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NOTES

TURF WARS: STREET GANGS AND THE OUTER LIMITS OF RICO'S "AFFECTING COMMERCE" REQUIREMENT

Frank D'Angelo*

In response to the increasingly vast economic impact of organized crime, Congress in 1970 enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) to provide federal prosecutors additional tools to combat such crime. RICO requires that enterprises whose members are charged with violating the Act must "affect interstate commerce." Courts have held that RICO may be applied to enterprises with no economic motivation so long as they minimally affect interstate commerce. However, given the Act's economic history and interstate commerce element, its application to noneconomic intrastate enterprises presents a special problem. This Note argues that, consistent with relevant Commerce Clause jurisprudence and doctrines of statutory interpretation, future courts should read RICO to require that noneconomic intrastate enterprises substantially affect interstate commerce.

INTRODUCTION

On December 15, 2005, a federal jury sentenced Jackson Nascimento to 171 months in jail and 60 months of supervised release for shooting one person and conspiring to murder several others.1 Nascimento was a member of a street gang that operated exclusively within the city of Boston and the sole purpose of which was to attack members of rival Boston gangs.2 Nascimento, however, was convicted of violating a federal statute that criminalizes racketeering activity and that identifies as a specific

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1. See Brief of Defendant-Appellant at 5, 7, United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007) (No. 06-1152); see also Brief for the United States at 12–15, Nascimento, 491 F.3d 25 (Nos. 06-1152, 06-1153, 06-1154) (describing the circumstances surrounding the shooting at issue).
2. See Nascimento, 491 F.3d at 30. The U.S. Court of Appeals for the First Circuit accepted the lower court's ruling that the gang did not deal drugs. See id. at 30 n.1.
concern the economic impact of such activity.\textsuperscript{3} The statute’s legislative history indicates that it was “designed to attack the infiltration of legitimate business”\textsuperscript{4} and to eradicate organized criminal activity “that annually drain[ed] billions of dollars from America’s economy.”\textsuperscript{5}

Nascimento was convicted under the Racketeer Influenced and Corrupt Organizations Act (RICO).\textsuperscript{6} RICO\textsuperscript{7} was passed by Congress in 1970 as Title IX of the Organized Crime Control Act.\textsuperscript{8} Its most important liability provision is § 1962(c), which makes it illegal for “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”\textsuperscript{9} That RICO provision contains the Act’s federal “jurisdictional hook”—its statutory anchor to Article I congressional power. Federal prosecutors may not charge an individual under RICO unless his or her enterprise is engaged in interstate commerce or the enterprise’s activities affect interstate commerce.\textsuperscript{10}

RICO’s early history suggests that it was intended to have a narrow and specific scope.\textsuperscript{11} When Congress enacted RICO in 1970, however, it mandated that RICO “be liberally construed to effectuate its remedial purposes.”\textsuperscript{12} Over the decades that followed, prosecutors, seeking to test just how liberally courts would construe the Act’s language, invoked RICO to charge members of a panoply of new and increasingly noneconomic criminal enterprises.\textsuperscript{13} For the most part, courts embraced RICO’s

\textsuperscript{3} Jackson Nascimento was actually convicted of violating several federal statutes, but this Note focuses on one: 18 U.S.C. § 1962(c) (2000). See Nascimento, 491 F.3d at 31.
\textsuperscript{6} See Nascimento, 491 F.3d at 31.
\textsuperscript{9} 18 U.S.C. § 1962(c). The Act also provides a detailed list of activities that constitute “racketeering activity.” Those include “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.” Id. § 1961(1)(A).
\textsuperscript{10} See id. § 1962(c). The U.S. Supreme Court has determined that an enterprise is “engaged in commerce” when it is “directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.” United States v. Robertson, 514 U.S. 669, 672 (1995) (quoting United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975)).
\textsuperscript{11} See infra notes 38–45 and accompanying text.
\textsuperscript{13} See infra Part I.A. The Racketeer Influenced and Corrupt Organizations Act’s (RICO) allure lay not only in its amenability to liberal construction, but also in its practical statutory utility. The Act does not require mens rea beyond that necessary for its predicate acts, and it provides for severe sanctions in addition to those for the mere underlying offenses. Ross Bagley et al., Racketeer Influenced and Corrupt Organizations, 44 Am. Crim. L. Rev. 901, 903 (2007); see also infra notes 68–69 and accompanying text.
broadening application. In the 1980s and 1990s, the U.S. Supreme Court held that RICO may be used to prosecute not only economically motivated criminal enterprises, but also legitimate businesses and enterprises without a profit motive.\textsuperscript{14}

Cases like that of Jackson Nascimento, however, present the most challenging and troubling applications of RICO. They force us to consider the limits of the Act’s purpose and language—specifically the Act’s “affecting commerce” language. Nascimento’s gang was a small-scale operation, unlike the larger, economically and politically entrenched Mafia that the Act targeted in the 1970s.\textsuperscript{15} Instead, it is the type of gang with which a city police department would ordinarily concern itself. As an organization, Nascimento’s gang was not engaged in drug dealing, organized gambling, loan-sharking, money laundering, or any other economic activity.\textsuperscript{16} To be sure, several members of the gang had dealt drugs, but there was no evidence that their dealing was organized by or connected to the gang.\textsuperscript{17} As an organization, it sought only to shoot members of nearby rival gangs.\textsuperscript{18} One such shooting resulted in the temporary closing of a twenty-four-hour tire shop and thus arguably affected “commerce” within the meaning of § 1962(c).\textsuperscript{19}

These facts reveal two critical deficiencies regarding the economic nature of the activity at issue: (1) the economic activity was individualized—not hierarchical, and (2) to the extent that there were economic effects, they were incidental or secondary—not primary. Given this, can a gang like Nascimento’s be said to “affect interstate commerce”? In other words, can RICO redress admittedly heinous gang violence with such tenuous connections to interstate commerce? If so, what is the necessary proof?

Although it is easy to mistake such questions for sympathy to the gang’s cause, such an interpretation misunderstands the fundamental jurisdictional and evidentiary requirements at issue. The actions of Nascimento’s gang are no less reprehensible than the actions of La Cosa Nostra or any other larger-scale crime syndicate. Murder is murder, and we should hope that authorities would make use of all available tools to keep dangerous thugs off the streets and behind bars. The critical question is whether, in these situations, RICO may be constitutionally used to achieve that end.

The U.S. Court of Appeals for the Sixth Circuit was the first court to bring these concerns to the fore. In \textit{Waucaush v. United States}, it noted that prosecutors’ use of RICO to convict a member of a noneconomically

\textsuperscript{14} See \textit{infra} notes 61–64, 94–96 and accompanying text.
\textsuperscript{15} RICO was mostly a response to La Cosa Nostra, the Italian organized crime enterprise that rose to prominence in the United States during the first half of the twentieth century. For a discussion regarding the history of La Cosa Nostra’s activities and federal prosecutors’ attack on the organization, see generally James B. Jacobs & Lauryn P. Gouldin, \textit{Cosa Nostra: The Final Chapter?}, 25 Crime & Just. 129 (1999).
\textsuperscript{16} See \textit{United States v. Nascimento}, 491 F.3d 25, 30 n.1, 37 (1st Cir. 2007).
\textsuperscript{17} See \textit{id.} at 30 n.1.
\textsuperscript{18} See \textit{supra} note 2 and accompanying text.
\textsuperscript{19} See \textit{Nascimento}, 491 F.3d at 43–44.
motivated organization that engaged only in noneconomic intrastate activity raised constitutional concerns.\(^{20}\) Prior cases had held that prosecutors could satisfy RICO by demonstrating that intrastate enterprises had a de minimis effect on interstate commerce; those cases, however, all addressed profit-driven enterprises.\(^{21}\) Given the unique concerns raised by noneconomic enterprises, *Waucaush* held that federal prosecutors needed to demonstrate a substantial, rather than a de minimis, effect on interstate commerce.\(^{22}\)

Last year, however, the U.S. Court of Appeals for the First Circuit departed from the Sixth Circuit's holding in *Waucaush*.\(^{23}\) In upholding Nascimento's conviction, it held that the normal de minimis standard applies.\(^{24}\) This is an important distinction. Proving a substantial effect on interstate commerce is a significant hurdle, whereas proving a de minimis effect is, as one scholar has described, "a polite fiction, equivalent to no required jurisdictional nexus at all."\(^{25}\) The applicable legal rule thus has important prosecutorial implications.

The First Circuit based its holding on *Gonzales v. Raich*, a recent Supreme Court case handed down after *Waucaush*.\(^{26}\) In *Raich*, the Court held that Congress may regulate noneconomic intrastate activities as part of a comprehensive scheme of regulation that bears a substantial relation to interstate commerce.\(^{27}\) The *Nascimento* court held that Congress's regulation of local violent activity does not raise any constitutional concerns, and, thus, courts need not read RICO as requiring a substantial effect on interstate commerce.\(^{28}\)

*Raich* marked the first time in over a decade that the Supreme Court has construed the Commerce Clause broadly to permit federal regulation over intrastate activity.\(^{29}\) Some have read the decision to signal an end to the Court's recent trend of limiting Congress's power to regulate what may be


\(^{21}\) See, e.g., *United States v. Shryock*, 342 F.3d 948, 984 n.6 (9th Cir. 2003) (upholding a RICO conviction based only upon a de minimis effect on interstate commerce because "the heart of [the defendants'] crimes, drug trafficking and extortion, [were] quintessential illegal economic activities"); *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (holding that "a de minimis connection suffices for a RICO enterprise that 'affects' interstate commerce," but addressing an enterprise engaging in economic activity such as illegal gambling and extortion); *United States v. Beasley*, 72 F.3d 1518, 1526 (11th Cir. 1996) (noting that, in order to satisfy the affecting commerce requirement, "only a slight effect on interstate commerce is required").

\(^{22}\) See *Waucaush*, 380 F.3d at 256–57.

\(^{23}\) See *Nascimento*, 491 F.3d at 42–43.

\(^{24}\) See id.

\(^{25}\) Lynch, supra note 8, at 715 n.232.

\(^{26}\) See *Nascimento*, 491 F.3d at 40–43.

\(^{27}\) See *Gonzales v. Raich*, 545 U.S. 1, 26–27 (2005). Specifically, *Raich* held that Congress may regulate intrastate marijuana cultivation and use as part of a comprehensive federal scheme regulating the use of controlled substances for medical purposes. See id. at 27.

\(^{28}\) See *Nascimento*, 491 F.3d at 42–43.

\(^{29}\) See infra note 103 and accompanying text.
seen as strictly local activity under the Commerce Clause.\textsuperscript{30} That trend is marked by \textit{United States v. Lopez}\textsuperscript{31} and \textit{United States v. Morrison}.\textsuperscript{32} In \textit{Lopez}, the Supreme Court prohibited Congress from using the Commerce Clause to regulate gun possession in school zones,\textsuperscript{33} and in \textit{Morrison}, domestic violence against women.\textsuperscript{34} Others believe that \textit{Raich} may not signal an end to this recent trend; the case may simply amount to a jurisprudential outlier.\textsuperscript{35}

The question of RICO’s applicability to street gangs, therefore, is not merely a question of statutory construction. In other words, it is not sufficient to interpret the words “affecting commerce” without reference to wider historical and constitutional concerns. As a matter of plain language, “affecting commerce” may very well mean “affecting commerce in any way, even in a de minimis way.” But that does not answer the ultimate question. Even if we do assign the words “affecting commerce” their plain meaning, should courts nonetheless construe them to mean “affecting commerce in a substantial way” when applied to street gangs to (1) stay faithful to congressional intent, and (2) avoid opening the statute to a constitutional challenge under the governing Commerce Clause cases?

This Note argues that, to avoid a potential unconstitutional extension of Congress’s commerce power, RICO’s “affecting commerce” language should not be construed to require street gangs’ local acts to have a mere de minimis impact on interstate commerce. It also argues that, in this context, \textit{Raich} does not displace \textit{Lopez} and \textit{Morrison}. Part I considers RICO’s legislative history and expanding application, the evolution of Supreme Court Commerce Clause jurisprudence, and the constitutional avoidance doctrine—the use of which in \textit{Waucaush} was criticized by the \textit{Nascimento} court. Part II lays out the split between the Sixth and First Circuits, tracks their reasoning in \textit{Waucaush} and \textit{Nascimento} respectively, and details how those courts employ different Commerce Clause analyses to reach divergent conclusions. Finally, Part III explains why courts should adopt the \textit{Waucaush} approach and interpret RICO to require that noneconomic intrastate enterprises substantially affect interstate commerce.

\textsuperscript{30} See, e.g., Steven K. Balman, \textit{Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause}, 41 Tulsa L. Rev. 125, 127 (2005) (“Gonzales v. Raich represents a great leap backward in Commerce Clause doctrine and the jurisprudence of federalism.”); Thomas W. Merrill, \textit{Rescuing Federalism After Raich: The Case for Clear Statement Rules}, 9 Lewis & Clark L. Rev. 823, 826 (2005) (noting that, in \textit{Raich}, “Lopez’s prohibitory rule was watered down to the point where it may have little continuing significance”); Ilya Somin, Gonzales v. Raich: \textit{Federalism as a Casualty of the War on Drugs}, 15 Cornell J.L. & Pub. Pol’y 507, 508 (2006) (“Gonzales v. Raich marks a watershed moment in the development of judicial federalism. If it has not quite put an end to the Rehnquist Court’s ‘federalism revolution,’ it certainly represents an important step in that direction.”).

\textsuperscript{31} 514 U.S. 549 (1995).

\textsuperscript{32} 529 U.S. 598 (2000).

\textsuperscript{33} See \textit{Lopez}, 514 U.S. at 567–68.

\textsuperscript{34} See \textit{Morrison}, 529 U.S. at 617–18.

\textsuperscript{35} See infra note 155 and accompanying text.
I. RICO, THE COMMERCE CLAUSE, AND CONSTITUTIONAL AVOIDANCE

Before examining the circuit split, it is necessary to consider the following: (1) the evolving breadth of RICO applications that permitted federal prosecutors to charge members of gangs involved in noneconomic intrastate activity; (2) relevant Commerce Clause cases that bear on the meaning of RICO’s “affecting commerce” language; and (3) the constitutional avoidance doctrine.

A. The Evolving Breadth of RICO Applications

RICO’s origin can be traced back to the 1920s and 1930s, during which a number of factors including increased narcotic use, Prohibition, and the Great Depression contributed to the rise of organized crime.36 As crime grew, prosecutors attempted to dissolve organized crime rings by prosecuting individual members for discrete crimes; however, this approach proved largely unsuccessful.37

As the problem mounted, a series of senatorial and presidential committees and commissions were formed to analyze organized crime and to recommend methods of recourse.38 In the 1950s, the Kefauver and McClellan Committees exposed the structure of the national organized crime syndicate known as La Cosa Nostra, or the Mafia, and identified as a primary concern the organization’s infiltration of legitimate businesses.39 In 1965, President Lyndon B. Johnson declared in an address to Congress that crime had become “a malignant enemy in America’s midst”40 and appointed a commission headed by Attorney General Nicholas Katzenbach to study the problem.41

Like its predecessor committees, the Katzenbach Commission emphasized the special problem of organized crime’s infiltration of legitimate businesses.42 The commission recommended that the...
government use not only criminal law enforcement but also civil and regulatory means to curb the expanding problem of organized crime. Specifically, it noted the easier standard of civil, rather than criminal, proof, the possibility of discovery, and the value of antitrust-type remedies. These insights paved the way for RICO's combined criminal and civil approaches.

Congressional response to the Katzenbach Commission's report was swift. In 1970, three years after the report was released, the Senate almost unanimously passed Senate Bill 30—the immediate precursor to RICO. The bill received minor amendments in the House and was signed by the President into law. Both the legislative history and the congressional findings accompanying the Act reflect Congress's preoccupation with the negative economic effects of criminal infiltration into legitimate businesses. Accordingly, some scholars claim that eliminating such infiltration was the Act's sole purpose. Others, however, point to changes in the bill's language and title, as well as broader statements of purpose in the Act's legislative history, to support the claim that RICO was intended to have a much broader scope.

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43. See id. at 208.
44. See id.; see also Blakey & Gettings, supra note 38, at 1015 n.25.
45. See Blakey & Gettings, supra note 38, at 1015 n.25.
46. See id. at 1019–21. Senate Bill 30 was largely the result of collaboration between Senators John L. McClellan (D-AR) and Roman Hruska (R-NE). See Lynch, supra note 8, at 673–80. Senator McClellan, introducing the bill to the Senate, remarked, "The problem, simply stated, is that organized crime is increasingly taking over organizations in our country.... This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President's Crime Commission." 115 Cong. Rec. 9566, 9567 (1969) (statement of Sen. McClellan). The Senate subsequently passed the bill by a vote of 73–1. Blakey & Gettings, supra note 38, at 1019 n.61.
47. See Blakey & Gettings, supra note 38, at 1020–21.
50. See, e.g., Lynch, supra note 8, at 680 ("[N]owhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business."); Smith, supra note 37, at 909–10 (noting that both the language and structure of § 1962 evince RICO's purpose to protect enterprises from criminal infiltration).
51. See, e.g., Blakey & Gettings, supra note 38, at 1025 n.91 (claiming that the title's change to "Racketeer Influenced and Corrupt Organizations" implies a double aim, that is, to eliminate infiltrated (racketeer influenced) businesses on the one hand, and wholly illegitimate (corrupt) organizations on the other). G. Robert Blakey and Brian Gettings also point to the broad statement of congressional purpose included with RICO. See id. at 1026 n.91. As that statement reads, RICO's purpose is "to seek the eradication of organized crime..."
The Act's plain language lent itself to broad application. The substance of RICO's criminal component appears in 18 U.S.C. § 1962. That section creates four new crimes: (1) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise,\(^{52}\) (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity,\(^{53}\) (3) conducting the affairs of an enterprise through a pattern of racketeering activity,\(^{54}\) and (4) conspiring to commit any of these offenses.\(^{55}\) Each of the four subsections contains a federal jurisdictional hook that requires the enterprise to have engaged in or affected interstate commerce.\(^{56}\)

When Congress enacted RICO in 1970, it specified that the Act should be "liberally construed to effectuate its remedial purpose."\(^{57}\) By liberally construing such terms as "enterprise" and "pattern of racketeering activity," one could argue that the Act's text criminalizes not only infiltrations but also noninfiltrations.\(^{58}\) During the 1970s, federal prosecutors learned that limiting RICO prosecutions to infiltrations of legitimate businesses left criminals free to engage in purely criminal endeavors.\(^{59}\) As the decade drew to a close, the U.S. Department of Justice started prosecuting noninfiltrations under RICO in an effort to broaden its scope.\(^{60}\)

In 1981, the Supreme Court explicitly approved the expansion of RICO to noninfiltrations. In United States v. Turkette,\(^{61}\) the Court held that a RICO "enterprise" may be a wholly illegitimate organization.\(^{62}\) It departed from the infiltration focus in the Act's legislative history\(^{63}\) and embraced a broader reading because, as the Court said, "[a]pplying [RICO] also to criminal organizations does not render any portion of the statute in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922) 1073, 1073.

\(^{53}\) Id. § 1962(b).
\(^{54}\) Id. § 1962(c). For the text of § 1962(c), the section of RICO most relevant to the circuit split at issue in this Note, see supra note 9 and accompanying text.
\(^{55}\) Id. § 1962(d).
\(^{56}\) See supra notes 52–55.
\(^{58}\) "Enterprise" is defined as any "group of individuals associated in fact," 18 U.S.C. § 1961(4), and "pattern of racketeering activity" is defined as the commission of at least two of a variety of crimes such as murder, bribery, extortion, or drug dealing. Id. § 1961(5); see also id. § 1961(1)(A).
\(^{59}\) See Smith, supra note 37, at 910–11.
\(^{60}\) See Edward S.G. Dennis, Jr., Current RICO Policies of the Department of Justice, 43 Vand. L. Rev. 651, 653 (1990).
\(^{62}\) See id. at 593.
\(^{63}\) See id. ("The language of the statute . . . reveals that Congress opted for a far broader definition of the word 'enterprise,' and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.").
superfluous nor does it create any structural incongruities within the framework of the Act."  

Turkette also demonstrated that the Court was willing to relax standards of proof concerning the "organized" nature of the "enterprise." The evidence suggested that Novia Turkette, Jr.'s "enterprise" was far from an "organization" in the traditional sense, but rather it was a collection of small-time criminals with whom he occasionally committed robberies or arson. This is another important development, for it suggests that federal prosecutors can gain jurisdiction over otherwise state law crimes if they can demonstrate even a tenuous connection between or among the criminal participants.

From a law enforcement standpoint, prosecuting criminals in federal court under RICO instead of deferring to state prosecutions provided three distinct practical benefits. First, it placed criminal prosecutions in more able hands. Federal prosecutors are often better able to prosecute organized crime because they can conduct organized crime investigations more quickly and win more convictions than state and local authorities. Second, it enabled the joining of crimes that otherwise could not have been joined in the same indictment. Courts have held that in RICO indictments, where all defendants are alleged to have participated in the same underlying pattern of racketeering, there is no misjoinder of defendants under Federal Rule of Criminal Procedure 8(b). Third, it provided a wider range of available penalties. A defendant charged with violating RICO may be sentenced for each of his predicate acts, meaning the substantive crimes that were committed to acquire or maintain interest in the enterprise or conduct the affairs of the enterprise. But, in addition, a defendant faces a twenty-year maximum sentence for a RICO violation and up to twenty additional years if the government can prove there was a conspiracy under RICO. RICO also provides for massive fines and for mandatory forfeiture of any

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64. Id. at 587.
65. See Lynch, supra note 8, at 705.
67. See, e.g., United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980); United States v. Campanale, 518 F.2d 352, 359 (9th Cir. 1975). Rule 8(b) reads, "The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). Thus, defendants that have committed different predicate acts may still be joined in the same RICO indictment because they participated in the same "series of acts." See Bright, 630 F.2d at 812–13.
69. See id. §§ 1962(d), 1963(a); see also Jacobs & Gouldin, supra note 15, at 169 (discussing further the penalties under RICO).
portion of the defendant’s property that can be traced to the proceeds of the racketeering activity.\textsuperscript{70}

\textit{Turkette} sparked an expansion of RICO prosecutions. The first wave of expansion extended RICO into the areas of government and corporate corruption.\textsuperscript{71} For instance, during the 1980s, federal prosecutors used RICO to prosecute corrupt corporate officers,\textsuperscript{72} state officials,\textsuperscript{73} and judges.\textsuperscript{74} A second wave saw prosecutors use RICO to prosecute violent gangs. Until the late 1980s, murder was rarely prosecuted in federal court,\textsuperscript{75} but since then federal prosecutors have used RICO to bring down murderous motorcycle gangs,\textsuperscript{76} white supremacist groups,\textsuperscript{77} and ethnic street gangs,\textsuperscript{78} among others.

In the overwhelming majority of these cases, RICO’s commerce requirement was easily satisfied. Corrupt officials exploited their positions of power to collect illicit profits—often through bribes\textsuperscript{79}—and were thus engaged either in interstate commerce or intrastate economic activity that affected interstate commerce. Likewise, violent gangs were usually engaged in some kind of interstate activity such as trafficking drugs,\textsuperscript{80} organizing gambling,\textsuperscript{81} peddling cigarettes,\textsuperscript{82} or instigating credit fraud.\textsuperscript{83} Other gangs were not actually engaged in interstate commerce, but instead committed intrastate acts of violence.\textsuperscript{84} To satisfy RICO, only the enterprise—not the violent acts themselves—must affect interstate commerce; thus, federal prosecutors were able to gain jurisdiction over these cases simply because the violent acts furthered the gangs’ goals.\textsuperscript{85}

\textsuperscript{70} See Jacobs & Gouldin, \textit{supra} note 15, at 169.


\textsuperscript{72} See, e.g., United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980).

\textsuperscript{73} See, e.g., United States v. Dozier, 672 F.2d 531 (5th Cir. 1982).

\textsuperscript{74} See, e.g., United States v. Devine, 787 F.2d 1086 (7th Cir. 1986).

\textsuperscript{75} See Jeffries & Gleeson, \textit{supra} note 66, at 1102.

\textsuperscript{76} See, e.g., United States v. Grayson, 795 F.2d 278 (3d Cir. 1986).

\textsuperscript{77} See, e.g., United States v. Yarbrough, 852 F.2d 1522 (9th Cir. 1988).

\textsuperscript{78} See, e.g., United States v. Wong, 40 F.3d 1347 (2d Cir. 1994); United States v. Thai, 29 F.3d 785 (2d Cir. 1994).

\textsuperscript{79} See, e.g., \textit{Devine}, 787 F.2d at 1087; United States v. Dozier, 672 F.2d 531, 535 (5th Cir. 1982); United States v. Marubeni Am. Corp., 611 F.2d 763, 764 (9th Cir. 1980).

\textsuperscript{80} See, e.g., United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996).

\textsuperscript{81} See, e.g., United States v. Wall, 92 F.3d 1444 (6th Cir. 1996).

\textsuperscript{82} See, e.g., United States v. Abdullah, 162 F.3d 897 (6th Cir. 1998).

\textsuperscript{83} See, e.g., United States v. Valenzeno, 123 F.3d 365 (6th Cir. 1997).

\textsuperscript{84} See, e.g., United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000) (involving a RICO prosecution where the predicate act was murder); United States v. Miller, 116 F.3d 641 (2d Cir. 1997) (same).

\textsuperscript{85} See United States v. Crenshaw, 359 F.3d 977, 984 (8th Cir. 2004).
Courts considering the convictions of such gangs’ members had held that the enterprise needed only to have had a de minimis effect on interstate commerce. Those cases, however, shared a common thread: the gangs had an economic motive. Given both this case law and RICO’s distinctly economic legislative history, some subsequent cases held that noneconomic enterprises were exempted from RICO. These cases emphasized a return to RICO’s more modest origins. A 1994 civil RICO case handed down by the Supreme Court, however, authorized the expansion of RICO to noneconomic enterprises.

During the era of criminal RICO expansion, civil RICO enjoyed a significant expansion of its own. Until 1994, however, these expansions generally occurred in separate lines of cases.

National Organization of Women, Inc. v. Scheidler marked an important bifocal expansion of both civil and criminal RICO. In Scheidler, a women’s rights organization and various abortion clinics brought a civil

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86. See, e.g., United States v. Shryock, 342 F.3d 948, 984 (9th Cir. 2003); United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001); see also United States v. Beasley, 72 F.3d 1518, 1526 (11th Cir. 1996) (noting “only a slight effect on interstate commerce is required”).

87. See, e.g., Shryock, 342 F.3d at 984 n.6; Riddle, 249 F.3d at 537.

88. See, e.g., Nat’l Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 629 (7th Cir. 1992), rev’d, 510 U.S. 249 (1994) (“We do not believe that requiring an economic motive will place undue limitations upon RICO actions.”); United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988) (“For purposes of RICO, an enterprise must be directed toward an economic goal.”); United States v. Ivic, 700 F.2d 51, 59 (2d Cir. 1983) (“[I]n our view the conduct . . . did not constitute an offense . . . because . . . it was neither claimed nor shown to have any mercenary motive.”).

89. See, e.g., Ivic, 700 F.2d at 63 (“RICO is the lineal descendant of a pair of 1967 Senate bills designed to apply antitrust-type measures to the problem of ‘black money’. Although the bill ultimately enacted as RICO went somewhat beyond this initial conception, preventing and reversing the infiltration of legitimate businesses by organized crime elements remained its core purpose.”). Regardless, the U.S. Department of Justice continued to prosecute participants in noneconomic enterprises, consistent with the 1984 revisions to its formal guidelines. See Scheidler, 510 U.S. at 261 (noting that the U.S. Attorneys’ Manual was changed from requiring that enterprises prosecuted under RICO be directed toward “an economic goal” to requiring that they be directed toward “an economic or otherwise identifiable goal”).

90. See Scheidler, 510 U.S. at 252.

91. The central civil RICO provisions appear in § 1964. That section permits “[a]ny person injured in his business or property by reason of a violation of section 1962” of RICO to bring a civil suit in federal court against the RICO offender. 18 U.S.C. § 1964(c) (2000). Section 1964(c) provides for monetary recovery (three times the damages sustained and the cost of the suit, including reasonable attorney’s fees), and § 1964(a) provides for equitable remedies (including divestiture of an interest in an enterprise, restrictions on future activities or investments, and dissolution or reorganization of an enterprise). See id. § 1964(a), (c). This powerful remedial tool has become a corporate weapon against labor unions, a device to sue health maintenance organizations for health care fraud, and a last resort for victims of police misconduct. See Bagley, supra note 13, at 947–53.

92. For instance, Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985), functioned as the civil analog to the Turkette case. It recognized that although Congress may have intended civil RICO to be used against criminally infiltrated businesses, it may also be used against noninfiltrated businesses in everyday fraud cases. See id. at 499–500.

RICO action against a coalition of antiabortion groups that allegedly used extortion in an effort to shut down the abortion clinics. Although the antiabortion coalition neither sought nor gained any financial benefit from its actions, the Court held that the predicate acts had the requisite effect on interstate commerce. The Court held that the word "enterprise" in § 1962(c) of RICO did not require an underlying economic motivation and, so long as the enterprise satisfied the commerce element, it met RICO's requirements.

After Scheidler, enterprises that were once seemingly immune to federal prosecution under RICO's language and context became plausible targets for RICO prosecutions. Scheidler did not, however, specify the precise effect upon interstate commerce necessary to satisfy RICO. The only guidance that the Waucaush and Nascimento courts had at their disposal were earlier cases holding that RICO was satisfied when gangs involved in economic activity minimally affected interstate commerce. Waucaush and Nascimento, however, presented a new question: does the de minimis standard apply to gangs of the noneconomic intrastate variety?

B. Supreme Court Commerce Clause Jurisprudence

The conflict between the First Circuit in Nascimento and the Sixth Circuit in Waucaush centered on the required effect on interstate commerce. The Nascimento court held that to satisfy § 1962(c) of RICO, prosecutors need only show a de minimis effect on interstate commerce. Waucaush, however, held that prosecutors need to show a substantial effect. In Nascimento, the First Circuit based its opinion in large part on the Supreme Court's holding in Gonzales v. Raich. In order to evaluate Nascimento, it is necessary to place Raich into context and consider it in light of preceding Supreme Court Commerce Clause cases.

The U.S. Constitution gives Congress the power to "regulate commerce... among the several states." The Supreme Court, however, has struggled with pinpointing exactly how far congressional commerce power extends. Scholars generally recognize at least three distinct eras

94. See Scheidler, 510 U.S. at 252–53.
95. See id. at 260.
96. See id. at 258–61.
97. See supra notes 86–87 and accompanying text.
98. See United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007) ("[T]he normal requirements of the RICO statute apply to defendants involved with enterprises that are engaged only in noneconomic criminal activity.").
99. See Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004) ("Where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do.").
100. See Nascimento, 491 F.3d at 40–43.
101. U.S. Const. art. 1, § 8, cl. 3.
streets apart...
Clause-based legislation.\textsuperscript{110} This shift from narrow to broad interpretation is often attributed to the emergence of the popular idea that national economic problems demanded a federal legislative response and that the judiciary should permit such critical legislation under the Commerce Clause, regardless of how tenuous the connection to interstate commerce may be.\textsuperscript{111} This more deferential approach to Commerce Clause–based legislation endured long after the New Deal thanks to the Court’s new substantial effects test.\textsuperscript{112} With each new major Commerce Clause case, the Court refined this test, permitting regulation over both private activities\textsuperscript{113} and activities that indirectly impacted commerce.\textsuperscript{114}

The Court debuted the substantial effects test in 1937. In rejecting its prior exclusion of intrastate manufacturing from the scope of congressional commerce power, the Court held that intrastate activities are within the scope of the Commerce Clause so long as they “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.”\textsuperscript{115} The Court later held that Congress could choose the means reasonably adapted to attain the desired interstate regulation, even if those means amounted to regulation of intrastate activities.\textsuperscript{116} In 1942, the Court started aggregating discrete intrastate activities to bring them within the ambit of the substantial effects test.\textsuperscript{117} In other words, the Court held that Congress could prohibit individual farmers from growing wheat for home


\textsuperscript{113} See id. at 675.

\textsuperscript{114} See Mank, supra note 110, at 384.

\textsuperscript{115} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (upholding a congressional act that provided for collective bargaining based upon its potential to promote industrial peace and productivity).

\textsuperscript{116} See United States v. Darby, 312 U.S. 100, 121 (1941) (upholding the Fair Labor Standards Act, which promoted labor standards by prohibiting the interstate shipment of goods produced under substandard labor conditions). Professor Gerald Gunther calls this the “super-bootstrap” technique. See Gerald Gunther, Constitutional Law 188–89 (9th ed. 1975). As applied in Darby, to attain the end of regulating interstate commerce, Congress may prohibit interstate shipments; and to attain the prohibition of interstate shipments, Congress may regulate the labor standards and local minimum wage because they drive up prices. According to the Court, “The requirement for [employment] records even of the intrastate transaction is an appropriate means to a legitimate end.” Darby, 312 U.S. at 125.

consumption because that activity in the aggregate would substantially affect interstate commerce.\footnote{118}{See id. That is, homegrown wheat consumption by “many others similarly situated” would reduce the demand for and price of wheat in the national market. \textit{id. at 128.}}

Although the period of Commerce Clause jurisprudence from 1937 to 1995 is most widely recognized for the development of the Court’s substantial effects test, it produced another jurisprudential development that, for the purposes of this Note, is perhaps more important than the substantial effects test. In its later cases during this period, the Court developed a comprehensive regulatory scheme rationale to justify regulation of intrastate activities. Considered together, the major substantial effects test cases stand for the principle that Congress may regulate intrastate activity if it has a rational basis for concluding that the activity substantially affects interstate commerce.\footnote{119}{See \textit{Mank}, \textit{supra} note 110, at 384–87 (referring to \textit{NLRB, Darby, and Wickard}).} The comprehensive scheme rationale is a practical extension of the substantial effects test. For example, under this rationale, the Court permitted Congress to extend the federal Fair Labor Standards Act to the states and thus regulate local employers.\footnote{120}{See \textit{Maryland v. Wirtz}, 392 U.S. 183, 189–90 (1968); see also \textit{Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2000)}.} Although the employers’ activities, taken individually, did not affect interstate commerce, the cumulative effect of withholding application to all local employers would undermine the efficacy of the federal regulatory program.\footnote{121}{See \textit{id. at 192–93.}} Thus, Congress, the Court held, may regulate a “class of activities” that significantly affects interstate commerce, even if the class includes at least some intrastate activities that do not.\footnote{122}{\textit{See} \textit{id. at 146, 152–55 (1971).}}\footnote{123}{\textit{See \textit{Perez v. United States}, 402 U.S. 146, 152–55 (1971).}}\footnote{124}{\textit{See}, e.g., \textit{United States v. Lopez}, 514 U.S. 549, 556–57 (1995) ("\textit{Jones &Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence . . . But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.").}}

According to the Court,

A complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.\footnote{123}{See \textit{id. at 192–93.}}

Both the substantial effects test and the comprehensive scheme rationale have found their way into modern Supreme Court Commerce Clause jurisprudence—though in very different ways. In the late 1990s, the Rehnquist Court turned the substantial effects test on its head, using portions of earlier cases to narrow, rather than broaden, congressional commerce power.\footnote{124}{See, e.g., \textit{United States v. Lopez}, 514 U.S. 549, 556–57 (1995) ("\textit{Jones &Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence . . . But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.").} It struck down legislation that strayed too far from the Commerce Clause and returned a great deal of power to the states in the
name of New Federalism. In 2005, however, the Court departed from its stricter analysis of Commerce Clause–based legislation and adopted the comprehensive scheme approach to uphold federal drug legislation that regulated intrastate marijuana use and cultivation.

The two Rehnquist Court cases that mark the third era of Supreme Court Commerce Clause jurisprudence are United States v. Lopez and United States v. Morrison. In those cases, the Court struck down, respectively, federal legislation prohibiting gun possession in school zones and an act that provided a federal civil remedy for the victims of gender-motivated violence.

Using the substantial effects test, the Court struck down the legislation as straying too far from the spirit of the Commerce Clause. It noted that neither the actors that the legislation at issue regulated, nor their conduct, had a commercial character. Thus, as Chief Justice William Rehnquist noted, the legislation could not be sustained under "cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." The Court, driven by a professed respect for traditional state authority, emphasized the need to distinguish between what is truly national and truly local.

In striking down both pieces of legislation, however, the Court did not merely rely upon federalism arguments; rather, it set forth a detailed framework for analyzing the connection of such legislation to the Commerce Clause. In Lopez, the Court noted that one of the three areas of valid congressional power under the Commerce Clause is activity having a substantial effect on interstate commerce. The Court set forth the following four-step analysis for legislation governing such activity: (1) Is the activity described in the statute economic in nature? (2) Does the statute contain a jurisdictional element establishing that the federal cause of action is in pursuance of Congress's commerce power? (3) Are there congressional findings regarding the effects of the activity upon interstate commerce? (4) Is the link between the activity and a substantial effect upon interstate commerce attenuated?

125. See, e.g., Rosalie Berger Levinson, Will the New Federalism Be the Legacy of the Rehnquist Court?, 40 Val. U. L. Rev. 589, 590 (2006) (noting that the Rehnquist Court struck down more congressional acts than all previous Supreme Courts combined).
126. See Gonzales v. Raich, 545 U.S. 1, 26–27 (2005).
131. See Lopez, 514 U.S. at 580 (Kennedy, J., concurring).
132. See id. at 561.
133. See Morrison, 529 U.S. at 617–18; Lopez, 514 U.S. at 567–68.
134. See Lopez, 514 U.S. at 558–59. The other two areas are the channels of interstate commerce and the instrumentalities of interstate commerce. See id. at 558.
Under that framework, if the congressional statute is noneconomic, the activity cannot be aggregated to meet the substantial effects test.\footnote{See Lopez, 514 U.S. at 561; see also supra note 117 and accompanying text.} Moreover, the connection between the regulated activity and interstate commerce may be too attenuated to warrant validity.\footnote{See Lopez, 514 U.S. at 567. The link may be too attenuated if it would require one 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.” Id.} Even if the statute includes congressional findings describing such a connection, those findings are not sufficient, by themselves, to rescue the statute from unconstitutionality.\footnote{See Morrison, 529 U.S. at 614.}

Some have criticized the \textit{Lopez-Morrison} framework as unworkable,\footnote{See e.g., Dral & Phillips, supra note 102, at 616–17; Mank, supra note 110, at 402–03; Robert J. Pushaw, Jr., \textit{The Medical Marijuana Case: A Commerce Clause Counter-Revolution?}, 9 Lewis & Clark L. Rev. 879, 895 (2005).} and whether due to that unworkability, the challenges presented by a new fact pattern, or some combination of the two, the Court abandoned it in \textit{Gonzales v. Raich}. Instead, the Court looked to the cases decided between 1937 and 1995 that developed the comprehensive scheme rationale to uphold the provision of the Controlled Substances Act (CSA) that criminalized intrastate marijuana cultivation and use as an essential part of the wider regulatory scheme, i.e., the CSA itself.\footnote{See Gonzales v. Raich, 545 U.S. 1, 26–27 (2005). The Controlled Substances Act criminalizes several other drugs as well, including heroin, cocaine, PCP, and LSD. See 21 U.S.C. § 841(a), (b) (2000).}

To justify its departure from the \textit{Lopez-Morrison} framework and its use of an alternative test, the Court distinguished CSA from the statutes at issue in \textit{Lopez} and \textit{Morrison} on two major grounds. First, it distinguished the CSA as a comprehensive piece of legislation. It described the act as a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, possession, and use of five classes of controlled substances.\footnote{See Raich, 545 U.S. at 24. The Court, however, did not specify how to distinguish comprehensive from noncomprehensive statutes.} Secondly, the Court distinguished the CSA as a “quintessentially economic” statute.\footnote{Id. at 25.} The Court, which in \textit{Lopez} restricted Congress’s Commerce Clause power to only “economic” activities,\footnote{Lopez, 514 U.S. at 561.} here defined “economic” as anything involving “the production, distribution, and consumption of commodities.”\footnote{Raich, 545 U.S. at 25 (internal quotation marks omitted).} It described the CSA as just that kind of statute: a regulation over “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”\footnote{Id. at 26. The Court likened the case to \textit{Wickard v. Filburn}, noting that both the CSA and wheat production regulations at issue in \textit{Wickard} sought to control the supply and}
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Lopez and Morrison, however, were neither comprehensive nor economic.146 Justice Sandra Day O'Connor, however, criticized the majority’s definition of “economic” as excessively broad.147 She warned that the Court’s adoption of the definition would upset the newly restored federal-state balance and undo the Court’s work in Lopez and Morrison. The broad definition, she claimed, “threatens to sweep all of productive human activity into federal regulatory reach.”148 Consequentially, it provides incentives for Congress to over legislate.149

The CSA’s distinguishing characteristics nonetheless proved dispositive. The difference was clear: Raich presented a challenge to an individual application of a concededly valid, decidedly economic, comprehensive statutory scheme, whereas Lopez and Morrison presented facial challenges to noneconomic statutes. Given these procedural and legal differences, the Court opted for the comprehensive scheme approach, which permits it to uphold regulation over a subdivided class of intrastate activity if such regulation is essential to ensure the efficacy of a wider, comprehensive regulatory scheme and if Congress rationally believes that the class of activity is substantially related to interstate commerce.150 The Court held that regulation of intrastate marijuana cultivation and use was essential to ensure orderly enforcement of a regulatory scheme designed to regulate the use of controlled substances for medicinal purposes.151 Just as nationwide exemption of home wheat production from federal regulation might disrupt the interstate wheat market and undermine national production quotas,152 “nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on [its] interstate market.”153

Raich did not overturn Lopez and Morrison; it merely limited those cases to their factual analogues.154 It is unclear, however, if Raich signals a return to broader Commerce Clause interpretation and more lenient review of federal Commerce Clause-based legislation. Perhaps, as some have suggested, Raich is a legal aberration whose politically charged facts drove demand of fungible commodities. See id. at 17–19; see also supra note 117 and accompanying text.

146. See Raich, 545 U.S. at 24–25.
147. See id. at 49–51 (O’Connor, J., dissenting).
148. Id. at 49.
149. See id. at 43.
150. See id. at 26–27.
151. See id. at 27–29.
152. See supra note 117 and accompanying text.
153. Raich, 545 U.S. at 28.
the Court to an unlikely decision.\textsuperscript{155} Regardless, federal courts may soon face questions regarding \textit{Raich}'s comprehensive scheme test. \textit{Raich} has left behind various unresolved issues, including the majority's potentially overly broad definition of economic,\textsuperscript{156} and the absence of objective tests for determining whether a statute is comprehensive and whether a particular regulatory component is essential to the statute.

\section*{C. Constitutional Avoidance}

\textit{Waucaush} used the constitutional avoidance doctrine to give a different reading to \S 1962(c) of RICO when applying the statute to enterprises engaged in noneconomic intrastate activity.\textsuperscript{157} In contrast, the \textit{Nascimento} court argued that \textit{Waucaush} misapplied that doctrine.\textsuperscript{158} To evaluate the validity of those courts' arguments, it is necessary to review the doctrine's nature, purpose, and application.

The avoidance doctrine requires federal courts to construe a statute to avoid rendering it unconstitutional. The Supreme Court first enunciated the principle in 1909, describing it in the following way:

\begin{quote}
It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.\textsuperscript{159}
\end{quote}

The doctrine is one of many canons of construction that a court may use to effectuate Congress's intent in enacting a particular statute before it considers the merits of a constitutional challenge to that statute.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{155} The vote to uphold application of the CSA was 6–3. \textit{Raich}, 545 U.S. 1. Only Justices Anthony Kennedy and Antonin Scalia switched their votes from striking down the legislation in \textit{Lopez} and \textit{Morrison} to upholding application of the CSA in \textit{Raich}. For criticism and speculation concerning the switch in voting, see, for example, Editorial, \textit{Federalism, a la Carte}, Wall St. J., Jan. 18, 2006, at A10 (characterizing the decision as "results-oriented jurisprudence in federalist drag"); Randy Barnett, \textit{The Ninth Circuit's Revenge}, Nat'l Rev. Online, June 9, 2005, http://www.nationalreview.com/comment/barnett200506090741.asp (describing Justice Kennedy as having a "zero-tolerance approach to drugs" and Justice Scalia as concerned more with majoritarianism than originalism); Ryan Grim, \textit{A Guide to Gonzales vs. Raich}, Salon.com, June 7, 2005, http://www.salon.com/news/feature/2005/06/07/supreme_court_and_pot/ (positing that Scalia faced a dilemma whereby he "had to stick somewhere near his expressed principles, not piss off Republicans in Congress and the White House—and, of course, make sure there are no hippies smoking legal marijuana anywhere in his United States").
\item \textsuperscript{156} See supra note 144, 147–49 and accompanying text.
\item \textsuperscript{157} See \textit{Waucaush} v. United States, 380 F.3d 251, 255 (6th Cir. 2004).
\item \textsuperscript{158} See \textit{United States} v. \textit{Nascimento}, 491 F.3d 25, 38 (1st Cir. 2007).
\item \textsuperscript{159} United States \textit{ex rel.}\textsuperscript{159} Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 407 (1909).
\end{itemize}
Underlying courts’ use of the doctrine is the assumption that Congress did not intend to enact an unconstitutional statute.161

Two major principles drive the courts’ continued use of the avoidance doctrine. The first is judicial self-restraint in constitutional adjudication.162 Courts are likely to exercise restraint on constitutional issues, as separation of powers concerns accompany those issues.163 Whereas appellate courts have limited fact-finding power and attenuated electoral accountability, legislatures have better democratic and policy-making pedigree164 and are thus better positioned to vindicate constitutional principles.165 By avoiding constitutional questions, courts signal their concern for constitutional issues without risking interbranch conflict.166 Instead of blindly overturning laws, they allow Congress and other bodies to respond through new legislation.167

The second principle underlying courts’ use of the avoidance doctrine is deference to congressional intent.168 Courts may apply a saving interpretation to a statute only when it is amenable to such an interpretation;169 that is, courts may not impose an interpretation that is plainly contrary to Congress’s intent,170 as demonstrated by the statute’s text and legislative history.171 That said, if a statute’s legislative history actually demonstrates that Congress was aware of and concerned with potential constitutional problems, the avoidance doctrine might be superfluous.172

161. See id. at 532.
162. See id. at 534–40. This phrase is borrowed from Harry H. Wellington, Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues, 1961 Sup. Ct. Rev. 49, 63. Some, however, have claimed that the avoidance doctrine actually enhances judicial activism and functionally results in a presumption of unconstitutionality. See, e.g., Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 816 (1983) (arguing that the doctrine creates a “judge-made constitutional ‘penumbra’”); Michelle R. Slack, Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence—A Response to Lisa Kloppenberg, 56 Case W. Res. L. Rev. 1057, 1063 (2006) (arguing that the doctrine “creates a protective zone around possibly unconstitutional interpretations because the court will not get close enough to the Constitution to tell us how close is too close”).
165. See Scheef, supra note 160, at 535.
166. See id.
167. See id.
168. See id. at 540–48.
169. See id. at 540–41.
171. See Scheef, supra note 160, at 543.
172. See id. at 548. Even when legislative history is unhelpful, it might be wrong to apply the avoidance doctrine. See Lawrence C. Marshall, Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation, 66 Chi.-Kent L. Rev 481, 488–89 (1990) (criticizing the underlying assumption that Congress always intends to enact a constitutional statute).
Of the myriad Supreme Court cases employing the avoidance doctrine, two are of particular concern to the Waucaush-Nascimento circuit split. The court in Waucaush cited to Jones v. United States\textsuperscript{173} in deciding that § 1962(c) of RICO warranted a different reading when applied to enterprises engaged in noneconomic intrastate activity.\textsuperscript{174} The court in Nascimento, meanwhile, cited to Clark v. Martinez\textsuperscript{175} to support its claim that Waucaush misapplied the constitutional avoidance doctrine.\textsuperscript{176}

In Jones, the Court considered whether a federal arson statute applied to the arson of a private residence.\textsuperscript{177} The relevant part of the statute made it a crime for one to "damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."\textsuperscript{178} The arson statute is contained within the same organized crime act of which RICO is a part, and its "affecting commerce" language is analogous to that of § 1962(c). The Court rejected the government’s argument that the private residence that had been set ablaze was "used" in activities affecting interstate commerce.\textsuperscript{179} Such an interpretation threatened to sweep all arson under federal jurisdiction and render the statute’s commerce-affecting limitation mere "surplusage."\textsuperscript{180} The Court thus rejected that reading of the statute as unconstitutional.\textsuperscript{181}

In Clark, the Court considered a provision of the Immigration and Nationality Act (INA) that authorized detention of three different classes of aliens.\textsuperscript{182} In a prior case, the Court had held that the statute implicitly prohibited indefinite detention of one of those three classes;\textsuperscript{183} in Clark, the government argued that the implicit prohibition did not apply to one of the other two classes.\textsuperscript{184} Rejecting the government’s argument, the Court refused to give the "same detention provision a different meaning when

\textsuperscript{173} 529 U.S. 848 (2000).
\textsuperscript{174} See Waucaush v. United States, 380 F.3d 251, 255 (6th Cir. 2004).
\textsuperscript{175} 543 U.S. 371 (2005).
\textsuperscript{176} See United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007).
\textsuperscript{177} See Jones, 529 U.S. at 852.
\textsuperscript{179} Jones, 529 U.S. at 855 (citing the government’s argument that the building was used (1) as collateral to secure a mortgage, (2) to obtain casualty insurance from an out-of-state insurer, and (3) to receive natural gas from out-of-state sources).
\textsuperscript{180} Id. at 857. Jones was decided at the height of the Rehnquist Court's New Federalism. It is unsurprising, then, that the Court made a federalism argument similar to that made in Lopez. It noted that arson, like gun possession, is traditionally local criminal conduct and that federalizing such local conduct raised grave constitutional concerns. See id. at 858–59.
\textsuperscript{181} See id. at 859.
\textsuperscript{183} See Zadvydas v. Davis, 533 U.S. 678, 697–99 (2001) (holding that aliens who had been admitted but were subsequently ordered removed could not be detained indefinitely).
\textsuperscript{184} See Clark, 543 U.S. at 380. The government claimed that the statutory purpose and constitutional concerns that influenced Zadvydas did not exist for the class of aliens who attempted to enter the country, but were deemed inadmissible and subsequently ordered removed. See id.
[different] aliens are involved." In applying the avoidance doctrine, the Court may impose a limiting construction on a statute’s language in one particular application even though other applications of the statute do not support the same limitation. But, the Court noted, the “lowest common denominator” must govern.

This previously unarticulated lowest common denominator rule seems to require courts to interpret a statute to avoid both actual or present and potential or future constitutional difficulties and then uniformly apply that interpretation in subsequent cases even when those later cases do not raise serious constitutional concerns. The goal, it seems, is to prevent a statute from becoming a “chameleon” whose meaning is subject to change based upon the particular constitutional concerns of a given case. Regardless, the Court noted in Clark, the avoidance doctrine must serve to effectuate congressional intent.

The avoidance doctrine is necessary to understand how RICO may be interpreted differently based upon various accompanying constitutional concerns. As Part I.B demonstrated, a statute that includes language requiring a particular activity to “affect interstate commerce” is informed by over 150 years of Commerce Clause jurisprudence. Those cases indicate that federal Commerce Clause–based legislation often raises constitutional questions. RICO is no different.

On its face, § 1962(c)’s “affecting commerce” language seems to imply that the enterprise must simply affect interstate commerce in some discernible way. The best evidence for this is probably congressional acquiescence in light of the Court’s subsequent expansions of RICO applications. However, as mere statutory interpretation does not put the issue to rest, the inquiry does not end with Scheidler. That case was almost entirely an exercise in strict statutory interpretation. The wider jurisprudential context calls for a more nuanced analysis. In Lopez and Morrison, the Court emphatically warned that it was unconstitutional to

185. Id.
186. See id.
188. See Clark, 543 U.S. at 380–81.
189. See id. at 382. The rule, however, has been criticized as counterintuitive. See, e.g., The Supreme Court, 2004 Term—Leading Cases, supra note 188, at 394 (noting that the rule requires courts to “confront constitutional issues before they are ripe”); Jonathan R. Siegel, The Polymorphic Principle and the Judicial Role in Statutory Interpretation, 84 Tex. L. Rev. 339, 382 (2005) (arguing that the rule “ratchets up the judicial interference with congressional will”).
190. See Clark, 543 U.S. at 382.
191. Many in Congress have viewed the major Supreme Court RICO cases as “judicial S.O.S. signals,” that is, as indications that Congress may need to revise RICO and provide for greater ease of interpretation. Dennis, supra note 60, at 656. Congress has not, however, undertaken any such major revisions.
permit Congress to regulate behavior that only tenuously affected interstate commerce. Moreover, the avoidance doctrine compels courts to choose from among competing statutory interpretations the interpretation that avoids rendering the statute unconstitutional. However, *Raich* may also be read to compel courts to uphold potentially unconstitutional statutory applications—but only if the comprehensive regulatory scheme approach kicks in. *Waucaush* and *Nascimento* take two different approaches toward resolving these myriad concerns.

II. THE CIRCUIT SPLIT: SATISFYING RICO'S 
"AFFECTING COMMERCE" REQUIREMENT FOR ENTERPRISES ENGAGED IN NONECONOMIC INTRASTATE ACTIVITIES

In 2004, the Sixth Circuit held in *Waucaush v. United States* that members of noneconomic intrastate enterprises could not be charged under RICO unless the enterprise substantially affected interstate commerce. Three years later, in *United States v. Nascimento*, the First Circuit considered the same question as an issue of first impression. That court held, contrary to *Waucaush*, that such enterprises need only have a de minimis effect upon interstate commerce.

A. Waucaush v. United States

The facts of the *Waucaush* case are very similar to those of *Nascimento*: Robert Waucaush was a member of a Detroit-area street gang known as the "Cash Flow Posse," or the CFP, which, despite its name, did not conduct any economic activities. Its purpose, like Nascimento’s gang, was to resist the recruiting efforts of rival gangs. To effect this purpose, gang members engaged in various acts of violence, including murders, drive-by shootings, arsons, and assaults. Waucaush and his colleagues committed these acts exclusively within Michigan state boundaries.

On July 16, 1997, federal prosecutors handed down an indictment charging Waucaush and six other members of the CFP with substantive RICO violations under § 1962(c) and RICO conspiracy under § 1962(d). Although the CFP was not engaged in interstate commerce, the indictment alleged that it was connected to interstate commerce in the following ways: (1) gang members traveled on an interstate highway to commit murders, (2)
one of the gang members used a gun that was manufactured outside of Michigan, (3) other gang members’ guns were purchased at a trade center that frequently did business with out-of-state citizens, (4) a gang member alluded to the possibility of CFP chapters in other states, and (5) a gang member acknowledged that other members, while in Mexico, had held a meeting to discuss the gang’s activities. Despite the seemingly tenuous connection, the district court refused Waucaush’s motion to dismiss the indictment.

Waucaush’s case was revived, however, thanks to the Supreme Court’s rulings in Jones and Morrison. According to the Sixth Circuit, Lopez sparked a new era in Commerce Clause jurisprudence: it established (1) that Congress could control intrastate activity only if it substantially affected interstate commerce, and (2) that courts may not pile inference upon inference to demonstrate that activities with a tenuous connection to interstate commerce satisfy the substantial effects test. Lopez may seem distinguishable from Waucaush because in Lopez, the government sought to defend the statute on its potential to curb violence, whereas in Waucaush, the defendants actually did engage in violence; but Morrison and Jones demonstrated that Lopez could be extended to remove the CFP’s activities from the sphere of congressional commerce power.

The evidence in Morrison demonstrated that “the economic impact of actual gender-motivated violence was far more direct and apparent than that of mere possession of a weapon near a school [in Lopez].” Thus, even though the economic impact of the CFP’s activities were more direct than the activities in Lopez, the rule set forth in Lopez would still govern. Jones had a similar broadening effect on Lopez’s application: “Because losing one’s house has obvious commercial effects, the refusal to distinguish Lopez [from Jones] on that basis indicated that Lopez would be read broadly.”

Lopez, Morrison, and Jones were not the only important cases bearing on Waucaush. Three prior Sixth Circuit cases set the stage for Waucaush’s rejection of the de minimis test. In United States v. Smith, the Sixth Circuit held that, even though Lopez necessitated a substantial effect on
interstate commerce, the de minimis standard survived *Lopez* as applied to the Hobbs Act—a close statutory cousin of RICO.\(^{214}\) The defendant in *Smith* was convicted of robbing a number of party stores.\(^{215}\) He claimed that the government failed to prove the nexus between the robberies and interstate commerce.\(^{216}\) The court, however, upheld Quintus Smith's conviction because the stores that he robbed had purchased a substantial quantity of beer, wine, and tobacco products from out of state.\(^{217}\) Applying the aggregation principle, the court noted that de minimis interferences with those businesses, in the aggregate, substantially affected commerce.\(^{218}\)

In *United States v. Wang*,\(^ {219}\) the Sixth Circuit considered another Hobbs Act conviction, but unlike Smith the defendant in *Wang* was convicted of robbing a married couple in their home.\(^ {220}\) The court again recognized that the de minimis test survived *Lopez*,\(^ {221}\) but it overturned the defendant's conviction in this case.\(^ {222}\) It invoked *Lopez*'s and *Morrison*’s admonitions about extending congressional commerce power to regulations on noneconomic intrastate violence.\(^ {223}\) Ultimately, the government here failed to demonstrate that the robbery of a small amount of money from a private residence had an impact that, if aggregated, would substantially affect interstate commerce.\(^ {224}\)

In *United States v. Riddle*,\(^ {225}\) the court directly addressed the application of the de minimis test to RICO. The defendant in *Riddle* was involved in an illegal gambling enterprise in Ohio that extorted money from out-of-state businessmen and protected against gambling losses by purchasing out-of-state lottery tickets.\(^ {226}\) The court once again held that the de minimis test survived as applied to RICO and that the government easily satisfied that test.\(^ {227}\)

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\(^{214}\) See id. at 456. The Hobbs Act, commonly known as the federal extortion law, criminalizes actual and attempted robbery or extortion affecting interstate or foreign commerce. See 18 U.S.C. § 1951 (2000). It also proscribes conspiracy to commit robbery or extortion. See id. Civil RICO litigants often use RICO and the Hobbs Act in conjunction when presenting their claims to the court. For example, in *Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 14 (2006), the respondents brought an action under RICO asserting that the petitioners had engaged in physically violent antiabortion activities that were intended to interfere with abortion clinics, and that these activities violated RICO because they amounted to extortion under the Hobbs Act.

\(^{215}\) See *Smith*, 182 F.3d at 455.

\(^{216}\) See id.

\(^{217}\) See id. at 456.

\(^{218}\) See id.; see also supra notes 117–18 and accompanying text.

\(^{219}\) 222 F.3d 234 (6th Cir. 2000).

\(^{220}\) See id. at 236.

\(^{221}\) See id. at 238.

\(^{222}\) See id. at 240.

\(^{223}\) See id. at 238–40.

\(^{224}\) See id.

\(^{225}\) 249 F.3d 529 (6th Cir. 2001).

\(^{226}\) See id. at 537.

\(^{227}\) See id.
Waucaush argued that Smith, Wang, and Riddle demonstrate that the issue is not whether the de minimis test applies, but rather how the test is applied in different contexts.\textsuperscript{228} The difference between Smith and Wang, Waucaush claimed, is much like the difference between Riddle and his own case.\textsuperscript{229} The Sixth Circuit agreed and refused to extend the de minimis test from Riddle to Waucaush. It noted that "a minimal connection sufficed in Riddle only because the enterprise itself had engaged in economic activity."\textsuperscript{230} Although other circuits had adopted the de minimis test for RICO, the Sixth Circuit dismissed those cases as involving illegal economic activities, such as drug trafficking and extortion.\textsuperscript{231} In Waucaush, all that was left was "violence qua violence—which the Supreme Court in Morrison plainly classified as conduct of the noneconomic strain."\textsuperscript{232} The court went on:

\begin{quote}
At the end of the day, we are left with an enterprise whose activity was intrastate, noneconomic, and without substantial effects on interstate commerce. The CFP's violent enterprise surely affected interstate commerce in some way—a corpse cannot shop, after all. But we may not "follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce."\textsuperscript{233}
\end{quote}

Once the court made this important distinction, it employed the constitutional avoidance doctrine to create a substantial effects test for RICO.\textsuperscript{234} Jones required courts to avoid interpreting statutes to prohibit conduct that Congress may not constitutionally regulate, and since RICO's "affecting interstate commerce" requirement may not exceed the bounds of the Commerce Clause, Congress may only regulate noneconomic intrastate activities under RICO if they have a substantial effect on commerce.\textsuperscript{235} As the court said, "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do."\textsuperscript{236}

B. United States v. Nascimento

Nascimento's gang, "Stonehurst," was a collection of thugs in the Boston area who organized themselves for the purpose of shooting and killing rival gang members.\textsuperscript{237} Like the CFP, Stonehurst was neither engaged in

\textsuperscript{228} See Brief for the Appellant, supra note 201, at 18.
\textsuperscript{229} See id.
\textsuperscript{230} See id. at 255–56. The cases the Sixth Circuit declined to follow include United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004); United States v. Shryock, 342 F.3d 948 (9th Cir. 2003); and United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000).
\textsuperscript{231} Id. at 256. Waucaush, 380 F.3d at 255–56. The cases the Sixth Circuit declined to follow include United States v. Crenshaw, 359 F.3d 977 (8th Cir. 2004); United States v. Shryock, 342 F.3d 948 (9th Cir. 2003); and United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000).
\textsuperscript{232} Waucaush, 380 F.3d at 256.
\textsuperscript{233} Id. at 258 (quoting United States v. Morrison, 529 U.S. 598, 615 (2000)).
\textsuperscript{234} See id. at 255–56. Although the Sixth Circuit does not explicitly state that it is employing the avoidance doctrine, that is the clear implication.
\textsuperscript{235} See id. at 255.
\textsuperscript{236} Id. at 256.
\textsuperscript{237} See United States v. Nascimento, 491 F.3d 25, 30 & n.1 (1st Cir. 2007).
interstate commerce nor driven by an underlying economic motive. The government, however, claimed that Stonehurst's activities affected interstate commerce. It offered as its most "loudly bruited" piece of evidence that a murder committed by a Stonehurst gang member inside a twenty-four-hour tire shop caused the shop to temporarily close. Nascimento claimed that the government lacked evidence that the temporary closing actually affected commerce. In fact, the owner of the shop had testified that there was no way for him to know whether customers were turned away by the shooting. Moreover, the tire shop was the only twenty-four-hour shop in Boston, and since it was closed for only a few hours after midnight, it was likely that any potential customers simply waited until the shop reopened in the morning.

The First Circuit, however, focused on a different point raised by the government: at least eight guns seized from Stonehurst members had been manufactured out-of-state, and at least one had been purchased out-of-state. Nascimento claimed that the guns demonstrated a mere tenuous connection with interstate commerce rather than an actual detrimental effect on such commerce. The court rejected this argument. Referring to the purchase of the weapon outside the state, it noted that "crossing state lines for [the] purpose of engaging in a commercial transaction is a paradigmatic example of an activity that falls within the compass of the commerce power." The court thus concluded that Stonehurst's activities had a de minimis effect upon interstate commerce.

Nascimento argued that the First Circuit, like the Sixth Circuit in Waucaush, should require the government to demonstrate a substantial effect on interstate commerce. The First Circuit had held in United States v. Marino that a de minimis effect was sufficient. There the court cited the Sixth Circuit holding in Riddle for support, presumably because the enterprise in Marino—as in Riddle—was engaged in economic activity. The defendant in Marino was a member of an organized crime family that collected extortion payments and controlled a cocaine distribution ring. Nascimento argued that the First Circuit should depart

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238. See id.
239. Id. at 43–44; see also Brief of the Defendant-Appellant, supra note 1, at 17.
240. See Brief of the Defendant-Appellant, supra note 1, at 32–33.
241. See id. at 33.
242. See id.
243. See Nascimento, 491 F.3d at 45.
244. See Brief of the Defendant-Appellant, supra note 1, at 30.
245. Nascimento, 491 F.3d at 45.
246. See id. at 43–45.
248. 277 F.3d 11 (1st Cir. 2002).
249. See id. at 35.
250. See id.
251. See id. at 19–21.
from its holding in Marino for the same reason that the Sixth Circuit departed from Riddle in Waucaush.252

The government encouraged the First Circuit to dismiss Waucaush as flawed.253 It contended that Lopez and Morrison may not be used to alter the burden of proof for RICO’s jurisdictional element.254 The constitutional inquiry as to whether a given regulation over intrastate activity falls within the ambit of congressional commerce power is qualitatively different from the more limited statutory and evidentiary inquiry into whether the government met its burden to prove, in a given prosecution, that the enterprise’s activities affected interstate commerce—an inquiry that depends exclusively on the adjudicative facts presented at trial. Thus, Waucaush needlessly conflates a constitutional test with an evidentiary one.255

The government’s argument, it appears, was that analysis under the Lopez-Morrison framework was unnecessary because the core issue presented by the case did not implicate such constitutional questions. Instead, they argued, the core issue was the government’s burden of proof. If that were the case, the issue could presumably be resolved without reference to the Court’s long line of Commerce Clause cases.

Nascimento rebutted that argument, claiming that it misconstrued Lopez’s analytical framework and ignored the Court’s holding in Jones.256 In Jones, the Supreme Court used Lopez to interpret the scope of the federal arson statute and determine whether the government’s evidence concerning the connection to interstate commerce was sufficient to support a conviction thereunder.257 That case, Nascimento claimed, made it clear that Lopez was not only relevant in determining an act’s facial constitutionality, but also in ensuring that statutes were interpreted in a manner that avoided potential unconstitutionality.258

Nascimento’s rebuttal finds support in a First Circuit case from 2004. In United States v. Morales-de Jesús,259 the court noted that a defendant may raise a valid as-applied challenge to a statute with an interstate commerce requirement if the facts of the case raise “concerns that the conduct at issue, although covered by the language of the statute, was not within the sphere of activity identified by Congress as the basis for its exercise of power under the Commerce Clause.”260 Applying this argument to the facts of Nascimento, a court may determine that Stonehurst’s acts were not within the sphere of activity that Congress identified as RICO’s basis. Thus, a

253. See Brief for the United States, supra note 1, at 62.
254. See id. at 63 (citing United States v. Cardoza, 129 F.3d 6, 11 (1st Cir. 1997)).
255. Id. at 63 (citation omitted).
256. See Reply Brief for the Defendant-Appellant at 2, United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007) (No. 06-1152).
257. See id.; see also supra notes 177–81 and accompanying text.
259. 372 F.3d 6 (1st Cir. 2004).
260. Id. at 18.
court may refuse to read RICO as encompassing noneconomic activities that have only a de minimis effect on interstate commerce.

Ultimately, the First Circuit refused to follow Waucaush. Its rationale was twofold: (1) disapproval of the Sixth Circuit’s holding in Waucaush, and (2) reliance on post-Waucaush Supreme Court precedent in Raich.

The First Circuit criticized the Waucaush court for misconstruing the constitutional avoidance doctrine. It characterized Waucaush as reading the phrase “affecting commerce” to require prosecutors to prove different things in different situations. The court found nothing in § 1962(c)’s language and legislative history to suggest that those words were intended to be dependent on factual application.

The court dismissed the paltry discussion of the avoidance doctrine in Waucaush and offered its own version of the canon. For support, it cited the Clark case, decided after both Waucaush and Jones. Clark, it noted, specified that the avoidance doctrine does not give alternative meanings to statutory phrases in cases where its applicability might raise constitutional questions. Pointing to the lowest common denominator test, the court interpreted Clark to require “a single definition for a phrase that is then applied even in cases in which a broader reading would not be constitutionally dubious.” That single definition was provided in Marino, where the First Circuit defined the word “affecting” in the RICO context as requiring “only some effect on interstate commerce.” The case law, then, left no room for efforts at constitutional avoidance.

The court claimed that this argument was consistent with Jones. In Jones, it noted, the Court defined the word “used” as “active employment.” Instead of giving that language of the federal arson statute

261. See Nascimento, 491 F.3d at 38.
262. See infra notes 264–75 and accompanying text.
263. See infra notes 276–87 and accompanying text.
264. See id. at 38.
265. See id.
266. See id. at 37 (“[B]asic principles of statutory construction . . . counsel[] persuasively against a court trying to tease from the simple word ‘affect’ sophisticated gradations of meaning that will vary from situation to situation.”).
267. See id. at 38. Although Waucaush discusses Jones at length, the opinion includes a mere sentence describing the court’s understanding of the avoidance doctrine. See Waucaush v. United States, 380 F.3d 251, 255 (6th Cir. 2004) (“Because we should avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate, RICO’s meaning of ‘affect[ing] interstate or foreign commerce’ cannot exceed the bounds of the Commerce Clause.”).
268. See Nascimento, 491 F.3d at 38.
269. See id.
270. Id.
271. United States v. Marino, 277 F.3d 11, 35 (1st Cir. 2002) (internal quotation marks omitted).
272. See Nascimento, 491 F.3d at 39.
273. See id.
274. Jones v. United States, 529 U.S. 848, 855 (2000). The word “used” appeared in § 844(i) of the federal arson statute, which made it a crime for anyone to “damage[] . . . by
a case-specific meaning, the Court provided a single definition to apply in all cases.275

Secondly, the First Circuit placed a great deal of emphasis upon Raich, which it suggested superseded the Waucaush holding.276 By relying on Raich, the court rejected the government’s argument that the core issue was its burden of proof and that the case could be resolved by focusing on evidentiary rather than constitutional questions. This did not, however, stop the court from siding with the government. It dismissed the notion that RICO’s application to noneconomic intrastate activities raised constitutional concern and interpreted Raich to permit congressional regulation of those activities as part of a comprehensive regulatory scheme.277

The court rejected Nascimento’s argument that Stonehurst’s criminal activities were an almost exact match for the violent criminal conduct that the Lopez and Morrison Courts refused to aggregate.278 It acknowledged the federalism concerns raised by Lopez and Morrison, but ultimately refused to follow those cases’ analytical framework.279 Instead, it adopted the approach outlined in Raich.280 Raich, it claimed, was more directly on point than Lopez or Morrison because it presented an as-applied challenge rather than a facial challenge.281 Just as the Supreme Court in Raich refused to “excise individual applications of a concededly valid statutory scheme,” so too did the First Circuit.282

Raich established that the relevant unit of constitutional analysis was not individual statutory application, but rather the general class of activities that the statute governs (e.g., drugs, racketeering).283 As the First Circuit noted,

Given the lessons of Raich, it is evident that [Nascimento’s] constitutional argument—like that of the Waucaush court—misapprehends the relevant unit of analysis. The linchpin of their argument is the fact that Stonehurst’s activities were undertaken without an economic motive. In the long run, however, that isolated fact is of little significance. The correct mode of analysis requires a more global view. . . .

Thus, the class of activity is the relevant unit of analysis and, within wide limits, it is Congress—not the courts—that decides how to define a class of activity.284

mean of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” 18 U.S.C. § 844(i) (2000).
275. See Nascimento, 491 F.3d at 39.
276. See id. at 38 n.4.
277. See id. at 41-43.
278. See id. at 41.
279. See id.
280. See id. at 40-43.
281. See id.
282. See id. at 41 (quoting Gonzales v. Raich, 545 U.S. 1, 23 (2005)).
283. See id. at 42.
284. Id.
Courts are thus charged with deferring to Congress’s method of regulation. They must dismiss the constitutional challenge if it appears to them that Congress acted rationally in developing a statute to regulate a class of activities that bears a substantial relation to interstate commerce. In applying that analysis to Nascimento, the First Circuit noted,

Given the obvious ties between organized violence and racketeering activity—the former is a frequent concomitant of the latter—we defer to Congress’s rational judgment, as part of its effort to crack down on racketeering enterprises, to enact a statute that targeted organized violence.

Raich led the First Circuit to conclude that RICO’s application to noneconomic intrastate violence was constitutionally sound. This meant there was no reason to read RICO’s “affecting commerce” requirement differently in the name of constitutional avoidance. The court held that “the normal requirements of the RICO statute apply.”

III. REQUIRING A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE FOR NONECONOMIC GANGS CHARGED UNDER RICO

This Note has detailed the split between the First and Sixth Circuits over what is sufficient to satisfy RICO’s “affecting commerce” requirement in the case of enterprises engaged in noneconomic intrastate activity. The two circuits have based their holdings on different Commerce Clause tests. In holding that prosecutors must demonstrate a substantial effect on interstate commerce, the Sixth Circuit in Waucaush relied heavily on the version of the substantial effects test laid out in Lopez and Morrison, as well as the Jones Court’s use of the avoidance doctrine. In holding that the normal de minimis test applies, the First Circuit in Nascimento rejected the Waucaush method of analysis in favor of Raich’s comprehensive scheme rationale. This Note advocates that courts should adopt the Waucaush holding and require noneconomic intrastate enterprises to have a substantial effect on interstate commerce.

On the surface, this particular application of RICO suggests a fairly rigid mode of analysis. It is tempting to try to fit a potential RICO enterprise into one of several discrete categories: noneconomic intrastate, economic intrastate, noneconomic interstate, economic interstate, and so on. Indeed, for the most part this Note has described Stonehurst and the CFP as noneconomic intrastate enterprises; and as a matter of pure fact they are. But such classification oversimplifies the issue of gangs and RICO.

Street gangs are dynamic entities. Rather than classifying them into certain discrete categories, it is more useful to picture them as existing

285. See id.
286. Id. at 43.
287. Id. at 30.
288. See supra notes 232–36 and accompanying text.
289. See supra notes 261–87 and accompanying text.
Gangs that are least likely to be charged under RICO exist at the low end of this spectrum. These gangs are nonviolent, noneconomic, very loosely organized, and operate only intrastate. On the high end of the spectrum exist those gangs most likely to be charged under RICO: violent, profit-driven, highly organized, and rigidly hierarchical groups that maintain coordinated operations in several states. Somewhere along that spectrum exists a line that divides constitutional and unconstitutional RICO prosecutions.

Street gangs, as dynamic entities, are likely to move along that spectrum. Whereas, at its inception, a gang may exist at one point along the spectrum, it is likely to move higher up the spectrum as it continues to grow and evolve. La Cosa Nostra, whose rise to prominence was a driving force behind RICO’s enactment, likely existed at a lower point on the spectrum in the decades prior to 1970. It is not unreasonable to suspect that street gangs like Stonehurst and the CFP may also evolve and move along that spectrum. For instance, if at \( t_0 \) is the time at which Nascimento was indicted, at \( t_1 \) Stonehurst may start dealing drugs purchased from outside Massachusetts, and at \( t_2 \) might start “offering protection” to Boston-area businesses in return for regular payments. Although at \( t_0 \), Stonehurst is a noneconomic intrastate enterprise, at \( t_2 \) it is a decidedly economic venture with indisputably substantial effects on interstate commerce. This Note argues that, despite potential criminal evolution, the aforementioned dividing line sits just above Stonehurst at \( t_0 \).

The best, and perhaps only, argument for prosecuting Stonehurst at \( t_0 \) is preemptive: nip it in the bud. Such an argument, however, presumes inherently bad evolution. Federal judges are not soothsayers and, absent actual criminal evolution, should not be granted jurisdiction over gangs below the dividing line. A criminal justice system that precludes fact-finders from preempting individual crime cannot simultaneously permit preemption of enterprise criminality.

A. Scaling Back an Untethered Statutory Expansion

The prosecution of noneconomic street gangs that operate exclusively intrastate fails not only the preemptive argument, but also various historical and constitutional arguments. Courts should prevent RICO from extending to noneconomic intrastate enterprises that only minimally affect interstate commerce.

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290. Many thanks to Professor Thomas Lee for suggesting the idea of a “gang spectrum.”
291. Perhaps the “Red Hand Gang” or the “Little Rascals” would exist at the very lowest point on the spectrum.
292. La Casa Nostra likely exists at the highest point on the spectrum. See generally Jacobs and Gouldin, supra note 15 (describing the violence, organization, and economics behind La Casa Nostra).
293. See supra notes 38–51 and accompanying text.
294. Cf. Katzenbach Commission, supra note 42, at 195 (noting that in the years leading up to the report, La Cosa Nostra had become “increasingly diversified and sophisticated”).
commerce because, unlike previous RICO expansions, this one remains untethered to any logical principle of expansion.

In the past, major criminal RICO expansions were either rooted directly in RICO's text or produced as the result of a bifocal expansion of criminal and civil RICO. *Turkette* expanded RICO from infiltrations to noninfiltrations and thus solidified RICO's status as a malleable prosecutorial tool.\(^{295}\) In approving this major expansion, the Court looked directly to the statute's text.\(^{296}\) The Court noted that "neither the language nor structure of RICO limits its application to legitimate 'enterprises.' Applying it also to criminal organizations does not render any portion of the statute superfluous nor does it create any structural incongruities within the framework of the Act."\(^{297}\) On the other hand, the extension of RICO to noneconomic intrastate enterprises that only minimally affect interstate commerce both renders a portion of the act superfluous and creates a structural incongruity. It renders § 1962(c)'s "affecting commerce" requirement useless\(^{298}\) and isolates § 1962(c) as the only subsection of RICO that targets noneconomic activity.\(^{299}\)

*Scheidler* produced a major bifocal expansion of RICO and permitted noneconomic enterprises to be charged under the Act’s criminal and civil components.\(^{300}\) While the case presented a question as to whether the plaintiffs had satisfied the elements of a civil RICO claim,\(^{301}\) the holding touched criminal RICO as well.\(^{302}\) As civil RICO cases permit private plaintiffs to recover personal losses resulting from the harm perpetrated by racketeering enterprises,\(^{303}\) they present far different concerns than criminal RICO cases. There is no civil analog or bifocal origin to which courts can point if they wish to extend RICO to noneconomic intrastate enterprises that only minimally affect interstate commerce—only the lone voice of the *Nascimento* court.

The expansion proposed by *Nascimento* is rooted, if anywhere, in Commerce Clause jurisprudence. The First Circuit claimed that *Raich* should govern the issue,\(^{304}\) but the application of *Raich*’s comprehensive scheme rationale is legally unsound.

\(^{295}\) *See supra* notes 61–64 and accompanying text.
\(^{296}\) *See supra* note 63.
\(^{298}\) *See supra* note 25 and accompanying text.
\(^{299}\) *See supra* notes 9, 52–55 and accompanying text. By extension, it would also render § 1962(d) a tool for targeting noneconomic activity, since § 1962(d) addresses conspiracy to commit other RICO offenses.
\(^{300}\) *See supra* note 96 and accompanying text.
\(^{301}\) *See supra* notes 94–96 and accompanying text.
\(^{302}\) The *Nascimento* court briefly discussed the effect of *Scheidler* on criminal cases. See United States v. *Nascimento*, 491 F.3d 25, 39 (1st Cir. 2007).
\(^{303}\) *See supra* note 91.
\(^{304}\) *See supra* notes 281–87 and accompanying text.
B. The Drawbacks of Applying Raich’s Comprehensive Scheme Rationale

In *Raich*, the Court held that Congress may regulate noneconomic intrastate activities as part of a comprehensive regulatory scheme so long as Congress had a rational basis for concluding that the regulated class of activities bore a substantial relation to interstate commerce. While at first blush, this may seem to permit Congress to regulate local gang violence under RICO, upon closer examination it does not.

Contrary to what the First Circuit claimed in *Nascimento*, *Lopez* and *Morrison* are more directly on point than *Raich*. Gun possession in school zones and gender-motivated violence are the same species of activity as local gang shootings: all are traditionally state-regulated crimes that have a tenuous—if any—connection to interstate commerce. *Nascimento* attempts to forestall this argument by using *Raich* to characterize RICO as a comprehensive scheme that regulates economic activity. *Raich*’s definition of economics, however, precludes the classification of RICO as a comprehensive scheme amenable to the *Raich* approach.

Limiting its approach to economic activities only, the Court in *Raich* defines economics as “the production, distribution, and consumption of commodities.” The CSA qualified as economic because it regulates “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.” The particular emphasis on the regulation of commodities is omnipresent in the *Raich* opinion. The Court’s reliance on *Wickard v. Filburn*’s aggregation principle should demonstrate the point: the home consumption of wheat in *Wickard* and the local cultivation and use of marijuana in *Raich* lend themselves so easily to aggregation under the substantial effects test because they involve fungible commodities that, by seeping into or being extracted from the market, directly affect supply, demand, and price.

RICO, however, does not regulate commodities; it regulates behavior. Although its enactment was driven by organized crime’s damage to the national economy, its ultimate goal, as specified by Congress, was to eliminate the criminal behavior that caused that damage. Nothing in the legislative history or text of RICO indicated that Congress intended to target noneconomic intrastate criminal behavior in particular.

*Raich* claimed that Congress could regulate intrastate marijuana cultivation and use because it was an essential part of the broader regulatory

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305. See supra notes 119, 150 and accompanying text.
306. See supra notes 284–86 and accompanying text.
307. See supra note 144 and accompanying text.
308. Gonzales *v.* Raich, 545 U.S. 1, 25 (2005).
309. Id. at 26.
310. See *Wickard v. Filburn*, 317 U.S. 111 (1942); supra notes 117–18 and accompanying text.
311. See supra notes 51–55 and accompanying text.
312. See supra notes 47–55 and accompanying text.
scheme. RICO, in addition to falling outside the Court’s definition of a comprehensive scheme regulating economic activity, fails to include noneconomic intrastate activity as an “essential” part of its regulation. Raich may not have provided any guidance for determining whether a discrete part of a regulatory scheme is essential, but even the most detailed examination of RICO is unlikely to yield any evidence that regulation over noneconomic intrastate activity is “essential” to the Act’s continued success.

In addition to these practical deficiencies, Raich’s application to Nascimento-type situations raises a grave policy concern: As Justice O’Connor suggested in her Raich dissent, the Court’s holding invites Congress to legislate broadly and threatens to obliterate the delicate federal-state balance in the regulation of criminal activity. Lopez and Morrison advocated respect for traditional areas of state concern, but both Raich and Nascimento disregarded this principle. Nascimento now serves as a fine example that the Raich decision “allows Congress to regulate intrastate activity without check.”

To be sure, a strict federalism argument is susceptible to criticism in this context. RICO has usurped a wide array of state crimes by way of their incorporation into the statute as predicate acts, and it seems that after much judicial expansion potential RICO liability exists whenever more than one person engages in more than one crime. Congressional acquiescence in the face of such judicial expansion seems to indicate paltry concern for federalism in the RICO context. But even despite RICO’s storied history and repeated judicial construction, it shares problems with the gun legislation in Lopez and the gender-motivated violence legislation in Morrison. Those statutes did not regulate activity that substantially affected interstate commerce, and thus had to be struck down as unconstitutional. Since section 1962(c) leaves open the possibility of application to intrastate activity that does not substantially affect interstate commerce, that application must likewise be deemed unconstitutional.

C. The Guidance of Jones

Jones is the most instructive case on this issue, and Waucaush was correct in using it to read § 1962(c) as requiring a substantial effect on interstate commerce. The facts of Jones, Waucaush, and Nascimento are very similar: In each case, the defendant engaged in noneconomic intrastate criminal activities and was charged with violating a federal criminal statute.

313. See supra notes 150–51 and accompanying text.
314. See supra notes 147–49 and accompanying text.
315. See supra note 133 and accompanying text.
316. Gonzales v. Raich, 545 U.S. 1, 46 (O’Connor, J., dissenting).
318. See id. at 713–14.
319. See supra note 192 and accompanying text.
320. See supra notes 131–38 and accompanying text.
that was a part of the Organized Crime Control Act and that had an "affecting commerce" requirement. The language of § 1962(c) and the federal arson statute are slightly different, but this is of little significance.  

The Court in Jones rejected an expansive interpretation of the federal arson statute because it would have permitted Congress to criminalize the arson of nearly any building and would have drained the statute's commerce-affecting language of its meaning.  

$Nascimento$ should have rejected an expansive interpretation of § 1962(c) on the same grounds. That holding now threatens to bring any two acts of intrastate gang violence within the ambit of RICO and essentially to void federal prosecutors' requirement to prove an effect on interstate commerce.  

$Waucaush$ correctly employed the constitutional avoidance doctrine to read § 1962(c) as requiring a substantial effect on interstate commerce. Indeed, Lopez made it clear that Congress could regulate intrastate activities only if they substantially affected interstate commerce; therefore, regulation of intrastate activity that minimally affects interstate commerce would render RICO constitutionally dubious. $Nascimento$ characterized $Waucaush$ as an outdated case that was decided before the Supreme Court weighed in with $Raich$ but $Raich$ only emphasizes the correctness of the $Waucaush$ holding. $Raich$ did not resolve the issue of federal regulation over intrastate activities; it only demonstrated that such regulation should be viewed with greater suspicion.  

Although the $Nascimento$ court used Clark in an attempt to demonstrate $Waucaush$'s and Jones's shortcomings, its argument reflected a misapplication of the avoidance doctrine and the lowest common denominator idea. Clark is distinguishable from $Waucaush$ and $Nascimento$ because the statutes at issue in those cases are markedly different. The statute at issue in Clark explicitly governed three different classes of aliens. The government, in claiming that there were different constitutional concerns for each class, argued, in effect, that the statute implied different kinds of detention authority for each. RICO, however, specifies one category: enterprises whose activities affect interstate commerce. Requiring a substantial effect for noneconomic enterprises does not render the statute a chameleon; it simply says that enterprises that fall outside the spirit of the Act must meet a higher threshold to qualify under the language of the Act.  

Clark noted that courts may "give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even

321. See supra notes 9, 178 and accompanying text.  
322. See supra note 180 and accompanying text.  
323. See supra note 134 and accompanying text.  
324. See supra note 276 and accompanying text.  
325. See supra Part III.B.  
326. See supra note 270 and accompanying text.  
327. See supra note 182 and accompanying text.  
328. See supra note 184 and accompanying text.  
329. See supra note 190 and accompanying text.
though other of the statute’s applications, standing alone, would not support the same limitation. In imposing a limiting construction on § 1962(c)’s application to noneconomic intrastate activity, Waucaush did precisely that.

The argument in Nascimento ignores the two chief principles underlying the avoidance doctrine: in carving out a new sphere of activity subject to RICO regulation, it failed either to exercise judicial restraint or to effectuate congressional intent.

CONCLUSION

The moment the First Circuit affirmed Jackson Nascimento’s conviction, it became complicit in an unconstitutional expansion of RICO. Section 1962(c) of that Act requires that enterprises like the one with which Nascimento was affiliated “affect interstate commerce.” That language, on its face, most likely means that the enterprise need only affect interstate commerce in some minimally discernible way. If the inquiry did indeed end there, the First Circuit’s decision would remain beyond criticism. But that is not the case. To stay faithful to Congress’s decidedly economic (though not commodity-centric) statutory intent, and to avoid opening the statute to constitutional challenges under the Commerce Clause, § 1962(c) should instead be read to require a substantial effect on interstate commerce when it is applied to noneconomic intrastate enterprises.

It is probably true that, had Nascimento and several of his associates not been convicted under RICO, their gang would have evolved into a more archetypal RICO enterprise. That is, the gang likely would have adopted an economic strategy or expanded interstate, or both. But such presumptions do not justify RICO’s application to an enterprise that, at the time of prosecution, lies beyond RICO’s constitutional reach. Besides, in Nascimento’s case, RICO was not the solitary statutory tool available to the prosecution. It may have been the lone available tool at the federal level, but Nascimento was at the same time susceptible to a variety of state law criminal statutes. It is at that level—the state level—where Nascimento should have been prosecuted and where members of such street gangs must be prosecuted in the future.

331. See supra notes 162–68 and accompanying text.
Notes & Observations