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# CHAPTER 2

## CONSTITUTIONAL LAW

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### 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 42)

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

If Bad Frog had sought to use the offensive 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.

### 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 Would it be a violation of equal protection for a state to impose a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies 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 (BLTS page 41)

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  
(BLTS page 51)**

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 (BLTS 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 Dormant commerce clause

(BLTS page 38)

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 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

### 2–9A 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.

#### 2–10A BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENTS

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 2

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# Constitutional Law



See Separate Lecture Outline System

### 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.

#### ADDITIONAL RESOURCES —



### VIDEO SUPPLEMENTS



The following video supplements relate to topics discussed in this chapter—

#### PowerPoint Slides

To highlight some of this chapter's key points, you might use the Lecture Review PowerPoint slides compiled for Chapter 2.

#### Business Law Digital Video Library

The Business Law Digital Video Library at [www.cengage.com/blaw/dvl](http://www.cengage.com/blaw/dvl) offers a variety of videos for group or individual review. These clips apply legal concepts to common experiences to ignite discussion and illustrate core concepts. Clips on topics covered in this chapter include the following.



- Drama of the Law

**Free Speech: Constitutional Issues**—The right to free speech is guaranteed in the Constitution. When an individual chooses to speak freely about a business, there may be legal consequences.

- Legal Conflicts in Business

**Privacy in Information Sharing**—Solicitation of potential customers, by phone or direct mail, is a common practice for businesses to generate interest in their products. When a customer list is obtained under questionable circumstances, however, the “common practice” may pose a problem.

- Ask the Instructor

**Constitutional Law: Monitoring Employees’ E-mail and Internet Usage**—The constitutional right to privacy protects us from government intrusion. But employers in the private sector are free to monitor their employees, subject only to specific state laws.

## 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.

## CASE SYNOPSIS—

## Case 2.1: Heart of Atlanta Motel v. United States

A motel owner, who refused to rent rooms to African Americans despite the Civil Rights Act of 1964, brought an action to have the Civil Rights Act of 1964 declared unconstitutional. The owner alleged that, in passing the act, Congress had exceeded its power to regulate commerce because his motel was not engaged in interstate commerce. The motel was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states). The district court sustained the constitutionality of the act and enjoined the owner from discriminating on the basis of race. The owner appealed. The case went to the United States Supreme Court.

The United States Supreme Court upheld the constitutionality of the Civil Rights Act of 1964. The Court noted that it was passed to correct “the deprivation of personal dignity” accompanying the denial of equal access to “public establishments.” Congressional testimony leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging. This discrimination impeded interstate travel, thus impeding interstate commerce. As for the owner’s argument that his motel was “of a purely local character,” the Court said, “[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.” Therefore, under the commerce clause, Congress has the power to regulate any local activity that has a harmful effect interstate commerce.

## Notes and Questions

Does the Civil Rights Act of 1964 actually regulate commerce or was it designed to end the practice of race (and other forms of) discrimination? In this case, the Supreme Court said, “[T]hat Congress was legislating against moral wrongs . . . rendered its enactments no less valid.”

Are there any businesses in today’s economy that are “purely local in character”? An individual who contracts to perform manual labor such as lawn mowing or timber cutting within a small geographic area might qualify, as long as the activity has no effect on interstate commerce. But in most circumstances it would be difficult if not impossible to do business “purely local in character” in today’s U.S. economy. Federal statutes that derive their authority from the commerce clause often include requirements or limits to exempt small or arguably local businesses.

Which constitutional clause empowers the federal government to regulate commercial activities among the 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.”

### 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.)

Which constitutional clause empowers the federal government to regulate commercial activities among the 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 Power 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—

**9**

## DOES STATE REGULATION OF INTERNET PRESCRIPTION

### TRANSACTIONS VIOLATE THE COMMERCE CLAUSE? **8 8**



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.<sup>a</sup> 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 undue burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.<sup>b</sup>

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.<sup>d</sup> In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.<sup>e</sup> 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 undue 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.

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 gives laws enacted by the federal government 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.

**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.

**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 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.

##### 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.”

## 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.

### 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 24). Consumers' privacy rights online are covered further in Chapter 33.

## 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—



**9**

CREATING

A

WEB

SITE

PRIVACY

POLICY

**8 8**



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 than 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. Would it be a violation of equal protection for a state to impose a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies 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.



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# *Chapter 2*

# Constitutional Law

## *Case 2.1*

379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258, 1 Empl. Prac. Dec. P 9712

**Supreme Court of the United States**

**HEART OF ATLANTA MOTEL, INC., Appellant,**

**v.**

**UNITED STATES et al.**

**No. 515.**

Argued Oct. 5, 1964.

Decided Dec. 14, 1964.

Mr. Justice CLARK delivered the opinion of the Court

This is a declaratory judgment action, and (1958 ed.) attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat. 241, 241. In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under s 206(a) of the Act and asked for a three-judge district court under s 206(b). A three-judge court, empaneled under s 206(b) as well as ed.) sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of Mr. Justice BLACK, We affirm the judgment.

See Appendix.

1. The Factual Background and Contentions of the Parties.

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it



maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under ; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a 'taking' within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations, beyond the reach of both federal and state law.

At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (ss 201(a), (b)(1) and (c)(1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from '(r) efusing to accept Negroes as guests in the motel by reason of their race or color' and from '(m)aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.'

## 2. The History of the Act.

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a a message to Congress to which he attached a proposed bill. Its stated purpose was

14 Stat 27.

Slave Kidnaping Act, 14 Stat. 50; Peonage Abolition Act of March 2, 1867, 14 Stat. 546; Act of May 31, 1870, 16 Stat. 140; Anti-Lynching Act of April 20, 1871, 17 Stat. 13.

18 Stat. 335.

71 Stat. 634.

74 Stat. 86.

'to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in \* \* \* public accommodations through the exercise by Congress of the powers conferred upon it \* \* \* to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.' H.R.Doc.No. 124, 88th Cong., 1st Sess., at 14.

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 and one in the House, H.R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

S. 1732 dealt solely with public accommodations. A second Senate bill, S. 1731, contained the entire administration proposal. The Senate Judiciary Committee conduct the hearings on S. 1731 while the Committee on Commerce considered S. 1732.

After extended hearings each of these bills was favorably reported to its respective house. H.R. 7152 on November 20, 1963, H.R.Rep.No.914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S.Rep.No.872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact these were eliminated from the bills as they were reported. The House passed its bill in January 1964 and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in

each house.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

### 3. Title II of the Act.

This Title is divided into seven sections beginning with s 201(a) which provides that:

'All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.'

There are listed in s 201(b) four classes of business establishments, each of which 'serves the public' and 'is a place of public accommodation' within the meaning of s 201(a) 'if its operations affect commerce, or if discrimination or segregation by it is supported by State action.' The covered establishments are:

'(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

'(2) any restaurant, cafeteria \* \* \* (not here involved);

'(3) any motion picture house \* \* \* (not here involved);

'(4) any establishment \* \* \* which is physically located within the premises of any establishment otherwise covered by this subsection, or \* \* \* within the premises of which is physically located any such covered establishment \* \* \* (not here involved).'

Section 201(c) defines the phrase 'affect commerce' as applied to the above establishments. It first declares that 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se. Restaurants, cafeterias, etc., in class two affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have 'moved in commerce.' Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., 'which move in commerce.' And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment 'the operations of which affect commerce.' Private clubs are excepted under certain conditions. See s 201(e). Section 201(d) declares that 'discrimination or segregation' is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, s 202 affirmatively declares that all persons 'shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.'

Finally, s 203 prohibits the withholding or denial, etc., of any right or privilege secured by s 201 and s 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are limited to civil actions for preventive relief. The Attorney General may bring suit where he has 'reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described \* \* \*.' s 206(a).

A person aggrieved may bring suit, in which the Attorney General may be permitted to intervene. Thirty days' written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. s 204(c). In States where such condition does not exist the court after a case is filed may refer it to the Community Relations Service which is established under Title X of the Act. s 204(d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the President with the advice and consent of the Senate and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

### 4. Application of Title II to Heart of Atlanta Motel.

It is admitted that the operation of the motel brings it within the provisions of s 201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on s 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' At the same time, however, it noted that such an objective has been and could be readily achieved 'by congressional action based on the commerce power of the Constitution.' S.Rep. No. 872, supra, at 16--17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is s 201(d) or s 202, having to do with state action, involved here and we do not pass upon either of those sections.

#### 5. The , and their Application.

In light of our ground for decision, it might be well at the outset to discuss the Civil Rights Cases, supra, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in 'inns, public conveyances on land or water, theaters, and other places of public amusement,' without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in , the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day. Finally, there is language in the Civil Rights Cases which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that 'no one will contend that the power to pass it was contained in the constitution before the adoption of the last three amendments (Thirteenth, Fourteenth, and Fifteenth),' the Court went on specifically to note that the Act was not 'conceived' in terms of the commerce power and expressly pointed out:

'Of course, these remarks (as to lack of congressional power) do not apply to those cases in which congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the states, as in the regulation of commerce with foreign nations, among the several states, and with the Indian tribes \* \* \*. In these cases congress has power to pass laws for regulating the subjects specified, in every detail, and the conduct and transactions of individuals in respect thereof.'

Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the Civil Rights Cases have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

#### 6. The Basis of Congressional Action.

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S.Rep. No. 872, supra; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H.R.Rep. No. 914, supra. This testimony

included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S.Rep. No. 872, supra, at 14--22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself 'dramatic testimony to the difficulties' Negroes encounter in travel. Senate Commerce Committee Hearings, supra, at 692--694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is 'no question that this discrimination in the North still exists to a large degree' and in the West and Midwest as well. Id., at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. Id., at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his 'belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.' . We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

#### 7. The Power of Congress Over Interstate Travel.

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in , in these words:

'The subject to be regulated is commerce; and \* \* \* to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities \* \* \* but it is something more: it is intercourse \* \* \* between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. (At 189--190.)

'To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.'

'It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse \* \* \*. No sort of trade can be carried on \* \* \* to which this power does not extend. (At 193--194.)

'The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled \* \* \*.

\* \* \* (I)t may very properly be restricted to that commerce which concerns more States than one. \* \* \* The genius and character of the whole government seem to be, that its action is to be applied to all the \* \* \* internal concerns (of the Nation) which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. (At 194-- 195.)

'We are now arrived at the inquiry--What is this power?

'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. \* \* \* If, as has always been understood, the sovereignty of Congress \* \* \* is plenary as to those objects (specified in the Constitution), the power over commerce \* \* \* is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. (At 196-- 197.)'

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the 'intercourse' of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the where Mr. Justice McLean stated: 'That the transportation of passengers is a part of commerce is not now an open question.' At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, said: 'Commerce among the states, we have said, consists of intercourse and traffic between their citizens, and includes the

transportation of persons and property.' And only four years later in 1917 in *Mr. Justice Day* held for the Court:

'The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.' At 491,

Nor does it make any difference whether the transportation is commercial in character. In *Mr. Justice Reed* observed as to the modern movement of persons among the States:

'The recent changes in transportation brought about by the coming of automobiles (do) not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. (It but) emphasizes the soundness of this Court's early conclusion in ' At 383, .

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, ; to criminal enterprises, ; to deceptive practices in the sale of products, ; to fraudulent security transactions, ; to misbranding of drugs, ; to wages and hours, ; to members of labor unions, ; to crop control, ; to discrimination against shippers, ; to the protection of small business from injurious price cutting, ; to resale price maintenance, , ; to professional football, ; and to racial discrimination by owners and managers of terminal restaurants, .

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, '(i)f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . See *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, supra. As Chief Justice Stone put it in *United States v. Darby*, supra:

'The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See ' .

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may--as it has--prohibit racial discrimination by motels serving travelers, however 'local' their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the Civil Rights Cases themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, 'by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.'

The following statutes indicate States which have enacted public accommodation laws:

to ; to ; Colo.Rev.Stat.Ann., ss 25--1--1 to 25--2--5 (1953); Supp.); Del.Code Ann., Tit. 6, c. 45 (1963); to Supp.); Ill.Ann.Stat. (Smith-Hurd ed.), c. 38, ss 13--1 to 13--4 (1964), c. 43, s 133 (1944); Ind.Ann.Stat. (Burns ed.), ss 10--901 to 10--914 (1956, and 1963 Supp.); Iowa Code Ann., ss 735.1 and 735.2 (1950); Supp.); Me.Rev.Stat.Ann., c. 137, s 50 (1954); ; and , and Supp.); Mich.Stat.Ann., ss 28.343 and 28.344 (1962); ; Mont.Rev.Codes Ann., s 64--211 (1962); and ; N.H.Rev.Stat.Ann., ss 354:1, 354:2, 354:4 and 354:5 (1955, and 1963 Supp.); to , ss 18:25--1 to 18:25--6 (1964 Supp.); to 49--8--7 (1963 Supp.); N.Y.Civil Rights Law (McKinney ed.), Art. 4, ss 40 and 41 (1948, and 1964 Supp.), Exec. Law, Art. 15, ss 290 to 301 (1951, and 1964 Supp.), Penal Law, Art. 46, ss 513 to 515 (1944); --30 (1963 Supp.); Ohio Rev.Code Ann. (Page's ed.), ss 2901.35 and 2901.36 (1954); , and ; Pa.Stat.Ann., Tit. 18, s 4654 (1963);



to ; S.Dak.Sess.Laws, c. 58 (1963); and 1452 (1958); to , and ; ; Wyo.Stat.Ann., ss 6--83.1 and 6--83.2 (1963 Supp.).

In 1963 the Governor of Kentucky issued an executive order requiring all governmental agencies involved in the supervision or licensing of businesses to take all lawful action necessary to prevent racial discrimination.

As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. . As a result the constitutionality of such state statutes stands unquestioned. 'The authority of the Federal government over interstate commerce does not differ,' it was held in , 'in extent or character from that retained by the states over intrastate commerce.' At 569--570, See also .

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others \* \* \* has never been a barrier' to such legislation. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See , and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia 'as broad as the police power of a state' which included the power to adopt a 'law prohibiting discriminations against Negroes by the owners and managers of restaurants in the . Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See ; ; .

We find no merit in the remainder of appellant's contentions, including that of 'involuntary servitude.' As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval the laws of 'all the States' prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way 'akin to African slavery.' .

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed--what means are to be employed--is within the sound and exclusive discretion of the Congress. It is subject only to one caveat--that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

## 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 Liqueur. Each label prominently features an artist's rendering of 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 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.<sup>FN1</sup> 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.<sup>FN2</sup> 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.<sup>FN3</sup> 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." <sup>FN4</sup>

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).<sup>FN5</sup>

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.*<sup>FN6</sup> *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.<sup>FN7</sup>

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.<sup>FN8</sup> *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.”).<sup>FN9</sup> *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.<sup>FN10</sup> *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.<sup>FN11</sup>

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 *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, the court found that the free exercise rights of Orthodox Jews were likely violated when Tenaflly 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*”).<sup>FN12</sup>

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.<sup>FN13</sup> 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.<sup>FN14</sup> 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.<sup>FN15</sup>

[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.”).<sup>FN16</sup>

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,<sup>FN17</sup> and he could not quantify the impact of steel wheels on the County's normal schedule of road repair or resurfacing.<sup>FN18</sup>

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](http://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 Judeo-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. .





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. <sup>FN1</sup>

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.<sup>FN2</sup> 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 its 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,<sup>FN3</sup> 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. <sup>FN4</sup> 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. Shelnett*, 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 [plaintiffs] 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: *Law, Diversity, and Business: Managerial Implications*

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.<sup>FN1</sup> 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.<sup>FN2</sup>

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.<sup>FN3</sup> 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).<sup>FN4</sup> 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.”<sup>FN5</sup> Doc. 728 (Permanent Injunction), *Perry v. Schwarzenegger*, No. 09–cv–02292 (N.D.Cal. Aug. 12, 2010).<sup>FN6</sup>

## 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.<sup>FN7</sup>

## 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.<sup>FN8</sup> 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)).<sup>FN9</sup> 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,<sup>FN10</sup> 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.<sup>FN11</sup>

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. <sup>FN12</sup>

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.<sup>FN13</sup>

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[y]ing persons by a single trait and then den[y]ing 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.<sup>FN14</sup>

[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.<sup>FN15</sup> 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.<sup>FN16</sup> 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.” <sup>FN17</sup> *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.<sup>FN18</sup> 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).<sup>FN19</sup> 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.<sup>FN20</sup>

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.<sup>FN21</sup>

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.<sup>FN22</sup> 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.

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[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).<sup>FN23</sup>

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.<sup>FN24</sup> 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).<sup>FN25</sup> 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.



[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 legitimization 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.<sup>FN26</sup> 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.**<sup>FN27</sup>

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