Chapter 2

Constitutional Law

+ See Separate Lecture Outline System

INTRODUCTION

Many people assume that a government acts from a vague position of strength and can enact any regulation it deems necessary or desirable. This chapter emphasizes a different perspective from which to view the law: action taken by the government must come from authority and this authority cannot be exceeded.

Neither Congress nor any state may pass a law in conflict with the Constitution. The Constitution is the supreme law in this country. The Constitution is the source of federal power and to sustain the legality of a federal law or action a specific federal power must be found in the Constitution. States have inherent sovereign power—that is, the power to enact legislation that has a reasonable relationship to the welfare of the citizens of that state. The power of the federal government was delegated to it by the states while the power of the states was retained by them when the Constitution was ratified.

The Constitution does not expressly give the states the power to regulate, but limits the states' exercise of powers not delegated to the federal government.

ADDITIONAL RESOURCES –

HIH VIDEO SUPPLEMENTS HIH

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

PowerPoint Slides

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

Business Law Digital Video Library

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

• Drama of the Law

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

• Legal Conflicts in Business

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

• Ask the Instructor

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

CHAPTER OUTLINE

I. The Constitutional Powers of Government

Before the U.S. Constitution, the Articles of Confederation defined the central government.

A. A FEDERAL FORM OF GOVERNMENT

The U.S. Constitution established a federal form of government, delegating certain powers to the national government. The states retain all other powers. The relationship between the national government and the state governments is a partnership—neither partner is superior to the other except within the particular area of exclusive authority granted to it under the Constitution.

B. THE SEPARATION OF POWERS

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of checks and balances. Congress, for example, has power over spending and commerce, but the president can veto congressional legislation. The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the members of the Senate. Congress determines the jurisdiction of the federal courts, but the United States Supreme Court has the power to hold acts of the other branches of the federal government unconstitutional.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 1

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

branch from exercising too much power.

C. THE COMMERCE CLAUSE

1. The Commerce Clause and the Expansion of National Powers

The Constitution expressly provides that Congress can regulate commerce with foreign nations, interstate commerce, and commerce that affects interstate commerce. This provision—the commerce clause—has had a greater impact on business than any other provision in the Constitution. This power was delegated to the federal government to ensure a uniformity of rules governing the movement of goods through the states.

CASE SYNOPSIS—

Case 2.1: Heart of Atlanta Motel v. United States

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

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

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Notes and Questions

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

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

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

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 2

(Note that your students can find the answers to the even-numbered For Review questions on this text's Web site at www.cengage.com/blaw/blt. We repeat these answers here as a convenience to you.)

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

2. The Commerce Power Today

The breadth of the power was interpreted to permit the federal government to legislate in areas in which there is no explicit grant of power to Congress. In the 1990s, the United States Supreme Court began to limit this power, but it still serves as the basis for much federal legislation.

3. The Regulatory Powers of the States

Another problem that arises under the commerce clause concerns a state's ability to regulate matters within its own borders. As part of their inherent sovereignty, states possess police power, and state laws enacted pursuant to a state's police powers carry a strong presumption of validity.

4. The "Dormant" Commerce Clause

States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

D. THE SUPREMACY CLAUSE

In the supremacy clause, the Constitution provides that the Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a direct conflict between a federal law and a state law, the state law is held to be invalid. Preemption occurs when Congress chooses to act

exclusively in an area of concurrent federal and state powers. A valid federal statute or regulation takes precedence over a conflicting state or local law on the same general subject. Generally, congressional intent to preempt will be found if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it. Also, when a federal statute creates an agency to enforce the law, matters that may come within the agency's jurisdiction will likely preempt state laws.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 3

Which constitutional clause gives laws enacted by the federal government priority over conflicting state laws? The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." This article is important in the ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

II. Business and the Bill of Rights

The first ten amendments to the Constitution embody protections against various types of interference by the federal government. The guarantees include protection of the freedoms of religion and speech. Also held to be fundamental is a personal right to privacy, derived from guarantees found in some of these amendments.

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 4

(Note that your students can find the answers to the even-numbered For Review questions on this text's Web site at www.cengage.com/blaw/blt. We repeat these answers here as a convenience to you.)

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

A. LIMITS ON BOTH FEDERAL AND STATE GOVERNMENTAL ACTIONS

Most of the rights and liberties set out in the Bill of Rights apply to the states through the due process clause of the Fourteenth Amendment with the United States Supreme Court determining the parameters.

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

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

B. The First Amendment—Freedom of Speech

The freedoms guaranteed by the First Amendment cover symbolic speech (gestures, clothing, and so on) if a reasonable person would interpret the conduct as conveying a message.

1. Reasonable Restrictions

A balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their rights. If a restriction imposed by the government is content neutral (aimed at combating a societal problem such as crime, not aimed at suppressing expressive conduct or its message), then a court may allow it.

2. Corporate Political Speech

Speech that otherwise would be protected does not lose that protection simply because its source is a corporation. For example, corporations cannot be entirely prohibited from making political contributions that individuals are permitted to make. Corporations may, however, be prohibited from using corporate funds to make independent expressions of opinion about political candidates.

3. Commercial Speech

Freedom-of-speech cases generally distinguish between commercial and noncommercial messages. Commercial speech is not protected as extensively as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective.

CASE SYNOPSIS—

Case 2.2: Bad Frog Brewery, Inc. v. New York State Liquor Authority

Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as "giving the finger." Bad Frog's distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed.

The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA's ban on the use of the labels lacked a "reasonable fit" with the state's interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban. "In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree." Also, there were "numerous less intrusive alternatives."

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Notes and Questions

The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information ("commercial speech") is protected by the First Amendment.

Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately.

Whose interests are advanced by banning certain ads? The government's interests are advanced when certain ads are banned. For example, in the Bad Frog case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

ANSWER TO "WHAT IF THE FACTS WERE DIFFERENT?" IN CASE 2.2

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

ADDITIONAL CASES ADDRESSING THIS ISSUE—

Recent cases involving the *constitutionality of government restrictions on advertising under the commerce clause* include the following.

- Cases in which restrictions on advertising were held unconstitutional include Thompson v. Western States Medical Center, __ U.S. __, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of compounded drugs); and This That and Other Gift and Tobacco, Inc. v. Cobb County, 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices).

- Cases in which restrictions on advertising were held not unconstitutional include Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park, 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); Borgner v. Brooks, 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists' ads); Genesis Outdoor, Inc. v. Village of Cuyahoga Heights, __ Ohio App.3d __, __ N.E.2d __ (8 Dist. 2002) (restrictions on billboard construction); and Johnson v. Collins Entertainment Co., 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads).

4. Unprotected Speech

Constitutional protection has never been afforded to certain classes of speech—"the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

Obscene material is unprotected. The United States Supreme Court has held that material is obscene if (1) the average person finds that it violates contemporary community standards; (2) the work taken as a whole appeals to a prurient interest in sex; (3) the work shows patently offensive sexual conduct; and (4) the work lacks serious redeeming literary, artistic, political, or scientific merit. Aside from child pornography, however, there is little agreement about what material qualifies as obscene.

5. Online Obscenity

Portions of the Communications Decency Act of 1996 were struck as unconstitutional. The Child Online Protection Act of 1998 has been suspended. The "community" of the Internet is "nationwide"—too large for applying the "standards of the community" test, which thereby restricts non-pornographic materials. The Children's Internet Protection Act of 2000, which requires libraries to use filters, was held to be not unconstitutional.

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

Why should it be illegal to "pander" virtual child pornography when it is not illegal to possess it? This is a question of social policy and political belief. Those who believe that the First Amendment protects all speech might argue that neither the possession nor the pandering of pornography of any kind should be restricted. The purpose for the prohibition of child pornography is the protection of children. Those who believe that children should be as protected as possible from exposure to pornography of all kinds might argue that possession should be as illegal as pandering. Between these extremes are the difficulties of defining, perceiving, and weighing the competing interests of individuals, society, and government. Currently, the balance has been struck at allowing possession—on the reasoning that the images are not real—and banning pandering—with the goal of limiting distribution.

C. FREEDOM OF RELIGION

1. The Establishment Clause

Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion. Federal or state regulation that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. This clause mandates accommodation of all religions and forbids hostility toward any.

CASE SYNOPSIS—

Case 2.3: In re Episcopal Church Cases

The Episcopal Church in New Hampshire ordained a gay man as bishop. Members of St. James Parish did not agree with this ordination. St. James voted to end its affiliation with the Episcopal Church. A dispute then arose as to who owned the church building that the parish used for worship and the property on which it stands. The Episcopal Church and others filed a suit in a California state court against St. James and others, with both sides claiming ownership. The court ruled that the parish owned the building and the property, but a state intermediate appellate court reversed. St. James appealed.

The California Supreme Court affirmed. The First Amendment prohibits state courts from deciding questions of religious doctrine. But to the extent that a secular court can resolve a property dispute without referring to church doctrine, it should apply "neutral principles of law." The court should consider the deeds to the property, the local church's governing documents, the general church's constitution, canons, and rules, and other relevant sources, including state statutes. Although the deeds to the property in this case had long been in the name of the parish, the local church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents. Those documents clearly state that church property is held in trust for the general church and may be controlled by the local church only so long as it remains a part of the general church. When St. James disaffiliated from the Episcopal Church, it did not have the right to take church property with it.

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Notes and Questions

Should a secular court ever accept and apply ecclesiastical rules, customs, or laws? Yes. Most churches have a hierarchical structure—a "religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government" in the words of the United States Supreme Court—and a court must recognize this fact. When "questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

Thus when examining a church document such as the trust document in the Episcopal case to resolve a property dispute, a secular court must "scrutinize the document in purely secular terms, and not * * * rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust." But "there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body."

What are the advantages of the "neutral principles of law" approach applied in this case? According to the United States Supreme Court] "the primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of * * * law familiar to lawyers and judges. It thereby promises to free civil

courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general—flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate * * * provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members."

ANSWER TO CRITICAL ANALYSIS QUESTION IN CASE 2.3

Should the court have considered whether the Episcopal Church abandoned or departed from the tenets of faith and practice that it held at the time of St, James's affiliation? Why or why not? No. The First Amendment prohibits a court from considering religious doctrinal matters. Thus, a right to property used by a local church cannot be made to turn on a decision as to whether the general church followed or changed the tenets of its faith and practice over time. Under the U.S. Constitution, a secular court has no role in determining ecclesiastical questions such as the interpretation of particular church doctrines and the importance of those doctrines to the religion.

2. The Free Exercise Clause

Under the free exercise clause, the government cannot prohibit the free exercise of religious practices. In other words, a person cannot be compelled to do something contrary to his or her religious practices unless they contravene public policy or public welfare.

III. Due Process and Equal Protection

A. DUE PROCESS

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived "of life, liberty, or property, without due process of law."

ANSWER TO LEARNING OBJECTIVE/FOR REVIEW QUESTION NO. 5

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

1. Procedural Due Process

A government decision to take life, liberty, or property must be made fairly. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge).

2. Substantive Due Process

If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end.

B. Equal Protection

Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to the federal government through the due process clause of the Fifth Amendment. Equal protection means that the government must treat similarly situated individuals in a similar manner. When a law or action distinguishes between or among individuals, the basis for the distinction (the classification) is examined.

1. Strict Scrutiny

If the law or action inhibits some persons' exercise of a fundamental right or if the classification is based on a race, national origin, or citizenship status, the classification is subject to strict scrutiny—it must be necessary to promote a compelling interest.

2. Intermediate Scrutiny

Intermediate scrutiny is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to important government objectives.

3. The "Rational Basis" Test

In matters of economic or social welfare, a classification will be considered valid if there is any conceivable rational basis on which the classification might relate to any legitimate government interest.

IV. Privacy Rights

Invasion of another's privacy is also a civil wrong (Chapter 4), and federal laws protect the privacy of individuals in several areas. In business, issues of privacy often arise in the employment context (Chapter 24). Problems concerning privacy in the contexts of the Internet and computer use in the workplace are identified in the text. Consumers' privacy rights online are covered further in Chapter 33.

A. Constitutional Protection of Privacy Rights

A personal right to privacy is held to be so fundamental as to apply at both the state and the federal level. Although there is no specific guarantee of a right to privacy in the Constitution, such a right has been derived from guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.

B. Federal Statutes Protecting Privacy Rights

These statutes include the Freedom of Information Act of 1966, the Privacy Act of 1974, the Driver's Privacy Protection Act of 1994, the Health Insurance Portability and Accountability Act of 1996, and other laws listed in the text.

ADDITIONAL BACKGROUND—

USA PATRIOT Act Tech Provisions

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to "sunset" in 2005.)

Wiretap Offenses

Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse.

Voice Mail

Section 209—LEAs can seize voice mail messages, with a warrant.

ESP Records

Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers' (ESPs) subscribers as "name," "address," "local and long distance telephone connection records, or records of session times and durations," "length of service (including start date) and types of service utilized," "telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address," and "means and source of payment for such service (including any credit card or bank account number)."

Pen Registers, and Trap and Trace Devices

Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs "capture[] the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act.

Computer Trespassers

Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting "computer trespasser's communications."

ESP Compensation

Section 222—An ESP "who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance."

ENHANCING YOUR LECTURE—

KK } CREATING A WEB SITE PRIVACY POLICY || KK

Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement Web site privacy policies.

PRIVACY POLICY GUIDELINES

In the last several years, a number of independent, nonprofit organizations have developed model Web site privacy policies and guidelines for online businesses to use. Web site privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a "seal of approval" that Web-based businesses can display at their sites if they follow the organization's privacy guidelines.

One of the best known of these organizations is TRUSTe. Web site owners that agree to TRUSTe's privacy standards are allowed to post the TRUSTe "seal of approval" on their Web sites. The idea behind the seal, which many describe as the online equivalent of the "Good Housekeeping Seal of Approval," is to allay users' fears about privacy problems.

DRAFTING A PRIVACY POLICY

Online privacy guidelines generally recommend that businesses post notices on their Web sites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing Web site visitors to access and correct or remove personal information and giving visitors an "opt-in" or "opt-out" choice. For example, if a user selects an "opt-out" policy, the personal data collected from that user would be kept private.

In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its Web site privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site's practices to the FTC. The FTC standards are incorporated in the following checklist.

CHECKLIST FOR A WEB SITE PRIVACY POLICY

1. Include on your Web site a notice of your privacy policy.
2. Give consumers a choice (such as opt-in or opt-out) with respect to any information collected.
3. Outline the safeguards that you will employ to secure all consumer data.
4. Let consumers know that they can correct and update any personal information collected by your business.

5. State that parental consent is required if a child is involved.

6. Create a mechanism to enforce the policy.

TEACHING SUGGESTIONS

1. The concept of federalism is basic to students' understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was granted specific powers by the states in the Constitution while the states retained the police power.

2. The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means. To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute's concern is to protect the state's fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate.

3. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. Stare decisis does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law.

Cyberlaw Link

Ask your students to consider the following issue. In most circumstances, it is not constitutional for the government to open private mail. Why is it then sometimes considered legal for the government to open e-mail between consenting adults?

DISCUSSION QUESTIONS

1. What is the basic structure of the American national government? The basic structure of the American government is federal—a form of government in which states form a union and power is shared

with a central authority. The United States Constitution sets out the structure, powers, and limits of the government.

2. What is the national government's relation to the states? The relationship between the national and state governments is a partnership. Neither is superior to the other except as the Constitution provides. When conflicts arise as to which government should be exercising power in a particular area, the United States Supreme Court decides which governmental system is empowered to act under the Constitution.

3. What is the doctrine of separation of powers and what is its purpose? Each of the three governmental branches—executive, legislative, and judicial—performs a separate function. Each branch has some power to limit the actions of the others. This system of checks and balances prevents any branch from becoming too powerful.

4. What is the conflict between the states' police power and the commerce clause? The term police power refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—which Congress regulates under the commerce clause—the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.

5. What is preemption? Preemption occurs when Congress chooses to act exclusively in an area of concurrent federal and state powers, and a valid federal law will override a conflicting state or local law on the same general subject. Generally, if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it, the federal law will be held to have preempted the area. When a federal statute creates an agency to enforce the law, matters within the agency's jurisdiction will likely preempt state law.

6. What is the distinction between the degrees of regulation that may be imposed on commercial and noncommercial speech? Commercial speech is not as protected as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. As for noncommercial speech, the government cannot choose what are and what are not proper subjects.

7. Should the First Amendment protect all speech? One argument in support of this suggestion is that all views could then be fully expressed, and subject to reasoned consideration, in the "marketplace of ideas" without the chilling effect of legal sanctions. One argument against this suggestion is exemplified by the yelling of "Fire!" in a crowded theater: there are statements that are too inflammatory to be allowed unfettered expression.

8. What does it mean that under the establishment clause the government cannot establish any religion or prohibit the free exercise of religious practices? Federal or state regulation that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. The clause mandates accommodation of all religions and forbids hostility toward any.

9. Would a state law imposing a fifteen-year term of imprisonment without allowing a trial on all businesspersons who appear in their own television commercials be a violation of substantive due process? Would it violate procedural due process? Yes, the

law would violate both types of due process. The law would be unconstitutional on substantive due process grounds, because it abridges freedom of speech. The law would be unconstitutional on procedural due process grounds, because it imposes a penalty without giving an accused a chance to defend his or her actions.

10. What are the tests used to determine whether a law comports with the equal protection clause? Equal protection means that the government must treat similarly situated individuals in a similar manner. Equal protection requires review of the substance of a law or other government action instead of the procedures used. If the law distinguishes between or among individuals, the basis for the distinction is examined. If the law inhibits some persons' exercise of a fundamental right or if the classification is based on race, national origin, or citizenship status, the classification must be necessary to promote a compelling interest. In matters of economic or social welfare, a classification will be upheld if there is any rational basis on which it might relate to any legitimate government interest. Laws using classifications that discriminate on the basis of gender or legitimacy must be substantially related to important government objectives. When a law or action limits the liberty of all persons, it may violate substantive due process; when a law or action limits the liberty of some persons, it may violate the equal protection clause.

ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students look through the local newspaper for current stories about proposed laws. Ask them where the government would find the authority within the Constitution to adopt a specific law under consideration.

2. Would the ten amendments in the Bill of Rights be part of the Constitution if it were introduced today? Have students phrase the Bill of Rights in more contemporary language and poll their friends, neighbors, and relatives as to whether they would support such amendments to the Constitution. If not, what rights might they be willing to guarantee?

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 3: The regulation in Wickard v. Filburn involved a marketing quota. The Supreme Court upheld the regulation even though it would be difficult for the farmer alone to affect interstate commerce. Total supply of wheat clearly affects market price, as does current demand for the product. The marketing quotas were designed to control the price of wheat. If many farmers raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product. The Court deferred to congressional judgment concerning economic effects and the relationship between local activities and interstate commerce. This was a return to the broad view of the commerce power that John Marshall had defined in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Footnote 9: Domaine Alfred, a small winery in California, received requests for its wine from Michigan consumers but could not fill the orders because of that state's direct-shipment ban. The Swedenburg Estate Vineyard, a small winery in Virginia, was unable to fill orders from New York because of that state's laws. Domaine and others filed a suit in a federal district court against Michigan and others, contending that its laws violated the commerce clause. The court upheld the laws, but on appeal, the U.S. Court of Appeals for the Sixth Circuit reversed this ruling. Swedenburg and others filed a suit in a different federal district court against New York and others, arguing that its laws violated the commerce clause. The court issued a judgment in the

plaintiffs' favor, but the U.S. Court of Appeals for Second Circuit reversed this judgment. Both cases were appealed to the United States Supreme Court. In Granholm v. Heald, the United States Supreme Court held that state restrictions on out-of-state wineries' direct shipments to consumers violate the dormant commerce clause because "they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." In this case, "New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws." The Court affirmed the judgment of the U.S. Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws, and reversed the judgment of the U.S. Court of Appeals for the Second Circuit, which upheld the New York laws.

The Twenty-First Amendment to the U.S. Constitution provides that the "transportation or importation into any State, Territory, or possession of the United Sates for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." Doesn't this allow states to enforce discriminatory liquor regulations? The Court said no—state regulation of alcohol is limited by the nondiscrimination principle of the commerce clause. State laws violating other provisions of the Constitution are not saved by the Twenty-First Amendment, which does not abrogate Congress's commerce clause power with regard to liquor. The Court explained in part that the "central purpose" of the amendment "was not to empower States to favor local liquor industries by erecting barriers to competition."

Suppose that the state had only required the out-of-state wineries to obtain a special license that was readily available. How might this have affected the result in this case? Explain. The effect of this requirement on interstate commerce would have been subject to scrutiny and the result might have depended on its economic impact and other considerations. It seems unlikely that this type of regulation would have as heavily burdened the interstate sale of wine as the requirements at issue in this case, but in some cases, even slight infringements on interstate commerce have been invalidated.

Footnote 16: At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants' favor. On the student's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In Morse v. Frederick, the United States Supreme Court reversed the lower court's judgment and remanded the case. The Supreme Court viewed this set of facts as a "school speech case." The Court acknowledged that the message on Frederick's banner was "cryptic," but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is "wrong and harmful." Thus it was reasonable for the principal in this case to order the banner struck.

Did—or should—the Court rule that Frederick's speech can be proscribed because it is "plainly offensive"? The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, "We think this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

ANSWERS TO ESSAY QUESTIONS IN

STUDY GUIDE TO ACCOMPANY BUSINESS LAW TODAY, NINTH EDITION

1. What is the effect of the supremacy clause? The supremacy clause of the Constitution provides that the Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a conflict between a federal law and a state law, the state law is invalidated. Thus, a federal action under a power delegated to the federal government by the Constitution prevails over a state law on the same matter. A federal regulatory scheme supersedes state law when they conflict or when state regulation interferes with federal objectives.

2. What is the significance of the commerce clause? The commerce clause is a provision in the Constitution authorizing Congress to regulate commerce with foreign nations, commerce between states, and commerce that affects interstate commerce. The commerce clause has had a greater impact on business than any other provision in the Constitution. This power ensures uniformity of the law concerning the movement of goods through the states. The breadth of the power allows the federal government to legislate in areas in which there is no express grant of power to Congress.

REVIEWING—

HIH CONSTITUTIONAL LAW HIH

A state legislature enacted a statute that required any motorcycle operator or passenger on the state's highways to wear a protective helmet. Jim Alderman, a licensed motorcycle operator, sued the state to block enforcement of the law. Alderman asserted that the statute violated the equal protection clause because it placed requirements on motorcyclists that were not imposed on other motorists. Ask your students to answer the following questions, using the information presented in the chapter.

1. Why does this statute raise equal protection issues instead of substantive due process concerns? When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

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

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

4. Applying this standard, or test, is the helmet statute constitutional? Why or why not? The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely

strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

HIH

EXAMPREP—

HIH ISSUE SPOTTERS HIH

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

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

HIH

CHAPTER 2

CONSTITUTIONAL LAW

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

Note that your students have the answers to the even-numbered *Review Questions* in Appendix E of their textbooks. We repeat these answers here as a convenience to you.

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

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

2A. ***Commercial activities***

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

3A. ***Priority of laws***

The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are "the supreme Law of the Land." This article is important in the ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

4A. ***Bill of Rights***

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

5A. ***Due process clause***

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

ANSWERS TO CRITICAL ANALYSIS QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS (PAGE 45)

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

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—FOR CRITICAL ANALYSIS (PAGE 49)

Why should it be illegal to "pander" virtual child pornography when it is not illegal to possess it?

ANSWERS TO CRITICAL ANALYSIS QUESTIONS IN THE CASES

CASE 2.2—WHAT IF THE FACTS WERE DIFFERENT? (PAGE 40)

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

CASE 2.3 FOR CRITICAL ANALYSIS (PAGE_)

Political Consideration *Should the court have considered whether the* Episcopal Church *abandoned or departed from the tenets of faith and practice that it held at the time of St, James's affiliation? Why or why not?* No. The First Amendment prohibits a court from considering religious doctrinal matters. Thus, a right to property used by a local church cannot be made to turn on a decision as to whether the general church followed or changed the tenets of its faith and practice over time. Under the U.S. Constitution, a secular court has no role in determining ecclesiastical questions such as the interpretation of particular church doctrines and the importance of those doctrines to the religion.

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

1A. ***Equal protection***

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

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

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

3A. ***Standard***

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

4A. ***Application***

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

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

HYPOTHETICAL SCENARIOS

2.1A. ***Commercial speech***

(BLTS pages 43–44)

This hypothetical is based on *Los Angeles City Council v. Taxpayers for Vincent* [466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed. 2d 772 (1984)]. The United States Supreme Court upheld the ordinance because it furthered a substantial interest of the city of Los Angeles (to improve its appearance) that is basically unrelated to the suppression of free expression. Further, the ordinance curtailed no more speech than was necessary to accomplish its purpose. If the ordinance had banned the only forum available for the public expression of ideas, the result would have been different. In this case, however, the Court reasoned that the citizens of Los Angeles had numerous alternative forums for free public speech. The Court thus held that the city's interest in passing the ordinance outweighed the slight curtailment of free speech imposed by the ordinance.

2.2A. **Hypothetical QUESTION WITH SAMPLE ANSWER**

As the text points out, Thomas has a constitutionally protected right to his religion and the free exercise of it. In denying his unemployment benefits, the state violated these rights. Employers are obligated to make reasonable accommodations for their employees' beliefs, right or wrong, that are openly and sincerely held. Thomas's beliefs were openly and sincerely held. By placing him in a department that made military goods, his employer effectively put him in a position of having to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2.3A. ***Commerce clause***

(BLTS pages 39–40)

A Georgia statute that requires the use of contoured rear-fender mudguards on trucks and trailers operating within its state lines, when thirty-five other states make it legal to use straight mudguards and Florida explicitly mandates the use of straight mudguards, would violate the commerce clause of the Constitution because the law would interfere substantially with interstate commerce.

2.4A. ***Freedom of religion***

(BLTS page 48)

If an employee's right to the free exercise of his or her religion conflicts with the demands of an employer, the employer must "reasonably accommodate" the employee's religious needs. If the employer fires Tollens without first attempting a reasonable accommodation of her religious needs, very likely a court would hold that the firm violated Title VII of the Civil Rights Act of 1964. What constitutes "reasonable accommodation" usually varies depending on the specific circumstances of each case. Here, the employer should consider the reasonableness of its demands and consider alternative efforts that might be undertaken to meet its deadlines. For example, the employer might arrange for Tollens to work longer than eight hours a day during the rest of the week to compensate for her not working on Saturday. Or perhaps it would be in the firm's best interest to hire additional, temporary employees until its backlog of orders is filled.

2.5A. ***Equal protection***

(BLTS pages 51–52)

The district court dismissed the plaintiffs' complaint. The plaintiffs appealed. The U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision. The plaintiffs argued that because the ordinance applied to female topless entertainment, but not to male topless entertainment, it violated the equal protection clause. As a gender-based distinction, this ordinance's classification was subject to intermediate scrutiny. The appellate court pointed out that gender-based distinctions are acceptable in circumstances in which the two genders are not similarly situated. The court concluded that "New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are important. We also believe that the [ordinance's] regulation of female, but not male, topless dancing, in the context of its overall regulation of sexually explicit commercial establishments, is substantially related to the achievement of New York City's objectives." The court noted that, in drafting the ordinance, the city regulated "only the types of establishments that have been

found to produce negative impacts on the communities in which they are located." Male topless establishments were not among those found to have negative effects. "The male chest is routinely exposed on beaches, in public sporting events and the ballet, and in general consumption magazine photography without involving any sexual suggestion. In contrast, public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones. It is therefore permissible for New York City * * * to classify female toplessness differently from the exhibition of the naked male chest. This does not constitute a denial of equal protection."

2.6A. CASE PROBLEM WITH SAMPLE ANSWER

This case involves the privacy rights of an individual. As noted in the chapter, the U.S. Constitution protects, by inference, individual privacy rights. In addition, both state and federal statutes, as well as most state constitutions, protect privacy. Here, statutory law applies, and the relevant statute is the Privacy Act of 1974. That act was designed to protect individuals against the disclosure of private information collected about them by the government. The key, then, to answering this question lies in the statutory language of the 1974 act, as quoted in the case problem. Essentially, you need to ask two questions. First, did the plaintiff (Doe) sustain any "actual damages"? Second, were the damages sustained caused by the government's "intentional and willful actions"? The answer to the first question is contained in the text of the case problem itself, which reveals that Doe did not offer any proof of actual injury. Because Doe suffered no actual injury, there could be no actual damages—and therefore the second question need not be explored. Ultimately, the United States Supreme Court reached this conclusion. The Court held that the Privacy Act provides limited recovery only on a showing of actual damages caused by willful and intentional actions of a government agency. Doe received no award, because he had not proved even the first requirement for recovery—that he had sustained actual damages.

2.7A. *Supremacy clause*

(BLTS pages 40–41)

The Federal Communications Act of 1934 provides the right to govern all *interstate* telecommunications to the Federal Communications Commission (FCC) and the right to regulate all *intrastate* telecommunications to the states. The federal Telephone Consumer Protection Act of 1991, the Junk Fax Protection Act of 2005, and FCC rules permit a party to send unsolicited fax ads to recipients with whom they have an "established business relationship" if those ads include an "opt-out" alternative. Section 17538.43 of California's Business and Professions

Code (known as "SB 833") was enacted in 2005 to accord the citizens of California greater protection than that afforded under federal law. SB 833 omits the "established business relationship" exception and requires a sender to obtain a recipient's express consent (or "opt-in") before faxing an ad to that party into or out of California. The Chamber of Commerce of the United States filed a suit against Bill Lockyer, California's state attorney general, seeking to block the enforcement of SB 833. What principles support the plaintiff's position? How should the court resolve the issue?

2.8A. Freedom of speech

(BLTS pages 85–86)

The court issued an injunction to prohibit the enforcement of the regulations at issue against young adults between eighteen and twenty-one. The defendants appealed to the U.S. Court of Appeals for the Second Circuit, which affirmed the lower court's issuance of the injunction on the basis of the plaintiffs' First Amendment claims. Applying an "intermediate level of scrutiny" to examine the regulations and consider the propriety of the injunction, the appellate court explained that this meant the rules must further "an important or substantial governmental interest," which must be "unrelated to the suppression of free expression," and any "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." The means chosen must not "burden substantially more speech than is necessary to further the government's legitimate interests. . . . For example, a city has a legitimate aesthetic interest in forbidding the littering of its public areas with paper, but that could not justify a prohibition against the public distribution of handbills, even though the recipients might well toss them on the street." Why? Because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."

Here, the court found that the "prohibition against young adults' possession of spray paint and markers in public places—because it applies even where the individuals have a legitimate purpose for their use—imposes a substantial burden on innocent expression." The contrast between the numbers of those cited for violating the rules at odds in this case and those arrested for actually making illegal graffiti also undercut the city's claim that its "goal of eliminating illegal graffiti would be achieved less effectively absent the . . . prohibition[s]." In short, "given [the rules'] hindering of young adults' access to the materials they need for their lawful artistic expression and [the] blanket prohibition against young adults' public possession of graffiti implements, encompassing possession for purely lawful purposes, the challenged subsections appear to burden substantially more

speech than is necessary to achieve the City's legitimate interest in preventing illegal graffiti."

2.9A. ***Due process***
(BLTS pages _)

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

2.10A. **A QUESTION OF ETHICS**

1. According to the United States Supreme Court in this case, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), "Congress pre-empted state cigarette advertising regulations like [Massachusetts'] because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the [U.S. Court of Appeals for the] First Circuit concentrated on whether they are 'with respect to' advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising." The Supreme Court did not agree: "There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. The Attorney General's argument that the regulations are not 'based on smoking and health' since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is intertwined with the smoking and health concern."

2. Regarding a state's or a locality's ability to enact generally applicable zoning restrictions, the Supreme Court recognized that "state interests in traffic safety and esthetics may justify zoning regulations for advertising. Although [in

the FCLAA] Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not 'based on smoking and health.' " The Court noted that the pre-emption provision "in no way affect[s] the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." An argument against local governments' exercise of their zoning power to regulate tobacco products' advertising is that "states and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes."

CRITICAL THINKING AND WRITING ASSIGNMENTS

2.11A. CRITICAL LEGAL THINKING

Despite the widespread belief in the sanctity of privacy, most people would support some loosening of the warrant requirement and other restrictions on government agents to invade privacy in some circumstances. The central dilemma in terms of the law is where the line should be drawn. One approach is to avoid entirely any restraint on governmental intrusion, trusting the officials to intrude only when absolutely necessary. An opposite approach is to require a warrant in virtually every circumstance, in effect imposing judicial oversight of the agents' conduct. Both of these approaches have their complications and difficulties, as do other line-drawing justifications (for example, the intent of an agent and the circumstances surrounding a search can be hard to assess). Given the difficulties, the central tool of analysis is a "balancing of interests." The safety and security interests to be protected are balanced against the injury to privacy. When one or the other is held in a "preferred position," the state interest in limiting it must be "compelling" to uphold its regulation. The outcome can depend on how the interests are phrased. What are the interests to be protected in allowing the government to listen and monitor without restriction? Safety? What is the interest to be protected in refusing to allow the government to listen and monitor? Privacy? Is the interest of the state in securing its citizens' safety compelling enough to outweigh the infringement of privacy inflicted by a law that

permits government agents to listen and monitor without, for example, judicial oversight? If so, how should the statute be worded?

2.12A. CRITICAL THINKING AND WRITING ASSIGNMENT FOR BUSINESS

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

Chapter 2

Constitutional Law

Case 2.1

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

Supreme Court of the United States

HEART OF ATLANTA MOTEL, INC., Appellant,

v.

UNITED STATES et al.

No. 515.

Argued Oct. 5, 1964.

Decided Dec. 14, 1964.

Mr. Justice CLARK delivered the opinion of the Court

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

See Appendix.

1. The Factual Background and Contentions of the Parties.

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

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

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

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

2. The History of the Act.

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

14 Stat 27.

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

18 Stat. 335.

71 Stat. 634.

74 Stat. 86.

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

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

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

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

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement

discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

3. Title II of the Act.

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

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

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

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

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

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

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

Section 201(c) defines the phrase 'affect commerce' as applied to the above establishments. It first declares that 'any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se. Restaurants, cafeterias, etc., in class two affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have 'moved in commerce.' Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., 'which move in commerce.' And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment 'the operations of which affect commerce.' Private clubs are excepted under certain conditions. See s 201(e).

Section 201(d) declares that 'discrimination or segregation' is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

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

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

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

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

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

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

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The

legislative history of the Act indicates that Congress based the Act on s 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, s 8, cl. 3, of the Constitution.
The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' At the same time, however, it noted that such an objective has been and could be readily achieved 'by congressional action based on the commerce power of the Constitution.' S.Rep. No. 872, supra, at 16--17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is s 201(d) or s 202, having to do with state action, involved here and we do not pass upon either of those
sections.
5. The , and their Application.
In light of our ground for decision, it might be well at the outset to discuss the Civil Rights Cases, supra, which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed 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 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 which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

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

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

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

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

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

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

to ; to ; Colo.Rev.Stat.Ann., ss 25--1--1 to 25--2--5 (1953); Supp.); Del.Code Ann., Tit. 6, c. 45 (1963); to Supp.); Ill.Ann.Stat. (Smith-Hurd ed.), c. 38, ss 13--1 to 13--4 (1964), c. 43, s 133 (1944); Ind.Ann.Stat. (Burns ed.), ss 10--901 to 10--914 (1956, and 1963 Supp.); Iowa Code Ann., ss 735.1 and 735.2 (1950); Supp.); Me.Rev.Stat.Ann., c. 137, s 50 (1954); ; and , and Supp.); Mich.Stat.Ann., ss 28.343 and 28.344 (1962); ; Mont.Rev.Codes Ann., s 64--211 (1962); and ; N.H.Rev.Stat.Ann., ss 354:1, 354:2, 354:4 and 354:5 (1955, and 1963 Supp.); to , ss 18:25--1 to 18:25--6 (1964 Supp.); to 49--8--7 (1963 Supp.); N.Y.Civil Rights Law (McKinney ed.), Art. 4, ss 40 and 41 (1948, and 1964 Supp.), Exec. Law, Art. 15, ss 290 to 301 (1951, and 1964 Supp.), Penal Law, Art. 46, ss 513 to 515 (1944); --30 (1963 Supp.); Ohio Rev.Code Ann. (Page's ed.), ss 2901.35 and 2901.36 (1954); , and ; Pa.Stat.Ann., Tit. 18, s 4654 (1963); to ; S.Dak.Sess.Laws, c. 58 (1963); and 1452 (1958); to , and ; ; Wyo.Stat.Ann., ss 6--83.1 and 6--83.2 (1963 Supp.).

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

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

extent or character from that retained by the states over intrastate commerce.' At 569--570, See also .
It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a 'member of the class which is regulated may suffer economic losses not shared by others * * * has never been a barrier' to such legislation. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See , and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia 'as broad as the police power of a state' which included the power to adopt a 'law prohibiting discriminations against Negroes by the owners and managers of restaurants in the Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See ; ; .
We find no merit in the remainder of appellant's contentions, including that of 'involuntary servitude.' As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the Civil Rights Cases is to the contrary as we have seen, it having noted with approval the laws of 'all the States' prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way 'akin to African slavery.' .
We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed--what means are to be employed--is within the sound and exclusive discretion of the Congress. It is subject only to one caveat--that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.
Affirmed.

Case 2.2

134 F.3d 87
(Cite as: 134 F.3d 87)

BAD FROG BREWERY, INC., Plaintiff-Appellant,

v.

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

No. 1080, Docket 97-7949.
United States Court of Appeals,Second Circuit.
Argued Oct. 22, 1997.
Decided Jan. 15, 1998.
JON O. NEWMAN, Circuit Judge:
A picture of a frog with the second of its four unwebbed "fingers" extended in a manner evocative of a well known human gesture of insult has presented this Court with significant issues concerning First Amendment protections for commercial speech. The frog appears on labels that Bad Frog Brewery, Inc. ("Bad Frog") sought permission to use on bottles of its beer products. The New York State Liquor Authority ("NYSLA" or "the Authority") denied Bad Frog's application.
Bad Frog appeals from the July 29, 1997, judgment of the District Court for the Northern District of New York (Frederic J. Scullin, Jr., Judge) granting summary judgment in favor of NYSLA and its three Commissioners and rejecting Bad Frog's commercial free speech challenge to NYSLA's decision. We conclude that the State's prohibition of the labels from use in all

circumstances does not materially advance its asserted interests in insulating children from vulgarity or promoting temperance, and is not narrowly tailored to the interest concerning children. We therefore reverse the judgment insofar as it denied Bad Frog's federal claims for injunctive relief with respect to the disapproval of its labels. We affirm, on the ground of immunity, the dismissal of Bad Frog's federal damage claims against the commissioner defendants, and affirm the dismissal of Bad Frog's state law damage claims on the ground that novel and uncertain issues of state law render this an inappropriate case for the exercise of supplemental jurisdiction.

Background

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

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

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

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

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

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

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

Id.

Bad Frog filed the present action in October 1996 and sought a preliminary injunction barring NYSLA from taking any steps to prohibit the sale of beer by Bad Frog under the controversial labels. The District Court denied the motion on the

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

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

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

Id.

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

973 F.Supp. at 286.

Finally, the Court ruled that the fourth prong of Central Hudson--narrow tailoring--was met because other restrictions, such as point-of-sale location limitations would only limit exposure of youth to the labels, whereas rejection of the labels would "completely foreclose the possibility" of their being seen by youth. Id. at 287. The Court reasoned that a somewhat relaxed test of narrow tailoring was appropriate because Bad Frog's labels conveyed only a "superficial aspect of commercial advertising of no value to the consumer in making an informed purchase," id., unlike the more exacting tailoring required in cases like 44 Liquormart and Rubin, where the material at issue conveyed significant consumer information.

The Court also rejected Bad Frog's void-for-vagueness challenge, id. at 287-88, which is not renewed on appeal, and then declined to exercise supplemental jurisdiction over Bad Frog's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3) (1994), id. at 288.

Discussion

I. New York's Label Approval Regime and Pullman Abstention

Under New York's Alcoholic Beverage Control Law, labels affixed to liquor, wine, and beer products sold in the State must be registered with and approved by NYSLA in advance of use. See N.Y. Alco. Bev. Cont. Law § 107-a(4)(a). The statute also empowers NYSLA to promulgate regulations "governing the labeling and offering" of alcoholic beverages, id. § 107-a(1), and directs that regulations "shall be calculated to prohibit deception of the consumer; to afford him adequate information as to quality and identity; and to achieve national uniformity in this field in so far as possible," id. § 107-a(2).

Purporting to implement section 107-a, NYSLA promulgated regulations governing both advertising and labeling of alcoholic beverages. Signs displayed in the interior of premises licensed to sell alcoholic beverages shall not contain "any

statement, design, device, matter or representation which is obscene or indecent or which is obnoxious or offensive to the commonly and generally accepted standard of fitness and good taste" or "any illustration which is not dignified, modest and in good taste." N.Y. Comp.Codes R. & Regs. tit. ix § 83.3 (1996). Labels on containers of alcoholic beverages "shall not contain any statement or representation, irrespective of truth or falsity, which, in the judgment of [NYSLA], would tend to deceive the consumer." Id. § 84.1(e).

NYSLA's actions raise at least three uncertain issues of state law. First, there is some doubt as to whether section 83.3 of the regulations, concerning designs that are not "in good taste," is authorized by a statute requiring that regulations shall be calculated to prohibit deception of consumers, increase the flow of truthful information, and/or promote national uniformity. It is questionable whether a restriction on offensive labels serves any of these statutory goals. Second, there is some doubt as to whether it was appropriate for NYSLA to apply section 83.3, a regulation governing interior signage, to a product label, especially since the regulations appear to establish separate sets of rules for interior signage and labels. Third, there is some doubt as to whether section 84.1(e) of the regulations, applicable explicitly to labels, authorizes NYSLA to prohibit labels for any reason other than their tendency to deceive consumers.

[1][2] It is well settled that federal courts may not grant declaratory or injunctive relief against a state agency based on violations of state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). "The scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts." Allen v. Cuomo, 100 F.3d 253, 260 (2d Cir.1996) (citing Pennhurst). Moreover, where a federal constitutional claim turns on an uncertain issue of state law and the controlling state statute is susceptible to an interpretation that would avoid or modify the federal constitutional *94 question presented, abstention may be appropriate pursuant to the doctrine articulated in Railroad Commission v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). See Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 477, 97 S.Ct. 1898, 1902-03, 52 L.Ed.2d 513 (1977); Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus, 60 F.3d 122, 126 (2d Cir.1995). Were a state court to decide that NYSLA was not authorized to promulgate decency regulations, or that NYSLA erred in applying a regulation purporting to govern interior signs to bottle labels, or that the label regulation applies only to misleading labels, it might become unnecessary for this Court to decide whether NYSLA's actions violate Bad Frog's First Amendment rights.

[3][4][5][6] However, we have observed that abstention is reserved for "very unusual or exceptional circumstances," Williams v. Lambert, 46 F.3d 1275, 1281 (2d Cir.1995). In the context of First Amendment claims, Pullman abstention has generally been disfavored where state statutes have been subjected to facial challenges, see Dombrowski v. Pfister, 380 U.S. 479, 489-90, 85 S.Ct. 1116, 1122-23, 14 L.Ed.2d 22 (1965); see also City of Houston v. Hill, 482 U.S. 451, 467, 107 S.Ct. 2502, 2512-13, 96 L.Ed.2d 398 (1987). Even where such abstention has been required, despite a claim of facial invalidity, see Babbitt v. United Farm Workers National Union, 442 U.S. 289, 307-12, 99 S.Ct. 2301, 2313-16, 60 L.Ed.2d 895 (1979), the plaintiffs, unlike Bad Frog, were not challenging the application of state law to prohibit a specific example of allegedly protected expression. If abstention is normally unwarranted where an allegedly overbroad state statute, challenged facially, will inhibit allegedly protected speech, it is even less appropriate here, where such speech has been specifically prohibited. Abstention would risk substantial delay while Bad Frog litigated its state law issues in the state courts. See Zwickler v. Koota, 389 U.S. 241, 252, 88 S.Ct. 391, 397-98, 19 L.Ed.2d 444 (1967); Baggett v. Bullitt, 377 U.S. 360, 378-79, 84 S.Ct. 1316, 1326-27, 12 L.Ed.2d 377 (1964).

II. Commercial or Noncommercial Speech?

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

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

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

enjoy some First Amendment protection, but are to be assessed by the somewhat reduced standards applicable to commercial speech.

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

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

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

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

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

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

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

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

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

Supreme Court commercial speech cases upholding First Amendment protection since Virginia State Board have all involved the dissemination of information. See, e.g., 44 Liquormart, 517 U.S. 484, 116 S.Ct. 1495 (price of beer); Rubin, 514 U.S. 476, 115 S.Ct. 1585 (alcoholic content of beer); Central Hudson, 447 U.S. 557, 100 S.Ct. 2343 (benefits of using electricity); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (availability of lawyer services); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (residential "for sale"

signs). In the one case since Virginia State Board where First Amendment protection was sought for commercial speech that contained minimal information--the trade name of an optometry business--the Court sustained a governmental prohibition. See Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979). Acknowledging that a trade name "is used as part of a proposal of a commercial transaction," id. at 11, 99 S.Ct. at 895, and "is a form of commercial speech," id., the Court pointed out "[a] trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time...." Id. at 12, 99 S.Ct. at 895. Moreover, the Court noted, "the factual information associated with trade names may be communicated freely and explicitly to the public," id. at 16, 99 S.Ct. at 897, presumably through the type of informational advertising protected in Virginia State Board. The trade name prohibition was ultimately upheld because use of the trade name had permitted misleading practices, such as claiming standardized care, see id. at 14, 99 S.Ct. at 896, but the Court added that the prohibition was sustainable just because of the "opportunity" for misleading practices, see id. at 15, 99 S.Ct. at 896-97.

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

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

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

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

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

[10] We are unpersuaded by Bad Frog's attempt to separate the purported social commentary in the labels from the hawking of beer. Bad Frog's labels meet the three criteria identified in Bolger: the labels are a form of advertising, identify a specific product, and serve the economic interest of the speaker. Moreover, the purported noncommercial message is not

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

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

III. The Central Hudson Test

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

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

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

A. Lawful Activity and Not Deceptive

We agree with the District Court that Bad Frog's labels pass Central Hudson 's threshold requirement that the speech "must concern lawful activity and not be misleading." See Bad Frog, 973 F.Supp. at 283 n. 4. The consumption of beer (at least by adults) is legal in New York, and the labels cannot be said to be deceptive, even if they are offensive. Indeed, although NYSLA argues that the labels convey no useful information, it concedes that "the commercial speech at issue ... may not be characterized as misleading or related to illegal activity." Brief for Defendants-Appellees at 24.

B. Substantial State Interests

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

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

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

C. Direct Advancement of the State Interest

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

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

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

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

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

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

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

FN8. Appellant has included several examples in the record.

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

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

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

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

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

D. Narrow Tailoring

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

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

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

In this case, Bad Frog has suggested numerous less intrusive alternatives to advance the asserted state interest in protecting children from vulgarity, short of a complete statewide ban on its labels. Appellant suggests "the restriction of advertising to point-of-sale locations; limitations on billboard advertising; restrictions on over-the-air advertising; and segregation of the product in the store." Appellant's Brief at 39. Even if we were to assume that the state materially advances its asserted interest by shielding children from viewing the Bad Frog labels, it is plainly excessive to prohibit the labels from all use, including placement on bottles displayed in bars and taverns where parental supervision of children is to be expected. Moreover, to whatever extent NYSLA is concerned that children will be harmfully exposed to the Bad Frog

labels when wandering without parental supervision around grocery and convenience stores where beer is sold, that concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant's products may be displayed within such stores. Or, with the labels permitted, restrictions might be imposed on placement of the frog illustration on the outside of six-packs or cases, sold in such stores.

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

E. Relief

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

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

[17] Though we conclude that Bad Frog's First Amendment challenge entitles it to equitable relief, we reject its claim for damages against the NYSLA commissioners in their individual capacities. The District Court's decision upholding the denial of the application, though erroneous in our view, sufficiently demonstrates that it was reasonable for the commissioners to believe that they were entitled to reject the application, and they are consequently entitled to qualified immunity as a matter of law.

IV. State Law Claims

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

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

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

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

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

Case 2.3

Cal.,2009.
In re Episcopal Church Cases
45 Cal.4th 467, 198 P.3d 66, 87 Cal.Rptr.3d 275, 09 Cal. Daily Op. Serv. 89, 2009 Daily Journal D.A.R. 89
Supreme Court of California
EPISCOPAL CHURCH CASES.
No. S155094.
Jan. 5, 2009.
As Modified on Denial of Rehearing Feb. 25, 2009.
CHIN, J.
***472 **70** In this case, a local church has disaffiliated itself from a larger, general church with which it had been affiliated. Both the local church and the general church claim ownership of the local church building and the property on which the building stands. The parties have asked the courts of this state to resolve this dispute. When secular courts are asked to resolve an internal church dispute over property ownership, obvious dangers exist that ***473** the courts will become impermissibly entangled with religion. Nevertheless, when called on to do so, secular courts must resolve such disputes. We granted review primarily to decide how the secular courts of this state should resolve disputes over church property.
State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of the property dispute involves a doctrinal dispute, the court must defer to the position of the highest ecclesiastical authority that has decided the doctrinal point. But to the extent the court can resolve the property dispute without reference to church doctrine, it should use what the United States Supreme Court has called the "neutral principles of law" approach. (*Jones v. Wolf* (1979) 443 U.S. 595, 597, 99 S.Ct. 3020, 61 L.Ed.2d 775.) The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property, such as Corporations Code section 9142.
Applying the neutral principles of law approach, we conclude, on this record, that the general church, not the local church, owns the property in question. Although the deeds to the property have long been in the name of the local church, that church agreed from the beginning of its existence to be part of the greater church and to be bound by its governing documents. These governing documents make clear that church property is held in trust for the general church and may be controlled by the local church only so long as that local church remains a part of the general church. When it disaffiliated from the ****71** general church, the local church did not have the right to take the church property with it.
We must also resolve the preliminary procedural question of whether this action is subject to a special motion to dismiss under Code of Civil Procedure section 425.16-generally called an "anti-SLAPP motion." FN1 We conclude that this action is *****281** not subject to an anti-SLAPP motion. Although protected activity arguably lurks in the background of this case, the actual dispute concerns property ownership rather than any such protected activity. Accordingly, this action is not one "arising from" protected activity within the meaning of Code of Civil Procedure section 425.16, subdivision (b)(1). Hence, that provision does not apply.

FN1. The acronym "SLAPP" stands for "strategic lawsuit against public participation." (See *Equilon Enterprises v.*

Consumer Cause, Inc. (2002) 29 Cal.4th 53, 57 & fn. 1, 124 Cal.Rptr.2d 507, 52 P.3d 685.)

We affirm the judgment of the Court of Appeal, which reached the same conclusions, although not always for the same reasons.

***474 I. FACTS AND PROCEDURAL HISTORY**

"The Protestant Episcopal Church in the United States of America ..., organized in 1789, was the product of secession of the Anglican church in the colonies from the Church of England, the latter church itself being the product of secession from the Church of Rome in 1534." (*Protestant Episcopal Church v. Barker* (1981) 115 Cal.App.3d 599, 606, 171 Cal.Rptr. 541.) The church (hereafter the Episcopal Church) is governed by a general convention and a presiding bishop. In the United States, the Episcopal Church is divided geographically into dioceses, including the Episcopal Diocese of Los Angeles (Los Angeles Diocese). Each diocese is governed by a diocesan convention and a bishop. A diocese is itself divided into missions and parishes, which are individual churches where members meet to worship. A parish is governed by a rector and a board of elected lay persons called the vestry. (See *Protestant Episcopal Church v. Barker, supra,* at pp. 606-607, 171 Cal.Rptr. 541.) One such parish within the Los Angeles Diocese was St. James Parish in Newport Beach (St. James Parish).

St. James Parish began as a mission of the Episcopal Church in 1946. In 1947, members of the mission sought permission from the Los Angeles Diocese to organize as a parish. The members' handwritten application "promise[d] and declare[d] that the said Parish shall be forever held under, and conform to and be bound by, the Ecclesiastical authority of the Bishop of Los Angeles, and of his successor in office, the Constitution and Canons of the [Episcopal Church], and the Constitution and Canons of the Diocese of Los Angeles." Articles of Incorporation of St. James Parish, filed with the California Secretary of State on March 1, 1949, stated that the corporation was formed "[t]o establish and maintain a Parish which shall form a constituent part of the Diocese of Los Angeles in [the Episcopal Church]; and so that the Constitution and Canons, Rules, Regulations and Discipline of said Church ... and the Constitution and Canons in the Diocese of Los Angeles, for the time being shall, unless they be contrary to the laws of this State, always form a part of the By-Laws and Articles of Incorporation of the corporation hereby formed and shall prevail against and govern anything herein contained that may appear repugnant to such Constitutions, Canons, Rules, Regulations and Discipline...." In 1991, St. James Parish amended its articles of incorporation, but it did not modify these provisions.

In 1950, the "Bishop of the Protestant Episcopal Church in Los Angeles" deeded the property on which the church building stands to St. James Parish for consideration of "less than $100.00." The deeds to the property have been in the name of the local church ever since.

Canon II.6 of the canons of the general convention of the Episcopal Church provides: "Sec. 1. No Church or Chapel shall *****282** be consecrated until the ***475** Bishop shall have been sufficiently satisfied that the building and the ground on which it is erected are secured for ownership and use by a Parish, Mission, Congregation, or Institution affiliated with this ****72** Church and subject to its Constitution and Canons.

"Sec. 2. It shall not be lawful for any Vestry, Trustees, or other body authorized by laws of any State or Territory to hold property for any Diocese, Parish or Congregation, to encumber or alienate any dedicated and consecrated Church or Chapel, or any Church or Chapel which has been used solely for Divine Service, belonging to the Parish or Congregation which they represent, without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese.

"Sec. 3. No dedicated and consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of for any worldly or common use, without the previous consent of the Standing Committee of the Diocese.

"Sec. 4. Any dedicated and consecrated Church or Chapel shall be subject to the trust declared with respect to real and personal property held by any Parish, Mission, or Congregation as set forth in Canon I.7.4."

The record shows, and no one disputes, that the Episcopal Church first adopted the original versions of sections 2 and 3 of Canon II.6 in 1868. It added section 1 of that Canon in 1871 and section 4 in 1979 when it amended Canon I.7.

In 1979, in apparent response to that year's United States Supreme Court opinion in *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, the Episcopal Church added section 4 to Canon I.7 (Canon I.7.4), which provides: "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons."

Recently, as a result of a doctrinal dispute, St. James Parish disaffiliated itself from the Episcopal Church. It appears that the dispute leading to the decision to disaffiliate arose after the national church ordained an openly gay man as a bishop in New Hampshire in 2003. Some members of the Episcopal Church, including members of St. James Parish, disagreed with this ordination. In July 2004, the board of St. James Parish voted to end its affiliation with the Episcopal Church and to affiliate with the Anglican Church of ***476** Uganda. A majority of the congregation voted to support the decision. After the

disaffiliation, a further dispute arose as to who owned the church building that St. James Parish used for worship and the property on which the building stands-the local church that left the Episcopal Church or the higher church authorities.
To resolve this dispute, the Los Angeles Diocese and various individuals, including a dissenter from the decision by St. James Parish to disaffiliate (hereafter collectively Los Angeles Diocese), sued various individuals connected with St. James Parish (defendants) alleging eight property-recovery-related causes of action. Later, the national Episcopal Church successfully sought to intervene on the side of the Los Angeles Diocese and filed its own complaint in intervention against defendants. In essence, both sides in this litigation, i.e., defendants on one side, and the Los Angeles*****283** Diocese and Episcopal Church allied on the other side, claim ownership of the local church building and property on which it stands.
The defendants moved to strike the Los Angeles Diocese's lawsuit as a SLAPP suit under Code of Civil Procedure section 425.16. The trial court granted the motion and dismissed the action without leave to amend, finding both that the action was a SLAPP suit and that the plaintiffs had not established a probability that they would prevail. The court later sustained without leave to amend defendants' demurrer to the Episcopal Church's complaint in intervention and dismissed that action. The Los Angeles Diocese and the Episcopal Church appealed the dismissals. The Court of Appeal consolidated the appeals and reversed the judgments. That court ruled that the action was not a SLAPP suit subject to the special motion to strike, and that the higher church authorities, ****73** not defendants, own the disputed property.
We granted review to decide whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and to address the merits of the church property dispute.

II. DISCUSSION

A. Special Motion to Strike Under Code of Civil Procedure Section 425.16

Before considering the merits of the property dispute, we must decide a preliminary procedural question. Subdivision (b)(1) of Code of Civil Procedure section 425.16 (section 425.16) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special ***477** motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Defendants filed a special motion to strike under this section-a "so-called anti-SLAPP motion." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131, 104 Cal.Rptr.2d 377, 17 P.3d 735.) The trial court found that section 425.16 governs the action the Los Angeles Diocese filed and, further finding the plaintiffs had not shown a probability they would prevail, granted the special motion to strike. The Court of Appeal concluded that the action was not a SLAPP suit. We agree with the Court of Appeal.
[1] "[S]ection 425.16 requires that a court engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, 124 Cal.Rptr.2d 519, 52 P.3d 695.) Defendants argue that this action arose from their protected activity in first expressing disagreement with the higher church authorities regarding church governance and then disaffiliating from the general church.
[2] The Los Angeles Diocese's complaint did allege facts concerning the reasons defendants decided to disaffiliate from the greater church. Nevertheless, we conclude the action did not arise from protected activity within the meaning of section 425.16. As the Court of Appeal aptly stated, "The flaw in this thinking is that it confuses the *motivation for the disaffiliation* with the claims made by the *****284** general church about the *use of church property*. [¶] ... [I]t makes no difference *why* defendants are disaffiliating; the point is they are being sued for asserting *control over the local parish property* to the exclusion of a *right to control asserted by plaintiffs*."
[3][4][5] "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 124 Cal.Rptr.2d 530, 52 P.3d 703.) In filing this action, the Los Angeles Diocese sought to resolve a *property dispute*. The property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is "the gravamen or principal thrust" of the action. ***478**(*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193, 6 Cal.Rptr.3d 494.) The additional fact that protected activity may lurk in the background-and may explain why the rift between the parties arose in the first place-does not transform a property dispute into a SLAPP suit. Accordingly, the trial court erred in treating this as a SLAPP suit subject to section 425.16's special motion to dismiss.

****74 B. Resolving the Dispute Over the Church Property**

Both lower courts also addressed the merits of the dispute over ownership of the local church-the trial court found in favor of

the local church and the Court of Appeal found clear and convincing evidence in favor of the general church. We will also address this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to analyze the dispute of this case.

1. How California Courts Should Resolve Disputes Over Church Property

[6] Decisions from both this court and the United States Supreme Court have made clear that, when asked to do so, secular courts may, indeed must, resolve internal church disputes over ownership of church property. As the high court put it in the seminal 19th-century case involving a church property dispute, "an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases. [¶] Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints." (*Watson v. Jones* (1871) 80 U.S. (13 Wall.) 679, 714, 20 L.Ed. 666.) Similarly, in its most recent decision involving a church property dispute, the court stated, "There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." (*Jones v. Wolf, supra,* 443 U.S. at p. 602, 99 S.Ct. 3020.) (For cases from this court, see, e.g., *Rosicrucian Fellow v. Rosicrucian Etc. Ch.* (1952) 39 Cal.2d 121, 131, 245 P.2d 481; *Wheelock v. First Presb. Church* (1897) 119 Cal. 477, 482, 51 P. 841.)

*****285** [7][8][9][10] But when called on to resolve church property disputes, secular courts must not entangle themselves in disputes over church doctrine or infringe on the right to free exercise of religion. In this regard, the United States Supreme Court has made two points clear: (1) how state courts resolve church property disputes is a matter of state law; but (2) the method a state chooses must not ***479** violate the First Amendment to the United States Constitution.[FN2] "[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice. [Citations.] As a corollary to this commandment, the Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization. [Citations.] Subject to these limitations, however, the First Amendment does not dictate that a State must follow a particular method of resolving church property disputes. Indeed, 'a State may adopt *any* one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.' " (*Jones v. Wolf, supra,* 443 U.S. at p. 602, 99 S.Ct. 3020, quoting *Md. & Va. Churches v. Sharpsburg Ch.* (1970) 396 U.S. 367, 368, 90 S.Ct. 499, 24 L.Ed.2d 582 (conc. opn. of Brennan, J.).)

> FN2. As relevant here, the First Amendment to the United States Constitution (First Amendment) provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." (See *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94, 100, fn. 5, 73 S.Ct. 143, 97 L.Ed. 120.)Although the amendment refers solely to Congress, its restraints apply to the states through the Fourteenth Amendment. (See *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 441, 89 S.Ct. 601, 21 L.Ed.2d 658.)

The high court found invalid, for example, a method used in Georgia whereby "the right to the property previously used by the local churches was made to turn on a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." (*Presbyterian Church v. Hull Church, supra,* 393 U.S. at p. 441, 89 S.Ct. 601.) The court held ****75** that "the civil courts [have] *no* role in determining ecclesiastical questions in the process of resolving property disputes." (*Id.* at p. 447, 89 S.Ct. 601.) It explained that the First Amendment "commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Hence, States, religious organizations, and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions." (*Id.* at p. 449, 89 S.Ct. 601.) The court concluded that the "departure-from-doctrine" approach " requires the civil court to determine matters at the very core of a religion-the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." (*Id.* at p. 450, 89 S.Ct. 601; see also *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 698, 96 S.Ct. 2372, 49 L.Ed.2d 151 ["inquiries made by the Illinois Supreme Court into matters of ecclesiastical cognizance and polity and the court's actions pursuant thereto contravened the First and Fourteenth Amendments"].) The court remanded the matter to the Georgia Supreme Court to develop a new method for resolving church property disputes. (*Presbyterian Church v. Hull Church, supra,* at pp. 450-452, 89 S.Ct. 601.)

*****286 *480** The high court has approved two methods for adjudicating church property disputes. The first approach is one the court itself adopted in the 19th century. (*Watson v. Jones, supra,* 80 U.S. 679.) [FN3] This approach is often called the "principle of government" approach. (See *Watson v. Jones, supra,* 80 U.S. at p. 725.) The *Watson v. Jones* court distinguished between two types of church disputes. One "has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself ...; and to property held by such a church, either by way of purchase

or donation, with no other specific trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society." (*Id.* at pp. 724-725.) "In such cases," the court explained, "where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations." (*Id.* at p. 725.) Another type, which the court said "is the one which is oftenest found in the courts," involves a hierarchical structure, i.e., a "religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government." (*Id.* at p. 726.) In the latter case, the court said, "we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments." (*Id.* at pp. 726-727.)

> FN3. As the high court later explained, *Watson v. Jones, supra,* 80 U.S. 679, predated *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 and, accordingly, "it was based on general federal law rather than the state law of the forum in which it was brought." (*Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. at p. 710, fn. 5, 96 S.Ct. 2372.)

The court adopted this test for a hierarchical church: "[W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." (*Watson v. Jones, supra,* 80 U.S. at p. 727; see also *Serbian Orthodox Diocese v. Milivojevich, supra,* 426 U.S. at p. 710, 96 S.Ct. 2372 [quoting this language and describing it as the rule applicable to "hierarchical churches"].)

[11] The second approach the high court has approved is what it called the "neutral principles of law" approach. (*Jones v. Wolf, supra,* 443 U.S. at p. 597, 99 S.Ct. 3020.) The court first mentioned such a possible approach in *Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 89 S.Ct. 601: "And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." ****76** (*Id.* at p. 449, 89 S.Ct. 601.) A year later, in a brief per curiam opinion, the high court upheld ***481** Maryland's resolution of a church property dispute that "relied upon provisions of state statutory law governing the holding of property by religious corporations, upon language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." *****287**(*Md. & Va. Churches v. Sharpsburg Ch., supra,* 396 U.S. at p. 367, 90 S.Ct. 499, fn. omitted.) FN4 Because this approach "involved no inquiry into religious doctrine," the high court dismissed the appeal as one involving no substantial federal question. (396 U.S. at p. 368, 90 S.Ct. 499; see also *id.* at p. 370, 90 S.Ct. 499 (conc. opn. of Brennan, J.) [discussing the neutral principles approach in greater detail].)

> FN4. Although the high court originally referred to "neutral principles of law, developed for use in all property disputes" (*Presbyterian Church v. Hull Church, supra,* 393 U.S. at p. 449, 89 S.Ct. 601), it later made clear that such neutral principles may include application of statutes specifically governing religious property. (*Md. & Va. Churches v. Sharpsburg Ch., supra,* 396 U.S. at p. 367, 90 S.Ct. 499; see also *id.* at p. 370, 90 S.Ct. 499 (conc. opn. of Brennan, J.).) As the high court explained in *Jones v. Wolf, supra,* 443 U.S. at pages 602-603, 99 S.Ct. 3020,"The neutral-principles approach was approved in [*Md. & Va. Churches v. Sharpsburg Ch., supra*], an appeal from a judgment of the Court of Appeals of Maryland settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, *the state statutes governing the holding of church property,* and the provisions in the constitution of the general church concerning the ownership and control of church property." (Italics added.)
>
> A statute governing specifically church property obviously is not developed for use in all property disputes, but, as the high court has made clear, it may still be considered in applying neutral principles of law as that court defines the term. Such a statute is-or must be-neutral in the sense that it does not require state courts to resolve questions of religious doctrine.

The high court definitively approved the neutral principles approach in *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, a 1979 decision that is the high court's most recent on this subject and, hence, is of critical importance to the instant dispute. After that court had invalidated Georgia's method for resolving church property disputes (*Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 89 S.Ct. 601), Georgia adopted a new approach. The high court considered that new approach in *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020. It summarized the issue at the outset: "This case involves a dispute over the ownership of church property following a schism in a local church affiliated with a hierarchical church organization. The question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve the dispute on the basis of 'neutral principles of law,' or whether they must defer to the resolution of an authoritative tribunal of the hierarchical church." (*Id.* at p. 597, 99 S.Ct. 3020.)

The high court reviewed three Georgia Supreme Court opinions that postdated the remand in *Presbyterian Church v. Hull*

Church, supra, 393 U.S. 440, 89 S.Ct. 601. It explained that after the remand, the Georgia Supreme Court "adopted what is now known as the 'neutral principles of law' method for resolving ***482** church property disputes. The [Georgia Supreme Court] examined the deeds to the properties, the state statutes dealing with implied trusts [citation], and the Book of Church Order to determine whether there was any basis for a trust in favor of the general church." (*Jones v. Wolf, supra,* 443 U.S. at p. 600, 99 S.Ct. 3020.) In all three of the Georgia Supreme Court cases, the deeds to the disputed property were in the name of the local church. In two of them, including the case the *Jones v. Wolf* court was reviewing, no statute or church document created a trust in favor of the general church. In those cases, the Georgia Supreme Court awarded the property to the local church. (*Id.* at pp. 600-601, 99 S.Ct. 3020.) In the third case, however, involving a dispute within the United Methodist Church, the high court explained that the Georgia Supreme Court "observed, however,*****288** that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was ****77** awarded to the denominational church." (*Ibid.,* fn. omitted.)

The *Jones v. Wolf* court upheld Georgia's neutral principles approach, although it remanded the particular case to the Georgia Supreme Court for further proceedings on a narrow point irrelevant to the issue of this case.[FN5] It recognized advantages inherent in that approach. "The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice. Furthermore, the neutral-principles analysis shares the peculiar genius of private-law systems in general-flexibility in ordering private rights and obligations to reflect the intentions of the parties. Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members." (*Jones v. Wolf, supra,* 443 U.S. at pp. 603-604, 99 S.Ct. 3020.)

> FN5. The Georgia Supreme Court had also resolved a dispute over which of two local factions properly represented the local church. The high court was concerned that the Georgia Supreme Court had not adequately explained its reasoning. Specifically, the Georgia Supreme Court did not explain whether it simply applied majority rule-which the high court indicated would be permissible-or whether the decision "involve[d] considerations of religious doctrine and polity"-which the high court indicated would not be permissible. (*Jones v. Wolf, supra,* 443 U.S. at p. 608, 99 S.Ct. 3020.) The high court remanded the matter to permit the Georgia Supreme Court to articulate the reasons it concluded one particular faction represented the local church. (*Id.* at pp. 609-610, 99 S.Ct. 3020.) This case presents no such issue.

***483** The court also recognized potential difficulties inherent in the neutral principles approach. "The neutral-principles method, at least as it has evolved in Georgia, requires a civil court to examine certain religious documents, such as a church constitution, for language of trust in favor of the general church. In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body." (*Jones v. Wolf, supra,* 443 U.S. at p. 604, 99 S.Ct. 3020.)

Despite these potential difficulties, the high court concluded that "the promise of nonentanglement and neutrality inherent in the neutral-principles approach more than compensates for what will be occasional problems in application. These problems, in addition, should be gradually *****289** eliminated as recognition is given to the obligation of 'States, religious organizations, and individuals [to] structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions.' [Citation.] We therefore hold that a State is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." (*Jones v. Wolf, supra,* 443 U.S. at p. 604, 99 S.Ct. 3020, quoting *Presbyterian Church v. Hull Church, supra,* 393 U.S. at p. 449, 89 S.Ct. 601.)

Early cases from this court resolving church property disputes generally cited *Watson v. Jones, supra,* 80 U.S. 679, the only then existing United States Supreme Court decision on the subject. (See *Rosicrucian Fellow v. Rosicrucian Etc. Ch., supra,* 39 Cal.2d at p. 131, 245 P.2d 481; *Committee of Missions v. Pacific Synod* (1909) 157 Cal. 105, 122, 106 P. 395; *Horsman v. Allen* (1900) 129 Cal. 131, 135, 61 P. 796; ****78***Wheelock v. First Presb. Church, supra,* 119 Cal. at p. 485, 51 P. 841; *Baker v. Ducker* (1889) 79 Cal. 365, 374, 21 P. 764.) This court has not had occasion to consider the neutral principles approach in a church property case since its development.[FN6] The Courts of Appeal have, however, adopted and consistently used it. ***484**(*Concord Christian Center v. Open Bible Standard Churches* (2005) 132 Cal.App.4th 1396, 1411, 34 Cal.Rptr.3d 412;

California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal.App.4th 754, 762-764, 17 Cal.Rptr.3d 442; *Guardian Angel Polish Nat. Catholic Church of L.A., Inc. v. Grotnik* (2004) 118 Cal.App.4th 919, 930, 13 Cal.Rptr.3d 552; *Singh v. Singh* (2004) 114 Cal.App.4th 1264, 1280-1281, 9 Cal.Rptr.3d 4; *Korean United Presbyterian Church v. Presbytery of the Pacific* (1991) 230 Cal.App.3d 480, 497-499, 503, 281 Cal.Rptr. 396; *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d at p. 615, 171 Cal.Rptr. 541; *Presbytery of Riverside v. Community Church of Palm Springs* (1979) 89 Cal.App.3d 910, 919-923, 152 Cal.Rptr. 854 (*Presbytery of Riverside*); *In re Metropolitan Baptist Church of Richmond, Inc.* (1975) 48 Cal.App.3d 850, 858-859, 121 Cal.Rptr. 899; see also *Metropolitan Philip v. Steiger* (2000) 82 Cal.App.4th 923, 929, fn. 7, 98 Cal.Rptr.2d 605 [not deciding whether the neutral principles approach is valid because the case turned on an ecclesiastical dispute requiring the court to defer to the ecclesiastical authorities].)

FN6. In a case not involving a church property dispute, we described "the rule that the state must accept the decision of appropriate church authorities on ... matters [of religious doctrine and internal church governance]" as "the rule of the so-called church property cases." (*Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 541, 10 Cal.Rptr.3d 283, 85 P.3d 67.) As *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, makes clear, this rule does indeed apply to church property cases even under the neutral principles approach. Because no church property dispute existed in *Catholic Charities of Sacramento, Inc. v. Superior Court,* we did not consider whether neutral principles of law can be used to resolve such disputes.

[12] The Court of Appeal in this case criticized these Court of Appeal decisions for, in its view, violating principles of stare decisis. The Court of Appeal believed that early cases of this court specifically adopted the principle of government approach, thus precluding the more recent Courts of Appeal from adopting the neutral principles approach. We disagree. As explained in the Court of Appeal opinion containing the most thorough examination of this question (*Presbytery of Riverside, supra,* 89 Cal.App.3d 910, 152 Cal.Rptr. 854), the principle of government method of *****290***Watson v. Jones, supra,* 80 U.S. 679, and the neutral principles method of *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, are not mutually exclusive, but can be reconciled.[FN7] In any event, this court unquestionably has authority to adopt the neutral principles approach.

FN7. The opinion of *Presbytery of Riverside, supra,* 89 Cal.App.3d 910, 152 Cal.Rptr. 854, actually predated *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, by a few months, but it considered the discussion of "neutral principles of law" found in *Presbyterian Church v. Hull Church, supra,* 393 U.S. 440, 89 S.Ct. 601. (*Presbytery of Riverside, supra,* at pp. 920-924 & fn. 2, 152 Cal.Rptr. 854.)

[13] *Watson v. Jones, supra,* 80 U.S. at page 727, held that secular courts must accept as binding any church adjudication regarding "questions of discipline, or of faith, or ecclesiastical rule, custom, or law...." As *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, makes clear, this remains the rule. Secular courts may not decide questions involving church doctrine or faith. But this rule does not prevent courts from using neutral principles of law to resolve a church property dispute that does not turn on questions of church doctrine: "However, when the dispute to be resolved is essentially ownership or right to possession of property, the civil courts appropriately adjudicate the controversy even though it may arise out of a dispute over doctrine or other ecclesiastical question, provided the court can resolve the property dispute ***485** without attempting to resolve the underlying ecclesiastical controversy." (*Presbytery of Riverside, supra,* 89 Cal.App.3d at p. 920, 152 Cal.Rptr. 854.) As the *Presbytery of Riverside* court explained, "[i]n *Watson v. Jones* the court was asked to decree the termination of an implied trust because of alleged departures from doctrine ****79** by the general church. (See *Presbyterian Church v. Hull Church, supra,* 393 U.S. at p. 445, 89 S.Ct. 601.) Thus the dispute involved in the case was purely ecclesiastical." (*Id.* at p. 921, 152 Cal.Rptr. 854.)

[14] The *Presbytery of Riverside* court also discussed early decisions of this court and concluded that, although they cited and applied the rule of *Watson v. Jones, supra,* 80 U.S. 679, they do not preclude use of neutral principles of law to decide church property disputes that do not turn on questions of church doctrine. (*Presbytery of Riverside, supra,* 89 Cal.App.3d at pp. 922-923, 152 Cal.Rptr. 854.) As did the court in *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d at page 614, 171 Cal.Rptr. 541 (and implicitly the more recent Court of Appeal decisions using the neutral principles approach), we find the discussion in *Presbytery of Riverside, supra,* 89 Cal.App.3d 910, 152 Cal.Rptr. 854, persuasive. Subject to the proviso that secular courts may not decide questions of church doctrine, we believe that California courts should use neutral principles of law to decide church property disputes.

[15] Accordingly, we conclude that secular courts called on to resolve church property disputes should proceed as follows: State courts must not decide questions of religious doctrine; those are for the church to resolve. Accordingly, if resolution of a property dispute involves a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point. But to the extent the court can resolve a property dispute without reference to church doctrine, it should apply neutral principles of law. The court should consider sources such as the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, *****291**

including statutes specifically concerning religious property, such as Corporations Code section 9142. (See *Jones v. Wolf, supra,* 443 U.S. at p. 600, 99 S.Ct. 3020 [upholding Georgia's use of such sources]; *Md. & Va. Churches v. Sharpsburg Ch., supra,* 396 U.S. 367, 90 S.Ct. 499 [upholding Maryland's use of such sources]; *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d at p. 621, 171 Cal.Rptr. 541.)

2. Resolving the Dispute of This Case

St. James Parish holds record title to the property in question. That is the fact that defendants rely on most heavily in claiming ownership. On the other hand, from the beginning of its existence, St. James Parish promised to be bound by the constitution and canons of the Episcopal Church. Such commitment is found in the original application to the higher church authorities to ***486** organize as a parish and in the articles of incorporation. Canon I.7.4, adopted in 1979, provides that property held by a local parish "is held in trust" for the general church and the diocese in which the local church is located. The same canon states that the trust does not limit the authority of the parish over the property "so long as the particular Parish ... remains a part of, and subject to, this Church and its Constitution and Canons." Other canons adopted long before St. James Parish existed also contained substantial restrictions on the local use of church property.

The question before us is, which prevails-the fact that St. James Parish holds record title to the property, or the facts that it is bound by the constitution and canons of the Episcopal Church and the canons impress a trust in favor of the general church? In deciding this question, we are not entirely free from constitutional constraints. Once again, *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, is important to this question. Although that decision permitted the states to use the neutral principles approach, it also made clear that in applying that approach, state courts must neither become entangled in religious matters nor, especially important to the instant dispute, violate the First Amendment right to free exercise of religion. *Jones v. Wolf* was a five-to-four decision, with the dissent arguing that the First Amendment compels use of the principle-of-government approach of *Watson v. Jones, supra,* 80 U.S. 679-under which the higher church authorities would necessarily win. Normally, the dissent would not be of great significance to this court, because we are bound by the majority opinion concerning ****80** federal constitutional questions. But the majority responded to some of the dissent's specific arguments. The dissent is important to give context and meaning to the majority's response.

The dissent argued that "in each case involving an intrachurch dispute-including disputes over church property-the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance.... [B]y recognizing the authoritative resolution reached within the religious association, the civil court avoids interfering indirectly with the religious governance of those who have formed the association and submitted themselves to its authority." (*Jones v. Wolf, supra,* 443 U.S. at p. 618, 99 S.Ct. 3020, fn. omitted (dis. opn. of Powell, J.).) The majority responded to this point, which it described as an argument "that a rule of compulsory deference is necessary in order to protect the free exercise rights 'of those who have formed the association and submitted themselves to its authority.' " (*Jones v. Wolf, supra,* at pp. 605-606, 99 S.Ct. 3020.) Significantly, the *****292** majority did not deny that free exercise rights require a secular court to defer to decisions made within a religious association when local churches have submitted themselves to the authority of that association. Rather, the majority argued that the neutral principles approach is consistent with this requirement.

***487** The dissent's argument, the *Jones v. Wolf* majority stated, " assumes that the neutral-principles method would somehow frustrate the free-exercise rights of the members of a religious association. Nothing could be further from the truth. The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, hire employees, or purchase goods. Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. *At any time before the dispute erupts,* the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.* The burden involved in taking such steps will be minimal. *And the civil courts will be bound to give effect to the result indicated by the parties,* provided it is embodied in some legally cognizable form." (*Jones v. Wolf, supra,* 443 U.S. at p. 606, 99 S.Ct. 3020, italics added.)

[16][17] Shortly after this decision, and in apparent reaction to it, the Episcopal Church added Canon I.7.4, which recites an express trust in favor of the denominational church. This occurred some 25 years before the instant dispute erupted. Defendants focus on the high court's reference to what the "parties" can do, and argue that Canon I.7.4, to be effective, had to have been enacted by the parties-in other words, that some kind of agreement must have been reached between the general church and St. James Parish (and presumably every other parish in the country) ratifying Canon I.7.4. We do not so read the high court's words. Use of the passive voice in describing the possible "alternative[ ]" of making the general church's constitution recite the trust suggests the high court intended that this could be done by whatever method the church structure contemplated. Requiring a particular method to change a church's constitution-such as requiring every parish in

the country to ratify the change-*would* infringe on the free exercise rights of religious associations to govern themselves as they see fit. It would impose a major, not a "minimal," burden on the church governance. (*Jones v. Wolf, supra,* 443 U.S. at p. 606, 99 S.Ct. 3020.)

Thus, the high court's discussion in *Jones v. Wolf, supra,* 443 U.S. at page 606, 99 S.Ct. 3020, together with the Episcopal Church's adoption of Canon I.7.4 in response, strongly supports the conclusion that, once defendants left the general church, the property reverted to the general church. Moreover, Canon I.7.4 is consistent with earlier-enacted canons that, although not using the word "trust," impose substantial limitations on the local parish's use of church property and give the higher church authorities substantial authority****81** over that property. For example, permitting a disaffiliating local church to take the property with it when it reaffiliates with a different church is ***488** inconsistent with the prohibition of Canon II.6, section 2, against encumbering or alienating local property without the previous consent of higher church authorities. Thus, a strong argument exists that Canon *****293** I.7.4 merely codified what had long been implicit. As we discuss below, this is the conclusion reached by some of the out-of-state decisions that awarded property to the national Episcopal Church in similar disputes.

A California statutory provision that was enacted shortly after *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, and that is consistent with the language quoted above from page 606 of that decision, also supports the conclusion that the property now belongs to the general church. As relevant, subdivisions (c) and (d) of Corporations Code section 9142 (section 9142), which were enacted in 1982 (Stats.1982, ch. 242, § 1, p. 784), provide:

"(c) No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless *one* of the following applies: [¶] ...

"(2) Unless, and only to the extent that, the articles or bylaws of the corporation, *or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide.* [¶] ...

"(d) Trusts created by paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments *creating the trusts.* ..." (Italics added.)

This statute appears to be the type of statute the United States Supreme Court had in mind when it approved reliance on "provisions of state statutory law governing the holding of property by religious corporations...." (*Md. & Va. Churches v. Sharpsburg Ch., supra,* 396 U.S. at p. 367, 90 S.Ct. 499, fn. omitted.) Justice Brennan fleshed out the point in his concurring opinion in that case. He explained that one possible approach to resolving church property disputes "is the passage of special statutes governing church property arrangements in a manner that precludes state interference in doctrine. Such statutes must be carefully drawn to leave control of ecclesiastical polity, as well as doctrine, to church governing bodies." (*Id.* at p. 370, 90 S.Ct. 499 (conc. opn. of Brennan, J.).) Section 9142, subdivisions (c) and (d), does not permit state interference in religious doctrine and leaves control of ecclesiastical policy and doctrine to the church. Subdivision (c) of that section permits the governing instruments of the general church to create an express trust in church property, which Canon I.7.4 does. Subdivision (d) permits changing a trust, but only if done in the instrument that *created* it. Canon I.7.4 has not ***489** been amended. So it would appear that this statute also compels the conclusion that the general church owns the property now that defendants have left the general church.

[18] Defendants argue that section 9142 states only a negative conditional, not a positive imperative. In other words, in their view, the statutory provisions are *minimum* requirements for impression of a trust on local religious property, and do not necessarily exclude other requirements therefor. Defendants focus on the grammatical construction of subdivision (c), and its repeated use of the word "unless." As defendants would have it, there is *never* a trust "unless" one of the statutory provisions is present, but this does not mean there is *always* a trust when one or more of the provisions *is* present. But this interpretation overlooks subdivision (d) of section 9142. That subdivision provides that "[t]rusts *created by* paragraph (2) of subdivision (c) may be amended or dissolved by amendment from time to time to the articles, bylaws, or governing instruments *creating the trusts*...."(Italics added.) Thus, subdivision (d) appears *****294** clearly to indicate that, under California law, a trust *is created* by compliance with any one of the alternatives set forth in subdivision (c)(2), and it can only be altered or dissolved by amending the creating instrument.

[19] In short, St. James Parish agreed from the beginning of its existence to be part ****82** of a greater denominational church and to be bound by that greater church's governing instruments. Those instruments make clear that a local parish owns local church property in trust for the greater church and may use that property only so long as the local church remains part of the greater church. Respect for the First Amendment free exercise rights of persons to enter into a religious association of their choice, as delineated in *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020 (as well as the provisions of section 9142) requires civil courts to give effect to the provisions and agreements of that religious association. To adapt a similar conclusion in a recent Court of Appeal decision involving a different religious association, "In summary, [St. James Parish] is bound by the constitution, laws, rules and regulations of the [Episcopal Church]. Historically, it has accepted the authority of the national church and submitted itself to the national church's jurisdiction." (*Guardian Angel Polish Nat.*

Catholic Church of L.A., Inc. v. Grotnik, supra, 118 Cal.App.4th at p. 929, 13 Cal.Rptr.3d 552; see also *Korean United Presbyterian Church v. Presbytery of the Pacific, supra,* 230 Cal.App.3d 480, 281 Cal.Rptr. 396 [reaching a similar conclusion regarding a different religious association based in part on section 9142 and a general church's constitutional provision comparable to Canon I.7.4].)

This conclusion is bolstered by a review of out-of-state cases that involved similar church property disputes within the Episcopal Church and that, with near unanimity, awarded the disputed property to the general church when a ***490** local church disaffiliated itself from that general church. A typical case, and one cited in some of the later cases, is *Rector, Wardens v. Episcopal Church* (1993) 224 Conn. 797, 620 A.2d 1280. In that case, the court reviewed the history of the Episcopal Church. It concluded that a local church that had withdrawn from the general Episcopal Church, as well as the local church's predecessors, "had agreed, as a condition to their formation as ecclesiastical organizations affiliated with the Diocese and [the Episcopal Church], to use and hold their property only for the greater purposes of the church." (*Id.* at p. 1292.) Specifically, it found that Canon I.7.4 (which it called the "Dennis Canon"), "adopted in 1979 merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the Episcopal Church] in 1789." (*Ibid.*) Accordingly, it found "a legally enforceable trust in favor of the general church in the property claimed by the [local church]." (*Id.* at p. 1293.)

Other Episcopal Church cases reaching similar conclusions include *Bishop and Diocese of Colorado v. Mote* (Colo.1986) 716 P.2d 85; *Episcopal Diocese of Mass. v. Devine* (2003) 59 Mass.App.Ct. 722, 797 N.E.2d 916 (relying on Canon I.7.4 and the fact the local church had agreed to accede to the general church's canons); *Bennison v. Sharp* (1983) 121 Mich.App. 705, 329 N.W.2d 466; *Protestant Episc. Church, etc. v. Graves* (1980) 83 N.J. 572, 417 A.2d 19; *The Diocese v. Trinity Epis. Church* (1999) 250 A.D.2d 282, 684 N.Y.S.2d 76, 81 ("[T]he 'Dennis Canon' amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal *****295** Church," citing *Rector, Wardens v. Episcopal Church, supra,* 224 Conn. 797, 620 A.2d 1280); *Daniel v. Wray* (2003) 158 N.C.App. 161, 580 S.E.2d 711 (relying on Canon I.7.4); *In re Church of St. James the Less* (2005) 585 Pa. 428, 888 A.2d 795 (relying on Canon I.7.4 and citing *Rector, Wardens v. Episcopal Church, supra,* 224 Conn. 797, 620 A.2d 1280). The court in *Bjorkman v. Protestant Episcopal Church* (Ky.1988) 759 S.W.2d 583 awarded the property to the local church, but there the dispute arose before the high court decision of *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, the opinion did not mention Canon I.7.4, and the decision has not been followed by other jurisdictions. These out-of-state decisions are not binding on this court, but we find them persuasive, especially in the aggregate.

Defendants rely in part on *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d 599, 171 Cal.Rptr. 541, the only reported California case involving a property dispute within the Episcopal Church. In that case, four local churches in Los Angeles ****83** disaffiliated from the general Episcopal Church. The Court of Appeal, over a dissent, awarded the disputed property to three of the local churches and to the general church regarding the fourth local church. The ***491** factual difference that caused the different results was that the three churches were incorporated before, and the fourth after, a particular canon of the Los Angeles Diocese was adopted. The dissent would have awarded all of the disputed property to the general church. We need not decide whether the majority decision was correct based on the specific record before it and the state of the law at the time, for it is distinguishable, largely due to the passage of time. In that case, the dispute arose and, indeed, the trial court judgment was rendered before (1) the decision in *Jones v. Wolf, supra,* 443 U.S. 595, 99 S.Ct. 3020, (2) the Episcopal Church adopted Canon I.7.4, and (3) the Legislature enacted section 9142, subdivisions (c) and (d). The appellate court in *Barker* did not mention any of the general church's canons. Accordingly, that decision does not control a dispute that, here, arose 25 years after the high court decision and the adoption of Canon I.7.4. We note that several of the out-of-state cases discussed above cite, but do not follow, *Protestant Episcopal Church v. Barker, supra,* 115 Cal.App.3d 599, 171 Cal.Rptr. 541.[FN8]

FN8. See *Bishop and Diocese of Colorado v. Mote, supra,* 716 P.2d at pages 108-109; *id.*, footnote 17 ("[W]e find the holding in *Barker* inapplicable and decline to follow it"); *Rector, Wardens v. Episcopal Church, supra,* 620 A.2d at page 1285 ("declin[ing] to follow" *Barker*); *Episcopal Diocese of Mass. v. Devine, supra,* 797 N.E.2d at page 924, footnote 21; *Bennison v. Sharp, supra,* 329 N.W.2d at pages 473-474.

Defendants also cite *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church, supra,* 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (*St.Luke's*), which interpreted section 9142. The court in that case concluded that there had been a trust in favor of the general church, but that the deeds to the local property and the local church's articles of incorporation, not the general church's governing instruments, created the trust. (See *St. Luke's, supra,* at p. 770, 17 Cal.Rptr.3d 442 ["The Book of Discipline [i.e., the general church's governing instrument] did not, by itself, 'create' the trust."].) Accordingly, it concluded that the local church could, and did, revoke the trust. (*Id.* at p. 771, 17 Cal.Rptr.3d 442.) We need not decide whether *St. Luke's* was correct on its facts because, assuming its conclusion was factually correct, the decision is distinguishable. Here, the general church's canons, not instruments*****296** of the local

church, created the trust. The language of section 9142, subdivision (d), requires any revocation of that trust to exist in the document that created it. So, assuming the local church in *St. Luke's* may have been able to revoke the trust of that case, nothing in section 9142 or the governing instruments of the Episcopal Church suggests that defendants may do so in this case.

[20] The *St. Luke's* court also stated that "subdivision (c)(2) of Corporations Code section 9142 does not authorize a general church to create a trust interest for itself in property owned by a local church simply by issuing a rule declaring that such a trust exists...." (*St. Luke's, supra,* 121 Cal.App.4th 754, 757, 17 Cal.Rptr.3d 442.) As a general proposition, this statement is inconsistent ***492** with section 9142, subdivision (c)(2)'s plain language, and we disapprove it. Instead, we agree with the assessment of the Court of Appeal in this case: "[I]n a hierarchically organized church, the 'general church' *can* impress a trust on a local religious corporation of which the local corporation is a 'member' *if* the governing instruments of that superior religious body so provide."

[21] Defendants argue that such a reading of section 9142"would unconstitutionally promote and establish denominational religion." We need not, indeed, cannot consider all possible applications of section 9142, but as applied here, the section is fully consistent with *Jones v. Wolf, supra,* 443 U.S. at page 606, 99 S.Ct. 3020, and promotes the free exercise rights of persons to form and join a religious association that is constructed and governed as they choose. Defendants also suggest that the Episcopal Church did not properly adopt Canon I.7.4 under its own rules. It is a bit late to argue that Canon ****84** I.7.4 was not effectively adopted, a quarter of a century later, and, in light of the consistent conclusions of the out-of-state cases that that canon is, indeed, part of the Episcopal Church's governing documents, the argument seems dubious at best. But, in any event, this is one of those questions regarding "religious doctrine or polity" (or, as we phrased it in *Catholic Charities of Sacramento, Inc. v. Superior Court, supra,* 32 Cal.4th at page 541, 10 Cal.Rptr.3d 283, 85 P.3d 67,"religious doctrine and internal church governance") on which we must defer to the greater church's resolution. (*Jones v. Wolf, supra,* 443 U.S. at p. 602, 99 S.Ct. 3020.) Over the years, the Episcopal Church has consistently taken the position that Canon I.7.4 was effectively adopted.

Defendants also rely on Evidence Code section 662, which provides, "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." We need not decide how or whether this statute interacts with the more specific section 9412 (or the First Amendment constraints that exist in this case), because, as the Court of Appeal noted, "particularly when read in conjunction with section 9142, canon I.7.4 *is* clear and convincing evidence rebutting any presumption that the beneficial interest in the local church property is solely controlled by the local parish corporation."

Defendants state that, over the years, St. James Parish "purchased additional parcels of property in its own name, with funds donated exclusively by its members." They contend that it would be unjust and contrary to the intent of the members who, they argue, "acquired, built, improved, maintained, repaired, cared for and used the real and personal property at issue for over fifty years," to cause the local parish to "los[e] its property simply because it has changed its *spiritual* affiliation." But the matter is not so clear. We *****297** may assume that St. James Parish's members did what defendants say they did for ***493** all this time. But they did it for a local church that was a constituent member of a greater church and that promised to remain so. Did they act over the years intending to contribute to a church that was part of the *Episcopal Church* or to contribute to St. James Parish even if it later joined a different church? It is impossible to say for sure. Probably different contributors over the years would have had different answers if they had thought about it and were asked. The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.

For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, on this record, when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church. As stated in one of the out-of-state cases involving the same Episcopal Church, "[t]he individual defendants are free to disassociate themselves from [the parish and the Episcopal Church] and to affiliate themselves with another religious denomination. No court can interfere with or control such an exercise of conscience. The problem lies in defendants' efforts to take the church property with them. This they may not do." (*Protestant Episc. Church, etc. v. Graves, supra,* 417 A.2d at p. 25.)

III. CONCLUSION

We affirm the judgment of the Court of Appeal.

Supplemental Case Printout for: *Beyond Our Borders*

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

John Geddes LAWRENCE and Tyron Garner, Petitioners,

v.

TEXAS.

No. 02-102.

Argued March 26, 2003.
Decided June 26, 2003.

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

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

I

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

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

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

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

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

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

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

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

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

2. Whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.

3. Whether should be overruled. See Pet. for Cert. i.

The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.
II
We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in
There are broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including , and ; but the most pertinent beginning point is our decision in .
In the Court invalidated a state law prohibiting the use of drugs or devices of contraception and counseling or ****2477** aiding and abetting the use of contraceptives. The Court described the protected interest as a right to privacy and ***565** placed emphasis on the marriage relation and the protected space of the marital bedroom.
After it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. In , the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause, but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights, It quoted from the statement of the Court of Appeals finding the law to be in conflict with fundamental human rights, and it followed with this statement of its own:
"It is true that in the right of privacy in question inhered in the marital relationship .... If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
The opinions in and were part of the background for the decision in . As is well known, the case involved a challenge to the Texas law prohibiting abortions, but the laws of other States were affected as well. Although the Court held the woman's rights were not absolute, her right to elect an abortion did have real and substantial protection as an exercise of her liberty under the Due Process Clause. The Court cited cases that protect spatial freedom and cases that go well beyond it. recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person.
***566** In , the Court confronted a New York law forbidding sale or distribution of contraceptive devices to persons under 16 years of age. Although there was no single opinion for the Court, the law was invalidated. Both and as well as the holding and rationale in confirmed that the reasoning of could not be confined to the protection of rights of married adults. This was the state of the law with respect to some of the most relevant cases when the Court considered
The facts in had some similarities to the instant case. A police officer, whose right to enter seems not to have been in question, observed Hardwick, in his own bedroom, engaging in intimate sexual conduct with another adult male. The conduct was in violation of a Georgia statute making it a criminal offense to engage in sodomy. One difference between the two cases is that the Georgia statute prohibited the conduct whether or not the participants were of the same sex, while the Texas statute, as we have seen, applies only to participants of the same sex. Hardwick was not prosecuted, but he brought an action in federal court to declare the state statute invalid. He alleged he was a practicing homosexual and that the criminal prohibition violated rights guaranteed to him by the Constitution. The Court, in an opinion by Justice White, sustained the Georgia law. Chief Justice Burger and Justice Powell joined the opinion of the Court and filed separate, concurring opinions. Four Justices dissented. (opinion of Blackmun, J., joined by Brennan, Marshall, and STEVENS, JJ.); ****2478** (opinion of STEVENS, J., joined by Brennan and Marshall, JJ.).
The Court began its substantive discussion in as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so ***567** for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the

conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

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

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

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

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

The policy of punishing consenting adults for private acts was not much discussed in the early legal literature. We can infer that one reason for this was the very private nature of the conduct. Despite the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. The reported decisions concerning the prosecution of consensual, homosexual sodomy between adults for the years 1880-1995 are not always clear in the details, but a significant number involved conduct in a public place. See Brief for American Civil Liberties Union et al. as *Amici Curiae* 14-15, and n. 18.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so. See 1977 Ark. Gen. Acts no. 828; 1983 Kan. Sess. Laws p. 652; 1974 Ky. ****2480** Acts p. 847; 1977 Mo. Laws p.

687; 1973 Mont. Laws p. 1339; 1977 Nev. Stats. p. 1632; 1989 Tenn. Pub. Acts ch. 591; 1973 Tex. Gen. Laws ch. 399; see also (sodomy law invalidated as applied to different-sex couples). Post-even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them. See, *e.g.,* ; ; ; ***571**; see also 1993 Nev. Stats. p. 518 (repealing).

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

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

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

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

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

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

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

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

Two principal cases decided after cast its holding into even more doubt. In , the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The decision again confirmed ***574** that our laws and tradition afford

constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

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

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

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

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

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

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders. ; . We are advised that if Texas convicted an adult for private, consensual homosexual conduct under the statute here in question the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. Pet. for Cert. 13, and n. 12 (citing to ; La.Code Crim. Proc. Ann. § § 15:540-15:549 ***576** West 2003); to (Lexis 2003); to (West 2002)). This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

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

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

The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision' " (quoting)). In we noted that when a court is asked to

overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. see also ("Liberty finds no refuge in a jurisprudence of doubt"). The holding in however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on of the sort that could counsel against overturning its holding once there are compelling reasons to do so. itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

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

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

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

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

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

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

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

It is so ordered.

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

535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403, 30 Media L. Rep. 1673, 02 Cal. Daily Op. Serv. 3211, 2002 Daily Journal D.A.R. 4033, 15 Fla. L. Weekly Fed. S 187

Supreme Court of the United States

John D. ASHCROFT, Attorney General, et al., Petitioners,

v.

The FREE SPEECH COALITION, et al.

No. 00-795.

Argued Oct. 30, 2001.

Decided April 16, 2002.

***239** Justice KENNEDY delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251 *et seq.,* abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who ***240** look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U.S.C. § 2251.

[1] By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.,* at 758, 102 S.Ct. 3348. As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U.S., at 761, 102 S.Ct. 3348.

[2] While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U.S.C. §§ 1460-1466. Like the law in *Ferber,* the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller* standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber.*

****1397 *241** I

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber,* images made using actual minors. 18 U.S.C. § 2252 (1994 ed.). The CPPA retains that prohibition at 18 U.S.C. § 2256(8)(A) and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse." § 2256(2).

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Finding (3), notes following § 2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id.,* Findings***242** (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See *id.,* Finding (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing.

Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber.* Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge § 2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. See S.Rep. No. 104-358, p. 22 (1996) ("This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as ****1398** child pornography"). The statute is not so limited in its reach, however, as it punishes even ***243** those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' ... will be treated as 'criminal contraband.' " App. to Pet. for Cert. 62a-63a.

The Court of Appeals for the Ninth Circuit reversed. See 198 F.3d 1083 (1999). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. 198 F.3d, at 1097. The Court of Appeals voted to ***244** deny the petition for rehearing en banc, over the dissent of three judges. See 220 F.3d 1113 (2000).

While the Ninth Circuit found the CPPA invalid on its face, four other Courts of Appeals have sustained it. See *United States v. Fox*, 248 F.3d 394 (C.A.5 2001); *United States v. Mento*, 231 F.3d 912 (C.A.4 2000); *United States v. Acheson*, 195 F.3d 645 (C.A.11 1999); *United States v. Hilton*, 167 F.3d 61(C.A.1),cert. denied, 528 U.S. 844, 120 S.Ct. 115, 145 L.Ed.2d 98 (1999). We granted certiorari. 531 U.S. 1124, 121 S.Ct. 876, 148 L.Ed.2d 788 (2001).

II

[3] The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." The government may violate this mandate in many ways, *e.g.,* *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Keller v. State Bar of Cal.*, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. ****1399** The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In ***245** its legislative findings, Congress recognized that there are subcultures of persons who harbor illicit desires for children and commit criminal acts to gratify the impulses. See Congressional Findings, notes following § 2251; see also U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those

who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.
[4][5] Congress may pass valid laws to protect children from abuse, and it has. *E.g.*,18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech" (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); see also *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment' ") (quoting *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)); *Carey v. Population Services Int'l*, 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").
[6] As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not ***246** embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F.3d, at 1101. It would be necessary for us to take this step to uphold the statute.
[7][8] As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Id.*, at 24, 93 S.Ct. 2607. The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller*requirements. ****1400** The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.
The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea-that of teenagers engaging in sexual activity-that is a fact of modern society and has been a theme in art and literature throughout the ages. ***247** Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U.S.C. § 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See § 2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U.S. National Survey of State Laws 384-388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021-1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.
Both themes-teenage sexual activity and the sexual abuse of children-have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E.g.,* Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.
Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. See Predictable and Less So, the Academy Award Contenders, N.Y. Times, Feb. 14, 2001, p. E11. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her ***248** to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. See "American Beauty" Tops the Oscars, N.Y. Times, Mar. 27, 2000, p. E1. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an

older man.

[9][10] Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of ****1401** sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 419, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966) (plurality opinion) ("[T]he social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness"). Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois v. Wisconsin*, 408 U.S. 229, 231, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)*(per* ****249*** *curiam).* For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

[11][12] The Government seeks to address this deficiency by arguing that speech prohibited by the CPPA is virtually indistinguishable from child pornography, which may be banned without regard to whether it depicts works of value. See *New York v. Ferber*, 458 U.S., at 761, 102 S.Ct. 3348. Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. *Id.*, at 761, n. 12, 102 S.Ct. 3348; see also *id.*, at 775, 102 S.Ct. 3348 (O'CONNOR, J., concurring) ("As drafted, New York's statute does not attempt to suppress the communication of particular ideas"). The production of the work, not its content, was the target of the statute. The fact that a work contained serious literary, artistic, or other value did not excuse the harm it caused to its child participants. It was simply "unrealistic to equate a community's toleration for sexually oriented materials with the permissible scope of legislation aimed at protecting children from sexual exploitation." *Id.*, at 761, n. 12, 102 S.Ct. 3348.

Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Id.*, at 759, 102 S.Ct. 3348. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. See *id.*, at 759, and n. 10, 102 S.Ct. 3348. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material ***250** by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.*, at 760, 102 S.Ct. 3348. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

Later, in *Osborne v. Ohio*, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.*, at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111, 110 S.Ct. 1691. The Court, however, anchored its holding in the concern for the participants, those whom it ****1402** called the "victims of child pornography." *Id.*, at 110, 110 S.Ct. 1691. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra,* at 1402-1403.

In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 458 U.S., at 759, 102 S.Ct. 3348. While the Government asserts that the images can lead to actual instances of child abuse, see *infra,* at 1402-1404, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

[13][14] The Government says these indirect harms are sufficient because, as *Ferber* acknowledged, child pornography rarely can be valuable speech. See 458 U.S., at 762, 102 S.Ct. 3348 ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis* "). This argument, however, suffers from two flaws. First, *Ferber's* judgment***251** about child pornography was based upon how it was made, not on what it communicated. The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.*, at 764-765, 102 S.Ct. 3348 ("[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live

performance or photographic or other visual reproduction of live performances, retains First Amendment protection").
[15] The second flaw in the Government's position is that *Ferber*did not hold that child pornography is by definition without value. On the contrary, the Court recognized some works in this category might have significant value, see *id.*, at 761, 102 S.Ct. 3348, but relied on virtual images-the very images prohibited by the CPPA-as an alternative and permissible means of expression: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative." *Id.*, at 763, 102 S.Ct. 3348. *Ferber*, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber*provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.
III
[16][17] The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber.* The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials***252** to children, see *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). In *Butler v. Michigan*, 352 U.S. 380, 381, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to " 'incite minors to violent or depraved or immoral acts.' " A unanimous Court agreed upon ****1403** the important First Amendment principle that the State could not "reduce the adult population ... to reading only what is fit for children." *Id.*, at 383, 77 S.Ct. 524. We have reaffirmed this holding. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 814, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno v. American Civil Liberties Union*, 521 U.S., at 875, 117 S.Ct. 2329 (The "governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults"); *Sable Communications v. FCC, supra*, at 130-131, 109 S.Ct. 2829 (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").
Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well ***253** beyond that interest by restricting the speech available to law-abiding adults.
[18][19] The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.
[20][21] To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.*, 360 U.S., at 689, 79 S.Ct. 1362; see also *Bartnicki v. Vopper*, 532 U.S. 514, 529, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)*(per curiam).* The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)*(per curiam).* There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit ***254** speech on the ground that it may encourage pedophiles to engage in illegal conduct.

[22] The Government next argues that its objective of eliminating the market for pornography produced using real children **1404 necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

In the case of the material covered by *Ferber*, the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive. See *Osborne*, 495 U.S., at 109-110, 110 S.Ct. 1691. Even where there is an underlying crime, however, the Court has not allowed the suppression of speech in all cases. *E.g.*, *Bartnicki*, *supra*, at 529, 121 S.Ct. 1753 (market deterrence would not justify law prohibiting a radio commentator from distributing speech that had been unlawfully intercepted). We need not consider where to strike the balance in this case, because here, there is no underlying crime at all. Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

[23] Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images.*255 The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

[24][25] The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted ...." *Broadrick v. Oklahoma*, 413 U.S., at 612, 93 S.Ct. 2908. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

[26] To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. § 2252A(c).

The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult *256 for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not **1405 have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. See *ibid.* So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the use of adult actors who appear to be minors. See *ibid.* In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

[27] In sum, § 2256(8)(B) covers materials beyond the categories recognized in *Ferber* and *Miller*, and the reasons the Government offers in support of limiting the freedom of speech have no justification in our precedents or in the law of the First Amendment. The provision abridges the freedom to engage in a substantial amount of lawful speech. For this reason, it is overbroad and unconstitutional.

***257** IV

[28] Respondents challenge § 2256(8)(D) as well. This provision bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The parties treat the section as nearly identical to the provision prohibiting materials that appear to be child pornography. In the Government's view, the difference between the two is that "the 'conveys the impression' provision requires the jury to assess the material at issue in light of the manner in which it is promoted." Brief for Petitioners 18, n. 3. The Government's assumption, however, is that the determination would still depend principally upon the content of the prohibited work.

We disagree with this view. The CPPA prohibits sexually explicit materials that "conve[y] the impression" they depict minors. While that phrase may sound like the "appears to be" prohibition in § 2256(8)(B), it requires little judgment about the content of the image. Under § 2256(8)(D), the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

[29][30] The Government does not offer a serious defense of this provision, and the other arguments it makes in support of the CPPA do not bear on § 2256(8)(D). The materials, for instance, are not likely to be confused for child pornography in a criminal trial. The Court has recognized that ****1406** pandering may be relevant, as an evidentiary matter, to ***258** the question whether particular materials are obscene. See *Ginzburg v. United States*, 383 U.S. 463, 474, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) ("[I]n close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test"). Where a defendant engages in the "commercial exploitation of erotica solely for the sake of their prurient appeal," *id.*, at 466, 86 S.Ct. 942, the context he or she creates may itself be relevant to the evaluation of the materials.

Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg's* rationale. Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." *Ibid.* As a consequence, the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment.

V

For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Having reached this conclusion, we need not address respondents' further contention that the provisions are unconstitutional because of vague statutory language.

The judgment of the Court of Appeals is affirmed.

It is so ordered.