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Reversing the Tide under the Commerce Clause

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REVERSING THE TIDE UNDER THE COMMERCE CLAUSE

United States v. Lopez, 115 S. Ct. 1624 (1995)

School's a place for learnin'
School's a place for fun
And that sure ain't gonna happen
If someone brings a gun.

I. INTRODUCTION

America's children are at war and the school yard is the battlefield. During 1990 alone, nearly 4,200 teenagers were killed by guns.[1] Not including accidental deaths and suicides, it is expected that 120 American children under the age of eighteen years will be slain by gunfire this month.[2] In fact, more youths will die in our nation's streets every 100 hours than were killed during 100 hours of ground war in the Persian Gulf.[3] Much of the killing occurs on the school ground. During the academic years of 1986-1990, sixty-five students were killed with guns at school.[4] An additional 201 individuals were severely wounded, and another 242 were held hostage at gunpoint.[5] On an annual basis, 39% of urban school districts report a shooting or knifing, and 23% report drive-by shootings.[6] Teachers are also victims of the violence. Each day in the United States, 6,250 teachers are threatened with violence and 260 teachers are physically assaulted.[7] To combat gun violence occurring at school, Congress enacted the Gun Free School Zones Act of 1990[8] (the Act).

The Act makes it unlawful "for any individual knowingly to pos-

1 *Report for the Center for Health Statistics, 1990,* WASH. POST, May 9, 1994, at 1A.

2 Richard Price, *Violence Spreading Like Wildfire,* USA TODAY, May 9, 1994, at 1A.

3 Gordon Witkin et al., *Kids Who Kill,* U.S. NEWS & WORLD REP., Apr. 8, 1991, at 26 (quoting Louis Sullivan, Secretary of the United States Department of Health and Human Services).

4 CENTER TO PREVENT HANDGUN VIOLENCE, CAUGHT IN THE CROSSFIRE: A REPORT ON GUN VIOLENCE IN OUR NATION'S SCHOOLS (1990).

5 *Id.*

6 Elizabeth Shogren, *More Violence Seen in Schools than 5 Years Ago,* L.A. TIMES, Jan. 6, 1994, at 17.

7 Charlie Weaver, *When Kids Pack a Gun Instead of a Lunch,* STAR TRIB. (Mpls.), Feb. 10, 1993, at A17.

8 18 U.S.C. § 922(q) (Supp. II 1990).

sess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."[9] Under the Act, violators are subject to penalties of up to five years imprisonment and a $5,000 fine.[10] The Act defines a "school zone" as the grounds of a public, private, or parochial school, or property within 1,000 feet of such premises.[11]

In *United States v. Lopez*,[12] the United States Supreme Court, in a five to four decision, held that the Gun Free School Zones Act was an impermissible exercise of Congress' legislative authority under the Commerce Clause.[13] The Supreme Court emphasized the lack of express congressional findings linking the Act to interstate commerce, and the traditional role of local government over educational concerns.[14]

This Note first argues that the Supreme Court, by failing to apply the well established rational basis standard of review to its constitutional analysis of the Gun Free School Zones Act, wrongly decided the fate of the Act. Under the rational basis test, the relevant judicial inquiry is whether Congress could have rationally concluded that gun possession at school affects interstate commerce. Because Congress, in related gun control legislation, specified the link between juvenile gun possession and interstate commerce, Congress could have rationally concluded that guns at school affect interstate commerce. Furthermore, even if Congress was required to provide express findings linking gun violence in the schools with interstate commerce, it did so, albeit retroactively.

In finding constitutional authority under the Commerce Clause for the Gun Free School Zones Act, this Note examines judicial scrutiny of other gun control legislation, as well as broader social policy initiatives. In so doing, this Note reconciles Congress' ability to regulate through its commerce power over areas traditionally left to the state or local government, such as crime and education, with states' rights under the Tenth Amendment.

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9 18 U.S.C. § 922(q)(1)(A) (Supp. II 1990).

10 18 U.S.C. § 924 (a)(4) (Supp. II 1990).

11 18 U.S.C. § 921(a)(25) (Supp. II 1990). However, the statute provides exceptions for firearms located on private property outside of the school grounds, 18 U.S.C. § 922(q)(1)(B)(i) (Supp. IV 1992), to individuals qualified and licensed under state or local law to possess firearms, 18 U.S.C. § 922(q)(1)(B)(iii) (Supp. IV 1992), to unloaded firearms stored in a locked container or on a locked firearms rack on a motor vehicle, 18 U.S.C. § 922(q)(1)(B)(ii) (Supp. IV 1992), to individuals acting pursuant to a contractual agreement with the school, 18 U.S.C. § 922(q)(1)(B)(v) (Supp. IV 1992), and to law enforcement officers acting in their official capacity, 18 U.S.C. § 921(q)(1)(B)(vi) (Supp. II 1990).

12 115 S. Ct. 1624 (1995).

13 *Id.*

14 *Id.* at 1632-34.

Finally, this Note argues that the Supreme Court erred in determining that gun violence at school does not substantially affect interstate commerce. The existence of guns in schools creates an intimidating learning environment which deteriorates the quality of American education. A substandard educational process creates a workforce which produces poorer quality goods and services. Given that these outputs are traded in interstate commerce, guns at school substantially affect interstate commerce. This Note thus concludes that the Gun Free School Zones Act was a permissible exercise of Congress' commerce power.

II. BACKGROUND

The Supreme Court, in determining that the Gun Free School Zones Act was an impermissible exercise of Congress' legislative authority, cited the lack of express congressional findings linking the Act to interstate commerce,[15] emphasized the intrastate nature of education,[16] and expressed a desire to reserve educational issues to the domain of local government.[17] This section first reviews relevant constitutional jurisprudence including the evolution of Congress' expanding power under the modern Commerce Clause and the interrelated inquiry of local government sovereignty under the Tenth Amendment. Second, this section provides a brief synopsis of the legislative and judicial development of the Gun Free Schools Zone Act and compares the Act to other related federal gun control initiatives that have mustered judicial scrutiny.

A. CONSTITUTIONAL JURISPRUDENCE: THE COMMERCE CLAUSE & THE TENTH AMENDMENT

Under the Commerce Clause, the Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States."[18] If Congress exercises legislative power beyond that delegated to it under the Commerce Clause, it may also violate the Tenth Amendment,[19] for both issues are interrelated.[20] If a power is delegated to Congress, through the Commerce Clause for example, the Tenth Amendment expressly disclaims any reservation

15 *Id.* at 1632.

16 *Id.* at 1634.

17 *Id.* at 1634.

18 U.S. CONST. art. 1, § 8, cl. 3.

19 The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

20 New York v. United States, 112 S. Ct. 2408, 2417 (1992).

of the power to the States.[21] Conversely, if a power is reserved to the States under the Tenth Amendment, it is necessarily a power not conferred on Congress.[22]

1. Judicial Evolution of the Commerce Clause

It has been said that the modern scope of Congress' commerce power is broad and "grants the federal government jurisdiction so long as it can show . . . that the regulated activity burdens, obstructs, or affects interstate commerce, however indirectly."[23] As discussed below, such a view reflects the broad latitude given to Congress' commerce power when it was initially defined by Chief Justice Marshall over 170 years ago in *Gibbons v. Ogden*.[24] Such a view is also consistent with Congress' recent exercise of the Commerce Clause to achieve social objectives in the areas of Civil Rights[25] and crime control.[26]

a. *Gibbons v. Ogden*: the Foundation

The Commerce Clause received its initial interpretation in *Gibbons v. Ogden*.[27] In *Gibbons*, Chief Justice Marshall, writing for the Court, held that a 1793 federal statute licensing ships preempted a New York navigation license that would have granted a monopoly on interstate steamboat trade between New York and New Jersey.[28] The Chief Justice broadly interpreted "commerce among the several states" as "that commerce which concerns more states than one," even where such intercourse reaches inside the boundaries of each state it touches.[29] In Chief Justice Marshall's reading, only that commerce which is exclusively internal to a state and does not affect other states would be precluded from the reach of the Commerce Clause.[30] Moreover, Chief Justice Marshall described Congress' commerce power as plenary: "[t]his power, like all others vested in Congress, is complete in

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21 *Id.* at 2417.

22 *Id.*

23 Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

24 22 U.S. (9 Wheat.) 1 (1824).

25 *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) as discussed below in part II.A.1.c.

26 *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971).

27 22 U.S. (9 Wheat.) 1 (1824).

28 *Id.* at 13.

29 *Id.* at 194-95.

30 *Id.* The *Gibbons* court went on to say: "Commerce among the States cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between a different part of the same State, and which does not extend to or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary." *Id.* at 194.

itself, may be exercised to its utmost extent, and acknowledges no limitation, other than those which are prescribed in the Constitution."[31] According to many scholars and judges, *Gibbons* gave the Commerce Clause the broad scope it enjoys today.[32]

b. Using the Commerce Clause to Achieve Police Power

Although the Constitution did not grant Congress a national police power,[33] Congress attempted to achieve police power objectives though the exercise of its commerce power.[34] The Supreme Court initially approved a restrictive use of Congress' commerce power to police goods moving in interstate commerce.[35] In establishing the boundaries of this "police power" the Court established a "direct" versus "indirect" test.[36] The Court held that activities that affected interstate commerce directly were within Congress' powers, while activities that affected interstate commerce only indirectly were beyond Congress' reach.[37] Accordingly, Congress could prohibit the interstate transport of "contraband" such as lottery tickets,[38] impure foods,[39] and stolen vehicles.[40] Congress, however, could not regulate "production,"[41] "manufacture,"[42] and "mining"[43] activities because these were

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31 *Id.*

32 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 120 (1942) ("At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded."); *see also* EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS: BACK TO THE CONSTITUTION (1936).

33 Classically, these police powers concerned health, morals, and well-being. *See, e.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

34 *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903) (*The Lottery Case*).

35 *Id.*

36 A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

37 *Id.* at 546. The Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the regulated activity only indirectly affected interstate commerce. *Id.*

38 *Champion*, 188 U.S. at 332.

39 Hipolite Egg Co. v. United States, 220 U.S. 45, 49 (1911).

40 Brooks v. United States, 267 U.S. 432 (1925).

41 Hammer v. Dagenhart, 247 U.S. 251 (1918) (The Child Labor Case). A federal law restricting the interstate shipping of goods produced by child labor was held unconstitutional as invasive of the reserved powers of the states. Justice Day's opinion distinguished *Hammer* from other cases, such as the Lottery Case, on the determination that the evil of child labor was confined to the original locality and ended when the goods entered interstate commerce. *Id.* at 270-72.

42 *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895) (The Sugar Trust Case). The Court affirmed the dismissal of a government civil action under the Sherman Act to nullify the acquisition of competing sugar refineries, which created a monopoly. The Court distinguished between "manufacture" and "commerce." *Id.* at 11-18. "Commerce succeeds to manufacture, and is not part of it." *Id.* at 12.

43 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it.")

seen as local activities which only indirectly affected interstate commerce. Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so intermingled that full regulation of commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.[44]

c. The New Deal Cases

In the 1930s, Congress extended its use of the Commerce Clause beyond federal police power objectives when it used the Commerce Clause to pass President Franklin D. Roosevelt's New Deal agenda. After initial resistance by the Court, an unsuccessful attempt by President Roosevelt to pack the Court, and the subsequent retirement of seven of the nine Supreme Court justices, the President was able to achieve judicial approval of his progressive New Deal legislation.[45] Through judicial appointments,[46] President Roosevelt was able to strengthen the power of the federal government and return the breadth of the commerce power to that initially granted in *Gibbons v. Ogden.*[47] Three cases epitomize the New Deal jurisprudence: *National Labor Relations Board v. Jones & Laughlin Steel Corp.*,[48] *United States v. Darby*,[49] and *Wickard v. Filburn.*[50]

In *NLRB v. Jones & Laughlin Steel Corp.*,[51] the Court upheld the National Labor Relations Act of 1935 against a Commerce Clause challenge.[52] The Court abandoned the "direct" and "indirect" effects test, and concluded that the correct inquiry was whether an intrastate activity has "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions."[53]

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44 *See e.g.*, House, E. & W.T.R. Co. v. United States, 234 U.S. 342 (1935) (Shreveport Rate Cases).

45 For a historical discussion of the Supreme Court's initial resistance to the New Deal legislation, President Franklin D Roosevelt's subsequent unsuccessful attempt to "pack the court," and the subsequent death or retirement of seven of the nine justices, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 at 238 (1990).

46 By 1941, President Franklin D. Roosevelt had appointed seven Supreme Court justices: Black (1937), replacing Van Devanter; Reed (1938), replacing Sutherland; Frankfurter (1939), replacing Cardozo; Douglas (1939), replacing Brandeis; Murphy (1940), replacing Butler; Byrnes (1941), replacing McReynolds; and Jackson (1941), replacing Stone (who was appointed Chief Justice, replacing Hughes).

47 22 U.S. 1 (1824).

48 301 U.S. 1 (1937).

49 312 U.S. 100 (1941).

50 317 U.S. 111 (1942).

51 301 U.S. 1 (1937).

52 *Id.* at 5.

53 *Id.* at 37.

In *United States v. Darby*,[54] the Supreme Court upheld Congress' ability to prohibit shipment in interstate commerce of goods produced in violation of the wage and hour provisions of the Fair Labor Standards Act of 1938, stating that Congress' power over interstate commerce was not confined solely to the regulation of commerce among the states.[55] Instead, the Court determined that Congress' power extended to those activities intrastate which "so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate . . ."[56]

Subsequently, in *Wickard v. Filburn*,[57] the Court held that farm production of wheat which is intended for home consumption is subject to Congress' commerce power, because it may have a substantial cumulative effect on interstate commerce.[58] The Court indicated that while the farmer's "contribution to the demand for wheat may be trivial by itself," the effect must be considered in light of the farmer's "contribution, taken together with that of many others similarly situated . . . ."[59] When the cumulative effect was considered, the *Wickard* Court found that "[h]ome-grown wheat . . . competes with wheat in commerce"[60] because it decreases overall demand for wheat on the market.[61] In modern day cases, such as the civil rights cases discussed below, the "affects commerce" principle of *Wickard* was used as a means for permitting congressional control over intrastate activities not directly connected to interstate commerce.[62]

d. The Civil Rights Cases

In cases dealing with Title II of the Civil Rights Act of 1964,[63] the Supreme Court further extended the scope of the Commerce Clause.

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54 312 U.S. 100 (1941).

55 *Id.* at 112. *Darby* expressly overruled Hammer v. Dagenhart (The Child Labor Case). *Darby* noted that *Hammer's* reliance on "congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property" had "long since been abandoned." *Darby*, 312 U.S. at 116.

56 *Id.* at 118.

57 317 U.S. 111 (1942).

58 *Id.* At issue was the Agricultural Adjustment Act of 1938, which established quotas limiting the acreage of wheat for each farm. The appellee had exceeded the quota by approximately 11.9 acres. *Id.* at 114.

59 *Id.* at 127-28.

60 *Id.* at 128.

61 *Id.* at 129.

62 *Cf.* Robert L. Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 ARIZ. L. REV. 271, 275 (1973).

63 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243-46 (1964) (codified as amended at 42 U.S.C. §§ 2000(a)-2000(b) (1988 & Supp. IV 1992)). The Act provides for injunctive relief against discrimination on the basis of race, color, religion, or national origin in places of public accommodation.

Among the most significant cases interpreting the Act were *Heart of Atlanta Motel v. United States*[64] and *Katzenbach v. McClung*.[65]

In *Heart of Atlanta Motel*,[66] the Supreme Court determined that Congress could regulate a single hotel located in Georgia because racial discrimination in public lodging burdens travelers, and thus has a deleterious effect on the interstate movement of persons and goods.[67] The Court held that "the power of Congress to promote interstate commerce also includes the power to regulate . . . local activities. . . ."[68]

In *Katzenbach v. McClung*,[69] the Court found that although an activity is local and may not be regarded as commerce, Congress may still reach it if the activity has a substantial economic effect on interstate commerce.[70] The Court determined that such congressional regulation should be judicially scrutinized under a "rational basis" test.[71] Thus, in upholding a Title II action against a local restaurant which refused to provide dining room service to African-Americans, the Court found that Congress had a rational basis for finding that such discrimination had a direct and adverse effect on interstate commerce because the discriminatory restaurants sold less interstate food and obstructed travel.[72]

The Civil Rights Cases are important for two reasons. First, they exemplify the Court's broad application of the "cumulative effects" test established in *Wickard*[73] to achieve social goals. The Court sanctioned Congress' ability to legislate over a single local hotel[74] or local restaurant[75] in order to discourage discrimination. Second, they established that substantial deference is to be granted to congressional intent under the "rational basis" test. To the extent that Congress could rationally believe that the regulated activity affected interstate commerce, Congress could regulate the activity under its commerce power. It is notable that the Civil Rights Act of 1964 passed the rational basis test even though, like the Gun Free School Zones Act of 1990, it carried no congressional findings.[76]

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64 379 U.S. 241 (1964).
65 379 U.S. 294 (1964).
66 379 U.S. 241 (1964).
67 *Id.* at 246.
68 *Id.* at 258.
69 379 U.S. 294 (1964).
70 *Id.* at 301.
71 *Id.*
72 *Id.* at 298.
73 Wickard v. Filburn, 317 U.S. 111, 119 (1942).
74 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964).
75 *Katzenbach*, 379 U.S. at 298.
76 *Id.* at 299.

e. Using the Commerce Power to Legislate Crime Control

Since the 1970s, the Supreme Court has upheld Congress' regulation of purely intrastate criminal activity under its commerce power. The principle examples of such jurisprudence are *Perez v. United States*[77] and *Russell v. United States.*[78]

The realm of congressional power over intrastate activity peaked in *Perez v. United States.*[79] In *Perez*, the Supreme Court found that the antiloan-sharking provisions of the Consumer Credit Protection Act,[80] which regulated extortionate credit transactions, was a valid exercise of Congress' power under the Commerce Clause.[81] Even though the loan-sharking was completely local, the Court held that Congress could rationally decide that local loan-sharking activity, as a subset of a broader class of organized crime, could substantially affect interstate commerce.[82] *Perez* established that intrastate criminal activity could be regulated under Congress' Commerce Clause authority.[83]

More recently, in *Russell v. United States,*[84] the Supreme Court decided that setting fire to an apartment building was an activity within the reach of the Commerce Clause because the rental of an apartment building substantially affects interstate commerce.[85] In so doing, the Court upheld the Organized Crime Control Act of 1970, which made it a federal crime to burn property used in or affecting interstate commerce.[86] Because Russell was renting the property when he attempted to set fire to it, the property was being used in an activity affecting interstate commerce.[87] The *Russell* decision reflects the continuing expansion of the boundaries within which Congress can regulate under the Commerce Clause, despite the minimal effects on commerce.

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77 402 U.S. 146 (1971).

78 471 U.S. 858 (1985).

79 402 U.S. 146 (1971).

80 Pub. L. No. 90-321, 82 Stat. 146, 159-64 (1968) (codified as amended at 18 U.S.C. §§ 891-96 (1994)).

81 *Perez*, 402 U.S. at 146-47.

82 *Id.*

83 In the case's single dissent, Justice Stewart recognized that the majority intended *Perez* to be applied to intrastate crime as well when he commented: "I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws." *Perez*, 402 U.S. at 157 (Stewart, J., dissenting).

84 471 U.S. 858 (1985).

85 *Id.* at 862.

86 Pub. L. No. 91-452, 84 Stat. 922 (1970).

87 *Id.*

f. Recent Reaffirmation Of The Rational Basis Test

The Supreme Court's deference to Congress' use of the Commerce Clause under the rational basis test was reaffirmed in the late 1980s in *Hodel v. Indiana.*[88] This case challenged the Surface Mining Act of 1977 as an unconstitutional use of Congress' commerce power. In *Hodel,* Justice Marshall held that federal courts must defer to congressional findings that an activity substantially affects interstate commerce.[89] Justice Marshall instructed courts to apply the rational basis standard of review to determine the constitutionality of the law. This deferential standard of review prohibits the courts from substituting their own analysis regarding an act's substantial effect on interstate commerce when the legislature's purpose is legitimate and the law is rationally related to that purpose.[90]

2. Tenth Amendment Precedent

The Supreme Court has held that commerce power and Tenth Amendment inquiries are "mirror images" of each other.[91] The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[92] Early in our nation's development, the Supreme Court in *McCulloch v. Maryland*[93] attempted to secure its view of the proper allocation of power between the states and the federal government.[94] In *McCulloch,* the Court rejected the claim that the importance of broad state autonomy should motivate a narrow interpretation of the scope of federal power.[95] Instead, the Court determined the proper scope of congressional power by considering what was necessary to enable the rational accomplishment of enumerated federal objectives.[96]

More recently, in 1976, the Supreme Court again addressed the issue of federalism in *National League of Cities v. Usery.*[97] The Court

88 452 U.S. 314 (1981).

89 *Id.* at 323.

90 In *Hodel,* the Court found that the activity that Congress sought to regulate impacted only .006% of the nation's total prime farmland. While this appeared to be an insubstantial amount, the Court noted that Congress had explicitly found in the Surface Mining Act that there was a substantial effect on interstate commerce. The Court believed it was improper to substitute its own finding of insubstantiality for Congress' explicit finding of substantial effect. *Id.* at 324.

91 New York v. United States, 112 S.Ct. 2408, 2417 (1992).

92 U.S. CONST. amend. X.

93 17 U.S. (4 Wheat.) 316 (1819).

94 *Id.* at 321.

95 *Id.* at 319.

96 *Id.*

97 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro Transit Auth., 469 U.S.

held that certain federal laws which regulated the "States as States" address matters that are attributes of state sovereignty and consequently directly impair the states' ability to structure their internal operating processes in areas of traditional governmental functions.[98] The Court further ruled that these laws violate principles of state sovereignty unless they are justified by a sufficiently important federal interest.[99] Thus, *Usery* protected unspecified traditional state functions from Congress' reach.[100] *Usery* was short-lived, however; the Court overruled it less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*.[101]

In *Garcia* the Court conceded that distinctions could not be drawn between "traditional governmental functions" and other functions, and thus rejected *Usery* as "unsound in principle and unworkable in practice. . . ."[102] Instead, *Garcia* determined that the primary role of the courts in enforcing federalism was to safeguard against "possible failings in the national political process. . . ."[103]

In 1991, the Court in *Gregory v. Ashcroft*[104] followed *Garcia's* focus on the political process. To protect state functions from direct federal regulation, the Court announced that it would interpret federal statutes so as not to intrude upon fundamental state governmental functions absent a clear statement of congressional intent.[105]

Although *Gregory* did not place an absolute constraint on Congress' power, provided that Congress was specific about its intentions, two years later in *New York v. United States*[106] the Supreme Court tightened the rein on congressional power.[107] In *New York*, the Court upheld monetary and access incentives provided under the Radioactive Waste Act as a means of encouraging states to implement programs for the disposal of radioactive waste, but invalidated the Act's threat to impose liability on the states for waste generated within their bor-

528 (1985).

98 426 U.S. at 845.

99 *Id.* at 845, 852-55.

100 *Id.*

101 469 U.S. 528 (1985). Between *Usery* and *Garcia*, the Court applied *Usery's* test in four cases, each time rejecting a state sovereignty challenge to a federal statute. *See* EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

102 *Garcia*, 469 U.S. at 546.

103 *Id.* at 554.

104 501 U.S. 452 (1991) (holding that Missouri's constitutional requirement that state judges retire at age 70 was not governed by the Age Discrimination in Employment Act of 1967, which makes it unlawful for any employer to discharge an employee due to age).

105 501 U.S. at 457, 460-61.

106 112 S. Ct. 2408 (1992).

107 *Id.* at 2412.

ders.[108] The Court reasoned that when Congress requires states receiving federal funds to undertake particular legislative or regulatory actions, state autonomy is nevertheless preserved because a state may elect to forego the funds. By contrast, the "take title" provision crossed the line between encouragement and coercion because it compelled states to choose between two forms of coerced regulation—accepting ownership of the waste or regulating as Congress dictated.[109] Since the Act essentially forced states to enact and enforce a federal regulatory program, the Act subjected the States to federal government control and consequently violated fundamental sovereignty principles.[110] As *New York* did not expressly overrule *Garcia,* the continued application of *Garcia* is uncertain. Accordingly, the Supreme Court's current stance on the Tenth Amendment is far from clear.

B. GUN CONTROL & THE SECOND AMENDMENT

The constitutional right to bear arms stems from the Second Amendment, which states that "the right of the people to keep and bear Arms, shall not be infringed."[111] Despite this constitutional language, Congress often has imposed limitations on an individual's rights to gun possession.[112] Early examples include: the National Firearms Act of 1934,[113] the Federal Firearms Act of 1938,[114] the Omnibus Crime Control Safe Streets Act,[115] and the Gun Control Act of 1968.[116] During the 1980s, Congress enacted three major acts, in ad-

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108 *Id.* at 2419-20.

109 *Id.* at 2428.

110 *Id.* at 2429-30.

111 U.S. CONST. amend II.

112 Many scholars and judges have indicated that the Second Amendment was meant to protect states ability to maintain their militia and does not grant individuals an absolute right to bear arms. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2, at 299 n.6 (2d ed. 1988); 79 AM. JUR. 2d *Weapons & Firearms* § 4 ("The right to bear arms does not apply to private citizens as an individual right guaranteed by the Constitution of the U.S.") (citing Harris v. State, 432 P. 2d 929 (Nev. 1967)).

113 National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-5872 (1988 & Supp. V. 1993)); David T. Hardy & John Stompoly, *Of Arms And The Law,* 51 CHI-KENT L. REV. 62, 63 (1974).

114 Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938) (repealed by Act of June 19, 1968, Pub. L. No. 90-351, § 906, 82 Stat. 234 (1968)); *see* Hardy & Stompoly, *supra* n.113 at 63-64.

115 Omnibus Crime Control Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended at 18 U.S.C. §§ 921-928). This Act incorporated many of the provisions that had been first enacted in the Federal Firearms Act.

116 Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-930 (1994)). This Act, which is still effective today, prohibits the selling of firearms to convicted felons, fugitives from justice, drug users and addicts, persons adjudicated mentally incompetent, illegal aliens, persons dishonorably discharged from the military, and anyone who has renounced his or her United States citizenship. 18 U.S.C.

dition to the Gun Free School Zones Act, to combat increasing crime rates: The Firearm Owners' Protection Act,[117] The Undetectable Firearms Act,[118] and the Brady Act.[119]

1. *Early Second Amendment Constraints*

In an effort to curb the extensive violence accompanying the expansion of organized crime during the Prohibition Era, Congress placed limitations on the Second Amendment right to bear arms by passing the National Firearms Act of 1934.[120] This Act imposed a $200 tax on transfers of certain automatic weapons, such as sawed off shotguns, and imposed a $5 tax on transfers of other weapons.[121] Congress later created licensing requirements for all dealers of firearms when it passed the Federal Firearms Act of 1938.[122] In addition to its licensing requirements, this Act prohibited the interstate shipment of firearms to felons, persons under felony indictment, and persons lacking required permits.[123]

2. *The 1968 Control Acts*

After three decades of silence, Congress revived its initiatives to strengthen gun control laws in response to the widespread civil disorder that culminated in the murders of Robert Kennedy and Martin Luther King, Jr. when it passed the Omnibus Crime Control Safe Streets Act[124] and the Gun Control Act of 1968.[125] The combined force of these two enactments imposed broad constraints on the possession and use of firearms that extended well beyond their mere transport in interstate commerce. Congress extended federal licensing requirements to all firearms dealers, regardless of whether they

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§ 922(d) (1994). In addition to regulating interstate gun sales, the Act mandates that a federal license be obtained to engage in manufacturing, importing or dealing in firearms in interstate or foreign commerce. 18 U.S.C. § 923(a) (1994).

117 Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as 18 U.S.C. § 922(o)).

118 Pub. L. No. 100-649, 102 Stat. 3816 (1988) (codified as 18 U.S.C. § 922(p)).

119 Pub. L. No. 103-159, § 104(b), 107 Stat. 1543 (1993) (recodified as Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921-22).

120 National Firearms Act of 1934, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-5872 (1988 & Supp. V. 1993)).

121 26 U.S.C. § 5811(a) (1988).

122 *See* Federal Firearms Act of 1938, ch. 850, 52 Stat. 1250, repealed by Act of June 19, 1968, Pub. L. No. 90-351, § 906, 82 Stat. 234 (1968); Hardy & Stompoly, *supra* note 113, at 63-64.

123 Act of June 30, 1938, ch. 850, § 2, 52 Stat. 1250 (repealed 1968).

124 Pub. L. No. 90-351, 82 Stat. 197 (1968); 18 U.S.C. §§ 921-928. Title IV (§§ 901-907) of the act repealed the Federal Firearms Act (§ 907) and enacted a new chapter 44 ("Firearms") of Title 18 (18 U.S.C. §§ 921-928) which incorporated most of the provisions that had been first enacted in the Federal Firearms Act and added further offenses.

125 *See supra* note 116.

operated in interstate commerce.[126] Finally, Congress criminalized the mere possession of firearms by certain individuals, including felons, mental incompetents, drug addicts, and illegal aliens.[127] Congress justified these provisions by providing express findings linking its gun control initiatives to interstate commerce.[128]

Two aspects of the 1968 legislation are relevant in analyzing the Gun Free School Zones Act. First, the 1968 Acts illegalized the mere possession of guns, rather than the transfer of guns in interstate commerce. Second, among the statutory provisions contained in the 1968 legislation was 18 U.S.C. § 922, which was amended in the Gun Free School Zones Act to include the safe school subsection at issue in *Lopez.*

3. The Firearm Owners' Protection Act (§ 922(o))

In response to rising crime conducted with automatic assault weapons, Congress passed the Firearm Owners' Protection Act of 1986.[129] This Act makes it unlawful for any person to transfer or possess a machine gun.[130] Section 922(o) denounces the mere possession of guns without a tie-in to interstate commerce. Section 922(o), like the Gun Free School Zones Act, did not contain any separate Congressional findings, but simply relied on the findings contained in the original 1968 enactments.[131]

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126 The Omnibus Crime Control & Safe Streets Act of 1968 required a federal license "for any person. . . to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition". Pub. L. No. 90-351, § 902, 82 Stat. 197, 228 (1968) (codified at 18 U.S.C. § 922(a)(1)).

127 18 U.S.C. § 921 (1988 & Supp. V 1993).

128 Pub. L. No. 90-351, § 901(a) contains, among others, the following express congressional findings linking gun control to interstate commerce:

> (1) that there is a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce, and that the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;
> (2) that the ease with which any person can acquire firearms other than a rifle or shotgun (including criminals, juveniles without the knowledge or consent of their parents or guardians, narcotics addicts, mental defectives, armed groups who would supplant the functions of duly constituted public authorities, and others who possession of such weapons is similarly contrary to the public interest) is a significant factor in the prevalence of lawlessness and violent crime in the United States; . . .

129 Pub. L. No. 99-308, 100 Stat. 449 (1988) (codified as amended at 18 U.S.C. § 922(o)).

130 18 U.S.C. § 922(o) (1988); *see also* United States v. Rock Island Armory, Inc., 773 F.Supp. 117, 119 (C.D. Ill. 1991) (interpreting § 922(o) as a prohibition on private citizens from possessing or transferring a machine gun that was not made and registered before May 19, 1986, unless such transfer or possession is authorized by federal or state governments).

131 There is no committee report and sparse legislative history concerning this provision as it was added on the House floor. The only apparent explanation for the provision is the statement of its sponsor, Rep. Hughes, who stated, "I do not know why anyone would ob-

The Fifth, Eighth, and Ninth Circuits have sustained the constitutionality of § 922(o). In *United States v. Ardoin,*[132] the Fifth Circuit, ignoring its earlier decision in *Lopez,* found § 922(o) constitutional, based in part, upon Congress' authority under the Commerce Clause.[133] The *Ardoin* court upheld the constitutionality of § 922(o), indicating merely that "no one could seriously contend that the regulation of machine guns could not also be upheld under Congress' power to regulate interstate commerce."[134] Similarly, the Eighth Circuit in *United States v. Hale,*[135] and the Ninth Circuit in *U.S. v. Evans*[136] upheld § 922(o). The Hale Court indicated that the lack of specific Congressional findings linking § 922(o) to interstate commerce did not render the Act as an unconstitutional exercise of Congress' commerce power.[137]

The Supreme Court's decision in *Lopez* has cast doubt on the likelihood that the judiciary will continue to find § 922(o) constitutional. Subsequent to the Supreme Court's ruling in Lopez, the Southern District of Mississippi, in *United States v. Bownds,*[138] found § 922(o) to be unconstitutional. Bownds was indicted under § 922(o) for the purchase of two machine guns and their subsequent resale.[139] The *Bownds* decision disregarded the *Ardoin* opinion, and instead followed the Fifth's Circuit's reasoning in *Lopez,* which required Congress to articulate an express nexus between interstate commerce and the regulated activity.[140] Absent such a stated nexus, the *Bownds* court found § 922(o) to be beyond Congress' power.[141]

4. The Undetectable Firearms Act (§ 922(p))

In response to technological advances in gun manufacturing and detection avoidance, Congress passed the Undetectable Firearms Act.[142] This Act makes it unlawful for any person to "manufacture,

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ject to the banning of machine guns." *See* Farmer v. Higgins, 907 F.2d 1041, 1044 (11th Cir. 1990).

132 19 F.3d 177, 178 (5th Cir.), *cert. denied,* 115 S. Ct. 327 (1994).

133 *Id.* at 180.

134 *Id.*

135 978 F.2d 1016 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1614 (1993).

136 928 F.2d 858 (9th Cir. 1991).

137 "When it first enacted section 922, Congress found facts indicating a nexus between the regulation of firearms and the commerce power.... The 1986 amendments to section 922 added subsection (o) without substantially altering the findings of fact on this point.... [It] is within the authority granted to Congress by the Commerce Clause" *Hale,* 978 F.2d at 1018.

138 1994 U.S. Dist. LEXIS 11738 (S.D. Miss. Aug. 18, 1994).

139 *Id.* at *2.

140 *Id.* at *13.

141 *Id.*

142 Pub. L. No. 100-649, 102 Stat. 3816 (1988) (codified as amended at 18 U.S.C.

import, ship, deliver, possess, transfer, or receive" any firearm undetectable either by walk-through metal detectors or x-ray machines.[143] Analogous to the Gun Free School Zones Act, § 922(p) did not by its terms require any link with interstate commerce, but rather banned the mere possession of undetectable guns, no matter how they were produced and obtained.[144] Moreover, like the Gun Free School Zones Act, § 922(p) did not rest on any new congressional findings establishing a link to commerce regulation.

5. *The Brady Act*

In response to John Hinckley's attempted assassination of President Ronald Reagan in 1980 and the resulting injuries sustained by White House Press Secretary James Brady,[145] Congress enacted the Brady Act.[146] The purpose of the Brady Act is to prevent convicted felons and other legally barred persons from purchasing guns from licensed gun dealers, manufacturers, or importers.[147] To achieve this objective, the Act imposes a five day waiting period on the purchase of certain handguns.[148]

Although public debate has focused on the Brady Act's waiting period requirement and its infringement on the Second Amendment, the background check provision and its impact on the Tenth Amendment have been the focus of judicial inquiry.[149] Unlike other gun control legislation,[150] judicial inquiry regarding the Brady Act has focused on state sovereignty, specifically, whether Congress has the authority to require local law enforcement officials to perform

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§ 922(p)).

143 *Id.*

144 *Id.*

145 See H.R. REP. No. 344, 103d Cong., 1st Sess. 14 (1993), reprinted in 1993 U.S.C.C.A.N. 1984, 1991. *See also* President's Remarks on Signing the Brady Bill, 29 Weekly Comp. Pres. Doc. 2477 (Dec. 6, 1993).

146 Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Title I, 107 Stat. 1536 (1993) (codified in various subsections of 18 U.S.C. §§ 921-25).

147 H.R. REP. No. 344, 103d Cong., 1st Sess. 7 (1993), reprinted in 1993 U.S.C.C.A.N. 1984, 1984.

148 "Handgun" includes a firearm which has a short stock and is designed to be held and fired by the use of a single hand. 18 U.S.C. § 921(a)(29) (Supp. V 1993). The waiting period allows local law enforcement officers to determine the legality of the attempted gun purchase. *Id.* In 1998, the waiting period provisions are scheduled to be superseded by a national instant background check computer system established by the Attorney General. When operational, this system will allow dealers to contact a federal computer system and make an instant on-line background check. *Id.*

149 *See, e.g.*, McGee v. United States, 863 F. Supp. 321, 324 (S.D. Miss. 1994); Mack v. United States, 856 F. Supp. 1372, 1381-82 (D. Ariz. 1994).

150 For example, as discussed *supra* in part II.B.3, the courts have emphasized the existence of congressional findings linking gun control to interstate commerce in decisions concerning the Firearm Owners' Protection Act, 18 U.S.C. § 922(o).

background checks.[151]

An illustration of judicial scrutiny of the Brady Act is *Printz v. United States.*[152] In *Printz,* a local sheriff brought an action to seek injunctive relief against enforcement of the Brady Act's provision requiring him to perform a background check on individuals seeking to purchase a firearm.[153] The sheriff argued that he did not have sufficient resources to perform the background checks.[154] The District Court of Montana found that the Brady Act transgressed the "division of authority between the federal and state governments."[155] The *Printz* court stated that although Congress could enlist the judicial branch to enforce its policies, it could not directly compel states to legislate to "enforce a federal regulatory program."[156] Federal district courts in Arizona,[157] Mississippi,[158] and Vermont[159] have also ruled that the Brady Act exceeds Congressional authority.

6. The Gun Free School Zones Act

a. The History of The Gun Free School Zones Act

Congress enacted the Gun Free School Zones Act in response to the growing crisis of guns in schools and the related problems of drugs and gang activity.[160] The Act's specific purpose was to "address the devastating tide of firearm violence in our Nation's schools"[161] and to provide "an important step toward fighting gun violence and keeping our teachers and children safe."[162]

The Gun Free School Zones Act was passed by the Senate as part of the Crime Control Act of 1990.[163] Although the Gun Free School Zones Act was not initially included in the House version of the Crime

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151 *See McGee,* 863 F. Supp. at 324.

152 854 F. Supp. 1503 (D. Mont. 1994).

153 *Id.* at 1513.

154 *Id.* at 1507.

155 *Id.* at 1513.

156 *Id.* at 1513 (citing New York v. United States, 112 S. Ct. 2408, 2420 (1992)).

157 *See* Mack v. United States, 856 F. Supp. 1372, 1379-81 (D. Ariz. 1994).

158 *See* McGee v. United States, 863 F. Supp. 321, 326-27 (S.D. Miss. 1994).

159 *See* Frank v. United States, 860 F. Supp. 1030, 1042-43 n.13 (D. Vt. 1994).

160 The Gun Free School Zones Act was introduced in the House by Representative Edward Feighan of Ohio as H.R. 3757, 101st Cong., 2d Sess. (1991), and in the Senate by Senator Herbert Kohl of Wisconsin as S. 2070, 101st Cong., 2d Sess (1991).

161 135 CONG. REC. 3988 (1989) (Representative Feighan).

162 136 CONG. REC. 1165 (1990) (Senator Kohl). Senator Kohl noted that "the National School Safety Center estimated that more than 100,000 students carry guns to school every day, and more than a quarter of a million students brought handguns to school in 1987." *Id.* The Act, he said, "would ensure that our school grounds do not become battlefields." *Id.*

163 *See* 136 CONG. REC. 9477, 9519 (1990) (passage of the Act by the Senate); 136 CONG. REC. 10,184, 10,240 (1990) (text of the Act).

Control Act of 1990, the Act's provisions were subsequently adopted by the conference committee[164] and enacted into law as § 1702 of the Crime Control Act of 1990.[165]

The source of constitutional authority was not manifest on the face of the Act. At the time of the statute's enactment, neither the Act nor its corresponding legislative history contained express congressional findings regarding the effects of gun possession in a school zone upon interstate commerce.[166] In fact, when President George Bush signed the Crime Control Act of 1990 into law, he noted that particular provisions of the legislation constrained the discretion of state and local governments.[167] The President found that the Gun Free Zones Act "inappropriately over r[o]de legitimate State firearms laws with a new and unnecessary Federal law."[168] The President argued that the policies reflected in the Gun Free Zones Act could be adopted by the states, but that they should not be imposed on the states by Congress.[169]

After the Fifth Circuit held that the Gun Free School Zones Act was unconstitutional in 1993 in *United States v. Lopez*,[170] Congress passed a law which included specific findings as to the nexus between guns at school and interstate commerce.[171]

b. The Gun Free School Zones Act Precedent

Prior to the Supreme Court's decision in *United States v. Lopez*,[172] the circuits were split regarding the constitutionality of the Gun Free School Zones Act. In *Lopez*, the Fifth Circuit ruled that the Gun Free

164 *See* 136 CONG. REC. 17,595 (1990).

165 *See* Pub. L. No. 101-647 § 1702, 104 Stat. 4789, 4844-45 (1990).

166 *See* Pub. L. No. 101-647. Although the congressional hearings extensively addressed the impact of firearms violence on education, witnesses did not specifically discuss the effects of school firearm possession on interstate commerce. *See Gun Free School Zones Act of 1990: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 101st Cong., 2d Sess. (1990) [hereinafter *Gun Free School Zones Act Hearings*].

167 Statement by President George Bush upon signing S. 3266, 26 Weekly Comp. Pres. Doc. 1944, 1945 (Nov. 29, 1990).

168 *Id.*

169 *Id.*

170 2 F.3d 1342 (5th Cir 1993).

171 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 320904, 108 Stat. 1796, 2125-26. Congress found that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools" and that the resulting "occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country" which has had an "adverse impact on interstate commerce and the foreign commerce of the United States." *Id.* Furthermore, the Senate stated that "Congress has power under the Commerce Clause and other provisions of the Constitution to enact measures to ensure the integrity and safety of the Nation's Schools." 139 CONG. REC. S16,302 (daily ed. Nov. 19, 1993).

172 2 F.3d 1342 (1993).

School Zones Act was unconstitutional.[173] The Ninth Circuit, however, upheld the Act in *United States v. Edwards*,[174] and was subsequently followed in its holding by several district court cases, including *United States v. Glover*[175] and *United States v. Ornelas*.[176]

Fundamental to the Ninth Circuit's decision was a narrow interpretation of two earlier decisions: *Perez v. United States*,[177] which upheld a federal antiloan-sharking statute, and *United States v. Evans*,[178] a Ninth Circuit case which upheld the prohibition of machine gun possession under the Firearms Owners Protection Act.[179] Relying on *Perez*, the *Edwards* court cited the Supreme Court's determination that Congress has the power to regulate "those activities intrastate which so affect interstate commerce . . . as to make regulation of them appropriate means to the attainment of a legitimate end . . .[that is, the ability to exercise Congress' commerce power]."[180] Based on *Perez*, the *Edwards* court found that Congress' failure to provide specific findings of the nexus between a regulated activity and interstate commerce should not preclude the court from finding that such a nexus existed.[181] Thus, the *Edwards* court determined that the absence of express Congressional findings linking gun possession in a school zone to interstate commerce did not make the Gun Free School Zones Act an unconstitutional exercise of Congress' commerce power.

The *Edwards* court bolstered its conclusion with the *Evans* decision. *Evans* upheld Congress' power to enact the Firearms Owners Protection Act under the Commerce Clause because Congress found a connection between gun regulation and the effect of violence on the national economy.[182] Relying on the stare decisis effect of *Evans*, the *Edwards* court stated that it was compelled to uphold the Gun Free School Zones Act absent an intervening Supreme Court decision preventing Congress from so expanding federal powers under the Commerce Clause.[183]

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173 *Id.* at 1357.

174 13 F.3d 291 (9th Cir. 1993).

175 842 F. Supp. 1327 (D. Kan. 1994).

176 841 F. Supp. 1087(D. Colo. 1994).

177 402 U.S. 146 (1971).

178 928 F.2d 858, 862 (9th Cir. 1991).

179 18 U.S.C. § 922(o) (1988).

180 United States v. Perez, 402 U.S. 146, 151 (1971).

181 United States v. Edwards, 13 F.3d 291, 295 (1994).

182 *See Evans*, 928 F.2d at 862 (noting congressional finding that 750,000 people had been killed in the United States by firearms since the turn of the century), "[i]t was thus reasonable for Congress to conclude that the possession of firearms affects the national economy. . . .").

183 *Id.* at 294 (citing United States v. Frank, 956 F.2d 872, 882 (9th Cir. 1991)).

III. Facts and Procedural History

On March 10, 1992, respondent Alfonso Lopez, Jr., then a twelfth grade student at Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun and five bullets.[184] Acting on an anonymous tip, school officials confronted Lopez, who admitted that he was carrying the weapon.[185] After being advised of his rights, Lopez explained that an individual he identified as "Gilbert" had given him the gun to deliver to another individual named "Jason" for use in a "gang war."[186]

State authorities immediately charged Lopez with violating § 46.03(a)(1) of the Texas Penal Code.[187] For over twenty years, this statute made it a felony for a person to go "on the premises of a school or an educational institution" while carrying a firearm and stipulated a punishment of up to ten years imprisonment and a $10,000 fine.[188] At the time of the Lopez incident, over forty states had similar laws.[189] The state charges were dismissed after a federal grand jury indicted Lopez for violating the Gun Free School Zones Act of 1990,[190] which makes it illegal to possess a firearm in a school zone.[191]

Lopez moved to dismiss the indictment, arguing that § 922(q) "was unconstitutional as it is beyond the power of Congress to legislate control over our public schools."[192] The District Court denied the motion, concluding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting commerce, and the 'business' of elementary, middle, and high schools . . . affects interstate commerce."[193] Lopez subsequently waived his right to a jury trial and was tried on the stipulated evidence.[194] The District Court convicted Lopez and sentenced him to six months imprisonment, to be followed by two years of supervised release.[195]

On appeal, Lopez challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause.[196] The Court of Appeals for the Fifth Circuit con-

184 United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).
185 *Id.*
186 United States v. Lopez, 2 F.3d 1342, 1352 n.1 (1992).
187 *Lopez*, 115 S. Ct. at 1626.
188 Tex. Penal Code §§ 46.04(a)(1), 12.34.
189 Brief for Respondent at 24 n.20, United States v. Lopez, 115 S. Ct. 1624 (1995) (No. 93-1260).
190 *See* 18 U.S.C. § 922(q).
191 *Lopez*, 115 S. Ct. at 1626.
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Lopez*, 115 S. Ct. at 1626.

curred, stating that in light of insufficient congressional findings and legislative history, Congress had exceeded its constitutional power under the Commerce Clause. Accordingly, the Fifth Circuit reversed Lopez's conviction.[197]

The United States government filed a petition for certiorari with the United States Supreme Court. The Court granted the government's petition[198] to determine whether § 922(q) was a constitutional exercise of Congress' power under the Commerce Clause.[199]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[200] Chief Justice Rehnquist concluded that the Gun Free School Zones Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce," and as such the Act exceeded the authority of Congress to regulate commerce among the several States.[201] Chief Justice Rehnquist then provided a lengthy review of the historical development of the Commerce Clause.[202]

Touching first on the backdrop of federalism, Chief Justice Rehnquist wrote that the Constitution "creates a Federal Government of enumerated powers" that are "few and defined," and preserves numerous powers for the States.[203] Chief Justice Rehnquist noted that such division of authority "was adopted . . . to ensure protection of our fundamental liberties."[204]

The Chief Justice then turned to an analysis of Congress' power under the Commerce Clause. He wrote that the Constitution delegates to Congress the power "[to] regulate Commerce . . . among the several States. . . ."[205] Referencing Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[206] Chief Justice Rehnquist described Congress' commerce power as "complete in itself [which] may be exercised to its utmost extent, and acknowledges no limitations, other than [those] prescribed in the Constitution."[207] However, Chief Justice Rehnquist

197 *Id.*
198 United States v. Lopez, 114 S. Ct. 1536 (1995).
199 *Lopez*, 115 S. Ct. at 1626.
200 Justices O'Connor, Scalia, Kennedy, and Thomas joined in the opinion of Chief Justice Rehnquist. *Id.* at 1626.
201 *Id.* (quoting U.S. CONST. art. 1, § 8, cl. 3).
202 *Id.*
203 *Id.* (citing THE FEDERALIST No. 45, at 292-93 (C. Rossiter ed. 1961)).
204 *Id.* at 1626 (citing Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
205 *Id.* at 1627 (citing U.S. CONST. art. I, § 8, cl. 3).
206 *Id.* (citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).
207 *Id.* (citing *Gibbons*, 22 U.S. (9 Wheat.) at 189-90).

commented that the *Gibbons* Court also acknowledged that the commerce power possessed inherent limitations when it stated that "[i]t is not intended to say that [the Commerce Clause] comprehend[s] that commerce, which is completely internal . . . and which does not extend to or affect other States."[208]

Chief Justice Rehnquist summarized the Court's decisions for nearly a century following *Gibbons v. Ogden* as dealing "rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce."[209] "Under this line of precedent," Chief Justice Rehnquist wrote, "certain categories of activity such as 'production,' 'manufacturing,' and 'mining' were within the province of state governments and thus were beyond the power of Congress under the Commerce Clause."[210]

When Congress enacted the Interstate Commerce Act[211] in 1887, and the Sherman Antitrust Act[212] in 1890, it "ushered in a new era of federal regulation under the commerce power."[213] In dealing with these statutes, Chief Justice Rehnquist noted, the Court followed the negative Commerce Clause approach in determining that Congress could not regulate activities such as "production," "manufacturing," and "mining."[214] Chief Justice Rehnquist admitted, however, that where the interstate and intrastate aspects of commerce were mingled together, the Court upheld congressional regulation.[215]

Chief Justice Rehnquist further noted that during the dawn of the New Deal Era, the Court limited congressional oversight by distinguishing between the "direct" and "indirect" effects of intrastate transactions on interstate commerce.[216] Activities that affected interstate commerce directly were within Congress' commerce power, while activities that affected interstate commerce indirectly were beyond Congress' reach.[217] The Court drew this distinction for fear that otherwise "there would be virtually no limit to the federal power. . . ."[218]

The Court departed from the distinction between "direct" and

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208 *Id.* (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194-95).

209 *Id.* at 1627.

210 *Id.* at 1627 (citing Wickard v. Filburn, 317 U.S. 111, 121 (1942)).

211 24 Stat. 379 (1887).

212 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 *et seq.*).

213 *Lopez*, 115 S. Ct. at 1627.

214 *Id.* at 1627 (citing United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895)).

215 *Id.* (citing Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342 (1914)).

216 *Id.*

217 *Id.* (citing A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935)).

218 *Id.* at 1628 (quoting *Schecter Poultry*, 295 U.S. at 548).

"indirect" effects in *NLRB v. Jones & Laughlin Steel Corp.*,[219] and ushered in a new period in which the Court expanded the previously defined scope of congressional authority.[220] Chief Justice Rehnquist summarized the Court's rulings since the late 1930s as holding that "activities that have . . . a close and substantial relation to interstate commerce are within Congress' commerce power."[221] Chief Justice Rehnquist warned, however, that the scope of Congress' commerce power could not be extended "to embrace effects upon interstate commerce so indirect . . [as to] obliterate the distinction between what is national and what is local. . . ."[222]

Consistent with the structure of Congress' commerce power as outlined by Chief Justice Rehnquist, the Court identified three broad categories of activity that Congress could regulate under its commerce power.[223] First, Congress could regulate the use of channels of interstate commerce.[224] Second, Congress could regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even where the threat may come only from intrastate activities.[225] Finally, Congress could regulate those activities having a substantial relation to interstate commerce.[226] Under this final category, Chief Justice Rehnquist clarified that the activity must "substantially affect," rather than merely "affect" interstate commerce.[227]

Having laid the framework for his analysis, Chief Justice Rehnquist turned to the current controversy and considered the ability of Congress to enact the Gun Free School Zones Act.[228] Chief Justice Rehnquist quickly disposed of the first two categories of authority by indicating that the Act is neither a regulation of the use of the channels of interstate commerce, nor an attempt to prohibit the interstate transportation of a commodity through commerce channels.[229] Moreover, the Gun Free School Zones Act is not a regulation seeking to protect an instrumentality of interstate commerce or a thing in in-

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219 301 U.S. 1 (1937).

220 *Lopez*, 115 S.Ct. at 1629.

221 *Id.*

222 *Id.* at 1628-29.

223 *Id.* at 1629.

224 *Id.* (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) and United States v. Darby, 312 U.S. 100, 114 (1941)).

225 *Id.* (citing Shreveport Rate Cases, 234 U.S. 342 (1914) and Southern R.R. Co. v. United States, 222 U.S. 20 (1911)).

226 *Id.* at 1630 (citing NLRB v. Jones & Laughlin Steel, 301 U.S. 1, 37 (1937)).

227 *Id.*

228 *Id.*

229 *Id.*

terstate commerce.[230] Thus, Chief Justice Rehnquist indicated that if the Gun Free School Zones Act could be sustained, it had to satisfy the third category as a regulation of an activity that substantially affects interstate commerce.[231]

In determining whether the Gun Free School Zones Act would fall within the third category, Chief Justice Rehnquist first identified other congressional acts where the Court had held that an activity substantially affected interstate commerce.[232] As examples, he cited cases challenging acts that involved the regulation of intrastate coal mining,[233] intrastate extortionate credit transactions,[234] restaurants utilizing substantial interstate supplies,[235] inns and hotels catering to interstate guests,[236] and the production and consumption of home grown wheat.[237] Chief Justice Rehnquist argued that each case concerned an economic activity that substantially affected interstate commerce.

Chief Justice Rehnquist, however, concluded that the possession of a gun in a school zone did not involve an economic activity that substantially affected interstate commerce.[238] The Gun Free School Zones Act, argued Chief Justice Rehnquist, "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[239] Chief Justice Rehnquist contended that even the consumption of home grown wheat, which is probably the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not.[240] Home consumed wheat could have a substantial influence on the market price of wheat, and as such, Congress had the power under the Commerce Clause to assess a penalty for over harvested wheat.[241] Chief Justice Rehnquist distinguished the Gun Free School Zones Act from the various subject matters where the Court has upheld Congress' exercise of its commerce power by indicating that "the States possess primary authority for defining and enforcing the crimi-

230 *Id.*
231 *Id.* at 1630.
232 *Id.*
233 *Id.* (citing Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc., 452 U.S. 264 (1981)).
234 *Id.* (citing Perez v. United States, 402 U.S. 146 (1971)).
235 *Id.* (citing McClung v. United States, 370 U.S. 294 (1964)).
236 *Id.* at 1630 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)).
237 *Id.* (citing Wickard v. Filburn, 317 U.S. 111 (1942)).
238 *Id.*
239 *Id.* at 1630-31.
240 *Id.* at 1630.
241 *Id.* at 1630.

nal law."[242] When Congress criminalizes conduct already denounced as criminal by the states, it effects a "change in the sensitive relation between federal and state criminal jurisdiction."[243] The Chief Justice concluded that the Gun Free School Zones Act "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question."[244]

Second, Chief Justice Rehnquist reasoned that the Gun Free School Zones Act contained no jurisdictional elements that would require the Government to determine that the firearm possession in question affects interstate commerce.[245] As an example, Chief Justice Rehnquist referenced *United States v. Bass*[246] in which the Court set aside a conviction under a federal statute outlawing the receipt, possession or transportation in commerce of any firearm.[247] In *Bass*, the Court interpreted the possession component of the statute to require an additional nexus to interstate commerce because the statute was "ambiguous" and "unless Congress conveys its purpose clearly, it [would] not be deemed to have significantly changed the federal-state balance."[248] The *Bass* Court found that there was an insufficient nexus between the alleged crime of possessing a firearm and interstate commerce.[249] Chief Justice Rehnquist concluded that the Gun Free School Zones Act was unconstitutional because it had no express jurisdictional element that would limit its reach to firearm possessions that have an explicit connection with interstate commerce.[250]

Commenting further about the Act's viability, Chief Justice Rehnquist discussed the lack of congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.[251] Although Chief Justice Rehnquist acknowledged that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,"[252] he commented that "to the extent that congressional findings would enable [the Court] to evaluate . . . that the activity in question substantially

242 *Id.* at 1631 n.3 (citing Brecht v. Abrahamson, 113 S. Ct. 1710, 1720 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982))).

243 *Id.* at n.3 (citing United States v. Enmons, 410 U.S. 396, 411-12 (1973) (quoting United States v. Bass, 404 U.S. 336, 349 (1971))).

244 *Id.* at n.3 (citing Brief for Petitioner at 29 n.18, United States v. Lopez, 115 S.Ct. 1624 (1995) (No. 93-1260)).

245 *Id.* at 1631.

246 404 U.S. 336 (1971).

247 *Lopez*, 115 S. Ct. at 1631 (citing 18 U.S.C. § 1202 (1994)).

248 *Id.* at 1631 (citing *Bass*, 404 U.S. at 349).

249 *Id.*

250 *Id.*

251 *Id.* at 1631-32.

252 *Id.*

affected interstate commerce . . . they are lacking here."[253]

Next, Chief Justice Rehnquist rebuffed the Government's contention that Congress had accumulated institutional expertise regarding the regulation of firearms through previous enactments.[254] Chief Justice Rehnquist indicated that prior federal enactments and congressional findings could not justify the Gun Free School Zones Act because they did not deal with the Act's subject matter or its relationship to interstate commerce.[255] Moreover, Chief Justice Rehnquist determined that the Gun Free School Zones Act was revolutionary and represented "a sharp break" with prior federal firearms legislation.[256]

Chief Justice Rehnquist then rejected the Government's argument that possession of a firearm in a school zone substantially affects interstate commerce by increasing the frequency of violent crime.[257] The Government contended that increased violent crime affects the national economy in two ways.[258] First, insurance spreads the significant cost of violent crimes throughout the population.[259] Second, violent crime reduces the willingness of individuals to travel to areas that are perceived as unsafe.[260] Moreover, the Government argued that the presence of guns in schools would hamper the learning environment, which in turn would result in a less productive citizenry and a dampened national economy.[261] While Chief Justice Rehnquist paused to consider the Government's arguments, he eventually rejected them.[262] Under the Government's "costs of crime" reasoning, Chief Justice Rehnquist found that it would be "difficult to perceive any limitation on federal power."[263] Chief Justice Rehnquist admitted that congressional legislation under the Commerce Clause always will engender "legal uncertainty."[264] However, the Court diminished this concern by indicating that Congress has operated under legal uncertainty since the Court in *Marbury v. Madison* determined that it was the judiciary's duty "to say what the law is."[265]

Finally, Chief Justice Rehnquist refused to follow earlier rulings

253 *Id.* at 1632.
254 *Id.*
255 *Id.*
256 *Id.* at 1632 (citing United States v. Lopez, 2 F.3d 1342, 1366 (1992)).
257 *Id.*
258 *Id.*
259 *Id.* (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)).
260 *Id.* (citing Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 253 (1964)).
261 *Id.* at 1632.
262 *Id.*
263 *Id.*
264 *Id.*
265 *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803)).

that had given great deference to Congress.[266] Chief Justice Rehnquist contended that he would not "pile inference upon inference" in order to convert congressional Commerce Clause power to a general police power over the states.[267]

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy agreed with the majority that Congress had overstepped its Commerce Clause power in enacting the Gun Free School Zones Act,[268] but described the majority's opinion as a "necessary, though, limited holding."[269] Justice Kennedy emphasized the need for the Court to prevent the federal government's continued intrusion on the states' sovereignty.[270] Because the Gun Free School Zones Act foreclosed the states from "experimenting and exercising their own judgment" in an area to which they claim a right to act based on their history and expertise,[271] Justice Kennedy saw the Act as an invalid erosion of the Tenth Amendment.[272]

C. JUSTICE THOMAS' CONCURRENCE

Justice Thomas also joined the majority, but wrote separately to explain why he thought that the Court has drifted far from its original understanding of the Commerce Clause.[273] Justice Thomas argued that the substantial effects test, "if taken to its logical extreme, would give Congress a 'police power' over all aspects of American life."[274] However, Justice Thomas commented that the Court has always "rejected readings of the Commerce Clause . . . that would permit Congress to exercise a police power."[275] Justice Thomas additionally refuted Justice Steven's accusation that the majority decision was a "radical departure" from precedent.[276] Instead, Justice Thomas concluded that "[i]f anything, the 'wrong turn' was the Court's dramatic departure in the 1930s from a century and a half of precedent."[277] Up until the mid-1930s, Justice Thomas argued, "it was widely understood

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266 *Id.* at 1634.
267 *Id.*
268 *Id.* at 1635 (Kennedy, J., concurring). Justice O'Connor joined Justice Kennedy's concurrence.
269 *Id.* at 1634 (Kennedy, J., concurring).
270 *Id.* at 1641 (Kennedy, J., concurring).
271 *Id.* at 1641 (Kennedy, J., concurring).
272 *Id.* (Kennedy, J., concurring).
273 *Id.* at 1642 (Thomas, J., concurring).
274 *Id.* at 1643 (Thomas, J., concurring).
275 *Id.* (Thomas, J., concurring).
276 *Id.* at 1650 (Thomas, J., concurring).
277 *Id.* at 1649 (Thomas, J., concurring).

that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause."[278] Although Justice Thomas was willing to return to the original understanding of the Commerce Clause, he conceded that stare decisis and reliance interests made his desire unrealistic.[279] Although he did not believe *Lopez* presented the appropriate opportunity, Justice Thomas invited the Court to modify its Commerce Clause jurisprudence at the appropriate juncture.[280]

D. JUSTICE STEVENS' DISSENTING OPINION

In his dissent, Justice Stevens[281] contended that the welfare of the United States' future "[c]ommerce with foreign Nations, and among the several States,"[282] is vitally dependent on the character of the education of our children.[283] Thus, Justice Stevens argued, Congress has ample power to prohibit the possession of firearms in or near schools.[284] Moreover, Justice Stevens contended that the market for handguns with school age children is "distressingly substantial," and as such, it is in the national interest to eliminate that market.[285]

E. JUSTICE SOUTER'S DISSENTING OPINION

Justice Souter chided the majority for repudiating judicial restraint by not deferring to rationally based legislative judgments.[286] He also argued that the majority's decision "portend[s] a return to the untenable jurisprudence [the direct/indirect effects test] from which the Court extricated itself almost 60 years ago."[287] Although Justice Souter warned the Court to treat this case as a misstep because it does not conform with the prevailing standard, he expressed concern that the Court may be changing direction toward a new, limited approach to Congress' power under the Commerce Clause.[288]

F. JUSTICE BREYER'S DISSENTING OPINION

Justice Breyer dissented from the majority by concluding that the Act falls within the scope of Congress' commerce power.[289] In reach-

278 *Id.* (Thomas, J., concurring).
279 *Id.* (Thomas, J., concurring).
280 *Id.* at 1651 (Thomas, J., concurring).
281 *Id.* at 1651 (Stevens, J., dissenting).
282 *Id.* (citing U.S. CONST. art. I, § 8, cl. 3) (Stevens, J. dissenting).
283 *Id.* (Stevens, J., dissenting).
284 *Id.* at 1651 (Stevens, J., dissenting).
285 *Id.* (Stevens, J., dissenting).
286 *Id.* at 1651 (Souter, J., dissenting).
287 *Id.* at 1654 (Souter, J., dissenting).
288 *Id.* at 1657 (Souter, J., dissenting).
289 *Id.* at 1657 (Breyer, J., dissenting). Justices Stevens, Souter, and Ginsburg joined in

ing his conclusion, Justice Breyer applied three basic principles of Commerce Clause interpretation. First, Congress' commerce power encompasses the power to regulate local activities insofar as they "significantly" affect interstate commerce.[290] Second, in determining whether a local activity will have a significant effect upon interstate commerce, the Court must consider the cumulative effect of all similar instances versus an individual act.[291] Third, the Court must give Congress leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce.[292] Thus, argued Justice Breyer, the issue in the current case is not whether the regulated activity sufficiently affected interstate commerce, but whether Congress had a rational basis for so concluding.[293]

Justice Breyer discussed how, based on statistical and other evidence, Congress could have found a connection between school violence and interstate commerce.[294] Justice Breyer reasoned that because guns in schools undermine the quality of education, Congress could have found that education is inextricably intertwined with interstate commerce and that gun-related violence in schools is a commercial problem.[295]

Finally, Justice Breyer indicated his three major concerns with the majority's opinion.[296] First, he took exception to the Court's upholding of Congressional actions, such as the regulation of loan-sharking, which had a less significant impact on commerce than school violence.[297] Second, he rejected the majority's distinction between commercial and noncommercial transactions, arguing that even if such a categorization could be made, schools could rationally be placed in the commercial category.[298] Third, he believed that the majority's opinion would create uncertainty in an area of constitutional law that had been settled since the late 1930s.[299] Thus, Justice Breyer would have reversed the Fifth Circuit and upheld the constitutionality of the Gun Free School Zones Act.[300]

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the opinion.

290 *Id.* at 1657 (Breyer, J., dissenting).
291 *Id.* at 1658 (Breyer, J., dissenting).
292 *Id.* (Breyer, J., dissenting).
293 *Id.* (Breyer, J., dissenting).
294 *Id.* at 1659 (Breyer, J., dissenting).
295 *Id.* (Breyer, J., dissenting).
296 *Id.* at 1659 (Breyer, J., dissenting).
297 *Id.* at 1662 (Breyer, J., dissenting).
298 *Id.* at 1664 (Breyer, J., dissenting).
299 *Id.* (Breyer, J., dissenting).
300 *Id.* (Breyer, J., dissenting).

V. ANALYSIS

This Note argues that the Gun Free School Zones Act is a valid exercise of congressional power under the Commerce Clause. First, this Note contends that the majority failed to apply the well-established rational standard of review to its analysis of the Act's constitutionality. Under this standard, Congress did not have to provide an explicit connection between the Gun Free School Zones Act and interstate commerce. Rather, the relevant judicial inquiry was only whether Congress could have rationally concluded that gun possession at school affects interstate commerce. Because Congress, in related gun control legislation, specified the link between juvenile gun possession and interstate commerce, it could have rationally concluded that guns at school affect interstate commerce. Furthermore, even if Congress was required to provide express findings linking gun violence in the schools with interstate commerce, it did so when it retroactively amended the Gun Free School Zones Act.

Second, this Note contends that the Supreme Court erred in determining that education and local crime issues fall within the exclusive jurisdiction of state and local governments. This Note finds support for Congress' ability to legislate over localized school gun possession under the Commerce Clause in the judicial ratification of similar gun control legislation and in the Supreme Court's approval of other social policy legislation which possess more tenuous links to interstate commerce.

Finally, this Note argues that the Supreme Court erred in determining that gun violence in the schools does not substantially affect interstate commerce because the presence of guns diminishes the educational process. The primary objective of the American educational system is to prepare the country's future workforce. Given that the produced goods and services will be traded throughout interstate and foreign commerce, a deteriorated educational system substantially affects interstate commerce.

A. THE COURT FAILED TO APPLY A RATIONAL BASIS STANDARD OF REVIEW

The Supreme Court, in ruling that the Gun Free School Zones Act was an impermissible exercise of Congress' legislative authority under the Commerce Clause, contended that the Act's legislative history did not provide congressional "findings" detailing the nexus between the regulated activity and interstate commerce.[301] In so ruling,

[301] *Lopez*, 115 S. Ct. at 1632.

the Supreme Court erred by failing to apply the well established rational basis standard of review. Had the Court used the proper standard of review, it would have upheld the Gun Free School Zones Act as a constitutional enactment under Congress' commerce power.

1. The Rational Basis Standard of Review

The rational basis test provides that federal courts must defer to a congressional determination that an activity substantially affects interstate commerce.[302] Thus, acts of Congress are presumed constitutional under the Commerce Clause unless a reviewing court determines that no rational basis could exist for a congressional finding that the regulated activity affects interstate commerce.[303]

Under this deferential standard of review, Congress does not have to explicitly invoke the Commerce Clause to regulate an activity.[304] Congress is not required to identify the source of its power to act in the text of the statute or in its legislative history.[305] In fact, under the rational basis standard, the Court "never requires[s] a legislature to articulate its reasons for enacting a statute."[306] Thus, the absence of legislative facts have no impact on a rational basis analysis, but rather legislative judgments may simply "be based on rational speculation unsupported by evidence or empirical data."[307] In all instances, Congress need not collect evidence as to the nexus between interstate commerce and the regulated activity.[308] Instead, the courts' inquiry into whether Congress could rationally have concluded that a regulated activity has the requisite effect on interstate commerce is "restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for [such a conclusion]."[309]

By requiring Congress to provide express congressional findings

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302 Hodel v. Indiana, 452 U.S. 314 (1981). "A statute enacted by Congress pursuant to its power 'to regulate commerce . . . among the several States,'" U.S. CONST. art. I, § 8, cl. 3, comes with "' a presumption of constitutionality.'" *Id.* at 323. (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

303 *Id.* at 323-24; *see also* Perez v. United States, 402 U.S. 146, 152-56 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258, 262 (1964).

304 The "constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." EEOC v. Wyoming, 460 U.S. 226, 243-44, n.18 (1983) (citing Woods v. Miller Co., 333 U.S. 138, 144 (1948)).

305 Woods v. Miller Co., 333 U.S. 138, 144 (1948).

306 FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993).

307 *Id.* at 2102.

308 "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." Fullilove v. Klutznick, 448 U.S. 448, 478 (1980); *see also* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) ("'formal findings' of an interstate commerce nexus of course are not necessary.").

309 United States v. Carolene Products Co, 304 U.S. 144, 154 (1938).

linking gun control at school to interstate commerce, the Supreme Court failed to apply the rational basis test. As discussed further in part B below, because guns at school decrease the quality of education,[310] ease drug trafficking,[311] and create unnecessary social costs in the form of medical expenses and increased insurance rates,[312] Congress could have rationally concluded that guns affect interstate commerce. Under the rationale basis standard, Congress was not required to collect data evidencing this nexus. Nor was Congress required to identify the source of its congressional power for the enactment.

Application of the rational basis standard is essential to the constitutional separation of powers. The Supreme Court has explained that it accords great weight to the decisions of Congress because it is a co-equal branch of government.[313] To require Congress to identify the precise source of authority for each of its enactments would unduly constrain its ability to legislate and subjugate it to overextending judicial power.[314] Thus, in demanding that Congress supply a legislative record justifying the link between gun possession at school and interstate commerce, the Supreme Court overstepped its authority.

2. *Earlier Gun Control Enactments Provide the Necessary Nexus to Interstate Commerce*

The Court erred in concluding that Congress could only rely on the legislative history specific to the Gun Free School Zones Act to provide findings for a rational basis connection to the Commerce Clause. In addition to the legislative history associated with a particular piece of legislation, courts may consider the history of other legislation regulating the same class of activities.[315] The rationale behind this principle is that after Congress has legislated repeatedly in an area of national concern, its members gain experience that may re-

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310 "Gun violence at school impedes the ability of schools to attract and retain qualified school personnel and threatens the education goals related to student achievement." *Gun Free School Zones Act Hearings, supra* note 166, at 46 (statement of Joel Packer, Legislative Specialist, National Education Association and National PTA).

311 *See* 21 U.S.C. § 801(3)-(6) (1994) ("Gun possession in the vicinity of schools is associated with drug dealing, an activity that Congress has recognized to affect interstate commerce.").

312 The estimated cost to society for firearm injuries is $387,235 per fatality and $29,870 per non-fatal injury requiring hospitalization. DOROTHY P. RICE ET AL., COST OF INJURY IN THE UNITED STATES: A REPORT TO CONGRESS 53 (1989).

313 *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 563 (1990); Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

314 "Such a requirement would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process." Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

315 Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

duce debate when Congress again considers action in that area.[316] Moreover, earlier legislative findings can support subsequent enactments, and Congress thus can avoid unnecessary expenditure of the legislature's time and public resources by not revisiting the same issues each time it legislates.[317]

For more than half a century, Congress has recognized that the destructive capabilities of firearms provide a basis for federal regulation of their transfer and possession.[318] Gun control legislation enacted during this period contained express interstate commerce connections.[319]

Congress included express ties to interstate commerce when legislating the Federal Firearms Act of 1938.[320] For example, the Federal Firearms Act of 1938 prohibited any unlicensed manufacturer or dealer from transporting, shipping, or receiving any firearm or ammunition in interstate or foreign commerce,[321] made it an offense for "any person" to transport in interstate or foreign commerce any stolen firearm or ammunition,[322] and outlawed the shipment or transportation in interstate or foreign commerce of any firearm or ammunition to any felon or fugitive.[323]

When Congress repealed the Federal Firearms Act of 1938 and reincorporated it almost in its entirety into the Omnibus Crime Control and Safe Streets Act of 1968,[324] it reiterated its intention to ground gun control legislation in the Commerce Clause.[325] The 1968

316 *Id.* at 503.

317 *Cf. Id.*

318 *See* National Firearms Act of 1934, 48 Stat. 1236; Federal Firearms Act of 1938, 52 Stat. 1250.

319 Congress' earliest gun control legislation was grounded in its taxing power. For example, the National Firearms Act, which is applicable only to machine guns, "sawed-off" shotguns and rifles, silencers, and the like, is grounded on Congress' tax power under Article I, Section 8, Clause 1. 48 Stat. 1236 (1934) (originally codified as 26 U.S.C. § 1132; now codified, as amended, 26 U.S.C. §§ 5801-5872). Its prohibitions are based on the imposition of an excise tax on the business of dealing in such weapons, on their transfers, along with related requirements for registration of the dealer, the transfers, and the weapons. The Gun Free Schools Zone Act is not tied to taxation registration or reporting, and is applicable to a broader class of firearms than that covered by the National Firearms Act. Thus, the National Firearms Act is not considered in analyzing the constitutionality of the Gun Free School Zones Act under the Commerce Clause. Starting with the Federal Firearms Act of 1938, major gun control legislation has been based on the Commerce Clause.

320 52 Stat. 1250 (codified at 15 U.S.C. §§ 901-910) (repealed 1968), the provisions of which, as amended and supplemented, have been carried forward to 18 U.S.C. §921 et seq.

321 15 U.S.C. § 902(a) (1964).

322 15 U.S.C. § 902(g) (1964).

323 15 U.S.C. § 902(d) (1964).

324 *See supra* note 124.

325 The 1968 Act added a license requirement for any person engaging in the business of importing, manufacturing, or dealing in firearms. 18 U.S.C. § 922(a)(1).

Act also contained express congressional findings linking gun control to interstate commerce.[326] Congress found, among other things, that the States could not adequately control the widespread traffic in firearms moving throughout interstate commerce through the exercise of their police power.[327] In order to control firearms traffic moving in or otherwise affecting interstate commerce, Congress broadened the 1968 Act's scope to regulate all firearms dealers and manufacturers, not just those conducting an interstate business.[328] Congress determined that mail-order businesses and the ease with which weapons could be concealed during transportation required federal control over all persons engaging in the firearms business.[329]

While gun control initiatives through 1968 contained Congress' express intentions to control interstate commerce, recent legislation has not contained this explicit interstate commerce element. One such example is the Firearms Owners' Protection Act of 1986,[330] which made it unlawful for any person to transfer or possess a machine gun. There is no committee report and sparse legislative history concerning this provision. The only express explanation for it is the statement by its sponsor, Representative Hughes, stating "I do not know why anyone would object to the banning of machine guns."[331] This enactment is highly analogous to the Gun Free School Zones Act. While the legislative history of § 922(o) indicated that Congress considered the relationship between the availability of machine guns, violent crime, and narcotics trafficking,[332] Congress did not provide express legislative findings regarding the mere possession of ordinary firearms.[333]

Only a few circuit courts have addressed the constitutionality of

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326 *See supra* note 128.

327 *Id.*

328 *Id.*

329 *Id.*

330 Pub. L. No. 99-308, 100 Stat. 449, 452-53 (adding 18 U.S.C. § 922(o)).

331 *See* Farmer v. Higgins, 907 F.2d 1041, 1044 (11th Cir. 1990) (citing 132 CONG. REC. 1750 (1986) (statement of Rep. Hughes)).

332 United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1614 (1993), states that "when it first enacted section 922, Congress found facts indicating a nexus between the regulation of firearms and the commerce power." Moreover, the Ninth Circuit stated that because "Congress specifically found that at least 750,000 people had been killed in the United States by firearms. . . it was thus reasonable for Congress to conclude that the possession of firearms affects the national economy . . ." United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991). However, neither case finds express legislative findings that mere private party intrastate possession of firearms that have not moved in interstate commerce has an effect on interstate commerce.

333 *See* H.R. REP. No. 495, 99th Cong., 2d Sess. 1-5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327-31.

the Firearms Owners' Protection Act of 1986.[334] Surprisingly, one of the circuits which has upheld § 922(o) is the Fifth Circuit. Even though the Fifth Circuit in *Lopez* questioned the constitutionality of § 922(o) itself,[335] later in *United States V. Ardoin*[336] it found § 922(o) constitutional based in part upon Congress' authority under the Commerce Clause. The court held that no one could seriously doubt Congress' intention to regulate machine guns.[337] The Fifth Circuit's ready acceptance of § 922(o) appears inconsistent with its earlier decision regarding the constitutionality of the Gun Free School Zones Act. The Undetectable Firearms Act of 1988,[338] which added 18 U.S.C. § 922(p), also lacks an express legislative intent to regulate interstate commerce. Section 922(p) makes it unlawful for any person to "manufacture, import, ship, deliver, possess, transfer, or receive" any firearms either not detectable "by walk-through metal detectors" or which "when subjected to inspection by the type of x-ray machines commonly used at airports, do not generate an image that accurately depicts the shape of any major component."[339] Like the Gun Free School Zones Act, § 922(p) contains no express requirement of an interstate nexus for the possession offense.[340] Moreover, the committee reports accompanying the Act, which indicate that the purpose of § 922(p) is to reduce the threat posed by firearms which could avoid detection at security checkpoints, including courthouses, airports, etc., do not have an express interstate commerce context.[341]

It is important to note that the Firearms Owners' Protection Act and the Undetectable Firearms Act, as well as the Gun Free School Zones Act, are amendments to 18 U.S.C. § 922, which was added by the Gun Control Act of 1968. As discussed above, the 1968 Act contained specific congressional findings linking gun control to interstate commerce. Legislative history accompanying prior gun control enactments should be used to convey a nexus between gun possession in school zones with interstate commerce. If it is not, then other gun control initiatives which also lack this express connection, such as the Firearms Owners' Protection Act of 1986 and the Undetectable Firearms Act of 1988, are also in jeopardy.

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334 United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, 113 S.Ct 1614 (1993); United States v. Evans, 928 F.2d 858 (9th Cir. 1991).

335 United States v. Lopez, 2 F.3d 1342, 1356 (5th Cir. 1992).

336 19 F.3d 177 (5th Cir. 1994).

337 *Id.* at 178.

338 Pub. L. No. 100-649, 102 Stat. 3816 (codified at 18 U.S.C. § 922(p)).

339 18 U.S.C. § 922(p)(1).

340 *See* 18 U.S.C. § 922.

341 *See* H.R. REP. No. 612, 100th Cong., 2d Sess. 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5359, 5360.

3. *The Gun Free Schools Zone Amendment: Subsequent Announcement of Specific Congressional Findings*

While Congress did not provide express findings linking gun possession in school zones to interstate commerce when the legislation was initially enacted, it amended the Act[342] to provide such findings after the Fifth Circuit's ruling in *Lopez*.[343] In the amendment, Congress stated that "[c]rime at the local level is exacerbated by the interstate movement of. . . guns" and "[f]irearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools. . . ."[344]

The Supreme Court wrongly ignored this amendment in determining the constitutionality of the Gun Free School Zones Act. Because the amendment expressly evoked the Commerce Clause as Congress' authority for the Act and provided congressional findings linking gun control in schools with interstate commerce, the Supreme Court should have upheld the constitutionality of the Act. Generally, where congressional findings are made, they carry great weight.[345] The Supreme Court has indicated that when Congress makes findings that the regulated activity substantially affects interstate commerce, the courts must defer "if there is any rational basis for such a finding."[346] Moreover, the Court has announced that where there are specifically stated reasons for Congress' action, "our [judicial] inquiry is at an end."[347] In the past fifty years, the Supreme Court has never set aside such stated reasons as being without a rational basis.[348]

Lower courts expressed their willingness to approve the Gun Free School Zones Act based on the congressional findings contained in the amendment. Prior to the Supreme Court's decision in *Lopez*, the district court of Kansas[349] found that the Gun Free School Zones Act

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342 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 320904, 108 Stat. 1796, 2125-26. Congress found that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools" and that the resulting "occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country" which has had an "adverse impact on interstate commerce and the foreign commerce of the United States." *Id.* Furthermore, the Senate stated that "Congress has power under the Commerce Clause and other provisions of the Constitution to enact measures to ensure the integrity and safety of the Nation's Schools." 139 CONG. REC. S16,302 (daily ed. Nov. 19, 1993).

343 2 F.3d 1342, 1368 (5th Cir. 1992).

344 *Id.*

345 *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); *see also* United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991).

346 Preseault v. ICC, 494 U.S. 1, 17 (1990).

347 United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1981).

348 *Lopez*, 2 F.3d at 1363.

349 United States v. Glover, 842 F. Supp. 1327 (D. Kan. 1994).

was constitutional because the amendment explicitly set forth the necessary findings.[350] Even the Fifth Circuit in *Lopez*[351] indicated that given clear congressional intent to ground the Gun Free School Zones Act in the Commerce Clause, the Act could be held constitutional.[352] From the initiation of the Gun Free School Zones Act, Congress intended to legislate the Act according to its commerce power. This is evidenced by the fact that Congress quickly passed the amendment following the Fifth Circuit's instructions in *Lopez*.[353] In the amendment, Congress loudly voiced its continuing intention to ground the Gun Free School Zones Act in the Commerce Clause. As Congress provided, albeit retroactively, an express link between the Act and interstate commerce, the Supreme Court should have found the Act to be a constitutionally accepted exercise of Congress' commerce power.

B. CONGRESS' ABILITY TO REGULATE OVER INTRASTATE EDUCATION AND GUN CONTROL ACTIVITIES

1. Congress' Ability to Regulate Intrastate Activities

The Supreme Court erred in determining that only local governments can regulate educational activities, including gun possession in school. While education traditionally has been under the domain of local government, the denomination of an activity as "local" or "intrastate" does not in itself resolve the question of whether Congress may regulate it under the Commerce Clause. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. Instead, Congress' commerce power extends to those intrastate activities which affect interstate commerce.[354]

Several cases demonstrate that the Court has recognized that Congress may regulate purely intrastate activities if those activities affect interstate commerce. The Supreme Court in *Perez v. United States*[355] ruled that even an activity which is purely intrastate in character may be regulated by Congress, where the activity, "combined with like conduct by others similarly situated, affects commerce among the

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350 *Id.* at 1334.

351 *Lopez*, 2 F.3d at 1363.

352 *Id.* at 1368.

353 The amendment was passed on November 19, 1993 (three months after the Fifth Circuit's opinion).

354 United States v. Darby, 312 U.S. 100, 118 (1941); *see also* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942). Moreover, Congress' power over this type of intrastate activity stems from Congress' constitutional authority "to make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers, which includes the Commerce power. *See* U.S. CONST. art. I, § 8, cl. 18.

355 402 U.S. 146 (1971).

States or with foreign nations."[356] Similarly, the Supreme Court in *New York v. United States*[357] recognized that "activities once considered purely local have come to have effects on the national economy," and have accordingly come within the scope of Congress' commerce power.[358] Finally, in *Wickard v. Filburn*,[359] the Supreme Court stated that although an "activity [is] local and . . . may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ."[360]

Based on this reasoning, the Supreme Court has often upheld legislation enacted pursuant to the Commerce Clause and designed to regulate purely intrastate activities which affect interstate commerce. Among other things, the Supreme Court found that Congress may permissibly regulate the price of milk sold intrastate,[361] home grown wheat consumption,[362] local labor wage and hour provisions,[363] and intrastate redemption of firearms from pawnshops[364] on the basis that such transactions affect interstate commerce.

Gun violence at schools degrades the overall quality of educational instruction in many ways, including: increasing the dropout rate; discouraging talented resources from entering the teaching profession; and distracting attention away from the learning process. An ineffective educational system will affect interstate commerce by underpreparing the nation's future workforce, which in an increasingly complex society produces substandard goods and services. Arguably, the education system has a more substantial impact on interstate commerce than home grown wheat because labor is a significant input in almost all production and has effects beyond just one type of market. Because the Supreme Court has approved federal regulation of activities which have more tenuous links to interstate commerce, such as home grown wheat, the Court should have upheld the Gun Free School Zones Act.

2. *Congress' Use of Its Commerce Power to Achieve Social Reforms*

Where Congress has used its commerce power to legislate necessary social reforms which have a "real and substantial relation to the national interest," the judiciary has given Congress broader discretion

356 *Id.* at 150.
357 112 S.Ct. 2408 (1992).
358 *Id.* at 2419.
359 317 U.S. 111 (1942).
360 *Id.* at 125.
361 United States v. Wrightwood Dairy Co., 315 U.S. 110, 118 (1942).
362 *Wickard*, 317 U.S. at 137-39.
363 United States v. Darby, 312 U.S. 100, 118 (1941).
364 Huddleston v. United States, 415 U.S. 814, 833 (1974).

over local activities.[365] In the civil rights context, the Supreme Court ruled in *Katzenbach v. McClung*[366] that a statute prohibiting racial discrimination at local restaurants was a legitimate exercise of Congress' commerce power because discrimination discouraged travel by African-Americans and affected purchases of food and restaurant supplies from other states.[367] In *Daniel v. Paul*,[368] the Court found that an amusement park exercising discriminatory practices affected interstate commerce. Although the park was located deep in the Alabama countryside, some customers, food, and equipment came from out of state. In *Heart of Atlanta Motel v. United States*,[369] the Supreme Court determined that Congress could regulate a single hotel located in Georgia because of the deleterious effect that racial discrimination in public lodging had on the interstate movement of persons and goods.

Outside of the civil rights context, the Supreme Court has allowed Congress to legislate broadly under its commerce power to regulate criminal activity. In *United States v. Russell*,[370] the Court upheld the Organized Crime Control Act of 1970, which made it a federal crime to burn down a rental apartment. The Court held that even where an individual criminal activity has a minimal effect on interstate commerce, Congress could regulate it.[371] In *Perez v. United States*,[372] the Court upheld a federal statute criminalizing loan-sharking activity which occurred exclusively at a local level.[373] The Court stated that Congress may judge that such transactions "though purely intrastate . . . affect interstate commerce."[374]

The majority's holding in *Lopez* is contrary to precedent which has upheld congressional acts with more tenuous connections to interstate and foreign commerce than the connection in *Lopez*. Just as the Court determined that racial discrimination in local businesses deters interstate travel,[375] violence around schools dissuades travel into those areas. Moreover, just as a local amusement park exercising discriminatory practices affected interstate commerce because supplies came from outside the state, schools receive texts and other educational supplies, many of which probably are sourced out-of-state. Fur-

365 *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).
366 379 U.S. 294 (1964).
367 *Id.* at 301.
368 395 U.S. 298 (1969).
369 379 U.S. at 246.
370 471 U.S. 858 (1985).
371 *Id.* at 862.
372 402 U.S. 146 (1971).
373 *Id.* at 147.
374 *Id.* at 154.
375 *See* Katzenbach v. McClung, 379 U.S. 294, 298 (1964).

thermore, violence may affect the labor supply to schools. Numerous teachers may be unwilling to risk personal harm to provide their services to violent schools.[376] Thus, school violence may create a shortage of qualified instructors, and affect the national market for such individuals, which would obviously impact interstate commerce. Moreover, the Court has upheld federal laws criminalizing acts which are more localized in nature than school gun violence. Arguably, education has a stronger relationship to the national interest than localized loan-sharking[377] or arson.[378] Finally, based on Supreme Court precedent, courts have generally given more leeway to social reform legislation, such as the Gun Free School Zones Act. Courts have refused to overturn such legislation for a half-century.[379]

3. The Impact of the Tenth Amendment

Contrary to Justice Kennedy's concern,[380] the Gun Free School Zones Act does not erode states' Tenth Amendment rights by regulating education and localized crime. "The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police power powers."[381] The Tenth Amendment does place limits on Congress' ability to impose requirements directly upon state governments.[382] Those limitations have no relevance, however, to congressional regulation of private activity. *National League of Cities* distinguished between "the authority of Congress to enact laws regulating individual businesses" and the "exercise of congressional authority directed, not to private citizens, but to the States as States."[383] Moreover, in *Hodel v. Indiana*,[384] the Court found that "a claim that congressional commerce power legislation is invalid under the reason-

376 "Gun violence at school impedes that ability of schools to attract and retain qualified school personnel." *Gun Free School Zones Act Hearings, supra* note 166, at 46 (Statement of Joel Packer, Legislative Specialist, National Education Association and National PTA).

377 *See Perez*, 402 U.S. at 154.

378 *See* United States v. Russell, 471 U.S. 858, 862 (1985).

379 *See, e.g., Perez*, 402 U.S. at 154; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 246 (1964).

380 United States v. Lopez, 115 S. Ct. 1624, 1635 (Kennedy, J., concurring).

381 Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 291 (1981).

382 *See* New York v. United States, 112 S. Ct. 2408 (1992); Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528 (1985); National League of Cities v. Usery, 426 U.S. 833 (1976) (*overruled by Garcia*).

383 *National League of Cities*, 426 U.S. at 845. Although the Supreme Court overturned *National League of Cities* in *Garcia*, nothing in *Garcia* suggests that the requirement that the federal law regulate states as states to implicate the Tenth Amendment is erroneous. *Garcia*, 469 U.S. at 537-38.

384 452 U.S. 314 (1981).

ing of *National League of Cities*. . . [requires] a showing that the challenged statute regulates the 'States as States.'"[385]

The Gun Free School Zones Act does not regulate the states, but instead regulates the possession of firearms by individuals. Unlike other federal crime legislation which is currently under attack, such as the Brady Act,[386] the Gun Free School Zones Act imposes no affirmative obligations upon state or local government units, nor does it limit state and local autonomy with respect to curricular choices or resources allocation. Rather, the Act incorporates state and local policy choices by exempting individuals licensed to possess firearms under state or local law.[387]

Even though Congress possesses unquestioned authority under the Commerce Clause to preempt state law,[388] Congress has tried to minimize its intrusion on state prerogatives.[389] The Act provides that "nothing in it shall be construed as preempting or preventing a state or local government from enacting a statue establishing gun-free school zones."[390] The Act thus supplements, rather than supplants, the efforts of state and local authorities, and hence, the Gun Free School Zones Act does not violate the Tenth Amendment.

C. GUN POSSESSION IN SCHOOLS SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

The Supreme Court was also wrong in determining that gun possession in school zones does not "substantially affect" interstate commerce. Numerous reports and studies clearly indicate that gun possession in a school zone substantially affects interstate commerce in at least three ways: a less productive workforce, proliferated drug trafficking, and increased insurance costs.[391]

1. A Less Productive Workforce

The National School Safety Center estimates that more then

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385 *Id.* at 323.

386 Pub. L. No. 103-159, Title I, 107 Stat. 1536 (1993) (codified in scattered subsections of 18 U.S.C. §§ 921-925).

387 18 U.S.C. 922(q)(1)(B)(ii) (Supp. IV 1992). Also individuals acting pursuant to contractual agreements with the school and local law enforcement officers are exempted from the Act. *See* 18 U.S.C. § 922(q)(1)B)(v)-(vi) (Supp. IV 1992).

388 *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2435 (1992).

389 The Act provides that if state or local officials authorize (in any variety of ways) the possession of firearms in a school zone, the federal prohibition will not apply. *See* 18 U.S.C. § 922(q)(1)(B)(ii)-(vi) (Supp. IV 1992). For example, individuals acting pursuant to contractual agreements with the school and local law enforcement officers are exempted from the Act. *Id.*

390 18 U.S.C. § 922(q)(3) (Supp. IV 1992).

391 United States v. Lopez, 115 S.Ct. 1624, 1659 (Breyer, J., dissenting).

100,000 students carry guns to school every day.[392] Twelve percent of urban high school students have had guns fired at them.[393] In any six month period, several hundred thousand school children are victims of violent crimes in or near their schools.[394] This excessive firearm violence has a deleterious effect upon the educational process. The widespread violence in schools significantly interferes with the quality of education in those schools by increasing dropout rates[395] and contributing to poor academic performance.[396] As Secretary of Education Richard Riley has observed, the threat of violence in the schools "creates an environment where children cannot learn, teachers cannot teach, and parents are reluctant to send their kids to school."[397]

This educational demise harms the United States' economic condition because education is "inextricably intertwined" with the nation's economy.[398] Recently, this link between education and the health of the national economy has strengthened. Technological changes and innovations in management techniques have caused greater demand for educational skills in the workplace.[399] There is evidence that "service, manufacturing and construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas."[400] Increasing global competition has also strengthened the connection between education and the nation's economic well-being. "The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports."[401] The United States suffers from negative trade balances and decreases in real hourly compensation due significantly to "students who emerge from classrooms without the reading or mathematical skills necessary to compete."[402] Congress has previously stated that "functionally or technologically illiterate" Americans in the work force "erod[e]" our economic "standing in the inter-

392 *Children Carrying Weapons: Why the Recent Increase: Hearings Before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. 8 (1992) [hereinafter *Children Carrying Weapons*].

393 CATHERINE H. WHITAKER & LISA D. BASTIAN, U.S. DEP'T. OF JUSTICE, TEENAGE VICTIMS, A NATIONAL CRIME SURVEY REPORT (1991).

394 *Children and Guns: Hearings Before the House Select Committee on Children, Youth, and Families*, 101st Cong., 1st Sess. (1989).

395 *Gun Free School Zones Act Hearings, supra* note 166, at 46.

396 *Id.*

397 SAFEGUARDING OUR YOUTH: VIOLENCE PREVENTION FOR OUR NATION'S CHILDREN, Forum Proceedings 8 (July 20-21, 1993).

398 *Gun Free School Zones Act Hearings, supra* note 166, at 46-47.

399 *Trying Harder*, THE ECONOMIST; A SURVEY OF EDUCATION 5 (Nov. 21, 1992).

400 *Gun Free School Zones Act Hearings, supra* note 166, at 46-47.

401 *Id.*

402 *Id.*

national marketplace."[403] Finally, many firms require educated workers.[404] If companies cannot get enough skilled workers in the United States, they will "move the skilled jobs out of the country."[405] As the educational process prepares the nation's workforce, their diminished productivity, resulting from substandard preparation, will substantially affect future interstate and foreign commerce.

B. OTHER EFFECTS OF GUNS AT SCHOOL ON INTERSTATE COMMERCE: PROLIFERATED DRUG TRAFFICKING AND INCREASED MEDICAL/ INSURANCE COSTS

In addition to deteriorating the quality of education, guns are often associated with illegal drug sales. As the judiciary has approved of Congress' use of its commerce power to regulate illegal drugs, it should have upheld Congress' regulation of guns, which are the tools of the drug trade.

Eighteen percent of all weapons in school incidents are drug related.[406] Approximately forty percent of violence caused by persons under twenty-five years of age is drug-related violence.[407] Congress' power under the Commerce Clause to regulate activities related to the possession and sale of drugs is well recognized.[408] Even the Fifth Circuit in *Lopez* recognized that Congress' commerce power supports legislation controlling the drug possession and sale.[409] Arguably, because weapons are being carried into schools to support the drug trade,[410] the constitutionality of the Gun Free School Zones Act could

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403 The Education and Training for a Competitive America Act of 1988, enacted as Title VI of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title VI, 102 Stat. 1107, 1469.

404 *See Reauthorization of Expiring Federal Elementary and Secondary Education Programs: Joint Hearings Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor and the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 2 (1987).

405 *See* Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments, Pub. L. No. 100-297, 102 Stat. 130 (1988).

406 *Children Carrying Weapons, supra* note 392, at 36 (Statement of Ronald D. Stephens).

407 *Children and Guns: Hearings before the House Select Committee on Children, Youth, and Families*, 101st Cong., 1st Sess. 81 (1989) (Statement of Thomas Scalea, M.D.).

408 *See, e.g.*, United States v. McDougherty, 920 F.2d 569, 572 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991); United States v. Lopez, 459 F.2d 949, 951-53 (5th Cir. 1972), *cert. denied*, 409 U.S. 878 (1972).

409 *See* United States v. Lopez, 2 F.3d 1342, 1366-67 n.50 (5th Cir. 1992).

410 "As street narcotic enforcement programs become more effective, we force gang members to distribute narcotics in schools. children of all ages are used to further this purpose. . . Recruitment is achieved through offering incentives . . . if this cannot be accomplished, it is often then done through fear and intimidation. . . with controlling the flow of weapons and drugs into the schools, we can lessen their influence in the school environment." *Children Carrying Weapons, supra* note 392, at 23 (statement of Lt. Thomas Byrne).

rest on this factor alone.

Another significant effect of gun possession at school on interstate commerce is increased medical and insurance costs. On average, each firearm injury or fatality costs the American public approximately $50,000.[411] In one year, guns caused 268,000 injuries, including 31,556 fatalities in the United States.[412] These firearm injuries cost society an estimated $14.4 billion.[413] Congress has recognized the direct connection between guns and rising insurance rates.[414]

All of these costs factor into the determination of whether gun possession at school substantially affects interstate commerce. As *Wickard v. Filburn* indicated, the relevant inquiry is whether the regulated activity has "a substantial economic effect on interstate commerce," not whether the effect is "direct" or "indirect."[415] Any activity whose annual consequences impose actual costs of $14.4 billion on individuals, insurance companies, and the government is necessarily "commerce which concerns more States than one and has a real and substantial relation to the national interest."[416]

VI. Future Impact of the Decision

The future effects of the *Lopez* decision are difficult to ascertain. The real impact of *Lopez* on school violence may be minimal. The *Lopez* loss should be mitigated by the fact that forty-three states have statutes imposing sanctions on individuals who bring guns onto school property. Even Lopez was initially charged under Texas state law for violating a Texas penal statute which prohibits carrying a firearm at school. Alternatively, *Lopez* could be circumvented by linking educational funds or other programs dependent on federal financial aid to the level of states' compliance in the enforcement of a gun ban. This alternative would comply with the Court's decision in *United States v. New York.*

Alternatively, *Lopez's* impact may be much broader than the Court

411 Rice et al., *supra* note 312, at 50.

412 *Id.*

413 *Id.* The Cost of Injury report calculated the direct costs of annual firearm injuries at $911,411,000 in actual out-of-pocket spending for goods and services: $863,586,000 for medical care, $13,743,000 in home modification and vocational rehabilitation expenses for survivors of firearm injuries, and $34,082,000 in administrative costs to the insurance industry. *Id.* at 177-79. The remaining $13.5 billion represented the indirect cost to society of workers' lost productivity. *Id.* at 173, 177.

414 *Compare* 138 Cong. Rec. E1532 (daily ed. May 27, 1992) (statement of Rep. Hamilton) ("We pay the cost of crime in higher taxes, insurance rates, and prices.") *with* United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991) ("Congress may reasonably conclude that possession of firearms affects the national economy through the insurance industry").

415 317 U.S. 111, 125 (1942).

416 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255 (1964).

anticipated. The *Lopez* decision threatens the constitutionality of existing gun control statutes such as the Firearm Owners' Protection Act, the Undetectable Firearms Act, and the Brady Act. Like the Gun Free School Zones Act, none of these acts contain express commerce elements or have a legislative history directly linking the objective of the Act to interstate commerce. Thus, if the Court decides not to apply a rational basis test to these statutes, their existence may be in jeopardy. In addition, *Lopez* may have a "chilling effect" on other federal anticrime legislation. As Congress historically has used its commerce power to enact federal crime bills, the *Lopez* decision may place severe constitutional limits on the federal government's ability to enact future legislation addressing the national problem of crime. Congress may have to use another one of its enumerated powers, such as the taxing and spending power, to create future federal crime legislation.

VII. CONCLUSION

This Note concludes that the majority improperly decided *United States v. Lopez* for three reasons. First, the majority failed to apply a rational basis test to its analysis of the constitutionality of the Gun Free School Zones act. While Congress did not provide an explicit connection between the Act and interstate commerce when the legislation was originally passed, under the rational basis test the Act would still be constitutional because prior gun control legislation laid the foundation for its enactment. Second, the Supreme Court erred in deciding that Congress could not regulate education and local crime because these were traditionally state domains. Support for Congress' ability to legislate over school gun possession through the Commerce Clause can be found in the Supreme Court's ratification of other localized crime control legislation and its approval of social policy legislation which possess more tenuous links to interstate commerce. Finally, the Supreme Court erred in determining that gun violence in schools does not substantially affect interstate commerce because such violence deteriorates educational standards and provides a less productive future workforce.

Lopez may severely impact crime control measures. The *Lopez* decision threatens the constitutionality of existing gun control statutes such as the Firearm Owners' Protection Act, the Undetectable Firearms Act, and the Brady Act. As Congress historically has used its commerce power to enact federal crime bills, the *Lopez* decision may place severe constitutional limits on the federal government's ability to enact future legislation to address the national problem of crime.

Accordingly, the potential ramifications of *Lopez* stretch far beyond the issues of guns in schools to a wide range of existing and future federal crime control measures.

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