Business Law Today Comprehensive 12th edition Miller Solutions Manual

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CHAPTER 1

LAW AND LEGAL REASONING

ANSWERS TO LEARNING OBJECTIVES AT THE BEGINNING OF THE CHAPTER

1A. ***What are four primary sources of law in the United States?*** Primary sources of law are sources that establish the law. In the United States, these include the U.S. Constitution and the state constitutions, statutes passed by Congress and the state legislatures, regulations created by administrative agencies, and court decisions, or case law.

2A. ***What is a precedent? When might a court depart from precedent?*** Judges attempt to be consistent, and when possible, they base their decisions on the principles suggested by earlier cases. They seek to decide similar cases in a similar way and consider new cases with care, because they know that their conflicting decisions make new law. Each interpretation becomes part of the law on the subject and serves as a legal precedent—a decision that furnishes an example or authority for deciding subsequent cases involving similar legal principles or facts.

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

3A. ***What is the difference between remedies at law and remedies in equity?*** An award of compensation in either money or property, including land, is a remedy at law. Remedies in equity include the following:

1. A decree for specific performance—that is, an order to perform what was promised.

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2. An injunction, which is an order directing a party to do or refrain from doing a particular act.

3. A rescission, or cancellation, of a contract and a return of the parties to the positions that they held before the contract's formation.

As a rule, courts will grant an equitable remedy only when the remedy at law (money damages) is inadequate. Remedies in equity on the whole are more flexible than remedies at law.

4A. ***What are some important differences between civil law and criminal law?*** Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated. In a civil case, a private party may sue another private party (the government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for damage caused by a failure to comply with a duty.

Criminal law has to do with wrongs committed against society for which society demands redress. Local, state, or federal statutes proscribe criminal acts. Public officials, such as district attorneys, not victims or other private parties, prosecute criminal defendants on behalf of the state.

In a civil case, the object is to obtain remedies (such as damages) to compensate an injured party. In a criminal case, the object is to punish a wrongdoer to deter others from similar actions. Penalties for violations of criminal statutes include fines and imprisonment, and in some cases, death.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS—CRITICAL THINKING

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

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ANSWERS TO QUESTIONS IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

1A. ***Parties***
In this situation, the automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2A. ***Remedy***
The plaintiffs are seeking an injunction, which is an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3A. ***Source of law***
This case involves a law passed by the California legislature and a federal statute, thus the primary source of law is statutory law.

4A. ***Finding the law***
Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in both of these sources to find the relevant state and federal statutes.

ANSWER TO DEBATE THIS QUESTION IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

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

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was 100 years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and

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consumers, perhaps the courts should simply stick to statutory language when disputes arise.

ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

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

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

ANSWERS TO BUSINESS SCENARIOS AND CASE PROBLEMS AT THE END OF THE CHAPTER

1–1A. ***Binding v. persuasive authority***

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

1–2A. ***Sources of law***

1. The U.S. Constitution—The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced.

2. The federal statute—Under the U.S. Constitution, when there is a conflict between a federal law and a state law, the state law is rendered invalid.

3. The state statute—State statutes are enacted by state legislatures. Areas not covered by state statutory law are governed by state case law.

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4. The U.S. Constitution—State constitutions are supreme within their respective borders unless they conflict with the U.S. Constitution, which is the supreme law of the land.

1–3A. ***Remedies***

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

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

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

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

1–4A. ***Philosophy of law***

Crimes against humanity constituted, at the time of the Nuremberg trials, a new international crime, consisting of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious ground." In response to the defendants' assertion that they had only been following orders, the Nuremberg judges explained in part that these were familiar crimes within domestic jurisdictions and that thus the accused must have known, when they committed their acts, that they would be considered criminal.

In terms of a philosophy of law, it might be said that these criminals violated "natural law." The oldest and one of the most significant schools of jurisprudence is the natural law school. Those who adhere to the natural law school of thought believe that government and the legal system should reflect universal moral and ethical principles that are inherent in human nature. Because natural law is universal, it takes on a higher order than positive, or conventional, law. The natural law tradition presupposes that the legitimacy of conventional, or positive, law derives from natural law. Whenever it conflicts with natural law, conventional law loses its legitimacy. For example, a precept of natural law may be that murder is wrong, which is a value reflected by specific laws prohibiting murder. If a specific, written law *requires* murder, it conflicts with the natural law precept, in which case individuals should disobey the written law and obey the natural law.

1–5A. **SPOTLIGHT ON AOL—*Common law***

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

In this problem, the enforceability of a forum selection clause is at issue. There are two precedents mentioned in the facts that the court can apply The United States Supreme Court has held that a forum selection clause is unenforceable "if

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enforcement would contravene a strong public policy of the forum in which suit is brought." And California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

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

1–6A. Business CASE PROBLEM WITH SAMPLE ANSWER—*Reading citations*

The court's opinion in this case—*WorldwideTechServices, LLC v. Commissioner of Revenue,* 479 Mass. 20, 91 N.E.3d 650 (2018)—can be found in Volume 479 of the *Massachusetts Reports* on page 20, and in Volume 91 of West's *North Eastern Reporter*, Third Series, on page 650. The Supreme Judicial Court of Massachusetts issued the opinion in 2018.

1–7A. A QUESTION OF ETHICS—*The doctrine of precedent*

1. In this problem, White operated a travel agency. To obtain low fares for her clients, she submitted fake military identification cards to the airlines. She was charged with the crime of identity theft, which requires the "use" of another's identification. In a previous case, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. Miller's conviction for identity theft was overturned on the ground that he had not "used" the investors' identities—he had only *said* that they had done something when they had not. In a second case, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature. White's actions most closely resemble Medlock's forgery. White not only told the airlines that her clients were members of the military—she created false identification cards and sent them to the airlines.

In all of these cases, the defendants lied about their actions. Whether or not their conduct fell within the meaning of a word within a statute, or matched the actions of a perpetrator in another case, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful about their actions.

In the actual case on which this problem is based, the court concluded that White's actions were most similar to Medlock's. White was convicted of identity theft. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction.

2. No, in the two cases cited by the *White* court—and in the *White* case—there were no ethical differences in the actions of the parties.

Almost any definition of ethics, and any set of ethical standards, includes honesty as a component. In the *White* case, Sandra White lied to the airlines that her clients were members of the military, and created false identification cards to obtain cheaper fares. In the first case cited by the *White* court, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. In the

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second case cited by the *White* court, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature.

In all of these cases, the defendants lied. Whether or not their conduct fell within the meaning of a word within a statute, or matched the unlawful actions of each other, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful.

CRITICAL THINKING AND WRITING ASSIGNMENTS

1–8A. BUSINESS LAW WRITING

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

1–9A. TIME-LIMITED GROUP ASSIGNMENT—*Court opinions*

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

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

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

ANSWER TO CRITICAL THINKING QUESTION IN APPENDIX EXHIBIT 1A–3

EXHIBIT 1A–3—CRITICAL THINKING—LEGAL ENVIRONMENT

Did the court hold that Yeasin had a right to post his tweets without being disciplined by the university? Explain. No, the court did not decide whether Yeasin

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had a First Amendment right to post his tweets without being disciplined by the university. The question before the court was whether KU and Dr. Durham violated clearly established law when Yeasin was expelled for his tweets and his misconduct. The court held that Yeasin, the plaintiff and appellant, failed to show such a violation.

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." The United States Supreme Court and other federal courts, however, permit schools to circumscribe students' free speech rights in certain contexts. In the *Yeasin* case, in the court's view, these broad statements of legal principle do not qualify as clearly established law. The court further concluded that the cases cited by Yeasin to argue the university could not discipline him for his tweets did not apply to his situation because the facts were not similar.

Considering these principles and cases, the court iterated that "at the intersection of university speech and social media, First Amendment doctrine is unsettled." Yeasin could not establish that Dr. Durham violated clearly established law when she expelled him. And, the court concluded, in this case Dr. Durham and KU had a reasonable basis—Yeasin's conduct and his tweets—to expel him from the university. His presence on campus would disrupt A.W.'s education and interfere with her rights.

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Chapter 1

Law and Legal Reasoning

INTRODUCTION

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

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

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

CHAPTER OUTLINE

I. Business Activities and the Legal Environment

A. MANY DIFFERENT LAWS MAY AFFECT A SINGLE BUSINESS TRANSACTION

Various areas of the law can affect a business decision (such as whether to enter into a contract). A businessperson should know enough about the law to know when to ask for advice.

B. LINKING BUSINESS LAW TO THE SIX FUNCTIONAL FIELDS OF BUSINESS

The text introduces a feature that appears in selected chapters, which explains how legal concepts can be useful to managers and other businesspersons in any functional field of business—

- Corporate management
- Production and transportation

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- Marketing
- Research and development
- Accounting and finance
- Human resource management

II. Sources of American Law

A. CONSTITUTIONAL LAW

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

B. STATUTORY LAW

Laws enacted by legislative bodies at any level of government, such as the statutes passed by Congress or by state legislatures, make up the body of law generally referred to as statutory law. When a legislature passes a statute, that statute ultimately is included in the federal code of laws or the relevant state code of laws. Much of the work of courts is interpreting what lawmakers meant when a law was enacted and applying that law to a set of facts (a case).

1. Local Ordinances

Local legislative bodies enact ordinances—regulations passed by municipal or county governing units to deal with matters not covered by federal or state law.

2. Applicability of Statutes

A federal statute applies to all states. A state statute applies only within the state's borders.

3. Uniform Laws

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

4. The Uniform Commercial Code

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

ADDITIONAL BACKGROUND—

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

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

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

C. ADMINISTRATIVE LAW

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

1. Federal Agencies

Executive agencies within the cabinet departments of the executive branch are subject to the power of the president to appoint and remove their officers. The officers of independent agencies serve fixed terms and cannot be removed without just cause.

2. State and Local Agencies

These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

3. Agency Creation

Congress creates an agency through enabling legislation to perform certain functions with respect to specific subjects. The functions may include legislative powers (rulemaking), executive capabilities (investigation and enforcement), and judicial authority (adjudication).

4. Rulemaking

An agency's creation and changing of its rules is subject to the requirements of the Administrative Procedure Act of 1946.

a. Legislative Rules

Legislative rules implement federal laws and are legally binding. Creating a legislative rule typically involves—

- Public notice through the publication of a proposed rule in the *Federal Register.*
- Receipt and review of public comments.
- Drafting and publication of the final rule in the *Federal Register*.

b. Interpretive Rules

Interpretive rules declare policy—how an agency will interpret and apply its regulations. These informal guidelines are not legally binding.

5. Enforcement and Investigation

An agency can request an individual's or a business's records. An agency can conduct an on-site inspection, which may require a search warrant. The purpose is to uncover regulatory violations against which an agency may issue a formal complaint.

6. Adjudication

On a formal complaint, an agency's administrative law judge may conduct a trial-like hearing and render a decision, which may compel a fine or prohibit certain behavior. This may be appealed to the board or commission that governs the agency and ultimately to a federal court.

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D. CASE LAW AND COMMON LAW DOCTRINES

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

ADDITIONAL BACKGROUND—

Restatement (Second) of Contracts

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

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

Chapter 1
MEANING OF TERMS

* * * *

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

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

§ 1. Contract Defined

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

Comment:

* * * *

c. Set of promises. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of

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promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a "set," promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

III. The Common Law

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

A. Early English Courts

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

B. *Stare Decisis*

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

1. The Importance of Precedents in Judicial Decision Making

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

2. *Stare Decisis* and Legal Stability

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

ENHANCING YOUR LECTURE—

"IS AN 1875 CASE PRECEDENT STILL BINDING?

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

At issue on appeal was whether a U.S. Supreme Court case decided in 1875, *Totten v. United States*,[a] remained the controlling precedent in this area. In *Totten*, the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate Army during the Civil War. When the plaintiff sued the government for compensation for his services, the Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that "might compromise or embarrass our government" or cause other "serious detriment" to the public. In Korczak's case, the federal appellate court held that the *Totten* case precedent was still "good law,"

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and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, "*Totten*, despite its age, is the last pronouncement on this issue by the Supreme Court. . . . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed."[b]

THE BOTTOM LINE

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

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

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

4. When There Is No Precedent
When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature's passing a specific statute; society's values and custom; and data and principles from other disciplines.

5. *Stare Decisis* and Legal Reasoning
Through the use of legal reasoning, judges harmonize their decisions with those that have been made before, as the doctrine of *stare decisis* requires. The IRAC method of legal reasoning is an acronym for *Issue*, *Rule, Application*, and *Conclusion.*

C. EQUITABLE REMEDIES AND COURTS OF EQUITY

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

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

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

3. Equitable Maxims
These guide the application of equitable remedies.

D. SCHOOLS OF LEGAL THOUGHT

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

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

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

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

IV. Classifications of Law

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

A. Civil Law and Criminal Law

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

B. National and International Law

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

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

Teaching Suggestions

1. Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as "black letter law"—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented

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against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems ("spot the issues") when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision.

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

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

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

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

Cyberlaw Link

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

DISCUSSION QUESTIONS

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

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

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

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

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

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

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

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

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

ACTIVITY AND RESEARCH ASSIGNMENTS

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

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

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

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 7: In ***Brown v. Board of Education of Topeka,*** the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a non-segregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S. Constitution's Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Footnote 8: In ***Plessy v. Ferguson*,** the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution's Thirteenth and Fourteenth Amendments (the Civil War Amendments) "could not have been intended to abolish distinctions based on color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed "the race line from our governmental systems," and the Constitution was thus "color-blind."

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Appendix to Chapter 1

Finding and Analyzing the Law

INTRODUCTION

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

APPENDIX OUTLINE

I. Finding Statutory and Administrative Law

Publications collecting statutes and administrative regulations are discussed in the text.

II. Finding Case Law

A brief introduction to case reporting systems and legal citations is also included.

III. Reading and Understanding Case Law

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

ADDITIONAL BACKGROUND—

The *Federal Reporter*

Federal court decisions are published unofficially in a variety of publications. These reports are organized by court level and issued chronologically. Opinions from the United States Court of Appeals, for example, are reported in the *Federal Reporter*. Thomson Reuters publishes these decisions with headnotes condensing

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important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue,* as published with headnotes in the *Federal Reporter*.

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

No. 90-4430

Summary Calendar.
United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

1. Constitutional Law 92K84(2)

Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

2. Witnesses 410K227

Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

Betty Ann Ferguson, Metairie, La., pro se.

Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

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I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. * * *

Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought,* 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

[1] The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States,* 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (*per curiam*), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

* * * *

[2] The government offers only two justifications for Judge Korner's refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent.

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The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of "an oath" an element of the crime of perjury. *Accord Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson's proposal would not suffice as "an oath" for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)).

The parties' briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows:

MS. FERGUSON: I have religious objections to taking an oath.
THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm.
MS. FERGUSON: Sir, may I present this to you? I do not—
THE COURT: Just a minute. The Clerk will ask you.
THE CLERK: You are going to have to stand up and raise your right hand.
MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court.
THE COURT: I don't care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge.
MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus—
THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify.
MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify.

Ms. Ferguson contends that Judge Korner insisted that she use either the word "swear" or the word "affirm"; the government suggests instead that Judge Korner only required an affirmation which the government defines as "an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603]." Even Ms. Ferguson's proposed alternative would be an "affirmation" under the government's definition.

If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any "recognizable religious scruple," but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing.

We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion.

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ADDITIONAL BACKGROUND—

State Codes:

Pennsylvania Consolidated Statutes

State codes may have any of several names—Codes, General Statutes, Revisions, and so on—depending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101).

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
TITLE 13. COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE

§ 1101. Short title of title

This title shall be known and may be cited as the "Uniform Commercial Code."

1984 Main Volume Credit(s)

1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980.

California Commercial Code

The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101).

WEST'S ANNOTATED CALIFORNIA CODES
COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE

§ 1101. Short Title

This code shall be known and may be cited as Uniform Commercial Code.

1964 Main Volume Credit(s)

(Stats.1963, c. 819, § 1101.)

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ADDITIONAL BACKGROUND—

Corpus Juris Secundum

Because the body of American case law is huge, finding relevant precedents would be nearly impracticable were it not for case digests, legal encyclopedias, and similar publications that classify decisions by subject. Like case digests, legal encyclopedias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category "*Theaters & Shows"* (86 C.J.S. *Theaters & Shows* § 47).

f. Assumption of Risk

A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.

While it has been said that, strictly speaking, the doctrine of assumed risk is applicable only to the relationship of master and servant,[3] patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,[4] or to the devices located therein,[5] or to the form of amusement,[6] which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks

3. Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.
4. Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285.
62 C.J. p 877 note 62.

Darkened motion picture theater

Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.
N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.
Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.
5. Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.
Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.
Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.
Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.
Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.
Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.
62 C.J. p 877 note 63

Particular amusement devices

(1) "Dodge Em" cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].

(2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.

(3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].

6. Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.
N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.
N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.
Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.
62 C.J. p 877 note 63.

Other statements of rule

(1) A spectator at game assumes risk of such dangers incident to playing of game as are known to him or should be obvious to reasonable and prudent person in exercise of due care under circumstances.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.

(2) One participating in a race assumes the risk of injury from natural hazards necessarily incident to, or which inhere in, such a race, under maxim "volenti non fit injuria," which means that to which a person assents is not esteemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.

(3) Patrons of a place of amusement assume the risk of ordinary dangers normally attendant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

Liability of proprietor of sports arena

Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are conducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.

Risks of particular sports/entertainment

(1) Baseball.
Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.
Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.
La.—Jones v. Alexandria Baseball Ass'n, App., 50 So.2d 93.
Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.
N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.
Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.
Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.
Tex.—Williams v. Houston Baseball Ass'n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.
Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.
62 C.J. p 877 note 63 [a].

(2) Basketball.—Paine v. Young Men's Christian Ass'n, 13 A.2d 820, 91 N.H. 78.

(3) Golf.
Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.
N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

(4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.

(5) Hockey.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.

(6) Horse racing.
Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
N.Y.—Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.

(7) Ice skating.
Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.
N.D.—Filler v. Stenvick, 56 N.W.2d 798.
Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.

(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374.

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ADDITIONAL BACKGROUND—

United States Code

Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the ***United States Code***. In the *United States Code,* all federal laws of a public and permanent nature are compiled by subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the *United States Code* (15 U.S.C. § 1).

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

ADDITIONAL BACKGROUND—

Code of Federal Regulations

Created by Congress in 1937, the ***Code of Federal Regulations*** is a set of soft cover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the *Federal Register* and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the *United States Code* (discussed above). Each title is divided into chapters, parts, and sections. The *Code of Federal Regulations* is completely revised every year. The following is the text of Section 230.504 of Title 17 of the *Code of Federal Regulations* (17 C.F.R. § 230.504).

TITLE 17—COMMODITY AND SECURITIES EXCHANGE
Chapter II—Securities and Exchange Commission
Part 230—General Rules and Regulations, Securities Act of 1933
REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS
Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933

§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.

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(a) Exemption.

Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met—

(b)(1) General Conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made:

(b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or

(b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities.

(b)(2) Specific condition—

(b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state's securities laws.

Note 1.—The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504.

Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

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Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a).

(b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502.

[53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989]

AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37.

Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

ADDITIONAL BACKGROUND—

United States Code Annotated

The ***United States Code Annotated*** contains the complete text of laws enacted by Congress that are included in the *United States Code* (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the *United States Code Annotated* (15 U.S.C.A. § 1), including the historical notes and selected references.

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1975 Amendment. Section 4 of Pub. L. 94-145 provided that: "The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975]."

Short Title of 1984 Amendment. Pub. L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: "That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the 'Local Government Antitrust Act of 1984'."

Short Title of 1982 Amendment. Pub. L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that "This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the 'Foreign Trade Antitrust Improvements Act of 1982'."

Short Title of 1980 Amendment. Pub. L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: "That this Act [enacting section 26a of this title] may be cited as the 'Gasohol Competition Act of 1980'."

Short Title of 1975 Amendment. Section 1 of Pub. L. 94-145 provided: "That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the 'Consumer Goods Pricing Act of 1975'."

Short Title of 1974 Amendment. Section 1 of Pub. L. 93-528 provided: "That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the 'Antitrust Procedures and Penalties Act'."

Short Title. Pub. L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: "That this Act [sections 1 to 7 of this title] may be cited as the 'Sherman Act'."

Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2322.

For legislative history and purpose of Pub. L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub. L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569.

REFERENCES

CROSS REFERENCES

Antitrust laws inapplicable to labor organizations, see § 17 of this title.

Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation.

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Combinations in restraint of import trade, see § 8 of this title.

Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure.

Discrimination in price, services or facilities, see § 13 of this title.

Fishing industry, restraints of trade in, see § 522 of this title.

Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure.

Monopolies prohibited, see § 2 of this title.

Trusts in territories or District of Columbia prohibited, see § 3 of this title.

FEDERAL PRACTICE AND PROCEDURE

1990 Pocket Part Federal Practice and Procedure

Adding new parties, see Wright & Miller: Civil § 1504.

Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765.

Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167.

Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730.

Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031.

Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942.

Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564.

Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668.

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

Joiner of claims, see Wright & Miller: Civil § 1587.

* * * *

CODE OF FEDERAL REGULATIONS

1973 Main Volume *Code of Federal Regulations*

Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 *et seq.*

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Common sales agency, see 16 CFR 15.46.

Compliance with state milk marketing orders, see 16 CFR 15.154.

Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254.

LAW REVIEW COMMENTARIES

Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986).

Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24

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ANNOTATIONS

1. Common law

Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. *National Society of Professional Engineers v. U.S.,* U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637.

This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. *U.S. v. Socony-Vacuum Oil Co.,* Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. *Denison Mattress Factory v. Spring-Air Co.,* C.A.Tex.1962, 308 F.2d 403.

Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. *Rogers v. Douglas Tobacco Bd. of Trade, Inc.,* C.A.Ga.1957, 244 F.2d 471.

Federal statutory law on monopolies did not supplant common law but incorporated it. *Mans v. Sunray DX Oil Co.,* D.C.Okl.1971, 352 F.Supp. 1095.

Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. *U.S. v. Arnold, Schwinn & Co.,* D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567.

This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. *U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n,* D.C.Mo.1949, 82 F.Supp. 147.

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CASE SYNOPSIS—

A Sample Court Case: *Yeasin v. Durham*

Navid Yeasin and A.W. were students at the University of Kansas (KU). They dated for about nine months. When A.W. tried to end the relationship, Yeasin restrained her in his car, took her phone, and threatened to make the "campus environment so hostile that she would not attend any university in the state of Kansas." He repeatedly tweeted disparaging comments about her. Tammara Durham, the university's vice provost for student affairs, found that Yeasin's conduct and tweets violated the school's student code of conduct and sexual-harassment policy. She expelled him.

Yeasin filed a suit in a Kansas state court against Durham, and the university reinstated him. He then filed a suit in a federal district court against Durham, claiming that she had violated his First Amendment rights by expelling him for the content of his off-campus speech. The court dismissed the claim. Yeasin appealed to the U.S. Court of Appeals for the Tenth Circuit.

The U.S. Court of Appeals for the Tenth Circuit affirmed the lower court's dismissal of Yeasin's suit. Yeasin argued that three cases decided by the United States Supreme Court clearly established his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, his tweets. In response, the court here pointed out that those cases did not involve circumstances similar to Yeasin's situation. In those cases, no student had been charged with a crime against another student and then made sexually harassing comments affecting her ability to feel safe while attending classes. And, the court concluded, in this case Dr. Durham could reasonably believe, based on Yeasin's conduct and his tweets, that his presence at the university would disrupt A.W.'s education and interfere with her rights.

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BUSINESS ACTIVITIES AND THE LEGAL ENVIRONMENT

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society.
  - All rules have one feature in common: they establish rights, duties, and privileges that are consistent with the values and beliefs of a society or its ruling group.
- **Liability:** The state of being legally responsible (liable) for something, such as a debt or obligation.
- Business law is linked to six functional fields of business:

  (1) corporate management
  (2) production and transportation
  (3) marketing
  (4) research and development
  (5) accounting and finance
  (6) human resource management

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SOURCES OF AMERICAN LAW

- **Primary Source of Law:** A document that establishes the law on a particular issue. In the U.S., primary sources of law include:

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

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

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

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

  (4) *case law*, which is the body of judicial decisions that interpret and enforce any of the foregoing.

- **Secondary Source of Law:** A publication that summarizes or interprets the law, such as a legal encyclopedia, a legal treatise, or an article in a law review.

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CONSTITUTIONAL LAW

- **Constitutional Law:** The body of law derived from the U.S. Constitution (for example, the Tenth Amendment) and the constitutions of the various states.

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STATUTORY LAW

- **Statutory Law:** The body of law enacted by legislative bodies, as opposed to constitutional law, administrative law, or case law.
  - **Citation:** A reference to a publication in which a legal authority—such as a statute or a court decision—can be found.
- **Ordinance:** A regulation enacted by a city or county legislative body that becomes part of that state's statutory law.
- A federal statute applies to all states; a state statute applies only within the state's borders. No state statute or local ordinance may violate the U.S. Constitution or the relevant state constitution.
- To counteract problems arising from differences among state laws, the National Conference of Commissioners on Uniform State Laws draft **uniform laws** ("model statutes") that states can choose to adopt or reject.
  - The Uniform Commercial Code (UCC), one of the most important uniform acts, facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions.

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ADMINISTRATIVE LAW

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

- Rules issued by various administrative agencies now affect almost every aspect of a business's operations.

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CASE LAW AND COMMON LAW DOCTRINES

- **Case Law:** The rules of law announced in court decisions. Case law interprets statutes, regulations, and constitutional provisions, and governs all areas not covered by statutory or administrative law.

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THE COMMON LAW

- Due to colonial heritage, much American law is based on the English court system, which began under William the Conqueror in the 11th century.

- **Common Law:** The body of law developed from custom or judicial decisions in English and U.S. courts, not attributable to a legislature.

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

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STARE DECISIS

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

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

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

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

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STARE DECISIS AND LEGAL REASONING

- **Legal Reasoning:** The process of reasoning by which a judge harmonizes his or her opinion with the judicial decisions in previous cases, achieved by asking the following IRAC questions:
  - *Issue*: What are the key facts and issues?
  - *Rule*: What rule of law applies to the case?
  - *Application*: How does the rule of law apply to the particular facts and circumstances of this case?
  - *Conclusion*: What conclusion should be drawn?
- Some key terms associated with legal reasoning include:
  - **Plaintiff:** The party who filed a court action.
  - **Defendant:** The party against whom the plaintiff filed its action.
  - **Allege:** To state, recite, assert, or charge.
  - **Case on Point:** A previous case involving factual circumstances and issues that are similar to those in the case before the court.
- Personal factors shape the legal reasoning process, and there is often not "one right answer" to a legal question.

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EQUITABLE REMEDIES AND COURTS OF EQUITY

- From their origin in the late 11th century, common law courts were typically classified as either "courts of law" or "courts of equity."
  - *Courts of Law* were empowered only to award wronged parties money or other valuable compensation for their injuries or other losses.
  - *Courts of Equity,* by contrast, were empowered to award any manner of non-monetary relief, such as ordering a person to do something (a.k.a. "specific performance") or to cease doing something (a.k.a. "injunction").
- In most of the United States the courts of law and equity have *merged*. Nonetheless, American courts still recognize *legal remedies* and *equitable remedies*.
  - **Remedy:** The means given to a party to enforce a right or to compensate for another's violation of a right.
  - **Equitable Maxims:** General propositions or principles of law that have to do with fairness (equity).

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SCHOOLS OF LEGAL THOUGHT

- **Jurisprudence:** The science or philosophy of law, typically influenced by one of several schools of legal thought:

  - **Natural Law:** The oldest school of legal thought, based on the belief that the legal system should reflect universal ("higher") moral and ethical principles that are inherent in human nature.

  - **Legal Positivism:** A school of thought centered on the assumption that there is no law higher than the laws created by a national government.

  - **Historical School:** A school of legal thought that looks to the past to determine what the principles of contemporary law should be.

  - **Legal Realism:** A school of legal thought that holds that the law is only one factor to be considered when deciding cases, and that social and economic circumstances should also be taken into account.

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CLASSIFICATIONS OF LAW

- **Substantive vs. Procedural Law**
  - **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations.
  - **Procedural law** consists of all laws that establish and regulate the manner of enforcing or vindicating the rights established by substantive law.
    - An example of an emerging body of law is **Cyberlaw**, which refers to all laws governing electronic communications and transactions, particularly those conducted via the Internet

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CIVIL LAW AND CRIMINAL LAW

- **Civil law** defines and enforces the duties or obligations of persons to one another.
  - **Civil law systems**, such as those in Mexico and France, are based primarily on statutory, or "codified," law. Prior judicial decisions have no *binding* authority except as between the parties to the decision.
- **Criminal law**, by contrast, defines and enforces the obligations of persons to society as a whole.

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NATIONAL AND INTERNATIONAL LAW

- **National Law:** Laws governing rights and obligations within a particular country.

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

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C.A.9 (Cal.),2009.
Doe 1 v. AOL LLC
552 F.3d 1077, 09 Cal. Daily Op. Serv. 636, 2009 Daily Journal D.A.R. 756

United States Court of Appeals,
Ninth Circuit.

DOE 1, Doe 2, and Kasadore Ramkissoon, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,
v.
AOL LLC, Defendant-Appellee.

No. 07-15323.
Argued and Submitted Dec. 6, 2007.
Filed Jan. 16, 2009.

Background: Members of internet company brought an action, on behalf of themselves and a putative nationwide class of members, alleging violations of federal electronic privacy law and California law. The United States District Court for the Northern District of California, Saundra B. Armstrong, J., internet company's motion to dismiss for improper venue. Members appealed.

Holdings: The Court of Appeals held that:
(1) designation of "the courts of Virginia" in forum selection clause of internet company's member agreement meant the state courts of Virginia, and
(2) forum selection clause was unenforceable.

Reversed and remanded.

D.W. Nelson, Senior Circuit Judge, and Reinhardt, Circuit Judge, filed a concurring opinion.

Bea, Circuit Judge, filed a concurring opinion.

West Headnotes

[1] Federal Courts 170B 818

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk818 k. Dismissal. Most Cited Cases

An appellate court reviews a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion.

[2] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent

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170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, an appellate court reviews a district court's interpretation de novo.

[3] Federal Courts 170B 95

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk95 k. Objections, Waiver and Consent. Most Cited Cases

Federal Courts 170B 96

170B Federal Courts
170BII Venue
170BII(A) In General
170Bk96 k. Affidavits and Other Evidence. Most Cited Cases

A motion to enforce a forum selection clause is treated as a motion to dismiss for improper venue; pleadings need not be accepted as true, and facts outside the pleadings may be considered. Fed.Rules Civ.Proc.Rule 12(b)(3), 28 U.S.C.A.

[4] Contracts 95 206

95 Contracts
95II Construction and Operation
95II(C) Subject-Matter
95k206 k. Legal Remedies and Proceedings. Most Cited Cases

Designation of “the courts of Virginia” in forum selection clause of internet company's member agreement meant the state courts of Virginia, and did not include federal courts located in Virginia; courts “of” Virginia referred to courts proceeding from, with their origin in, Virginia.

[5] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to the interpretation of a forum selection clause.

[6] Contracts 95 147(2)

95 Contracts

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95II Construction and Operation
95II(A) General Rules of Construction
95k147 Intention of Parties
95k147(2) k. Language of Contract. Most Cited Cases

Contracts 95 152

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k151 Language of Instrument
95k152 k. In General. Most Cited Cases

Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself; whenever possible, the plain language of the contract should be considered first.

[7] Contracts 95 143.5

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143.5 k. Construction as a Whole. Most Cited Cases

Under federal law, a court reads a written contract as a whole, and interprets each part with reference to the whole.

[8] Contracts 95 143(2)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k143 Application to Contracts in General
95k143(2) k. Existence of Ambiguity. Most Cited Cases

That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation.

[9] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

Forum selection clause in internet company's member agreement designating Virginia state courts was unenforceable as to California resident plaintiffs bringing class action claims under California consumer law; class action relief for consumer claims was unavailable in Virginia state court, and California state court had previously found a

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California public policy against consumer class action waivers and waivers of consumer rights under California consumer law.

[10] Federal Courts 170B 412.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk412 Contracts; Sales
170Bk412.1 k. In General. Most Cited Cases

A federal court applies federal law to determine the enforceability of a forum selection clause.

[11] Contracts 95 141(1)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k141 Evidence
95k141(1) k. Presumptions and Burden of Proof. Most Cited Cases

A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a heavy burden to establish a ground upon which a court will conclude the clause is unenforceable.

[12] Contracts 95 127(4)

95 Contracts
95I Requisites and Validity
95I(F) Legality of Object and of Consideration
95k127 Ousting Jurisdiction or Limiting Powers of Court
95k127(4) k. Agreement as to Place of Bringing Suit; Forum Selection Clauses. Most Cited Cases

A forum selection clause is unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.

Joseph J. Tabacco, Jr., Christopher T. Heffelfinger, Berman DeValerio Pease Tabacco Burt & Pucillo, San Francisco, CA; C. Oliver Burt, III, Berman DeValerio Pease Tabacco Burt & Pucillo, West Palm Beach, FL; Richard R. Wiebe, Law Office of Richard R. Wiebe, San Francisco, CA; and James K. Green, James K. Green, P.A., West Palm Beach, FL, for the plaintiffs-appellants.

Patrick J. Carome, Samir C. Jain, D. Hien Tran, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for the defendant-appellee.

Appeal from the United States District Court for the Northern District of California; Saundra B. Armstrong, District Judge, Presiding. D.C. No. CV-06-05866-SBA.

Before: D.W. NELSON, STEPHEN REINHARDT, and CARLOS T. BEA, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge D.W. NELSON; Concurrence by Judge BEA.

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PER CURIAM:

On July 31, 2006, AOL LLC (formerly America Online, Inc.) made publicly available the internet search records of more than 650,000 of its members. The records contained personal and sometimes embarrassing information about the members. Plaintiffs, members of AOL, brought an action in federal district court in California on behalf of themselves and a putative nationwide class of AOL members, alleging violations of federal electronic privacy law, 18 U.S.C. § 2702(a). A subclass of AOL members who are California residents also alleged various violations of California law, including the California Consumers Legal Remedies Act, California Civil Code § 1770.

Under the AOL Member Agreement, all plaintiffs agreed to a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The Member Agreement also contains a choice of law clause designating Virginia law to govern disputes.

AOL moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), on the basis of the parties' forum selection clause. AOL contends the clause permits plaintiffs to refile their consumer class action in state *or* federal court in Virginia. Plaintiffs contend the forum selection clause limits them to Virginia state court, where a class action remedy would be unavailable to them; this, they contend, violates California public policy favoring consumer class actions and renders the forum selection clause unenforceable.

The district court granted AOL's motion and dismissed the action without prejudice to plaintiffs refiling it in a state or federal court in Virginia. We hold the district court erred when it interpreted the forum selection clause to permit actions in either state or federal court in Virginia; the plain language of the clause-courts "of" Virginia-demonstrates the parties chose Virginia state courts as the only fora for any disputes. We reverse and remand for further proceedings.

I.

A. The Complaint

Plaintiffs Kasadore Ramkissoon and Doe 1 and Doe 2,[FN1] members of AOL, filed a class action complaint in the District Court for the Northern District of California against AOL on behalf of themselves and a nationwide putative class of AOL members. The complaint alleges Ramkissoon currently is a resident of New York, while Doe 1 and Doe 2 currently are residents of California. The complaint does not state when Doe 1 and Doe 2 became residents of California, where they resided when they entered into the Member Agreement with AOL, or where they resided when they used AOL's services.

FN1. Plaintiffs and AOL filed a joint stipulation and proposed order to allow Doe 1 and Doe 2 to proceed anonymously, because of the sensitive nature of the personal information Doe 1 and Doe 2 claim AOL publicly disclosed about them. The district court granted the motion, which ruling is not at issue on appeal.

AOL provides its members with access to the Internet and a variety of related features, including search tools and security features. The complaint alleges that on July 31, 2006, "roughly twenty million AOL Internet search records were packaged into a database" and made publicly available for download for a period of approximately ten days. The data consisted of the records of which internet sites were visited by nearly 658,000 AOL members who conducted such visits from approximately March 2006 through May 2006. AOL does not contest this occurrence.

The complaint alleges the data contained the addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information of AOL members. Plaintiffs also allege the searches reveal members' "personal struggles with various highly personal issues, including sexuality, mental illness, recovery from alcoholism, and victimization from incest, physical abuse, domestic violence, adultery, and rape," by revealing their Internet searches for information on these issues. Although AOL admitted it made a "mistake" and took down the data, "mirror" websites appeared on the internet that reproduced the data. Some of these websites present the data in

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a searchable form and others "invite the public to openly criticize and pass judgment on AOL members based on their searches."

Plaintiffs' complaint alleges seven causes of action. Two of the causes of action-violation of the federal Electronic Communications Privacy Act, 18 U.S.C. § 2702(a),[FN2] and unjust enrichment under federal common law-are brought on behalf of all plaintiffs and the putative nationwide class.

FN2. 18 U.S.C. § 2702(a) prohibits an entity that provides an electronic communications service or remote computing service from knowingly divulging, except in certain circumstances, the contents of an electronic communication or a record or other information about a subscriber.

The other five causes of action are brought under California statutory and common law. Doe 1 and Doe 2 bring these claims on behalf of the putative sub-class of AOL members who are California residents. They allege AOL violated the following California statutes: (1) the California Consumers Legal Remedies Act (CLRA),[FN3] which prohibits unfair methods of competition and unfair or deceptive acts or practices resulting in the sale of goods or services; (2) the California Customer Records Act,[FN4] which requires businesses to destroy customers' records that are no longer to be maintained, and requires businesses to maintain security procedures to protect customers' personal information; (3) California False Advertising law; [FN5] and (4) California Unfair Competition law,[FN6] which prohibits unfair, unlawful, and fraudulent business practices. These California plaintiffs also allege AOL committed the tort of public disclosure of private facts under California common law.

FN3. Cal. Civ.Code § 1770.

FN4. Cal. Civ.Code § 1798.81.

FN5. Cal. Bus. & Prof.Code § 17500 *et seq.*

FN6. Cal. Bus. & Prof.Code § 17200 *et seq.*

B. The Forum Selection and Choice of Law Clause

AOL's headquarters are located in Dulles, Virginia. All members of AOL's online service, including all plaintiffs and putative class members, must agree to the AOL Member Agreement as a prerequisite to register for AOL service. Each member must click on a box that states the member has agreed to the terms of the Member Agreement before he can complete his registration.

The Member Agreement contains a choice of law clause that designates Virginia law, excluding its conflict-of-law rules. It also contains a forum selection clause that designates the "courts of Virginia" as the fora for disputes between AOL and its members. The choice of law and forum selection clause of the Member Agreement in effect during the time period relevant to the complaint-January 1, 2004 through September 22, 2006-states in its entirety:

> The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Member Agreement and your membership. You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of the AOL Services resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or AOL Services. The foregoing provision may not apply to you depending on the laws of your jurisdiction. This Agreement shall not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

C. District Court Order

Based on the forum selection clause, AOL moved to dismiss the action for improper venue under Federal Rule

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of Civil Procedure 12(b)(3) ("Rule 12(b)(3)"), or, alternatively, to transfer venue to the District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1406(a).[FN7] The district court granted AOL's Rule 12(b)(3) motion to dismiss and adopted AOL's proposed order in its entirety. The district court held the forum selection clause "expressly requires that this controversy be adjudicated in a court in Virginia" and that "[p]laintiffs agreed the courts of Virginia have 'exclusive jurisdiction' over any claims or disputes with AOL, and venue in the Northern District of California is improper." The order dismissed plaintiffs' complaint "without prejudice to the refiling of their claims in a state or federal court in Virginia."

FN7. 28 U.S.C. § 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

II.

[1][2] We review a district court's order enforcing a contractual forum selection clause and dismissing a case for improper venue for abuse of discretion. *Argueta v. Banco Mexicano, S.A.,* 87 F.3d 320, 323 (9th Cir.1996). Where the interpretation of contractual language in a forum selection clause does not turn on the credibility of extrinsic evidence but on an application of the principles of contract interpretation, we review the district court's interpretation *de novo*. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.,* 817 F.2d 75, 77 (9th Cir.1987).

[3] A motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule 12(b)(3); pleadings need not be accepted as true, and facts outside the pleadings may be considered. *Argueta,* 87 F.3d at 324.

III.

[4] As a threshold matter, the parties dispute the meaning of the forum selection clause, specifically the phrase "exclusive jurisdiction ... resides *in the courts of Virginia.*" AOL claims the phrase "courts of Virginia" refers to state and federal courts in Virginia, while plaintiffs claim it refers to Virginia state courts only. We agree with plaintiffs' interpretation.

[5] We apply federal law to the interpretation of the forum selection clause. *Manetti-Farrow, Inc. v. Gucci Am., Inc.,* 858 F.2d 509, 513 (9th Cir.1988). When we interpret a contract under federal law, we look for guidance "to general principles for interpreting contracts." *Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1210 (9th Cir.1999).

[6][7][8] "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first." *Id.* (internal citation omitted). We apply the "primary rule of interpretation ... that the common or normal meaning of language will be given to the words of a contract unless circumstances show that in a particular case a special meaning should be attached to it." *Hunt Wesson Foods, Inc.,* 817 F.2d at 77 (internal quotation marks and alteration omitted). We read a written contract as a whole, and interpret each part with reference to the whole. *Klamath Water Users Protective Ass'n,* 204 F.3d at 1210. That the parties dispute a contract's meaning does not render the contract ambiguous; a contract is ambiguous "if reasonable people could find its terms susceptible to more than one interpretation." *Id.*

The district court, without discussion, interpreted the forum selection clause to refer to state *and* federal courts of Virginia. We determine the meaning of the phrase "courts of Virginia" *de novo,* *Hunt Wesson Foods, Inc.,* 817 F.2d at 77, and look first to its plain meaning. We have not previously addressed the meaning of a forum selection clause designating the courts "of," rather than "in," a state. We hold that the forum selection clause at issue here-designating the courts of Virginia-means the state courts of Virginia only; it does not also refer to federal courts in Virginia.

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The clause's use of the preposition "of"-rather than "in"-is determinative. Black's Law Dictionary defines "of" as a term "denoting that from which anything proceeds; indicating origin, source, descent, and the like...." [FN8] *Black's Law Dictionary* 1080 (6th ed.1990). Thus, courts "of" Virginia refers to courts proceeding from, with their origin in, Virginia-i.e., the state courts of Virginia. Federal district courts, in contrast, proceed from, and find their origin in, the federal government.[FN9]

FN8. In contrast, the proposition "in" "express[es] relation of presence, existence, situation, inclusion, action, etc.; inclosed or surrounded by limits, as in a room; also meaning for, in and about, on, within etc. ...." *Black's Law Dictionary* 758 (6th ed.1990).

FN9. Reading the forum selection and choice of law clause as a whole further supports this reasonable interpretation. *See Klamath Water Users Protective Ass'n,* 204 F.3d at 1210. The clause contains both a forum selection provision by which the parties agreed to the "courts of Virginia" as the fora for their disputes, *and* a choice of law provision by which the parties agreed to apply the "laws of the Commonwealth of Virginia." The *state* courts of Virginia are the ultimate determiners of the "laws of the Commonwealth of Virginia"; a federal court in Virginia merely follows Virginia law.

Our interpretation finds support among opinions by our sister circuits who have addressed the meaning of forum selection clauses designating the "courts of" a state-all of whom have interpreted such clauses to refer to the state courts of the designated state, and not also to the federal courts in the designated state. *See Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc.,* 428 F.3d 921, 926 (10th Cir.2005) (interpreting "Courts of the State of Colorado" to mean Colorado state courts; the clause "refers to sovereignty rather than geography"); *Dixon v. TSE Int'l Inc.,* 330 F.3d 396, 398 (5th Cir.2003) (interpreting "Courts of Texas, U.S.A." to mean Texas state courts; "[f]ederal district courts may be *in* Texas, but they are not *of* Texas"); *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.,* 739 F.2d 4, 7 (1st Cir.1984) (interpreting forum selection and choice of law clause stating the contract shall be interpreted according to "the law, and in the courts, of the Commonwealth of Massachusetts" to designate the state courts of Massachusetts; "the word 'of' as it appears in the phrase in question must have been intended to restrict the meaning of both 'law' and 'courts' to those that trace their origin to the state.").

Accordingly, we hold the plain meaning of the forum selection clause's designation of the "courts of Virginia" is the state courts of Virginia; it does not include federal district courts located in Virginia.[FN10]

FN10. We find no ambiguity in the forum selection clause. Even if we did find the phrase ambiguous, we would interpret it in plaintiffs' favor. The parties produced no other evidence of their expressed intent. Accordingly, we would construe the contract against AOL as the drafter and adopt plaintiffs' reasonable interpretation of the phrase to mean the state courts of Virginia. *See InterPetrol Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.,* 719 F.2d 992, 998 (9th Cir.1984).

IV.

[9] Having interpreted the AOL forum selection clause to designate Virginia state courts, we turn to the enforceability of the clause.

Plaintiffs contend the forum selection clause so construed is unenforceable as a matter of federal law, because it violates California public policy against waivers of class action remedies and rights under the California Consumers Legal Remedies Act. AOL, however, steadfastly has asserted the forum selection clause permits plaintiffs to maintain an action in federal court in Virginia, where plaintiffs could pursue their consumer class action remedies. AOL has raised no contention that the forum selection clause, construed to mean only Virginia state courts, nevertheless is enforceable and does not violate California public policy.

[10][11][12] We apply federal law to determine the enforceability of the forum selection clause. *Manetti-*

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Farrow, 858 F.2d at 513. A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a "heavy burden" to establish a ground upon which we will conclude the clause is unenforceable. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Under the directives of the Supreme Court in *Bremen,* we will determine a forum selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute *or by judicial decision.*" *Id.* at 15, 92 S.Ct. 1907 (emphasis added).

California has declared "by judicial decision" the same AOL forum selection clause at issue here contravenes a strong public policy of California-as applied to California residents who brought claims under California statutory consumer law in California state court. In *America Online, Inc. v. Superior Court of Alameda County (Mendoza),* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699 (2001), Mendoza, a California resident and member of AOL, brought a putative class action on behalf of AOL members in California state court, alleging violations of California state law, to wit: the California Consumers Legal Remedies Act, the California Unfair Business Practices Act, and common law conversion and fraud. *Mendoza,* 108 Cal.Rptr.2d at 702.

AOL moved to dismiss Mendoza's action based on its forum selection clause designating the "courts of Virginia." *Id.* at 701-02. The state trial court denied AOL's motion, holding the forum selection clause was unenforceable because it "diminished" the rights of California consumers, and remedies available in Virginia were not "comparable" to those in California.[FN11] *Id.* at 703.

FN11. The trial court also denied AOL's motion on the basis the forum selection clause was unconscionable under California law because the clause was not negotiated, was contained in a standard form contract, and "was in a format that was not readily identifiable by Mendoza." *Id.* at 703. The Court of Appeal did not reach the trial court's unconscionability ruling, because it affirmed on other grounds. *Id.* at 713 n. 17.

AOL filed a petition for writ of mandamus. The California Court of Appeal denied the writ, thereby leaving in place the trial court's denial of AOL's motion to dismiss. Relevant to the instant appeal, the California Court of Appeal held the AOL forum selection clause was unenforceable, because the clause violated California public policy on two grounds: (1) enforcement of the forum selection clause violated California public policy that strongly favors consumer class actions, because consumer class actions are not available in Virginia state courts, *id.* at 712;[FN12] and (2) enforcement of the forum selection clause violates the anti-waiver provision of the Consumer Legal Remedies Act (CLRA), *id.* at 710, which states "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. The state Court of Appeal held the forum selection clause, together with the choice of law provision, effect a waiver of statutory remedies provided by the CLRA in violation of the anti-waiver provision, as well as California's "strong public policy" to "protect consumers against unfair and deceptive business practices." [FN13] *Mendoza,* 108 Cal.Rptr.2d at 710.

FN12. The California Court of Appeal expressed "the importance class action consumer litigation has come to play" in California and noted California courts have "extolled" "the right to seek class action relief in consumer cases." *Mendoza,* 108 Cal.Rptr.2d at 712. In Virginia state court, in contrast, class action relief for consumer claims is unavailable. *Id.*; Kent Sinclair & Leigh B. Middleditch, Jr., *Virginia Civil Procedure* § 3.11 (4th ed. 2003) (Virginia "does *not* have a statute or rule authorizing a 'class action' comparable to such proceedings under Rule 23 of the Federal Rules of Civil Procedure or the statutes and rules of most sister states.") (emphasis in original).

FN13. The California Court of Appeal noted its conclusion on this point was "reinforced by a statutory comparison of California and Virginia consumer protection laws, which reveals Virginia's law provides significantly less consumer protection to its citizens than California law provides for our own." *Id.* at 710. Specifically, the court noted Virginia consumer protection law has a shorter statute of limitations, has a lower required minimum recovery amount, and does not provide the enhanced remedies for disabled and senior citizens which the CLRA provides. *Id.*

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We agree with plaintiffs that *Mendoza* is the kind of declaration "by judicial decision" contemplated by *Bremen. Mendoza* found a California public policy against consumer class action waivers and waivers of consumer rights under the CLRA that California public policy applies to California residents bringing class action claims under California consumer law. As to such California resident plaintiffs, *Mendoza* holds California public policy is violated by forcing such plaintiffs to waive their rights to a class action and remedies under California consumer law.

Accordingly, the forum selection clause in the instant member agreement is unenforceable as to California resident plaintiffs bringing class action claims under California consumer law.[FN14]

FN14. The members of this panel, however, disagree as to whether the plaintiffs in the instant case have established the AOL forum selection clause is unenforceable as to them, or whether further development of the record is necessary on remand.

REVERSED and REMANDED.[FN15]

FN15. Plaintiffs' requests for judicial notice of an AOL memorandum of law in an unrelated litigation and an AOL press release stating AOL will move its headquarters to New York are denied as moot.

D.W. NELSON, Senior Circuit Judge, and REINHARDT, Circuit Judge, concurring:

Plaintiffs Doe 1 and 2 have alleged sufficient facts to invoke California's public policy. California courts have made clear that they will "refuse to defer to the selected forum if to do so would substantially diminish the rights of California *residents* in a way that violates our state's public policy." *Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 707 (2001) (emphasis added). In this case, plaintiffs, who allege that they were California *residents* at the time of the filing of the complaint, are bringing claims under California's consumer protection statutes, while the defendant seeks to enforce the same AOL contract by relying on the exact contract provisions that *Mendoza* refused to apply. Nothing in California law suggests that a plaintiff must have been a resident for any period of time before invoking California's public policy. To the contrary, being a resident at the time the complaint is filed is sufficient. *See id.* at 708, 709 (evaluating the effect of the forum selection clause on the rights of "California residents").

As the per curiam opinion recognizes, California's Consumer Legal Remedies Act states that "[a]ny waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void." Cal. Civ.Code § 1751. California public policy is offended by *any* clause that would require the plaintiffs, being California *residents,* to pursue their claims in a forum that does not permit class actions. This is true regardless of whether plaintiffs' rights are waived directly by a forum selection clause or indirectly, as our colleague proposes, through conflicts of law analysis. As *Mendoza* made clear, "Enforcement of the contractual forum selection *and choice of law clauses* would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited under California law." *Mendoza,* 108 Cal.Rptr.2d at 702 (emphasis added). As a result, no further pleadings are necessary. Any purported waiver of the rights of a California consumer is unenforceable.

Our colleague has created a pleading requirement premised on a supposed distinction between California "consumers" and California "residents." However, *Mendoza* treats California consumers and California residents as interchangeable, making it clear that, at least for the purposes of the California Consumers Legal Remedies Act, no such distinction exists under California law. This is not surprising given that it is difficult, if not impossible, to reside somewhere without also consuming there. Every California resident is a California consumer. Moreover, the California courts have never applied a pleading requirement such as that proposed by our colleague. If California wishes to adopt such a requirement, its courts are free to do so. However, as a federal court sitting in diversity jurisdiction, we apply, but do not create, state law. *See Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Thus, we may not do so here.

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We would add that we do not share our colleague's fear that there will be a rush by out-of-staters to establish California residency in order to file consumer class actions-that we face a new "Gold Rush." No such rush has occurred in the past despite the state's policy designed to protect California consumers' right to file class actions in cases of fraud or "unfair and deceptive business practices." *Mendoza,* 108 Cal.Rptr.2d at 710.[FN1] The chain of horrors tactic is not a credible one as urged in this case. There are far better reasons to move to the Golden State than are conjured up here by our imaginative and creative colleague.

FN1. Judge Bea's reliance on the example of Seymour Lazar is entirely out of place. Mr. Lazar was a Californian from childhood. *See* Rhonda L. Rundle, "Legal Setback: A Career in Courts Leads to Trouble For Seymour Lazar," Wall St. J., Jan. 19, 2006, at A1.

BEA, Circuit Judge, concurring:

I concur in the court's judgment reversing the district court's dismissal order and remanding for further proceedings. However, I would remand to allow the plaintiffs an opportunity to plead and prove facts to establish California law and public policy apply to their action and that, therefore, California public policy is violated by enforcement of the AOL contractual forum selection clause.

California has a public policy against the waiver of the class action procedural mechanism by California consumers, as well as the waiver of consumer rights under the California Consumer Legal Remedies Act (CLRA). But that public policy applies to *California consumers* bringing class action claims under *California consumer law.* It is not a foregone conclusion that the AOL forum selection clause (or, for that matter, the choice of law clause) is unenforceable as to plaintiffs. For the forum selection and the choice of law clauses to be unenforceable, plaintiffs must establish they are protected by California law and public policy.

As the California Supreme Court has explained, a consumer class action waiver violates California public policy if it is unconscionable because it operates as an exculpatory clause, exempting a defendant from liability-to the extent the obligation at issue is governed by California law. *See Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100, 1109 (2005) ("Such one-sided, exculpatory contracts in a contract of adhesion, *at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law,* are generally unconscionable." (emphasis added)). Where, however, liability is not controlled by California law-for example because a valid choice of law provision or conflict of laws principles dictate the application of the laws of another state or country-California's public policy against consumer class action waivers is not implicated. *See id.*

Moreover, enforcement of the AOL forum selection and choice of law clause violates the CLRA statutory anti-waiver provision, California Civil Code § 1751, only if plaintiffs are California consumers who otherwise would be protected by California law. *See* Cal. Civ.Code § 1751 ("Any waiver by a *consumer* of the provisions of this title is contrary to public policy and shall be unenforceable and void."). If plaintiffs have no contacts with California and are not covered by the CLRA, they have no protection under the California law "which would otherwise govern"; hence, they have nothing to waive. *See Am. Online Inc. v. Mendoza,* 90 Cal.App.4th 1, 108 Cal.Rptr.2d 699, 706, 708-09 (1st Dist.2001).

Based on the allegations in plaintiffs' complaint, however, it is not clear whether they are California consumers protected by California law.[FN1] Plaintiffs' complaint, as it currently stands, is devoid of factual allegations that would support a conclusion that California law would apply, notwithstanding the Virginia choice of law provision. Plaintiffs' complaint alleges Doe 1 and Doe 2 "currently"-as of the time they filed their complaint-are residents of California. It further alleges the "California subclass" of plaintiffs is comprised of "AOL members in the State of California." The complaint is silent as to the place of the contracting, the place where the contract was negotiated, the place where the contract was performed, the location of the subject matter of the contract, or the residency of the

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AOL members at the time of their injuries. *Cf.* *Klussman v. Cross Country Bank,* 134 Cal.App.4th 1283, 36 Cal.Rptr.3d 728, 740-41 (1st. Dist.2005) (noting that California had a materially greater interest than Delaware in the application of its own law where the consumer contracts were formed in California, the allegedly illegal conduct took place at the plaintiffs' homes in California, and the plaintiffs were residents of California at the time of injury). The sole relevant allegation is that, as of the time of filing the complaint, Doe 1 and Doe 2 were residents of California. That alone is simply insufficient to establish California law would govern plaintiffs' action. Even in the absence of a choice of law or forum selection clause, residency is but one factor to be considered in determining whether California law applies. "California, despite its interest in securing recovery for its residents, will not apply its law to conduct in other jurisdictions resulting in injury in those jurisdictions." *McGhee v. Arabian Am. Oil Co.,* 871 F.2d 1412, 1425 (9th Cir.1989).

FN1. To determine whether California or Virginia law would apply, we would apply federal conflict of law rules, as set forth in the Restatement (Second) of Conflicts of Laws. *See* *Huynh v. Chase Manhattan Bank,* 465 F.3d 992, 997 (9th Cir.2006). Under the Restatement, the parties' chosen law of Virginia will apply unless either (a) Virginia has no substantial relationship to the parties or transaction and there is no other reasonable basis for the parties' choice of law, or (b) application of Virginia law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of [Restatement (Second) of Conflict of Laws] § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Restatement (Second) of Conflict of Laws § 187 (1971). Plaintiffs do not claim Virginia has no substantial relation to the transaction; after all, Virginia is where AOL has its principal place of business. *See* *Discover Bank v. Superior Court,* 134 Cal.App.4th 886, 36 Cal.Rptr.3d 456, 458-59 (2005) (holding Delaware had a substantial relation to transaction where defendant Discover Bank was domiciled in that state).

To determine whether California "has a materially greater interest" than Virginia and would be the state of the applicable law in the absence of an effective choice of law by the parties, § 188 directs us to take into account the following contacts to determine the applicable law: (a) the place of contracting; (b) the place of negotiation of the contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties. Restatement (Second) of Conflict of Laws § 188 (1971). Here, plaintiffs' voluminous complaint is curiously silent as to any and all of the determinative contacts mentioned in the Restatement.

There is no "declar[ation] by statute or by judicial decision," *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 17, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), that California public policy against consumer rights waivers could possibly be offended by enforcing a contractual class action waiver against a party whose sole connection to California is residency at the time he filed a consumer class action in a California court.[FN2] My colleagues' suggestion otherwise would permit a citizen of another state to move to California for the sole purpose of serving as a class representative and clothing himself with the protections of consumer-friendly California public policy. This would magnetize California courts to pull in out-of-state contracts, actions or omissions. I see nothing in California consumer-protection statutes or cases that would invite such a new Gold Rush.

FN2. The majority cites *Mendoza* for the proposition that mere residency at the time of filing a complaint is sufficient to invoke California public policy. *Mendoza* neither said nor held any such thing. In *Mendoza,* there was no dispute whether the plaintiffs were California *consumers entitled to invoke the protection of California consumer law,* not merely California residents. *See* *Mendoza,* 108 Cal.Rptr.2d at 706, 707, 708 (discussing "California consumers" and "this state's consumers"). What *Mendoza* did was use the phrase "California residents" twice. *See* *id.* at 708, 709. And in each case, the court explained California courts would not enforce contract provisions that would diminish the rights of California residents in a way that would violate California public policy. *Id.* at 708, 709. These statements assume, but do not put, analyze, nor determine, the ultimate question: whether the forum selection and choice of law clauses violate California public policy.

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> The majority's logical syllogism-all California residents are California consumers-says nothing about whether the plaintiffs are California consumers of AOL products entitled to invoke the protection of California public policy in the instant litigation.

I am admittedly not as sanguine as my colleagues as to the non-litigation attractions which bring class action plaintiffs to the Golden State. They mention, but do not describe, "far better reasons" for class action representative plaintiffs moving to California than simply to become class action plaintiffs. I am reminded of Mr. Lazar, of Palm Springs, California, recipient of Mel Weiss's kickbacks to become a class action representative plaintiff in several cases.[FN3] With thanks to my colleagues for their encomium, it doesn't really require one to be "imaginative and creative" to suspect the class representatives may not have become California residents for reasons other than class action litigation status and are not really California consumers entitled to California consumer protection.

> FN3. *See* The Wall Street Journal Law Blog, http:// blogs. wsj. com/ law/? s= seymour+ lazar (last visited August 20, 2008).

My concurrence merely requires the plaintiff class representatives plead and prove they really are California *consumers* by stating facts which make California substantive law applicable to them, pursuant to the well-known rules of federal choice of law, set forth in the Restatement. This point seems to be brushed away by the majority as an unnecessary technicality by a misreading of *Mendoza.*

Accordingly, I would remand for plaintiffs to be permitted to file an amended complaint to allege facts-if they can so allege-that would demonstrate contacts with California sufficient to establish their causes of action are controlled by California law.

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Chapter 2

Constitutional Law

Case 2.1

379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258
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 mainains 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

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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.

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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

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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 discriminaton 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 ot 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

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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 porperty.' 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 parctices 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

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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,

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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

878 F.3d 1184
United States Court of Appeals, Ninth Circuit

ANIMAL LEGAL DEFENSE FUND; People for the Ethical Treatment of Animals Inc.; American Civil Liberties Union of Idaho; Center for Food Safety; Farm Sanctuary; River's Wish Animal Sanctuary; Western Watersheds Project; Sandpoint Vegetarians; Idaho Concerned Area Residents for the Environment; Idaho Hispanic Caucus Institute for Research and Education; Counterpunch; Farm Forward; Will Potter; James McWilliams; Monte Hickman; Blair Koch; Daniel Hauff, Plaintiffs–Appellees,
v.
Lawrence G. WASDEN, in His Official Capacity as Attorney General of Idaho, Defendant–Appellant.

No. 15-35960
Argued and Submitted May 12, 2017
Seattle, Washington
Filed January 4, 2018

OPINION

McKEOWN, Circuit Judge:

*1189 Investigative journalism has long been a fixture in the American press, particularly with regard to food safety.[1] In the early 1900s, Upton Sinclair highlighted conditions in the meat-packing industry in *The Jungle*, a novel based on his time working incognito in a packing plant.[2] This case also originates in the agricultural sector—a secretly-filmed exposé of the operation of an Idaho dairy farm. By all accounts, the video was disturbing: dairy workers were shown dragging a cow across the ground by a chain attached to her neck; twisting cows' tails to inflict excruciating pain; and repeatedly beating, kicking, and jumping on cows to force them to move.[3]

After the film went live on the Internet, both the court of public opinion and the Idaho legislature responded, with the latter eventually enacting the Interference with Agricultural Production law. Idaho Code § 18–7042. That legislation—targeted at undercover investigation of agricultural operations—broadly criminalizes making misrepresentations to access an agricultural production facility as well as making audio and video recordings of the facility without the owner's consent. Statutes of this genre—dubbed by some as Ag–Gag laws—have been passed in several western states.[4]

*1190 This appeal highlights the tension between journalists' claimed First Amendment right to engage in undercover investigations and the state's effort to protect privacy and property rights in the agricultural industry. Idaho challenges the district court's determination that four subsections of the statute—§ 18–7042(1)(a)–(d)—are unconstitutional on First Amendment and

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Equal Protection grounds. The Animal League Defense Fund and various other animal rights organizations (collectively "ALDF") urge us to uphold the district court's injunction against enforcement of the statute, arguing that the law criminalizes whistleblower activity and undercover investigative reporting—a form of speech that has brought about important and widespread change to the food industry, an arena at the forefront of public interest.

Our analysis is framed by the Supreme Court's decision in *United States v. Alvarez*, which addressed the First Amendment and false speech. 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012). We conclude that Idaho's criminalization of misrepresentations to enter a production facility, § 18–7042(1)(a), and ban on audio and video recordings of a production facility's operations, § 18–7042(1)(d), cover protected speech under the First Amendment and cannot survive constitutional scrutiny. In contrast, in accord with *Alvarez*, Idaho's criminalization of misrepresentations to obtain records and secure employment are not protected speech under the First Amendment and do not violate the Equal Protection Clause. § 18–7042(1)(b)–(c). Thus, we affirm in part and reverse in part the district court's entry of summary judgment in favor of ALDF and vacate in part its permanent injunction against enforcement of the statute.

We are sensitive to journalists' constitutional right to investigate and publish exposés on the agricultural industry. Matters related to food safety and animal cruelty are of significant public importance. However, the First Amendment right to gather news within legal bounds does not exempt journalists from laws of general applicability. For this reason, we uphold the provisions that fall within constitutional parameters, but strike down those limitations that impinge on protected speech.

Background

The Investigation

In 2012, an animal rights activist went undercover to get a job at an Idaho dairy farm and then secretly filmed ongoing animal abuse there. Mercy for Animals, an animal rights group, publicly released portions of the video, drawing national attention. The dairy farm owner responded to the video by firing the abusive employees who were caught on camera, instituting operational protocols, and conducting an animal welfare audit at the farm. Local law enforcement authorities launched an investigation that culminated in the conviction of one of the employees for animal cruelty. After the video's release, the dairy farm owner and his family received multiple threats.

Idaho's Interference with Agricultural Production Statute

In February 2014, Idaho enacted a law criminalizing "interference with agricultural production" to protect Idaho farmers. *See* Idaho Code § 18–7042. Relevant here, a person commits the crime of interference with agricultural production if the person knowingly:

*1191 (a) Is not employed by an agricultural production facility and enters an agricultural facility by force, threat, misrepresentation or trespass;

(b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;

(c) Obtains employment with an agricultural facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers; [or]

(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations[.][5]

Idaho Code § 18–7042(1)(a)–(d).

For purposes of this statute, the term "agricultural production" broadly covers "activities associated with the production of agricultural products for food, fiber, fuel and other lawful uses," and other activities such as "[p]reparing land for agricultural production" and "[h]andling or applying pesticides ...."[6] *Id.* § 18–7042(2)(a). The term "agricultural production facility" is broad and covers "any structure or land, whether privately or publicly owned, leased or operated, that is being used for agricultural production." *Id.* § 18–7042(2)(b).

Interference with agricultural production is a misdemeanor punishable by up to one year in prison or a fine not in excess of $5,000, or both. *Id.* § 18–7042(3). A person convicted of this crime must pay restitution to the victim in an amount of twice the damage resulting from violation of the statute. *Id.* § 18–7042(4). This damages payment includes a victim's "economic loss[es]." *Id.* § 19–5304.

The legislative history reveals a complex series of motivations behind the statute. The bill was drafted by the Idaho Dairymen's Association, a trade organization representing Idaho's dairy industry. When the Association's lawyer addressed legislators, he stated that one goal of the bill was "to protect Idaho farmers from wrongful interference.... Idaho farmers live and work spread out across the land where they're uniquely vulnerable to interference by wrongful conduct." Another goal was to shield the agricultural industry from undercover investigators who expose the industry to the "court of public opinion," *1192 which destroys farmers' reputations, results in death threats, and causes loss of customers.

At the time of the passage of this legislation, Idaho already had a law relating to interference with agricultural research—which has not been challenged—prohibiting knowingly damaging or obtaining property at an agricultural research facility with intent to hinder

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agricultural research; obtaining access to an agricultural research facility by misrepresentation with the intent to perform acts that would hinder agricultural research; entering an agricultural research facility with the intent to damage, alter, duplicate or obtain unauthorized possession of records or property related to the agricultural research; obtaining control over records or property of an agricultural research facility with intent to destroy such property without authorization of the facility; and releasing, stealing, or causing death or injury to an animal at an agricultural research facility. Idaho Code § 18–7040(1). The Idaho Dairymen's Association used this interference with agricultural research law as the framework for § 18–7041.

Legislators discussed the bill as protecting against two types of perceived harm to agricultural producers. First, lawmakers expressed concern about physical and operational damage caused by animal rights activists who gain access to agricultural production facilities. For example, some legislators discussed concerns about farm security and privacy. Others voiced concerns about the intentional destruction of crops, breeding records, and farm structures.

Lawmakers also discussed damage caused by investigative reporting: "One of the things that bothers me a lot about the undercover investigation [at the dairy], and the fact that there's videos, well, we're being tried and persecuted and prosecuted in the press." Other legislators used similar language demonstrating hostility toward the release of these videos, and one supporter of the legislation dubbed animal rights groups as "terrorists" who "use media and sensationalism to attempt to steal the integrity of the producer and their reputation." One legislator stated that the dairy industry's reason behind the legislation was "[t]hey could not allow fellow members of the industry to be persecuted in the court of public opinion." Another described these videos as used to "publicly crucify a company" and "as a blackmail tool." Finally, one legislator indicated that if the video had not been published, she did not "think this bill would ever have surfaced."

Procedural Background

In March 2014, ALDF filed suit against Lawrence G. Wasden as Attorney General of Idaho.[7] The complaint alleges that the purpose and effect of the statute "are to stifle political debate about modern agriculture by (1) criminalizing all employment-based undercover investigations; and (2) criminalizing investigative journalism, whistleblowing by employees, or other expository efforts that entail images or sounds." ALDF asserts violations of the First and Fourteenth Amendments. Although ALDF claimed preemption under the False Claims Act, Food Safety Modernization Act, and Clean Water Act, ALDF did not address those issues on appeal.

The district court granted ALDF's motion for summary judgment on its First Amendment and Equal Protection claims. The district court concluded that the prohibitions on misrepresentations in *1193 § 18–7042(1)(a)–(c) (the "Misrepresentation Clauses") criminalize speech protected by the First Amendment because Idaho could not "show the lies it seeks to prohibit cause any legally cognizable harm." The court explained that the regulation on audio and video recordings under § 18–7042(1)(d) (the "Recordings Clause") covers speech protected by the First Amendment and discriminates based on content because it criminalizes only "recordings of the conduct of an agricultural production facility's operations." The district court further reasoned that subsections (c) (misrepresentation to gain employment) and (d) (the Recordings Clause) discriminate on the basis of viewpoint because they "burden speech critical of the animal-agriculture industry." Applying strict scrutiny to all challenged provisions, the district court resolved that even if the state's interests in privacy and property were compelling, the restrictions were neither narrowly tailored nor the least restrictive means available to protect those interests.

The district court also determined that all four challenged subsections violate the Fourteenth Amendment's Equal Protection Clause and fail rational basis review. The subsections fail on their face because they classify between whistleblowers in the agricultural industry and whistleblowers in other industries. The subsections also fail through their purpose because they were "animated by an improper animus toward animal welfare groups and other undercover investigators in the agricultural industry" and "further[ ] no other legitimate or rational purpose." The court noted that there was "abundant evidence that the law was enacted with the discriminatory purpose of silencing animal rights activists who conduct undercover investigations in the agricultural industry."

The district court deemed moot ALDF's remaining claims and permanently enjoined enforcement of the challenged subsections. Idaho appeals the district court's grant of summary judgment, which we review de novo. *Roberts v. Continental Ins. Co.*, 770 F.2d 853, 855 (9th Cir. 1985).

Analysis

I. The Misrepresentation Clauses: Idaho Code § 18–7042(1)(a)–(c)

Subsections (a), (b) and (c) criminalize misrepresentations used to gain entry to agricultural production facilities, obtain records, and, under certain circumstances, secure employment. Relevant here, a person commits the crime of interference with agricultural production if the person knowingly:

(a) Is not employed by an agricultural production facility and enters an agricultural facility by force, threat, *misrepresentation* or trespass;

(b) Obtains records of an agricultural production facility by force, threat, *misrepresentation* or trespass; [or]

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(c) Obtains employment with an agricultural facility by force, threat, or *misrepresentation* with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers[.]
Idaho Code § 18–7042(1)(a)–(c) (emphasis added).
Idaho argues that the "misrepresentation" component of these provisions regulates conduct induced by false statements of fact. ALDF counters that the subsections regulate pure speech, effectively prohibiting investigative reporters from accessing agricultural production facilities and therefore blocking reporters' access to material for journalistic exposés.
The First Amendment, applied to states through the Fourteenth Amendment, prohibits laws "abridging the freedom of speech." U.S. Const., amend I. Our first *1194 task is to determine whether the misrepresentations prohibited in the Idaho statute constitute speech protected by the First Amendment. *See Cornelius v. NAACP Legal Def. Fund & Educ. Fund, Inc.*, 473 U.S. 788, 797, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). If the government's actions do not implicate speech protected by the First Amendment, we "need go no further." *Id.*
In *Alvarez*, the Supreme Court examined the Stolen Valor Act, 18 U.S.C. § 704 ("the Act"), a statute criminalizing false claims that the speaker had received the Congressional Medal of Honor. 567 U.S. 709, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012). Justice Kennedy's plurality opinion (joined by the Chief Justice and Justices Ginsburg and Sotomayor), as well as Justice Breyer's concurring opinion (joined by Justice Kagan), concluded that the Act's flat prohibition of such lies constituted an impermissible restriction on speech protected by the First Amendment. *Id.* at 729–30, 132 S.Ct. 2537 (plurality opinion); *id.* at 739, 132 S.Ct. 2537 (Breyer, J., concurring). In deciding that lying about receiving the Medal of Honor, without more, is protected speech, the plurality and concurrence "reject[ed] the notion that false speech should be in a general category that is presumptively unprotected." *Id.* at 722, 132 S.Ct. 2537 (plurality opinion); *accord id.* at 731–32, 132 S.Ct. 2537 (Breyer, J., concurring).
1However, neither the plurality nor the concurrence in *Alvarez* held that false statements are *always* protected under the First Amendment. Instead, as the plurality outlines, false speech may be criminalized if made "for the purpose of material gain" or "material advantage," or if such speech inflicts a "legally cognizable harm." *Id.* at 723, 719, 132 S.Ct. 2537. The concurring justices agreed: statutes that criminalize falsities typically require proof of specific or tangible harm. *Id.* at 734–36, 132 S.Ct. 2537. We thus focus our attention on misrepresentations of the type singled out by the Court—false statements made for material gain or advantage or that inflict harm.
A. Idaho Code § 18–7042(1)(a): Entry by Misrepresentation
Subsection (a) criminalizes entry into an agricultural production facility "by force, threat, misrepresentation or trespass." Notably, ALDF challenges only the "misrepresentation" prong of this subsection.[8] And, as we note below, Idaho can easily address the problematic term by simply excising "misrepresentation" from this subsection. Thus, entry by force, threat or trespass would continue to be a criminal violation.
2Guided by *Alvarez*, we conclude that subsection (a)'s misrepresentation provision regulates speech protected by the First Amendment. The targeted speech—a false statement made in order to access an agricultural production facility—cannot on its face be characterized as "made to effect a fraud or secure moneys or other valuable considerations." *Alvarez*, 567 U.S. at 723, 132 S.Ct. 2537 (plurality opinion). Nor can the misrepresentation provision be characterized as simply proscribing conduct. Like the statute in *Alvarez*, subsection (a) "seeks to control and suppress all false statements [related to access] in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain." *1195 *Id.* at 722–23, 132 S.Ct. 2537 (plurality opinion). Unlike lying to obtain records or gain employment—which are associated with a material benefit to the speaker—lying to gain entry merely allows the speaker to cross the threshold of another's property, including property that is generally open to the public. The hazard of this subsection is that it criminalizes innocent behavior, that the overbreadth of this subsection's coverage is staggering, and that the purpose of the statute was, in large part, targeted at speech and investigative journalists.
Idaho's argument that "the material gain to the person telling the lie *is* the entry to the property," is not supported by any authority and does not establish how entry onto the property and *material* gain are coextensive. Under the statute, any misrepresentation to gain entry could net a criminal prosecution. Take, for example, a teenager who wants to impress his friends by obtaining a highly sought after reservation at an exclusive pop-up restaurant that is open to the public. If he were to call the restaurant and finagle a reservation in the name of his mother, a well-known journalist, that would be a misrepresentation. If the restaurant offers up a reservation on the basis of the mother's notoriety, granting a "license" to enter the premises and sit at a table, the teenager would be subject to punishment of up to one year in prison, a fine not to exceed $5,000, or both.
The teenager risks this potential despite the fact that he might leave before ordering, be discovered and removed by the manager, or his friends might not be impressed at all. In those instances, he would not receive even the secondary benefits of having gained access. In fact, all our teenager would have to do is enter the restaurant and he could be arrested because he gave a false name to the maître d' on the phone. This entry alone does not constitute a material gain, and without more, the lie is pure speech.[9]

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Or the lunch could go off without a hitch. The restaurant is none the wiser, it gets paid for the meal, and loses nothing, but the teenager could still be subject to prosecution. Once again, the lie is pure speech.
The teenager does not necessarily even gain protection from trespass liability. Idaho's criminal trespass law prohibits "[e]ntering without permission of the owner or the owner's agent, upon the real property of another" but limits its application to property posted with "No Trespassing" signs that meet certain parameters. Idaho Code § 18–7008(9). Thus, even if the dissent is correct that the teenager receives a license that would not otherwise have been granted, since in some circumstances the teenager may have entered the restaurant with no permission without trespassing, he gains little to nothing from his misrepresentation.[10]
*1196 Two earlier cases involving investigative reporters and trespass in the First Amendment context foreshadowed the decision in *Alvarez*, albeit in slightly different scenarios. The Fourth Circuit in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (1999), and the Seventh Circuit in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (1995), examined whether plaintiffs in a civil action could maintain a trespass claim against journalists for misrepresenting their identities. Both courts invalidated the trespass claim predicated on the misrepresentations because "the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land." *Desnick*, 44 F.3d at 1353; *Food Lion*, 194 F.3d at 518 ("[I]f we turned successful resume fraud into trespass, we would not be protecting the interest underlying the tort of trespass—the ownership and peaceable possession of land.").[11] Put differently, "consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for ... lawful reasons to revoke his consent" because that entry does not infringe upon the specific interests trespass seeks to protect. *Desnick*, 44 F.3d at 1351. This language is prescient in its tracking of *Alvarez*'s reasoning: some lies quite simply do not inflict any material or legal harm on the deceived party. *See Alvarez*, 567 U.S. at 718–19, 132 S.Ct. 2537 (plurality opinion); *see also id.* at 736, 132 S.Ct. 2537 (Breyer, J., concurring) (statutes properly prohibiting false statements are those with "limitations of context, or requirements of proof of injury" to narrow the prohibition to "a subset of lies where specific harm is more likely to occur" and not "where harm is unlikely or the need for the prohibition is small.").
3Re-visiting our teenager, we have already established that he is not guilty of ordinary criminal trespass in the absence of a "No Trespassing" sign. However, as with a journalist or even a curiosity seeker who dissembles to get access to the property, under the challenged Idaho law, the teenager would be subject to criminal prosecution for nothing more than what can only be characterized as a fib. Thus, the misrepresentation provision of subsection (a) regulates protected speech while "target[ing] falsity and nothing more." *Alvarez*, 567 U.S. at 719, 132 S.Ct. 2537 (plurality opinion). Such regulation is subject to the "most exacting scrutiny." *Id.* at 724, 132 S.Ct. 2537 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)). Idaho's chosen restriction on speech must be "actually necessary" to achieve a compelling government interest, and there must be a "direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725, 132 S.Ct. 2537. Subsection (a) cannot survive this high bar.
Even assuming Idaho has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not "actually necessary" to protect those rights. If, as Idaho argues, its real concern is trespass, then Idaho already has a prohibition against trespass that does not implicate speech in any way. If instead, as a number of the legislators made clear and the dairy lobby underscored, the statute was intended to quash investigative reporting on agricultural production facilities, then the speech aspect of the statute prohibiting *1197 misrepresentations is even more problematic. The focus of the statute to avoid the "court of public opinion" and treatment of investigative videos as "blackmail" cannot be squared with a content-neutral trespass law.
It is troubling that criminalization of these misrepresentations opens the door to selective prosecutions—for example, pursuing the case of a journalist who produces a *60 Minutes* segment about animal cruelty versus letting the misrepresentation go unchecked in the case of the teenager. As Justice Breyer aptly noted in his concurrence,
the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a [politically unpopular individual who makes false claims], while ignoring members of other political groups who might make similar false claims.
Id. at 734, 132 S.Ct. 2537. In this case, the targeted group—journalists and investigative reporters—could also face enhanced penalties. Violating Idaho's criminal trespass statute could result in up to six months in prison, a fine not in excess of $1,000, or both, *see* Idaho Code § 18–7011(1), whereas the penalty under the agricultural protection provision, § 18–7042, could be up to one year in prison, a fine not in excess of $5,000, or both.
We are also unsettled by the sheer breadth of this subsection given the definitions of "agricultural production facility" and "agricultural production." *Id.* § 18–7042(2)(a), (b). Applying these definitions, the subsection reaches misrepresentations not only in the context of a large-scale dairy facility or cattle feedlot, but also grocery stores, garden nurseries, restaurants that have an herb garden or grow their own produce, llama farms that produce wool for weaving, beekeepers, a chicken coop in the backyard, a field

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producing crops for ethanol, and hardware stores, to name a few. *See* *Alvarez*, 567 U.S. at 722, 132 S.Ct. 2537 (plurality opinion) (criticizing the Act for having "sweeping, quite unprecedented reach").
The subsection's reach is particularly worrisome because many of the covered entities are, unlike large-scale dairy facilities, places of business that are open to the public. Imagine a situation in which an Albertsons grocery store opens early to the first one hundred affinity cardholders to visit the new, spectacular food court. Given the expansive definition of "agricultural production," the Albertsons store would be covered under the statute as a facility where agricultural products are "process[ed] and package[ed] ... into food." An enterprising person with no Albertsons card, but representing otherwise, or even someone using a friend's Albertsons card, falls prey to the statute simply because he wants to see the food-court extravaganza. Under subsection (a), our protagonist would be guilty of a misdemeanor and could be punished by up to one year in prison, a fine not in excess of $5,000, or both—not to mention a potential restitution award. Idaho Code § 18–7042(3), (4). The same can be said for a restaurant critic who goes undercover, claiming to be a repeat customer in order to get a prime table from which to review the restaurant's food, service, and ambiance. In these scenarios, the statute punishes speech where there is no fraud, no gain, and no valuable consideration. The limitation that a misrepresentation must be "knowing[ ]" does not eliminate the threat posed by this subsection's staggering *1198 reach. The fact that the subsection regulates speech related to property far beyond a classic agricultural facility would invariably result in the chilling of lawful speech. Indeed, "a speaker might still be worried about being *prosecuted* for a careless false statement, even if he does not have the intent required to render him liable." *Alvarez*, 567 U.S. at 736, 132 S.Ct. 2537 (Breyer, J., concurring) (applying intermediate scrutiny).
Nor is this subsection the "least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004). We see no reason, and Idaho has not offered any, why the state could not narrow the subsection by requiring specific intent or by limiting criminal liability to statements that cause a particular harm. Idaho did exactly that with subsection (c), which covers misrepresentation "with the intent to cause economic or other injury." It is no surprise that after the Supreme Court's decision in *Alvarez*, Congress amended the Stolen Valor Act to criminalize only those "[w]hoever, *with intent to obtain money, property, or other tangible benefit*, fraudulently hold[ ] oneself out to be a recipient" of a qualifying medal. 18 U.S.C. § 704(b) (2013) (emphasis added). Such a limitation would still effectuate agricultural production facility owners' property rights while complying with *Alvarez*'s relatively straightforward First Amendment requirements.
The reach of subsection (a) is so broad that it gives rise to suspicion that it may have been enacted with an impermissible purpose. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 455 (1996) ("At a certain point—when the asserted interest is insubstantial or when it does not fit the scope of the challenged regulation—the usual presumption of proper purpose topples; there is reason, then, to think that the law, though content neutral, has been tainted by impermissible purpose."). Our suspicion is not eased after reading the legislative history. The record reflects that the statute was partly motivated to protect members of the agricultural industry from "persecut[ion] in the court of public opinion," and journalists who use exposés to "publicly crucify a company." Although, for Equal Protection Clause purposes, we need not decide whether animus motivated this subsection, we do not ignore that a vocal number of supporters were less concerned with the protection of property than they were about protecting a target group from critical speech, which adds to our skepticism that the provision survives the "exacting scrutiny" required under *Alvarez*. *See* *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 387 n.18, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (expressing skepticism about the motivation behind a bill when some supporters were concerned with protecting themselves from critical speech).
4In the same vein, if intermediate scrutiny is the standard, as Justice Breyer advocates in *Alvarez*, then this subsection would still fail. Subsection (a) criminalizes speech that inflicts no "specific harm" on property owners, "ranges very broadly," and risks significantly chilling speech that is not covered under the statute. *Alvarez*, 567 U.S. at 736–37, 132 S.Ct. 2537 (Breyer J., concurring). Additionally, it is "possible substantially to achieve the Government's objective in less burdensome ways" with "a more finely tailored statute." *Id.* at 737, 132 S.Ct. 2537. Even under intermediate scrutiny, the subsection "works disproportionate constitutional harm." *Id.* at 739, 132 S.Ct. 2537.
5There is, of course, an easy fix to this First Amendment problem: simply strike the word "misrepresentation" from *1199 the subsections. Idaho explicitly invites this result in its discussion of the statute's severability clause, and ALDF's surgical challenge indirectly endorses this remedy. Under Idaho law, an invalid portion of a statute may be severed where "part of a statute ... is unconstitutional and yet is not an integral or indispensable part of the measure." *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217, 1220 (1976). Because the proscription on misrepresentations is neither integral nor indispensable to the subsection's goal of protecting property rights, the offending term "misrepresentation" should be stricken, leaving the remainder of the subsection intact. In light of this resolution, we need not analyze subsection (a) under the Equal Protection Clause.
B. Idaho Code § 18–7042(1)(b): Obtaining Records by Misrepresentation
67Subsection (b)—which criminalizes obtaining records of an agricultural production facility by misrepresentation[12]—protects against a "legally cognizable harm associated with a false statement" and therefore survives constitutional scrutiny under *Alvarez.* 567 U.S. at 719, 132 S.Ct. 2537. *Alvarez* highlights that a false statement made in association with a legally cognizable harm or for

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the purpose of material gain is not protected. *Id.* at 719, 723, 132 S.Ct. 2537. Unlike false statements made to enter property, false statements made to actually acquire agricultural production facility records inflict a property harm upon the owner, and may also bestow a material gain on the acquirer.

This subsection is aimed at conduct—obtaining records—that has long been prohibited in Idaho. For decades, Idaho has lawfully proscribed similar types of conduct that infringe on property rights. For example, Idaho criminalizes conversion, which involves "any distinct act of dominion wrongfully exerted over another's personal property in denial or inconsistent with his rights therein." *Wiseman v. Schaffer*, 115 Idaho 537, 768 P.2d 800, 803 (1989) (citation omitted); *see also* Idaho Code §§ 18–2403(3), 18–7001(1). Idaho also criminalizes theft by false pretenses, which involves "a wrongful taking, obtaining or withholding of another's property" by conduct constituting "obtaining property, money or labor under false pretenses." Idaho Code § 18–2403(2); *State v. Larsen*, 76 Idaho 528, 286 P.2d 646, 648 (Idaho 1955) (citation omitted) ("[a] false pretense may consist in any act, word, symbol, or token calculated and intended to deceive"). Larceny, which involves the "fraudulent obtaining of personal property, and carrying that property away with the intent permanently to deprive the owner thereof," is also prohibited. *State v. Jesser*, 95 Idaho 43, 501 P.2d 727, 736 & n.29 (1972). Criminalizing the obtaining of records by misrepresentation is one of a variety of Idaho statutes that protect property rights. Obtaining an agricultural production facility's records by misrepresentation inflicts a "legally cognizable harm" by impairing an agricultural production facility owner's ability to control who can assert dominion over, and take possession of, his property. Additionally, obtaining records through misrepresentation may also infringe on other rights by, for example, exposing proprietary formulas, trade secrets, or other confidential business information to unwanted parties. *See* Idaho Code § 48–801 *et seq.* (prohibiting misappropriation of trade secrets).

*1200 The legislative history illustrates how such conduct has harmed, and threatens to harm, agricultural production facility owners. For example, legislators expressed general concern about damage to breeding papers, and one legislator noted an instance in which the breeding papers of a mink ranch were "tossed" into a "pile," "damag[ing] the whole operation." The agricultural industry also expressed concern about the theft of facility records, particularly when such theft leads to the release of a facility's proprietary and confidential information, including divulging locations of genetically engineered crops or valuable research documents for sale to competitors. Although some legislators wanted to silence investigative journalists reporting on the agricultural industry, the full legislative history shows that a legitimate purpose for enacting the subsection was to prevent harm from damaged or stolen records.

Obtaining records may also bestow a "material gain" on the speaker. *See Alvarez*, 567 U.S. at 723, 132 S.Ct. 2537 (plurality opinion). The records may contain confidential information, such as breeding histories of animals and livestock, and other proprietary research and development information valuable to those in the industry. Once disclosed, this information may lose its confidential or proprietary research status.

Acquiring records by misrepresentation results in something definitively more than does entry onto land—it wreaks actual and potential harm on a facility and bestows material gain on the fibber. So unlike subsection (a), subsection (b) does not regulate constitutionally protected speech, and does not run afoul of the First Amendment.[13]

8Nor does subsection (b) violate the Equal Protection Clause. The district court determined that the statute was "animated by an improper animus toward animal welfare groups and other undercover investigators in the agricultural industry" and could not survive rational basis review. We agree that animus was one of the motivating factors but disagree as to the conclusion.

910Legislation is generally presumed to be valid and will be sustained under the Equal Protection Clause "if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). However, neither "a bare ... desire to harm a politically unpopular group" nor "negative attitude[s]" or "fears" about that group constitute a legitimate government interest for the purpose of this review. *Id.* at 448, 105 S.Ct. 3249. When a law exhibits a desire to harm an unpopular group, courts will often apply a "more searching" application of rational basis review. *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (O'Connor, J., concurring); *see also Cleburne*, 473 U.S. at 448–50, 105 S.Ct. 3249; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535–38, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). When the politically unpopular group is not a traditionally suspect class, a court may strike down the challenged statute under the Equal Protection Clause "if the statute serves no legitimate governmental purpose *and* if impermissible animus toward an unpopular group prompted the statute's enactment." *Mountain Water Co. v. Mont. Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 598 (9th Cir. 1990) *1201 (emphasis added); *Moreno*, 413 U.S. at 534, 93 S.Ct. 2821.

11We invoke searching scrutiny here. Although animus towards particular speech by reporters and activists was one factor driving Idaho's decision to pass the statute, to strike down the law, we must also determine whether the law serves "no legitimate governmental purpose." *Mountain Water Co.*, 919 F.2d at 598. The overall purpose of § 18–7042 is to protect agricultural production facilities from interference by wrongful conduct. As noted, the legislative history relevant to subsection (b) describes situations in which agricultural production facilities have been, or may be, harmed as a result of a misrepresentation leading to the acquisition of records. Idaho's desire to protect against harm relating to an agricultural production facility's most sensitive information—affecting both property rights and privacy interests—is a legitimate government interest. It also bears noting that the

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penalty provisions for falsely obtaining records under this statute are in line with the penalties in Idaho's other statutes relating to records and property offenses. *See, e.g.*, Idaho Code §§ 18–2403(2)(d), 18–2407, 18–2408 (theft by false promise); 18–7001 (malicious injury to property); 48–803 (misappropriation of trade secrets). Subsection (b) does not offend the Equal Protection Clause because it does not rest exclusively on an "irrational prejudice" against journalists and activists. *Cleburne*, 473 U.S. at 450, 105 S.Ct. 3249.

C. Idaho Code § 18–7042(1)(c): Obtaining Employment by Misrepresentation

1213Subsection (c) criminalizes knowingly "[o]btain[ing] employment with an agricultural production facility by ... misrepresentation with the intent to cause economic or other injury" to the facility's operations, property, or personnel. Almost as though the Idaho legislature drafted this provision with *Alvarez* by its side, this subsection follows the Supreme Court's guidance as to what constitutes a lie made for material gain. Indeed, the plurality in *Alvarez* explicitly stated that "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, *say offers of employment*, it is well established that the Government may restrict speech without affronting the First Amendment." 567 U.S. at 723, 132 S.Ct. 2537 (emphasis added). The misrepresentations criminalized in subsection (c) fall squarely into this category of speech.

Additionally, subsection (c) limits criminal liability to only those who gain employment by misrepresentation *and* who have the intent to cause economic or other injury to the agricultural production facility, which further cabins the prohibition's scope. Given this clear limitation, we disagree with ALDF that the statute would reach "a person who overstates her education or experience to get a job for which she otherwise would not have qualified, whether the person is an undercover investigator or not," because the requisite intent to injure would not be satisfied. On the other hand, this subsection would apply to an employee hired with an intent to harm the employer, which, as Idaho points out, is a breach of the covenant of good faith and fair dealing that is implied in all employment agreements in Idaho. *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 108 P.3d 380, 389–90 (2005); *cf. Shackelford v. Shirley*, 948 F.2d 935, 938 (5th Cir. 1991) ("[T]hreats made with specific intent to injure and focused on a particular individual easily fall into that category of speech deserving of no first amendment protection.").

Although it may be true that "[t]he goal of undercover employment-based investigations *1202 is not to 'secure moneys or other valuable considerations' for the investigator, but rather to expose threats to the public," ALDF ignores that the Supreme Court singled out offers of employment and that these undercover investigators are nonetheless paid by the agricultural production facility as part of their employment. Of course, this does not mean that every investigative reporter hired under false pretenses intends to harm the employer. That is a critical element that requires proof.

We are also not persuaded by ALDF's arguments that the statute was enacted solely to suppress a specific subject matter or viewpoint. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). We reject ALDF's argument that the statute's restitution clause is a way to punish journalists and whistleblowers for printing exposés, because we do not interpret the restitution clause to include reputational and publication damages. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

The restitution clause requires a court to order a defendant "to make restitution to the victim of the offense ... in an amount equal to twice the value of the damage resulting from the violation" of the statute. Idaho Code §§ 18–7042(4), 19–5304. Restitution is made for the "economic loss" to the victim. Idaho Code § 19–5304(1)(a). This includes "the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct." *Id.* It does not include "less tangible damage such as pain and suffering, wrongful death or emotional distress." *Id.*

14That the statute excludes "less tangible damage" such as emotional distress indicates that reputational damages would not be considered an "economic loss," and we are not aware of a case suggesting otherwise. Rather, Idaho case law defines "economic loss" as "tangible out-of-pocket loss" which the victim "actually suffers." *State v. Straub*, 153 Idaho 882, 292 P.3d 273, 280 (2013). The restitution clause focuses on actual, quantifiable economic loss as opposed to abstract damages such as reputational harm. *See id.* In the absence of Idaho case law to the contrary, we read the statute's restitution clause as excluding reputational and publication damages.[14] *See Berger v. City of Seattle*, 569 F.3d 1029, 1046 (9th Cir. 2009) (en banc) ("[W]here an unconstitutionally broad statute is readily subject to a narrowing construction that would eliminate its constitutional deficiencies, we accept that construction.") (internal quotation marks omitted).

The district court erred by granting summary judgment on this ground.

15For the same reasons as provided in our analysis of subsection (b), subsection (c) does not violate the Equal Protection Clause because it serves a "legitimate governmental purpose." *Mountain Water Co.*, 919 F.2d at 598. The same property and privacy concerns apply here—employees have access to limited areas of an agricultural production facility and other confidential information that may lead to destruction or serious harm—and Idaho has a legitimate governmental purpose in restricting such employment-seeking misrepresentations. This result follows from *Alvarez*. By establishing that misrepresentations to "secure ... offers of employment" may be restricted, the Court implicitly *1203 recognized that a government interest exists in restricting such speech. *Alvarez*, 567 U.S. at 723, 132 S.Ct. 2537. Thus, this subsection has a legitimate governmental purpose beyond an "irrational prejudice" against journalists and activists. *City of Cleburne*, 473 U.S. at 450, 105 S.Ct. 3249.

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II. The Recordings Clause—Idaho Code § 18–7042(1)(d)

16We now turn to the Recordings Clause, which prohibits a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the "conduct of an agricultural production facility's operations." Idaho Code § 18–7042(1)(d). The Recordings Clause regulates speech protected by the First Amendment and is a classic example of a content-based restriction that cannot survive strict scrutiny.

1718We easily dispose of Idaho's claim that the act of creating an audiovisual recording is not speech protected by the First Amendment. This argument is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not. Audiovisual recordings are protected by the First Amendment as recognized "organ[s] of public opinion" and as a "significant medium for the communication of ideas." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (extending First Amendment protection to movies). Indeed, "[w]e live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private." Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (Jan. 2011).

19It is no surprise that we have recognized that there is a "First Amendment right to film matters of public interest." *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). It defies common sense to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.

Rejecting an argument remarkably similar to Idaho's pitch here, we observed that

neither the Supreme Court nor [the Ninth Circuit] has ever drawn a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or artwork) in terms of the First Amendment protection afforded.... The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.

Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (determining that the tattooing process is purely expressive activity protected by the First Amendment); *see also ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech."); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) ("The First Amendment protects actual photos, videos, and recordings ... and for this protection to have meaning the Amendment must *1204 also protect the act of *creating* that material.") (emphasis added). Because the recording process is itself expressive and is "inextricably intertwined" with the resulting recording, the creation of audiovisual recordings is speech entitled to First Amendment protection as purely expressive activity. *See Anderson*, 621 F.3d at 1062.

2021The Recordings Clause prohibits the recording of a defined topic—"the conduct of an agricultural production facility's operations." This provision is an "obvious" example of a content-based regulation of speech because it "defin[es] regulated speech by particular subject matter." *Reed v. Town of Gilbert*, —— U.S. ——, 135 S.Ct. 2218, 2227, 192 L.Ed.2d 236 (2015); *see also United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (a statute was content-based when it prohibited "visual [and] auditory depiction[s] ... depending on whether they depict conduct in which a living animal is intentionally harmed" (alterations in original)). A regulation is content-based when it draws a distinction "on its face" regarding the message the speaker conveys or "when the purpose and justification for the law are content based." *Reed*, 135 S.Ct. at 2228. The Recordings Clause checks both boxes. It would permit filming a vineyard's art collection but not the winemaking operation. Likewise, a videographer could record an after-hours birthday party among co-workers, a farmer's antique car collection, or a historic maple tree but not the animal abuse, feedlot operation, or slaughterhouse conditions.

Problematically, Idaho has effectively eliminated the subject matter of any audio and visual recordings of agricultural operations made without consent and has therefore "prohibit[ed] public discussion of an entire topic." *In re Nat'l Sec. Letter*, 863 F.3d 1110, 1122 (9th Cir. 2017) (internal quotation marks omitted). And, because the Recordings Clause prohibits the filming of agricultural "operations" but nothing else, its application explicitly pivots on the content of the recording; in other words, only by viewing the recording can the Idaho authorities make a determination about criminal liability. *See League of Women Voters*, 468 U.S. at 383, 104 S.Ct. 3106 (a statute is content-based when "enforcement authorities must necessarily examine the content of the message" to determine whether it complies with the statute). Here, the statute depends not just on "where they say" the message but also—critically—"on what they say." *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014).

2223As a content-based regulation, the Recordings Clause is constitutional only if it withstands strict scrutiny, meaning it "is necessary to serve a compelling state interest" and "is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Strict scrutiny is "an exacting test" requiring "some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as

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possible to serve the goal." *Turner*, 512 U.S. at 680, 114 S.Ct. 2445. As with the Misrepresentation Clauses, Idaho asserts that the Recordings Clause protects both property and privacy interests. Even assuming a compelling government interest, Idaho has not satisfied the narrow tailoring requirement because the statute is both under-inclusive and over-inclusive.

Prohibiting only "audio or video recordings," but saying nothing about photographs, is suspiciously under-inclusive. *City of Ladue v. Gilleo*, 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 ("[T]hat a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles."). Why the *1205 making of audio and video recordings of operations would implicate property or privacy harms, but photographs of the same content would not, is a mystery. This distinction defies the old adage that "a picture is worth a thousand words."

Nor has Idaho explained how limiting the filming of operations, but nothing else, effectuates its interests better than eliminating all audio and video recordings at agricultural production facilities. Presumably, for example, an unauthorized recording of the agricultural production facility's buildings would still implicate Idaho's concerns about property, and the unauthorized filming of an employee birthday party would implicate concerns about privacy. Without some legitimate explanation, we are left to conclude that Idaho is singling out for suppression one mode of speech—audio and video recordings of agricultural operations—to keep controversy and suspect practices out of the public eye. *Reed*, 135 S.Ct. at 2229 (content-based laws lend themselves to use for "invidious, thought-control purposes"). The district court aptly noted that "[t]he recording prohibition gives agricultural facility owners veto power, allowing owners to decide what can and cannot be recorded, effectively turning them into state-backed censors able to silence unfavorable speech about their facilities."

The Recordings Clause is also over-inclusive and suppresses more speech than necessary to further Idaho's stated goals of protecting property and privacy. *See* *Lone Star Security and Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016). Because there are "various other laws at [Idaho's] disposal that would allow it to achieve its stated interests while burdening little or no speech," the law is not narrowly tailored. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (applying intermediate scrutiny). For example, agricultural production facility owners can vindicate their rights through tort laws against theft of trade secrets and invasion of privacy. Idaho Code § 48–801 *et seq.* (prohibiting misappropriation of trade secrets); *Taylor v. K.T.V.B., Inc.*, 96 Idaho 202, 525 P.2d 984, 985 (1974) (outlining the invasion of privacy torts). To the extent the legislators expressed concern that fabricated recordings of animal abuse would invade privacy rights, the victims can turn to defamation actions for recourse. Even still, as *Alvarez* points out, "[t]he remedy for speech that is false is speech that is true"—and not, as Idaho would like, the suppression of that speech. 567 U.S. at 727, 132 S.Ct. 2537.

For these reasons, the Recordings Clause cannot survive First Amendment scrutiny and is therefore unconstitutional. In light of this result, we need not analyze the Recordings Clause under the Equal Protection Clause.

In sum, we affirm the district court's grant of summary judgment with respect to §§ 18–7042(1)(a) and (d). We reverse the district court's grant of summary judgment with respect to §§ 18–7042(1)(b) and (c). The permanent injunction should be modified accordingly.

Case 2.3

134 F.3d 87
United States Court of Appeals, Second Circuit.

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.
Argued Oct. 22, 1997.
Decided Jan. 15, 1998.
JON O. NEWMAN, Circuit Judge:

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

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

Background

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

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

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

Bad Frog's labels have been approved for use by the Federal Bureau of Alcohol, Tobacco, and Firearms, and by authorities in at least 15 states and the District of Columbia, but have been rejected by authorities in New Jersey, Ohio, and Pennsylvania. In May 1996, Bad Frog's authorized New York distributor, Renaissance Beer Co., made an initial application to NYSLA for brand label approval and registration pursuant to section 107-a(4)(a) of New York's Alcoholic Beverage Control Law. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a) (McKinney 1987 & Supp.1997). NYSLA denied that application in July. Bad Frog filed a new application in August, resubmitting the prior labels and slogans, but omitting the label with the slogan "He's mean, green and obscene," a slogan the Authority had previously found rendered the entire label obscene. That slogan was replaced with a new slogan, "Turning bad into good." The second application, like the first, included promotional material making the extravagant claim that the frog's gesture, whatever its past meaning in other contexts, now means "I want a Bad Frog beer," and that the company's goal was to claim the gesture as its own and as a symbol of peace, solidarity, and good will. In September 1996, NYSLA denied Bad Frog's second application, finding Bad Frog's contention as to the meaning of the frog's gesture "ludicrous and disingenuous." NYSLA letter to Renaissance Beer Co. at 2 (Sept. 18, 1996) ("NYSLA Decision"). Explaining its rationale for the rejection, the Authority found that the label "encourages combative behavior" and that the gesture and the slogan, "He just don't care," placed close to and in larger type than a warning concerning potential health problems,

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

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

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

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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

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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").

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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.

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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

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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

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of onsite advertising. See id. at 510-12, 101 S.Ct. at 2893- 95 (plurality opinion). Though not a complete ban on outdoor advertising, the prohibition of all offsite advertising made a substantial contribution to the state interests in traffic safety and esthetics. In United States v. Edge Broadcasting Co., 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993), the Court upheld a prohibition on broadcasting lottery information as applied to a broadcaster in a state that bars lotteries, notwithstanding the lottery information lawfully being broadcast by broadcasters in a neighboring state. Though this prohibition, like that in Metromedia, was not total, the record disclosed that the prohibition of broadcasting lottery information by North Carolina stations reduced the percentage of listening time carrying such material in the relevant area from 49 percent to 38 percent, see Edge Broadcasting, 509 U.S. at 432, 113 S.Ct. at 2706, a reduction the Court considered to have "significance," id. at 433, 113 S.Ct. at 2706-07. [FN6]

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

On the other hand, a prohibition that makes only a minute contribution to the advancement of a state interest can hardly be considered to have advanced the interest "to a material degree." Edenfield, 507 U.S. at 771, 113 S.Ct. at 1800. Thus, In Bolger, the Court invalidated a prohibition on mailing literature concerning contraceptives, alleged to support a governmental interest in aiding parents' efforts to discuss birth control with their children, because the restriction "provides only the most limited incremental support for the interest asserted." 463 U.S. at 73, 103 S.Ct. at 2884. In Linmark, a town's prohibition of "For Sale" signs was invalidated in part on the ground that the record failed to indicate "that proscribing such signs will reduce public awareness of realty sales." 431 U.S. at 96, 97 S.Ct. at 1620. In Rubin, the Government's asserted interest in preventing alcoholic strength wars was held not to be significantly advanced by a prohibition on displaying alcoholic content on labels while permitting such displays in advertising (in the absence of state prohibitions). 514 U.S. at 488, 115 S.Ct. at 1592. Moreover, the Court noted that the asserted purpose was sought to be achieved by barring alcoholic content only from beer labels, while permitting such information on labels for distilled spirits and wine. See id. [FN7]

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

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

FN8. Appellant has included several examples in the record.

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

FN9. Though Edge Broadcasting recognized (in a discussion of the fourth Central Hudson factor) that the inquiry as to a reasonable fit is not to be judged merely by the extent to which the government interest is advanced in the particular case, 509 U.S. at 430-31, 113 S.Ct. at 2705- 06, the Court made clear that what remains relevant is the relation of the restriction to the "general problem" sought to be dealt with, id. at 430, 113 S.Ct. at 2705. Thus, in the pending case, the pertinent point is not how little effect the prohibition of Bad Frog's labels will have in shielding children from indecent displays, it is how little effect NYSLA's authority to ban indecency from labels of all alcoholic beverages will have on the "general problem" of insulating children from vulgarity. The District Court ruled that the third criterion was met because the prohibition of Bad Frog's labels indisputably achieved the result of keeping these labels from being seen by children. That approach takes too narrow a view of the third criterion. Under that approach, any regulation that makes any contribution to achieving a state objective would pass muster. Edenfield, however,

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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

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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.

Supplemental Case Printout for: *Managerial Strategy*

961 F.Supp.2d 1181

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United States District Court, D. Utah, Central Division.

Derek KITCHEN, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge, Plaintiffs,
v.
Gary R. HERBERT, John Swallow, and Sherrie Swensen, Defendants.

Case No. 2:13–cv–217.
Dec. 20, 2013.

MEMORANDUM DECISION AND ORDER
ROBERT J. SHELBY, District Judge.

The Plaintiffs in this lawsuit are three gay and lesbian couples who wish to marry, but are currently unable to do so because the Utah Constitution prohibits same-sex marriage. The Plaintiffs argue that this prohibition infringes their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The State of Utah defends its laws and maintains that a state has the right to define marriage according to the judgment of its citizens. Both parties have submitted motions for summary judgment.

The court agrees with Utah that regulation of marriage has traditionally been the province of the states, and remains so today. But any regulation adopted by a state, whether related to marriage or any other interest, must comply with the Constitution of the United States. The issue the court must address in this case is therefore not who should define marriage, but the narrow question of whether Utah's current definition of marriage is permissible under the Constitution.

Few questions are as politically charged in the current climate. This observation is especially true where, as here, the state electorate has taken democratic action to participate in a popular referendum on this issue. It is only under exceptional circumstances that a court interferes with such action. But the legal issues presented in this lawsuit do not depend on whether Utah's laws were the result of its legislature or a referendum, or whether the laws passed by the widest or smallest of margins. The question presented here depends instead on the Constitution itself, and on the interpretation of that document contained in binding precedent from the Supreme Court and the Tenth Circuit Court of Appeals.

Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional.

BACKGROUND
I. The Plaintiffs

The three couples in this lawsuit either desire to be married in Utah or are already legally married elsewhere and wish to have their marriage recognized in Utah. The court summarizes below the relevant facts from the affidavits that the couples filed in support of their Motion for Summary Judgment.

A. *Derek Kitchen and Moudi Sbeity*

Derek Kitchen is a twenty-five-year-old man who was raised in Utah and obtained a B.A. in political science from the University of Utah. Moudi Sbeity is also twenty-five years old and was born in Houston, Texas. He grew up in Lebanon, but left that country in 2006 during the war between Lebanon and Israel. Moudi came to Logan, Utah, where he received a B.S. in economics from Utah State University. He is currently enrolled in a Master's program in economics at the University of Utah.

Derek testifies that he knew he was gay from a young age, but that he did not come out publicly to his friends and family for several years while he struggled to define his identity. Moudi also knew he was gay when he was young and came out to his mother when he was sixteen. Moudi's mother took him to a psychiatrist because she thought he was confused, but the psychiatrist told her that there was nothing wrong with Moudi. After that visit, Moudi's mother found it easier to accept Moudi's identity, and Moudi began telling his other friends and family members. Moudi testifies that he was careful about whom he told because he was concerned that he might expose his mother to ridicule.

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Derek and Moudi met each other in 2009 and fell in love shortly after meeting. After dating for eighteen months, the two moved in together in Salt Lake City. Derek and Moudi run a business called “Laziz” that they jointly started. Laziz produces and sells Middle Eastern spreads such as hummus, muhammara, and toum to Utah businesses like Harmon's and the Avenues Bistro. Having maintained a committed relationship for over four years, Derek and Moudi desire to marry each other. They were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

B. *Karen Archer and Kate Call*

Karen Archer was born in Maryland in 1946, but spent most of her life in Boulder, Colorado. She received a B.A. and an M.D. from the University of Texas, after which she completed her residency in OB/GYN at the Pennsylvania State University. She worked as a doctor until 2001, when she retired after developing two serious illnesses. Karen experienced a number of hardships due to her sexual identity. Karen came out to her parents when she was twenty-six years old, but her parents believed that her sexual orientation was an abnormality and never accepted this aspect of Karen's identity. Karen was one of thirteen women in a medical school class of 350, and she recalls that her male classmates often referred to the female students as “dykes.” Karen also testifies that she was once present at a gay bar when it was raided by the police, who assaulted the bar patrons with their batons.

Kate Call is sixty years old and spent her earliest years in Wisconsin and Mexico, where her parents were mission presidents for the Church of Jesus Christ of Latter-day Saints. When she was eight years old, Kate moved to Provo, Utah, where her father worked as a professor at Brigham Young University. Kate received her B.A. from BYU in 1974. While she was in college, she dated several men and was even engaged twice. Although she hoped that she would begin to feel a more intimate connection if she committed herself to marriage, she broke off both engagements because she never developed any physical attraction to her fiancés. Kate began to realize that she was a lesbian, a feeling that continued to develop while she was serving a mission in Argentina. She wrote a letter sharing these feelings to her mission president, who, without Kate's consent, faxed Kate's message to church authorities and her parents. Kate's family was sad and puzzled at first, but ultimately told her that they loved her unconditionally.

During her professional life, Kate owned a number of businesses. In 2000, she bought a sheep ranch in San Juan County and moved there with D., her partner at the time. Kate worked seasonally for the National Park Service and D. found a job at the Youth Detention facility in Blanding. But when rumors surfaced that D. was a lesbian, D.'s boss told her that she needed to move away from Kate's ranch if she wished to keep her job. While Kate was helping D. move, someone from D.'s work saw Kate's vehicle at D.'s new trailer. That person reported the sighting to D.'s boss, and D. was fired. Several weeks later, Kate's supervisor also told her that her services were no longer needed. Kate never found out why she was let go, but she surmises that her supervisor may have been pressured by D.'s boss, who was one of her supervisor's mentors. Kate and D. moved back to the Wasatch Front, and Kate was eventually forced to sell the ranch. Kate testifies that she and D. split up as a result of the difficult challenges they had faced, and Kate eventually moved to Moab.

Karen and Kate met online through a dating website and were immediately attracted to each other when they first met in person. Karen moved from Colorado to Utah, and the couple now lives in Wallsburg. The two are both concerned about how they will support each other in the event that one of them passes away, a consideration that is especially urgent in light of Karen's illness. Karen has had difficult experiences with the legal aspects of protecting a same-sex union in the past. Before meeting Kate, Karen had two partners who passed away while she was with them. While partnered to a woman named Diana, Karen had to pay an attorney approximately one thousand dollars to draw up a large number of legal documents to guarantee certain rights: emergency contacts, visitation rights, power of attorney for medical and financial decisions, medical directives, living wills, insurance beneficiaries, and last wills and testaments. Despite these documents, Karen was unable to receive Diana's military pension when Diana died in 2005.

Karen and Kate have drawn up similar legal papers, but they are concerned that these papers may be subject to challenges because they are not legally recognized as a couple in Utah. In an attempt to protect themselves further, Karen and Kate flew to Iowa to be wed in a city courthouse. Because of the cost of the plane tickets, the couple was not able to have friends and family attend, and the pair had their suitcases by their side when they said, “I do.” Kate testifies that the pragmatism of their Iowa wedding was born out of the necessity of providing whatever security they could for their relationship. Under current law, Utah does not recognize their marriage performed in Iowa.

C. *Laurie Wood and Kody Partridge*

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Laurie Wood has lived in Utah since she was three years old. She grew up in American Fork, received a B.A. from the University of Utah, and received her Master's degree from BYU. She spent over eleven years teaching in the public school system in Utah County and is now employed by Utah Valley University. She teaches undergraduate courses as an Associate Professor of English in the English and Literature Department, and also works as the Concurrent Enrollment Coordinator supervising high school instructors who teach as UVU adjuncts in high schools across Utah County. She has served on the Board of Directors for the American Civil Liberties Union for fifteen years and co-founded the non-profit Women's Redrock Music Festival in 2006. Laurie was not open about her sexual identity while she was a public school teacher because she believed she would be fired if she said anything. She came out when she was hired at UVU. While she dated men in high school and college, she never felt comfortable or authentic in her relationships until she began dating women.

Kody Partridge is forty-seven years old and moved to Utah from Montana in 1984 to attend BYU. She received her B.A. in Spanish and humanities and later obtained a Master's degree in English. She earned a teaching certificate in 1998 and began teaching at Butler Middle School in Salt Lake County. She realized that she was a lesbian while she was in college, and her family eventually came to accept her identity. She did not feel she could be open about her identity at work because of the worry that her job would be at risk. While she was teaching at Butler, Kody recalls that the story of Wendy Weaver was often in the news. Ms. Weaver was a teacher and coach at a Utah public school who was fired because she was a lesbian. Kody also became aware that the pension she was building in Utah Retirement Systems as a result of her teaching career could not be inherited by a life partner. Given these concerns, Kody applied and was accepted for a position in the English department at Rowland Hall–St. Mark's, a private school that provides benefits for the same-sex partners of its faculty members. Kody volunteers with the Utah AIDS Foundation and has traveled with her students to New Orleans four times after Hurricane Katrina to help build homes with Habitat for Humanity.

Laurie and Kody met and fell in love in 2010. Besides the fact that they are both English teachers, the two share an interest in books and gardening and have the same long-term goals for their committed relationship. They wish to marry, but were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

II. History of Amendment 3

The Utah laws that are at issue in this lawsuit include two statutory prohibitions on same-sex unions and an amendment to the Utah Constitution. The court discusses the history of these laws in the context of the ongoing national debate surrounding same-sex marriage.

In 1977, the Utah legislature amended Section 30–1–2 of the Utah Code to state that marriages “between persons of the same sex” were “prohibited and declared void.” In 2004, the Utah legislature passed Section 30–1–4.1 of the Utah Code, which provides:

> (1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married.

In the 2004 General Session, the Utah legislature also passed a Joint Resolution on Marriage, which directed the Lieutenant Governor to submit the following proposed amendment to the Utah Constitution to the voters of Utah:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Laws 2004, H.J.R. 25 § 1. The proposed amendment, which became known as Amendment 3, was placed on the ballot for the general election on November 2, 2004. Amendment 3 passed with the support of approximately 66% of the voters. The language in Amendment 3 was then amended to the Utah Constitution as Article I, § 29, which went into effect on January 1, 2005.[FN1]

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FN1. Unless noted otherwise, the court will refer to Amendment 3 in this opinion to mean both the Utah constitutional amendment and the Utah statutory provisions that prohibit same-sex marriage.

These developments were influenced by a number of events occurring nationally. In 1993, the Hawaii Supreme Court found that the State of Hawaii's refusal to grant same-sex couples marriage licenses was discriminatory. *Baehr v. Lewin,* 74 Haw. 530, 852 P.2d 44, 59 (1993).[FN2] And in 1999, the Vermont Supreme Court held that the State of Vermont was required to offer all the benefits of marriage to same-sex couples. *Baker v. Vermont,* 170 Vt. 194, 744 A.2d 864, 886–87 (1999).[FN3] Two court cases in 2003 immediately preceded Utah's decision to amend its Constitution. First, the United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment protected the sexual relations of gay men and lesbians. *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Second, the Supreme Court of Massachusetts ruled that the Massachusetts Constitution protected the right of same-sex couples to marry. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 948 (2003).

FN2. The Hawaii Supreme Court remanded the case to the trial court to determine if the state could show that its marriage statute was narrowly drawn to further compelling state interests. *Baehr,* 852 P.2d at 68. The trial court ruled that the government failed to make this showing. *Baehr v. Miike,* No. 91–1394, 1996 WL 694235, at *22 (Haw.Cir.Ct. Dec. 3, 1996). The trial court's decision was rendered moot after Hawaii passed a constitutional amendment that granted the Hawaii legislature the ability to reserve marriage for opposite-sex couples. Recently, the legislature reversed course and legalized same-sex marriage. Same-sex couples began marrying in Hawaii on December 2, 2013.

FN3. The Vermont legislature complied with this mandate by creating a new legal status called a “civil union.” The legislature later permitted same-sex marriage through a statute that went into effect on September 1, 2009.

Since 2003, every other state has either legalized same-sex marriage [FN4] or, like Utah, passed a constitutional amendment or other legislation to prohibit same-sex unions. During the past two decades, the federal government has also been involved in the same-sex marriage debate. In 1996, Congress passed the Defense of Marriage Act (DOMA), which allowed states to refuse to recognize same-sex marriages granted in other states and barred federal recognition of same-sex unions for the purposes of federal law. Act of Sept. 21, 1996, Pub.L. 104–199, 110 Stat. 2419. In 2013, the Supreme Court held that Section 3 of DOMA was unconstitutional.[FN5] *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 2696, 186 L.Ed.2d 808 (2013).

FN4. Six states have legalized same-sex marriage through court decisions (California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico); eight states have passed same-sex marriage legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont); and three states have legalized same-sex marriage through a popular vote (Maine, Maryland, Washington). Same-sex marriage is also legal in Washington, D.C.

FN5. As discussed below, Section 3 defined marriage as the union between a man and a woman for purposes of federal law. The Court did not consider a challenge to Section 2, which allows states to refuse to recognize same-sex marriages validly performed in other states. *See* 28 U.S.C. § 1738C.

The Supreme Court also considered an appeal from a case involving California's Proposition 8. After the California Supreme Court held that the California Constitution recognized same-sex marriage, *In re Marriage Cases,* 43 Cal.4th 757, 76 Cal.Rptr.3d 683, 183 P.3d 384, 453 (2008), California voters passed Proposition 8, which amended California's Constitution to prohibit same-sex marriage. The Honorable Vaughn Walker, a federal district judge, determined that Proposition 8 violated the guarantees of equal protection and due process under the United States Constitution. *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 1003 (N.D.Cal.2010). Applying different reasoning, the Ninth Circuit Court of Appeals affirmed Judge Walker's holding that Proposition 8 was unconstitutional. *Perry v. Brown,* 671 F.3d 1052, 1095 (9th Cir.2012). This issue was appealed to the Supreme Court, but the Court did not address the merits of the question presented. *Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 2668, 186 L.Ed.2d 768 (2013). Instead, the Court found that the proponents of Proposition 8 did not have standing to appeal Judge Walker's decision after California officials refused to defend the law. *Id.* Consequently, the Supreme Court vacated the Ninth Circuit's opinion for lack of jurisdiction. *Id.* A number of lawsuits, including the suit currently pending before this court, have been filed across the country to address the question that the Supreme Court left unanswered in the California case. The court turns to that question now.

ANALYSIS

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I. Standard of Review

The court grants summary judgment when "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). The court "view[s] the evidence and make[s] all reasonable inferences in the light most favorable to the nonmoving party." *N. Natural Gas Co. v. Nash Oil & Gas, Inc.,* 526 F.3d 626, 629 (10th Cir.2008).

II. Effect of the Supreme Court's Decision in *United States v. Windsor*

The court begins its analysis by determining the effect of the Supreme Court's recent decision in *United States v. Windsor,* —– U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). In *Windsor,* the Court considered the constitutionality of Section 3 of DOMA, which defined marriage as the "legal union between one man and one woman as husband and wife" for the purposes of federal law. 1 U.S.C. § 7 (2012). A majority of the Court found that this statute was unconstitutional because it violated the Fifth Amendment of the United States Constitution. *Windsor,* 133 S.Ct. at 2696.

Both parties argue that the reasoning in *Windsor* requires judgment in their favor. The State focuses on the portions of the *Windsor* opinion that emphasize federalism, as well as the Court's acknowledgment of the State's "historic and essential authority to define the marital relation." *Id.* at 2692; *see also id.* at 2691 ("[S]ubject to [constitutional] guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.' " (quoting *Sosna v. Iowa,* 419 U.S. 393, 404, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975))). The State interprets *Windsor* to stand for the proposition that DOMA was unconstitutional because the statute departed from the federal government's "history and tradition of reliance on state law to define marriage." *Id.* at 2692. Just as the federal government cannot choose to disregard a state's decision to recognize same-sex marriage, Utah asserts that the federal government cannot intrude upon a state's decision *not* to recognize same-sex marriage. In other words, Utah believes that it is up to each individual state to decide whether two persons of the same sex may "occupy the same status and dignity as that of a man and woman in lawful marriage." *Id.* at 2689.

The Plaintiffs disagree with this interpretation and point out that the *Windsor* Court did not base its decision on the Tenth Amendment.[FN6] Instead, the Court grounded its holding in the Due Process Clause of the Fifth Amendment, which protects an individual's right to liberty. *Id.* at 2695 ("DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."). The Court found that DOMA violated the Fifth Amendment because the statute "place[d] same-sex couples in an unstable position of being in a second-tier marriage," a differentiation that "demean[ed] the couple, whose moral and sexual choices the Constitution protects[.]" *Id.* at 2694. The Plaintiffs argue that for the same reasons the Fifth Amendment prohibits the federal government from differentiating between same-sex and opposite-sex couples, the Fourteenth Amendment prohibits state governments from making this distinction.

> FN6. The Tenth Amendment makes explicit the division between federal and state power: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Both parties present compelling arguments, and the protection of states' rights and individual rights are both weighty concerns. In *Windsor,* these interests were allied against the ability of the federal government to disregard a state law that protected individual rights. Here, these interests directly oppose each other. The *Windsor* court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage. *See id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it ... the distinct question whether the States ... may continue to utilize the traditional definition of marriage."). But the Supreme Court has considered analogous questions that involve the tension between these two values in other cases. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (balancing the state's right to regulate marriage against the individual's right to equal protection and due process under the law). In these cases, the Court has held that the Fourteenth Amendment requires that individual rights take precedence over states' rights where these two interests are in conflict. *See id.* at 7, 87 S.Ct. 1817 (holding that a state's power to regulate marriage is limited by the Fourteenth Amendment).

The Constitution's protection of the individual rights of gay and lesbian citizens is equally dispositive whether this protection requires a court to respect a state law, as in *Windsor,* or strike down a state law, as the Plaintiffs ask the court to do here. In his dissenting opinion, the Honorable Antonin Scalia recognized that this result was the logical outcome of the Court's ruling in *Windsor:*

> In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion ... is that DOMA is motivated by "bare ... desire to harm"

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couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

133 S.Ct. at 2709 (citations and internal quotation marks omitted). The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.

III. *Baker v. Nelson* Is No Longer Controlling Precedent

In 1971, two men from Minnesota brought a lawsuit in state court arguing that Minnesota was constitutionally required to allow them to marry. *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185, 187 (1971). The Minnesota Supreme Court found that Minnesota's restriction of marriage to opposite-sex couples did not violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. *Id.* at 186–87. On appeal, the United States Supreme Court summarily dismissed the case "for want of a substantial federal question." *Baker v. Nelson,* 409 U.S. 810, 810, 93 S.Ct. 37, 34 L.Ed.2d 65 (1972).

Utah argues that the Court's summary dismissal in *Baker* is binding on this court and that the present lawsuit should therefore be dismissed for lack of a substantial federal question. But the Supreme Court has stated that a summary dismissal is not binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

[1] Here, several doctrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in *Baker* has little if any precedential effect today. Not only was *Baker* decided before the Supreme Court held that sex is a quasi-suspect classification, *see Craig v. Boren,* 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Frontiero v. Richardson,* 411 U.S. 677, 688, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (plurality op.), but also before the Court recognized that the Constitution protects individuals from discrimination on the basis of sexual orientation. *See Romer v. Evans,* 517 U.S. 620, 635–36, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). Moreover, *Baker* was decided before the Supreme Court held in *Lawrence v. Texas* that it was unconstitutional for a state to "demean [the] existence [of gay men and lesbians] or control their destiny by making their private sexual conduct a crime." 539 U.S. 558, 578, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). As discussed below, the Supreme Court's decision in *Lawrence* removes a justification that states could formerly cite as a reason to prohibit same-sex marriage.

The State points out that, despite the doctrinal developments in these cases and others, a number of courts have found that *Baker* survives as controlling precedent and therefore precludes consideration of the issues in this lawsuit. *See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs.,* 682 F.3d 1, 8 (1st Cir.2012) (holding that *Baker* "limit[s] the arguments to ones that do not presume to rest on a constitutional right to same-sex marriage."); *Sevcik v. Sandoval,* 911 F.Supp.2d 996, 1002–03 (D.Nev.2012) (ruling that *Baker* barred the plaintiffs' equal protection claim). Other courts disagree and have decided substantially similar issues without consideration of *Baker. See, e.g., Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D.Cal.2010) (ruling that California's prohibition of same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment). In any event, all of these cases were decided before the Supreme Court issued its opinion in *Windsor.*

As discussed above, the Court's decision in *Windsor* does not answer the question presented here, but its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development. Importantly, the *Windsor* Court foresaw that its ruling would precede a number of lawsuits in state and lower federal courts raising the question of a state's ability to prohibit same-sex marriage, a fact that was noted by two dissenting justices. The Honorable John Roberts wrote that the Court "may in the future have to resolve challenges to state marriage definitions affecting same-sex couples." *Windsor,* 133 S.Ct. at 2697 (Roberts, C.J., dissenting). And Justice Scalia even recommended how this court should interpret the *Windsor* decision when presented with the question that is now before it: "I do not mean to suggest disagreement ... that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples." *Id.* at 2709 (Scalia, J., dissenting). It is also notable that while the Court declined to reach the merits in *Hollingsworth v. Perry* because the petitioners lacked standing to pursue the appeal, the Court did not dismiss the case outright for lack of a substantial federal question. *See* —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013). Given the Supreme Court's disposition of both *Windsor* and *Perry,* the court finds that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law.

As a result, *Baker v. Nelson* is no longer controlling precedent and the court proceeds to address the merits of the question presented here.

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IV. Amendment 3 Violates the Plaintiffs' Due Process Rights

[2][3] The State of Utah contends that what is at stake in this lawsuit is the State's right to define marriage free from federal interference. The Plaintiffs counter that what is really at issue is an individual's ability to protect his or her fundamental rights from unreasonable interference by the state government. As discussed above, the parties have defined the two important principles that are in tension in this matter. While Utah exercises the "unquestioned authority" to regulate and define marriage, *Windsor,* 133 S.Ct. at 2693, it must nevertheless do so in a way that does not infringe the constitutional rights of its citizens. *See id.* at 2692 (noting that the "incidents, benefits, and obligations of marriage" may vary from state to state but are still "subject to constitutional guarantees"). As a result, the court's role is not to define marriage, an exercise that would be improper given the states' primary authority in this realm. Instead, the court's analysis is restricted to a determination of what individual rights are protected by the Constitution. The court must then decide whether the State's definition and regulation of marriage impermissibly infringes those rights.

[4][5] The Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual's fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *W.Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). When the Constitution was first ratified, these rights were specifically articulated in the Bill of Rights and protected an individual from certain actions of the federal government. After the nation's wrenching experience in the Civil War, the people adopted the Fourteenth Amendment, which holds: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies to "matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 846, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (quoting *Whitney v. California,* 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring)).

The most familiar of an individual's substantive liberties are those recognized by the Bill of Rights, and the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most portions of the Bill of Rights against the States. *See, e.g., Duncan v. Louisiana,* 391 U.S. 145, 147–48, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (discussing incorporation of certain rights from the First, Fourth, Fifth, and Sixth Amendments); *McDonald v. City of Chicago,* —— U.S. ——, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010) (incorporating the Second Amendment). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Supreme Court recognized the authority of an argument first made by the Honorable John Marshall Harlan II that the Due Process Clause also protects a number of unenumerated rights from unreasonable invasion by the State:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe v. Ullman, 367 U.S. 497, 543, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds), *quoted in Casey,* 505 U.S. at 848–49, 112 S.Ct. 2791.

A. *Supreme Court Cases Protecting Marriage as a Fundamental Right*

[6] The right to marry is an example of a fundamental right that is not mentioned explicitly in the text of the Constitution but is nevertheless protected by the guarantee of liberty under the Due Process Clause. The Supreme Court has long emphasized that the right to marry is of fundamental importance. In *Maynard v. Hill,* the Court characterized marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. 190, 205, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). In *Meyer v. Nebraska,* the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause. 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). And in *Skinner v. Oklahoma ex rel. Williamson,* the Court ruled that marriage is "one of the basic civil rights of man." 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

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In more recent cases, the Court has held that the right to marry implicates additional rights that are protected by the Fourteenth Amendment. For instance, the Court's decision in *Griswold v. Connecticut,* in which the Court struck down a Connecticut law that prohibited the use of contraceptives, established that the right to marry is intertwined with an individual's right of privacy. The Court observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). And in *M.L.B. v. S.L.J.,* the Court described marriage as an associational right: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (citation omitted).

The Supreme Court has consistently held that a person must be free to make personal decisions related to marriage without unjustified government interference. *See, e.g., Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639–40, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Carey v. Population Servs. Int'l,* 431 U.S. 678, 684–85, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." (citations and internal quotation marks omitted)); *Hodgson v. Minnesota,* 497 U.S. 417, 435, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990) ("But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."). In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court emphasized the high degree of constitutional protection afforded to an individual's personal choices about marriage and other intimate decisions:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851, 112 S.Ct. 2791.

Given the importance of marriage as a fundamental right and its relation to an individual's rights to liberty, privacy, and association, the Supreme Court has not hesitated to invalidate state laws pertaining to marriage whenever such a law intrudes on an individual's protected realm of liberty. Most famously, the Court struck down Virginia's law against interracial marriage in *Loving v. Virginia,* 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). The Court found that Virginia's anti-miscegenation statute violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. *Id.* The Court has since noted that *Loving* was correctly decided, even though mixed-race marriages had previously been illegal in many states [FN7] and, moreover, were not specifically protected from government interference at the time the Fourteenth Amendment was ratified: "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia.*" *Casey,* 505 U.S. at 847–48, 112 S.Ct. 2791; *see also Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 992 (N.D.Cal.2010) ("[T]he Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.").

> FN7. In 1948, the California Supreme Court became the first court in the twentieth century to strike down an anti-miscegenation statute. *Perez v. Sharp,* 32 Cal.2d 711, 198 P.2d 17 (1948); *see also Loving,* 388 U.S. at 6 n. 5, 87 S.Ct. 1817.

In addition to the anti-miscegenation laws the Supreme Court struck down in *Loving,* the Supreme Court has held that other state regulations affecting marriage are unconstitutional where these laws infringe on an individual's access to marriage. In *Zablocki v. Redhail,* the Court considered a Wisconsin statute that required any Wisconsin resident who had children that were not

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currently in the resident's custody to obtain a court order before the resident was permitted to marry. 434 U.S. 374, 375, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). The statute mandated that the court should not grant permission to marry unless the resident proved that he was in compliance with any support obligation for his out-of-custody children, and could also show that any children covered by such a support order "[were] not then and [were] not likely thereafter to become public charges." *Id.* (quoting Wis. Stat. § 245.10 (1973)). The Court found that, while the State had a legitimate and substantial interest in the welfare of children in Wisconsin, the statute was nevertheless unconstitutional because it was not "closely tailored to effectuate only those interests" and "unnecessarily impinge[d] on the right to marry[.]" *Id.* at 388, 98 S.Ct. 673. The Court distinguished the statute at issue from reasonable state regulations related to marriage that would not require any heightened review:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Id. at 386, 98 S.Ct. 673. As the Honorable John Paul Stevens noted in his concurring opinion, "A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship." *Id.* at 403–04, 98 S.Ct. 673 (Stevens, J., concurring).

In *Turner v. Safley,* the Court struck down a Missouri regulation that prohibited inmates from marrying unless the prison superintendent approved of the marriage. 482 U.S. 78, 99–100, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The Court held that inmates retained their fundamental right to marry even though they had a reduced expectation of liberty in prison. *Id.* at 96, 107 S.Ct. 2254. The Court emphasized the many attributes of marriage that prisoners could enjoy even if they were not able to have sexual relations:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Id. at 95–96, 107 S.Ct. 2254.

[7] These cases demonstrate that the Constitution protects an individual's right to marry as an essential part of the right to liberty. The right to marry is intertwined with the rights to privacy and intimate association, and an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy. While states have the authority to regulate marriage, the Supreme Court has struck down several state regulations that impermissibly burdened an individual's ability to exercise the right to marry. With these general observations in mind, the court turns to the specific question of Utah's ability to prohibit same-sex marriage.

B. *Application of the Court's Jurisprudence to Amendment 3*

[8] The State does not dispute, nor could it, that the Plaintiffs possess the fundamental right to marry that the Supreme Court has protected in the cases cited above. Like all fundamental rights, the right to marry vests in every American citizen. *See Zablocki,* 434 U.S. at 384, 98 S.Ct. 673 ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."). The State asserts that Amendment 3 does not abridge the Plaintiffs' fundamental right to marry because the Plaintiffs are still at liberty to marry a person of the opposite sex. But this purported liberty is an illusion. The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person's right to marry because such arrangements would infringe an individual's rights to privacy, dignity, and intimate association. A person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment. *See Casey,* 505 U.S. at 851, 112 S.Ct. 2791. The State's argument disregards these numerous

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associated rights because the State focuses on the outward manifestations of the right to marry, and not the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right.

Moreover, the State fails to dispute any of the facts that demonstrate why the Plaintiffs' asserted right to marry someone of the opposite sex is meaningless. The State accepts without contest the Plaintiffs' testimony that they cannot develop the type of intimate bond necessary to sustain a marriage with a person of the opposite sex. The Plaintiffs have not come to this realization lightly, and their recognition of their identity has often risked their family relationships and work opportunities. For instance, Kody and Laurie both worried that they would lose their jobs as English teachers if they were open about their sexual identity. Kate's previous partner did lose her job because she was a lesbian, and Kate may have been let go from her position with the National Park Service for the same reason. Karen's family never accepted her identity, and Moudi testified that he remained cautious about openly discussing his sexuality because he feared that his mother might be ridiculed. The Plaintiffs' testimony supports their assertions that their sexual orientation is an inherent characteristic of their identities.

Forty years ago, these assertions would not have been accepted by a court without dispute. In 1973, the American Psychiatric Association still defined homosexuality as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM–II), and leading experts believed that homosexuality was simply a lifestyle choice. With the increased visibility of gay men and lesbians in the past few decades, a wealth of new knowledge about sexuality has upended these previous beliefs. Today, the State does not dispute the Plaintiffs' testimony that they have never been able to develop feelings of deep intimacy for a person of the opposite sex, and the State presents no argument or evidence to suggest that the Plaintiffs could change their identity if they desired to do so. Given these undisputed facts, it is clear that if the Plaintiffs are not allowed to marry a partner of the same sex, the Plaintiffs will be forced to remain unmarried. The effect of Amendment 3 is therefore that it denies gay and lesbian citizens of Utah the ability to exercise one of their constitutionally protected rights. The State's prohibition of the Plaintiffs' right to choose a same-sex marriage partner renders their fundamental right to marry as meaningless as if the State recognized the Plaintiffs' right to bear arms but not their right to buy bullets.

While admitting that its prohibition of same-sex marriage harms the Plaintiffs, the State argues that the court's characterization of Amendment 3 is incorrect for three reasons: (1) the Plaintiffs are not qualified to enter into a marriage relationship; (2) the Plaintiffs are seeking a new right, not access to an existing right; and (3) history and tradition have not recognized a right to marry a person of the same sex. The court addresses each of these arguments in turn.

1. *The Plaintiffs Are Qualified to Marry*

[9][10] First, the State contends that same-sex partners do not possess the qualifications to enter into a marriage relationship and are therefore excluded from this right as a definitional matter. As in other states, the purposes of marriage in Utah include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another[,] and to join in an economic partnership and support one another and any dependents." *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 961 (N.D.Cal.2010). There is no dispute that the Plaintiffs are able to form a committed relationship with one person to the exclusion of all others. There is also no dispute that the Plaintiffs are capable of raising children within this framework if they choose to do so. The State even salutes "[t]he worthy efforts of same-sex couples to rear children." (Defs.' Mem. in Opp'n, at 46 n. 7, Dkt. 84.) Nevertheless, the State maintains that same-sex couples are distinct from opposite-sex couples because they are not able to naturally reproduce with each other. The State points to Supreme Court cases that have linked the importance of marriage to its relationship to procreation. *See, e.g., Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

The court does not find the State's argument compelling because, however persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal relationships from a legal and constitutional point of view. The State's position demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have children. Under the State's reasoning, a post-menopausal woman or infertile man does not have a fundamental right to marry because she or he does not have the capacity to procreate. This proposition is irreconcilable with the right to liberty that the Constitution guarantees to all citizens.

At oral argument, the State attempted to distinguish post-menopausal women from gay men and lesbians by arguing that older women were more likely to find themselves in the position of caring for a grandchild or other relative. But the State fails to recognize that many same-sex couples are also in the position of raising a child, perhaps through adoption or surrogacy. The court

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sees no support for the State's suggestion that same-sex couples are interested only in a “consent-based” approach to marriage, in which marriage focuses on the strong emotional attachment and sexual attraction of the two partners involved. *See Windsor,* 133 S.Ct. at 2718 (Alito, J., dissenting). Like opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise. Same-sex couples are just as capable of providing support for future generations as opposite-sex couples, grandparents, or other caregivers. And there is no difference between same-sex couples who choose not to have children and those opposite-sex couples who exercise their constitutionally protected right not to procreate. *See Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

In any event, the State's argument also neglects to consider the number of additional important attributes of marriage that exist besides procreation. As noted above, the Supreme Court has discussed those attributes in the context of marriages between inmates. *Turner v. Safley,* 482 U.S. 78, 95–96, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). While the Supreme Court noted that some inmates might one day be able to consummate their marriages when they were released, the Court found that marriage was important irrespective of its relationship to procreation because it was an expression of emotional support and public commitment, it was spiritually significant, and it provided access to important legal and government benefits. *Id.* These attributes of marriage are as applicable to same-sex couples as they are to opposite-sex couples.

2. *The Plaintiffs Seek Access to an Existing Right*

[11][12] The State's second argument is that the Plaintiffs are really seeking a new right, not access to an existing right. To establish a new fundamental right, the court must determine that the right is “deeply rooted in this Nation's history and tradition” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if [it] were sacrificed.” *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citations omitted). Because same-sex marriage has only recently been allowed by a number of states, the State argues that an individual's right to marry someone of the same sex cannot be a fundamental right. But the Supreme Court did not adopt this line of reasoning in the analogous case of *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). Instead of declaring a new right to interracial marriage, the Court held that individuals could not be restricted from exercising their existing right to marry on account of the race of their chosen partner. *Id.* at 12, 87 S.Ct. 1817. Similarly, the Plaintiffs here do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner.

The alleged right to same-sex marriage that the State claims the Plaintiffs are seeking is simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond. This right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference. And, as discussed above, this right is enjoyed by all individuals. If the right to same-sex marriage were a new right, then it should make new protections and benefits available to all citizens. But heterosexual individuals are as likely to exercise their purported right to same-sex marriage as gay men and lesbians are to exercise their purported right to opposite-sex marriage. Both same-sex and opposite-sex marriage are therefore simply manifestations of one right—the right to marry—applied to people with different sexual identities.

While it was assumed until recently that a person could only share an intimate emotional bond and develop a family with a person of the opposite sex, the realization that this assumption is false does not change the underlying right. It merely changes the result when the court applies that right to the facts before it. Applying that right to these Plaintiffs, the court finds that the Constitution protects their right to marry a person of the same sex to the same degree that the Constitution protects the right of heterosexual individuals to marry a person of the opposite sex.

Because the right to marry has already been established as a fundamental right, the court finds that the *Glucksberg* analysis is inapplicable here. The Plaintiffs are seeking access to an existing right, not the declaration of a new right.

3. *Tradition and History Are Insufficient Reasons to Deny Fundamental Rights to an Individual.*

[13][14] Finally, the State contends that the fundamental right to marriage cannot encompass the right to marry someone of the same sex because this right has never been interpreted to have this meaning in the past. The court is not persuaded by the State's argument. The Constitution is not so rigid that it always mandates the same outcome even when its principles operate on a new set of facts that were previously unknown:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the

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> components of liberty in its manifold possibilities, they might have been more specific. They did not presume 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.

Lawrence v. Texas, 539 U.S. 558, 578–79, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). Here, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian. The court cannot ignore the fact that the Plaintiffs are able to develop a committed, intimate relationship with a person of the same sex but not with a person of the opposite sex. The court, and the State, must adapt to this changed understanding.

C. *Summary of Due Process Analysis*

The Fourteenth Amendment protects the liberty rights of all citizens, and none of the State's arguments presents a compelling reason why the scope of that right should be greater for heterosexual individuals than it is for gay and lesbian individuals. If, as is clear from the Supreme Court cases discussing the right to marry, a heterosexual person's choices about intimate association and family life are protected from unreasonable government interference in the marital context, then a gay or lesbian person also enjoys these same protections.

The court's holding is supported, even required, by the Supreme Court's recent opinion concerning the scope of protection that the Fourteenth Amendment provides to gay and lesbian citizens. In *Lawrence v. Texas,* the Court overruled its previous decision in *Bowers v. Hardwick,* 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and held that the Due Process Clause protected an individual's right to have sexual relations with a partner of the same sex. 539 U.S. at 578, 123 S.Ct. 2472. The Court ruled: "The Texas [sodomy] statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* While the Court stated that its opinion did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.,* the Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage,* procreation, contraception, family relationships, child rearing, and education" and held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574, 123 S.Ct. 2472 (emphasis added). The court therefore agrees with the portion of Justice Scalia's dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court's reasoning logically extends to protect an individual's right to marry a person of the same sex:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, ... what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"?

Id. at 604–05, 123 S.Ct. 2472 (Scalia, J., dissenting) (citations omitted).

[15] The Supreme Court's decision in *Lawrence* removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals. The only other distinction the State has attempted to make is its argument that same-sex couples are not able to naturally reproduce with each other. But, of course, neither can thousands of opposite-sex couples in Utah. As a result, there is no legitimate reason that the rights of gay and lesbian individuals are any different from those of other people. All citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family.

The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner.

D. *Amendment 3 Does Not Survive Strict Scrutiny*

The court's determination that the fundamental right to marry encompasses the Plaintiffs' right to marry a person of the same sex is not the end of the court's analysis. The State may pass a law that restricts a person's fundamental rights provided that the law is "narrowly tailored to serve a compelling state interest." *Reno v. Flores,* 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). For instance, a state may permissibly regulate the age at which a person may be married because the state has a compelling interest in protecting children against abuse and coercion. Similarly, a state need not allow an individual to marry if that person is mentally incapable of forming the requisite consent, or if that prohibition is part of the punishment for a prisoner serving a

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life sentence. *See Butler v. Wilson,* 415 U.S. 953, 94 S.Ct. 1479, 39 L.Ed.2d 569 (1974) (summarily affirming decision to uphold a state law that prohibited prisoners incarcerated for life from marrying).

The court finds no reason that the Plaintiffs are comparable to children, the mentally incapable, or life prisoners. Instead, the Plaintiffs are ordinary citizens—business owners, teachers, and doctors—who wish to marry the persons they love. As discussed below, the State of Utah has not demonstrated a rational, much less a compelling, reason why the Plaintiffs should be denied their right to marry. Consequently, the court finds that Amendment 3 violates the Plaintiffs' due process rights under the Fourteenth Amendment.

V. Amendment 3 Violates the Plaintiffs' Right to Equal Protection

[16] The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const. amend. XIV, § 1. The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting). But the guarantee of equal protection coexists with the practical necessity that most legislation must classify for some purpose or another. *See Romer v. Evans,* 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

[17][18] To determine whether a piece of legislation violates the Equal Protection Clause, the court first looks to see whether the challenged law implicates a fundamental right. "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki,* 434 U.S. at 388, 98 S.Ct. 673; *see also Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 670, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). Here, the court finds that Amendment 3 interferes with the exercise of the Plaintiffs' fundamental right to marry. As discussed above, Amendment 3 is therefore unconstitutional because the State has not shown that the law is narrowly tailored to meet a compelling governmental interest. But even if the court disregarded the impact of Amendment 3 on the Plaintiffs' fundamental rights, the law would still fail for the reasons discussed below.

[19][20] The Plaintiffs argue that Amendment 3 discriminates against them on the basis of their sex and sexual identity in violation of the Equal Protection Clause. When a state regulation adversely affects members of a certain class, but does not significantly interfere with the fundamental rights of the individuals in that class, courts first determine how closely they should scrutinize the challenged regulation. Courts must not simply defer to the State's judgment when there is reason to suspect "prejudice against discrete and insular minorities ... which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities[.]" *United States v. Carolene Prods. Co.,* 304 U.S. 144, 152–53 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938).

[21] To decide whether a challenged state law impermissibly discriminates against members of a class in violation of the Equal Protection Clause, the Supreme Court has developed varying tiers of scrutiny that courts apply depending on what class of citizens is affected. "Classifications based on race or national origin" are considered highly suspect and "are given the most exacting scrutiny." *Clark v. Jeter,* 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). On the other end of the spectrum, courts must uphold a legislative classification that does not target a suspect class "so long as it bears a rational relation to some legitimate end." *Romer,* 517 U.S. at 631, 116 S.Ct. 1620. "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Clark,* 486 U.S. at 461, 108 S.Ct. 1910. Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are "substantially related to an important governmental objective." *Id.*

A. *Heightened Scrutiny*

The Plaintiffs assert three theories why the court should apply some form of heightened scrutiny to this case. While the court discusses each of these theories below, it finds that it need not apply heightened scrutiny here because Amendment 3 fails under even the most deferential level of review.

1. *Sex Discrimination*

[22] The Plaintiffs argue that the court should apply heightened scrutiny to Amendment 3 because it discriminates on the basis of an individual's sex. As noted above, classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective[.]" *United States v. Virginia,* 518 U.S. 515, 533, 116

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S.Ct. 2264, 135 L.Ed.2d 735 (1996) (citation omitted); *Concrete Works v. City of Denver,* 36 F.3d 1513, 1519 (10th Cir.1994) ("Gender-based classifications ... are evaluated under the intermediate scrutiny rubric").

[23] The State concedes that Amendment 3 involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman. Nevertheless, the State argues that Amendment 3 does not discriminate on the basis of sex because its prohibition against same-sex marriage applies equally to both men and women. The Supreme Court rejected an analogous argument in *Loving v. Virginia,* 388 U.S. 1, 8–9, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). In *Loving,* Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both white and black citizens. *Id.* at 7–8, 87 S.Ct. 1817. The Court found that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9, 87 S.Ct. 1817. Applying the same logic, the court finds that the fact of equal application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex.

But because the court finds that Amendment 3 fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard of demonstrating an "exceedingly persuasive" justification for its prohibition against same-sex marriage. *Virginia,* 518 U.S. at 533, 116 S.Ct. 2264.

2. *Sexual Orientation as a Suspect Class*

The Plaintiffs assert that, even if Amendment 3 does not discriminate on the basis of sex, it is undisputed that the law discriminates on the basis of a person's sexual orientation. The Plaintiffs maintain that gay men and lesbians as a class exhibit the "traditional indicia" that indicate they are especially at risk of discrimination. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The Plaintiffs therefore urge the court to hold that sexual orientation should be considered at least a quasi-suspect class, a holding which would require the court to apply heightened scrutiny to its analysis of Amendment 3.

The court declines to address the Plaintiffs' argument because it finds that it is bound by the Tenth Circuit's discussion of this issue. In *Price–Cornelison v. Brooks,* the Tenth Circuit considered a claim that an undersheriff refused to enforce a protective order because the domestic violence victim was a lesbian. 524 F.3d 1103, 1105 (2008). The court held that the plaintiff's claim did not "implicate a protected class, which would warrant heightened scrutiny." *Id.* at 1113. In a footnote, the court supported its statement with a number of citations to cases from the Tenth Circuit and other Courts of Appeal. *See id.* at 1113 n. 9.

[24] The American Civil Liberties Union submitted an amicus brief arguing that the Tenth Circuit had no occasion to decide whether heightened scrutiny would be appropriate in *Price–Cornelison* because the court found that the discrimination at issue did not survive even rational basis review. *Id.* at 1114. As a result, the ACLU contends that the Tenth Circuit's statement was dicta and not binding. The court is not persuaded by the ACLU's argument. Even if the Tenth Circuit did not need to reach this question, the court's extensive footnote in *Price–Cornelison* clearly indicates that the Tenth Circuit currently applies only rational basis review to classifications based on sexual orientation. Unless the Supreme Court or the Tenth Circuit hold differently, the court continues to follow this approach.

3. *Animus*

[25] The Plaintiffs contend that Amendment 3 is based on animus against gay and lesbian individuals and that the court should therefore apply a heightened level of scrutiny to the law. As discussed below, there is some support for the Plaintiffs' argument in the Supreme Court opinions of *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) and *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). But because the Supreme Court has not yet delineated the contours of such an approach, this court will continue to apply the standard rational basis test.

In *Romer,* the Supreme Court considered an amendment to the Colorado Constitution that prohibited any department or agency of the State of Colorado or any Colorado municipality from adopting any law or regulation that would protect gay men, lesbians, or bisexuals from discrimination. 517 U.S. at 624, 116 S.Ct. 1620. The amendment not only prevented future attempts to establish these protections, but also repealed ordinances that had already been adopted by the cities of Denver, Boulder, and Aspen. *Id.* at 623–24, 116 S.Ct. 1620. The Supreme Court held that the amendment was unconstitutional because it violated the Equal Protection Clause. *Id.* at 635, 116 S.Ct. 1620. While the Court cited the rational basis test, the Court also stated that the Colorado law "confound[ed] this normal process of judicial review." *Id.* at 633, 116 S.Ct. 1620. The Court then held that the law had

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no rational relation to a legitimate end for two reasons. First, the Court ruled that it was not "within our constitutional tradition" to enact a law "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government[.]" *Id.* Second, the Court held that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634, 116 S.Ct. 1620. The Court's analysis focused more on the purpose and effect of the Colorado amendment than on a consideration of the purported legitimate interests the State asserted in support of its law.

The Supreme Court's opinion in *Windsor* is similar. The Court did not analyze the legitimate interests cited by DOMA's defenders as would be typical in a rational basis review. *See Windsor,* 133 S.Ct. at 2707 (Scalia, J., dissenting) ("[The majority] makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them."). Instead, the Court focused on the "design, purpose, and effect of DOMA," *id.* at 2689, and held that the law's "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma" on same-sex couples that a state had permitted to wed. *Id.* at 2693. Because DOMA's "principal purpose" was "to impose inequality," *id.* at 2694, the Court ruled that the law deprived legally wed same-sex couples of "an essential part of the liberty protected by the Fifth Amendment." *Id.* at 2692.

In both *Romer* and *Windsor,* the Court cited the following statement from *Louisville Gas & Elec. Co. v. Coleman:* "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 277 U.S. 32, 37–38, 48 S.Ct. 423, 72 L.Ed. 770 (1928), *quoted in Romer,* 517 U.S. at 633, 116 S.Ct. 1620. Indeed, the *Windsor* Court held that "discriminations of an unusual character especially *require* careful consideration." 133 S.Ct. at 2693 (emphasis added) (citation omitted). The Court's emphasis on discriminations of an unusual character suggests that, when presented with an equal protection challenge, courts should first analyze the law's design, purpose, and effect to determine whether the law is subject to "careful consideration." If the principal purpose or effect of a law is to impose inequality, a court need not even consider whether the class of citizens that the law effects requires heightened scrutiny or a rational basis approach. Such laws are "not within our constitutional tradition," *Romer,* 517 U.S. at 633, 116 S.Ct. 1620, and violate the Equal Protection Clause regardless of the class of citizens that bears the disabilities imposed by the law. If, on the other hand, the law merely distributes benefits unevenly, then the law is subject to heightened scrutiny only if the disadvantages imposed by that law are borne by a class of people that has a history of oppression and political powerlessness.

While this analysis appears to follow the Supreme Court's reasoning in *Romer* and *Windsor,* the court is wary of adopting such an approach here in the absence of more explicit guidance. For instance, the Supreme Court has not elaborated how a court should determine whether a law imposes a discrimination of an unusual character. There are a number of reasons why Amendment 3 is similar to both DOMA and the Colorado amendment that the Supreme Court struck down in *Windsor* and *Romer.* First, the avowed purpose and practical effect of Amendment 3 is to deny the responsibilities and benefits of marriage to same-sex couples, which is another way of saying that the law imposes inequality. Indeed, Amendment 3 went beyond denying gay and lesbian individuals the right to marry and held that no domestic union could be given the same or substantially equivalent legal effect as marriage. This wording suggests that the imposition of inequality was not merely the law's effect, but its goal.

Second, Amendment 3 has an unusual character when viewed within the historical context in which it was passed. Even though Utah already had statutory provisions that restricted marriage to opposite-sex couples, the State nevertheless passed a constitutional amendment to codify this prohibition. This action is only logical when viewed against the developments in Massachusetts, whose Supreme Court held in 2003 that the Massachusetts Constitution required the recognition of same-sex marriages. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 798 N.E.2d 941, 948 (2003). The Utah legislature believed that a constitutional amendment was necessary to maintain Utah's ban on same-sex marriage because of the possibility that a Utah court would adopt reasoning similar to the Massachusetts Supreme Court and hold that the Utah Constitution already protected an individual's right to marry a same-sex partner. Amendment 3 thereby preemptively denied rights to gay and lesbian citizens of Utah that they may have already had under the Utah Constitution.

But there are also reasons why Amendment 3 may be distinguishable from the laws the Supreme Court has previously held to be discriminations of an unusual character. Most notably, the Court has not articulated to what extent such a discrimination must be motivated by a "bare ... desire to harm a politically unpopular group." *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The Plaintiffs argue that Amendment 3 was motivated by animus and urge the court to consider the statements in the Voter Information Pamphlet that was provided to Utah voters. The Pamphlet includes arguments made by Amendment 3's proponents that the amendment was necessary to "maintain[ ] public morality" and to ensure the continuation of

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"the ideal relationship where men, women and children thrive best." (Utah Voter Information Pamphlet to General Election on Nov. 2, 2004, at 36, Dkt. 32–2.) The Plaintiffs submit that these statements demonstrate that Amendment 3 was adopted to further privately held moral views that same-sex couples are immoral and inferior to opposite-sex couples.

While the Plaintiffs argue that many Utah citizens voted for Amendment 3 out of a dislike of gay and lesbian individuals, the court finds that it is impossible to determine what was in the mind of each individual voter. Some citizens may have voted for Amendment 3 purely out of a belief that the amendment would protect the benefits of opposite-sex marriage. Of course, good intentions do not save a law if the law bears no rational connection to its stated legitimate interests, but this analysis is the test the court applies when it follows the Supreme Court's rational basis jurisprudence. It is unclear how a mix of animus and good intentions affects the determination of whether a law imposes a discrimination of such unusual character that it requires the court to give it careful consideration.

In any event, the theory of heightened scrutiny that the Plaintiffs advocate is not necessary to the court's determination of Amendment 3's constitutionality. The court has already held that Amendment 3 burdens the Plaintiffs' fundamental right to marriage and is therefore subject to strict scrutiny. And, as discussed below, the court finds that Amendment 3 bears no rational relationship to any legitimate state interests and therefore fails rational basis review. It may be that some laws neither burden a fundamental right nor target a suspect class, but nevertheless impose a discrimination of such unusual character that a court must review a challenge to such a law with careful consideration. But the court's analysis here does not hinge on that type of heightened review. The court therefore proceeds to apply the well-settled rational basis test to Amendment 3.

B. *Rational Basis Review*

[26][27][28] When a law creates a classification but does not target a suspect class or burden a fundamental right, the court presumes the law is valid and will uphold it so long as it rationally relates to some legitimate governmental purpose. *See Heller v. Doe,* 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). The court defers to the judgment of the legislature or the judgment of the people who have spoken through a referendum if there is at least a debatable question whether the underlying basis for the classification is rational. *See Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). But even under the most deferential standard of review, the court must still "insist on knowing the relation between the classification adopted and the object to be obtained." *Romer v. Evans,* 517 U.S. 620, 632, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996); *Lyng v. Int'l Union,* 485 U.S. 360, 375, 108 S.Ct. 1184, 99 L.Ed.2d 380 (1988) ("[L]egislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals."). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633, 116 S.Ct. 1620. As a result, a law must do more than disadvantage or otherwise harm a particular group to survive rational basis review. *See U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973).

[29][30] The State emphasizes that the court must accept any legislative generalizations, "even when there is an imperfect fit between means and ends." *Heller,* 509 U.S. at 321, 113 S.Ct. 2637. The court will uphold a classification provided "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison,* 415 U.S. 361, 383, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). Based on this principle, the State argues that its extension of marriage benefits to opposite-sex couples promotes certain governmental interests such as responsible procreation and optimal child-rearing that would not be furthered if marriage benefits were extended to same-sex couples. But the State poses the wrong question. The court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. No one disputes that marriage benefits serve not just legitimate, but compelling governmental interests, which is why the Constitution provides such protection to an individual's fundamental right to marry. Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest. Here, the challenged statute does not grant marriage benefits to opposite-sex couples. The effect of Amendment 3 is only to disallow same-sex couples from gaining access to these benefits. The court must therefore analyze whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.

This focus on a rational connection between the State's legitimate interests and the State's exclusion of a group from benefits is well-supported in a number of Supreme Court decisions. For instance, the Court held in *Johnson v. Robison* that the rational basis test was satisfied by a congressional decision to exclude conscientious objectors from receiving veterans' tax benefits because their lives had not been disrupted to the same extent as the lives of active service veterans. 415 U.S. at 381–82, 94 S.Ct. 1160. *See also City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 448–50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (examining the city's interest in denying housing for people with developmental disabilities, not in continuing to allow residence for

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others); *Moreno,* 413 U.S. at 535–38, 93 S.Ct. 2821 (testing the federal government's interest in excluding unrelated households from food stamp benefits, not in maintaining food stamps for related households); *Eisenstadt v. Baird,* 405 U.S. 438, 448–53, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (requiring a state interest in the exclusion of unmarried couples from lawful access to contraception, not merely an interest in continuing to allow married couples access); *Loving v. Virginia,* 388 U.S. 1, 9–12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (examining whether Virginia's exclusion of interracial couples from marriage violated equal protection principles independent of Virginia's interest in providing marriage to same-race couples).

For the reasons stated below, the court finds that the legitimate government interests that Utah cites are not rationally related to Utah's prohibition of same-sex marriage.

1. *Responsible Procreation*

[31] The State argues that the exclusion of same-sex couples from marriage is justified based on an interest in promoting responsible procreation within marriage. According to the State, "[t]raditional marriage with its accompanying governmental benefits provides an incentive for opposite-sex couples to commit together to form [ ] a stable family in which their planned, and especially unplanned, biological children may be raised." (Defs.' Mot. Summ. J., at 28, Dkt. 33.) The Plaintiffs do not dispute the State's assertion, but question how disallowing same-sex marriage has any effect on the percentage of opposite-sex couples that have children within a marriage. The State has presented no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex couples to marry. Indeed, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. If there is any connection between same-sex marriage and responsible procreation, the relationship is likely to be the opposite of what the State suggests. Because Amendment 3 does not currently permit same-sex couples to engage in sexual activity within a marriage, the State reinforces a norm that sexual activity may take place outside the marriage relationship.

As a result, any relationship between Amendment 3 and the State's interest in responsible procreation "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne,* 473 U.S. at 446, 105 S.Ct. 3249; *see also Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 972 (N.D.Cal.2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriage."). Accordingly, the court finds no rational connection between Amendment 3 and the state's interest in encouraging its citizens to engage in responsible procreation.

2. *Optimal Child–Rearing*

[32] The State also asserts that prohibiting same-sex couples from marrying "promotes the ideal that children born within a state-sanctioned marriage will be raised by both a mother and father in a stable family unit." (Defs.' Mot. Summ. J., at 33, Dkt. 33.) Utah contends that the "gold standard" for family life is an intact, biological, married family. (*Id.* at 34.) By providing incentives for only opposite-sex marriage, Utah asserts that more children will be raised in this ideal setting. The Plaintiffs dispute the State's argument that children do better when raised by opposite-sex parents than by same-sex parents. The Plaintiffs claim that the State's position is demeaning not only to children of same-sex parents, but also to adopted children of opposite-sex parents, children of single parents, and other children living in families that do not meet the State's "gold standard." Both parties have cited numerous authorities to support their positions. To the extent the parties have created a factual dispute about the optimal environment for children, the court cannot resolve this dispute on motions for summary judgment. But the court need not engage in this debate because the State's argument is unpersuasive for another reason. Once again, the State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote.

There is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples. The State has presented no evidence that Amendment 3 furthers or restricts the ability of gay men and lesbians to adopt children, to have children through surrogacy or artificial insemination, or to take care of children that are biologically their own whom they may have had with an opposite-sex partner. Similarly, the State has presented no evidence that opposite-sex couples will base their decisions about having children on the ability of same-sex couples to marry. To the extent the State wishes to see more children in opposite-sex families, its goals are tied to laws concerning adoption and surrogacy, not marriage.

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If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiffs' assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. (Patterson Decl. ¶ 40, Dkt. 85.) These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples. Amendment 3 "humiliates [ ] thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor,* 133 S.Ct. at 2694. Amendment 3 "also brings financial harm to children of same-sex couples," *id.* at 2695, because it denies the families of these children a panoply of benefits that the State and the federal government offer to families who are legally wed. Finally, Utah's prohibition of same-sex marriage further injures the children of both opposite-sex and same-sex couples who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends.

For these reasons, Amendment 3 does not make it any more likely that children will be raised by opposite-sex parents. As a result, the court finds that there is no rational connection between Utah's prohibition of same-sex marriage and its goal of fostering an ideal family environment for a child.

3. *Proceeding with Caution*

[33] The State contends that it has a legitimate interest in proceeding with caution when considering expanding marriage to encompass same-sex couples. But the State is not able to cite any evidence to justify its fears. The State's argument is analogous to the City of Cleburne's position in *City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In that case, the City was concerned about issuing a permit for a home for the developmentally disadvantaged because of the fears of the property owners near the facility. *Id.* at 448, 105 S.Ct. 3249. The Supreme Court held that "mere negative attitudes, or fear, ... are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* The State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review.

In any event, the only evidence that either party submitted concerning the effect of same-sex marriage suggests that the State's fears are unfounded. In an amicus brief submitted to the Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births. (Brief of State Amici in *Sevcik v. Sandoval,* at 24–28, Ex. 13 to Pls.' Mem. in Opp'n, Dkt. 85–14.) In addition, the process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce, or inheritance laws.

For these reasons, the court finds that proceeding with caution is not a legitimate state interest sufficient to survive rational basis review.

4. *Preserving the Traditional Definition of Marriage*

[34] As noted in the court's discussion of fundamental rights, the State argues that preserving the traditional definition of marriage is itself a legitimate state interest. But tradition alone cannot form a rational basis for a law. *Williams v. Illinois,* 399 U.S. 235, 239, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *see also Heller v. Doe,* 509 U.S. 312, 326, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

[35] The traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views. *See Lawrence v. Texas,* 539 U.S. 558, 577–78, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted); *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 733–35, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003) (finding that government action based on stereotypes about women's greater suitability or inclination to assume primary childcare responsibility was unconstitutional). And, as Justice Scalia has noted in dissent, " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence,* 539 U.S. at 601, 123 S.Ct. 2472 (Scalia, J., dissenting). While "[p]rivate biases may be outside the reach of the law, ... the law cannot, directly or indirectly, give them effect" at the expense of a disfavored group's constitutional rights. *Palmore v. Sidoti,* 466 U.S. 429, 433, 104 S.Ct. 1879, 80 L.Ed.2d 421

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(1984).

Although the State did not directly present an argument based on religious freedom, the court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage. If anything, the recognition of same-sex marriage expands religious freedom because some churches that have congregations in Utah desire to perform same-sex wedding ceremonies but are currently unable to do so. *See* Brief of Amici Curiae Bishops et al., at 8–15, *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013) (No. 12–307) (arguing that the inherent dignity of lesbian and gay individuals informs the theology of numerous religious beliefs, including the Unitarian Universalist Church and the United Church of Christ). By recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.

For these reasons, the court finds that the State's interest in preserving its traditional definition of marriage is not sufficient to survive rational basis review.

C. *Summary of Rational Basis Analysis*

In its briefing and at oral argument, the State was unable to articulate a specific connection between its prohibition of same-sex marriage and any of its stated legitimate interests. At most, the State asserted: "We just simply don't know." (Hr'g Tr., at 94, 97, Dec. 4, 2013, Dkt. 88.) This argument is not persuasive. The State's position appears to be based on an assumption that the availability of same-sex marriage will somehow cause opposite-sex couples to forego marriage. But the State has not presented any evidence that heterosexual individuals will be any less inclined to enter into an opposite-sex marriage simply because their gay and lesbian fellow citizens are able to enter into a same-sex union. Similarly, the State has not shown any effect of the availability of same-sex marriage on the number of children raised by either opposite-sex or same-sex partners.

In contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed. To apply the Supreme Court's reasoning in *Windsor,* Amendment 3 "tells those couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition. This places same-sex couples in an unstable position of being in a second-tier [relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor,* 133 S.Ct. at 2694; *see also id.* at 2710 (Scalia, J., dissenting) (suggesting that the majority's reasoning could be applied to the state-law context in precisely this way). And while Amendment 3 does not offer any additional protection to children being raised by opposite-sex couples, it demeans the children of same-sex couples who are told that their families are less worthy of protection than other families.

The Plaintiffs have presented a number of compelling arguments demonstrating that the court should be more skeptical of Amendment 3 than of typical legislation. The law differentiates on the basis of sex and closely resembles the type of law containing discrimination of an unusual character that the Supreme Court struck down in *Romer* and *Windsor.* But even without applying heightened scrutiny to Amendment 3, the court finds that the law discriminates on the basis of sexual identity without a rational reason to do so. Because Amendment 3 fails even rational basis review, the court finds that Utah's prohibition on same-sex marriage violates the Plaintiffs' right to equal protection under the law.

VI. Utah's Duty to Recognize a Marriage Validly Performed in Another State

Plaintiffs Karen Archer and Kate Call contend that their rights to due process and equal protection are further infringed by the State's refusal to recognize their marriage that was validly performed in Iowa. The court's disposition of the other issues in this lawsuit renders this question moot. Utah's current laws violate the rights of same-sex couples who were married elsewhere not because they discriminate against a subsection of same-sex couples in Utah who were validly married in another state, but because they discriminate against all same-sex couples in Utah.

CONCLUSION

In 1966, attorneys for the State of Virginia made the following arguments to the Supreme Court in support of Virginia's law prohibiting interracial marriage: (1) "The Virginia statutes here under attack reflects [sic] a policy which has obtained in this Commonwealth for over two centuries and which still obtains in seventeen states"; (2) "Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' "; (3) "[I]ntermarriage constitutes a threat to society"; and (4) "[U]nder the Constitution the regulation and control of marital and family relationships are reserved to the States." Brief for Respondents at 47–52, *Loving v.*

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Virginia, 388 U.S. 1 (1967), 1967 WL 113931. These contentions are almost identical to the assertions made by the State of Utah in support of Utah's laws prohibiting same-sex marriage. For the reasons discussed above, the court finds these arguments as unpersuasive as the Supreme Court found them fifty years ago. Anti-miscegenation laws in Virginia and elsewhere were designed to, and did, deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice. Utah's Amendment 3 achieves the same result.

Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples. And while the State cites an interest in protecting traditional marriage, it protects that interest by denying one of the most traditional aspects of marriage to thousands of its citizens: the right to form a family that is strengthened by a partnership based on love, intimacy, and shared responsibilities. The Plaintiffs' desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse.

The State of Utah has provided no evidence that opposite-sex marriage will be affected in any way by same-sex marriage. In the absence of such evidence, the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens. Moreover, the Constitution protects the Plaintiffs' fundamental rights, which include the right to marry and the right to have that marriage recognized by their government. These rights would be meaningless if the Constitution did not also prevent the government from interfering with the intensely personal choices an individual makes when that person decides to make a solemn commitment to another human being. The Constitution therefore protects the choice of one's partner for all citizens, regardless of their sexual identity.

ORDER

The court GRANTS the Plaintiffs' Motion for Summary Judgment (Dkt. 32) and DENIES the Defendants' Motion for Summary Judgment (Dkt. 33). The court hereby declares that Amendment 3 is unconstitutional because it denies the Plaintiffs their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The court hereby enjoins the State from enforcing Sections 30–1–2 and 30–1–4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex.

Supplemental Case Printout for: *Beyond Our Borders*

539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508
Supreme Court of the United States

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

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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

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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

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persons.
Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. Thus the model sodomy indictments presented in a 19th-century treatise, see 2 Chitty, *supra,* at 49, addressed the predatory acts of an adult man against a minor girl or minor boy. Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals.
To the extent that there were any prosecutions for the acts in question, 19th-century evidence rules imposed a burden that would make a conviction more difficult to obtain even taking into account the problems always inherent in prosecuting consensual acts committed in private. Under then-prevailing standards, a man could not be convicted of sodomy based upon testimony of a consenting partner, because the partner was considered an accomplice. A partner's testimony, however, was admissible if he or she had not consented to the act or was a minor, and therefore incapable of consent. See, *e.g.,* F. Wharton, Criminal Law 443 (2d ed. 1852); 1 F. Wharton, Criminal Law 512 (8th ed. 1880). The rule may explain in part the infrequency of these prosecutions. In all events that infrequency makes it difficult to say that society approved of a rigorous and systematic ***570** punishment of the consensual acts committed in private and by adults. The longstanding criminal prohibition of homosexual sodomy upon which the decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.
The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14-15, and n. 18.
It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. ****2480** Acts p. 847; 1977 Mo. Laws p. 687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also (sodomy law invalidated as applied to different-sex couples). Post-even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g.,* ; ; ; ***571**; see also 1993 Nev. Stats. p. 518 (repealing).
In summary, the historical grounds relied upon in are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.
It must be acknowledged, of course, that the Court in was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." .
Chief Justice Burger joined the opinion for the Court in and further explained his views as follows: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults. See, *e.g.,* Eskridge, . In all events we think that our laws and traditions in the past half century are of ***572** most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (KENNEDY, J., concurring).
This emerging recognition should have been apparent when was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not recommend or provide for "criminal penalties for consensual sexual relations conducted in private." ALI, , Comment 2, p. 372 (1980). It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not

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harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955). In 1961 Illinois changed its laws to conform to the Model Penal Code. ****2481** Other States soon followed. Brief for Cato Institute as *Amicus Curiae* 15-16.

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

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

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

In our own constitutional system the deficiencies in became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances. .

Two principal cases decided after cast its holding into even more doubt. In , the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The decision again confirmed ***574** that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

****2482** Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in would deny them this right.

The second post- case of principal relevance is . There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. invalidated an amendment to Colorado's Constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships," (internal quotation marks omitted), and deprived them of protection under state antidiscrimination laws. We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude***575** the instant case requires us to address whether itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.

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The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. ; . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing to ; La.Code Crim. Proc. Ann. § § 15:540-15:549 ***576** West 2003); to (Lexis 2003); to (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

The foundations of have sustained serious erosion from our recent decisions in and When our precedent has been thus weakened, criticism from other sources is of greater significance.****2483** In the United States criticism of has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. See, *e.g.,* C. Fried, Order and Law: Arguing the Reagan Revolution-A Firsthand Account 81-84 (1991); R. Posner, Sex and Reason 341-350 (1992). The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment, see ; ; ; ; .

To the extent relied on values we share with a wider civilization, it should be noted that the reasoning and holding in have been rejected elsewhere. The European Court of Human Rights has followed not but its own decision in *Dudgeon v. United Kingdom.* See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary ***577** Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

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

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

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

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

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

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

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume ***579** to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and

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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*

137 S.Ct. 1730
Supreme Court of the United States

Lester Gerard PACKINGHAM, Petitioner
v.
NORTH CAROLINA.

No. 15–1194.
Argued Feb. 27, 2017.
Decided June 19, 2017.
Justice KENNEDY delivered the opinion of the Court.
In 2008, North Carolina enacted a statute making it a felony for a registered sex offender to gain access to a number of websites, including commonplace social media websites like Facebook and Twitter. The question presented is whether that law is permissible under the First Amendment's Free Speech Clause, applicable to the States under the Due Process Clause of the Fourteenth Amendment.
I
A
North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). A "commercial social networking Web site" is defined as a website that meets four criteria. First, it "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the *1734 Web site." § 14–202.5(b). Second, it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges." *Ibid.* Third, it "[a]llows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." *Ibid.* And fourth, it "[p]rovides users or visitors ... mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger." *Ibid.*
The statute includes two express exemptions. The statutory bar does not extend to websites that "[p]rovid[e] only one of the following discrete services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." § 14–202.5(c)(1). The law also does not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors." § 14–202.5(c)(2).
According to sources cited to the Court, § 14–202.5 applies to about 20,000 people in North Carolina and the State has prosecuted over 1,000 people for violating it. Brief for Petitioner 6–8.

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B
In 2002, petitioner Lester Gerard Packingham—then a 21–year–old college student—had sex with a 13–year–old girl. He pleaded guilty to taking indecent liberties with a child. Because this crime qualifies as "an offense against a minor," petitioner was required to register as a sex offender—a status that can endure for 30 years or more. See § 14–208.6A; see § 14–208.7(a). As a registered sex offender, petitioner was barred under § 14–202.5 from gaining access to commercial social networking sites.
In 2010, a state court dismissed a traffic ticket against petitioner. In response, he logged on to Facebook.com and posted the following statement on his personal profile:
"Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!" App. 136.
At the time, a member of the Durham Police Department was investigating registered sex offenders who were thought to be violating § 14–202.5. The officer noticed that a " 'J.R. Gerrard' " had posted the statement quoted above. 368 N.C. 380, 381, 777 S.E.2d 738, 742 (2015). By checking court records, the officer discovered that a traffic citation for petitioner had been dismissed around the time of the post. Evidence obtained by search warrant confirmed the officer's suspicions that petitioner was J.R. Gerrard.
Petitioner was indicted by a grand jury for violating § 14–202.5. The trial court denied his motion to dismiss the indictment on the grounds that the charge against him violated the First Amendment. Petitioner was ultimately convicted and given a suspended prison sentence. At no point during trial or sentencing did the State allege that petitioner contacted a minor—or committed any other illicit act—on the Internet.
Petitioner appealed to the Court of Appeals of North Carolina. That court struck down § 14–202.5 on First Amendment grounds, explaining that the law is not narrowly tailored to serve the State's *1735 legitimate interest in protecting minors from sexual abuse. 229 N.C.App. 293, 304, 748 S.E.2d 146, 154 (2013). Rather, the law "arbitrarily burdens all registered sex offenders by preventing a wide range of communication and expressive activity unrelated to achieving its purported goal." *Ibid.* The North Carolina Supreme Court reversed, concluding that the law is "constitutional in all respects." 368 N.C., at 381, 777 S.E.2d, at 741. Among other things, the court explained that the law is "carefully tailored ... to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors." *Id.,* at 389, 777 S.E.2d, at 747. The court also held that the law leaves open adequate alternative means of communication because it permits petitioner to gain access to websites that the court believed perform the "same or similar" functions as social media, such as the Paula Deen Network and the website for the local NBC affiliate. *Id.,* at 390, 777 S.E.2d, at 747. Two justices dissented. They stated that the law impermissibly "creates a criminal prohibition of alarming breadth and extends well beyond the evils the State seeks to combat." *Id.,* at 401, 777 S.E.2d, at 754 (opinion of Hudson, J.) (alteration, citation, and internal quotation marks omitted).
The Court granted certiorari, 580 U.S. ——, 137 S.Ct. 368, 196 L.Ed.2d 283 (2016), and now reverses.
II
12 A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. See *Ward v. Rock Against Racism,* 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.
While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the "vast democratic forums of the Internet" in general, *Reno v. American Civil Liberties Union,* 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997), and social media in particular. Seven in ten American adults use at least one Internet social networking service. Brief for Electronic Frontier Foundation et al. as *Amici Curiae* 5–6. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. *Id.,* at 6. This is about three times the population of North America.
Social media offers "relatively unlimited, low-cost capacity for communication of all kinds." *Reno, supra,* at 870, 117 S.Ct. 2329. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. See Brief for Electronic Frontier Foundation 15–16. In short, social media users employ these websites to engage in a wide array of protected First *1736 Amendment activity on topics "as diverse as human thought." *Reno, supra,* at 870, 117 S.Ct. 2329 (internal quotation marks omitted).
The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: " 'The American war is over; but this is far from being the case with

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the American revolution. On the contrary, nothing but the first act of the great drama is closed' "). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow. This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.

III

3 This background informs the analysis of the North Carolina statute at issue. Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley,* 573 U.S. ——, ——, 134 S.Ct. 2518, 2534, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). In other words, the law must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at ——, 134 S.Ct., at 2535 (internal quotation marks omitted).

For centuries now, inventions heralded as advances in human progress have been exploited by the criminal mind. New technologies, all too soon, can become instruments used to commit serious crimes. The railroad is one example, see M. Crichton, The Great Train Robbery, p. xv (1975), and the telephone another, see 18 U.S.C. § 1343. So it will be with the Internet and social media.

45 There is also no doubt that, as this Court has recognized, "[t]he sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people." *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 244, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). And it is clear that a legislature "may pass valid laws to protect children" and other victims of sexual assault "from abuse." See *id.,* at 245, 122 S.Ct. 1389; accord, *New York v. Ferber,* 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). The government, of course, need not simply stand by and allow these evils to occur. But the assertion of a valid governmental interest "cannot, in every context, be insulated from all constitutional protections." *Stanley v. Georgia,* 394 U.S. 557, 563, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

It is necessary to make two assumptions to resolve this case. First, given the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com. See *post,* at 1741 – 1743; see also Brief for Electronic Frontier Foundation *1737 24–27; Brief for Cato Institute et al. as *Amici Curiae* 10–12, and n. 6. The Court need not decide the precise scope of the statute. It is enough to assume that the law applies (as the State concedes it does) to social networking sites "as commonly understood"—that is, websites like Facebook, LinkedIn, and Twitter. See Brief for Respondent 54; Tr. of Oral Arg. 27.

6 Second, this opinion should not be interpreted as barring a State from enacting more specific laws than the one at issue. Specific criminal acts are not protected speech even if speech is the means for their commission. See *Brandenburg v. Ohio,* 395 U.S. 444, 447–449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (*per curiam*). Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor. Cf. Brief for Respondent 42–43. Specific laws of that type must be the State's first resort to ward off the serious harm that sexual crimes inflict. (Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.)

7 Even with these assumptions about the scope of the law and the State's interest, the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. *Supra,* at 1735 – 1736. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox." *Reno,* 521 U.S., at 870, 117 S.Ct. 2329.

In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.

IV

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The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose. See *McCullen,* 573 U.S., at ——, 134 S.Ct., at 2540.
It is instructive that no case or holding of this Court has approved of a statute as broad in its reach. The closest analogy that the State has cited is *Burson v. Freeman,* 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). There, the Court upheld a prohibition on campaigning within *1738 100 feet of a polling place. That case gives little or no support to the State. The law in *Burson* was a limited restriction that, in a context consistent with constitutional tradition, was enacted to protect another fundamental right—the right to vote. The restrictions there were far less onerous than those the State seeks to impose here. The law in *Burson* meant only that the last few seconds before voters entered a polling place were "their own, as free from interference as possible." *Id.,* at 210, 112 S.Ct. 1846. And the Court noted that, were the buffer zone larger than 100 feet, it "could effectively become an impermissible burden" under the First Amendment. *Ibid.*
The better analogy to this case is *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.,* 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987), where the Court struck down an ordinance prohibiting any "First Amendment activities" at Los Angeles International Airport because the ordinance covered all manner of protected, nondisruptive behavior including "talking and reading, or the wearing of campaign buttons or symbolic clothing," *id.,* at 571, 575, 107 S.Ct. 2568. If a law prohibiting "all protected expression" at a single airport is not constitutional, *id.,* at 574, 107 S.Ct. 2568 (emphasis deleted), it follows with even greater force that the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.
* * *
8 It is well established that, as a general rule, the Government "may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition,* 535 U.S., at 255, 122 S.Ct. 1389. That is what North Carolina has done here. Its law must be held invalid.
The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
It is so ordered.
Justice GORSUCH took no part in the consideration or decision of this case.
Justice ALITO, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in the judgment.
The North Carolina statute at issue in this case was enacted to serve an interest of "surpassing importance." *New York v. Ferber,* 458 U.S. 747, 757, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)—but it has a staggering reach. It makes it a felony for a registered sex offender simply to visit a vast array of websites, including many that appear to provide no realistic opportunity for communications that could facilitate the abuse of children. Because of the law's extraordinary breadth, I agree with the Court that it violates the Free Speech Clause of the First Amendment.
I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. *Ante,* at 1735 – 1736. And this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites, including, for example, teenage dating sites and sites designed to permit minors to discuss personal problems with their peers. I am troubled by the implications of the Court's unnecessary rhetoric.
I
A
The North Carolina law at issue makes it a felony for a registered sex offender "to *1739 access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). And as I will explain, the statutory definition of a "commercial social networking Web site" is very broad.
Packingham and the State debate the analytical framework that governs this case. The State argues that the law in question is content neutral and merely regulates a "place" (*i.e.,* the internet) where convicted sex offenders may wish to engage in speech. See Brief for Respondent 20–25. Therefore, according to the State, the standard applicable to "time, place, or manner" restrictions should apply. See *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Packingham responds that the challenged statute is "unlike any law this Court has considered as a time, place, or manner restriction," Brief for Petitioner 37, and he advocates a more demanding standard of review, *id.,* at 37–39.
Like the Court, I find it unnecessary to resolve this dispute because the law in question cannot satisfy the standard applicable to a content-neutral regulation of the place where speech may occur.
B
A content-neutral "time, place, or manner" restriction must serve a "legitimate" government interest, *Ward, supra,* at 798, 109 S.Ct. 2746 and the North Carolina law easily satisfies this requirement. As we have frequently noted, "[t]he prevention of sexual

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exploitation and abuse of children constitutes a government objective of surpassing importance." *Ferber, supra,* at 757, 102 S.Ct. 3348. "Sex offenders are a serious threat," and "the victims of sexual assault are most often juveniles." *McKune v. Lile,* 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion); see *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1, 4, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). "[T]he ... interest [of] safeguarding the physical and psychological well-being of a minor ... is a compelling one," *Globe Newspaper Co. v. Superior Court, County of Norfolk,* 457 U.S. 596, 607, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), and "we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights," *Ferber, supra,* at 757, 102 S.Ct. 3348.

Repeat sex offenders pose an especially grave risk to children. "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune, supra,* at 33, 122 S.Ct. 2017 (plurality opinion); see *United States v. Kebodeaux,* 570 U.S. ——, —— – ——, 133 S.Ct. 2496, 2503–2504, 186 L.Ed.2d 540 (2013).

The State's interest in protecting children from recidivist sex offenders plainly applies to internet use. Several factors make the internet a powerful tool for the would-be child abuser. First, children often use the internet in a way that gives offenders easy access to their personal information—by, for example, communicating with strangers and allowing sites to disclose their location.[1] Second, the internet provides previously unavailable ways *1740 of communicating with, stalking, and ultimately abusing children. An abuser can create a false profile that misrepresents the abuser's age and gender. The abuser can lure the minor into engaging in sexual conversations, sending explicit photos, or even meeting in person. And an abuser can use a child's location posts on the internet to determine the pattern of the child's day-to-day activities—and even the child's location at a given moment. Such uses of the internet are already well documented, both in research[2] and in reported decisions.[3]

Because protecting children from abuse is a compelling state interest and sex offenders can (and do) use the internet to engage in such abuse, it is legitimate and entirely reasonable for States to try to stop abuse from occurring before it happens.

C

1

It is not enough, however, that the law before us is designed to serve a compelling state interest; it also must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S., at 798–799, 109 S.Ct. 2746; see also *McCullen v. Coakley,* 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014). The North Carolina law fails this requirement.

A straightforward reading of the text of N.C. Gen. Stat. Ann. § 14–202.5 compels the conclusion that it prohibits sex offenders from accessing an enormous number of websites. The law defines a "commercial social networking Web site" as one with four characteristics. First, the website must be "operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site." § 14–202.5(b)(1). Due to the prevalence of advertising on websites of all types, this requirement does little to limit the statute's reach.

Second, the website must "[f]acilitat[e] the social introduction between two or *1741 more persons for the purposes of friendship, meeting other persons, or information exchanges." § 14–202.5(b)(2). The term "social introduction" easily encompasses any casual exchange, and the term "information exchanges" seems to apply to any site that provides an opportunity for a visitor to post a statement or comment that may be read by other visitors. Today, a great many websites include this feature.

Third, a website must "[a]llo[w] users to create Web pages or personal profiles that contain information *such as* the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site." § 14–202.5(b)(3) (emphasis added). This definition covers websites that allow users to create anything that can be called a "personal profile," *i.e.,* a short description of the user.[4] Contrary to the argument of the State, Brief for Respondent 26–27, everything that follows the phrase "such as" is an illustration of features that a covered website or personal profile may (but need not) include.

Fourth, in order to fit within the statute, a website must "[p]rovid[e] users or visitors ... mechanisms to communicate with other users, *such as* a message board, chat room, electronic mail, or instant messenger." § 14–202.5(b)(4) (emphasis added). This requirement seems to demand no more than that a website allow back-and-forth comments between users. And since a comment function is undoubtedly a "mechanis[m] to communicate with other users," *ibid.,* it appears to follow that any website with such a function satisfies this requirement.

2

The fatal problem for § 14–202.5 is that its wide sweep precludes access to a large number of websites that are most unlikely to facilitate the commission of a sex crime against a child. A handful of examples illustrates this point.

Take, for example, the popular retail website Amazon.com, which allows minors to use its services[5] and meets all four requirements of § 14–202.5' s definition of a commercial social networking website. First, as a seller of products, Amazon unquestionably derives revenue from the operation of its website. Second, the Amazon site facilitates the social introduction of

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people for the purpose of information exchanges. When someone purchases a product on Amazon, the purchaser can review the product and upload photographs, and other buyers can then respond to the review.[6] This information exchange about products that Amazon sells undoubtedly fits within the definition in § 14–202.5. It is the equivalent of passengers on a bus comparing notes about products they have purchased. Third, Amazon allows a user to create a personal profile, which is then associated with the product reviews that *1742 the user uploads. Such a profile can contain an assortment of information, including the user's name, e-mail address, and picture.[7] And fourth, given its back-and-forth comment function, Amazon satisfies the final statutory requirement.[8]

Many news websites are also covered by this definition. For example, the Washington Post's website gives minors access[9] and satisfies the four elements that define a commercial social networking website. The website (1) derives revenue from ads and (2) facilitates social introductions for the purpose of information exchanges. Users of the site can comment on articles, reply to other users' comments, and recommend another user's comment.[10] Users can also (3) create personal profiles that include a name or nickname and a photograph. The photograph and name will then appear next to every comment the user leaves on an article. Finally (4), the back-and-forth comment section is a mechanism for users to communicate among themselves. The site thus falls within § 14–202.5 and is accordingly off limits for registered sex offenders in North Carolina.

Or consider WebMD—a website that contains health-related resources, from tools that help users find a doctor to information on preventative care and the symptoms associated with particular medical problems. WebMD, too, allows children on the site.[11] And it exhibits the four hallmarks of a "commercial social networking" website. It obtains revenue from advertisements.[12] It facilitates information exchanges—via message boards that allow users to engage in public discussion of an assortment of health issues.[13] It allows users to create basic profile pages: Users can upload a picture and some basic information about themselves, and other users can see their aggregated comments and "likes."[14] WebMD also provides message boards, which are specifically mentioned in the statute as a "mechanis[m] to communicate with other users." N.C. Gen. Stat. Ann. § 14–202.5(b)(4).

As these examples illustrate, the North Carolina law has a very broad reach and *1743 covers websites that are ill suited for use in stalking or abusing children. The focus of the discussion on these sites—shopping, news, health—does not provide a convenient jumping off point for conversations that may lead to abuse. In addition, the social exchanges facilitated by these websites occur in the open, and this reduces the possibility of a child being secretly lured into an abusive situation. These websites also give sex offenders little opportunity to gather personal details about a child; the information that can be listed in a profile is limited, and the profiles are brief. What is more, none of these websites make it easy to determine a child's precise location at a given moment. For example, they do not permit photo streams (at most, a child could upload a single profile photograph), and they do not include up-to-the minute location services. Such websites would provide essentially no aid to a would-be child abuser.

Placing this set of websites categorically off limits from registered sex offenders prohibits them from receiving or engaging in speech that the First Amendment protects and does not appreciably advance the State's goal of protecting children from recidivist sex offenders. I am therefore compelled to conclude that, while the law before us addresses a critical problem, it sweeps far too broadly to satisfy the demands of the Free Speech Clause.[15]

II

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." *Ante,* at 1735. The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites[16] are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.

I will mention a few that are relevant to internet use by sex offenders. First, it is easier for parents to monitor the physical locations that their children visit and the individuals with whom they speak in person than it is to monitor their internet use. Second, if a sex offender is seen approaching children or loitering in a place frequented by children, this conduct may be observed by parents, teachers, or others. Third, the internet offers an unprecedented degree of anonymity and easily permits *1744 a would-be molester to assume a false identity.

The Court is correct that we should be cautious in applying our free speech precedents to the internet. *Ante,* at 1736. Cyberspace is different from the physical world, and if it is true, as the Court believes, that "we cannot appreciate yet" the "full dimensions and vast potential" of "the Cyber Age," *ibid.,* we should proceed circumspectly, taking one step at a time. It is regrettable that the Court has not heeded its own admonition of caution.

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