To: Students in Con. Law III
From: Barack Obama
Re: The Exam

Overall, I was impressed with the quality of the exams'- almost all of you identified the main issues, leaving me to score the exams mostly on the precision of your answers. The memo below gives you a basic idea of the analysis I was looking for in grading the exams, as well as some of the thoughts that you may have raised and for which I assigned appropriate credit. This memo isn't intended to be exhaustive (although it is more comprehensive than I would have expected from any exam, given the time limits you were all working under); there may be issues that some of you identified that represent sparkling insight and for which you were awarded credit, but which are not included in this memo.

Each exam should have four grades on the cover. The circled grade is the "official" grade. The other three grades are by part: that is, Part I, and the two parts of Part II. These latter grades are basically provided for your information, but they do not necessarily average out to your final grade, since the final grade took the curve into consideration.

Question I - The Preserving Family Values Act

There are a number of possible claims available to Helen under both the Equal Protection Clause and the "substantive" prong of the Due Process Clause. In organizing a response to the question, it's useful to examine each component of PFVA in turn.

<u>The prohibition against providing infertility services to unmarried persons</u>. The first two clauses of PFVA bar both private and public doctors and hospitals/clinics from providing infertility services to unmarried persons. As most of you recognized, the question at the outset is what degree of scrutiny a court should apply in evaluating the classification between married and unmarried persons.

With respect to a possible Equal Protection claim, the courts have never recognized unmarried persons as a "suspect class" (nor, possibly, should they, according to many of you, at least not if we accept the Carolene Products/Professor Ely/processual view of the Equal Protection clause as "protecting discrete and insular minorities"). As a consequence, strict scrutiny of the unmarried/married classification under the Equal Protection clause will arise only if we can establish that the PFVA's prohibition against providing in vitro fertilization implicates one of the rights that the Supreme Court has deemed "fundamental."

At first blush, the PFVA seems clearly to implicate such a right: the right to procreate first announced in Skinner v. Oklahoma. It is true that Skinner involved an active attempt by the government to sterilize persons it deemed unfit to procreate; as such, it involved the sorts of violations of a person's bodily integrity that have traditionally been suspect not only under long-standing interpretations of various clauses in the Bill of Rights (4th, 5th, 8th, etc.), but under common law as well. In contrast, the PFVA involves no such encroachments on bodily integrity.

Nevertheless, if the language of Skinner is taken at face value, then the fundamental right at stake in that case goes well beyond issues of bodily integrity, but instead involves the broader principle that the government cannot be in the business of deciding who should bear children and who should not - at least without offering up some pretty compelling reasons for doing so. If we accept this broad reading of Skinner, then it would appear doubtful that the distinction between the more "active" efforts to sterilize persons selectively and more "passive" but no less selective prohibition on the use of readily available technology to induce fertility should be legally relevant, at least for purposes of answering the threshold question of whether strict scrutiny does or does not apply.

Assuming that a court finds Skinner to be directly on point, and therefore applies strict scrutiny to the PFVA, then the next step in our analysis is determining whether the PFVA is narrowly tailored to serve a compelling state interest. My guess is that the PFVA does not meet such a standard. While it is true that the Court has found the state to have anlegitimate interest in preserving the state-sanctioned marriage union (see, e.g., Michael H.), the Court has never indicated such a generally stated, inchoate interest to be sufficiently compelling so as to justify an outright ban on the exercise of a constitutionally protected right.

Moreover, as most of you pointed out, the connection between restricting infertility services to married couples and "preserving the integrity of marriage" is so tenuous that it cannot be considered a narrowly tailored means of serving that interest. Similarly, although preventing out-of-wedlock births might be considered compelling given the correlation between such births and various social problems, the state has at its disposal a wide range of means to discourage such births (e.g. programs to encourage contraception, abstinence, etc.) that do not involve far-reaching restrictions on the ability of unmarried persons to access infertility services.

Of course, Skinner doesn't end our inquiry. In cases subsequent to Skinner, the Supreme Court has grounded its analysis with respect to reproductive rights issues not on the Equal Protection Clause, but rather, in the "substantive" prong of the Due Process Clause. Moreover, in an attempt to cabin the potential breadth of unenumerated rights under the Due Process Clause, the Court has left the status and scope of the "procreation right" increasingly unsettled.

Thus, on the one hand, the line of cases from Griswold through Roe seems entirely consistent with our broad reading of the "right to procreate" discussed above. Starting with a relatively narrow opinion in Griswold that relies heavily on the concept of marital privacy, the Court went on in Eisenstadt to announce "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In Roe, the Court found this right sufficiently fundamental that any burden the government places on the right must be subject to strict scrutiny. Based on these cases, one might safely assume that if the right to make reproductive decisions free from unwarranted government intrusion is sufficiently expansive to encompass an unmarried woman's freedom to purchase contraceptive or terminate her pregnancies, then it must also encompass Helen's right to access available medical technology in an effort to get pregnant.

On the other hand, both the language and results in substantive due process cases since Roe indicate a potential narrowing of this right in at least two ways. First, in a number of cases involving the regulation of abortion (e.g. Casey), the Court appears, at least implicitly, to have moved away from the familiar (and perhaps unduly rigid) "fundamental rights/strict scrutiny" approach to analyzing these claims, and has instead resorted to what seems to be a more fluid and particularized balancing of individual liberty interests versus the interests the state seeks to vindicate and the means it employs.

How much of a difference such a "balancing" approach might make in a court's evaluation of this case isn't clear, however. After all, even under a balancing of interests analysis, a court would probably feel compelled to recognize that Helen has some sort of interest in determining her procreative status, irrespective of whether that interest is labeled "fundamental." On the opposite end of the scale, the State, in passing PFVA, has offered no interest that is remotely comparable to the state's interest in protecting the life of the fetus. Moreover, if we take the analogy between abortion regulation and in vitro regulation one step further, and assume that even under a balancing approach a court must still strike down restrictions that "unduly burden" the exercise of a right/interest, then it is hard to conceive how an outright ban on the exercise of Helen's right/interest in having children could survive judicial scrutiny.

The second, more troubling, issue involves the Court's tendency, in cases since Roe, to embrace notions of "tradition" as a means of curtailing the potential expansiveness of rights recognized under the Due Process Clause. As most of you recognized, this trend is most prominently displayed in Bowers v. Hardwick, but can also be seen in the Michael H. case, a case in which Justice Scalia argued that constitutionally protected substantive rights under the Due Process Clause must be defined at their most specific, traditionally recognized level. As applied to this case, Justice Scalia's approach might result in a relatively narrow description of the right to procreate, i.e. the right to bear children within the context of a monogamous, heterosexual marriage; in that case, the PFVA would be subject only to rational basis review.

Helen has several possible answers for Justice Scalia. First, Helen can point out that the majority of the Court has never explicitly embraced Justice Scalia's cramped approach to defining the scope of rights protected under the substantive Due Process Clause. Indeed, such an approach, while consistent with Bowers, would be almost impossible to reconcile with the contraception and abortion cases. Second, the absence of any clear tradition with respect to in vitro services for single women cuts both ways: while there may be no clear tradition establishing the right to obtain such services, there is also no clear tradition of preventing single women from obtaining such services - something that could not be said with respect to the tradition of criminalizing homosexual sodomy. Third, Helen might argue for a narrow reading of Bowers, noting the Court's emphasis in that case on the absence of a connection between homosexual sodomy and "family, marriage or procreation"; in contrast, the connection between Helen's ability to access in vitro services and her ability to bear children in both obvious and direct.

Finally, as a fallback position, Helen might argue that the "fit" between the PFVA restrictions as applied to unmarried persons, and the purported state interests in preserving the institution of marriage and preventing out-of-wedlock births is so poor that the PFVA does not even survive rational basis review under the Equal Protection Clause. After all, the number of persons utilizing in vitro fertilization is so small that the PFVA can have a meaningful impact on the marital and reproductive decisions of only a negligible number of persons; with the vast majority of unmarried persons still free to have children out of wedlock, the statute must be considered grossly underinclusive. Conversely, if the state's true interest is to avoid the public welfare costs associated with supporting single mothers and their children, then the means it has chosen might also be considered overinclusive, at least insofar as it sweeps in heretofore self-supporting persons like Helen.

Of course, the more rigorous the level of rational basis review a court engages in (recall that Eisenstadt was supposedly decided under rational basis review), the more the court would appear to be engaging in heightened scrutiny - an indication, as some of you suggest, that courts do not use the tools of Equal Protection or substantive Due Process doctrine (i.e., three, tiers of judicial scrutiny, or the distinction between ordinary "interests" and "fundamental rights") to guide their analysis, but rather, use these labels to justify, after the fact, what are inescapably decisions based on policy calculation, ethical and political considerations, and the idiosyncratic values ofparticular justices.

Prohibition against providing in vitro services to homosexuals. The question here involves analyzing the degree to which PFVA more closely resembles the classifications at issue in Romer or Bowers; or, to state the problem a bit differently, evaluating the degree to which Romer modifies Bowers.

As almost all of you recognized, despite some persuasive arguments by the 9th Circuit in Watkins, the Supreme Court has never recognized homosexuals as a suspect class for equal protection purposes. Indeed, although the Court in Bowers did not explicitly pass on the equal protection claims raised in that case, its willingness to uphold

a statute criminalizing homosexual sodomy, while reserving the issue of whether heterosexual sodomy could be similarly criminalized, seems tantamount to stating that laws which discriminate against homosexuals are constitutional. The same conclusion can be drawn from the Bowers opinion's substantive due process analysis: not only does the Court define the right of privacy so narrowly (based on the sort of "traditionalist" reading discussed above) that the private, consensual sexual conduct at issue in the case falls outside its ambit, but the Court goes on to say that a majority's interest in expressing its moral distaste for homosexual conduct is, by itself, a sufficiently legitimate purpose for passing such discriminatory legislation.

We've discussed above whether Bowers forecloses the possibility of a finding that the PFVA encroaches on one of Helen's fundamental rights. If a court finds the right to procreate encompasses the right to obtain in vitro services, then it shouldn't make a difference whether Helen is gay or straight - strict scrutiny should apply, and, according to our earlier analysis, at least, PFVA will be struck down.

A more interesting question arises if we assume that a court rejects Helen's claim that a fundamental right is at stake, and instead chose to subject PFVA to rational basis review. The recent Romer opinion may not overturn (in fact, it doesn't even mention) Bowers, but it nevertheless indicates that even under rational, basis review, the Equal Protection Clause does not permit classifications based merely on a majority's "distaste" of a particular group - at least not insofar as the classification is not merely directed at the group's ability to engage in particular conduct that the majority finds disturbing, but rather, is "class legislation" that potentially disadvantages the group in a range of activities unrelated to any particular conduct.

If this is an accurate reading of Romer, then it shouldn't be hard for Helen to argue that the PFVA is in fact such noxious class legislation. After all, in the absence of any showing by the State of Wazoo that the PFVA, as applied solely to homosexuals, either strengthens marriage or prevents out-of-wedlock births in any statistically meaningful way, Helen could argue that the only conceivable purpose of the law is to harass and stigmatize homosexuals.

Helen's argument isn't a slam dunk, however, given the remarkable opacity of Justice Kennedy's opinion in Romer. In particular, it is possible to argue that what triggered the "rational basis review with teeth" engaged in by the Court in Romer was not the mere fact that the Colorado amendment targeted homosexuals, but rather, was the unconfined breadth of the Colorado amendment's potential application. In line with this more limited reading of Romer, the State of Wazoo might argue that unlike the Colorado amendment, the PFVA does not sanction discrimination against gays solely because of their status, nor does it discriminate (or potentially discriminate) against them across the board (e.g. in their possibility of obtaining employment, housing, receipt of government services, etc.). Rather, the State of Wazoo might argue, the PFVA is narrowly directed at a particular form of conduct: namely, the rearing of children by homosexual couples, a form of conduct that the majority of Wazoozians find morally objectionable, in precisely

the same way that the majority of Georgians in Bowers found homosexual sodomy to be objectionable.

Which spin on Romer the Court might adopt is anybody's guess. What is safe to say is that the views of particular justices on the desirability of rearing in children in homosexual households would play a big part in the decision.,

Restricting state health care plan coverage of infertility services to married, heterosexual couples. The final clause of the PFVA restricts the coverage of in vitro services under the state health plan to married, heterosexual couples. Most of you correctly identified the relevant cases here: in Maher and Harris, the Supreme Court ruled that the federal government was not obliged to fund abortions under its Medicaid program, even though the Medicaid program did cover pregnancy services. Both decisions rested on several related premises: 1) while the government may not unduly burden the exercise of a fundamental right like abortion, it is under no affirmative obligation to fund ("subsidize") the exercise of that fundamental right (allowing for certain narrow exceptions involving criminal trials, etc.); 2) classifications based on wealth do not trigger strict scrutiny, even when they implicate a person's ability to exercise fundamental right; and 3) the fundamental right to make reproductive decisions free from unwarranted government intrusion does not mean that the government cannot subsidize, and thereby preference, some choices (e.g. pregnancy) over others (e.g. abortion).

At first blush, at least, the analogy between the abortion funding cases and this case seems fairly straightforward. First, it is clear that even if a court defines the right to procreate broadly enough to encompass Helen's desire for in vitro services, and proceeds to strike down the PFVA under either the Due Process Clause or fundamental-rights prong of the Equal Protection Clause, the State of Wazoo remains under no constitutional obligation to subsidize any in vitro services if it doesn't want to. It seems equally clear that if the State of Wazoo chooses to subsidize some constitutionally protected activities related to procreation (say, providing both coverage for pregnancies and abortions, but not providing in vitro coverage), there is nothing in the Fourteenth Amendment to prevent them from making that choice.

What a number of you missed, however, is the question really at issue here: namely, whether the State of Wazoo can choose to subsidize some of its residents (married persons) in the exercise of a constitutionally protected activity (in vitro fertilization), while choosing not to subsidize other residents (unmarried persons, or homosexuals) in the exercise of that very same activity. In other words, the analogous situation in the abortion context is not where the state chooses to subsidize pregnancy, but fails to subsidize abortion; rather, it is where the state chooses to subsidize abortion for black women, say, but not for white women.

Of course, the analysis here isn't quite that simple, since - as we've discussed above - neither unmarried persons nor homosexuals are considered a suspect class. It is

therefore conceivable that a court might strike down the PFVA solely due to the fact that the statute infringes on a fundamental right, while at the same time upholding the funding classification under the most deferential form of rational basis review. Nevertheless, what is important to keep in mind is that the same "rational basis with teeth" arguments that are available in evaluating the constitutionality of the first three clauses of the PFVA are equally available here, and are not foreclosed by Maher or Harris.

Gender claims. A number of you mentioned the possibility of raising a gender claim on Helen's behalf, based either on the notion that only lesbians would have any need to resort to in vitro fertilization (presumably a male couple would need not so much in vitro services as they would a surrogate mother) or based on a broader theory that the PFVA reinforces gender stereotypes by coercing people into a nuclear family norm.

The problem with the first approach is that the statute itself is facially neutral with respect to gender, and under cases like Feeney and Geduldig, Helen might have a hard time convincing a court that the Wazoo legislature passed the law with the intention of discriminating against women as a class. Similarly, while it is true that some of the language in the abortion cases (e.g. Casey) and the gender cases suggests some sensitivity to the relationship between marriage norms and the gender hierarchy, it has never gone so far as to suggest that marriage itself, as an institution, oppresses women; to strike down the PFVA on that basis would call into question almost any statute - e.g. family laws, property laws, estate law, tax laws - that privilege marriage over other forms of intimate relations, something that the Supreme Court is not likely to do anytime soon.

Question IIA - Mayor Dwight's Contracting Plan

Most of you correctly identified the threshold issue here: does the Mayor's contracting plan constitutes a race-based affirmative action program? If the program is race-neutral, then it should be subject to only rational basis review under the Equal Protection Clause; under rational basis review, the program would almost certainly pass constitutional muster, since it appears to be rationally related to the legitimate government purpose of alleviating poverty, encouraging employment, and promoting business relocation in low-income communities. If, on the other hand, the program is held to be a race-based affirmative action program, then Mayor Duright will have an uphill battle having it upheld in the face of an equal protection challenge.

In answering this threshold question, some of you jumped the gun a bit and simply declared the low-income classification contained in the Mayor Duright's plan to be a thinly-veiled proxy for race. Although the hypothetical certainly offers some evidence for this conclusion, this is not the type of situation that existed in Yick Wo or Gomillion where the law is neutral on its face but "unexplainable on grounds other than race." (Arlington Heights). Nor are we dealing with the type of program at issue in Adarand, which purported to provide preferences to contractors who suffered from socio-economic disadvantage, but then made the irrebutable presumption that any contractor who was a

member of a minority group fell into this economically disadvantaged category; the Mayor's plan carries with it no such presumption. Thus, any potential challenge to the plan would have to be evaluated under the familiar standard first set forth in Washington v. Davis for cases involving racially disparate impact - i.e. in order to invoke strict scrutiny under the Equal Protection Clause, the plaintiffs would have to show that the Mayor's plan, while racially neutral, intentionally discriminates against whites.

In making their argument, the white contractors might point to various factors that the Supreme Court, in Arlington Heights, says may support a claim of invidious discrimination: for example, the sequence of events leading up to the plan (a black mayor is elected in a racially polarized election) and the substantive departure in the manner in which HOPE contracts are being awarded relative to other contracts are allocated. The problem that the white contractors face, however, is that despite the lip service that the Court has given to such "circumstantial evidence" in making an invidious intent determination, the case law indicates that it rarely, if ever, finds such circumstantial evidence, standing alone, to be sufficient (see, e.g., the result in Arlington Heights itself, where the Court ruled against black plaintiffs challenging exclusionary zoning).

Moreover, according to cases like Feeney, the mere knowledge on the part of the Mayor and his staff that the proposed plan disproportionately benefits blacks and disadvantage whites does not, by itself, prove invidious intent. Rather, the white plaintiffs will have to show that the Administration implemented the plan because of, and not merely in spite of, its disparate impact on whites.

What does it mean for the government to pass a law because of, rather than merely in spite of, it racially disparate impact? If it means (as cases like Arlington Heights and McCleskey seem to suggest) that the government must be motivated by an active animus towards the group to be disadvantaged by its action, then Mayor Duright can plausibly -- and perhaps sincerely -- answer that neither he nor his administration harbor such animus towards whites; they are simply interested in promoting opportunities for residents of poor communities, a disproportionate number of whom happen to be black

Alternatively, the white contractors might argue that the "because of' test simply requires a showing that the government, though its actions, seeks to benefit a particular racial group, as a group, instead of allocating rewards and burdens on the basis of some objective, non-racial standard like "merit." Assuming; however, that the Mayor's proposal will in fact utilize "objective measures" such as median income or firm location in determining who receives the benefit of a "plus factor" in the 'allocation of contracts, then there appears to be nothing which prevents white contractors from benefiting from the program -- other than, perhaps, their own unwillingness to relocate into "low-income" communities or hire "low-income" workers. The mere fact that there is a strong correlation between race and the objective measure being used (in this case, "low-income" status) can't be sufficient to show intent (see, e.g., Justice O'Connor's concurrence in Hernandez); if it were, then black plaintiff could presumably sue a city or state whenever - under the guise of urban planning or industrial development - those

governmental bodies subsidized firms to locate in downtown or suburban areas that happen to contain no black residents.

Thus, it would appear that under current Equal Protection doctrine, white plaintiffs would have a very difficult time proving that the Mayor's plan is based on an invidious intent to discriminate against whites - a telling example, perhaps, of why an "intent" test is not a particularly fruitful means of analyzing disparate impact claims in a society where the socio-economic disparities between the races are so stark, pervasive, and deeply-rooted.

Our analysis would be incomplete, of course, if we didn't at least consider the possibility that a court might find the Mayor's program to be a race-based affirmative action program. If that case, Supreme Court precedent under Croson and Adarand would require the court to subject the program to strict scrutiny; the fact that the program might be described as a "benign" racial classification would be irrelevant (Recall that Adarand resolves the issue, left open in Croson, as to whether courts must use a more deferential standard in evaluating federal, as opposed to state/municipal, programs. The answer is no. As a consequence, the fact that the HOPE program is federally funded is irrelevant to our analysis).

Despite Justice O'Connor's insistence in Adarand that strict scrutiny is not necessarily fatal, both Adarand and Croson indicate that race-based affirmative action programs are permissible only when narrowly tailored to remedy specific, documented instances of current or prior discrimination. Most of you did a good job evaluating the various factors in the hypo that might help or hurt the Mayor's cause. On the plus side, the proposed program a) is of limited duration; b) provides for a "plus factor" rather than strict quotas or set-asides, and thus still allows for both individualized determinations and competition across racial lines; and c) creates a diffuse, rather than a localized, burden on white contractors (at least theoretically - it is possible, of course, that the program drives some smaller white contractors out of business). Some of you also mentioned the race-neutral language in which the program is framed as being relevant to the analysis under strict-scrutiny -- but if we are evaluating the program under strict scrutiny, then presumably the court has already decided that the program is not really race-neutral.

On the minus side, the evidence of past or current discrimination - or at least tacit acceptance of discriminatory practices in the contracting industry -- by the City is, at this point, at least, to tenuous to meet the rigorous standards of proof called for in Croson. The statistical disparity between certified black contractors (5%) and contracts awarded to black contractors (1%) is 'a useful starting point: as most of you pointed out, one of Croson's central holdings is that only disparities between the number of contracts awards to minorities and the number of qualified black contractors can serve to justify an affirmative action program in contracting (disparities between the percentages of contracts awarded and the percentage of minorities in the general population are not relevant, according to Justice O'Connor, no matter how gross the disparities may be).

Nevertheless, Croson and Adarand clearly indicate that bare statistics are only a starting point unless they can't be explained as resulting from factors other than race. In her opinions, Justice O'Connor is somewhat vague on what additional evidence does provide a firm basis for a race-based affirmative action program (other than some sort of "smoking gun" indicating intentional discrimination on the part of recent administrations in awarding city contracts). What we do know is that evidence of "societal discrimination" of the sortcurrently available to the Mayor won't fly with the Court; according to Justice O'Connor, such evidence does not provide any principled means by which to define the precise scope of injury sought to be remedied. Thus; too the extent that the Mayor is interested in designing a program that can withstand strict scrutiny, he better get cracking in search of more hard evidence of past discrimination in the contracting industry or in the dispensing of city contracts.

Question IIB - Mayor Dwight's Firefighter Plan

This question offers a slight variation on the issues raised by the Mayor's contracting plan.

The surface parallels between our hypothetical and the fact pattern in Washington v. Seattle School Board should have been relatively easy to spot (Some of you also cited Romer, which isn't quite right - it was the lower court, and not the Supreme Court, that emphasized the "government restructuring" aspects of the Colorado initiative. Still, I gave you credit if your analysis tracked the discussion below, albeit citing the wrong case). Like the voter initiative in Seattle, the referendum being proposed by the union appears to single out an issue of special interest to blacks - in our case, fire department hiring practices -- and attempts to shift decision decision-making power over that issue from the local to the state level. According to Seattle, the fact that a state has the authority to make such a shift isn't be relevant; a restructuring of the political process to make passage of "race legislation" more difficult than other forms of legislation places "special burdens on racial minorities within the governmental process," in violation of Equal Protection Clause.

But is the Mayor's plan in fact legislation/decision-making of a "racial nature" as that term is used in Seattle? And, even if the Mayor's plan can be considered "racial" in nature, does that automatically render a facially race-neutral referendum that disallows the plan a "racial classification" subject to strict scrutiny?

These are tricky questions, mainly because Justice Blackmun's opinion in Seattle lends itself to at least two very different readings. On the one hand, it is possible to argue that for all its fancy talk about government restructuring and democratic processes, Seattle is really just a straight-forward disparate impact case that was settled using the principles set out in Washington v. Davis. Under this reading, the Seattle School Board's busing program was an explicitly raced-based effort to vindicate the rights of black schoolchildren to .a non-segregated education. By forbidding busing to achieve this explicitly racial purpose (while still permitting busing for various non-racial reasons),

Initiative 350 disproportionately impacted black schoolchildren; and although the initiative may have been framed in race-neutral terms, the Court determined -- based on the sequence of events, the initiative's alteration of normal procedural. practices; and so on., (i.e., the Arlington Heights factors discussed above) -- that the initiative was enacted "because of' and not "in spite of' its adverse effect on black schoolchildren.

If this reading of Seattle is correct, and the facially race-neutral referendum being proposed by the union is simply subject to the Washington v. Davis test for intentional discrimination, then the Mayor will have real problems mounting a successful court challenge. After all, not only is the referendum written in non-racial terms, but the Mayor's plan is also facially race-neutral.

The Mayor might argue, of course, that although written in race-neutral terms, his plan really benefits blacks, and that the union's referendum is therefore an act of intentional discrimination designed to keep the City's Fire Department predominately white. But given the fact that the referendum appears to uphold the very principles of "merit through testing" that the Court in Washington v. Davis found to be so persuasive, it is hard to imagine that a court in this case would be willing to find that the voters of Wazoo voted to uphold such principles "because of," rather than "in spite of' its effect on future black hiring (as a number of you pointed out, examining a referendum under Washington v. Davis also raises serious issues regarding whose intent we are suppose to examine). The fact that the current test being used appears to have been "validated" through the consent decree process further weakens the Mayor's argument. Indeed, in light of the court's acceptance of testing as a legitimate means to measure merit and upgrade the workforce (were dealing here only with Equal Protection doctrine, and not Title VII law), it is conceivable that a court would sooner find the Mayor's effort to change the testing procedure to be an impermissible affirmative action program than it would strike down the referendum as an impermissible racial classification.

There is another, no doubt more controversial way to read Seattle. The argument would go something like this: Seattle recognizes that blacks are burdened not only by intentional racism, but also by facially neutral processes that nevertheless place blacks in a structurally subordinate position. Thus, anti-discrimination legislation of the type at issue in Hunter v. Erickson (in that case, a fair housing ordinance) is not the only type of legislation that is "racial" in nature; blacks may also seek to extract through the political process affirmative programs - like the voluntary busing program in Seattle - that may not be constitutionally required, but that nevertheless help alleviate structural inequality. Precisely because such affirmative programs are not constitutionally required (given the Court's "negative charter of liberties" reading of the Constitution and theories of judicial restraint), a majority of voters may choose not to enact such programs, and may even choose to repeal those programs that the majority feels have outlived their usefulness. What the majority cannot do is to change the rules of the game so as to make it more difficult for blacks and other minorities to achieve such affirmative programs through the give and take of the democratic process - by resort, for example, to state-wide initiatives and referendums in which minority influence is lessened.

If a court were willing to accept such a reading of Seattle, then the Mayor might have a chance at defeating the referendum. The Mayor could argue that once you get beyond certain baseline constitutional requirements of fairness - i.e. no outright discrimination on the basis of race, gender, religion, sexual orientation, etc. -- there are no pre-political, non-racial, "legitimate" ways to select a tire department or determine "merit." The Mayor's plan is "racial" in the sense that it represents an affirmative effort to increase black representation on the police force without resorting to quotas or lowering standards of performance; at the same time, it is no more racial than is the union's plan to maintain the status quo through a regime of written examinations. The union is free to debate the pros and cons of the Mayor's plan in the public square; it can put pressure on the City Council to block the Mayor's proposal, and can organize to vote the Mayor out of office. What it cannot do is shift decision-making over these racially-charged issues to the state level, where (we assume) blacks have less of political clout.

There are problems with this argument, of course, the most obvious being the one that was raised by the state in Seattle - namely, if the "rules" of democracy in a given state include the possibility of state-wide initiatives and referendums, and if the "rules" of democracy also envision the state imposing its sovereign will on local governments within its borders, then in what sense does the initiative in Seattle, or the referendum in our hypothetical, change the rules of the game? If states and their voters can't decide, through democratic processes sanctioned by that state's constitution, to take certain decisions that happen to touch on race out of the hands of localities, then is there any limit to the state legislation that might be potentially overturned? To cite just one example, how do we evaluate state legislation that places property tax caps on localities? Such caps prevent localities from raising taxes to fund public schools beyond a certain level without a majority vote, and presumably has a disproportionate impact on black populations that are both younger and more likely to rely on public, as opposed to private, education. Are they unconstitutional under Seattle?

The bottom line is that such an expansive view of Seattle would implicitly overturn the intent-based approach to evaluating racial issues embodied in Washington v. Davis. My personal guess is that the current Supreme Court would almost certainly shy away from such a reading of Seattle. Of course, we won't have to guess on the Court's position for long, since it is precisely these sorts of arguments that will come up in the current challenge to California's Proposition 209, which bars state government from engaging in any form of affirmative action.