Student Exam Number _____

Final Examination
Constitutional Law, Professor Leslie Griffin
University of Houston Law Center
May 6, 2011
9 A.M. to 1 P.M.

THESE EXAMINATION QUESTIONS **AND THE CONSTITUTION** MUST BE RETURNED AT THE END OF THE EXAM.

This examination is **CLOSED BOOK**, **NO NOTES**. You may not consult any other materials or communicate with any other person. You are bound by the Law Center's Honor Code. **Don't forget that it is a violation of the Honor Code to discuss the exam's contents with any student in this class who has not yet taken it.** I recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of ***each*** of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are handwriting, please ***do not use pencil.*** If you write your exam, use ONE SIDE of a page only, and SKIP LINES.

If you are using a computer, please follow the directions that you learned at the training session. If the system fails, you should immediately start writing in your bluebooks. You **do not** need to write your exam number on the flash drive.

At the end of the exam, you MUST turn in this copy of the examination and the Constitution. Please do not write your name, Social Security number or any other information that provides me with your identity.

This exam is SEVEN pages long, with FOUR questions. Question I is worth 30 points. Question II is worth 30 points. Question III is worth 30 points. Question IV is worth 10 points. I recommend that you spend 60 minutes on Question I, 60 minutes on Question II, 60 minutes on Question III, and 30 minutes on Question IV.

Your job is to analyze the facts in each question. Do not make up facts or fight the facts given. If you need more information to resolve a difficult question, state what information you would need and how it would affect your answer. Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor. **The questions may be similar to current events. You must answer the questions based on the facts given in the question and not what you read in the newspaper.**

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. **Sign your number and not your name.**
PLEDGE: _____

Question I (30 points, 60 minutes)

I. If-I-Only-Had-a-Heart State Legislature passed the Abortion Heartbeat Legislation Act, which states:

A. Findings

(1) As many as thirty per cent of natural pregnancies end in spontaneous miscarriage;

(2) Less than five per cent of all natural pregnancies end in spontaneous miscarriage after detection of fetal cardiac activity;

(3) Over ninety per cent of in vitro pregnancies survive the first trimester if cardiac activity is detected in the gestational sac;

(4) Nearly ninety per cent of in vitro pregnancies do not survive the first trimester where cardiac activity is not detected in the gestational sac;

(5) Fetal heartbeat, therefore, has become a key, medical predictor that an unborn human individual will reach viability and live birth;

(6) Cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac; and

(7) "Gestational sac" comprises the extra embryonic membranes that envelop the fetus and that is typically visible by ultrasound after the fourth week of pregnancy.

THEREFORE

B. Rules

(1) No person shall perform an abortion on a pregnant woman prior to determining if the fetus the woman is carrying has a detectable fetal heartbeat.

(2) Any person who intentionally or recklessly performs or attempts to perform an abortion on a fetus that has cardiac activity is guilty of a felony. The woman upon whom such abortion is performed will be guilty of a misdemeanor.

II. I-Feel-Your-Pain If-I-Only-Had-a-Brain State Legislature passed the Abortion Fetal Pain Legislation Act, which states:

A. Findings

The legislature makes the following findings:

(1) Pain receptors (nociceptors) are present throughout the unborn child's entire body by no later than sixteen (16) weeks after fertilization and nerves link these receptors to the brain by no later than twenty (20) weeks.

(2) By eight (8) weeks after fertilization, the unborn child reacts to touch. After twenty (20) weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example by recoiling.

(3) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli are applied without such anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty (20) weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the brain nevertheless experience pain.

(8) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(9) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty (20) weeks after fertilization.

(10) It is the purpose of the State to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

B. Rules

(1) No person shall perform an abortion on a pregnant woman prior to determining the age of development of the fetus. No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is sixteen (16) or more weeks.

(2) Any person who intentionally or recklessly performs or attempts to perform an abortion on an unborn child of more than sixteen (16) weeks is guilty of a felony.

III. I-Will-Survive State Legislature added the following provision to its abortion statute:

No physician shall perform an abortion upon a woman when it has been determined that the unborn child is viable unless there is in attendance a physician other than the physician performing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required to be in attendance shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to

preserve the life or health of the viable unborn child; provided that it does not pose an increased risk to the life of the woman or does not pose an increased risk of substantial and irreversible physical impairment of a major bodily function of the woman.

Parties with standing filed constitutional challenges to the three states' legislation. What constitutional arguments should the challengers make? How should the state governments respond? Will the challengers win their lawsuits when they reach the Supreme Court of the United States? Why or why not?

Question II (30 points, 60 minutes)

The Constitution of the State of Change defines marriage as a legal union "between one man and one woman." Under state law, transgender individuals may file sex change documentation with the state in order to receive a marriage license. Thus a man who undergoes a sex change operation may marry a man as long as documentation of the sex change operation is provided. A woman who undergoes a sex change operation may marry a woman as long as documentation of the sex change operation is provided.

State legislators unhappy with that policy passed new legislation, the Stay-the-Way-You-Are Act, which states: "The State finds that gender is assigned at birth and sticks with a person throughout their life even if they have a sex change. Therefore sex change documentation may not be used as a basis for the state to provide a marriage license." The Act's sponsor, Senator Simple, says the reason for passing the legislation is to simplify marriage licensing for clerks, who have spent too much time processing sex change documentation forms.

Richard underwent a sex change operation before the new law was passed and then changed his name to Renee. Renee went to the county registrar's office to request a marriage license to long-time partner, Bob. The county registrar denied Renee's application under the new law, even though Richard/Renee brought sex change documentation to the licensing office.

Harry underwent a sex change operation five years ago, when he was then a woman named Sally. Harry married Polly, and they were happily married for five years. Harry died recently, and his parents, who never liked Polly or approved of Harry/Sally's sex change operation, filed suit to gain control of Harry's estate. The parents successfully argued in state court that the marriage should be voided because same-sex marriage is not legal under the State constitution. Polly thus lost her ability to collect survivor benefits as Harry's spouse.

Identify possible constitutional challenges to the state law that can be brought by parties named in this question. What response will State make to those challenges? Who will win in the Supreme Court of the United States?

Members of Congress who represent State heard about the State's new legislation and decided it was a good idea. Accordingly they sponsored federal Stay-the-Way-You-Are legislation stating "gender is assigned at birth and sticks with a person throughout their life even if they have a sex change. Therefore sex change documentation may not be used as a basis for any state in the United States to provide a marriage license." Is the federal statute constitutional? Why or why not?

Question III (30 points, 60 minutes)

The Governor of Peaceful State signed into law the Violent Video Games Act, which restricts the sale or rental of "violent video games" to minors and imposes a labeling requirement on them. The Act defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being" in a manner that meets all of the following requirements: (1) A reasonable person, considering the game as a whole, would find that it appeals to a deviant or morbid interest of minors; (2) it is patently offensive to prevailing standards in the community as to what is suitable for minors, and; (3) it causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors. The Act does not prohibit a minor's parent or guardian from purchasing or renting such games for the minor. The preamble identifies two purposes to the Act: preventing violent, aggressive, and antisocial behavior and preventing psychological or neurological harm to minors who play violent video games.

The Act requires anyone who imports into or distributes within Peaceful State a violent video game to place a 2-inch square "18" label on the front of the game's packaging. The Act also makes it illegal for a retailer to sell or rent a game labeled "18" to a minor under the age of 18. Violations of the labeling or retail provisions are punishable by a civil fine of up to $1,000. The Act provides an affirmative defense if a retailer can prove it relied on evidence, such as a driver's license, that the purchaser or renter was 18 or older.

In passing the Act, the Peaceful State Legislature sought to reinforce the right of parents to restrict children's ability to purchase offensively violent video games. In doing so, the Legislature considered numerous studies, peer-reviewed articles, and reports from social scientists and medical associations that establish a correlation between playing violent video games and an increase in aggressive thoughts and behavior, antisocial behavior, and desensitization to violence in both minors and adults. The Legislature also considered the Federal Trade Commission's report that the video game industry specifically markets M-rated (Mature) video games to minors, that 69% of 13- to 16-year-old children were able to purchase M-rated games, and that only 24% of cashiers asked the minor's age.

The Act includes findings that exposing minors to depictions of violence in video games makes them more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior, and that even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

The legislative record contains examples of the violent content of various video games that may be covered by the Act. For example, one game involves shooting both armed opponents, such as police officers, and unarmed people, such as schoolgirls. Girls attacked with a shovel will beg for mercy; the player can be merciless and decapitate them. People shot in the leg will fall down and crawl; the player can then pour gasoline over them, set them on fire, and urinate on them. The player's character makes sardonic comments during all this; for example, urinating on someone elicits the comment "Now the flowers will grow." In another game, players can crush animals with the heels of their shoes.

Groups presumed to have standing--manufacturers of video games, retailers and minors--file suit against the Act, arguing that it violates their constitutional rights. What arguments will they make? How will the Peaceful State respond? Who will win in the Supreme Court of the United States? Why?

Question IV (10 points, 30 minutes)

Seventeen Chinese citizens currently held at Guantanamo Bay Naval Base, Cuba, brought petitions for writs of habeas corpus. Each petitioner is an ethnic Uighur, a Turkic Muslim minority whose members reside in the Xinjiang province of far-west China. Sometime before September 11, 2001, the petitioners left China and traveled to the Tora Bora mountains in Afghanistan, where they settled in a camp with other Uighurs. Petitioners fled to Pakistan when U.S. aerial strikes destroyed the Tora Bora camp. Eventually they were turned over to the U.S. military, transferred to Guantanamo Bay and detained as enemy combatants. Evidence produced at hearings before Combatant Status Review Tribunals indicated that the seventeen Uighurs belonged to a group, the Eastern Turkistan Islamic Movement, that had no connection to al Qaida or the Taliban and had never engaged in hostilities against the United States. Therefore there was no evidence that the Uighurs were enemy combatants.

Because there was no evidence against them, the district court granted the writ of habeas corpus. The district court then reasoned that the Uighurs could not be returned to China because they would face arrest, torture or execution there. The court thus ordered their release into the United States.

The President immediately argued for a stay of the court's order, arguing that he would look for an alternative nation and friend to the United States that would take the Uighurs in. The President told the district court that the Uighurs could not be released into the United States and would therefore stay at Guantanamo. The President ordered the Uighurs to be sent back to Guantanamo and held there indefinitely until an alternate home for them could be found.

Congress then passed legislation prohibiting any funds that it appropriates for the Department of Defense (DOD) from being used to transfer Guantanamo detainees into the United States for any purpose. Congress also passed legislation prohibiting the transfer of prisoners at Guantanamo to foreign nations or their release into the United States.

Which branch of government should have the last word about the status of the Uighurs? Why? Does it matter that the Uighurs are Muslim?

Exam Memo, Constitutional Law, Spring 2011
Professor Griffin

Your letter grades in this course were based on the following point totals from the final examination and were awarded according to the mandatory UH grading curve for first year courses, which requires that the class average fall between 2.9 and 3.1. The class average was 3.05. The number in parentheses is the number of students that received each letter grade. The exams varied greatly in quality.

90-100 A (4)
85-89 A- (11)
80-84 B+ (10)
70-79 B (33)
65-69 B- (5)
55-64 C (2)
50-54 C- (1)
Below 50 F (2)

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

Thus in Question I it was important that you subject the whole statute to the undue burden standard of *Casey* and not just summarize *Casey*. *Carhart II* is the current law of abortion, so you lost points if you did not mention it where appropriate (e.g., how much deference the Court will give to legislative findings, that the Court may defer to the state's interest in life, that the state may be concerned that the mother regrets her decision to abort, or in figuring out Justice Kennedy). Too many of you forgot to mention that the first two state laws lacked an exception for the life or health of the mother.

Question II had four basic issues to spot: substantive due process, equal protection, procedural due process, and Congress's enumerated power to pass federal legislation about transgender marriage. You lost points if you missed those issues and gained them as you filled in case law and analysis. One important argument regarded the *classification* involved in equal protection and the *level of scrutiny* involved, issues that are always present in EP cases. Is transgender….gender? homosexual? Animus? The goal for any challenger is to persuade me what level of scrutiny would apply. Because you didn't read any transgender cases, you had reason to make a good argument based on the cases you had read.

In Question III the quality of your First Amendment answer eclipsed all other arguments about the Dormant Commerce Clause and Equal Protection. You had to cite *Stevens*, and you should have relied on that case, not only in deciding how the Court would rule, but in making the

challengers' arguments. If there is a leading precedent you argue about it. It was also important to talk about the *pornography* cases and not just the *obscenity* cases.

In Question IV the most important thing was to ANSWER THE QUESTION—WHICH BRANCH OF GOVERNMENT SHOULD HAVE THE LAST WORD AND WHY? If you just rambled on about separation of powers, you lost a lot of points. You had to pick a branch and support your conclusion. The Court may be forced to answer this question over the next few years so you could have chosen any branch as long as you gave a good argument. Many of you forgot that Congress has power over immigration and naturalization, which seemed relevant here.

The best student answers are pasted below. Please be sure to read them over and compare them to your exam before making an appointment to ask me about your grade. I included some short ones so that you could see an example of students writing with focus.

-->Question -1-
Question 1

Parties have standing.

Challengers 14th Amendment SDP argument

(I) If-I-Only-Had-A-Heart

Challengers will argue that under Casey the state's interest in the potentiality of life does not allow the state to reach into the previability phase by placing a substantial obstacle in the path of the mother that places an undue burden on her. Challengers will argue that because the state is attempting to put a classification ban on abortions if the fetus has a detectable heartbeat, the State is impermissably trying to reach into the previability phase. During previability, the decision lies between a mother and her doctor and the state cannot place a substantial obstacle in her path that places an undue burden on her. Because this is an outright ban of abortions that fall between the time the fetus has a heartbeat and the time viability is acheived, this is impermissable under Casey. Finding (5) illustrates this point by saying "Fetal heartbeat... [is a] PREDICTOR that a human individual will reach viability." This is overeaching far beyond the reporting requirements, 24 hour waiting period, and limited notification allowed in Casey. In addition, the state has noted that this does reach into previability (see 6) and does not provide a health exception for the mother. While a blanket ban does not necessarily require a health exception for a facial challenge (see Carhardt II), an as-applied challenge her should make this statute unacceptable. Because this is only a predictor and Casey firmly drew the line at viability, this should be ruled unconstitutional.

The state will respond by saying that under Casey it has a compelling interest in the potentiality of life even before viability and it is only acting to protect that interest. Carhardt II shows that it is in fact permissable to put a blanket ban on a type of procedure previability. Carhardt II found that D&E extractions could be banned, and this should be treated no differently. Because the government had provided evidence that D&E bans are not medically necessary in Carhardt II, the Court should consider that the legislature is better equipped to handle the problem of viability because it can better keep abreast of recent medical knowledge through hearings with medical experts and other means. (6) Shows the state is looking for a biologically identifiable moment in time when the fetal heart is formed in the gestational sac. This finding shows that the statute is specific enough and is similar to the description of the procedure used in Carhardt II which described the precise nature by anatomical descriptors. The state is only attempting to better define viability, so this measure should be upheld.

The Supreme Court will reach a 5-4 decision.

SCALIA, THOMAS, ROBERTS, ALITO, and KENNEDY are in the majority stating: this is similar to Carhardt II, the state has shown there is are specific biologically identifiable markers it is relying on.
SCALIA (concurring): I have my doubts about substantive due process in general. But for abortions specifically, I would advise this Court to remain on the sidelines. By ruling as we have, we have only divided the nation on the issue. State legislatures are better equipped to handle these issues.
THOMAS (concurring): There is no right to abortion in the Constitution. I can find no such right and would leave this matter to the states.
GINSBURG, BREYER, SOTOMAYOR, and KAGAN dissent.
GINSBURG, BREYER (dissenting): The state has noted that it is in fact reaching into previability and is attempting to regulate. This blanket ban is not on a procedure but on abortions in general. The state cannot say that it is attempting to determine viability. This is much more than a substantial obstacle: this is a roadblock.

(II) I-Feel-Your-Pain If-Only-I-Had-A-Brain

Challengers will argue that the state is placing an undue burden on the mother by placing a substantial obstacle in the mother's path. Casey. Because the state is in effect trying to redefine viability at 16 weeks by vague means, the state is trying to again reach into previability which is protected under Casey. This is a substantial obstacle because again it is an outright ban on abortions. The state is in effect trying to overturn Casey by instituting a strict deliniation of when viability occurs much like Roe's trimester system. Because the trimester system was rejected in Casey, the state should not be able to reinstitute a system that does not actually determine viability. There is conflicting medical science (6) on this issue, and the state is attempting to identify pain as the main condition that makes a fetus viable. Pain is not a marker for viability and the state has not shown that pain in any way determines whether the fetus is viable.

The state will respond by saying that due to its compelling interest in the potentiality of life, it is acting in response to new medical knowledge. (6) Shows the state has taken hearings on research which shows that a functioning cortex is not necessary for experiencing pain. Because the question of life is not one for the courts, the Court here should defer to the the legislature in determining that pain is a valid marker for how we define viable life. Because a functioning cortex (7) is not necessary to experience pain, the state's logic is sound that a functioning cortex cannot be used as a method of determining viability. The state is only acting in its interest to show where the viability line is, not trying to reach into the previability stage.

The Supreme Court will reach a 5-4 decision.

GINSBURG, SOTOMAYOR, BREYER, KAGAN, and KENNEDY in the majority: the statute makes no mention of that it is attempting to determine viability and has only arbitrarily chosen pain as in its determination.
KENNEDY (concurring): The legislature made no findings about why pain truly matters here.

SCALIA, THOMAS, ROBERTS, and ALITO dissent.
SCALIA, THOMAS (dissenting): This Court should not be determining these issues, legislatures should.

(III) I-Will-Survive

Challengers will argue that the state is infringing on her right to choose even post viability. Because the statute provides that physicians will act to preserve the life of the child even against her wishes. Abortion is still a woman's choice and when the state has allowed a woman the right to choose post-viability, it should not restrict that right by allowing the state to choose the "life or health" of the child when doing so might cause substantial harm to the mother. The mother is only protected so much as it does not "pose an increased risk" to her life or "substantial and irrevisible physical impairment". A mother could be allowed to have an abortion in a circumstance where there would be no risk of medical harm to her if the state did not protect the child's life, but in actually caused her something slightly less than "substantial and irreversible physical impairment". This distinction could cause a mother grave harm.

State will argue that under Casey it can regulate and even ban abortions after viability and it is only acting to regulate here. The statute only requires a physician to take all steps "to preserve the life or health of the unborn child" providing it does not pose an increased risk to the life of the woman or does not pose "an increased risk of substantial and irreversible physical impairment" of the mother. Because the state's interest in the potentiality of life is compelling and the state may regulate as it chooses after viability, the state is providing a delicate balance that protects the life of the child, even if the mother wished an abortion.

The Supreme Court will reach a 5-4 decision.

SCALIA, THOMAS, ROBERTS, ALITO, and KENNEDY will be in the majority, stating the State has a valid interest in protecting the unborn fetus after viability and can regulate as it chooses.
SCALIA, THOMAS (concurring): State legislatures should decide abortions, not this Court.
KENNEDY (concurring): The state can regulate post-viability. This is not about a pre-viability health exception for the mother under an as-applied challenge, which I suggested might have made a difference in Carhardt II.

SOTOMAYOR, KAGAN, GINSBURG, and BREYER dissent.
GINSBURG, BREYER (dissenting): If the state here wished to provide a health exception for the mother, it should provide a true health exception. As it is, it is vague and presents a possible of grave harm to a woman.

-->End of Question 1

-->Question -1-

Parties have standing.

If I only had a heart state

Challengers to the Heart state will argue that under Casey, the State may not regulate abortion before the point of viability. Challengers will argue that viability in Casey meant the point at which it would be possible for the fetus to survive outside the mother's body, not when there is simply an identifiable heartbeat. State will respond by arguing that the scientific findings they have identified show that over 90% of all pregananices surive the first trimester if there has been identifiable cardiac activity. State will argue that viability means likelihood of survival and here, fetuses with detectable cardiac activity have a 90% chance to survive.

State will further assert that it has a strong interest in protecting the unborn life [Casey]. State will argue that this interest is vindicated under the statute because after the detection of the fetal heartbeat, only 5% of pregnancies end in spontaneous miscarriage. Before that point, there is a higher probability that a miscarriage will occur, and therefore a woman still has the right to choose abortion as established by Roe.]

Challengers will also assert that the statute does not provide an exception for the health of the woman. The Court has held in numerous cases [Casey, Carhart I] that a restriction on the woman's right to choose abortion must provide an exception for when the health of the mother

requires an abortion.

State will argue that under Gonzales, such an exception is no longer required. State will attempt to analogize its position with the state in Gonzales by pointing the the empirical data it has collected about the life of the fetus and the life of the mother.

Challengers should counter this by arguing that the type of data that supports the If I only had a Heart State's legislation is not like the data in Gonzales. In Gonzales, the data specifically showed that the intact D&E procedure banned by Congress was never medically necessary for the health of the woman. Here, Challengers will argue, the scientific data only relates to fetal heartbeats, not the medical necessity.

Challengers will argue that the statute places an undue burden on the pregnant mother by forcing her to undergo a procedure to determine if the fetus has a detectable fetal heartbeat. The procedure could be very invasive or expensive, in which case it it would violate the woman's rights. Challengers will further argue that the statute gives women a very narrow window of time to discover that they are pregnant and to subsequently seek an abortion. This narrow window is an undue burden because, as argued above, the fetal heartbeat is not equatable to viability, and under Casey, a restriction on aboriton cannot stand if it places an undue burden on the woman before viability.

State will argue that both the procedure and the narrow window are necessary to protect its strong interest in a) protecting the life of the fetus and b) protecting the integrity of the medical profession. Further, state will argue that if women find out after they have chosen to have an abortion that the fetus had a heart beat, they may experience

psychological pain and regret as Kennedy articulated women may experience after intact D&E procedures in Gonzales.

The Court will probably rule 5-4 in favor of the If-I-only-had-a-heart State's legislation. Justice Kennedy will probably write the opinion, and will likely be persuaded by Congress' data about the fetal heartbeat. Kennedy will reiterate his argument in Gonzales that women man feel regret after they have chose to abort a fetus with a heartbeat. Justices Scalia and Thomas will concur and reassert their belief that abortion is not a fundamental right, and that Roe should probably be overturned. Justice Alito, who voted to uphold restrictions in Casey before he got to the Supreme Court, and who concurred in Gonzales, will probably join the majoriyt. Chief Justice Roberts will join, too.

Ginsburg will write for the dissent, which will definitely include Justice Breyer. They will argue that the statute lacks an exception for the health of the mother, which should automatically result in teh statute being struck. Justices Sotomayor and Kagan's votes are techincally up for grabs because they were not on the Court for the abortion cases. If they follow Justices Souter and Stevens, respectively, tehn they will join Breyer and Ginsburg.

I-Feel-your-pain state

Challengers will argue that pain is completely unrelated to viability, and viability is the standard measuring point under Casey. Challengers will argue that although fetal anesthesia is usually applied during abortion procedures, that does not equate to an acknowledgement

that the fetus' rights are somehow greater. Indeed, Challengers will argue that the Supreme Court, despite the misgivings of Justice White, has never held that a fetus is a 'person' for the purposes of the Constitution, and that necessarily when the rights of the mother and the fetus clash, the mother wins because she is a 'person' under the Constitution.

State will argue that its strong interest in protecting the role of doctors as healers requires that it ban aboritions after the fetus is capable of feeling pain. State will cite to the evidence showing the very real effects of pain on the fetus- specifically finding (4) concerning the long term developmental effects.

Challengers will again counter by saying that the fetus is not a person under the Constitution, and that the right for a woman to have an abortion is fundamental.

State may argue that the fetus has the right to be free from pain, which five justices Glucksberg implied may exist. Challengers will counter this by saying that this right, if it even exists, is the right to be free from state-inflicted pain. If a woman chooses to have an abortion, it is private action, not state action.

Challengers will again argue that there is no medical exception in the statute. The challengers and state will make substantially the same arguments as for the Heart state.

The Court will likely rule 5-4 for the Challengers. Justice Kennedy will provide, as he usually does, the crucial fifth vote for the Challengers. Justice Kennedy will be particularly concerned with letting the fetus' right to be free from pain, which has a dubious status under the Court's jurisprudence, trump the mother's right to control her own

reproductive destiny, which has been established as a fundamental (at least under Roe) right. The other justices will reiterate the arguments as discussed above.

The I-will-survive state

The Challengers will argue that the statute places an undue burden on the woman's right to choose because it incurrs the additional expense of having to pay for two doctors.

The State will aruge that the States are free to regulate aboriton under Casey past the point of viability. Here, the statute specifically says that it does not reach into the woman's decision pre-viability, but only after viability. State will also argue that the Court has upheld provisions in the past that required additional expenses, like the 24 hour informed consent provision in Casey that essentially incurred the additional travel costs and time the make two trips to the abortion clinic.

Challengers will further argue that the statute is too vague, specifically the medical exception. Challengers will argue that the statute does not adequately protect women in the event of a medical exception, because it conditions the exception explicitly on the existende of a risk that a 'substantial and irreversible physical impairment of a major bodily function.' There are numerous harms that a woman can suffer during the course of an abortion that are substantial, but might not fall into this demanding category.

State will argue that under Gonzales, in which the Court upheld a ban on intact D&E (a supposedly 'safer' for the mother procedure), the

medical exception is sufficient. State will argue that its interest in preserving the life of the fetus as well as preserving the role of doctors as healers demands the exacting nature of the statute's medical exception.

The Court will likely uphold this statute by at least a 5-2 vote. The majority- Kennedy, Roberts, Scalia, Thomas, Alito will emphasize that the statute only governs post-viability pregnancies, and under Casey, states are free to do that. Again, Thomas and Scalia will argue that there is no fundamental right to abortion, so States can place whatever restrictions they want on the practice. Breyer and Ginsburg will argue that hte medical exception is not sufficient to protect women, because it places the decision regarding the 'substantial and irreversibler physical impairment' outside of the woman's decision. They will argue that this is exactly the kind of control that the state should NOT have over the woman's right to control her body and her reproductive desinty under Roe.

Justices Sotomayor and Kagan's votes are again up for grabs. If they follow Justices Souter and Stevens, then they will likely vote with the dissent. However, they may be impressed by the statute's clear adherance to the Casey 'viability' guidelines, and one of them may vote with the majority.

-->End of Question 1

-->Question -2-
Richard/Renee has standing. Standing requires an injury-in-fact, causation, and redressability. Richard/Renee's (R/R) injury is that he/she was denied a marriage license, it was caused by the new law, and it can be redressed by finding that law violates the constitution.

Polly has standing. Polly's injury is that the she lost her survivor benefits, it was caused by the law, and it can be redressed by finding that her marriage to Harry/Sally is still valid.

R/R's 14th Amendment SDP argument

R/R can argue that the state is impermissably attepting to take away his fundamental right to marry. R/R will argue the Court should apply strict scrutiny to his situation and the state has failed to show that it has a compelling interest that has a narrowly tailored means/ends fit. Under Loving, R/R will argue that the liberty right to marriage under the 14th amendment. Because he has successfully undergone a sex change operation, he should be considered male and the state is impermissably trying to infringe on his liberty interest. Because the state has no compelling interest in preventing these kinds of marriages, this should be unconstitutional.

Even if he is not entitled to strict scrutiny because the court sees this as more an issue of homosexual conduct and only entitled to rational scrutiny, R/R will argue that this cannot even pass rational basis scrutiny. Under Lawrence, the Court found that the state law that infringed on sexual contact between homosexuals impermissably infringed on Lawrence's liberty interest. Like Lawrence, this could also be argued perhaps more persuasively on equal protection grounds, but this still is a violation because the state is reaching into a privacy interest here. If the liberty interest of a couples' bedroom, whether marital or not, is protected, then this should be a violation as well.

The goverment will argue that it has a compelling interest that marriage will follow traditional moral values. Because liberty interests are those interests that are deeply rooted in the history and traditions of our country, the Court should find that our nation does not having a history of allowing transexuals the right to marry, or even a formal recoginition of transexuals. In addition, marriage is at least partly about the preserving the traditional family and childbearing. There is no possibility of childbearing in a marriage such as this.

R/R's 14th Amendment EP argument (classification vs. non-transgendered couples)

R/R will argue that because the state is classifying him on the basis of his gender, he is entitled to intermediate scrutiny. Under intermediate scrutiny, the state would have to show an important goverment interest substantially related to their objective. VMI. The state has no important government interest in allowing non-transgendered couples the right to marry but not transgendered couples to marry. Marriage is about much more than just procreation--it is about companionship, sharing of

finances, survivor benefits, and much more. Moreover, this is based on the stereotype that transgendered males are somehow different than normal males.

Even if the Court were to analyze this under a rational basis test, it should still fail. Romer v. Evans purportedly used a rational basis test that the government must have a legitimate interest that is rationally related to its objectives, and in Romer the goverment still failed to show that. Like Romer was a targeted statute that descriminated against gays, this is targeted against transgendered people. Animus is never rational, and this is clearly animus: "State legislatures [were] unhappy with that policy."

The state will respond by saying that this is only subject to rational basis scrutiny because the state is classifying not due to his gender (the state is only defining what gender is), but is only classifying him due to his sexuality. Even if this were tested under intermediate scrutiny, INS shows that the government can distinguish between the sexes if there is a biological basis for doing so. Because there is a biological basis for determining that transgendered people cannot reproduce in the same way, this is a valid distinction. Under rational basis scrutiny, the goverment has a legitimate interest in preserving traditional family values.

R/R's 14th Amendment EP argument (classification vs. transgendered couples already married)

R/R can argue that there is a classification here that distinguishes him from couples already married under the law. Because a class of one is enough to bring an EP case (see Willowbrook), R/R can argue that because other couples retained their marriages (at least until invalidated by a court), there is no rational basis for distinguishing him from other couples.

The state will respond by saying that although there is a classification, it is entirely rational. States cannot retroactively apply laws without creating chaos, and the state had a rational basis for not immediately reverting all the marriages already allowed beforehand.

The Supreme Court will reach a 5-4 decision.
KENNEDY, GINSBURG, BREYER, SOTOMAYOR, and KAGAN are the majority.
KENNEDY (concurring): Just as I stated in Romer and Lawrence, even under a rational basis, the state cannot enact legislation such as this.
GINSBURG (concurring): This law is based off of stereotypes about transgendered individuals. There is no meaningful distinction the state can point to for why to treat a transgendered individual differently.
SCALIA, THOMAS, ALITO, and ROBERTS dissent.
SCALIA, THOMAS (dissenting): This is not a fundamental value that is deeply rooted in the history and traditions of our nation. What is next? This is a slippery slope towards allowing all sorts of immoral conduct. The state has a valid interest in moral legislation and this cannot be sustained on substantive due process nor equal protection grounds.

Polly's 14th Amendment EP Argument

Polly will argue that her economic rights are being infringed on because the state has made a distinction between her and other windows based on the nature of her husband's gender. Economic liberty gets rational basis scrutiny, but Polly will argue there is no rational basis for distinguishing her from other widows. A class of one is enough for an equal protection violation. Willowbrook. In Willowbrook, the difference in easements was enough. Here the difference between her and other widows is only that her husband's gender had been changed. The state here is showing animus in its legislation (see R/R's argument) and animus is never rational, she is being distinguished irrationally.

The state will respond by saying that economic EP is only subject to rational basis scrutiny and because it is rational for the state to determine that once it has stated that no more marriages are allowed between transgendered people, no more benefits of marriage will accrue either.

Polly's 14th Amendment Procedural Due Process Argument

Polly will argue that she has a government entitlement that has been taken away without due process. Because survivor benefits are a direct benefit of marriage, she should not have her survivor benefits taken away without due process. Polly will rely on a line of cases stating that tenure, welfare benefits, and so on require due process.

The government will argue that survivor benefits stemming from marriage are not a government entitlement. Not everything the government does is an entitlement. Castle Rock showed that restraining orders, while given by the government are not mandatory. Survivor benefits here are not mandatory because they explicitly depend on the couples marriage.

Under the Mathews v. Eldridge test, the type of process due depends on balancing 1) the private interest 2) the risk of erroneuous deprivation and 3) the government's interest. The private interest is Polly's survivor benefits. The risk of erroneous deprivation here is low because the marriage was invalidated in a state court. The government's interest is in having its new law apply to all of its citizens. Because invalidating the marriage is done through a state court, the government will argue that a proper procedure is already in place

The Supreme Court will reach a 5-4 decision.
SCALIA, THOMAS, ALITO, ROBERTS, and KENNEDY are in the majority, stating that Polly is not entitled to her survivor benefits.

KAGAN, SOTOMAYOR, GINSBURG, and BREYER dissent.

Federal Law Constitutionality - 14th Amendment Sec. 5

Challengers will argue that this is an improper use of Congress's 14th amendment Sec. 5 powers and cannot be sustained under any other power such as the commerce clause, spending power, or taxing power. The statute

fails on multiple grounds. First, the statute must be congruent and proportional to the issue Congress is attempting to address. City of Boerne. Because this statute is attempts to regulate what gender is to determine whether the marriage licenses can apply, it is not proportional to the problem. Second, this is a substantive, not remedial legislation. It is the Court's job to determine the effect of sex change operations on gender. Like City of Boerne, the legislature is overstepping its bounds here. Lastly, under Morrison, the statute is improperly reaching into private action. Morrison's Violence Against Women act could not be upheld on Sec. 5 powers because it regulated private action v. private action. Here, Congress is impermissably attempting to regulate the private action of getting a sex change. This is not a regulation of marriage, as the statute says, but a regulation of sex changes.

The state will respond by saying that this is in fact congruent and proportional because Congress is attempting to solve the problem of transgendered marriages that do not conform with traditional values. This is entirely remedial and not substantive. Unlike City of Boerne, the Congress here is not attempting to overturn a Court ruling, it is only attempting to legislate. And finally, this is about state action. The Congress is not banning what private actors do, it is banning giving marriage certificates to transgenered people, which is a function of the state government. It is true the 14th amendment only applies to the states, but this is exactly what Congress is doing here.

Prof. G: It would have been better to spend more time on the Commerce Clause here.
The Supreme Court will reach a 6-3 decision.

KENNEDY, GINSBURG, SOTOMAYOR, KAGAN, KENNEDY, and SCALIA in the majority: This is substantive, not remedial, and Congress is overstepping itself here.

ALITO, THOMAS, and ROBERTS dissent.
-->End of Question 2

-->Question -2-

Standing

In order to have standing, a party must show injury (in fact, palpable, concrete), causation (that the legal wrong is fairly traceable to the conduct of the defendant, not some 3rd party not before the court), and redressability (that the legal wrong is likely, not probably, to be cured by a favorable court decision) [Lujan].

Polly will argue that she has standing. She will argue that her injury is the loss of survivor benefits as Harry's spouse, she will argue that her injury is fairly traceable to the State's new legislation, and she will argue that her injury will would cured by a favorable court decision striking the "stay-the-way-you-are Act." State will argue she does not have standing because under the new law she does not have a legal injury to point to.

Renee and Bob will argue that they suffered an legal injury under the new Act because the legal right that they relied on, right to get married, was summarily removed by the new Act. In essence, they had a legal right, and the statute harmed that right. Causation and redressability will be the same argumetn as Polly. State will again argue that under the new law Renee and Bob do not have a legal injury to point to.

The parties will likely have standing.

Richard/Renee and Bob's claims

EPC

Renee and Bob will argue that the statue violates their Equal Protection rights under the 14th Amendment. They will argue that the statute makes a classification based on sex, and should therefore receive intermediate scrutiny. They will also argue that the statute makes a classification on the basis of sex change documents, which would probably mean that the court would employ a rational basis standard of review. The rational basis test is that the statute must serve a legitimate government interest, and the means must be reasonably related to that end.

First, Challengers will argue that the new statute makes a classification that is motivated by animus, which is not a legitimate governmental objective under Moreno and Romer. Challengers will argue that their situation is just like in Moreno. In Moreno, State decided that it did not want hippies to benefit from the food stamp program, and thus limited eligibility to more traditional families instead of hippie communities. The act's stated purpose was to increase the health and availability of food to people, but legislative history revealed that the statue was actually the result of animus towards hippies.

Challengers will argue that here, there is the same kind of pretextual justification given for the state's statute. Senator simple stated that the reason for the Act was to simplify marriage licensing for clerks, which is most likely a legitimate interest for states (the Court is usually very deferential to this determination- see Lee Optical). However, Challengers will argue that simplifying clerks' jobs is not the actual purpose of the statute, the actual purpose is to remove the ability of transgender individuals to get married. They will point to the fact that the legislators were 'unhappy' with the current state law and wanted

to change it. The strength of the Challengers argument will depend on whether the state legislators being "unhappy with the policy" would qualify as legislative history like the anti-hippie sentiments in Moreno.

State will argue that it is not acting with animus, and is merely trying to do exactly what the statute says, which is to simply the job for clerks. State will say that it has a legitimate interest in simplying the job of clerks, and that reducing one more item of paperwork that a clerk must handle and process does exactly that. State will argue that it can legislate "one step at a time" under the Supreme Court's jurisprudence.

Substantive Due Process

Renee and Bob will argue that they have a fundamental right to marriage under Turner (for prisoners), Zablocki (for everyone), and Loving (for everyone, including interacial couples). If it is indeed a fundamental right, then the state must have a compelling interest to override it, as well as employ narrowly tailored means.

Challengers will argue that their fundamental right to marry cannot be overridden by the state's interest in reducing paperwork, which can hardly be described as compelling. Challengersr will also argue that the means the State employed to make clerks' jobs easier are not narrowly tailored- there are other alternatives that the State could have employed that would not have tremmeled on their fundamental right to marriage. Challengers will argue that they deserve strict scrutiny protection because they are a discrete and insular minority under Carolene Products FN4. This is because they have a history of targeted discrimination (generally, and specifically with this new statute), because they are such a small population their ability to affect change within the political

process is relatively small, and because the inherent desire & feelings to change gender are immutable. Challengers will also argue that Lawrence v. Texas established a fundamental right to intimacy for every person. Challengers will argue that just as it would demean heterosexuals to claim that marriage is only about the right to have sexual relations (as Kennedy said in Lawrence), it similarly demeans same-sex couples to say that that is all the rights afforded to them. A crucial aspect of their relationship is the ability to be recognized on equal footing with heterosexual couples. Challengers will also argue that because other countries in the world, especially in Western culture, recognize similar relationships the States should, too.

State will argue that there is no such fundamental right to marriage for transgendered individuals. State will argue that although there is a fundamental right to marraige and marital intimacy [Turner, Zablocki, Loving, and Griswold for intimacy] that only applies to marriage between a man and woman, who were born so. State will argue that there is no history or tradition for recoginizing the right of transgendered people to marry, indeed it is not implicit within the concepts of ordered liberty [Palko]. State will argue that transgenders are not a discrete and insular minority because the choice to change gender is exactly that, a choice. Other 'discrete and insular' minorities were not given a choice to enter into that classification.

The Court will probably rule 5-4 for Bob and Renee on equal protection grounds. The Court has been very reluctant to extend fundamental rights. Justice Kennedy, who wrote both Romer and Lawrence, will probably write the majority opinion. The majority will be persuaded

by the comparison to Moreno and the pretextual basis of the State's legislature. Kennedy will also be especially persuaded by the challengers appeal to the intimate nature of their relationship and the argument that other countries recognize such relationships with marriage. Breyer and Ginsburg will join for sure, and Kagan and Sotomayor, if they follow Stevens and Souter, will as well.

Scalia will probably write the dissent, joined by Alito, Thomas and Roberts. They will argue that there is no animus or fundamental right for transgendered marriage.

Polly's claims

EPC

Polly will claim that her equal protection rights under the Fourteenth Amendment have been violated by the new statute. She will argue that the state's distribution of survivor benefits is based on a classification- same sex and different sex. Although under Romer classifications based on sexual orientation receive rational basis scrutiny, the instant case adds a new wrinkle because of the possibility of gender discrimination. However, the Court will probably employ rational basis.

Polly will argue that the decision to withhold survivor benefits is based on animus like under Moreno and Romer. Specifically, she will analogize her case to Romer, in which the Court held that a state cannot categorically remove the rights of homosexuals. "A state cannot make a classification of people a stranger to its laws." P will argue that the new law removes her previously held right to survivor benefits only on a "bare desire to do harm" to people involved in same-sex marriages.

State will argue that its decision to withhold benfits from P do have a legitimate interest. After the legislature decided that transgendered documents would no longer provide a basis for a marriage license, it had a ratoinal basis to not give P survivor benefits for a marriage that she could no longer legally enter into.

Procedural Due Process

P will also argue that the State deprived her of a life, liberty or property interest without due process of law. Specificaly, she will argue that the new Statute deprives her of her property interest in survivor benefits as Harry's spouse. State's laws provide survivor benefits upon the death of a spoouse, and when Harry died, that is exactly what he was to Polly. Polly will argue that the new state statute does not make same-sex marriages illegal, but it just prohibits the state from providing new marriage licenses. She will analogize her situation to Loudermill and argue that she should be given more process before her property rights are removed.

State will argue that she is no longer entitled to benefits, and that instead of possessing a legal right to a property interest, she only possesses a mere "unilateral expectation" of a right. Under Roth, that is not enough to trigger additional process. Like Roth, an untenured professor did not have a property interest in having his contract renewed, State will argue, P does not have a property interest in obtaining survivor benefits.

The Court will probably rule 5-4 for Polly. Kennedy will write the opinion for the majority, joined by Justices Breyer, Ginsburg, Sotomayor

(if she follows Souter) and Kagan (if she follows Stevens). Kennedy will find the situation similar to Romer, in addition to many of the same arguments discussed above.

In addition, Scalia, Thomas, Roberts, and Alito will dissent for the reasons above.

Congress's legislation

To determine wehther Congress has the power to enact a legislation, the first question is whether it has the enumerated power to do so. Because it does not involve spending, commerce, taxing, or war powers, Congress will probably enact the statute under its Section 5 of the 14th Amendment power. Under City of Boerne, in order to act under Section 5, the legislation must be congruent (related to) and proportional (not too over or under inclusive) to an identifiable harm. Congress must point to a pattern of harm that it is trying to regulate [Florida Prepaid, which held that Congress cannot abrogate state sovereign immunity for patent infringement because there was no pattern of states infringing patents]. Significantly, under the "one way ratchet" theory in *Morgan*, Congress cannot dilute rights under Section 5, but only strengthen them.

Here, Congress has not identified a pattern of harm necessary to remedy. Further, because Congress has not identified a harm that it is trying to remedy, it would be impossible to determine whether this legislation is congruent or proportional to remedying that harm. Further, under the one way ratchet theory, Congress cannot dilute rights under Section 5. It is hard to see how Congress could be seen as enhancing a right with this legislation. Rather, it is specifically limiting the

rights of transgendered individuals to enter into marriage. The federal statute would be unconstitutional.

-->End of Question 2

-->Question -3-
Groups have standing.

Manufacturers and Retailers vs. State -- 1st amendment free speech, unprotected category to minors?

Because the 1st amendment is incorported by the 14th amendment, it applies to the states.

Challengers will argue that the State here is impermissibly infringing on their 1st amendment rights. The Challengers will first argue that the legislature here is attempting to create a new category of unprotected free speech for minors. Unprotected speech only falls in strict categories such as sexual obscenity, child pornography, and fighting words. Under U.S. v. Stephens, the Court rejected an extension to the existing categories of unprotected speech to "crush videos". The video games here are similar in their violence and nature and one of them even contains essentially a crush video: players can crush animals with the heels of their shoes. Because this is not unprotected speech and this is wholly content-based legislation, the government must show a compelling interest narrowly tailor to its objective.

The state will argue that this is in fact unprotected speech to minors. While U.S. v. Stephens rejects the argument for crush videos, here we have findings that show that there are numerous bases for finding unprotected speech. The government has adopted the sexual obscenity standard of earlier cases in determining what it finds an obscene video game: 1) a reasonable person would find that it appeals to deviant ("prurient") interest 2) judged by the standards of the community 3) it lacks serious literary, artistic politcal, or scientific value.
The state will also argue that this is unprotected under fighting words. Because of the state's findings that exposing minors to depictions of violence in video games makes them more likely to experience feelings of agression, the Court should find that this constitutes fighting words under Ferber and similar cases. Even if it does not quite rise to the standards set out, combining the fighting words with the non-sexual obsenity this with the government's interest in preventing minors from "violent, aggressive, and antisocial behavior", the state's position it that because 1) fighting words is implicated and 2) obscenity (albeit non-sexual obscenity) is involved, the combination of these two should be enough to create an unprotected category for non-sexually obscene material that promotes aggressive behavior.

The challengers will respond by saying that there is a strict distinction in unprotected categories that cannot be blurred by simply combining aspects of unprotected interests. The Court has held that virtual child pornography is not the same as real child pornography and thus does not fall into an unprotected category of speech. Like the virtual child pornography case, there is no actual harm being done to people here. These video game depictions are nothing more than that--depictions.

Because the Court rejected the argument that virtual child pornography will give pedophiles the urge to harm children, the argument that video games will cause kids to lash out violently does not hold.

The state will briefly respond by saying it has conducted studies saying that there is actually a connection.

Manufacturers and Retailers vs. State -- 1st amendment free speech, content/viewpoint restriction

Challengers will argue that this content restriction and subject to strict scrutiny. The government's stated purpose of protecting neurological harm to children is not a compelling interest that is narrowly tailored to the state's objective. This measure is not narrowly tailored because it does not actually prevent minors from getting video games; minor's parents or guardians can still buy the games for them. If the legislature's true purpose is to prevent the inevitable harm that comes from these games, the measure needs to truly prevent access to minors, not just burden manufacturers and retailers of video games.

The government will respond by saying that it does have a compelling interest in protecting minors from neurological harm and that this is narrowly tailored because the legislature is directly responding to the FTC's showing that video games are marketed extensively to minors. Like burning a draft card, not all speech is protected by the 1st amendment. Like sexual obscenity, the government is only restricting minors under 18 and this distinction is tenable. Paris Adult Theatre. This kind of "speech" is different than the kind of speech we hold in high regard, such as speech related to politics, and the government has shown the detrimental effects sufficient to show that nthe neurological harm and preventing violence rationales are compelling.

The Court will come to an 5-4 decision.
KAGAN, SOTOMAYOR, GINSBURG, BREYER, and KENNEDY in the majority: this is not an unprotected category of speech and the government has no compelling interest that is narrowly tailored.

ROBERTS, ALITO, THOMAS, and SCALIA dissenting.
SCALIA and THOMAS (dissenting): I would find that the government has a compelling interest in restricting the content of this "speech" even though I would not find this to be an unprotected category.
ROBERTS (dissenting): This statute is not overbroad like U.S. v Stephens and it would not also encompass traditonal activites such as hunting. Because this is restricted to violence depicting human beings, I would find this to be unprotected.
ALITO (dissenting): I would find this category unprotected. There is no doubt the harm these games bring and I stand by my dissent in U.S. v. Stephens.

Minors v. State -- 14th Amendment Equal Protection

The minors can bring suit stating that the state is classifying minors differently than adults. Age is subject to rational basis scrutiny, and

the minors can claim there is no rational basis for the distinction. The minors can attept to show that the state has generalized them into one group based on stereotypes about how they are more likely to commit violence and so on.

However, the state can strongly counter that minors have always been treated differently, and it has a legitimate purpose in reinforcing the rights of parents to restrict their children's ability to purchase offensive video games, preventing aggressive, violent behavior, and preventing psychological/neurological harm. This distinction should be reviewed under the mimimum rationality review of Lee Optical where the state only must show any legitimate interest rationally related to its objective. There is no animus here because the state is attempting to help parents and minors, not to distinguish them and place a negative mark on them. Stereotypes may be important for intermediate scrutiny, but for minimum rational basis review, these should not be persuasive. And more importantly, the state has conducted numerous studies and this data is not mere stereotypes but it is based on scientific data.

(Boldly) The Supreme Court will come to a 9-0 ruling against the minors.
SCALIA (concurring): We follow the Lee Optical test.
THOMAS (concurring): This is an uncommonly silly law, yes, but under rational basis review we defer to the state.

-->End of Question 3

-->Question -3-

Parties have standing

Manufacturers

Video game manufacturers will first argue that violent video games are not an unprotected a category of free speech. Manufacturers will point to the Court's recent decisions in Snyder v. Phelps and [Stevens] to argue that violent video games should not be unprotected.

Manufactures will argue that in Stevens, the Court declined to include video footage of the death, torture, and mutilation of actual living animals as outside the First Amendment's protection. Manufacturers should place heavy emphasis on the fact that in crush videos an animal is actually being harmed, but in video games, nothing is actually being harmed. The animals being "crushed with the heels of shoes" are simply pixels on a screen.

States will respond by saying that the Court left open the possibility that crush videos could be unprotected, but the Court simply declined to do so in Stevens because the statute was overlybroad. States will argue that the harm associated with crush videos is magnified by video games because video games allow the user to participate in the action, rather than simply observe.

Manufacturers should compare their case to Snyder. In Snyder, the Court upheld Westboro Baptist Church's right to picket funerals and to use signs bearing phrases like "God hates Fags" and "thank God for dead marines." The Court held that even signs as harmful as these were not

outside the protection of the First Amendment. Manufacturers should analogize to Snyder and say that just like the CT upheld WBC's right to use potentially harmful language, the CT should uphold manufacturers' rights to produce violent video games.

States will argue that in Snyder, the Court relied on the fact that WBC was speaking about matters of public concern. THere is no such public concern in violent video games.

Manufacturers will argue that because violent video games are protected under the First Amendment, the State's legislation should be subject to the strictest scrutiny because it is not content-neutral. In order to be content neutral, the legislation must be both 1) subject matter neutral and 2) view point neutral. By categorically restricting a certain kind of game, manufacturers will argue, the State's legislation is neither. Mfgers will argue that the law is subject matter-based because it restricts a particular kind of speech- violence- but allows others. Manufactuers should analogize to the Carey case, in which the Court struck down a law that banned protesting except if it was related to a labor protest.

Manufacturers will further argue that even if violent vidoe games are unprotected, the state should not employ the Miller test, because the Miller test dealt only with sexually explicit content. Manufactures should argue that such a test places them at the mercy of local morals and prejudices, and thus inhibits their business. Further, manufacturers will argue that the kinds of people making these determinations are not the intended audiences of their products, and thus will not be able to

accurately evaluate them.

The Court

The court will probably rule 8-1 for the manufacturers, with the same voting pattern as Snyder and Stevens. Roberts will write for the majority, assering that violent video games are not outside the protection of the First Amendment. Justice Alito will dissent, arguing as he did in Stevens that such video games serve no important purpose, and that they are so harmful that they should be unprotected by teh First Amendment. Breyer will concur, and say that although in his concurrence in Stevens he said an assault probably would not be protected under the First Amendment, here there is no real assault.

However, Justice Sotomayor may side with Alito, because of her experience as a former state prosecutor. Justice Sotomayor may be particularly sensitive to activities that increase the likelihood of violent crimes, a subject that she is particularly passionate about.

-->Question -4-

The President should be the one to determine where Petitioners are released.

In Dames & Moore v. Regan, the Court uphold President Carter's right to make an executive agreement with Iran and agree to end the hostage situation if Iranian assets in the US were frozen and no American could bring a claim against an Iranian. The court found this act as a valid exercise of Presidential power, and rejected petitioner’s argument that it was an overreach of presidential authority. The court ruled that this was a valid Presidential response to a national crisis. Similarly, any presidential agreement which would agree to release prisoners in another country is a response to a national crisis. Just as there was no other reasonable choice for President Carter but to make an agreement with Iran, there is no other reasonable choice but for President Obama to make an agreement with another country, and release petitioners there.

If Congress were to be the ultimate decision maker in this matter, it is possible that Petitioners would never be released from Guantanamo. Congress has already showed that they are unwilling to set Petitioners free at all. This is a clear violation of their due process rights, which were granted to prisoners in Guantanamo in Rasul. Congress's refusal to expend any money to have Petitioners release shows that they are not the ones to make a decision on matters such as these. Furthermore, the Court has ruled that the President, not Congress, is the single voice of the country, and that he has the power, as a diplomat, to work with other nations for a solution to problems.

Congress does have the power to control citizenship and residency requirements in Art. I, § 8, cl. 4, and therefore their decision that

Petitioners should not be released into America should be obeyed. This however, is as far as their input into the situation should go. The President, should respect Congress on that matter, but be allowed to negotiate with other countries, as part of his executive powers.

It also would not be proper for the judiciary to decide what happens to Petitioners. This is a political question which has no place in judiciary. Baker v. Carr stipulated that if the Court must make an initial policy decision to decide the case, then it is non-justiciable. Baker v. Carr also held that if there would be significant embarassment from multiple pronouncements from the different branches, and if adjudicating the case would show a lack or respect to a coordinte branch, then the case is non-justiciable. Finally, if there is no legal standard, the court should not decide the case. All of these factors come into play here. There is no legal standard on which to base a decision. No situation like this has ever happened before, and therefore, there is no legal standard by which to adjudicate this issue. Secondly, an initial policy determination would have to be made by the court to decide what should happen to petitioners, because it would need to be decided where to release the petitioners, as opposed to simply deciding that they in fact need to be released. Lastly, there is a risk of embarrassment from different pronouncements from the coordinate branches if the judiciary were to come to a decision conflicting with that of the President and Congress. Most importantly, however, the judiciary would show a lack of respect for the office of the President if it adjudicated this case, because the fate of the Petitioners falls within his executive powers, and is his problem to solve. The Court, in adjudicating this case, would encroach on the President's role as the representative of our country and

the person able to make treaties with other nations. Therefore, based on the factors set forth in Baker v. Carr, this is a political question that is not appropriate for the court to decide.

Therefore, it is the President, not any of the other branches, who should be given the choice of what becomes of Petitioners. This decision would fall under his executive powers.

-->End of Question 4