

ORIGINAL

IN THE SUPREME COURT OF OHIO

Global Knowledge Training, LLC,

Appellant,

vs.

Richard A. Levin,  
Tax Commissioner of Ohio,

Appellee.

)  
) Case No. 09-1543

)  
) Appeal from the Ohio  
) Board of Tax Appeals

)  
) BTA Case No. 2006-V-471

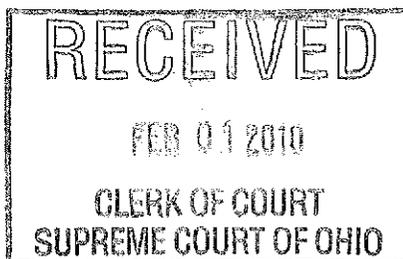
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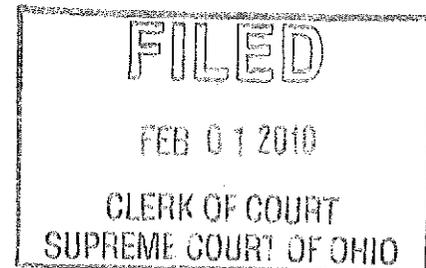
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## INTRODUCTION

R.C. 5739.01(Y)(1)(b) taxes “*training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.*” (emphasis added). The statute thus only taxes training whose content is computer programming and operation. Indeed, training is taxable only if it is instruction “in the use of computer equipment and its systems software.” O.A.C. 5703-9-46(A)(6) (1993). The content of any given training necessarily determines whether it is subject to the tax. In its Merit Brief, Global showed that this statute, on its face, is content-based, presumptively invalid, and subject to strict scrutiny.<sup>1</sup> The statute fails strict scrutiny, and therefore violates the right to freedom of speech. The Government has no answer to Global’s showing:

- In its Third Proposition of Law, Gov. Br. 22-23, the Government argues that Global has brought an as-applied challenge that is not properly before this Court.<sup>2</sup> Not so. This Court need only test the face of the statute against the case law to strike it down. See Argument Section I, *infra*,
- In its Fourth Proposition of Law, Gov. Br. 23-25, the Government argues that the First Amendment protects only “oral speech.” That is wrong. See Argument Section II.A., *infra*.
- In its Fifth Proposition of Law, Gov. Br. 25-35, the Government argues that the statute is not subject to strict scrutiny. That also is wrong; the Government’s meritless argument is refuted by the cases it cites, as well as those cited by Global. See Argument Section II.B., *infra*.
- In its Sixth Proposition of Law, Gov. Br. 35-37, the Government implicitly concedes that the law fails strict scrutiny. It therefore is unconstitutional. See Argument Section II.C., *infra*.

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<sup>1</sup> Terms defined in the Merit Brief of Global Knowledge Training, LLC (“Global Br.”) will be used as defined therein, and cases cited in full therein will be cited in abbreviated form. “Reply Appx.” will refer to the Appendix to the Reply Brief of Global Knowledge Training, LLC, attached hereto.

<sup>2</sup> “Gov. Br.” will refer to the Merit Brief of Appellee Richard A. Levin, Tax Commissioner of Ohio.

The Government's opposition to Global's equal protection and vagueness challenges is similarly unavailing:

- The Government's Second Proposition of Law, Gov. Br. 20-22, makes another baseless jurisdictional attack. But Global's notice of appeal properly raises those challenges. See Argument Section III, *infra*.
- The Government's Seventh Proposition of Law, Gov. Br. 37-44, confusedly applies incorrect legal standards in arguing that the statute does not violate the right to equal protection. That argument fails. On its face, the statute discriminates among persons in exercising their right to freedom of speech. It is subject to strict scrutiny, which it does not survive. See Argument Section IV, *infra*.
- The Government's Eighth Proposition of Law, Gov. Br. 44-50, again relies upon an inapplicable legal standard in arguing the statute is not unconstitutionally vague. That argument also fails. The Government must prove that the statutory terms "computer equipment" and "computer systems" are clear in all applications. It has not met that burden. See Argument Section V, *infra*.

Finally, the Government's statutory argument, its First Proposition of Law, Gov. Br. 13-20, does not refute Global's showing, Global Br. 26-34, 36-47, that twenty-four of its courses are non-taxable under the terms of the statute. See Argument Section VI, *infra*.<sup>3</sup>

## ARGUMENT

### **I. Response to the Government's Third Proposition of Law: This Court has jurisdiction over Global's free-speech facial challenge to R.C. 5739.01(Y)(1)(b).**

The Government's Third Proposition of Law erroneously argues that Global's freedom of speech claim "is not a purely 'facial challenge,'" but rather is an as-applied challenge that Global was required to raise before the BTA. Gov. Br. 22-23. A facial challenge is resolved by "considering the Act itself without regard to extrinsic facts." *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 231, 520 N.E.2d 188. A facial challenge may be raised on appeal to

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<sup>3</sup> This appeal cannot be resolved on statutory grounds alone. Global Br. 8 n.11, 47, conceded that ten courses at issue are taxable under the terms of the statute, but asserted that they are not properly taxable because of the statute's constitutional infirmities. Thus, even if the Court rules for Global on the statutory issues, it must reach Global's constitutional claims.

this Court from the BTA. *Id.* at paragraph 2 of syllabus, 231. Global's freedom of speech claim is a facial challenge to the "training" provision of R.C. 5739.01(Y)(1)(b). Global claims that, by its terms, that provision (and its implementing regulation) taxes training based on its content and is unconstitutional. Global Br. 2-4, 10-17. To decide that claim, this Court must determine: (i) if the statute taxes protected speech, (ii) if the terms of the statute are content-based, and (iii) if the statute can survive strict scrutiny. See *Turner Broadcasting System, Inc. v. FCC* (1994) ("*TBS*"), 512 U.S. 622, 636-637, 641-643, 114 S.Ct. 2445, 129 L.Ed.2d 497; *Simon & Schuster*, 502 U.S. at 115-118. To make those determinations, this Court need only examine the language of the statute and its implementing regulation, and the relevant case law. No extrinsic facts are necessary. Gov. Br. 23's argument, that the cost of each course should be parsed into taxable and non-taxable elements, is misguided. See Argument Section II.A., *infra*. It also is a futile attempt to create factual issues where none exist; the entire tuition for each course at issue was taxed under the facially invalid statute. See S.T. 1; Supp. 37. Global's claim is the very model of a facial challenge, and is properly raised on this appeal.

**II. Response to the Government's Fourth, Fifth, and Sixth Propositions of Law: On its face, the "training" provision of R.C. 5739.01(Y)(1)(b) imposes a content-based tax on protected speech; the statute is subject to strict scrutiny, which it fails.**

Training in computer programming and operation is protected speech. The "training" provision of R.C. 5739.01(Y)(1)(b), on its face, imposes a content-based tax on that protected speech. See Global Br. 14-15. The Government contends that the statute enjoys a "strong presumption of constitutionality" and that Global "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." Gov. Br. 36. That contention is wrong. A content-based tax is presumptively invalid and subject to strict scrutiny, and the burden of proof is squarely on the Government. *Simon & Schuster*, 502 U.S. at 115, 118; *Arkansas Writers' Project*, 481 U.S. at 230-231; *In re Warner* (La. 2009), 21 So.3d 218, 250; Chemerinsky,

Constitutional Law (2 Ed. 2005) 619.<sup>4</sup> The Government must demonstrate that it is narrowly tailored to serve a compelling state interest. See 502 U.S. at 118; 481 U.S. at 231.<sup>5</sup> By arguing the statute has only a “rational relation” to a governmental interest, Gov. Br. 35-37 implicitly concedes that the Government cannot meet its “heavy burden.” *Arkansas Writers’ Project*, 481 U.S. at 231. The tax is invalid.

**A. Training in Computer Programming and Operation is Protected Speech.**

In its Fourth Proposition of Law, Gov. Br. 23-25, the Government contends that training in computer programming and operation consists of “oral instruction,” which it concedes is protected speech, and two “nonspeech elements” – the use of instruction manuals and computer equipment – which it says are not protected. The Government’s argument is at war with First Amendment jurisprudence.

As for the use of instruction manuals, “the transmission of knowledge or ideas by way of the spoken or *written* word” is “pure speech,” fully protected under the First Amendment. *Goulart*, 345 F.3d at 247 (internal quotation marks omitted; emphasis added); see also *Texas v. Johnson* (1989), 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (“[W]e have long recognized that [the First Amendment’s] protection does not end at the spoken or written word.”). The use of tangible things as part of course instruction also is protected speech. See *Goulart*, 345 F.3d at

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<sup>4</sup> Pages cited herein from Chemerinsky are found in Reply Appx. A.

<sup>5</sup> Gov. Br. 36 mistakenly relies on *Leathers v. Medlock* (1991), 499 U.S. 439, 451, 111 S.Ct. 1438, 113 L.Ed.2d 494, discussing *Regan v. Taxation Without Representation of Wash.* (1983), 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129. *Regan* did not address a content-based tax, but a content-neutral federal subsidy for certain speakers. See 461 U.S. at 548. It held that through tax *exemptions* Congress may choose to subsidize some *speakers*, but not others. See *id.* at 549-550. *Regan* is irrelevant here; this case does not deal with a regulation of speakers, or a tax exemption. See *TBS*, 512 U.S. at 641-643, 657-658 (discussing distinct standards for speaker-based and content-based regulations). Also irrelevant are the other cases cited in Gov. Br. 36, which addressed content-neutral statutes not subject to strict scrutiny.

245, 247-248 (holding that instruction in knitting, crochet, spinning and weaving is “pure speech”). The Government’s erroneous theory fails to recognize that tangible things routinely are used as part of course instruction. Use of a map is part of instruction in Geography; use of a calculator is part of instruction in Math; use of a drill press is part of instruction in Shop. Similarly, when computer equipment is used as part of course instruction, that use is protected speech. The Government’s argument is specious. Training in computer programming and operation cannot be disaggregated as the Government suggests.<sup>6</sup>

**B. The “Training” Provision of R.C. 5739.01(Y)(1)(b) is a Content-Based Tax on Protected Speech that is Subject to Strict Scrutiny.**

The Government argues at length in its Fifth Proposition of Law, Gov. Br. 25-35, that the “training” provision of R.C. 5739.01(Y)(1)(b) is not subject to strict scrutiny. Citing *Leathers*, 499 U.S. at 447-449, it asserts that First Amendment strict scrutiny applies to a tax statute *only* if it: (i) is not generally applicable; (ii) singles out the press; (iii) imposes a tax upon a small segment of the same medium; or (iv) is an intentional attempt to interfere with protected speech. Gov. Br. 25-26. But the Government conveniently omits the relevant part of *Leathers*’ holding:

*Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.*

499 U.S. at 447 (emphasis added). *Leathers* teaches that the tax at issue is subject to strict scrutiny. *Leathers* hardly stands alone.

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<sup>6</sup> The speech/nonspeech distinction drawn by Gov. Br. 24 is irrelevant. It applies to regulation of expressive *conduct*, not regulation of “pure speech.” See *United States v. O’Brien* (1968), 391 U.S. 367, 376-377, 88 S.Ct. 1673, 20 L.Ed.2d 672; *Goullart*, 345 F.3d at 247-248; Chemerinsky, at 1314-1316. Certain regulated *conduct*, such as burning an American flag, may contain communicative elements that bring the First Amendment into play, while other elements of the conduct may not be communicative. See *Johnson*, 491 U.S. at 404-406. R.C. 5739.01(Y)(1)(b) regulates “pure speech,” not conduct.

Under the First Amendment, a content-based statute is subject to strict scrutiny, while a content-neutral law is subject to less-stringent intermediate scrutiny. *TBS*, 512 U.S. at 641-643. To determine the constitutionality of a law that regulates protected speech, a court therefore must determine if it is content-based or content-neutral. *Id.*; see *In re Warner*, 21 So.3d at 243-246, 244 n.53, 248-249 (collecting and discussing authorities). If the content conveyed determines whether speech is subject to a law, then that law is content-based. See *TBS*, 512 U.S. at 643 (“As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based.”) (citations omitted).<sup>7</sup> Thus, if a statute on its face taxes protected speech only of a particular content, it is content-based, presumptively invalid, and subject to strict scrutiny. See, e.g., *Simon & Schuster*, 502 U.S. at 115-118; *Leathers*, 499 U.S. at 447; *United States Satellite Broadcasting*, 41 F.Supp.2d at 1120-1121; *TVKO v. Howland* (Or.T.C. 2001), 15 OTR 335, 344-345 (tax imposed upon telecasts or transmissions of boxing and wrestling matches is content-based and subject to strict scrutiny).<sup>8</sup>

Gov. Br. 30-33 argues that a statute is content-based *only* if a legislature *intended* to suppress certain speech. That argument is contradicted by the case law, including those cases cited by the

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<sup>7</sup> See, e.g., *North Olmsted Chamber of Commerce v. City of North Olmsted* (N.D. Ohio 2000), 86 F.Supp.2d 755, 763 (“A regulation of speech is content based when the content conveyed determines whether the speech is subject to restriction.”) (citations omitted); *Opinion of the Justices to the Senate*, 764 N.E.2d at 348 (“By definition, if the applicability of the bill’s requirements can only be determined by reviewing the contents of the proposed expression, the bill is a content-based regulation of speech.”); *Magazine Publishers*, 604 So.2d at 462-463 (statute content-based because “content of a publication is a key factor in determining whether the publication is subject to taxation.”)

<sup>8</sup> Gov. Br. 34 asserts that *City of Cincinnati v. Discovery Network* (1993), 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99, as explained in *Trans Union Corp. v. FTC* (C.A.D.C. 2001), 267 F.3d 1138, 1141, holds that “the fact that a restriction is content-based cannot alone trigger strict scrutiny.” As with *Leathers*, the Government again simply omits the relevant portion of the quoted sentence. *Trans Union* was referring only to content-based restrictions on “commercial speech,” which is entitled to “only qualified constitutional protection.” *Trans Union*, 267 F.3d at 1140. This case, “involving fully protected speech,” “warrant[s] strict scrutiny.” *Id.*

Government. See, e.g., *Leathers*, 499 U.S. at 445 (“Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.”) (citation omitted). The Court reiterated in *TBS* that, although the government’s purpose is the “principal inquiry in determining content-neutrality,” 512 U.S. at 642 (citation and internal quotation marks omitted), a content-based purpose “is not necessary to such a showing in all cases.” *Id.* (citation omitted).<sup>9</sup> Where a law, on its face, discriminates on the basis of content, “the mere assertion of a content-neutral purpose [will not] save [it].” *TBS*, 512 U.S. at 642-643 (citations omitted).<sup>10</sup>

The “training” provision of R.C. 5739.01(Y)(1)(b) is content-based. That provision taxes “training of computer programmers and operators.” To “train” a computer programmer or operator is to instruct him or her in material relevant to that profession, *i.e.*, computer programming and operation.<sup>11</sup> The statute taxes *only* training with that content.<sup>12</sup> O.A.C. 5703-9-46(A)(6) (1993) confirms that point. It explains that taxable “training” is limited to instruction

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<sup>9</sup> See also *Discovery Network*, 507 U.S. at 429 (“[J]ust last Term we expressly rejected the argument that ‘discriminatory \* \* \* treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.’”) (citation omitted; alteration *sic*); *In re Warner*, 21 So.3d at 244 n.53 (discussing cases); *North Olmsted*, 86 F.Supp.2d at 765 (“The question in determining whether a regulation is content based is not whether the regulation or the legislature intends to suppress speech, but rather it is, simply, whether the regulation restricts speech based on content.”).

<sup>10</sup> Gov. Br. 30-33 also asserts that the statute is valid because it does not favor one “viewpoint” over another. As *TBS* itself makes clear, that argument is irrelevant here; R.C. 5739.01(Y)(1)(b) is a content-based tax, not a speaker-based tax. See *TBS*, 512 U.S. at 641-643, 657-658 (discussing distinct standards for speaker-based and content-based regulations); *In re Warner*, 21 So.3d at 245 n.54.

<sup>11</sup> See Webster’s Third New International Dictionary (2002) 2424 (defining “train” as “to teach or exercise (someone) in an art, profession, trade, or occupation \* \* \* .”) (Reply Appx. B).

<sup>12</sup> See Global Br. 2-3, discussing the three Statutory Criteria that training must meet to be taxable.

“in the use of computer equipment and its systems software.”<sup>13</sup> Thus, under the terms of the statute and its implementing regulation, the content of any given training course determines whether it is taxable. The statute therefore is facially content-based. As such, it is presumptively invalid and subject to strict scrutiny.<sup>14</sup>

Gov. Br. 33-35 fails in its vain attempt to escape strict scrutiny. First, it contends that Global’s cases apply only to restrictions on the press. But see *Simon & Schuster*, 502 U.S. at 117 (“[T]he characterization of an entity as a member of the ‘media’ is irrelevant for these purposes. . . . The government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.”). Second, Gov. Br. 34 contends that *Simon & Schuster* “does not stand for the proposition that a content based regulation automatically is subject to strict scrutiny analysis.” But see *Simon & Schuster*, 502 U.S. at 115 (“A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.”) (citation omitted), 118 (“In order to justify such differential treatment, ‘the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.’”) (citation omitted). Third, Gov. Br. 35 “distinguishes” *Forsyth*, *Opinion of the Justices to the Senate* and *United States Satellite*

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<sup>13</sup> This Court “must consider” O.A.C. 5703-9-46(A)(6)(1993) in evaluating Global’s facial challenge to R.C. 5739.01(Y)(1)(b). *Forsyth*, 505 U.S. at 131.

<sup>14</sup> Gov. Br. 4 n.2, 23 n.8 claims that if the statute taxed both application and systems software training, Global would “have no cause to complain” under the First Amendment. It asserts that Global’s claim “derives from the fact that the latter is subject to tax while the former is not.” *Id.* Not so. The statute violates the right to free speech not because it taxes training in systems software as opposed to training in application software, but rather because it taxes training, which is protected speech, based on its content. If by its terms the statute also taxed training in application software, it still would be singling out training of only certain content for taxation – it would simply be doing so on a broader scale. A content-based tax on instruction in Geometry would not be cured by expanding it to cover instruction in all Math. Nor could the statute at issue be cured through the Government’s suggested expansion.

*Broadcasting*, by arguing that their facts were different. But that is no answer to the rule of law they articulate – a content-based infringement on protected speech is unconstitutional, unless it survives strict scrutiny. The laws at issue in those cases failed.<sup>15</sup> So does this one.

**C. The “Training” Provision of R.C. 5739.01(Y)(1)(b) Fails Strict Scrutiny.**

The Government’s Sixth Proposition of Law, Gov. Br. 35-37, argues that the statute bears only a “rational relation” to a governmental purpose; it thus implicitly concedes that the statute does not survive strict scrutiny. Moreover, Gov. Br. 37 concedes that the tax was enacted “as a portion of the state’s appropriations bill to support and fund Ohio’s government.” See *id.* at 27-28 (same). As a matter of law, that is not a compelling interest. See Global Br. 16 & n.21 (citing and quoting cases). The Government has failed to meet its “heavy burden” under strict scrutiny. *Arkansas Writers’ Project*, 481 U.S. at 231. The statute is unconstitutional.

**III. Response to the Government’s Second Proposition of Law: This Court has jurisdiction over Global’s equal protection and vagueness challenges to R.C. 5739.01(Y)(1)(b).**

In its Second Proposition of Law, Gov. Br. 20-22, the Government erroneously argues that Global’s notice of appeal did not meet the requirements of R.C. 5717.04 as to Global’s equal protection and vagueness claims. A notice of appeal adequately sets forth a constitutional error under R.C. 5717.04 if it: (i) explicitly identifies the statutory provisions being challenged and (ii) identifies the relevant constitutional provisions by citing the article and section. *Ohio Apartment Ass’n v. Levin*, 122 Ohio St.3d 1231, 2009-Ohio-3477, 911 N.E.2d 906, at ¶6. Global’s notice identifies R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b) as the subject of its challenge, and states that they violate “Sections 2 and 11 of Article I of the Ohio Constitution

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<sup>15</sup> Gov. Br. 35 argues that *Magazine Publishers* conflicts with *Simon & Schuster*, *Discovery Network*, and *Arkansas Writers’ Project*. But, consistent with them, and relying on *Arkansas Writers’ Project*, *Magazine Publishers* struck down a content-based tax. 604 So.2d at 462-463.

and the First and Fourteenth Amendments to the United States Constitution.” Appx. A. Because Global’s equal protection and vagueness claims arise under the quoted constitutional provisions, this Court has jurisdiction over them.<sup>16</sup>

Gov. Br. 21 relies heavily on *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, 847 N.E.2d 420, but there the notice of appeal to the BTA used generic language, and “did not state which provision of the use tax violated the Equal Protection Clauses \* \* \* .” *Id.* at ¶40.<sup>17</sup> In *Ohio Apartment*, the Government argued that *Castle Aviation* controlled. 2009-Ohio-3477, at ¶6. This Court disagreed, because the notice of appeal in *Ohio Apartment* explicitly identified the regulation being challenged and the relevant constitutional provisions. *Id.* So here. *Ohio Apartment*, not *Castle Aviation*, governs this case.<sup>18</sup> Global’s notice is proper.<sup>19</sup>

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<sup>16</sup> *Ohio Apartment*, 2009-Ohio-3477, at ¶6, also found pertinent that the regulation cited by the notice of appeal explicitly set forth the challenged classification. R.C. 5739.01(Y)(1)(b), cited in Global’s notice of appeal, explicitly sets forth the classification subject to Global’s equal protection and vagueness challenges.

<sup>17</sup> *Castle Aviation*, which dealt with an as-applied challenge, see *id.* at ¶39-40, also observed that the notice did not state “how the application of the use tax violated its right to equal protection.” *Id.* at ¶40. Because Global brings a facial challenge, that factor is irrelevant here. See *Ohio Apartment*, 2009-Ohio-3477, at ¶1, 6 (describing notice raising facial constitutional challenges and ruling it adequate).

<sup>18</sup> The other cases the Government cites also involved notices of appeal containing generic language. See, e.g., *Ohio Bell Tel. Co. v. Levin*, 2009-Ohio-6189, at ¶23, 27 (notice gave “no hint” of error argued to the Court and simply stated “Ohio Bell’s general disagreement with the final determination of value \* \* \* .”); *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 583, 120 N.E.2d 310 (“the errors set out \* \* \* might be advanced in nearly any case \* \* \* .”).

<sup>19</sup> The Government’s reliance on *Castle Aviation*, *Queen City* and *Ohio Bell* also is misplaced because those cases involved R.C. 5717.02. Gov. Br. 20-22 conflates R.C. 5717.02 with R.C. 5717.04, but a notice of appeal filed under R.C. 5717.04 “need not be as specific as a notice filed pursuant to R.C. 5717.02.” *Inter-City Foods, Inc. v. Porterfield* (1970), 36 Ohio App.2d 50, syllabus, 301 N.E.2d 920, affirmed on other grounds *sub nom. Inter-City Foods, Inc. v. Kosydar* (1972), 30 Ohio St.2d 159, 283 N.E.2d 161. Even if R.C. 5717.02 were applicable, Global’s notice of appeal would suffice, because it: (i) questions the taxation of Global’s courses under

**IV. Response to the Government's Seventh Proposition of Law: On its face, the "training" provision of R.C. 5739.01(Y)(1)(b) violates the right to equal protection.**

The Government's Seventh Proposition of Law, Gov. Br. 37-44, cannot defeat Global's equal protection claim. The Government agrees that the "first step under an equal protection challenge is to examine the classification created by the statute in question." Gov. Br. 41. A statutory classification of persons is present if: (i) a statute discriminates on its face; (ii) a facially neutral statute has a disparate impact; or (iii) a facially neutral statute has been unequally administered. *E&T Realty v. Strickland* (C.A.11, 1987), 830 F.2d 1107, 1112 n.5, certiorari denied (1988), 485 U.S. 961, 108 S.Ct. 1225, 99 L.Ed.2d 425; see also *Strattman v. Studt* (1969), 20 Ohio St.2d 95, 98-99, 253 N.E.2d 749; Chemerinsky, at 618-619. If a statute on its face discriminates among persons, that is the end of the classification inquiry. *Strickland*, 830 F.2d at 1112 n.5; Chemerinsky, at 618-619. R.C. 5739.01(Y)(1)(b) is in that category. It taxes those persons "providing \* \* \* training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems." On its face, the statute distinguishes between persons who provide that training and persons who do not; it imposes a tax on the former group.<sup>20</sup>

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*footnote continued*

R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b); (ii) cites the United States and Ohio constitutional provisions under which it objects; and (iii) asserts that its training courses should not have been taxed. See *MCI Telecomm. Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197, 625 N.E.2d 597.

<sup>20</sup> The Government argues that no statutory classification exists: (j) because Global "has presented no evidence of other similarly-situated companies that are not taxed in Ohio," Gov. Br. 37-38; and (ii) "[b]ecause systems software and application software are not competing interests and are not similarly situated \* \* \* ." Gov. Br. at 43. Both of those points are irrelevant where, as here, a classification is present on the face of the statute. See *Strickland*, 830 F.2d at 1112 n.5 (facial challenges are resolved by examining the statutory classification and the government interest); *Advantage Media v. City of Hopkins* (D.Minn. 2005), 379 F.Supp.2d 1030, 1045-1046

A facial statutory classification of persons is subject to strict scrutiny under the Equal Protection Clause if it impinges upon “personal rights protected by the Constitution,” such as the right to freedom of speech. *Cleburne*, 473 U.S. at 440; see *Thompson*, 95 Ohio St.3d at 266-267; Chemerinsky, 619-620, 622-623. Such classifications fail if they are not “narrowly tailored to serve a compelling state interest.” *Thompson*, 95 Ohio St.3d at 266-267 (citations omitted). The burden of proof is squarely on the Government. See *id.* at 270; Chemerinsky, at 619.<sup>21</sup>

On its face, the statute differentially treats members of the relevant class (for-profit companies providing technical instruction to corporate personnel) by taxing or not taxing them based upon the content of their training. Such differential taxation of persons based on the content of protected speech is subject to strict scrutiny under the Equal Protection Clause. See generally *Mosley*, 408 U.S. at 101-102; *Thompson*, 95 Ohio St.3d at 269; Chemerinsky, at 622-623.<sup>22</sup> Gov. Br. 43 concedes that the tax was enacted “to raise money for the support of the government’s operation.” As previously discussed, that is not a compelling interest. The Government has failed to meet its burden. The statute therefore fails strict scrutiny.

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*footnote continued*

(evidence of dissimilar treatment from those similarly-situated not necessary in facial challenge). The Government’s latter assertion also is irrelevant because the Equal Protection Clause is concerned with discriminatory treatment of persons (not software). See *City of Cleburne v. Cleburne Living Ctr., Inc.* (1985), 473 U.S. 432, 439-440, 105 S.Ct. 3249, 87 L.Ed.2d 313; Chemerinsky, 618-619.

<sup>21</sup> The Government’s argument, Gov. Br. 39, that “invidious discrimination” is the “test” under equal protection analysis, is simply wrong. See *Cleburne*, 473 U.S. at 439-441; *Thompson*, 95 Ohio St.3d at 266-267.

<sup>22</sup> As with Global’s freedom of speech cases, Gov. Br. 44’s attempt to “distinguish” *Mosley* and *Thompson*, by stating that their facts differ, fails. Similarly, most of the cases cited by the Government require no discussion, because they involved laws that did not implicate a fundamental right. See, e.g., *Vacco v. Quill* (1997), 521 U.S. 793, 799, 117 S.Ct. 2293, 138 L.Ed.2d 834; *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, at ¶89, 91.

V. **Response to the Government's Eighth Proposition of Law: R.C. 5739.01(Y)(1)(b) is facially unconstitutional because "computer equipment" and "computer systems" as used in the statute and its implementing regulation are impermissibly vague.**

Gov. Br. 44-45 correctly states that a law is impermissibly vague if persons of ordinary intelligence must necessarily guess at its meaning, such that it: (i) fails to provide sufficient notice of its proscriptions, or (ii) risks arbitrary or discriminatory enforcement. However, Gov. Br. 45-48 then discusses at length a legal standard that applies only when reviewing a statute that does *not* implicate constitutionally protected rights. See *Village of Hoffman Estates v. The Flipside* (1982), 455 U.S. 489, 494-495, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362. The statute at issue imposes a content-based tax upon constitutionally protected speech. Thus, the Government's discussion is inapplicable.

Where, as here, a statute implicates constitutionally protected rights, such as the right to freedom of speech, the burden is on the *Government* to prove the statute constitutional beyond a reasonable doubt. *State v. Janssen* (Wis. 1998), 219 Wis.2d 362, 370-371, 580 N.W.2d 260.<sup>23</sup> In this context, a "stringent" vagueness test applies. *Hoffman Estates*, 455 U.S. at 499. A statute regulating protected speech must be drafted with "narrow specificity." *Hynes*, 425 U.S. at 620. It is unconstitutional if there is "*any situation* in which the protected rights will be impermissibly restricted \* \* \* ." *State v. Hayes* (1987), 31 Ohio App.3d 40, 42, 507 N.E.2d 1176 (emphasis added).<sup>24</sup> A facial vagueness challenge under the First Amendment is resolved by examining

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<sup>23</sup> See also *State v. A Motion Picture Film Entitled "Without a Stitch"* (1974), 37 Ohio St.2d 95, 102, 307 N.E.2d 911 ("It is settled that in areas generally protected by the First Amendment, the state must shoulder the burden of proving that the particular activity complained of is outside the scope of constitutional protection.") (citations omitted), appeal dismissed for want of substantial federal question *sub nom. Art Theater Guild, Inc. v. Ewing* (1975), 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed.2d 82.

<sup>24</sup> See also *Cable Ala. Corp. v. City of Huntsville* (N.D.Ala. 1991), 768 F.Supp. 1484, 1505-1506 (holding that a statute implicating constitutionally protected conduct must have "clear

the language of the statute, without reference to the facts of the case at hand. See *Kolender v. Lawson* (1983), 461 U.S. 352, 358 n.8, 103 S.Ct. 1855, 75 L.Ed.2d 903; *Hoffman Estates*, 455 U.S. at 495 n.7.

Gov. Br. 48 posits that “[t]wenty-seven years of silence in the case law implies that other taxpayers have not been surprised in understanding what the terms ‘computer equipment’ and ‘computer systems’ mean under the statute.” The fact that a statute has not previously been held unconstitutional implies nothing, and would be a strange basis for avoiding analysis now. Next, in an effort to clarify the terms “computer equipment” and “computer systems,” Gov. Br. 49 refers this Court to a definition of “stand-alone computers.” That definition contains the undefined and equally vague term “related hardware,” which does not clarify what devices fall within the statutory terms at issue. Ultimately, the Government is reduced to claiming that the statute is not unconstitutionally vague because it has done a “cursory review of the Internet” and concluded that “routers are in fact computer equipment.” Gov. Br. 49. The Government surely cannot prevail merely by stating its desired conclusion and citing its “cursory review of the Internet” as support. The Government does not come close to proving the statute constitutional beyond a reasonable doubt.

The Government’s position fails because “computer equipment” and “computer systems” are unconstitutionally vague. Televisions, telephones, routers, switches, and other types of devices all can operate on the same network as a computer. See Global Br. 23, 27. But, those devices also may operate on separate networks that do *not* include computers. *Id.* The statute gives no

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*footnote continued*

application in *all circumstances* or it will be found entirely void”; it cannot be “vague in *any application*”) (emphases added).

guidance as to which of those devices are “computer equipment” or “computer systems” – and which are not. *Id.* at 23-26. Nor does it provide guidance as to the circumstances under which a particular device might come within the statutory terms’ scope. *Id.* Does a television or a telephone operating on the same network as a computer qualify as “computer equipment”? Does a router transmitting data solely among telephones fall within that term? Is a printer “computer equipment?” The statute does not answer these or similar questions. Instead, the Tax Commissioner must engage in subjective, case-by-case line drawing in trying to apply the statute. That has led the Commissioner to conclude, for example, that printers and scanners are not computer equipment, Supp. 117; H.R. Ex. 9 at 10, while contending that routers and switches are. Thus, the statute not only fails to provide notice of what training is taxable, it also invites arbitrary administration.<sup>25</sup> It is unconstitutionally vague.<sup>26</sup>

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<sup>25</sup>Global does not contend that “precise statutory definitions” always are required “to pass constitutional muster.” Gov. Br. 48. Global does contend that clear definitions of “computer equipment” and “computer systems” are required here, because constitutionally protected speech is implicated, see *Hynes*, 425 U.S. at 620, and because the statutory terms give no guidance as to what training is taxable.

<sup>26</sup>Gov. Br. 50 asserts that *Big Mama Rag* “conflicts with” *Regan*. Not so. The only constitutional question addressed in *Big Mama Rag* was a vagueness challenge. 631 F.2d at 1035-1040. *Regan* does not even mention vagueness.

Gov. Br. 50 also vainly attempts to distinguish *Hynes* and *United Food*, arguing that they are not relevant because the statutes at issue were not economic regulations, and did not provide an administrative remedy. But if a statute implicates constitutionally protected conduct, as in this case, those factors are immaterial. See *Hoffman Estates*, 455 U.S. at 498-499; *Bullfrog Films*, 847 F.2d at 513.

The Government cites cases, but they do not help it. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶84-88, 104 actually held that an ordinance implicating constitutionally protected rights was impermissibly vague. Other cited cases are inapposite, because the statutes did not implicate a constitutionally protected right, and involved terms that were statutorily defined or clearly defined by other sources. See, e.g., *Columbia Gas*, 2008-Ohio-511, at ¶43, 46-47 (statute “set forth specific definitions that clearly distinguish between [industry terms]”).

**VI. Response to the Government's First Proposition of Law: Twenty-four courses at issue do not meet one or more of the three Statutory Criteria necessary to be taxable as "computer services" under R.C. 5739.01(Y)(1)(b).**

Gov. Br. 15 argues that "[e]xemptions are a matter of legislative grace \* \* \* [that] must not be allowed \* \* \* unless the statute specifically allows it." But there is no tax exemption at issue here; the point, as demonstrated in Global Br. 26-34, 36-47 is that twenty-four of Global's courses do not fall within the scope of this tax statute. The governing principles thus are quite different. First, unlike the sale of tangible goods, there is no presumption that the provision of services is taxable; rather, the provision of services is not subject to tax unless it clearly falls within the terms of a taxing statute. See *Opinion of the Tax Comm'r* (Aug. 17, 2007), No. 06-0013, at 2, 2007 Ohio Tax Commr. LEXIS 2. Second, "strict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." *Roxane Laboratories*, 75 Ohio St.3d at 127 (citation and internal quotation marks). Third, although Gov. Br. 15 rightly notes that this Court normally will defer to the BTA's factual determinations, that principle is irrelevant here. Where, as here, the BTA has made erroneous *legal conclusions* based on an *undisputed* record, this Court need accord the BTA's decision no deference; this Court "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." *Bd. of Educ.*, 93 Ohio St.3d at 232 (citation omitted).

Application of these governing principles mandates the conclusion that twenty-four courses at issue are non-taxable, because they do not satisfy one or more of the three Statutory Criteria necessary to be taxed under R.C. 5739.01(Y)(1)(b). Each course falls into one or more of three non-taxable categories:

1. **Seventeen Courses on Routers and Switches:** The Government does nothing to rebut Global's showing, Global Br. 26-29, that the seventeen courses at issue here, which teach about

routers and switches, are courses about *network equipment*.<sup>27</sup> Network equipment is not within the statutory term “computer equipment.”<sup>28</sup> *Id.* Global Br. 28-29 construes that term by reference to definitions of analogous terms from Webster’s Dictionary and the IRC.<sup>29</sup> The Government rejects those definitions and instead makes up its own.<sup>30</sup> Gov. Br. at 16. It claims that “computer equipment” is an item “necessary for a computer’s use, function, and is connected to the computer \* \* \* .” *Id.* But routers and switches are *not* necessary for the use or function of a computer. See Supp. 116-117; I.L.R. Ex. 9-10. Computers independently process and store information. *Id.* A PC or laptop disconnected from the Internet still performs an array of functions, from word processing to playing music to displaying photographs. Further, routers

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<sup>27</sup> Gov. Br. 15-18 does not argue that routers and switches are “computer systems” under the statute. The Government thereby concedes that point, so in this Section Global need not explicate it further.

<sup>28</sup> As explained in Argument Section V, *supra*, “computer equipment” and “computer systems” are unconstitutionally vague. Thus, Global maintains that this Court should strike down the statute. This Argument Section VI presupposes that this Court may construe the unconstitutional term “computer equipment,” despite the fact that it is statutorily undefined and vague in common usage. But see *City of Toledo v. Ross* (Aug. 31, 2001), 6th Dist. No. L-00-1337, unreported, 2001 Ohio App. LEXIS 3891, at \*13-\*16 (striking down as unconstitutional an ordinance with undefined terms that lacked clear meaning in common usage), appeal dismissed as moot (2002), 97 Ohio St.3d 1211, 2002-Ohio-5780, 777 N.E.2d 265. This Section’s reference to definitions of terms analogous to “computer equipment” is meant to demonstrate that, purely as a matter of statutory construction, routers and switches should not be included within that term’s scope.

<sup>29</sup> When construed by reference to analogous terms, “computer equipment” is the mechanical hardware that is under control of a computer’s CPU. Global Br. 28-29. Network equipment is not, as the Gov. Br. 17 contends, a “subset” of “computer equipment.” Network equipment is the mechanical hardware used to transmit information in electronic form among various types of devices. See Global Br. 27; Supp. 116-117; H.R. Ex. 9 at 9-10. It is distinct from “computer equipment” because it is not under control of a computer’s CPU, and because it is not necessarily used in conjunction with a computer. See Global Br. 26-29.

<sup>30</sup> Gov. Br. 17’s attempt to undermine the IRC definition, because it is “not related to sales tax,” is meritless. Regardless whether the definition relates to sales tax, it is a detailed definition from the IRC of a term comparable to “computer equipment.” That definition is instructive here.

and switches are not necessarily connected to a computer. Supp. 117; H.R. Ex. 9 at 10. Routers and switches do not meet the Government's latest definition of "computer equipment."<sup>31</sup>

Gov. Br. 17 also refers this Court to a definition of "stand-alone computer," and merely asserts its desired conclusion that routers and switches "are related computer hardware used in business," without explanation. The Government offers no reason why "related computer hardware" would include network equipment that is not under the control of a computer's CPU and that is not necessarily used in a computer network. See Global Br. 26-29.

Gov. Br. 17 asserts that Global Br. 28's reliance on R.C. 5739.01(AA)(1), which explicitly recognizes the use of routers outside of computer networks, is "misplaced," because "[t]here is nothing in the record which establishes that (1) a router is used in a telecommunication service \* \* \*; (2) that if routers are used, there is nothing to disprove the BTA's factual findings that a router is connected to and accessed by a computer to work; and (3) if a router is present, how the router functions within that service." *Id.*<sup>32</sup> But the undisputed record is to the contrary:

- As to the first point, "the record clearly shows that routers and switches *do* have utility outside of computer networks, such as in telecommunications and cable networks." Global Br. 28; Supp. 5-7, 16, 116-117; H.R. 14-15, 20-21, 23-24, 59; H.R. Ex. 9 at 9-10 ("[T]he transmission hardware for an I.T. network is no different than for a voice or video network \* \* \* .").
- As to the second point, the record plainly demonstrates that routers and switches need not be connected to a computer to function. See Supp. 96, 117, 124; H.R. Ex. 6 at 4; H.R. Ex. 9 at 10 ("For example, in our illustration (attachment 'B') what we have shown as a computer could be a telephone or a television.").
- As to the third point, the record also explains precisely how routers and switches function in other networks. See Supp. 117; H.R. Ex. 9 at 10 ("[T]hey are sophisticated mechanical

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<sup>31</sup> For these same reasons, Gov. Br. 16's generic definition of "equipment" does not help it.

<sup>32</sup> The BTA recognized that a computer typically acts as the interface mechanism to configure routers, not that "a router is connected to and accessed by a computer to work." See *Global Knowledge*, 11-12; Gov. Br. 17. Routers and switches are not under the control of a computer's CPU during that interface. Supp. 27; H.R. 105. As Mr. Fox testified, when a person accesses a switch or router, he talks "directly with the router"; "the computer is really not involved." *Id.*

switches that act as a conduit to transmit electronic media to other equipment that process or store the information \* \* \* .”).

The record is undisputed that routers and switches are network equipment, not “computer equipment,” when construed by reference to analogous terms. Especially in light of the governing principles discussed *supra*, the BTA erred as a matter of law in taxing the seventeen courses listed in Global Br. 29 n.32.

**2. Six Courses Not on Systems Software:** Gov. Br. 18 does not dispute, and thus concedes, that the BTA improperly taxed three courses that were training in application software, not systems software.<sup>33</sup> Gov. Br. 18 does contest Global’s showing that courses #6950 PERL Scripting, and #6980 PERL with CGI for the Web, involve a programming language for writing application software. But the record is undisputed that those courses involve PERL, a programming language that is used to create and run “*application programs*.” Supp. 112; I.R. Ex. 9 at 5 (emphasis added); see Global Br. 39-40. The courses do not involve training in systems software, so are not taxable.<sup>34</sup>

**3. Ten Introductory Courses:** The attendees of ten introductory courses at issue are beginners, who have *not* yet achieved the required technical acumen to be considered “computer programmers and operators” under the definition relied upon by the BTA. See Global Br. 32-34. The Government continues to rely on the same selective, out-of-context quotation from Mr. Fox cited by the BTA. See Gov. Br. 20; *Global Knowledge*, at 13. But, the context of his statement

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<sup>33</sup> Those courses are listed in Global Br. 31 n.34. Gov. Br. 11 wrongly asserts that course #8800 Router Installation and Basic Configuration is in systems software. See Global Br. 37-38.

<sup>34</sup> The Government also claims that those two courses hypothetically could have been taxed under the “computer programming” provision of R.C. 5739.01(Y)(1)(b). The “computer programming” provision only taxes “the service of writing, changing, debugging, or installing *systems software*.” O.A.C. 5703-9-46(A)(5) (1993) (emphasis added). The courses would not be taxable under that provision either.

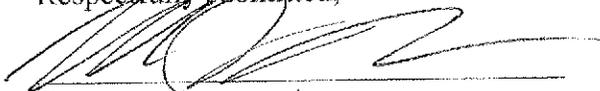
clearly shows that Mr. Fox was referencing the “very, very difficult” courses that Global teaches, *i.e.* advanced courses. See Global Br. 33; Supp. 24; H.R. 92-93.

As the BTA acknowledged, the record is undisputed that certain courses were geared towards beginners. See *Global Knowledge*, at 14; Global Br. 32-34. An individual with professional expertise or training would not take this type of course, as he or she would already know the “very basic building block information.” Supp. 16; H.R. 60. By definition, beginners taking introductory courses in a particular subject have not yet achieved “expertise” or a “higher-level of training and understanding.” *Global Knowledge*, at 13-14. Again, applying the governing principles, the BTA erred as a matter of law in taxing the ten courses listed in Global Br. 34 n.38.

### CONCLUSION

For the reasons set forth in Global’s Merit Brief, and herein, this Court should reverse the BTA’s decision, and enter judgment in Global’s favor.

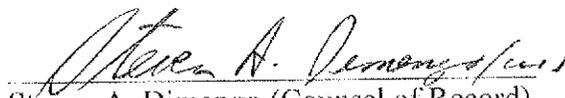
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# APPENDIX

# **APPENDIX A**

# CONSTITUTIONAL LAW

## Second Edition

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**ASPEN**  
PUBLISHERS

111 Eighth Avenue, New York, NY 10011  
[www.aspenpublishers.com](http://www.aspenpublishers.com)

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Aspen Publishers  
Attn: Permissions Department  
111 Eighth Avenue, 7th Floor  
New York, NY 10011-5201

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 0-7355-4946-X

**Library of Congress Cataloging-in-Publication Data**

Chemerinsky, Erwin.  
Constitutional law / Erwin Chemerinsky.—2nd ed.  
p. cm.  
Includes index.  
ISBN 0-7355-4946-X (alk. paper)  
1. Constitutional law—United States—Cases. I. Tide.

KF4549.C44 2005  
342.73—dc22

2005007712

It is now well settled that the requirements of equal protection are the same whether the challenge is to the federal government under the Fifth Amendment or to state and local actions under the Fourteenth Amendment. The Supreme Court has expressly declared that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."<sup>3</sup> But technically, equal protection applies to the federal government through judicial interpretation of the Due Process Clause of the Fifth Amendment and to state and local governments through the Fourteenth Amendment.

## 2. *A Framework for Equal Protection Analysis*

All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose? Many government laws draw a distinction among people and thus are potentially susceptible to an equal protection challenge. For example, those under age 16 might claim to be discriminated against by the age requirement for obtaining a driver's license, and those denied government benefits might argue that they are discriminated against by eligibility guidelines. If these laws, or any government actions, are challenged based on equal protection, the issue is whether the government can identify a sufficiently important objective for its discrimination.

What constitutes a sufficient justification depends entirely on the type of discrimination. For instance, the Supreme Court has declared that it is extremely suspicious of race discrimination, and therefore the government may use racial classifications only if it proves that they are necessary to achieve a compelling government purpose. This is known as "strict scrutiny." In contrast, a 14 year old who claimed that the denial of a driver's license violated equal protection would prevail only by proving that the law was not rationally related to a legitimate government purpose. This is known as "rational basis" review.

To be more specific, all equal protection issues can be broken down into three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?

### *QUESTION 1: WHAT IS THE CLASSIFICATION?*

The first question is: What is the government's classification? How is the government drawing a distinction among people? Equal protection analysis always must begin by identifying how the government is distinguishing among people. Sometimes this is clear; sometimes it is the focus of the litigation.

As described below, there are two basic ways of establishing a classification. One is where the classification exists on the face of the law; that is, where the law in its very terms draws a distinction among people based on a particular characteristic. For example, a law that prohibits blacks from serving on juries is an obvious facial racial classification.<sup>4</sup> Likewise, a law that says that only those 16 and older can have drivers' licenses is obviously a facial classification.

Alternatively, sometimes laws are facially neutral, but there is a discriminatory impact to the law or discriminatory effects from its administration. For instance, a

3. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

4. *See Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating state law limiting jury service to "white male persons").

law that requires that all police officers be at least 5'10" tall and 150 pounds is, on its face, only a height and weight classification. Statistics, however, show that 40% of men, but only 2% of women will meet this requirement. The result is that the law has a discriminatory impact against women in hiring for the police force.

As described below, the Supreme Court has made it clear that discriminatory impact is insufficient to prove a racial or gender classification. If a law is facially neutral, demonstrating a race or gender classification requires proof that there is a discriminatory purpose behind the law.<sup>5</sup> Thus, women challenging the height and weight requirements for the police force must show that the government's purpose was to discriminate based on gender.

In other words, there are two alternative ways of proving the existence of a classification: showing that it exists on the face of the law or demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose.

#### QUESTION 2: WHAT IS THE APPROPRIATE LEVEL OF SCRUTINY?

Once the classification is identified, the next step in analysis is to identify the level of scrutiny to be applied. The Supreme Court has made it clear that differing levels of scrutiny will be applied depending on the type of discrimination.

Discrimination based on race or national origin is subjected to strict scrutiny. Also, generally, discrimination against aliens is subjected to strict scrutiny, although there are several exceptions where less than strict scrutiny is used. Under strict scrutiny, a law is upheld if it is proven necessary to achieve a compelling government purpose. The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative. The government has the burden of proof under strict scrutiny and the law will be upheld only if the government persuades the court that it is necessary to achieve a compelling purpose. Strict scrutiny is usually fatal to the challenged law.<sup>6</sup>

Intermediate scrutiny is used for discrimination based on gender and for discrimination against non-marital children. Under intermediate scrutiny, a law is upheld if it is substantially related to an important government purpose.<sup>7</sup> In other words, the Court need not find that the government's purpose is "compelling," but it must characterize the objective as "important." The means used need not be necessary, but must have a "substantial relationship" to the end being sought. Under intermediate scrutiny, the government has the burden of proof. The Supreme Court recently explained that the "burden of justification is demanding and that it rests entirely on the state."<sup>8</sup>

Finally, there is the rational basis test. Rational basis review is the minimum level of scrutiny that all laws challenged under equal protection must meet. All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test. Under rational basis review a law will be upheld if it is rationally related to a

5. See e.g., *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (discriminatory impact is insufficient to prove a gender classification; there must be proof of discriminatory purpose); *Washington v. Davis*, 426 U.S. 229 (1976) (discriminatory impact is insufficient to prove a racial classification; there must be proof of discriminatory purpose).

6. Professor Gerald Gunther described it as "strict in theory and fatal in fact." *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

7. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Lehr v. Robertson*, 463 U.S. 248, 266 (1983).

8. See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

legitimate government purpose.<sup>9</sup> The government's objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need be a rational way to accomplish the end.

The challenger has the burden of proof under rational basis review. The rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review.<sup>10</sup>

How has the Court decided which level of scrutiny to use for particular classifications? Although the Court has shown little willingness in the past two decades to subject additional classifications to strict or intermediate scrutiny, how will it evaluate such requests? Several criteria are applied in determining the level of scrutiny.

For example, the Court has emphasized that immutable characteristics—like race, national origin, gender, and the marital status of one's parents—warrant heightened scrutiny.<sup>11</sup> The notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change.

The Court also considers the ability of the group to protect itself through the political process. Women, for example, are more than half the population, but traditionally have been severely underrepresented in political offices. Aliens do not have the ability to vote and thus the political process cannot be trusted to represent their interests.<sup>12</sup>

The history of discrimination against the group also is relevant to the Court in determining the level of scrutiny. A related issue is the Court's judgment concerning the likelihood that the classification reflects prejudice as opposed to a permissible government purpose.<sup>13</sup> For example, the Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action. In contrast, the Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to be instances where sex is a justifiable basis for discrimination.

Although the levels of scrutiny are firmly established in constitutional law and especially in equal protection analysis, there are many who criticize the rigid tiers of review. For example, Justices Thurgood Marshall and John Paul Stevens, among others, have argued that there should be a sliding scale of review rather than the three levels of scrutiny.<sup>14</sup> They maintain that the Court should consider such factors as the constitutional and social importance of the interests adversely affected and the invidiousness of the basis on which the classification was drawn. They contend that under the rigid tiers of review the choice of the level of scrutiny is usually decisive

9. *See, e.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988); *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175, 177 (1980); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959).

10. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (all discussed below).

11. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting).

12. *See, e.g.*, *Graham v. Richardson*, 403 U.S. 365, 367 (1971).

13. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin, [t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.")

14. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 109, 110 (1973) (Marshall, J., dissenting).

and unduly limits the scope of judicial analysis. Those who favor a sliding scale believe that it would lead to more candid discussion of the competing interests and therefore provide overall better decision making.

Some critics suggest that although the Court speaks in terms of three tiers of review, in reality there is a spectrum of standards of review.<sup>15</sup> The claim is that in some cases where the Court says that it is using rational basis review, it is actually employing a test with more "bite" than the customarily deferential rational basis review. Similarly, it is argued that in some cases intermediate scrutiny is applied in a very deferential manner that is essentially rational basis review, while in other cases intermediate scrutiny seems indistinguishable from strict scrutiny. The argument is that although the Court articulates three tiers of review, the reality is a range of standards. In reading the cases below, it is useful to consider whether the Court's definitions and applications of the levels of scrutiny have been consistent, or whether the Court has varied in this regard to achieve the results it desires.

### *QUESTION 3: DOES THE GOVERNMENT ACTION MEET THE LEVEL OF SCRUTINY?*

The level of scrutiny is the rule of law that is applied to the particular government action being challenged as denying equal protection. In evaluating the constitutionality of a law, the Court evaluates both the law's ends and its means. For strict scrutiny, the end must be deemed compelling for the law to be upheld; for intermediate scrutiny, the end has to be regarded as important; and for the rational basis test, there just has to be a legitimate purpose.

In evaluating the relationship of the means of the particular law to the end, the Supreme Court often focuses on the degree to which a law is underinclusive and/or overinclusive.<sup>16</sup> A law is underinclusive if it does not apply to individuals who are similar to those to whom the law applies. For example, a law that excludes those under age 16 from having drivers' licenses is somewhat overinclusive because some younger drivers undoubtedly have the physical ability and the emotional maturity to be effective drivers.

A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose. In other words, the law unnecessarily applies to a group of people. For example, the government's decision to evacuate and intern all Japanese-Americans on the West Coast during World War II was radically overinclusive.<sup>17</sup> Although the government's purported interest was in preventing espionage, individuals were evacuated and interned without any determination of their threat. Obviously, the law was enormously overinclusive because it harmed a large number of people unnecessarily.

A law can be both underinclusive and overinclusive. The decision to evacuate Japanese-Americans during World War II was certainly both. If the goal was to isolate those who were a threat to security, interning only Japanese-Americans was underinclusive in that it did not identify those of other races who posed a danger. At the same time, as explained above, the federal government's action was extremely

15. See Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L.J. 161 (1984).

16. These concepts were articulated and explained in Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 348-353 (1949).

17. See *Korematsu v. United States*, 323 U.S. 214 (1944), presented below.

overinclusive because few, if any, Japanese-Americans posed any threat. In fact, not a single Japanese-American during World War II was ever charged with espionage.<sup>18</sup>

The fact that a law is underinclusive and/or overinclusive does not mean that it is sure to be invalidated. Quite the contrary, virtually all laws are underinclusive, overinclusive, or both. The Court has recognized that laws often are underinclusive because the government may choose to proceed "one step at a time."<sup>19</sup> But underinclusiveness and overinclusiveness are used by courts in evaluating the fit between the government's means and its ends. If strict scrutiny is used, a relatively close fit is required; in fact, the government will have to show that the means are necessary—the least restrictive alternative—to achieve the goal. Under intermediate scrutiny, a closer fit, less underinclusiveness or overinclusiveness, will be required than under the rational basis test.

Thus, equal protection analysis involves three questions: What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny? Cases posing an equal protection issue always involve a dispute over one or more of these questions.

### THE PROTECTION OF FUNDAMENTAL RIGHTS UNDER EQUAL PROTECTION

Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics, such as race, gender, age, disability, or other traits. Sometimes, though, equal protection is used if the government discriminates among people as to the exercise of a fundamental right.

An early case using equal protection in this way was *Skinner v. Oklahoma*, 316 U.S. 535 (1942).<sup>20</sup> The Oklahoma Habitual Criminal Sterilization Act required surgical sterilization for individuals who had been convicted three or more times for crimes involving "moral turpitude." The Supreme Court declared the law unconstitutional as violating equal protection because it discriminated among people in their ability to exercise a fundamental liberty: the right to procreate. Justice William Douglas, writing for the Court, said: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects." In other words, the Court found that the right to procreate was a fundamental right and essentially used strict scrutiny under the Equal Protection Clause to analyze the government's discrimination. The Court has used the Equal Protection Clause to protect other fundamental rights such as voting,<sup>21</sup> access to the judicial process,<sup>22</sup> and interstate travel.<sup>23</sup> The use of equal protection to safeguard these fundamental rights was, in part, based on the Supreme

18. See Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 Colum L. Rev. 175 (1945).

19. *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

20. *Skinner* is presented more fully in Chapter 8 in the discussion of the right to procreate.

21. See, e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964).

22. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right to fee waiver for indigents in filing for divorce); *Douglas v. California*, 372 U.S. 353 (1963) (right to counsel on appeal for indigents); *Criffin v. Illinois*, 351 U.S. 12 (1956) (right to free transcripts on appeal for indigents).

23. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring unconstitutional as violating the right to travel a state law creating a one-year residency requirement for receiving welfare).

Court's desire to avoid substantive due process, which had all of the negative connotations of the *Lochner* era. However, the effect is the same whether a right is deemed fundamental under the Equal Protection Clause or under the Due Process Clause: government infringements are subjected to strict scrutiny.

Chapter 8 discusses fundamental rights, including both those that the Court has protected under the Equal Protection Clause and those safeguarded under due process. This chapter focuses on the use of equal protection to analyze discrimination among people based on traits such as race, gender, alienage, legitimacy, age, disability, wealth, and sexual orientation.

## B. THE RATIONAL BASIS TEST

### I. Introduction

The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet. In other words, unless the government action is a type of discrimination that warrants the application of intermediate or strict scrutiny, rational basis review is used. Although the Court has phrased the test in different ways over time,<sup>24</sup> the basic requirement is that a law meets rational basis review if it is rationally related to a legitimate government purpose. For instance, in *New Orleans v. Duke*, 427 U.S. 297 (1976), and in many other cases, the Court said that the Equal Protection Clause is satisfied so long as the classification is "rationally related to a legitimate state interest." Also, the Court has been consistent that the challenger has the burden of proof when rational basis review is applied. There is a strong presumption in favor of laws that are challenged under the rational basis test.<sup>25</sup>

The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. As discussed below, the Court often has said that a law should be upheld if it is possible to conceive any legitimate purpose for the law, even if it was not the government's actual purpose. The result is that it is rare for the Supreme Court to find that a law fails the rational basis test.

This raises important questions. First, is this appropriate deference to the legislative process or undue judicial abdication? Since 1937, the Court has made it clear that it will defer to government economic and social regulations unless they infringe on a fundamental right or discriminate against a group that warrants special judicial protection.<sup>26</sup> This can be defended as proper judicial restraint, as the Court allows the more democratic branches of government to make decisions except in areas where there is reason for heightened judicial scrutiny.<sup>27</sup> Legislation often involves

24. See, e.g., *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911); *Royston Guarro Co. v. Virginia*, 253 U.S. 412 (1920).

25. See *McCowan v. Maryland*, 366 U.S. 420, 425-426 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.").

26. This, of course, was the philosophy articulated in the famous *Carolene Products* Footnote 4. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938), presented in Chapter 6.

27. "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981).

they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones. It is hard to imagine a more narrowly tailored prohibition of the disclosure of illegally intercepted communications, and it distorts our precedents to review these statutes under the often fatal standard of strict scrutiny. These laws therefore should be upheld if they further a substantial governmental interest unrelated to the suppression of free speech, and they do. Surely "the interest in individual privacy," at its narrowest must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations. The Court subordinates that right, not to the claims of those who themselves wish to speak, but to the claims of those who wish to publish the intercepted conversations of others. Congress' effort to balance the above claim to privacy against a marginal claim to speak freely is thereby set at naught.

#### d. Right of Publicity

The right of publicity protects the ability of a person to control the commercial value of his or her name, likeness, or performance. In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Court held that a state may allow liability for invasion of this right when a television station broadcast a tape of an entire performance without the performer's authorization. A television station broadcast a 15-second tape of a circus act featuring "human cannonball" shot from a cannon into a net. The Supreme Court held that the broadcast station could be held liable because it broadcast the entire performance without authorization. The Court noted, however, that the plaintiff would have to prove damages and noted that it was quite possible that "respondent's news broadcast increased the value of petitioner's performance by stimulating the public's interest in seeing the act live." The *Zacchini* Court emphasized that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."

### 6. Conduct that Communicates

#### a. What Is Speech?

People often communicate through symbols other than words. Marches, picketing, armbands, and peace signs are just a few examples of obviously expressive conduct. To deny First Amendment protection for such forms of communication would mean a loss of some of the most effective means of communicating messages. Also, words are obviously symbols and there is no reason why the First Amendment should be limited to protecting just these symbols to the exclusion of all others.

Thus, the Supreme Court long has protected conduct that communicates under the First Amendment. For example, in *Stromberg v. California*, 283 U.S. 359 (1931), the Court declared unconstitutional a state law that prohibited the display of a "red flag." In *West Virginia State Board of Education v. Barnette*, above in Section B, the Supreme Court invalidated a law that required that students salute the flag. The Court found that the state statute impermissibly compelled expression and emphasized that saluting, or not saluting, a flag is a form of speech. The Court explained that "[s]ymbolism is a primitive but effective way of communicating

ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind."

Conduct of all sorts can convey a message. Yet, if taken to the extreme, it would mean that virtually every criminal law would have to meet strict scrutiny because any criminal defendant could argue that his or her conduct was meant to communicate a message. Two interrelated questions thus emerge: When should conduct be analyzed under the First Amendment? And what should be the test for analyzing whether conduct that communicates is protected by the First Amendment?

#### b. When Is Conduct Communicative?

The Supreme Court observed that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.<sup>177</sup> In *Spence v. Washington*, 418 U.S. 405 (1974), the Court considered the issue of when conduct should be regarded as communicative.

An individual who taped a peace sign on an American flag after the killing of students at Kent State was convicted of violating a state law prohibiting flag desecration. The Supreme Court, in a per curiam opinion, reversed the conviction and found that the act was speech protected by the First Amendment. The Court said that "this was not an act of mindless nihilism. Rather, it was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government." The Court emphasized two factors in concluding that the conduct was communicative: "An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."

In other words, under this approach, conduct is analyzed as speech under the First Amendment if, first, there is the intent to convey a specific message, and second, there is a substantial likelihood that the message would be understood by those receiving it. Problems in applying this test are inevitable. How is it to be decided whether a person intended an act to communicate a message? Is it subjective, in which case a person always can claim such an intent in a hope to avoid punishment, or is it objective from the perspective of the reasonable listener, in which case it collapses the first part of the test into the second? How is it to be decided whether the message is sufficiently understood by the audience? Moreover, why should protection of speech depend on the sophistication and perceptiveness of the audience? For example, there may be great works of art whose message people fail to comprehend.

There are many examples of conduct that the Supreme Court has properly recognized as communicative.<sup>178</sup> For example, in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), presented below in Section D, the Court held that wearing a black armband to protest the Vietnam War was speech protected by the First Amendment. The Court explained that "the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the First Amendment. . . . It [is] closely akin to 'pure speech.'"

177. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

178. See also *Schacht v. United States*, 398 U.S. 58 (1970), declaring unconstitutional a federal law that allowed wearing a military uniform only "if the portrayal does not tend to discredit" the armed forces. This law obviously was content-based: The symbol of the uniform could be used to express a pro-military view, but not an anti-military sentiment.

In terms of the *Spence* test, there is little doubt that the armband was worn to communicate a message and that those seeing it, in the context of the times, would understand it as a symbol of protest against the Vietnam War.

c. **When May the Government Regulate Conduct that Communicates?**

i. *The O'Brien Test*

Finding that conduct communicates does not mean that it is immune from government regulation. The question then arises as to whether the government has sufficient justification for regulating the conduct. In *United States v. O'Brien*, the Court formulated a test for evaluating the constitutional protection for conduct that communicates.

UNITED STATES v. O'BRIEN

391 U.S. 367 (1968)

Chief Justice WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts.

The indictment upon which he was tried charged that he "willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b)." Section 462(b) is part of the Universal Military Training and Service Act of 1948. Section 462(b)(3) was amended by Congress in 1965, so that at the time O'Brien burned his certificate an offense was committed by any person, "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate. . . ." We hold that the 1965 Amendment is constitutional both as enacted and as applied.

I

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate (SSS Form No. 2). Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number.

## **APPENDIX B**

Webster's  
Third  
New International  
Dictionary  
OF THE ENGLISH LANGUAGE  
UNABRIDGED

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY  
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Library of Congress Cataloging in Publication Data  
Main entry under title:

Webster's third new international dictionary of the English language, unabridged: a Merriam-Webster/editor in chief, Philip Babcock Gove and the Merriam-Webster editorial staff.

p. cm.

ISBN 0-87779-201-1 (blue sturdite).—ISBN 0-87779-202-X (carrying case).—ISBN 0-87779-206-2 (imperial buckram).

I. English language—Dictionaries. I. Gove, Philip Babcock, 1902-1972. II. Merriam-Webster, Inc.  
PE1625.W36  
423-dc20

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MADE IN THE UNITED STATES OF AMERICA

5152535455QKY05040302

**trail** *v.* *cap T*: to pull having a head, a web, and a flat flange base so that a motion resembles the latter 1: called also *Vignac rail*  
**trail angle** *n.*: the angle between the trail sight and a vertical line from an airplane drawn at the instant of impact of a bomb dropped from the airplane  
**trail arm** *n.* *pl. but sing. in constr.*: the imperative phase *trail arm* 1: a position in military drill to which a rifle butt is raised a few inches from the ground and the muzzle inclined forward so that the barrel makes an angle of about 30 degrees with the vertical 2: a rifle butt 3: *T rail*: *J base*  
**trailblazer** *v.* *n.* 1: one that blazes a trail to guide others through a wilderness or unknown country 2: *PATHFINDER* (the ~ valley began to echo with the thud of the rifles) 3: *Amer. Guide*: one that discovers or pines out new ways (as of doing something) 4: *PIIONEER* (the ~, the setters of new patterns in business—Frieda Curtis)  
**trailblazing** *v.* *adj.*: making or pointing a new way 1: *PATHFINDERING* (as ~ expedition) 2: *UNIQUE* and ~ effort in coordinated ~ techniques—Paul Pejos  
**trail board** *n.*: one of the curved and carved boards on the sides of the cutter near the forehead of a ship  
**trail boss** *n.*: *WEIR* 1: one in charge of a trail (the trail boss trail out three hands in trail to hold the leaders back—S.E. Fletcher)  
**trailbreak** *v.* *n.* 1: *TRAILBLAZING*  
**trail bridge** or **trail ferry** *n.*: a beam or raft attached to a pulley running on a rope stretched across a stream and moved from side to side by the action of the current  
**trail car** *n.*: *TRAILER* 4a  
**trail cutter** *n.*: a cowboy who breaks through a moving herd of cattle to reach the horses  
**trailed part of trail**  
**trailer** *v.* *n.* 1: *TRAIL* + *ER* 1: one that trails or follows a trail: as *A* one that tracks a suspect—Stanley Walker 2: *TRAIL* + *ER* 3: one that travels over a trail (the ~ of yesterday . . . inscribed names and dates—A. B. Guthrie) 2: something that trails or touches the ground in moving or hanging: as *A* 1: a trailing plant 2: a *TRAIL* 3: *TRAIL* 4: one that drags or prevents a vehicle from moving backward 5: one that trails, follows, or lags behind: as *A* 1: a hunting dog that yields the initiative to its breeder 2: a player in various sport games (as hockey, baseball, or football) who is outplayed by another 3: a male who is dribbling the puck or ball 6 (1): a short motion-picture film made up of snatches from a feature picture and displayed in advance for advertising purposes (2): a short film shown for the purpose of making an announcement to the theater audience (3): a short length of blank film attached to the finish end of a reel so that the film will continue to feed through the projector mechanism after the light and sound are turned off—compare *TRAILER* 4: a *TRAILER* 5: a *TRAILER* 6: a class or fadeout of a performance (as of a theatrical act or a film) (for my last ~, I'll use *Only a Rose*—Gypsy Lee) 4: a vehicle or one in a succession of vehicles hauled by one or other vehicle: as *A* 1: a car other than one pulled by another car 2: a light 2-wheeled cart pulled (as by a bicycle or motorcycle) 3: a *TRAILER* 4: a *TRAILER* 5: a *TRAILER* 6: a *TRAILER* 7: a *TRAILER* 8: a *TRAILER* 9: a *TRAILER* 10: a *TRAILER* 11: a *TRAILER* 12: a *TRAILER* 13: a *TRAILER* 14: a *TRAILER* 15: a *TRAILER* 16: a *TRAILER* 17: a *TRAILER* 18: a *TRAILER* 19: a *TRAILER* 20: a *TRAILER* 21: a *TRAILER* 22: a *TRAILER* 23: a *TRAILER* 24: a *TRAILER* 25: a *TRAILER* 26: a *TRAILER* 27: a *TRAILER* 28: a *TRAILER* 29: a *TRAILER* 30: a *TRAILER* 31: a *TRAILER* 32: a *TRAILER* 33: a *TRAILER* 34: a *TRAILER* 35: a *TRAILER* 36: a *TRAILER* 37: a *TRAILER* 38: a *TRAILER* 39: a *TRAILER* 40: a *TRAILER* 41: a *TRAILER* 42: a *TRAILER* 43: a *TRAILER* 44: a *TRAILER* 45: a *TRAILER* 46: a *TRAILER* 47: a *TRAILER* 48: a *TRAILER* 49: a *TRAILER* 50: a *TRAILER* 51: a *TRAILER* 52: a 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