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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1587**	**7844**	**9406**
Section 2	**1261**	**6396**	**7642**
Section 3	**772**	**4009**	**4776**
Total	**3620**	**18249**	**21824**

Answer-to-Question-_1_

The WIC program could be vulnerable to Constitutional challenge for lack of congressional authority and because it violates the 10th Amendment and the 5th amendment's Due Process clause. Such challenges would likely fail because the Congress likely has power under the Spending Clause to pass WIC and because it likely does not violate either the 10th or 5th amendment such that the entire law would be found unconstitutional.

~Congressional Power~

Congress could claim power to pass WIC from the commerce clause, 14/5 enforcement power or via the spending clause but it likely only has power under the Spending Clause.

I. Spending Clause (and 10th Amendment?)

The clearest way to congressional authority to pass WIC is through the spending clause. Congress can spend to promote the general welfare and not just as it is connected to enumerated powers (*Butler*). The congressional findings, though they could be ignored (as in *Morrison*) make a strong case encouraging breastfeeding via federal funds would be in the general welfare, improving the health and capacity of society. This spending is likely not coercive (*Dole*) because it serves a national (and not just a state or local) welfare purpose, as long as the conditions came when the bill was first passed and it does not require the states to take the money in the first place, the conditions are unambiguous and they are rationally related to the federal program at issue because they ARE the

program (whether this spending violates external constitutional provisions or the 10th amendment will be handled below).

It is important to not that nowhere in the statute does it say that the state will not receive funding if they do not adhere to the conditions (i.e. what the state shall do). So there are no conditions on the receipts of the funds but even if they did they do not create a gun the head (*Sebelius*) per se because we just don't know how much WIC funding is worth to the states. We would need more facts. It is possible that it is so small that the states could easily take it or leave it (though this seems unlikely as this program serves *half* of the infants born in the US every year).

There is an argument that there is a 10th amendment commandeering violation (*Printz*) here as WIC requires State and local agencies to administer the program, submit monthly financial reports, keep records and maintain lists, etc. Yet, this seems to be a lawful condition on the receipt of funds. The states do not have to take the money so, unlike *Printz*, the States only have to take such action if they would like to have the funds. This sounds like Medicaid or Medicare which, to my knowledge are constitutional uses of congressional power.

If they are not constitutional simply via the spending clause, a case could be made that they are constitutional via the Spending + N&P clause. It could very well be that asking the states to administer the program is simply incidental to the spending power itself (*Sebelius*). This seems to be similar to the view that J. Scalia expresses in his concurrence in *Raich*.

II. Commerce Clause

It is unclear what activity Congress would be claiming to regulate under the commerce clause. It certainly isn't a instrumentality or channel of commerce. If WIC is attempting to regulate poor health among infants and women or if it lack of breastfeeding neither would seems to meet the economic requirement under *Lopez.* If it is healthcare generally, it could be said that they substantially affect interstate commerce because it affects the health care markets but then in some ways it looks like *Sebelius*, that the gov't is trying to create commerce. It is different in that if they do not breastfeed they would be buying formula and thus this is not strictly creating a market but regulating activity affects the market for infant formula. Even if these activities were considered economic, and though there are congressional findings that failure to breastfeed is hurting the productivity and intelligence of the overall population of the US, it, like Lopez is probably too attenuated. To claim that a failure to breastfeed substantially affects interstate commerce because it starts kids off on the wrong foot sounds similarly the claim that fear of guns at schools hurts school performance and thus productivity, and that was found to be too attenuated in *Lopez*.

III. 14/5 Enforcement Power

Congress could similarly claim that it has power under 14/5 to enforce the EPC. Here there is discriminatory impact on minorities and the indigent. This has two problems. First, it isn't clear that Congress has 14/5 power when using the 5th Amendment reverse incorporation (*Bolling v. Sharp*) EPC and second, wealth is not a suspect class (*Rodriguez*). The claim could be that "equal liberty" is at stake and action needs to be taken to protect racial minorities but the Court's have not spoken to whether there is a right to health care or proper child nutrition and the Court could strike this

down under *City of Boerne* for being incongruent with the substantive rights of the 14th amendment as expressed by the Court. The Court hasn't spoke, so Congress has no way to follow.

There is likely power under the Spending Clause for the WIC program.

~Limitations on Congressional Authority~

Challengers to the law could argue that even though there is congressional authority to pass the law, WIC violates the Due Process clause of the 5th amendment, both on grounds of reverse incorporation "equal liberty" (*Bolling*) and/or unduly burdening the fundamental privacy right to an abortion (*Casey*).

I. EPC (Reverse Incorporation)

Challengers could claim that WIC discriminates on the basis for gender, both among women and between women and men, and/or that it discriminate on the basis of race.

A. Gender Discrimination (among women and between men and women)

A man could claim that WIC facially discriminates against poor men as it gives post-natal, financial assistance to women and not men (as eligible participants). Like *Nguyen*, the court would likely find that there is a biological difference (and not a stereotypical one) here, there will always be a woman involved in a birth but not always a man (they could just take off). This would get RBR (because no stereotype) and would likely be upheld as there in an legitimate gov't interest in health. An as applied challenge could be brought by a man who's wife died at child birth and thus he needs the assistance. If the Court took this case it could get intermediate scrutiny but it would likely

only result in him getting benefits, not in striking the law.

Women who do not want to or cannot breastfeed their children could claim that there is discrimination among women under the supplemental foods section because WIC does not provide infant formula but only allows states (States "*may*") to provided it. Because there is no explicit gender classification and any discriminatory intent (which you can probably find because WIC is all about promoting breastfeeding - *Washington v. Davis, Arlington Heights* Factors) it would not be on the basis of suspect classification, only as to the choice or ability to breastfeed. It is unlikely that the lack of ability is a disability (under the ADA for example) and thus it would probably get RBR and would again be upheld because the promotion of breastfeeding (in light of the congressional findings) is a legitimate gov't interest.

There is the off chance of DPC claim that this abridges the right of a mother to bring up a child (*Meyers v. NE*) but this does not preclude the right, just doesn't promote that life style, therefore, RBR and again upheld.

B. Race Discrimination

No african american women could bring the claim of race discrimination because the States are requires to "develop and implement programming target to promote breastfeeding by black women." This is facially discriminatory on the basis of race. It would get strict scrutiny but it is a close call whether it would survive. There is a compelling gov't interest in remedial measures and because congress has made findings that low breastfeeding numbers among black women both hurts blacks and that it is traced back to slavery, this may suffice and a remedial measure. It also appears to be narrowly tailored because it does not give black women more benefits, it just targets the programing, which I presume, just means that it does a better job of getting out the word

among black women, a problem that may not exist for other races.

II. SDP (Abortion)

There could also be a challenge that WIC unduly burdens women's rights to abortion (*Casey*). WIC prohibits states from giving women information about abortion providers. This is, in a way, the inverse of Casey which allows the gov't to give lots of (even manipulative) information about abortions. It has no exception fro the health or life of the mother, even when the information is requested. But, this would likely be upheld given Carhart because there need not always been an exception for the health of the mother (if it really gives no exception for life, then it would probably be stricken but this seems easily severable and does not sink the entire law). So, unfortunately, it looks like this does not "unduly burden" the right to an abortion.

As there is likely power under the spending clause and there is no external constitutional prohibition on WIC, it will likely survive any Constitutional challenges.

Answer-to-Question-_2_

Any challenge brought by the NRA, NATM, or other individuals would probably be focused on a lack of congressional power to enact this bill, regulatory takings or as an abridgment of 2d amendment right to bear arms. All such challenges would likely fail. Congress may have power under the commerce clause (this is the weakest part of the gov't's case) to regulate the production and manufacturing of "imitation firearms" and such toys are not protected by the 2d amendment (I will not deal with the possibility of takings as we didn't cover that in this class).

~Congressional Power~

I. Commerce Clause

Perhaps the most suspect aspect of this law is that is directly regulates the manufacturing of imitation firearms. The heart of the commerce clause is federalism. As J. Sutherland said in Carter Coal, If the commerce clause power is not kept in check, the States "may find [themselves] so despoiled of their powers . . . as to reduce them to little more than geographical subdivisions of the National domain." Directly regulating production/manufacturing is the epitome of reaching into a state to regulate commerce but *Jones & Laughlin* abolished this distinction and *Wickard* was the death blow to all such nomenclature.

Any imitation firearms that travel in interstate commerce are instrumentalities of

interstate commerce and can be directly regulated by Congress under the commerce clause. But, the law does not include the jurisdictional hook "interstate commerce" for imitation firearms that "enter into commerce, [are] ship[ed], transport[ed] or receive[d]." So, such regulation must come through the "substantially affects" prong. This activity is unquestionably economic, as the NATM says it will dramatically cut into their sales (though NB: there is no congressional finding as to the amount of money involved in the sale of such imitation firearms). The question is whether such economic activity substantially affect instate commerce. Without the congressional findings to that effect, it may be a close call. Even aggregated (*Wickard*; see *Raich*) this may fall short of a "substantial" effect. Congress does make findings that the shootings that are allegedly the result of the the possession of imitation firearms affect public safety, health and welfare and surely those things have effects on interstate commerce, but again, it is questionable, even in the aggregate if it rises to the level of substantial.

Perhaps congress's best argument comes from the civil rights cases, especially *Ollie's BBQ*. Ollie's BBQ itself did not have a very large effect on the interstate market for food but it purchased its meat out of state and thus, in the aggregate came under the commerce clause powers. By the same token, the purchase of large amounts of plastic (almost surely from out of state or over seas) and other materials to produce these imitation firearms would likely, in the aggregate link such manufacturing and shipping to the Commerce Clause. The current court, as it is consistently limiting the power of the CC (but see *Raich*, may look dimly on such constitutional gymnastics but as the political opinion is turning in favor of such laws and gun regulation and because a majority of states already have some regulation of imitation firearms in place, the Court may well side with public opinion (see *Obergefell*).

In such close cases, Congress can always try to lean on N&P. It would not be useless here as in Sebelius because the necessary predicate (commercial activity) already exists and it necessary (convenient, useful - *Gibbons v. Ogden*) to regulate manufacturing to regulate interstate commerce in imitation firearms. Whether it is proper may be a question of federalism or other external constitutional provisions. If this law does not survive it will be for lack of a jurisdictional hook, so it has an easy fix (as in Lopez), just add the words “interstate” or “among the several states”.

It is a difficult matter but I believe it is more likely than not that this bill would be upheld under the commerce clause. Congresswoman Ramirez could do herself a favor by adding the jurisdictional hook (of she did it would survive as regulation of instrumentalities and (via N&P) manufacturing and production) and findings as to the size of the imitation firearm market in total dollars.

II. Penalties Problem

As in *Morrison*, even if the rest of the law is upheld, the penalties provision regulates private actors and as such may fail due to the State Action Doctrine. But that is only if this was somehow brought under 14/5 power (which likely could not be the case here) which only allows the Fed gov’t to regulate state or other public actors. If it survives under the commerce clause there would be no such problem.

~Limits on Congressional Power~

I. Federalism

As mentioned above, the limits on Commerce Clause power are directly tied to

ideas of Federalism (See *Lopez*'s step back with guns in a school zone). A majority of states have already regulated imitation firearms to some extent. A preemption of such laws by Congress could invoke federalism concerns when the states have already spoke to such issues. The current Court could be especially amenable to such a claim but it does not involve commandeering and if the fed gov't can regulate squarely under one of its enumerated powers, neither the 10th Amendment nor federalism itself, would require that this bill be stricken for interfering with a traditional state function (*Garcia*).

II. 2d Amendment, Fundamental Rights

In *Heller*, the Court extended the right to bear arms to owning/possessing a handgun and *McDonald* incorporated that right against the states. The arguments for why there was a right to bear arms in both cases, while historically based focused on a right (though not formally recognized) to personal self-defense, eschewing the notion that the 2d amendment protects only hunter's or militia rights. Perhaps an argument could e made that possessing a real-looking imitation firearm somehow offers an individual some protection. Maybe intimidation if one carries it on her person or the ability to draw it and startle and attacker but such claims are attenuated at best. It would be a difficult sale to a Court that in Heller said that regulation of firearms was still permissible, not everyone need be allowed to have one. If this is not a completely different discussion (regulating toys, not firearms), it is sufficiently different that such heavy regulations would very likely be permissible.

If somehow the Court determined that his did abridge a fundamental right to bear arms, it would get strict scrutiny. The health and welfare of the citizens could be considered a compelling gov't interest (it might be if J. Marshall's sliding scale theory

(See *Rodriguez*) is correct as this is not a right to bear real firearms, just imitations) and it could to be narrowly tailored. It gives the manufacturers many choices as to colors and make of the guns, though, this may not be enough as it restricts them to bright colors which would make them nearly unusable to protective purposes (if the Court finds that is the reason for extending the 2d amendment right to toys).

I would recommend adding a jurisdictional hook to the "Acts Prohibited" section. If that is done, Constitutional challenges to this bill (should it pass into law) would likely fail because Congress has authority to pass such a law under the Commerce Clause (+ N&P clause if need be), and it does not abridge a fundamental right or violate principles of federalism. If no such hook is added, with the current Court, this could striken as an unlawful use of the Commerce Clause power.

Answer-to-Question-_3_

Given the history of segregation and subsequent integration (and then subsequent re-segregation - See *Milliken* (focus on achievement); *PICS v. Seattle* (integration only needed if history of *de jure* segregation and diversity not a compelling interest in primary/secondary education)) percentage plan would likely be upheld by the Court as a lawful alternative to the holistic approach, though I believe a reading of the reconstruction amendments, in light their history and common sense, with our case law precludes their use as a lawful alternative.

The Court has been moving away from an anti-subordination reading of *Brown* and toward an anti-classification reading. Whether or not the public high schools or neighborhoods were de facto segregated or not, under *Swann*, so long as there was a history of *de jure* segregation in the area (*Keyes*) single race schools would be presumptively suspect. But as *PICS* indicated, such is not the case in areas without such a history. Therefore, it is permissible, and perhaps even required (see *Fisher*), to use race neutral means to accomplish the “critical mass” required for diversity. It is an open question, or just perhaps fact bound, whether the the percentage plans are achieving that critical mass (in the recent *Fisher* Oral Argument there seemed to be some indication that under the percentage plan alone, most classes had only one or two minority students, which could potentially making them feel like a spokesperson for their race, which is one

of the things Critical Mass is meant to avoid and part of what makes diversity a compelling interest). If percentage plans don't achieve a critical mass then even under *Fisher* they would not be able to fully replace holistic admissions processes because a race neutral alternative is unable to achieve sufficient diversity.

Perhaps more concerning is that such programs seem to dismiss the need for individual consideration because they are race neutral (and individual consideration is check on the abuse of facial classifications) but under a *Washington v. Davis* type analysis, there would likely be discriminatory intent. It is well understood that this plan will achieve diversity because of the de facto segregation of high schools and their surrounding communities and so this plan was chosen ***because of*** its affect on minorities (and perhaps, *a fortiori*, on asians and whites). That should get the analysis back the question of a compelling interest in diversity and therefore back to the concerns about individual considerations as a check on such race-specific measures.

The other concern is the legal fiction that the Court is accepting. The use of Diversity as a compelling interest, instead of Remedial Measures, is really to just set up a proxy for such measures. The Court claims that diversity in higher education benefits everyone (*Grutter*) but at the heart of using affirmative action to achieve diversity is a remedial rationale. If all all students of all races, ethnicity, nationality, background, did proportionately well in school and on entrance examinations then there would be societally-proportional diversity in higher education (give or take a little based on preferences of schools). The reason such diversity is lacking is not because minorities cannot perform equally well by such metrics (I will ignore any *Plessy*-like claims of

white superiority or just general minority inferiority). The reason, and this would have to be found by a court, is likely that Blacks in particular but other races too, started off behind the curve and, even if the disparity may be shrinking, is because of past oppression/discrimination. Thus the reason that affirmative action must be used to achieve diversity is because of the need for remedial action. To index such action, as the Court does in *PICS*, on the basis of *de jure* discrimination in that geographical area, is to ignore the pervasiveness of not just the discrimination but its effect.

Anti-classification requirements are important and such a reading of the law is a noble ideal that should be striven for but to read SCOTUS case law and our history only in terms of anti-classification myopic and accepting of a legal fiction. Absent a determination to look at this area of the law in a more functionalist light or a finding that the percentage plans fail to achieve a critical mass, the Courts will likely uphold the percentage plans as a lawful alternative to the holistic approach. I believe that such a reading of the case law is inaccurate but more importantly, a reading of the reconstruction amendments in light of their history requires, at least to some degree, an anti-subordination reading. Therefore, whether the Court rules in this way or not, the percentage plans are not a lawful alternative.
