# *[United States v. Lopez](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=)*

Supreme Court of the United States

November 8, 1994, Argued ; April 26, 1995, Decided

No. 93-1260

**Reporter**

514 U.S. 549 \*; 115 S. Ct. 1624 \*\*; 131 L. Ed. 2d 626 \*\*\*; 1995 U.S. LEXIS 3039 \*\*\*\*; 63 U.S.L.W. 4343; 95 Cal. Daily Op. Service 3074; 8 Fla. L. Weekly Fed. S 752

UNITED STATES, PETITIONER v. ALFONSO LOPEZ, JR.

**Opinion by:** REHNQUIST

**Opinion**

**[\*551]  [\*\*1626]  [\*\*\*632]** CHIEF JUSTICE **REHNQUIST** delivered the opinion of the Court.

 [***LEdHN[1A]***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=&link=LEDHN1)[] [1A]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." [*18 U.S.C. § 922*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=)**[\*\*\*\*4]** [*(q)(1)(A) (1988 ed., Supp. V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). 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 . . . ." [*U.S. Const., Art. I, § 8, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=).

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. See [*Tex. Penal Code Ann. § 46.03(a)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8N6D-N5W2-8T6X-7279-00000-00&context=) (Supp. 1994). The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. [*18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). [[1]](#footnote-1)1

[Procedural history omitted.]

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *[Gregory](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=)* [*v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=) (internal quotation marks omitted). "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." **[\*\*\*\*7]** *Ibid.*

The Constitution delegates to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, **[\*553]** cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' **[\*\*1627]** commerce power in *[Gibbons](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=)* [*v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=):

"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 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." [*Id., at 196*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=). The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=).

"It is not intended to say that these words comprehend that commerce, which is completely internal, **[\*\*\*\*8]** 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 **[\*\*\*634]** 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." [*Id., at 194-195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=).

For nearly a century thereafter, the Court's [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) decisions dealt but rarely with the extent of Congress' power, and almost entirely with the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) as a limit on state legislation that discriminated against interstate commerce. See, *e. g.,* *[Veazie](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-K520-003B-H3PF-00000-00&context=)* [*v. Moor, 55 U.S. 568, 14 How. 568, 573-575, 14 L. Ed. 545 (1853)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-K520-003B-H3PF-00000-00&context=) (upholding a state-created steamboat monopoly **[\*554]** because it involved regulation of wholly internal commerce); *[Kidd](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXR0-003B-H17C-00000-00&context=)* [*v. Pearson, 128 U.S. 1, 17, 20-22, 32 L. Ed. 346, 9 S. Ct. 6 (1888)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GXR0-003B-H17C-00000-00&context=) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic **[\*\*\*\*9]** commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, American Constitutional Law 306 (2d ed. 1988). 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=). See *[Wickard](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)* [*v. Filburn, 317 U.S. 111, 121, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=) (describing development of [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, [*15 U.S.C. § 1 et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S9D-W4V2-8T6X-74X3-00000-00&context=) These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e. g.,* *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F4P0-003B-H2Y6-00000-00&context=)* [*v. E. C. Knight Co., 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F4P0-003B-H2Y6-00000-00&context=) ("Commerce **[\*\*\*\*10]** succeeds to manufacture, and is not part of it"); *[Carter](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9RW0-003B-739V-00000-00&context=)* [*v. Carter Coal Co., 298 U.S. 238, 304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9RW0-003B-739V-00000-00&context=) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) authorized such regulation. See, *e. g.,* *[Shreveport Rate Cases](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7G00-003B-H3HR-00000-00&context=)*[*, 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833 (1914)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7G00-003B-H3HR-00000-00&context=).

In *[A. L. A. Schechter Poultry Corp.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=)* [*v. United States, 295 U.S. 495, 550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=), the Court struck down regulations that **[\*555]** fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between **[\*\*1628]** direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=)*[*, at 548*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=). **[\*\*\*\*11]** Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly **[\*\*\*635]** were beyond Congress' reach.  *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=)*[*, at 546*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=). The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=)*[*, at 548*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=).

Two years later, in the watershed case of *[NLRB](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)* [*v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=), the Court upheld the National Labor Relations Act against a [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, at 36-38*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=) ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, at 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=).

**[\*\*\*\*12]** In *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)* [*v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=), the Court upheld the Fair Labor Standards Act, stating:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)*[*, at 118*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=).

**[\*556]** See also *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5MS0-003B-74W4-00000-00&context=)* [*v. Wrightwood Dairy Co., 315 U.S. 110, 119, 86 L. Ed. 726, 62 S. Ct. 523 (1942)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5MS0-003B-74W4-00000-00&context=) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. *[317 U.S. at 128-129](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, **[\*\*\*\*13]** stating:

"Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, at 125*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=).

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, at 127-128*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=).

*Jones & Laughlin Steel, Darby*, and *Wickard* ushered in an era of [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence that greatly expanded the previously defined **[\*\*\*636]** 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 **[\*\*\*\*14]** also reflected a view that earlier [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) **[\*557]** 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 **[\*\*1629]** 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." *[301 U.S. at 37](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*; see also *[Darby, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)*[*, at 119-120*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=) (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *[Wickard, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, at 125*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=) (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a **[\*\*\*\*15]** regulated activity sufficiently affected interstate commerce. See, *e. g.,* *[Hodel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)* [*v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-280, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=); *[Perez](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)* [*v. United States, 402 U.S. 146, 155-156, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=); *[Katzenbach](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=)* [*v. McClung, 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=); *[Heart of Atlanta Motel, Inc.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=)* [*v. United States, 379 U.S. 241, 252-253, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=). [[2]](#footnote-2)2

**[\*\*\*\*16]** Similarly, in *[Maryland](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)* [*v. Wirtz, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "the Court has ample power" to enforce. *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)*[*, at 196*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=), overruled on other grounds, *[National League of Cities](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9V70-003B-S20H-00000-00&context=)* [*v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9V70-003B-S20H-00000-00&context=), overruled by *[Garcia](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBW0-0039-N1M8-00000-00&context=)* [*v. San Antonio Metropolitan Transit* ***[\*558]*** *Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBW0-0039-N1M8-00000-00&context=). In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "all activities affecting commerce, even in the minutest degree, *[Wickard]*, may be regulated and controlled by Congress," *[392 U.S. at 204](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)* (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "neither here nor in *Wickard* has the Court declared that **[\*\*\*637]** Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *[id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)*[*, at 197, n. 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=). Rather, "the Court has said only that where **[\*\*\*\*17]** *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *[Perez, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)*[*, at 150*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=); see also *[Hodel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)*[*, at 276-277*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=). First, Congress may regulate the use of the channels of interstate commerce. See, *e. g.,* *[Darby](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)*[*, 312 U.S. at 114*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=); *[Heart of Atlanta Motel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=)*[*, at 256*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=) ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *[Caminetti](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6F80-003B-H1RV-00000-00&context=)* [*v. United States, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6F80-003B-H1RV-00000-00&context=))). 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 **[\*\*\*\*18]** from intrastate activities. See, *e. g.,* *[Shreveport Rate Cases](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7G00-003B-H3HR-00000-00&context=)*[*, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7G00-003B-H3HR-00000-00&context=); *[Southern R. Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8VH0-003B-H063-00000-00&context=)* [*v. United States, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8VH0-003B-H063-00000-00&context=) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *[Perez, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)*[*, at 150*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=) ("For example, the destruction of an aircraft ([*18 U.S.C. § 32*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5032-D6RV-H4YJ-00000-00&context=)), or . . . thefts from interstate shipments ([*18 U.S.C. § 659*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H02F-00000-00&context=))"). Finally, Congress' commerce authority includes the power to regulate those activities **[\*559]** having a substantial **[\*\*1630]** relation to interstate commerce, *[Jones & Laughlin Steel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, 301 U.S. at 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=), *i. e.*, those activities that substantially affect interstate commerce, *[Wirtz, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)*[*, at 196, n. 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=).

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=). Compare *[Preseault](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=)* [*v. ICC, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=), with *[Wirtz, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)*[*, at 196,* ***[\*\*\*\*19]*** *n. 27*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=) (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). The first two categories of authority may be quickly disposed of: [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) be justified as a regulation by which Congress has sought to protect an instrumentality **[\*\*\*638]** of interstate commerce or a thing in interstate commerce. Thus, if [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate **[\*\*\*\*20]** commerce. Examples include the regulation of intrastate coal mining; *[Hodel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)*, intrastate extortionate credit transactions, *[Perez, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)*, restaurants utilizing substantial interstate supplies, *[McClung, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=)*, inns and hotels catering to interstate guests, *[Heart of Atlanta Motel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=)*, and production **[\*560]** and consumption of homegrown wheat, *[Wickard](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)* [*v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=).These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the **[\*\*\*\*21]** remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

"One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. **[\*561]** **[\*\*\*\*22]** Home-grown wheat in this sense competes with wheat in commerce." *[317 U.S. at 128](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*.

[*Section 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is a criminal statute that by its terms has nothing to do with **[\*\*1631]** "commerce" or any sort of economic enterprise, however broadly one might define those terms. [[3]](#footnote-3)3 [*Section 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is not an essential **[\*\*\*639]** 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=)* [*v. Bass, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=), the Court interpreted former [*18 U.S.C. § 1202(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H0BN-00000-00&context=), which made it **[\*562]** a crime for a felon to "receive, posses[s], or transport in commerce or affecting commerce . . . any firearm." *[404 U.S. at 337](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=)*. The Court interpreted the possession component of [*§ 1202(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H0BN-00000-00&context=) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=)*[*, at 349*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=). The *Bass* Court set aside the conviction because although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=)*[*, at 347*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=). The Court thus interpreted the statute to reserve the constitutional question whether Congress could **[\*\*\*\*24]** regulate, without more, the "mere possession" of firearms. See *[id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=)*[*, at 339, n. 4*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DCC0-003B-S06T-00000-00&context=); see also *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JF10-003B-S4KF-00000-00&context=)* [*v. Five Gambling Devices, 346 U.S. 441, 448, 98 L. Ed. 179, 74 S. Ct. 190 (1953)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JF10-003B-S4KF-00000-00&context=) (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative"). Unlike the statute in *Bass*, [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, *e. g.,* *[Preseault](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=)* [*v.* ***[\*\*\*640]*** *ICC, 494 U.S. at 17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=), the Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of **[\*\*\*\*25]** gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. See *[McClung](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=)*[*, 379 U.S. at 304*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=); **[\*563]** see also *[Perez](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)*[*, 402 U.S. at 156*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=) ("Congress need [not] make particularized findings in order to legislate"). But to the **[\*\*1632]** extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. [[4]](#footnote-4)4

**[\*\*\*\*26]** The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. Cf. *[Fullilove](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7440-003B-S0X6-00000-00&context=)* [*v. Klutznick, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7440-003B-S0X6-00000-00&context=) (Powell, J., concurring). We agree, however, with the Fifth Circuit that importation of previous findings to justify [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of [*section 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) or its relationship to interstate commerce. Indeed, [*section 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." *[2 F.3d at 1366](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CVM0-003B-P3C3-00000-00&context=)*.

The Government's essential contention, *in fine*, is that we may determine here that [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. 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 **[\*\*\*\*27]** of violent **[\*564]** crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FDR0-008H-V4PC-00000-00&context=)* [*v. Evans, 928 F.2d 858, 862 (CA9 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FDR0-008H-V4PC-00000-00&context=). Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *[Heart of Atlanta Motel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=)*[*, 379 U.S. at 253*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=). 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 **[\*\*\*641]** concluded that [*§ 922(q)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) 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. See **[\*\*\*\*28]** Tr. of Oral Arg. 8-9. 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)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' **[\*565]** commerce power, such as family law or certain aspects of education. *Post*, at 624. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

JUSTICE BREYER focuses, for the **[\*\*\*\*29]** most part, on the threat that firearm possession in **[\*\*1633]** and near schools poses to the educational process and the potential economic consequences flowing from that threat. *Post*, at 619-624. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. [*Post, at 623*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) power, regulate activities that adversely affect the learning environment, then, *a fortiori*, 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," cf. *ibid.*, and that, in turn, has a substantial effect on interstate **[\*\*\*\*30]** commerce.

BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 629. Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "falling on the commercial **[\*\*\*642]** 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." *Ibid.* We do not doubt that Congress **[\*566]** has authority under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those **[\*\*\*\*31]** enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) always will engender "legal uncertainty." [*Post, at 630*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). As Chief Justice Marshall stated in *[McCulloch](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KRV0-003B-H0GC-00000-00&context=)* [*v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KRV0-003B-H0GC-00000-00&context=):

"The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *[Id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KRV0-003B-H0GC-00000-00&context=)*[*, at 405*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KRV0-003B-H0GC-00000-00&context=).

See also [*Gibbons v. Ogden, 9 Wheat., at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=) ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *[Marbury](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KWW0-003B-H16C-00000-00&context=)* [*v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KWW0-003B-H16C-00000-00&context=) **[\*\*\*\*32]** (Marshall, C. J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

In *[Jones & Laughlin Steel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, 301 U.S. at 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=), we held that the question of congressional power under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) "is necessarily one of degree." To the same effect **[\*567]** is the concurring opinion of Justice Cardozo in *Schechter Poultry:*

"There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *[295 U.S. at 554](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BB30-003B-74NV-00000-00&context=)***[\*\*1634]** (quoting *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VK50-003B-K41W-00000-00&context=)* [*v. A. L. A. Schechter Poultry Corp., 76 F.2d 617, 624 (CA2 1935)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VK50-003B-K41W-00000-00&context=) (L. Hand, J., concurring)).

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school **[\*\*\*\*33]** zone is in no sense an economic activity that might, through repetition elsewhere, substantially **[\*\*\*643]** 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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. See [*supra, at 556-558*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DSX0-003B-70PM-00000-00&context=). 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, cf. [*Gibbons v. Ogden, supra, at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=), and that there never will be a distinction between what is **[\*568]** truly national and what is truly local, **[\*\*\*\*34]** cf. *[Jones & Laughlin Steel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, at 30*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=). This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

*Affirmed*.

**Concur by:** KENNEDY; THOMAS

**Concur**

JUSTICE **KENNEDY**, with whom JUSTICE **O'CONNOR** joins, concurring.

The history of the judicial struggle to interpret the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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.

[Discussion of precedent omitted.]

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

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role **[\*\*1638]** in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. See, *e. g.,* *[Prize Cases](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JYS0-003B-H2T1-00000-00&context=)*[*, 67 U.S. 635, 2 Black 635, 17 L. Ed. 459 (1863)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JYS0-003B-H2T1-00000-00&context=); *[Youngstown Sheet & Tube Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JHH0-003B-S1YS-00000-00&context=)* [*v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JHH0-003B-S1YS-00000-00&context=); *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBG0-003B-S1WP-00000-00&context=)* [*v. Nixon, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CBG0-003B-S1WP-00000-00&context=); *[Buckley](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B270-003B-S4B9-00000-00&context=)* [*v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B270-003B-S4B9-00000-00&context=); **[\*\*\*\*48]** *[INS](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4MT0-003B-S3TP-00000-00&context=)* [*v. Chadha, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4MT0-003B-S3TP-00000-00&context=); *[Bowsher](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-60P0-0039-N2XD-00000-00&context=)* [*v. Synar, 478 U.S. 714, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-60P0-0039-N2XD-00000-00&context=); [*Plaut v. Spendthrift Farm, Inc., 514 U.S. 211*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78F0-003B-R3NH-00000-00&context=). These standards are by now well accepted. Judicial review is also established beyond question, *[Marbury](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KWW0-003B-H16C-00000-00&context=)* [*v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KWW0-003B-H16C-00000-00&context=), and though we may differ when applying its principles, see, *e. g.,* *[Planned Parenthood of Southeastern Pa.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KDG0-003B-R206-00000-00&context=)* [*v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KDG0-003B-R206-00000-00&context=), its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Foreword, 86 **[\*576]** Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power **[\*\*\*\*49]** surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also *[Gregory](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=)* [*v. Ashcroft, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=) ("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. . . . In the tension between federal and state power lies the promise of liberty"); *[New York](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=)* [*v. United States, supra, at 181*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=) ("The Constitution **[\*\*\*649]** divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive **[\*\*\*\*50]** from the diffusion of sovereign power'") (quoting *[Coleman](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRP0-003B-R0FY-00000-00&context=)* [*v. Thompson, 501 U.S. 722, 759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRP0-003B-R0FY-00000-00&context=) (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of **[\*577]** the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *[FTC](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XF80-003B-R3S0-00000-00&context=)* [*v. Ticor Title Ins. Co., 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XF80-003B-R3S0-00000-00&context=). Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political **[\*\*\*\*51]** responsibility would become illusory. Cf. *[New York](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=)* [*v. United States, supra, at 155-169*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=); *[FERC](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5H60-003B-S53J-00000-00&context=)* [*v. Mississippi, 456 U.S. 742, 787, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5H60-003B-S53J-00000-00&context=) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government answerable **[\*\*1639]** to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered, **[\*\*\*\*52]** " *ibid.* Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, see The Great Speeches and **[\*578]** Orations of Daniel Webster 227-272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1-3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper **[\*\*\*650]** federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete **[\*\*\*\*53]** renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *[Public Citizen](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9W90-003B-4143-00000-00&context=)* [*v. Department of Justice, 491 U.S. 440, 466, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9W90-003B-4143-00000-00&context=); *[Rostker](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-69R0-003B-S080-00000-00&context=)* [*v. Goldberg, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-69R0-003B-S080-00000-00&context=), 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.

[Additional discussion of precedent omitted.]

**[\*583]** 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. See U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics 73, 104 (NCES 94-115, 1994) (Tables 63, 94). Each **[\*\*\*\*62]** 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 **[\*\*1642]** of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *[New York](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=)* [*v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=), or to organize its governmental functions in a certain way, cf. *[FERC](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5H60-003B-S53J-00000-00&context=)* [*v. Mississippi, 456 U.S. at 781*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5H60-003B-S53J-00000-00&context=) (O'CONNOR, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent [*Tenth Amendment*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T552-8T6X-7328-00000-00&context=) cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), that interference contradicts the federal balance **[\*\*\*\*63]** the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

**[\*584]** JUSTICE THOMAS, concurring.

The Court today properly concludes that the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844. 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=). In a future case, we ought to temper our [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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.

**[\*\*\*654]** We have said that Congress may regulate not only "Commerce . . . among the several States," [*U.S. Const., Art. I, § 8, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), 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 **[\*\*\*\*64]** applied the substantial effects test for the past 60 years, we *always* have rejected readings of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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. See *[New York](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=)* [*v. United States, 505 U.S. 144, 155, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=) ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers'") (quoting *[Gregory](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=)* [*v. Ashcroft, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KRV0-003B-R0G7-00000-00&context=); *[Maryland](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)* [*v. Wirtz, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=); *[NLRB](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)* [*v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=). Cf. *[Chisholm](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KYD0-003B-H1HG-00000-00&context=)* [*v. Georgia, 2 U.S. 419, 2 Dall. 419, 435, 1 L. Ed. 440 (1793)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KYD0-003B-H1HG-00000-00&context=) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal **[\*585]** Government has nothing approaching a police power. Compare [*ante,* ***[\*\*\*\*65]*** *at 556-558,*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) with [*post, at 624*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=).

[Discussion of dissent omitted.]

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) without totally rejecting **[\*\*1643]** our more recent [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) and an analysis of our early case law. My goal is **[\*\*\*\*66]** simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see [*post, at 602*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *[Jones & Laughlin Steel Corp., supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*[*, at 37*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=).

**[\*\*\*655]** I

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary **[\*586]** of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com -- "with"; merci -- "merchandise**[\*\*\*\*67]** "). In fact, when Federalists and Anti-Federalists discussed the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); [[5]](#footnote-5)1 *id.*, No. 7, at 39-40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); *id.*, No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in [*id., at 107*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CW50-003B-S3KJ-00000-00&context=).

As one would expect, the term "commerce" was used in contradistinction to productive **[\*\*\*\*68]** activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, *e. g.*, The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.*, No. 21, at 133 (distinguishing commerce, arts, and industry); *id.*, No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions **[\*587]** were made in the state ratification conventions. See, *e. g.*, 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); [*id., at 336*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CYV0-003B-73W7-00000-00&context=) (M. Smith at New York convention).

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, **[\*\*\*\*69]** but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According **[\*\*\*656]** to that Clause, "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." [*U.S. Const., Art. I, § 9, cl. 6*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PPB2-D6RV-H31X-00000-00&context=). Although it is possible to **[\*\*1644]** conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) [[6]](#footnote-6)2 does not state that Congress may **[\*588]** "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily **[\*\*\*\*70]** prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

In addition to its powers under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power **[\*\*\*\*71]** to regulate commerce among the several States. [*U.S. Const., Art. I, § 8, cl. 18*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H30X-00000-00&context=). But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify **[\*589]** that Congress can regulate international trade and commerce **[\*\*\*\*72]** with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, § 8 (including portions of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An **[\*\*\*657]** interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, § 8. [[7]](#footnote-7)3

**[\*\*\*\*73]** Indeed, if a "substantial effects" test can be appended to the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), why not to every other power of the Federal Government? There is no reason for singling out the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) 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.

**[\*\*1645]** Our construction of the scope of congressional authority has the additional problem of coming close to turning the [*Tenth Amendment*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T552-8T6X-7328-00000-00&context=) 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.

**[\*590]** II

The exchanges during the ratification campaign reveal the relatively limited reach of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal **[\*\*\*\*74]** Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other -- that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("Discerning citizens are well aware that the mechanic and manufacturing **[\*\*\*\*75]** arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that **[\*\*\*658]** the merchant is their natural patron and friend"); [*id., at 221*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=) ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as **[\*591]** a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, [*id., at 152*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KF90-003B-R26X-00000-00&context=) (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, **[\*\*\*\*76]** the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

"The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

[Additional evidence omitted.]

In short, the Founding Fathers were well aware of what the principal dissent calls "'economic . . . realities.'" See **[\*593]** [*post, at 625*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) (BREYER, J.) (quoting *[North American Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=)* [*v. SEC, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=). Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless **[\*\*\*\*79]** respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

III

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *[Gibbons](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=)* [*v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=), established that Congress may control all local activities that "significantly affect interstate commerce," [*post, at 615*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). And, "with the exception of one wrong turn subsequently corrected," this has been the "traditional" method of interpreting the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=). *[Post](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=)*[*, at 631*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) (citing *Gibbons* and *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)* [*v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=).

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

A [Discussion of Gibbons omitted.]

B

I am aware of no cases prior to **[\*\*\*\*85]** the New Deal that characterized the power flowing from the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *[Cohens](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KR80-003B-H0CY-00000-00&context=)* [*v. Virginia, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KR80-003B-H0CY-00000-00&context=), noted that Congress had "no general right to punish murder committed within any of the States," [*id., at 426*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KN50-003B-H03X-00000-00&context=), and that it was "clear that congress cannot punish felonies generally," [*id., at 428*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KN50-003B-H03X-00000-00&context=). The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers -- for instance, over the District of Columbia. [*Id., at 426*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BBG0-003B-74SN-00000-00&context=). Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any **[\*597]** other subject of federal concern) was irrelevant to the question of congressional power. [[8]](#footnote-8)6

[Discussion of cases omitted.]

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=). [[9]](#footnote-9)7 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.

**[\*\*\*\*90]** IV

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further **[\*600]** flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. [*Post, at 624*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threatening legal uncertainty in **[\*\*1650]** an area of law that . . . seemed reasonably well settled." [*Post, at 630*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). The one advantage of the dissent's standard is certainty: It is certain that under its analysis everything may be regulated under the guise of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=).

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether **[\*\*\*\*91]** the class of activities *as a whole* substantially affects interstate commerce, not whether **[\*\*\*664]** any specific activity within the class has such effects when considered in isolation. See *[Maryland](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)* [*v. Wirtz, 392 U.S. at 192-193*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=) (if class of activities is "'within the reach of federal power,'" courts may not excise individual applications as trivial) (quoting *[Darby](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)*[*, 312 U.S. at 120-121*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently **[\*\*\*\*92]** would be constitutional. **[\*601]** Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

V

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. [[10]](#footnote-10)8 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. [[11]](#footnote-11)9 The analysis also suggests that we ought to temper our [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence.

**[\*602]** **[\*\*\*\*93]** Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider **[\*\*\*665]** the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=)'s boundaries simply cannot be "defined" as being "'commensurate with the national needs'" or self-consciously intended **[\*\*1651]** to let the Federal Government "'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" See [*post, at 625*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) (BREYER, J., dissenting) (quoting *[North American Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=)* [*v. SEC, 327 U.S. at 705*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=)). Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

**Dissent by:** STEVENS; SOUTER; BREYER

**Dissent**

JUSTICE **STEVENS**, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States, **[\*\*\*\*94]** " [*U.S. Const., Art. I, § 8, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), is vitally dependent on the character of the education of our children. I therefore agree entirely with JUSTICE BREYER's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools -- just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with JUSTICE SOUTER's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. Cf. *[Dolan](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-JV00-003B-R52D-00000-00&context=)* [*v. City of Tigard, 512 U.S. 374, 405-411, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-JV00-003B-R52D-00000-00&context=) (STEVENS, J., dissenting). I believe, however, that the Court's extraordinary decision merits this additional comment.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, **[\*603]** 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 **[\*\*\*\*95]** market for the possession of handguns by school-age children is, distressingly, substantial. [[12]](#footnote-12)\* 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*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), 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." *[Hodel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)* [*v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=); *[Preseault](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=)*[***[\*\*\*666]*** *v. ICC, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=); **[\*\*\*\*96]** see *[Maryland](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=)* [*v. Wirtz, 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FJ30-003B-S09D-00000-00&context=), quoting *[Katzenbach](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=)* [*v. McClung, 379 U.S. 294, 303-304, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PY-00000-00&context=). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *[Hodel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)* [*v. Virginia Surface Mining & Reclamation Assn., Inc., supra, at 276*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=), quoting *[Heart of Atlanta Motel, Inc.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=)* [*v. United States, 379 U.S. 241, 262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GRN0-003B-S2PX-00000-00&context=); see also *[Preseault](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=)* [*v. ICC, supra, at 17*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7Y20-003B-41DF-00000-00&context=). [[13]](#footnote-13)1

**[\*604]** The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *[FCC](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-K4V0-003B-R3SK-00000-00&context=)* [*v. Beach Communications, Inc., 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-K4V0-003B-R3SK-00000-00&context=). In judicial review under the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), 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 **[\*\*1652]** from Congress's political accountability in dealing with matters open to a wide range of possible choices. **[\*\*\*\*97]** See *[id.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-K4V0-003B-R3SK-00000-00&context=)*[*, at 313-316*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-K4V0-003B-R3SK-00000-00&context=); *[Hodel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)* [*v. Virginia Surface Mining & Reclamation Assn., Inc., supra, at 276*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=); *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8RX0-003B-709T-00000-00&context=)* [*v. Carolene Products Co., 304 U.S. 144, 147, 151-154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8RX0-003B-709T-00000-00&context=); cf. *[Williamson](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JBT0-003B-S267-00000-00&context=)* [*v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461 (1955)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JBT0-003B-S267-00000-00&context=).

It was not ever thus, however, as even a brief overview of [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's **[\*\*\*\*98]** decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

I [Supporting evidence omitted.]

II [Supporting evidence omitted.]

III

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions **[\*615]** not quite in **[\*\*\*\*117]** gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. *[301 U.S. at 41-43](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9C70-003B-721F-00000-00&context=)*. But we know what happened.

I respectfully dissent.

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

The issue in this case is whether the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. [*18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). 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.

I

In reaching this conclusion, I apply three basic principles of [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) interpretation. First, the power to "regulate Commerce . . . among the several States," [*U.S. Const., Art. I, § 8, cl. 3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=), encompasses the power to regulate local activities insofar as they significantly **[\*\*\*\*118]** affect interstate commerce. [Caselaw omitted.]

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). [Caselaw omitted.]

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the **[\*617]** determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. See *[Hodel, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)*[*, at 276-277*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=). Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding. [*Ante, at 557*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=) (emphasis added).

[Discussion of precedent omitted.]

[W]e must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign **[\*\*\*\*124]** commerce"? [*18 U.S.C. §§ 922(q)(1)(F)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=), [*(G)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *[Swift & Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=)* [*v. United States, 196 U.S. 375, 398, 49 L. Ed. 518, 25 S. Ct. 276* ***[\*619]*** *(1905)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- **[\*\*\*676]** make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, *infra*, at 631, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

[Discussion of economic links omitted.]

Specifically, Congress could have found that gun-related violence **[\*\*\*\*132]** near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, *e. g.*, National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, *e. g.*, Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *[Perez](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=)* [*v. United States, 402 U.S. at 157*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-DM70-003B-S366-00000-00&context=), and that unfair labor practices pose **[\*\*\*679]** to instrumentalities of commerce, see *[Consolidated Edison Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8CT0-003B-74NT-00000-00&context=)* [*v. NLRB, 305 U.S. 197, 221-222, 83 L. Ed. 126, 59 S. Ct. 206 (1938)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8CT0-003B-74NT-00000-00&context=). As I have pointed out, [*supra, at 618*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-VK50-003B-K41W-00000-00&context=), Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." [*18 U.S.C. §§ 922*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=)**[\*\*\*\*133]** [*(q)(1)(F)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=), [*(G)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=). The violence-related facts, the educational **[\*624]** facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see [*supra, at 615-617*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JJJ0-003B-H0SG-00000-00&context=); [*infra, at 627-628*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=), the sufficiency of the constitutionally necessary [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

[Omitted section.]

The majority's holding -- that [*§ 922*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=) falls outside the scope of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) -- 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.

[Caselaw discussion omitted.]

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making **[\*\*\*\*140]** a critical distinction between "commercial" and noncommercial "transaction[s]." [*Ante, at 561*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=). That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give

**[\*628]** "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *[Wickard, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, at 120*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=).

See also *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)* [*v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=) (overturning the Court's distinction between "production" and "commerce" in the child labor case, *[Hammer](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5S30-003B-H0H7-00000-00&context=)* [*v. Dagenhart, 247 U.S. 251, 271-272, 62 L. Ed. 1101, 38 S. Ct. 529 (1918))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5S30-003B-H0H7-00000-00&context=); *[Swift & Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=)* [*v. United States, 196 U.S. at 398*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=) **[\*\*\*682]** (Holmes, J.) ("Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, **[\*\*\*\*141]** the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez, McClung*, and *Wickard* as involving intrastate "economic activity," [*ante, at 559*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S42-78N0-003B-R3NW-00000-00&context=), the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "*though it may not be regarded* **[\*\*1664]** *as commerce*," could nevertheless be regulated -- "*whatever its nature*" -- so long as "it exerts a substantial economic effect on interstate commerce." *[Wickard, supra](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, at 125*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=) (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez* -- in **[\*\*\*\*142]** each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a **[\*629]** practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See [*supra, at 620, 622*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RGS-NNX0-003B-R004-00000-00&context=). When, and to what extent, does its involvement make education commercial? Does the number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *[Hodel](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=)* [*v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6B00-003B-S0DY-00000-00&context=).

**[\*\*\*\*143]** Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $ 230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our $ 5.5 trillion gross domestic product for that year. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' **[\*\*\*683]** salaries. See U.S. Dept. of Education 4, 7 (1993). These expenditures enable schools to provide a valuable service -- namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources **[\*630]** they spend, and whether they can be restructured to achieve **[\*\*\*\*144]** greater returns. See, *e. g.*, S. Rep. No. 100-222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185-229 (school choice); Hanushek 85-122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). Why could Congress, for [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, *e. g.*, [*18 U.S.C. § 844(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H04N-00000-00&context=) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, *e. g.*, [*18 U.S.C. § 922*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8SG9-5042-D6RV-H05V-00000-00&context=)**[\*\*\*\*145]** (*o*)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3B30-0039-M1G4-00000-00&context=)* [*v. Staszcuk, 517 F.2d 53, 57-58 (CA7 1975)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3B30-0039-M1G4-00000-00&context=) (en **[\*\*1665]** banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *[Wickard](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=)*[*, 317 U.S. at 127-128*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5300-003B-73MS-00000-00&context=), (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather **[\*631]** than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

IV

In sum, to find this legislation within the scope of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) would permit "Congress . . . **[\*\*\*\*146]** to act in terms of economic . . . realities." *[North American Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=)* [*v. SEC, 327 U.S. at 705*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JXF0-003B-S2TD-00000-00&context=) (citing *[Swift & Co.](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=)* [*v. United States, 196 U.S. at 398*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=) (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See [*Gibbons v. Ogden, 9 Wheat., at 195*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-KP70-003B-H07M-00000-00&context=) (holding that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally**[\*\*\*684]** "); *[United States](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=)* [*v. Darby, 312 U.S. at 116-117*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6GP0-003B-719R-00000-00&context=) ("The conclusion is inescapable that *Hammer* v. *Dagenhart* [the child labor case] was a departure from the principles which have prevailed in the interpretation of the [*Commerce Clause*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-PP62-D6RV-H2XS-00000-00&context=) both before and since the decision . . . . It should be and now is overruled"). Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce **[\*\*\*\*147]** they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

1. 1The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921(a)(25). [↑](#footnote-ref-1)
2. 2[Footnote omitted.] [↑](#footnote-ref-2)
3. 3Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" [Extensive citations omitted.] [↑](#footnote-ref-3)
4. 4[Footnote omitted.] [↑](#footnote-ref-4)
5. 1[Footnote omitted.] [↑](#footnote-ref-5)
6. 2[Footnote omitted.] [↑](#footnote-ref-6)
7. 3[Footnote omitted.] [↑](#footnote-ref-7)
8. 6[Omitted.] [↑](#footnote-ref-8)
9. 7[Omitted.] [↑](#footnote-ref-9)
10. 8Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean. [↑](#footnote-ref-10)
11. 9Nor can the majority's opinion fairly be compared to *[Lochner](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BJ40-003B-H3FB-00000-00&context=)* [*v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BJ40-003B-H3FB-00000-00&context=). [Discussion omitted.] [↑](#footnote-ref-11)
12. \*[Omitted.] [↑](#footnote-ref-12)
13. 1[Omitted.] [↑](#footnote-ref-13)