

**Exam Memo, Constitutional Law, Spring 2012**  
**Professor Griffin**

Your letter grades in this course were based on the following point totals from the final examination and were awarded according to the mandatory UH grading curve for first year courses, which requires that the class average fall between 2.9 and 3.1. The class average was 3.1. The number in parentheses is the number of students that received each letter grade. The exams varied greatly in quality.

90-100 A (7)  
82-89 A- (9)  
75-80 B+ (11)  
70-74 B (16)  
65-69 B- (14)  
56-64 C+ (3)  
55 and below C (2)

The highest grades went to the students who 1) spotted the relevant constitutional challenges and 2) wrote the best analysis *using case law to guide that analysis*. Several students wrote rules with no case law; this is unacceptable in constitutional law, which is based on cases. Good analysis requires you to *apply the law to the facts*. There were many facts in all the questions. If you wrote about the case law without analyzing the facts, you got a lower grade than the students who just *answered the question*.

In Question I you had to follow directions and *write the opinion* for the Court. You lost points if you gave lots of arguments without finally identifying which Justices would espouse those arguments. It was also important to include details of Montana history that we covered in class and not just the statutory wording of the question. The Montana statute could not be interpreted without considering the history of corruption that we discussed in class.

Question II was an equal protection/race discrimination question. In this question it was important that you spend time with the facts. You lost points if you did not subject the add-on admissions program to strict scrutiny. Although it was essential to discuss *Gratz* and *Grutter*, you also needed to consider *Parents Involved*. *Parents* explains how the Justices would rule on a racial classification, especially Justice Kennedy. As in all the questions, here it was important to include the reasoning of the Justices as well as their names.

Question III was the question that divided the class and set the curve. It was important that you subject the whole statute to the undue burden standard of *Casey* and not just summarize *Casey*. *Carhart II* is the current law of abortion, so you lost points if you did not mention it where appropriate (e.g., how much deference the Court would give to any possible “findings” in the amendment, that the Court may defer to the state’s interest in life, that the state may be concerned that the mother regrets her decision to abort, or in figuring out Justice Kennedy). Too many of you conflated the health exception and the life exception. The Court has always held that a life exception is required but debated the status of the health exception.

Most of you came up with creative answers for Polly (*Griswold*) and Kent (any number of SDP cases about raising a family and having children). Unfortunately, many of you missed the parallel between this fact situation and *Romer* and *Perry*. I think if you had created a checklist in your head or on your scratch paper, you would have remembered that those cases were implicated in a set of facts where an *amendment to a state constitution* took away rights. Missing *Romer* was costly.

Question IV was obviously a Commerce Clause question. Here the levels of analysis varied as some students summarized the case law while others *applied the law to the facts*. You lost points if you forgot the Necessary and Proper Clause and *Comstock*. Many of you missed *Cruzan*, which should give the women some constitutional right to refuse the medical treatment of the vaccine.

I was generous with points for Question V as long as you put in a good faith effort to interpret the ministerial exception.

The best student answers are pasted below. Please be sure to read them over and compare them to your exam before making an appointment to ask me about your grade. Remember that model answers are not perfect answers, but they do set the curve for the rest of the class.

**Question I (Montana wins.)**

Challengers will have standing because they claim the law stifles their free speech and thus injures them. The law causes this injury, and the Court can provide redressability by ruling it unconstitutional.

Justice KENNEDY delivered the opinion of the Court, joined by Justices GINSBURG, BREYER, SOTOMAYOR, and KAGAN.

Today, the Court is forced to visit its recent decision in *Citizen United*. In that case, the Court decided that individual expenditures, including those by corporations, do not give rise to corruption, or the appearance thereof. Preventing corporations from donating to political campaigns from their general treasury accounts was a violation of free speech. In *Buckley*, this Court held that campaign money is speech, and not voting. Today, we reaffirm that principle. We also overturned *Austin*, a case that held that corporate expenditures in political campaigns distort the reality of political campaigns. We decided that there was no evidence of quid pro quo corruption that resulted from campaign expenditures from corporations. However, although not explicitly held in *Citizens United*, the Court held out on the possibility that if a state could provide sufficient evidence that unlimited expenditures had a significant and identifiable impact on its elections. We find tantamount evidence of that in Montana. As such, we hold that the Montana law is constitutional, and not at odds with our decision in *Citizens United*.

Montana presents two prongs of evidence to justify its law. First, Montana experienced decades of political corruption prior to enacting the law in

question. Several Senate campaigns were essentially purchased because of the lack of spending limits in their elections. As a result, the Legislature enacted Sec. 13-35-227, and prohibited corporate campaign expenditures, except by means of a corporate PAC. As further evidence, Montana draws a vivid pictures of what elections would be like if campaigns were allowed to directly fund candidates. Montana, although one of the biggest states by land, is one of the smallest by population. In a sense, it is one of the few frontiers left in the west. As such, local elections consist of grassroots efforts, with candidates relying on more traditional campaign tactics like knocking on doors and town halls meetings rather than expensive TV ads and mailers. Montana fears that unlimited campaign contributions paid directly by campaigns drastically alter the landscape of its elections to the point that the candidate with the most money would almost be guaranteed an election. That candidate, once in office, would be tempted to engage in quid pro quo corruption and feel indebted to its biggest donors rather than to the people they represent. There was ample evidence of that in the early part of the 1900s in Montana, and evidence suggests that that would happen again. We agree with the state. Like Justice Stevens said in his dissent in Citizens United, buying a vote and buying access to a law maker is a difference of degree, not kind. Today, that fear is realized in Montana.

Challengers to the law attempt to make many of the same arguments that the Court upheld in Citizens United. The challengers, two corporations and an individual who wants to make contributions through the corporation he runs claim that limiting their expenditures to those made through a corporate PAC is an infringement on their free speech. While the majority in

Citizens United did not believe that Corporate PACs were an adequate substitute for corporate expenditures, they are best suited for the small-scale and more personal campaign setting that exists in Montana.

The right of free speech is one of the most important in our Nation, and that is evidenced by its place in the First Amendment of the Bill of Rights. Time and time again, this Court has protected the right to free speech. However, that right, just like all of the others, is not unlimited. Where free speech becomes detrimental to society and begins to corrode our very system of government, it cannot go unchecked. Our fear is that if corporations are allowed to spend freely and with no accountability, the one man one vote principle that our nation was founded will become meaningless. Where there is ample proof that unlimited corporate campaign expenditures will adversely affect the ordinary citizens right to vote, much like it would in Montana, the freedom of speech finds encounters its outer limit. For the sake of our democracy and the continue livelihood of our Nation, this Court cannot extend its holding in Citizens United to every political arena. As such, we refuse to today, and we uphold the Montana law.

Justice BREYER, concurring.

I write simply to express many of the sentiments outlined by my former colleague in his dissent in Citizens United. Even over 200 years ago, the Framers new that the power of corporations were to be feared. If they were alive today, the sight of the power wielded by corporations would cripple our Framers in fear. Now, corporations unquestionably contribute to

society, and are the machines of our free market economy. However, their contributions become detrimental when their power gets to the point that it dilutes to vote of the citizens of the Nation. Although I would go beyond Justice Kennedy's opinion and hold that corporate contributions do in fact give rise to more than just quid pro quo corruption, today's holding provides hope that the system of government that our Framers carefully constructed over two centuries will continue to flourish, and every citizens' right to vote in spared.

Ginsburg and Sotomayor will vote with the majority, based on their dissenting votes in Citizens United. Further, Kagan will likely vote with this group, especially as the replacement to Justice Stevens.

Justice SCALIA dissenting, joined by the CHIEF JUSTICE, and Justices THOMAS and ALITO (all based on their votes in the majority of Citizens United).

The corporations feared by the Framers are not the same as those that are present today. Today's corporations are the principle agents of our free market, and our Nation would simply not be what it is without their contributions to society. Corporations play such an important role in our society, and denying them the ability to contribute freely to campaigns, whether they be federal, state, or local elections, is an infringement on their right of free speech. What of stare decisis when the Court simply overturns a case decided less than two years ago? Although the Court does not do so explicitly, it rather clearly does so implicitly. What's more is that they are fooled by Montana's argument that the environment of their

elections today is the same as it was exactly 100 years ago when their law was passed. Our nation, and its elections right along with it, has changed dramatically since then. It has become the world's strongest nation, all while continuing to maintain the freedoms guaranteed by the Constitution. A large part of the flourishing experienced in the past century is attributable to corporations. Yet today, the Court denies these same corporations the right to freely express their preference and to take part in the defining activity of our nation--free elections. Today's decision is a step backward in the direction of a time when the Nation denied some in this country the right to participate in its elections. Because of this, I adamantly dissent.

**Question I (Montana loses.)**

JUSTICE KENNEDY delivered the opinion of the Court, to which JUSTICE SCALIA, ROBERTS, ALITO, and THOMAS concur:

At issue in this case is whether a state's history of corruption can justify limitations on the speech of corporations. Appellees argue that the State of Montana has a long history of corporate corruption of politics and that a ban on corporate expenditures and contributions is necessary to combat this corruption. We now hold that it cannot and reverse the Circuit Court.

We begin by noting that the State of Montana must abide by the guarantees of the 1st Amendment, which have been incorporated against the States through the 14th Amendment Due Process Clause. Montana must therefore allow to its citizens freedom of speech. Our precedents have long held that money is speech (*Buckley*). More recently, we have held that states and the federal government may not limit the speech of corporations (*Citizens*). We disagreed with the appellants in *Citizens* that allowing corporations unlimited contributions or expenditures distorts or corrupts the political process. We also disagreed that it distorted shareholders' interests.

The appellees in this case argue that Montana's history of corruption justifies its ban on campaign contributions and expenditures. The appellees argue that in Montana's early history, corporations significantly corrupted the political process. Through large expenditures and contributions, Montana corporations effectively bought the time and attention of Montana politicians. However, the appellees have not argued that there is any recent history of corruption. The law at issue in this

case was enacted in 1912, during the height of political corruption in the state. Appellees have introduced sufficient evidence to show that corruption is a current threat to the State.

Appellees argue that because of small size of the state's population, allowing unlimited expenditures would distort the political process. Appellees argue that Montana politicians spend a minimal amount on money on their campaigns, and that an increase in corporate expenditures would effectively buy elections. Such arguments cannot sustain a ban on corporate expenditures. Allowing corporations the same speech as is given individuals would not corrupt or distort Montana's political process. Corporations are people for the purposes of the 1st Amendment's guarantees, and they should be treated the same as individuals.

The appellees argue that political action committees (PACs), which are cheap and readily accessible in Montana, are an adequate alternative to allowing corporations to use their general treasury funds for campaign expenditures. As we held in *Citizens United*, however, PACs do not allow corporations free speech. PACs force corporations to go out of their way in order to exercise their freedom of speech, and even then, corporations cannot donate to PACs out of their general treasury funds. We now hold that PACs are never an appropriate alternative for corporate expenditures, and may not be used to limit the free speech of corporations.

As we stated in *Citizens United*, money does not corrupt or give rise to the appearance of corruption. Our detailing of *Buckley's* holding about *quid pro quo* corruption was not to be taken as an exemption from our holding in *Citizens*. *Citizens* made it clear that money does not corrupt or give rise to the appearance of corruption. That holding is firm, and may not be circumvented by baseless claims about individualized corruption.

The decision of the Circuit Court is REVERSED

JUSTICE BREYER, with whom JUSTICES SOTOMAYOR, KAGAN, and GINSBURG concur, dissenting:

The Court's holding today is an improper reading of our holding in *Citizens* and risks corrupting Montana's political process.

Our holding in *Citizens* left open the question of whether corruption ever may constitute a compelling interest in banning corporate campaign expenditures. There, we held that money did not give rise to corruption or the appearance of corruption. However, we noted that *Buckley* held that *quid pro quo* corruption may serve as a compelling interest.

Appellees have presented sufficient evidence of a history of *quid pro quo* corruption. Appellees cite numerous incidents in Montana's history of corporate corruption of the political process. The statute at issue in this case, which bans corporate contributions and expenditures, is clear evidence of that history. The Court today is reckless in its holding that money never corrupts or gives rise to the appearance of corruption. The evidence presented here shows that money can and does in fact corrupt politicians. Corporations should not be allowed the right to purchase politicians simply because they can speak louder than individuals.

Further, unlimited corporate expenditures distorts the votes of other citizens. Montana, for instance, is a relatively small state in terms of population. Appellees argue that allowing unlimited corporate expenditures would give corporations a bigger say in the political process than is given to individual Montana citizens. Montana politicians run on

fairly little money as it is, and today's holding will raise their funds significantly. Because individual Montana citizens cannot keep up with the spending power of corporations, their votes will be effectively drowned out in the elections. Montana politicians will then be more likely to favor those corporations, because those corporations are the voters than put them into office. Such a system would inevitably lead to some level of corruption, which this Court today holds is impossible.

Corporations can speak adequately through their PACs, particularly in Montana. Pacs are cheap and easy to obtain, and they allow corporations to choose their candidates without distorting or corrupting the system or going against their shareholders' interests.

As it stands, corporations are now free to influence and control Montana's elections. After today's holding, Montana voters will have less of a say in their political process simply because they cannot afford it. The campaign expenditures of corporations can be limited without violating the guarantees of the 1st Amendment, and they should be. Corporations cannot feel or show emotions, do not have consciences, and cannot be imprisoned. They are not "people" in the sense of the word. The Framers of our Constitution feared and despised corporations, and they did not intend them to have the same free speech as is given individual citizens.

For these reasons, I respectfully dissent.

**Question II (Texas program is constitutional.)**

Challengers will bring a 14th amendment equal protection challenge against UT for its admissions policy. They will have standing because their injury is being denied admission as a non-minority student to the state school and the court can redress this injury by holding unconstitutional the admissions process.

Challengers will first argue that the state's admission policy should be subject to strict scrutiny in that the law must be narrowly tailored to meet the government's compelling state interest in order to justify the admissions' process means. Race discrimination, whether benign or invidious, is subject to strict scrutiny. (*Bakke, Adarand*)

Challengers will say that the PAI score is like a racial quota for medical school admissions in *Bakke*. In *Bakke*, the court struck down a medical school's admissions policy because the means/or quota reserved for minorities used to achieve racial diversity in the medical class were not substantially related to the compelling government interest. Challengers will compare the arbitrary score which gives more weight to an applicant because of an applicant's race, is like a set-aside quota. They will also say it is like *Gratz* because though the "special circumstances" element is not explained how much weight is given to race in the equation, challengers will say this is like a free-for-all in the admissions office to say that based on someone's race, the admissions department can go back through a student's writing that would OTHERWISE be considered sub-par and look at it through the eyes of adding "racial diversity" which is subjecting minorities to a different standard that is unequal to non-

minority students.

Challengers will next say that the development of the policy was a result of studies like that done in *Parents Involved*. In *PI*, the state was dividing children to schools splitting them solely on the basis of race and sending them outside of the zone where they would normally attend school in the interest of providing a diverse learning environment. However, the court held that the government's interest in diversity was not compelling enough to justify the divisions and that there was no history of discrimination to any of the races involved. Here, the current policy was developed as a result of the findings that not many minority students were in UT's smaller classes. Challengers will argue that this was not a result of any type of discrimination and the installation of the AI/PAI policy was not the way to go about making their admissions decisions.

The state will rely on *Grutter*. State will say diversity is a compelling interest in higher learning and the means used to the compelling state interest of achieving diversity in the classroom are substantially related to the outcome. In *Grutter*, the Court upheld the university of Michigan law school factor test in admitting diverse students and said that diversity was a compelling state interest. State will say their test is even more narrowly tailored than the *Grutter* test because there are so many steps in order to achieve any kind of preferential treatment based on race (like Harvard's test mentioned as the preferable standard in *Grutter*). State will say that non-diverse and diverse students not in the top ten percent have an equal chance under the AI test because it is a mechanical

formula that predicts GPAs and because some scores are high enough to receive admission based on that alone it gives non-minority students an equal chance. Additionally, State will say that the PAI score is additionally another way to distinguish a student regardless of race. The two required essays are scrutinized the same way initially and combine with the personal achievement score which is a wholistic approach to an applicant's file, still at this point regardless of race - which assesses "intangibles". The only part of the entire PAI score that takes race into account is the "special circumstances" element that may reflect NOT ONLY RACE, but socioeconomic status, family status/responsibilities, standardized test scores compared to his/her high school. Again, state will say this is far more narrowly tailored to the state's interest in diversity in the classroom than *Grutter*.

Additionally, the state will say that not only was *PI* about K-12 grade and not higher learning, there was a history of discrimination against African Americans, Asian-Americans, and Hispanics in the educational process from the days of *Brown v. Board of Education* when the court said racial segregation in school was unconstitutional.

State will also say that it has an extremely compelling interest in diversity of the classroom and the admissions policy is the most narrowly tailored means of achieving that interest. First, the diverse makeup of the state of Texas yields that the classroom should reflect the state and if the initial top ten percent law doesn't account for this exception, the additional admissions policies helps compensate for that. The state's belief in the diverse student enrollment as an enhancement of the learning

process, break-down of stereotypes and promoting cross-racial understanding. The university's role as preparing students for leadership in the state of Texas is an example of how compelling the state's interest is in the diversity of the classroom, as it was pointed out by O'Connor in *Grutter*.

The decision will be 5-4, upholding UT's admissions policy. Kennedy will be the swing vote here, because his decision in *Parents Involved* is distinguishable. He will therefore, write the decision.

MAJORITY -

KENNEDY - This case is distinguishable from *Parents Involved*, because the university has a far more compelling state interest than was evident in *Parents Involved*. Additionally, the means used to achieve the diversity through the PAI and AI are narrowly tailored enough to survive strict scrutiny.

GINSBURG & BREYER concurrence - benign discrimination and this is furthering the government's interest in compensating for past racial discrimination

KAGAN, SOTOMAYOR - traditionally liberal, will likely follow in Stevens & Souter's footsteps

DISSENT

ROBERTS will write the dissent as he wrote the majority in *Parents Involved* - and will be joined by SCALIA, THOMAS, & ALITO.

ROBERTS - *Parents Involved* - the only way to end discrimination on the basis of race is to stop discriminating on the basis of race. He sees the path to ending discrimination as avoiding any kind of special privileges and by adding the extra special circumstances.

THOMAS - as he said in *PI* - it's a color blind constitution, race should not be a factor in admissions decisions

SCALIA & ALITO - voted with Roberts in *Parent's Involved* - do not agree with benign discrimination.

## **Question II (Texas program is unconstitutional.)**

### Challengers

The non-minority students who denied admission will likely have standing because they have a concrete injury that is causally related to the defendants actions, this can be redressed by a ruling that the race conscious efforts are constitutional. A court will likely not find that the redressability element fails, because even if the issue is moot, it happens so frequently that they can expect cases like this forever.

The challengers will bring up that this program impermissibly discriminates against them based on race in violation of the equal protection clause of the 14th amendment.

The challengers will first discuss that this program is entitled to strict scrutiny because it takes account of race. Race is entitled to strict scrutiny even if it is used in affirmative action cases. See Adarand, Grutter, Gratz, Bakke. Strict scrutiny requires a compelling government interest and a narrowly tailored means of achieving that interest. This means that the law cannot be under or over inclusive and must relate directly to the states interest.

The challengers will then attempt to show that this case is more like Gratz because it impermissibly uses race as a factor when it should not. In Gratz the school had a point system that allowed for a certain number of points to be allotted for someone based on race; once you hit a threshold of points you were automatically admitted. The court thought that this was too rigid of a system and basically amounted to a quota of

minority kids. The challengers will argue that separating the residents and applying race conscious measures goes too far in utilizing race as a factor and amounts to a quota system because it puts more weight on the racial factors than need be. They will use as support the fact that the non-admitted students have two factors that are left to get in, the AI and the PAI. They could make the argument that race will be unfairly used in the process because within the PAI more weight is given to special circumstances, which they can argue is basically race.

The challengers will argue that the race measures are already being implemented by the top ten percent law. They will argue that this is a non-racial way to achieve diversity in the class room and that the state should not be able to use more race conscious reviews past that. They should really harp on this because they will surely have the 4 conservative justices and if they target Kennedy (who voted against affirmative action in almost every case and specifically advocates for non-race conscious means that propel diversity) they will win on their challenge.

They will also try to show how their case is like Parents Involved. Even though their argument will be more difficult because the schools in Parents Involved did not have past history of racial segregation, they can make the argument that Texas is already achieving its diversity by non-racial means, via the top ten percent law. They should also compare the schools use of race as only one of many factors. In Parents United, the schools took other factors in consideration and only then used race later as a tiebreaker, the challengers here should make the argument that the

use of racial qualifications serves as a tie breaker because it is considered after a few other measures and quite possibly could be the determining factor. They will also show that the school uses race much more than they explain because the once non-diverse school is now number 6 on best schools for minority students.

While the facts may be more difficult to allude to in Parents Involved, the Challengers should point out to the fact that the state can never discriminate based on race when it comes to education based on the majority writing of Parents Involved. They can discuss that if this country wants to stop discriminating based on race, they should stop discriminating based on race.

Also, in Parents Involved, the court discussed in great length the possibility of race neutral means being able to solve the problems that affirmative action is trying to solve. Even though there is not a strong foundation, the challengers should argue that in their case, the race-neutral means were employed to reach diversity and the further use of diversity as a qualification is no longer needed.

The challengers will then try to distinguish Grutter. They can discuss that while Grutter recognized the compelling interest of diversity in education and the interest in rectifying past discrimination, the holistic review needed in Grutter is no longer needed to meet these interests presented by UT. They can argue that the diversity interest is satisfied through the top ten percent law and race conscious matters after that are impermissible.

## State

The state can try to argue that this is not invidious discrimination and that their plan should not be held to strict scrutiny, this is unlikely to succeed however because it is becoming more and more concrete that using race regardless of what the purpose, will lead to strict scrutiny.

They will argue citing Grutter, Gratz, Parents, and Bakke that they have a compelling interest in diversity and in remedying past discrimination which is found in Adarand. They will show the importance of diversity in the educational setting citing Grutter and would be wise to include the amicus briefs again to show the importance of diversity, which will reinforce Breyer's beliefs (probably doesn't matter though). They will point out that their stated goal is not necessarily ethnic diversity, but a more diverse group of students from all walks of life. They should show their numbers in the classes they surveyed and the feelings of the minority students that are alone.

The state does not want Gratz to be controlling so they will point out their similarities with Grutter. They will show that their policy is just like Grutter in that it provides a holistic and individual review of applicants and only takes account of race in a minor and impermissible way. They will point out that their policy first utilizes the 10% rule, then looks at 2 qualifications with only one third of 1 of those qualifications looking at race. They will talk about their holistic review that permissibly takes account of race only when looking at the individual as a whole, just like in Grutter. They will also discuss how their interests

relate to this goal.

They will then distinguish Parents Involved and Gratz. They will distinguish Parents Involved by showing that they have had evidence of past discrimination, which is shown by their once low minority numbers. They will also discuss the importance of diversity in higher education which is undoubted and has much support. This should be adequate in distinguishing their policy from Parents Involved which involved elementary education in districts where past discrimination was not evident.

They will then distinguish Gratz. They will talk about the rigidity of a point system and how their holistic review of applicants which is very individual is nothing like the quota system applied in Gratz. They will show how little of an effect that race has in their system (a bit more than 1/3 of 1/5 of the remaining factors, not including the top 10 percent law or the AI). They will again try to argue that their system is just like Grutter.

The state will also try to show that the top 10% is a socioeconomic way of achieving diversity, but does not satisfy completely this interest. This is important because in Parents Involved there was much talk about a non-racial way of looking at education and the state should be worried that if the top 10% law achieves diversity, the court may find further race measures as unconstitutional. They should show that the top 10% rule does not achieve the diversity that is required for higher education.

To get at the justices they should de-emphasize how much of a factor that race uses. They do not want to talk about racial balancing or critical mass because those ideas took a slam in Parents Involved which was the most recent AA case.

### The Votes

I think the court will rule the UT plan unconstitutional.

I think KENNEDY will write the opinion and it will be joined by SCALIA, THOMAS, ROBERTS, and ALITO. I dont think this is a slam dunk for the challengers, but I think Kennedy will give in to conservative wing of the court, Roberts will then allow Kennedy to write the opinion. I expect them to continue the theme from Parents Involved that discrimination is impermissible in education. I also expect them to continue the argument that non-race conscious methods of obtaining diversity are preferable. They will then talk about race not being needed after these race neutral means are employed (IE top 10%). This will probably be the end of affirmative action. I expect the court to distort Brown 1 and talk about how awful discrimination is.

SCALIA will concur and talk about never allowing race to be a factor in education decisions. He will also talk about reaching critical mass and achieving racial balance are never permissible interests.

THOMAS will concur and talk about the stamp of inferiority that affirmative action programs place on minorities.

The more liberal justices will dissent: GINSBURG, BREYER, KAGAN, and SOTOMAYOR. I expect this to have much of the rationale we saw in Grutter. I also would not be surprised to see the 25 year time frame come up. They will probably talk about the court distorting Brown 1. They will think that the compelling interests are being met. They will also discuss that the top 10% rule does not take race into account and other measures are needed to achieve diversity.

GINSBURG will file a separate dissent joined by BREYER where she will talk about strict scrutiny being fatal in fact. She will also discuss the fact that the majority uses discrimination in this sense as a bad thing when it should only be used to designate rich versus poor or non-minority versus minority.

**Question III (There were some better answers on abortion, but this answer importantly included *Romer*.)**

Annie Proulx, Viola, Mia

These women have standing to bring suit. Their injury is the inability to have an abortion as they once could before the law was changed. The cause of the issue was the change in the law, and its redressable because SCOTUS can find the amendment unconstitutional. There may be an issue of mootness by the time this gets to the court because their pregnancies have occurred. But in *Roe* it was held that because it was repeatable that the case could be heard.

SDP

Challengers

The first thing that these women will argue is that the state has impermissibly interfered with their right to an abortion as established through case history. *Casey* remains the controlling case on abortion which states that no state can place an undue burden on pre-viability abortions, but may regulate post-viability to the point of abolishing them. Here, no finding is established that the date of viability has been changed (as permitted by *Webster*).

Annie Proulx would argue that her right has been abridged because she is now strictly forbidden from having an abortion (assuming that biological development begins sometime before 8 week point). *Casey* says that you can't place a burden on the procedure, and nothing could be more burdensome than a flat denial.

Mia Life will challenge that the change does not include a medical exception for the life of the mother. She is going to die if she has this

baby. Under Carhart I the court established that any regulation must make an exception where the mother's health is at issue. There are no explicit exceptions for health and no legislative findings as were suggested by the justices in Carhart II.

Viola Lance will also likely challenge for lack of failure to include a mental health exception for her. She likely has very serious emotional issues as a result of the rape and her inability to abort her fetus are likely contributing to it. She will argue that the state has an interest in protecting the mental health of the mother.

All women will likely challenge that the statute is unconstitutionally vague in that that it provides no explicit definition of when biological development begins. This leaves it unclear if an abortion is ever allowed. Vagueness was found to be unconstitutional in Carhart 1 where a statute was interpreted as possibly prohibiting all abortions. Likewise here, the vagueness of the term biological development could create this impression, as it does with the Dr. and pharmacist.

Challengers will argue that this can't be a redefining of viability as it existed in Webster because there are no factual findings on fetus ability to live outside womb when it begins to biologically develop.

#### State's arguments

State will argue that it is not placing an undue burden on previable abortions because it is actually redefining viability as the point in which biological development begins. Establishing new dates was found to be acceptable under Webster. But here no factual findings are presented, and State will likely ask that deference be given to the voters and assume that they are aware of the medical facts.

State will also likely argue along similar lines for not including a health exception. In *Carhart II*, the court deferred to the legislature for findings that medical procedures were never necessary for a D&X abortion. Here they would ask for the same deference. State will argue that the difference in *Carhart II* is that here we are not concerned with an abortion procedure, and that the mandate is to do nothing at all which the citizens are able to decide on their own.

State will also argue that its interest in mental health only extends regret for an abortion, and not to concern over a mother actually having a child. This also serves the state's interest in protecting potential life.

State will argue it has strong interest in preserving potential life by passing this law as established in *Casey*.

EP of earlier women who were able to have the abortion.

Challengers

The women will also likely challenge the fact that their 14A EP rights are being violated because they are being discriminated against versus women who were able to have an abortion prior to the new law. They will argue that their decision to abort was interfered with. They will try to argue for strict scrutiny review of this categorization under *Carolene Products FN4* because they are a discrete and insular minority that doesn't have political power. This could be because the law was just recently passed and not that many women were pregnant at the time it was voted upon. This level of scrutiny means the law must be analyzed as narrowly tailored to serving a compelling state interest.

Women should argue that under Romer they're entitled to abortion. Romer held that it is unconstitutional to single a group out for disfavored legal status. In Romer the issue was the removal of a right that allowed gays to have equal protection laws passed to protect them. The court found there that the law singled them out of animosity and that animosity is never a legitimate government interest. Challengers will argue that they are being targeted out of animosity from the people and therefore the state is not serving a legitimate interest by passing the law.

State

State will argue that this is not strict scrutiny and the women only deserve rational basis review. That the law should only be rationally related to any conceivable state issue. They will argue that this law was not passed out of any animosity as evidenced by the fact that it applies to such a narrow group of women that are pregnant. Also they will argue that there is a legitimate state interest in implementing the law and thus some women will be burdened more than others (US RR Bd v Fritz).

Justices: 5-4

kennedy will be the swing and likely find that that the lack of any findings supporting redefining the point of viability, or maternal health are sufficient to overturn the law. He is joined by Breyer, Ginsburg, kagan, sotomayor

dissent: Roberts, Scalia, Thomas, Alito

Scalia/Thomas: There is no right to abortion in constitution and this is a

matter that should be left to the states.

Alito: i have no problems with any restrictions on abortions as seen in my vote on Casey when on 3rd circuit. **[Note from Prof G: Justices' analysis should have included more cases showing how they voted.]**

Standing for Kent and Polly because they were able to have their in vitro procedure or get contraception. The causation is the law, and its redressable by overturning it.

Kent Conceive Right to bear and beget

kent will argue that his SDP right to have a family has been unconstitutionally infringed upon by the amendment. he will argue that under Loving there is a SDP right to raise a family and any decision affecting that decision deserves strict scrutiny. In Griswold the court established a fundamental right to privacy. In Loving (a marriage case) the court determined that if the right to privacy meant anything, it included the right to make decisions that fundamentally affected the bearing and begetting of a child. kent will argue that the law is impermissible because it prohibits him from having a child because the doctor won't consider it. Further, he will argue that the law is not narrowly tailored because its vagueness could be specified to exclude his attempt to use invitro.

State will argue that there is a compelling interest in protecting that potential life and that its means are narrowly drawn based on the biological development language.

Polly Amorous SDP right to contraception

Polly will argue that her 14A SDP right to contraception has been impermissibly burdened by the amendment. She will argue that in Griswold the court established there is a fundamental right to contraception because it emanates from the privacy rights present in the constitution. In Eisenstadt the court determined it didn't matter if you were married, and in XXXX it didn't matter if you were a child. It seems that everyone should be allowed contraception. Challenger will argue that the state's interest in protecting life is not present here because this not even a conceived child yet, that this is before conception and impossible for there to be any biological development.

State may argue that they have their interest in protecting life and that includes sperm and ovaries that have not yet been joined. This is a far reach for the state.

Justices:

Justices will likely find that the invitro and contraception rights are fundamental, in a 5-4 decision.

Ginsburg will write for the majority and state that there are in-fact fundamental rights to these services that are protected by the constitutions 14A. She is joined by Kennedy, Breyer, Soto, .

Dissent:

Scalia/Thomas - These may be silly laws, but it is not our place to tell state legislatures how to decide cases. These are the types of decision best left to the states.

Alito - I'm pretty catholic so we don't generally like contraception and

this should be a decision of the state as well. **[Note from Prof G:  
Justices' analysis should have included more cases showing how they  
voted.]**

#### **Question IV**

The Challengers here will be women who were forced to get the shot or take oral medication. They will have standing.

#### **Commerce Clause:**

The Challengers will argue that this regulation is beyond the scope of the commerce clause. While the selling and purchasing of health insurance and the cost of medical service is an considered commerce. The Challenger's will frame the issue differently and argue that the getting and shot or oral form of medication is not an economic activity that substantially affects commerce (Lopez, Morrison). They will make the argument that protecting women from the "possibility" of cervical cancer is not unlike protecting women from "violent crimes" in Morrison. They will argue that just like Morrison this regulation possesses a threat to notion of Federalism. They will argue that under the 10th Amendment, the police powers, include those of Health and Safety, are left to the States. The women in this case will have standing to bring this 10th amendment issue for the states in light of *Bond v. US*. The Challengers should also argue the lack of evidence that cervical cancer is economic because of high health care costs. The challengers should argue that other ailments contribute to the Health Care problem as well other in greater numbers than cervical cancer. The challenger need to emphasize that getting a vaccine is a non economic activity and that allowing Congress to regulate that would be granting congress a blank check to regulate virtually anything with the most minor link to interstate commerce.

The Gov't will argue they have the right to pass such legislation in light of the commerce clause coupled with the necessary and proper clause. The Gov't will first argue it is appropriate under the Commerce Clause

because the effects of HPV on health care cost in the aggregate have proved to be an issue of interstate commerce. (Wickard, Raich) They will argue Raich and state that the regulation of local activity such as HPV vaccination can have an effect on interstate commerce in the aggregate. They will argue that there is a market for health care (argument likely established in the passage of Obamacare) they will say that the vaccination had a direct relationship with that market because failure to vaccinate causes more cancer and thereby increased cost. They will argue that the regulation is necessary and proper to carry to reduce the effect of HPV which had a substantial effect on health care cost, which under the passage of Obamacare, has been deemed to be interstate commerce. Here the Government will cite *Comstock* and argue that in the same way that the civil commitment of prisoners was permissible under the Necessary and Proper Clause to further deal with an issue related to the federal crimes legislation that had been passed under the Commerce Clause the HPV legislation is appropriate. They will argue that because Obamacare was constitutional under the Commerce Clause and potentially the N & P clause as well, that this regulation is an extension of that power that is necessary and proper to deal with the healthcare issue.

The Court will likely uphold the HPV legislation under the Commerce Clause in a 6-3 vote:

Majority: Kennedy, Ginsburg, Alito, Breyer, Sotomayer, Kagan

Breyer will vote just as he voted with the majority in *Comstock* based on a broad interpretation of the N&P clause. He will argue that this regulation is a modest addition to the already passed Obamacare legislation.

Kennedy and Alito will vote based on the rationality review they mentioned in

their *Comstock* concurrence. They will argue that forcible vaccination of women is rationally related to the end of reducing national health care cost thereby, the use of Necessary and proper clause to pass this is not inappropriate

Sotomayor and Kagan: Sotomayor will vote to grant Congress the power based in her *Comstock* vote and Kagan has not spoken much on this issue but based in her predecessor's votes, it seems they would like vote with the majority. Souter and Stevens both dissented in *Morrison* in favor the aggregate effects application to the facts, it seems these two justices would have voted similarly in that case.

Dissent: Scalia, Thomas, Roberts:

Roberts will change from his vote in *Comstock* and say that the link of this regulation is less attenuated/tied to the commerce clause than the prison term in *Comstock* was. He will also give weight to the 10TH Amendment Federalism concerns and state that such regulation by Congress infringes on the state's police power to regulate the health and safety within its state.

Scalia will dissent and argue this is to far fetched from the Commerce Clause. He will say this is a non-economic activity that cannot be regulated under the Commerce Clause and since it cannot be regulated under the commerce clause the necessary and proper clause may not be invoked. Scalia will require the N&P clause be linked to an enumerated power. In other words, Scalia will argue there is enumerated power that predicates the use of the Necessary and Proper Clause in this case.

Thomas will be concerned with the infringement of the state's police powers by this legislation (HIS DISSENT IN *Comstock*). He will Commerce Clause has gone to far off from what the framers intended (see Concurrence in *Morrison*) and that this is an inappropriate use of necessary and proper

clause and as an excuse to regulate a health matter that is solely within the State's police power.

**Tax/Spending Powers Challenge:**

The Challengers will argue against the \$500 penalty and say it is an inappropriate form of taxation. The Challengers will cite to *US v. Constantine* where the court found a tax to be a penalty when it invaded the State's police powers. The Challengers should also argue *US v. Butler* where the choice of farmers to participate in a government program or being at an economic disadvantage by not participating was found to be unconstitutional. The Challengers should argue this penalty is even more egregious because it is as the dissent in *Butler* says "threat of loss, not hope of gain, is economic coercion." As a result, the plaintiffs should argue that this penalty amounts to economic coercion by the government of the people to participate in something possible outside the scope of their enumerated powers. Thereby the regulation may be an inappropriate use of their tax power.

The Government will argue that under the passage of Obamacare, the \$500 penalty is just like the "individual mandate" that was found to be permissible. They will argue they have the right to tax and spend pursuant to the General Welfare of the nation and that is exactly what they are doing by imposing the penalty. They are ensuring the national welfare through the prevention of cervical cancer. Moreover, they will argue they are acting within their powers under the commerce clause + necessary and proper clause and are therefore not coercing anyone to participate in the program.

**5th Amendment Substantive Due Process Claim:**

The women will bring a SDP claim and argue that they are being deprived of their liberty by being forced to undergo this medical procedure. They should argue *Cruzan* and assert that they have the Constitutional right to deny unwanted medical care or treatment, even if it may be lifesaving. The women should raise the issue that the State interest in reducing health care cost does not outweigh her rights as an individual to make choices and have control over her body. They should argue that state has no compelling interest for depriving the women of this fundamental right. The women should argue that the reduction of health care cost can be achieved by other means that do not deprive all women of their liberty. For example, the state could make the vaccination available for women who desire to be free from the threat of cervical cancer. Under the scenario, a large number of women might participate in the government vaccination and women still retain the liberty to refuse. Ultimately, this would accomplish some reduction in cervical cancer and thereby health costs.

The state will argue they have an interest in preserving life and the health of the American population. They argue *Cruzan* as well and say that their government interest outweighs the women's individual choice to get the shot. Moreover, they will argue the state is not forcing the women to undergo treatment they have the right under *Cruzan* to deny the medical procedure they will just have to pay the fine associated with that choice. They will argue that the women

**14th Equal Protection Claim:**

The women can assert they are being classified on the basis of their gender by being forced to undergo the vaccination. This will receive a intermediate scrutiny review by the court. They will make the argument that because they are women, they are being treated differently than men and

subject to either a penalty of a vaccination. The women will argue it should be irrelevant that men are not affected by cervical cancer, they will argue the fact that women are forced to undergo vaccination for disease only affecting is discriminatory. They will argue that certain diseases effect men such as prostate cancer, yet men are not faced with the same burdens that women are being faced with through forcible vaccination.

The state will argue they have an important governmental objective in reducing health care cost spurred on by the great number of women suffering from cervical cancer. They will also argue the imposition of the vaccination or penalty are substantially related to ameliorating that problem. Additionally, the men will cite to *VMI* and say this classification is consistent with the VMI. The classification is not done on the basis of stereotype but rather on biological difference between men and women.

On SDP and EP grounds the justice will vote to strike down the law 7-2

Majority: Ginsburg, Sotomayor, Kagan, Breyer, Kennedy, Alito, Roberts

Ginsburg, Sotomayor, Kagan, Breyer will vote based on their the EP/SDP claim. They will argue that like this regulation deprives the women of their right to make an autonomous choice concerning their body (Ginsburg joined by Breyer in the *Carhart 2* dissent). Kennedy will join just as he did in *Casey* in order to protect a women's right to have a choice and uphold her right of privacy as to whether or not she wasnt to under the vaccination. Kagan and Sotomayor we are unsure about however, their earlier counterparts Souter and Stevens voted favoring women's autonomous choice about their health and bodies in case such as *Casey*, and both *Carharts*.

Dissent: Thomas will say the distinction is okay because it is a biological difference although ultimately all together he will strike down this entire regulation as a violation of Congressional powers. He will say it is beyond Congress' power to enact this legislation but solely on SDP he would uphold it claiming the state may differentiate between men and women for biological reasons. Scalia would do the same he is skeptical of SDP and it has been read into the Constitution. He believes some gender classification are permissible (See his opinion in VMI) but he would ultimately strike down the regulation for the same reasons Thomas would not have power to pass it under the commerce clause.