**ARTICLE I, SECTION 8, CLAUSE 3** — COMMERCE CLAUSE — ABSENT AN INTERSTATE COMMERCE NEXUS, CONGRESS MAY NOT REGULATE GUN POSSESSION ON SCHOOL GROUNDS — *United States v. Lopez*, 115 S. Ct. 1624 (1995).

In what has been touted as a conservative move back to the pre-New Deal era, the Supreme Court of the United States held earlier this year that Congress could not regulate gun possession within school zones without demonstrating, or proving, an interstate commerce nexus. *United States v. Lopez*, 115 S. Ct. 1624 (1995). The five-Justice-majority determined that under the "substantial effects" test, Congress did not show that possession of guns within local school zones was sufficiently related to the nation's economic and commercial well-being to justify federal regulation. *Id.* at 1630, 1632. Reasoning that Congress did not act pursuant to a constitutionally enumerated power, the Court struck down the Gun-Free School Zones Act ("the Act") as an impermissible regulation of an inherently local activity. *Id.* at 1632 (citing 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V)).

Alfonso Lopez, Jr., was arrested on March 10, 1992 for possession of a concealed .38 caliber handgun and ammunition. *Id.* at 1626. Although Mr. Lopez was initially charged under a Texas penal law, authorities dropped state charges and prosecuted Mr. Lopez under the Act. *Id.* Upon an indictment and denial of a motion to dismiss, the district court found Mr. Lopez guilty of violating the Act. *Id.* The court found that section 922 was a "constitutional exercise of Congress's well-defined power to regulate activities in and affecting commerce." *Id.* (citation omitted).

Mr. Lopez appealed, asserting that the Act was an unconstitutional extension of the Commerce Clause. *Id.* Agreeing with Mr. Lopez, the United States Court of Appeals for the Fifth Circuit held that without sufficient legislative history or findings concerning the connection between gun possession in school zones and interstate commerce, Congress had exceeded its Commerce Clause powers by enacting section 922(q). *Id.* (citing *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993)). The United States Supreme Court granted *certiorari* to determine the constitutionality of the Act. *Id.* (citing *United States v. Lopez*, 114 S. Ct. 1536 (1994)).

Writing for the Court, Chief Justice Rehnquist commenced by examining the root of Congress's legislative powers. *Id.* Relying on the Constitution and notions of federalism, the Court explained that Congress may only legislate pursuant to an enumerated power, such as the power "to regulate Commerce . . . among the several States." *Id.* (citing U.S. CONST. art. I, § 8, cl. 3; THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 1961)).

Next, the Court surveyed the history of the Commerce Clause power to ascertain the limitations upon Congress's regulation of commerce. *Id.* at 1627-30. Beginning with *Gibbons v. Ogden*, the Court demonstrated that the commerce power was plenary in nature, subject to the language of the Commerce Clause. *Id.* at 1627. The main limitation, the Chief Justice continued, was that Congress may only regulate commerce "among the several States," excluding the "internal commerce of a State." *Id.* (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194-95; *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)). In the wake of early twentieth century federal commerce legislation, the Court adhered to its directive that Congress could not regulate those activities which only affected interstate commerce indirectly or were wholly intrastate. *Id.* at 1627-28 (citing *A.L.A. Schecter Poultry Corp. v. Unites States*, 295 U.S. 495 (1935) (other citations omitted)). Under *NLRB v. Jones & Laughlin Steel Corp.*, however, the Court broadened the "indirect effect" standard, favoring a "close and substantial relation," or "substantial economic effect" standard. *Id.* at 1628 (citing *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard*, 317 U.S. at 111; *United States v. Darby*, 312 U.S. 100 (1941)).

The Court continued its historical analysis, explaining that Congress's expanded power to regulate commerce was due in part to the interstate nature of business during the early twentieth-century and that earlier Commerce Clause cases placed artificial constraints on Congress's legislative authority. *Id.* The Chief Justice reiterated, however, that the commerce power remained subject to the limitations of federalism. *Id.* at 1628-29. Over the course of twenty years of Commerce Clause jurisprudence, the Court fashioned a test for federal commerce legislation, asking whether there existed a rational basis for Congress to conclude that the regulated activity "sufficiently affected interstate commerce." *Id.* at 1629 (citations omitted). Continuing with the "substantial relation" test, the Court categorized the activities that Congress legitimately could legislate under the Commerce Clause. *Id.* at 1629-30 (citations omitted). Section 922, the Court reasoned, must fall within "those activities having a substantial relation to [or substantial affect upon] interstate commerce." *Id.* (citations omitted).

The Court opined that section 922 had "nothing to do" with interstate commerce and lacked the express interstate jurisdictional element found in most criminal statutes. *Id.* at 1630-31 (citing *United States v. Bass*, 404 U.S. 336 (1917) (interpreting 18 U.S.C. § 1202(a), a statute prohibiting a felon from "receiv[ing], possess[ing] or transport[ing] in commerce . . . any firearm")). Indeed, Chief Justice Rehnquist elaborated, without an interstate commerce basis, states, and not the federal government, are responsible for defining criminal laws. *Id.* at 1631 n.3 (citations omitted). Further, the Court mentioned that federal laws, such as the Gun-Free School Zones Act,

that mirror existing state laws, affect the careful distinction "between federal and state criminal jurisdiction." *Id.*

The Court then examined the legislative history of the Act to assist determining whether gun possession within a school zone substantially affects interstate commerce. *Id.* at 1631. Agreeing that Congress need not make explicit findings to regulate interstate commerce, the Chief Justice noted that Congress had made no findings. *Id.* at 1631-32. Neither previously enacted federal firearms regulations nor a recent amendment to section 922, the Court explained, could render the Act constitutionally valid. *Id.* at 1632.

The Court next addressed the government's and Justice Breyer's arguments that gun possession in schools substantially affects the nation's economy. *Id.* at 1632-34. Chief Justice Rehnquist summarized the government's argument: gun possession causes violent crime, which in turn creates an insurance cost to the nation at large, and discourages people from travelling to teach in different parts of the country. *Id.* at 1632 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964)). The Court proffered that allowing Congress to regulate under this "cost of crime" reasoning would enable Congress to regulate almost any local activity. *Id.* The Court similarly disposed of the government's argument that gun possession in schools threatens the educational environment and learning process, thus, resulting in a "less productive citizenry." *Id.*

Justice Breyer's dissenting opinion, the Chief Justice argued, failed to demonstrate how the states could maintain sovereignty over traditionally state-regulated activities, such as criminal law and family law, were the Court to accept the government's rationale. *Id.* The majority warned that the dissent's reasoning — that gun-related violence affects education, which in turn affects trade and commerce — would allow Congress to eventually legislate a federal educational directive. *Id.* at 1632-33. The dissent's argument that a case-by-case determination of what is an intrastate commercial activity leads to "legal uncertainty," the Court continued, is an indistinguishable consequence of the tension between constitutionally enumerated powers and "judicially enforceable outer limits." *Id.* The Court, therefore, declined to remove the "legal uncertainty" that accompanies any review of congressional commerce legislation. *Id.*

Chief Justice Rehnquist concluded by relying on the concept of federalism: Congress may only regulate pursuant to one of its constitutionally enumerated powers and may not legislate under a general federal police power, which subsumes areas traditionally left to state control. *Id.* at 1634. The Court admitted that it had previously deferred to congressional Commerce Clause legislation; however, the Court declined to expand the commerce power in this particular instance. *Id.* Permitting Congress to regulate gun possession in a local school, the Court surmised,

would erode the boundary between federal and local control — a result the Constitution did not intend. *Id.*

Justice Kennedy, with whom Justice O'Connor joined, concurred in the Court's opinion. *Id.* (Kennedy, J., concurring). Justice Kennedy viewed the Court's seemingly inconsistent Commerce Clause jurisprudence with an eye toward the country's economic history. *Id.* at 1634-36 (Kennedy, J., concurring). The careful federal-state balance constructed by the nation's founders, the Justice proffered, has tilted toward federal legislation — particularly commerce legislation — according to the economic needs of the times. *Id.* Noting that the country maintained a unified national market, the Justice determined that there was no longer a need to overly scrutinize federal Commerce Clause legislation. *Id.* at 1637 (Kennedy, J., concurring). The Justice cautioned, however, that when Congress "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power," the Court must intervene to restore the equilibrium. *Id.* at 1640 (Kennedy, J., concurring).

Justice Kennedy first surveyed the Court's Commerce Clause precedents, which analyzed the states' ability to regulate commercial activities in light of federal government silence. *Id.* at 1634-35 (Kennedy, J., concurring). These dormant Commerce Clause cases, the Justice opined, were a matter of semantics, the Court having attempted to distinguish between manufacturing and commerce. *Id.* at 1635 (Kennedy, J., concurring). Justice Kennedy observed that the Court eventually departed from the "manufacture-commerce" dichotomy, or the direct-indirect effect test, and began deferring to federal legislation. *Id.* at 1635-36 (Kennedy, J., concurring). Explaining that the Court seemed caught between adopting a tenable standard for federal Commerce Clause legislation and the need to decide individual commerce cases, Justice Kennedy described the evolution of the "substantial affect" or "close and substantial relation" test. *Id.* at 1635-37 (Kennedy, J., concurring).

Reviewing the Court's Commerce Clause jurisprudence, the concurring Justice characterized the Court's Commerce Clause history as demonstrating "the imprecision of content-based boundaries" for Commerce Clause legislation, and the need for stability in Commerce Clause jurisprudence. *Id.* at 1637 (Kennedy, J., concurring). The Justice, however, recognized but did question the current deferential standard given to federal commerce legislation. *Id.* Rather, the Justice noted that due to *stare decisis* the broad, flexible language of the Constitution, and the modern unified economy, there are times when the Court must play a role in preserving federalism. *Id.*

Noting that the Court has a well-established role in preserving separation of powers and checks and balances, Justice Kennedy carefully approached the Court's role in preserving federalism. *Id.* at 1637-38 (Kennedy, J., concurring). The Justice briefly explained the foundation and

significance of federalism and concluded that the dual government system amounted to a means of political accountability. *Id.* at 1638 (Kennedy, J., concurring) (citing THE FEDERALIST No. 51 (James Madison); *New York v. United States*, 112 S. Ct. 2408, 2431 (1992)). When the citizens are unclear as to whether the federal or the state government is accountable for certain actions — such as when the federal government regulates activities seemingly within the state realm — Justice Kennedy opined that "political responsibility" becomes a worthless term. *Id.*

The concurring Justice further noted that although the federal government has a responsibility to preserve and the power to control the federal-state balance, the Court maintains a responsibility to intervene when Congress has violated principles of federalism. *Id.* at 1639 (Kennedy, J., concurring) (citations omitted). Justice Kennedy conceded that Commerce Clause jurisprudence lacks "bright and clear lines," but suggested that difficulty and ambiguity are not barriers to determining the Commerce Clause's meaning. *Id.* at 1640 (Kennedy, J., concurring).

Justice Kennedy then returned to the constitutionality of the Gun-Free School Zones Act, criticizing it for lacking any commercial aspect and for interfering with traditional state concerns. *Id.* The Justice agreed that eliminating guns in schools is an admirable goal and wise policy but that, as in the areas of crime and education, the states already have varying individual laws and programs to discourage and punish gun possession on school grounds. *Id.* at 1641 (Kennedy, J., concurring). The Justice concluded that it is the Court's role to hold unconstitutional a statute that regulates activities "beyond the realm of commerce" and intrudes upon traditional state sovereignty. *Id.* at 1641-42 (Kennedy, J., concurring).

Justice Thomas wrote a separate concurring opinion, criticizing the Court's Commerce Clause jurisprudence and urging the Court to reexamine the "substantial effect" test. *Id.* (Thomas, J., concurring). The current test, the Justice proffered, fails to incorporate the original understanding of the Commerce Clause and creates a veritable federal police power. *Id.* at 1642-43 (Thomas, J., concurring). Justice Thomas explained that the current broad Commerce Clause analysis did not arise naturally from developed case law or the changing nature of the nation's economy. *Id.* at 1643-44, 1647, 1648 (Thomas, J., concurring). Rather, the Justice opined, the Court's broad interpretation emanated from a misreading of early cases and a failure to analyze the original meaning of the term "commerce," as understood at the time of the Constitution's ratification and as interpreted during the first 150 years of Commerce Clause jurisprudence. *Id.*

Justice Thomas recounted the history of the Commerce Clause, stating that the Framers only gave Congress the powers enumerated in the Constitution and never intended for Congress to regulate all activities that "substantially affect" interstate commerce. *Id.* at 1644, 1646 (Thomas, J.,

concurring). The Justice disagreed with the dissent's opinion that the first 150 years of Commerce Clause jurisprudence constituted a "wrong turn." *Id.* at 1646 (Thomas, J., concurring). Justice Thomas then revisited historical writings and early cases to show that the Court never accepted congressional free reign over all activities affecting interstate commerce. *Id.* at 1645-48, 1649 n.7 (Thomas, J., concurring) (citing THE FEDERALIST No.'s 24, 42, 45 (Alexander Hamilton & James Madison); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (other citations omitted)). Justice Thomas clarified that the "affects" language quoted in *Gibbons* meant that Congress could not regulate purely local activities, but only those that were of "national" concern. *Id.* at 1647-48 (Thomas, J., concurring).

Justice Thomas argued that the modern "substantial effects" test improperly gives Congress a national police power to regulate activities that have little to do with business or commerce. *Id.* at 1649 (Thomas, J., concurring). No limits on congressional authority, the Justice opined, are themselves worse than the inherent uncertainty in defining those limits. *Id.* at 1650 (Thomas, J., concurring). The concurring Justice again rejected application of the "substantial effects" test to the Act, reasoning that the aggregate "class of activities" category would allow Congress to prohibit the broad activities of weapon possession and other elements of daily existence. *Id.* Instead, the Justice recommended that the "substantial effects" test be reevaluated to conform with the true and original understanding of the Commerce Clause. *Id.* at 1651 (Thomas, J., concurring).

Justice Stevens added a dissenting opinion to address the majority's "radical" departure from Commerce Clause jurisprudence. *Id.* at 1651 (Stevens, J., dissenting). Guns and gun possession in schools, the Justice insisted, are both articles of commerce and consequences of commercial activity necessarily giving the federal government the power to regulate. *Id.*

Justice Souter's dissenting opinion focused on the Court's role of judicial restraint and the need to conduct a "rational basis" review of federal legislation. *Id.* at 1651, 1653, 1655 (Souter, J., dissenting) (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981); *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993) (other citations omitted)). A restrictive view of federal commercial power, such as the majority's retreat from modern Commerce Clause jurisprudence, the Justice proffered, is only effective during times of "laissez-faire economics" and formalist semantics. *Id.* at 1652 (Souter, J., dissenting). The Justice explained that the current practice of legislative deference has a history accompanying the Court's conception of due process: Congress need not have any more of a rational basis for regulating and protecting commerce than it need for interfering with contracts. *Id.* at 1653 (Souter, J., dissenting) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

Justice Souter criticized the majority's reasoning in four areas. First the Justice posited that the Court's attempt to distinguish "commercial" from "non-commercial" activities is no different than the direct-indirect dichotomy rejected by such cases as *Wickard v. Filburn*, 317 U.S. 111 (1942). *Id.* at 1653-54 (Souter, J., dissenting). Next, Justice Souter argued that the Court placed too great an emphasis on whether the regulated activity is traditionally state regulated. *Id.* at 1654 (Souter, J., dissenting). In addition, the Justice opined, the majority failed to separate the rules for determining congressional intent from the standard of review for congressional authority. *Id.* at 1055 (Souter, J., dissenting). Finally, the Justice attacked the majority's concern with a lack of explicit legislative findings as failing to recognize that reasonable congressional action implies supportive, legislative findings. *Id.* at 1655-56 (Souter, J., dissenting).

Additionally, Justice Souter worried that a formal legislative process would shield the Court from engaging in warranted review of the merits of federal legislation. *Id.* at 1656 (Souter, J., dissenting). The Court's departure from rationality review, Justice Souter surmised, is not the end of the Commerce Clause debate, but opens the possibility for future scrutinizing review of federal legislation. *Id.* at 1657 (Souter, J., dissenting).

In a final dissent, Justice Breyer, with whom Justices Stevens, Souter, and Ginsburg joined, carefully explained the elements of Commerce Clause interpretation, cited and described the "economic realities" of gun violence in schools, and discerned three major legal problems stemming from the majority's opinion. *Id.* at 1657-65 (Breyer, J., dissenting). In keeping with what the Justice assumed was a well-established principle, Justice Breyer opined that Congress had a rational basis for enacting the Gun-Free School Zones Act and could have found that gun possession in schools substantially, or significantly, affects interstate commerce. *Id.* at 1659, 1661, 1664 (Breyer, J., dissenting).

Justice Breyer first set forth the principles governing the Court's review of federal commercial legislation: (1) Congress may regulate activities local in nature but national in effect; (2) the aggregate impact, and not the individual instance of an act determines whether the local activity significantly affects interstate commerce; and (3) the Court's opinion must not turn on whether Congress made explicit findings of a connection between the regulated activity and interstate commerce, but whether Congress *could have* rationally so concluded. *Id.* at 1657-58 (Breyer, J., dissenting) (citing *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942) (other citations omitted)).

The Justice quickly noted that "[t]he statute does not interfere with the exercise of state or local authority[,]" and then set forth extensive statistical detail and administrative findings to support the conclusion that education is inextricably linked to the nation's economic well-being and global

competitiveness. *Id.* at 1658-61 (Breyer, J., dissenting). Anything that threatens the link to national economic strength, such as gun possession and violence in schools, the Justice reasoned, undoubtedly falls within the reach of federal legislative powers. *Id.* at 1661 (Breyer, J., dissenting) (citing *Perez v. United States*, 402 U.S. 146 (1971); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)).

The dissenting Justice warned that the majority's reasoning contained several problems. *Id.* at 1662-65 (Breyer, J., dissenting) (citing *Katzenbach v. McClung*, 379 U.S. 294, (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942) (other citations omitted)). First, the Justice posited that the Court departed from its own precedents upholding regulations of local activities that had less harmful effects on interstate commerce than gun violence. *Id.* at 1662-63 (Breyer, J., dissenting) (citations omitted). Second, Justice Breyer argued that the majority mischaracterized earlier Commerce Clause cases as focusing on the economic nature of the regulated activity. *Id.* at 1663-64 (Breyer, J., dissenting) (citations omitted). Finally, the Justice opined that the Court's holding creates uncertainty as to what affects commerce. *Id.* at 1664-65 (Breyer, J., dissenting) (citations omitted).

Justice Breyer emphasized that upholding the Act would not, contrary to the majority's fear, expand the commerce power and allow Congress to regulate purely local activity. *Id.* at 1661-62 (Breyer, J., dissenting). Rather, the Justice opined, the Court would be simply following established Commerce Clause precedent, allowing Congress to constitutionally legislate according to "changing economic circumstances" and modern "economic realities." *Id.* at 1662, 1665 (Breyer, J., dissenting) (citations omitted).

### *Analysis*

The majority's ability to found its departure from recent Commerce Clause jurisprudence in notions of federalism and accepted legislative tests indicates that the Court may place constitutional interpretation and *stare decisis* above economic reality. Even though the Justices differ in their interpretations of the case law, they seemed to agree that they should defer to congressional legislation. Five Justices, however, would preclude the government from activity without clear indications that the activity substantially affects interstate commerce; a minority of the Court would defer not only to Congress's decisions, but also to what the government could have rationally determined has a substantial effect on interstate commerce.

Three Justices, Kennedy, O'Connor, and perhaps Breyer, support policies of state sovereignty, but recognize national problems. They provide the middle ground between the polar interpretations of constitutional language and the Court's own semantic jurisprudence, and may cast pivotal votes in future legislative review. It is clear, however, that with Justice Thomas's

deconstructive analysis and judicial recognition of disturbing national statistics, the Court simply will not be able to apply out-of-date precedent to every case, whether or not dealing with commerce.

As predicted earlier, the Court's decision turned upon whether the Justices believed Congress could have rationally found an interstate commerce nexus, explicitly or implicitly. *See* Rachel J. Littman, Comment, *Gun-Free Schools: Constitutional Powers, Limitations, and Social Policy Concerns Surrounding Federal Regulation of Firearms in Schools*, 5 SETON HALL CONST. L.J. 723, 756-57 (1995). Arguing solely within the boundaries of constitutional precedent and legal terminology, however, causes one to loose sight of the very realities of gun-violence that call for a well defined and workable policy. The Tenth Amendment and enumerated powers are certainly important aspects of our country's constitutional jurisprudence. Strictly applying principles of federalism, and 150-year-old precedents, however, fails to take into consideration modern societal problems. Congress should not be permitted to take over the nation's education system, but the precious state sovereignty that appeals to conservative jurists has done little to prevent the increasing number of guns in schools and the inexcusable incidents of youth violence. Political accountability indeed.

*Rachel J. Littman*