

JOHNNY CAN'T READ 'CAUSE JANE'S GOT A GUN: THE EFFECTS OF GUNS IN SCHOOLS, AND OPTIONS AFTER *LOPEZ*

Carl W. Chamberlin[†]

Today's American teenagers are confronted by violence more frequent and more lethal than that faced by any other generation.¹ Consider, for example, that every 100 hours more youths die on the streets than were killed in 100 hours of ground war in the Persian Gulf.² Most of them are killed by gunfire,³ and over 120 children are slain

[†] Of Counsel, Orrick, Herrington & Sutcliffe LLP, Menlo Park, California. J.D., University of California, Hastings College of the Law, 1985. A. B., Stanford University, 1980. Along with William F. Abrams, Mr. Chamberlin represented several children advocacy organizations in their amicus curiae brief submitted to the United States Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995). Mr. Chamberlin is also an Adjunct Professor at the University of California, Hastings College of the Law, and the Santa Clara University School of Law. The views expressed herein are not necessarily the views of Orrick, Herrington & Sutcliffe LLP or its clients.

¹ In 1988-1989, American teenagers ran the greatest risk of being murdered of any segment of the U.S. population, and teenagers between the ages of 15 and 19 suffered the greatest increase in murder rates. See *Murder Rates: Why the Recent Rise?: Hearing on the Increase of Homicides in Our Nation Before the Senate Comm. on Judiciary*, 101st Cong. 56, 67-68 (1990); Jonah Blank & Warren Cohen, *Prayer Circle Murders*, U.S. NEWS & WORLD REP., Dec. 15, 1997, at 24 (reporting that the number of juvenile murder victims increased 66% between 1985 and 1995). From 1986 to 1990, 10,052 children (ages 5-19) were murdered with guns in America, and an additional 9,213 died from guns unintentionally discharged or by suicide. See Lois A. Fingerhut, *Firearm Mortality Among Children, Youth and Young Adults 1-34 Years of Age, Trends and Current Status: United States, 1986-90*, 231 ADVANCE DATA FROM VITAL AND HEALTH STATISTICS OF THE CTRS. FOR DISEASE CONTROL AND PREVENTION NAT'L CTR. FOR HEALTH STATISTICS 12-15 tbl.3 (1993). According to a report by the National Center for Health Statistics, in 1990 alone nearly 4,200 teenagers were killed by guns. See Barbara Vobejda, *Rate of Gun Deaths Rises Sharply Among 15-24 Age Group*, WASH. POST, Mar. 24, 1993, at A4.

² Gordon Witkin, *Kids Who Kill*, U.S. NEWS & WORLD REP., Apr. 8, 1991, at 26, 27 (quoting Louis Sullivan, Secretary of the Dep't of Health and Human Services).

³ In 1986, 61% of homicides among boys and 32% of homicides among girls involved firearms. See *Fatal Injuries to Children—United States, 1986*, Morbidity & Mortality Weekly Reports, 264 JAMA 952 (1990). In 1990, 82% of homicides of persons 15 to 19 years old were committed with guns. *Teens and Firearms: Not Just an Inner-City Problem*, Public Health Report, March 14, 1995 (visited April 20, 1998) <<http://www.hhs.gov/cgi-bin/waisgat>> [hereinafter *Teens and Firearms*]. People between 16 and 24 are more likely to be victims of handgun crime than any other age group. See MICHAEL R. RAND, U.S. DEP'T OF JUST., *HAND-GUN CRIME VICTIMS* 3 (1990).

by guns each month.⁴ In fact, every 36 minutes, a child is shot.⁵

Much of this violence occurs in our nation's schools. Although schools should be safe havens, equipping children with the skills and values needed to lead society into the future, they are actually primary locations for violence.⁶ In the last few months of the 1997-98 academic year, a dozen students and teachers were killed and dozens more wounded in shootings across the country.⁷ In a single incident in April 1999, two Colorado high school students killed twelve of their classmates and a teacher, and wounded several more.⁸ And these well-publicized tragedies are just the tip of the iceberg. Over a third of all high school students are regularly threatened with harm, and more than ten percent are actually attacked.⁹ A surprising twenty percent of all urban

⁴ See Richard Price, *Violence 'spreading like wildfire'*, USA TODAY, May 9, 1994, at 1A (reporting that 120 million American children under the age of 18 are slain by gunfire each month, not including accidental deaths and suicides).

⁵ See Mary Taylor Previte, *What Will They Say at My Funeral?*, N.Y. TIMES, Aug. 7, 1994, at 17.

⁶ Approximately half of all violent crimes against youths aged 12 to 19 occur on school property or adjacent streets. See CATHERINE J. WHITAKER & LISA D. BASTIAN, U.S. DEP'T. OF JUSTICE, *TEENAGE VICTIMS, A NATIONAL CRIME SURVEY REPORT* (May 1991). Around 37% of violent crimes and 81% of crimes of theft against younger teenagers occur at school. See *id.*

⁷ In Jonesboro, Arkansas, two camouflage-clad boys, aged 11 and 13, shot and killed four classmates and a teacher, and wounded nine others on the grounds of Westside Middle School. See *Shaken Kids Huddle For Comfort*, USA TODAY, Mar. 25, 1998, at 3A; Karen S. Peterson, *Society More Violent; So are Children*, USA TODAY, Mar. 25, 1998 at 3A. In Kentucky, a fourteen-year old freshman arrived at a high school prayer meeting with a pistol, two shotguns, two rifles, and 700 rounds of ammunition and shot eight of his classmates, killing three of them. See Blank & Cohen, *supra* note 1 at 24. In Edinboro, Pennsylvania, a 14-year old boy shot and killed a teacher and wounded two students and another teacher at an eighth-grade graduation dance. See Kristen Hays, *8th-Grader Held in Fatal Shooting*, WASH. POST, Apr. 26, 1998, at A3. In Pearl, Mississippi, a high school student killed two classmates and wounded seven others. See *id.* At Thurston High School in Oregon, a freshman carrying three guns opened fire in the cafeteria, killing four and wounding 20. See Timothy Egan, *Shootings in a Schoolhouse: The Overview*, N.Y. TIMES, May 23, 1998, at A9.

⁸ In April 1999, two Columbine High School students in Littleton, Colorado took guns and bombs to school and reportedly laughed as they killed 12 students and a teacher, wounded 28 others, and then killed themselves. See Kevin Fagan et al., *School Littered With Bombs*, S.F. CHRON., April 22, 1999, at A1, A6. The two were purportedly obsessed with guns, death, and violent video games. *Id.* The teenagers' rampage was one of the bloodiest mass killings in our nation's history. *Id.* See Kevin Fagan et al., *Suicide Attack Blamed on 2 Students*, S.F. CHRON., April 21, 1999, at A4.

⁹ A 1987 National Adolescent Student Health survey found that out of 11,000 eighth and tenth grade students, 34% had been threatened with harm, 14% had been robbed and 13% were attacked while they were at school or on a school bus during the previous year. See LISA D. BASTIAN & BRUCE M. TAYLOR, U.S. DEP'T OF JUST., *SCHOOL CRIME: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 1* (1991). In 1989, over 400,000 students aged 12 to 19 were victims of violent crime in or around their schools within the previous six months. See *id.* In 1991-92, in Los Angeles public schools alone, 383 students were assaulted with deadly weapons. *Id.* See also *Everyone Should Be Scared*, L.A. TIMES, Sept. 26, 1993, at E1 (interviews conducted by Michael Arkush et al.); SOURCEBOOK, 233, tbl. 3.38 (In 1996, 13.2% of high school seniors reported being threatened with a weapon at school).

high school students have been threatened with guns.¹⁰ In 1993 alone, over a third of urban school districts reported a shooting or knifing.¹¹ Furthermore, students are not the only ones in danger at school. Thousands of secondary school teachers are physically attacked each year,¹² and thousands more are threatened with harm every day.¹³ A 1994 Gallup poll ranked school violence as America's primary concern in education.¹⁴

In particular, the presence of guns in our schools has contributed mightily—and mortally—to the violent disruption of our children's education. On any given day, odds are good that when a teenager sits down in an urban high school classroom, one of his or her classmates is packing a gun.¹⁵ In many parts of the country, schools conduct "duck-and-cover" drills designed to prepare students for neighborhood gunfire,¹⁶ search students with metal detectors,¹⁷ and employ SWAT teams and gun sniffing dogs.¹⁸ In these and other ways, guns and gun violence degrade the education process,¹⁹ compromising our children's employ-

¹⁰ See J.F. Sheley et al., *Gun-Related Violence In and Around Inner-City Schools*, 146 AM. J. DISEASES IN CHILDREN 677, 679 (1992).

¹¹ Elizabeth Shogren, *More Violence Seen in Schools Than 5 Years Ago*, L.A. TIMES, Jan. 6, 1994, at 17 (citing survey conducted by National School Boards Ass'n, which found that 39% of responding urban school districts had reported a shooting or knifing in their schools in 1993, and that 23% reported drive-by shootings).

¹² A report to Congress revealed that approximately 5,200 teachers are physically attacked monthly in our nation's secondary schools. See NAT'L INST. OF EDUC., U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *Violent Schools—Safe Schools: The Safe School Study Report to the Congress* 64 (1978) [hereinafter *SAFE SCHOOL REPORT*].

¹³ According to statistics compiled by the U.S. Dep't of Justice, *each day* in the United States, 6,250 teachers are threatened with violence and 260 teachers are physically assaulted. Charlie Weaver, *When Kids Pack a Gun Instead of a Lunch*, STAR TRIB., Feb. 10, 1993, at 17A.

¹⁴ See Jonathan Marshall, *Beyond the Bruises—the Cost of School Violence*, S.F. CHRON., May 26, 1997, at B1.

¹⁵ See *infra* note 42 and accompanying text.

¹⁶ See *Selected Crime Issues: Prevention and Punishment: Hearings Before the Subcomm. on Crime and Crim. Just. of the House Comm. on the Judiciary*, 102d Cong. 654 (1991) [hereinafter *Prevention and Punishment*] (statement of Ronald D. Stephens, Exec. Dir., National School Safety Center, "NSSC").

¹⁷ Approximately 15% of school districts had installed metal detectors by 1994. See *School Officials Need Help To Curb Violence, Survey Says*, SCHOOL LAW NEWS, Jan. 14, 1994, at 4 (citing survey conducted by National School Board Ass'n). See Thomas Toch et al., *Violence in Schools*, U.S. NEWS & WORLD REP., Nov. 8, 1993, at 34, 35 (stating that approximately 45 urban public school districts had installed metal detectors as a result of school violence).

¹⁸ See *Gun-Free School Zones Act of 1990: Hearings on H.R. 3757 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong. 39 (1990) [hereinafter *Hearings on H.R. 3757*] (statement of Barbara Lautman, Dir., Center to Prevent Handgun Violence); William Celis 3d., *Schools Getting Tough on Guns in the Classroom*, N.Y. TIMES, Aug. 31, 1994, at A1 (explaining how schools are using dogs trained to detect guns, banning the use of book bags and refusing to provide lockers).

¹⁹ See *infra* notes 48-81 and accompanying text.

ment opportunities²⁰ and, ultimately, our nation's competitiveness in the world economy.²¹ School gun violence also gives rise to other direct national costs, such as medical and rehabilitation expenses, which totaled over \$33 million in 1986-1990 alone.²²

Although the presence of guns in schools may be symptomatic of deeply rooted social problems and an increasingly violent society, state and federal governments have attempted to deter students from taking guns to school. These efforts have focused on criminalizing gun possession on or near schools, mandating the expulsion of gun-toting students, or penalizing parents whose children are caught with guns.²³ It is unclear, however, whether local governments have the resources or the will to enforce such sanctions to the extent that they will actually deter students from carrying guns at school—especially since many students believe they need to carry a gun for status or protection from their peers.²⁴

What is also unclear is the legality of federal regulations regarding guns in schools, as Congress' power is much disputed in this area. In the 1995 *United States v. Lopez*²⁵ decision, the Supreme Court struck down federal legislation known as the Gun-Free School Zones Act,²⁶ which had prohibited the possession of a firearm within 1,000 feet of a school. The Court held that notwithstanding the national ramifications of gun violence in schools,²⁷ the Act exceeded the scope of Congressional power under the Constitution's Commerce Clause.²⁸ Since *Lopez*, Congress has amended the Gun-Free School Zones Act in an effort to cure the original statute.²⁹ As amended, the Gun-Free School Zones Act now prohibits the knowing possession or discharge of a firearm—that has been in interstate commerce—within 1,000 feet of a school.³⁰

Congress has also adopted several other measures directed at gun violence in schools. Under its Commerce Clause power, Congress passed a law in 1994 prohibiting the possession or purchase of handguns by juveniles.³¹ Under its Spending Clause³² power, Congress enacted the Gun-Free Schools Act of 1994,³³ which conditions a state's accept-

²⁰ See *infra* notes 90-91 and accompanying text.

²¹ See *infra* notes 204-209 and accompanying text.

²² See *infra* notes 83-89 and accompanying text.

²³ See *infra* notes 170-178 and accompanying text.

²⁴ See *infra* notes 120-141 and accompanying text.

²⁵ *United States v. Lopez*, 514 U.S. 549 (1995).

²⁶ 18 U.S.C. § 922(q) (1995).

²⁷ See *Lopez*, 514 U.S. at 563-565.

²⁸ U.S. CONST., art. I, § 8, cl. 3.

²⁹ 18 U.S.C. § 922(q) (1999). See Gun-Free School Zones Act Amendments of 1995, S. 890, H.R. 3610, (passed as part of the Omnibus Appropriations Bill for 1997).

³⁰ 18 U.S.C. § 922(q) (1999).

³¹ 18 U.S.C. § 922(x) (1994).

³² U.S. CONST., art. I, § 8, cl. 1.

³³ Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994).

ance of federal education funds on its enactment of a law requiring the expulsion of any student who takes a gun to school. Also pursuant to its Spending Clause power, Congress adopted the Safe Schools Act of 1994,³⁴ which offers grants to high-crime school districts that are willing to undertake various approaches to decreasing gun violence in schools.³⁵

This article considers Congress' power to regulate, and the efficacy of various attempts to regulate, the problem of guns in schools. Part I reviews the incidence and consequences of gun possession and gun-related violence in schools, including the effect on education and the economy. Part II discusses various approaches to curbing gun violence in schools, and suggests that local governments, because they best understand their particular communities, may best be able to devise ways to deter students from carrying guns. Part III examines the states' traditional power to regulate school violence and the reasons that federal regulation may nonetheless be warranted. Part IV examines the power of the federal government to curb gun violence in schools, particularly after *Lopez*. The article concludes that, although the federal government may have Commerce Clause power to regulate aspects of gun possession in schools after *Lopez*, indirect regulation by conditioning federal funds to the states under the Spending Clause will be more effective. The article also suggests that although each of the federal government's latest legislative acts addressing gun violence in schools is constitutional, Congress should nevertheless permit state and local governments to spend federal funds on a broader range of deterrent measures.

I. GUNS IN SCHOOLS AND THE RAMIFICATIONS FOR EDUCATION AND THE NATIONAL ECONOMY

By 1989, there were over 200 million firearms in circulation in the United States—almost one for every man, woman and child.³⁶ Indeed, many guns *are* in the hands of children, and gun manufacturers are now specifically focusing on schoolchildren as a viable market.³⁷ Juvenile possession of guns has increased dramatically over the years, and as

³⁴ Safe Schools Act of 1994, 20 U.S.C. §§ 5961, 5962 (1994).

³⁵ See Goals 2000: Educate America Act, 20 U.S.C. §5802 (1994). See also *infra* note 367 and accompanying text.

³⁶ See Michael Isikoff, *200 Million Guns Reported in Circulation Nationwide*, WASH. POST, May 24, 1991, at A1 (citing 1991 report of Bureau of Alcohol, Tobacco and Firearms, estimating the number of firearms in circulation as of 1989).

³⁷ See *infra* note 118 and accompanying text; See also *United States v. Lopez*, 514 U.S. 549, 603 n.* (1995) (Stevens, J., dissenting). See Richard Price, *Sleek, and Tempting, by Design*, USA TODAY, May 9, 1994, at 9A. (quoting Geoffrey Canada of the Rheedlen Center for Children and Families who alleges that "[guns being manufactured today] have [m]ore gadgets [and]. . .[m]ore bullets in the clip. It's the same thing that happened in the sneaker industry, which keeps adding things like air pumps and little lights to attract kids.").

more and more children take guns to school, violence increases, children die, and the quality of education declines.

A. THE PROBLEM: GUN POSSESSION AND GUN-RELATED VIOLENCE IN SCHOOLS

1. *Guns in Schools*

The juvenile arrest rate for weapons possession rose over 113% between 1985 and 1994,³⁸ and nearly a quarter of inner-city high school students own at least one gun.³⁹ Not only do more school-aged children own guns, they are taking their guns to school. According to the U.S. Department of Justice, every day 100,000 students in the U.S. take firearms to school.⁴⁰ Other sources report that nearly three times that number—approximately 270,000 guns—are taken to school daily,⁴¹ and that one in eight urban high school students carries a gun.⁴²

³⁸ See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 1995 276 (1996) [hereinafter 1995 FBI REPORTS] (visited April 25, 1998) <www.fbi.gov/ucr/crimeus.pdf>. The juvenile arrest rate for weapons possession increased 60% between 1980 and 1990. See U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS: FOR THE UNITED STATES, 1991 289 tbl. 5.1 (1992). Although juvenile violent crime arrests have actually declined in the past few years, they remain substantially higher than a decade ago. See 1995 FBI REPORTS, *supra* note 38 at 27.

³⁹ A survey by the National Institute of Justice of 1,600 male students in 10 inner-city high schools found that 22% owned at least one gun. Over 80% of those who had guns had a semi-automatic handgun. See Price, *supra* note 37, at 9A tbl.; See Pierre Thomas, *Guns Seen as Part of Life Among Inner-City Youths*, WASH. POST, Dec. 13, 1993, at A4 tbl.

⁴⁰ See Weaver, *supra* note 13. *Hearings on H.R. 3757*, *supra* note 18, at 37 (statement of Sen. Arlen Specter, referring to testimony of Dewey Stokes, president of the Fraternal Order of Police, before the House Subcommittee on Juvenile Justice, in June 1993).

⁴¹ See Toch, *supra* note 17, at 31-32. See also CENTER TO PREVENT HANDGUN VIOLENCE, CAUGHT IN THE CROSSFIRE: A REPORT ON GUN VIOLENCE IN OUR NATION'S SCHOOLS 7 (1990) [hereinafter CROSSFIRE] (reporting that each year, as many as 400,000 boys carry handguns to school). See also BASTIAN & TAYLOR, *supra* note 9, at 10-12 (reporting that one-half million students in a six-month period took a weapon to school to protect themselves).

⁴² See Nancy McCarthy, *Children Not Escaping Tough-on-Crime Climate*, CAL. B.J. 1 tbl. (July 1995) (citing study by National Institute of Justice); Cf. *Recess from Violence: Making Our Schools Safe: Hearing on S. 1125 Before the Subcomm. on Educ., Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 103d Cong. 39 (1993) (statement of Ronald D. Stephens, Exec. Dir., NSSC) (citing a Louis Harris Poll from July 1993, which found that 15% of the teenage students surveyed had carried a handgun in the previous 30 days). In 1993, approximately one in 12 students carried a gun to school in a 30-day period. See Todd S. Purdum, *Clinton Seeks Way Around High Court's Gun Ruling*, S.F. EXAM'R, Apr. 30, 1995, at A2. Other sources report that four percent of high school students and six percent of inner-city high school students carry guns to school. See *United States v. Lopez*, 514 U.S. 549, 603 (1995) (Breyer, J., dissenting); See *Teens and Firearms*, *supra* note 3 (showing study which found that one in four males in New Orleans suburb carries a gun). In addition, the percentage of students carrying guns to school appears to have increased. In a national survey in 1987, one out of every 36 tenth grade boys said they had carried a handgun to school during the year, and one in every hundred boys took a gun to school nearly every day. *Id.* See THE NATIONAL ADOLESCENT STUDENT HEALTH SURVEY, A REPORT ON THE HEALTH OF AMERICA'S YOUTH, tbls. 2-29 (1989); Charles M. Callahan & Frederick P. Rivara, *Urban High School*

Each year more and more guns are taken to school.⁴³ In California public schools, the number of guns confiscated, at all grade levels—including kindergarten through sixth grade—doubled between 1985 and 1988.⁴⁴ And in 1990 alone, California schools experienced a forty percent increase in the presence of firearms.⁴⁵ Schools may also be becoming a common place for children to actually obtain firearms.⁴⁶ Thus, while a previous generation may have traded baseball cards at school; many children now trade and sell guns.⁴⁷

2. *Guns at School Mean Death at School*

The presence of guns in our schools has increased both the incidence and lethality of school violence.⁴⁸ Firearms are obviously more dangerous than other weapons,⁴⁹ and the wounds inflicted are accordingly more severe, and often fatal.⁵⁰

Because guns can engender a feeling of power and control, they embolden students to escalate confrontation and to resolve disputes by pulling a trigger.⁵¹ An argument between students that might before

Youth and Handguns, 267 JAMA 3038-42 (1992). A survey of students at 31 Illinois high schools revealed that one in 20 students had carried a gun to school in 1990. See ILL. CRIM. JUST. INFO. AUTH., Trends & Issues 91: Education and Criminal Justice in Illinois 40 (1991). In another city, one out of every 15 eleventh grade boys has carried a handgun to school. Toch et al., *supra* note 17, at 34. See also U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996 254, at tbl. 3.53 (1997) (4.5% of high school respondents carried a gun to school at least once in 1995-96).

⁴³ *Id.*

⁴⁴ See CAL. DEP'T OF EDUC., SCHOOL CRIME IN CALIFORNIA FOR THE 1988-1989 SCHOOL YEAR 1 (1990).

⁴⁵ See *Prevention and Punishment*, *supra* note 16, at 656 (statement of Ronald D. Stephens, Exec. Dir., NSSC). See also Blank & Cohen, *supra* note 1 at 24 (reporting President Clinton's statement that "high school seniors are more likely to take weapons to school than to take calculus in school").

⁴⁶ Students who report that they could easily obtain a handgun say that they would be more likely to get guns from friends than on the street. See Callahan & Rivara, *supra* note 42; McCarthy, *supra* note 42.

⁴⁷ Gregory Freeman, *Guns in School: Deadly Issue*, ST. LOUIS POST-DISPATCH, Nov. 27, 1992, at 1E (reporting that in 1992, Houston school administrators discovered that a student was running a gun rental service on campus).

⁴⁸ See Hattie Rutenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 YALE L.J. 1885, 1892 (1994) (stating that "[t]he recent increases in the juvenile murder arrest rate—and, presumably, in murders by juveniles—appear inextricably linked to firearms").

⁴⁹ Firearms are estimated to be between two and five times more lethal than knives. See JAMES D. WRIGHT ET AL., UNDER THE GUN: WEAPONS, CRIME AND VIOLENCE IN AMERICA 198 (1983). They are also seven times as lethal as all other weapons combined. See U.S. DEP'T OF JUST., UNIFORM CRIME REPORTS: FOR THE UNITED STATES, 1963 7 (1964).

⁵⁰ Over a recent two-year period, 47 of 74 intentional deaths on school campuses involved the use of firearms. NSSC, SCHOOL ASSOCIATED VIOLENT DEATHS 7 (1994) (tracking period from July 1, 1992 to May 26, 1994).

⁵¹ As one commentator has put it, "[a] 14-year-old armed with a gun is far more menacing than a 44-year-old with a gun. While the teenager may be less schooled in using a firearm.

have resulted in a fistfight may now be resolved by a gunfight. Children now shoot other children for teasing them,⁵² or to avenge a wrong.⁵³ Children execute their teachers because they were disciplined or given a poor grade.⁵⁴ Children hold their classmates and teachers at bay with shotguns and spray classrooms with bullets.⁵⁵ Children die when firearms accidentally discharge.⁵⁶ Children die for no reason at all.⁵⁷

Shocking examples of school violence have abounded from all parts of the country in recent years. In academic years 1986 through 1990, at least seventy-one people—sixty-five students and six school employees—were killed by firearms at school, another 201 were severely wounded, and 242 were held hostage at gunpoint.⁵⁸ During this same period, shootings or hostage situations in schools were reported in at least thirty-five states and the District of Columbia.⁵⁹ And in just a few heralded incidents during the 1997-98 and 1998-99 school years, school shootings killed more than two dozen students and teachers and wounded

he is more willing to pull the trigger.” James A. Fox, *Murder Most Common*, BOSTON GLOBE, Jan. 31, 1993, at 65.

⁵² A 15-year old Texas girl killed a classmate—the varsity football captain and junior prom prince—in a lunch line because she thought he called her a name. See Tom Morganthau, *It's Not Just New York* . . . , NEWSWEEK, MAR. 9, 1992, at 25. In Pennsylvania, a 15-year old killed a tenth-grader in front of 22 students because he had been teased about his height. See *Roll Call of the Dead*, PEOPLE WKLY, Jun. 14, 1993, at 51, 53.

⁵³ At a New York high school swarming with security guards in preparation for a visit from the mayor, a 15-year old boy shot and killed two students at point blank range, leaving another student so distraught he went home and killed himself. See John Shanahan, *Two Students Killed in NYC High School Before Mayor's Visit*, A.P., Feb. 26, 1992.

⁵⁴ In Kentucky, a boy fired a fatal bullet into his teacher's temple, killed a custodian, and held his classmates hostage because, among other reasons, he disagreed with a grade he was given. See Jerry Buckley, *The Tragedy in Room 108*, U.S. NEWS & WORLD REP., Nov. 8, 1993, at 41, 41-42, 44. A 16-year old middle school student in Washington shot his teacher, who had given him a grade that made him ineligible to play football. See Paula Bock et al., *"Arms Race" in Schools—Students Say They Pack Guns for Protection*, SEATTLE TIMES, Mar. 10, 1992, at A1.

⁵⁵ See Andrea Stone, *Kids, Guns: 'It's shoot or be shot'*, USA TODAY, Jun. 3, 1993, at 1A; Jim Abrams, *From Inner Cities to Rural Heartland, Violent Start to School Year*, A.P., Sept. 22, 1991.

⁵⁶ A Chicago seventh-grader shot himself in homeroom thinking his gun was not loaded. See *Roll Call of the Dead*, *supra* note 52, at 50. A Los Angeles tenth-grader was killed when a .357 magnum in another student's backpack accidentally discharged. See *id.*

⁵⁷ In a Montana elementary school, a fourth-grader shot and killed an 11-year old for no apparent reason. See Price, *supra* note 4. In Tennessee, while watching a Disney movie in class, a 14-year old killed the 13-year old seated in front of him by wrapping a jacket around the gun in his hand and firing it into the back of the classmate's head. *Id.* at 5A. The 14-year old who shot his classmates in West Paducah, Kentucky said he did not know why he did it. Cox News Service, *Victimized Towns Relive Horror of Shootings*, S.F. CHRON., April 21, 1999, at A6.

⁵⁸ CROSSFIRE, *supra* note 41.

⁵⁹ *Id.* The Center for Disease Control and Prevention recorded 105 violent school-related deaths in 1997-98. *Id.*

several dozens more.⁶⁰ In some areas across the country, gun violence has become so severe⁶¹ that schools have installed metal detectors, hired extra security, and added “drive-by shooting drills” and “intruder drills”⁶² to traditional fire drill schedules.⁶³

B. THE CONSEQUENCES: EFFECTS OF GUN POSSESSION AND GUN-RELATED VIOLENCE ON EDUCATION AND THE ECONOMY

1. *Effect of School Violence on Education*

Not surprisingly, “violent school crimes arouse destructive fears among students, parents, and teachers”⁶⁴ long after the gunshots have stopped echoing in the halls. After two students were murdered at a Connecticut elementary school, “[k]ids didn’t want to go to class, they couldn’t eat or sleep, they [would] burst out crying.”⁶⁵ After a double-murder and hostage situation in a rural Kentucky high school, it was reported that:

There was little pattern to the post-trauma reactions. One girl slept on the couch in her living room with a parent on the floor beside her. Another studied at home because she couldn’t go back into the building. One boy had to sit next to the door in all his classes because he felt trapped anywhere else in the room. One day last spring, a student [had] a terrifying flashback when a prop for the senior prom crashed to the gymnasium floor.

All of the students held hostage by the young killer have now graduated. Still, for some the tears continue.⁶⁶

The day after the murder of two teenagers in a New York high school, the parents of several students asked for a transfer, attendance

⁶⁰ See *supra* notes 7-8 and accompanying text.

⁶¹ In New York City alone, six students were shot and killed and 13 were shot and wounded in school buildings during the 1991-92 school year. See Anne Chase, *School Violence: Two Ways to Fight Back*, GOVERNING, Mar. 1993, at 20. About 45% of the 758 students interviewed at 10 inner-city public high schools in California, New Jersey, Louisiana and Illinois said they had been threatened with a gun or had been shot at on the way to or from school within the previous few years. See Thomas, *supra* note 39; Pierre Thomas, *Guns Seen as Part of Life Among Inner-City Youths*, WASH. POST, Dec. 13, 1993, at A4.

⁶² Nanette Asimov et al., *Bay Area Schools Reassessing Programs*, S.F. CHRON., April 22, 1999, at A5.

⁶³ See Toch et al., *supra* note 17, at 32; *Prevention and Punishment*, *supra* note 16, at 654 (statement of Ronald D. Stephens, Exec. Dir., NSSC); *supra* notes 16-18 and accompanying text.

⁶⁴ Jackson Toby, *Violence in Schools*, Nat’l Inst. Just Research in Brief 3 (1983).

⁶⁵ See Toch et al., *supra* note 17, at 34 (quoting Jettie Tisdale, principal of Longfellow Elementary School, Bridgeport, Connecticut).

⁶⁶ Bucklev, *supra* note 54, at 46.

was down fifty percent, classes were replaced with counseling sessions, and classrooms became grieving rooms.⁶⁷

But it does not require a tragedy the magnitude of a double homicide to disrupt America's education system. Chronic violent crime and the prevalence of guns are disruptive as well. Studies conducted in the 1970s showed that students were fearful of certain school-related locations.⁶⁸ As the number of guns and the frequency of gun-related violence have proliferated, these fears have increased. In a 1992 survey, fifteen percent of inner-city high school students said they were afraid at school almost all of the time.⁶⁹ Sixteen percent of eighth graders, fourteen percent of tenth graders and twelve percent of twelfth graders told University of Michigan researchers that they fear for their safety.⁷⁰ A full thirty-seven percent of tenth and twelfth graders had reported that they did not feel safe at school, and forty-three percent avoided school restrooms.⁷¹

⁶⁷ See Edna Negron, *400 Students Want Out of Jefferson HS*, *Newsday*, Feb. 28, 1992, at 2. (Despite the *Newsday* article's title, "four or five"—not 400—parents had requested transfers for their children. By the following day that number had risen to ten. The article was corrected in a later edition of *Newsday*.)

⁶⁸ One-third of junior high school pupils in large cities and nearly one-fifth of their counterparts in rural areas reported being afraid of three or more places on school grounds, i.e. bathrooms. See *SAFE SCHOOL REPORT*, *supra* note 12 at 62 fig.1-6 & 64. As researchers have concluded, "about 1.7 million junior and 2.0 million senior high youth [are] afflicted by moderate or high levels of fear." Ivor Wayne & Robert J. Rubel, *Student Fear in Secondary Schools*, 14 *URB. REV.* 197, 203 (1982). About 11% of them are afraid on the way to school at least once a week. *Id.* at 219. In a study of 1,250 Philadelphia families having 12-year old boys, two researchers determined that "about one-quarter found the school building itself dangerous (halls and rooms), and about half were fearful of streets leading to and from school, and the school yard." *Id.* at 198-99.

⁶⁹ See J.F. Sheley et al., *Gun Related Violence In and Around Inner-City Schools*, 146 *AM. J. DISEASES CHILDREN* 677, 678-79 (1992).

⁷⁰ Toch et al., *supra* note 17, at 32.

⁷¹ See *Recess from Violence*, *supra* note 41, at 39 (statement of Ronald D. Stephens, Exec. Dir., NSSC).

Fearing the violence, many students avoid school altogether.⁷² This same fear inhibits the learning of those who manage to stay in school.⁷³ A 1972 study reported that:

The perception of the school environment as being dangerous could very well influence the students' ability to do well in school. A student who feels that he is in danger of being beaten up or robbed in the schoolroom is not likely to devote full attention to his or her teacher. Also, the perception of the schoolyard and halls as dangerous may account somewhat for the high truancy rates that are recorded by the inner-city schools.⁷⁴

Indeed, a 1976 study of the criminal victimization of public school students in Dade County, Florida, revealed that "about one-fifth of the responding secondary school students [felt] that their ability to learn in class was affected by their fear of other students."⁷⁵ Students who were highly apprehensive of their school for safety reasons were considerably more likely to have below-average grades (D's and F's).⁷⁶ Very apprehensive students rated themselves much lower than their classmates in

⁷² "[S]tudents are frequently led by apprehensiveness to avoid some school locations and that, in extreme cases, fear of the school setting makes students avoid school altogether." Wayne & Rubel, *supra* note 68, at 230. According to the Justice Dep't, each day in the 1970's 160,000 kids failed to attend school because they were afraid to go. *Id.* (citing M. LALLI AND L. SAVITZ, U.S. DEP'T OF JUSTICE, *DELINQUENCY AND CITY LIFE* (1972)). More recently, nearly eight percent of urban junior and senior high school students missed at least one day of school a month because they were afraid to go. NSSC, *SAFE SCHOOLS OVERVIEW*, NSSC RESOURCE PAPER, 3 (Feb. 1986). See *SAFE SCHOOL REPORT*, *supra* note 12, at 63 fig.1-17, 64. See also Witkin, *supra* note 2, at 32 (citing study of Illinois high school students which found that one in 12 students confessed to staying away from school out of fear). In 1996, five percent of high school students nationwide, and as many as 17 percent in Chicago schools, stayed home due to fear. Melissa Sickmund, Howard N. Snyder, and Eileen Poe-Yamagata, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Offenders and Victims: 1997 Update on Violence 14-15* (1997). See *Hearings on H.R. 3757*, *supra* note 18, at 44 (statement of Joel Packer, Legislative Specialist, National Education Ass'n and National PTA) ("The threat of violence is a significant factor in the dropout rate, the stress related to fear of violence threatens the educational goals related to student achievement, and fear of violence impedes the ability of schools to attract and retain qualified school personnel.").

⁷³ See Betsy McAlister Groves et al., *Silent Victims, Children Who Witness Violence*, 269 JAMA 262, 262 (1993) (declaring that an "[e]xposure to violence adversely affects children's development in many areas, including their ability to function in school, emotional stability, and orientation toward the future").

⁷⁴ Wayne & Rubel, *supra* note 68, at 199 (quoting M. LALLI & L. SAVITZ, U.S. DEP'T OF JUSTICE, *DELINQUENCY AND CITY LIFE* (1972)).

⁷⁵ *Id.* The Safe School Study Report confirmed these results as a national phenomenon. See *SAFE SCHOOL REPORT*, *supra* note 12, at 116 (reporting that 18% of attack victims were afraid at school most of the time).

⁷⁶ See Wayne & Rubel, *supra* note 68, at 204-05 & tbl.3, fig.1. See also NAT'L EDUC. GOALS PANEL, *THE NAT'L EDUC. GOALS REPORT: BUILDING A NATION OF LEARNERS* 44 (1992) (determining that students in violent or drug-ridden schools were much less likely to "stay in school, perform at higher academic levels, and excel in mathematics and science").

reading ability.⁷⁷ By 1993, sixty-three percent of tenth, eleventh and twelfth graders reportedly believed that they would learn more if they felt safer.⁷⁸

Gun violence also affects parents and teachers.⁷⁹ Many parents do not believe that the schools their children attend are safe,⁸⁰ and many teachers are unable to maintain environments conducive to learning. In fact, twelve percent of secondary school teachers across the country—and twenty-eight percent of secondary school teachers in the largest cities—admitted that they had hesitated to confront misbehaving students in the preceding month, out of fear of retaliation.⁸¹ This response affects how students view the school system, creates an atmosphere of mistrust, undermines school morale, and demonstrates that “student disorder is more powerful than the adult call for order.”⁸²

2. *The Long-Term Effects of Gun Violence in School*

Gun violence in schools affects more than a child’s feeling of safety or ability to learn: it also creates a number of serious long-term problems. In particular, gun violence in schools gives rise to millions of dollars in medical costs, which are often paid out of public funds. Such violence may also limit the child’s future employment opportunities and have long-term psychological consequences.

a. Medical Costs

Gun violence is expensive, and becoming more so as health costs rise. In 1986, hospitalization costs (not including ambulance services,

⁷⁷ See Wayne & Rubel, *supra* note 68, at 204-05 & fig.1.

⁷⁸ See *Recess from Violence*, *supra* note 42, at 39 (1993) (statement of Ronald D. Stephens, Exec. Dir., NSSC).

⁷⁹ The mother of a 15-year-old boy who killed two teenagers at a New York high school was afraid to walk outside her home alone for fear the victims’ avengers would kill her. See Mary B.W. Tabor, *A Year Later, Death’s Echoes*, N.Y. TIMES, June 24, 1993, at B3. The mother of one of the victims moved out of her housing project. *Id.* The mother of another student lamented, “You sit at home and you wonder if your kid will come home alive or not.” Negron, *supra* note 67, at 2. Shortly after a student was gunned down in a Los Angeles high school, a teacher penned this rap lyric: “School’s a place for learnin’ / School’s a place for fun / And that sure ain’t gonna happen / If someone brings a gun.” Tracey Kaplan, *Fatal Shooting at School Prompts Project to Spread Anti-Weapons Message*, L.A. TIMES, June 5, 1993, at B4.

⁸⁰ Less than a third of parents believe that most children are safe at school. Ruttenberg, *supra* note 48, at 1886 n.3 (citing LOUIS HARRIS, LH RESEARCH, ISSUE, SURVEY OF THE AMERICAN PEOPLE ON GUNS AS A CHILDREN’S HEALTH ISSUE at iv, v (June 1993)); Cf. Michele Ingrassia, *Growing Up Fast and Frightened*, NEWSWEEK, Nov. 22, 1993, at 52 (reporting that 73% of parents and 56% of children fear that they or a family member would be victimized by violent crime).

⁸¹ Jackson Toby, *supra* note 64, at 3. See also Maria Koklanaris, *Change in Pupils Has Teachers Scared*, WASH. TIMES, Aug. 16, 1994, at A1 (explaining that teachers may now be more reluctant to interfere in altercations).

⁸² Wayne & Rubel, *supra* note 68, at 230-31.

physicians fees, readmissions, ambulatory care, follow-up visits, physical therapy, rehabilitation services, and long-term care) were estimated at about \$7,000 per gunshot patient.⁸³ In 1990, hospitalization costs rose to nearly \$15,000 per gunshot patient,⁸⁴ and more recently it was estimated that “every gun injury amounts to more than \$33,000 in medical costs—exclusive of doctor’s fees.”⁸⁵

These costs are largely the burden of taxpayers.⁸⁶ Approximately eighty-six percent of hospitalization costs are borne by public funds, including Medi-Cal (Medicaid), Medicare, the Medically Indigent Adult Program, the jail system, the Victims & Witnesses Assistance Program, and bad debts written off by hospitals.⁸⁷ In addition, recent escalation of violence has placed substantial financial strain on urban trauma centers, forcing some of them to close.⁸⁸

The gun violence occurring in schools contributes significantly to the total economic cost of gun violence overall. Assuming the 1986 cost of \$7,000 per gunshot patient, the seventy-one firearm deaths and 201 firearm injuries at schools in 1986-90 amounted to nearly \$2 million in hospitalization costs, over \$1.6 million of which were borne by taxpayers. Furthermore, the total economic costs of gun violence far exceed the costs of medical treatment alone. It has been estimated that the total costs to society of firearm injuries in 1985 amounted to approximately \$387,235 per fatality and \$29,870 per non-fatal injury.⁸⁹ At this rate, the seventy-one firearm deaths and 201 firearm injuries occurring at schools in 1986-90 cost society a total of almost \$33.5 million.

b. Employment Prospects

The quality of a student’s education directly affects that student’s ultimate ability to compete economically in our society. Simply put, the more education a student achieves, the less likely it is that the student

⁸³ Michael J. Martin et al., *The Cost of Hospitalization for Firearm Injuries*, 260 JAMA 3048, 3050 (1988).

⁸⁴ See Daniel W. Webster et al., *Epidemiologic Changes in Gunshot Wounds in Washington DC, 1983-1990*, 127 ARCHIVES OF SURGERY 694, 697 (1992) (basing figure on the mean cost for hospital care, excluding physician fees, for a patient with a gunshot wound in Washington, D.C., including both adults and children, between July 1, 1989, and June 30, 1990).

⁸⁵ Donna Harrington-Lueker, *Metal Detectors: Schools Turn To Devices Once Aimed Only At Airport Terrorists*, AM. SCH. BD. J., May 1992, at 21, 22 24 (quoting Deane Calhoun of Teens on Target in Oakland, California).

⁸⁶ For a thorough updated discussion on the costs of gunshot wounds and the shifting of those costs to others, see Erik Freeland, *Guns, Money & Medicine*, U.S. NEWS & WORLD REP., July 1, 1996, at 31.

⁸⁷ See Martin et al., *supra* note 83, at 3049, tbl.3.

⁸⁸ See Webster et al., *supra* note 84, at 694 (citing U.S. GEN. ACCT. OFF., TRAUMA CARE: LIFESAVING SYSTEM THREATENED BY UNREIMBURSED COSTS AND OTHER FACTORS (1991)).

⁸⁹ Martin et al., *supra* note 83 at 3049-50.

will be unemployed.⁹⁰ In addition, higher levels of education directly result in higher income. During the 1980s, for example, college graduates saw their real incomes rise by ten percent, whereas high school graduates and high school dropouts saw their real incomes *fall* by ten percent.⁹¹

c. Psychological Effects

Children today are exposed to significant amounts of violence and school violence contributes to a student's overall level of exposure. When schools, as well as the streets, are filled with violence, the child's exposure to violence becomes chronic. This can cause the child to develop symptoms of post-traumatic stress disorder, which can impair social and academic behavior.⁹² One expert has noted that:

Children who live with danger develop defenses against their fears, and these defenses can interfere with their development. When children have to defend themselves constantly from outside or inside dangers, their energies are not available for other, less immediately urgent tasks, such as learning to read and write and do arithmetic and learning about geography and history and science. In addition to not having enough energy to devote to schoolwork, there is evidence that specific cognitive functions such as memory and a sense of time can be affected by experiencing trauma.⁹³

⁹⁰ See *Human Capital*, THE ECONOMIST, Nov. 21, 1992, at 4. In 1989, people who did not finish high school were over four times more likely than college graduates to be unemployed.

⁹¹ See *id.* These statistics are not surprising. Better quality education develops personal attributes that are useful in the job market or conducive to greater interest in continuing schooling. See *id.* The benefits of education—and the necessity of education—become even more important as we increase our reliance on automation and information technology, rather than manual labor or low-skilled jobs. *Id.*

⁹² See JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 13, 25-26, 56-57, 67-99 (1992); Amicus Curiae Brief for Children Now, Project on Children and Violence, Youth Alive, Children's Law Offices, Inc. on Behalf of Petitioner, United States v. Lopez, 514 U.S. 549, app. at 10 (1995) (No. 93-1260) (declaration of James Garbarino) [hereinafter Garbarino Decl.]. Symptoms of post-traumatic stress disorder include sleep disturbances, day dreaming, recreating trauma in play, emotional numbing, diminished expectations for the future, and even biochemical changes in the child's brain that impair social and academic behavior. Children suffering from post-traumatic stress disorder experience problems with their schoolwork more often than their classmates do. See GARBARINO ET AL., at 59 (finding that "[c]hildren exposed to chronic community violence often develop problems related to school performance and intellectual development" such that, children under seven exposed to such violence "could not learn in a normal classroom situation").

⁹³ Lorraine B. Wallach, *Helping Children Cope with Violence*, YOUNG CHILDREN, May 1993, at 4, 5-6 (citation omitted). See GARBARINO ET AL., *supra* note 92, at 55 (citation omit-

In sum, the presence of guns in schools is a national concern. It escalates school violence, takes lives, frightens students, intimidates teachers, and impedes education. Guns in schools affect the national economy directly in medical costs, and indirectly in the declining education of our children.

II. APPROACHES TO CURBING GUN VIOLENCE IN SCHOOLS

State and federal governments have generally approached the problem of guns and gun violence in schools in three ways: (1) removing guns from schools, primarily by criminalizing the possession of guns on and around campus; (2) removing gun-carrying students from school by suspending or expelling them; and (3) penalizing parents for their children's gun possession. Each of these approaches gives rise to issues of their legality⁹⁴ and effectiveness.⁹⁵ This section examines deterrence theory and the factors that make deterrence more likely. It applies deterrence theory to the efforts used to curb gun possession and gun violence in schools. Finally, it suggests that local government—most sensitive to the characteristics of its schools, communities, resources, culture and violence—would be more effective than the federal government at maximizing the possibility of deterrence.

A. DETERRENCE THEORY

According to deterrence theory, an actor will refrain from taking a particular action if the losses resulting from that action outweigh the gains.⁹⁶ Conversely, if an actor expects to profit from his wrongful conduct, he will commit the wrong, despite potential liability. Thus, on one

ted) ("Children experiencing acute traumatic events lose interest in the world and try to avoid anything that reminds them of the event; they also manifest feelings of estrangement, constriction in affect and cognition, memory impairment, phobias, and impairment in performing daily activities."). Violence also affects a child's representations of the world, warping the ability to deal productively with the challenges of adulthood. A child exposed to chronic violence may develop pathogenic conclusions such as, "the world is a hostile and dangerous place," "[it is necessary to] kill or be killed," and "my enemies are less than human." Garbarino Decl., *supra* note 92 at 10. In fact, recent research finds an association between a child's witnessing violence and subsequent development of emotional disturbances. Linda N. Freeman et al., *Violent Events Reported by Normal Urban School-Aged Children: Characteristics and Depression Correlates*, 32 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 419, 423 (1993).

⁹⁴ See *infra* part III, notes 151-162 and accompanying text.

⁹⁵ See *infra* notes 105-124 and accompanying text.

⁹⁶ This may be conceptualized by analogy to the formula of $B = P \times L$, introduced by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). Here, B represents the benefit the actor derives from the act, P is the probability of ensuing liability, and L is the severity of the liability. When the benefit of the act is less than the liability the actor will suffer multiplied by the perceived probability of liability, the actor will not engage in the act. For example, if the benefit, B , of an act has a value of \$10, the fine for committing that act is \$30, and there is a .5 (50%) probability that liability will be imposed, the actor will refrain from acting because $\$10 < .5 \times \30 , or \$15.

side of the equation, the severity of the sanction and the perceived certainty of its imposition determine the disincentives to commit the wrong.⁹⁷ These disincentives are weighed against the potential benefits derived from committing the act, which may be skewed by the individual characteristics of the actors we seek to deter.⁹⁸ For example, a person highly motivated to engage in a particular prohibited behavior is harder to deter than one only marginally motivated.⁹⁹ A person whose wrongdoing is rewarded by his peers may be difficult to deter.¹⁰⁰ And an irrational person, or one without adequate capacity or opportunity to consider the risk of punishment before acting, may be nearly impervious to the threat of prosecution.¹⁰¹ Therefore, if the actors customarily engaged in the act are not susceptible to the threat of liability, neither increased severity, nor perceived certainty, of the punishment will deter.¹⁰²

The potential deterrent effect of laws intended to curb gun possession in schools will therefore depend upon how students perceive the severity of the sanction, the likelihood that the sanction will be imposed, and the perceived benefit of taking a gun to school.¹⁰³ It is important to note, however, that even if a sanction *is* likely to deter, it may not be an appropriate sanction for a state to adopt if the costs of imposing it would outweigh the benefit society would derive from ridding itself of the wrong.¹⁰⁴

⁹⁷ See Ruttenberg, *supra* note 48, at 1906-07; Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 427 (1989). Another factor in the likelihood of deterrence is the timing of the penalty: the shorter the time between the act and the punishment, the greater the deterrent effect. See Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 n.21 (1966).

⁹⁸ Cramton, *supra* note 97, at 427. These characteristics include the actor's motivation, personality, and the "conflicting norms of groups to which the individual owes loyalty and affection." *Id.* (citation omitted). These factors affect the benefit, *B*, perceived by the actor. Theoretically, an increase in *B* may be offset, preserving the deterrent influence, by an equivalent increase in $P \times L$.

⁹⁹ *Id.* at 425.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 426.

¹⁰² In our model, *B*, the actor's perceived benefit, increases as his motivation (or influences) to engage in the conduct increases. At some point, the actor becomes undeterrable because the probability of apprehension and liability cannot exceed 100%. Any time the actor's benefit exceeds the potential liability, the actor will not be deterred.

¹⁰³ It is admittedly difficult to predict the deterrent effect of a sanction directed at a child or adolescent. Deterrence theory presupposes a rational actor who will weigh the potential punishment and the likelihood of receiving it (i.e., the likelihood of apprehension, prosecution, conviction, and incarceration) against the expected value of the act. Elementary and secondary school students may not weigh these factors before acting, or they may give greater weight to certain factors than a "rational" actor would. However, evaluating their behavior in these terms provides valuable insight into potential remedies. Furthermore, the possibility that youth will handle guns less rationally than adults confirms the need to keep them from taking a gun to school.

¹⁰⁴ See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 8-9 (1982).

B. THE DETERRENT EFFECT OF EFFORTS TO CURB GUN POSSESSION IN SCHOOLS

1. *Banning Guns from Schools*

The primary response to guns and gun violence in schools has been to criminalize the possession of guns on campus. At least forty states have criminal statutes outlawing the possession of firearms in school and on school property.¹⁰⁵ Some states—and the federal government under the Gun-Free School Zones Act of 1990¹⁰⁶—have gone further, seeking to create a “gun-free zone” around schools.¹⁰⁷

However, the threat posed by a criminal sanction for taking a gun to school may not outweigh the perceived benefit of doing so. In the first place, those in difficult socio-economic conditions may not view the severity of a potential criminal sentence for gun possession as particularly grave. Such conditions, particularly poverty,¹⁰⁸ can cause some children

¹⁰⁵ ALASKA STAT. § 11.61.195 (Michie Supp. 1997); ARIZ. REV. STAT. § 13-3102(A)(12) (1998); ARK. CODE ANN. § 5-73-119(a)(2) (Michie 1997); CAL. PENAL CODE § 626.9 (West Supp. 1999); COLO. REV. STAT. § 18-12-105.5 (1997); CONN. GEN. STAT. ANN. § 53a-217b (West 1994); GA. CODE ANN. § 16-11-127.1 (1996 & Supp. 1998); FLA. STAT. ANN. § 790.115 (West Supp. 1998); FLA. STAT. ANN. § 810.095 (West 1994); IDAHO CODE § 18-3302D (1997); IND. CODE ANN. § 35-47-9-2 (Lexis 1998); KAN. STAT. ANN. § 21-4204(a)(5) (Supp. 1997); KY. REV. STAT. ANN. § 527.070 (Banks-Baldwin Supp. 1997); ME. REV. STAT. ANN. tit. 20-A § 6552 (West 1993); MD. CODE ANN. art. 27, § 36A (Supp. 1997); MASS. ANN. LAWS ch. 269, § 10(j) (Law. Co-op. 1992); MICH. COMP. LAWS ANN. § 750.237a (West Supp. 1998); MINN. CODE ANN. § 609.66 Subd. 1 (West Supp. 1998); MISS. CODE ANN. § 97-37-17 (1994); MO. ANN. STAT. § 571.030.1(8) (West Supp. 1999); NEB. REV. STAT. § 28-1204.4 (1995); NEV. REV. STAT. ANN. § 202.265 (Michie 1997); N.J. STAT. ANN. 2C:39-5(e) (West Supp. 1998); N.M. STAT. ANN. § 30-7-2.1 (Michie Supp. 1998); N.Y. PENAL LAW § 265.01 (McKinney 1994 & Supp. 1997); N.C. GEN. STAT. § 14-269.2 (Supp. 1997); N.D. CENT. CODE § 62.1-02-05 (1995); OHIO REV. CODE ANN. § 2923.122 (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 21, § 1280.1 (West Supp. 1999); OR. REV. STAT. § 166.370 (1990); 18 PA. CONS. STAT. ANN. § 912 (West 1998); R.I. GEN. LAWS § 11-47-60 (1994); S.C. CODE ANN. § 16-23-430 (Law. Co-op. Supp. 1997); S.D. CODIFIED LAWS 13-32-7 (Michie Supp. 1998); TENN. CODE ANN. § 39-17-1309 (1997); TEX. PENAL CODE ANN. § 46.03(a)(1) (West Supp. 1993); UTAH CODE ANN. § 54A-3-502 (1997); VT. STAT. ANN. tit. 13, § 4004 (1998); VA. CODE ANN. § 18.2-308.1 (1996); WASH. REV. CODE ANN. § 9A.1.280 (West 1999); W.VA. CODE § 61-7-11a (1997).

¹⁰⁶ 18 U.S.C. § 922(q) (Supp. II 1996). The Act was held unconstitutional in *United States v. Lopez*, 514 U.S. 549 (1995). See *infra* notes 261-273 and accompanying text. The Act was amended in 1996 as part of the Omnibus Appropriations Bill for 1997, 18 U.S.C. § 922(q) (amending 18 U.S.C. § 922 (1994)).

¹⁰⁷ CAL. PENAL CODE § 626.9 (West Supp. 1999); 720 ILL. COMP. STAT. ANN. 5-24-1 (West Supp. 1998); LA. REV. STAT. ANN. § 14:95.2 (West Supp. 1999); WIS. STAT. ANN. § 948.605 (West 1996).

¹⁰⁸ Researchers have correlated youth violence with the presence of various “risk factors,” including poverty, repeated exposure to violence, drugs, easy access to firearms, unstable family life and family violence, delinquent peer groups, and media violence. See Ruttenberg, *supra* note 48, at 1894, 1902-03; Barbara Kantrowitz, *Wild in the Streets*, NEWSWEEK, Aug. 2, 1993, at 40, 46.

to develop a fatalism about their lives,¹⁰⁹ rendering the threat of criminal punishment virtually meaningless.¹¹⁰

Secondly, even if the criminal sanction is actually perceived to be serious, the likelihood of its enforcement may be low. Not all school districts have metal detectors or the additional personnel necessary to detect weapons and apprehend students carrying the weapons. And the criminal justice system, especially for juveniles, is neither swift nor certain.

At the same time, the perceived benefits of taking a gun to school may be significant. The immediate threat of armed gang members or other dangers at school may greatly exceed the threat of arrest and conviction. In fact, most students who carry guns to school say that they do so for self-protection.¹¹¹ Students who genuinely believe they are in danger, and who have access to guns will, therefore, have great incentive to take a gun to school.

Another incentive to carrying a gun is status. Owning and carrying guns may be alluring, particularly to younger students.¹¹² Some teenagers, in their search for acceptance and identity, turn to peer groups that are armed or enamored with guns.¹¹³ And students themselves report that gangs and peer groups are a major factor contributing to school vio-

¹⁰⁹ Their conditions are so severe, and so filled with death and despair, that some children have begun planning their own funerals. See Mary A. French, *In Black Despair*, June 20, 1993, at C1.

¹¹⁰ See Vernon Houk & Rueben C. Warren, *The Necessity of Social Change in Preventing Violence*, 106 PUB. HEALTH REP. 228 (1991) ("Faced with such bleak prospects, some minority youth have feelings of anger and hopelessness about the future. Many sense that what they do does not matter because they do not believe they will live to see middle age."); Ruttenberg, *supra* note, 48 at 1908 ("Sadly, many American children and youths today see their future prospects as so bleak that potential criminal sanctions seem meaningless. Some take it for granted that they will not live past their twentieth birthdays.").

¹¹¹ Deane Calhoun & Nancy Gannon, *Students and Guns* (unpublished survey of 261 Oakland, California junior and senior high school students, on file with the Oakland Gun and Safety Task Force) (1988). In suburban Jefferson Parish, Louisiana, where 21% of high schoolers admitted they had carried a gun within in the past year, 73% said they did so for protection. Toch et al., *supra* note 17, at 34. In surveys of 835 youth in prison and 1,653 students from inner-city schools, self-protection was the primary reason for carrying a gun, as "the odds of surviving are seen to be better if one is armed than if not." James D. Wright et al., *Kids, Guns, and Killing Fields*, SOCIETY, Nov.-Dec. 1992, at 84, 88. See also Sarah Glazer, *Violence in Schools*, 2 CQ RESEARCHER 787 (1992) (citing a 1990 survey by the Center for Disease Control that found that one in five high school students carries a weapon at least once a month for self-protection or in a fight); Sickmund, et al., *supra* note 73, at 27 (two-thirds of juvenile arrestees said they carried a gun for protection or self-defense).

¹¹² Calhoun & Gannon, *supra* note 111.

¹¹³ DEBORAH PROTHROW-SMITH & MICHAEL WEISSMAN, *DEADLY CONSEQUENCES* 97 (1991) (noting that gangs "provide young people with goals and objectives, a world, and a place where they are valued" and a manufactured identity, dramatically symbolized in the wearing of gang "colors").

lence.¹¹⁴ Meanwhile, movies and television bombard children and adolescents with the glorification of guns and gun violence,¹¹⁵ consequently desensitizing children to the dangers that guns create.¹¹⁶ Video games and song lyrics also glorify violence and guns, teaching our children that it is appropriate to handle anger, rejection and frustration with vengeance and violence.¹¹⁷ In addition, gun manufacturers, searching for a new market for their products, target children by selling weapons resembling those featured in movies, and for less than the cost of popular shoes.¹¹⁸ Because carrying a gun has thus become a status symbol in many districts, the risk of being caught with a gun provides little deterrent.

2. *Removing Students from Schools*

A number of states have enacted laws providing for the suspension or expulsion of students who possess guns at school.¹¹⁹ Some of these

¹¹⁴ *Id.* For other factors contributing to school violence, see *Factors*, *infra* note 143 and accompanying text.

¹¹⁵ See W. James Potter & William Television, *An Analysis of the Contexts of Antisocial Acts on Prime-Time Television*, 14 COMM. RES. 664, 664-86 (1987). Television portrays approximately 90% of aggressive actions as justified, and 88% of those actions are ultimately rewarded. See *id.* at 683. The fourteen-year old who shot eight classmates during a school prayer meeting reportedly stated that he was inspired by the 1995 movie, *The Basketball Diaries*. This film includes a dream sequence in which the protagonist (played by Leonardo DiCaprio) kills several students and a teacher while his classmates cheer. See Blank & Cohen, *supra* note 1.

¹¹⁶ A child who is surrounded by guns and violence in the home, in the community, and in the media becomes desensitized to the dangers of guns and the adverse effects of violence. See CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 1992 xii, (reporting *TV Guide's* estimate that a violent incident is shown on television every six minutes on average). A typical child has witnessed 8,000 murders and more than 100,000 other acts of violence by the time he or she reaches seventh grade. *Id.*

¹¹⁷ Some believe that video games, as well as television, lead to violence. See Carl T. Hall, *Experts Cite Media, Absent Parents, as Possible Explanations*, S.F. CHRON., April 22, 1999, at A5. Some opine that music with violent messages also breeds violence, as in the case of the 1999 shootings committed by teenagers at Colorado's Columbine High School. See Michael Fleeman, *Root of Youth Violence Scrutinized*, S.F. CHRON., April 24, 1999, at A3. While violent songs and entertainment might not directly cause gun violence, they seem to be a contributing factor or "trigger." See *id.* at A3. The family of one of the students killed in the 1997 Kentucky high school shooting filed a \$130 million lawsuit against entertainment companies that produce violent movies and computer games. Cox News Service, *Victimized Towns Relive Horror of Shootings*, S.F. CHRON., April 21, 1999, at A6.

¹¹⁸ See Price, *supra* note 4, at 1A; see also VIOLENCE POLICY CENTER, *CEASE FIRE: A COMPREHENSIVE STRATEGY TO REDUCE FIREARMS VIOLENCE* (1994) (visited Nov. 17, 1998) <<http://www.vpc.org/studies/cfcont.htm>> (The executive summary appeared as an article in the March 20, 1994 edition of *ROLLING STONE* magazine) Gunmakers have tapped into the hype and popularity that has surrounded high-level sneakers and logo-jackets. *Id.* See Price, *supra* note 37 and accompanying text.

¹¹⁹ See, e.g., ALA. CODE § 16-1-24.1 (1995); IND. CODE ANN. § 20-8.1-5-9 (Michie 1997); KY. REV. STAT. ANN. § 158.150(1)(a) (Banks-Baldwin 1995); WASH. REV. CODE ANN. § 9.41.280 (West 1998). Most of the States enacted such a measure after the federal government conditioned federal education funds on such a law. In October 1994, Congress passed the Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994). The Act requires, as a condition

expulsion programs include assignment to special educational facilities, while others do not.¹²⁰ To the student who takes a gun to school, the gravity of a suspension or expulsion is likely no more significant than that of a fine or criminal sentence. In addition, the likelihood of enforcement may be perceived as quite low because expelling or suspending a student, like criminal prosecution, requires catching the student with a firearm.

Furthermore, and perhaps most importantly, a deterrent is not appropriate if its social costs exceed its social benefits. Consider that expulsion does not only take the gun out of school; it takes the student out of school. If the state does not then provide an expelled student with an alternative school, the student's educational opportunities will be reduced. In the alternative, if the state *does* provide an alternative school to expelled students, it will incur additional expenses to provide that opportunity.¹²¹ In addition, expelling or suspending a student may leave the student on the streets, which may often be more dangerous than school. Even if the student is suspended rather than expelled, he or she will miss instruction and may distrust the authority that ordered the suspension.¹²²

3. *Penalizing Parents*

Some states have imposed penalties on parents or guardians if their child takes a gun to school.¹²³ Presumably, the parent who is aware of the statute has an increased incentive to ascertain whether his or her child has a gun. That parent will then also have increased incentive to prevent

to receiving federal aid, all school districts expel, for at least one year, any student caught taking a gun to school.

¹²⁰ See Jonathan Martin, *Legislators Poised to Take Harsher Stand on Guns in Schools*, SEATTLE TIMES, Feb. 1, 1995, at B1 (discussing a proposed automatic-year-long expulsion for students with guns and an established intense semester-long reentry program for serious offenders). See ALA. CODE § 16-1-24.1 (1995) (restrictions on readmission).

¹²¹ At least one court has held that the state must provide an alternative school for students suspended or expelled. See *Leon v. Greenbrier County Bd. of Educ.*, 484 S.E.2d 909 (W.Va. Dec. 13, 1996).

¹²² AMALIA CUERVO ET AL., NATIONAL SCHOOL BOARDS ASS'N, TOWARD BETTER AND SAFER SCHOOLS: A SCHOOL LEADER'S GUIDE TO DELINQUENCY PREVENTION 18 (1984). Furthermore, it appears that many students who are suspended or expelled do not finish their education. *Id.* at 18-19.

¹²³ See, e.g., OKLA. STAT. ANN. tit. 21, § 858 (West 1993) (fining parents who allow their children to possess firearms at school or certain other public places without notifying the school or law enforcement); TENN. CODE ANN. § 39-17-1312 (1997) (misdemeanor for parents to allow children to possess firearm at school); Editorial, *Straight Shooter: Gov. Casey's Reasonable Plan to Control Assault Weapons*, PITTSBURGH POST-GAZETTE, Mar. 14, 1994, at B2 (proposed bill); Gregg Krupa, *New Gun-Control Plans Could Tighten Local Law*, BOSTON GLOBE, June 20, 1993, at 29 ("[T]en states do have laws that hold parents criminally responsible when they do not properly secure weapons, and their children pick them up and do harm to themselves or others.").

the child from taking the gun to school. These statutes, however, suffer from the detection and enforcement problems that plague punishments directed at the child. In fact, enforcement is even less likely because of the difficulty in proving that the parent actually knew the child had taken the gun to school.¹²⁴ In addition, parents who genuinely believe their child needs to carry a gun for protection will not be deterred by the slight possibility of a moderate fine.

B. INCREASING THE DETERRENT EFFECT OF EFFORTS TO CURB GUN VIOLENCE IN SCHOOLS

In theory, increasing the severity of a sanction increases the likelihood of deterrence.¹²⁵ Here, however, increasing the punishment for gun possession may be perceived as an empty threat (if not enforced) or, if enforced, remove youth from school and place them into the criminal system or onto more savage streets. More productive alternatives include (1) increasing the perceived likelihood of existing sanctions through better detection of the violation; and (2) decreasing the perceived benefit of gun possession by making students feel more secure, teaching them about conflict resolution and the dangers of guns, and making it more difficult for them to obtain a gun.¹²⁶

1. *Increasing the Likelihood of Enforcement*

Increasing the likelihood that gun restrictions will be enforced may be accomplished in a number of ways. First, schools may use metal detectors to increase firearm detection.¹²⁷ The use of metal detectors,

¹²⁴ It is reported that these laws are not prosecuted aggressively. See Katherine Seligman, *Law Winks at Parents of Kids Who Use Guns*, S.F. EXAM'R, Mar. 29, 1998, at A1.

¹²⁵ See *supra* notes 96-104 and accompanying text.

¹²⁶ See PANEL ON THE UNDERSTANDING & CONTROL OF VIOLENT BEHAVIOR, NAT'L RES. COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE 6, 292-94 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1993) ("50% increase in the probability of incarceration would prevent twice as much crime as a 50% increase in the average term of incarceration"); *Guns in Schools—A Federal Role?: Hearings on S. 890 Before the Subcomm. on Youth Violence of the Senate Judiciary Comm.*, 104th Cong. 89 (1995) [hereinafter *Hearings on S. 890*] (statement of Larry Kramer, Professor of Law, New York University) ("The problem in [combating school violence] is not a dearth of laws, but a problem of enforcement.").

¹²⁷ The Supreme Court has not determined whether a suspicionless metal detector search violates the Fourth Amendment protection against unreasonable searches. Courts have usually held that the "search" performed by a metal detector at an airport is reasonable. See *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974); *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973); *United States v. Slocum*, 464 F.2d 1180 (3d Cir. 1972). Unlike an airline traveler, however, a student is compelled by the state to attend school and thus be subjected to a search. On the other hand, the student has advance notice that a metal detector is at the school entrance. See *Klarfeld v. United States*, 944 F.2d 583, 586 (9th Cir. 1991) (holding metal detectors permissible at courthouse entrances as a result of threats of violence which require "urgent need" for protective measures) (citing *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978)); *People v. Dukes*, 580 N.Y.S.2d 850 (Crim. Ct. 1992) (holding hand-held detector

however, has a number of potential drawbacks. Metal detectors can be expensive,¹²⁸ and the expense is compounded by the fact that schools typically have so many entrances and alternate means of access that a large number of the devices would be necessary.¹²⁹ In addition, installing metal detectors only at doors to school buildings would not detect guns on school grounds outside the buildings. For example, the two suspected shooters in the Jonesboro, Arkansas shooting waited outside among bushes for the victims to walk out of the school building before firing upon them.¹³⁰ Thus, it may be necessary to enclose the campus by a fence and position metal detectors at a limited number of gates. Moreover, some view metal detectors to be labor intensive, time consuming, and not particularly effective in preventing violence.¹³¹

Second, a school may use an anonymous tip system to increase the likelihood of discovering that a student is carrying a gun.¹³² To encourage students to provide these tips, school districts could educate students on the importance of disclosing guns on campus and even pay students for information leading to the confiscation of guns or to arrests.¹³³ One such program in Tennessee has reportedly met with some success.¹³⁴

to search students permissible because minimally intrusive); TENN. CODE ANN. 49-6-4207 (1994) (authorizing use of metal detectors).

¹²⁸ Hand-held metal detectors, sometimes called "wands," cost approximately \$115 each. Walk-through devices cost on average approximately \$2,500 each and are much more effective in detecting metal. See Toch, *supra* note 17, at 35. However, walk-through devices can actually cost as much as \$10,000 each and the x-ray devices used to search book bags cost even more, around \$17,000. See Glazer, *supra* note 111, at 790.

¹²⁹ See Clifford Krauss, *Teenager Shoots Fellow Student at Their High School in Brooklyn*, N.Y. TIMES, Sept. 15, 1994, at A1 (reporting that student entered side door to evade metal detector); See also Karel Holloway, *High School's Metal Detector Fails to Find Weapons*, DALLAS MORNING NEWS, June 7, 1994, at 18A (reporting that properly set up metal detectors missed weapons altogether).

¹³⁰ See *Shaken Kids Huddle for Comfort*, *supra* note 7.

¹³¹ Glazer, *supra* note 111, at 790.

¹³² "Warrantless" searches of students based on anonymous tips have been upheld. See *S.D. v. State*, 650 So. 2d 198, 199 (Fla. Dist. Ct. App. 1995); *State v. Joseph T.*, 336 S.E.2d 728, 737 (W.Va. 1985). See *infra* note 160 and accompanying text.

¹³³ See *United States v. Lopez*, 514 U.S. 549, 582 (Kennedy, J., concurring); Christina Lima, *Schools May Launch Weapons Hot Line*, L.A. TIMES, Jan. 13, 1995, at B1. In one program, Students anonymously call Crime Stoppers, a nationwide non-profit organization that residents can call to report crimes. Crime Stoppers notifies the police department, which notifies the school, which searches the suspect. The student caller then receives a reward of \$50. See *id.* A similar program was begun in a school in Tucson, Arizona, after experiencing more than one incident per day involving handguns. See *Reward for Tips on Guns in Tucson Schools*, ARIZ. REP., Jan. 7, 1995, at B2. School districts in California have considered adopting such a program as well. See Lima, *supra* note 133.

¹³⁴ In the first year of the Tennessee program, police confiscated over 300 weapons, including 115 guns. Students appeared supportive, and Memphis schools reported a decrease in the number of weapon-related crimes. See Lima, *supra* note 133.

Third, when school districts have a reasonable suspicion that something unlawful is present, they may increase searches of students, backpacks and lockers.¹³⁵ Fourth, school districts may increase the awareness of parents and teachers of efforts to enforce existing laws and regulations, thereby increasing the perception, if not the reality, of the chances of detection and punishment.¹³⁶

It is important to note that all of these measures have potential adverse effects on the school environment. Searches of students, as well as the use of metal detectors and informant systems, diminish privacy and may make students feel oppressed.¹³⁷

Whether the economic cost and adverse effects of these tactics are deemed worth a potential increase in school safety depends upon the circumstances of each school. For example, the degree to which these measures intrude into the lives of students and teachers depends, in part, on the school's architecture and the configuration of the school grounds.¹³⁸ The nature of the school environment—including the extent of gun violence in the school and the perspectives of teachers, parents, and students—will dictate the perceived need for intrusive measures. Each of these factors will vary by school district, and a solution suitable for one region of the country may be unsuitable for another. Ideally, each school district should best understand its own needs and resources and be able to predict its community's reaction. By comparison, federal officials are less likely to be familiar with specific local circumstances. The interjection of federal officials, therefore, could interrupt longstanding and close working relationships between school administrators, police and prosecutors. It could also interfere with local development of programs particularly suited to a specific school, community, or district. Thus, local government would likely strike the most acceptable balance

¹³⁵ See *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981); *in re William G.*, 709 P.2d 1287, 1295 (1985); *In re Joseph G.*, 38 Cal. Rptr. 2d 902 (Ct. App. 1995); *in re DuBois*, 821 P.2d 1124 (Or. Ct. App. 1991); *State v. Slaterry*, 787 P.2d 932, 933 (Wash. Ct. App. 1990) (holding it permissible for school officials to search student's car for drugs); *Commonwealth v. Carey*, 554 N.E.2d 1199 (Mass. 1990). See *infra* note 160 and accompanying text.

¹³⁶ See Cramton, *supra* note 97; Andenaes, *supra* note 97.

¹³⁷ See Glazer, *supra* note 111, at 790 (noting the concern that metal detectors and searches adversely impact the school environment, but also reporting that students actually liked having the metal detectors). Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

¹³⁸ See Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U.L. REV. 817, 839-43 (1992) (suggesting potential solutions for reducing school violence without disrespecting individual rights, including design and architecture of school to minimize obtrusiveness of surveillance).

between costly oppressive security measures and the risks of gun violence.

2. *Decreasing the Perceived Benefit of Possessing a Gun*

As discussed above, the perceived benefit of bringing a gun to school often stems from the students' belief that they need protection, and from a desire to gain respect or status among their peers.¹³⁹ Students' perceived need for self-protection may be abated in a number of ways. Schools might increase security personnel and patrols, not only on campus but also on buses and in the immediate vicinity of schools. Metal detectors, surveillance cameras in hallways and parking lots, and discreet security monitors in restrooms (where students are reportedly most afraid) may increase student safety and decrease the existing need for self-protection.¹⁴⁰

Impressing upon students that there are alternatives to violent responses, and actually teaching them methods of resolving conflict by other means may also help create a safer environment, and reduce the perceived need for guns.¹⁴¹ Educating children and their parents, through informational programming or public service announcements, on the dangers and drawbacks of possessing a firearm may likewise dispel the perception that a gun serves as a status symbol.¹⁴² Providing students

¹³⁹ See *supra* notes 111-118 and accompanying text.

¹⁴⁰ See *Stern v. New Haven Community Sch.*, 529 F. Supp. 31 (E.D. Mich. 1982) (permitting visual surveillance of students through two-way restroom mirrors on the ground that students have reduced expectations of privacy at school). See also Glazer, *supra* note 110, at 790 (reporting that students appreciated the presence of metal detectors both for protection and for the personal attention the students receive during the process).

¹⁴¹ An analysis of such programs predicted that they would not "produce long-term changes in violent behavior or risk of victimization." Daniel W. Webster, *The Unconvincing Case for School-Based Conflict Resolution Programs for Adolescents*, HEALTH AFFAIRS Winter 1993, at 126, 127. Conflict resolution skills may not "counterbalance the real-life problems of a child who, for example, is living in poverty, a dangerous neighborhood, and an unstable family." Ruttenberg, *supra* note 48, at 1906. Programs directed more specifically to the dangers of guns might be successful, however. For example, a 16-month evaluation of over 2,000 middle school students, sponsored by the National Institute of Justice, tested the effectiveness of two New York City middle school violence prevention programs from February 1993 to June 1994. See U.S. DEP'T OF JUST., NATIONAL INSTITUTE OF JUSTICE UPDATE, EVALUATION OF VIOLENCE PREVENTION PROGRAMS IN MIDDLE SCHOOLS (August 1995). Project S.T.O.P. (Schools Teaching Options for Peace) was a conflict resolution program including a curriculum and peer mediation. The Safe Harbor Program included a curriculum, counseling, and a schoolwide anti-violence campaign. *Id.* The study showed that students in the S.T.O.P. program used reasoning to resolve conflicts more often than those who did not participate in the program. Students who participated in the Safe Harbor Program were less likely to believe that violent retaliation was necessary. *Id.* In addition, the Center to Prevent Handgun Violence has developed an educational program called "STAR" (Straight Talk About Risks), involving role playing exercises designed to promote appropriate responses to dangerous situations for pre-kindergarten to 12th graders.

¹⁴² See, e.g., *Violence Having Traumatic Effect on Kids, Study Says*, MESA TRIB., Apr. 24, 1993, at A3 (early-childhood organization contends that "an anti-violence campaign simi-

with alternate sources of self-esteem, by actively recognizing their talents, engendering a respect for life and others, and instilling hope for the future, might also counteract the negative influences that make gun violence seem acceptable.¹⁴³

The perceived "benefit" of carrying a gun—whether for protection or status—may also be reduced by making it more difficult to obtain one. Federal laws have, for years, prohibited sales to minors by licensed firearm dealers.¹⁴⁴ Fairly recent legislation outlaws most sales to minors (and possession by minors) altogether¹⁴⁵ and vigilant enforcement of laws prohibiting juvenile gun possession has been shown to reduce juvenile violence.¹⁴⁶ Additional laws make it more difficult for children and young teens to gain access to guns stored in their homes. Because a substantial number of loaded handguns are not stored properly,¹⁴⁷ some states have passed laws that make parents liable for injuries caused by

lar to the anti-drunken driving movement could increase public awareness" and could "shap[e] public opinion along the lines of the anti-drinking driving campaigns").

¹⁴³ See *supra* notes 113-118 and accompanying text. Strong positive influences from family, school, churches or other groups may establish a belief system that gives meaning, acceptance, self-esteem and hope to youth, or at least buffer violent influences from the media and some peers. To be sure, much of this must come from the home. Teachers believe that the primary causes of school violence are lack of parental supervision at home, lack of family involvement with the school, and exposure to violence in the media. See *Factors Contributing to School Violence*, at <www.eric-web.tc.columbia.edu/monographs/uds107/preventing_factors.html> (visited April 25, 1999) [hereinafter *Factors*] (citing *Violence In America's Public Schools* THE AMERICAN TEACHER (1993)). Students agree that lack of parental supervision at home, as well as peer groups, are the major causes of school violence. *Id.* Sadly, the 15-year old shooter in the 1998 Oregon incident said he "had no other choice" but to shoot. See Cox News Service, *Victimized Towns Relive Horror of Shootings*, S.F. CHRON., April 21, 1999, at A6.

¹⁴⁴ 18 U.S.C. § 922(b)(1) (1999). The problem, however, is that juveniles often get their guns from friends, family or on the street, and these transactions may not be covered by laws regulating licensed dealers. See *supra* notes 46-47 and accompanying text.

¹⁴⁵ 18 U.S.C. § 922(x) (1999). See *infra* notes 299-316 and accompanying text.

¹⁴⁶ According to a May 1995 California report, "juvenile violence could be reduced by limiting the number of firearms illegally possessed by juveniles." CLIFTON CURRY, LEGISLATIVE ANALYSTS OFFICE, JUVENILE CRIME—OUTLOOK FOR CALIFORNIA, MAY 1995 (visited April 20, 1998) <www.lao.ca.gov/kkpart6.html>. Research from experiments in Kansas City recently showed that "the use of law enforcement personnel whose sole responsibility was to seize illegal guns in gun 'hot spots' increased gun seizures by 65% and reduced the incidence of violence in those areas by 49%." *Id.* In other areas of the city, which did not employ targeted patrols, gun-related crime slightly increased, perhaps because it was "displaced" from the targeted areas. See *id.*

¹⁴⁷ Seligman, *supra* note 124, at A14 (reporting a 1996 survey by the National Institute of Justice that one in three handguns is stored unlocked and loaded).

guns stored unsafely.¹⁴⁸ There is some evidence that these “safe storage” laws are effective.¹⁴⁹

Increased security and educational programs, however, cost money, as does the enforcement of laws prohibiting the sale of, or juvenile access to, firearms. Furthermore, extensive security measures intrude on student privacy and may thereby negatively affect the school environment. Here again, it is local government that is most familiar with the extent of the violence—and possible reactions to the measures by teachers, students and parents—in each area. State and local governments should be best able to evaluate which of these methods, if any, would be most effective in reducing the perceived need for and allure of guns.¹⁵⁰

In sum, measures intended to curb gun violence will deter only if the perceived costs of taking a gun to school outweigh the perceived benefits. State and local governments are best able to maximize the apparent risk of having a gun at school, by employing the particular measures that will increase perceptions that firearms will be detected and the laws will be enforced. They are also best able to determine how to minimize the students’ perceived need for guns, by increasing security, providing examples of appropriate conflict resolution, and giving students alternative sources of status or self-esteem.

III. THE TRADITIONAL PROVINCE AND POWERS OF THE STATES TO REGULATE GUNS AND SCHOOLS, AND THE NEED FOR FEDERAL SUPPORT

The states have traditional authority over education and local law enforcement. Despite their best intentions, however, they may be unable to devote sufficient resources to effectively combat the growing and complex problem of gun violence in schools. Accordingly, there is significant cause to supplement state efforts with federal resources, resolve, and regulation. This is particularly urgent in light of the national ramifications of school violence.

¹⁴⁸ In California, a parent who keeps a firearm at home, knowing that a child is likely to gain access to it, may be charged with a felony if the child uses the gun to harm himself or others. *See id.* at A1 (reporting that Florida and Connecticut also have such laws, but that the law is not stringently enforced).

¹⁴⁹ *See id.* at A14 (reporting a study that found there was a 40% reduction in unintentional shooting deaths after enactment of felony legislation). Enforcement of safe storage laws could also reduce the number of stolen guns, which are typically used in crime or sold in secondary markets (such as street sales and gun shows) that are difficult to regulate.

¹⁵⁰ Other measures directly restricting children’s access to guns would of course also reduce gun possession and, presumably, gun violence. *See Ruttenberg, supra* note 48, at 1904-05, 1910-11. *See also* Witkin et al., *supra* note 2, at 26 (“[T]he biggest difference in today’s atmosphere is that the no-problem availability of guns in every nook of the nation has turned record numbers of everyday encounters into deadly ones.”).

A. THE STATE'S INTERESTS IN EDUCATION AND THE POLICE POWER

In *Brown v. Board of Education*,¹⁵¹ the United States Supreme Court declared that "education is perhaps the most important function of state and local governments."¹⁵² The Court further explained that:

Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.¹⁵³

The regulation of education has historically been the province of the states.¹⁵⁴ Through local control over education, school authorities work with parents and local governments to fashion regulations best suited for a particular school district or community.¹⁵⁵

Although the state's interest in education is not absolute,¹⁵⁶ the state may regulate activities that detract from the quality of education provided at school. In addition, children are subject to more stringent regu-

¹⁵¹ 347 U.S. 483 (1954).

¹⁵² *Id.* at 493.

¹⁵³ *Id.* See also *School Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923) ("American people have always regarded education and acquisition of knowledge as matters of supreme importance.").

¹⁵⁴ See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

¹⁵⁵ See, e.g., *Milliken*, 418 U.S. at 741 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."); *San Antonio Sch. Dist.*, 411 U.S. at 50 (1973) (noting local control over education process permits structuring of school programs to fit local needs and encourages "experimentation, innovation, and a healthy competition for educational excellence").

¹⁵⁶ See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (holding that although providing public school regulation "ranks at the very apex of the function of a State," compulsory attendance law struck down under Free Exercise Clause); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding that state could not compel public school attendance, because state's interest in education yields to right of parents to provide equivalent private education).

lations than adults are, especially in a school environment.¹⁵⁷ Therefore, restrictions necessary for the control of students are generally valid if they address conduct that disturbs the peace and order of the classroom.¹⁵⁸ Thus, an ordinance prohibiting noise or diversions tending to disturb classes is valid.¹⁵⁹ Searches of student lockers, backpacks and persons without search warrants are similarly permissible provided there is some reasonable suspicion that the student possesses something unlawful.¹⁶⁰

Furthermore, the state has a general interest in protecting its citizens from harm and in preserving "[p]ublic safety, public health, morality, peace and quiet, law and order" and general welfare.¹⁶¹ Pursuant to this police power, the states have the authority to regulate the use and possession of guns.¹⁶²

Therefore, in light of both their interests in education and their police powers, states may unquestionably regulate the possession of guns on school property.¹⁶³ In particular, states may enact statutes that

¹⁵⁷ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school need not tolerate student speech in school newspaper that is inconsistent with its educational mission, even if such speech would be protected outside school); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1968) (finding first amendment rights of students not coextensive with rights of adults in other settings, and student could be disciplined for a speech that was sexually explicit); *Montalvo v. Madera Unified Sch. Dist. Bd. of Educ.*, 21 Cal. App. 3d 323, 330 (1971) ("[A] student may be subject to far more stringent regulations than an adult outside a school environment due to his immaturity and status as a student in a school environment where disciplinary and health problems and considerations relating to safety of minors take on special significance.").

¹⁵⁸ See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding that students cannot be punished for expressing personal views on school premises unless school authorities have reason to believe it will "substantially interfere with the work of the school or impinge upon the rights of other students").

¹⁵⁹ See *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972) (upholding ordinance against vagueness and overbreadth challenges, and declaring that "schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse").

¹⁶⁰ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that searches of students are exempt from the Fourth Amendment's warrant requirement and need only be reasonable under the circumstances); *Stern v. New Haven Community Sch.*, 529 F. Supp. 31 (E.D. Mich. 1982) (permitting visual surveillance of students through two-way restroom mirrors on the ground that students have reduced expectations of privacy at school).

¹⁶¹ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁶² See, e.g., *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1417-19 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723 (9th Cir. 1992); *Burton v. Sills*, 248 A.2d 521, 526, 531 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969).

¹⁶³ See *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J., concurring) ("If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures."); *People v. Singer*, 128 Cal. Rptr. 920 (1976) (upholding California Penal Code § 629.9, prohibiting guns on campus, against due process and equal protection challenges because there was a rational distinction between public schools and other public places where unloaded firearms may be lawfully possessed).

criminalize the possession of guns in or around schools, require expulsion of students who carry guns on campus, and punish parents for such acts by their children—as long as the statutes remain sufficiently related to legitimate government interests.

1. *Students' Rights to Education*

A student has a legitimate claim of entitlement to a public education if the state has established a public school system and requires its children to attend.¹⁶⁴ This entitlement constitutes a property interest protected by the Due Process Clause.¹⁶⁵ Therefore, expelling or suspending a student for carrying a gun to school arguably conflicts with that student's interest in obtaining an education. On the other hand, the state also has a significant interest in excluding the student who brings a gun to school, or at least in excluding the gun.¹⁶⁶ Further, because a student does not have a fundamental right to education only an entitlement, a regulation that may compromise a student's interest in that education need only be rationally related to a legitimate state interest.¹⁶⁷ Expelling students who bring guns to school has been upheld as being rationally related to the state's interest in providing an education.¹⁶⁸

2. *Rights of Licensed Gun Owners*

The regulation of guns in schools—particularly laws that criminalize gun possession in a school zone—could arguably conflict with a gun owner's interest in carrying an otherwise lawful firearm. The Second Amendment to the United States Constitution provides, in part, that “the right of the people to keep and bear Arms, shall not be infringed.”¹⁶⁹

¹⁶⁴ All 50 states have compulsory education laws. See *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

¹⁶⁵ *Id.* at 574. See also *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906, 918 (D. Me. 1990).

¹⁶⁶ *Carey*, 754 F. Supp. at 918.

¹⁶⁷ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). See *infra* notes 184-187 and accompanying text.

¹⁶⁸ *Mitchell v. Bd. of Trustees of Oxford Mun. Separate Sch. Dist.*, 625 F.2d 660 (5th Cir. 1980) (upholding rule mandating the automatic expulsion of any student bringing a knife or other weapon to school as rationally related to the goal of providing a safe environment in which children could learn). See also *People v. Singer*, 128 Cal. Rptr. 920 (1976). From a procedural standpoint, the Due Process Clause requires fundamentally fair procedures, such as notice and opportunity to be heard, before the student may be expelled or suspended. *Id.* “At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.” *Goss*, 419 U.S. at 579 (holding that statute permitting suspension without a hearing unconstitutional). See also *Carey v. Maine Sch. Admin. Dist. No. 17*, 754 F. Supp. 906 (D. Me. 1990) (finding due process not violated in expelling student who brought semi-automatic weapon to school).

¹⁶⁹ The Second Amendment provides that “[a] well-regulated militia, being necessary to

The courts have consistently held, however, that the Second Amendment does not preclude gun control laws affecting the private ownership, sale, and use of firearms.¹⁷⁰ Courts have further held that the Second Amend-

fringed." U.S. CONST., amend. II (emphasis added). The meaning of the Second Amendment is rooted in the concept of a "militia." Before the Constitution was adopted, each of the states had its own militia. See Articles of Confederation, art. VI ("[E]very State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred."); W. RIKER, *SOLDIERS OF THE STATES: THE ROLE OF THE NATIONAL GUARD IN AMERICAN DEMOCRACY* 11-12 (1957). When the Constitution established a permanent federal army of professional soldiers, the colonists feared national standing armies, based on their recent experiences with European monarchs, and believed that the continuation of the state militias was vital to their security. See Keith Ehrman & Dennis Henigan, *The Second Amendment in the Twentieth Century: Have you Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 14-15 (1989). Moreover, the Constitution gave the federal government power over the arming of the militias, U.S. CONST., ART. I, § 8, cl. 16, and many were concerned that the federal government could neutralize the states' security by taking their arms. *Id.* at 14-15. The Second Amendment was thus adopted to provide citizens a right to maintain arms for the purpose of maintaining a "well regulated Militia" of the state, which was still deemed "necessary to the security of a free State." *Id.* In the 19th century, the states largely abandoned the concept of the state militia. See *id.* at 36; *Perpich v. Dep't of Defense*, 496 U.S. 334, 341 (1989). Today there are no "state armies," and the closest analogue to the "well-regulated Militia" is the National Guard. However, because National Guard weapons are not privately owned, the right to possess a firearm no longer bears any relationship to preserving the militia contemplated by the Second Amendment. See Henigan, *supra* note 169, at 14-15.

¹⁷⁰ In *United States v. Miller*, 307 U.S. 174 (1939), the U.S. Supreme Court held that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness" of the state militia, and that the amendment "must be interpreted and applied with that end in view." *Id.* at 178. Since then, federal courts, including every circuit court of appeals, have unanimously held that the Second Amendment guarantees a right to be armed only to persons using the arms in service to an organized state militia. See, e.g., *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993) ("[The] purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."); *Thomas v. Members of the City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983) (It is "clear that the right to bear arms is inextricably connected to the preservation of a militia. . . . [W]e conclude that the right to keep and bear handguns is not guaranteed by the second amendment."); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *Eckert v. City of Philadelphia*, 477 F.2d 610 (3d Cir. 1973), *cert. denied*, 414 U.S. 839 (1973) ("It must be remembered that the right to keep and bear arms is not a right given by the U.S. Constitution."); *United States v. Day*, 476 F.2d 562, 568 (6th Cir. 1973); *United States v. Tomlin*, 454 F.2d 176 (9th Cir. 1972), *cert. denied*, 406 U.S. 924 (1972) (following *Miller* without discussion); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943). Numerous state courts have reached the same conclusion. See, e.g., *Arnold v. Cleveland*, 616 N.E.2d 163, 167-68 (Ohio 1993) ("[Court] decisions signify, and history supports the position, that the amendment was drafted not with the primary purpose of guaranteeing the rights of individuals to keep and bear arms but, rather, to allow Americans to possess arms to ensure the preservation of a militia."); *Galvan v. Superior Court*, 70 Cal. 2d 851, 866 (1969) ("The claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question."); *Burton v. Sills*, 248 A.2d 521, 526, 531 (N.J. 1968), *appeal dismissed*, 394 U.S. 812 (1969) (Second Amendment "refers to the collective right 'of

ment was intended to protect and inure to the benefit of the states, and therefore does not preclude gun regulation by state or local government.¹⁷¹ Finally, because the Second Amendment does not grant a fundamental right to possess a gun, the regulation of gun possession within a school zone need only be rationally related to the legitimate governmental purpose of maintaining education.¹⁷² The state's interest in education and safety, the large number of children in an area surrounding a school, and the fact that regulating an area around a school makes it easier to enforce a regulation within the school, suggest that creating a gun-free zone is rationally related to a legitimate government interest.¹⁷³

3. Parental Due Process Rights

Statutes imposing liability on parents if their children take guns to school may conflict with the parents' due process rights. These statutes are, however, roughly analogous to existing statutes that impose liability on parents for damages caused to third parties by the willful or malicious acts of their children.¹⁷⁴ Such laws are held to not violate the parents' due process rights,¹⁷⁵ at least where there is a statutory ceiling on the

the people' to keep and bear arms in connection with a 'well regulated militia,'" meaning the "active, organized militia of each state, which today is characterized as the state National Guard." "Reasonable gun control legislation is clearly within the police power of the State and must be accepted by the individual though it may impose a restraint or burden on him.").

¹⁷¹ Although the courts have chosen to apply many other Bill of Rights provisions to the states through the Fourteenth Amendment, they have explicitly declined to do so with the Second Amendment. *See, e.g.*, *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *Fresno Rifle and Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1417-19 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723 (9th Cir. 1992).

¹⁷² *See People v. Singer*, 56 Cal. App. 3d Supp. 1, 128 Cal. Rptr. 920 (1976).

¹⁷³ *Id.* Statutes creating a gun-free school zone typically exempt possession of a firearm in a locked container or on private property. *See, e.g.*, 18 U.S.C. § 922(q) (1999); Cal. Pen. Code § 626.9 (West 1998). Therefore, persons driving through the zone could carry an otherwise lawful weapon if it were properly secured, and residents who live within the zone could keep guns in their homes.

¹⁷⁴ *See, e.g.*, Cal. Civ. Code § 1714.1 (West 1998) (imposing civil liability on parent for damages caused by unlawful act of child); Cal. Civ. Code § 1714.3 (West 1998) (imposing civil liability for personal injury or property damage caused by the discharge of firearm by minor, up to \$30,000 per injury or death for one person or \$60,000 per incident).

¹⁷⁵ *See First Bank Southeast, N.A. v. Bentkowski*, 405 N.W.2d 764, 766 (Wis. Ct. App. 1987) (upholding parental liability statute holding parents liable for acts of child for damages to property or personal injury attributable to willful, malicious or wanton act of child, not to exceed \$1,000); *Rudnay v. Corbett*, 374 N.E.2d 171, 174-75 (Ohio Ct. App. 1977) (affirming parents responsible for up to \$2,000 for property damages willfully caused by child); *Watson v. Gradzik*, 373 A.2d 191, 193 (Conn. C.P. 1977) (stating parent liable for up to \$1,500 for child willfully or maliciously causing damage to property); *In re Sorrell*, 315 A.2d 110 (Md. Ct. Spec. App. 1974); *Mahaney v. Hunter Enters., Inc.*, 426 P.2d 442 (Wyo. 1967) (allowing parent to be liable for up to \$300 for children under 17 who maliciously and willfully damage or destroy property); *General Ins. Co. of Am. v. Faulkner*, 130 S.E.2d 645 (N.C. Ct. App. 1963) (holding that parent can be liable for up to \$500 for minor who maliciously or willfully destroys property); *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961) (holding that

amount of liability imposed.¹⁷⁶ Although such statutes have been justified on the ground that the injured parties would not otherwise be compensated,¹⁷⁷ they have also been upheld on the ground that they motivate parents to pay closer attention to their children and thereby deter juvenile misconduct.¹⁷⁸

B. THE NEED FOR A FEDERAL MANDATE AND FEDERAL RESOURCES TO PROTECT NATIONAL INTERESTS

States have the power to regulate gun possession in schools and, as a general matter, would certainly not choose to promote the presence of guns in classrooms or increase the death toll due to gun violence. Not all state or local governments, however, have the economic resources to effectively regulate guns in schools. In addition, some states may be unwilling to enact effective legislation or devote sufficient resources to enforcement.¹⁷⁹ As a result, a number of states do not have, or do not

parent can be liable for up to \$300 for minor "who maliciously and willfully damages or destroys property").

¹⁷⁶ Compare cases cited *supra* note 175, with *Corley v. Lewless*, 182 S.E.2d 766, 770 (Ga. 1971) (finding statute deprived parents of property without due process of law because it sought to provide compensation in full for property damage or personal injury; a statute imposing a limit, on the other hand, amounts to a penal statute and is constitutional).

¹⁷⁷ See, e.g., *Bryan v. Kitamura*, 529 F. Supp. 394, 399-400 (D. Haw. 1982); *Vanthournout v. Burge*, 387 N.E.2d 341 (Ill. App. Ct. 1979); *Rudnay*, 374 N.E.2d at 174-75.

¹⁷⁸ See *Kitamura*, 529 F. Supp. at 399-400 (finding that statute making parents jointly liable with their children for tortious acts is rationally related to state interest in providing a remedy for tort victims who would otherwise receive no compensation. It also deters juvenile delinquency by providing an incentive for parents to exercise greater supervision over their children); *Curry v. Superior Ct.*, 20 Cal. App. 4th 180, 185, 24 Cal. Rptr. 2d 495, 498 (1993) (deciding it is fair to impose liability on parent under Cal. Civ. Code § 1714.1 because parent has duty to control, supervise and train the child); *First Bank Southeast*, 405 N.W.2d at 766 (stating that parental liability statute represents a valid exercise of state's police power in giving parents a financial incentive to prevent their minor children from inflicting personal injury and property damage, in that it is rationally related to the legitimate state interest in curbing vandalism); *Board of Educ. v. Caffiero*, 431 A.2d 799, *cert. denied*, 454 U.S. 1025 (1981) (holding statute making parent liable for damages for injury caused by child to school property is rationally related to interest in compensating the public and deterring delinquent behavior); *Vanthournout*, 387 N.E.2d at 341 (holding parent's liability for willful or malicious acts is rationally related to interest in compensating innocent victims of juvenile misconduct, and places obligation on parents to control a minor child); *Rudnay*, 374 N.E.2d at 174-75 (finding statute making parents responsible for property damage willfully caused by child is rationally related to government purpose of compensating innocent victims of property damage, and might also tend to curb juvenile delinquency by rendering parents jointly and severally liable for the willful misconduct of their minor children); *General Ins. Co. of Am. v. Faulkner*, 130 S.E.2d 645, 650 (1963) (holding that "parental liability for harm done by children will stimulate attention and supervision" and prevent juvenile delinquency).

¹⁷⁹ As described by one sponsor of the Gun Free School Zones Act:

[N]ot every state has a law [prohibiting taking a gun to school]. And not every state law is adequately drafted to do the job. For example, Alabama only prohibits bringing a gun to school with the intent to cause bodily harm. . . . And in Alabama you

aggressively enforce, any laws prohibiting guns at school.¹⁸⁰ Furthermore, while the warning signs of violent youth are known,¹⁸¹ states often do not have sufficient resources to help the troubled youth who may be prone to gun violence.¹⁸²

In short, the states may simply be unable to address the problem of guns in school without additional resources. Because the states have no legal obligation to eliminate guns in schools, and because important federal interests hang in the balance, federal legislation may be appropriate.

1. *States Have No Federal Constitutional Obligation to Protect Students from Gun Violence*

A state generally has greater incentive to address a danger within its borders if it is subject to liability for that danger, or if it is subject to an injunction or other order requiring it to do so. However, while a student has an interest in obtaining an education and an interest in being safe from harm, these interests are not sufficient to compel enactment of legislation exposing a state to liability for school violence.

A student's interest in receiving an education is adversely affected by guns and gun violence in the classroom,¹⁸³ and while education is not a fundamental constitutional right,¹⁸⁴ the denial of an education alto-

can bring a gun to a private school without any worries. In other states, the maximum penalty for an adult who brings a gun into school is only one year. (statement of Sen. Herb Kohl, July 18, 1995, Federal Document Clearing House, Inc).

¹⁸⁰ In his *Lopez* concurrence, Justice Kennedy reported that 40 states had outlawed the possession of firearms on or near school grounds. *United States v. Lopez*, 514 U.S. 549, 581 (1995). The remaining states were Alabama, Delaware, Hawaii, Iowa, Louisiana, Montana, New Hampshire, Wisconsin and Wyoming.

¹⁸¹ Warning signs of violence include cruelty to animals, preference for violent entertainment, angry essays or artwork, history of uncontrollable outbursts, suicide threats, and sudden behavioral changes. Lori Olszewski & Elaine Herscher, *Support Services Thin, But Kids Can Be Helped*, S.F. CHRON., April 22, 1999, at A5 (citing National School Safety Center and therapists); National School Safety Center, <www.nsscl.org/reporter/checklist.htm> (visited April 17, 1999). The students who massacred their peers in Littleton, Colorado, were described as intelligent and from an upscale community, but they also displayed a number of warning signs: they were fascinated with Hitler and Nazi paraphernalia, filmed videos of themselves shooting high powered weapons, threatened to kill people, talked about bombs, consistently dressed in black, operated a hate-talk web site, played violent video games, and listened to songs of oppression, revenge and violence. *Id.* See Kevin Fagan & Jaxon Van Derbeken, *Eerie Hints of the Outcasts' Dark Side*, S.F. CHRON., April 22, 1999, at A1, A4.

¹⁸² While 20% of children and adolescents have a behavioral, emotional or mental health problem, two-thirds of them do not get the help they need. See Olszewski & Herscher, *supra* note 181, at A5 (reporting statistics from the U.S. Dep't of Health and Human Services).

¹⁸³ See *supra* notes 1-12.

¹⁸⁴ See, e.g., *Kadrmas v. Dickinson Public Schools et al*, 487 U.S. 450, 464 (1988) (finding that state and local legislation resulting in some North Dakota school districts providing free transportation to some students to their local public school, while other districts in the state conditioned such transportation on payment of a fee, did not violate the equal protection clause because it was rationally related to a legitimate government purpose); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (applying rational basis test, state statutory

gether is unconstitutional.¹⁸⁵ Therefore, some level of educational opportunity, such as the opportunity to acquire "basic minimal skills," may be constitutionally protected.¹⁸⁶ The difficulty with succeeding on such a claim, however, is that although gun violence in some schools seriously impedes students' learning and causes truancy, it is hard to prove that it altogether prevents them from acquiring "basic minimal skills." Furthermore, unlike a statute precluding a class of children from attending school,¹⁸⁷ or a statutory scheme precluding students from educational opportunities,¹⁸⁸ the state's failure to control school violence is merely a failure to address a situation caused by third parties.

scheme financing schools with local property taxes did not violate equal protection clauses). The significance of education being a fundamental right is in the standard by which an infringement of that right is evaluated. *Id.* at 17. In determining whether a statute violates the Equal Protection Clause, the court requires that there be a reasonable relationship to a legitimate public purpose. *Id.* at 40. A higher standard applies if that statute disadvantages a "suspect class," or impinges on a "fundamental right." *Id.* In those instances, there must be a showing that the legislation was narrowly tailored to fulfill a compelling state interest. *Id.*; see *Plyler v. Doe*, 457 U.S. 202, 217 (1982), *reh'g denied*, 458 U.S. 1131 (1982). Some classifications trigger intermediate scrutiny, requiring a showing that the law furthers a substantial state interest. *Plyer*, 457 U.S. at 217-18.

¹⁸⁵ In *Plyler* a Texas statute withheld from local school districts state funds for the education of children who were not legal admittees to the United States. *Id.* The statute also authorized school districts to deny enrollment to those children. Although the Court recognized that education was not a fundamental right, the Court found that the statute had to be justified by a showing that it justified "some substantial state interest," *id.* at 230, because the denial of an education imposed a lifelong hardship and a stigma of illiteracy and deprived the children of any opportunity to advance their personal and economic interests. *Id.* at 223-24. See *Kadrmas*, 487 U.S. at 450, 459 (holding that application of *Plyler* should be limited to facts in *Plyler* because it represented a unique situation involving the total denial of education to a group of children resident in the state as well as a penalty on children for the illegal conduct of their parents).

¹⁸⁶ In *San Antonio Ind. Sch. District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court considered an equal protection challenge to a state statutory system that financed primary and secondary education with local property taxes. Because of disparate property values in the school district, some areas in the district had more funds than others to spend per student on educational programs and resources. In upholding the statutory system, the Court rejected the argument that education should be deemed a fundamental right based on its relationship to fundamental freedoms of speech and voting. *Id.* at 35-36. This is because citizens are not guaranteed the *most effective* participation in the public process. *Id.* Without excluding the possibility that some level of educational opportunity might be constitutionally protected, the Court upheld the statute because there was no indication that the system failed to provide the students with "an opportunity to acquire the basic minimal skills." *Id.* at 37; see *Papasan v. Allain*, 478 U.S. 265, 285 (1986) (using rational relationship standard to review disparities in the funding of educational school districts, but noting that the "Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review").

¹⁸⁷ See *Plyler*, 457 U.S. at 202.

¹⁸⁸ See *San Antonio Ind. Sch. District*, 411 U.S. at 1.

A student's interest in freedom from harm is also adversely affected by gun violence in schools.¹⁸⁹ The Fourteenth Amendment, which provides that no "State shall deprive any person of life [or] liberty . . . without due process of law,"¹⁹⁰ protects children as well as adults.¹⁹¹ This due process right includes a liberty interest in the avoidance of personal harm.¹⁹² In the landmark case of *DeShaney v. Winnebago County Department of Social Services*,¹⁹³ however, the Supreme Court determined that an individual generally does not have a due process right to protection by the state, even if the state knows the individual is in danger.¹⁹⁴ Subsequent decisions have concluded that a state may have a duty to protect an individual, but only if the state created the danger,¹⁹⁵ or the state placed the individual in a custodial relationship and implicitly assumed responsibility for his or her protection.¹⁹⁶

The rule set forth in *DeShaney* has been held to preclude liability for gun violence in schools. In *Johnson v. Dallas Independent School Dis-*

¹⁸⁹ The issue has been examined in cases brought against school personnel under the federal civil rights enforcement statute, 42 U.S.C. § 1983 (1999). Under § 1983, a plaintiff must allege, among other things, that his or her constitutional rights were violated by a state actor. School employees are state actors in this context.

¹⁹⁰ U.S. CONST. amend. XIV.

¹⁹¹ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 12 (1967) ("Accordingly, while these cases relate only to restricted aspects of [constitutional rights], they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

¹⁹² See *Ingraham v. Wright*, 430 U.S. 651, 674-76 (1977) (holding that child has liberty interest in avoidance of physical harm, but administrative safeguards relating to corporal punishment in schools falls within the area of educational responsibility that lies primarily with the schools).

¹⁹³ 489 U.S. 189 (1989).

¹⁹⁴ See *id.* *DeShaney* is the seminal case on the state's obligation to protect a child. In *DeShaney*, the Wisconsin Department of Social Services had received several reports that a four year-old boy was suffering abuse by his father. *Id.* The state failed to remove the boy from his father's custody, and the father beat the boy so severely that he suffered permanent brain damage. *Id.* The Supreme Court held that, even when the state knows that the person is in imminent danger of harm, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors." *Id.* at 195.

¹⁹⁵ See, e.g., *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, (1990) (involving a female passenger raped after a police officer arrested the intoxicated driver, impounded his car, and left the passenger alone at night in a known high-crime area); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (involving 16 month-old child molested and abused in numerous foster homes after being removed by state from parents' custody).

¹⁹⁶ See, e.g., *DeShaney*, 489 U.S. at 199-200. In dictum, the Court noted that a duty of protection may arise if the state imposes limitations upon an individual to act on his or her own behalf "through incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 200. Thus, if "the State takes a person into its custody and holds him there against his will," it assumes a constitutionally-mandated duty of protection. *Id.* at 199-200.

trict,¹⁹⁷ a nonstudent rode a school bus to a Dallas high school and walked into a school building without a required student identification badge. He was carrying a concealed firearm, which was not discovered because the school's metal detectors were not in use. He then created a disturbance, pulled out the gun and starting firing it, killing a bystanding student who was struck in the head by a stray bullet.¹⁹⁸

The Fifth Circuit held that there was no state-created danger because the school had not taken any affirmative, culpable action placing the boy in danger or depriving him of the ability to defend himself or obtain private aid.¹⁹⁹ The court further found that compulsory attendance laws do not create a custodial relationship, because parents may withdraw their children from public school and place them in private schools,²⁰⁰ and because parents, at any rate, remain the principal caretakers of their children.²⁰¹ Under this analysis, the Constitution²⁰² does not require a state

¹⁹⁷ 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995).

¹⁹⁸ The boy's father brought suit under 42 U.S.C. § 1983 (1995), alleging that the school violated the boy's constitutional rights by creating the hazardous environment at school which resulted in his son's death and, alternatively, that the school had violated an affirmative duty arising out of the state's compulsory attendance laws. *Id.*

¹⁹⁹ *Id.* at 201. The court suggested that a claim could not be stated unless previous criminal conduct at the high school made the school a "high-crime area" and unless school officials had affirmatively committed a culpable act with actual knowledge that the high school was dangerous. *Id.*

²⁰⁰ *Id.* at 203. However, private schooling is not an available option for many families. As the court in *Johnson* acknowledged, most parents cannot afford to place their children in private schools. *Id.* at 203 n.7. Furthermore, some courts have held that a state may forbid home instruction as a substitute to attending public schools. *Duro v. District Attorney*, 712 F.2d 96, 99 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

²⁰¹ *Johnson*, 38 F.3d at 203. Other courts have held that compulsory school attendance laws are insufficient to create a custodial relationship that would trigger the state's duty to protect the student. *See, e.g., Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) ("[S]tate-mandated school attendance does not entail so restrictive a custodial relationship as to impose upon the State the same duty to protect it owes to prison inmates."); *Maldonado v. Josey*, 975 F.2d 727, 732 (10th Cir. 1992), *cert. denied*, 507 U.S. 914 (1993) ("[C]ompulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992) (*en banc*) (compulsory attendance laws do not create special relationship), *cert. denied*, 506 U.S. 1079; *J.O. v. Alton Community Unit. Sch. Dist.*, 909 F.2d 267, 272-73 (7th Cir. 1990) ("Schoolchildren are not like mental patients and prisoners such that the State has an affirmative duty to protect them.").

²⁰² There may be other claims against the state, such as alleged common law negligence. *See Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201-02 (1989) (holding that a state may acquire a duty of care under state tort law by voluntarily undertaking to protect the child). For example, as a result of their physical custody of the student, school officials have been held to have a duty to exercise the same care that a reasonable parent would exercise. *See, e.g., Gary on Behalf of Gary v. Meche*, 626 So.2d 901, 903 (La. Ct. App. 1993) (holding school officials liable when an unsupervised first grader ran out of the schoolyard and was hit by a truck). *See Brum v. Town of Dartmouth*, 690 N.E.2d 844 (Mass. 1998) (finding no § 1983 claim because student murdered by private actors and school had no constitutional obligation to protect him, but holding that plaintiff could pursue claim for

to protect its students from gun violence.²⁰³

2. *Federal Interests Regarding Guns in Schools*

While there exists no constitutional obligation for the state to eliminate guns and violence from schools, the existence of each touches upon several federal interests. First, the effect of violence on education is a national concern, because of the established relationship between the quality of education and the country's economic competitiveness.²⁰⁴ Congress has repeatedly acknowledged the connection between primary and secondary education, a skilled work force, and the nation's position in the global economy.²⁰⁵ In addition, researchers reported to the World Bank, in 1990, that:

[t]here is now a persuasive body of theoretical and empirical evidence that investment in the formal education and training of the labor force plays a crucial role in economic development . . . [and] The results of these studies suggest that in both developed and developing

negligent failure to provide security). In addition, the California Constitution provides that "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful." Cal. Const., art. I, sec. 28(c). *See Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 249 Cal. Rptr. 688 (1988) (section 28(c) does not provide a right to sue for damages, but negligence theory many).

²⁰³ Even where the school has actual knowledge that a particular person is in danger of being harmed, it may have no duty to act. *See Graham v. Independent School District*, 22 F.3d 991 (10th Cir. 1994) (finding no § 1983 claim where student was murdered after school district employees received warnings that another student who had threatened violence against him was on school grounds with a gun, because compulsory school attendance laws do not create a duty to protect students even where violence is foreseeable); *Thames v. Kimbrough*, 1991 U.S. Dist. LEXIS 6581 (N.D. Ill. 1991) (holding that allegations that from 1987 through 1989 there were 554 reported confiscations of weapons in the school system, including eleven weapons violations at the subject high school, were insufficient to state a claim). *Cf. Walton v. Alexander*, 20 F.3d 1350 (5th Cir.), *reh'g en banc granted*, 1994 U.S. App. LEXIS 16495 (5th Cir. July 1, 1994) (finding that school had affirmative duty to protect students at public boarding school for deaf children); *Spivey v. Elliott*, 29 F.3d 1522 (11th Cir. 1994) (same). In *Walton* and *Spivey*, the child was in the state's full-time care. *But see Pagano v. Massapequa Public Schools*, 714 F. Supp. 641, 641-43 (E.D.N.Y. 1989) (holding that elementary school student's allegations of school official's failure to prevent continuing attacks stated duty to student and § 1983 claim, because compulsory school attendance laws give rise to some duty of care and indifference to repeated attacks could be considered deliberate).

²⁰⁴ *See United States v. Lopez*, 514 U.S. at 602 (Breyer, J., dissenting).

²⁰⁵ *Id.* *See, e.g.*, Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments, Pub. L. No. 100-297, 102 Stat. 130; S. Rep. No. 222, 100th Cong., 1st Sess. 2 (1987), at 3, 8, 16, 41, 63, 65-66, 75, 82, 85; The Education and Training for a Competitive America Act of 1988, enacted as Title VI of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title VI, 102 Stat. 1107, 1469 ("functionally or technologically illiterate [workers] erode the nation's standing in the international marketplace"); School Dropout Prevention and Basic Skills Improvement Act of 1990, Pub. L. No. 101-600, 104 Stat. 3042.

countries, educational investment has been one of the most important factors contributing to economic growth. . . .²⁰⁶

Historically, education has been critical to our national economy. Nearly a quarter of America's increase in economic growth between 1929 and 1957 was due to the increased education of its labor force.²⁰⁷ Education contributed to eleven percent of the total economic growth in the United States between 1948 and 1973.²⁰⁸ Schooling also makes more productive workers.²⁰⁹ Thus, although:

education is principally a State and local responsibility, . . . there is also the national problem of our ability to cope generally with rapidly changing technology and changing labor-force requirements, and a pressing national need to improve our international economic competitiveness. These national concerns demand a response at the federal level.²¹⁰

Second, due to the extensive mobility of American citizens, deficiencies in the quality of education in one state can affect the quality of education in other states. In a single year, between two and four percent of children below the age of eighteen—over a million boys and girls—move to a different state.²¹¹ Students with inadequate educational backgrounds who transfer schools may adversely affect the level of education in their new school by slowing the progress of the class as a whole. Moreover, the high degree of guns and gun violence in some urban schools may discourage travel to those areas, thus restricting interstate travel.²¹²

²⁰⁶ WADI D. HADDAD ET AL., WORLD BANK DISCUSSION PAPERS, EDUCATION AND DEVELOPMENT: EVIDENCE FOR NEW PRIORITIES 3 (1990).

²⁰⁷ LEWIS C. SOLOMON, THE QUALITY OF EDUCATION AND ECONOMIC GROWTH: A REVIEW OF THE LITERATURE, IN THE QUALITY OF EDUCATION AND ECONOMIC DEVELOPMENT 12-13 (Stephen P. Heyneman and Daphne Siev White, eds. 1986).

²⁰⁸ DALE JORGENSEN, THE CONTRIBUTION OF EDUCATION TO U.S. ECONOMIC GROWTH, 1948-73, IN EDUCATION AND ECONOMIC PRODUCTIVITY (Edwin Dean, ed. 1984).

²⁰⁹ CHRISTOPHER COLDOUGH, PRIMARY SCHOOLING AND ECONOMIC DEVELOPMENT: A REVIEW OF THE EVIDENCE, WORLD BANK STAFF WORKING PAPER No. 399 (1980).

²¹⁰ See *Education for Economic Security Act: Hearings Before the Subcomm. on Education, Arts and Humanities of the Senate Comm. on Labor and Human Resources*, 98th Cong. 1 (1983) (statement of Sen. Stafford).

²¹¹ KRISTIN A. HANSEN, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS 20-473, GEOGRAPHICAL MOBILITY: MARCH 1991 TO MARCH 1992, 7, tbl.1 (1993).

²¹² Cf. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 300 (1964) (stating that racial discrimination in certain geographical areas may discourage travel to those areas, thus affecting interstate travel).

Third, each year the federal government gives billions of dollars to states for public schooling.²¹³ Since the federal government contributes substantial funds to education,²¹⁴ it has an interest in assuring that such funds are used effectively.

Fourth, the economic cost of gun violence in schools is a national concern. Over eighty percent of hospitalization costs are borne by public funds, which include federally-sponsored programs, such as MediCal (Medicaid) and Medicare.²¹⁵ And most of the balance of hospitalization costs, as well as the fees of doctors and other professionals, are borne by interstate concerns such as private insurance companies, workers' compensation insurance providers, and health maintenance organizations.²¹⁶

Fifth, the presence of guns in schools is tied to, and is perhaps a critical part of, an interstate gun trade. Gun traffickers buy guns in states that have relatively lenient gun-buying restrictions, smuggle them into localities with stricter gun control laws, and sell them at a profit.²¹⁷ Schools have become a significant site for such gun sales,²¹⁸ and the guns that are sold in schools have likely crossed state lines.²¹⁹ Because guns are transported across state lines, and firearm regulations vary from state to state, the federal government has a strong interest in national uniform regulations curbing the availability of firearms.²²⁰

²¹³ See *Hearings on S. 890, supra* note 126, at 37 (statement of Sen. Arlen Specter)

²¹⁴ See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 553 (1985).

²¹⁵ See *supra* notes 86-87.

²¹⁶ *Id.* See *United States v. Evans*, 928 F.2d 858, 862 (9th Cir. 1991) (finding that possession of firearms adversely affects the national economy, at least through interstate insurance companies).

²¹⁷ Witkin, *supra* note 2, at 28 ("In cities with strong gun-control laws, like Boston, New York and Washington, weapons are imported and resold at a profit by traffickers who purchase them in states that until recently have had few gun-buying restrictions: Florida, Texas, Virginia, Georgia and Ohio."). See Isikoff, *infra* note 219.

²¹⁸ See *supra* notes 46-47 and accompanying text.

²¹⁹ One out of every four traceable guns in New York City was bought in Virginia; one in three traceable guns in Washington, D.C. was also bought in Virginia. Lorraine Woellert, *Gotham's Guns Come From Virginia*, WASH. TIMES, Dec. 30, 1992, at A1. Four California firearms manufacturers provided 40% of the handguns seized by Denver police from gang members in 1993. John C. Ensslin, *Denver's Gang Arsenal*, ROCKY MOUNTAIN NEWS, March 13, 1994, at F20A. A study by the Bureau of Alcohol, Tobacco and Firearms in Detroit, Michigan found that the gun most frequently used in Detroit's serious crimes was manufactured in California. *Id.* at F22A. According to the Violence Policy Center, a gun-control advocacy group in Washington, D.C., these California guns are the favorites of drug traffickers and youth. *Id.* Indeed, the interstate activity of gangs has apparently fueled interstate transportation of guns. The "Crips" and the "Bloods" from Southern California have loose affiliations in 32 states and 113 cities across the United States. *Id.*; see Witkin, *supra*, note 2, at 28. See also Michael Isikoff, *Gun Pipeline: From Ohio to Streets of Philadelphia*, WASH. POST, Mar. 12, 1991, A1-A4.

²²⁰ See Karl P. Adler et al., *Firearm Violence and Public Health; Limiting the Availability of Guns*, 271 JAMA 1281-1283 (1994).

3. *Other Reasons for Federal Regulation*

Other arguments support federal regulation or resources (or both) supplementing the laws and resources of the states. Federal regulation signals national resolve and may attract greater attention to the problem of guns in schools. Additional legislation and publicity may increase public knowledge about the potential punishment for gun possession, creating the perception that violators will be apprehended and punished. Such a perception would increase disincentives to bringing guns to school, thereby increasing the possibility of deterrence.²²¹ Even if the federal law duplicates existing state laws, state and federal law enforcement may share the costs and burden of prosecuting those who take guns to school.²²² Due to their greater resources, the federal system provides advantages in the prosecution of more serious offenders.²²³

In sum, although the states traditionally have authority over schools and controlling gun violence, there is room for federal regulation as well. Significant federal interests in education, the national economy, and interstate gun trafficking are at stake, and states often do not have the resources to tackle the task effectively. Supplementing state regulation with federal resources and federal regulations, therefore, may serve the dual purpose of alleviating the burden on state law enforcement and establishing the protection of students as a national priority.

IV. FEDERAL POWER UNDER THE COMMERCE CLAUSE AND SPENDING CLAUSE TO REGULATE GUNS IN SCHOOLS

Unlike state governments, the federal government only has the powers delegated to it by the Constitution.²²⁴ Thus, although the federal government has an interest in activities that transcend state borders, affect the national economy, or otherwise have interstate ramifications, it may not have the power to regulate those activities. This section examines whether federal legislation affecting guns in schools—including the amended Gun-Free School Zones Act, the federal ban on sales of guns to juveniles, the Gun-Free Schools Act, and the Safe Schools Act—is justi-

²²¹ See *supra* notes 94-103 and accompanying text.

²²² *Hearings on S. 890*, *supra* note 126, at 3 (statement of Sen. Herb Kohl). State and federal prosecutors work together in prosecuting other crimes that could be chargeable under either federal or state law, such as drug offenses and other crimes. *Id.*

²²³ In comparing the Texas state criminal system with the federal system, the federal system does not permit bonds for individuals who are a threat to the community, provides tougher sentences, requires those convicted to serve a higher percentage of the sentence, does not offer parole, and mandates supervision after release from prison. See *Hearings on S. 890*, *supra* note 126, at 9 (statement of Robert Wortham, U.S. Attorney for the Eastern District of Texas).

²²⁴ See U.S. CONST., ART. I, § 8; U.S. CONST., amend. X.

fied under either the Constitution's Commerce Clause²²⁵ or Spending Clause.²²⁶

A. COMMERCE CLAUSE POWER

The U. S. Constitution delegates to Congress the power "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."²²⁷ The issue, then, is whether an activity that Congress has undertaken to regulate may be deemed "Commerce . . . among the several states." The Supreme Court initially construed the Commerce Clause narrowly, precluding Congress from regulating activities that were not actually interstate purchases or sales.²²⁸ As the scope of the nation's commerce subsequently expanded, however, so did the Court's construction of the commerce power.²²⁹

Today, the Commerce Clause is held to empower Congress to enact legislation with respect to any activities substantially affecting interstate commerce.²³⁰ Congress may, therefore, regulate interstate activities, intrastate activities that have a substantial relationship to interstate commerce by their economic effect, and intrastate activities that must be regulated to effectuate regulation of interstate commerce.²³¹

²²⁵ U.S. CONST., ART. I, § 8, cl. 3.

²²⁶ U.S. CONST., ART. I, § 8, cl. 1.

²²⁷ U.S. CONST., ART. I, § 8, cl. 3. *See also* *Gibbons v. Ogden*, 9 Wheat. 1, 194-95 (1824) ("The genius and character of the whole government seem to be, that its action is to be applied to all the . . . internal concerns [of the Nation] which affect the States generally.").

²²⁸ *See, e.g.*, *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (finding that manufacturing is not commerce); *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (finding that mining is not commerce).

²²⁹ The Supreme Court has found, for example, that the commerce power reached intrastate activities that were so closely and substantially connected to interstate commerce that their control was necessary for Congress to regulate interstate commerce effectively. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act); *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding Fair Labor Standards Act). Perhaps the broadest construction of the Commerce Clause is found in *Wickard v. Filburn*, 317 U.S. 111 (1942); *see infra* note 231. Under the Agricultural Adjustment Act of 1938, which was intended to regulate commerce in wheat to avoid fluctuation of wheat prices, an Ohio farmer was assessed a penalty for harvesting too much wheat. The court held that Congress may regulate an individual's harvesting and storage of wheat because, when that activity is combined with the similar conduct of others, it "exerts a substantial economic effect on interstate commerce." *Wickard*, 317 U.S. at 125.

²³⁰ *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-58 (1964).

²³¹ *See, e.g.*, *Fry v. United States*, 421 U.S. 542, 547 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the states or with foreign nations."); *Wickard*, 317 U.S. at 111 (finding individual's intrastate production and consumption of home grown wheat subject to regulation where his contribution, taken together with that of many others, exerts a substantial effect on interstate commerce); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Jones & Laughlin Steel Corp.*, 301 U.S. at 30-31 (upholding National Labor Relations Act because Congress may regulate intrastate activities having such a close and substantial relation to interstate commerce that their control is appropriate

1. *Congress' Regulation of Firearms Under the Commerce Clause Before United States v. Lopez*²³²

Under its power to regulate commerce, Congress has enacted numerous statutes regulating firearms.²³³ The sum of these regulations is, for the most part, now codified at §§ 921-928 in Title 18 of the United States Code.²³⁴ Among other things, § 922 prohibits interstate transactions by nonlicensed dealers;²³⁵ selling firearms to non-citizens, drug addicts, mental defectives and felons;²³⁶ dealing in stolen firearms;²³⁷ transporting in interstate commerce a firearm with an obliterated serial number;²³⁸ importing firearms;²³⁹ transporting, possessing or dealing in machine guns,²⁴⁰ undetectable firearms,²⁴¹ or assault weapons;²⁴² transferring firearms without a criminal background check;²⁴³ and selling firearms to juveniles.²⁴⁴

Courts have also upheld other federal firearm regulations against Commerce Clause challenges. In *United States v. Miller*,²⁴⁵ the Supreme Court upheld a provision in the National Firearms Act of 1934 prohibiting the transportation in interstate commerce of certain unregistered shotguns. There the Court concluded that the statute did not usurp the "police power reserved to the states."²⁴⁶ However, *Miller* involved a

to protect commerce from burdens). See ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE 2ND, § 4.9 at 404-05.

²³² 514 U.S. 549 (1995).

²³³ In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197 (1968) [hereinafter the 1968 Act]. Title IV of the 1968 Act repealed the Federal Firearms Act and enacted 18 U.S.C. §§ 921-928. Title VII of the 1968 Act enacted new provisions at 18 U.S.C. § 1201. In the Firearms Owners' Protection Act of 1986, Pub. L. 99-308, 100 Stat. 449, Title VII of the 1968 Act (18 U.S.C. 1201) was repealed and most of the provisions incorporated, in substance, into 18 U.S.C. § 922. It also added present § 922(o), banning the transfer or possession of machine guns unless possessed before the effective date of the law. The Undetectable Firearms Act of 1988, Pub. L. 100-649, 102 Stat. 3816, added § 922(p) making it unlawful to deal, possess or receive a firearm that was not detectable by a metal detector. See also Federal Firearms Act of 1938, former 15 U.S.C. § 901(3). Under its taxing power, Congress enacted the National Firearms Act of 1934, former 26 U.S.C. § 5845(a) (excise tax on sales of machine guns, sawed off shotguns and rifles). See U.S. CONST. art. 1, § 8 (granting the power to tax).

²³⁴ 18 U.S.C. §§ 921-928 (1999). See also 18 U.S.C. § 924(h) (outlawing transfer of firearms with knowledge it will be used in a crime of violence or drug trafficking crime).

²³⁵ 18 U.S.C. § 922(a) (1999).

²³⁶ *Id.* § 922(d).

²³⁷ *Id.* § 922(j).

²³⁸ *Id.* § 922(k).

²³⁹ *Id.* § 922(l).

²⁴⁰ *Id.* § 922(o).

²⁴¹ *Id.* § 922(p).

²⁴² *Id.* § 922(v).

²⁴³ *Id.* § 922(t).

²⁴⁴ *Id.* § 922(x).

²⁴⁵ 307 U.S. 174 (1939).

²⁴⁶ *Id.* at 177 (1939) (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)).

statute that was specifically related to interstate commerce, and thus ostensibly within Congress' Commerce Clause authority. The mere possession of guns (at or near a school, or otherwise), as opposed to other interstate transportation, is less clearly linked to interstate commerce.

Circuit Courts of Appeal have addressed regulations of the mere possession of firearms, upholding 18 U.S.C. § 922(o), which bans the possession of machine guns unless the guns were lawfully possessed before the effective date of the subsection. In *United States v. Hale*,²⁴⁷ the Eighth Circuit reasoned that both the statute and legislative history indicated that Congress had considered the relationship between the availability of machine guns and violent crime. The *Hale* Court was also persuaded that Congress had previously found a relationship between firearm regulation and interstate commerce. In *United States v. Evans*,²⁴⁸ the Ninth Circuit found it reasonable for Congress to conclude that firearm possession represents a class of activities affecting interstate commerce, due to the affects of gun violence on the national economy.²⁴⁹ In both of these cases, the courts determined that the mere possession of a firearm was sufficiently linked to interstate commerce to fall within Congress' Commerce Clause power, even though the firearm had not necessarily moved in interstate commerce.

Prior to *Lopez*, the Supreme Court had not addressed the permissible scope of federal regulation regarding the mere possession of firearms. The Court did examine the issue indirectly, however, in several cases challenging convictions obtained under federal firearm laws. In *United States v. Bass*,²⁵⁰ the Court interpreted Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 (the "1968 Act"), former 18 U.S.C. § 1201, to determine the elements necessary for a conviction of gun possession by a felon. The 1968 Act made it unlawful for any felon to "receive[], possess[], or transport[] in commerce or affecting commerce" any firearm.²⁵¹ Because the "in commerce or affecting commerce" language could have been read to apply only to the crime of transporting a firearm, the issue in *Bass* was whether the government had to prove a connection to interstate commerce where the crime was firearm possession. The Court concluded that the statute required proof of a connection to commerce, and left open "the question whether, upon ap-

²⁴⁷ 978 F.2d 1016, 1018 (8th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993).

²⁴⁸ 928 F.2d 858, 862 (9th Cir. 1991).

²⁴⁹ Federal firearm regulations have also been upheld against challenges under the Second Amendment and the equal protection clause. See *supra* note 170 and accompanying text (Second Amendment); *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988) (finding that statute criminalizing possession by felon did not violate equal protection clause because Congress could rationally conclude that felony conviction was sufficient basis).

²⁵⁰ 404 U.S. 336 (1971).

²⁵¹ 18 U.S.C. § 1201 (1968).

propriate findings, Congress can constitutionally punish the 'mere possession' of firearms."²⁵² In subsequent cases, the Supreme Court concluded that the required movement in interstate commerce could have occurred at any time, even before the felon received the firearm.²⁵³

2. *The Gun-Free School Zones Act of 1990 and United States v. Lopez*

The Gun-Free School Zones Act (the "Act")²⁵⁴ was enacted as part of the Crime Control Act of 1990.²⁵⁵ The Act provided, in pertinent part: "It shall be unlawful 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."²⁵⁶ The Act defined "school zone" to mean on, or within 1,000 feet of, the grounds of a public, parochial or private school which provides elementary or secondary education.²⁵⁷

The Act thus criminalized the mere possession of a firearm within a certain geographic location, without any requirement that the firearm have travelled in interstate commerce. When passing the Act, Congress was plainly aware of the problems of gun violence in schools²⁵⁸ but did

²⁵² *Bass*, 404 U.S. at 339 n.4.

²⁵³ See *Scarborough v. United States*, 431 U.S. 576, (1977) (upholding conviction under 18 U.S.C. § 1202(a) (now 18 U.S.C. § 922(g)), prohibiting possession of a firearm by a felon, because the conviction required proof that the firearm had been in interstate commerce "at some time"); *Barrett v. United States*, 423 U.S. 213 (1976) (upholding conviction under 18 U.S.C. § 922(h), banning possession of a firearm by a felon, even though the firearm had moved independently of the felon's receipt). *Bass*, *Barrett*, and *Scarborough* were cases in which the court was called upon to interpret a statute, not to determine whether Congress had sufficient power to enact it. Nevertheless, the court's interpretation was guided by the parameters of federal power in relation to the states.

²⁵⁴ 18 U.S.C. § 922(q)(2)(A) (1994).

²⁵⁵ Pub. L. No. 101-647, 104 Stat. 4789-4968.

²⁵⁶ 18 U.S.C. § 922(q)(1)(A) (1994). Section 922(q)(1)(B), now § 922(q)(2)(B), provided exceptions where (1) possession of the firearm was on private property, not part of school grounds, (2) the person possessing the firearm was licensed to do so, (3) the firearm was unloaded and in a locked container or secured rack in a motor vehicle, (4) the firearm was for use in a school-approved program, pursuant to contract, or by a law enforcement officer, or (5) the firearm was unloaded and possessed by an individual crossing the zone in order to gain access to hunting grounds.

²⁵⁷ *Id.* at § 921(a)(25), (26).

²⁵⁸ The sponsor of the Act, Sen. Kohl, described the effects of gun violence on schoolchildren in this way:

[O]ver the past few years we have witnessed a shocking number of attacks against our children as they sat in the classroom and played in the schoolyard. The National School Safety Center estimates that more than 100,000 students carry guns to school every day, and that more than a quarter of a million students brought a handgun to school at least once in 1987. . . . [S]ome parents are now dressing their children in bullet-proof vests before sending them off to school. It's a sad and frightening commentary that violence in our schools and on our streets has reached such a level that there's a market for these products.

136 CONG. REC. S17595 (daily ed. Oct. 27, 1990).

not make any specific findings that linked those problems to interstate commerce.²⁵⁹

Having skirted the issue of Commerce power over the mere possession of a gun in *United States v. Bass*,²⁶⁰ the Supreme Court addressed the issue and the Act head-on in *United States v. Lopez*.²⁶¹ In *Lopez*, a twelfth-grade high school student was caught at school with a .38 caliber handgun and five bullets, which he maintained someone had given him to deliver to someone else for use in a gang war. Lopez was convicted of a felony under the Act. The Fifth Circuit reversed the conviction, on the ground that the Act regulated an activity that bore no relationship to interstate commerce and therefore violated the Commerce Clause.²⁶²

²⁵⁹ Congress made such findings in 1993, by amendment to the Act, during the pendency of *United States v. Lopez*. The amendment added the following findings:

(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 Judiciary Committee of The House of Representatives and Judiciary Committee 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) Congress has 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.

S. 1607, 103d Cong. (1993); H.R. 3355, 103d Cong. (1993). The findings were included in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-32, 108 Stat. 1796, which, in part, amended § 922(q) to include the findings. Before the Supreme Court in *Lopez*, the government did not rely on those findings as a substitute for the absence of legislative findings when the Gun Free School Zones Act was originally enacted. *United States v. Lopez*, 514 U.S. 549, 562 n.4 (1994).

²⁶⁰ 404 U.S. 336 (1971). See *supra* notes 250-253 and accompanying text.

²⁶¹ 514 U.S. 549 (1995).

²⁶² *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993). The Fifth Circuit reasoned that "neither the Act nor its legislative history reflect any Congressional determination" that possession of a firearm within a school zone was related in any way to interstate commerce. *Id.* at 1366. The court determined it could not assume such a relationship. *Id.* at 1367. The Fifth Circuit concluded that:

If Congress can thus bar firearms possession because of such a nexus to the grounds of any public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, sneakers, Game Boys, or slide rules.

The Supreme Court affirmed the Fifth Circuit's decision, holding that the Act exceeded Congress' authority under the Commerce Clause.²⁶³ The Court noted that the Commerce Clause authorizes regulation of (1) interstate commerce itself ("the use of the channels of interstate commerce"), (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, even if the threat comes from intrastate activities, and (3) activities that have a "substantial relation to" interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.²⁶⁴ The Court found that the Act did not regulate the channels of interstate commerce or protect an instrumentality of, or a thing in, interstate commerce. Accordingly, the Act could only be upheld if the regulated activity (possession of a gun within 1000 feet of a school) substantially affected interstate commerce.²⁶⁵

The Court then articulated three types of activities that may be found to substantially affect interstate commerce for the purposes of the Commerce Clause. First, it held that the economic activity being regulated may itself substantially affect interstate commerce.²⁶⁶ Second, the statute may define the prohibited activity in a manner that would require proof, in each case, "that the firearm possession affects interstate commerce."²⁶⁷ Third, the Court may simply conclude that the regulated activity substantially affects interstate commerce, at least if Congress made findings to that effect.²⁶⁸

The Court then decided that the Act did not meet any of these criteria. First, the activity regulated by the Act—the possession of a gun in a school zone—was not in itself an economic activity,²⁶⁹ nor was the Act

Id. at 1367 (emphasis in original). The Ninth Circuit, on the other hand, had held that the Gun-Free School Zones Act was constitutional as a permissible regulation under the Commerce Clause. *United States v. Edwards*, 13 F.3d 291 (9th Cir. 1993), *vacated* *United States v. Lopez*, 514 U.S. 549, *on remand* 55 F.3d 428. The Ninth Circuit held that Congress had established in previous legislative findings that possession of firearms affects the national economy, and the addition in § 922(q) of the condition that the firearms be possessed within 1000 feet of a school did not diminish Congress' power. If Congress can legitimately regulate the whole of firearm possession, the court concluded, it may legitimately regulate a subset.

²⁶³ *Lopez*, 514 U.S. at 549.

²⁶⁴ *Id.* at 557-58. To satisfy the latter alternative, the Court noted, there must be a substantial affect on interstate commerce, rather than a mere "affect." *Id.* at 559.

²⁶⁵ *Id.* at 559.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 560-61. The court used the phrase "affects interstate commerce" rather than "substantially affects interstate commerce." In context, however, the court was referring to a statutory requirement that the firearm travel in interstate commerce, and there is no indication that a standard less than "substantial affect" would apply.

²⁶⁸ *Id.* at 560-61. The Court did not require legislative findings, but hinted that it could more easily reach the conclusion if such findings were present. *Id.*

²⁶⁹ *Id.* at 560 ("The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.").

an essential part of a larger regulation of economic activity.²⁷⁰ Second, the Act did not require proof of a link between the defendant's activity and interstate commerce.²⁷¹ For example, the Act did not require that the firearm possessed within the school zone had been transported in interstate commerce.²⁷²

Third, the Court found that the mere possession of guns in schools does not have a substantial affect on interstate commerce. Congress had not made findings to this effect in adopting the Act, and the Government did not rely on the findings that Congress subsequently made.²⁷³ Also, previous congressional findings that possession of firearms affected interstate commerce²⁷⁴ were deemed inapposite because they did not specifically address the possession of guns in schools.²⁷⁵

The Court also rejected the Government's attempts to tie gun possession in a school zone to interstate commerce. The Government con-

²⁷⁰ *Id.*

²⁷¹ *Id.* at 562 (the Act "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"). The Court thus distinguished the statute in *United States v. Bass*, 404 U.S. 336, 345 (1971). *Id.*

²⁷² *Lopez*, 514 U.S. at 562.

²⁷³ *Id.* at 562 n.4

²⁷⁴ The formal findings made by Congress in adopting the 1968 Act did show a connection between possession of firearms and interstate commerce: "Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons . . . constitutes— (1) a burden on commerce or threat affecting the free flow of commerce." 18 U.S.C. § 1201. *See Bass*, 404 U.S. at 345-46 n.14. In addition, Congress found that interstate trafficking in firearms could not be adequately addressed without federal control over commerce in those weapons. Pub. L. No. 90-351, § 901(a), 82 Stat. 197, 225 (1968). Once Congress finds that an activity affects interstate commerce, it need not make those findings anew. *See Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.").

²⁷⁵ *Lopez*, 514 U.S. at 563. Although the 1968 Act did not include a specific regulation of guns in or near schools, nothing in the 1968 Act suggests that Congress believed that guns affecting interstate commerce suddenly ceased their interstate effects when transported within target-range of school children. Section 922(q) is a subset of legitimate federal regulation of the possession of firearms, and is therefore premised upon Congress' understanding of the interstate effects of the activity. *See United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993) (§ 922(q)(1)(A) does not violate the Tenth Amendment because Congress established that possession of firearms affects the national economy, and addition of the condition in § 922(q), that the firearms be possessed within 1000 feet of a school does not diminish Congress' power). Indeed, once a class of activities has been held to affect interstate commerce, all subparts of that class are presumed to affect interstate commerce. *See Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)) ("Where the class of activities is regulated and that class is within the reach of the federal power, the courts have no power to excise, as trivial, individual instances' of the class."); *United States v. McDougherty*, 920 F.2d 569, 572 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991) (holding that because "Congress has already determined, and the courts have accepted as rational, that drug trafficking affects interstate commerce," Congress has power to enact a statute providing harsher punishment for drug trafficking within 1,000 feet of a school).

tended that the presence of guns in schools might result in violent crime, that the high costs of gun violence are spread throughout the nation through insurance costs, and that gun violence threatens the learning environment and thus adversely affects the national economy.²⁷⁶ The Court dismissed this argument, concluding that these propositions would justify congressional regulation of nearly anything, including subjects—such as, for example, family law—that have traditionally been left to the states.²⁷⁷ The Court further maintained that, if Congress can “regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly,” including determining a school’s curriculum.²⁷⁸

3. *Federal Regulation of Guns in Schools After Lopez*

After *Lopez*, the exact scope of permissible federal regulation of guns in the schools under the Commerce Clause is unclear. So far, *Lopez* has not had a significant impact on Commerce Clause decisions.²⁷⁹ This should not be surprising, despite the flurry amongst commentators at the Court’s deciding, for the first time in decades, that Congress lacked commerce power to regulate.²⁸⁰ *Lopez* did not announce a new or different

²⁷⁶ *Lopez*, 514 U.S. at 563-64.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 565. This gratuitous conclusion is quite a stretch. There would seem to be a reasonable distinction between the regulation of firearms, which impede the learning of any curriculum, and the regulation of curriculum itself. See *McDougherty*, 920 F.2d at 572 n.2 (9th Cir. 1990) (holding that the “schoolyard statute,” 21 U.S.C. § 860, which increases the punishment for those who sell drugs within 1,000 feet of schools, does not in any way regulate the schools themselves).

²⁷⁹ See, e.g., *United States v. Turner*, 77 F.3d 887, 888-89 (6th Cir. 1996) (§ 922(g) was constitutional despite holding in *Lopez*); *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1995) (18 U.S.C. § 922(o), prohibiting transfer or possession of a machine gun if not lawfully owned before May 19, 1986, is proper exercise of commerce power, because there could be no unlawful possession under § 922(o) without an unlawful transfer, and thus the statute regulates the market in weapons rather than the possession of a weapon in a specific geographical area); *United States v. Diaz-Martinez*, 71 F.3d 946 (1st Cir. 1995) (18 U.S.C. § 922(k), prohibiting transportation in interstate commerce of a firearm that has had its serial number removed or obliterated, is lawful because it requires that the firearm be in interstate commerce); *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (same); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (same); *United States v. Hanna*, 55 F.3d 1456, 1462 & n.2 (9th Cir. 1995) (holding that *Lopez* did not affect Ninth Circuit’s prior decision in *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988), that 18 U.S.C. § 922(g)(1), prohibiting possession of a firearm by a felon, was a constitutional exercise of commerce power); *United States v. Presley*, 52 F.3d 64, 67 (4th Cir. 1995) (“the federal statute criminalizing the possession of a firearm by a felon does not violate the Commerce Clause because sufficient nexus exists between the harm of firearms and interstate concerns”); *United States v. Garcia-Beltran*, 890 F. Supp. 67 (D.P.R. 1995) (18 U.S.C. § 2119, federal car-jacking statute, lawful due to statutory language requiring interstate commerce and express legislative findings on effects of carjacking on interstate commerce).

²⁸⁰ See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Anthony B. Ching, *Travelling Down the Unsteady Path: United States v.*

test for evaluating statutes under the Commerce Clause.²⁸¹ At its broadest, *Lopez* requires that the nexus between the regulated activity and interstate commerce be closer, in some unquantified sense, than what was deemed satisfactory in prior decisions that the Court declined to identify.²⁸² At its narrowest, *Lopez* holds only that the mere possession of a firearm within 1000 feet of a school did not have, on the record before the Court, a substantial affect on interstate commerce. There remain, therefore, several avenues open for Commerce Clause regulation of guns in schools.²⁸³

First, Congress may regulate aspects of gun possession that constitute independent economic activities, at least where those activities have an interstate effect.²⁸⁴ For example, the sale of firearms, and perhaps possession with intent to sell, are economic activities, and there is substantial proof that gun sales, even at school, have an interstate charac-

Lopez, New York v. Unites States & the Tenth Amendment, 29 LOYOLA L.A. L. REV. 99 (1995).

²⁸¹ *Lopez*, 514 U.S. at 558-60. See *United States v. Kirk*, 1997 U.S. App. LEXIS 1756 (5th Cir. Feb. 3, 1997) (per curiam) ("It is important to the understanding of *Lopez* that the Supreme Court intended to establish an outer limit to congressional authority, not to retreat from well-established Commerce Clause precedent.") (citing *United States v. Kenney*, 91 F.3d 884, 887 (7th Cir. 1996)).

Contrary to defendant's contentions, *Lopez* neither purports to espouse a more critical test of Congress' authority under the Commerce Clause nor implicitly overrules prior decisions upholding the constitutionality of § 841(a)(1) Instead, the Supreme Court employed the same analysis it used previously, and rather than limiting the applicability of the Commerce Clause, the Court simply declined to expand the breadth of Congress' power to regulate under the Commerce Clause to include the Gun Act.

United States v. Sung Jin Kim, 94 F.3d 1247, 1249 (9th Cir. 1996); see also *United States v. Paredes*, 1998 U.S. App. LEXIS 7758 (11th Cir. Apr. 22, 1998) (finding the evidentiary standard under 18 USC §1951(a) unchanged by *Lopez*) *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) ("*Lopez* did not elevate the government's burden in proving a nexus to interstate commerce," where statute contains a jurisdictional element.).

²⁸² *Lopez*, 514 U.S. at 559-60 (holding that test is whether activity has substantial affect, rather than mere affect, on interstate commerce); *id.* at 566 (noting that prior decisions, not identified by the Court, had "taken long steps down [the] road" to a general federal police power).

²⁸³ Federal regulation would likely be based on the assertion that the possession of guns in or near schools has a substantial affect on interstate commerce. Theoretically, firearms regulation could also be permissible if the statute regulated a channel or instrumentality of interstate commerce (such as public highways or the mails). See *Lopez*, 514 U.S. at 558-60; *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996) (upholding 18 U.S.C. § 922(o) as a regulation of channels of interstate commerce). Further, firearms may themselves be objects in interstate commerce and subject to federal regulation. See *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995) (upholding 18 U.S.C. § 922(o) as regulation of a thing in interstate commerce).

²⁸⁴ Cf. *Lopez*, 514 U.S. at 561-63.

ter.²⁸⁵ Thus, Congress could regulate the sale of firearms taking place within a school zone, as well as all sales to minors.²⁸⁶

Second, Congress could outlaw an activity involving a firearm in interstate commerce.²⁸⁷ For example, Congress could specify as an element of the offense that the firearm must have been transported in interstate commerce.²⁸⁸ Thus, Congress could outlaw possession of a firearm within a school or school zone, as long as the firearm has been shipped, received or transported in interstate commerce.

Third, Congress could demonstrate the substantial affect that guns in and around schools have on interstate commerce, by making express legislative findings to that effect.²⁸⁹ Congress could start by restating its 1993 findings that firearms move easily in interstate commerce, that violent crime in school zones adversely affects the quality of education and adversely impacts interstate commerce, and that states have difficulty handling "gun-related crime" without federal involvement due to inconsistencies in laws from state to state.

Legislative findings by themselves may not be sufficient.²⁹⁰ Language in the Court's *Lopez* opinion appears to foreclose the possibility of any finding that the mere possession of a gun within a school zone could substantially affect interstate commerce.²⁹¹ On the other hand, the Court

²⁸⁵ See *supra* notes 250-253 and accompanying text.

²⁸⁶ See 18 U.S.C. § 922(x) (1999) (prohibiting firearm sale to minors).

²⁸⁷ Cf. *Lopez*, 514 U.S. at 561.

²⁸⁸ *United States v. Gateward*, 84 F.3d 670, 671 (3d Cir. 1996) ("We do not understand *Lopez* to undercut the *Bass Scarborough* proposition that the jurisdictional element in or affecting commerce' keeps the felon firearm law well inside the constitutional fringes of the Commerce Clause.") See *United States v. Bass*, 404 U.S. 336 (1971); *supra* notes 250-253 and accompanying text. See also *Scarborough v. United States*, 431 U.S. 563, 575 (1977) (conviction under federal law regulating possession of firearms that "have been, at some time, in interstate commerce") (footnote omitted); *Barrett v. U.S.*, 423 U.S. 212, 225 (1976) (federal law regulating receipt of firearms "that previously had moved in interstate commerce," independent of felon's receipt).

²⁸⁹ Proof that the activity regulated by a federal statute substantially affects interstate commerce does not require express legislative findings. See, e.g., *Perez v. United States*, 402 U.S. 146, 156 (1971) ("We have mentioned in detail the economic, financial and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate."); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (holding that formal findings are not necessary). See also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252, 258 (1964) (referring to legislative history in absence of express findings). Nevertheless, such findings undoubtedly assist a court in determining whether Congress did, in fact, ascertain a nexus between interstate commerce and the activity being regulated. *Lopez*, 514 U.S. at 562-63.

²⁹⁰ *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981) ("A court may invalidate legislation under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted end.").

²⁹¹ The Court concluded that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567.

did not reject the Government's arguments because there were no formal legislative findings of a nexus with interstate commerce, but because such a conclusion would require multiple inferences justifying regulation of any activity.²⁹² Indeed, the Court was apparently most troubled that neither Congress, nor the Court, nor even the Government's lawyers were able to identify a single activity that could *not* be federally regulated under the Government's theory.²⁹³

One of the lessons from *Lopez*, therefore, is that Congress, when adopting legislation like the Act (18 U.S.C. § 922(q)), should include findings that clearly distinguish between regulating guns in schools and regulating other intrastate activities traditionally left to the states. Also, Congress should emphasize that the legislation regulates firearms, not school curriculum. Indeed, the prohibition of guns from schools and school zones does not dictate what children will learn, but rather better enables them to learn whatever the states choose to teach. By the same token, while control of the school day should remain the province of the states, activities affecting the national interest should not become insulated from federal regulation merely because they occur within 1000 feet of a school. Thus, while the effect that guns in school have on education is of national interest and legitimately motivates Congress to act, it is specifically Congress' concern about interstate gun trafficking that would justify a Gun-Free School Zones Act under the Commerce Clause.

4. *Constitutionality of the Gun-Free School Zone Act Amendments of 1995*

In 1995, the Gun-Free School Zones Act²⁹⁴ was amended to address the deficiencies pointed out in *Lopez*. The Act now requires proof that firearms possessed within school zones have moved in interstate commerce. Thus, as amended, the Act prohibits the knowing possession or discharge of a firearm within 1000 feet of a school, *if* the firearm travelled in interstate commerce. This new jurisdictional element makes the Act constitutional.²⁹⁵ In addition, the Act also includes the legislative findings added by amendment in 1993.²⁹⁶ These findings may provide

²⁹² *Lopez*, 514 U.S. at 549-50 ("To uphold the Government's contentions here [that § 922(q) is justified because firearms possession in a local school zone substantially affects interstate commerce], 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.").

²⁹³ *Id.* at 564-65.

²⁹⁴ 18 U.S.C. § 922(q) (1999).

²⁹⁵ *Cf. Lopez*, 514 U.S. at 549.

²⁹⁶ *See supra* note 259.

another basis for a court to conclude that the regulated activity “substantially affects” interstate commerce.²⁹⁷

Even if the amended Act is constitutional, however, there is no guarantee that it will deter students from taking guns to school. A Gun-Free School Zone will deter only if there is a perception that firearms within the zone will be detected, and violators will be punished. Detecting firearms within a school, where expectations of privacy are diminished and limited numbers of students are confined to a physical space, is difficult enough; detecting firearms on public streets among passers-by within a 1000-foot radius would present an even greater challenge.

Furthermore, the Act does not provide for granting federal funds to the states for detection or enforcement, and thus leaves it to the states to bear the cost. While federal law enforcement could help local agencies police school zones, the specter of FBI agents patrolling tens of thousands of schools across the nation is as daunting as it is unrealistic.²⁹⁸ Finally, the state’s enforcement of the amended Gun Free School Zones Act consumes resources that could otherwise be spent on measures or programs that might be better tailored to the particular circumstances of the school.

5. *The Prohibition of Possession By and Sales to Minors*

With certain exceptions,²⁹⁹ § 922(x) makes it unlawful for a person to sell, deliver or otherwise transfer a handgun or ammunition to a person whom the transferor, knows or should know, is a minor.³⁰⁰ The section also makes it unlawful for a juvenile to knowingly possess a handgun or ammunition.³⁰¹

²⁹⁷ *But see supra* notes 280 and accompanying text. As discussed above, it may not be sufficient for Congress merely to announce that gun possession in a school zone does, in fact, affect interstate commerce.

²⁹⁸ Even with this legislation, the FBI is not about to start posting its agents around the more than 100,000 schools in this country. Primary enforcement responsibility will remain where it is: with state and local police. But these police either have or have not got the resources to fight this problem effectively. If it is a priority and they have the resources, adopting this law isn’t necessary; if not, adopting it won’t help.

Hearings on S. 890, supra note 126, at 89 (statement of Professor Larry Kramer).

²⁹⁹ Section 922(x) does not apply to temporary transfers or possession if the handgun or possession is used in the course of employment or certain ranching or farming, the juvenile’s parent or guardian has given written permission, the juvenile is a member of the Armed Forces, the transfer is a transfer of title by inheritance, or the juvenile takes possession of the handgun or ammunition in defense of the juvenile or others against an intruder into a residence. *See* 18 U.S.C. § 922(x)(3)(A) (1999).

³⁰⁰ *Id.* § 922(x)(1) (1999).

³⁰¹ *Id.* § 922(x)(2).

To the extent that § 922(x) regulates sales, it regulates an economic activity that has a substantial affect on interstate commerce and, therefore, falls squarely within Congress' commerce power.³⁰² To the extent that § 922(x) regulates the mere possession of handguns, its constitutionality is less clear. As noted, mere possession is not an economic activity.³⁰³ The statute does not contain a jurisdictional element requiring proof that the firearm travelled in interstate commerce,³⁰⁴ nor does § 922(x) contain any legislative findings on the affect of juvenile gun possession on interstate commerce. It is difficult to see how the possession of a firearm by a minor is more likely to affect interstate commerce than the possession of a firearm within a school zone (which the *Lopez* Court found was lacking sufficient effect).

Nonetheless, persuasive arguments for the constitutionality of § 922(x) do exist. First, congressional findings *do* suggest that possession of guns by juveniles affects interstate commerce. Specifically, findings made in amending the Gun-Free School Zones Act reflect Congress' understanding that juvenile gun possession involves interstate gun trafficking and is often linked to gangs and drug trafficking.³⁰⁵ Findings made in enacting the 1968 Act express a causal connection between the easy availability of firearms and juvenile crime.³⁰⁶ And although these findings were not included in § 922(x), it should be unnecessary for Congress to make such findings anew.³⁰⁷

Second, § 922(x)(2) is distinguishable from the Gun Free School Zones Act. Unlike that statute, § 922(x)(2)'s scope is not limited to a geographical area, such as a school, which is traditionally left to state regulation.³⁰⁸

Third, the court could read § 922(x) so that it is, at all times, a statute regulating interstate commerce. If a juvenile is in possession of a firearm, the firearm must have been transferred to him. If the firearm came into the juvenile's possession after the effective date of § 922(x) (which precludes such transfers), the possession would be a direct manifestation of an unlawful economic activity. Thus, the statute could be construed to regulate not mere possession, but the gun market.³⁰⁹ This type of regulation is permissible.³¹⁰

³⁰² See *Lopez*, 514 U.S. at 563-64.

³⁰³ *Id.* at 567.

³⁰⁴ *Id.* at 561.

³⁰⁵ 18 U.S.C. § 922(q) (1999).

³⁰⁶ 18 U.S.C. § 1201 (1999). See *supra* note 274.

³⁰⁷ See *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring).

³⁰⁸ Cf. *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1996).

³⁰⁹ Cf. *id.* at 952.

³¹⁰ See *United States v. Michael R.*, 90 F.3d 340 (9th Cir. 1996).

The Ninth Circuit held in *United States v. Michael R.*,³¹¹ that § 922(x)(2) regulated the gun market and was a permissible regulation of interstate commerce. In *Michael R.*, the defendant argued that, under *Lopez*, § 922(x)(2) had nothing to do with commerce, or any economic enterprise. The court rejected this argument, accepting instead the Government's contention that § 922(x)(2) was an essential part of the overarching purpose of § 922(x)—to curb the underground market in firearms and drugs.³¹² The court then concluded that, read as a whole, § 922(x) regulates the sale, delivery and transfer of firearms and, therefore, affects the supply and demand of firearms.³¹³ Furthermore, the court asserted that it had “no doubt” that juvenile handgun possession “could have a substantial effect on interstate commerce,” based on legislative findings that the statute was enacted to help control crime by stopping juveniles’ commerce in handguns nationwide.³¹⁴ The court also found that the handgun possession by a minor does implicate interstate commerce because the manufacture of a firearm often involves materials from multiple states.³¹⁵

It appears questionable, however, that § 922(x) will have any significant impact on the presence of guns in schools. Even if the government could successfully deter mainstream firearms dealers from selling to minors, minors could obtain most of their guns on the street or from friends or family members, as they often do.³¹⁶ Such firearm exchange will cease only if the law is enforced so rigorously that the risks outweigh the perceived benefits of acquiring a gun.

In sum, both the amended Gun-Free School Zones Act and § 922(x) are constitutional. Because of their significant effect on interstate commerce, Congress may regulate guns in and around schools by regulating (1) the sale of guns within school zones and the sale of guns to minors, (2) possession of firearms that have travelled in interstate commerce, and (3) possession of firearms by juveniles.

However, it is unlikely that either the Gun-Free School Zones Act or § 922(x) will materially decrease the number of guns in schools. Although the measures increase the penalty for gun possession at school, they will not increase the overall risk faced by the gun-toting student unless additional resources are devoted to increase the likelihood of detection and enforcement. Because the measures do not provide for such

³¹¹ *Id.*

³¹² *See id.* at 344.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* *See also* *United States v. Cardoza*, 914 F. Supp. 683, 687 (D. Mass. 1996) (holding that § 922(x) impacts the handgun market by excluding juvenile participation and is therefore constitutional under the Commerce Clause).

³¹⁶ *See supra* notes 46-47 and accompanying text.

resources, the burden and exposure will fall upon the states. Furthermore, these measures do not address peer influence, the students' perceived need for self-protection, student self-esteem, lack of conflict resolution skills, and other factors that motivate students to carry guns. Finally, as noted, these federal measures may not be the best way to deter gun violence in the schools of a particular state or school district, because the regulations will not be closely tailored to the circumstances of the particular schools.

B. SPENDING CLAUSE POWER

The Constitution gives to Congress the power to tax, to coin money, and to "provide for the common Defence and general Welfare of the United States."³¹⁷ By this authority, Congress may give funds directly to the states. Congress may also place conditions on the receipt of those funds. Conditional spending is contractual in nature, whereby "in return for federal funds, the States agree to comply with federally-imposed conditions."³¹⁸ In this way, Congress can induce states to take action that they could not compel through direct regulation under the Commerce Clause.³¹⁹ Although Congress' power to place conditions on federal funds is not unlimited,³²⁰ it has proven quite extensive.³²¹

The parameters of the Spending Clause were set forth clearly in *South Dakota v. Dole*.³²² In *Dole*, South Dakota challenged a federal statute, which conditioned a state's receipt of federal highway funds on the state's prohibiting the purchase or public possession of alcoholic beverages by a person under twenty-one years of age.³²³ If the state did not enact such a law, the Secretary of Transportation withheld approximately five percent of federal highway funds. South Dakota contended that imposing adoption of the statute violated the 21st Amendment, which grants the states almost total control over the liquor distribution system.³²⁴

³¹⁷ U.S. CONST., ART. I, § 8, cl. 1.

³¹⁸ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); *United States v. Butler*, 297 U.S. 1, 66 (1936).

³¹⁹ *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981).

³²⁰ See, e.g., *Pennhurst State School & Hosp.*, 451 U.S. at 17 n.13 (1981); *Lau v. Nichols*, 414 U.S. 563, 569 (1974).

³²¹ For example, in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), the Supreme Court upheld the conditioning of loans and grants to Oklahoma for highway improvements on removing a member of the state's highway commission (who also happened to be chairman of the Democratic State Central Committee). It is unlikely that the removal of a state officer could be compelled through direct regulations under the Commerce Clause. See Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STANFORD L. REV. 1103 (1987).

³²² 483 U.S. 203 (1987).

³²³ 23 U.S.C. §§ 158, 408(d)(3), (e)(3) (1987).

³²⁴ U.S. CONST. amend. XXI.

Justice Rehnquist—who also penned the majority opinion in *Lopez*—announced the opinion of the *Dole* Court. The Court declined to decide the scope of the 21st Amendment, holding that the federal statute was a valid exercise of Congress' spending power "even if Congress may not regulate drinking ages directly."³²⁵ The Court explained that, under the Spending Clause, Congress may attach conditions to the acceptance of funds to further national policy objectives, even if those objectives are not within Congress' enumerated powers.³²⁶ To be valid, such conditional spending must be undertaken in pursuit of the general welfare (deferring substantially to Congress), the condition must be stated unambiguously, and the condition must relate to the federal interest in particular national projects or programs.³²⁷ In addition, there can be no independent constitutional bar to the conditional grant.³²⁸

The Court found that the federal statute met the first three conditions, and that the 21st Amendment posed no "independent constitutional bar" to the conditional grant of highway funds.³²⁹ The "independent constitutional bar" limitation, the Court explained, does not prohibit the "indirect achievement of objectives which Congress is not empowered to achieve directly."³³⁰ It merely precludes coercing the states to engage in activities that would themselves be unconstitutional, such as invidious discrimination or cruel and unusual punishment.³³¹ The Court noted that placing a condition upon the receipt of five percent of the highway funds a state could receive was "mild" and a proper exercise of power under the Spending Clause.³³²

Dole, therefore, clearly demonstrates the distinction between Congress' power to regulate under the Commerce Clause, and its power to condition acceptance of funds under the Spending Clause. Most notably, regulation of interstate activities is permitted under the Commerce Clause only if the activities "substantially affect" interstate commerce. By comparison, conditional spending is proper under the Spending Clause if the condition merely "relates" to a federal interest. In Spending

³²⁵ *Dole*, 483 U.S. at 206.

³²⁶ *Id.* at 206-07.

³²⁷ *Id.* at 207-08.

³²⁸ *Id.* (citing, e.g., *Lawrence Co. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269-70 (1985)).

³²⁹ 483 U.S. at 208.

³³⁰ *Id.* at 210.

³³¹ *Id.* at 210-11.

³³² *Id.* at 211. The states are presumed to have sufficient political power and financial resources to be able to protect their interests from federal intrusion and reject funds conditioned by unsatisfactory requirements. As federal grants to state and local governments now approximate \$100 billion and amount to what is a substantial proportion of state and local government revenues, however, the idea that states are free to reject federal funds may not be realistic.

Clause analysis, the relationship between the condition and the federal interest need not be particularly close; it is only necessary that there be "some" relationship.³³³

1. *The Spending Clause After Lopez*

Both the Commerce Clause and the Spending Clause permit, directly or indirectly, federal intrusion into state autonomy. Thus, some commentators believe that the Court's decision in *Lopez*—the first decision to strike down a statute under the Commerce Clause in decades—could signal a narrower interpretation of the Spending Clause.³³⁴

These arguments are premised on the notion that conditional spending under the Spending Clause invades the Tenth Amendment's preservation of powers to the states³³⁵ as much as direct regulation under the Commerce Clause. In theory, a state can decline federal funds if the conditions are too onerous or repugnant, but as a practical matter, states are dependent on a substantial inflow of federal funds and are not likely able to raise equivalent funds by increasing state taxes.³³⁶ States lacking any meaningful alternative to federal funding may be forced to submit to the federal will.³³⁷

These arguments, however, miss the mark. The potentially coercive effect of the Spending Clause has not been recognized as a valid basis for striking down Spending Clause legislation.³³⁸ The issue of constitutionality under the Spending Clause has never included a "coercion test."³³⁹

³³³ See *New York v. U.S.*, 505 U.S. 144, 167 (1992).

³³⁴ See, e.g., Baker, *supra* note 283. Baker contends that the Spending Clause should be deemed coextensive with the Commerce Clause. She proposes that, if a Spending Clause appropriation would regulate the states in ways that would not be permitted under the Commerce Clause, the appropriation should be presumed invalid unless it merely reimbursed the states for amounts spent for a purpose specified by the bill. Under Baker's proposal, a statute—calling for reimbursement to the states for the costs of prosecuting offenders under the state's gun-free school zone statute—would be permissible reimbursement legislation, because it would not offer any funds beyond what is necessary to reimburse expenditures for the specified purpose. On the other hand, a statute that provides an education fund of, e.g., \$100 per student, on the condition that the state has a gun-free school zone act, would be impermissible.

³³⁵ The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

³³⁶ Baker, *supra* note 283 at 1936-37.

³³⁷ Even in *Dole*, the Supreme Court acknowledged this possibility. "In some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). The Court concluded that the threatened loss to states of five percent of their allotment of federal highway funds did not pass this critical point, but did not identify the percentage that would. *Id.* Provisions requiring 95% of Federal Highway Act funds to be forfeited have been upheld. *Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

³³⁸ *Nevada v. Skinner*, 884 F.2d 445 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

³³⁹ *State of Missouri v. U.S.*, 918 F. Supp. 1320, 1329 (E.D. Mo. 1996).

In fact, the Supreme Court has suggested that an inquiry as to the coercive nature of the condition would be inappropriate.³⁴⁰

In any event, it is unlikely that *Lopez* will have an effect on Spending Clause litigation for several reasons.³⁴¹ First, the Spending Clause is a power independent from the Commerce Clause. Decades ago, in *United States v. Butler*,³⁴² the Supreme Court interpreted the Spending Clause as authorizing the "expenditure of public moneys for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution."³⁴³

Second, Spending Clause legislation does not implicate the Tenth Amendment. The Tenth Amendment is implicated only if Congress has "directly compelled" the state "to enact a federal regulatory program."³⁴⁴ Even if a federal statute had a measurable impact on a particular state program or economy that impact alone would not be sufficient to establish a Tenth Amendment violation.³⁴⁵

Third, decisions since *Lopez* do not reflect a narrower view of the Spending Clause. In *State of Missouri v. United States*,³⁴⁶ the court upheld the constitutionality of two provisions of the 1990 Amendments to the Clean Air Act,³⁴⁷ despite the plaintiff's argument that *Lopez* indicated a new interest in federalism on the part of the Supreme Court. In *Commonwealth of Virginia Dep't of Education v. Riley*,³⁴⁸ the Fourth Circuit upheld provisions of the Individuals with Disabilities Education Act ("IDEA"). Under the IDEA, federal funds are provided to states to help them educate disabled children if the states, among other things, guarantee to all children with disabilities the right to a free appropriate public education.

³⁴⁰ *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

³⁴¹ Although interesting, Baker's proposal is not persuasive. First, Baker begins with a faulty premise. She presumes that the Spending Clause and the Commerce Clause are coextensive. However, in *United States v. Butler*, 297 U.S. 1 (1935), the Court interpreted the Spending Clause as authorizing "expenditure of public moneys for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution." *Id.* at 66. See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). Second, her distinction between reimbursement spending and regulatory spending may often prove illusory. Congress could simply reduce existing appropriations by the expected reimbursement, or, in lieu of providing increased educational appropriations, keep existing appropriations the same and condition their reimbursement.

³⁴² 297 U.S. 1, 66 (1935).

³⁴³ *Id.* at 66. See *Dole*, 483 U.S. at 206-07.

³⁴⁴ *New York v. United States*, 505 U.S. 144, 162 (1992).

³⁴⁵ *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.33 (1981).

³⁴⁶ 918 F. Supp. 1320 (E.D. Mo. 1996).

³⁴⁷ Clean Air Act §§ 110, 179, as amended, 42 U.S.C. §§ 7410-7509.

³⁴⁸ 86 F.3d 1337 (4th Cir. 1996).

Finally, as mentioned earlier, the author of the *Lopez* opinion, Justice Rehnquist, was also the author of the Court's opinion in *United States v. Dole*, which embraced a broad view of the Spending Clause. Indeed, the Court's opinion in *Dole* makes clear the distinction between the Commerce Clause and the Spending Clause.³⁴⁹ The constitutionality of Spending Clause legislation should, therefore, continue to turn on the test set forth in *Dole*.

2. *Spending Clause Power to Regulate Guns in Schools*

Conditional funding may be used to regulate guns in schools. As discussed above, conditional spending legislation will be upheld if (1) it is undertaken in pursuit of the general welfare, (2) the conditions are not ambiguous, (3) the conditions relate to the federal interest in making the expenditure, and (4) the conditions do not violate any constitutional guarantee.³⁵⁰ Congress' grant of funds to the states for education certainly furthers the general welfare.³⁵¹ Conditioning those funds on the states' undertaking measures to minimize the disruption caused by guns is related to the federal interest in reducing gun violence in schools.³⁵² Thus, as long as the condition is stated unambiguously and does not implicate an independent constitutional bar, the conditional funding should be permitted under the Spending Clause. Under this analysis, both the Gun-Free Schools Act of 1994³⁵³ and the Safe Schools Act of 1994³⁵⁴ are constitutional, although they have several shortcomings, discussed below.

3. *The Gun-Free Schools Act of 1994*

The Gun-Free Schools Act of 1994 provides that, as a condition of receiving federal education funds, each state must require its local educational agencies to expel, for at least a year, any student who brings a firearm to school.³⁵⁵ The Act does permit, however, the local educational agency to decide, on an ad hoc basis, not to expel the student.³⁵⁶ The Act further leaves it to the states to decide whether to provide educational opportunities to the expelled student in an alternative setting.³⁵⁷

The Gun-Free Schools Act plainly meets the standards for Spending Clause legislation set forth in *Dole*. First, the statute is undertaken in

³⁴⁹ *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987).

³⁵⁰ *New York v. United States*, 505 U.S. 144, 171-72 (1992); *Dole*, 483 U.S. at 207-08.

³⁵¹ See *supra* notes 204-210 and accompanying text.

³⁵² See *supra* notes 204-223 and accompanying text.

³⁵³ 20 U.S.C. § 8921(b) (1994).

³⁵⁴ *Id.* §§ 5961, 5962 (1994).

³⁵⁵ *Id.* § 8921(b).

³⁵⁶ *Id.* § 8921(b)(1).

³⁵⁷ *Id.* § 8921(b)(2).

pursuit of the general welfare, because both educational funding and attempts to minimize disruptions in education are important to the welfare of the nation.³⁵⁸ Second, the condition is set forth unambiguously, as the statute specifically declares that "each state receiving federal funds under this chapter shall have in effect a state law" requiring expulsion.³⁵⁹ Third, the condition of mandating expulsion for gun possession in schools relates to the federal interest in providing funds for education. Finally, the condition of mandatory expulsion does not violate any constitutional guarantee. The regulation of guns in general, and the expulsion of students for possessing guns in particular, are rationally related to legitimate government interests.³⁶⁰ Guns and gun violence instill fear in students and teachers, cause truancy, and affect the ability of students to learn³⁶¹—expulsion prevents at least the expelled student from bringing a gun to school.

However, the Gun-Free Schools Act may actually do little to reduce guns and gun violence in schools. The statute does not supplement state funds or resources for either detecting students who have firearms or administering and enforcing the expulsion requirement. Unless students believe that expulsion can and will be enforced, they will not likely be deterred.

Furthermore, the Gun-Free Schools Act has other shortcomings. First, the Act leaves the states to deal with the significant ramifications of expulsion. Unless the expelled student enrolls in a private school or is provided an alternative school by the state, he or she will be deprived of education for at least a year, if not more.³⁶² Most families cannot afford private schooling, and private schools may not welcome a student expelled for gun possession. If an alternative school *is* provided for expelled students, the state must expend additional funds. In either event, the statute may merely serve to move guns from one school to another.

Second, although the statute does not prohibit the state from undertaking other measures to combat gun violence in schools, it does discourage the state from doing so. The Act requires schools to expend funds to enforce a particular punishment dictated by the federal government, at the expense of pursuing other preventative or punitive measures, or to lose federal educational funding in its entirety. This is truly coercive Spending Clause legislation.³⁶³

³⁵⁸ See *supra* notes 204-210 and accompanying text.

³⁵⁹ 20 U.S.C. § 8921(b)(1) (1994) (emphasis added).

³⁶⁰ See discussion *supra* parts III.A.1, III.A.2; See *supra* notes 164-171 and accompanying text (discussing right to education and right to possess guns).

³⁶¹ See *supra* notes 64-82 and accompanying text.

³⁶² Once expelled, most students do not complete their education. See *supra* note 121.

³⁶³ A bill that would similarly tie the hands of state and local governments is the Violent and Repeat Juvenile Offender Act of 1997, S.B.10, which passed the Senate Judiciary Com-

4. *The Safe Schools Act of 1994*

The Safe Schools Act of 1994 grants up to \$3,000,000 over two years to local educational agencies demonstrating a high incidence of juvenile violent crime. The funds may be used to conduct studies assessing violence, develop strategies to combat that violence, train school personnel, conduct community education programs to promote safety and reduce school violence, teach students conflict resolution skills and conduct other violence prevention activities, create "safe zones of passage" through increased law enforcement and neighborhood patrols, educate students and parents on the dangers of guns, counsel victims, purchase metal detectors, hire security personnel and reimburse local law enforcement personnel for participation in activities permitted under the statute.³⁶⁴

The Safe Schools Act meets the criteria for Spending Clause legislation. The statute is undertaken for the general welfare in that the goal, as expressed by Congress, is to improve safety in the educational environment.³⁶⁵ The statute identifies the condition for the funding unambiguously, as the statute provides that the funds may only be spent for designated uses.³⁶⁶ The uses to which the funds may be put are all related to maintaining order at school, which is related to the national interest in education. Finally, the statute does not require the states to act in violation of any constitutional guarantee.

The Safe Schools Act gives the states flexibility in dealing with guns in schools, and is less of an affront to state autonomy than the Gun-Free Schools Act. Rather than requiring a state to mandate expulsion or lose federal funding, the Act provides the states with funds to allocate among a variety of programs geared toward curbing gun violence in, and around, schools. Based on the nature of the school district's needs and environment, and based on input from parents and school personnel, one school district could choose to use most of its grant on educational programs, conflict resolution programs and security personnel. Another district, based on its circumstances, could use its grant for studies assessing its needs, creating safe zones of passage and reimbursing local law en-

mittee in July 1997. The bill would provide \$2.5 billion to state juvenile justice programs for five years, but require recipients to: fingerprint and photograph children charged with serious crimes, whether or not convicted, and provide the information to the FBI, schools and the courts; drug-test juveniles in certain situations; yield jurisdiction to federal prosecutors who would have discretion to prosecute juveniles as adults for certain offenses; allow 14-year olds to be prosecuted as adults; and allow juveniles to be jailed in adult facilities for up to 72 hours and incarcerate youths for truancy (in apparent contradiction with the conditions on federal grants under the Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601).

³⁶⁴ 20 U.S.C. § 5965(a) (1994).

³⁶⁵ *Id.* § 5965(b).

³⁶⁶ *Id.* § 5965(a) ("A local educational agency shall use grant funds received under this subchapter for one or more of the following activities")

forcement. Although it is more likely that states will welcome the funds and allocate them among permissible uses, if a state ultimately dislikes all permissible uses of the proposed funds, it need not accept the federal grant, and can do so without fear of losing educational funding.

The Safe Schools Act is also more likely to lead to deterrence than the Gun-Free Schools Act. Many of the permissible uses of the funds, such as installing metal detectors and hiring security personnel, will increase the real and perceived enforcement of existing punitive measures. Other uses of funds, such as community education programs, instruction on conflict resolution skills, and creating safe zones of passage will decrease the perceived need to have a gun. Increased perceptions of enforcement and decreased benefits of gun possession lead to deterrence.³⁶⁷ And most importantly, the flexibility given to the states allows districts to spend money on programs best designed to meet local needs.

The Safe Schools Act does not go far enough, however, because it unduly limits the activities that the state may undertake using federal funds. Expenditures for creating safe zones of passage, acquiring and installing metal detectors, hiring security personnel, and reimbursing local law enforcement for participating in school violence prevention activities, are limited in the aggregate to five percent of the grant, and those expenditures are permitted only if there are no other federal sources of funding.³⁶⁸ This is particularly problematic because the funds will be made available only to high crime school districts, in which heightened security and enforcement of existing measures is particularly important. And while monies are available for counseling and conflict resolution, studies suggest that counseling and conflict resolution skills may not be as effective for youth living in dangerous neighborhoods.³⁶⁹

C. INCREASING THE OVERALL DETERRENT POTENTIAL

The Gun-Free School Zones Act, the ban on sales to juveniles under 18 U.S.C. § 922(x), the Gun-Free Schools Act and the Safe Schools Act make a powerful combination. The Gun-Free School Zones Act criminalizes the possession of a gun within 1000 feet of a school.³⁷⁰ Section 922(x) criminalizes the possession of a firearm by, and the sale of a firearm to, any juvenile.³⁷¹ The Gun-Free Schools Act coerces states to expel students who are caught with a gun at school.³⁷² The Safe Schools Act grants high crime school districts funds to use for studying

³⁶⁷ See *supra* notes 151-155 and accompanying text.

³⁶⁸ 20 U.S.C. § 5965(b) (1994).

³⁶⁹ Ruttenberg, *supra* note 48, at 1906. But see *supra* note 141.

³⁷⁰ 18 U.S.C. § 922 (q)(12)(A) (1999).

³⁷¹ *Id.* § 922(x).

³⁷² 20 U.S.C. § 8921(b) (1994).

the problem of violence, providing education about weapons and dispute resolution, and, to a lesser extent, for metal detectors, security, and law enforcement.³⁷³ The cumulative effect of these statutes is to provide strong penalties for taking a gun to school, and they send a strong national message that guns and schools do not mix.

However, none of these measures, with the possible exception of the Safe Schools Act, gives the states a means of increasing the perception that these penalties will ever be enforced. Nor do they address the students' underlying motivations to bring guns to school, or reduce the perceived need for firearms. The availability of funds for these purposes under the Safe Schools Act is strictly limited.

Federal funding should be directed toward increasing the detection of firearms and the likelihood of enforcement, increasing students' sense of security, and tailoring punishment to the circumstances of the student. First, the Safe Schools Act should be amended to give local school districts greater flexibility in allocating federal funds to reimburse local law enforcement, increase school security personnel, install metal detectors and security cameras, limit access to firearms, and maintain corridors of safe passage. The safe corridors need not correlate to the Gun Free School Zones Act's fixed 1000-foot perimeter around the school. The geography of the school and the typical travel routes of students to the school may dictate that it makes more sense to establish safe corridors along certain streets. The corridors could be secured by a combination of school security, parent and community volunteers and local law enforcement.

Second, the Gun Free Schools Act should be amended or interpreted so that expulsion is not required as a condition of federal education funding.³⁷⁴ It may at times be inappropriate to expel a student caught with a gun. After all, little is gained from shuttling the student from school to school or casting him or her out of the school system and into the streets. Instead, in some circumstances more suitable punishments would include a brief suspension, confiscation of the firearm, mandatory classes in conflict resolution and the dangers of guns, parent-teacher conferences, and community service hours.

These modifications to the Safe Schools Act and the Gun Free Schools Act will allow the local agencies closest to the problem to evalu-

³⁷³ *Id.* §§ 5961, 5962.

³⁷⁴ There already exists the right of the local agency to decide on an ad hoc basis not to enforce the expulsion requirement. 20 U.S.C. § 8921(b)(1) (1994). The proposal here goes further, replacing the requirement with a number of alternative punishments, which could include expulsion in serious cases. In this way, the statute would assure that the students were appropriately disciplined, but without a presumption of expulsion, and without the appearance that a statutory punishment was being disregarded. The goal is not to condone gun possession at school, but to maximize deterrence.

ate and respond to gun possession in schools.³⁷⁵ They will thereby both increase the likelihood of deterrence and strike a community balance between deterrence and social utility.³⁷⁶

CONCLUSION

There is no law, and no tolerable degree of enforcement, that will magically whisk away the problem of guns and violence in our nation's schools. Some of the more popularized tragedies, in which children brought family guns to school and killed classmates and teachers, would not have been prevented by a new law or harsher punishment. To be sure, gun violence is symptomatic of more profound societal ills, including increasingly disaffected youth, the media's glorification of guns and violence, and juveniles' easy access to guns. Yet state and federal government must join forces to curb this problem that has such demonstrable adverse effects on children, education, and the national economy.

Deterrence will occur only if the risk of adverse consequences outweighs the perceived benefits of taking a gun to school. To increase the

³⁷⁵ Other federal legislation provides block grants to states relating to juvenile crime. The Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601(1999), provides grants to states, local governments and private organizations for development of education, prevention, treatment and rehabilitation programs targeting juvenile delinquency and improving the juvenile justice system. 42 U.S.C. § 5631(1999). To receive funding, the state must submit a three-year plan providing for coordination with local government and private agencies, an analysis of juvenile crime problems, and juvenile justice and delinquency prevention needs, goals and services to be provided. *Id.* § 5633. At least 75% of the funds must be used for a variety of programs, including community-based alternatives to incarceration, programs to strengthen families, delinquency prevention and educational programs, job training and literacy programs. *Id.* § 5633(a)(10). States lose the funding if they fail to comply with certain restrictions on the incarceration of juveniles, such as jailing juveniles for offenses that would not be criminal if committed by an adult. *Id.* § 5633(a)(12).

For fiscal year 1998 Congress created a new \$250 million Juvenile Accountability Incentive Block Program. See *Juvenile Accountability Incentive Block Program* (visited April 27, 1998) <www.ojp.usdoj.gov/ocpa/NewAct/ja.htm>. States may use the funds for certain enumerated purposes, including constructing and operating juvenile detention and correction facilities, creating and administering accountability-based sanctions for juvenile offenders, hiring additional juvenile court personnel, establishing court-based juvenile justice programs that target young firearm offenders through the establishment of juvenile gun courts for juvenile firearms offenders, and programs that enable the court system, schools and social services agencies to address serious juvenile offenders. *Id.* At least 45% of the funds must be used for court programs, and at least 35% must be used for detention and correction facilities, other sanctions for juvenile offenders, and information sharing among courts, schools and social service agencies. *Id.* To be eligible, states must certify that they are actively considering or will consider accountability-based reforms, including adult prosecution of violent juveniles and juvenile record reforms. *Id.* States must also have a plan for reducing juvenile crime and a policy of testing appropriate categories of juveniles for use of controlled substances. *Id.*

³⁷⁶ See *Hearings on S. 890*, *supra* note 126 (statement of Jerry Kilgore, Secretary of Schools, Commonwealth of Virginia) ("A more productive step to help states and localities keep guns out of their schools would be a loosening of the strings attached to things like federal gun free schools zone acts—providing a block grant approach to allow each state to address its problem in its own individualized manner.").

risk of adverse consequences, we must convince students not only that carrying a gun to school is unlawful, but also that guns will be detected and penalties will be enforced. To decrease the perceived benefit of carrying a gun, we must show students that guns are not necessary for protection or self-esteem. While the family plays a critical role in this task, much of the burden of devising and implementing these deterrent measures falls on the state government and local school districts. States plainly have the right to regulate guns in schools because of their traditional purview over education and their police power. They should also know what deterrent measures would best fit the needs of their communities. State and local governments, however, often lack the resources to accomplish implementation. In light of the effects of school violence on national productivity and the national economy, the federal government has a significant interest in assisting the states to curb gun violence in schools.

Despite the Supreme Court's decision in *United States v. Lopez*, the federal government may still regulate gun sales and the possession of firearms transported in interstate commerce. The amended Gun Free School Zones Act, prohibiting the possession within a school zone of guns that have travelled in interstate commerce, and the ban of 18 U.S.C. § 922(x) on sales to minors, are likely within Congress' Commerce Clause power. These measures may not be effective, however, because they focus on punishment, rather than enforcement and student motivations. They also give local agencies no assistance with, or flexibility in, implementation and enforcement.

Indirect federal regulation under the Spending Clause provides states with funds as long as they adhere to certain criteria. Because Spending Clause legislation gives school districts greater leeway in allocating federal funds to meet the needs of the district, it provides the greater potential for deterrence. The Gun-Free Schools Act, which conditions education funds on states requiring expulsion of students who carry guns to school, and the Safe Schools Act, which grants funds to schools to be spent on various programs designed to make schools safer, are valid exercises of the Spending Clause power. Both of them address one of the causes of gun violence—the availability of guns to youth.

Still, the Gun-Free Schools Act and the Safe Schools Act are not the total answer. The expulsion requirement of the Gun-Free Schools Act will either not be enforced (undermining deterrence) or will deprive students of needed education. Although the Safe Schools Act provides greater flexibility to the states, it strictly limits the amount that can be spent on measures critical to detection and enforcement. The Safe Schools Act should be broadened to allow schools to spend a greater proportion of federal funds on law enforcement, security personnel, cor-

ridors of safe passage, and other means of increasing the likelihood of detecting firearms. This will increase the perceived risk of taking guns to school and decrease the perceived need to carry a gun for self-protection. Combined with programs teaching conflict resolution skills, instilling self-esteem and respect for others, and otherwise further decreasing the perceived need to carry a gun to the classroom, these measures will increase the likelihood of deterrence.