SUGGESTED ANSWER OPTIONS,
P SC 104D FINAL, PART I, QUESTION A:

[Note: As noted on the Fall 2012 Midterm scoresheet, where a statement had two opposing "facets," the best answers generally gave one example for "one facet" and one example for the "other facet"]

Statement 1:

--Bush *majority tried to limit reach of its holding:*
**The opinion said "our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities."
**The opinion then distinguished the Bush question from the ? "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." (The majority emphasized that the Florida challenge was "a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards" and failed to assure even the "rudimentary requirements of equal treatment and fundamental fairness."
--Yet later election challenges show litigants trying to use holding for own goals:
**In Southwester Voter Registration Education Project v. Shelley, opponents of the special election to recall Governor Gray Davis argued that use of obsolete voting technology in some heavily-urban and minority jurisdictions (but not elsewhere in the state) would lead to a higher error rate in these jurisdictions, in violation of *Bush.* (Indeed, before they were overruled, a three-judge 9th Circuit panel found the claim to present "almost precisely the same issue as…in *Bush*"). The challengers sought to protect minority (and probably Democratic) voting power, and likely sought to slow or stop the momentum to elect Arnold Schwarzennegger.
**In Summit County Democratic Central and Executive Committee v. Blackwell, clearly partisan challengers sought to use (in part) an Equal Protection theory to argue that Republican-party plans to send special voter challengers to certain heavily Democratic and minority polling places were unconstitutional.
**In Obama for America v. Husted, challengers representing the Democratic presidential candidate and the Democratic party challenged restrictions on early voting under a *Bush*-type Equal Protection theory; the majority opinion cited *Bush* and noted that the restrictions would disproportionately restrict women, older voters, lower-income and –education voters, and African-American voters (all of whom were more likely to vote Democratic and might swing the election in the "battleground" state of Ohio).
**In Service Employees Int'l Union v. Husted, similar pro-Democratic and pro low-income and minority-voter organizations challenged Ohio's refusal to treat "wrong place/wrong precinct" voters on the same basis as "right place/wrong precinct" voters. (Although the opinion does not clearly specify the legal basis for the challenge, drawing distinctions among seemingly situated voters is the essence of a challenge under Equal Protection, the basis on which *Bush* was argued.)
[NOTE1: Although this is a minor error in the context of this class, the challenges in Sandusky County Democratic Party v. Blackwell were not as good an example, because they turned not on Equal Protection (the theory in *Bush*), but on the application of the Help America Vote Act (HAVA), enacted AFTER *Bush* was decided. NOTE 2: The Pennsylvania voter-ID cases lectured on in class were not a good example, because they turned on Pennsylvania state law, and not federal Equal Protection theory.]

Statement 2:

--Some Factors for Non-Full Implementation Apply Equally to Judges and Non-Judges:
--(Carp, pp. 375-376) Lack of clarity in the Court's own opinion, due to
**a fractionalized Court (e.g., failure of a majority to agree on any one position; may be multiple concurring and dissenting opinions)
**a vague mandate (EX: Brown II – desegregate "with all deliberate speed")
**a multi-factor balancing test that is indeterminate (EX: the "totality of the cirumstances" test for determining whether a search is legal) or especially fact specific (EX: community-based decency standards for obscenity)
**compromise opinions between multi-member judges (Carp., p. 377)
--In general, there is usually great discretion in how a Court precedent applies to the next phase of a case (EX: Atkins decision requiring lower court judge to decide how to apply to particular defendant; Carp, pp. 378-379); both judges and non-judges alike can exploit this discretion
--Both judges and non-judges have policy preferences which may be at odds with those reflected in a Court opinion (Carp., p. 379 for judges; pp. 386-87 for non-judicial officials)

--In general, there is no systematic procedure for communicating Court decisions to lower courts or non-judicial officials (Carp., p. 377)

--*Other Factors vary in Application to Judges vs. Non-Judges*
--Judges are more likely to find that jurisdictional requirements (including "justiciability" doctrines) preclude them from applying or considering the implementation of a Court decision; non-judicial officials are not bound by these restrictions
--Even though there is no systematic procedure for communicating Court decisions to lower courts or non-judicial officials (Carp., p. 377), lower-courts are more likely to be able to rely on litigating lawyers (in cases before them) and law clerks to call the judges attention to new relevant rulings (Carp., p. 377-78); even though political officials have legal advisers, the calling attention function is more hit or miss
--Judges (especially federal judges) have professional norms stressing following precedent and honoring higher-court decisions; Non-judicial/political officials lack these professional norms (and may have greater political pressures to cave to popular opinion and undermine Court rulings)
--Non-judicial officials (e.g., school-board members, principals, individual prosecutors and police officers) have "front-line" influence on implementation of Court decisions with individuals; these decisions are largely unsupervised by judges (or only years later…); so in a very real sense, non-judges' compliance has more pervasive effect (EX: Mixed police compliance with *Miranda* decision)
--Other?

Statement 3:
***Some Ways for Controlling the Federal Judiciary (or At Least Limiting its Influence) Common to Both Legislators and the President:*
--FILLING VACANT APPOINTMENTS: The President can appoint, and the Senate can try to confirm, judicial nominees who they think will decide issues in ways different from disliked opinions/trends
--PACKING THE COURT (? but is it constitutional): Arguably, Congress and the President can pass legislation adding justices to the Court to give the president and the Senate more control over the Court majority's direction
--PASSING COURT-STRIPPING LEGISLATION: By taking certain subjects off the agenda of the Supreme and/or lower-federal courts, Congress and the president can change the direction of decision-making on controversial subjects (e.g., proposals passing one house of Congress to strip courts of jurisdiction over same-sex marriage)
--AMENDING THE CONSTITUTION TO CHANGE COURT DECISIONS; four amendments did this (Carp, p. 383)
--CHANGING STATUTES to alter court statutory interpretations.
--CRITICIZING JUDGES INDIVIDUALLY OR COLLECTIVELY ("Activist Judges")
--REFUSING (OR SLOWING) JUDICIAL PAY INCREASES to "send a message"
--DECIDING how many employees and $ will be devoted to ENFORCEMENT of Court decisions
--Other?

***Some Ways for Controlling the Federal Judiciary (or At Least Limiting its Influence) Possessed by Only One Branch:*
[NOTE: *Some of the above answers can legitimately be put here, by more precisely dividing the authority in question. For example, one could say that only the Congress passes court-stripping legislation, while the president plays a subsidiary role in vetoing or signing it…*]
--The President determines how thoroughly the Justice Dept. and other law executors within the executive branch ENFORCE court decisions in their daily decisions
--The President can on his own PARDON persons convicted in federal court
--Only the Congress IMPEACHES federal judges (with the House impeaching and the Senate convicting)
--Only the Congress can hold OVERSIGHT HEARINGS on the judiciary or to shine a light on ?able judicial decisions
--Other?

SUGGESTED ANSWER OPTIONS, P SC 104D FINAL, PART I, QUESTION B:

Pair 3: (Lower-federal-court and state-court judges defying (i.e., flatly refusing to follow) U.S. Supreme Court decisions /// These judges narrowly interpreting (or finding technical reasons for avoiding) U.S. Supreme Court decisions)

--Outright defiance of Supreme Court decisions is very rare (Carp, p. 380; see examples in Carp, pp. 296 re Judge Mize and Baum of Judge Tumkovich, p. 199, and Judge Schwarzer, pp. 189-190, who all criticized, but then implemented, Supreme Court decisions); narrow interpretation or technical avoidance is a regular occurrence (indeed, it may be even more frequent among state-court judges who may feel less a part of the "same" legal system as federal judges and whose greater susceptibility to political/electoral influence may give them more incentive to distance themselves)
--(Related) There are professional norms/socialization (see Carp. p. 296 and p. 380) and sanctions against outright defiance (example discussed in class of Alabama Supreme Court Chief Justice Roy Moore's being sanctioned and removed from office); but it is at best a basis for reversal for a lower court judge to "mis-apply" a Supreme Court ruling
--Defiance is done deliberately and only by a judge out of sympathy with Supreme Court rulings; narrow interpretation and technical avoidance can be done in "good faith" – i.e., by a judge who honestly believes, in light of precedential and other legal ambiguities, that the narrow interpretation is correct or the technical doctrines require avoidance.

SOME PROMISING ANSWER AVENUES FOR PART II, FINAL EXAM, P SC 104D, FALL 2012:

Exchange 2: Charles vs. Delta:

SUPPORTING PROF. CHARLES:

--In *Bush,* the Court faced two choices, either of which clearly favored the election of one of the two presidential candidates:

--If, as the majority did, they stopped the recount, Bush would win (b/c the Fla. legislature had already certified Bush as winner of the state's electoral votes)
--If the Court had allowed the recount to continue, it seems very likely that Gore would have won (given the way the majority described the recount, it would likely have favored Gore (b/c the partial recounts in Miami and Palm Beach favored Gore, as likely would the vote counters in those jurisdictions)

--By contrast, in ANY of these other pre-election cases, "judges can plausibly claim that they are not really sure how their decisions will affect elections":

--Calif recall controversy: who knows how a several-months postponement would affect election? Maybe Arnold would consolidate support, or get a sympathy vote. Or *maybe* would give Dems time to either find a convincing standard-bearer or better argue Gov. Davis' merits
--2004 Ohio provisional vote case (Sandusky County): hard to tell which voters would likely cast provisional votes in wrong precinct; and who knows whether vote will be close
--2004 Ohio voter-challenge case (Summit County): who knows whether any voters in predominantly low-income, minority districts will be challenged and whether that challenge will be successful? (That's why the second judge found lack of standing…who would be injured is "speculative")
--2012 Early Voting Ohio case (Obama for America): although courts found that mainly low-income, minority, older voters would be dissuaded from voting, who knows if that would make any difference in the outcome?
--2012 Wrong Location/Wrong Precinct case (Service Employees Int'l): here, was absolutely no findings about which voters might show up in wrong locations, so absolutely no idea re impact

SUPPORTING PROF. DELTA:

In ALL the pre-election cases, it was "clear who benefitted"

--Recall case: Schwartzenegger was the contender for whom the recall was designed; he was on a roll, and in no way would he be benefitted by a postponement. (Indeed as the 9th Cir. en banc opinion noted, campaigns had been crafted and strategized assuming the statutory deadline.) Plus, the higher error rate was likely to occur in jurisdictions that were more urban and minority concentrated. These are predominantly Democratic voters…

--In all the other cases, it was either clearly found (e.g., the early-voting 2012 case) or clearly implicit (e.g., the 2004 voter-challenge case) and even the 2004 and 2012 wrong-precinct cases – after all, it is less educated, savvy, politically active voters who are likely to make this mistake) that the beneficiaries from judicial intervention would be relatively low-income, less-educated, rigid-hours-working, older, or minority voters – all of whom are more likely to vote for Democratic candidates. (Conversely, judicial decisions upholding the challenged practices would benefit the Republican party.)

--Indeed that's why the challenging plaintiffs are so often Democractic organizations, campaigns (e.g., Obama for America), or labor unions associated with Democrats. That's why the defenders are Republican state officials allied with Republican party operatives!

Exchange 3: Ekko vs. Fox:

SUPPORTING PROF. EKKO:

--Examples of *a few* of the many "matters that do not involve judicial expertise" and/or "for which meaningful legal standards are especially lacking" in Election Cases:

--When is a vote-counting method so arbitrary and lacking in minimal safeguards that courts should depart from the general principle that states have discretion to structure their elections as they see fit? (basic Equal Protection issue in *Bush v. Gore*)

--Can a state's recount process be "fixed" and does the importance of giving a state the opportunity to try to remedy the problem outweigh the value of having a state's electoral votes being unchallengeable (b/c of the Dec. 12th safe harbor afforded by federal law)? (basic remedies issue in *Bush*)

--What's more important, allowing most Californians to consider whether to recall their duly elected governor subject to state law schedule, or making sure that thousands of minority/low-income voters aren't disenfranchised by erroneous voting machines? (Calif. recall case)

--How daunting are administrative burdens on state election officials (at issue in the Calif. recall case and all the Ohio cases), and will imposing additional duties really hurt the election process? (2012 Ohio early-voting case)

--Where does the public interest lie in voting cases? (any case deciding whether to preliminarily enjoin a voting procedure in advance of the election?)

--Judges "cross a forbidden line" when they participate in cases involving partisan political elections. The core reason giving non-elected or not-fully-politically-accountable judges significant policy making power in a majoritarian democracy emphasizing political accountability is the perception that judges are "above politics." (That's why, for example, merit selection of state judges is deemed a progressive reform…) Election cases uniquely threaten that perception.

--Rebutting Prof. Fox, the kind of "partisanship" that's involved when partisanship indirectly *affects* decisions (e.g., when Democratic appointees have different ideological views than Republican appointees) is still distinct and less forbidden/threatening than direct judicial *involvement* in partisanship.

SUPPORTING PROF. FOX:

--Examples of *a few* of the many arguably "highly controversial legal issues seemingly more appropriate for non-judicial policy makers and without especially meaningful guidance" at work in the same-sex-marriage-equality cases:

--Is sexual-orientation discrimination as pervasive, and sexual-orientation as worthy of protection, as gender and illegitimacy? (this underlies the basic questions re level of Equal Protection scrutiny in *Windsor*)

--Should fundamental policy changes about tradition and morality be made by courts or elected officials (or the people)? (goes to many ?s, including how much deference should be given to elected official judgments in DOMA and in state laws?)

--How important is it to try to maximize having a same-gender role model for girls and boys? (goes to means/end scrutiny of DOMA)

--Do/should heterosexual couples feel "threatened" / diminished by recognition of same-sex marriages (same)

--When is there a sufficient policy basis for the federal government departing from the general policy of letting states decide matters of marriage and family? (goes to validity of district court's argument that DOMA is irrationally contrary to general pattern of federal-law deference to state law)

--"[P]artisanship is significantly present in the same-sex-marriage-equality area"
(See analysis under "Professor Abel" above (Exchange 1)

--The public and its officials do not make a meaningful distinction between partisanship indirectly *affecting* decisions (e.g., when Democratic appointees have different ideological views than Republican appointees) as when it plays out in electoral disputes. Both involve constitutional questions that courts are more or less justified in using as bases for second-guessing and countermanding elected officials and majorities. Both generate great controversy. There is nothing uniquely problematic about election cases!

[IMPORTANT NOTE TO SPRING 2014 STUDENTS: The Part III Question on the Fall 2012 tested cases (specifically, the 2012 Ohio Voting cases) we did not study. So, do not worry if you are not familiar with these. This question will still be useful to illustrate the Question format and the format of responsive answers…]

Especially Promising Argument Alternatives for Part III, Change I

Arguments in SUPPORT of League (CHANGE I = UNConstitutional**):

--Like 2012 Ohio Early-Voting Case (Obama For America v. Husted):

*Is a strong likelihood of League prevailing on claims, b/c = insufficient basis for distinguishing b/tw military and non-military voters:

--True, some military voters will be out of the jurisdiction, facing longer mailing and logistical difficulties; but so might some non-military voters (e.g., persons institutionalized in nursing homes; persons traveling out-of-state or overseas)

--Many military voters will not face special hardships (e.g., some active-duty military or reservists might be stationed in or visiting the jurisdiction; these deserve *Anderson-Burdick* intermediate scrutiny (the level used when substantial impairment of voting rights is at stake)

*The harm to non-military voters who lose their voting rights would be irreparable (can't "unscramble the egg" after the election)

*The balance of equities tips against the State (if it can handle a longer window for military voters requesting/turning in ballots it could do so for non-military voters, at least those showing good cause); see similar point in *Husted* (if state offices are open for early voting by military voters, than can be for others)

*The public interest favors enhancing voter access and civic participation

*Overall Policy: avoiding the evil "if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges" – and especially if, as seems here, "[p]artisan state legislatures could give extra voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents." [Husted, p. 435]
--Per Bush v. Gore: Equal Protection requires votes of similarly situated voters to be counted equally

Arguments in OPPOSITION TO League (CHANGE I = Constitutional**):
--UNLike 2012 Ohio Early-Voting Case (Obama For America v. Husted):
*Is NO likelihood that League will prevail on merits b/c:
--There is little evidence that "a significant number of voters will in fact be precluded from voting without the additional" time for ballot requests and mail in." [Husted, p. 431]. If voters are minimally attentive they can comply with the existing deadlines, & get and turn in absentee ballots
--Thus, "flexible" and intermediate (balancing of interests) *Anderson-Burdick* scrutiny is not triggered; instead, the low-level rationality test of *McDonald* is, and is met b/c overall there is a meaningful distinction b/tw opportunities available to military and non-military voters
--Also, *McDonald's* holding that there is "no fundamental right to receive an absentee ballot as such" would count heavily against the League's argument
*There is no real irreparable injury here: voters just have to get their act together to get and return a ballot
*The hardships on the state are indeed significant: the administrative burden of processing paperwork for a limited # of military voters is very different from doing that for voters at large!
*The public interest favors establishing meaningful deadlines, thus conserving state resources for the overall sound administration of the election
[*Per *Husted* concurrence: there is no constitutional right for voting to be easy or convenient]Overall: *Appellate courts are supposed to give substantial deference to district-court judgments about preliminary injunctions; only should overrule if "abuse of discretion"

--As in the 2012 "Wrong Place/Wrong Precinct" case, at a certain point the law shouldn't defer to voters who can't vote due to their own inattention or lack of care
--Per Bush v. Gore: states and localities should be allowed reasonable variation in their voting procedures to tailor them to the needs of their states (up to the point where they are below the standard of minimal non-arbitrariness, which this isn't)

Especially Promising Argument Alternatives for Part III, Change II

Arguments in SUPPORT of League (CHANGE II = UNConstitutional**):
--Like 2012 Ohio Early-Voting Case (Obama For America v. Husted):
*Is a strong likelihood of League prevailing on claims, b/c = likely strong evidence that, as in Ohio, lack of early voting opportunities will cause "a significant number of voters [to] in fact be precluded from voting without…additional" voting time. [*Husted*, p. 431]. The injury would be predominantly felt by older, poorer, less-educated, disabled and marginally employed voters (who have greater difficulties voting on election day.) (Analogy to dissenting judge Cole's concern in 2004 "voter challenge" case (Summit County Dem. Committee v. Blackwell) – that Republican party not be able to threaten/disenfranchise low-income, minority voters especially)

*The harm to the non-military voters who lose their voting rights would be irreparable (can't "unscramble the egg" after the election)
*The balance of equities tips against the State (as the judges in *Husted* noted, if the state could handle early voting before, it still can; all the administrative efficiency/etc. arguments are fairly minimal)
*The public interest favors enhancing voter access and full participation
*Overall Policy: Avoiding the evil "if states were permitted to pick and choose among groups of similarly situated voters to dole out special voting privileges" (here, the state is arguably preferencing higher-income, non-minority voters who can easily take off work and vote on election day). Plus, it would be especially bad if, as seems here, "[p]artisan state legislatures could...impose… burdens on the other party's core constituents." [*Husted*, p. 435]
--Per Bush v. Gore: Equal Protection requires votes of similarly situated voters should be counted equally

Arguments in OPPOSITION TO League (CHANGE II = Constitutional**):
--UNLike 2012 Ohio Early-Voting Case (Obama For America v. Husted):
*Is NO likelihood that League will prevail on merits b/c:
--The key element present in *Husted* is missing here –*unequal* treatment of military voters (who could early vote under the revised Ohio law) and non-military voters (who couldn't); Here, NO voter can vote early, so there is no different treatment of "similarly situated" voters (early voters and day-of voters are very differentially situated!); there's no allowing the State to "pick and choose among groups of similarly situated voters to dole out special voting privileges"
--The majority was wrong to apply the "flexible" and intermediate (balancing of interests) *Anderson-Burdick* scrutiny; it should have used the low-level rationality test of *McDonald* is, and that is met b/c overall there is a rational basis for not wasting scarce election administration resources on the eve of an election for early voting. (Lots of states don't have early voting!)
[*Per *Husted* concurrence: there is no constitutional right for voting to be easy or convenient]
*There is no real irreparable injury here: voters just have to get their act together and vote on election day
*The hardships on the state are indeed significant: the administrative burdens of devoting pre-election resources to pre-election-day voting are major
*The public interest favors conserving state resources for the overall sound administration of the election
*Overall: Appellate courts are supposed to give substantial deference to district-court judgments about preliminary injunctions; only should overrule if "abuse of discretion"
-As in the 2012 "Wrong Place/Wrong Precinct" case, at a certain point the law shouldn't defer to voters who can't vote due to their own lack of commitment or life management
--Per Bush v. Gore: states and localities should be allowed reasonable variation in their voting procedures to tailor them to the needs of their states (up to the point where they are below the standard of minimal non-arbitrariness, which this isn't)