MEMORANDUM

To: Spring 2009 Constitutional Law Class
From: Professor Virelli
Date: February 14, 2011
Re: Sample Answer and Comments for the Final Exam

Below please find a sample answer for the Spring 2009 final exam. Since you were not permitted to remove it from the test room, I am also providing a copy of the exam itself.

This sample is an actual student answer and thus is not meant as a model (i.e. perfect) answer, but instead as an actual example of a successful exam answer (as you will see, unedited). I hope it will be helpful in identifying your strengths and weaknesses on this exam in particular and in exam-taking in general. I have not included any information pertaining to Section III, as that section was designed primarily to measure your ability to take and defend a position.

In addition to the sample, I have included some general comments for each question based on the exams as a whole. These are not meant to be exhaustive, but should help to fill in some gaps in the sample answer. The fact that a particular point is not mentioned in the sample or my comments does not mean that a student including that information in their answer did not receive credit for it; where answers included information that was relevant and instructive in responding to the question, credit was awarded accordingly. Finally, as I explained earlier, you are welcome to schedule a meeting with me to discuss your exam, but I strongly encourage you to review this material prior to scheduling such a meeting.

PART I (QUESTIONS 1 AND 2)

QUESTION 1

Comments for Question 1:

The biggest problem with this question for the group as a whole was with applying the balancing test under the Dormant Commerce Clause. Most of you correctly identified that the PTA was not facially discriminatory and then considered whether it had a discriminatory purpose or effect, but many of you failed to mention the relevant facts that would help show which of these discriminatory features were exhibited by the
PTA. Most common, however, was the failure to engage in the balancing test required of statutes that are not facially discriminatory, namely to weigh the PTA’s effect on interstate commerce against the Act’s public benefits.

As for Part B, many of you correctly identified the procedural due process issue under § 2 of the PTA and engaged in the appropriate balancing test (to varying depths and degrees of sophistication). The most common problem was failing to make enough of the total lack of process afforded under the statute, thereby making it much more likely that those who had licenses denied or revoked were denied their procedural due process rights.

Sample Answer to Question 1:

Part A

In analyzing section 1 for violating the dormant commerce clause, there must be a state law, which there is. We should also make sure there has been no congressional consent or preemption, which there appears there has not been. The DCC asks does a state law interfere with the interstate commerce clause in a way that is inconsistent with congress’s commerce power. A DCC claim may be brought by an individual or an entity/corporation. There are 2 ways for a state to burden interstate commerce either discriminatory or non-discriminatory. Discrimination in this context is whether the state law does treat out of state actors differently than in state actors, in the context of commerce. Discrimination is on the basis of state residency and a state that passes a law cannot treat their citizens better than another states citizens in the context of commerce. The discrimination can be facial, or it would have a discriminatory purpose or effect. If it had one of these the law will be subject to strict scrutiny, which I will describe later. The only exception to a discriminatory law is the market participant doctrine. If the law is not discriminatory it can still burden interstate commerce and then we would balance the burden on interstate commerce versus the benefits of the state. Looking at this law, there is an argument that the law is facially discriminatory as it distinguishes between Maine citizens and non Maine citizens and Maine citizens who have been citizens for 5 years are exempt. However, the distinction is not clear and it does not specifically say other citizens from other states are completely barred. Thus, the facial argument is not strong.
It will be better and perhaps easier if we can show a discriminatory purpose or effect and showing that will get the court to the same place as a facially discriminatory law, to strict scrutiny. Discriminatory effect when the law is facially neutral but the law effects groups of people outside of the state, which can usually be shown by a state giving preferential treatment to its citizens. The fact that only 40% of the people who did not qualify for the residency requirements passed the test could show a discriminatory effect. The problem here is that facts do not indicate that how many of the 500 requests from applicants who did not meet the residency requirement were actually from out of state. The law says that you must be a continuous Maine citizen for the last 5 years. Well, it is possible, in fact likely, that out of those 500 people who did not pass the resident requirement were actually Maine citizens. For example, if a citizen has only been living in Maine for 3 years or if a citizen has lived in Maine for 6 years but there was a 6 month period where they lived somewhere else, then it would not be continuous, If it was determined that a majority of the failures came from out of state citizens, the law is likely to have a discriminatory effect. However, it is possible that these failures came from Maine citizens who did not meet the residency requirement or who did not know enough about the geography of Maine and failed the test and thus it might not have a discriminatory effect. Maybe there is nobody from out of state who took this test. Nevertheless even if there is no discriminatory effect, there might be a discriminatory purpose. The legislative history shows that lawmakers stated that the trout should be benefiting Maine’s sons and daughters. Even though it tried to rationalize this and the test of the geography by saying that newer residents are unlikely to have the knowledge that it gets cold in the fall and for rapidly changing marine conditions, this could show a discriminatory purpose. A resident, even a new one, knows it gets cold in the fall in Maine and that marine conditions change rapidly. These are not things that the ordinary person would not know, Maine gets cold in the fall. It seems like a poor rationalize to the law and instead is just a way to protect the vibrant industry that is exclusive to Maine and that the industry should only benefit Maine’s citizens. Since it is their most valuable possession, the legislature might have a discriminatory purpose that it does not want out of state actors to grab part of this lucrative enterprise. Since there is likely a strong argument that the law has a discriminatory purpose, it must pass strict scrutiny, which means the law is only
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Constitutional if there is an important state interest and the means they choose is necessary to achieve that interest. It must be the least restrictive means on interstate commerce. The important interest here is maintain the appropriate balance between the interests of commercial fisherman recreational fisherman, the environment, and to promote safety within the commercial fishing industry. These are important interests, environmental interests are usually interest to have an important interest and promoting safety is always an important state interest. But is the means that the state is choosing, the regulation of the industry by giving residency requirement and passing a rigorous test necessary to achieve those interests and is it the least restrictive means on interstate commerce. The law would have a difficult time passing strict scrutiny as there is a presumption that the law is invalid. First a residency requirement and knowledge of the geography has very little if anything to do with the environment, its not like the law is regulating how many fish they can catch between recreational and commercial. Also, the connection or balance the law is trying to show between recreational and commercial is also weak. The law says nothing about recreational fishing, it only says to become a licensed commercial fisherman. It says nothing about ordinary Joe who wants to catch a few trout for himself as he could want it for dinner as it is a delicious alternative to Tuna. There would also be other ways that the burden on interstate commerce would be less. A rigorous test seems very harsh to out of state resident. Perhaps they could simply limit the amount of fish or the amount of licenses overall. Seeing as fisherman sell their catch all over the United States, they could do these things to lessen the burden on interstate commerce. Thus the law is likely to fail strict scrutiny. The market participant exception would not work because the state is not participating, is not buying or selling in the market. Lastly, even if the law is not discriminatory or somehow manages to pass strict scrutiny, it might be looked at as a non discriminatory law that simply has an impact on interstate commerce. It could be non discriminatory because on its face it does not really distinguish and it might not have effect(based on the argument above) and the lawmakers purpose might not be enough to show a direct purpose. In that event, we would use the balancing test and we would balance the burden on interstate commerce versus the benefits of the state. This case could be compared to Kassel where there was a possible discriminatory purpose but it was ultimately ruled non discriminatory. The burden on
interstate commerce would be not allowing out of state residents who could not pass the test precluded from a license compared with the benefits of the state or what they wanted to get out of the law, which would be the states gain in the balance between recreational/commercial fisherman, the environment, and promoting safety. I don’t believe the state interest here would trump the burden on interstate commerce because first the law doesn’t even do a very good job of promoting what the state wanted to get out of the law. Even though the potato trout is exclusive to Maine, it is a vibrant industry and these fish are sent all over the country and thus the burden in pretty high on interstate commerce. Although it is unclear how many out of state residents failed the test, if there were a good amount who did fail it, that could shown as a burden. Economic impact on neutral regulations are also a common way in which to measure the burden, so if an out of state fishing company could should an economic loss from the time before to after the act was enacted that could also show the burden. Overall because the law is likely to fail strict scrutiny if its discriminatory and because the burden on interstate commerce is high, it would likely not be balanced in the states favor either even if the law is non discriminatory.

**Part B**

Under section 2 of the act, there is a procedural due process problem. Procedural due process apply to the state through the 14 amendment and that no state shall deprive any person of life liberty or property without due process of law. There seems to be a property interest at stake which is created by state law and a continuing reasonable expectation of that right. The license to fish is created by state law and there is a reasonable expectation that it will continue as it may only be revoked if someone fails the requirements of section 1 (which they presumably passed when they got the license. The first past of the procedural due process test is the state must deprive you of one of those interests, here it is depriving Marty of a property interest. The next step is to ask whether Marty was given the required due process, which usually requires notice and an opportunity to be heard. Well, we have a problem right away. There is no opportunity to be heard at all because the decision is final, there is no appeal process. However, seeing if the proper procedural due process was given requires to engage in a 3 part balancing test where we must balance the private interest that will be affected by the official action, the
risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional procedures with the government interest including the function involved and the fiscal and administrative burden that additional procedure would entail. The individual interest here would be high as Marty is the sole shareholder of McGrupp fishing which is probably his livelihood. Without his license the business is doomed to fail. The erroneous deprivation would also be very high here as there is no appeal process, nothing can be filed. There is no opportunity to be heard. The balancing involves taking this interest plus the risk of erroneous deprivation balanced against the government interest. The governments interest here is efficiency, it would take alot of time and man hours to sift through the many appeals likely to happen. The government might have an argument that no appeal is necessary because it is not based on individual factors and there is no need to explain, its either you meet the requirements or not. Thus, it could be argued that additional procedures might not have any gain because there are no individual factors unlike in the Golberg v Kelly case where welfare benefit receives is very individually based. They need to tell their story and have an opportunity to be heard. This is much more objective based process. However, I believe because the individual interest(livelihood) and the risk of erroneous deprivation is so high that the individual will win as it will be balanced in Marty’s favor. If the individual, they get some additional due process. If the government were to win, the status quo would stay, there is never any due process taken away.

**QUESTION 2**

**Comments for Question 2:**

Part A of this question asks whether Fish Hunters has standing to bring suit. Students were required to identify first that associational standing is at issue and then to ask whether individual members of the group could meet the constitutional requirements of standing: injury in fact, causation and redressability. Associational standing is satisfied where any member of the group would have standing, their interest is related to that of the group, and standing is not dependent on individual circumstances that reach beyond the scope of the group. The causation and redress components of constitutional standing are easily met here, but the question is whether adequate injury exists. The
relevant facts from the fact pattern are that Fish Hunters currently has reservations to travel to Maine to fish for potato trout, but does not currently have any members fishing for potato trout in Maine, nor has it ever had any member do so.

Part B raises the issue of whether the Act was within Congress’ constitutional authority, in particular whether the Commerce Clause empowers Congress to pass the Act and, conversely, whether the Tenth Amendment limits congressional authority to do so. For the Commerce Clause analysis, it was important to recognize that the Act does not regulate a channel or instrumentality of commerce, nor does it include a jurisdictional element limiting the regulated activity to interstate conduct. This leaves the substantial effect test as the only viable way of evaluating the Act under the Commerce Clause. Under the substantial effect test, it was important to ask whether the activity being regulated was economic or not, and whether the purely local conduct of fishing in Maine for potato trout could be aggregated in considering its interstate commercial impact.

There are facts in the fact pattern suggesting that the Act does regulate economic activity (potato trout is a commodity with an existing market for it), and those that suggest it is purely non-economic (only recreational fishing is regulated). If the regulated potato trout fishing is economic, then a rational basis review is appropriate, whereas if it is non-economic, closer judicial scrutiny is required. Also relevant to the question of whether potato trout fishing has a substantial effect on interstate commerce are congressional findings and the fact that fishing may be a traditional subject of state regulation. Both the available findings and traditional state function arguments can be made for and against the Act.

The Tenth Amendment is implicated by the Act’s requirement that state officials gather information and report to Congress about the potato trout population. The Tenth Amendment analysis depends on whether the Act’s reporting requirement constitutes commandeering of state officials under New York and Printz or whether the fact that the officials required to act are not policy makers and are only required to gather information, as opposed to enact or enforce federal law, is persuasive.
Sample Answer to Question 2:

Part A
To have standing, which is part of the constitutions case or controversy requirement, their must be injury, causation, and redressability. The injury must be actual and concrete and not hypothetical. Fish hunters in an organization and although it is not an environmental group, it is a group that is affected by this environmental regulation. In FOE v. Laid, the court ruled that injury in fact can be alleged when a group avers that they use the affected area and are persons for whom the aesthetic and recreational values of the land will be lessened. Here, the recreational value of the area being regulated, the Maine waterways, would be lessened as the group will not be able to take part in recreational fishing.

However, the injury needs to be concrete and so far have never been fishing in Maine and only have tentative plans for the trip, thus it is possible that this injury is only hypothetical. Although the travel reservations have been made that might Thus it is likely an injury in fact is satisfied. Causation should be an issue because it would be fairly traceable to the defendant which would be the United States which passed the law.

Redressability must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. The fish hunters will argue that a favorable decision in declaring the law invalid will remedy their injury because then they would be able to do recreational fishing in Maine. The problem here is that this is an association and while usually there is no third party standing. However, there is an exception to this for associational standing which is a prudential standing doctrine. For Association standing, it must be shown that members have standing on their own, the suit is related to associations purpose and the claim does not require individual member as a party. It is hard to say without more facts if the members would have standing on their own. It does not appear that any other members have injury themselves. It is possible that the member who is from Maine and is a fisherman has a direct injury himself. That one guy must be their best and only hope but the problem is he has never been fishing for potato trout. Also, he is only one guy and it might require more than one member. This first prong of associational standing might prove to be the problem for this fish hunters. Causation and redressability should not be a for that guy as the same would apply as described above.
The suit is related to the associations purpose and their purpose is recreational fishing and that is acting what the law is outlawing. It also must be shown that the claim does not require individual member as a party. This would perhaps depend on the first prong whether the fisherman from Maine satisfies it. If not, the claim might require an individual member as a party to have standing because none of the members might not have standing on their own. Another potential issue with standing is the competence of other branches issue. If allowing a suit to go forward would cause a separation of powers issue the court will not hear the case. This is unlikely to cause a problem as courts frequently hear cases challenging congressional action based on the commerce clause. However, it could be argued that there is a problem better dealt with by congressional action, by the groups lobbying congress to change the law.

**Part B**

The Fish Hunters would challenge this act as a violation of Congress’s commerce power. There is a federal law that congress passed with its commerce power. Congress can regulate the channels, instrumentalities and things that have substantial effects on interstate commerce. Congress is clearly regulating under the substantial effects prong as it states that in the finding. In looking at a commerce clause claim, I will go through the steps that the court would likely take under the Lopez factors in analyzing a claim to a federal law passed under congresses commerce power. First, we must figure out the activity being regulated. The activity being regulated is Recreational trout fishing. Then we must see whether this activity is economic or non economic. The courts will decided this by looking at the facts but most importantly the nature of the activity involved. The Raich court held that economic meant the “production, distribution and consumption of a commodity.” While the nature of the activity here is recreational fishing which is described as personal consumption and not for sale to another, I do not believe that this definition will preclude it from a determination that the activity is economic. This could be shown as a similarity to the situation in Wickard and Raich. Although those dealt with the personal consumption of wheat and marijuana, the court ruled that those were economic activities. Even though, the court in Wickard did not expressly say it was economic activity mostly because it was before Lopez, the court in Raich essentially said that if ruled on today Wickard would involve economic activity. The arguments for this
activity is similar in those two cases as while personal consumption by itself might not be an economic activity, if there is recreational fishing allowed and people are catching their own fish to eat, nobody will be buying the fish on the open market and it will affect the supply and demand, which is economic at its finest. If there is no recreational fishing allowed, they would have to buy the fish on the open market and thus it could have a substantial influence on price and market conditions. Just as the court in Raich believed the consumption of wheat and marijuana were economic, a court will probably say the same here as well. Fishing is a huge industry in this country and if we allow the recreational fishers to “fish out” an area, it could had severe consequences on the commercial fisherman in the area thus hurting a local or even national economy severely. Thus, this activity is economic. If the activity is economic court will use rationality review and will give deference to congress and their finding, which are used to show the court that the activity does substantially effect interstate commerce. As long as congress is acting rational, the court will usually defer to congress that the activity substantially affects commerce. The court will also look at whether what congress claims and see if the chain of inference between the regulated act is too remote and attenuated to affect interstate commerce. It appears that the chain of inference is not too attenuated and that congress was acting rational as it shows that the commercial industry has lost 1 million annually due to the recreational fishing industry and 100k from the eco tourism industry. There is an argument on the other side that these loses amount to a very small percent of the total revenues of the industries, the commercial fishing industry total annual revenue is 100 million so 1 million is not that much. This could be caused by the slow economy instead of recreational fishing. However, the court is usually very deferential to congress when the activity is economic and unless it clearly is acting irrational, it will take congress word that the activity substantially affects interstate commerce. Congress has shown some economic loss so they do have some rational basis as well as the belief that word is spreading fast about the industry and its reward and how Maine relies on the tourism industry and recreational fisherman could disrupt this and cause economic consequences in Maine. Next the court will look at whether the activity is national or local. While fish might be national, the activity being regulated is the recreational fishing, which probably local. Local is something that on its won doesn’t travel in
interstate commerce. The reason is doesn’t travel on its own is because recreational fishing is not for selling the fish. Recreational fisherman either catch and release the fish for fun or catch the fish for fun or catch the fish and take it home to eat. Thus by itself, it is a local activity. Since it is a local activity, the activity can be aggregated. Aggregation allows congress to aggregate repeated instances of the same economic activity in order to determine that a certain class of activity substantially affects interstate commerce. At this point, aggregation is somewhat of a formality because if the activity is already ruled economic as above the court will defer to congress that the activity substantially affects interstate commerce, which is basically what aggregation will show as well. Congress does uses aggregation in its finding as it says that recreational fishing will contribute to the depletion of potato trout stock and that could have an economic affect. Aggregation is best described as if everybody did the regulated activity (recreationally fish the trout), would it affect interstate commerce in a way that only one person doing it would not affect it. the answer here as congress has pretty much shows is that aggregation will allow you to show substantial effect. If one person recreationally fishes, it will likely have no affect. But is lots of people recreationally fish, it will affect as it will deplete the stock for commercial fisherman thus affecting the market and having other economic impacts and consequences. Lastly, the court will look at whether the activity being regulated is a traditional state functions, if the congressional regulation involves a traditional state function, it could serve as another reason to strike the law. It does implicate one of traditional state functions such as property, torts, contracts, criminal law, or family law. I am no fish regulation expert, but it would seem that states usually regulate fishing within its own borders, but I do believe there is anything stopping congress from doing so and since its not a “traditional” state function, this will probably not serve as a problem. The last part of a commerce clause analysis is to determine whether the means other improper unconstitutional activity. There does not seem to be any other constitutional bar to prohibiting or regulating recreational fishing so the law should have no problem with this either. Thus, I believe that this law was rightfully passed under congress’s commerce power as described in the above steps because it is an economic activity that substantially affects interstate commerce.
Lastly, there also might be 10th amendment issue with this law. In Printz v United States, Congress can not force the state to enforce a federal law. It was ruled that it cannot commander the state. It was also ruled that congress cannot force state government employees to do something that is part of a federal regulatory scheme. It is possible that under section 2 of this act, where congress sates that Maine’s secretary shall report to congress regarding the health of the potato trout and shall issue a recommendation to Congress. There are several issues with this, first it does not give the state a choice, they must comply with the law and also it only applies to Maine, it does not apply to anyone else. Thus it could be argued that the state is forcing them or commandeering them to comply with this law. However, the government could argue that under Garcia, this is simply something that states have to comply with a federal law that was rightfully passed under its commerce power. The court could be worried about accountability to make sure the citizens know who to blame. Because the 10th amendment is not a positive check of Congress Article 1 powers and because congress’s commerce power is plenary, this is probably not the strongest claim but could served as another basis the fish hunters could challenge the law.

**PART II (QUESTION 3)**

**Comments for Question 3:**

This Question asks whether the Family Protection Ordinance (FPO) is constitutional. The issues implicated by this Question are substantive due process and equal protection. In general, the biggest problem with this answer was in students’ failure to use enough of the available facts from the fact pattern to support their reasoning. Some, but not necessarily all, of those relevant facts are mentioned here.

A. **Substantive Due Process**

The substantive due process analysis depends on whether the right to divorce is a fundamental right. An analogy can be made to the right to marry and to cohabitate with family, but a better comparison is likely with the right to contract, as there is no national tradition of protecting the right to divorce. If you concluded that the right to divorce was
fundamental, then strict scrutiny review should have been applied. If it is not fundamental, then the court would apply rational basis review.

B. Equal Protection

The equal protection analysis should first note that married couples are not a suspect class and therefore that rational basis review will generally apply, unless a disparate impact argument can be made. The disparate impact analysis asks whether the FPO has a discriminatory purpose and effect. A disparate effect is apparent in the fact that 80% of the applicants for a divorce under the FPO have been African-American, whereas only 55% of the divorces in South Gamehendge involved African-American couples. The important facts to consider in evaluating whether a potentially discriminatory purpose exists are those surrounding the Act’s stated impetus, its legislative history, and the racial history of the municipality. Where a discriminatory purpose and effect are found, strict scrutiny is applied. Where they are not, rational basis review is appropriate.

C. Standard of Review

In terms of applying the relevant standard of review, strict scrutiny requires an inquiry into whether the FPO serves a compelling government interest (limiting juvenile delinquency) and was narrowly tailored to do so (probably not – it is focused on children but not on married couples, and there is no particular reason why it should only apply to couples married longer than 5 years). If rational basis review applies, the court asks whether a legitimate state interest exists (limiting juvenile delinquency) and if the FPO is rationally related to that interest. In this case, the logical argument about protecting children by avoiding broken homes will likely survive rationality review, but there are countervailing arguments about why divorces are targeted over broken homes more generally, and why the five-year cutoff applies if children of broken homes are the primary focus.

D. As-Applied Challenge

Finally, there is the potential for an as-applied challenge by the Wilsons. They have no children, and therefore would argue that regardless of whether strict scrutiny or rational basis review is applied, the FPO cannot possibly achieve its purpose by preventing them from divorcing.
Sample Answer to Question 3:

Wilson will want to challenge this law on two main levels; substantive due process and equal protection. I will start with substantive due process. The due process clause of the 14th amendment, which includes both a procedural and substantive element, apply to the states. Substantive due process is about everyone’s rights and is usually implicated when the government says you cannot do something unless. In terms of judging a substantive due process claim, first there it must be decided that there is a fundamental right. A fundamental right is one that is deeply rooted in this nation’s history and tradition. If the right is fundamental it will be subject to strict scrutiny while if it is not fundamental it will be subject to the rational basis standard of review, both of which I will explain later. First we must figure out here is fundamental or not. The right that is implicated is a right to get a divorce. Is this right deeply rooted in our history and tradition? Well, Zablocki says there is a fundamental right to marry, so we could say that since there is a fundamental right to marry there has to be a fundamental right to end that marriage, by divorce. In Zablocki, the court held that a statute cannot interfere directly and substantially with the right to marry. This could be seen as such interference because it could serve somewhat as a chilling effect to marriage. Perhaps, someone wants to get married, which they have a fundamental right to, but they see this law and realize what a burden it would be in the event they would want to get divorced. Thus, it could be a substantial and direct interference with the right to marry. However, while marriage is clearly rooted in our history and tradition, is divorce. Several of the tradition religions look down on divorce but also some of them allow it and have allowed it for many years. The court in Roe looked at ancient religion in their history analysis so this is something the court could look at as well. It seems that divorce is not a new revelation could have been allowed in ancient times, which is how Roe looks at the history. Or we can take a more contemporary look, like the court did in Lawrence when it did not look at the past 100s of years like Roe but instead look at the last 50 years and perhaps there is an “emerging awareness” of the acceptability of divorce. In addition, there is also a fundamental right to privacy and the marital relationship is usually considered a part of the privacy right as shown in Griswold. In fact, Justice Harlan in Griswold stated that
there is a right to privacy for married couples. Also, Griswold, Roe, Casey, and Lawrence are in some respects about the control of intimate details about one’s life and divorce is and should be a private detail. It just seems through the combination of a fundamental right to marry and privacy, that a right to divorce would also be fundamental and thus subject to strict scrutiny; however, if the right is not fundamental the law would be subject only to rational basis. Thus, since it is not clear I will look at both standards of review. under strict scrutiny, any regulation limiting fundamental rights may be justified only by a compelling state interest and that the legislative enactments must be narrowly tailored to express only the state interests at stake. The city says the purpose of the law or the state interest is to combat juvenile delinquency by encouraging the development and persistence of strong family units. The Court in Zablocki thought the states interest to help minor children was a compelling state interest, it is likely that this is as well. Combating Juvenile delinquency and possibly future crime is a compelling state interest. Crime control is one of the main objectives of a state. Strict scrutiny is a very high standard and there usually is a presumption that the law is invalid. However, next we must look at whether this law is narrowly tailored those interests stated. I believe this law would fail strict scrutiny as it is not narrowly tailored. Limiting and regulating divorce really has nothing to due with juvenile delinquency. The city tries to rationalize it and say that couples married longer than 5 years are more likely to have kids in the age range that are most prone to juvenile crime but there is no proof or any statistical data whatsoever to back that claim up. Perhaps if there was some it might be different but there isn’t. Also, mandating 6 months of marital counseling for divorced parents and having them fill out a questionnaire every 3 months, not only is burdensome, but has nothing to do with the juveniles and reducing delinquency. How is counseling the parents who are presumably already separated, going to help the juveniles and count down on crimes. Perhaps if they were counseling the juveniles themselves it might be different, but they are not. Just because the overwhelming percentage of juveniles arrested are from 12 to 18 are from broken homes also shows the law is not narrowly tailored because the broken homes could be from divorced parents who were only married for a year or two while this law only focuses on people married longer than 5 years. The law also does not address anything related to age for the juveniles. The law is thus both over inclusive because it
doesn’t distinguish between homes that have kids between ages 12 and 18 and those that do not (although this might present an equal protection problem) and both under inclusive because it only includes people married for over 5 years. Thus it is not narrowly tailored and will fail strict scrutiny. However, lets say the right is not fundamental and thus only needs to pass the rational basis test which is a much less strict standard which requires that the governmental action be rationally related to a legitimate government interest. The court usually gives much deference to the legislature under this standard. Since I have already concluded that the state interest, is compelling, the state interest will then also be legitimate. However, is the law rationally related to the stated state interest. I believe the law would pass under rational basis. However, the one thing that concerns is what councilwomen Z stated that divorce is immoral. This could come back to doom this law because in Lawrence it was clearly stated imposing morality is not a legitimate state interest and would not even pass rational basis. But, hopefully, at least for the city, the court will use the state interest of juvenile delinquency instead. In that sense, the law is rationally related because there is some proof, albeit a bit stretched, that passing this law would cut down on juvenile delinquency. The counseling for the divorced parents could serve as a rational basis because perhaps if we counsel people who get divorced once and possibly had kids that are juvenile delinquents, we can counsel these recent divorcees on not only how to be better parents but also how to make a relationship work where divorce would not be necessary and then kids wouldn’t come from broken homes and perhaps have a less of a chance to become juvenile delinquents. Thus, I do not believe the city was acting irrational and because the court will usually defer to the legislature under a rational basis test, I believe this will pass rational basis. So the outcome on the substantive due process will come down to whether the right is fundamental or not as the outcome under the different standards could make or break this law. Next, the Wilson will want to challenger this law on an equal protection level. Equal protection comes from the 14th amendment and applies to the states. Equal protection is about group rights and singling out one group and making classifications. It is based on discrimination, one group of person cannot be treated better than another group of persons. There are 3 possible standards of review for equal protection depending on the nature of the classification. If the classification involves a suspect class(i.e. race) then the law gets
strict scrutiny. A suspect class was first described in United States v. Carolene Products as a discrete and insular minorities. If the classification involves no suspect class then the law gets rational basis. If the classifications involves gender then the law gets intermediate scrutiny standard of review. For I will look to see if this law involves a suspect class, a suspect class involves any racial classification at all, whether it is benign or not, if its a racial classification it will get strict scrutiny. There are several approaches to see if the law involves a suspect class/race. If the law is facially discriminatory, where it expressly mentions race, it will be a suspect class classification. If the law is facially neutral but being applies in a racially discriminatory way. If the law is facially neutral but has a racially disparate impact. Even if the law is a benign racial classification it will be subject to strict scrutiny. Going through each of these, the law is not facially discriminatory, it does not mention race at all in the law. The law makes no mention of race thus it cannot be benign either, which is usually when it treats one race better like affirmative action. thus the law is facially neutral. there is no evidence that it is being applied in a discriminatory way. For instances, there is no evidence threat the city is only giving divorces to whites or that the clerk of the family court is only giving the paperwork to whites. Thus the only legitimate basis to say that this law involves a racial classification is that it is facially neutral, not being applied in a discriminatory manner but has a racially disparate impact. In order to decide whether there is a disparate impact, it must be shown that the statute has a racial effect and the legislature has a discriminatory purpose. First, I will look at the potential discriminatory effect. According to the findings, even though the city has a relatively equal racial balance between whites and African Americans, since the laws passage 80% of the applicants for a divorce under the FPO have been african american while only 20% are white. This likely shows that african americans are more likely to get divorced after being married for more than 5 years compared to whites, at least in this city. Also, interestingly, african american children ages 12-18 are 3 times more likely to commit the juvenile offense then white kids. This might show an effect in that because of the divorces and broken homes in the african american community, there are more african american children possible committing the crimes, which is somewhat shown by the city’s finding. However, this fact could also show purpose. Also, in the same time frame the total number of divorces (including
everyone) were spilt much more evenly between the races. Thus the fact that when you
limit it to couples married more than 5 years, the spilt shows an 80% to 20% affecting
african americans rather than the 55% to 45% when you include everyone, which is much
more like the racial balance in the actual city. Thus when limiting it to couples married
more than 5 years, it shows a racial impact. However, does it have a racial purpose. I
would point to the fact that Councilmember X said that it always appears to be the same
kids. since we have data that shows that these kids that are getting locked up which is
what the councilmember is referring to, the 12-18 year olds, that african american kids in
that group are 3 times more likely to commit those crimes, it is not a far stretch to say
when he was talking about the same kids, he was talking about the african american kids
as demonstrated by the statistics, which would show a discriminatory purpose.
Councilmember Y also stated that “this part of our community has to be helped.” Again
using the rationale as the I applied to the previous councilmember, it could be inferred
that she was referring to the african american community when Y stated this. In addition,
the fact that the city has a pretty painful past including a tense racial clash about 35 years
ago when the city council was accused of frustrating school integration. While, I highly
doubt it is the same city councilmembers from 35 years ago, the trend does not bode well
as its police department only 10 years ago was the subject of a racial profiling lawsuit.
All this shows a trend that the city might have some sort of a discriminatory purpose.
Thus, if it can be shown that there is a discriminatory effect and purpose the law will be
subject to strict scrutiny. simply showing the effect will not trigger a racial classification.
In applying strict scrutiny, see above for a more defined and detailed analysis of it, but
again the law would still fail as in order to sustain a classification the government must
prove it has a compelling government interest in the subject matter about which it made
the classification and that it has narrowly tailored its classification to fulfill that interest. I
have already concluded that the interest was compelling but here the state had not
narrowly tailored its classification, if the law was a narrowly tailored it would have had
something to address the issue regarding the group of children the city claims are 3 times
more likely to commit juvenile crimes. If it is concerned with juvenile delinquency and
the concern is the “same group of kids” (the 12-18 year old african american kids) then
why it is not addressing that groups kids? thus the law is not narrowly tailored. However,
lets say that the law fails s a suspect class classification, since it does not involve gender, it would be subject to a rational basis standard or review. However, the challenge would then switch from an equal protection challenge based on race to an equal protection challenge of treating couples married for more than 5 years differently than couples married for less than 5 years. Since couples married more than 5 years is not a suspect class it would only have to pass rational basis but it still is an equal protection challenge nonetheless. In this event, I believe that again just like above in due process, the law would pass the rational basis test as the court gives great deference to the legislature. As described above, there is a legitimate governmental interest and its would be rationally related in this context as the city claims that couples married longer than 5 years are more likely to have children in the 12-18 year range that are most prone to juvenile crime than coups married recently or unmarried couples. Although there are no statistical finding on this, the court is going to defer to the legislature. The counseling, the waiting period, the questionnaire all seem a bit excessive and burdensome and it could certainly be argued that these are not rationally related; however, given the deferential approach taken under this standard, if the law is not classified as a racial classification and thus subject to rational basis, it will likely meet that standard of review. Additionally, if I were the Wilson, I would attempt to challenge this law on the substantive due process level first rather than equal protection because if an act were struck down on equal protection grounds, it might be possible for the government to enact the same substantive regulation but to do so in a broader basis. On the other hand, a ruling on substantive due process grounds would make any government regulation in the area far more difficult. The court in Lawrence was worried about this which is why they ruled on that case on a due process grounds rather than an equal protection ground; the court could do the same here.