QUESTION 8

The City of Brotherly and Sisterly Love adopted an ordinance prohibiting "speech or symbols that arouse anger in, deride or insult another on the basis of race." The City has charged a member of the Segregation Forever Society under that ordinance for displaying an emblem above the entrance to its headquarters. The City alleges that the emblem is racially derisive and insulting because the motto on the emblem proclaims that "Separate Is Inherently Desirable."

QUESTION:

Discuss any constitutional grounds upon which the ordinance may be challenged.

DISCUSSION FOR QUESTION 8

The city's ordinance must be measured against First Amendment principles which prevent the government from abridging or impairing freedom of speech. See also Article 2, Section 10 of the Colorado Constitution. A statute properly may criminalize speech which constitutes "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942); Whimbush v. People, 869 P.2d 1245, 1248 (Colo. 1994). "Fighting words," however, must plainly tend to incite or animate an immediate breach of peace or unlawful conduct, or to provoke immediate retaliatory action or violence. Chaplinsky, at 572; Whimbush, at 1248; Gooding v. Wilson, 405 U.S. 518, 523 (1972). It is debatable whether the message on the building's headquarters, even if taken as arousing anger, derisive or insulting, tends toward such imminent incitement.

The law in question may also be unconstitutionally overbroad. Given the preferred status accorded to free speech by the federal and state constitutions, a statute which restricts speech must be narrowly drawn to avoid criminalizing an intolerable range of constitutionally protected conduct. Osborne v. Ohio, 495 U.S. 103, 112, 110 S.Ct. 1691, 1697, 109 L.Ed.2d 98 (1990); People v. Batchelor, 800 P.2d 599, 602 (Colo.1990); People v. Smith, 862 P.2d 939, 941 (Colo. 1993). If a statute substantially infringes upon constitutionally protected speech while proscribing speech which is not constitutionally protected, it will be struck down as facially overbroad. Broadrick v. Oklahoma, 413 U.S. 601, 615, 93 S.Ct. 2908, 2917, 37 L.Ed.2d 830 (1973); Batchelor, 800 P.2d at 601; Smith, 862 P.2d at 941. The regulation may be a basis not only for prosecuting individuals whose opinions simply may be objectionable but also those that represent a political perspective and do not necessarily provoke a violent response. Because of the potential to regulate speech merely because it is "offensive to some who hear" it, the law probably sweeps too broadly. Gooding, 405 U.S. at 527.

In addition to being overbroad, the law may be challenged as affording no definite meaning with respect to what it proscribes. It may therefore be unconstitutionally vague. Gooding at 528. Vague laws violate First and Fourteenth Amendment principles by: 1) failing to provide fair warning to the innocent; 2) impermissibly delegating basic policy matters to non-legislative entities for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application; and, 3) where a vague statute abuts on sensitive areas of basic First Amendment freedoms, operating to inhibit the exercise of those freedoms. Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). When legislation is challenged as void for vagueness, the essential inquiry is whether the statute forbids the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); Grayned, supra. The law's prohibition against speech that might "arouse anger in, deride or insult another," does not appear to give clear guidelines which would prevent guessing at the meaning and application of those terms.

(While the doctrines of vagueness and overbreadth are often interrelated, they are conceptually distinct. Whereas an overbroad law substantially burdens protected speech, an impermissibly vague law fails to provide fair notice of what conduct is prohibited and allows arbitrary and discriminatory enforcement. Board of Education v. Wilder, 960 P.2d 695, 703 (Colo. 1998).)

Finally, the regulation singles out racially significant speech and does not proscribe expression that insults or offends other groups. Moreover, as a practical matter, the law operates to silence only those who are bigoted in their views. "Fighting words" or abusive speech that does not invoke the illegal subject of race would seemingly be useable freely by those arguing in favor of racial tolerance and equality, but not by their opponents. The law accordingly may be struck down too on grounds of illegal content or viewpoint discrimination. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547-48 (1992). Given its deficiencies, the ordinance does not appear capable of surviving a First Amendment challenge.

44580

Essay 8 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Recognition of First Amendment/Free Speech protections. 1. _____

2. An ordinance may, however, criminalize speech that constitutes "fighting words." 2. _____

   2a. "Fighting words" must incite immediate or imminent breach of peace, unlawful conduct or provoke action or violence. 2a. _____

3. Ordinance may be overbroad. 3. _____

   3a. It must be narrowly drawn to avoid prohibiting Constitutionally protected speech. 3a. _____

4. Ordinance may be void for vagueness. 4. _____

   4a. No definite meaning of what the ordinance proscribes (no fair notice). 4a. _____

5. Ordinance may be unconstitutional because it is content or viewpoint discrimination. 5. _____

QUESTION 4

The State of Excess has a culturally diverse population whose racial composition is reflected proportionately in the makeup of its legislature. Based upon a study showing that older automobiles are primarily responsible for air pollution in the state, the legislature unanimously passed a law that imposes an environmental impact fee upon the registration of any automobile manufactured prior to 1990.

Although every lawmaker went on record in support of the legislation on grounds it would protect the environment, and no other reasons or statements were offered in support of the law's enactment, it has become evident that the law disproportionately burdens historically disadvantaged racial minorities. A coalition of these disproportionately impacted minorities has sued in Federal Court on grounds that the law invidiously discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment.

QUESTION:

Discuss the validity of the coalition's claim.

DISCUSSION FOR QUESTION 4

The Equal Protection Clause prohibits "official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). To establish that the environmental impact fee violates the equal protection clause of the Fourteenth Amendment, however, it must be demonstrated that the legislature intended to discriminate. *Id.* A racially disproportionate impact by itself is insufficient to establish a constitutional violation, *id.*, although it may provide "powerful evidence of discrimination." *Bray v. Alexander Clinic,* 506 U.S. 263 (1993).

Purposeful discrimination may be evidenced when it is "express or appear[s] on the face of the statute." *Washington v. Davis,* 426 U.S. at 241. The impact fee speaks to an environmental concern and, by its terms, manifests no discriminatory purpose. A determination that the law is not discriminatory on its face, however, does not end the inquiry. A law that is "fair on its face" may discriminate invidiously in its application. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). Disproportionate impact does not rise to invidious discrimination to the extent "that permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Washington v. Davis*, 426 U.S. at 239. Given the regulation's environmental aims, it appears that disparities in the law's application are attributable to racially neutral factors.

Circumstantial evidence may be a basis for establishing invidious discrimination violative of the equal protection guarantee. Such proof may be gleaned from the legislative history or from "a clear pattern unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Development* Corporation, 429 U.S. 252, 266-68 (1977). Absent any actions, statements, or departures from normal procedures, legislative history provides no circumstantial evidence of purposeful racial discrimination. Because the law connects directly with environmental concerns, it does not fit into the category of cases "unexplainable on grounds other than race." Therefore, the burden of proving purposeful discrimination cannot be carried under these circumstances, and the law will survive an equal protection challenge.

21453

Essay 4 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. The Equal Protection Clause prohibits official discrimination on the basis of race. 1._____

2. An equal protection violation requires proof of discriminatory intent. 2._____

3. A racially disproportionate impact by itself does not establish an equal protection violation. 3._____

4. A racially disproportionate impact may, however, provide indication of discrimination. 4._____

5. Unconstitutional discrimination may be express or apparent on the face of the law. 5._____

6. The law here does not, on its face, reveal a discriminatory purpose. 6._____

7. A racially neutral law on its face may be discriminatory in its application (effect or impact). 7._____

8. A racially disproportionate impact, when attributable to racially neutral applications and criteria, does not constitute discrimination. 8._____

9. Circumstantial evidence may be a basis for establishing discrimination violative of the equal protection guarantee. 9._____

10. Proof of discrimination may be gleaned from:

    a. legislative history; or 10a._____

    b. a clear pattern unexplainable on grounds other than race. 10b._____

QUESTION 5

The State of Density adopted a law requiring all commercial trucks using coastal highways to install special lights enabling drivers to see better in foggy conditions. This law was adopted pursuant to studies showing that fog in coastal areas is particularly dense and has been a cause of numerous accidents. The cost of installing these lights is insignificant and not an issue. Nor is there any argument with respect to whether the law is designed to promote safety. The National Trucking Association, on behalf of affected commercial truck drivers, has challenged the law on grounds that it is burdensome and only applies to commercial trucks. Association attorneys point out that commercial trucks are engaged in interstate commerce and are not the only type of vehicles involved in the type of weather-related accidents which prompted the state's action.

QUESTION:

Discuss any possible constitutional challenges to the Density law.

DISCUSSION FOR QUESTION 5

The challenge to this law initially presents a commerce clause claim. A non-protectionist state law that incidentally burdens interstate commerce is constitutional provided it addresses a legitimate state concern and does not impose a burden on interstate commerce that clearly exceeds the safety benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The state's police power provides it with a legitimate interest in regulating highway safety. Because a connection exists between foggy conditions and traffic accidents, the special lights enhance visual acuity, and it is conceded that the cost of compliance is not an issue, the burden does not appear to exceed the safety benefits attributable to the law. A commerce clause claim thus does not appear to be promising.

There is also an argument that commercial truckers are being discriminated against which raises an equal protection claim. By requiring only commercial truckers to bear the cost of the regulation, the state has created an economic classification. The standard of review under such circumstances imposes upon the plaintiff the burden of demonstrating that the classification has no rational relationship to a legitimate government interest. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). If any plausible reason exists for the legislature's action, the "inquiry is at an end." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). It is not unreasonable to conclude that commercial trucks represent a class of vehicles that, because of their frequently greater impact in a collision, their numbers and effect on highway traffic, may be a particular regulatory concern. Even if the state's first stage response turns out to be the only stage of regulation, government has the freedom to address the problem on an incremental or piecemeal basis if it so chooses. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). The equal protection claim thus appears to be no more compelling than the commerce clause argument.

21551

Essay 5 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

COMMERCE CLAUSE

1. Recognition of commerce clause issue. 1. _____
2. Recognition that law is non-protectionist. 2. _____
3. Law addresses a legitimate state concern. 3. _____
4. Burden is incidental (insignificant cost). 4. _____
5. Burden does not exceed safety benefits. 5. _____

EQUAL PROTECTION

6. Recognition of equal protection issue. 6. _____
7. Recognition of classification between commercial trucks and other vehicles. 7. _____
8. Recognition that rational basis test applies to equal protection issue. 8. _____
9. Recognition that law must be upheld if the facts indicate that a plausible reason exists for the law as written. 9. _____
10. Recognition that government may regulate on an incremental basis. 10. _____
11. Determination that a compelling basis does not exist for an equal protection challenge. 11. _____

QUESTION 9

The city code of Big City establishes a ceiling of 3,000 taxi licenses for the town. The code further provides that the Transportation Commissioner shall regulate taxis within Big City. The code states, in part:

> The commissioner shall have the authority to revoke, deny, or otherwise alter a taxi license for reasons of health condition or other impairment of the licensee. The commissioner shall consider such evidence as is relevant in reaching a decision, including that submitted by the licensee. Such revocation, denial, or alteration shall be final.

Danny Driver, a licensed taxi operator, was hit from behind while stopped at a light. Talking with the police afterward, Danny casually mentioned that he was taking some prescription medicine and feeling a little light-headed. The police report said Danny was not at fault, but stated that he was "under medication and exhibiting the effects of drugs."

Based on this report, the commissioner immediately revoked Danny's taxi license. The notice of revocation sent to Danny stated that his use of medication impaired his ability to operate a taxi safely. The notice also stated that he was free to apply for a new license after 30 days and satisfactory completion of a physical exam and drug test. There is currently an 18 month waiting list of approved applicants for taxi licenses.

QUESTION:

Discuss Danny's potential avenues for appealing the commissioner's decision and to what relief he might be entitled.

DISCUSSION FOR QUESTION 9

Danny has a constitutionally protected property interest in his taxi license. It was revoked by the commissioner without adequate due process. He may appeal the revocation in court because there is no administrative route open to him. The court will probably order a hearing on the revocation, but is unlikely to reinstate him pending its outcome, because of the public safety concerns.

While the Big City ordinance clearly authorizes the commissioner to revoke taxi licenses without any kind of hearing, and states that such revocation is final, the licensee will nonetheless have a basis for demanding judicial intercession in attaining a hearing. While the statute does not afford Danny a right to a hearing, a due process right under the U.S. Constitution may afford him such a right. Where no applicable statute requires a hearing, a party is entitled to a hearing as a matter of constitutional due process when the action may adversely affect an individual's "liberty" or "property interests." *Goldberg v. Kelly*, 397 U.S. 254 (1970) (case involving cancellation of AFDC benefits). The property interests protected by due process go well beyond the actual ownership of real estate, personal property or money to include any interest that a person has acquired in "specific government benefits." A property interest in a specific government benefit constitutes a sufficient interest to qualify for due process when the person has a "legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564 (1972).

There can be little question that Danny has a protected "property interest" in his taxi license. At one time, the constitutional right to a hearing depended on whether the affected interest was a legally protected right or merely a governmentally bestowed privilege. The Supreme Court in *Goldberg v. Kelly* abandoned the notion that rights were entitled to constitutional protection while privileges such as welfare benefits could be revoked freely. Professional or occupational licenses have been considered "rights" and protected even before the distinction was effectively eliminated. *See Ex parte Robinson*, 19 Wall. 505 (U.S. 1874) (attorney disbarment). *See also Bell v. Burson*, 402 U.S. 535 (1971) (holding a drivers license was a sufficient due process property interest). While a taxi license is not the same as attorney licensure, it does not fall into the suspect category of liquor licenses that some states and state courts still treat in the privilege category with little or no procedural safeguards. *See Smith v. Liquor Control Board*, 169 N.W.2d 803 (Iowa 1969).

While the argument could be made that because the state has created the property rights through granting the license, the state can limit or deny due process in revoking it. There is some support for this view in *Arnett v. Kennedy*, 416 U.S. 134 (1974) where Justice Rehnquist said that since the state law created the employment, the law could also define procedural limits on deprivation of employment. The court rejected that notion in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) by taking the position that state created property interests were entitled to constitutional due process protection.

Once it has been determined that due process applies, the question becomes what process is due. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Some form of hearing is generally required before an individual is finally deprived of a protected property interest. Due process requires that the opportunity to be heard be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews* the court balanced three factors in judging the type of process required under the due process clause: (1) the private interest affected by the government action (i.e., the degree of loss to the individual), (2) the risk of error inherent in the procedures used (i.e., the likelihood of erroneous deprivation), and (3) the administrative burdens involved in requiring the

government to afford the party further process. Under this standard, Danny can be afforded significantly more procedural protection with relatively little burden on the government.

Because Danny was afforded no opportunity for a hearing before his taxi license was revoked, he has the basis for an appeal. The Big City ordinance provides that the commissioner "shall consider" relevant evidence, including evidence from the licensee, but there is no procedure for doing so. In this case the commissioner did not consider evidence from the licensee, so Danny had no opportunity to present his side of the case. There can be little dispute that Danny is entitled to some kind of hearing before the permanent revocation of his license, and that he did not receive anything close to it in this case. At a minimum, he should be afforded the opportunity to respond to the allegations that led to revocation of his license.

While Danny has been told he has the right to reapply for his license after 30 days, this does not constitute an appeal of his license revocation. Reapplication in competition and on the same footing with all other applicants does not afford Danny any protection of the license he previously possessed. The fact that he has been told as part of the notice of his license revocation that he may take this step does not force his efforts to secure relief into this channel. The city cannot define the procedures relating to these licenses in a constitutionally defective manner just because the city creates the property interest itself. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

There is a general rule in administrative law that an individual must pursue all relief available from the agency before seeking review in the courts. *McKart v. U.S.*, 395 U.S. 185 (1969). This notion of exhausting administrative remedies should have no effect on Danny's claim. Danny must appeal to the court because there is simply no avenue available within the agency for relief. The new application process is inadequate as discussed above. Further, even though the ordinance states that the commissioner "shall" consider evidence, there is no mechanism for the commissioner to hear Danny's evidence.

Danny no doubt wants his license back. He should be entitled to some kind of hearing on his revocation, but since his revocation involved a potential safety issue, it is unlikely that he will be entitled to reinstatement pending the outcome of his hearing. Courts use the balancing test in *Mathews v. Eldridge, supra.*, for determining when a hearing must be given and the type of hearing required. When immediate adverse effects may result from government action, the issue is whether the parties affected are entitled to a hearing before the government acts or whether a hearing after governmental action is sufficient. Generally courts have required some sort of hearing before the governmental action resulting in harm occurs. *Id.* However, in cases involving public health and safety, post deprivation hearings have been held to be constitutional even though the government has taken drastic governmental action. *Ewing v. Mytinger and Casselberry, Inc.*, 339 U.S. 594 (1950).

While Danny's right to earn a living at his chosen occupation has been impaired, the Supreme Court has lately not been inclined to require the full trial-type hearing they called for in *Goldberg v. Kelly* and have been satisfied with less formal procedures (see the balancing factors discussed above in *Mathews v. Eldridge*). Due process requires at a minimum, notice, an opportunity to comment and respond to the evidence, and the development of a record for review. Thus, Danny at a minimum should be entitled to be told the charges against him and respond to them before the commissioner.

Perry v. Sinderman, 408 U.S. 593 (1972) (a fired professor with de facto tenure). A record of some kind is necessary to provide a basis for review later on.

It is unlikely that Danny can get reinstatement pending his hearing. While many cases talk about requiring due process prior to the termination of a property interest, public health and safety concerns can justify post-termination process. *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) established this principle when the confiscation of possibly tainted food was upheld when an opportunity for a hearing was provided immediately after the seizure. In a more recent case more directly on point, *Barry v. Barchi*, 443 U.S. 55 (1979), the court approved a post deprivation hearing when a jockey was suspended for alleged drug use. Thus, in conclusion Danny would most likely be entitled to a hearing, but not to reinstatement pending the hearing and its outcome.

21741

Essay 9 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

Arguments for appeal

1. Danny has no right under the statute to appeal his revocation. 1. _____

2. Danny may assert a claim under the due process clause of the U.S. Constitution for review despite the statutory preclusions for review. 2. _____

3. A party is entitled to a hearing under the due process clause when the govermental action adversely affects an individual's "protected property interests." 3. _____

4. Danny has a "protected property interest" in a vocational license (i.e., a driver's license). 4. _____

5. Courts consider the following three factors in determining the timing and nature of a hearing required under due process:

   5a. the private interest affected by the government action (i.e. the degree of loss to the individual). 5a. _____

   5b. the risk of errors inherent in the procedures used (i.e., the likelihood of erroneous deprivation). 5b. _____

   5c. the administrative burden on the government. 5c. _____

6. The commissioner's procedure for revocation is inadequate in failing to provide an opportunity for Danny to respond. 6. _____

7. Permitting some response by the licensee prior to final revocation is not overly burdensome. 7. _____

Commissioner or court arguments

8. Reapplication to the commissioner in 30 days is not adequate due process protection given the limited number of available licensees. 8. _____

9. Because there is no administrative procedure to exhaust, Danny may appeal directly to the appropriate court. 9. _____

Form of relief

10. Danny is entitled, at a minimum, to notice, an opportunity to comment and respond to the evidence, and the development of a record for review. 10. _____

11. Due process does not always require a full adjudicatory hearing. 11. _____

12. A post-deprivation hearing is sufficient protection when public health and safety is at stake (i.e., no reinstatement pending his hearing). 12. _____

QUESTION 7

To protest a recent United States Senate election in the state of Utopia, Marcia Jones burned her voter registration card. She was arrested under a Utopia law prohibiting the willful and knowing destruction of a voter registration card. The state contends that voter registration cards are an efficient and effective means of verifying the identity and eligibility of voters and deterring voter fraud.

Utopia claims that the authority for the law is derived from Article I, Section 4 of the United States Constitution. Section 4 gives states the right to prescribe the time, place, and manner of holding elections for U. S. Senators.

QUESTION:

Discuss whether the burning of Ms. Jones' voter registration card is protected under the First Amendment of the United States Constitution.

DISCUSSION FOR QUESTION 7

The burning of a voter registration card, as a means of making a political point, constitutes symbolic speech. Expression of this nature has both a speech and nonspeech element. When these elements coalesce into the same course of conduct, the government interest in regulating the nonspeech component may justify incidental restrictions on expressive freedom. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The necessary inquiry focuses upon whether the state has the power to regulate the subject matter, the regulation advances an important or substantial government interest, the government interest is unrelated to suppression of speech, and the incidental burden on speech is no greater than necessary to advance the government's interest. *Id.* at 377.

The state's power to manage United States Senate elections is established by the federal constitution. The validity of laws regulating the electoral process that might affect rights of speech and expression will be reviewed under a balancing test. If the restriction of speech is severe, it must achieve a compelling state interest. *See, generally, Burdick v. Takushi,* 504 U.S. 428 (1992). The smooth and effective functioning of the voting system and avoidance of fraud constitute important or substantial interests. These concerns also represent concerns that are unrelated to expression. Identification can be established readily, however, by cross-referencing voter registration lists and other credible forms of identification (such as driver's licenses or birth certificates). Given the ease of verifying a voter's identification, even without a voter registration card, the incidental burden on speech appears greater than necessary to account for the government's interest.

42345

Essay 7 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. This is a question of freedom of speech/fundamental right. 1. _____

2. The burning of a voter registration card is symbolic speech. 2. _____

3. Restrictions may be content based or content neutral. 3. _____

4. If content based - strict scrutiny; 4. _____

5. The restriction on speech must achieve a compelling state interest; 5. _____

6. If content neutral - intermediate scrutiny; 6. _____

7. The restriction on speech must achieve an important or substantial state interest. 7. _____

8. To regulate conduct (symbolic speech), it is necessary to establish that:

   8a. government has power to regulate the activity; 8a. _____

   8b. the government interest is important or substantial; 8b. _____

   8c. the government interest is unrelated to the suppression of speech; 8c. _____

   8d. the incidental burden on speech is no greater than necessary to achieve the government interest. 8d. _____

9. The interests in smooth and effective functioning of voting systems and avoiding fraud are important or substantial interests. 9. _____

10. The interests in smooth and effective functioning of voting systems and avoiding fraud are unrelated to expression. 10. _____

11. Restriction is overbroad: Incidental burden on speech is greater than necessary to account for the state's interest. 11. _____

QUESTION 7

Senator Kiljoy of the Colorado State Legislature drafted a bill entitled "Keeping Colorado's Female Minority Youth Safe and Sound." The provisions of this bill would establish a statewide curfew between the hours of 10 p.m. and 6 a.m. for non-emancipated Hispanic, African-American, Native American, and Asian females under the age of 18. The basis for this legislation is nationally accepted research proving that minority females are most likely to be assaulted, injured in accidents, or become pregnant between the hours of 10 p.m. and 6 a.m. Numerous civil liberties groups have threatened to challenge the bill as unconstitutional if adopted.

QUESTION:

Discuss the grounds upon which this bill might be challenged under the U.S. Constitution and the standards of review that would be applied to such challenges.

DISCUSSION FOR QUESTION 7

The proposed legislation concerns classifications based upon race, gender and age, thereby implicating the "equal protection" clause of the Fourteenth Amendment to the U.S. Constitution. The purpose of the question is have exam takers identify the constitutional basis under which such a law can be challenged, the nature of the categories created by the legislation, and the varying standards of review to which each classification would be subject.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. Equal protection is implicated where a state or local law treats certain classes of people differently from others. See, e.g., Loving v. Virginia, 388 U.S. 1, 10-13 (1967). Here, because the proposed state legislation creates classifications treating female minority minors differently than other citizens, a constitutional challenge to the state legislation would be grounded in the Fourteenth Amendment's prohibition against state action that deprives citizens of equal protection of the laws.

Test takers also may identify the concept of procedural or substantive "due process"-- and the potential deprivation of "liberty" by the proposed curfew -- as an additional basis for challenging the legislation. An examinee will not receive credit for elaborating on this concept (other than the point allocated on the scoresheet for general identification of the Fourteenth Amendment as the appropriate vehicle for challenging the state legislation) unless s/he correctly recognizes that a due process challenge to the legislation at issue is inapplicable because only certain classes of citizens are affected by the legislation versus all citizens; or the loss of a freedom involved is unlikely to be deemed a fundamental right; or the restriction at issue is not so unjustifiable as be violative of due process. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Loving v. Virginia, 388 U.S. 1, 10-13 (1967).

Courts apply varying standards of scrutiny when examining challenges to classifications under the equal protection clause. Classifications based upon race/national origin/ethnicity are considered "suspect classifications" requiring strict scrutiny by the courts. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995). Strict scrutiny requires legislation to be necessary to serve a compelling or overriding state interest and that such legislation be narrowly tailored to achieve that interest. Adarand at 227; Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

A gender-based classification is constitutionally permissible when it is substantially related to an important governmental interest. Craig v. Boren, 429 U.S. 190, 197 (1976). Gender is considered to be a quasi-suspect category meriting intermediate or mid-level scrutiny. Id.

Age is not a suspect category, and therefore requires only minimal or rational basis scrutiny. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). As such, legislation implicating age need only to be rationally related to legitimate governmental interests. Id.

42345

Essay 7 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Recognition of general concept that state laws can be challenged under the 14th Amendment to the U.S. Constitution. 1. _____

2. Recognition that the concept of equal protection is applicable because the law treats certain classes of people differently than others and/or creates classifications based upon suspect categories. 2. _____

3. Recognition that race/national origin/ethnicity is a suspect classification requiring strict scrutiny. Under this standard, a law will be upheld only if: 3. _____

   3a. it is necessary to serve a compelling or overriding governmental interest and, 3a. _____

   3b. it is narrowly tailored to achieve that interest. 3b. _____

4. Recognition that gender is a quasi-suspect classification requiring intermediate/mid-level scrutiny. 4. _____

   4a. The legislation must be substantially related to important governmental interests. (Must identify both underlined elements.) 4a. _____

5. Recognition that age is not a suspect category thereby requiring minimal/rational basis scrutiny. 5. _____

   5a. The legislation must be rationally related to legitimate governmental interests. (Must identify both underlined elements.) 5a. _____

QUESTION 7

The State of Hysteria enacted the Driver's Law which repealed former laws allowing all persons to obtain a driver's license at age 16. The new law provides that females may be licensed at age 18, but males may not be licensed until age 21. Drivers of Hispanic, Asian, African-American, and Native-American descent may not be licensed until age 21, regardless of gender.

The rationale for the Driver's Law is based on evidence presented during legislative hearings which revealed that drivers under the age of 18 have significantly higher accident rates than drivers over 18; the accident rate of male drivers in the 18 to 21 age group is a few percentage points higher than females in the same age group; and minority drivers under the age of 21 were statistically more likely than non-minority drivers under the age of 21 to be uninsured or under-insured.

QUESTION:

Discuss the constitutional basis for a lawsuit seeking to invalidate the Driver's Law. Specifically discuss the standards of review a court will apply to the law's age, gender, and racial classifications and evaluate whether each classification will withstand constitutional scrutiny.

DISCUSSION FOR QUESTION 7

Exam takers may identify either the concept of Due Process under the Fifth and Fourteenth Amendments or Equal Protection under the Fourteenth Amendment, or both, as the constitutional bases for a challenge to the Driver's Law. Generally, a substantive due process analysis applies where a law limits the liberty of all persons to engage in some activity. In this scenario, all persons under the age of 18 have been prevented from obtaining drivers' licenses, so a substantive due process analysis may be used. An equal protection argument is appropriate where a law treats certain classes of people differently from others. In the case of the Driver's Law, males are treated differently than females and minorities are treated differently than non-minorities, so an equal protection claim is also warranted.

Classifications on the basis of age are subject to "rational basis" review. *Massachusetts Retirement Board v. Murgia*, 427 U.S. 307, 312 (1976). Pursuant to this standard, a court must determine whether the classification is rationally related to a legitimate interest. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973) (test is whether the classification (1) targets a legitimate regulatory objective, and (2) rationally furthers that aim.). Management of highway safety represents a legitimate exercise of the state's police power. *Craig v. Boren*, 429 U.S. 190, 200 (1976). Studies indicating a correlation between age and accident risk establish a rational relationship between the classification and the regulatory objective. It follows logically that, with fewer drivers in the high-risk category on the road, the state's interest in reducing accidents will be advanced. Given the state's valid regulatory concern and the rational relationship between the classification and the regulatory objective, the age classification is compatible with due process/equal protection guarantees and would be upheld. Furthermore, age is not a suspect class.

Unlike age classifications, gender classifications trigger closer judicial attention in the form of an "intermediate" standard of review. Pursuant to this criterion, a court must determine whether the classification is substantially related to an important governmental interest. *Id.* at 197 (test is whether the classification (1) serves an important government interest, and (2) is substantially related to achievement of these objectives.) A review of the evidence indicates that there is some relationship between gender and accident rates. Moreover, reduction of accidents may be considered an important governmental objective. However, given the burden placed upon all males to accomplish the goal of accident reduction (3 extra years without a license) and the fact that the statistical correlation between gender and accident rates is not that substantial, the gender classification would likely be deemed incompatible with the guarantee of equal protection.

Classifications on the basis of race are inherently suspect and trigger "strict scrutiny" or the highest level of review. This level of review has resulted in invalidation of racial classifications in all but the most compelling of cases, such as preservation of national security. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944.) In order to prevail, the state must demonstrate that the law is necessary to achieve a compelling or overriding state interest or purpose. In analyzing whether a law utilizing a suspect classification is constitutional, the courts also will consider whether the means chosen are narrowly tailored or whether less burdensome means are available. In the scenario presented here, it is highly likely that the courts would strike down the Driver's Law as violative of equal protection as it pertains to minority drivers despite the statistical relationship between minority status and insurance issues. The burden to minority drivers is substantial, the interest of the state is not compelling, and presumably there are other less burdensome means of ensuring that drivers maintain adequate insurance coverage. The other governmental action that merits strict scrutiny is when government classifies persons on the exercise of a fundamental right, however, driving and/or licensure to drive is not a fundamental right.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2004 BAR EXAM
Regrade

ESSAY Q7

SEAT | | | |

ISSUE

			YES	NO
1.	Identifies the *Due Process* clauses of the Fifth and/or Fourteenth Amendments.	1.	o	o
1a.	substantive due process applicable where law limits liberty of all persons to engage in activity.	1a.	o	o
2.	Identifies *Equal Protection* clause of the 14th Amendment.	2.	o	o
2a.	appropriate analysis where law treats certain classes of people differently than others.	2a.	o	o
3.	Classifications on the basis of age are subject to *rational basis* review which requires a court to determine whether the classification:	3.	o	o
3a.	*rationally* furthers or is related to the state's regulatory objective;	3a.	o	o
3b.	targets a *legitimate* regulatory objective.	3b.	o	o
4.	The state has a legitimate interest in safety/reducing the accident rate.	4.	o	o
5.	Age classification likely would withstand judicial scrutiny.	5.	o	o
6.	Gender classifications are subject to an *intermediate* standard of review which requires a court to determine whether the classification:	6.	o	o
6a.	is *substantially* related to achievement of the important objectives;	6a.	o	o
6b.	serves *important* government interests.	6b.	o	o
7.	Gender classifications likely would not withstand judicial scrutiny.	7.	o	o
8.	Racial classifications are inherently suspect and are therefore subject to *strict scrutiny* which requires that:	8.	o	o
8a.	the classification be *necessary* to achieve the governmental interest;	8a.	o	o
8b.	the governmental interest be *compelling* or overriding.	8b.	o	o
9.	The courts also look to whether the means adopted are narrowly tailored to meet the state's objective and/or whether less burdensome means are available.	9.	o	o
10.	Racial classifications would not withstand judicial scrutiny.	10.	o	o

QUESTION 7

The State of Shangri-la recently added the Women Aviator's College (WAC) to its public college system. WAC is the only state supported institution of higher education in Shangri-la offering pilot and astronaut training. Although WAC became co-ed in the 1970's, it still has a policy that 70% of the incoming class be female. This policy is based on increasing the small number of women who are currently pilots and astronauts.

The college denied admission to the following three applicants:

Andy Able: Andy was denied because all male slots had been filled by the time he applied. Andy can prove, however, that he is more qualified than some already admitted female students.

Betty Biplane: Betty is Caucasian of non-Hispanic descent. Although the college does not have any race-based quotas, the college does consider race, along with many other factors (economic background, high school activities, first generation college student) in order to obtain the educational benefits that flow from a diverse student body. Betty can show that she is more academically qualified than some already admitted minority-race students.

Diane Diminutive: Diane is 4'11". Since most graduates of WAC will become pilots or astronauts, and those positions require that individuals be at least 5'1'' (and no taller than 6'6''), WAC requires that 80% of the class meet the generally accepted height restrictions.

QUESTION:

Discuss what constitutional claims each student may raise in challenging his/her denial of admission.

DISCUSSION FOR QUESTION 7

Andy Able

Andy will raise an equal protection challenge to the school's gender quota under the 14th Amendment. Gender-based decisions in admissions to state schools are subject to a heightened review standard. A state seeking to defend a gender-based admission decision to public schools must demonstrate an "exceedingly persuasive justification" for that action. U.S. v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The state must show "at least that the challenged classification serves an important governmental objective and that the discriminatory means employed is substantially related to the achievement of that objective." Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982). The justification cannot be hypothesized or invented *post hoc* in response to challenge, and cannot rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. U.S. v. Virginia, supra.

While a state may evenhandedly support diverse educational opportunities, including single-sex schools, it cannot support an exclusion if the educational opportunity at the gender-segregated school is a "unique" opportunity available only at a premier educational facility. Id. Here, the educational opportunity is unique, and the exclusion is substantial. Therefore, it is likely that the quota will be found unconstitutional.

Betty Biplane

Betty will raise an equal protection challenge to the school's use of race as a factor in admission decisions under the 14th Amendment. All racial classifications imposed by government must be analyzed under strict scrutiny. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). To pass constitutional muster under the strict scrutiny test, the racial classification must be *narrowly tailored* to further a *compelling governmental interest*. Richmond v. J.A. Croson Co., 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). Attaining a diverse student body can be a compelling state interest. Grutter v. Bollinger, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). Good faith on the part of a university is presumed absent a showing to the contrary. Richmond v. J.A. Croson Co., supra; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). To be narrowly tailored, the means chosen must fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. Grutter v. Bollinger, supra.

Here, it is likely that Betty will not succeed on a constitutional challenge. A university cannot use racial quotas, but may consider race or ethnicity as a "plus" in a particular applicant's file, so long as it does not insulate the individual from comparison with all other candidates for the available seats. Grutter v. Bollinger, supra.

Diana Diminutive:

Diana will raise a 14th Amendment equal protection challenge to the height requirement. Since this requirement does not affect a suspect class such as race or gender, the Court will employ the rational basis test. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441, 105

S.Ct. 3249, 3255, 87 L.Ed.2d 313 (1985). Under the 14th Amendment, at a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 1288, 36 L.Ed.2d 16 (1973). A court should be reluctant to overturn governmental action on the ground that it denies equal protection of the laws under the rational basis test. Cleburne v. Cleburne Living Center, Inc., supra. Thus, the burden is upon the challenging party to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification"—the state does not even have to articulate its basis at the moment the decision is made. Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)

Where a group possesses "distinguishing characteristics relevant to interests the state has the authority to implement," the state can prove a rational basis, and the action does not give rise to a constitutional violation. Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955, (2001). Here, the state has an interest in promoting aerospace and aeronautics, and therefore Diane will not be able to show that there is no rational basis to exclude applicants who do not meet the height restriction.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2005 BAR EXAM
Regrade

ESSAY Q7

SEAT

ISSUE		POINTS AWARDED
Andy		
1.	Andy can raise an equal protection challenge to the school's gender quota under the 14th Amendment.	1. o
2.	Gender-based decisions in admissions to state schools are subject to a heightened or intermediate review standard.	2. o
3.	Gender-based decisions must	
3a.	serve an important governmental objective;	3a. o
3b.	substantially related to the achievement of that objective.	3b. o
Betty		
4.	Betty can raise an equal protection challenge to the school's use of race as a factor in admission decisions under the 14th Amendment.	4. o
5.	All racial classifications imposed by government must be analyzed under a strict scrutiny standard.	5. o
6.	The strict scrutiny test requires that racial classifications must be	
6a.	narrowly tailored;	6a. o
6b.	to further a compelling governmental interest.	6b. o
7.	Attaining a diverse student body can be a compelling state interest.	7. o
8.	A university cannot use racial quotas, but may consider race or ethnicity.	8. o
Diana		
9.	Diana can raise a 14th Amendment equal protection challenge to the height requirement.	9. o
10.	Height is not a suspect classification; a court will employ the rational basis test.	10. o
11.	A statutory classification must be	
11a.	rationally related;	11a. o
11b.	to a legitimate governmental purpose.	11b. o
12.	Courts are reluctant to grant equal protection claims on the rational basis test,	12. o
12a.	unless the challenger can negate "any reasonably conceivable state of facts that could provide a rational basis for the classification."	12a. o

QUESTION 8

The Brotherhood of God is a small religious organization that spreads its message by reading from the Bible in public places. The Brotherhood wants permission for its members to perform Bible readings in a large public park in the center of Capital City. Capital officials denied the Brotherhood permission to perform the planned Bible readings "because the content of the Brotherhood's speech may distract or disturb people in the park." There is evidence to suggest that Capital's decision was motivated by a bias against the Brotherhood's religious message.

QUESTION:

Discuss any grounds the Brotherhood of God may raise to compel Capital City to allow the planned Bible readings.

DISCUSSION FOR QUESTION 8

The city's denial of the Brotherhood's request for permission to perform Bible readings in the public park may violate two provisions of the First Amendment, as incorporated against states and municipalities through the Fourteenth Amendment: the freedom of speech and the freedom of religion. See U.S. Const. Amend. I, XIV.

The initial question a court must confront when a speaker wishes to speak on public property is whether the property is a public forum. A public forum is government property that traditionally has been open to expressive activity, Hague v. CIO, 307 U.S. 496 (1939), or that the government has opened to such activity by designation. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975). In a public forum, the government must satisfy strict scrutiny, an extremely difficult standard, before it may regulate speech based on content. To satisfy strict scrutiny, the government must show that the regulation is (1) necessary to accomplish (2) a compelling governmental interest and is (3) narrowly tailored to serve that interest. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). In contrast, in a nonpublic forum, the government merely must show a rational basis to justify content-based regulation of speech, an extremely easy showing to make. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985). In this case, the government has stated clearly that its denial of the Brotherhood's request is based on the content of the Brotherhood's speech. Thus, the determination whether or not the public park is a public forum will dictate which test will apply and probably will be dispositive.

The public park is the quintessential public forum. Courts generally hold that speakers are free to speak on public streets and sidewalks and in public parks, subject only to content-neutral "time, place, and manner" regulations. United States v. Grace, 461 U.S. 171 (1983). Because the city's denial of the Brotherhood's request is content based, the city will have to satisfy strict scrutiny to keep the Brotherhood out of the park. Protecting citizens from distraction and disturbance does not rise to the level of a compelling governmental interest. Erznoznik v. Jacksonville, 422 U.S. 205 (1975). Thus, the Brotherhood almost certainly will prevail as to the park.

The Brotherhood also can raise a claim that the city's denial of permission violates the First Amendment right to the free exercise of religion. Two different types of arguments are possible under the Free Exercise Clause.

First, to the extent the city's denial of permission was neutral — that is, any group making the same request would have been denied for the same reasons — the Brotherhood might try to obtain an exemption from operation of the law, also known as a religious "accommodation." Such an argument probably would fail, because the Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990), held that religious accommodation claims were entitled to nothing more than "rational basis" review, and the city's interest in maintaining order and decorum provides a rational basis for the denial.

Second, to the extent the Brotherhood can show the city denied permission for the Bible readings because of bias against the Brotherhood, it can argue that the city has violated the Free Exercise Clause by impermissibly targeting religion for a special burden. The Court in Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), held unanimously that such deliberate targeting of religion violated the Free Exercise Clause. Thus, if the Brotherhood can prove bias, it should be able to win on a free exercise claim.

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2006 BAR EXAM
Regrade

ESSAY Q8

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	The City's denial may violate the First Amendment of the U.S. Constitution in two provisions:	
	1a. the freedom of speech;	1a. ○
	1b. the freedom of religion, association or assembly.	1b. ○
2.	The First Amendment is applied to municipalities through the 14th Amendment.	2. ○
3.	A court must determine whether the City park is a public forum.	3. ○
4.	A public forum is government property that traditionally has been open to expressive activity.	4. ○
5.	If the park is a public forum, then the strict scrutiny test applies to regulate speech.	5. ○
6.	Strict scrutiny tests requires government to show that the regulation is:	
	6a. necessary to accomplish;	6a. ○
	6b. a compelling government interest;	6b. ○
	6c. is narrowly tailored to serve that interest.	6c. ○
7.	In a non-public forum, the government only needs to show that the regulation is rationally related (rational basis test) to serve the interest.	7. ○
8.	City's goal of no disruption will probably not pass the strict scrutiny test.	8. ○
9.	Brotherhood may claim special accommodation as a religious accommodation under the freedom of religion clause.	9. ○
10.	Brotherhood may claim that City impermissibly targeted religious speech.	10. ○

QUESTION 9

The administration of State University is considering a policy that would establish a free speech zone for students. The proposed site is a lecture hall that typically has been reserved for classes. The policy would establish the following conditions for access to the free speech zone. First, to avoid any appearance of the university endorsing religion, student expression must avoid any discussion of religion. Second, to facilitate the orderly use of the facility and universal access to the amplification system, each speaker must adhere to a ten minute rule in which to make comments at the microphone if other speakers are waiting, but speakers are not limited in the number of times they can speak so long as they wait for additional turns at the microphone. Third, speakers must avoid any speech that is obscene. The proposed policy defines obscenity as "any speech that is sexually explicit."

QUESTION:

Discuss the constitutionality of the three proposed limitations on use of the free speech zone.

DISCUSSION FOR QUESTION 9

State University, if it opens the lecture hall to student speech, would create a limited or designated public forum. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983). This type of forum is subject to the same First Amendment principles governing traditional public forums, except that the university reserves the power to close it altogether on a non-discriminatory basis. *Id*.

Religious Expression

Regulation of religious speech in a limited/designated forum is subject to strict scrutiny and would be permissible only if necessary to account for a compelling government interest and it is narrowly drawn. *Widmar v. Vincent*, 454 U.S. 263, 270 (1981). The ban on religious speech reflects a concern that by allowing religious speech, the University would be advancing religion in violation of the Establishment Clause. Because otherwise protected speech would be abridged and free exercise interests burdened by this restriction, this concern does not rise to the level of a compelling governmental interest. *Id*. at 276. The prohibition of religious speech would be an impermissible exercise in content discrimination. *Id*.

Time, Place and Manner Restrictions

Because speech is conveyed through physical action, the government can regulate the time, place and manner in which speech is conveyed in limited/designated public forums with reasonable regulations. To be valid, regulation of speech and assembly in limited/designated public forums must be (i) content neutral, (ii) narrowly tailored to serve a significant governmental interest, and (iii) leave open alternative channels of communication. *Ward v. Rock Against Racism, 491 U.S. 781 (1989).* Because the ten-minute rule is not based upon the content of the speaker's remarks but rather on an important interest by the University to facilitate access to the public address system by all users, it is likely a constitutional restriction on the time, place and manner of speech. Moreover, a speaker is not limited in the number of times s/he may speak; thus, the regulation does not burden substantially more speech than is necessary to accomplish the University's objective of facilitating access to the limited/designated public forum.

Obscenity

Obscenity is not protected speech. *Roth v. United States, 354 U.S. 476 (1957).* For speech to be classified as obscene, it must satisfy a three-part test. The inquiry is whether the "(i) average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (ii) work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (iii) work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). The proposed policy's definition of obscenity encompasses "sexually explicit" speech without qualification, and thus would include expression that does not necessarily appeal to the prurient interest. The proposed policy also fails to define with specificity the prohibited depiction or description of sexual conduct. Finally, it makes no allowance for sexually explicit material that may have literary, artistic, political, or scientific value. The proposed policy thus fails the test for establishing that the banned speech is obscene.

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2007 BAR EXAM
Regrade

ESSAY Q9

SEAT

ISSUE		POINTS AWARDED
1.	This is state action restricting free speech (First Amendment).	1. ○
2.	Limited/designated forums are subject to same First Amendment principles governing traditional public forums.	2. ○
3.	Regulation of the content of speech, such as religious speech, is subject to strict scrutiny and is permissible only if:	3. ○
3a.	necessary to effectuate a compelling governmental interest;	3a. ○
3b.	the regulation is narrowly drawn.	3b. ○
4.	University's concern with an Establishment Clause violation likely does not constitute a compelling governmental interest.	4. ○
5.	The limitation on time for speaker's comments is a restriction on conduct or the time, place and manner of speech.	5. ○
6.	To be valid, governmental regulation of conduct in a limited/designated public forum must be:	
6a.	content neutral;	6a. ○
6b.	narrowly tailored to serve an important/significant government interest;	6b. ○
6c.	open alternative channels of communication.	6c. ○
7.	Obscenity is not constitutionally protected speech.	7. ○
8.	For speech to be classified as obscene, the inquiry is whether:	
8a.	it appeals to the prurient interest;	8a. ○
8b.	the work is patently offensive; and	8b. ○
8c.	the work lacks serious literary, artistic, political, or scientific value.	8c. ○
9.	Statutes regulating obscenity must not be vague.	9. ○

QUESTION 2

The state legislature of New Arcadia was concerned about the danger of terrorist threats against New Arcadia's population. Accordingly, they enacted the "New Arcadia Terrorism Prevention Act" (the "Act"), which provides: "Any resident of New Arcadia who is not a citizen of the United States must register with the New Arcadia Department of State. As part of the registration process, the Department shall photograph and fingerprint the resident, and the resident shall be issued an identification card that (s)he must carry at all times."

QUESTION:

Discuss any arguments that might be raised that the Act violates the United States Constitution.

DISCUSSION FOR QUESTION 2

The New Arcadia Terrorism Prevention Act may violate either of two constitutional provisions: (A) the Supremacy Clause (Article VI, Clause 2) or (B) the Equal Protection Clause of the Fourteenth Amendment.

(A) The Supremacy Clause of the Constitution provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST. Art. VI, cl. 2. The Supreme Court, in the doctrine of federal preemption, has construed the Supremacy Clause to bar states from taking actions that contradict or interfere with federal authority. Federal law may preempt state law where the state law either conflicts directly with federal law or if it appears that Congress intended to "occupy" the entire field, thus precluding any state regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). The Act implicates this latter category of preemption, "field preemption."

The Court will find field preemption where (a) the scheme of congressional regulation is so pervasive that no room remains for states to act, (b) the federal interest in the field is so dominant as to preclude state regulation, or (c) the object of the federal law and the character of the obligations it imposes imply preemption. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983). Challengers to the Act will argue that it violates principle (b) of Pacific Gas. For support, they will point to the Court's repeated holdings that Congress enjoys plenary power over all matters relating to immigration and naturalization. See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580 (1952). The challengers will contend that the "plenary power" doctrine reflects an understanding that the federal government has an overriding interest in regulating non-citizens.

New Arcadia can attempt two responses. First, it can argue that the Act does not operate within the "field" preempted by federal immigration regulation because it deals with domestic security, not immigration. This argument is easily refuted, because the Court has broadly defined the scope of the plenary power doctrine. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 766 (1972). Imposing regulatory burdens based on immigrant status clearly would diminish some non-citizens' desire to enter the United States. Second, New Arcadia can argue that, under the Tenth Amendment, protecting citizens against local threats is a quintessential matter of traditional state concern. Cf. Carter v. Carter Coal Co., 298 U.S. 238 (1936). This, however, amounts to an argument that the Tenth Amendment affirmatively limits federal power. The Court has consistently rejected such an interpretation, holding instead that the Tenth Amendment simply reserves to the States any power not granted to the federal government. See United States v. Darby, 312 U.S. 100 (1941). The Tenth Amendment argument is especially weak in this case, where the nature of federal authority is clear. The challengers should be able to defeat the Act on grounds of field preemption.

(B) Alternatively, the challengers can attempt to defeat the Act under the Equal Protection Clause. Where a law treats classes of persons differently, it is an equal protection question. To uphold a classification it must be substantially related to an important governmental objective. The court applies three standards: Suspect classification – requires

strict scrutiny – the classification is necessary to achieve a compelling interest; Quasi-suspect classification – requires scrutiny – the classification must be substantially related to an important interest; Other classifications – minimal scrutiny – will be upheld unless action is not rationally related to a legitimate government interest. The Supreme Court has held that distinctions drawn among people based on their citizenship status are "suspect classifications" subject to strict scrutiny. See Graham v. Richardson, 403 U.S. 365 (1971). Accordingly, such distinctions must represent the least restrictive means to satisfy a compelling governmental interest. Here, the challengers will argue that the Act places a burden on non-citizens that is not justified by any compelling interest.

New Arcadia will argue that it can satisfy strict scrutiny. The State will contend that prevention of terrorism clearly is a compelling governmental interest, justifying distinctions that otherwise would be unconstitutional. The challengers will argue that the Act's recordkeeping, registration, and identification requirements impose substantial burdens on non-citizens by dramatically eroding their civil liberties, and thus are not the least restrictive means to satisfy a compelling governmental interest..

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2007 BAR EXAM
Regrade

ESSAY Q2

SEAT

ISSUE		POINTS AWARDED
1.	The Act may violate the Supremacy Clause (or doctrine of federal preemption).	1. ○
2.	The Act may violate the Equal Protection Clause of the Fourteenth Amendment.	2. ○
3.	The Supremacy Clause bars states from taking actions that contradict or interfere with Federal authority, or directly conflicts with federal law.	3. ○
4.	The Court will find field preemption where	
4a.	the scheme of congressional regulation is so pervasive that no room remains for states to act or occupy the entire field,	4a. ○
4b.	the federal interest in the field is so dominant as to preclude state regulation, or	4b. ○
4c.	the object of the federal law implies preemption.	4c. ○
5.	Congress enjoys plenary power over all matters relating to immigration and naturalization (or an overriding interest in regulating non-citizens).	5. ○
6.	The State will argue that the Act is not preempted by federal immigration regulation because it deals with domestic security (police power), not immigration.	6. ○
7.	Where a law treats classes of persons differently or where similarly situated persons are treated differently, it is an equal protection question.	7. ○
8.	To uphold a classification it must be substantially related to an important governmental objective.	8. ○
9.	Distinctions drawn among people based on their citizenship status are "suspect classifications" subject to strict scrutiny.	9. ○
10.	Such distinctions must represent the least restrictive means or most narrowly tailored to satisfy a compelling governmental interest.	10. ○
11.	Challengers argue the Act places a burden on non-citizens that is not narrowly tailored or east restrictive to meet their objective.	11. ○
12.	The State will contend that prevention of terrorism is a compelling governmental interest.	12. ○
13.	Recognition that 10th Amendment may apply.	13. ○

QUESTION 4

Last month, on a rural tract of land located in the State of Bliss, the Ku Klux Klan (KKK) held a "membership rally." A secretly made film of the rally shows twelve hooded figures gathered around a large wooden cross, carrying firearms, and ultimately burning the cross. During the rally, speakers made derogatory references about ethnic and religious groups. One speaker, Jones, stated "We're not a vengeful organization, but if our President, our Congress, our Supreme Court, continue to suppress the white, Caucasian race, it's possible that there might have to be some revenge taken."

When the film was made public, Jones was arrested and charged under two Bliss statutes. One statute, Bliss's Syndicalism Statute, makes it a crime to advocate the "duty, necessity or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," and also prohibits people from "voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." The second statute, Bliss's Cross Burning Statute, makes it "unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony." The Cross Burning Statute goes on to state that: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

QUESTION:

Discuss whether in light of protections offered under the First Amendment to the United States Constitution, Jones' will be convicted under the Bliss statutes.

DISCUSSION FOR QUESTION 4

This question focuses on the test taker's knowledge of the First Amendment to the United States Constitution's protections for freedom of expression. It also focuses on the United States Supreme Court's advocacy of illegal action cases, in particular the holding in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), in light of the Court's more recent decisions in two cross burning cases. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Virginia v. Black*, 538 U.S. 343 (2003).

I. Recognition that Defendant Has Engaged in "Speech" Within the Meaning of the First Amendment to the United States Constitution.

The initial question is whether the defendant's rally involved "freedom of expression" within the meaning of the First Amendment. The simple answer is "yes." In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which involved nearly identical facts (except that the events occurred in Ohio rather than in Bliss), the United States Supreme Court had no difficulty concluding that defendant had engaged in protected expression. In regard to the oral speech (in which Brandenburg called for "revenge"), the Court concluded that defendants were engaged in political advocacy, and that they were exercising their right to associate for First Amendment purposes. As a result, the Court held that defendant's speech was protected under the First Amendment.

Jones' cross burning also involves protected expression. In a number of decisions, the United States Supreme Court has held that "symbolic speech" is entitled to protection under the First Amendment. As a result, in *Texas v. Johnson*, 491 U.S. 397 (1989), when defendant burnt a United States flag to express his opposition to the Reagan administration's policies, although the Court characterized the burning as "conduct," it concluded that the flag burning also had communicative elements. *See also Spence v. Washington*, 418 U.S. 405, 409 (1974) ("Conduct" may be "sufficiently imbued with elements of communication"); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students who wore black arm bands to protest the Vietnam War were found to have engaged in protected expression).

In two major decisions, the Court has treated cross burning as protected speech. In the first case, *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Court struck down a City of St. Paul ordinance as applied to a cross burning. Subsequently, in *Virginia v. Black*, 538 U.S. 343 (2003), the Court recognized that cross burning can constitute symbolic expression: "The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner." *Id.*, at 359.

II. Recognition that the First Amendment to the United States Constitution is Incorporated into, and Applied to the States by Virtue of, the Fourteenth Amendment.

By its terms, the First Amendment to the United States Constitution applies only to Congress ("Congress shall make no law . . ."). Despite the literal terms of the Amendment, the

protection for freedom of expression has been applied to other branches of the federal government. *See Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *New York Times Company v. United States*, 403 U.S. 713 (1971). In addition, because of the due process clause of the Fourteenth Amendment to the United States Constitution, the First Amendment also applies to the states. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. State of Minnesota*, 283 U.S. 697 (1931). Since defendant's conviction rests on speech and conduct that is allegedly protected under the First Amendment, the protections of that Amendment must be considered in evaluating the conviction.

III. Bliss's Syndicalism Statute is Unconstitutional as Applied to This Case.

At one point in United States history, defendants might have been subject to prosecution under such a statute. In a number of early decisions, the United States Supreme Court held that defendants could be prosecuted for advocating illegal action. *See, e.g., Whitney v. California*, 274 U.S. 37 (1927); *Gitlow v. New York,* 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). In these early decisions, defendants were convicted without regard to whether they came close to accomplishing their objectives.

However, in the United States Supreme Court's landmark decision in *Brandenburg* at 444 - 447, the Court articulated a new approach to illegal advocacy cases. The Court held that: "[L]ater decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The facts in *Brandenburg* were nearly identical to the facts of the present case. In *Brandenburg*, the Court reversed defendant's convictions, stating that: "[W]e are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California*, cannot be supported, and that decision is therefore overruled." *Id.*, at 449.

Under the *Brandenburg* precedent, it would be extremely difficult to convict Jones under the Bliss Syndicalism Statute. As in that case, a statute that "purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action" falls "within the condemnation of the First and Fourteenth Amendments."

IV. Bliss's Cross Burning Statute is Unconstitutional as Applied to This Case.

The United States Supreme Court has decided two major cross burning cases. In the first decision, *R.A.V. v. City of St. Paul*, *supra*, the Court struck down the City's cross burning

ordinance because it involved "content-based" and "viewpoint-based" discrimination against speech. In the second decision, *Virginia v. Black*, *supra*, the Court partially upheld Virginia's cross burning statute which was nearly identical to the Bliss Cross Burning Statute. The Court traced the history of cross burning in the United States and elsewhere. Although Scottish tribes burnt crosses to call warriors to arms, the practice was heavily associated with the KKK in the United States. The KKK used burning crosses to send a warning to those who opposed it, and the warning carried with it a threat of impending violence. Moreover, many of these threats were followed by action with the targets of cross burnings being killed or maimed. For these reasons, the Court held that Virginia's cross burning statute could be justified under the "true threats" doctrine which allows the state to prohibit "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." The Court viewed the Virginia cross burning statute as designed to prohibit threats of violence, or intimidation, "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 359 - 360.

The Court distinguished *R.A.V.* on the basis that the Court, in that case, did not prohibit all content-based discrimination. On the contrary, *R.A.V.* held that content-based discrimination against speech is permissible when "the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable, no significant danger of idea or viewpoint discrimination exists." The Court viewed cross burning with intent to intimidate as proscribable within the category of "true threats."

Despite the holding in *Black*, there are two reasons why Jones should not be convicted. First, before the true threat doctrine will apply, there must be an intent to intimidate. In other words, the threat must be focused on a particular person who the cross burner seeks to intimidate with a threat of violence. In the present problem, the threat was more diffuse. It is not clear that Jones was actually threatening anyone with violence in other than an abstract way. *Black* involved two separate and distinct cross burning incidents. One was a KKK rally, like the one involved in this case, in which one speaker went so far as to state that "he would love to take a .30/30 and just random[ly] shoot the blacks." The Court dismissed the case against participants in the KKK rally, concluding that the facts did not present sufficient evidence of an intent to intimidate. The KKK rally threat was not directed at anyone in particular, and constituted nothing more than rhetorical flourish. The other incident involved two men who burned a cross in a neighbor black man's yard. The Court remanded this incident back to the lower courts for further hearings. The facts of this case are similar to the KKK rally in *Black*, and therefore would not warrant conviction.

V. Is Bliss's Prima Facie Evidence Provision Valid?

Even if Bliss's Cross Burning Statute were otherwise valid, Jones should not be convicted because of the statute's prima facie evidence provision. That provision reads: "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." In *Black*, the Court struck down Virginia's prima facie evidence provision which was identical to the provision in Bliss's statute. The Court concluded that there must be actual evidence of defendant's intent to intimidate. Such intent could not be presumed. As a result, in *Black*, the Court overturned defendant's conviction because it was based on the provision.

CONCLUSION

Bliss's Syndicalism Statute, and Bliss's Cross Burning Statute, are unconstitutional as applied to the facts of this case. Under the Syndicalism Statute, there is no evidence that defendant's speech was "directed to inciting or producing imminent lawless conduct," or that the speech was "likely" to produce such conduct. As for the Cross Burning Statute, there is no proof that the burning was undertaken with intent to intimidate any particular person. In any event, the prima facie evidence provision, which allows a jury to assume that defendant had the intent to intimidate, is unconstitutional.

COLORADO SUPREME COURT
Board of Law Examiners

FEBRUARY 2008 BAR EXAM
Regrade

ESSAY Q4

SEAT | | | | |

ISSUE		POINTS AWARDED
1.	First Amendment protects freedom of speech and expression.	1. ○
2.	First Amendment applies to states via the due process clause of the 14th Amendment.	2. ○
	STATUTE ONE: SYNDICATE STATUTE	
3.	Jones' oral speech constitutes "political expressions" within First Amendment.	3. ○
4.	Even oral speech that advocates violence or illegal action is protected.	4. ○
5.	Content based & viewpoint based prohibition on free speech generally not allowed.	5. ○
6.	Statute can forbid advocacy of use of force/violation of law where speech is directed to inciting imminent lawless "fighting words" action and is likely to produce such.	6. ○
7.	Jones statement, 'possible there might have to be some revenge taken' not likely to produce imminent lawless action or incite such action.	7. ○
8.	Statute forbids assembly with others to advocate actions protected by First Amendment.	8. ○
9.	Bliss Syndicate Statute is unconstitutional/not valid.	9. ○
10.	Jones will not likely be convicted under the Bliss Syndicate Statute.	10. ○
	STATUTE TWO: CROSS BURNING	
11.	Symbolic expression, such as cross burning, is protected by the First Amendment.	11. ○
12.	State can prohibit cross burning if combined with intent to intimidate – true threat.	12. ○
13.	The prima facie evidence provision of the Bliss Statute doesn't allow analysis of 'intent to intimidate.'	13. ○
14.	Bliss cross burning statute is unconstitutional/not valid.	14. ○
15.	No intent to intimidate: Rally where cross burned held on private property of group member (or) not directed at individual or group (no intent to intimidate)	15. ○
16.	Jones will not likely be convicted under the cross burning statute.	16. ○