UNITED STATES v. LOPEZ

SUPREME COURT OF THE UNITED STATES
514 U.S. 549
April 26, 1995
[5 - 4]

OPINION: CHIEF JUSTICE REHNQUIST/O'CONNOR/SCALIA/KENNEDY/THOMAS...In the **Gun-Free School Zones Act of 1990**, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce...among the several States..."

Unless logic is to be utterly disregarded, I fail to see how **any** Justice could possibly disagree with the majority in this case, yet it is a 5-4 decision. ?!?! I wonder how Madison would react to the dissenting views.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990.

Let us not forget that Texas had at least some type of criminal statute in force to take care of Mr. Lopez. Why was the State charge dismissed? Why was the Federal charge pursued? Perhaps the feds wanted to take a constitutional spin with these facts. Perhaps the Federal penalty was more in line with what the "locals" wanted to see. Who knows?

A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of §922(q) [of the Act]...The District Court...found him guilty...and sentenced him to six months' imprisonment and two years' supervised release. On appeal, respondent challenged his conviction based on his claim that §922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals...agreed and reversed [his] conviction...[W]e granted certiorari and...now affirm [the Court of Appeals].

We start with first principles. The Constitution creates a Federal Government of **enumerated** powers. See Art. I, §8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are **few and defined**. Those which are to remain in the State governments are **numerous and indefinite**." This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

...The *Gibbons*[1] Court...acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause:

> 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 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.
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> Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one...**The enumeration presupposes something not enumerated**; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

For nearly a century [*Gibbons*], the Court's Commerce Clause decisions dealt but 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. *Veazie v. Moor* (1853) (upholding a state-created steamboat monopoly because it involved regulation of wholly internal commerce); *Kidd v. Pearson* (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State"). Under this line of precedent, the Court held that 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...

In 1887, Congress enacted the Interstate Commerce Act and in 1890, Congress enacted the Sherman

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[1]Case 1-14 on this website.

Antitrust Act. These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." *United States v. E.C. Knight Co.*[2] ("Commerce succeeds to manufacture, and is not part of it"); *Carter v. Carter Coal Co.* (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it".) Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.

In *Schechter Poultry Corp. v. United States*[3], the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, **essential to the maintenance of our constitutional system**." Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. The justification for this formal distinction was rooted in the fear that **otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."**

Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.* (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. ("The question [of the scope of Congress' power] is necessarily one of degree.") The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate.

In *United States v. Darby* (1941)[4], the Court upheld the Fair Labor Standards Act, stating:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends 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 means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

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[2]Case 1-15 on this website.

[3]Case 1-16 on this website.

[4]Case 1-17 on this website.

...In *Wickard v. Filburn*[5], the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

> Even if appellee's activity be local and though it 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, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

...***Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.** In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents...confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce **so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government**." See also *Darby* (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard* (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Similarly, in *Maryland v. Wirtz* (1968), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits"...In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "all activities affecting commerce, even in the minutest degree may be regulated and controlled by Congress," the *Wirtz* Court replied that the dissent had misread precedent as "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."

...[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. *Darby*; *Heart of Atlanta Motel*[6] ("The authority of Congress to keep the channels of interstate

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[5]Case 1-18 on this website.

[6]Case 1-19 on this website.

commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question."). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *Southern R. Co. v. United States* (1911)...**Finally**, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce (*Jones & Laughlin Steel*), those activities that **substantially** affect interstate commerce. *Wirtz*.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause...**We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.**

We now turn to consider the power of Congress, in the light of this framework, to enact §922(q). The first two categories of authority may be quickly disposed of: §922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can §922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if §922(q) is to be sustained, it must be under the third category as a regulation of an activity that **substantially affects** interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; *Hodel*, intrastate extortionate credit transactions, *Perez*, restaurants utilizing substantial interstate supplies, *McClung*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, and production and consumption of homegrown wheat, *Wickard v. Filburn*...[T]he pattern is clear. **Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained**.

Even *Wickard*...involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

> One of the primary purposes of the Act in question was to increase the market price

> of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce.

Section 922(q) 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. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce. Second, §922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass* (1971), the Court interpreted former 18 U.S.C. §1202(a), which made it a crime for a felon to "receive, possess, or transport in commerce or affecting commerce...any firearm." The Court interpreted the possession component of §1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." The *Bass* Court set aside the conviction because although the Government had demonstrated that *Bass* had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the "mere possession" of firearms...Unlike the statute in *Bass*, §922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "neither the statute nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce...But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here...

The Government's essential contention...is that we may determine here that §922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. **The Government argues** [1] that possession of a firearm in a school zone may result in violent crime and [2] that violent crime can be expected to affect the functioning of the national economy

in two ways. [3] First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. [4] Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. *Heart of Atlanta Motel*. [5] The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. [6] That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could **rationally** have concluded that §922(q) substantially affects interstate commerce.

Anyone ever heard of the "Kevin Bacon Game?" If the foregoing convoluted "reasoning" were to hold up, literally nothing could ever elude the power of Congress to regulate.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only **all violent crime**, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate **any activity** that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. **Under the...theories [of the] Government..., it is difficult to perceive any limitation on federal power**, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

JUSTICE BREYER focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom

learning," and that, in turn, has a substantial effect on interstate commerce.

JUSTICE BREYER rejects our reading of precedent and argues that "Congress...could rationally conclude that schools fall on the commercial side of the line." Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "falling on the commercial side of the line" because it provides a "valuable service -- namely, to equip children with the skills they need to survive in life and, more specifically, in the workplace." We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." As Chief Justice Marshall stated in *McCulloch v. Maryland* [7]:

> The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it...is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

See also *Gibbons v. Ogden* ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury v. Madison*[8]...

In *Jones & Laughlin Steel*, we held that the question of congressional power under the Commerce Clause "is necessarily one of degree." To the same effect is the concurring opinion of Justice Cardozo in *Schechter Poultry*:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours is an elastic medium which transmits all tremors throughout

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[7]Case 1-7 on this website.

[8]Case 6-2 on this website.

its territory; the only question is of their size.

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. **The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce...**

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated (*Gibbons v. Ogden*), and that there never will be a distinction between what is truly national and what is truly local. *Jones & Laughlin Steel*. This we are unwilling to do...[T]he Court of Appeals is *Affirmed*.

CONCURRENCE: JUSTICE KENNEDY/O'CONNOR...The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding...

This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. These standards are by now well accepted. Judicial review is also established beyond question (*Marbury v. Madison*) and though we may differ when applying its principles, its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double

security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51...

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function...Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory...The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power. To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered." Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates and the debates over the Civil Rights Acts, some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. **The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.**

In other words, the legislative and executive branches have as much of a responsibility as does the judicial branch to respect the boundaries between state and federal authority crafted by the framers of our government.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far...

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed...

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are charged with maintaining. These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns; programs to encourage the voluntary surrender of guns with some provision for amnesty; penalties imposed on parents or guardians for failure to supervise the child; fining parents who allow students to possess a firearm at school; misdemeanor for parents to allow students to possess a firearm at school; laws providing for suspension or expulsion of gun-toting students or programs for expulsion with assignment to special facilities; automatic year-long expulsion for students with guns and intense semester-long reentry program.

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. Each of these now has an invisible federal zone extending 1,000 feet beyond the (often

irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy...or to organize its governmental functions in a certain way...While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. **Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce...**

CONCURRENCE: JUSTICE THOMAS...[O]ur case law has drifted far from the original understanding of the Commerce Clause...[W]e ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce...among the several States," U.S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years,...our cases are quite clear that there are real limits to federal power. *New York v. United States* (1992) ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers'"); *Chisholm v. Georgia* (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them"). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal Government has nothing approaching a police power.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. **Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.**

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence...

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. Johnson, A Dictionary of the English Language 361 (4th ed. 1773) (defining commerce as "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffick")...This understanding finds support in the etymology of the word, which literally means "with merchandise." Oxford English Dictionary 552 (2d ed. 1989) (com -- "with"; merci -- "merchandise "). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. Federalist No. 4 (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); No. 40 (Madison) (asserting that it was an "acknowledged object of the Convention...that the regulation of trade should be submitted to the general government")...

As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. Federalist No. 36...

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles...

The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes."...Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power to regulate commerce among the several States. U.S. Const., Art. I, §8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, **if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights...**

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate

commerce. An interpretation of cl. 3 that makes the rest of §8 superfluous simply cannot be correct. **Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, §8...**

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly prohibited by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other...Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

> The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction. The Federalist No. 17.

...The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, e. g., 2 Debates 267-268 (A. Hamilton at New York convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate... a State's civil and criminal institutions or penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45 (Madison). Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. Federalist No. 34 (A. Hamilton) (observing that the "internal encouragement of agriculture and manufactures" was an object of state expenditure). Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers "herein granted" by the rest of the Constitution. Art. I, §1.

...If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *Gibbons v. Ogden* established that Congress may control all local activities that "significantly affect interstate commerce." And, "with the exception of one wrong turn subsequently corrected," this has been the "traditional" method of interpreting the Commerce Clause.

In my view, the dissent is wrong about the holding and reasoning of *Gibbons*. Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

In *Gibbons*, the Court examined whether a federal law that licensed ships to engage in the "coasting trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In concluding that it did, the Court noted that Congress could regulate "navigation" because "all America...has uniformly understood, the word 'commerce,' to comprehend navigation..." The Court also observed that federal power over commerce "among the several States" meant that Congress could regulate commerce conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States.

At the same time, the Court took great pains to make clear that Congress could not regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation...not surrendered to a general government." From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce...

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard v. Filburn*. See also *Perez v. United States* (1971) (claiming that with *Darby* and *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "commerce" that "does not extend to or affect other States." From this statement, the principal dissent infers that whenever an activity **affects** interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affects" language: Because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could never be said to be commerce "among the several States."

But even if one were to adopt the dissent's reading, the "affects" language, at most, permits Congress

to regulate only intrastate commerce that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate all activities that affect interstate commerce.

The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters to the States. The Court was not saying that whatever Congress believes is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8. *Gibbons*' emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally." *Gibbons* simply cannot be construed as the principal dissent would have it.

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens v. Virginia*, noted that Congress had "no general right to punish murder committed within any of the States" and that it was "clear that congress cannot punish felonies generally." The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers -- for instance, over the District of Columbia. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any other subject of federal concern) was irrelevant to the question of congressional power.

If the ideal of federalism caused the author of *Gibbons* to rule that Congress has no power to punish murder committed within a state, how could anyone justify punishing mere possession of the instrument of murder in a state? How could they, with a straight face, argue that John Marshall's opinion in *Gibbons* supports such a national law?

United States v. Dewitt (1870) marked the first time the Court struck down a federal law as

exceeding the power conveyed by the Commerce Clause. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States."...

In *United States v. E. C. Knight Co.*, this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause. Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "commerce succeeds to manufacture, and is not a part of it."

See...*Newberry v. United States* (1921) ("It is settled...that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress"). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter v. Carter Coal Co.* (1936) (Congress may not regulate mine labor because "the relation of employer and employee is a local relation"); see also *Schechter Poultry Corp. v. United States* (1935) (holding that Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce.

These cases all establish a simple point: **From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.**

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threatening legal uncertainty in an area of law that...seemed reasonably well settled." **The one advantage of the dissent's standard is certainty: It is certain that under its analysis <u>everything</u> may be regulated under the guise of the Commerce Clause...**

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law

and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "commensurate with the national needs" or self-consciously intended to let the Federal Government "defend itself against economic forces that Congress decrees inimical or destructive of the national economy." Such a formulation of federal power is no test at all: It is a blank check...

DISSENT: JUSTICE STEVENS...Guns are both articles of commerce and articles that can be used to restrain commerce. **Their possession is the consequence, either directly or indirectly, of commercial activity.**

Say goodbye to federalism...say goodbye to states' rights and all of the enumerated (and limiting) Congressional powers. If Justice Stevens has his way, say hello to a national police power. Apparently he actually believes that mere possession of any item of tangible property is sufficient to come within Congressional regulation of "commerce among the several states." For, even if one has not purchased the widget in his possession, but received it as a gift, surely it has been the subject of some "indirect" commercial activity at sometime in its past. Mere possession of something, then, gets us beyond the question of "commerce." Once you are there, as we have seen, the connection to "other states," according to the dissenting views, is practically a given.

In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at **any location because of their potentially harmful use...**

He certainly is consistent. Justice Stevens would allow Congress to regulate possession of anything potentially harmful that is located anywhere! There is no limit!

[I]t necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial...Whether or not the national interest in eliminating that market would have justified federal legislation in **1789**, it surely does today.

I am not going to take the time to research either the state of public schooling in 1789 or possession of handguns by school-age children in 1789 because whether or not there would have been "justification" for federal legislation in 1789 is irrelevant to the issues here. However, I am willing to bet that in 1789 school-age children owned guns, knew how to use guns and did so responsibly, all with the knowledge and guidance of their parents.

DISSENT: JUSTICE SOUTER...In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding."...If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress are reasonably adapted to the end permitted by the Constitution.'" *Hodel*.

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC v. Beach Communications, Inc.* (1993). In judicial review under the Commerce Clause, **it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.**

Please challenge me if I am out of line, but where is Justice Souter when the legislative branches seek respect for their "institutional competence" and "political accountability" when it comes to Eighth Amendment issues?

...A look at history's sequence will serve to show how today's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons v. Ogden*, Congress saw few occasions to exercise that power prior to Reconstruction and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level...[T]he period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, e. g., *Carter v. Carter Coal Co.* (1936) (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp.* (1935) (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer v. Dagenhart* (1918) (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair v. United States* (1908) (striking protection of labor union membership as outside "commerce")...

The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co. v. Parrish* and *NLRB v. Jones & Laughlin Steel Corp.* In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses...and in due course that deference became articulate in the standard of rationality review...The moment came, however, with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." Thus, under commerce,...adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments...

Further glosses on rationality review, moreover, may be in the offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed

to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. **The commerce power, we have often observed, is <u>plenary</u>**. *Gibbons v. Ogden.*

Time out! As I recall, although Justice Marshall did refer to the power of Congress being plenary (or, "complete"), he indicated, as all must agree, that the commerce power is plenary, "subject to the limitations provided in the Constitution." Please, please...ELLians are not going to be misled by citations out of context!

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress acted **ultra vires** intentionally.

Ultra vires: "beyond authority; beyond power."

Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. *FCC v. Beach Communications, Inc.*

I just cannot let this one get by. The only question for the Court is "whether legislative judgment is **within the realm of reason**?" Are you kidding? That may be so when you agree with Congress. It can never be so when you do not, for in spite of numerous pieces of legislation you have found to be unconstitutional, no one can honestly say that any legislation that gets by Congress and the President is "**outside the realm of reason**." If "reason" were the test of constitutionality, all legislation would pass muster and many of the High Court's conclusions would not. You do not pass "Go" and, therefore, do not collect your $200 with that theory.

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. But we know what happened. I respectfully dissent.

DISSENT: JUSTICE BREYER/STEVENS/SOUTER/GINSBURG...The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce...among the several States" encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. As the majority points out, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not...And, as the majority also recognizes in quoting Justice Cardozo, the question of degree (how *much* effect) requires an estimate of the "size" of the effect that no verbal formulation can capture with precision. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools)...

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding...Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce...As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States*, the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.

Enjoy as you sit back and watch the Search for the Empirical Connection! (Sounds like a movie title.) Have a few laughs and ask this question, "If this is what judges do, do we need them?" Perhaps I am being too hard – perhaps not respectful enough. But, you see, I believe this type of "thinking" is what Justice Marshall referred to (in *Gibbons*) as **"a course of well digested, but refined and <u>metaphysical reasoning</u> [that] explain[s] away the constitution of our country, and leave[s] it, a magnificent structure, indeed, to look at, but totally unfit for use."** See what you think. Here goes!

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students...carry a gun to school at least

occasionally; that 12 percent of urban high school students have had guns fired at them; that 20 percent of those students have been threatened with guns; and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools. And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools...Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Congress could therefore have found a substantial educational problem -- teachers unable to teach, students unable to learn -- and concluded that guns near schools contribute substantially to the size and scope of that problem.

Guns are not conducive to learning. The problem of guns at schools is widespread and “substantial.”

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. As late as the 1920's, many workers still received general education directly from their employers -- from large corporations, such as General Electric, Ford, and Goodyear, which created schools within their firms to help both the worker and the firm. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school.) As public school enrollment grew in the early 20th century, the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one; and that the economic returns to this investment in education exceeded the returns to conventional capital investment.

As the overall level of education rises, the economy of the Country grows.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills...

Education is more important today than ever before.

Increasing global competition also has made primary and secondary education economically more

important...

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." The evidence of (1) the *extent* of the gun-related violence problem, (2) the *extent* of the resulting negative effect on classroom learning and (3) the *extent* of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

...In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress "to act in terms of economic...realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy."...

In *Katzenbach v. McClung (1964),* this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States. In *Daniel v. Paul (1969),* this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama -- because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well. It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. Families will hesitate to move to neighborhoods where students carry guns instead of books. (Congress expressly found in 1994 that "parents may decline to send their children to school" in certain areas "due to concern about violent crime and gun violence.") And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly, like the local racial discrimination at issue in *McClung* and *Daniel*, the local instances here, taken together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions...

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transactions." That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formulas" that would give "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."...

Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our $5.5 trillion gross domestic product for that year. The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' salaries. These expenditures enable schools to provide a valuable service -- namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources they spend, and whether they can be restructured to achieve greater returns...Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled...

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress...to act in terms of economic...realities." It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. *Gibbons v Ogden* (holding that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally"); *United States v. Darby* ("The conclusion is inescapable that *Hammer* v. *Dagenhart* (the child labor case) was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision...It should be and now is overruled"). Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

Cell phones, gum, T-shirts that carry teenage messages, knives, tattoos, lunch boxes with sharp edges, Twinkies, etc., etc., "have a detrimental effect on education." Therefore, a negative effect on the economy, etc., etc. Is there no end to the "national police?" And, lest we forget, we are not dealing with the wisdom of the legislation. Individual states have the power to enact criminal laws identical to that of Congress or, more importantly, in any manner they wish that solves **their** unique problem!