

1-1-2000

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Michael A. Lawrence

*Michigan State University College of Law*, michael.lawrence@law.msu.edu

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## Recommended Citation

Michael A. Lawrence, A New Case for Direct Congressional Regulation of Guns in School Zones, 77 *Denv. U. L. Rev.* 769 (2000).

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# A NEW CASE FOR DIRECT CONGRESSIONAL REGULATION OF GUNS IN SCHOOL ZONES

MICHAEL A. LAWRENCE\*

## I. INTRODUCTION

The one-year anniversary of the Columbine school shootings in Littleton, Colorado provides an appropriate opportunity to explore the legal and social issues relating to school violence. While Columbine brought the topic of school violence to the forefront of the nation's consciousness in horrifying fashion a year ago last April 20th, it was hardly the only school attack or threat of attack that has occurred in the last several years. Since 1995 alone there have been school shootings resulting in death or injury in Moses Lake, Washington;<sup>1</sup> Bethel, Alaska;<sup>2</sup> Pearl, Mississippi;<sup>3</sup> Paducah, Kentucky;<sup>4</sup> Stamps, Arkansas;<sup>5</sup> Jonesboro, Arkansas;<sup>6</sup> Edinboro, Pennsylvania;<sup>7</sup> Fayetteville, Tennessee;<sup>8</sup> Springfield,

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\* Associate Dean and Professor of Law, Michigan State University, Detroit College of Law. J.D., M.S. University of Wisconsin - Madison. The author wrote this Article while visiting at the University of Denver College of Law in 1999-2000. Special thanks to Susan J. Hendrick, Erick Hohenegger and Chris Rose for their research assistance.

1. Two students and one teacher were killed, and one other was wounded when 14-year-old Barry Loukaitis opened fire on his algebra class in February 1996. Elissa Haney, *Lessons In Violence: A Timeline of Recent School Shootings*, available at <http://www.infoplease.com/spot/schoolviolence1.html> (last visited July 30, 2000) [hereinafter *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>].

2. The school Principal and one student were killed and two others were wounded when Evan Ramsey, 16, opened fire at his high school in February 1997. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

3. Two students were killed and seven wounded in October 1997 by a 16-year-old who was also accused of killing his mother. He and several friends thought to be in on the plot were said to be outcasts who worshipped Satan. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

4. Three students were killed and five were wounded by a 14-year-old boy as they participated in a prayer circle at Heath High School in December 1997. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

5. Two students were wounded in December 1997 when Colt Todd, 14, from his hiding spot in the woods, shot at students as they stood in the parking lot. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

6. Four students and one teacher were killed and ten others were wounded as they evacuated Westside Middle School during a false fire alarm when Mitchell Johnson, 13, and Andrew Golden, 11, shot at their classmates and teachers from the woods in March 1998. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

7. One teacher was killed and two students were wounded when a 14-year-old boy opened fire at a dance at James W. Parker Middle School in April 1998. See *Haney* <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

Oregon;<sup>9</sup> Richmond, Virginia;<sup>10</sup> Littleton, Colorado;<sup>11</sup> Taber, Alberta, Canada;<sup>12</sup> Conyers, Georgia;<sup>13</sup> Fort Gibson, Oklahoma in December 1999;<sup>14</sup> and Mount Morris Township, Michigan in March 2000.<sup>15</sup>

The numbing frequency of these events - nearly 200 reports of school shootings resulting in death since 1992, not counting the hundreds of copy-cat threats made in dozens of other states during that same period - suggests that the problem is approaching epidemic proportions.

What can be done about this flurry of deadly school attacks? The problem stems from teen alienation and anger and, therefore, any lasting solution must address both the root sociological causes of the teen alienation and anger that has resulted in the increase in school violence. Regardless of the cause—be it lack of parental involvement, teasing among students, perpetuation of a have/have not atmosphere in schools, the easy accessibility of violent video games, or any number of other societal pressures facing teenagers, the solution must also encompass matters of enforcement, including the passage of legislation imposing penalties for the possession of guns and other weapons in schools.

The *source* of any proposed solution could come from either Congress or individual states. It can be argued on one hand that matters in-

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8. One student was killed in the parking lot at Lincoln County High School in May 1998, three days before he was to graduate, when he was shot by 18-year-old honor student Jacob Davis, his girlfriend's ex-boyfriend. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

9. Two students were killed and twenty-two others were wounded in the cafeteria at Thurston High School in May 1998 by 15-year-old Kip Kinkel, who had been arrested and released to his parents a day earlier, after it was discovered that he had a gun at school. His parents were found dead at home. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

10. One teacher and one guidance counselor were wounded when they were shot by a 14-year-old boy in the hallway of a Richmond high school. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

11. Fourteen students (including the killers) and one teacher were killed and twenty-three others were wounded at Columbine High School in April 1999. Eric Harris, 18, and Dylan Klebold, 17, had plotted for a year to kill at least 500 people and blow up their school. At the end of their hour-long rampage, they turned their guns on themselves. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

12. One student was killed and one was wounded at W. R. Myers High School in April 1999, in the first fatal high school shooting in Canada in 20 years. The suspect, a 14-year-old boy, had been unhappy at Myers and dropped out in order to begin home schooling. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

13. Six students were injured at Heritage High School in May 1999 when they were shot by 15-year-old T.J. Solomon, who was reportedly depressed after breaking up with his girlfriend. Haney, *supra* note 2.

14. Four students were wounded and one was severely bruised when a 13-year-old boy opened fire in December 1999 with a 9mm semiautomatic handgun at Fort Gibson Middle School. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

15. Six-year-old Kayla Rolland was killed when her six-year-old classmate fired a handgun at her in class. See Haney <http://www.infoplease.com/spot/schoolviolence1.html>, *supra* note 1.

volving education are of "traditional state concern," so any attempts to address the problem should be undertaken—if they are to be undertaken by government at all—by the individual states and local subunits.<sup>16</sup> The Tenth Amendment<sup>17</sup> is at the root of this concern for the relative authority of Congress *vis-a-vis* the states. Respect for Tenth Amendment principles requires that Congress must be especially sensitive in attempting to regulate in areas of "traditional state concern" such as criminal law and education.<sup>18</sup>

On the other hand, one can argue that the increased frequency and the very severity of these attacks suggest a crisis of national dimension that is beyond the competence of the individual states.<sup>19</sup> A component of this argument is that school attacks—epitomized by the spate of recent shootings culminating in Columbine—have evolved into nothing less than a new form of domestic terrorism,<sup>20</sup> thus requiring congressional intervention.

The latter approach raises fundamental constitutional questions concerning Congress's authority to legislate on the matter of school violence. It is axiomatic that Congress may act only pursuant to a power enumerated in the Constitution.<sup>21</sup> As the Supreme Court stated in *U.S. v. Lopez*<sup>22</sup>

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16 Indeed, this was a component of the Supreme Court's reasoning in *U.S. v. Lopez*, 514 U.S. 549, 551 (1995) in which the Court held that Congress exceeded its Commerce Power in enacting the Gun Free School Zones Act of 1990. See *infra* notes 31-36 and accompanying text.

17. "The powers not delegated to the United States by the Constitution . . . are reserved to the States . . ." U.S. CONST. amend. X.

18. Regarding criminal law, Congress' explicit constitutional authority to regulate in the field of criminal law is limited to two types of laws: those that would (1) "provide for the punishment of counterfeiting the securities and current coin of the United States" U.S. CONST. art. I, § 8, (6); and (2) "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. I § 8 (10). In addition, the "necessary and proper clause" allows Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, § 8 (18). Some believe that Congress' use of the necessary and proper clause and other provisions of Article I, Section 8 to promulgate and enforce criminal laws has gone too far, however "[i]t is questionable whether Congress should arrogate to itself vast criminal powers supposedly deriving from the interstate commerce power, or the taxing power. Much of the expansion of [the] federal criminal power has taken place as a result of an excessive judicial deference to Congress' proclivity for reading the interstate commerce power as a general grant of legislative authority on any subject." Douglas B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 344 (1996).

19. See *infra* notes 72-74 and accompanying text describing the chilling fact that well over 600 students could have died at Columbine had all of the killers' bombs been detonated as they had planned - a number of deaths 4 times greater than at the bombing of the Alfred Murrah Federal Building in Oklahoma City in 1995 -- which has been described as the single most destructive act of domestic terrorism in our nation's history.

20. See *infra* notes 64 and accompanying text.

21. See U.S. CONST. art. I, § 8 (18).

22. 514 U.S. 549, 552 (1995).

in holding that Congress exceeded its Commerce power in enacting the Gun Free School Zones Act of 1990.<sup>23</sup>

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." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties. Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>24</sup>

Congress has not been completely thwarted in its efforts to limit the possession of guns in schools. In addition to several broader pieces of existing and proposed legislation that regulate the purchase and possession of guns, which would of course ultimately affect possession of guns in schools,<sup>25</sup> The Gun Free School Act of 1994<sup>26</sup> tied the states' receipt of certain funds to their passage, by October 20, 1995, of state laws requiring local educational institutions to expel from school any student found in possession of a gun on school grounds.<sup>27</sup>

The fact remains, however, that currently there is no uniform national law dealing directly with the possession of guns in schools. Again,

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23. 18 U.S.C. § 922(q)(2)(A) (1994). The Act 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." *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(2)(A)).

24. *Lopez*, 514 U.S. at 552 (internal citations omitted) (quoting THE FEDERALIST NO. 45, pp.292-293; *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

25. *See, e.g.*, The Youth Handgun Safety Act, 18 U.S.C. 922(x) (1994). The Act was passed as an amendment to the federal criminal code in 1994 to combat the problems associated with juvenile possession of handguns. *See* 18 U.S.C. 922(x). Part 1 of the Act prohibits the sale or transfer of handguns or handgun ammunition to someone the seller knows, or should know, is a juvenile. *See id.* Part 2 prohibits juveniles from knowingly possessing a handgun or handgun ammunition. *See id.* Part 3 contains exceptions; and Parts 4, 5, and 6 are procedural provisions. *See id.* The Youth Handgun Safety Act was upheld against commerce clause challenge by the Ninth Circuit in *United States v. Michael R.* in 1996, *see infra* notes 964-109 and accompanying text, but to date has not been reviewed by the Supreme Court. *See also* Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1994).

26. 18 U.S.C. §§ 921-22 (1994). The Act was passed as part of the Improving America's Schools Act of 1994, which was part of the reauthorization of the Elementary and Secondary Education Act of 1965. The state laws may also permit the local education agency's chief executive officer (presumably the superintendent) to modify the expulsion requirement on a case-by-case basis. *See* 18 U.S.C. §§ 921-22.

27. Congress is allowed to engage in such "arm-twisting" pursuant to its spending power under Article I § 8 (1). *See, generally*, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding Congress tying highway funds to the states' passage of laws fixing the minimum drinking age at 21).

some will maintain that this is as it should be.<sup>28</sup> This Article argues to the contrary, however, that the problem of violent attacks in schools has reached a critical point whereby direct Congressional intervention is necessary and constitutionally supportable. The landscape of school violence is quite different than that of just five years ago when *Lopez* was decided, as became so jarringly evident with the events of Columbine and its aftermath. To borrow from Justice Stevens' dissent in *Lopez*, "Whether or not the national interest in eliminating [the market for possession of handguns by school-age children] would have justified federal legislation in [1995], it surely does today."<sup>29</sup>

This Article proceeds in stages. Section II provides a synopsis of the Supreme Court's most recently elucidated position, in *Lopez*, on the matter of direct Congressional regulation of guns in schools, and concludes that the case was decided correctly under principles of federalism in the context of the year 1995. Section III recalls the events of Columbine and other school attacks of recent years, and asks whether uniform national legislation is necessary in order to address the burgeoning national crisis of deadly school violence and then suggests that some forms of deadly school violence might properly be classified as a new form of domestic terrorism.

Section IV considers possible constitutional justifications for any possible new federal legislation banning guns from schools, and also briefly discusses broader federal gun statutes that, by extension, reach the matter of possession in schools. Based on the foregoing—*i.e.*, in particular, the stunning increase in the magnitude of the problem of deadly school attacks in recent years; the devastating economic and social toll that such attacks inflict on victims, families, communities, and the nation alike; and the failure of states to adequately address the problem (as epitomized by the Colorado legislature's failure to enact meaningful legislation in the wake of Columbine)—Section IV finally concludes that the direct national regulation of guns and weapons in school zones *is* necessary at this time to lessen the likelihood of the recurrence of such acts of domestic terrorism as occurred at Columbine High School last year.

## II. *U.S. v. LOPEZ*<sup>30</sup>

### A. *The Holding*

Congress' previous attempt to regulate directly guns in schools—the 1990 Gun Free School Zones Act<sup>31</sup>—was struck down by the Supreme

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28. See *supra* note 18 and accompanying text.

29. *U.S. v. Lopez*, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting).

30. 514 U.S. 549 (1995).

Court in 1995 in *Lopez v. United States*.<sup>32</sup> In *Lopez*, a 5-4 majority of the Court pointedly noted that the Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce . . . . [and that] 'neither the statute nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.'"<sup>33</sup> The Court suggested that while "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, . . . [such] congressional findings would enable [the Court to better] evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect [is] visible to the naked eye."<sup>34</sup>

The opinion then went on to state that Congress under its commerce power may regulate (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce."<sup>35</sup> The Court found unconvincing the government's arguments that the possession of guns in school zones "substantially affects" interstate commerce, and thus held that Congress had acted beyond its commerce clause authority in passing the Gun Free School Zone Act.<sup>36</sup>

In arguing unsuccessfully that the Act should be upheld, the Government argued that the Gun Free School Zones Act sufficiently affected interstate commerce in two ways: one, violence in general (including in

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31. 18 U.S.C. § 922(q)(2)(A) (1994). The Act 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." *Id.*

32. 514 U.S. 549 (1995).

33. *Lopez*, 514 U.S. at 561-62 (quoting Brief for United States 5-6).

34. *Lopez*, 514 U.S. at 562-63 (citing *Perez v. U.S.*, 402 U.S. 146 (1971); *Katzenbach v. McClung*, 379 U.S. 294 (1964)). Indeed, a number of commentators suggest that this failure on the part of Congress to offer adequate constitutional justification for the Act is the true basis for the Court's opinion. See, e.g., Deborah Jones Merritt, *Reflections on United States v. Lopez: COMMERCE!*, 94 MICH. L. REV. 674, 690 (1995) (commenting that "the important point [of *Lopez*] is that Congress must proceed in a way that recognizes the possibility of some limits and takes the doctrine of enumerated powers seriously"); Steven Rosenberg, *Note: Just Another Kid With a Gun? United States v. Michael R.: Reviewing the Youth Handgun Safety Act Under the United States v. Lopez Commerce Clause Analysis*, 28 GOLDEN GATE U. L. REV. 51, 64, 78 (1998) (stating that "Congress' complete failure to justify its intrusion into the traditional state zones of power of education and criminal law signaled to the Court that federalism itself was threatened. Underlying the Court's decision in *Lopez* was the Court's belief that Congress should not use the commerce power as a general police power").

35. *Lopez*, 514 U.S. at 558-59.

36. See *id.* at 551.

schools) affects the national economy in the sense that insurance costs are spread throughout the national population and that people will be less willing to travel to parts of the country they perceive to be unsafe;<sup>37</sup> and two, violence in schools adversely affects the educational process "by threatening the learning environment [which in turn] will result in a less productive citizenry, [which in turn] will have an adverse effect on the Nation's economic well-being."<sup>38</sup>

In rejecting both of these arguments, the *Lopez* Court raised the following "slippery slope" concerns:

[U]nder its 'cost of crime' reasoning, . . . 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 . . . . [I]t 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 are to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.<sup>39</sup>

Moreover, the Court reasoned, a natural extension of the ability to regulate "activities that adversely affect the learning environment" would be the ability to "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."<sup>40</sup> The Court rejected the dissent's assertion that "Congress . . . could rationally conclude that schools fall on the commercial side of the line" (i.e., that schools encompass commercial activities to an extent sufficient to justify the exercise of the commerce power),<sup>41</sup> commenting that:

[This] rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as 'falling on the commercial side of the line' because it provides a 'valuable service - namely to equip [children] with the skills they need to survive in life and, more specifically, in the workplace.'<sup>42</sup>

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37. *See id.* at 563-64.

38. *Id.* at 564.

39. *Id.* (internal citations omitted).

40. *Id.* at 565.

41. *U.S. v. Lopez*, 514 U.S. 549, 565 (1995).

42. *Id.* (internal citations omitted).



The Court then commented that while Congress does have the authority under its Commerce power "to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process[, t]hat authority, though broad, does not include the authority to regulate each and every aspect of local schools."<sup>43</sup>

### B. *Lopez Was Properly Decided*

The Court's holding in *Lopez* was proper if solely for the fact that Congress, in deliberating upon and drafting the Gun Free School Zones Act, failed to make any attempt whatsoever to offer justification for how the legislation was authorized under the Constitution.<sup>44</sup> Only when the Act was found to be unconstitutional by the court below<sup>45</sup> did Congress begin to offer any sort of constitutional justification for the legislation.<sup>46</sup>

Congress's complacency is a result of the extreme deference - amounting to virtually unchecked authority—given Congress by the Court since 1937 in matters involving the Commerce power.<sup>47</sup> The Court's deference during the more than half a century following 1937 has been largely well-advised in the sense that it has allowed for the passage of monumentally important legislation that has, among other things,

43. *Id.* at 565-66. Moreover,

The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern . . . .

[I]t is well established that education is a traditional concern of the States. The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal . . . .

While it is doubtful that any State, or indeed any reasonable person, would argue that is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. (citing *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311)(Brandeis, J., dissenting).

*Id.* at 580-81 (Kennedy, J., concurring) (internal citations omitted).

44. *See supra* note 34 and accompanying text.

45. *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993).

46. In the Violent Crime Control and Law Enforcement Act of 1994, Congress found that "firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools," and that the "occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country," resulting in an "adverse impact on interstate commerce." 42 U.S.C. 13701; *see also supra* notes 387-38 and accompanying text for the Government's justifications in arguing the case.

47. *See generally*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.4 (1997) (analyzing the Supreme Court decisions pertaining to the commerce clause following *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, (1937); 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW L 5-4 (3d ed. 2000) (addressing the Supreme Court's perspective on the commerce clause throughout the twentieth century).

helped bring the nation out of the Great Depression, improved working conditions, and guaranteed protection of civil liberties for tens of millions of Americans.<sup>48</sup>

That said, principles of federalism<sup>49</sup> suggest that the minimum Congress - a co-equal branch of the federal government with limited Constitutional authority—should be expected to do in exercising its broad Commerce power is to explain, at the very least when it is not intuitively obvious, the nexus of the regulated activity to interstate commerce.

Indeed, this very notion may be the most important and lasting aspect of *Lopez*, because it forces Congress to “stay honest” and engage in a “self-checking” process as it considers adopting legislation pursuant to its Commerce power. In other words, *Lopez* might be seen as “merely a ‘sort of ‘signaling device’—a reminder to Congress that the Court is still out there, willing (however reluctantly) to intervene if federal legislators become too complacent about extending their authority.’”<sup>50</sup> Some commentators have applauded this outcome, stating, for example, that *Lopez* was an “extraordinary event” marking “a revolutionary and long overdue revival” of limiting federal powers.<sup>51</sup>

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48. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-49 (1937) (upholding unfair labor provisions of the National Labor Relations Act); *United States v. Darby*, 312 U.S. 100, 125-126 (1941) (sustaining minimum wage and maximum hour provisions of the National Labor Relations Act); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 304-305 (1964) (upholding anti-discrimination provisions of the Civil Rights Act).

49. See Rosenberg, *supra* note 34 at 56, stating, [F]ederalism is the political theory that two independent, sovereign systems of government are better able [than one] to ensure liberty and prosperity. A number of rationales explain why this balance of power under federalism is beneficial. These rationales include (1) decentralizing power ensures diversity and allows for experimentation in governing approaches by the states; (2) placing power in both national and state hands protects against tyranny, either from an overly powerful federal government or from a local majority exercising power over a local minority; (3) having two systems of government increases citizen participation in political affairs and makes government entities more accountable to their constituents; and (4) splitting power between the national and local governments is the most efficient use of resources because the national government can focus on national problems, while local governments can concentrate on local concerns. Many consider federalism the greatest American innovation to political theory.

*Id.*

50. Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 922-23 (1997) (quoting from *Guns in Schools*, 1995: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm., (1995) (statement of Professor Larry Kramer)). See also Rosenberg, *supra* note 34, at 83-84 (commenting that “When Congress makes no attempt to show the Court that, at a minimum, it thought about the effects of its regulation on federalism, as in *Lopez*, the Court will treat the regulation as though Congress was threatening federalism itself, and the Court will find a way to strike down the law.”)

51. Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995). See also Merritt, *supra*, at 690 (commenting

In addition to recognizing Congress's failure to offer constitutional justification for the Act, the *Lopez* opinion also properly suggested that there are substantive "outer limits" beyond which the commerce power may not extend.<sup>52</sup> The Court noted that even in 1937, when it granted Congress a broadened commerce power in *NLRB v. Jones & Laughlin Steel Corp.*<sup>53</sup>, that 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.<sup>54</sup>

Despite the positive effects of judicial acceptance of a broad commerce power during the latter half of the Twentieth Century, when Congress attempts to regulate an activity whose connections to interstate commerce are so attenuated as to strain credulity, the appropriate boundaries in our federalist system of dual sovereignty and shared state-national authority are inappropriately exceeded.

By enacting the Gun Free School Zones Act, "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, [and that] 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",<sup>55</sup> Congress went too far. There is no logical stopping point if Congress's commerce power extends so far. For example,

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 . . . . [I]f we are to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.<sup>56</sup>

Such a state of affairs is unacceptable, and the Court properly struck down the Act in *Lopez*.

that "the important point [of *Lopez*] is that Congress must proceed in a way that recognizes the possibility of some limits and takes the doctrine of enumerated powers seriously."); Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 813 (1996) (suggesting that "*Lopez* may amount to nothing more than a citation for the commercial/noncommercial distinction and the general proposition that the courts do have at least some role, however minimal, in limiting Congress to its enumerated powers . . .").

52. *United States v. Lopez*, 514 U.S. 549, 556-57 (stating that the commerce power is "subject to outer limits").

53. 301 U.S. 1 (1937).

54. *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. 1,37 (1937)).

55. *Lopez*, 514 U.S. at 561.

56. *Id.* at 564.

Even though—Congress as a coequal branch of government which is due great deference in the exercise of its constitutional authority—obviously believed it was necessary to address the issue of guns in schools, basic separation of powers principles require that the Court has the final responsibility for defining the "outer limits" of Congress's authority.<sup>57</sup> "Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."<sup>58</sup> Moreover, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."<sup>59</sup> Justice Kennedy, concurring in *Lopez*, commented that:

Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.<sup>60</sup>

In sum, it is well-settled constitutional doctrine that it is the *Court's* responsibility for adjusting and fine-tuning the relative responsibilities and powers of the co-equal branches of government as disputes arise.<sup>61</sup> By the late Twentieth Century Congress's commerce power had expanded to a point where a correction was necessary, and the Court's *Lopez* opinion was the appropriate vehicle for such a correction.

### III. DEADLY SCHOOL VIOLENCE AS A FORM OF DOMESTIC TERRORISM

Eric Harris and Dylan Klebold succeeded in their desire to cause mayhem and to achieve notoriety for themselves. By the afternoon of their attack on Columbine on April 20, 1999, 615 officers from 27 different agencies had converged on the scene, together with news organizations from around the world. Students encountered the media crush, local schools were locked down, and a two-mile radius around Columbine was blocked off. Frantic parents of Columbine students converged on the area looking for their unaccounted children, only to be sent to the public li-

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57. So long as a "rational basis" exists for Congress' "concluding that a regulated activity sufficiently affected interstate commerce", the regulation would be upheld by the Court. *Lopez*, 514 U.S. at 557 (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 276-280 (1981); *Perez v. United States*, 402 U.S. 146, 155-156 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 299-301(1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964)).

58. *Lopez*, 514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel*, 379 U.S. at 273 (Black, J., concurring)).

59. *Id.* (quoting *Hodel*, 452 U.S. at 311 (Rehnquist, J., concurring)).

60. *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

61. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (stating that "It is emphatically the province and duty of the judicial department to say what the law is.").

library and a nearby elementary school. Lists were created and faxed between the library and the elementary school to aid in reuniting parents with their students. Around 4 p.m., the gravity of the attack started to set in. As the day wore on into the night and the number of parents waiting to be reunited with their students dwindled. For some of those remaining, the unfathomable began to sink in—that their children were the ones still in the high school, dead.

As other investigators began the task of piecing together what happened at the high school, they found hundreds of backpacks left behind, in which pagers were going off. In the library, investigators found bodies and blood on the books. In the words of one, “[t]his was a school, a place where kids laughed, passed notes, studied” and dreamed of tomorrow.<sup>62</sup> “It was now a place where they had died.”<sup>63</sup>

The magnitude of this tragedy brought seasoned investigators of violent crimes to tears and prompted a national soul-searching seeking to understand what would drive two teenagers to unleash such a ruthless attack on their classmates and teachers. The Columbine massacre demonstrates that some forms of school violence have evolved into nothing less than a new form of domestic terrorism.<sup>64</sup>

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62. Nancy Gibbs & Timothy Roche, *The Columbine Tapes*, TIME, Dec. 20, 1999, Vol. 154, No. 25, available at <http://www.time.com/time/magazine/articles.html> [hereinafter Gibbs, <http://www.time.com/time/magazine/articles.html>].

63. See Gibbs & Roach, <http://www.time.com/time/magazine/articles.html>, *supra* note 62.

64. It is possible to be *too* loose in defining “terrorism”, and to react in knee-jerk fashion by suggesting ill-advised and overbroad federal enforcement. History suggests that the government has overreacted time and again to organizations which have challenged the existing system - such as the Alien and Sedition Acts which were enacted in part to respond to the Jeffersonians criticisms of President Adams and the Federalists; the relentless suppression of anti-slavery speech by many Southern states in response to the extremist rhetoric of some southern abolitionists; and the use of conspiracy and criminal syndicalism laws to suppress labor organizers, Communists, and civil rights activists. The temptation must be resisted to have government “crack down” in a way that would unnecessarily abridge civil liberties. See Kopel & Olson, *supra* note 18, at 252-55. Kopel and Olson suggest:

[I]t is easy for many Americans to see, in hindsight, the legitimacy of the viewpoint of the Jeffersonians, of southern abolitionists, of labor organizers, and of the civil rights movement, it is not so easy for some Americans to respect the current concerns of their fellow citizens. Today, there are many tens of millions of people who are terrified of the government, and many thousands (or perhaps more) who participate in militias. To follow the voices of those who urge us to ... crack down on radicals with unorthodox views would be the most dangerous course. Respectful dialogue and reform, not stereotyping and repression, are the courses that history will judge wisest . . . Everything that terrorists do is already illegal. Current laws already provide ample authority for investigations of potential terrorists, including persons who have done nothing more than talk big. Various proposals that are offered as supposed solutions to terrorism - including more spying on peaceful dissidents, more electronic surveillance, trials with secret evidence, felonizing charitable donations to foreign humanitarian causes, and federalizing and militarizing criminal law - will make America more dangerous, not safer. Releasing the federal government from the strict Constitutional rule of law would, in the long run, facilitate state terrorism.

According to the FBI, terrorism is “the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives,” with the perpetrators’ motivation or intent as the key factor.<sup>65</sup> If, therefore, the perpetrators target a sector of the public in order to instill fear and to cause a political or social change, the act is one of terrorism under the FBI’s definition.<sup>66</sup>

For its part, the Federal Emergency Management Agency (FEMA) defines terrorism as “the use of force or violence against persons or property in violation of criminal law for purposes of intimidation, coercion or ransom.”<sup>67</sup> The FEMA materials suggest that terrorists “often use threats to create fear among the public to try to convince citizens that their government is powerless to prevent terrorism and to get immediate publicity for their causes.”<sup>68</sup> Moreover,

a terrorist attack can take several forms, depending on the technological means available to the terrorist, the nature of the political issue motivating the attack, and the points of weakness of the terrorist’s target. Bombings are the most frequently used terrorist method in the United States. Other possibilities includes an attack at transportation facilities, an attack against utilities or other public services or an incident involving chemical or biological agents.<sup>69</sup>

After Columbine, it is necessary to add “attack on a school” to the list of possibilities for terrorist attacks. The attack on the students and staff at Columbine High School fits the FBI and FEMA definitions for terrorism.<sup>70</sup> Dylan Klebold and Eric Harris were “picked on,” and they

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Kopel, *supra* at 255-56, 346. These are wise words, and Congress would do well to heed them whenever it is tempted to pass any new laws designed to counter terrorism. That said, a law that would prohibit the possession of guns in schools does not raise the sorts of concerns addressed above – a school gun possession statute simply does not in any way abridge civil liberties in the way that other more invasive statutes might.

65. See Interview by Susan Hendrick with Mark Holstlaw, special agent, Denver FBI field office, Denver, Co. (February 23, 2000).

66. If, by contrast, the motivation is simply a personal agenda, such as to “get back at” an ex-girlfriend of ex-boyfriend, one would be hard-pressed to classify such an act as terrorism. See Interview by Susan Hendrick with Mark Holstlaw, special agent, Denver FBI field office, Denver, Co. (February 23, 2000).

67. FEMA: BACKGROUNDER – TERRORISM, available at <http://www.fema.gov/library/terror.html> (last modified Jan. 10, 1998).

68. FEMA, *supra* note 67, available at <http://www.fema.gov/library/terror.html> According to FEMA, “most terrorist incidents in the United States have involved small extremist groups who use terrorism to achieve a designated objective . . . . In recent years the largest number of terrorist strikes have occurred in the Western States and Puerto Rico. Attacks in Puerto Rico accounted for about 60 percent of all terrorist incidents between 1983 and 1991 that occurred on United States territory.” *Id.*

69. *Id.*

70. See *supra* notes 65-69 and accompanying text. The FBI is called in whenever a situation involves interstate commerce, explosives or hostages, and once the area is secured. In the case of

retaliated against a sector of the public—*i.e.*, students and teachers—in order to foment "a revolution" of social change.<sup>71</sup> Investigators found over 80 bombs in Columbine High School.<sup>72</sup> "Some were pipe bombs. Others were fashioned out of propane canisters and CO<sub>2</sub> (carbon dioxide) cartridges. Investigators even found some explosives containing homemade napalm, a jellied form of gasoline."<sup>73</sup> Investigators also found bombs in the cars and gym bags of both Harris and Klebold.

The FBI agents delicately looked inside the bags -- and instantly understood the true intentions of Dylan Klebold and Eric Harris: death, by fire, for hundreds of their fellow students. The gym bags each held a large bomb fashioned from a barbecue grill propane tank, a gasoline can and other fuel cylinders. Each was wired to a pipe bomb. A two-bell alarm clock served as a timing device. Had both bombs not failed, explosives experts concluded, the 660 kids in the cafeteria at 11:20 a.m. on April 20 likely would have died—nearly four times the number killed in the Oklahoma City bombing.<sup>74</sup>

It is a sad fact that after Columbine it can no longer be said that the threat of attack upon a school is an extremely rare occurrence. In the four weeks following Columbine, for example, there were 350 arrests for threats and bomb scares upon schools, with at least 30 of those arrests involving an actual bomb or weapon.<sup>75</sup>

Columbine, there were both hostages and over ninety explosives. In addition, local law enforcement lacked the resources or experience to deal with the crisis and the subsequent investigation, so the FBI was summoned. See Interview by Susan Hendrick with Mark Holstlaw, special agent, Denver FBI field office, Denver, Co. (February 23, 2000).

71. Gibbs & Roche, *supra* note 62. "Harris and Klebold have an inventory of their ecumenical hatred: all 'niggers, spics, Jews, gays, f\_ing whites' the enemies who abused them and the friends who didn't do enough to defend them . . . 'I hope we kill 250 of you,'" Klebold said, predicting that the attack would be the most "'nerve-racking 15 minutes of my life, after the bombs are set and we're waiting to charge through the school. Seconds will be like hours. I can't wait. I'll be shaking like a leaf.'" Harris and Klebold expressed their hope to live forever in memory and nightmares: "'We're going to kick-start a revolution,'" Harris said, and "'create flashbacks from what we do...and drive [the survivors] insane.'" *Id.*

72. Dan Luzadder & Kevin Vaughan, *Amassing the Facts*, DENVER ROCKY MOUNTAIN NEWS, Dec. 13, 1999, available at <http://www.denver.rmn.com/shooting/1213col1.shtml>.

73. Luzadder & Vaughan, *supra* note 72 available at <http://www.denver.rmn.com/shooting/1213col1.shtml>.

74. *Id.*

75. Steve Drummond, *Arrests Top 350 in Threats, Bomb Scares*, EDUCATION WEEK, May 26, 1999, available at <http://www.edweek.org/ew/1999/37threat.h18>. "This is a terroristic activity that needs to be taken seriously." *Id.* (quoting Ronald D. Stephens, Executive Director, National School Safety Center). "Many Communities are no longer taking teenage threats lightly. In Texas, four 8th grade boys were arrested for conspiracy to commit murder, conspiracy to commit arson, conspiracy to manufacture explosives after teachers and students overheard conversations about an attack on the school. In another Texas town, 4 teens were arrested after police found bomb making materials in the back seat and trunk of the car the boys were in." <http://www.angelfire.com> (visited Feb. 12, 2000). In Jefferson County, Colorado, the home of Columbine, eight students were expelled from the Jefferson County School district for making threats. See

The mere threat of a Columbine-type attack is enough to gain widespread media attention and virtually shut down entire communities. A troubled adolescent with a desire to “send a message” or seeking vengeance of some sort intends these effects<sup>76</sup>—just as any other terrorist intends his actions to impose maximum damage and to garner widespread publicity for his cause. True enough, gun-toting adolescents do not fit the typical “terrorist” profile, but the effect of their actions and threats on the average American is no less real - indeed, the effect is *more* real due to its immediacy—than the amorphous threat of a stereotypical foreign terrorist carrying out some sort of “traditional” terrorist activity such as a car-bombing or the like.<sup>77</sup> Moreover, the fact that some (or even most) threats or attacks are carried out by adolescents with a twisted desire for fame<sup>78</sup> or simply by confused kids who are lashing out in a highly inappropriate way (the latter do not constitute acts of terrorism) does not diminish the damaging effect of the act on the community and the nation as

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<http://www.salon.com/news/feature/1999/12/16/columbine/index/html> (visited Dec. 16, 1999). Moreover, others besides Harris and Klebold were plotting in late 1998 and early 1999. In November 1998, for example, in Burlington, WI,

five students, all boys aged 15 and 16, were arrested for conspiracy to commit murder. Two of the boys were subsequently released as they had dropped out of the conspiracy before the arrests. The plot to take the staff of the school hostage and kill some of them, as well as killing twelve other children, came apart when police intervened and arrested the boys the day before the plot was scheduled to happen. A police video of the interrogation did not show Miranda warnings being given, so the confessions of the three boys were not allowed at trial. All three plead to lesser offenses.... Initially, many of the townspeople felt that the police over-reacted, and that the situation was blown out of proportion. One mother thought the ‘hysteria’ was unreasonable. Six months later, after Columbine, parents and school officials believe they narrowly missed a major disaster.

<http://www.angelfire.com> (visited Feb. 12, 2000).

76. Gibbs & Roche, *supra* note 62. “Do not think we’re trying to copy anyone,” Eric Harris warned, recalling the school shootings in Oregon and Kentucky. Harris suggested that he and Dylan Klebold had the idea long ago, “before the first one ever happened.” *Id.* They also bragged that their plan was better, “not like those f\_\_\_\_\_s in Kentucky with camouflage and .22s. Those kids were only trying to be accepted by others.” *Id.*

77. As discussed *supra* note 68 and accompanying text, such acts of terrorism on U.S. soil are rare.

78. Such a child knows that carrying out a school shooting will get him on the evening news and perhaps even lead to Hollywood making a movie about him. “‘They wanted to be famous,’ concludes FBI agent Mark Holstlaw. ‘And they are. They’re infamous.’ It used to be said that living well is the best revenge; for these two, it was to kill and die in a spectacular fashion.” Gibbs & Roche, *supra* note 62. Fame was not Harris’s and Klebold’s sole motivation, though:

Because they were steeped in violence and drained of mercy, they could accomplish everything at once; payback to those who hurt them, and glory, the creation of a cult, for all those who have suffered and been cast out. They wanted movies made of their story, which they had carefully laced with ‘a lot of foreshadowing and dramatic irony,’ as Harris put it. There was a poem he wrote, imagining himself as a bullet. ‘Directors will be fighting over this story,’ Klebold said - and the boys chewed over which could be trusted with the script: Steven Spielberg or Quentin Tarantino. ‘You have two individuals who wanted to immortalize themselves,’ says Holstlaw. ‘They wanted to be martyrs and to document everything they were doing,’

to the point where they even made a video on the morning of the shooting describing their feelings, apologizing to their parents and bequeathing their favorite belongings. *Id.*



a whole, whose sense of well-being and safety is shaken to the core by these events.

#### IV. CONGRESSIONAL LEGISLATION IS NECESSARY

Given all of the above, what, if anything, should be done? One thing is clear—guns and schools do not mix, and new strategies must be adopted to prevent the recurrence of the events that occurred last year at Columbine and in its wake.<sup>79</sup> One area of focus that is receiving renewed attention is so-called "preventive" legislation, ranging from measures that would encourage strategies initiated within the family itself to those that are more community-based in nature.<sup>80</sup>

Beyond the possible promulgation of such preventive measures, it is important to consider what sort of "enforcement" mechanisms are necessary, and whether legislation establishing these mechanisms should be promulgated at the local, state or federal level. Whether it should be Congress or the states who will take the lead in legislating the possession of guns in schools is a matter of considerable controversy. While Congressional deference to state primacy in regulating activities touching upon matters of "traditional state concern" such as education and criminal law is to be desired and preferred in most circumstances,<sup>81</sup> our federalist system of dual sovereignty authorizes the national government to become involved pursuant to a power enumerated in the Constitution when a particular problem—even one concerning a subject that is "traditionally a state concern"—grows to such a dimension as to seriously harm the *nation's* economy and overall well-being.<sup>82</sup> In such circumstances, if the states simply are unable—whether through their own inherent limitations as only single entities among fifty, or through an absence of political will—to address the problem effectively, it is appropriate for Congress to step into the breach.<sup>83</sup>

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79. See *supra* note 62 and accompanying text.

80. Herein lies the potential for significant debate as well - *i.e.*, should government have a role in becoming involved in "family" and "child-rearing" issues, and if so, what level of government - local, state, or federal - should take primary responsibility? Such questions are beyond the scope of this article, so the article does not venture into this particular hornet's nest, other than to say that the soul-searching that has been prompted by Columbine on the topics of the family's and community's role in mitigating problems of teen alienation is useful and necessary. As a society, we need to address the problems facing our youth as they negotiate the difficult transitions from adolescence to adulthood.

81. See, *e.g.*, Kopel & Olson, *supra* note 18 at 343-48 and accompanying text.

82. See *supra* note 80 for discussion of the "which came first - the chicken or the egg?" nature of the purpose of the legislation.

83. As of 1995, a total of 40 states did regulate guns in schools in some way, *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring), but the lack of a national standard leads to uncertainty and ignorance of what the law is in any given state. State laws vary widely. In Colorado, the very state where Columbine High School is located, the legislature failed to pass meaningful gun control

Columbine forever changed the dimensions of the issue of gun possession in schools. Whereas before Columbine it was debatable whether Congress should have a role in regulating guns in schools,<sup>84</sup> the brave new post-Columbine world cries out for national control.

In the post-Columbine world, it is eminently reasonable for one to conclude, while still maintaining fidelity to federalist principles of a limited national government and a meaningful Tenth Amendment, that Congress may regulate guns in schools. Guns simply have no place in schools, and especially with Columbine and its aftermath there is little question that guns in schools have substantial negative effects on the nation's economy to the point where Congressional exercise of the commerce power would be justified—even after *Lopez*.

While it is arguably true that the commerce power has been used by Congress for too long as a virtual "blank check" for justifying legislation beyond its natural constitutional boundaries, the fact remains that Article One of the Constitution *does* grant Congress the affirmative power "to regulate Commerce . . . among the several states."<sup>85</sup> It has long been recognized that the commerce power is not to be read in its most narrow sense - i.e., it encompasses far more than mere commercial traffic:

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse . . . . [The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.<sup>86</sup>

That such a regulation may survive constitutional scrutiny is not certain,<sup>87</sup> of course, but there are a number of reasons to believe it would

legislation in the year following the massacre. For example, on February 11, 2000 the Colorado House Appropriations Committee killed HB1242, which would have required background checks for all buyers at gun shows. A former girlfriend of Harris's bought a couple of the guns used in the attack at a gun show. Ordinarily, "experimentation" by the states is to be lauded and encouraged, as described by Justice Brandeis in his dissenting opinion in *New State Ice Co. v. Liebman*,

To stave experimentation in things social and economic is a grave responsibility. Denial of the rights to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). However, with the advent of the Columbine-type school massacre, the problem of violence in schools has gone beyond the point where a single state should be allowed to serve as a "laboratory" – when potentially hundreds of children die, communities are terrified, and interstate commerce is adversely affected, Congressional preemption is necessary.

84. See *supra* notes 22-24 and accompanying text for discussion of *Lopez*, in which the Court held in 1995 that Congress does *not* have a role.

85. U.S. CONST. art. I, § 8, cl. 3.

86. *Gibbons v. Ogden*, 22 U.S. 1, 189, 196 (1824).

87. See *supra* note 83 and accompanying text for "source of legal uncertainty" language.

be upheld. For example, even before Columbine, in its 1997 *United States v. Michael R.* opinion, the Ninth Circuit Court of Appeals subjected another federal "gun possession" statute (*i.e.*, the Youth Handgun Safety Act—Congress' regulation of juvenile possession of handguns) to rigorous post-*Lopez* scrutiny and upheld the statute, concluding that the statute and facts were distinguishable from *Lopez*. Granted, *Michael R.* is not an opinion of the Supreme Court, and the statute does not specifically involve gun possession in *schools*, but there are enough parallels between the statute upheld in *Michael R.* and a statute that would regulate possession in schools to conclude that the latter would have a good chance in surviving judicial scrutiny.

#### A. Federal Measures - Constitutional Authority

In light of the magnitude of the problem, from an enforcement perspective it is time for Congress to take action to establish a uniform federal penalty for the act of bringing a gun onto school grounds. Current federal laws, such as the Gun Free School Act,<sup>88</sup> and other broader gun-related statutes such as the Youth Handgun Safety Act,<sup>89</sup> and the Brady Bill,<sup>90</sup> while effective in their own rights, do not adequately address and target the specific problem of guns in schools. Nor do individual state laws—many of which fall far short in their attention to the issue of guns possession among youth—do enough in addressing the *national* scope of the problem.

The problem on the ground, in real life, is severe. After Columbine, kids and families are fearful. Just as earlier problems of, for example, unfair working conditions began to harm the nation's economic well-being to a degree that the Court finally agreed that Congressional intervention was warranted,<sup>91</sup> the Columbine massacre and its aftermath have transformed the matter of gun possession in schools from the occasional isolated incident of a troubled youngster shooting his classmate(s)<sup>92</sup> into a problem that has substantial negative impacts on the national economy.

Columbine thus marks a turning point where the Court would be justified in concluding that Congress *does* have the constitutional authority and the necessary "rational basis" (at least)<sup>93</sup> for believing that

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88. 18 U.S.C. § 921 (1994). *See supra* note 26 and accompanying text.

89. 18 U.S.C. § 922(x) (1994). *See supra* note 25 and accompanying text.

90. Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1994).. *See supra* note 25 and accompanying text.

91. *See supra* notes 64, 82 and accompanying text

92. Tragic though events such as the murder in Spring 2000 of a 6 year old Michigan girl by a first grade classmate are, Keith Naughton and Evan Thomas, *Did Kayla Have to Die?*, NEWSWEEK, March 13, 2000, at 24, they are not acts of "domestic terrorism," and probably do not by themselves justify Congressional intervention. *See supra* note 64 and accompanying text.

93. *See infra* note 110 and accompanying text for description of standard of review.

regulation of gun possession in schools would further the legitimate government interest of preventing the recurrence of such terrorist acts and threats that do so much harm to the national economy and to the individuals, families and communities involved.

1. *United States v. Michael R.*<sup>94</sup>

Any new federal legislation attempting to regulate the possession of guns in schools must be promulgated with the principles of *Lopez* firmly in mind. Given the Court's disapproval of the statute at issue in *Lopez*, in which the Court asserted that "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,"<sup>95</sup> is it possible for Congress to craft any sort of legislation regulating guns in schools that would survive constitutional scrutiny? A more recent opinion of the Ninth Circuit Court of Appeals would seem to suggest that the answer is "Yes," provided the measure meets certain requirements.

In *United States v. Michael R.*<sup>96</sup> the Ninth Circuit upheld a provision of the Federal Juvenile Delinquency Act prohibiting the knowing and intentional possession of a handgun by a juvenile<sup>97</sup> against constitutional challenge,<sup>98</sup> stating that "18 U.S.C. 922(x)(2) is different" from section 922 (q).<sup>99</sup>

An analysis of the court's reasoning in distinguishing section 922(x)(2) from section 922(q) is crucial to the understanding of how a statute that prohibits the possession of guns in schools might be crafted to survive constitutional attack. The court first noted that section 922(x)(2) is "part of a larger, more comprehensive regulation to curb the bustling underground market in firearms and drugs."<sup>100</sup> Specifically, section 922(x)(2)

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94. 90 F.3d 340 (9th Cir. 1996).

95. *Lopez*, 514 U.S. at 567.

96. 90 F.3d 340 (9th Cir. 1996).

97. 18 U.S.C. § 922(x)(2) (1994).

98. The defendant challenged the constitutionality of section 922(x)(2) on the grounds that it is, like the statute that was at issue and struck down in *Lopez* (section 922(q)), "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *Michael R.*, 90 F.3d at 343 (quoting *Lopez*, 514 U.S. at 561). "Furthermore, [the defendant] maintains that section 922(x)(2) has no 'jurisdictional element' which would operate to ensure that, on a case-by-case basis, there was an effect on interstate commerce." *Michael R.*, 90 F.3d at 343 (quoting *Lopez*, 514 U.S. at 561).

99. Section 922(q) was the statute reviewed and struck down in *Lopez*.

100. *Michael R.*, 90 F.3d at 344. The Ninth Circuit noted the comparison to section 922(q), which the Supreme Court in *Lopez* commented was designed to regulate an activity (possession of a gun in a local school zone) that "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 344 (quoting *Lopez*, 514 U.S. at 567).

is part of a larger regulation [Section 922(x)] that deals with the sale, delivery, or transfer of firearms to a juvenile . . . . Read as a whole, section 922(x) by its terms regulates commerce: subsection (1) is targeted at curbing the supply of handguns and suitable ammunition,<sup>101</sup> while subsection (2) restricts the demand for those firearms.<sup>102</sup> We find that under the statute, Congress is in effect regulating interstate commerce by attacking both the supply and demand for firearms with respect to juveniles.<sup>103</sup>

Second, the court concluded that "possession of a handgun by a juvenile, as a general matter, could have a substantial effect on interstate commerce."<sup>104</sup> The court based this conclusion in part on the legislative history of Section 922(x),<sup>105</sup> which suggested that:

Congress enacted this statute to help control crime "by stopping commerce in handguns with juveniles nationwide." Congress defended the enactment of this statute as consistent with the Commerce Clause on three grounds: (a) the movement of the component parts, ammunition, and raw materials in interstate commerce; (b) the deterrence effect of violent crime on the travel of ordinary citizens and foreigners; and (c) the related effort to control gun possession and drug flow.<sup>106</sup>

The court found justifications (a) and (b) to be self-explanatory: "possession of a handgun by a juvenile implicates interstate commerce through the manufacturing process and by its deterrent effect on interstate travel;"<sup>107</sup> and justification (c) to be valid as well, based on the logical nexus between Congress's regulation of the sale, transfer and pos-

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101. Subsection (1) provides: "It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile- (A) a handgun; or (B) ammunition that is suitable for use only in a handgun." 18 U.S.C. § 922(x)(1).

102 Subsection (2) provides: "It shall be unlawful for any person who is a juvenile to knowingly possess- (A) a handgun; or (B) ammunition that is suitable for use only in a handgun." 18 U.S.C. § 922(x)(2).

103. *Michael R.*, 90 F.3d at 344.

104. *Id.* The court also cites to a federal district court opinion that reaches the same conclusion: "The District Court of Massachusetts found that 18 U.S.C. § 922(x) impacts the handgun market by excluding juvenile participation; it concluded that because of section 922(x)'s effects on the supply and demand of handguns, the statute fits within Congress's constitutional authority to regulate commerce." *Id.* at 344 n.2 (citing *United States v. Cardoza*, 914 F.Supp 683, 687 (D.Mass. 1996)).

105. The court alluded in a footnote to *Lopez's* approval of the judiciary's recourse to legislative history "as part of its independent evaluation of constitutionality under the Commerce Clause." *Michael R.*, 90 F.3d at 345 n.3. See *supra* note 34 and accompanying text for the *Lopez* Court's comments on this topic.

106. *Michael R.*, 90 F.3d at 344-45 (quoting H.R. CONF. REP. NO. 103-711, at 390-91 (1994), reprinted in 1994 U.S.C.C.A.N. 1858, 1859).

107. *Michael R.*, 90 F.3d at 345.

session of handguns by juveniles to its efforts curb the illegal flow of drugs and firearms in interstate commerce.<sup>108</sup>

In sum, the analysis undertaken by the Ninth Circuit in *Michael R.* serves as a useful template for understanding how a federal law prohibiting the possession of guns in schools might survive after *Lopez*. It is fair bet that the reasoning of the *Michael R.* court would not be accepted by an unanimous Supreme Court, but it is quite likely that it would be accepted by a majority<sup>109</sup>—and that, as they say, is all it takes for the Court to uphold a challenged law.

## 2. The necessary contours of any new proposed legislation

If it is to survive constitutional scrutiny, any federal legislation specifically regulating the possession of guns in schools of course must differ fundamentally from the Gun Free School Zones Act struck down in *Lopez*. In short, Congress must ask whether (and then affirmatively conclude) the subject of the regulation falls within its limited scope of authority and then, practically speaking, it must be able to defend its legislation convincingly in the likely event the legislation is challenged.<sup>110</sup>

Justice Stevens' dissenting opinion in *Lopez*, though by far the shortest of any of the opinions in the case, implicitly identifies a key component of any successful school gun-control legislation, when he states that "[t]he market for the possession of handguns by school-age

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108. The court noted Congress' statement that "[v]iolent crime and the use of illicit drugs go hand-in-hand, and attempts to control one without controlling the other may be fruitless." *Id.* (quoting H.R. CONF. REP. NO. 103-711, at 390-91 (1994), reprinted in 1994 U.S.C.C.A.N. 1858, 1859).

109. While it is true that denial of certiorari by the Supreme Court does not have formal precedential value, denial of cert. *does* have practical value to the extent that it can be understood that at least six Justices believed that the holding below was not so objectionable as to require the Court's review. Accordingly, when the Court denied certiorari in *Michael R.*, [cannot find denied cert citation], it was because at least six Justices concluded that the Ninth Circuit's upholding of Section 922(x) of the Federal Juvenile Delinquency Act was not so objectionable as to require review.

110. Although the appropriate judicial standard of review for any legislation not involving a "fundamental right" (or "suspect classification" in equal protection claims) is "rational basis" review - *i.e.*, the legislation is presumed to be constitutional, and will be upheld so long as Congress had a "rational basis" for believing the legislation was within its authority - the reality is that the Court seemed in *Lopez* to employ a standard somewhat more searching than is typical with highly-deferential rational basis review. Regardless of whether or not one believes the Court overstepped the boundaries of judicial review by applying this "rational basis-plus" standard, Congress needs to assume the Court will continue to examine its legislation (particularly that enacted under the commerce power) more critically than it had in the past. Indeed, in the scope of things, this is probably a good thing: as suggested *supra* notes 47-52 and accompanying text, constitutional principles of separation of powers and federalism argue in favor of the Court stepping in to "keep Congress honest" in those times when Congress becomes too complacent and casual in its exercise of its limited powers.

children is, distressingly, substantial."<sup>111</sup> Conceptually, the proper way to think of any new measure seeking to regulate the possession of guns in schools is to understand that, while a criminal statute, the law by its terms is seeking to dry up a particular market—*i.e.*, the interstate market for guns among school-age children. For example, if Congress concludes on the basis of available information that when the federal penalties for possessing guns in schools become so onerous as to convince a person who might otherwise consider purchasing a gun—the component parts, ammunition, and raw materials of which largely traveled in interstate commerce—not to consummate that transaction, the *demand* side of this particular market is affected. Multiply the decision of a single individual not to buy by the similar decisions of hundreds and thousands of other individuals, and one starts to see how a federal measure designed to impose harsh penalties on an individual possessing a gun in a school *does* in fact regulate "an economic activity that might, through repetition elsewhere, substantially affect . . . interstate commerce."<sup>112</sup>

Moreover, under a conceptual framework that views gun-control legislation as a mechanism for reducing the "demand-side" of the market, a specific regulation of gun possession in *schools* can be said to be a smaller component of the larger regulatory scheme of "stopping commerce in handguns with juveniles nationwide"<sup>113</sup> (after all, most students in schools are juveniles), which itself is a smaller component of the larger regulatory scheme of to help control crime. This is essentially the approach taken by Congress with the Juvenile Delinquency Act (regulating possession of handguns by juveniles) reviewed and upheld by the Ninth Circuit in *Michael R.*<sup>114</sup>

Just as the provision of the Juvenile Delinquency Act regulating possession of handguns by juveniles reviewed in *Michael R.* (section 922(x)(2))<sup>115</sup> was found to be "part of a larger, more comprehensive regulation to curb the bustling underground market in firearms and drugs,"<sup>116</sup> a provision regulating the possession of guns in *schools* arguably is part of the same "larger, more comprehensive regulation."<sup>117</sup> Extrapolating from the Ninth Circuit's reasoning in *Michael R.* that "possession of a handgun by a juvenile implicates interstate commerce through the manufacturing process and by its deterrent effect on interstate travel,"<sup>118</sup> and that regulating the sale, transfer and possession of

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111. *Lopez*, 514 U.S. at 603 (Stevens, J., dissenting)(italics added).

112. *Lopez*, 514 U.S. at 567.

113. See *supra* note 106 and accompanying text.

114. See *supra* notes 94-100 and accompanying text.

115. See *supra* notes 94-100 and accompanying text.

116. *U.S. v. Michael R.*, 90 F.3d 340, 344 (9th Cir. 1996).

117. *Michael R.*, 90 F.3d at 344.

118. *Id.* at 345.

handguns by juveniles is substantially tied to Congress' efforts to curb the illegal flow of drugs and firearms in interstate commerce, the regulation of gun possession in schools can be said to be a component part of those arguments. Finally, there's no reason to believe that Congress' observation that "violent crime and the use of illicit drugs go hand-in-hand, and attempts to control one without controlling the other may be fruitless"<sup>119</sup> applies any less in the school setting than it does elsewhere, a supposition that lends additional support for the proposition that Congress would be constitutionally justified in regulating the possession of guns in schools.

The foregoing "smaller component of the larger effort to curb violent crime and drug use" and market-based "demand-side" arguments, together with the additional congressional purpose of seeking to minimize the threat and recurrence of acts that amount to domestic terrorism in schools, coupled also with a requirement that the guns (or some component part, raw material or ammunition thereof) must have traveled in interstate commerce, all bolster the case for the constitutionality of a regulation prohibiting gun possession in schools. All of these factors combined serve to neutralize the "slippery slope" concerns<sup>120</sup> raised by the *Lopez* Court—*i.e.*, legislation with these components does not give rise to the possibility whereby Congress would use the legislation as a springboard for, for example, (1) using a "cost-of-crime" rationale to justify "regulating not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce"; (2) using a "national productivity" rationale to justify "regulating any activity that it found was related to the economic productivity of individual citizens" such as family law (including marriage, divorce, and child custody); and (3) using an "adverse effect on learning environment" rationale to justify "mandating 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."<sup>121</sup> In other words, school gun control legislation based on the factors described above would be adequately circumscribed and discrete so as to assuage the Court's concern that Congress is in some way opening a Pandora's Box of overreaching legislation.

### 3. Distinguishing *Lopez*

In elucidating the current parameters of the commerce power in the course of striking down the Gun Free School Zones Act in *Lopez*, the Court made several important qualifying statements that "left the door

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119. *Id.* (quoting H.R. CONF. REP. NO. 103-711, at 390-91 (1994), reprinted in 1994 U.S.C.C.A.N. 1858, 1859).

120. See *supra* notes 39-42 and accompanying text.

121. *U.S. v. Lopez*, 514 U.S. 549, 565 (1995); see *supra* notes 39-42 and accompanying text.



open" to the possibility that it would uphold similar legislation under different circumstances. For example, the Court commented that:

We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.<sup>122</sup>

Moreover,

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." . . . Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." . . . These are not precise formulations, and in the nature of things they cannot be.<sup>123</sup>

Finally,

[Here, r]espondent 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.<sup>124</sup>

One can conclude from these statements that the Court, at least implicitly, believes that (1) Congress *does* have the authority to regulate some aspects of local schools (i.e., those aspects involving commercial activities substantially affecting interstate commerce); (2) because the process of determining whether a certain aspect of local schools does or does not involve "commercial activities substantially affecting interstate commerce" is not a "bright-line" legal test, such determinations should be made on a case-by-case basis, and categorical statements should be resisted; and (3) if facts exist where there *is* an indication that a student subject to a school gun-possession statute had recently moved in interstate commerce, and if the statute *does* require that the possession is tied in some concrete way to interstate commerce, the statute may well survive constitutional scrutiny.<sup>125</sup>

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122. *Lopez*, 514 U.S. at 565-66.

123. *Id.* at 566 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

124. *Lopez*, 514 U.S. at 567.

125. Indeed, following the Court's decision in *Lopez*, President Clinton proposed the "Gun-Free School Zones Amendments Act of 1995", which provided the jurisdictional element for the Gun-Free School Zones Act of 1990: "The legislative proposal would amend the Gun-Free School Zones Act by adding the requirement that the Government prove that the firearm has 'moved in or

Moreover, the Court's statement in *Lopez* that "[t]he possession of a gun in a school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"<sup>126</sup> must be considered in light of the Court's immediately preceding comments concerning "legal uncertainty,"<sup>127</sup> and accordingly should be read so as to apply to the facts as they existed in *Lopez*, but not necessarily as a categorical statement that the act of possessing a gun in a school zone will *never* amount to an economic activity substantially affecting interstate commerce. It is unlikely that the Court, in literally the next sentence after speaking of the uncertain and imprecise "nature of things" in formulating legal determinations, would intend to issue an immutable categorical conclusion of this sort.<sup>128</sup>

It is necessary therefore to consider the individual law at issue in determining whether Congress has or has not acted within its constitutional authority in promulgating legislation governing the possession of guns in schools. As the Court notes, "the question of congressional power under the Commerce Clause 'is necessarily one of degree',"<sup>129</sup> and "any possible benefit from eliminating this 'legal uncertainty' [e.g., by issuing rigid categorical statements] would be at the expense of the Constitution's system of enumerated powers."<sup>130</sup>

In short, based on the unhappy developments of the last year spurred by and epitomized by the horrific events at Columbine, Congress should be able to establish sufficient justification<sup>131</sup> to withstand "rational basis" review by the Court.<sup>132</sup>

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the possession of such firearm otherwise affects interstate commerce.' The addition of this jurisdictional element would limit the Act's 'reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce,' as the Court stated in and thereby bring it within the Congress' Commerce Clause authority." H.R. DOC. NO. 104-72 (1995). Congress never acted on this proposal.

126. *Lopez*, 514 U.S. at 567.

127. See *supra* note 123 and accompanying text.

128. Indeed, in his concurring opinion, Justice Kennedy describes his reasons for believing the holding should be limited: "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 [certain] observations on what I conceive to be its necessary though limited holding." *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

129. *Id.* at 555 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

130. *Lopez*, 514 U.S. at 566.

131. As implied by the Court in *Lopez*, such justification is all-but-required whenever Congress attempts to regulate an activity that lacks an intuitively-obvious link to interstate commerce. See *supra* notes 34-35 and accompanying text.

132. See *supra* note 110 and accompanying text for discussion of standard of review.

## CONCLUSION

The events at Columbine High School in Littleton, Colorado on April 20, 1999 forever changed the contours of the national discussion about youth violence and guns in schools. This Article has argued that the events of Columbine and its aftermath should spur Congress to enact legislation to ban the possession of guns in schools. Such legislation is constitutionally supportable as a proper exercise of Congress' commerce power, despite the Supreme Court's 1995 *Lopez v. U.S.*<sup>133</sup> opinion striking down the 1990 Gun Free School Zones Act. With Columbine, school attacks have crossed the threshold whereby they now potentially affect interstate commerce in a substantial sense. Indeed, some such attacks actually constitute acts of domestic terrorism, thus justifying federal legislation to ban the possession of the major instruments of those attacks—guns—in schools. To borrow from Justice Stevens' dissent in *Lopez*, "Whether or not the national interest in eliminating [the market for possession of handguns in schools] would have justified federal legislation in [1995], it surely does today."<sup>134</sup>

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133. 514 U.S. 549 (1995).

134. *Lopez*, 514 U.S. at 603 (Stevens, J., dissenting).