SUPREME COURT OF THE UNITED STATES

No. 93–1260

UNITED STATES, PETITIONER *v.*
ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 26, 1995]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

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. 18 U. S. C. §922(q)(1)(A) (1988 ed., Supp. V). 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," U. S. Const., Art. I, §8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. See, *e.g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195 (1824) (Marshall, C. J.); *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). As the majority points out, *ante*, at 10, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not. Compare, *e.g.*, *Wickard*, *supra*, at 125 ("substantial economic effect"), with *Hodel* v. *Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981) ("affects interstate commerce"); see also *Maryland* v. *Wirtz*, 392 U. S. 183, 196, n. 27 (1968) (cumulative effect must not be "trivial"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937) (speaking of "close

and substantial *relation*" between activity and commerce, not of "substantial effect") (emphasis added); *Gibbons*, *supra*, at 194 (words of Commerce Clause do not "comprehend . . . commerce, which is completely internal . . . and which does not . . . affect other States"). 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. See *ante*, at 18. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. See, *e.g.*, *Perez* v. *United States*, 402 U. S. 146, 154 (1971); *Daniel* v. *Paul*, 395 U. S. 298, 308 (1969). 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). See, *e.g.*, *Wickard*, *supra*, at 127–128. As this Court put the matter almost 50 years ago:

> "[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) (citations omitted).

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. See *Hodel*, *supra*, at 276–277. 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. *Ante*, at 8 (emphasis added).

I recognize that we must judge this matter independently. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel*, *supra*, at 311 (REHNQUIST, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into

the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i.e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U. S. 294, 299 (1964) (noting that "no formal findings were made, which of course are not necessary"); *Perez*, *supra*, at 156–157; cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. ___, ___ (1994) (opinion of KENNEDY, J.) (slip op., at 42) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review"); *Fullilove* v. *Klutznick*, 448 U. S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate . . ."). And, it would seem particularly unfortunate to make the validity of the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance. See Pub. L. 103–322, §§320904(2)(F), (G), 108 Stat. 2125, 18 U. S. C. A. §922(q)(1)(F), (G) (Nov. 1994 Supp.).

In addition, despite the Court of Appeals' suggestion to the contrary, see 2 F. 3d 1342, 1365 (CA5 1993), there is no special need here for a clear indication of Congress' rationale. The statute does not interfere with the exercise of state or local authority. Cf., *e.g.*, *Dellmuth* v. *Muth*, 491 U. S. 223, 227–228 (1989) (requiring clear statement for abrogation of Eleventh Amendment immunity). Moreover, any clear statement rule would apply only

to determine Congress' intended result, *not* to clarify the source of its authority or measure the level of consideration that went into its decision, and here there is no doubt as to which activities Congress intended to regulate. See *ibid.; id.*, at 233 (SCALIA, J., concurring) (to subject States to suits for money damages, Congress need only make that intent clear, and need not refer explicitly to the Eleventh Amendment); *EEOC* v. *Wyoming*, 460 U. S. 226, 243, n. 18 (1983) (Congress need not recite the constitutional provision that authorizes its action).

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. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? 18 U. S. C. A. §§922(q)(1)(F), (G) (Nov. 1994 Supp.). As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co.* v. *United States*, 196 U. S. 375, 398 (1905) (Holmes, J.), 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. (See Appendix, *infra* at 19, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

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 (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, *ibid.;* that 20 percent of those students have been threatened with guns, *ibid.;* and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U. S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, *e.g.*, House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U. S. Dept. of Health 118–119 (1978) (school-violence victims suffer academically); compare U. S. Dept. of Justice 1 (1991) (gun violence worst in inner city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U. S. Dept. of Health 118, 123–124 (1978). And, 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.

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. See generally Seybolt; Rorabaugh; U. S. Dept. of Labor (1950). 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. See Bolino 15–25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See *id.*, at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), 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, see Denison 243; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this investment in education exceeded the returns to conventional capital investment, see, *e.g.*, Davis & Morrall 48–49.

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. See, *e.g.*, MIT 32 (only about one-third of hand-tool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better

trained workers increasing); U. S. Dept. of Labor 41 (1981) (job openings for dropouts declining over time). There is evidence that "service, manufacturing or construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas," Gordon, Ponticell, & Morgan 26; that "workers with truly few skills by the year 2000 will find that only one job out of ten will remain," *ibid.;* and that

> "[o]ver the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . [B]etter-trained workers become more productive workers, enabling a company to become more competitive and expand." Henkoff 60.

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Marshall 205; Marshall & Tucker 33. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. See National Center 57; Handbook of Labor Statistics 561, 576 (1989); Neef & Kask 28, 31. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, see, *e.g.*, MIT 28, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities), see, *e.g.*, National Center 47; Chubb & Hanushek 215. Indeed, Congress has said, when writing other statutes, that "functionally or technologically illiterate" Americans in the work force "erod[e]" our economic "standing in the international marketplace," Pub. L. 100–418, §6002(a)(3), 102 Stat.

1469, and that "our Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling." H. R. Rep. No. 98–6, pt. 1, p. 19 (1983).

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. See MacCormack, Newman, & Rosenfield 73; Coffee 296. Scholars on the subject report, for example, that today, "[h]igh speed communication and transportation make it possible to produce most products and services anywhere in the world," National Center 38; that "[m]odern machinery and production methods can therefore be combined with low wage workers to drive costs down," *ibid.*; that managers can perform "`back office functions anywhere in the world now,'" and say that if they "`can't get enough skilled workers here'" they will "`move the skilled jobs out of the country,'" *id.*, at 41; with the consequence that "rich countries need better education and retraining, to reduce the supply of unskilled workers and to equip them with the skills they require for tomorrow's jobs," Survey of Global Economy 37. In light of this increased importance of education to individual firms, it is no surprise that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools, Maturi 65–68, that 88 percent think this kind of involvement is important, *id.*, at 68, that more than 20 States have recently passed educational reforms to attract new business, Overman 61–62, and that business magazines have begun to rank cities according to the quality of their schools, see Boyle 24.

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." And, the evidence of (1) the *extent* of the gun-related violence problem, see *supra*, at 5, (2) the *extent* of the resulting negative effect on classroom learning, see *supra*, at 5–6, and (3) the *extent* of the consequent negative commercial effects, see *supra*, at 6–9, 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."

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, *e.g.*, National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, *e.g.*, Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *Perez* v. *United States*, 402 U. S., at 157, and that unfair labor practices pose to instrumentalities of commerce, see *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 221–222 (1938). As I have pointed out, *supra*, at 4, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce

and the foreign commerce of the United States." 18 U. S. C. A. §§922(q)(1)(F), (G) (Nov. 1994 Supp.). The violence-related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see *supra*, at 1–2; *infra*, at 15, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction of what is national and what is local," *ante*, at 18 (citation omitted; internal quotation marks omitted); nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. *Ante*, at 15–16. For one thing, this statute is aimed at curbing a particularly acute threat to the educational process —the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. See *supra*, at 5–6. This Court has previously recognized the singularly disruptive potential on interstate commerce that acts of violence may have. See *Perez*, *supra*, at 156–157. For another thing, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

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. See *Heart of Atlanta Motel*, *Inc*. v. *United States*, 379 U. S. 241, 251 (1964). 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." *North American Co.* v. *SEC*, 327 U. S. 686, 705 (1946) (citing *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.)).

The majority's holding—that §922 falls outside the scope of the Commerce Clause—creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez* v. *United States*, *supra*, the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan sharking ("[e]xtortionate credit transactions") at a local level. The Court said that Congress may judge that such transactions, "though purely *intra*state, . . . affect *inter*state commerce." 402 U. S., at 154 (emphasis added). Presumably, Congress reasoned that threatening or using force, say with a gun on a street

corner, to collect a debt occurs sufficiently often so that the activity (by helping organized crime) affects commerce among the States. But, why then cannot Congress also reason that the threat or use of force—the frequent consequence of possessing a gun—in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach* v. *McClung*, 379 U. S. 294 (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. See *id.*, at 300; *Heart of Atlanta Motel*, *supra*, at 274 (Black, J., concurring in *McClung* and in *Heart of Atlanta*). In *Daniel* v. *Paul*, 395 U. S. 298 (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. See *id.*, at 304–305, 308. 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. See *McClung*, *supra*, at 301; *Daniel*, *supra*, at 307, n. 10. 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." 18 U. S. C. A. §922(q)(1)(E) (Nov. 1994 Supp.)). 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.

In *Wickard* v. *Filburn*, 317 U. S. 111 (1942), this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and consumed on his own local farm because, considered in its totality, (1) home-grown wheat may be "induced by rising prices" to "flow into the market and check price increases," and (2) even if it never actually enters the market, home-grown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and, in that sense, "competes with wheat in commerce." *Id.*, at 128. To find both of these effects on commerce significant in amount, the Court had to give Congress the benefit of the doubt. Why would the Court, to find a significant (or "substantial") effect here, have to give Congress any greater leeway? See also *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 236 ("[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires

preventative regulation").

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 "transaction[s]." *Ante*, at 12–13. 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 "formula[s]" 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." *Wickard*, *supra*, at 120.

See also *United States* v. *Darby*, 312 U. S. 100, 116–117 (1941) (overturning the Court's distinction between "production" and "commerce" in the child labor case, *Hammer* v. *Dagenhart*, 247 U. S. 251, 271–272 (1918)); *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.) ("[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," *ante*, at 10–11, the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Wickard's consumption of home grown wheat, "*though it may not be regarded as commerce*," could

nevertheless be regulated—"*whatever its nature*"—so long as "it exerts a substantial economic effect on interstate commerce." *Wickard*, *supra*, at 125 (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases *(McClung* and *Daniel)* or *Perez*—in each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See *supra*, at 6, 9. When, and to what extent, does its involvement make education commercial? Does the number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit-seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981).

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. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' salaries. See U. S. Dept. of Education 4, 7 (1993). And, 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. See, *e.g.*, S. Rep. No. 100–222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185–229 (school choice); Hanushek 85–122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). 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. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that

use the words "affecting commerce" to define their scope, see, *e.g.*, 18 U. S. C. §844(i) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, *e.g.*, 18 U. S. C. §922(o)(1) (possession of machine guns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *United States* v. *Staszcuk*, 517 F. 2d 53, 57–58 (CA7 1975) (en banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard*, 317 U. S., at 127–128, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." *North American Co.* v. *SEC*, 327 U. S., at 705 (citing *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See *Gibbons* v. *Ogden*, 9 Wheat., at 195 (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*, 312 U. S., at 116–117 ("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.

APPENDIX

Congressional Materials
(in reverse chronological order)

Private Sector Management of Public Schools, Hearing before the Subcommittee on Labor, Health and Human Services, and Education and Related Agencies of the Senate Committee on Appropriations, 103d Cong., 2d Sess. (1994) (Senate Appropriations Committee Hearing (1994)).

Children and Gun Violence, Hearings before the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, 103d Cong., 1st Sess. (1993) (Senate Judiciary Committee Hearing (1993)).

Keeping Every Child Safe: Curbing the Epidemic of Violence, Joint Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources and the House Select Committee on Children, Youth, and Families, 103d Cong., 1st Sess. (1993).

Recess from Violence: Making our Schools Safe, Hearing before the Subcommittee on Education, Arts and Humanities of the Senate Committee on Labor and Human Resources, 103d Cong., 1st Sess. (1993) (Senate Labor and Human Resources Committee Hearing (1993)).

Preparing for the Economy of the 21st Century, Hearings before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 102d Cong., 2d Sess. (1992).

Children Carrying Weapons: Why the Recent Increase, Hearing before the Senate Committee on the Judicia-

ry, 102d Cong., 2d Sess. (1992).

Youth Violence Prevention, Hearing before the Senate Committee on Governmental Affairs, 102d Cong., 2d Sess. (1992).

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