Institution **Harvard Law School**
Course **F15 Brown-Nagin - Con Law SOP**

Event **NA**

Exam Mode **OPEN LAPTOP**

Exam ID **470693**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**1186**	**6787**	**7975**
Section 2	**877**	**4902**	**5776**
Section 3	**790**	**4687**	**5474**
Total	**2853**	**16376**	**19225**

Answer-to-Question-_1_

This memorandum will address whether WIC is vulnerable to constitutional challenges by a variety of individuals and classes. Although there are several potential challenges that could be mounted against WIC on the basis of gender and wealth discrimination, these are unlikely to be successful. The statute's requirement that states adopt measures to implement WIC, and to develop pro-breastfeeding programming targeted to black women, however, may be subject to constitutional challenge. The statute's restriction on providing pregnant women with abortion information may also run afoul of established constitutional principles.

As a threshold matter, Congressional authority to initiate WIC must be established. An argument may be made that WIC was passed under the Commerce Clause, since purchasing food necessities is certainly an economic transaction, as required in *Lopez*, and would have a substantial effect on interstate commerce due to the aggregate impact of low-income women and families purchasing approved, nutritional food items. *See, e.g., Wickard, Raich.* However, an easier argument may be made that Congress' authority to enact WIC stems from the Spending Clause. Since Congress may spend federal monies to promote the general welfare, *see Butler*, a use of federal funds that reduces poverty and malnutrition, particularly among children especially vulnerable to such risks, is almost certainly within constitutional limits on Congressional power.

Despite the existence of Congressional authority to enact this legislation, the implementation of the WIC program might give rise to constitutional challenge by states.

WIC currently requires state and local agencies to assume several responsibilities, such as the coordination of breastfeeding promotion efforts, monitor nutrition facts of WIC-approved foods, submit monthly financial reports and other records to ensure compliance with the federal program. Although Congress has authority to legislate, and in some instance, infringe on state sovereignty, *see Garcia v. San Antonio*, the federal government cannot commandeer state officials into administering a federal program. *Printz*. There may be a colorable claim that WIC imposes significant burdens on scarce state resources by requiring state officials to perform additional tasks associated solely with WIC - tasks that appear to be required without providing states the funding necessary to meet the act's demands. If such a claim is brought, a reviewing court would likely sever the state agency administration requirements and uphold the remainder of the act.

WIC also might be subject to constitutional challenge on the basis of discrimination. The federal government is bound to honor equal protection principles through reverse incorporation of the 14th Amendment's EPC into the 5th Amendment. *Bolling v. Sharpe*. The Act facially classifies and accords benefits to groups based on characteristics such as gender, wealth, and race. Each of these potential challenges will be discussed individually.

First, WIC facially limits program eligibility to children under the age of 5, and women. Men are excluded from eligibility, and thus might be able to bring a claim for gender discrimination - this suit would likely be brought by a single father responsible for the support of his children or other similarly situated individuals. To defend a statute that discriminates on the basis of gender on its face, the government must demonstrate an

"exceedingly persuasive justification." *U.S. v. Virginia* - a more traditional formulation of the test is that the classification must be substantially related to an important governmental interest. *See, e.g., Frontiero v. Richardson, Craig v. Boren*. However, gender discrimination may be permissible if the gender classification is based on actual biological differences, rather than social stereotypes of gender roles. That standard is met here. WIC limits eligibility to pregnant, postpartum, and breastfeeding women - men cannot, as a matter of biology, fit into any of these categories. The program thus meets the government interest of ensuring adequate nutritional support for women who are in especial need of essential nutrients due to the physical demands associated with pregnancy, childbirth, and breastfeeding. This challenge is thus unlikely to be successful.

Next, WIC discriminates on the basis of wealth, by limiting eligibility to individuals from households below or near federal poverty guidelines. A challenge against these regulations might be brought by individuals who are excluded from program eligibility but feel that government assistance is required in their case. However, because wealth is not a suspect class absent discrimination *against* the indigent in very specific circumstances, *see San Antonio v. Rodriguez*, and no fundamental rights are at issue here, this challenge will also easily fail.

Finally, WIC includes a mandate that state agencies develop and implement programming to promote breastfeeding by black women. Advocates for breastfeeding in general might challenge this provision, arguing that the benefits of breastfeeding apply to children of all races, and the government should promote breastfeeding to all members of the population, not simply a single racial group. All federal, state, and local programs that

include facial racial classifications are subject to strict scrutiny. *Adarand*. The government must thus demonstrate that the classification is narrowly tailored to serve a compelling governmental interest.

Although Congress has found that breastfeeding is significantly less prevalent among African-Americans, and that there are significant health benefits from breastfeeding, I am unsure that the promotion of breastfeeding among this particular class rises to the level of a *compelling* government interest. Nor do I believe the classification is narrowly tailored - although black women have the lowest prevalence of breast-feeding, opportunity for improvement in breastfeeding rates appears in every racial category. Congress' assertion that "targeted intervention" within this population is necessary, although significant, is not entitled to judicial deference. *Morrison*. There is no indication that programming that encourages women of other races to breastfeed would not have a similar impact on black women. Thus, I believe that if confronted with such a challenge, a court would strike the portion of WIC calling for programming promoting breastfeeding among black women - an easier fix would be to simply encourage state programming of a broad, non-targeted pro-breastfeeding campaign.

The final provision likely to be subject to substantial litigation is the act's restriction on state and local agencies provision of information about abortion providers to pregnant women. Under *Casey v. Planned Parenthood*, an abortion restriction is unconstitutional if it represents an "undue burden" - a state (or the federal government) may not place a "substantial obstacle" in the path of a woman seeking an abortion before a fetus is viable. That standard is likely to be met here - the act proscribes providing pregnant women who

have requested information about pregnancy termination with such information. Such deliberate stonewalling seems in direct contradiction with the Court's command that the government not interfere with a woman's right to make an informed choice about the termination of her pregnancy. As a result, this provision of WIC will likely be struck down, if reviewed by a Court.

In conclusion, WIC is unlikely to be held as an unconstitutional exercise of Congressional power - nor is it likely to constitute discrimination on the basis of wealth or gender. However, the Act's racial classifications may not withstand strict scrutiny, and the provisions requiring state action to implement the program, as well as prohibiting the provision of abortion-related information to women who ask about it may be struck down.

Answer-to-Question-_2_

This memorandum will address the constitutionality of Congresswoman Ramirez's Imitation Firearm Bill (IFB). The IFB will likely pass constitutional challenge on the grounds of lack of Congressional authority, violation of the Second Amendment, and concerns of federalism.

As an initial matter, Congressional power to enact such a law must be proven. The Supreme Court identifies three categories of activity Congress may regulate under the Commerce Clause - the first (channels of interstate commerce) is not at issue here. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, *or persons or things in interstate commerce . . . .*" *U.S. v. Lopez* (emphasis added). Implicit in these first two categories is the concept that Congress may regulate commerce *qua* commerce. The final category is those activities that have a substantial relationship to interstate commerce. This authority extends to instances when Congress concludes that "failure to regulate [a] class of activity would undercut the regulation of the interstate market in that commodity." *Gonzales v. Raich*. In addition, the Necessary and Proper Clause may expand Congress' authority to regulate interstate commerce, as Justice Scalia argued in *Raich*. However, the N&P Clause may only be used in the case of an admittedly legitimate exercise of Congress' enumerated powers. *See, e.g., Sebelius*.

The IFB appears to fall under the second category, instrumentalities of commerce. It can be fairly assumed that toy manufacturers do not make imitation firearms, and then sell those firearms exclusively within a single state - instead, the toys are shipped to various locations throughout the country. In this case, the government is well within its authority to regulate the commodity in question, just as food is regulated through the affixing of nutrition information.

However, even if toy manufacturers did attempt to dodge the statute by manufacturing and selling imitation firearms purely intrastate, the Commerce Clause could still likely reach the activity in question under *Raich* and the "substantially affects" prong, since allowing purely intrastate imitation firearm manufacture would completely undercut the commodity's interstate regulation. (The regulation at issue here also clearly meets *Lopez*'s economic/non-economic test - the manufacture, transport and sale of imitation firearms is inarguably economic activity.) Further, as Justice Scalia pointed out in his concurrence in Raich, the Constitution's Necessary and Proper Clause may allow regulation of an intrastate activity "even though the intrastate activity does not itself 'substantially affect' interstate commerce." Nor can manufacturers hold up previously accepted bright-line rules separating manufacturing from interstate commerce as a defense. *See, e.g., Carter Coal*; *E.C. Knight*. Such lines were firmly rejected in *NLRB v. Jones*.

The second line of attack is that the IFB violates the Second Amendment's express command that "the right of the people to keep and bear Arms shall not be infringed." Advocates of gun ownership, especially the NRA, are likely to challenge the law on these

grounds as the beginning of a slippery slope that ends with the banning of all firearms. The right to "keep and bear Arms" was found to be both a fundamental right and an individual right in *District of Columbia v. Heller*. However, in both *Heller* and *McDonald v. Chicago*, the primary rationale advanced for the necessity of the Second Amendment was self-defense, either from tyrannical government or other attackers. Not only is there a serious question as to whether imitation firearms meet the definition of "Arms" as contained in the Second Amendment as a textual matter, these "toy guns" cannot advance the Amendment's judicially-recognized objective of self-defense. It is therefore extremely unlikely that the IFB will be struck down for violations of the Second Amendment.

Finally, states may object to the federal government's insertion into a realm that had historically been subject to state control, as shown by the first factual finding in the IFB. The Bill further explicitly preempts any state or local legislation regarding the marking of imitation firearms. However, it is unlikely that these vague concerns of federalism will trump the Constitution's express empowerment of Congress to "regulate Commerce . . . between the several states." This point was convincingly made in *United States v. Darby*, where the Court said, "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . . [Whatever] their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause."

Nor are the NATM's assertions that the current safety mechanisms (orange tips) are

sufficient entitled to weight. Congress has made findings that indicating that orange tips are not adequate to prevent misuse of imitation firearms. These findings of fact, although not dispositive, are entitled to judicial consideration. *Katzenbach v. McClung*. Since it is rational for Congress to have decided that additional regulation will decrease the prevalance of imitation firearm-related shootings (and crime), their findings will likely be upheld.

In conclusion, the IFB is likely to pass constitutional muster - it is a valid exercise of Congressional authority to regulate interstate commerce, and accusations of Second Amendment violations are inapposite. Additionally, vague concerns of federalism and irrational Congressional fact finding are unlikely to invalidate the bill.

Answer-to-Question-_3_

The 14th Amendment guarantees to all persons "equal protection of the laws." However, even facially neutral statutes can have a disparate impact on classes of individuals. When this occurs, discriminatory intent must be proven to make a constitutional argument against a statute or policy. *Washington v. Davis*. If discriminatory intent is found, courts will apply strict scrutiny to determine if the policy is narrowly tailored to serve a compelling government interest. Cases have repeatedly found that within the higher education context, racial diversity is a compelling government interest. *E.g., PICS v. Seattle, Grutter v. Bollinger*.

A method of achieving racial diversity that has recently come into vogue are "percentage plans". These plans grant the top 10-20 percent of graduates in a high school automatic admission into public colleges and universities. Administrators of these plans are fully aware that de facto segregation provides greater likelihood that top graduates from some schools will be racially diverse, and should these individuals accept the public university's offer of admission, the university's racial diversity will increase as well. The question presented is whether administrator's actions to implement percentage plans constitute discriminatory intent and an impermissible use of race in university admissions processes.

Percentage plans are an acceptable alternative to holistic admissions policies, because they ensure that merit, not race, is the driver behind the admission of students to public universities. Although it is arguable that percentage plans represent an "intent to discriminate" this discrimination is justified by state interests in diversity and its narrow tailoring to avoid racial classifications.

Percentage plans ensure that the most qualified individuals from each high school are admitted into public universities, regardless of race or other individual characteristics. Although direct comparison of applicants might reveal some discrepancies (for example, a student in the 12th percentile at a particularly high-achieving school might objectively perform better than a student from the 7th percentile at a less challenging school), percentage plans are a fair and workable solution to ensure that the best-performing students are provided with additional opportunities to continue their education. The fact that this merit-based system has a racial impact is of limited relevance. *See Ricci v. Destefano* (finding that the results of a race-blind merit exam cannot be disregarded, even when the result is racially disproportionate).

In some ways, this system may be preferable to the holistic admissions process challenged in *Grutter*. There, although admissions processes were purportedly holistic, the risk that an individual's race, gender, or sexual orientation would play a much larger role in the admissions decision than acknowledged remained. No such risk appears with the adoption of a percentage plan. By its own terms, the percentage plan system takes individual characteristics completely out of the equation - a student's performance is the only metric used to determine university admission.

Of course, university administrators are aware that percentage plans provide a benefit in addition to ensuring that the most highly qualified students are offered admission to prestigious state universities. Due to housing patterns, socioeconomic factors and cultural associations, percentage plans tend to increase the diversity of universities, since a number of schools may be predominantly populated by minority students. Some rejected applicants have complained that because school administrators have adopted percentage plans at least in part due to this effect on university diversity, they represent an unconstitutional intent to discriminate. Assuming, for the sake of argument, this is the case, it does not necessarily follow that percentage plans are unconstitutional under the EPC.

Several cases have established that diversity is a compelling state interest within institutions of higher learning. *E.g.*, *Grutter*. It follows that percentage plans which promote racial diversity do not, without more, create a constitutional violation. Such a violation may be made out only if the means chosen to promote racial diversity are not narrowly tailored.

Holistic admissions policies have also been held to meet demands that discriminatory policies be narrowly tailored to achieve the state's interest. *Grutter*. Percentage plans similarly meet the narrowly tailored requirement, since they are facially race neutral and avoid "insulating each category of applicants with certain desired qualifications from competition with all other applicants." *Bakke*. Percentage plans do not establish quotas or assign "points" for membership in a given minority group, both of which have been

rejected as not sufficiently narrowly tailored to survive strict scrutiny. *Bakke; Gratz.* Instead, percentage plans *de*-emphasize race in admissions decisions and restrict administrators' ability to elevate race and diversity to a deciding factor in admissions policy.

Because percentage plans serve a compelling state interest in promoting diversity in public colleges and universities, and do so in a facially neutral manner without singling out particular minorities for preferential treatment, they are a constitutional form of affirmative action that emphasizes merit and achievement in university admissions decisions.