th Cir.2010), citing *Reno v. ACLU,* 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). *See also James v. Meow Media, Inc.,* 300 F.3d 683, 696 (6th Cir.2002).

For all these reasons, my backtracking to address these threshold questions yields a result that ultimately makes the initial inattention to the issues unproblematic. I trust, however, that as a result of the detour, the analysis of the case is now more complete. I conclude that whether the punishment of T.V. and M.K. was based on the acts depicted in the photographs, the taking or existence of the images themselves, or the posting of the photographs to the internet, each of those possibilities qualifies as "speech" within the meaning of the First Amendment.

Is the speech involved nonetheless unprotected?

The parties dispute whether the case involves speech protected by the First Amendment. Defendants contend that, under distinct standards, the photographs constitute both obscenity and child pornography, neither of which is protected by the First Amendment. *United States v. Stevens,* —— U.S. ——, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010). At the May 27th hearing, after being pressed on the point, counsel for defendants conceded that the law on obscenity and child pornography are not applicable here, and with good reason.

[6] Obscene material is not protected by the First Amendment. *Miller v. California,* 413 U.S. 15, 23, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Smith–Green and Couch initially invoked the three-part test for obscenity set out by the Supreme Court in *Miller.* The second part of that test asks whether "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Id.* at 24, 93 S.Ct. 2607. The state law defendants cite to is Indiana's definition of "sexual conduct" in its statutes on child exploitation and possession of child pornography:

> "Sexual conduct" means sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals intended to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual or deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person.

I.C. § 35–42–4–4(a). Tacitly acknowledging that the only item in this list that might apply to the photographs here is "deviate sexual conduct," defendants then turn to the definition of that term in I.C. § 35–41–1–9: " 'Deviate sexual conduct' means an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object."

[7] Although Smith–Green and Couch once blithely asserted that the photographs depict "deviate sexual conduct" within this definition, as necessary to meet the second element of the *Miller* obscenity test, I cannot reach the same conclusion. Not even a single photograph meets the definition of "deviate sexual conduct" because none of them depicts the sex organ, mouth or anus of two people, and none of the images depicts actual penetration. From the plain meaning of the words of the statutory definition, I conclude—consistent with the defendants' concession on the point—that the photographs do not depict "deviate sexual conduct" as defined in Indiana law, and that as a result the photographs do not constitute obscenity under the Supreme Court's criteria in *Miller.*

Neither do the photographs constitute child pornography under either state or federal statutes. Indiana's statutes addressing child pornography refer to images that include, depict or describe "sexual conduct by a

child," using the same definition of "sexual conduct" as has been considered and rejected previously with respect to the obscenity analysis. I.C. § 35–42–4–4(b) & (c). Defendants, while glossing over the inapplicable Indiana statutory definition of "sexual conduct" as discussed above, also initially argued that M.K. and T.V. have "admitted" that the photographs depicted oral and anal sexual acts. But this is a complete stretch of the girls' deposition testimony. The testimony referred to does not address the statutory definition of the term, and in any event could not do so, as these lay witnesses cannot offer such legal analysis and conclusions.

[8] The federal definition, found at 18 U.S.C. § 2256(8), requires a "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." The phrase "sexually explicit conduct" has a multi-part definition, from which defendants invoke this portion: "actual or simulated ... sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex." § 2256(2)(A)(i). With only candy phalluses and toy tridents, the photographs cannot be said to depict simulated oral-genital sexual intercourse or anal-genital sexual intercourse within the meaning of this statute. Instead, the conduct depicted "must have created the realistic impression of an actual sex act to constitute simulated sexual intercourse." *Tilton v. Playboy Entertainment Group, Inc.,* 554 F.3d 1371, 1376 (11th Cir.2009). An act "only constitutes simulated sexual intercourse ... if it creates the realistic impression of an *actual* sexual act." *Giovani Carandola, Ltd. v. Fox,* 470 F.3d 1074, 1080 (4th Cir.2006) (emphasis in original). Given this analysis, and defendants' later concession, the students' First Amendment claim is not defeated by a contention that their speech is unprotected obscenity or child pornography.

What free speech standards apply?

[9] Having rejected Smith–Green and Couch's arguments that the photographs are not protected by the First Amendment, I must next determine what constitutional free speech standards apply. Relying upon *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), Smith–Green and Couch first argue that the photographs are not entitled to First Amendment protection because they are lewd, vulgar and/or plainly offensive. In *Fraser,* the Supreme Court held that the First Amendment does not prevent school officials from punishing "a vulgar and lewd speech ... [that] would undermine the school's basic educational mission." *Id.* at 685, 106 S.Ct. 3159. The speech being made by the student in *Fraser* was at a school assembly. M.K. and T.V.'s photographs were taken inside the privacy of their own homes and were published to the internet from outside of school. Defendants contend that "it is undisputed that the photographs did in fact make it into the school." While this may be true, it's beside the point. Neither M.K. nor T.V. brought the material into the school environment. Others did.

Fraser cannot be interpreted as broadly as Smith–Green and Couch want. Context matters, as *Fraser* itself notes: "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students." *Id.* But as Justice Brennan noted in his concurrence, the Court's holding was limited: "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate." *Id.* at 688, 106 S.Ct. 3159.

Indeed, the Supreme Court itself has noted *Fraser*'s limited scope: "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' [citing *Fraser,* 478 U.S. at 685, 106 S.Ct. 3159], even though the government could not censor similar speech outside the school." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). Still more recently in *Morse v. Frederick,* 551 U.S. 393, 405, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007), the Supreme Court plainly stated that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected," echoing the observation of Justice Brennan in his *Fraser* concurrence. So here Smith–Green and Couch cannot prevail on a characterization of the photographs as lewd and vulgar in reliance on *Fraser* because, simply put, "[t]he School District's argument fails at the outset because *Fraser* does not apply to off-campus speech." *J.S. v. Blue Mountain School District,* 650 F.3d 915, 930–32 (3rd Cir.2011).

The Tinker standard and its limits.

All of which brings us to *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), where the Supreme Court considered a schools' punishment of students who wore black armbands to school to represent their objections to the Vietnam War and their support for a truce. The case presented a conflict between the rights of the students to free expression and the interest of the school officials in maintaining order in the educational environment. The Court balanced those competing interests by announcing the following standard: school officials can restrict student expression only if the officials can show "that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513, 89 S.Ct. 733. The Supreme Court found that there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Id.* at 508, 89 S.Ct. 733. Therefore, the suspension of the students for their expression by wearing the armbands was found to violate their First Amendment rights. *Id.* at 514, 89 S.Ct. 733.

[10] Smith–Green and Couch first argue that students have no constitutional right to participate in extracurricular activities, and therefore the discipline imposed upon M.K. and T.V. requires no showing of "substantial disruption." But *Tinker* itself defeats this argument:

> The principle of these cases [on student free speech] is not confined to the supervised and ordained discussion which takes place in the classroom ... A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, **or on the playing field,** or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.

Tinker, 393 U.S. at 512–13, 89 S.Ct. 733 (emphasis added), quoting *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir.1966). The constitutional right at issue is freedom of expression, not that of participation in extracurricular activities. That there is no constitutional right to participate in athletics or other extracurricular activities may be pertinent to an analysis of other sorts of constitutional claims, such as a Due Process claim, a Privileges and Immunities claim, or an Equal Protection claim, [FN3] but as *Tinker* itself notes, not to a freedom of expression claim.

> FN3. *See Angstadt v. Midd–West School District,* 377 F.3d 338 (3rd Cir.2004), and *Niles v. University Interscholastic League,* 715 F.2d 1027 (5th Cir.1983), for Due Process analysis; *Alerding v. Ohio High School Athletic Ass'n,* 779 F.2d 315 (6th Cir.1985), for Privileges and Immunities analysis, and *Bruce v. South Carolina High School League,* 258 S.C. 546, 189 S.E.2d 817 (1972), for Equal Protection analysis.

[11] What this means is that a student cannot be punished with a ban from extracurricular activities for non-disruptive speech. For example, in a case involving suspension from a high school football team, the Ninth Circuit observed: "In holding that a student's First Amendment rights are 'not confined to the supervised and ordained discussion which takes place in the classroom,' the Court extended *Tinker*'s principles to school activities broadly defined, including extracurricular activities." *Pinard v. Clatskanie School District 6J,* 467 F.3d 755, 769 (9th Cir.2006). Likewise, in *Doninger v. Niehoff,* 642 F.3d 334 (2nd Cir.2011), the Second Circuit applied the *Tinker* analysis to the student's role as a student government representative and emphasized: "To be clear, we do not conclude in any way that school administrators are immune from First Amendment scrutiny when they react to student speech by limiting students' participation in extracurricular activities." *Id.* at 351.

Defendants cite no case in which a court has held that discipline in the form of exclusion from extracurricular activities categorically could not implicate the First Amendment, or in which the *Tinker* standard was found not to apply because "only" extracurricular activities, not suspension or expulsion from school, were at issue. Oddly, on this point, the defendants cite *Lowery v. Euverard,* 497 F.3d 584 (6th Cir.2007), where the parties agreed that the case was "governed by *Tinker,*" and the Sixth Circuit stated its standard: "school officials may regulate speech that materially and substantially interferes 'with the requirements of appropriate discipline in the operation of the school.' " *Id.* at 588, *citing Tinker,* 393 U.S. at 513, 89 S.Ct. 733. So rather than disavow the "substantial disruption" standard, the *Lowery* court applies it, finding in the context of

the football team incident there, that the Plaintiffs' actions were "reasonably likely to cause substantial disruption on the Jefferson County football team." *Lowery,* 497 F.3d at 594. Discussion in *Lowery* concerning the special environment represented by athletic teams is properly seen as context for the determination of what constitutes "substantial disruption," which may be different with respect to the dynamics of a team than, say, in a classroom setting.

The Supreme Court has not considered whether *Tinker* applies to expressive conduct taking place off of school grounds and not during a school activity and has in fact noted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents." *Morse,* 551 U.S. at 401, 127 S.Ct. 2618, *citing Porter v. Ascension Parish School Bd.,* 393 F.3d 608, 615, n. 22 (5th Cir.2004). But nearly all federal courts have treated such circumstances as governed by the *Tinker* standard. *See, e.g., Doninger v. Niehoff,* 527 F.3d 41, 48, 50 (2nd Cir.2008); *Pinard,* 467 F.3d at 767 (9th Cir.2006); *Boucher v. School Bd. of School District of Greenfield,* 134 F.3d 821, 827–28 (7th Cir.1998); *Shanley v. Northeast Indep. School Dist., Bexar County, Texas,* 462 F.2d 960, 970 (5th Cir.1972).

Recently, however, eight judges of the Third Circuit sitting *en banc* joined a majority opinion in which they **assumed without deciding** that *Tinker* applied to the student's off-campus creation of an abusive and profane parody profile of a middle school principal. *J.S.,* 650 F.3d at 926–27. The majority opinion noted that it didn't need to address the appellants' argument that the First Amendment restricts school officials' power to regulate student speech to "the schoolhouse itself" because the school district violated the student's free speech rights even if *Tinker* governed. *Id.* at 927, n. 3. Five of the eight judges signed onto a concurrence which went further, endorsing the conclusion that *Tinker* does not apply to off-campus speech at all, "and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936.

In the present context, I will also assume without deciding that *Tinker* applies, because even under its contextual narrowing of the right of free speech, I conclude that the school officials violated the First Amendment rights of plaintiffs T.V. and M.K.

Substantial disruption

[12][13] Finally then, I arrive at the First Amendment standard to be applied, namely whether in the circumstances present here, Principal Couch reasonably found that the pictures posted on the internet had disrupted, or would materially and substantially disrupt, the work and discipline of the school. I agree with Principal Couch and Smith–Green that a showing of actual disruption is not required for the punishment to pass constitutional muster. School officials are not required to wait and allow a disruption of their school environment to occur before taking action. *Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. # 204,* 523 F.3d 668, 673 (7th Cir.2008) "It is not necessary that the school administration stay a reasonable exercise of restraint 'until disruption actually occur[s].' " *Shanley,* 462 F.2d at 970 (quoting *Butts v. Dallas Independent School Dist.,* 436 F.2d 728, 731 (5th Cir.1971)). However, " *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Saxe v. State College Area School District,* 240 F.3d 200, 211 (3rd Cir.2001).

M.K. and T.V. are under the impression that the defendants concede the actual disruption argument, and that the disciplinary decision was made entirely on the basis of potential future disruption. But this isn't the case. The school defendants rely on the assertion that Principal Couch acted in part on the report of the complaining parent that the photographs *had already caused* divisiveness on school teams. DE 72, pp. 5–6, pp. 12–13. The mother who brought the photos to Darnell reported that they were "causing issues" with her daughter and the extracurricular teams. DE 71–4, p. 3. [FN4] The trouble was further described as "divisiveness" with the girls on the volleyball teams, that is, the girls' division into "two camps"—those "in favor, you know, of what—what was going on in the pictures" and those who "just wanted to have no part of it." *Id.*. Superintendent Darnell's deposition testimony reflects that he shared the report of the ongoing disruption—if one can call it that—with Principal Couch when he took him the pictures and directed him to handle the matter:

FN4. Curiously, it appears that this mother's daughter was not in fact on any of the school's volleyball teams at that time. DE 65–3, p. 2; DE 65–6, p. 2. She may have just been a busybody.

Q. And then you went right over that day to Principal Couch, is that correct?

A. Yes, finished my conversation with her [the complaining parent] and took and said, "Austin, this has been brought to the school. It's causing a disruption in extracurricular teams. We—you need to—you need to follow code with this." DE 71–4, p. 4. Yet Principal Couch's deposition testimony is at odds with his boss on that point. Indeed, Couch disavows any reliance on actual disruption as a basis for the actions he took:

Q. Now, in determining that the girls should be suspended for violating the code, did you determine that there had been any sort of disruption caused in the school by the pictures?

A. Had not, at that time, been a disruption, that I was aware of.

DE 71–1, p. 11.

[14] Comparison of this testimony reflects a discrepancy in the record as to whether actual disruption of school-sponsored student activity was in fact a basis for the imposition of the discipline meted out to M.K. and T.V. But even assuming it was, the actual disruption in this case does not come close to meeting the *Tinker* standard. Here's what *Tinker* says on that point:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.... In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

Tinker, 393 U.S. at 508–09, 89 S.Ct. 733, quoting *Burnside,* 363 F.2d at 749.

Defendants' showing of actual disruption is extremely weak. Petty disagreements among players on a team—or participants in clubs for that matter—is utterly routine. This type of unremarkable dissension does not establish disruption with the work or discipline of the team or the school, much less disruption that is "substantial" or "material." Consider, for example, *J.C. v. Beverly Hills Unified School District,* 711 F.Supp.2d 1094 (C.D.Cal.2010), where school administrators dealt with the aftermath of a student's video clip posted to the website "YouTube," in which a group of students engaged in trash-talking about a fellow student. On summary judgment, the district court held that getting a phone call from disgruntled parent, and evidence that a student temporarily refused to go to class and that five students missed some undetermined portion of their classes because of the episode, did not rise to the level of a substantial disruption. *Id.* at 1117–19.

By way of contrast, consider the factual record presented on motions for summary judgment in the *Doninger* case, involving an off-campus blog post of a disgruntled would-be candidate for Senior Class Secretary about the scheduling of a Student Council event: "the controversy ... had already resulted in a deluge of phone calls and emails, several disrupted schedules, and many upset students" and continued "as calls poured in for both [the] Principal ... and Superintendent ..., a group of upset students gathered outside [the Principal's] office, and Doninger and three other students were called out of class to meet with [school officials] in an effort to resolve the controversy." 642 F.3d at 349.

This case is much closer to *J.C.* than it is to *Doninger.* Here, school officials cannot point to any *students* creating or experiencing actual disruption *during any school activity.* Instead, the officials merely responded to the complaints of parents (two in all), and the complaints do not appear to have been confirmed with any students or coaches. As was true of the armbands in *Tinker,* the photos in this case could be said, at best, to have "caused discussion outside of the classrooms, but no interference with work and no disorder." *Tinker,* 393

U.S. at 514, 89 S.Ct. 733. Certainly no evidence has been presented of the kind of serious issues enumerated recently by the Seventh Circuit as indicative of substantial disruption: "[s]uch facts might include a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school." *Zamecnik v. Indian Prairie School District,* 636 F.3d 874, 876 (7th Cir.2011).

In sum, at most, this case involved two complaints from parents and some petty sniping among a group of 15 and 16 year olds. This can't be what the Supreme Court had in mind when it enunciated the "substantial disruption" standard in *Tinker*. To find otherwise would be to read the word "substantial" out of "substantial disruption." *See e.g. J.C.,* 711 F.Supp.2d at 1119 (for *Tinker* "to have any reasonable limits, the word 'substantial' must equate to something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure"); *Scoville v. Bd. of Educ. of Joliet Township,* 425 F.2d 10, 14 (7th Cir.1970) (protected speech that "undoubtedly offended and displeased the dean" but is not shown to have substantially disrupted or materially interfered with school activities cannot be punished).

As for the forecast of substantial disruption from the "publication" of the photographs on the internet, the school defendants assert rather summarily that the *Tinker* standard is met. But they offer little, either in evidence or argument, as to the nature of the feared disruption. The defendants merely assert that "due to a prior, similar experience, Principal Couch was familiar with the potential disruption that can result when photographs posted online are brought in to school," and that "[b]ased on his prior experience, Principal Couch disciplined T.V. and M.K. in order to avoid the situation 'blowing up.' " DE 72, p. 13. In his deposition, Couch testified to his analysis of the "potential disruption" as follows:

> A. The start of a school year, we're two weeks after we had lost two students in a car accident. The incident is very similar to an incident that occurred last—in the previous spring, in which it took time and effort in—in just small school, small hallways, students talking. This had the—the potential of doing the exact same thing, being in the hallways, being in the gymnasiums, causing a disruption. And in light of the recent events with our car accident, I felt, Superintendent had felt the urgency that this needed to be dealt with, and I dealt with it because this was the start of the school year, and I wanted to get off on the right foot, and I needed to do something before this blew up.
>
> DE 71–1, pp. 43–44.

This thin record does not support a determination as a matter of law that the school officials made a reasonable forecast of substantial disruption. To the contrary, if this is all the school corporation relies upon, I can conclude as a matter of law that the substantial disruption required by the *Tinker* test was not reasonably forecast.

To sum up: no reasonable jury could conclude that the photos of T.V. and M.K. posted on the internet caused a substantial disruption to school activities, or that there was a reasonably foreseeable chance of future substantial disruption. And while the crass foolishness that is the subject of the protected speech in this case makes one long for important substantive expressions like the black armbands of *Tinker,* such a distinction between the worthwhile and the unworthy is exactly what the First Amendment does not permit. With all respect to the important and valuable function of public school authorities, and the considerable deference to their judgment that is so often due, "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities." *Layshock v. Hermitage School District,* 650 F.3d 205, 216 (3rd Cir.2011). Plaintiffs' motion for partial summary judgment will therefore be granted, and defendants' summary judgment motion denied, on the issue whether T.V. and M.K. were punished in violation of their First Amendment rights.

Immunity from damages

[15] Smith–Green School Corporation invokes Eleventh Amendment immunity from damages. The sovereign immunity underlying the Eleventh Amendment protects state governments, and instrumentalities of state governments, from the imposition of damages under § 1983 in federal courts. *Atkins v. City of Chicago,* 631 F.3d

823, 838 (7th Cir.2011). Local public school districts have often been found not to enjoy Eleventh Amendment immunity, in part because of the local source of and control over their funding, based on their ability to levy taxes and to issue bonds. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The Supreme Court in *Mount Healthy* concluded that "a local school board such as petitioner is more like a county or city than it is like an arm of the State" and therefore "was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." *Id.* at 280–81, 97 S.Ct. 568. The impact of a money judgment on the state treasury is a critical consideration in such analyses, with the result that as to state universities, the opposite conclusion is usually reached. *See, e.g., Kashani v. Purdue University,* 813 F.2d 843, 845–46 (7th Cir.1987).

Smith–Green cites 2008 changes by the Indiana legislature to the funding formula for Indiana's public schools, arguing that local property tax levies have been eliminated as a revenue source and replaced by sales tax revenue more directly controlled by the state, so that the school corporation is now an arm of the state entitled to immunity from damages under the Eleventh Amendment. Two decisions by the United States District Court for the Southern District of Indiana are cited in support.

One of the Southern District decisions, in *Amber Parker v. Franklin County Community School Corporation,* Cause No. 10–3595, is now on appeal to the Seventh Circuit. On May 31, 2011, the case was argued and taken under submission. At the hearing in this court on May 27, counsel agreed with my reserving any ruling on the Eleventh Amendment issues, pending the Seventh Circuit's decision in *Parker.* To the extent the present motions seek summary judgment on the issue, they are denied without prejudice to the matter being renewed by an appropriate motion after the Court of Appeals' ruling.

[16][17][18] With respect to Principal Couch, qualified immunity is raised as a defense to any award of damages. Qualified immunity shields public officials from civil liability for damages as long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. *Leaf v. Shelnutt,* 400 F.3d 1070, 1080 (7th Cir.2005). The defense " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent and those who knowingly violate the law.' " *Hunter v. Bryant,* 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (quoting *Malley v. Briggs,* 475 U.S. 335, 343, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). To defeat the defense, plaintiffs must cite analogous case law to show that the conduct alleged was unlawful, or that the violation was so obvious that a reasonable state actor would know that his action violates the constitution. *Morrell v. Mock,* 270 F.3d 1090, 1100 (7th Cir.2001).

The Supreme Court has identified two key inquiries for assertions of qualified immunity: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendant violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation. *Pearson v. Callahan,* 555 U.S. 223, 232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). *Pearson* held that the court may decide these questions in whatever order is best suited to the case at hand. *Pearson,* 555 U.S. at 236, 129 S.Ct. 808. The first question is one of law, while the second requires a broader inquiry.

[19] On this issue, and in similar (although not identical) circumstances, many courts have found school administrators sued individually to have qualified immunity, generally on a finding that the constitutional rights at issue were not clearly established. *See, e.g., Doninger,* 642 F.3d at 353 ["The law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors and judges."]. The recent discussion in *J.C. v. Beverly Hills Unified School District,* 711 F.Supp.2d 1094 (C.D.Cal.2010), is most instructive. There, as here, "although the Court has found that a violation of [plaintiff's] First Amendment rights has occurred, the second *Saucier* step unequivocally resolves the issue of qualified immunity in Defendants' favor." *Id.* at 1124.

As the court noted, "[t]he Supreme Court has yet to address whether off-campus speech posted on the Internet, which subsequently makes it way to campus either by the speaker or by any other means, may be regulated by school officials." *Id.* at 1125. It remains true that, "while numerous recent cases have applied the

Supreme Court's student speech precedents to cases involving student speech over the Internet ... none have done so in a factually analogous setting." *Id.* at 1126. Finally, in the Supreme Court's most recent student speech case, which did not even involve the complicating factor of the internet, the Court noted that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents." *Morse,* 551 U.S. at 401, 127 S.Ct. 2618.

Consider the Third Circuit's recent fractured resolution of *J.S.,* 650 F.3d 915, in which the *en banc* court generated three different approaches to a school's punishment of a student for her out-of-school creation of an insulting and vulgar MySpace profile as a parody of her middle school principal. The majority opinion assumed without deciding that *Tinker* applied, and found as a matter of law that neither actual nor anticipated substantial disruption supported the school's discipline. *Id.* at 928. A five-judge concurrence took the more extreme position that the student was entitled to summary judgment because the First Amendment's protection of the student's off-campus speech is not properly limited even by the standards of *Tinker*. *Id.* at 936–37. Finally, a vigorous dissent by six judges, though applying *Tinker,* differed sharply on whether the abusive, profane profile of the principal reasonably supported a forecast of substantial disruption. *Id.* at 944–45.

As Judge Wilson observed in *J.C.:* "While the five separate opinions in *Morse* aptly illustrate the 'plethora of approaches that may be taken in this murky area of the law'... the Justices were unanimous in at least one respect—all agreed that the principal was entitled to qualified immunity." *J.C.,* 711 F.Supp.2d at 1126 (quoting *Morse,* 551 U.S. at 409, 127 S.Ct. 2618). So I find here as well, and conclude that Principal Couch has qualified immunity from damages because, on the current state of the developing law in this context, particularly involving student speech originating off-campus and by use of the internet, Couch's actions could reasonably have been thought to be consistent with the rights they are alleged to have violated.

Vagueness and Overbreadth

T.V. and M.K. also argue that the school policy was unconstitutionally vague and overbroad because it permitted discipline based on the principal's conclusion that T.V. and M.K. had brought "discredit or dishonor" upon themselves and the school, a species of unbridled discretion not permitted by the First Amendment. The challenge is to the portion of the Student Handbook that provides: "If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year." DE 65–2, p. 40.

T.V. and M.K. cite the Sixth Circuit's holding that "a statute or ordinance offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by objective criteria, but may rest on 'ambiguous and subjective reasons.' " *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Auth.,* 163 F.3d 341, 359 (6th Cir.1998), *quoting Desert Outdoor Advertising, Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir.1996). T.V. and M.K. claim that "case law is clear that a standard allowing punishment for something that 'discredits' self or school is constitutionally impermissible." DE 66, p. 20.

In support of that statement, plaintiffs cite *Flaherty v. Keystone Oaks School District,* 247 F.Supp.2d 698, 706 (W.D.Pa.2003). There the terms "offend," "abuse," "harassment" and "inappropriate" were "not defined in any significant manner" and so did "not provide the students with adequate warnings of the conduct that is prohibited." *Id.* at 704. In addition, the district court found "the Student Handbook policies at issue to be unconstitutionally overbroad and vague because they permit a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurs outside of school premises and not tied to a school related activity." *Id.*

[20][21][22][23] Unconstitutional overbreadth may occur where a regulation that is directed at activities that are not constitutionally protected is structured so as to prohibit protected activities as well. *City of Houston, Texas v. Hill,* 482 U.S. 451, 458, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). Overbreadth creates "a likelihood that the statute's very existence will inhibit free expression" by "inhibiting the speech of third parties who are not before the Court." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 80

L.Ed.2d 772 (1984). For the overbreadth to render the policy unconstitutional, it must be "not only real but substantial in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). This aspect of the inquiry precludes invalidating a rule merely because it is susceptible to a few impermissible applications; instead, the breadth of the challenged language must be shown to reach a substantial amount of constitutionally protected conduct. *City of Houston,* 482 U.S. at 459, 107 S.Ct. 2502 (statutes "that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application").

[24] The Third Circuit has held that "[i]n undertaking this analysis in the public school setting, however, it is important to recognize that the school district may permissibly regulate a broader range of speech than could be regulated for the general public, giving school regulations a larger plainly legitimate sweep." *J.S.,* 650 F.3d at 935 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.,* 307 F.3d 243, 259 (3rd Cir.2002)). But as the earlier analysis indicates, with regard to student speech occurring out-of-school, the "plainly legitimate sweep" of school discipline reaches only speech that presents an actual, or reasonable expectation of, substantial disruption of the school's work and discipline.

[25] Applying these principles to the provision at hand, it is obvious that out-of-school conduct that brings discredit or dishonor upon the student or the school is a standard that reaches a whole host of acts for which no First Amendment protection could be claimed. The broad spectrum of criminal activity springs immediately to mind by way of example. But the standard may also reach a similar variety of speech or expressive conduct that would be protected by the First Amendment. Examples could include marching for or against certain political or social causes, or publicly speaking out on topics school authorities deem taboo. And much of such speech or expressive conduct, as in this case, would not meet *Tinker'*s substantial disruption standard so as to render it subject to school discipline. Because the breadth of the standard reaches a substantial amount of constitutionally protected conduct, I conclude as a matter of law that the challenged language is impermissibly overbroad.

Before striking a statute as facially overbroad, however, I must consider whether the language is susceptible to a reasonable limiting interpretation that would render it constitutional. *Powell's Books, Inc. v. Kroger,* 622 F.3d 1202, 1215 (9th Cir.2010). No reasonable limiting construction of the challenged language has been proffered by Smith–Green, and none is apparent. Where the challenged limitation is not "open to one or a few interpretations, but to an indefinite number ... [i]t is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring [it] within the bounds of permissible constitutional certainty." *Baggett v. Bullitt,* 377 U.S. 360, 378, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In such circumstances "the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Board of Airport Commissioners v. Jews for Jesus, Inc.,* 482 U.S. 569, 576, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987).

[26][27] As for the separate issue of vagueness, "[a] statute will be considered void for vagueness if it does not allow a person of ordinary intelligence to determine what conduct it prohibits, or if it authorizes arbitrary enforcement." *J.S.,* 650 F.3d at 935, citing *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). The first species of vagueness was found in *Baggett,* where the loyalty oath required of state employees was unconstitutionally vague because "[t]he range of activities which are or might be deemed inconsistent with the required promise is very wide indeed," and the oath failed to "provide[ ] an ascertainable standard of conduct." *Baggett,* 377 U.S. at 371, 372, 84 S.Ct. 1316. Unconstitutional vagueness may also take the form of an "unrestricted delegation of power," where a statute leaves the definition of its terms to the enforcing officers and thereby invites arbitrary and overzealous enforcement. *Leonardson v. City of East Lansing,* 896 F.2d 190, 198 (6th Cir.1990).

[28][29] The vagueness standard is also somewhat relaxed in the school setting: "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal

sanctions." *Fraser,* 478 U.S. at 686, 106 S.Ct. 3159. Nonetheless, vagueness will void a policy that "fails to give a student adequate warning that his conduct is unlawful or if it fails to set adequate standards of enforcement such that it represents an unrestricted delegation of power to school officials." *Layshock v. Hermitage School District,* 496 F.Supp.2d 587, 606 (W.D.Pa.2007).

Smith–Green cites dictionary definitions of "discredit" as "to deprive of good repute" and "dishonor" as "lack or loss of honor or reputation." DE 75, p. 12. But the subjectivity of these definitions supports plaintiffs' position rather than defendants'. The notion of good character inherent in each term introduces a nebulous degree of value judgment. Issues of character and values involve such a broad spectrum of reasonable interpretation (but also strongly-held disagreement) as to be insufficiently conclusive for a disciplinary standard. In other words, the meaning of the terms may be readily understood by persons of ordinary intelligence, but ready agreement about all the conduct and circumstances they apply to cannot reasonably be expected. Such subjective terms have been found to render school disciplinary policies overbroad. *Killion v. Franklin Regional School District,* 136 F.Supp.2d 446, 459 (W.D.Pa.2001) (punishment for "verbal/written *abuse* of a staff member").

On several occasions, the Seventh Circuit has found similar language in internal police department regulations to be unconstitutionally vague. In *O'Brien v. Town of Caledonia,* 748 F.2d 403 (7th Cir.1984), the Court of Appeals considered charges that an officer engaged in conduct "causing serious discredit to the Department and the Town." *Id.* at 408. The Court found the language "functionally identical" to the phrase "Conduct ... detrimental to the service," which it had earlier found unconstitutionally vague in *Bence v. Breier,* 501 F.2d 1185, 1190 (7th Cir.1974). Such language has "no inherent, objective content from which ascertainable standards defining the proscribed conduct could be fashioned." *Id.* Because the concept of "serious discredit" can "only be subjectively applied," it fails the constitutional test. This analysis is instructive and applicable here, where the Student Handbook prohibition is based on similarly subjective notions of "discredit" and "dishonor."

Applying these strong doctrines with appropriate deference to the importance and necessity of schools' disciplinary authority, I nonetheless conclude that the Student Handbook provision on conduct "out of school that brings discredit or dishonor upon [the student] or [the] school" is impermissibly overbroad and vague under constitutional standards. This determination will support the issuance of an injunction against the enforcement of such a standard.

Motions to Strike

Two motions to strike have been filed relating to the briefing of the summary judgment motions. Plaintiffs move to strike three statements in the affidavit of the school corporation's business manager. The challenged portions of Todd Fleetwood's affidavit read as follows:

> 4....The practical impact of Public Law 146 was to make schools such as SGCSC almost entirely dependent on state funding....
>
> 7....Despite SGCSC's ability to use a referendum process to raise additional funds pursuant to Ind.Code § 20–40–3–3, this referendum process is tightly controlled by the State of Indiana and the outcome is wholly dependent on a majority vote by taxpayers....
>
> 8. Due to the recently adopted state funding process the State of Indiana now exercises almost complete control over the operations of SGCSC....

DE 71–5, pp. 1–2. Plaintiffs argue that these statements contain legal conclusions which are inappropriate in an affidavit. I think a more accurate characterization of the challenged statements is that they reflect Fleetwood's opinions about the effect of the legislative changes from the perspective of local school districts. By presenting them in an affidavit, he merely swears that these are his views. Offered as opinion testimony by a lay witness, such views are admissible under Fed.R.Evid. 701. In any event, the issue of Eleventh Amendment immunity is currently tabled pending the Seventh Circuit's ruling in *Parker v. Franklin County Community School Corporation,* Cause No. 10–3595, now under consideration on appeal.

Defendants' Motion to Strike is directed at plaintiffs' citation to an on-line newspaper account for the facts of *Flaherty v. Keystone Oaks School District,* 247 F.Supp.2d 698 (W.D.Pa.2003), a district court case plaintiffs cite.

The objection to the propriety of such a source could just as well have been argued in an opposition brief rather than raised by a separate motion. Further, I don't find the underlying facts in *Flaherty* to be significant to the necessary analysis. In any event, the matters raised by the motions to strike do not prove critical to the resolution of the substantive motions now before me, and both motions will be denied.

CONCLUSION

Today I determine as a matter of law that the punishment imposed on T.V. and M.K. for their out of school expression violated their First Amendment rights. With the agreement of the parties, I reserve ruling on the issue of the school corporation's immunity from damages under the Eleventh Amendment, pending the Seventh Circuit's decision in *Amber Parker v. Franklin County Community School Corporation,* Cause No. 10–3595. I conclude that Principal Couch is entitled to qualified immunity from damages because, though mistaken, his judgment could reasonably have been thought to be consistent with the students' rights, which were not clearly established at the time of his decision. Finally, I conclude that a Student Handbook provision that authorizes discipline for out of school conduct that brings "dishonor" or "discredit" upon the school or the student is so vague and overbroad as to violate the Constitution. I wish the case involved more important and worthwhile speech on the part of the students, but then of course a school's well-intentioned but unconstitutional punishment of that speech would be all the more regrettable.

ACCORDINGLY:

Plaintiffs' Motion to Strike [DE 88] and defendants' Motion to Strike [DE 73] are DENIED.

Plaintiffs' Motion to Submit Supplemental Authority [DE 104] is GRANTED.

Plaintiffs' Motion for Partial Summary Judgment [DE 65] and Defendants' Motion for Summary Judgment [DE 71] are GRANTED IN PART and DENIED IN PART as follows:

Plaintiffs' claim of violation of their First Amendment rights by the punishment imposed on them by defendants Couch and Smith–Green is granted as a matter of law.

Plaintiffs' claim that the portion of the Churubusco High School Student Handbook authorizing student discipline for "out of school conduct that brings discredit or dishonor upon [the student] or [the] school" is unconstitutionally vague and overbroad is granted as a matter of law.

Defendant Smith–Green's invocation of Eleventh Amendment immunity from damages is denied without prejudice, but can be renewed by an appropriate motion following the Seventh Circuit's ruling in the case of *Amber Parker v. Franklin County Community School Corporation,* Cause No. 10–3595.

Defendant Couch's invocation of qualified immunity from damages is granted as a matter of law.

By separate order, the case will be set for a status conference.

SO ORDERED.

Supplemental Case Printout for: *Management Perspective*

C.A.9 (Cal.),2012.
Perry v. Brown
--- F.3d ----, 2012 WL 372713 (C.A.9 (Cal.)), 12 Cal. Daily Op. Serv. 1550, 2012 Daily Journal D.A.R. 1705

United States Court of Appeals,
Ninth Circuit.

Kristin M. PERRY; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs–Appellees,

City and County of San Francisco, Intervenor–Plaintiff–Appellee,

v.

Edmund G. BROWN, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk–Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar–Recorder/County Clerk for the County of Los Angeles, Defendants,

Hak–Shing William Tam, Intervenor–Defendant,

and

Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com–Yes On 8, a Project of California Renewal, as official proponents of Proposition 8, Intervenor–Defendants–Appellants.

Kristin M. Perry; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs–Appellees,

City and County of San Francisco, Intervenor–Plaintiff–Appellee,

v.

Edmund G. Brown, Jr., in his official capacity as Governor of California; Kamala D. Harris, in her official capacity as Attorney General of California; Mark B. Horton, in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk–Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar–Recorder/County Clerk for the County of Los Angeles, Defendants,

Hak–Shing William Tam, Intervenor–Defendant,

and

Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Mark A. Jansson; ProtectMarriage.com–Yes On 8, a Project of California Renewal, as official proponents of Proposition 8, Intervenor–Defendants–Appellants.

Nos. 10–16696, 11–16577.

Argued and Submitted Dec. 6, 2010.

Submission Withdrawn Jan. 4, 2011.

Resubmitted Feb. 7, 2012.

Argued and Submitted Dec. 8, 2011.
Filed Feb. 7, 2012.

OPINION

REINHARDT, Circuit Judge:

Prior to November 4, 2008, the California Constitution guaranteed the right to marry to opposite-sex couples and same-sex couples alike. On that day, the People of California adopted Proposition 8, which amended the state constitution to eliminate the right of same-sex couples to marry. We consider whether that amendment violates the Fourteenth Amendment to the United States Constitution. We conclude that it does.

Although the Constitution permits communities to enact most laws they believe to be desirable, it requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently. There was no such reason that Proposition 8 could have been enacted. Because under California statutory law, same-sex couples had all the rights of opposite-sex couples, regardless of their marital status, all parties agree that Proposition 8 had one effect only. It stripped same-sex couples of the ability they previously possessed to obtain from the State, or any other authorized party, an important right—the right to obtain and use the designation of 'marriage' to describe their relationships. Nothing more, nothing less. Proposition 8 therefore could not have been enacted to advance California's interests in childrearing or responsible procreation, for it had no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples. Nor did Proposition 8 have any effect on religious freedom or on parents' rights to control their children's education; it could not have been enacted to safeguard these liberties.

All that Proposition 8 accomplished was to take away from same-sex couples the right to be granted marriage licenses and thus legally to use the designation of 'marriage,' which symbolizes state legitimization and societal recognition of their committed relationships. Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples. The Constitution simply does not allow for "laws of this sort." *Romer v. Evans,* 517 U.S. 620, 633, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

[1] "Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court." *Sweatt v. Painter,* 339 U.S. 629, 631, 70 S.Ct. 848, 94 L.Ed. 1114 (1950). Whether under the Constitution same-sex couples may *ever* be denied the right to marry, a right that has long been enjoyed by opposite-sex couples, is an important and highly controversial question. It is currently a matter of great debate in our nation, and an issue over which people of good will may disagree, sometimes strongly. Of course, when questions of constitutional law are necessary to the resolution of a case, courts may not and should not abstain from deciding them simply because they are controversial. We need not and do not answer the broader question in this case, however, because California had already extended to committed same-sex couples both the incidents of marriage and the official designation of 'marriage,' and Proposition 8's only effect was to take away that important and legally significant designation, while leaving in place all of its incidents. This unique and strictly limited effect of Proposition 8 allows us to address the amendment's constitutionality on narrow grounds.

Thus, as a result of our "traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in th[is] case[ ] is unnecessary to [its] disposition." *Id.* Were we unable, however, to resolve the matter on the basis we do, we would not hesitate to proceed to the broader question—the constitutionality of denying same-sex couples the right to marry.

Before considering the constitutional question of the validity of Proposition 8's *elimination* of the rights of same-sex couples to marry, we first decide that the official sponsors of Proposition 8 are entitled to appeal the decision below, which declared the measure unconstitutional and enjoined its enforcement. The California Constitution and Elections Code endow the official sponsors of an initiative measure with the authority to represent the State's interest in establishing the validity of a measure enacted by the voters, when the State's

elected leaders refuse to do so. *See Perry v. Brown,* 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002 (2011). It is for the State of California to decide who may assert its interests in litigation, and we respect its decision by holding that Proposition 8's proponents have standing to bring this appeal on behalf of the State. We therefore conclude that, through the proponents of ballot measures, the People of California must be allowed to defend in federal courts, including on appeal, the validity of their use of the initiative power. Here, however, their defense fails on the merits. The People may not employ the initiative power to single out a disfavored group for unequal treatment and strip them, without a legitimate justification, of a right as important as the right to marry. Accordingly, we affirm the judgment of the district court.

We also affirm—for substantially the reasons set forth in the district court's opinion—the denial of the motion by the official sponsors of Proposition 8 to vacate the judgment entered by former Chief Judge Walker, on the basis of his purported interest in being allowed to marry his same-sex partner.

I

A

Upon its founding, the State of California recognized the legal institution of civil marriage for its residents. *See, e.g.,* Cal. Const. of 1849, art. XI, §§ 12, 14 (discussing marriage contracts and marital property); Cal. Stats. 1850, ch. 140 ("An Act regulating Marriages"). Marriage in California was understood, at the time and well into the twentieth century, to be limited to relationships between a man and a woman. *See In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 407–09 (2008). In 1977, that much was made explicit by the California Legislature, which amended the marriage statute to read, "Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary." Cal. Stats.1977, ch. 339, § 1. The 1977 provision remains codified in California statute. *See* Cal. Fam.Code § 300(a).

Following the enactment of the Defense of Marriage Act of 1996, Pub.L. 104–199, 110 Stat. 2419 (codified in relevant part at 1 U.S.C. § 7), which expressly limited the federal definition of marriage to relationships between one man and one woman, dozens of states enacted similar provisions into state law. *See* Andrew Koppelman, *The Difference the Mini–DOMAs Make,* 38 Loy. U. Chi. L.J. 265, 265–66 (2007). California did so in 2000 by adopting Proposition 22, an initiative statute, which provided, "Only marriage between a man and a woman is valid or recognized in California." Cal. Fam.Code § 308.5. The proposition ensured that same-sex marriages performed in any state that might permit such marriages in the future would not be recognized in California, and it guaranteed that any legislative repeal of the 1977 statute would not allow same-sex couples to marry within the State, because the Legislature may not amend or repeal an initiative statute enacted by the People. *See Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 409–10.

Meanwhile, however, California had created the designation "domestic partnership" for "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Cal. Stats.1999, ch. 588, § 2 (codified at Cal. Fam.Code § 297(a)). At first, California gave registered domestic partners only limited rights, such as hospital visitation privileges, *id.* § 4, and health benefits for the domestic partners of certain state employees, *id.* § 3. Over the next several years, however, the State substantially expanded the rights of domestic partners. By 2008, "California statutory provisions generally afford[ed] same-sex couples the opportunity to ... obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 417–18. The 2003 Domestic Partner Act provided broadly: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Cal. Stats.2003, ch. 421, § 4 (codified at Cal. Fam.Code § 297.5(a)). It withheld only the official designation of marriage and thus the officially conferred and societally recognized status that accompanies that designation.

B

In 2004, same-sex couples and the City and County of San Francisco filed actions in California state courts alleging that the State's marriage statutes violated the California Constitution. Proposition 22 was among the statutes challenged, because as an initiative statutory enactment, it was equal in dignity to an enactment by the Legislature and thus subject to the restrictions of the state constitution.[FN1] The consolidated cases were eventually decided by the California Supreme Court, which held the statutes to be unconstitutional, for two independent reasons.

First, the court held that the fundamental right to marry provided by the California Constitution could not be denied to same-sex couples, who are guaranteed "the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 433–34. The court began by reaffirming that "the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1 [of the California Constitution], and of the liberty interest protected by the due process clause of article I, section 7." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 426 (emphasis omitted). It then held "that an individual's homosexual orientation is not a constitutionally legitimate basis for withholding or restricting the individual's legal rights." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 429. The court acknowledged that although such an inclusive understanding of the right to marry was one that had developed only "in recent decades," as the State extended greater recognition to same-sex couples and households, it was "apparent that history alone does not provide a justification for interpreting the constitutional right to marry as protecting only one's ability to enter into an officially recognized family relationship with a person of the opposite sex," because " '[f]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.' " *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 428–30 (quoting *Hernandez v. Robles,* 7 N.Y.3d 338, 381, 821 N.Y.S.2d 770, 855 N.E.2d 1 (2006) (Kaye, C.J., dissenting)).

The court concluded its due process analysis by rejecting the argument that the availability of domestic partnerships satisfied "all of the personal and dignity interests that have traditionally informed the right to marry," because "[t]he current statutes—by drawing a distinction between the name assigned to the family relationship available to opposite-sex couples and the name assigned to the family relationship available to same-sex couples, and by reserving the historic and highly respected designation of 'marriage' exclusively to opposite-sex couples while offering same-sex couples only the new and unfamiliar designation of domestic partnership—pose a serious risk of denying the official family relationship of same-sex couples the equal dignity and respect that is a core element of the constitutional right to marry." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 434–35.

Second, the court held that "[t]he current statutory assignment of different names for the official family relationships of opposite-sex couples on the one hand, and of same-sex couples on the other" violated the equal protection clause in article I, section 7 of the California Constitution. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 435, 452–53. The court determined that the State had no interest in reserving the name 'marriage' for opposite-sex couples; "the historic and well-established nature of this limitation" could not itself justify the differential treatment, and the court found no reason that restricting the designation of 'marriage' to opposite-sex couples was necessary to preserve the benefits of marriage enjoyed by opposite-sex couples or their children. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 450–52. The court noted specifically that "the distinction in nomenclature between marriage and domestic partnership cannot be defended on the basis of an asserted difference in the effect on children of being raised by an opposite-sex couple instead of by a same-sex couple," because "the governing California statutes permit same-sex couples to adopt and raise children and additionally draw no distinction between married couples and domestic partners with regard to the legal rights and responsibilities relating to children raised within each of these family relationships." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 452 n. 72. Restricting access to the designation of 'marriage' did, however, "work[ ] a real and appreciable harm upon same-sex couples and their children," because "providing only a novel, alternative institution for same-sex

couples" constituted "an official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 452. Consequently, the court determined that withholding only the name 'marriage' from same-sex couples violated the California Constitution's guarantee of equal protection.

The court remedied these constitutional violations by striking the language from the marriage statutes "limiting the designation of marriage to a union 'between a man and a woman,' " invalidating Proposition 22, and ordering that the designation of 'marriage' be made available to both opposite-sex and same-sex couples. *Id.,* 76 Cal.Rptr.3d 683, 183 P.3d at 453. Following the court's decision, California counties issued more than 18,000 marriage licenses to same-sex couples.

C

Five California residents—defendants-intervenors-appellants Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak–Shing William Tam, and Mark A. Jansson (collectively, "Proponents")—collected voter signatures and filed petitions with the state government to place an initiative on the November 4, 2008, ballot. Unlike Proposition 22, this was an initiative constitutional amendment, which would be equal in effect to any other provision of the California Constitution, rather than subordinate to it. The Proponents' measure, designated Proposition 8, proposed to add a new provision to the California Constitution's Declaration of Rights, immediately following the Constitution's due process and equal protection clauses. The provision states, "Only marriage between a man and a woman is valid or recognized in California." According to the official voter information guide, Proposition 8 "[c]hanges the California Constitution to eliminate the right of same-sex couples to marry in California." Official Voter Information Guide, California General Election (Nov. 4, 2008), at 54. Following a contentious campaign, a slim majority of California voters (52.3 percent) approved Proposition 8. Pursuant to the state constitution, Proposition 8 took effect the next day, as article I, section 7.5 of the California Constitution.

Opponents of Proposition 8 then brought an original action for a writ of mandate in the California Supreme Court. They contended that Proposition 8 exceeded the scope of the People's initiative power because it revised, rather than amended, the California Constitution. The opponents did not raise any federal constitutional challenge to Proposition 8 in the state court. The state officials named as respondents refused to defend the measure's validity, but Proponents were permitted to intervene and do so. Following argument, the court upheld Proposition 8 as a valid initiative but construed the measure as not nullifying the 18,000–plus marriages of same-sex couples that had already been performed in the State. *Strauss v. Horton,* 46 Cal.4th 364, 93 Cal.Rptr.3d 591, 207 P.3d 48, 98–110, 119–22 (2009).

The court also explained Proposition 8's precise effect on California law: "[T]he measure carves out a narrow and limited exception to the[ ] state constitutional rights [articulated in the *Marriage Cases*], reserving the official *designation* of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law, but leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional right to establish an officially recognized and protected family relationship and the guarantee of equal protection of the laws." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 61; *see also id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 75. In other words, after Proposition 8, "[s]ame-sex couples retain all of the fundamental substantive components encompassed within the constitutional rights of privacy and due process, with the sole (albeit significant) exception of the right to equal access to the designation 'marriage.' " *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 116. Proposition 8 accomplished this result not by "declar[ing] the state of the law as it existed when the *Marriage Cases* decision was rendered, but instead [by] establish[ing] a new substantive state constitutional rule that became effective once Proposition 8 was approved by the voters." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 115; *see also id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 63.

II

A

Two same-sex couples—plaintiffs Kristin Perry and Sandra Stier, and Paul Katami and Jeffrey Zarrillo—

filed this action under 42 U.S.C. § 1983 in May 2009, after being denied marriage licenses by the County Clerks of Alameda County and Los Angeles County, respectively. Alleging that Proposition 8 violates the Fourteenth Amendment to the United States Constitution, they sought a declaration of its unconstitutionality and an injunction barring its enforcement. The City and County of San Francisco ("San Francisco") was later permitted to intervene as a plaintiff to present evidence of the amendment's effects on its governmental interests. The defendants—the two county clerks and four state officers, including the Governor and Attorney General—filed answers to the complaint but once again refused to argue in favor of Proposition 8's constitutionality. As a result, the district court granted Proponents' motion to intervene as of right under Federal Rule of Civil Procedure 24(a) to defend the validity of the proposition they had sponsored. [FN2]

The district court held a twelve-day bench trial, during which it heard testimony from nineteen witnesses and, after giving the parties a full and fair opportunity to present evidence and argument, built an extensive evidentiary record.[FN3] In a thorough opinion in August 2010, the court made eighty findings of fact and adopted the relevant conclusions of law. *Perry v. Schwarzenegger* (*Perry IV*), 704 F.Supp.2d 921 (N.D.Cal.2010).[FN4] The court held Proposition 8 unconstitutional under the Due Process Clause because no compelling state interest justifies denying same-sex couples the fundamental right to marry. *Id.* at 991–95. The court also determined that Proposition 8 violated the Equal Protection Clause, because there is no rational basis for limiting the designation of 'marriage' to opposite-sex couples. *Id.* at 997–1003. The court therefore entered the following injunction: "Defendants in their official capacities, and all persons under the control or supervision of defendants, are permanently enjoined from applying or enforcing Article I, § 7.5 of the California Constitution." [FN5] Doc. 728 (Permanent Injunction), *Perry v. Schwarzenegger,* No. 09–cv–02292 (N.D.Cal. Aug. 12, 2010).[FN6]

B

Proponents appealed immediately, and a motions panel of this court stayed the district court's injunction pending appeal. The motions panel asked the parties to discuss in their briefs, as a preliminary matter, whether the Proponents had standing to seek review of the district court order. After considering the parties' arguments, we concluded that Proponents' standing to appeal depended on the precise rights and interests given to official sponsors of an initiative under California law, which had never been clearly defined by the State's highest court. We therefore certified the following question to the California Supreme Court:

> Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.

Perry v. Schwarzenegger (*Perry V*), 628 F.3d 1191, 1193 (9th Cir.2011). The state court granted our request for certification in February 2011, and in November 2011 rendered its decision. *See Perry v. Brown* (*Perry VII*), 52 Cal.4th 1116, 134 Cal.Rptr.3d 499, 265 P.3d 1002 (2011). We now resume consideration of this appeal.[FN7]

III

[2] We begin, as we must, with the issue that has prolonged our consideration of this case: whether we have jurisdiction over an appeal brought by the defendant-intervenor Proponents, rather than the defendant state and local officers who were directly enjoined by the district court order.[FN8] In view of Proponents' authority under California law, we conclude that they do have standing to appeal.

[3][4] For purposes of Article III standing, we start with the premise that "a State has standing to defend the constitutionality of its [laws]." *Diamond v. Charles,* 476 U.S. 54, 62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). When a state law is ruled unconstitutional, either the state or a state officer charged with the law's enforcement may appeal that determination. Typically, the named defendant in an action challenging the constitutionality of a state law is a state officer, because sovereign immunity protects the state from being sued directly. *See Ex parte Young,* 209 U.S. 123, 157–58, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *L.A. County Bar Ass'n v. Eu,* 979 F.2d 697, 704 (9th Cir.1992). In such cases, if a court invalidates the state law and enjoins its enforcement, there is no

question that the state officer is entitled to appeal that determination. *See, e.g., Ysursa v. Pocatello Educ. Ass'n,* 555 U.S. 353, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) (Idaho Secretary of State and Attorney General appealed decision striking down an Idaho law on First Amendment grounds); *Stenberg v. Carhart,* 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (Nebraska Attorney General appealed decision holding unconstitutional a Nebraska abortion law). Moreover, there is no reason that a state itself may not also *choose* to intervene as a defendant, and indeed a state *must* be permitted to intervene if a state officer is not already party to an action in which the constitutionality of a state law is challenged. *See* 28 U.S.C. § 2403(b); Fed.R.Civ.P. 5.1; *cf.* Fed. R.App. P. 44(b). When a state does elect to become a defendant itself, the state may appeal an adverse decision about the constitutionality of one of its laws, just as a state officer may. *See, e.g., Caruso v. Yamhill County ex rel. County Comm'r,* 422 F.3d 848, 852–53 & n. 2 (9th Cir.2005) (sole appellant was the State of Oregon, which had intervened as a defendant in the district court). In other words, in a suit for an injunction against enforcement of an allegedly unconstitutional state law, it makes no practical difference whether the formal party before the court is the state itself or a state officer in his official capacity. *Cf. Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 114 n. 25, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (discussing the "fiction" of *Ex parte Young*); *see also Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 269–70, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (same).

Whether the defendant is the state or a state officer, the decision to assert the state's own interest in the constitutionality of its laws is most commonly made by the state's executive branch—the part of state government that is usually charged with enforcing and defending state law. *See, e.g., Ysursa,* 555 U.S. at 354, 129 S.Ct. 1093 (Idaho state officers represented by state Attorney General); *Caruso,* 422 F.3d at 851 (State of Oregon represented by Oregon Department of Justice). Some sovereigns vest the authority to assert their interest in litigation *exclusively* in certain executive officers. *See, e.g.,* 28 U.S.C. §§ 516–19; 28 C.F.R. § 0.20.

[5] The states need not follow that approach, however. It is their prerogative, as independent sovereigns, to decide for themselves who may assert their interests and under what circumstances, and to bestow that authority accordingly. In *Karcher v. May,* 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), for example, the Supreme Court held that the State of New Jersey was properly represented in litigation by the Speaker of the General Assembly and the President of the Senate, appearing on behalf of the Legislature, because "the New Jersey Legislature had authority under state law to represent the State's interests." *Id.* at 82, 108 S.Ct. 388 (citing *In re Forsythe,* 91 N.J. 141, 450 A.2d 499, 500 (1982)).[FN9] Principles of federalism require that federal courts respect such decisions by the states as to who may speak for them: "there are limits on the Federal Government's power to affect the internal operations of a State." *Va. Office for Protection & Advocacy v. Stewart,* —— U.S. ——, 131 S.Ct. 1632, 1641, 179 L.Ed.2d 675 (2011). It is not for a federal court to tell a state who may appear on its behalf any more than it is for Congress to direct state law-enforcement officers to administer a federal regulatory scheme, *see Printz v. United States,* 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), to command a state to take ownership of waste generated within its borders, *see New York v. United States,* 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), or to dictate where a state shall locate its capital, *see Coyle v. Smith,* 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). Who may speak for the state is, necessarily, a question of state law. All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm.

Proponents claim to assert the interest of the People of California in the constitutionality of Proposition 8, which the People themselves enacted. When faced with a case arising in a similar posture, in which an Arizona initiative constitutional amendment was defended only by its sponsors, the Supreme Court expressed "grave doubts" about the sponsors' standing given that the Court was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Arizonans for Official English v. Arizona* (*Arizonans*), 520 U.S. 43, 65–66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Absent some conferral of authority by state law, akin to the authority that the New Jersey legislators in *Karcher* had as "elected representatives," the Court suggested that proponents of a

ballot measure would not be able to appeal a decision striking down the initiative they sponsored. *Id.* at 65, 117 S.Ct. 1055.

Here, unlike in *Arizonans*, we *do* know that California law confers on "initiative sponsors" the authority "to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." The California Supreme Court has told us, in a published opinion containing an exhaustive review of the California Constitution and statutes, that it does. In answering our certified question, the court held

> that when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

Perry VII, 134 Cal.Rptr.3d at 536–37, 265 P.3d 1002. "[T]he role played by the proponents in such litigation," the court explained, "is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law and raising all arguable legal theories upon which a challenged provision may be sustained." *Id.* at 525, 265 P.3d 1002. The State's highest court thus held that California law provides precisely what the *Arizonans* Court found lacking in Arizona law: it confers on the official proponents of an initiative the authority to assert the State's interests in defending the constitutionality of that initiative, where the state officials who would ordinarily assume that responsibility choose not to do so.

We are bound to accept the California court's determination. Although other states may act differently, California's conferral upon proponents of the authority to represent the People's interest in the initiative measure they sponsored is consistent with that state's unparalleled commitment to the authority of the electorate: "No other state in the nation carries the concept of initiatives as 'written in stone' to such lengths as" does California. *People v. Kelly,* 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, 222 P.3d 186, 200 (2010) (internal quotation marks omitted). Indeed, California defines the initiative power as "one of the most precious rights of our democratic process," and considers "the sovereign people's initiative power" to be a "fundamental right" under the state constitution. *Assoc. Home Builders v. City of Livermore,* 18 Cal.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473, 477 (1976); *Brosnahan v. Brown,* 32 Cal.3d 236, 186 Cal.Rptr. 30, 651 P.2d 274, 277 (1982); *Costa v.Super. Ct.,* 37 Cal.4th 986, 39 Cal.Rptr.3d 470, 128 P.3d 675, 686 (2006). As the California Supreme Court explained in answering our certified question, "[t]he initiative power would be significantly impaired if there were no one to assert the state's interest in the validity of the measure when elected officials decline to defend it in court or to appeal a judgment invalidating the measure." *Perry VII,* 134 Cal.Rptr.3d at 523, 265 P.3d 1002. The authority of official proponents to "assert[ ] the state's interest in the validity of an initiative measure" thus "serves to safeguard the unique elements and integrity of the initiative process." *Id.* at 533., 265 P.3d 1002

It matters not whether federal courts think it wise or desirable for California to afford proponents this authority to speak for the State, just as it makes no difference whether federal courts think it a good idea that California allows its constitution to be amended by a majority vote through a ballot measure in the first place. *Cf. Pac. States Tel. & Tel. Co. v. Oregon,* 223 U.S. 118, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (holding nonjusticiable a Guaranty Clause challenge to Oregon's initiative system). The People of California are largely free to structure their system of governance as they choose, and we respect their choice. All that matters, for federal standing purposes, is that the People have an interest in the validity of Proposition 8 and that, under California law, Proponents are authorized to represent the People's interest. That is the case here.

[6] In their supplemental brief on the issue of standing, Plaintiffs argue for the first time that Proponents must satisfy the requirements of third-party standing in order to assert the interests of the State of California in this litigation. Litigants who wish "to bring actions on behalf of third parties" must satisfy three requirements. *Powers v. Ohio,* 499 U.S. 400, 410–11, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). First, they "must have suffered an 'injury in fact,' thus giving [them] a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Id.* at 411, 111 S.Ct. 1364. Second, they "must have a close relation to the third party." *Id.* Third, "there must exist

some hindrance to the third party's ability to protect his or her own interests." *Id.* Plaintiffs contend that Proponents cannot satisfy these requirements with respect to the State of California as a third party.

The requirements of third-party standing, however, are beside the point: the State of California is no more a "third party" relative to Proponents than it is to the executive officers of the State who ordinarily assert the State's interest in litigation. As the California Supreme Court has explained, "the role played by the proponents" in litigation "regarding the validity or proper interpretation of a voter-approved initiative measure ... is comparable to the role ordinarily played by the Attorney General or other public officials in vigorously defending a duly enacted state law." *Perry VII,* 134 Cal.Rptr.3d at 525, 265 P.3d 1002. When the Attorney General of California appears in federal court to defend the validity of a state statute, she obviously need not satisfy the requirements of third-party standing; she stands in the shoes of the State to assert its interests in litigation. For the purposes of the litigation, she speaks to the court *as* the State, not as a third party. The same is true of Proponents here, just as it was true of the presiding legislative officers in *Karcher,* 484 U.S. at 82, 108 S.Ct. 388. The requirements of third-party standing are therefore not relevant.

Nor is it relevant whether Proponents have suffered a *personal* injury, in their capacities as private individuals. Although we asked the California Supreme Court whether "the official proponents of an initiative measure possess either a *particularized interest* in the initiative's validity or the authority to assert the *State's interest* in the initiative's validity," *Perry V,* 628 F.3d at 1193 (emphasis added), the Court chose to address only the latter type of interest. *Perry VII,* 134 Cal.Rptr.3d at 515, 265 P.3d 1002 ("Because [our] conclusion [that proponents are authorized to assert the State's interest] is sufficient to support an affirmative response to the question posed by the Ninth Circuit, we need not decide whether, under California law, the official proponents also possess a particularized interest in a voter-approved initiative's validity."). The exclusive basis of our holding that Proponents possess Article III standing is their authority to assert the interests of the State of California, rather than any authority that they might have to assert particularized interests of their *own.* Just as the Attorney General of California need not satisfy the requirements of third-party standing when she appears in federal court to defend the validity of a state statute, she obviously need not show that she would suffer any *personal* injury as a result of the statute's invalidity. The injury of which she complains is the State's, not her own. The same is true here. Because "a State has standing to defend the constitutionality of its [laws]," *Diamond,* 476 U.S. at 62, 106 S.Ct. 1697, Proponents need not show that they would suffer any personal injury from the invalidation of Proposition 8. That the *State* would suffer an injury, *id.,* is enough for Proponents to have Article III standing when state law authorizes them to assert the State's interests.

[7] To be clear, we do not suggest that state law has any "power directly to enlarge or contract federal jurisdiction." *Duchek v. Jacobi,* 646 F.2d 415, 419 (9th Cir.1981). "Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's ... standing in state court." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). State courts may afford litigants standing to appear where federal courts would not,[FN10] but whether they do so has no bearing on the parties' Article III standing in federal court.

State law does have the power, however, to answer questions antecedent to determining federal standing, such as the one here: who is authorized to assert the People's interest in the constitutionality of an initiative measure? Because the State of California has Article III standing to defend the constitutionality of Proposition 8, and because both the California Constitution and California law authorize "the official proponents of [an] initiative ... to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so," *Perry VII,* 134 Cal.Rptr.3d at 505, 265 P.3d 1002, we conclude that Proponents are proper appellants here. They possess Article III standing to prosecute this appeal from the district court's judgment invalidating Proposition 8.

IV

[8][9] We review the district court's decision to grant a permanent injunction for abuse of discretion, but we

review the determinations underlying that decision by the standard that applies to each determination. Accordingly, we review the court's conclusions of law de novo and its findings of fact for clear error. *See Ting v. AT&T,* 319 F.3d 1126, 1134–35 (9th Cir.2003); Fed.R.Civ.P. 52(a).

[10][11][12] Plaintiffs and Proponents dispute whether the district court's findings of fact concern the types of "facts"—so-called "adjudicative facts"—that are capable of being "found" by a court through the clash of proofs presented in adjudication, as opposed to "legislative facts," which are generally not capable of being found in that fashion. "Adjudicative facts are facts about the parties and their activities ..., usually answering the questions of who did what, where, when, how, why, with what motive or intent"—the types of "facts that go to a jury in a jury case," or to the factfinder in a bench trial. *Marshall v. Sawyer,* 365 F.2d 105, 111 (9th Cir.1966) (quoting Kenneth Culp Davis, *The Requirement of a Trial–Type Hearing,* 70 Harv. L.Rev. 193, 199 (1956)) (internal quotation marks omitted). "Legislative facts," by contrast, "do not usually concern [only] the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." *Id.*

It is debatable whether some of the district court's findings of fact concerning matters of history or social science are more appropriately characterized as "legislative facts" or as "adjudicative facts." We need not resolve what standard of review should apply to any such findings, however, because the only findings to which we give any deferential weight—those concerning the messages in support of Proposition 8 that Proponents communicated to the voters to encourage their approval of the measure, *Perry IV,* 704 F.Supp.2d at 990–91—are clearly "adjudicative facts" concerning the parties and " 'who did what, where, when, how, why, with what motive or intent.' " *Marshall,* 365 F.2d at 111. Aside from these findings, the only fact found by the district court that matters to our analysis is that "[d]omestic partnerships lack the social meaning associated with marriage"—that the difference between the designation of 'marriage' and the designation of 'domestic partnership' is meaningful. *Perry IV,* 704 F.Supp.2d at 970. This fact was conceded by Proponents during discovery. Defendant–Intervenors' Response to Plaintiffs' First Set of Requests for Admission, Exhibit No. PX 0707, at 2 ("Proponents admit that the word 'marriage' has a unique meaning."); *id.* at 11 (Proponents "[a]dmit that there is a significant symbolic disparity between domestic partnership and marriage"). Our analysis therefore does not hinge on what standard we use to review the district court's findings of fact. *Cf. Lockhart v. McCree,* 476 U.S. 162, 168 n. 3, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) ("Because we do not ultimately base our decision today on the [validity or] invalidity of the lower courts' 'factual' findings, we need not decide the 'standard of review' issue"—whether "the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here.").

V

We now turn to the merits of Proposition 8's constitutionality.

A

[13] The district court held Proposition 8 unconstitutional for two reasons: first, it deprives same-sex couples of the fundamental right to marry, which is guaranteed by the Due Process Clause, *see Perry IV,* 704 F.Supp.2d at 991–95; and second, it excludes same-sex couples from state-sponsored marriage while allowing opposite-sex couples access to that honored status, in violation of the Equal Protection Clause, *see id.* at 997–1003. Plaintiffs elaborate upon those arguments on appeal.

[14] Plaintiffs and Plaintiff–Intervenor San Francisco also offer a third argument: Proposition 8 singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason. *Romer,* 517 U.S. at 634–35, 116 S.Ct. 1620. Because this third argument applies to the specific history of same-sex marriage in California, it is the narrowest ground for adjudicating the constitutional questions before us, while the first two theories, if correct, would apply on a broader basis. Because courts generally decide constitutional questions on the narrowest ground available, we consider the third argument first. *See Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 217, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (citing *Ashwander v. Tenn. Valley Auth.,* 297 U.S. 288, 347, 56

S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)).

B

Proposition 8 worked a singular and limited change to the California Constitution: it stripped same-sex couples of the right to have their committed relationships recognized by the State with the designation of 'marriage,' which the state constitution had previously guaranteed them, while leaving in place all of their other rights and responsibilities as partners—rights and responsibilities that are identical to those of married spouses and form an integral part of the marriage relationship. In determining that the law had this effect, "[w]e rely not upon our own interpretation of the amendment but upon the authoritative construction of [California's] Supreme Court." *Romer,* 517 U.S. at 626, 116 S.Ct. 1620. The state high court held in *Strauss* that "Proposition 8 reasonably must be interpreted in a limited fashion as eliminating only the right of same-sex couples to equal access to the designation of marriage, and as not otherwise affecting the constitutional right of those couples to establish an officially recognized family relationship," which California calls a 'domestic partnership.' 93 Cal.Rptr.3d 591, 207 P.3d at 76. Proposition 8 "leaves intact all of the other very significant constitutional protections afforded same-sex couples," including "the constitutional right to enter into an officially recognized and protected family relationship with the person of one's choice and to raise children in that family if the couple so chooses." *Id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 102. Thus, the extent of the amendment's effect was to "establish [ ] a new substantive state constitutional rule," *id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 63, which "carves out a narrow and limited exception to these state constitutional rights," by "reserving the official designation of the term 'marriage' for the union of opposite-sex couples as a matter of state constitutional law," *id.,* 93 Cal.Rptr.3d 591, 207 P.3d at 61.[FN11]

Both before and after Proposition 8, same-sex partners could enter into an official, state-recognized relationship that affords them "the same rights, protections, and benefits" as an opposite-sex union and subjects them "to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Cal. Fam.Code § 297.5(a). Now as before, same-sex partners may:

- Raise children together, and have the same rights and obligations as to their children as spouses have, *see* Cal. Fam.Code § 297.5(d);
- Enjoy the presumption of parentage as to a child born to either partner, *see Elisa B. v. Super. Ct.* [37 Cal.4th 108, 33 Cal.Rptr.3d 46], 117 P.3d 660, 670 (Cal.2005); *Kristine M. v. David P.,* 135 Cal.App.4th 783 [37 Cal.Rptr.3d 748] (2006); or adopted by one partner and raised jointly by both, *S.Y. v. S.B.,* 201 Cal.App.4th 1023 [134 Cal.Rptr.3d 1] (2011);
- Adopt each other's children, *see* Cal. Fam.Code § 9000(g);
- Become foster parents, *see* Cal. Welf. & Inst.Code § 16013(a);
- Share community property, *see* Cal. Fam.Code § 297.5(k);
- File state taxes jointly, *see* Cal. Rev. & Tax.Code § 18521(d);
- Participate in a partner's group health insurance policy on the same terms as a spouse, *see* Cal. Ins.Code § 10121.7;
- Enjoy hospital visitation privileges, *see* Cal. Health & Safety Code § 1261;
- Make medical decisions on behalf of an incapacitated partner, *see* Cal. Prob.Code § 4716;
- Be treated in a manner equal to that of a widow or widower with respect to a deceased partner, *see* Cal. Fam.Code § 297.5(c);
- Serve as the conservator of a partner's estate, *see* Cal. Prob.Code §§ 1811–1813.1; and
- Sue for the wrongful death of a partner, *see* Cal.Civ.Proc.Code § 377.60—among many other things.

Proposition 8 did not affect these rights or any of the other " 'constitutionally based incidents of marriage' " guaranteed to same-sex couples and their families. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61 (quoting *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 434). In adopting the amendment, the People simply took the

designation of 'marriage' away from lifelong same-sex partnerships, and with it the State's authorization of that official status and the societal approval that comes with it.

By emphasizing Proposition 8's limited effect, we do not mean to minimize the harm that this change in the law caused to same-sex couples and their families. To the contrary, we emphasize the extraordinary significance of the official designation of 'marriage.' That designation is important because 'marriage' is the name that society gives to the relationship that matters most between two adults. A rose by any other name may smell as sweet, but to the couple desiring to enter into a committed lifelong relationship, a marriage by the name of 'registered domestic partnership' does not. The word 'marriage' is singular in connoting "a harmony in living," "a bilateral loyalty," and "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut,* 381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). As Proponents have admitted, "the word 'marriage' has a unique meaning," and "there is a significant symbolic disparity between domestic partnership and marriage." It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important. *See id.* at 971.

We need consider only the many ways in which we encounter the word 'marriage' in our daily lives and understand it, consciously or not, to convey a sense of significance. We are regularly given forms to complete that ask us whether we are "single" or "married." Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, "Will you marry me?", whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron. Certainly it would not have the same effect to see "Will you enter into a registered domestic partnership with me?". Groucho Marx's one-liner, "Marriage is a wonderful institution ... but who wants to live in an institution?" would lack its punch if the word 'marriage' were replaced with the alternative phrase. So too with Shakespeare's "A young man married is a man that's marr'd," Lincoln's "Marriage is neither heaven nor hell, it is simply purgatory," and Sinatra's "A man doesn't know what happiness is until he's married. By then it's too late." We see tropes like "marrying for love" versus "marrying for money" played out again and again in our films and literature because of the recognized importance and permanence of the marriage relationship. Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire,* it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships. *See Knight v.Super. Ct.,* 128 Cal.App.4th 14, 31, 26 Cal.Rptr.3d 687 (2005) ("[M]arriage is considered a more substantial relationship and is accorded a greater stature than a domestic partnership."); *cf. Griswold,* 381 U.S. at 486.

The official, cherished status of 'marriage' is distinct from the incidents of marriage, such as those listed in the California Family Code. The incidents are both elements of the institution and manifestations of the recognition that the State affords to those who are in stable and committed lifelong relationships. We allow spouses but not siblings or roommates to file taxes jointly, for example, because we acknowledge the financial interdependence of those who have entered into an "enduring" relationship. The incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' itself. We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries. The designation of 'marriage' is the status that we recognize. It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it. [FN12]

We set this forth because we must evaluate Proposition 8's constitutionality in light of its actual and specific effects on committed same-sex couples desiring to enter into an officially recognized lifelong relationship. Before Proposition 8, California guaranteed gays and lesbians both the incidents and the status and dignity of marriage. Proposition 8 left the incidents but took away the status and the dignity. It did so by superseding the *Marriage Cases* and thus endorsing the "official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples." *Marriage Cases,* 76

Cal.Rptr.3d 683, 183 P.3d at 452. The question we therefore consider is this: did the People of California have legitimate reasons for enacting a constitutional amendment that serves only to take away from same-sex couples the right to have their lifelong relationships dignified by the official status of 'marriage,' and to compel the State and its officials and all others authorized to perform marriage ceremonies to substitute the label of 'domestic partnership' for their relationships?

Proponents resist this framing of the question. They deem it irrelevant to our inquiry that the California Constitution, as interpreted by the *Marriage Cases,* had previously guaranteed same-sex couples the right to use the designation of 'marriage,' because *In re Marriage Cases* was a "short-lived decision," and same-sex couples were allowed to marry only during a "143–day hiatus" between the effective date of the *Marriage Cases* decision and the enactment of Proposition 8. Proponents' Reply Br. 75, 79–80. According to Proponents, a decision to "restore" the "traditional definition of marriage" is indistinguishable from a decision to "adhere" to that definition in the first place. *Id.* at 79–80. We are bound, however, by the California Supreme Court's authoritative interpretation of Proposition 8's effect on California law, *see Romer,* 517 U.S. at 626, 116 S.Ct. 1620: Proposition 8 "eliminat [ed] ... the right of same-sex couples to equal access to the designation of marriage" by "carv[ing] out a narrow and limited exception to these state constitutional rights" that had previously guaranteed the designation of 'marriage' to all couples, opposite-sex and same-sex alike. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61, 76.

Even were we not bound by the state court's explanation, we would be obligated to consider Proposition 8 in light of its actual effect, which was, as the voters were told, to "*eliminate* the right of same-sex couples to marry in California." Voter Information Guide at 54. The context matters. Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade. The action of changing something suggests a more deliberate purpose than does the inaction of leaving it as it is. As the California Supreme Court held, "Proposition 8 [did] not 'readjudicate' the issue that was litigated and resolved in the *Marriage Cases*." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 63. Rather than "declar[ing] the state of the law as it existed under the California Constitution at the time of the *Marriage Cases,*" Proposition 8 "establishe[d] a *new* substantive state constitutional rule that took effect upon" its adoption by the electorate. *Id.* (emphasis added). Whether or not it is a historical accident, as Proponents argue, that Proposition 8 postdated the *Marriage Cases* rather than predating and thus preempting that decision, the relative timing of the two events is a fact, and we must decide this case on its facts.

C

1

This is not the first time the voters of a state have enacted an initiative constitutional amendment that reduces the rights of gays and lesbians under state law. In 1992, Colorado adopted Amendment 2 to its state constitution, which prohibited the state and its political subdivisions from providing any protection against discrimination on the basis of sexual orientation. *See* Colo. Const. art. II, § 30b. Amendment 2 was proposed in response to a number of local ordinances that had banned sexual-orientation discrimination in such areas as housing, employment, education, public accommodations, and health and welfare services. The effect of Amendment 2 was "to repeal" those local laws and "to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future." *Evans v. Romer,* 854 P.2d 1270, 1284–85 (Colo.1993). The law thus "withdr[ew] from homosexuals, but no others, specific legal protection ..., and it forb [ade] reinstatement of these laws and policies." *Romer,* 517 U.S. at 627, 116 S.Ct. 1620.

The Supreme Court held that Amendment 2 violated the Equal Protection Clause because "[i]t is not within our constitutional tradition to enact laws of this sort"—laws that "singl[e] out a certain class of citizens for disfavored legal status," which "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 633–34, 116 S.Ct. 1620. The Court considered possible justifications for Amendment 2 that might have overcome the "inference" of animus, but it found them all

lacking. It therefore concluded that the law "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635, 116 S.Ct. 1620.[FN13]

Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 "single[s] out a certain class of citizens for disfavored legal status...." *Id.* at 633, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 has the "peculiar property," *id.* at 632, 116 S.Ct. 1620, of "withdraw[ing] from homosexuals, but no others," an existing legal right—here, access to the official designation of 'marriage'—that had been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place. *Id.* at 627, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 denies "equal protection of the laws in the most literal sense," *id.* at 633, 116 S.Ct. 1620, because it "carves out" an "exception" to California's equal protection clause, by removing equal access to marriage, which gays and lesbians had previously enjoyed, from the scope of that constitutional guarantee. *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. Like Amendment 2, Proposition 8 "by state decree ... put[s] [homosexuals] in a solitary class with respect to" an important aspect of human relations, and accordingly "imposes a special disability upon [homosexuals] alone." *Romer,* 517 U.S. at 627, 631, 116 S.Ct. 1620. And like Amendment 2, Proposition 8 constitutionalizes that disability, meaning that gays and lesbians may overcome it "only by enlisting the citizenry of [the state] to amend the State Constitution" for a second time. *Id.* at 631, 116 S.Ct. 1620. As we explain below, *Romer* compels that we affirm the judgment of the district court.

To be sure, there are some differences between Amendment 2 and Proposition 8. Amendment 2 "impos[ed] a broad and undifferentiated disability on a single named group" by "identif[ying] persons by a single trait and then den[ying] them protection across the board." *Romer,* 517 U.S. at 632–33, 116 S.Ct. 1620. Proposition 8, by contrast, excises with surgical precision one specific right: the right to use the designation of 'marriage' to describe a couple's officially recognized relationship. Proponents argue that Proposition 8 thus merely "restor[es] the traditional definition of marriage while otherwise leaving undisturbed the manifold rights and protections California law provides gays and lesbians," making it unlike Amendment 2, which eliminated various substantive rights. Proponents' Reply Br. 77.

These differences, however, do not render *Romer* less applicable. It is no doubt true that the "special disability" that Proposition 8 "imposes upon" gays and lesbians has a less sweeping effect on their public and private transactions than did Amendment 2. Nevertheless, Proposition 8 works a meaningful harm to gays and lesbians, by denying to their committed lifelong relationships the societal status conveyed by the designation of 'marriage,' and this harm must be justified by some legitimate state interest. *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. Proposition 8 is no less problematic than Amendment 2 merely because its effect is narrower; to the contrary, the surgical precision with which it excises a right belonging to gay and lesbian couples makes it even more suspect. A law that has no practical effect except to strip one group of the right to use a state-authorized and socially meaningful designation is all the more "unprecedented" and "unusual" than a law that imposes broader changes, and raises an even stronger "inference that the disadvantage imposed is born of animosity toward the class of persons affected," *id.* at 633–34, 116 S.Ct. 1620. In short, *Romer* governs our analysis notwithstanding the differences between Amendment 2 and Proposition 8.

There is one further important similarity between this case and *Romer*. Neither case requires that the voters have stripped the state's gay and lesbian citizens of any federal constitutional right. In *Romer,* Amendment 2 deprived gays and lesbians of statutory protections against discrimination; here, Proposition 8 deprived same-sex partners of the right to use the designation of 'marriage.' There is no necessity in either case that the privilege, benefit, or protection at issue be a constitutional right. We therefore need not and do not consider whether same-sex couples have a fundamental right to marry, or whether states that fail to afford the right to marry to gays and lesbians must do so. Further, we express no view on those questions.[FN14]

[15] Ordinarily, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. Such was the case in *Romer,* and it is the case here as well. The end must be one that is legitimate for the *government* to pursue, not just one that would be legitimate for a private actor. *See id.* at 632,

635, 116 S.Ct. 1620. The question here, then, is whether California had any more legitimate justification for withdrawing from gays and lesbians its constitutional protection with respect to the official designation of 'marriage' than Colorado did for withdrawing from that group all protection against discrimination generally.

Proposition 8, like Amendment 2, enacts a " '[d]iscrimination[ ] of an unusual character,' " which requires " 'careful consideration to determine whether [it] [is] obnoxious to the' " Constitution. *Id.* at 633, 116 S.Ct. 1620 (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37–38, 48 S.Ct. 423, 72 L.Ed. 770 (1928)). As in *Romer,* therefore, we must consider whether any *legitimate* state interest constitutes a rational basis for Proposition 8; otherwise, we must infer that it was enacted with only the constitutionally illegitimate basis of "animus toward the class it affects." *Romer,* 517 U.S. at 632, 116 S.Ct. 1620.

2

Before doing so, we briefly consider one other objection that Proponents raise to this analysis: the argument that because the Constitution "is not simply a one-way ratchet that forever binds a State to laws and policies that go beyond what the Fourteenth Amendment would otherwise require," the State of California—" 'having gone beyond the requirements of the Federal Constitution' " in extending the right to marry to same-sex couples—" 'was free to return ... to the standard prevailing generally throughout the United States.' " Proponents' Reply Br. 76 (quoting *Crawford v. Bd. of Educ.,* 458 U.S. 527, 542, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982)). Proponents appear to suggest that unless the Fourteenth Amendment actually requires that the designation of 'marriage' be given to same-sex couples in the first place, there can be no constitutional infirmity in taking the designation away from that group of citizens, whatever the People's reason for doing so.

Romer forecloses this argument. The rights that were repealed by Amendment 2 included protections against discrimination on the basis of sexual orientation in the private sphere. Those protections, like any protections against private discrimination, were not compelled by the Fourteenth Amendment. [FN15] Rather, "[s]tates ha[d] *chosen* to counter discrimination by enacting detailed statutory schemes" prohibiting discrimination in employment and public accommodations, among other contexts, and certain Colorado jurisdictions had chosen to extend those protections to gays and lesbians. *Romer,* 517 U.S. at 628, 116 S.Ct. 1620 (emphasis added). It was these elective protections that Amendment 2 withdrew and forbade.[FN16] The relevant inquiry in *Romer* was not whether the *state of the law* after Amendment 2 was constitutional; there was no doubt that the Fourteenth Amendment did not require antidiscrimination protections to be afforded to gays and lesbians. The question, instead, was whether the *change in the law* that Amendment 2 effected could be justified by some legitimate purpose.

The Supreme Court's answer was "no"—there was no legitimate reason to take away broad legal protections from gays and lesbians alone, and to inscribe that deprivation of equality into the state constitution, once those protections had already been provided. We therefore need not decide whether a state may decline to provide the right to marry to same-sex couples. To determine the validity of Proposition 8, we must consider only whether the *change* in the law that it effected—eliminating by constitutional amendment the right of same-sex couples to have the official designation and status of 'marriage' bestowed upon their relationships, while maintaining that right for opposite-sex couples—was justified by a legitimate reason.

[16] This does not mean that the Constitution is a "one-way ratchet," as Proponents suggest. It means only that the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit *from one group but not others,* whether or not it was required to confer that right or benefit in the first place. Thus, when Congress, having chosen to provide food stamps to the poor in the Food Stamp Act of 1964, amended the Act to exclude households of unrelated individuals, such as "hippies" living in "hippie communes," the Supreme Court held the amendment unconstitutional because "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). In both *Romer* and *Moreno,* the constitutional violation that the Supreme Court identified was not the failure to confer a right or benefit in the first place; Congress was no more obligated to provide food stamps than Colorado was to enact antidiscrimination laws. Rather, what the

Supreme Court forbade in each case was the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens. The constitutional injury that *Romer* and *Moreno* identified—and that serves as a basis of our decision to strike down Proposition 8—has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself. Proponents' reliance on *Crawford v. Board of Education,* 458 U.S. 527, 102 S.Ct. 3211, 73 L.Ed.2d 948 (1982), is therefore misplaced. In *Crawford,* the Court affirmed Proposition 1, a California initiative constitutional amendment that barred state courts from ordering school busing or pupil-assignment plans except when necessary to remedy a federal constitutional violation. *Id.* at 531–32, 102 S.Ct. 3211. Like Proposition 8, Proposition 1 was adopted in response to a decision of the California Supreme Court under the state constitution, which had held that state schools were obligated to take "reasonably feasible steps," including busing and pupil-assignment plans, "to alleviate school segregation." *Crawford v. Bd. of Educ.,* 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28, 45 (1976). The Supreme Court "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede." [FN17] *Crawford,* 458 U.S. at 535, 102 S.Ct. 3211. That conclusion was consistent with the principle that states should be free "to experiment" with social policy, without fear of being locked in to "legislation that has proved unworkable or harmful when the State was under no obligation to adopt the legislation in the first place." *Id.* at 535, 539–40, 102 S.Ct. 3211.

Critically, however, the Court noted that Proposition 1 did not itself draw any classification; "[i]t simply forb[ade] state courts" from ordering specific *remedies* under state law "in the absence of a Fourteenth Amendment violation," while maintaining the state constitution's more robust "*right* to desegregation than exists under the Federal Constitution." *Id.* at 537, 542, 102 S.Ct. 3211 (emphasis added); *see also id.* at 544, 102 S.Ct. 3211 (noting that other remedies remained available). Most important, the proposition's purported benefit, "neighborhood schooling," was "made available regardless of race." *Id.* There was no evidence that the "purpose of [the] repealing legislation [was] to disadvantage a racial minority," which would have made the proposition unconstitutional. *Id.* at 539 n. 21, 543–45, 102 S.Ct. 3211 (citing *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967)). Because Proposition 1 did not establish any classification, and because it was supported by permissible policy preferences against specific court remedies, the Supreme Court held that it was valid. On the same day, by contrast, the Court struck down a similar Washington initiative, because it had been "drawn for racial purposes" in a manner that "impose[d] substantial and unique burdens on racial minorities" and accordingly violated the Fourteenth Amendment. *Washington v. Seattle Sch. Dist. No. 1,* 458 U.S. 457, 470–71, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982).

Romer, not *Crawford,* controls where a privilege or protection is withdrawn without a legitimate reason from a class of disfavored individuals, even if that right may not have been required by the Constitution in the first place. Although Colorado presented before the Supreme Court an argument regarding *Crawford* identical to the one that Proponents present here, that argument did not persuade the Court.[FN18] Neither Proposition 8 nor Amendment 2 was a law of general applicability that merely curtailed state courts' remedial powers, as opposed to a single group's rights. Rather, both Proposition 8 and Amendment 2 "carve[d] out" rights from gays and lesbians alone. Unlike the measure in *Crawford,* Proposition 8 is a "discrimination of an unusual character" that requires "careful consideration" of its purposes and effects, whether or not the Fourteenth Amendment required the right to be provided *ab initio.* Following *Romer,* we must therefore decide whether a legitimate interest exists that justifies the People of California's action in taking away from same-sex couples the right to use the official designation and enjoy the status of 'marriage'—a legitimate interest that suffices to overcome the "inevitable inference" of animus to which Proposition 8's discriminatory effects otherwise give rise.

D

We first consider four possible reasons offered by Proponents or amici to explain why Proposition 8 might have been enacted: (1) furthering California's interest in childrearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, and (4) preventing children from being taught about same-sex marriage in schools. To be credited, these rationales

"must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). They are, conversely, not to be credited if they "could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley,* 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979).[FN19] Because Proposition 8 did not further any of these interests, we conclude that they cannot have been rational bases for this measure, whether or not they are legitimate state interests.

1

The primary rationale Proponents offer for Proposition 8 is that it advances California's interest in responsible procreation and childrearing. Proponents' Br. 77–93. This rationale appears to comprise two distinct elements. The first is that children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents—one man and one woman—to marry. The second is that marriage reduces the threat of "irresponsible procreation"—that is, unintended pregnancies out of wedlock—by providing an incentive for couples engaged in potentially procreative sexual activity to form stable family units. Because same-sex couples are not at risk of "irresponsible procreation" as a matter of biology, Proponents argue, there is simply no need to offer such couples the same incentives. Proposition 8 is not rationally related, however, to either of these purported interests, whether or not the interests would be legitimate under other circumstances.

We need not decide whether there is any merit to the sociological premise of Proponents' first argument—that families headed by two biological parents are the best environments in which to raise children—because even if Proponents are correct, Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in California. As we have explained, Proposition 8 in no way modified the state's laws governing parentage, which are distinct from its laws governing marriage. *See Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 61. Both before and after Proposition 8, committed opposite-sex couples ("spouses") and same-sex couples ("domestic partners") had identical rights with regard to forming families and raising children. *See* Cal. Fam.Code § 297.5(d) ("The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses."). Similarly, Proposition 8 did not alter the California adoption or presumed-parentage laws, which continue to apply equally to same-sex couples. *Cf. Elisa B.,* 33 Cal.Rptr.3d 46, 117 P.3d at 667–71 (applying the presumed parentage statutes to a lesbian couple); *Sharon S. v.Super. Ct.,* 31 Cal.4th 417, 2 Cal.Rptr.3d 699, 73 P.3d 554, 570 (2003) (applying the adoption laws to a lesbian couple). In order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so.[FN20]

Moreover, California's "current policies and conduct ... recognize that gay individuals are fully capable of ... responsibly caring for and raising children." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 428. And California law actually prefers a non-biological parent who has a parental relationship with a child to a biological parent who does not; in California, the parentage statutes place a premium on the "social relationship," not the "biological relationship," between a parent and a child. *See, e.g., Susan H. v. Jack S.,* 30 Cal.App.4th 1435, 1442–43, 37 Cal.Rptr.2d 120 (1994). California thus has demonstrated through its laws that Proponents' first rationale cannot "reasonably be conceived to be true by the governmental decisionmaker," *Vance,* 440 U.S. at 111, 99 S.Ct. 939. We will not credit a justification for Proposition 8 that is totally inconsistent with the measure's actual effect and with the operation of California's family laws both before and after its enactment.

Proponents' second argument is that there is no need to hold out the designation of 'marriage' as an encouragement for same-sex couples to engage in responsible procreation, because unlike opposite-sex couples, same-sex couples pose no risk of procreating accidentally. Proponents contend that California need not extend marriage to same-sex couples when the State's interest in responsible procreation would not be advanced by doing so, even if the interest would not be harmed, either. *See Johnson v. Robison,* 415 U.S. 361, 383, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) ("When ... the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and

nonbeneficiaries is invidiously discriminatory."). But Plaintiffs do not ask that marriage be *extended* to anyone. As we have by now made clear, the question is whether there is a legitimate governmental interest in *withdrawing* access to marriage from same-sex couples. We therefore need not decide whether, under *Johnson,* California would be justified in not extending the designation of 'marriage' to same-sex couples; that is not what Proposition 8 did. *Johnson* concerns decisions not to *add* to a legislative scheme a group that is unnecessary to the purposes of that scheme, but Proposition 8 *subtracted* a disfavored group from a scheme of which it already was a part.[FN21]

Under *Romer,* it is no justification for taking something away to say that there was no need to provide it in the first place; instead, there must be some legitimate reason for the act of taking it away, a reason that overcomes the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer,* 517 U.S. at 634, 116 S.Ct. 1620. In order to explain how *rescinding* access to the designation of 'marriage' is rationally related to the State's interest in responsible procreation, Proponents would have had to argue that opposite-sex couples were *more* likely to procreate accidentally or irresponsibly when same-sex couples were allowed access to the designation of 'marriage.' We are aware of no basis on which this argument would be even conceivably plausible. There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly. The *Johnson* argument, to put it mildly, does not help Proponents' cause.

Given the realities of California law, and of human nature, both parts of Proponents' primary rationale simply "find [no] footing in the realities of the subject addressed by the legislation," and thus cannot be credited as rational. *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. Whatever sense there may be in preferring biological parents over other couples—and we need not decide whether there is any—California law clearly does not recognize such a preference, and Proposition 8 did nothing to change that circumstance. The same is true for Proponents' argument that it is unnecessary to extend the right to use the designation of 'marriage' to couples who cannot procreate, because the purpose of the designation is to reward couples who procreate responsibly or to encourage couples who wish to procreate to marry first. Whatever merit this argument may have—and again, we need not decide whether it has any—the argument is addressed to a failure to afford the use of the designation of 'marriage' to same-sex couples in the first place; it is irrelevant to a measure *withdrawing* from them, and only them, use of that designation.

The same analysis applies to the arguments of some amici curiae that Proposition 8 not only promotes responsible procreation and childrearing as a general matter but promotes the single best family structure for such activities. *See, e.g.,* Br. Amicus Curiae of High Impact Leadership Coalition, et al. 14 ("Society has a compelling interest in preserving the institution that best advances the social interests in responsible procreation, and that connects procreation to responsible child-rearing."); Br. Amicus Curiae of Am. Coll. of Pediatricians 15 ("[T]he State has a legitimate interest in promoting the family structure that has proven most likely to foster an optimal environment for the rearing of children."). As discussed above, Proposition 8 in no way alters the state laws that govern childrearing and procreation. It makes no change with respect to the laws regarding family structure. As before Proposition 8, those laws apply in the same way to same-sex couples in domestic partnerships and to married couples. Only the designation of 'marriage' is withdrawn and only from one group of individuals.

We in no way mean to suggest that Proposition 8 would be constitutional if only it had gone further—for example, by also repealing same-sex couples' equal parental rights or their rights to share community property or enjoy hospital visitation privileges. Only if Proposition 8 had actually had any effect on childrearing or "responsible procreation" would it be necessary or appropriate for us to *consider* the legitimacy of Proponents' primary rationale for the measure.[FN22] Here, given all other pertinent aspects of California law, Proposition 8 simply could not have the effect on procreation or childbearing that Proponents claim it might have been intended to have. Accordingly, an interest in responsible procreation and childbearing cannot provide a rational basis for the measure.

[17] We add one final note. To the extent that it has been argued that withdrawing from same-sex couples access to the designation of 'marriage'—without in any way altering the substantive laws concerning their rights regarding childrearing or family formation—will encourage heterosexual couples to enter into matrimony, or will strengthen their matrimonial bonds, we believe that the People of California "could not reasonably" have "conceived" such an argument "to be true." *Vance,* 440 U.S. at 111, 99 S.Ct. 939. It is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman. While deferential, the rational-basis standard "is not a toothless one." *Mathews v. Lucas,* 427 U.S. 495, 510, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). "[E]ven the standard of rationality ... must find some footing in the realities of the subject addressed by the legislation." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. Here, the argument that withdrawing the designation of 'marriage' from same-sex couples could on its own promote the strength or stability of opposite-sex marital relationships lacks any such footing in reality.

2

[18] Proponents offer an alternative justification for Proposition 8: that it advances California's interest in "proceed[ing] with caution" when considering changes to the definition of marriage. Proponents' Br. 93. But this rationale, too, bears no connection to the reality of Proposition 8. The amendment was enacted *after* the State had provided same-sex couples the right to marry and *after* more than 18,000 couples had married (and remain married even after Proposition 8, *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 122). [FN23]

Perhaps what Proponents mean is that California had an interest in pausing at 18,000 married same-sex couples to evaluate whether same-sex couples should continue to be allowed to marry, or whether the same-sex marriages that had already occurred were having any adverse impact on society. Even if that were so, there could be no rational connection between the asserted purpose of "*proceeding* with caution" and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution.[FN24] To enact a constitutional prohibition is to adopt a fundamental barrier: it means that the legislative process, by which incremental policymaking would normally proceed, is completely foreclosed. *Cf. Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (observing that legislatures may rationally reform policy "one step at a time"). Once Proposition 8 was enacted, any future steps forward, however cautious, would require "enlisting the citizenry of [California] to amend the State Constitution" once again. *Romer,* 517 U.S. at 631, 116 S.Ct. 1620.

Had Proposition 8 imposed not a total ban but a time-specific moratorium on same-sex marriages, during which the Legislature would have been authorized to consider the question in detail or at the end of which the People would have had to vote again to renew the ban, the amendment might plausibly have been designed to "proceed with caution." In that case, we would have had to consider whether the objective of "proceed[ing] with caution" was a legitimate one. But that is not what Proposition 8 did. The amendment superseded the *Marriage Cases* and then went further, by prohibiting the Legislature or even the People (except by constitutional amendment) from choosing to make the designation of 'marriage' available to same-sex couples in the future. Such a permanent ban cannot be rationally related to an interest in proceeding with caution.

[19] In any event, in light of the express purpose of Proposition 8 and the campaign to enact it, it is not credible to suggest that "proceed[ing] with caution" was the reason the voters adopted the measure. The purpose and effect of Proposition 8 was "to *eliminate* the right of same-sex couples to marry in California"—not to "suspend" or "study" that right. Voter Information Guide at 54 (Proposition 8, Official Title and Summary) (emphasis added). [FN25] The voters were told that Proposition 8 would "overturn[ ]" the *Marriage Cases* "to RESTORE the meaning of marriage." *Id.* at 56 (Argument in Favor of Proposition 8). The avowed purpose of Proposition 8 was to return with haste to a time when same-sex couples were barred from using the official designation of 'marriage,' not to study the matter further before deciding whether to make the designation more equally available.

3

[20] We briefly consider two other potential rationales for Proposition 8, not raised by Proponents but offered by amici curiae. First is the argument that Proposition 8 advanced the State's interest in protecting religious liberty. *See, e.g.,* Br. Amicus Curiae of the Becket Fund for Religious Liberty (Becket Br.) 2. There is no dispute that even before Proposition 8, "no religion [was] required to change its religious policies or practices with regard to same-sex couples, and no religious officiant [was] required to solemnize a marriage in contravention of his or her religious beliefs." *Marriage Cases,* 76 Cal.Rptr.3d 683, 183 P.3d at 451–52; *see* Becket Br. 4–5 (acknowledging this point). Rather, the religious-liberty interest that Proposition 8 supposedly promoted was to decrease the likelihood that religious organizations would be penalized, under California's antidiscrimination laws and other government policies concerning sexual orientation, for refusing to provide services to families headed by same-sex spouses. But Proposition 8 did nothing to affect those laws. To the extent that California's antidiscrimination laws apply to various activities of religious organizations, their protections apply in the same way as before. Amicus's argument is thus more properly read as an appeal to the Legislature, seeking reform of the State's antidiscrimination laws to include greater accommodations for religious organizations. *See, e.g.,* Becket Br. 8 n. 6 ("Unlike many other states, California has no religious exemptions to its statutory bans on gender, marital status, and sexual orientation discrimination in public accommodations."). This argument is in no way addressed by Proposition 8 and could not have been the reason for Proposition 8.

[21] Second is the argument, prominent during the campaign to pass Proposition 8, that it would "protect[ ] our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage." *Perry IV,* 704 F.Supp.2d at 930, 989–90 (quoting the Voter Information Guide at 56) (emphasis omitted); *see* Br. Amicus Curiae for the Hausvater Project 13–15. Yet again, California law belies the premise of this justification. Both before and after Proposition 8, schools have not been required to teach anything about same-sex marriage. They "may ... elect[ ] to offer comprehensive sexual health education"; only then might they be required to "teach respect for marriage and committed relationships." Cal. Educ.Code § 51933(a)–(b), (b)(7). Both before and after Proposition 8, schools have retained control over the content of such lessons. And both before and after Proposition 8, schools and individual teachers have been prohibited from giving any instruction that discriminates on the basis of sexual orientation; now as before, students could not be taught the superiority or inferiority of either same- or opposite-sex marriage or other "committed relationships." Cal. Educ.Code §§ 51500, 51933(b)(4). The *Marriage Cases* therefore did not weaken, and Proposition 8 did not strengthen, the rights of schools to control their curricula and of parents to control their children's education.

There is a limited sense in which the extension of the designation 'marriage' to same-sex partnerships might alter the content of the lessons that schools choose to teach. Schools teach about the world as it is; when the world changes, lessons change. A shift in the State's marriage law may therefore affect the content of classroom instruction just as would the election of a new governor, the discovery of a new chemical element, or the adoption of a new law permitting no-fault divorce: students learn about these as empirical facts of the world around them. But to protest the teaching of these facts is little different from protesting their very existence; it is like opposing the election of a particular governor on the ground that students would learn about his holding office, or opposing the legitimation of no-fault divorce because a teacher might allude to that fact if a course in societal structure were taught to graduating seniors. The prospect of children learning about the laws of the State and society's assessment of the legal rights of its members does not provide an *independent* reason for stripping members of a disfavored group of those rights they presently enjoy.

4

Proposition 8's only effect, we have explained, was to withdraw from gays and lesbians the right to employ the designation of 'marriage' to describe their committed relationships and thus to deprive them of a societal status that affords dignity to those relationships. Proposition 8 could not have reasonably been enacted to promote childrearing by biological parents, to encourage responsible procreation, to proceed with caution in social change, to protect religious liberty, or to control the education of schoolchildren. Simply taking away the designation of 'marriage,' while leaving in place all the substantive rights and responsibilities of same-sex

partners, did not do any of the things its Proponents now suggest were its purposes. Proposition 8 "is so far removed from these particular justifications that we find it impossible to credit them." *Romer,* 517 U.S. at 635, 116 S.Ct. 1620. We therefore need not, and do not, decide whether any of these purported rationales for the law would be "legitimate," *id.* at 632, 116 S.Ct. 1620, or would suffice to justify Proposition 8 if the amendment actually served to further them.

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[22] We are left to consider why else the People of California might have enacted a constitutional amendment that takes away from gays and lesbians the right to use the designation of 'marriage.' One explanation is the desire to revert to the way things were prior to the *Marriage Cases,* when 'marriage' was available only to opposite-sex couples, as had been the case since the founding of the State and in other jurisdictions long before that. This purpose is one that Proposition 8 actually did accomplish: it "restore[d] the traditional definition of marriage as referring to a union between a man and a woman." *Strauss,* 93 Cal.Rptr.3d 591, 207 P.3d at 76. But tradition alone is not a justification for *taking away* a right that had already been granted, even though that grant was in derogation of tradition. In *Romer,* it did not matter that at common law, gays and lesbians were afforded no protection from discrimination in the private sphere; Amendment 2 could not be justified on the basis that it simply repealed positive law and restored the "traditional" state of affairs. 517 U.S. at 627–29, 116 S.Ct. 1620. Precisely the same is true here.

[23] Laws may be repealed and new rights taken away if they have had unintended consequences or if there is some conceivable affirmative good that revocation would produce, *cf. Crawford,* 458 U.S. at 539–40, 102 S.Ct. 3211, but new rights may not be stripped away solely *because* they are new. Tradition is a legitimate consideration in policymaking, of course, but it cannot be an end unto itself. *Cf. Williams v. Illinois,* 399 U.S. 235, 239–40, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970). "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence v. Texas,* 539 U.S. 558, 577–78, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); *see Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (noting the historical pedigree of bans on interracial marriage but not even considering tradition as a possible justification for Virginia's law). If tradition alone is insufficient to justify *maintaining* a prohibition with a discriminatory effect, then it is necessarily insufficient to justify *changing* the law to revert to a previous state. A preference for the way things were before same-sex couples were allowed to marry, without any identifiable good that a return to the past would produce, amounts to an impermissible preference against same-sex couples themselves, as well as their families.

Absent any legitimate purpose for Proposition 8, we are left with "the inevitable inference that the disadvantage imposed is born of animosity toward," or, as is more likely with respect to Californians who voted for the Proposition, mere disapproval of, "the class of persons affected." *Romer,* 517 U.S. at 634, 116 S.Ct. 1620. We do not mean to suggest that Proposition 8 is the result of ill will on the part of the voters of California. "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone." *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (Kennedy, J., concurring). Disapproval may also be the product of longstanding, sincerely held private beliefs. Still, while "[p]rivate biases may be outside the reach of the law, ... the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Ultimately, the "inevitable inference" we must draw in this circumstance is not one of ill will, but rather one of disapproval of gays and lesbians as a class. "[L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Under *Romer,* we must infer from Proposition 8's effect on California law that the People took away from gays and lesbians the right to use the official designation of 'marriage'—and the societal status that accompanies it—because they disapproved of these individuals *as a class* and did not wish them to receive the same official recognition and societal approval of their committed relationships that the State makes

available to opposite-sex couples.

It will not do to say that Proposition 8 was intended only to disapprove of same-sex marriage, rather than to pass judgment on same-sex couples as people. Just as the criminalization of "homosexual conduct ... is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," *Lawrence,* 539 U.S. at 575, 123 S.Ct. 2472, so too does the elimination of the right to use the official designation of 'marriage' for the relationships of committed same-sex couples send a message that gays and lesbians are of lesser worth as a class—that they enjoy a lesser societal status. Indeed, because laws affecting gays and lesbians' rights often regulate individual conduct—what sexual activity people may undertake in the privacy of their own homes, or who is permitted to marry whom—as much as they regulate status, the Supreme Court has "declined to distinguish between status and conduct in [the] context" of sexual orientation. *Christian Legal Soc'y v. Martinez,* —— U.S. ——, 130 S.Ct. 2971, 2990, 177 L.Ed.2d 838 (2010). By withdrawing the availability of the recognized designation of 'marriage,' Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class.

[24][25] Just as a "desire to harm ... cannot constitute a *legitimate* governmental interest," *Moreno,* 413 U.S. at 534, 93 S.Ct. 2821, neither can a more basic disapproval of a class of people. *Romer,* 517 U.S. at 633–35, 116 S.Ct. 1620. "The issue is whether the majority may use the power of the State to enforce these views on the whole society" through a law that abridges minority individuals' rights. *Lawrence,* 539 U.S. at 571, 123 S.Ct. 2472. It may not. Without more, "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* at 582, 123 S.Ct. 2472 (O'Connor, J., concurring). Society does sometimes draw classifications that likely are rooted partially in disapproval, such as a law that grants educational benefits to veterans but denies them to conscientious objectors who engaged in alternative civilian service. *See Johnson,* 415 U.S. at 362–64, 94 S.Ct. 1160. Those classifications will not be invalidated so long as they can be justified by reference to some *independent* purpose they serve; in *Johnson,* they could provide an incentive for military service and direct assistance to those who needed the most help in readjusting to post-war life, *see id.* at 376–83, 94 S.Ct. 1160. Enacting a rule into law based solely on the disapproval of a group, however, "is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer,* 517 U.S. at 635, 116 S.Ct. 1620. Like Amendment 2, Proposition 8 is a classification of gays and lesbians undertaken for its own sake.

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[26] The "inference" that Proposition 8 was born of disapproval of gays and lesbians is heightened by evidence of the context in which the measure was passed.[FN26] The district court found that "[t]he campaign to pass Proposition 8 relied on stereotypes to show that same-sex relationships are inferior to opposite-sex relationships." *Perry IV,* 704 F.Supp.2d at 990. Television and print advertisements "focused on ... the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." *Id.* These messages were not crafted accidentally. The strategists responsible for the campaign in favor of Proposition 8 later explained their approach: " '[T]here were limits to the degree of tolerance Californians would afford the gay community. They would entertain allowing gay marriage, but not if doing so had significant implications for the rest of society,' " such as what children would be taught in school. *Id.* at 988 (quoting Frank Schubert & Jeff Flint, *Passing Prop 8,* Politics, Feb. 2009, at 45–47). Nor were these messages new; for decades, ballot measures regarding homosexuality have been presented to voters in terms designed to appeal to stereotypes of gays and lesbians as predators, threats to children, and practitioners of a deviant "lifestyle." *See* Br. Amicus Curiae of Constitutional Law Professors at 2–8. The messages presented here mimic those presented to Colorado voters in support of Amendment 2, such as, "Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!" Colorado for Family Values, *Equal Rights—Not Special Rights,* at 2 (1992), *reprinted in* Robert Nagel, *Playing Defense,* 6 Wm. & Mary Bill Rts. J. 167, 193 (1997).

[27] When directly enacted legislation "singl[es] out a certain class of citizens for disfavored legal status," we must "insist on knowing the relation between the classification adopted and the object to be attained," so that we may ensure that the law exists "to further a proper legislative end" rather than "to make the[ ] [class] unequal to everyone else." *Romer,* 517 U.S. at 632–33, 635, 116 S.Ct. 1620. Proposition 8 fails this test. Its sole purpose and effect is "to eliminate the right of same-sex couples to marry in California"—to dishonor a disfavored group by taking away the official designation of approval of their committed relationships and the accompanying societal status, and nothing more. Voter Information Guide at 54. "It is at once too narrow and too broad," for it changes the law far too little to have any of the effects it purportedly was intended to yield, yet it dramatically reduces the societal standing of gays and lesbians and diminishes their dignity. *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Proposition 8 did not result from a legitimate "Kulturkampf" concerning the structure of families in California, because it had no effect on family structure, but in order to strike it down, we need not go so far as to find that it was enacted in "a fit of spite." *Id.* at 636, 116 S.Ct. 1620 (Scalia, J., dissenting). It is enough to say that Proposition 8 operates with no apparent purpose but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships, by taking away from them the official designation of 'marriage,' with its societally recognized status. Proposition 8 therefore violates the Equal Protection Clause.

VI

[28] Finally, we address Proponents' motion to vacate the district court's judgment. On April 6, 2011, after resigning from the bench, former Chief Judge Walker disclosed that he was gay and that he had for the past ten years been in a relationship with another man. Proponents moved shortly thereafter to vacate the judgment on the basis that 28 U.S.C. § 455(b)(4) obligated Chief Judge Walker to recuse himself, because he had an "interest that could be substantially affected by the outcome of the proceeding," and that 28 U.S.C. § 455(a) obligated him either to recuse himself or to disclose his potential conflict, because "his impartiality might reasonably be questioned." Chief Judge Ware, to whom this case was assigned after Chief Judge Walker's retirement, denied the motion after receiving briefs and hearing argument.

The district court properly held that it had jurisdiction to hear and deny the motion under Fed.R.Civ.P. 62.1(a), that the motion was timely, and that Chief Judge Walker had no obligation to recuse himself under either § 455(b)(4) or § 455(a) or to disclose any potential conflict. As Chief Judge Ware explained, the fact that a judge "could be affected by the outcome of a proceeding[,] in the same way that other members of the general public would be affected, is not a basis for either recusal or disqualification under Section 455(b)(4)." *Perry v. Schwarzenegger,* 790 F.Supp.2d 1119, 1122 (N.D.Cal.2011); *see In re City of Houston,* 745 F.2d 925, 929–30 (5th Cir.1984) ("We recognize that 'an interest which a judge has in common with many others in a public matter is not sufficient to disqualify him.' "). Nor could it possibly be "reasonable to presume," for the purposes of § 455(a), "that a judge is incapable of making an impartial decision about the constitutionality of a law, solely because, as a citizen, the judge could be affected by the proceeding." 790 F.Supp.2d at 1122; *see United States v. Alabama,* 828 F.2d 1532, 1541–42 (11th Cir.1987). To hold otherwise would demonstrate a lack of respect for the integrity of our federal courts.

[29][30] The denial of the motion to vacate was premised on Chief Judge Ware's finding that Chief Judge Walker was not obligated to recuse himself. "We review the district court's denial of a motion to vacate the judgment for an abuse of discretion." *Jeff D. v. Kempthorne,* 365 F.3d 844, 850 (9th Cir.2004). Our standard for abuse of discretion requires us to (1) "look to whether the trial court identified and applied the correct legal rule to the relief requested"; and, if the trial court applied the correct legal rule, to (2) "look to whether the trial court's resolution ... resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson,* 585 F.3d 1247, 1263 (9th Cir.2009) (en banc). Here, Chief Judge Ware did not incorrectly apply the law. He identified and applied § 455(b)(4) and § 455(a), the correct legal rules, as well as the relevant precedents. His application of the law, determining whether Chief Judge Walker was obligated to recuse himself, was discretionary. *See United States v. Johnson,* 610 F.3d 1138, 1147–48 (9th Cir.2010). His resolution of the issue on the basis of the facts was not

illogical, implausible, or without support in inferences that may be drawn from the facts in the record. Thus, we affirm Chief Judge Ware's decision not to grant the motion to vacate.

VII

By using their initiative power to target a minority group and withdraw a right that it possessed, without a legitimate reason for doing so, the People of California violated the Equal Protection Clause. We hold Proposition 8 to be unconstitutional on this ground. We do not doubt the importance of the more general questions presented to us concerning the rights of same-sex couples to marry, nor do we doubt that these questions will likely be resolved in other states, and for the nation as a whole, by other courts. For now, it suffices to conclude that the People of California may not, consistent with the Federal Constitution, add to their state constitution a provision that has no more practical effect than to strip gays and lesbians of their right to use the official designation that the State and society give to committed relationships, thereby adversely affecting the status and dignity of the members of a disfavored class. The judgment of the district court is

AFFIRMED.[FN27]

SOURCES OF AMERICAN LAW

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society. U.S. law primarily takes the form of

  (1) **constitutions** setting forth the fundamental rights of the people living within the United States or a given state, describing and empowering the various branches of government, and prescribing limitations on that power;

  (2) legislatively-enacted **statutes** and local **ordinances**;

  - A given state statute may be based on a **uniform law** (*e.g.*, the Uniform Commercial Code) or on a **model act** (*e.g.*, the Model Business Corporations Act). However, each state is free to depart from the uniform law or model act as it sees fit.

  (3) **administrative rules and regulations** promulgated by federal, state, and local regulatory agencies; and

  (4) **common law**, which is the body of judicial decisions that interpret and enforce any of the foregoing as well as those relationships among individuals or between individuals and their society which are not subject to constitutional, statutory, or administrative law.

ADMINISTRATIVE LAW: AN INTRODUCTION

- **Administrative Law:** The body of rules, orders, and decisions issued by administrative agencies, such as the federal Securities and Exchange Commission or a state's public utilities commission.

- **Administrative Agencies:** Agencies authorized by federal or state legislation to make and enforce rules to administer and enforce legislative acts (*e.g.*, the Social Security Administration).

  - **Executive Agencies:** Agencies formed to assist the President or, at the state level, the Governor, in carrying out executive functions (*e.g.*, the Federal Bureau of Investigation).

  - **Independent Regulatory Agencies:** Agencies neither designed to aid nor directly accountable to the legislative or executive branches (*e.g.*, the Federal Reserve System).

- **Enabling Legislation:** Legislative action specifying the name, purposes, functions, and powers of the agency the legislation created.

  - As a general rule, an agency lacks the power to act beyond the scope of its enabling legislation.

ADMINISTRATIVE RULEMAKING

- **Rulemaking:** The process of formulating new regulations. Federal agency rulemaking typically occurs as follows:

  - **Notice of Proposed Rulemaking:** A proposed rule and some discussion of its rationale are published by the agency in the *Federal Register*. The notice invites public comment and notifies the public of the times and places of any hearings on the proposed rule.

  - **Comment Period:** Following publication in the *Federal Register*, the agency must allow ample time for public comment. The agency need not respond to all comments, but it must respond to any significant comments that bear directly on the proposed rule by either modifying the proposed rule or explaining why the modification was not made.

  - **Final Rule:** Once the final version of the rule is decided upon by the agency, it will be published first in the *Federal Register* and then compiled annually in the *Code of Federal Regulations*.

ADMINISTRATIVE INVESTIGATION AND ENFORCEMENT

- **Investigation:** Both as part of the rulemaking process and as part of the enforcement of the rules, agencies can inspect regulated entities' facilities or business records.

- **Enforcement:** If an agency determines that an entity has violated one or more rules, the agency may take ***administrative action*** against the entity. When possible, the agency will seek the entity's voluntary compliance, thus avoiding the expense and inconvenience of full-blown judicial or quasi-judicial proceedings.

- **Adjudication:** If voluntary compliance is not forthcoming, the agency and the entity will appear before an **administrative law judge** (ALJ) who will conduct a quasi-judicial (or "court-like") proceeding, the exact nature of which varies from agency to agency.

    - The ALJ issues an **initial order**, which is subject to appeal to the agency's governing board (*e.g.*, the actual commissioners of the Federal Trade Commission).

    - After disposing of any appeal, the agency issues a **final order**, which may be appealed to a designated court (*e.g.*, the U.S. Court of Appeals for the D.C. Circuit).

STARE DECISIS

- ***Stare Decisis*:** The doctrine that obliges judges to follow established precedent within a particular jurisdiction.

  - **Precedent:** The authority afforded to a prior judicial decision by judges deciding subsequent disputes involving the same or similar facts and the same jurisdiction's substantive law.

    - **Binding Authority:** Any primary source of law a court must follow when deciding a dispute. This includes all constitutional provisions, statutes, treaties, regulations, or ordinances that govern the issue being decided, as well as prior court decisions that constitute controlling precedent in the court's jurisdiction.

    - **Persuasive Authority:** Any primary or secondary source of law which a court may, but which the court is not bound to, rely upon for guidance in resolving a dispute.

    - A prior judicial decision acts as *binding* precedent only when the subsequent court is applying the same law as the prior court; otherwise, the prior decision is only *persuasive* authority.

LAW VS. EQUITY

- From their origin in the late-Eleventh Century, common-law courts were typically classified as either "courts of law" or "courts of equity."
  - **Courts of Law** were empowered only to award wronged parties money or other valuable compensation for their injuries or other losses.
  - **Courts of Equity**, by contrast, were empowered to award any manner of non-monetary relief, such as ordering a person to do something (a.k.a. "specific performance") or to cease doing something (a.k.a. "injunction").
- In most of the United States the courts of law and equity have *merged*. Nonetheless, American courts still recognize **legal remedies** and **equitable remedies**.
  - **Remedy:** The means given to a party to enforce a right or to compensate for another's violation of a right.

EQUITABLE MAXIMS

- A party's right to receive equitable relief and a court's power to grant it depends upon the following:
  - Whoever seeks equity must **do equity**;
  - Where the **equities favor both parties**, the dispute must be decided according to the law;
  - Whoever seeks equity must come to the court with **"clean hands"**;
  - Equitable relief will be awarded only when there is **no adequate remedy at law**;
  - Equity favors **substance over form**; and
  - Whoever seeks equity must **pursue the vindication of their rights vigilantly** or risk having their claims barred.

NATURAL LAW AND POSITIVE LAW

- **Natural Law:** A system of universal moral and ethical principles that are inherent in human nature and that people can discover by using their natural intelligence (*e.g.*, murder is wrong; parents are responsible for the acts of their minor children).

- **Positive Law:** The conventional, or written, law of a particular society at a particular point in time (*e.g.*, the U.S. Constitution, the Texas Securities Act, the Internal Revenue Code, and published judicial decisions).

JURISPRUDENCE

- **Jurisprudence:** The study of different schools of legal philosophy and how each can affect judicial decisionmaking.
  - **Natural Law Theory** presupposes that positive law derives its legitimacy from natural law and holds that, to the extent that natural law and positive law differ, natural law must prevail.
  - **Legal Positivism** holds that there is no higher law than that created by legitimate governments and that such laws must be obeyed, even if they appear unjust or otherwise at odds with natural law.
  - The **Historical School** emphasizes the evolutionary process of law by concentrating on the origin and history of a legal system and holds that law derives its legitimacy and authority through the test of time.
  - **Legal Realism** contends that positive law cannot be applied in the abstract; rather, judges should take into account the specific circumstances of each case, as well as economic and social realities.
  - The **Sociological School** views law as a tool for promoting social justice.

CLASSIFICATIONS OF LAW

- **Substantive vs. Procedural Law**
  - **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations.
  - **Procedural law** consists of all laws that establish and regulate the manner of enforcing or vindicating the rights established by substantive law.
- **Civil vs. Criminal Law**
  - **Civil law** defines and enforces the duties or obligations of persons to one another.
  - **Criminal law**, by contrast, defines and enforces the obligations of persons to society as a whole.
- **Cyberlaw:** A growing body of law that deals specifically with issues raised by cyberspace transactions.

NATIONAL AND INTERNATIONAL LAW

- **National Law:** Written and unwritten laws governing rights and obligations within a particular country.

  - **Common law systems**, such as those in the U.S. and the United Kingdom, recognize prior judicial decisions as *binding*, and not merely persuasive, authority to guide the decisions in subsequent disputes.

  - **Civil law systems**, such as those in Mexico and France, are based primarily on statutory, or "codified," law. Prior judicial decisions have no *binding* authority except as between the parties to the decision.

- **International Law:** Written and unwritten laws governing the relations between and among nations and between nations and the citizens of one or more other sovereign nations (*e.g.*, the Geneva Convention on the Treatment of Prisoners of War, the Warsaw Convention on International Air Travel, the General Agreement on Tariffs and Trade).

  - Key questions international law raises are:

    (1) **who** will enforce the rights and obligations created by a particular international law; and

    (2) **how** will they enforce those rights and obligations?

FEDERALISM & CHECKS AND BALANCES

- **Federal Government:** A form of government where states form a union and the sovereign power is divided between the national government and the various states.

- **Separation of Powers:** The national government of the United States of America is composed of three separate branches, each of which acts as a check on the others' power:

  - The **Legislative Branch** (*i.e.*, Congress), which may override the President's veto and which may define the jurisdiction of the Judiciary and must confirm Judiciary appointees;

  - The **Executive Branch** (*i.e.*, the President), which has the power to veto legislation passed by Congress and to appoint the members of the Judiciary; and

  - The **Judicial Branch** (*i.e.*, the Supreme Court and the lower federal courts), which has the power to void the acts of the Executive and Legislative branches because they are unconstitutional.

THE COMMERCE CLAUSE

- **Commerce Clause:** Article I, Section 8 of the U.S. Constitution empowers Congress "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

- Since 1824, the Supreme Court has interpreted the Commerce Clause to permit Congress to regulate both

  - **interstate commerce** (*i.e.*, commerce between two or more states) and

  - **intrastate commerce** (*i.e.*, commerce within a single state),

  as long as the intrastate commerce at issue **"substantially affects"** interstate commerce, according to *Gibbons v. Ogden* (1824).

THE REGULATORY POWERS OF THE STATES

- **Police Powers:** As part of their sovereign powers, states possess the power to regulate private activities in order to protect or promote public order, health, safety, morals, and general welfare.

- **The "Dormant" Commerce Clause:** When state regulations impinge on interstate commerce, courts must balance the state's interest in the merits and purposes of the regulation against the burden that the regulation places on interstate commerce. Generally speaking,

  - state laws enacted pursuant to the state's police powers are **presumed to be valid** notwithstanding their effect on interstate commerce; however,

  - if the state law **substantially interferes** with interstate commerce, it will most likely be held to violate the Commerce Clause (*i.e.*, to be unconstitutional).

THE SUPREMACY CLAUSE AND PREEMPTION

- Federal constitutional and statutory law and treaties supersede their state counterparts due to the **Supremacy Clause**, Article VI, Section 2 of the U.S. Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

- **Preemption:** Federal law is said to ***preempt*** a conflicting state or local law, regulation, or ordinance if
  - federal law is so **pervasive, comprehensive, or detailed** that it leaves state and local law no room to supplement it, or
  - federal law creates a **federal regulatory agency** that is empowered to enforce federal law.

THE BILL OF RIGHTS

- The first ten amendments to the U.S. Constitution comprise the **Bill of Rights** – a series of protections for individuals against various types of government action.

- The Bill of Rights, with certain notable exceptions, protects ***legal persons***, such as corporations and sole proprietorships, as well as ***natural persons***.

- The protections afforded by the Bill of Rights are only against action by the federal government.

- In order to extend the same protections against actions by state and local governments, the U.S. Supreme Court has ***incorporated*** the protections afforded by the Bill of Rights into the following language of the Fourteenth Amendment:

> . . . . No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without **due process of law**; nor deny to any person within its jurisdiction the **equal protection** of the laws.

THE BILL OF RIGHTS IN A NUTSHELL

- Most significantly, for our purposes, the Bill of Rights:
  - guarantees **freedom of religion, speech, and the press,** as well as the rights to **peaceably assemble,** and to **petition the government** [Amend. 1];
  - guarantees the right to **keep and bear arms** [Amend. 2];
  - prohibits **unreasonable searches and seizures** of persons or property [Amend. 4] and guarantees **fair payment for property** taken for public use [Amend. 5];
  - guarantees the rights to **due process of law**, including **indictment by grand jury** [Amend. 5], as well as the rights to a **speedy and public (criminal) trial** with the **assistance of counsel** and to **cross-examine witnesses and to solicit favorable testimony** [Amend. 6];
  - guarantees the right to **trial by jury** in both criminal cases [Amend. 6] and civil cases involving more than $20 [Amend. 7]; and
  - prohibits **excessive bails and fines**, as well as **cruel and unusual punishment** [Amend. 8].

FREEDOM OF SPEECH

- The First Amendment safeguards freedom of speech, including ***corporate political speech*** and ***symbolic speech***.
  - **Symbolic speech** includes all forms of expressive conduct, including gestures, movements, and clothing.
- **Commercial speech** (*i.e.*, advertising) may be restricted as long as the restriction
  (1) promotes a **substantial government interest**,
  (2) **directly advances** said interest, and
  (3) is **no more restrictive than necessary** in order to achieve the substantial government interest.
- **Unprotected speech:** Certain types of speech may be prohibited, for example:
  - speech (*i.e.*, ***slander***) or writing (*i.e.*, ***libel***) that **defames** or **harms the good reputation** of another person,
  - threatening or **"fighting" words**, and
  - **obscene** or **pornographic** speech.

ONLINE OBSCENITY

- An increasingly significant constitutional issue is the extent to which the First Amendment's protection of free speech covers the content of web sites and messages transmitted over the Internet.

- In 1996, Congress passed the **Communications Decency Act**. Two years later, Congress passed the **Child Online Protection Act**. The U.S. Supreme Court found both acts to be unconstitutional.

- One approach employers, schools, and parents have taken to restrict their employees', students', and children's access to inappropriate material is to use one or more types of ***filtering software***.

    - **Children's Internet Protection Act (CIPA):** Federal law requiring public schools and libraries to block children from accessing adult content, based on the ***meta tags***, or key words, appearing on the blocked site. In *United States v. American Library Association*, 539 U.S. 194 (2003), the Supreme Court held that CIPA did not violate the First Amendment.

FREEDOM OF RELIGION

- The First Amendment also provides that "Congress shall make no law respecting an **establishment** of religion, or prohibiting the **free exercise** thereof . . . ."

  - The **establishment clause** generally prohibits government from establishing a state-sponsored religion or passing laws that promote or show a significant preference for one religion over another, or that impose a significant burden on one or more religions.

  - The **free exercise clause** generally prohibits government from compelling anyone to do something contrary to his religious beliefs or restricting anyone's legitimate exercise of his religious beliefs, except where public policy or public welfare require government action.

- The key to analyzing a federal or state law or regulation as it relates to these provisions is to focus on the **primary effect** of the law or regulation, <u>not</u> any secondary effect. As long as the law or regulation does not promote or place a **significant burden** on religion, it will not be deemed unconstitutional simply because it has <u>some</u> impact on religion.

DUE PROCESS OF LAW

- **Procedural Due Process** requires that any government decision to take life, liberty, or property must be made fairly, giving the persons from whom life, liberty, or property is to be taken **prior notice** and the **opportunity to be heard** by an impartial decisionmaker.

- **Substantive Due Process** requires that the interest of the state to be served by any law or other governmental action be weighed against the right of the individuals against whom the law or action is directed.

  - A **fundamental** right (*e.g.*, free speech, interstate travel, privacy) will be protected unless the government can show a **compelling state interest** (*e.g.*, public safety).

  - In all other cases, a law or action will not violate substantive due process as long as it is **rationally related** to any legitimate governmental purpose.

EQUAL PROTECTION

- The Fourteenth and Fifth Amendments, respectively, prohibit any state or the federal government from denying "any person within its jurisdiction the equal protection of the laws."

- Like ***substantive due process***, the equal protection clauses require the substantive effect of a law or other government action be weighed against the right of the individuals against whom the law or action is directed.

  - If the law or action inhibits a group's exercise of a **fundamental right** or if it embodies a classification based on a **suspect trait** (*e.g.*, race, national origin), the law or action is subject to ***strict scrutiny***, and will only be upheld if it serves a **compelling state interest**.

  - If the law or action embodies a classification based on **gender** or **legitimacy**, it is subject to ***intermediate scrutiny***, and will only be upheld if it is **substantially related** to important government objectives.

  - If the law or action inhibits only rights related to **economic or social welfare**, it will be upheld so long as there is any ***rational basis*** on which the classification might relate to a legitimate government interest.

PRIVACY RIGHTS

- Despite the lack of any explicit right to privacy in the Bill of Rights, the courts have implied a **fundamental right to personal privacy** from the provisions of the First, Third, Fourth, Fifth, and Ninth Amendments.

- In addition, Congress has passed a number of statutes protecting individual privacy, including the

  - **Freedom of Information Act**, which affords individuals access to information collected about them by the federal government, and the

  - **Health Insurance Portability and Accountability Act (HIPAA)**, which requires health-care providers and health-care plans, including certain employer-sponsored plans, to inform patients/plan members of their privacy rights and to safeguard personal medical records from disclosure for non-health care purposes.

- Congress has also passed legislation authorizing government encroachment into individual privacy – most notably, **The USA Patriot Act**, enacted in 2001, which empowered government agencies to access and monitor electronic, financial, and other personal data and communication.

CHAPTER 1

THE LEGAL ENVIRONMENT

ANSWERS TO LEARNING OBJECTIVES/ FOR REVIEW QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can find the answers to the even-numbered *For Review* questions in Appendix F at the end of the text. We repeat these answers here as a convenience to you.

1A ***Sources of law***

Primary sources of law are sources that establish the law. In the United States, these include the U.S. Constitution and the state constitutions, statues passed by Congress and the state legislatures, regulations created by administrative agencies, and court decisions, or case law.

2A ***Common law tradition***

Because of our colonial heritage, much of American law is based on the English legal system. After the Norman conquest of England, the king's courts sought to establish a uniform set of rules for the entire country. What evolved in these courts was the common law—a body of general legal principles that applied throughout the entire English realm. Courts developed the common law rules from the principles underlying judges' decisions in actual legal controversies.

3A ***Precedent***

Judges attempt to be consistent, and when possible, they base their decisions on the principles suggested by earlier cases. They seek to decide similar cases in a similar way and consider new cases with care, because they know that their conflicting decisions make new law. Each interpretation becomes part of the law on the subject and serves as a legal precedent—a decision that furnishes an example or authority for

deciding subsequent cases involving similar legal principles or facts. A court will depart from the rule of a precedent when it decides that the rule should no longer be followed. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent.

4A *Remedies*

An award of compensation in either money or property, including land, is a remedy at law. Remedies in equity include a decree for *specific performance* (an order to perform what was promised), an *injunction* (an order directing a party to do or refrain from doing a particular act), and *rescission* (cancellation) of a contract (and a return of the parties to the positions that they held before the contract's formation). As a rule, courts will grant an equitable remedy only when the remedy at law (money damages) is inadequate. Remedies in equity on the whole are more flexible than remedies at law.

5A *Civil law and criminal law*

Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated. In a civil case, a private party may sue another private party (the government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for damage caused by a failure to comply with a duty. Criminal law has to do with wrongs committed against society for which society demands redress. Local, state, or federal statutes proscribe criminal acts. Public officials, such as district attorneys, not victims or other private parties, prosecute criminal defendants on behalf of the state. In a civil case, the object is to obtain remedies (such as damages) to compensate an injured party. In a criminal case, the object is to punish a wrongdoer to deter others from similar actions. Penalties for violations of criminal statutes include fines and imprisonment, and in some cases, death.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING (PAGE 11)

Does this argument justify the different treatment for unpublished opinions in the state and federal courts? Explain. Yes, because categorizing some decisions, unpublished or otherwise, as not establishing precedent is arguably unconstitutional. No, because such decisions are often less significant or may set "bad" precedents and have not traditionally been regarded as establishing precedent.

BEYOND OUR BORDERS— CRITICAL THINKING (PAGE 16)

Does the civil law system offer any advantages over the common law system, or vice versa? The positive and negative aspects of the characteristics of each legal system make up its advantages and disadvantages. For example, on the one hand, a civil law system relies on a code of laws without regard to precedent. When a statute is clear, this can make the application of law more standard. When a statute is ambiguously phrased, it can be subject to different interpretations, however, which can lead to unpredictable applications. On the other hand, in a common law system, reliance on precedent is required, which can render the application of an unclear statute more predictable, at least in a give jurisdiction. But a statute that is not clearly phrased may not be uniformly interpreted and applied across jurisdictions.

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Parties***

In this situation, the automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2A. ***Remedy***

The plaintiffs are seeking an injunction, which is an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3A. ***Source of law***

This case involves a law passed by the California legislature and a federal statute, thus the primary source of law is statutory law.

4A. ***Finding the law***

Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in both of these sources to find the relevant state and federal statutes.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling

reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute? Both England and the U.S. legal systems were constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

ANSWERS TO ISSUE SPOTTERS IN THE EXAMPREP FEATURE AT THE END OF THE CHAPTER

1A ***The First Amendment provides protection for the free exercise of religion. A state legislature enacts a law that outlaws all religions that do not derive from the Judeo-Christian tradition. Is this law valid within that state? Why or why not?*** No. The U.S. Constitution is the supreme law of the land, and applies to all jurisdictions. A law in violation of the Constitution (in this question, the First Amendment to the Constitution) will be declared unconstitutional.

2A. ***Under what circumstance might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

BUSINESS SCENARIOS AND CASE PROBLEMS

1–1A *Binding v. persuasive authority*

(BLTC page 10)

A decision of a court is binding on all inferior courts. Because no state's court is inferior to any other state's court, no state's court is obligated to follow the decision of another state's court on an issue. The decision may be persuasive, however, depending on the nature of the case and the particular judge hearing it. A decision of the United States Supreme Court on an issue is binding, like the decision of any court, on all inferior courts. The United States Supreme Court is the nation's highest court, however, and thus, its decisions are binding on all courts, including state courts.

1–2A *Remedies*

(BLTC pages 11 & 28)

1 In a suit by Arthur Rabe against Xavier Sanchez, Rabe is the plaintiff and Sanchez is the defendant.

2 Specific performance is the remedy that includes an order to a party to perform a contract as promised.

3 Rescission is a remedy that includes an order to cancel a contract.

4 In both cases, these remedies are remedies in equity.

5 If Sanchez appeals the decision, Sanchez would be the appellant (or petitioner) and Rabe would be the appellee (or respondent).

1–3A QUESTION WITH SAMPLE ANSWER—*Sources of law*

The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced. In this problem, the court determined that a Massachusetts state statute was in conflict with the U.S. Constitution. The Constitution takes priority, so the statute will not be enforced.

In the actual case on which this problem is based, the trial court held that the statute violated the Constitution, and the U.S. Court of Appeals for the First Circuit affirmed this holding. Under the statute's definitions of large and small wineries, most of the small wineries were in state, and all of the large wineries were out-of-state. The court found that the purpose of the statute was to "ensure that Massachusetts' wineries obtained an advantage over their out-of-state counterparts."

1–4A ***Philosophy of law***
(BLTC page 13)

Crimes against humanity constituted, at the time of the Nuremberg trials, a new international crime, consisting of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious ground." In response to the defendants' assertion that they had only been following orders, the Nuremberg judges explained in part that these were familiar crimes within domestic jurisdictions and that thus the accused must have known, when they committed their acts, that they would be considered criminal. In terms of a philosophy of law, it might be said that these criminals violated "natural law." The oldest and one of the most significant schools of jurisprudence is the natural law school. Those who adhere to the natural law school of thought believe that government and the legal system should reflect universal moral and ethical principles that are inherent in human nature. Because natural law is universal, it takes on a higher order than positive, or conventional, law. The natural law tradition presupposes that the legitimacy of conventional, or positive, law derives from natural law. Whenever it conflicts with natural law, conventional law loses its legitimacy. For example, a precept of natural law may be that murder is wrong, which is a value reflected by specific laws prohibiting murder. If a specific, written law *requires* murder, it conflicts with the natural law precept, in which case individuals should disobey the written law and obey the natural law.

1–5A ***Reading citations***
(BLTC page 22)

The court's opinion in this case—*McKee v. Laurion,* 825 N.W.2d 725 (Minn. 2013)—can be found in volume 825 of West's *Northwestern Reporter*, Second Series, on page 725. The Minnesota Supreme Court issued this opinion in 2013.

1–6A **CASE PROBLEM WITH SAMPLE ANSWER—*Law around the world***

The common law system spread throughout medieval England after the Norman Conquest in 1066. Courts developed the common law rules from the principles behind the decisions in actual legal controversies. Judges attempted to be consistent. When possible, they based their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as a legal precedent. Later cases that involved similar legal principles or facts could be decided with reference to that precedent.

The practice of deciding new cases with reference to former decisions, or precedents, eventually became a cornerstone of the English and American judicial systems. It forms a doctrine called *stare decisis.* Under this doctrine, judges are obligated to follow the precedents established within their jurisdictions. Generally,

those countries that were once colonies of Great Britain retained their English common law heritage after they achieved their independence. Today, common law systems exist in Australia, Canada, India, Ireland, and New Zealand, as well as the United States.

Most of the other European nations base their legal systems on Roman civil law. Civil law is codified law—an ordered grouping of legal principles enacted into law by a legislature or governing body. In a civil law system, the primary source of law is a statutory code, and case precedents are not judicially binding as they are in a common law system. Nonetheless, judges in such systems commonly refer to previous decisions as sources of legal guidance. The difference is that judges in a civil law system are not bound by precedent; in other words, the doctrine of *stare decisis* does not apply.

1–7A SPOTLIGHT ON AOL—*Common law*

The doctrine of *stare decisis* is the process of deciding case with reference to former decisions, or precedents. Under this doctrine, judges are obligated to follow the precedents established within their jurisdiction.

In this problem, the enforceability of a forum selection clause is at issue. There are two precedents mentioned in the facts that the court can apply The United States Supreme Court has held that a forum selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." And California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

In the actual case on which this problem is based, the court determined that the clause is not enforceable under those precedents.

1–8A A QUESTION OF ETHICS—Stare decisis

1. Your answer to this question and the reasons for that answer will likely follow one of the three schools of jurisprudential thought discussed in Chapter 1. In other words, your reasoning would indicate how you personally view the nature of law. If your sentiments are similar to those of the positivist school, you would have little difficulty. Your answer would be that the criminal law of the nation should be applied. In contrast, if you hold that there is a higher, "natural" law to which all human beings are subject, you might have concluded that, given their circumstances, the men should not be subject to any nation's particular laws but to that higher law. If you reached this conclusion, then you would have to further decide whether that higher law would sanction the killing of another human being for the sake of survival in these circumstances or absolutely prohibit the taking of another's life under any circumstances. This is a question that would ultimately be based on your personal ethical, religious, or philosophical leanings. Approaching the question from a legal realist's

perspective, you would probably attempt to balance your personal, subjective view of the men's actions against the views held by the others—how do most people feel about the issue? How would they respond to whatever your decision might be? As a judge, do you have an obligation to be responsive to society's ethical standards? If so, to what extent should this obligation be a determining factor in your decision, and how do you balance this obligation against your duty to uphold the law.

2. The legal realists believed that, just as each judge is influenced by the beliefs and attitudes unique to his or her personality, so, too, is each case attended by a unique set of circumstances. According to the legal realist school of thought, judges should tailor their decisions to take account of the specific circumstances of each case, rather than rely on an abstract rule that may not relate to those circumstances. Legal realists also believe that judges should consider extra-legal sources, such as economic and sociological data, in making decisions, to the extent that those sources illuminate the circumstances and issues involved in specific cases. A counterargument can be derived from the positivist school: the law is the law, and there is no need to look beyond it to apply it. In fact, a legal positivist might argue that looking at extra-legal sources would be acting contrary to the law.

CRITICAL THINKING AND WRITING ASSIGNMENTS

1–9A BUSINESS LAW WRITING

John's argument is valid. Under the doctrine of *stare decisis*, judges are generally bound to follow the precedents set in their jurisdictions by the judges who have decided similar cases. A judge does not always have to rule as other judges have, however, A judge can depart from precedent. One argument that a party might offer to counter an assertion of precedent is that the times have changed—the social, economic, political, or other circumstances have changed—and thus it is time to change the law.

1–10A BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENT

1. A majority opinion is a written opinion outlining the views of the majority of the judges or justices deciding a particular case. A concurring opinion is a written opinion by a judge or justice who agrees with the conclusion reached by the majority of the court but not necessarily with the legal reasoning that led the conclusion.

2. A concurring opinion will voice alternative or additional reasons as to why the conclusion is warranted or clarify certain legal points concerning the issue. A dissenting opinion is a written opinion in which a judge or justice, who does not agree with the conclusion reached by the majority of the court, expounds his or her views on the case.

3. Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote—but such opinions may be used by another court later to support its position on a similar issue.

CHAPTER 2

CONSTITUTIONAL LAW

ANSWERS TO LEARNING OBJECTIVES/ FOR REVIEW QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can find the answers to the even-numbered *For Review* questions in Appendix F at the end of the text. We repeat these answers here as a convenience to you.

1A ***Structure of the government***

The Constitution divides the national government's powers among three branches. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Each branch performs a separate function, and no branch may exercise the authority of another branch. A system of checks and balances allows each branch to limit the actions of the other two branches, thus preventing any one branch from exercising too much power.

2A ***Commercial activities***

To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

3A ***Priority of laws***

The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." This article

is important in the ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

4A ***Bill of Rights***

The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

5A ***Due process clause***

Both the Fifth and the Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." The due process clause of each of these constitutional amendments has two aspects—procedural and substantive.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS—CRITICAL THINKING (PAGE 41)

Should U.S. courts, and particularly the United States Supreme Court look to the other nations' laws for guidance when deciding important issues—including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national importance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be informative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when deciding issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING (PAGE 43)

How might the outcome of this case have been different if the girls had posted the photos on the high school's public Web site for all to see? Presumably, such speech could reasonably be restricted by high school administrators. There would be no question that suggestive photos viewed on the high school's public Web site could and would certainly be seen by most students, teachers, and parents.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.1—CRITICAL THINKING—SOCIAL CONSIDERATION (PAGE 42)

Could a state effectively enforce a law that banned all communication between minors and sex offenders through social media sites? Why or why not? The requirement of narrow tailoring may be satisfied so long as the state's interest would be achieved less effectively without the statute. In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil. And a law that banned all communication between minors and sex offenders through social media would almost certainly enhance the safety of minors, and burden less speech than the statute at issue in the *Doe* case. But such a statute would nevertheless create problems. It would free most expression from regulation but still prohibit a substantial amount of harmless speech—for example, it would prohibit conversations between a parent and child if the parent is a sex offender.

CASE 2.2—WHAT IF THE FACTS WERE DIFFERENT? (PAGE 45)

If Bad Frog had sought to use the label to market toys instead of beer, would the court's ruling likely have been the same? Explain your answer. Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

CASE 2.3—WHAT IF THE FACTS WERE DIFFERENT? (PAGE 49)

Suppose that Mitchell County had passed an ordinance that allowed the Mennonites to continue to use steel cleats on the newly resurfaced roads provided that the drivers paid a $5 fee each time they were on the road. Would the court have ruled differently? Why or why not? The Mennonites would still have been singled out for differential treatment under the law because of their use of steel cleats. Therefore, the court probably would have ruled similarly. Only if those who used snow chains and metal-studded snow tires were similarly asked to pay a fee would the court possibly have ruled otherwise.

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Equal protection***

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2A. ***Levels of scrutiny***

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the "rational basis" test (in matters of economic or social welfare).

3A. ***Standard***

The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

4A. ***Application***

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

Legislation aimed at protecting people from themselves concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a

helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

ANSWERS TO ISSUE SPOTTERS IN THE EXAMPREP FEATURE AT THE END OF THE CHAPTER

1A ***Can a state, in the interest of energy conservation, ban all advertising by power utilities if conservation could be accomplished by less restrictive means? Why or why not?*** No. Even if commercial speech is not related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this case, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

2A ***Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of equal protection if the only reason for the tax is to protect the local firms from out-of-state competition? Explain.*** Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.

ANSWERS TO QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

BUSINESS SCENARIOS AND CASE PROBLEMS

2–1A ***Freedom of speech***
(BLTC page 40)

To protect citizens from those who would abuse the right to free expression, speech is subject to reasonable restrictions. But a restriction must aim at a social problem and not at the content of the speech. Thus, the court in this problem is likely to consider the reasonableness of the restriction on the posting of signs on public property in terms of its purpose and the means it uses to achieve that purpose.

Here, the purpose of the ordinance is to improve the appearance of public property. The posting of all signs—not just political campaign signs—is prohibited. There are alternatives to posting signs on public property for a candidate's supporters to communicate their message. In other words, this prohibition on signs did not go so far as to ban political campaign speech altogether.

In the actual case on which this problem is based, the United States Supreme Court upheld a similar ordinance on the reasoning stated above.

2–2A QUESTION WITH SAMPLE ANSWER—*The free exercise clause*

Thomas has a constitutionally protected right to the free exercise of his religion. In denying his claim for unemployment benefits, the state violated this right. Employers are obligated to make reasonable accommodations for their employees' beliefs that are openly and sincerely held, as were Thomas's beliefs. By moving him to a department that made military goods, his employer effectively forced him to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2–3A *The equal protection clause*

(BLTC page 50)

According to the standards applied to determine compliance with the equal protection clause, this ordinance's classification—a gender-based distinction—is subject to intermediate scrutiny. Under this standard, the court could dismiss the plaintiffs' complaint. Gender-based distinctions are acceptable in circumstances in which the two genders are not similarly situated. The city's objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are legitimate and important. Regulation of female, but not male, topless dancing, in the context of the overall regulation of sexually explicit commercial establishments, could reasonably be interpreted as substantially related to achieving these objectives. The court might point out, for example, that males are often topless on beaches, in sporting events, during performances at the ballet, and in magazine photos without sexual suggestiveness. Female breasts are rarely exposed in public venues without sexual overtones, however. This arguably makes it permissible for the law to regard female toplessness differently from male toplessness.

2–4A SPOTLIGHT ON PLAGIARISM—*Due process*

To adequately claim a due process violation, a plaintiff must allege that he was deprived of "life, liberty, or property" without due process of law. A faculty member's academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can clear his or her name is through publicity. Gunasekera's alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that "a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved." Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

2–5A *The commerce clause*

(BLTC page 35)

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall's indictment. On the government's appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

2–6A CASE PROBLEM WITH SAMPLE ANSWER—*Establishment clause*

The establishment clause prohibits the government from passing laws or taking actions that promote religion or show a preference for one religion over another. In assessing a government action, the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion.

Although here DeWeese claimed to have a nonreligious purpose for displaying the poster of the Ten Commandments in a courtroom, his own statements showed a religious purpose. These statements reflected his views about "warring" legal philosophies and his belief that "our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments." This plainly constitutes a religious purpose that violates the establishment clause because it has the effect of endorsing Judaism or Christianity over other religions. In the case on

which this problem is based, the court ruled in favor of the American Civil Liberties Union.

2–7A *The dormant commerce clause*
(BLTC page 37)

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.]

2–8A *Freedom of speech*
(BLTC page 40)

No, Wooden's conviction was not unconstitutional. Certain speech is not protected under the First Amendment. Speech that violates criminal laws—threatening speech, for example—is not constitutionally protected. Other unprotected speech includes fighting words, or words that are likely to incite others to respond violently. And speech that harms the good reputation of another, or defamatory speech, is not protected under the First Amendment.

In his e-mail and audio notes to the alderwoman, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination and murder of politicians. He compared the alderwoman to the biblical character Jezebel, referring to her as a "bitch in the Sixth Ward." These references caused the alderwoman to feel threatened. The First Amendment does not protect such threats, which in this case violated a state criminal statute. There was nothing unconstitutional about punishing Wooden for this unprotected speech.

In the actual case on which this problem is based, Wooden appealed his conviction, arguing that it violated his right to freedom of speech. Under the principles set out above, the Missouri Supreme Court affirmed the conviction.

2–9A A QUESTION OF ETHICS—*Free speech*

1. The answers to these questions begin with the protection of the freedom of speech under the First Amendment. The freedom to express an opinion is a fundamental aspect of liberty. But this right and its protection are not absolute. Some statements are not protected because, as explained in the Balboa decision, "they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by

the social interest in order and morality." Defamatory statements are among those that are not protected.

Arguments in favor of protecting such statements include the perception of the right to freedom of speech as necessary to liberty and a free society. Arguments opposed to such protection include "the social interest in order and morality." In between these positions might fall a balancing of both their concerns. Under any interpretation the degree to which statements can be barred before they are made is a significant question.

In the *Balboa* case, the court issued an injunction against Lemen, ordering her to, among other things, stop making defamatory statements about the Inn. On appeal, a state intermediate appellate court invalidated this part of the injunction, ruling that it violated Lemen's right to freedom of speech under the Constitution because it was a "prior restraint"—an attempt to restrain Lemen's speech before she spoke. On further appeal, the California Supreme Court phrased "the precise question before us [to be] whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment." The court held it could enjoin the repetition of such statements without infringing Lemen's right to free speech. Quoting from a different case, the court reasoned, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment. An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." The court added that the injunction could not prevent Lemen from complaining to the authorities, however.

2. To answer this question requires a standard to apply to the facts. A different chapter in the text sets out two fundamental approaches to ethical reasoning: one involves duty-based standards, which are often derived from religious precepts, and the other focuses on the consequences of an action and whether these are the "greatest good for the greatest number."

Under the former approach, a pre-established set of moral values founded on religious beliefs can be taken as absolute with regard to behavior. Thus, if these values proscribed Lemen's name-calling as wrong, it would be construed as wrong, regardless of the truth of what she said or any effect that it had. Similarly, if the values prescribed Lemen's conduct as correct, it might be unethical not to engage in it. A different duty-based approach grounded on philosophical, rather than religious, principles would weigh the consequences of the conduct in light of what might follow if everyone engaged in the same behavior. If we all engaged in name-calling, hostility and other undesirable consequences would likely flourish. A third duty-based approach, referred to as the principle of rights theory, posits that every ethical precept has a rights-based corollary (for example, "thou shalt not kill" recognizes everyone's

right to live). These rights collectively reflect a dignity to which we are each entitled. Under this approach, Lemen's name-calling would likely be seen as unethical for failing to respect her victims' dignity.

Finally, an outcome-based approach focuses on the consequences of an act, requiring a determination as to whom it affects and assessments of its costs and benefits, as well as those of alternatives. The goal is to seek the maximum societal utility. Here, Lemen's behavior appears to have had little positive effect on herself or the objects of her criticism (the Inn, its employees, its patrons, and its business). The Inn's business seems to have been affected in a substantial way, which in Lemen's eyes may be a "benefit," but in the lives of its owners, employees, and customers, would more likely be seen as a "cost."

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–10A BUSINESS LAW WRITING

For commercial businesses that operate only within the borders of one state, the power of the federal government to regulate every commercial enterprise in the United States means that even exclusively intrastate businesses are subject to federal regulations. This can discourage intrastate commerce, or at least the commercial activities of small businesses, by adding a layer of regulation that may require expensive or time-consuming methods of compliance. This may encourage intrastate commerce, however, by disallowing restrictions, such as arbitrary discriminatory practices, that might otherwise impair the operation of a free market. This federal power also affects a state's ability to regulate activities that extend beyond its borders, as well as the state's power to regulate strictly in-state activities if those regulations substantially burden interstate commerce. This effect can be to encourage intrastate commerce by removing some regulations that might otherwise impede business activity in the same way that added federal regulations can have an adverse impact. A state's inability to regulate may discourage small intrastate businesses, however, by inhibiting the state's power to protect its "home" or "native" enterprises.

2–11A BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENT

1. The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government's interest is balanced against the individual's constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults'

possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

2. The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

3. Under the equal protection clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national origin, or citizenship. Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively. Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.

Chapter 1

The Legal Environment

INTRODUCTION

The first chapters in Unit 1 provide the background for the entire course. Chapter 1 sets the stage. At this point, it is important to establish goals and objectives. For your students to benefit from this course, they must understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

Law consists of enforceable rules governing relationships among individuals and between individuals and their society. The tension in the law between the need for stability and the need for change is one of the concepts introduced in this chapter. How common law courts originated, and the rationale for the doctrine of stare decisis are also covered in this chapter.

Another major concept in the chapter involves the distinctions among today's sources of law and distinctions in its different classifications. The sources include the federal constitution and federal laws, state constitutions and statutes (including the UCC), local ordinances, administrative agency regulations, and case law. The classifications include substantive and procedural, national and international, public and private, civil and criminal, and law and equity. These sources and categories give students a framework on which to hang the mass of principles known as the law.

CHAPTER OUTLINE

I. Business Activities and the Legal Environment

A. MANY DIFFERENT LAWS MAY AFFECT A SINGLE BUSINESS TRANSACTION
The text presents and illustrates an example of how various areas of the law can affect a business decision (such as whether to enter into a contract). It is also explained that a businessperson should know enough about the law to know when to ask for advice.

B. LINKING BUSINESS LAW TO THE SIX FUNCTIONAL FIELDS OF BUSINESS
The text introduces a feature that appears at the end of about half of the chapters to show how legal concepts can be useful to managers and other businesspersons in any functional field of business—

- Corporate management.
- Production and transportation.
- Marketing.
- Research and development.
- Accounting and finance.
- Human resource management.

C. THE ROLE OF THE LAW IN A SMALL BUSINESS

The small-business owner/operator is the most general of managers, wearing many "hats," with each including a link to the law.

II. Sources of American Law

A. CONSTITUTIONAL LAW

The federal constitution is a general document that distributes power among the branches of the government. It is the supreme law of the land. Any law that conflicts with it is invalid. The states also have constitutions, but the federal constitution prevails if their provisions conflict.

B. STATUTORY LAW

Congress and state legislatures enact statutes, and local legislative bodies enact ordinances. Much of the work of courts is interpreting what lawmakers meant when a law was enacted and applying that law to a set of facts (a case).

1. Uniform Laws

Panels of experts and scholars create uniform laws that any state's legislature can adopt.

2. The Uniform Commercial Code

The Uniform Commercial Code (UCC) provides a uniform flexible set of rules that govern most commercial transactions. The UCC has been adopted by all the states (only in part in Louisiana), the District of Columbia, and the Virgin Islands.

ADDITIONAL BACKGROUND—

National Conference of Commissioners on Uniform State Laws, Co-sponsor of the Uniform Commercial Code

As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted. The National Conference of Commissioners on Uniform State Laws is responsible for many of these acts. The National Conference of Commissioners on Uniform State Laws is an organization of state commissioners appointed by the governor of each state, the District of Columbia, and Puerto Rico. Their goal is to promote uniformity in state law where uniformity is desirable. The purpose is to alleviate problems that arise in an increasingly interdependent society in which a single transaction may cross many states. Financial

support comes from state grants. The members meet annually to consider drafts of proposed legislation. The American Law Institute works with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws.

C. ADMINISTRATIVE LAW

Administrative law consists of the rules, orders, and decisions of administrative agencies. The creation of federal administrative agencies, agencies' powers, and the administrative process (rulemaking, investigation, and adjudication) are discussed in detail in Chapter 38.

D. CASE LAW AND COMMON LAW DOCTRINES

Another basic source of American law consists of the rules of law announced in court decisions. These rules include judicial interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 1

What are four primary sources of law in the United States? Primary sources of law are sources that establish the law. In the United States, these include the U.S. Constitution and the state constitutions, statues passed by Congress and the state legislatures, regulations created by administrative agencies, and court decisions, or case law.

ADDITIONAL BACKGROUND—

Restatement (Second) of Contracts

The American Law Institute (ALI), a group of American legal scholars, is responsible for the Restatements. These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice.

The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the summaries are published as the Restatements. Each Restatement is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is Restatement (Second) of Contracts, Section 1 (that is, Section 1 of the second edition of the Restatement of Contracts) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section.

Chapter 1
MEANING OF TERMS

* * * *

Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this Restatement are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum.

In the Restatement, an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as "contract" or "promise." The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters.

§ 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Comment:

* * * *

c. Set of promises. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a "set," promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

III. The Common Law Tradition

American law is based on the English common law legal system. Knowledge of this tradition is necessary to students' understanding of the nature of our legal system.

A. EARLY ENGLISH COURTS

The English system unified its local courts after 1066. This unified system, based on the decisions judges make in individual cases, is the common law system. The common law system involves the consistent application of principles applied in earlier cases with similar facts.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 2

(Note that your students can find the answers to the even-numbered For Review questions in Appendix F at the end of the text.
We repeat these answers here as a convenience to you.)

What is the common law tradition? Because of our colonial heritage, much of American law is based on the English legal system. After the Norman conquest of England, the king's courts sought to establish a uniform set of rules for the entire country. What evolved in these courts was the common law—a body of general legal principles that applied throughout the entire English realm. Courts developed the common law rules from the principles underlying judges' decisions in actual legal controversies.

B. STARE DECISIS

The use of precedent forms the basis for the doctrine of stare decisis.

1. The Importance of Precedents in Judicial Decision Making

A court's application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules.

2. Stare Decisis and Legal Stability
   This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

ENHANCING YOUR LECTURE—

👎👎 ❾ IS AN 1875 CASE PRECEDENT STILL BINDING? ❽❽ 👎👎

In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret oral agreement he had made with the CIA. The federal trial court dismissed Korczak's claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

At issue on appeal was whether a Supreme Court case decided in 1875, Totten v. United States,[a] remained the controlling precedent in this area. In Totten, the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate army during the Civil War. When the plaintiff sued the government for compensation for his services, the Supreme Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that "might compromise or embarrass our government" or cause other "serious detriment" to the public. In Korczak's case, the federal appellate court held that the Totten case precedent was still "good law," and therefore Korczak, like the plaintiff in Totten, could not recover compensation for his services. Said the court, "Totten, despite its age, is the last pronouncement on this issue by the Supreme Court. . . . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed."[b]

THE BOTTOM LINE

Supreme Court precedents, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

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a. 92 U.S. 105 (1875).
b. Korczak v. United States, 124 F.3d 227 (Fed.Cir. 1997).

3. Departures from Precedent
   A judge may decide that a precedent is incorrect, however, if there may have been changes in technology, for example, business practices, or society's attitudes.

4. When There Is No Precedent

When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature's passing a specific statute; society's values and custom; and data and principles from other disciplines.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 3

What is a precedent? When might a court depart from precedent? Judges attempt to be consistent, and when possible, they base their decisions on the principles suggested by earlier cases. They seek to decide similar cases in a similar way and consider new cases with care, because they know that their conflicting decisions make new law. Each interpretation becomes part of the law on the subject and serves as a legal precedent—a decision that furnishes an example or authority for deciding subsequent cases involving similar legal principles or facts. A court will depart from the rule of a precedent when it decides that the rule should no longer be followed. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent.

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE—ADAPTING THE LAW TO THE ONLINE ENVIRONMENT

Does this argument justify the different treatment for unpublished opinions in the state and federal courts? Explain. Yes, because categorizing some decisions, unpublished or otherwise, as not establishing precedent is arguably unconstitutional. No, because such decisions are often less significant or may set "bad" precedents and have not traditionally been regarded as establishing precedent.

C. EQUITABLE REMEDIES AND COURTS OF EQUITY

A court of law is limited to awarding payments of money or property as compensation.

1. Remedies in Equity

Equity is a branch of unwritten law founded in justice and fair dealing and seeking to supply a fairer and more adequate remedy than a remedy at law. A court of equity can order specific performance, an injunction, or rescission of a contract.

2. The Merging of Law and Equity

Today, in most states, a plaintiff may request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.

3. Equitable Principles and Maxims

These guide the application of equitable remedies.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 4

(Note that your students can find the answers to the even-numbered For Review questions in Appendix F at the end of the text.

We repeat these answers here as a convenience to you.)

What is the difference between remedies at law and remedies at equity? An award of compensation in either money or property, including land, is a remedy at law. Remedies in equity include a decree for specific performance (an order to perform what was promised), an injunction (an order directing a party to do or refrain from doing a particular act), and rescission (cancellation) of a contract (and a return of the parties to the positions that they held before the contract's formation). As a rule, courts will grant an equitable remedy only when the remedy at law (money damages) is inadequate. Remedies in equity on the whole are more flexible than remedies at law.

D. SCHOOLS OF LEGAL THOUGHT

1. The Natural Law School
   Adherents of the natural law school believe that government and the legal system should reflect universal moral and ethical principles that are inherent in the nature of human life.

2. Legal Positivism
   Followers of the positivist school believe that there can be no higher law than a nation's positive law (the law created by a particular society at a particular point in time).

3. The Historical School
   Those of the historical school emphasize legal principles that were applied in the past.

4. Legal Realism
   Legal realists believe that judges are influenced by their unique individual beliefs and attitudes, that the application of precedent should be tempered by each case's specific circumstances, and that extra-legal sources should be considered in making decisions.

IV. Classifications of Law

Substantive law defines, describes, regulates, and creates rights and duties. Procedural law includes rules for enforcing those rights. Other classifications include splitting law into federal and state divisions or private and public categories. Cyberlaw is an informal term that describes the body of case and statutory law dealing specifically with issues raised by Internet transactions.

A. CIVIL LAW AND CRIMINAL LAW

Civil law regulates relationships between persons and between persons and their governments, and the relief available when their rights are violated. Criminal law regulates relationships between individuals and society, and prescribes punishment for proscribed acts.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 5

What are some important differences between civil law and criminal law? Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated. In a civil case, a private party may sue another private party (the

government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for damage caused by a failure to comply with a duty. Criminal law has to do with wrongs committed against society for which society demands redress. Local, state, or federal statutes proscribe criminal acts. Public officials, such as district attorneys, not victims or other private parties, prosecute criminal defendants on behalf of the state. In a civil case, the object is to obtain remedies (such as damages) to compensate an injured party. In a criminal case, the object is to punish a wrongdoer to deter others from similar actions. Penalties for violations of criminal statutes include fines and imprisonment, and in some cases, death.

B. NATIONAL AND INTERNATIONAL LAW

1. National Law
National law is the law of a particular nation. Laws vary from country to country, but generally each nation has either a common law or civil law system. A common law system, like ours, is based on case law. A civil law system is based on codified law (statutes).

2. International Law
International law includes written and unwritten laws that independent nations observe. Sources include treaties and international organizations. International law represents attempts to balance each nation's need to be the final authority over its own affairs and to benefit economically from relations with other nations.

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE—BEYOND OUR BORDERS

Does the civil law system offer any advantages over the common law system, or vice versa? Explain. The positive and negative aspects of the characteristics of each legal system make up its advantages and disadvantages. For example, on the one hand, a civil law system relies on a code of laws without regard to precedent. When a statute is clear, this can make the application of law more standard. When a statute is ambiguously phrased, it can be subject to different interpretations, however, which can lead to unpredictable applications. On the other hand, in a common law system, reliance on precedent is required, which can render the application of an unclear statute more predictable, at least in a give jurisdiction. But a statute that is not clearly phrased may not be uniformly interpreted and applied across jurisdictions.

TEACHING SUGGESTIONS

1. Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as "black letter law"—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static.

One of the purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems ("spot the issues") when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision.

2. Point out that the law assumes everyone knows it, or, as it's often phrased, "Ignorance of the law is no excuse." Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law's presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions.

3. As Oliver Wendell Holmes noted, "The life of the law has not been logic"—that is, the law does not respond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are manmade, that they can, and do, change over time as society changes. To what specific social forces does law respond? Are the changes always improvements? (These questions can also be discussed in connection with Chapter 7.)

4. One method of introducing the subject matter of each class is to give students a hypothetical at the beginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective.

5. You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement ("How could you prove that there was an oral contract?" for instance) will only undercut their learning, Once they have learned the principle for which a case is presented, then they can ask, "What if the facts were different?"

Cyberlaw Link

Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. What are the legal risks involved in transacting business over the Internet? As their knowledge of the law increases over the next few weeks, this question can be reconsidered.

DISCUSSION QUESTIONS

1. If justice is defined as the fair, impartial consideration of opposing interests, are law and justice the same thing? No. There can be law without justice—as happened in Nazi-occupied Europe, for example. There cannot be justice without law.

2. What is jurisprudence? Jurisprudence refers to the study of law and the ethical values used in defining what the law should be. Which of the schools of jurisprudence matches the U.S. system? None of the approaches mentioned in these sections is an exact model of the American legal system. They represent frameworks that can be used in evaluating the moral and ethical considerations that are an integral part of the law.

3. Define and discuss the sources of American law: What is the supreme law of the land? The federal constitution. What are statutes? Laws enacted by Congress or a state legislative body. What are ordinances? Laws enacted by local legislative bodies. What are administrative rules? Laws issued by administrative agencies under the authority given to them in statutes.

4. What is the Uniform Commercial Code? The Uniform Commercial Code (UCC) was created through the joint efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. The UCC was first issued in 1952. The UCC facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions (sales of goods, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). The UCC assures businesspersons, for example, that their contracts, if validly entered into, normally will be enforced. Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted in its entirety by nearly all states (except Louisiana, which has not adopted Article 2).

5. What is the common law? Students may most usefully understand common law to be case law—that is, the body of law derived from judicial decisions. The body of common law originated in England. The term common law is sometimes used to refer to the entire common law system to distinguish it from the civil law system.

6. Under what circumstance might a judge rely on case law to determine the intent and purpose of a statute? Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

7. Discuss the differences between remedies at law and in equity. Remedies at law were once limited to payments of money or property (including land) as damages. Remedies in equity were available only when there was no adequate remedy at law. Today, in most states, either or both may be granted in the same action. Remedies in equity are still discretionary, guided by equitable principles and maxims. Remedies at law still include payments of money or property as damages. Today, the major practical difference between actions at law and actions in equity is the right to demand a jury trial in an action at law.

8. Identify and describe remedies available in equity. Three are discussed briefly in the text. Specific performance is available only when a dispute involves a contract. The court may order a party to perform what was promised. An injunction orders a person to do or refrain from doing a particular act. Rescission undoes an agreement, and the parties are returned to the positions they were in before the agreement.

9. Discuss the differences within the classification of law as civil law and criminal law. Civil law concerns rights and duties of individuals between themselves; criminal law concerns offenses against society as a whole. (Civil law is a term that is also used to refer to a legal system based on a code rather than on case law.)

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students research the laws of other common law jurisdictions (England, India, Canada), other legal systems (civil law systems, contemporary China, Moslem nations), and ancient civilizations (the Hebrews, the Babylonians, the Romans), and compare the laws to those of the United States. In looking at other legal systems, have students consider how international law might develop, given the differences in legal systems, laws, traditions, and customs.

2. Assign specific cases and statutes for students to find, either in a library or online, or assign a list of citations, including uniform resource locators (URLs), for students to decipher.

3. Ask students to read newspapers and magazines, listen to radio news, watch television news, and surf the World Wide Web for developments in the law—new laws passed by Congress or signed by the president, laws interpreted by the courts, proposals for changes in the law. The omnipresent effect of law on society should be easy to see.

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 4: In Brown v. Board of Education of Topeka, the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a nonsegregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S> Constitution's Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Footnote 5: In Plessy v. Ferguson, the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution's Thirteenth and Fourteenth Amendments (the Civil War Amendments) "could not have been intended to abolish distinctions based on color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed "the race line from our governmental systems," and the Constitution was thus "color-blind."

REVIEWING—

THE LEGAL ENVIRONMENT

Suppose the California legislature passes a law that severely restricts carbon dioxide emissions from automobiles in that state. A group of automobile manufacturers file suit against the state of California to prevent the enforcement of the law. The automakers claim that a federal law already sets fuel economy standards nationwide, and that fuel economy standards are essentially the same as carbon dioxide emission standards. According to the automobile manufacturers, it is unfair to allow California to pass more stringent regulations than those set by the federal law. Ask your students to answer the following questions, using the information presented in the chapter.

1. Who are the parties (the plaintiffs and the defendant) in this lawsuit? In this situation, the automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2. Are the plaintiffs seeking a legal remedy or an equitable remedy? Why? The plaintiffs are seeking an injunction, which is an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3. What is the primary source of the law that is at issue here? This case involves a law passed by the California legislature and a federal statute, thus the primary source of law is statutory law.

4. Where would you look to find the relevant California and federal laws? Federal statutes are found in the United States Code, and California statutes are published in the California Code. You would look in both of these sources to find the relevant state and federal statutes.

DEBATE THIS:

Under the doctrine of stare decisis, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute? Both England and the U.S. legal systems were constructed on the common law system. The doctrine of stare decisis has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of stare decisis is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of stare decisis is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

EXAMPREP—

ISSUE SPOTTERS

1. The First Amendment provides protection for the free exercise of religion. A state legislature enacts a law that outlaws all religions that do not derive from the Judeo-Christian tradition. Is this law valid within that state? Why or why not? No. The U.S. Constitution is the supreme law of the land, and applies to all jurisdictions. A law in violation of the Constitution (in this question, the First Amendment to the Constitution) will be declared unconstitutional.

2. Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute? Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

Appendix to Chapter 1

Finding and Analyzing the Law

INTRODUCTION

Laws pertaining to business consist of both statutory law and case law. The statutes, agency regulations, and case law referred to in this text establish the rights and duties of businesspersons. The cases in this book provide students with concise, real-life illustrations of the interpretation and application of the law by the courts. The importance of knowing how to find statutory and case law is the reason for this appendix.

APPENDIX OUTLINE

I. Finding Statutory and Administrative Law
Publications collecting statutes and administrative regulations are discussed in the text.

II. Finding Case Law
A brief introduction to case reporting systems and legal citations is also included.

III. Reading and Understanding Case Law
To assist students in reading and analyzing court opinions, the formats of cases in the text are digested, terms are defined, and a sample case is annotated.

ADDITIONAL BACKGROUND—

West's Federal Reporter

Federal court decisions are published unofficially in a variety of publications by West Publishing Company. West organizes these reports by court level and issues them chronologically. Opinions from the United States Court of Appeals, for example, are reported in West's Federal Reporter. West publishes these decisions with headnotes condensing important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other West

publications. The following are excerpts from Ferguson v. Commissioner of Internal Revenue, as published with headnotes in West's Federal Reporter.

Betty Ann FERGUSON, Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 90-4430

Summary Calendar.
United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

1. Constitutional Law 92K84(2)

Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. U.S.C.A. Const. Amend. 1. Ferguson v. C.I.R. 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

2. Witnesses 410K227

Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. Ferguson v. C.I.R. 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

Betty Ann Ferguson, Metairie, La., pro se.

Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. * * *

Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in Staton v. Fought, 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

[1] The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). Accord Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and Sherbert v. Verner, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. United States v. Lee, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and United States v. Ballard, 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, Federal Practice and Procedure § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In Moore v. United States, 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (per curiam), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

* * * *

[2] The government offers only two justifications for Judge Korner's refusal to consider the Staton statement. First, the government contends that the Tax Court was not bound by a Louisiana decision.

This argument misses the point entirely; Ms. Ferguson offered Staton as an alternative to an oath or affirmation and not as a precedent.

The government also claims that the Staton statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of "an oath" an element of the crime of perjury. Accord Smith v. United States, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson's proposal would not suffice as "an oath" for purposes of § 1621. See Gordon, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)).

The parties' briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows:

> MS. FERGUSON: I have religious objections to taking an oath.
> THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm.
> MS. FERGUSON: Sir, may I present this to you? I do not—
> THE COURT: Just a minute. The Clerk will ask you.
> THE CLERK: You are going to have to stand up and raise your right hand.
> MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court.
> THE COURT: I don't care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge.
> MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus—
> THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify.
> MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify.

Ms. Ferguson contends that Judge Korner insisted that she use either the word "swear" or the word "affirm"; the government suggests instead that Judge Korner only required an affirmation which the government defines as "an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603]." Even Ms. Ferguson's proposed alternative would be an "affirmation" under the government's definition.

If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any "recognizable religious scruple," but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing.

We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion.

ADDITIONAL BACKGROUND—

State Codes:

Pennsylvania Consolidated Statutes

State codes may have any of several names—Codes, General Statutes, Revisions, and so on—depending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the Pennsylvania Consolidated Statutes (13 Pa. C.S. § 1101).

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
TITLE 13. COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE

§ 1101. Short title of title

This title shall be known and may be cited as the "Uniform Commercial Code."

1984 Main Volume Credit(s)

1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980.

California Commercial Code

The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the California Commercial Code (Cal. Com. Code § 1101).

WEST'S ANNOTATED CALIFORNIA CODES
COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE

§ 1101. Short Title

This code shall be known and may be cited as Uniform Commercial Code.

1964 Main Volume Credit(s)

(Stats.1963, c. 819, § 1101.)

ADDITIONAL BACKGROUND—

Corpus Juris Secundum

Because the body of American case law is huge, finding relevant precedents would be nearly impracticable were it not for case digests, legal encyclopedias, and similar publications that classify decisions by subject. Like case digests, legal encyclopedias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia Corpus Juris Secundum (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category "Theaters & Shows" (86 C.J.S. Theaters & Shows § 47).

f. Assumption of Risk

A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.

While it has been said that, strictly speaking, the doctrine of assumed risk is applicable only to the relationship of master and servant,[3] patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,[4] or to the devices located therein,[5] or to the form of amusement,[6] which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks

3. Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.
4. Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285.
62 C.J. p 877 note 62.

Darkened motion picture theater
Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.
N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.
Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.
5. Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.
Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.
Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.
Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.
Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.
Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.
62 C.J. p 877 note 63

Particular amusement devices
(1) "Dodge Em" cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].
(2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.
(3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].
6. Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.
N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.
N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.
Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.
62 C.J. p 877 note 63.

Other statements of rule
(1) A spectator at game assumes risk of such dangers incident to playing of game as are known to him or should be obvious to reasonable and prudent person in exercise of due care under circumstances.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.
(2) One participating in a race assumes the risk of injury from natural hazards necessarily incident to, or which inhere in, such a race, under maxim "volenti non fit injuria," which means that to which a person assents is not esteemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
(3) Patrons of a place of amusement assume the risk of ordinary dangers normally attendant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

Liability of proprietor of sports arena
Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are conducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Cen-tennial, 29 N.Y.S.2d 56.

Risks of particular sports/entertainment
(1) Baseball.
Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.
Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.
La.—Jones v. Alexandria Baseball Ass'n, App., 50 So.2d 93.
Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.
N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.
Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.
Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.
Tex.—Williams v. Houston Baseball Ass'n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.
Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.
62 C.J. p 877 note 63 [a].

(2) Basketball.—Paine v. Young Men's Christian Ass'n, 13 A.2d 820, 91 N.H. 78.
(3) Golf.
Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.
N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.
(4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.
(5) Hockey.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.
(6) Horse racing.
Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
N.Y.—Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.
(7) Ice skating.
Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.
N.D.—Filler v. Stenvick, 56 N.W.2d 798.
Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.
(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374.

	League Baseball Co., App., 78 S.W.2d	

ADDITIONAL BACKGROUND—

United States Code

Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the United States Code. In the United States Code, all federal laws of a public and permanent nature are compiled by subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the United States Code (15 U.S.C. § 1).

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

ADDITIONAL BACKGROUND—

Code of Federal Regulations

Created by Congress in 1937, the Code of Federal Regulations is a set of soft cover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the Federal Register and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the United States Code (discussed above). Each title is divided into chapters, parts, and sections. The Code of Federal Regulations is completely revised every year. The following is the text of Section 230.504 of Title 17 of the Code of Federal Regulations (17 C.F.R. § 230.504).

TITLE 17—COMMODITY AND SECURITIES EXCHANGE
Chapter II—Securities and Exchange Commission
Part 230—General Rules and Regulations, Securities Act of 1933
REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS
Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act

of 1933

§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.

(a) Exemption.

Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met—

(b)(1) General Conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made:

(b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or

(b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities.

(b)(2) Specific condition—

(b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state's securities laws.

Note 1.—The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504.

Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this

§ 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a).

(b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502.

[53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989]

AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37.

Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

ADDITIONAL BACKGROUND—

United States Code Annotated

Published by West Publishing Company, the United States Code Annotated contains the complete text of laws enacted by Congress that are included in the United States Code (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the United States Code Annotated (15 U.S.C.A. § 1), including the historical notes and selected references.

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1975 Amendment. Section 4 of Pub.L. 94-145 provided that: "The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975]."

Short Title of 1984 Amendment. Pub.L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: "That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the 'Local Government Antitrust Act of 1984'."

Short Title of 1982 Amendment. Pub.L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that "This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the 'Foreign Trade Antitrust Improvements Act of 1982'."

Short Title of 1980 Amendment. Pub.L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: "That this Act [enacting section 26a of this title] may be cited as the 'Gasohol Competition Act of 1980'."

Short Title of 1975 Amendment. Section 1 of Pub.L. 94-145 provided: "That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the 'Consumer Goods Pricing Act of 1975'."

Short Title of 1974 Amendment. Section 1 of Pub.L. 93-528 provided: "That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the 'Antitrust Procedures and Penalties Act'."

Short Title. Pub.L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: "That this Act [sections 1 to 7 of this title] may be cited as the 'Sherman Act'."

Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2322.

For legislative history and purpose of Pub.L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub.L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569.

REFERENCES

CROSS REFERENCES

Antitrust laws inapplicable to labor organizations, see § 17 of this title.

Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation.

Combinations in restraint of import trade, see § 8 of this title.

Conspiracy to commit offense or to defraud United States, see § 371 of Title18, Crimes and Criminal Procedure.

Discrimination in price, services or facilities, see § 13 of this title.

Fishing industry, restraints of trade in, see § 522 of this title.

Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure.

Monopolies prohibited, see § 2 of this title.

Trusts in territories or District of Columbia prohibited, see § 3 of this title.

FEDERAL PRACTICE AND PROCEDURE

1990 Pocket Part Federal Practice and Procedure

Adding new parties, see Wright & Miller: Civil § 1504.

Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765.

Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167.

Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730.

Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031.

Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942.

Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564.

Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668.

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

Joiner of claims, see Wright & Miller: Civil § 1587.

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CODE OF FEDERAL REGULATIONS

1973 Main Volume Code of Federal Regulations

Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 et seq.

Common sales agency, see 16 CFR 15.46.

Compliance with state milk marketing orders, see 16 CFR 15.154.

Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254.

LAW REVIEW COMMENTARIES

Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986).

Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24

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ANNOTATIONS

1. Common law

Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. National Society of Professional Engineers v. U.S., U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637.

This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. U.S. v. Socony-Vacuum Oil Co., Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. Denison Mattress Factory v. Spring-Air Co., C.A.Tex.1962, 308 F.2d 403.

Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. Rogers v. Douglas Tobacco Bd. of Trade, Inc., C.A.Ga.1957, 244 F.2d 471.

Federal statutory law on monopolies did not supplant common law but incorporated it. Mans v. Sunray DX Oil Co., D.C.Okl.1971, 352 F.Supp. 1095.

Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. U.S. v.

Arnold, Schwinn & Co., D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567.

This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n, D.C.Mo.1949, 82 F.Supp. 147.

CASE SYNOPSIS—

A Sample Case: Apple Inc. v. Amazon.com Inc.

Apple products (iPads, iPhones, iPods) use the term APP STORE. Amazon.com launched an Appstore for viewing and downloading applications to Android devices (such as the Kindle Fire). Apple claimed that Amazon's use of the word "Appstore" constituted false advertising and trademark infringement—that Amazon's use of "Appstore" misled the public into thinking that Amazon's Appstore is affiliated with Apple and offers the same content.

A federal district court determined that consumers were not deceived by the two vendors' use of the same term. There was no evidence that consumers understood "app store" to include specific qualities, characteristics, or attributes or were otherwise misled by the use of the term.

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Notes and Questions

What is required to establish that an ad, or the use of a certain term, as in this case, constitutes false advertising? A false advertising claim requires either a false statement of fact in an ad or evidence showing exactly what message was conveyed that was sufficient to constitute false advertising. In this case, the court was asked to consider, in light of a false advertising claim, whether Amazon could use the term "Appstore" to designate a site for buying apps. Apple made this assertion without representing that the nature, characteristics, or quality of the site is the same as that of Apple's "APP STORE." This did not meet the standard for establishing false advertising.

Amazon filed a motion for summary judgment. Summary judgment is appropriate when there is no genuine dispute as to any material fact. What is a material fact? What indicates that a dispute over a material fact is genuine? Material facts are those that might affect the outcome of the case. A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the party against whom the motion is filed.

Chapter 2

Constitutional Law

INTRODUCTION

Many people assume that a government acts from a vague position of strength and can enact any regulation it deems necessary or desirable. This chapter emphasizes a different perspective from which to view the law: action taken by the government must come from authority and this authority cannot be exceeded.

Neither Congress nor any state may pass a law in conflict with the Constitution. The Constitution is the supreme law in this country. The Constitution is the source of federal power and to sustain the legality of a federal law or action a specific federal power must be found in the Constitution. States have inherent sovereign power—that is, the power to enact legislation that has a reasonable relationship to the welfare of the citizens of that state. The power of the federal government was delegated to it by the states while the power of the states was retained by them when the Constitution was ratified.

The Constitution does not expressly give the states the power to regulate, but limits the states' exercise of powers not delegated to the federal government.

CHAPTER OUTLINE

I. The Constitutional Powers of Government

Before the U.S. Constitution, the Articles of Confederation defined the central government.

A. A FEDERAL FORM OF GOVERNMENT

The U.S. Constitution established a federal form of government, delegating certain powers to the national government. The states retain all other powers. The relationship between the national government and the state governments is a partnership—neither partner is superior to the other except within the particular area of exclusive authority granted to it under the Constitution.

B. THE SEPARATION OF POWERS

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of checks and balances.

- Congress, for example, can enact a law, but the president can veto it.

- The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the members of the Senate.
- Congress determines the jurisdiction of the federal courts, but the courts have the power to hold acts of the other branches of the government unconstitutional.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 1

What is the basic structure of the U.S. government? The Constitution divides the national government's powers among three branches. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Each branch performs a separate function, and no branch may exercise the authority of another branch. A system of checks and balances allows each branch to limit the actions of the other two branches, thus preventing any one branch from exercising too much power.

C. THE COMMERCE CLAUSE

1. The Commerce Clause and the Expansion of National Powers

The Constitution expressly provides that Congress can regulate commerce with foreign nations, interstate commerce, and commerce that affects interstate commerce. This provision—the commerce clause—has had a greater impact on business than any other provision in the Constitution. This power was delegated to the federal government to ensure a uniformity of rules governing the movement of goods through the states.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 2

(Note that your students can find the answers to the even-numbered For Review questions in Appendix F at the end of the text.
We repeat these answers here as a convenience to you.)

What constitutional clause gives the federal government the power to regulate commercial activities among the various states? To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. The Commerce Clause Today

The United States Supreme Court has recently limited the clause in its reach, in decisions that significantly enhanced the sovereign power of the states within the federal system. Some of these decisions are detailed in the text. Essentially, the holdings of these cases state that the clause does not support the national regulation of non-economic conduct.

3. The Regulatory Powers of the States

A state can regulate matters within its own borders under its police power.

4. The "Dormant" Commerce Clause

States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

ENHANCING YOUR LECTURE—

👎👎 ❾ DOES STATE REGULATION OF INTERNET PRESCRIPTION TRANSACTIONS VIOLATE THE COMMERCE CLAUSE? ❽❽ 👎👎

Every year, about 30 percent of American households purchase at least some prescription drugs online. There is nothing inherently unlawful in such a transaction. Consider that Article X of the Constitution gives the states the authority to regulate activities affecting the safety and welfare of their citizens. In the late 1800s, the states developed systems granting physicians the exclusive rights to prescribe drugs and pharmacists the exclusive right to dispense prescriptions. The courts routinely upheld these state laws.[a] All states use their police power authority to regulate the licensing of pharmacists and the physicians who prescribe drugs.

AN EXTENSION OF STATE LICENSING LAWS

About 40 percent of the states have attempted to regulate Internet prescription transactions by supplementing their licensure rules in such a way to define a "safe" consulting relationship between the physician prescribing and the pharmacists dispensing prescription drugs. For example, certain states allow an electronic diagnosis. This consists of a patient filling out an online questionnaire that is then "approved" by a physician before an Internet prescription is filled and shipped. In contrast, other states specifically prohibit a physician from creating a prescription if there is no physical contact between the patient and the physician providing the prescription.

SOME STATES ARE ATTEMPTING TO REGULATE INTERSTATE COMMERCE

Recently, the New York State Narcotic Bureau of Enforcement started investigating all companies in New Jersey and Mississippi that had been involved in Internet prescription medicine transactions with residents of New York. None of the companies under investigation has New York offices. The legal question immediately raised is whether the New York State investigations are violating the commerce clause. Moreover, it is the Food and Drug Administration (FDA) that enforces the regulation of prescription drugs, including their distributors.

ARE NEW YORK AND OTHER STATES VIOLATING THE DORMANT COMMERCE CLAUSE?

As you learned in this chapter, the federal government regulates all commerce not specifically granted to the states. This is called the dormant commerce clause. As such, this clause prohibits state regulations that discriminate against interstate commerce. Additionally, this clause prohibits state regulations that impose an undo burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.[b]

In this decade, there is an opposing view based on a line of cases that suggest that state regulation of Internet activities do not violate the dormant commerce clause. In one case, a New York state law that

banned the sale of cigarettes to its residents over the Internet was found not to violate the dormant commerce clause because of public health concerns.[d] In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.[e] Whether the reasoning in these cases will be extended to cases involving Internet pharmacies remains to be seen. There exist state laws limiting Internet prescriptions. For example, in Nevada, no resident can obtain a prescription from an Internet pharmacy unless that pharmacy is licensed and certified under the laws of Nevada. Because this statute applies equally to in-state and out-of-state Internet pharmacies, it is undoubtedly nondiscriminatory. Additionally, the requirement that Internet pharmacies obtain a Nevada license prior to doing business in the state will probably be viewed as not imposing an undo burden on interstate commerce

WHERE DO YOU STAND?

Clearly, there are two sides to this debate. Many states contend that they must regulate the provision of prescription drugs via the Internet in order to ensure the safety and well-being of their citizens. In some instances, however, the states may be imposing such regulations at the behest of traditional pharmacies, which do not like online competition. What is your stand on whether state regulation of Internet prescription drug transactions violates the dormant commerce clause of the Constitution? Realize that if you agree that it does, then you probably favor less state regulation. If you believe that it does not, then you probably favor more state regulation.

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a. See, for example, Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).
b. See, for example, Pharmaceutical Manufacturers' Association v. New Mexico Board of Pharmacy, 86 N.M. 571, 525 P.2d 931 (N.M. App. 1974); State v. Rasmussen, 213 N.W.2d 661 (Iowa 1973).
c. See American Libraries Association v. Pataki, 969 F.Supp.160 (S.D.N.Y. 1997).
d. Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2nd Cir. 2003).
e. Ford Motor Company v. Texas Department of Transportation, 264 F.3d 493 (5th Cir. 2001).

D. THE SUPREMACY CLAUSE

- The Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a direct conflict between a federal law and a state law, the state law is held to be invalid.
- When Congress chooses to act exclusively in an area of concurrent federal and state powers, it is said to preempt the area, and a valid federal law will take precedence over a conflicting state or local law. Generally, congressional intent to preempt will be found if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it. Also, when a federal statute creates an agency to enforce the law, matters that may come within the agency's jurisdiction will likely preempt state laws.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 3

Which constitutional clause allows laws enacted by the federal government to take priority over conflicting state laws? The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." This article is important in the

ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

II. Business and the Bill of Rights

The first ten amendments to the Constitution embody protections against various types of interference by the federal government. These are listed in the text.

A. Limits on Federal and State Governmental Actions

Most of the rights and liberties in the Bill of Rights apply to the states under the due process clause of the Fourteenth Amendment. The United States Supreme Court determines the parameters.

Answer to Learning Objective/For Review Question No. 4

(Note that your students can find the answers to the even-numbered For Review questions in Appendix F at the end of the text.
We repeat these answers here as a convenience to you.)

What is the Bill of Rights? What freedoms does the First Amendment guarantee? The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

Answer to Critical Thinking Question in the Feature—Beyond Our Borders

Should U.S. courts, and particularly the United States Supreme Court look to the other nations' laws for guidance when deciding important issues—including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national importance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be informative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when deciding issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

B. The First Amendment—Freedom of Speech

The freedoms guaranteed by the First Amendment cover symbolic speech (gestures, clothing, and so on) if a reasonable person would interpret the conduct as conveying a message.

1. Reasonable Restrictions

A balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their rights.

a. Content-Neutral Laws
If a restriction imposed by the government is content neutral (aimed at combating a societal problem such as crime, not aimed at suppressing expressive conduct or its message), then a court may allow it.

CASE SYNOPSIS—

Case 2.1: Doe v. Prosecutor, Marion County

John Doe was arrested in Marion County, Indiana, and convicted of child exploitation. Although he was released from prison and was not on any form of supervised release, he was required to register as a sex offender with Indiana. And under an Indiana statute that covered child exploitation and other sex offenses, Doe could not use certain Web sites and programs. Doe filed a suit in a federal district court against the Marion County prosecutor, alleging that the statute violated his right to freedom of speech under the First Amendment. Doe asked the court to issue an injunction to block the enforcement of the law. The court entered a judgment for the defendant. Doe appealed.

The U.S Court of Appeals for the Seventh Circuit reversed and remanded. A law that concerns rights under the First Amendment must be narrowly tailored to accomplish its objective. The blanket ban on social media in this case did not pass this test. "The Indiana law targets substantially more activity than the evil it seeks to redress. * * * Indiana has other methods to combat unwanted and inappropriate communication between minors and sex offenders."

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Notes and Questions

Besides the statutes discussed in the Doe case, are there other tools that a state possesses to combat sexual predators? Yes, and the court in its opinion noted some of them. In addition to the statutes that the court compared to the regulation at issue, "the penal system offers speech-restrictive alternatives to imprisonment. Regulations that do not implicate the First Amendment are reviewed only for a rational basis," and therefore might more readily pass muster than the statute that Doe challenged. "The Constitution even permits civil commitment under certain conditions."

ANSWER TO CRITICAL THINKING QUESTION IN CASE 2.1

Could a state effectively enforce a law that banned all communication between minors and sex offenders through social media sites? Why or why not? The requirement of narrow tailoring may be satisfied so long as the state's interest would be achieved less effectively without the statute. In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil. And a law that banned all communication between minors and sex offenders through social media would almost certainly enhance the safety of minors, and burden less speech than the

statute at issue in the *Doe* case. But such a statute would nevertheless create problems. It would free most expression from regulation but still prohibit a substantial amount of harmless speech—for example, it would prohibit conversations between a parent and child if the parent is a sex offender.

b. Laws That Restrict the Content of Speech
To regulate the content of speech, a law must serve a compelling state interest and be narrowly written to achieve that interest.

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE—ADAPTING THE LAW TO THE ONLINE ENVIRONMENT

How might the outcome of this case have been different if the girls had posted the photos on the high school's public Web site for all to see? Presumably, such speech could reasonably be restricted by high school administrators. There would be no question that suggestive photos viewed on the high school's public Web site could and would certainly be seen by most students, teachers, and parents.

2. Corporate Political Speech
Speech that otherwise would be protected does not lose that protection simply because its source is a corporation. For example, corporations cannot be entirely prohibited from making political contributions that individuals are permitted to make.

3. Commercial Speech
Freedom-of-speech cases generally distinguish between commercial and noncommercial messages. Commercial speech is not protected as extensively as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective.

CASE SYNOPSIS—

Case 2.2: Bad Frog Brewery, Inc. v. New York State Liquor Authority

Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as "giving the finger." Bad Frog's distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed.

The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA's ban on the use of the labels lacked a "reasonable fit" with the state's interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban. "In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree." Also, there were "numerous less intrusive alternatives."

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Notes and Questions

The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information ("commercial speech") is protected by the First Amendment.

Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately.

Whose interests are advanced by banning certain ads? The government's interests are advanced when

certain ads are banned. For example, in the Bad Frog case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" IN CASE 2.2

If Bad Frog had sought to use the label to market toys instead of beer, would the court's ruling likely have been the same? Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

ADDITIONAL CASES ADDRESSING THIS ISSUE—

Recent cases involving the constitutionality of government restrictions on advertising under the commerce clause include the following.

- Cases in which restrictions on advertising were held unconstitutional include Thompson v. Western States Medical Center, __ U.S. __, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of compounded drugs); and This That and Other Gift and Tobacco, Inc. v. Cobb County, 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices).

- Cases in which restrictions on advertising were held not unconstitutional include Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park, 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); Borgner v. Brooks, 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists' ads); Genesis Outdoor, Inc. v. Village of Cuyahoga Heights, __ Ohio App.3d __, __ N.E.2d __ (8 Dist. 2002) (restrictions on billboard construction); and Johnson v. Collins Entertainment Co., 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads).

4. Unprotected Speech
   Constitutional protection has never been afforded to certain classes of speech—defamatory speech, threats, child pornography, "fighting" words, and statements of fact, for example.

   a. Obscene Speech
      Obscene material is unprotected. The United States Supreme Court has held that material is obscene if (1) the average person finds that it violates contemporary community standards; (2) the work taken as a whole appeals to a prurient interest in sex; (3) the work shows patently offensive sexual conduct; and (4) the work lacks serious redeeming literary, artistic, political, or scientific merit. Aside from child pornography, however, there is little agreement about what material qualifies as obscene.

b. Online Obscenity

With respect to obscenity online, the text discusses some of the legislation. The "community" of the Internet is national or global—too large for applying the "standards of the community" test, which restricts non-pornographic materials. The Children's Internet Protection Act of 2000, which requires libraries to use filters, was held to be not unconstitutional.

C. THE FIRST AMENDMENT—FREEDOM OF RELIGION

1. The Establishment Clause
   Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion. Federal or state law that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion.

2. The Free Exercise Clause
   Under the free exercise clause, the government cannot prohibit the free exercise of religious practices. In other words, a person cannot be compelled to do something contrary to his or her religious practices unless the practices contravene public policy or public welfare.

CASE SYNOPSIS—

Case 2.3: Mitchell County v. Zimmerman

Members of the Mennonite Church in Iowa use horses and buggies for transportation, but they also use tractors equipped with steel cleats to haul agricultural products to market. The tractors had been in use for about forty years, when Mitchell County adopted an ordinance that effectively banned the cleats. The ordinance had the stated objective of preserving the condition of county roads, but allowed studded tires and tire chains. When Eli Zimmerman, a Mennonite, was cited for violating the ordinance, he asked the court to dismiss the citation. The court refused. He appealed.

The Iowa Supreme Court held that the ordinance violated the Constitution's free exercise clause and ordered the case dismissed. The ordinance was not operationally neutral because it was adopted specifically to address the Mennonites' use of steel cleats. And the ordinance was not generally applicable because it contained exceptions for tire chains and studded tires—it was not clearly tailored to achieve its stated objective. The court reasoned that a less restrictive alternative, which did not ban the Mennonites' use of cleats, was possible.

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Notes and Questions

Should the court have considered whether the Mennonites abandoned or departed from their faith and religious doctrine and practices when they chose to use tractors in place of horses and buggies? Why or why not? No. The First Amendment prohibits a court from considering religious doctrinal matters. Under the U.S. Constitution, a secular court has no role in determining ecclesiastical questions such as the interpretation of particular church doctrines and the importance of those doctrines to the religion and its practitioners.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" IN CASE 2.3

Suppose that Mitchell County had passed an ordinance that allowed the Mennonites to continue to use steel cleats on the newly resurfaced roads provided that the drivers paid a $5 fee each time they were on the road. Would the court have ruled differently? Why or why not? The Mennonites would still have been singled out for differential treatment under the law because of their use of steel cleats. Therefore, the court probably would have

ruled similarly. Only if those who used snow chains and metal-studded snow tires were similarly asked to pay a fee would the court possibly have ruled otherwise.

III. Due Process and Equal Protection

A. DUE PROCESS

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived "of life, liberty, or property, without due process of law."

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 5

Where in the Constitution can the due process clause be found? Both the Fifth and the Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." The due process clause of each of these constitutional amendments has two aspects—procedural and substantive.

1. Procedural Due Process

A government decision to take life, liberty, or property must be made fairly. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge).

2. Substantive Due Process

If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end.

B. EQUAL PROTECTION

Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to the federal government through the due process clause of the Fifth Amendment. Equal protection means that the government must treat similarly situated individuals in a similar manner. When a law or action distinguishes between or among individuals, the basis for the distinction (the classification) is examined.

1. Strict Scrutiny

If the law or action inhibits some persons' exercise of a fundamental right or if the classification is based on a race, national origin, or citizenship status, the classification is subject to strict scrutiny—it must be necessary to promote a compelling interest.

2. Intermediate Scrutiny

Intermediate scrutiny is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to important government objectives.

3. The "Rational Basis" Test
In matters of economic or social welfare, a classification will be considered valid if there is any conceivable rational basis on which the classification might relate to any legitimate government interest.

IV. Privacy Rights

Invasion of another's privacy is also a civil wrong (Chapter 4), and federal laws protect the privacy of individuals in several areas. In business, issues of privacy often arise in the employment context (Chapter 29). Consumers' privacy rights online are covered further in Chapter 40.

A. Constitutional Protection of Privacy Rights

A personal right to privacy is held to be so fundamental as to apply at both the state and the federal level. Although there is no specific guarantee of a right to privacy in the Constitution, such a right has been derived from guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.

B. Federal Statutes Protecting Privacy Rights

1. Federal Privacy Legislation
These statutes include the Freedom of Information Act of 1966, the Privacy Act of 1974, the Driver's Privacy Protection Act of 1994, and other laws listed in the text.

2. Medical Information
The Health Insurance Portability and Accountability Act (HIPAA) of 1996 defines the circumstances in which an individual's health information may be used or disclosed. Health-care providers, health-care plans, certain employers, and others must inform patients of their rights and how the information might be used.

C. Technological Advances and Privacy Rights

The technological ease of availability and use of public records has raised questions of invasion of privacy.

1. Court Records
The online dissemination of court-related information raises privacy issues. Local governments' sale of the information likewise raises concerns, whether the information is inaccurate and incomplete, and possibly uncorrectable, or detailed and revealing.

2. The USA Patriot Act
The USA Patriot Act of 2001 gave officials the authority to monitor Internet activities and access personal information without proof of any wrongdoing.

Additional Background—

USA PATRIOT Act Tech Provisions

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to "sunset" in 2005.)

Wiretap Offenses

Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse.

Voice Mail

Section 209—LEAs can seize voice mail messages, with a warrant.

ESP Records

Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers' (ESPs) subscribers as "name," "address," "local and long distance telephone connection records, or records of session times and durations," "length of service (including start date) and types of service utilized," "telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address," and "means and source of payment for such service (including any credit card or bank account number)."

Pen Registers, and Trap and Trace Devices

Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs "capture[] the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act.

Computer Trespassers

Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting "computer trespasser's communications."

ESP Compensation

Section 222—An ESP "who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance."

ENHANCING YOUR LECTURE—

👎👎 ❾ CREATING A WEB SITE PRIVACY POLICY ❽❽ 👎👎

Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement Web site privacy policies.

PRIVACY POLICY GUIDELINES

In the last several years, a number of independent, nonprofit organizations have developed model Web site privacy policies and guidelines for online businesses to use. Web site privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a "seal of approval" that Web-based businesses can display at their sites if they follow the organization's privacy guidelines.

One of the best known of these organizations is TRUSTe. Web site owners that agree to TRUSTe's privacy standards are allowed to post the TRUSTe "seal of approval" on their Web sites. The idea behind the seal, which many describe as the online equivalent of the "Good Housekeeping Seal of Approval," is to allay users' fears about privacy problems.

DRAFTING A PRIVACY POLICY

Online privacy guidelines generally recommend that businesses post notices on their Web sites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing Web site visitors to access and correct or remove personal information and giving visitors an "opt-in" or "opt-out" choice. For example, if a user selects an "opt-out" policy, the personal data collected from that user would be kept private.

In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its Web site privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site's practices to the FTC. The FTC standards are incorporated in the following checklist.

CHECKLIST FOR A WEB SITE PRIVACY POLICY

1. Include on your Web site a notice of your privacy policy.
2. Give consumers a choice (such as opt-in or opt-out) with respect to any information collected.
3. Outline the safeguards that you will employ to secure all consumer data.
4. Let consumers know that they can correct and update any personal information collected by your business.
5. State that parental consent is required if a child is involved.
6. Create a mechanism to enforce the policy.

TEACHING SUGGESTIONS

1. The concept of federalism is basic to students' understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the

regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was granted specific powers by the states in the Constitution while the states retained the police power.

2. The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means. To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute's concern is to protect the state's fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate.

3. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. Stare decisis does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law.

Cyberlaw Link

Ask your students to consider the following issue. In most circumstances, it is not constitutional for the government to open private mail. Why is it then sometimes considered legal for the government to open e-mail between consenting adults?

DISCUSSION QUESTIONS

1. What is the basic structure of the American national government? The basic structure of the American government is federal—a form of government in which states form a union and power is shared with a central authority. The United States Constitution sets out the structure, powers, and limits of the government.

2. What is the national government's relation to the states? The relationship between the national and state governments is a partnership. Neither is superior to the other except as the Constitution provides. When conflicts arise as to which government should be exercising power in a particular area, the United States Supreme Court decides which governmental system is empowered to act under the Constitution.

3. What is the doctrine of separation of powers and what is its purpose? Each of the three governmental branches—executive, legislative, and judicial—performs a separate function. Each branch has some power to limit the actions of the others. This system of checks and balances prevents any branch from becoming too powerful.

4. What is the conflict between the states' police power and the commerce clause? The term police power refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—which Congress regulates under the commerce clause—the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.

5. What is preemption? Preemption occurs when Congress chooses to act exclusively in an area of concurrent federal and state powers, and a valid federal law will override a conflicting state or local law on the same general subject. Generally, if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it, the federal law will be held to have preempted the area. When a federal statute creates an agency to enforce the law, matters within the agency's jurisdiction will likely preempt state law.

6. What is the distinction between the degrees of regulation that may be imposed on commercial and noncommercial speech? Commercial speech is not as protected as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. As for noncommercial speech, the government cannot choose what are and what are not proper subjects.

7. Should the First Amendment protect all speech? One argument in support of this suggestion is that all views could then be fully expressed, and subject to reasoned consideration, in the "marketplace of ideas" without the chilling effect of legal sanctions. One argument against this suggestion is exemplified by the yelling of "Fire!" in a crowded theater: there are statements that are too inflammatory to be allowed unfettered expression.

8. What does it mean that under the establishment clause the government cannot establish any religion or prohibit the free exercise of religious practices? Federal or state regulation that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. The clause mandates accommodation of all religions and forbids hostility toward any.

9. Would a state law imposing a fifteen-year term of imprisonment without allowing a trial on all businesspersons who appear in their own television commercials be a violation of substantive due process? Would it violate procedural due process? Yes, the law would violate both types of due process. The law would be unconstitutional on substantive due process grounds, because it abridges freedom of speech. The law would be unconstitutional on procedural due process grounds, because it imposes a penalty without giving an accused a chance to defend his or her actions.

10. What are the tests used to determine whether a law comports with the equal protection clause? Equal protection means that the government must treat similarly situated individuals in a similar manner. Equal protection requires review of the substance of a law or other government action instead of the procedures used. If the law distinguishes between or among individuals, the basis for the distinction is examined. If the law inhibits some persons' exercise of a fundamental right or if the classification is based on race, national origin, or citizenship status, the classification must be necessary to promote a compelling interest. In matters of economic or social welfare, a classification will be upheld if there is any rational basis on which it might relate to any legitimate government interest. Laws using classifications that discriminate on the basis of gender or legitimacy must be substantially related to important government objectives. When a law or action limits the liberty of all persons, it may violate substantive due process; when a law or action limits the liberty of some persons, it may violate the equal protection clause.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students look through the local newspaper for current stories about proposed laws. Ask them where the government would find the authority within the Constitution to adopt a specific law under consideration.

2. Would the ten amendments in the Bill of Rights be part of the Constitution if it were introduced today? Have students phrase the Bill of Rights in more contemporary language and poll their friends, neighbors, and relatives as to whether they would support such amendments to the Constitution. If not, what rights might they be willing to guarantee?

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 3: The regulation in Wickard v. Filburn involved a marketing quota. The Supreme Court upheld the regulation even though it would be difficult for the farmer alone to affect interstate commerce. Total supply of wheat clearly affects market price, as does current demand for the product. The marketing quotas were designed to control the price of wheat. If many farmers raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product. The Court deferred to congressional judgment concerning economic effects and the relationship between local activities and interstate commerce. This was a return to the broad view of the commerce power that John Marshall had defined in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Footnote 16: At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants' favor. On the student's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In Morse v. Frederick, the United States Supreme Court reversed the lower court's judgment and remanded the case. The Supreme Court viewed this set of facts as a "school speech case." The Court acknowledged that the message on Frederick's banner was "cryptic," but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is "wrong and harmful." Thus it was reasonable for the principal in this case to order the banner struck.

Did—or should—the Court rule that Frederick's speech can be proscribed because it is "plainly offensive"? The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, "We think this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

Footnote 30: Mount Soledad is in San Diego, California. There has been a forty-foot cross atop the peak since 1913. Since the 1990s, a war memorial has surrounded the cross. The site was privately owned until 2006 when the federal government acquired it to preserve the war memorial. Steve Trunk and others filed a suit in a

federal district court against San Diego, claiming a violation of the establishment clause. The court determined that the government acted with a secular purpose and the memorial did not advance religion, and issued a summary judgment in its favor. The plaintiffs appealed. In Trunk v. City of San Diego, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded. The government's purpose may have been nonreligious, but the memorial can be perceived as endorsing Christianity. Not all crosses at war memorials violate the Constitution. The context and setting must be examined. This cross physically dominates its site, was originally dedicated to religious purposes, and had a long history of religious use. From a distance, the cross was the only visible element. The court reasoned that "the use of a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion."

If the forty-foot cross were replaced with a smaller, less visible symbol of the Christian religion and the symbols of other religions were added to the display, does it seem likely that any parties would object? Yes. Those who are offended by the association of any religion with their state would likely object to the inclusion of any religious symbols. And there are those who might object to the inclusion of symbols for religions other than their own—Christians who take offense at Wiccan symbols, Muslims who protest Stars of David, and so on. These objections are among the reasons that some would argue the Constitution's proscriptions on a mix of government and religion should be honored to the fullest.

If the cross in this case had been only six feet tall and had not had a long history of religious use, would the outcome of this case have been different? Why or why not? A main reason that the court in this case found an establishment clause violation was because the cross was so large that it physically dominated the entire memorial site. The government could not avoid the appearance of promoting Christianity because the religious elements of the memorial overshadowed the nonreligious elements. In addition, the cross had a long history of religious use by the community. The court's decision might well have been different if the cross had not dominated the landscape and the memorial, and had not had a history of religious use.

Can a religious display that is located on private property violate the establishment clause? Explain. Probably not. Individuals can erect religious displays on their own private property without constitutional implications. It makes sense that the only way the government can be accused of sponsoring or endorsing religion is for the display in question to appear on public property.

Should religious displays on public property be held to violate the establishment clause? It might be argued that if a religious symbol is only one part of a larger display that features secular symbols, such as reindeer and candy canes in a winter holiday display, the display of the religious symbol does not violate the establishment clause. The symbols' acceptability may depend on such factors as size, number, and how close the symbols are to each other.

REVIEWING—

CONSTITUTIONAL LAW

A state legislature enacted a statute that required any motorcycle operator or passenger on the state's highways to wear a protective helmet. Jim Alderman, a licensed motorcycle operator, sued the state to block enforcement of the law. Alderman asserted that the statute violated the equal protection clause because it placed requirements on motorcyclists that were not imposed on other motorists. Ask

your students to answer the following questions, using the information presented in the chapter.

1. Why does this statute raise equal protection issues instead of substantive due process concerns? When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2. What are the three levels of scrutiny that the courts use in determining whether a law violates the equal protection clause? The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the "rational basis" test (in matters of economic or social welfare).

3. Which standard, or test, would apply to this situation? Why? The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

4. Applying this standard, or test, is the helmet statute constitutional? Why or why not? The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

DEBATE THIS:

Legislation aimed at protecting people from themselves concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

EXAMPREP—

ISSUE SPOTTERS

1. Can a state, in the interest of energy conservation, ban all advertising by power utilities if conservation could be accomplished by less restrictive means? Why or why not? No. Even if commercial speech is not related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this case, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

2. Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of equal protection if the only reason for the tax is to protect the local firms from out-of-state competition? Explain. Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.