AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government/Power to Regulate Commerce

**United States v. Lopez, 514 U.S. 549 (1995)**

From 1937 until 1995, the Supreme Court announced no limits on the federal power to regulate interstate commerce. Every claimed exercise of the national commerce power was sustained. This sixty-year trend was broken in 1995 when the justices in *United States v. Lopez* declared that Congress had no power to pass the Gun-Free School Zones Act of 1990. The crucial question is whether *Lopez* (and *United States v. Morrison*, noted later) signal a serious effort to declare sharp limitations on federal power or are mere prunings of largely symbolic statutes.

The Gun-Free Schools Zones Act (GFSZA) was passed as part of a broader crime bill in 1990, when the Democrats controlled Congress and Republican George H. W. Bush was in the White House. For the Democrats in Congress, the GFSZA was seen as a modest gun-control measure that simply modified the already popular idea of “drug-free school zones.” For federal politicians, it allowed them to claim credit for “doing something” about school violence, even though state and local laws already covered much of the same ground as the GFSZA, without the controversy that normally accompanied gun-control legislation. No ­objections—constitutional or otherwise—were raised to the bill in Congress. When twelfth-grader Alfonso Lopez faced federal charges under the GFSZA for carrying a handgun to his San Antonio, Texas, high school, his lawyers argued that Congress did not have the constitutional authority to pass the statute. The district court upheld the law under the commerce clause, and Lopez was convicted and sentenced to six months in prison and two years’ supervised release. In a unanimous holding, however, a Fifth Circuit opinion written by a Reagan appointee, but joined by two Carter appointees, struck down the GFSZA as exceeding Congress’s power under the commerce clause and marking with no explanation a federal encroachment into the traditional state arena of education. The majority of the justices on the Supreme Court agreed. *Lopez* had no effect on the state and local laws regulating guns in schools. Congress responded to the lower-court decision by passing the Gun-Free Schools Act of 1994, which required schools receiving federal funds to adopt a variety of policies to penalize those found with a gun on school grounds. Congress responded to the Supreme Court decision by passing the Gun-Free School Zones Act of 1996, which added a requirement that federal charges could be filed only when the gun had previously moved through interstate commerce.

*Lopez* was notable not only for its powerful symbolism of striking down a federal law on interstate commerce clause grounds but also for locking into place the five-justice majority of Rehnquist, O’Connor, Scalia, Kennedy, and Thomas that would become familiar in numerous federalism cases over the next several years of the Rehnquist Court (most of which did not involve the commerce clause).

As you read the case, consider the differences between the majority opinion by Chief Justice Rehnquist and the concurring opinion by Justice Thomas. Does Rehnquist work within or significantly challenge the New Deal settlement? In what ways might the Gun-Free School Zones Act be understood to be working at the margins of the New Deal settlement? In what ways might it be understood to be well within the bounds of that settlement?

CHIEF JUSTICE REHNQUIST, delivered the opinion of the Court.

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. . . .”

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We start with first principles. The Constitution creates a Federal Government of enumerated powers. . . . 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.” . . .

The Constitution delegates to Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” . . . The Court, through Chief Justice Marshall, first defined the nature of Congress’ commerce power in Gibbons *v.* Ogden (1824):

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

The Gibbons Court, however, 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.

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 thereafter, 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. . . . 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. . . .

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Jones & Laughlin Steel (1937), Darby (1941), and Wickard (1942) 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 which have expanded congressional power under the Commerce Clause 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.” . . . 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. . . .

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Consistent with this structure, we 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. . . . 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. . . . Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce. . . .

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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. . . .

Even Wickard, which is perhaps the most far-­reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . . 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) [the GFSZA] 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. . . . § 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.

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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 that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. . . . Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. . . . 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. 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.

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 that the Government presents in support of § 922(q), 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. . . .

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[I]f 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.

[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.” . . . The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. . . . Any possible benefit from eliminating this “legal uncertainty” would be at the expense of the Constitution’s system of enumerated powers.

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. . . 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. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to 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, . . . and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

JUSTICE KENNEDY, with whom JUSTICE O’CONNOR joins, concurring.

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.

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The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of ­content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. Stare decisis operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

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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. . . .

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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.

JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school. . . . Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we 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,” . . . 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, we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. New York v. United States (1992); Maryland v. Wirtz (1968). . . .

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.

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At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes. . . .

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. . . .

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.

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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. . . . 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, . . . or coin money and fix the standard of weights and measures, . . . or punish counterfeiters of United States coin and securities, clause 6. . . .

. . . [I]f a “substantial effects” test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that “substantially affect” the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

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.

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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.

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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.

JUSTICE STEVENS, dissenting.

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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. 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; it 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.

JUSTICE SOUTER, dissenting.

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.” . . .

The practice of deferring to rationally based legislative judgments “is a paradigm of judicial restraint.” . . . 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.

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There is today, however, a backward glance at . . . the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. . . . The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. . . . Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today’s decision reflects the century’s end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court’s qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began . . .

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

. . . 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. . . .”

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.

. . .

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,” 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. . . .

To hold this statute constitutional is not to “obliterate” the “distinction between what is national and what is local,” . . . 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. . . . First, 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. . . . Second, 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. . . .

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.

The majority’s holding . . . 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 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. . . . 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. . . . 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 . . . 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 “transaction[s].” . . .

. . . Although the majority today attempts to categorize . . . McClung and Wickard as involving intrastate “economic activity,” . . . 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.

. . . 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.” . . . 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.