

SUPREME COURT OF THE UNITED STATES

No. 07-0268

United States

v.

William DeNolf

On Appeal from the
Seventeenth Circuit Court of Appeals
ORDER OF THE COURT ON SUBMISSION

Having duly considered the written briefs of counsel for the parties and the Records of the Seventeenth Court of Appeals, this court finds that the resolution of this case rests upon interpretation of statutory and constitutional materials.

IT IS THEREFORE ORDERED that counsel appear before this court to present oral argument on the following issues:

(1) Whether the Gun Free School Zone Act of 1997 (18 USC 922 q) applies to DeNolf and whether it violates the Second Amendment to the United States Constitution;

AND

(2) Whether the United States government, in enacting 18 USC 922 q, exceeded its constitutional powers granted by the Commerce Clause, Article I, Section 8, Clause 3

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTEENTH CIRCUIT**

No. 06-22324445

UNITED STATES of America, Petitioner-Appellant

v.

William DENOLF, Defendant-Appellee

Argued June 14, 2007

Decided July 3, 2007

Rehearing Denied July 27, 2007

Appeal from the United States District Court for the Central District of Olympus, Judge Caroline Bresson, presiding. (OL No. 22-32-38-44-45).

Before Ruth Butler, Amy Medeiros, and Kenneth Grobe, Circuit Judges.

Opinion of the Court filed by Circuit Judge Medeiros.

Concurring/Dissenting opinion filed by Circuit Judge Butler.

OPINION OF THE COURT

Medeiros, A., Circuit Judge:

Defendant William DeNolf (“DeNolf”) moved to dismiss Indictment, OL No. 22-32-38-44-45, claiming the Gun Free School Zone Act of 1997, 18 USC 922(q), barring possession of a firearm on school grounds or while within 1000 feet of a school, does not apply to his conduct, that it exceeds congressional authority under the Commerce Clause (U.S. Const. Art. I, Sec 8, Cl. 3), and that it violates the Second Amendment to the U.S. Constitution. The Federal District Court for the Central District of Olympus, Judge Caroline Bresson presiding, granted DeNolf’s Motion to Dismiss the Indictment. The United States Appealed. For the reasons stated below, we **AFFIRM** the Order of Dismissal.

**I
BACKGROUND**

The following facts were agreed to by both parties. DeNolf and his spouse home schooled their

three children, ages 7, 9, and 12. The DeNolfs complied with the home school laws of the state of Olympus, and had a valid permit as required by provisions of the Olympus Home School Registration Act of 1982.

On February 18, 2006, Pantego Police were summoned to the DeNolf residence to investigate a public report of gunshots. The Police Report indicates investigating officers determined DeNolf was a part-time gunsmith who manufactured firearms in his home workshop and also, on occasion, cleaned and repaired firearms of various customers.

DeNolf granted Pantego Police permission to enter his residence/business and to examine the firearm production and repair area. En route to the workshop, DeNolf commented that firearms had to be discharged to assure their status as fully repaired and operational. DeNolf also explained that gun training and self defense was part of the curriculum that he and his wife had developed for their children's home-school program, and that being trained in how to discharge firearms was part of that training. DeNolf discussed how his children were allowed to discharge firearms—under his strict supervision—as part of this education. He also emphasized that the self-defense and firearms usage component of his children's home schooling was not part of the home schooling regiment that had been approved by the state of Olympus. He claimed that, to his knowledge, state officials were unaware that he and his wife had integrated firearms training and self-defense into their home schooling program (something that state officials later confirmed).

In examining the gunsmith area, police officers noted over two hundred firearms lying about the work area in various states of assembly and condition. Several of the guns were loaded with ammunition. When asked how many of the firearms were those of customers, DeNolf answered, "I have built about one hundred fifty; and about forty belong to customers." The police discovered that DeNolf manufactured and repaired non-automatic and semi-automatic long-barrel rifles and shotguns and pistols. DeNolf noted that his children's school room was immediately adjacent to the unlocked workshop, and that they were in the workshop when he discharged two repaired firearms into a drum filled with sand. After observing the police officers investigating the contents of his gun shop, DeNolf stated: "I will keep the windows closed to keep down the noise." The police noted that there were no locks on the doors and windows to the gunsmith area, and explained to DeNolf that this posed a danger to his children. DeNolf explained that his children were well behaved, and had been strictly forbidden from entering the gunsmith room unless accompanied by Mr. DeNolf.

The state of Olympus does not regulate firearms and has no requirement that individuals have a license to possess, use, discharge or manufacture firearms. Because the officers were uncertain whether any offenses of law had occurred, DeNolf was not taken into custody. The Pantego Police chief submitted a report to the City Prosecutor, who, after a brief examination of firearms laws, determined that 18 USC 922 q had been violated; he subsequently referred the matter to the US Attorney for the Central District of Olympus.

On May 3, 2006, the US Attorney for the Central District of Olympus subpoenaed the business records of DeNolf. These records ran from April 1, 2003 (the date that DeNolf began his home-

gun business) until April 30, 2006. A careful examination of these records revealed that seven of the three hundred and four customers of DeNolf resided in East Dakota, a neighboring state. Four of these customers purchased guns manufactured by DeNolf, and three had guns (guns that were not manufactured by DeNolf) cleaned and repaired by DeNolf. One of these customers purchased a tiny, single-shot “Saturday Night Special” that DeNolf had manufactured out of a high strength polymer that cannot be detected by a metal detector. DeNolf’s customers learned about his gun business from friends and acquaintances; DeNolf did not purchase advertising. Customers came to DeNolf’s home to deliver and pick-up firearms that DeNolf had built or repaired, and they always paid DeNolf in cash.

The facts also demonstrate that none of the supplies used by DeNolf to manufacture, repair and clean guns are produced or distributed by sources outside the state of Olympus. However, about 20 percent of the component parts to these supplies come from manufacturers outside the state of Olympus. For example, a solvent produced by the Olympus Solvent Corp. that is used by DeNolf to clean guns contains a chemical produced in the state of California. Similarly, the gun lubricant used by DeNolf contains oil that has been imported from outside the United States and that has been refined by a manufacturer located in Texas. An independent audit by a nationally renowned accounting firm demonstrates that DeNolf’s home-gun business injects just over \$300.00 annually into the interstate economy. The audit also indicates that DeNolf’s home-gun business has annual gross revenue of approximately \$10,000. DeNolf is in full compliance with all IRS tax laws.

On June 5, 2006, DeNolf was indicted by the Federal Grand Jury for violating provisions of 18 USC 922 (q). On September 13, 2006, DeNolf moved to dismiss the indictment, citing improper interpretation of 18 USC 922 (q) and violations of the U.S. Constitution. On October 4, 2006, Judge Bresson conducted a hearing on the statutory and constitutional questions. On January 5, 2007, Judge Bresson granted the Order for Dismissal. The Government then appealed.

II STATUTORY INTERPRETATION

Unlike the lower court, and over the defendant’s objections, we conclude that 18 USC 922 q applies to DeNolf’s conduct. DeNolf was in possession of firearms within a school zone, and none of the exceptions specified in the act apply to the conduct in which he engaged. He and his wife were operating a school as defined by state law, and his home-gun business was being conducted on the grounds of the school. DeNolf was not licensed by the state to possess, use, discharge, manufacture or trade in firearms because the state of Olympus does not have any firearms licensing requirements. Several of the firearms were loaded at the time of the police search, and it is clear that others were loaded at other times in order for DeNolf to test fire weapons that he had repaired or manufactured and to train the DeNolf’s children as part of their self defense and firearms training.

We reject DeNolf’s argument that 18 USC 922 q (2) (B) (iv) and 18 USC 922 q (3) (B) (ii) apply because the self defense and firearms training aspect of the DeNolf’s home school program was not recognized or on record with state officials who had, pursuant to the Olympus Home School

Registration Act of 1982, issued the home school license to the DeNolfs. We decline to accept DeNolf's construction of 18 USC 922 q that he can, unbeknownst to state education officials, unilaterally add elements to his children's home schooling program that would qualify him to take refuge under the exceptions afforded by 18 USC 922 q. Consequently, the government should be allowed to prosecute DeNolf under 18 USC 922 q unless we conclude that the statutory scheme, as applied to DeNolf, violates provisions of the United States Constitution.

III SECOND AMENDMENT ANALYSIS

The Second Amendment provides:

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed”

Relying upon two federal appellate court decisions, *Parker v. District of Columbia* No. 04-7041 (D.C. Cir., March 9, 2007) and *U.S. v. Emerson* 270 F.3d 203 (5th Cir. 2001), *cert. den.*, 536 U.S. 907 (2002), a state supreme court decision, *Rohrbaugh v. State* 607 S.E.2d 404 (W. Va. 2004), and a recent interpretation of the Second Amendment offered by the Office of Legal Counsel, <http://www.usdoj.gov/olc/secondamendment2.pdf>, DeNolf claims an individual right to possess a firearm. As such, he argues that 18 USC 922 q violates the Second Amendment to the United States Constitution. We agree.

The D.C. Circuit in *Parker* examined the legal meaning of various phrases of the Second Amendment and the historical roots of the right to possess firearms. The court held unconstitutional a District of Columbia Ordinance as it applied to the possession of a handgun inside one's home. The *Parker* Court explained:

[W]e conclude that the Second Amendment protects an individual right to keep and to bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense.

In *Parker*, the government claimed that the Second Amendment restricted the national government from placing constraints and restrictions upon state governments as the latter attempted to organize militias to provide for the security of the state. The government argued that the Second Amendment provides states with a collective right to organize state militias; the Amendment does not provide for an individual right to possess firearms outside of a well-regulated state militia. However, drawing upon text, structure, and history, the *Parker* majority rejected the government's "collective-rights" interpretation of the Second Amendment, and instead supported the "individual-rights" perspective advocated by Parker.

DeNolf also urges reliance upon *Emerson*, a case that concerned an alleged violation of another of the "Brady laws," 18 USC 922(g)(8), and a decision that DeNolf argues also supports the individual-rights interpretation of the Second Amendment. After a careful analysis of the legal

and scholarly history of the Second Amendment, the *Emerson* court explained that:

. . . there is no need to torture the meaning of its substantive guarantee into the collective rights or sophisticated collective rights model which is so plainly inconsistent with the substantive guarantee's text, its placement within the bill of rights and the wording of the other articles thereof and of the original Constitution as a whole. (at ____). . . . [The court held that] the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification . (at ____)

In a nod a bit more toward the government, the D.C. Circuit concluded in *Parker* that the government can pass reasonable regulations on conduct relating to guns, so long as those regulations “do not impair the core conduct upon which the right was premised” (at ____).

We agree with the *Parker* and the *Emerson* opinions that an individual has a fundamental right to possess firearms. As is true with other fundamental rights (e.g., those protected by the First and Fourth Amendments), the Second Amendment should not be interpreted as an absolute. Consequently, we think that strict scrutiny is the appropriate standard of review in cases involving challenges to government regulations that impinge on the individual’s right to bear arms. Only the most compelling governmental interests justify laws intruding on this right. Moreover, such laws must be narrowly tailored so that they promote the government’s interests while placing the fewest restrictions possible on an individual’s right to possess firearms.

While we agree that protecting children from gun violence while they attend school is a compelling state interest, we do not believe that 18 USC 922 q is narrowly tailored to promote that interest. There are less restrictive means available for the government to attain its policy goals. For instance, the government could require that individuals who want to possess firearms within a school zone acquire a license. These licenses might be restricted to only those individuals who can complete a rigorous instructional program and who can demonstrate that they do not pose a risk to school children as a result of their possessing firearms within a school zone. In addition, the government might impose severe penalties on individuals who are not licensed to possess firearms within a school zone, or who use firearms in inappropriate ways within such zones. These are just examples of more narrowly tailored laws that would effectively accomplish the government’s goal of protecting children who are attending school.

IV COMMERCE CLAUSE ANALYSIS

DeNolf claims Congress exceeded its authority under the Commerce Clause in enacting 18 USC 922(g)(8), citing *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 US 848 (2000). We agree. The statute at issue in the case before us reflects Congress’ effort to revise the one struck down in *Lopez*, and satisfy the Court that a substantial and rational connection exists between commerce and the regulated conduct. However, today we hold that the statute as revised does little to alleviate those concerns.

In its most recent Commerce Clause decisions, the United States Supreme Court addressed concerns that Congress' use of its commerce power has eroded the balance between federal and state power. Yet, such worries are not new. Writing for the *Lopez* Court, Chief Justice Rehnquist noted that as early as 1937, the Court stated in *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937) that powers granted to Congress under the commerce clause:

may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U. S., at 37.

This doctrine has guided the Court's recent decisions. In them, the Court has limited the power of Congress to regulate when it is unable to identify a rational basis for concluding that the thing regulated substantially effects interstate economic activity, particularly where that thing traditionally falls within powers reserved to the states. *Daniel v. Paul* 395 U.S. 298 (1969); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-253 (1964).

In *Jones v. United States*, 529 US 848, 2000, the Court considered a federal statute making it a crime to "maliciously damag[e] or destro[y], ... by means of fire or an explosive, any building ... used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" 529 U.S. at 848. That interpretation which extended prosecution under the act to arson of a private residence was found to exceed "the authority vested in Congress under the Commerce Clause." In *United States v. Morrison*, 529 U.S. 598 (2000), the court held that Congress exceeded the limitations of the Commerce Clause in enacting the Violence Against Women Act (VAWA) because it could not demonstrate, even through reference to an aggregate effect, that violence against women substantially effected interstate commerce. In holding the VAWA unconstitutional, the Court reaffirmed what it had stated as dicta in *Jones & Laughlin Steel*—the Court has said only that where 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. It is the substantial relation that determines whether the regulation withstands constitutional scrutiny.

In *Gonzales v. Raich* (2005), the Supreme Court rejected a claim that the federal government could not prosecute under its drug laws a person who was growing marijuana for personal consumption (in an effort to alleviate certain medical conditions) in a state where it was legal for some individuals to do so for medicinal purposes. However, that decision rested on a narrow exception that the Supreme Court had identified in *Morrison*. Under that exception, the federal government can regulate activities that are intrastate in nature if such regulation is necessary to implement a broad regulatory program that is legitimately based on the government's commerce clause powers. The decision in *Raich* was not based on the government's powers to regulate intrastate activities if such activities, when aggregated with the similar activities of many other individuals, had a substantial effect on interstate commerce. In fact, given the decision of the United States Supreme Court in *Lopez* and its subsequent commerce clause cases, the legitimacy of *Wickard* and its aggregation principle remains in serious doubt.

Thus, the revisions apparent in this statute notwithstanding, we find the logic of the *Lopez* Court controlling. In that case, Congress was determined to have exceeded its authority in enacting the Gun Free School Zones Act barring firearms near schools. In *Lopez*, the Supreme Court identified three broad categories of legislation permitted under the Commerce Clause: (1) regulation of “the use of the channels of interstate commerce,” *Heart of Atlanta Motel, supra*, at 256, (2) regulation and protection of “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and (3) regulation of “activities that substantially affect interstate commerce.” See *Lopez*, 514 U.S. 549, ____ (1995).

The *Lopez* court concluded (at ____):

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra*, at 8. 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 . . .

The government has demonstrated that some of the guns manufactured and repaired by DeNolf crossed state boundaries and that his business has effects on interstate commerce. Congress found that local crime involving drugs and guns is pervasive nationwide, has increased the movement of interstate drugs, has increased around schools, has resulted in a decline in education quality, and that this decline adversely impacts interstate and foreign commerce. The findings make reference to numerous hearings before Congress and collection of data on crime, drugs, guns and the educational system.

Two concerns limit the relevance of these findings toward establishing a rational basis to conclude that guns near schools substantially affect interstate economic activity. First, they do not address the *Lopez* Court's concern that a decision such as Petitioner seeks in this case would encourage the development of a general federal police power. The conclusion that Petitioner draws from the findings correlating crime with declining educational quality could be applied equally to family law, educational institutions, and the health and wellness of the nation's workforce. These are all things traditionally falling within the states' police powers, in which the National government may play a part regulating, but not the dominant one sought by Petitioner. A second and related concern is that the findings have nothing to do with the purpose of the Gun Free School Zones Act. That Act is designed to protect the safety and welfare of students attending schools within the states, and that purpose has little relevance to the regulation of interstate commerce, or to matters pertaining to economic transactions.

Without question, the government can regulate guns in the stream of commerce, or activities that have a substantial effect on interstate commerce, but there must be a rational nexus between the

regulated activities and interstate commerce. In this case (as in *Lopez*), the fact that individuals possess firearms within a school zone (even those that have passed through interstate commerce) is not reasonably related to the government's authority to regulate interstate commerce. We conclude that none of the *Lopez* tests were met. However noble the purpose (in this case, the protection of children), the Petitioner has failed to meet the burden set for him in *Lopez* and its progeny.

V CONCLUSION

For the foregoing reasons, we affirm the Dismissal of Indictment.

Butler, R., Circuit Judge, concurring in part, dissenting in part.

I wish I could say that I concur with all of the majority's opinion. Unfortunately, the only thing my colleagues and I agree upon is that 18 USC 922 q applies to DeNolf's conduct. Beyond that, however, we have significant disagreements about the meaning of the Second Amendment and the scope of congressional power under the commerce clause of Article I.

To begin with the Second Amendment, my esteemed colleagues ignore the findings of our sister circuits in *Nordyke v. King*, 319 F.3d 1185 (9th Cir. 2003) *rehear. en banc den.*, 364 F.3d 1025 (9th Cir. 2004), *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002), *as amended, reh. den.*, 328 F.3d 567 (9th Cir. 2003), cert. den., 124 S.Ct. 803 (2003), *United States v. Rybar*, 103 F.3d 273 (3rd Cir. 1996), and *United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004). They also ignore the ten state supreme courts that have rejected the individual rights interpretation of the Second Amendment, see, for example, *State v. Fennell* 382 S.E.2d 231 (N.C. Ct. App. 1989) and *Master v. State* 653 S.W.2d 944 (Tex. App. 1983).

These decisions rely upon *U.S. v. Miller*, 307 U.S. 174 (1939), in which the Second Amendment was held to apply to "organized militia." In *Miller*, the Court upheld a conviction for the possession of a short-barreled shotgun while crossing state boundaries, and in so doing it held that the Second Amendment does not provide individuals with a fundamental personal right to possess firearms. Tellingly, only the 5th and D.C. Circuit Courts of Appeals have concluded that the Second Amendment confers an individual right to bear arms; the nine other circuits to consider the matter have (correctly) followed *Miller* and have applied the "collective right" understanding that the Amendment provides for well-regulated state militias.

At most, the Second Amendment was designed to protect states from federal encroachment; it was never intended to afford individuals a fundamental right to possess firearms, free from reasonable state and federal regulations. There is clearly no justification to employ a heightened standard of review such as strict or intermediate scrutiny in cases involving the regulation of firearms. The rational-basis test is the appropriate standard, and it is easily met in this case. I fear that this court's flawed conclusion in this case will unduly hamper state and federal governmental efforts to regulate firearms, and that we will see, in the years to come, many more

tragic gun-related events (similar to those at West Nickel Mines, Columbine, and Virginia Tech) resulting from the majority's historically inaccurate and textually flawed reading of the Second Amendment.

The majority and I also diverge on our understanding of the commerce clause of Article I. The majority takes great pains to summarize the dominant concerns of the Supreme Court in its stewardship of the Constitution's commerce clause. In doing so, it properly points out that the power conferred upon Congress by this clause is plenary (see, *Champion v. Ames*, 188 U.S. 321, 1903), but that it is not, and has never been held to be, without limit. On that we can agree.

However, the question before this court today is whether Congress has exceeded its Constitutional grant of authority in the instant case. There is ample reason to conclude that it has not and no basis to conclude that if the challenged act is found constitutional the delicate balance between state and federal power will be upset and that this court would legitimate an encroaching general police power at the federal level.

In determining whether Congress has established a rational connection between the thing regulated and interstate economic activity, the Supreme Court has in the past relied on three basic principles of Commerce Clause interpretation. First, the power has been said to extend to regulation of local activities insofar as they substantially or significantly affect interstate commerce. *Daniel v. Paul*, 395 U.S. 298 (1969). Second, a court must consider, not the effect of a single or individual act, but the collective effects of similar instances see, *Wickard v. Filburn*, 317 U.S. 111 (1942). Finally, the Court has traditionally shown deference to the findings of the legislative branch. As Justice Breyer noted in dissent in *Lopez*

Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce--both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.

Taken together these principles form a clear pattern of review for courts when considering the constitutionality of legislative acts under the Commerce Clause. They are to consider whether the effects are substantial rather than distinguish between their local versus regional or national character. They are to consider the cumulative effects, not those of any single instance. Finally, they are to show deference to the findings of a co-equal branch of government on the substance and cumulative influence of those effects on interstate commerce. It is this pattern of review from which the United States Supreme Court departed in *Lopez*, and from which the majority in this case departs today.

The majority reasons that the primary purpose of the Gun Free School Zones Act is to protect children, and that protecting children traditionally falls within the scope of the states' police power. It then leaps to the conclusion that protecting children cannot be substantially related to interstate economic activity. But this is already a departure from longstanding principles of Commerce Clause interpretation. We are not called upon to state with axiomatic certainty that

some one or other function by nature belongs to a certain government and not to another. Our function is to determine in practical terms whether Congress, in justifying the regulation of some behavior, has rationally connected the effects of not regulating that behavior to some interstate economic condition. The findings included as part of the statute before us today meet that burden. Yet, the majority insists that the question before it is not one of commerce, but of federalism.

The authority of Congress to regulate commerce has been sustained in a long series of opinions ranging back to the early decades of the republic (see *Champion v. Ames*, 1903, for a review of the earliest decisions), but most recently in *Gonzales v. Raich* 545 U.S. 1 (2005). In that case, the Court held Congress may ban the use of marijuana even where states approve its use for medicinal purposes. While drug enforcement against local growers and users has been one of those areas traditionally falling within the police powers of the state, allowing federal regulation of drugs to override local enforcement provisions “is not a power that threatens to obliterate the line between “what is truly national and what is truly local.”” *Gonzales v. Raich*, concurring opinion at ____.

Today, the majority ask us to ignore the grave implications that connections between crime, drugs and education portend for the economic future. Surely, if the federal government may legitimately preempt the law enforcement authority of the states to regulate the use of marijuana by the terminally ill, then findings that drug and gun-related crime in and around schools have reached epidemic proportions nationwide is enough to justify federal intervention in the form of the statute before us today. Rather than eroding the balance of our federal system, a decision in favor of Petitioner would simply recognize that some social ills are of such profound national and economic importance that Congress may legitimately intervene to regulate.

Nor would we stand on shaky constitutional ground. In *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) and *Daniel v. Paul* 395 U.S. 298 (1969) the Supreme Court held that Congress may use the Commerce Clause to fight racial discrimination within states and localities. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court determined that Congress may "regulate Commerce . . . among the several States" in regard to price controls for agricultural products. Certainly, other circuits recognize that upholding federal regulation does not automatically undermine state autonomy. In *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997), the Fourth Circuit upheld the Child Support Recovery Act. In arriving at this conclusion that court stated . . .

"federal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are, of course, commonplace under the dual-sovereign concept and involve no infringement per se of states' sovereignty in the administration of their criminal laws." (at ____)

Furthermore, in *U. S. v. Wilson*, 159 F.3d 280 (7th Cir. 1998), the Seventh Circuit rejected a Commerce Clause claim in reviewing a statute similar to the one before us.

Finally, the majority bases its holding that Petitioner has failed to establish that guns around schools have a substantial effect upon interstate commerce on a flawed interpretation of Supreme Court precedent. In particular, it has twisted the logic of the more recent line of cases placing limits on congressional use of the Commerce Clause.

For example, the majority cites *Jones v. United States*. However, the Court’s decision in that case was limited specifically by language used in 18 U.S. §844(i). That act contained “the qualifying words “used in” a commerce-affecting activity” and thus prevented Congress from “invoking its full commerce clause authority.” 529 US 848, 2000, at _____. The decision was based on words that Congress itself used to limit the application of the act. Thus, the question of whether Congress had authority under its full Commerce Clause powers to regulate the behavior was not properly before the Court. To infer from this narrow decision a broad limitation on the commerce power of Congress is disingenuous.

The commerce clause jurisprudence of this Court during the last 100 years, announced in such venerable cases as *Champion v. Ames* (1903), *NLRB v. Jones & Laughlin Steel Corp.* (1937), *Wickard v. Filburn* (1942), *Heart of Atlanta Motel v. United States* (1964), and *Daniel v. Paul* (1969)—and recently punctuated by *Gonzales v. Raich* (2005)—provide the firm constitutional bedrock upon which this federal statute can (and should) safely rest.

I am led to the conclusion that the District Court order to dismiss should be reversed and that Respondent should stand trial for possessing firearms in violation of federal law. For the foregoing reasons, I respectfully dissent.

LIST OF AUTHORITIES

Champion v. Ames, 188 U.S. 321 (1903)

Daniel v. Paul, 395 U.S. 298 (1969)

Gonzales v. Raich, 545 U.S. 1 (2005).

Heart of Atlanta Motel Inc. v. United States., 379 U.S. 241 (1964).

Jones v. United States, 529 US 848 (2000).

Master v. State 653 S.W.2d 944 (Tex. App. 1983).

NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937)

Nordyke v. King, 319 F.3d 1185 (9th Cir. 2003) *rehear. en banc den.*, 364 F.3d 1025 (9th Cir. 2004).

Office of Legal Counsel, Memorandum Opinion for the Attorney General,
<http://www.usdoj.gov/olc/secondamendment2.pdf>

Parker v. District of Columbia, (No. 04-7041 (D.C. Cir., March 9, 2007).

Rohrbaugh v. State 607 S.E.2d 404 (W. Va. 2004)

Silveira v. Lockyer, 312 F.3d 1052, 1087 (9th Cir. 2002), *as amend. reh. den.*, 328 F.3d 567 (9th Cir. 2003), *cert. den.*, 124 S.Ct. 803 (2003).

State v. Fennell 382 S.E.2d 231 (N.C. Ct. App. 1989)

United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), *cert. den.*, 536 U.S. 907 (2002).

United States v. Johnson, 114 F.3d 476, 480 (4th Cir. 1997).

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

United States v. Miller, 307 U.S. 174 (1939).

United States v. Morrison, 529 U.S. 598 (2000).

United States v. Rybar, 103 F.3d 273 (3rd. Cir. 1996).

United States v. Parker, 362 F.3d 1279 (10th Cir. 2004)

United States v. Wilson, 159 F.3d 280 (7th Cir. 1998).

Wickard v. Filburn, 317 U.S. 111 (1942)

The Gun Free School Zone Act of 1997

18 USC § 921 Definitions

(a) As used in this chapter—

(2) The term “interstate or foreign commerce” includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).

(25) The term “school zone” means—

(A) in, or on the grounds of, a public, parochial or private school; or

(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.

(26) The term “school” means a school which provides elementary or secondary education, as determined under State law.

(18 USC 922 q) Unlawful Acts

(1) The Congress finds and declares that—

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves—even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation’s schools by enactment of this subsection.

(2)

(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm -

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the

school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is -

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)

(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm -

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.