AFTER *GONZALES V. RAICH*: CAN RICO BE USED TO PROSECUTE INTRASTATE NONECONOMIC STREET GANG VIOLENCE?

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I. INTRODUCTION

During the mid-1990s, in the Dorchester section of Boston, the street gang that controlled Stonehurst Street (hereinafter "Stonehurst") and their Wendover counterparts began having "problems" with each other.[1] From 1998-2000, these "problems" materialized as a "wave of violence": Stonehurst members shot at Wendover members repeatedly and Wendover members aggressively retaliated.[2] In September of 2004, a federal grand jury returned a thirty-three count superseding indictment charging thirteen Stonehurst members with various violations of the Racketeer Influenced and Corrupt Organizations Act[3] (RICO) through their membership in a racketeering enterprise.[4] The indictment charged "nearly two dozen instances of murder and assault with intent to kill" against the defendants.[5] Further, the indictment alleged that Stonehurst's "primary purpose" was "to shoot and kill members, associates, and perceived supporters of a rival gang in Boston known as Wendover."[6] The government did not establish that Stonehurst affected interstate commerce;[7] however, three Stonehurst members were convicted of violating RICO.[8]

RICO, enacted under Congress's commerce authority, requires that the alleged racketeering activity affect interstate commerce.[9] Traditionally, courts

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1. United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008).

2. *Id.*

3. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2006).

4. *Nascimento*, 491 F.3d at 30.

5. *Id.*

6. *Id.* (internal quotations omitted).

7. *See id.* at 37-40.

8. *Id.* at 31.

9. 18 U.S.C. § 1962(a)-(c). The RICO statute prohibits a person from conducting or participating, either directly or indirectly, in the affairs of an enterprise engaged in, or affecting, interstate commerce through a pattern of racketeering activity. *Id.* The government must show five elements to make out a substantive RICO violation: "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity." *Nascimento*, 491 F.3d at 31 (citing United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002)).

have required that the enterprise itself, not the predicate acts, affect interstate commerce.[10] Many courts considered the "affect interstate commerce" requirement met if the predicate acts have a *de minimis* impact on interstate commerce,[11] even if the enterprise itself has not profited.[12] However, in light of recent decisions by the United States Supreme Court, specifically, *United States v. Lopez*,[13] *United States v. Morrison*,[14] and *Gonzales v. Raich*,[15] the issue has arisen of whether RICO, as applied to street gangs engaged in violent, but noneconomic, criminal activity, exceeds Congress's power under the Commerce Clause.[16]

Part II of this Note describes the relevant history of Commerce Clause jurisprudence. Included in Part II is a description of the Court's movement towards a "New Federalism"[17] in the *Lopez* and *Morrison* decisions and the effect the Court's decision in *Raich* may have had on that doctrinal shift. Part II also focuses on shifts in the Court's emphasis between limiting Congress's power under the Commerce Clause to preserve the "distinction between what is truly national and what is truly local,"[18] and a "practical conception"[19] of the commerce power that does not artificially constrain Congress's power.[20] Part III of this Note discusses how lower courts have analyzed as-applied challenges to the Commerce Clause in the context of as-applied challenges to RICO by defendants engaged in noneconomic criminal activity. Next, Part IV analyzes the approach the Court is likely to take regarding as-applied

10. Nicholas Berg & Christopher Kelly, *Racketeer Influenced and Corrupt Organizations*, 41 AM. CRIM. L. REV. 1027, 1044 (2004).

11. *Id.* at 1044-45. *See, e.g.*, United States v. Feliciano, 223 F.3d 102, 117-19 (2d Cir. 2000); United States v. Owens, 167 F.3d 739, 755 (1st Cir. 1999).

12. *See* Berg & Kelly, *supra* note 10, at 1044-45.

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

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

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

16. *See* United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) (concluding that RICO, as applied to noneconomic criminal activity, did not exceed Congress's commerce power); *cf.* Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004) (concluding that RICO, as applied to noneconomic criminal activity, exceeded Congress's commerce power). *See generally* George D. Brown, *Counterrevolution? —National Criminal Law After* Raich, 66 OHIO ST. L.J. 947, 990-1010 (2005) (discussing the implications *Raich* will have on federal criminal law).

17. The term "New Federalism" encompasses various issues prevalent in the Rehnquist Court, including: state sovereignty and immunity pursuant to the Eleventh Amendment; limits on Congress's ability to "commandeer" state government resources; and limits on congressional authority pursuant to the enumerated powers of the Constitution. *See* Brown, *supra* note 16, at 948 n.2. However, this Note uses the term "New Federalism" only as it pertains to the Rehnquist Court's attempt to place meaningful limits on congressional commerce power.

18. *Lopez*, 514 U.S. at 567-68.

19. *Id.* at 572 (Kennedy, J., concurring).

20. *See* Lauren Bianchini, Comment, *Homegrown Child Pornography and the Commerce Clause: Where to Draw the Line on Intrastate Production of Child Pornography*, 55 AM. U. L. REV. 543, 549-54 (2005) (discussing the desire to preserve meaningful limits on Congress's commerce power versus the desire to employ a "practical conception" to avoid artificially constraining Congress's authority).

challenges to RICO by defendants engaged in noneconomic intrastate activity. Finally, Part V sets forth an alternative approach to resolving as-applied challenges to congressional commerce power that balances "New Federalism" ideals and a "practical conception" of congressional authority.

II. RELEVANT COMMERCE CLAUSE JURISPRUDENCE

A. Origins of Congress's Commerce Power

The Constitution provides Congress with certain enumerated powers.[21] The Commerce Clause, Article I, § 8 of the Constitution, empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States."[22] The Framers intended congressional commerce power to be limited to the realm of interstate and foreign commerce,[23] and expected the regulation of intrastate commerce to be reserved to the states,[24] respectively, as articulated in the Tenth Amendment.[25] However, historically,

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21. *See* U.S. CONST. art. I, § 8. James Madison wrote: "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite." THE FEDERALIST NO. 45, at 236 (James Madison) (Clinton Rossiter ed., 1992).

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft*,* 501 U.S. 452, 458, (1991).

22. U.S. CONST. art. I, § 8.

23. THE FEDERALIST NO. 39 (James Madison), *supra* note 21, at 194 ("[T]he proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."). *See also* THE FEDERALIST NO. 45 (James Madison), *supra* note 21, at 236:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

See also THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 21, at 152 ("[A]s the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States.").

24. For instance, it is well-established that the regulation of criminal activity falls within the province of the state police power. Tanya K. Shunnara, Comment, *Reaction to* Raich*: The Commerce Clause Counter-Revolution*, 37 CUMB. L. REV. 575, 577 n.15 (2007).

25. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

the judicial philosophy of the United States Supreme Court has been the "primary factor" in deciding the breadth of Congress's commerce power.[26]

B. Pre-New Deal Commerce Clause Jurisprudence

In 1824, in *Gibbons v. Ogden*,[27] the Court adopted an expansive view of congressional commerce power.[28] The *Gibbons* Court's interpretation of congressional authority under the Commerce Clause was exceptionally significant; to this day, the Court still begins Commerce Clause analysis by discussing *Gibbons*.[29]

In *Gibbons*, Chief Justice Marshall provided a broad, but not limitless, definition of "commerce." The Chief Justice stated that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[30] However, Chief Justice Marshall explicitly stated that, in the context of the Commerce Clause, the phrase "commerce among the several States" is not intended to "comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."[31] Thus, although Chief Justice Marshall broadly interpreted the commerce power, he acknowledged that certain "limitations on the commerce power are inherent in the very language" of the Constitution.[32]

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26. Shunnara, *supra* note 24, at 577. The Court's Commerce Clause jurisprudence can be divided into four "distinct chronological-thematic eras": 1) from the inception of the Constitution to 1888, the Court appeared to broadly interpret congressional commerce power; however, the scope of this authority remained largely undefined; 2) from 1888 to 1936, the Court narrowly defined congressional commerce authority to promote laissez-faire capitalism; 3) from 1937 to 1995, the Court broadly defined Congress's commerce power; and 4) from 1995 to the present, the Court broadly defined Congress's power under the Commerce Clause, but somewhat circumscribed the scope of congressional commerce authority to foster federalism ideals. *See* David L. Luck, Note, *Guns, Drugs, and . . . Federalism?* - Gonzales v. Raich *Enfeebles the Rehnquist Court's* Lopez-Morrison *Framework*, 61 U. MIAMI L. REV. 237, 238 & n.6 (2006) (citing JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 163-225 (7th ed. 2004) (describing the three commerce eras and concluding that post-1995 the Rehnquist Court adopted a posture favoring both expanded state police power and a more narrowly tailored federal commerce power)). A "general consensus" of constitutional scholars recognizes three such eras, while some scholars recognize a fourth distinct era. *Id.* at 238 & n.6. This Note focuses on the Court's post-1937 Commerce Clause jurisprudence and distinguishes the 1937-1995 ("Third Era") decisions from the 1995-present ("Fourth Era") decisions.

27. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

28. *See id.* at 189-90; *see, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 242-43 (3d ed. 2006).

29. CHEMERINSKY, *supra* note 28, at 243; *see, e.g.*, Gonzales v. Raich, 545 U.S. 1, 16 (2005) (citing *Gibbons*, 22 U.S. (9 Wheat.) at 224 (opinion of Johnson, J.)).

30. *Gibbons*, 22 U.S. (9 Wheat.) at 189-90.

31. *Id.* at 194.

32. United States v. Lopez, 514 U.S. 549, 553 (1995).

However, in 1887, the Court began to further narrow the definition of the congressional commerce power.[33] Between 1887 and 1937, the Court was controlled by conservative Justices dedicated to protecting laissez-faire economics.[34] During this period, many federal laws were overturned for "exceeding the scope of Congress's commerce power" or violating the sphere of activities reserved for the states.[35] Also, state laws were frequently invalidated for interfering with the right to contract, which was deemed a fundamental right.[36] Essentially this was the first time the Court had used its power of judicial review to invalidate federal and state statutes.[37]

During this era, the Court was committed to "dual federalism,"[38] embodied in three doctrines:[39] first, the Court interpreted "commerce" narrowly so that the states retained a zone of power;[40] second, "the Court restrictively defined *among the states* as allowing Congress to regulate only when there [is] a substantial effect on interstate commerce;"[41] third, "the Court held that the Tenth Amendment reserved a zone of activities to the states."[42] Moreover, the Court artificially distinguished between direct and indirect effects on interstate commerce, as well as between local and national activities.[43] Specifically, the Court determined that manufacturing, production, and labor relations were considered purely local activities, and, thus, beyond the scope of congressional commerce authority.[44]

The unnaturally formalistic confines of commerce power "was a principal cause of the judicial crisis of the New Deal period."[45] In the throes of The Great Depression, the Court invalidated a number of New Deal statutes.[46] Obviously, this frustrated President Roosevelt's New Deal agenda.[47] As a

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33. *See id.* at 554-55.

34. CHEMERINSKY, *supra* note 28, at 247; Luck, *supra* note 26, at 253.

35. CHEMERINSKY, *supra* note 28, at 247.

36. *Id.*

37. *Id.*

38. *Id.* at 248. Dual federalism is the view that the federal and state governments are "separate sovereigns," and that each has its own zone of authority to regulate. *Id.* According to this theory, the Court has a duty to protect the states from federal encroachment by enforcing the Constitution and defending the state's zone of activities. *Id.*

39. *Id.*

40. *Id.*

41. CHEMERINSKY, *supra* note 28, at 248.

42. *Id.* The Court invalidated statutes within the scope of the Commerce Clause if they intruded into the zone of activities reserved to the states. *Id.*; *see, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (striking down a law that prohibited the interstate transportation of goods manufactured in violation of child labor laws because it violated the Tenth Amendment), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

43. Luck, *supra* note 26, at 253.

44. *Id.*

45. *See* Brown, *supra* note 16, at 982 & n.265 (citing United States v. Morrison, 529 U.S. 598, 642 (2000) (Souter, J., dissenting)).

46. *See* Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1274 (1997 (noting the dramatic turnaround of the Court after an era of rejecting government attempts at regulations).

47. *See id.* (stating how the Court's actions led to Roosevelt's "Court-packing plan").

result, in early 1937, immediately following his landslide reelection, President Roosevelt proposed his, now infamous, "Court Packing Plan," asking for legislative authority to appoint additional members to the Court.[48]

However, in the spring of 1937, Justice Owen Roberts changed his position and voted to uphold two pro-government laws that were similar to laws that had been previously invalidated;[49] Roberts provided the fifth vote to uphold a state minimum wage law for women[50] and a federal labor relations law.[51] Justice Roberts' change of heart, most frequently referred to as "the switch in time that saved nine,"[52] marked the beginning of the "New Deal Constitutional Revolution."[53]

Thereafter, the Court adopted a broad interpretation of the Commerce Clause that gave Congress virtually unfettered discretion to determine the limits of its commerce power.[54] Between 1937 and 1995, the Court upheld every federal law that was an exercise of the Commerce Clause, even in the context of as-applied challenges.[55]

In *United States v. Darby*,[56] the Court articulated that Congress has the authority to regulate activities that substantially affect interstate commerce.[57] Writing for the unanimous Court, Justice Stone stated: "While manufacture is not of itself interstate commerce, the shipment of manufactured goods

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48. *Id.* at 1274 n.3.

49. CHEMERINSKY, *supra* note 28, at 256; *see also* Redlich & Lurie, *supra* note 46, at 1274.

50. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding a state minimum wage law for women); *see also* CHEMERINSKY, *supra* note 28, at 256.

51. *See* Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding a federal regulation of the steel industry); *see also* CHEMERINSKY, *supra* note 28, at 256.

52. CHEMERINSKY, *supra* note 28, at 256; Redlich & Lurie, *supra* note 46, at 1274.

53. Redlich & Lurie, *supra* note 46, at 1274.

54. *See* Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 432 (2002) (explaining the relaxed view the Court has taken on federalism issues, such as the scope of the commerce power, since 1937); *see also* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 308 (1981) (Rehnquist, J., concurring) ("[O]ne could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress."); Bianchini, *supra* note 20, at 550 (observing that "Congress enjoyed such unrestricted freedom in legislating under this clause that Judge Alex Kozinski wondered why 'anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'") (quoting Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995)).

55. *See* CHEMERINSKY, *supra* note 28, at 264; *see, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of local production of wheat against an as-applied challenge); *see also* Matthew Curtin, Case Note, *Sex, Drugs, and Guns:* Gonzales v. Raich *and the Expanding Scope of the Commerce Power*, 25 QUINNIPIAC L. REV. 887, 890 (2007); Luck, *supra* note 26, at 238-39; Shunnara, *supra* note 24, at 577. *See generally* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 880 (2005) ("This toothless judicial review under the Commerce Clause emboldened Congress to assert ever-expanding authority over a host of activities that did not appear to be either commercial or interstate in scope.").

56. United States v. Darby, 312 U.S. 100 (1941).

57. *Id.* at 123-24; Shunnara, *supra* note 24, at 577.

interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."[58] According to Justice Stone:

> [O]ur conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered.[59]

Moreover, Justice Stone repeatedly referred to "the plenary power conferred on Congress by the Commerce Clause."[60]

Essentially, from 1937-1995, the Court did not recognize that state sovereignty limited Congress's commerce power. During this period, in only one case, *National League of Cities v. Usery*,[61] was a federal statute determined to be unconstitutional as violating the Tenth Amendment, and that decision was subsequently expressly overruled.[62] The Court broadly interpreted and applied the "substantial affects" test, thus affording great deference to Congress.[63]

Exemplary of the extensiveness of Congress's commerce power in this era is the Court's 1942 decision in *Wickard v. Filburn*,[64] which, arguably, has come to represent the "outer limits" of the Commerce Clause.[65] In *Wickard*, a

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58. *Darby*, 312 U.S. at 113.

59. *Id.* at 123-24 (citations omitted).

60. *Id.* at 115; *see also* CHEMERINSKY, *supra* note 28, at 258 (quoting *Darby*, 312 U.S. at 115).

61. Nat'l League of Cities v. Usery, 426 U.S. 833, 842-43 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). The Court held:

> While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.

Id. (internal quotations omitted) (citation omitted) (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

62. *See* CHEMERINSKY, *supra* note 28, at 318-21; *see also* Massey, *supra* note 54, at 471 n.126.

63. *See* Shunnara, *supra* note 24, at 577; *see also* Massey, *supra* note 54, at 471 n.126.

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

65. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 560 (1995) (noting that *Wickard* is "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"); *see also* Steven K. Balman, *Constitutional Irony:* Gonzales v. Raich*, Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 TULSA L. REV. 125, 128 (2005) ("By endorsing *Wickard v Filburn*, the [*Raich*] Court effectively recognizes a national police power. Such a broad power to conduct experiments in social engineering is completely repugnant to the fundamental premise of federalism—the notion that the federal government has limited, enumerated powers.") (internal citations omitted).

> The prominent role of *Wickard* will be particularly galling to advocates of the New Federalism. *Lopez* had described that case as representing the outer limits of the Court's

commercial farmer was fined for violating the Agricultural Adjustment Act of 1938[66] (AAA) by harvesting an excess of wheat to be consumed by his family.[67] The general scheme of the AAA, as it related to wheat, was to stabilize prices and prevent surpluses and shortages by controlling the volume moving in interstate and foreign commerce.[68] Filburn claimed that the AAA could not constitutionally be applied to him because his cultivation of wheat for home consumption did not affect interstate commerce.[69]

Writing for the majority, Justice Robert Jackson upheld the regulation as applied against Filburn.[70] The *Wickard* Court rejected the distinctions, between commerce and production, and between direct and indirect effects on commerce, that were used in earlier cases.[71] The Court explained that a farmer who grew a small amount of wheat could affect the national supply and demand for wheat:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation,

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> tolerant view of the Commerce Clause and the reach of legislation based on it. Conservatives have long viewed *Wickard* with suspicion, particularly because of the possibilities it opens of broad federal regulation of intrastate activity, even when that activity seems totally removed and separate from any interstate market. A logical next step for New Federalists would be to call for the Court to overrule or substantially limit *Wickard*.

Brown, *supra* note 16, at 978 (internal citations omitted).

66. 7 U.S.C. §§ 1281-1339 (1940).

67. *See Wickard*, 317 U.S. at 113-15.

68. *Id.* at 115. Under the AAA, the Secretary of Agriculture, within prescribed limits and by prescribed standards, would annually set a national acreage allotment for the next crop of wheat. *Id.* States and their counties then received an apportionment, which was "eventually broken up into allotments for individual farms." *Id.* The AAA also authorized loans and payments to wheat farmers under certain circumstances. *Id.*

69. *Id.* at 113-14, 119.

70. *Id.* at 128-29.

71. *Id.* at 124. ("Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be 'production,' nor can consideration of its economic effects be foreclosed by calling them 'indirect.'"). *See generally* CHEMERINSKY, *supra* note 28, at 259 (explaining how the Court stopped making such distinctions after 1937).

> would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.[72]

The Court determined that even though Filburn's wheat did not affect the national economy, Congress could regulate his production because, cumulatively, homegrown wheat could substantially affect interstate commerce.[73] Justice Jackson concluded that "[t]he conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."[74]

1. Federal Criminal Laws

The Court's expansive interpretation of the Commerce Clause post-New Deal allowed Congress to regulate virtually anything, so long as another constitutional provision was not violated.[75] Since 1937,[76] Congress has used its wide commerce power to adopt, among other things, federal criminal laws, including RICO.[77]

Perez v. United States[78] demonstrates the Court's willingness to uphold federal criminal statutes enacted under the commerce power.[79] In *Perez*, the Court upheld Title II of the Consumer Protection Act,[80] which prohibited extortionate credit transactions,[81] commonly referred to as "loan sharking" activities.[82] The petitioner was convicted for "loan sharking" under the statute.[83] He challenged the constitutionality of the statute as applied to him

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72. *Wickard*, 317 U.S. at 128-29.

73. *Id.* at 127-28 ("[Though Filburn's] own contribution to the demand for wheat may be trivial by itself [it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."). *See generally* CHEMERINSKY, *supra* note 28, at 259 (explaining that activity could be regulated if it cumulatively had a substantial effect on commerce).

74. *Wickard*, 317 U.S. at 129.

75. *See* CHEMERINSKY, *supra* note 28, at 264 (explaining how the Court failed to find any federal law an unconstitutional act of Congress's commerce power between 1936 and 1995).

76. Some federal criminal laws, such as the Mann Act (outlawing the transportation of women for immoral purposes), and the Lindenberg law (punishing kidnappings related to interstate transportation or commerce), were adopted prior to the 1937 shift in the Court's attitude. *See id.* at 263. Prior to the 1937 shift, the Court conceded that Congress had the power to prohibit transportation interstate of "noxious articles." *See* United States v. Darby, 312 U.S. 100, 113 (1941); *see, e.g.*, Champion v. Ames (*Lottery Case*), 188 U.S. 321 (1903) (affirming that it is within Congress's authority to prohibit the interstate transportation of lottery tickets).

77. *See* CHEMERINSKY, *supra* note 28, at 263.

78. Perez v. United States, 402 U.S. 146 (1971).

79. *See* CHEMERINSKY, *supra* note 28, at 263.

80. 18 U.S.C. §§ 891-896 (Supp. V 1964).

81. "Extortionate credit transactions" are defined as activities characterized by the use or threat of use of "violence or other criminal means" of enforcement. § 891(6); *see also Perez*, 402 U.S. at 148.

82. *Perez*, 402 U.S. at 147.

83. *Id.* at 147-49.

because all of his activities took place in New York, there was no evidence that he was involved in organized crime, and he did not use the instrumentalities of interstate commerce.[84]

The Court rejected the petitioner's arguments and held that the law was within Congress's commerce power.[85] Justice Douglas, writing for the majority, found that it was rational for Congress to believe that intrastate loan sharking, a commercial activity, affected interstate commerce.[86] The Court stated that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[87]

After *Perez*, Congress used its commerce authority to adopt RICO, "one of the broadest and most important contemporary statutes."[88] RICO exemplifies the broad power granted to Congress with the constitutional revolution of 1937. RICO makes it a crime for a "person who has received any income . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income" in the affairs of "any enterprise which is engaged in" or "affect[s]" interstate commerce.[89] Although RICO has been severely criticized, the Court has been unwilling to find that the statute exceeds Congress's commerce power.[90]

C. Limits On Congress's Authority under the Commerce Clause: Lopez *and* Morrison

United States v. Lopez[91] was the apparent "beginning of the end" of the Court's era of deference to congressional judgment about the scope of the

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84. *See id.* at 149-57.

85. *Id.* at 156-57.

86. *Id.*; *see also* CHEMERINSKY, *supra* note 28, at 263.

87. *Perez*, 402 U.S. at 154 (citing Maryland v. Wirtz, 392 U.S. 183, 193 (1968)).

88. CHEMERINSKY, *supra* note 28, at 263.

89. 18 U.S.C. § 1962(a) (1988). "Racketeering Activity" includes "any act or threat involving . . . robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A) (2006). "Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." § 1961(4).

90. *See* United States v. Robertson, 514 U.S. 669 (1995) (per curiam). In *Robertson*, decided less than a week after *United States v. Lopez*, the Court avoided discussing the limits of the scope of RICO in light of the *Lopez* decision. *See id.* The *Robertson* Court unanimously upheld a RICO conviction by finding that the defendant engaged in interstate commerce. *Id.* at 671-72. The Court concluded that it was unnecessary to determine if the defendant's activities affected interstate commerce because the defendant had engaged in interstate activities. *Id.* The Court stated that the "affecting commerce" test was only necessary to "define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have a substantial *inter*state effects." *Id.* at 671. *See also* Berg & Kelly, *supra* note 10, at 1059 (explaining that the Commerce Clause empowers Congress to regulate racketeering activity that affects interstate commerce) (citing United States v. Vignola, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979) (holding power of Congress to regulate interstate commerce includes the power to regulate intrastate activities which have an effect on interstate commerce), *aff'd*, 605 F.2d 1199 (3d Cir. 1979)).

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

commerce power.[92] The *Lopez* decision was the first time in almost sixty years that the Court had determined a federal statute exceeded Congress's commerce authority.[93] By declaring a federal law unconstitutional the *Lopez* Court attempted to restore the balance between congressional Commerce Clause legislation and state police power regulations.[94] Five years after deciding *Lopez*, in *United States v. Morrison*,[95] the Court reaffirmed its commitment to the "New Federalism" approach to Commerce Clause challenges.[96] *Morrison* went "significantly further" than *Lopez* in narrowing the breadth of congressional commerce authority "by holding that Congress cannot regulate noneconomic activity by finding that the activity, when looked at cumulatively, may substantially affect interstate commerce."[97] However, five years after deciding *Morrison*, in *Gonzales v. Raich*,[98] the Court halted the "New Federalism" movement by holding that Congress may use its power to regulate intrastate commerce to prohibit the cultivation and possession of marijuana for medical purposes.[99] The *Raich* Court distinguished *Lopez* and *Morrison* on the basis that neither involved a challenge to "excise individual applications of a concededly valid statutory scheme."[100]

1. Narrowing Congress's Commerce Power: *United States v. Lopez*

In *Lopez*, the Court determined that § 922(q) of the Gun-Free School Zones Act of 1990[101] (GFSZA), which prohibited knowingly possessing a firearm in a school zone,[102] was unconstitutional because it exceeded Congress's commerce power.[103] *Lopez* was a 5-4 decision, with the Court

92. Massey, *supra* note 54, at 471 n.126.
93. *See* CHEMERINSKY, *supra* note 28, at 272.
94. *See id.*
95. United States v. Morrison, 529 U.S. 598 (2000).
96. *See* CHEMERINSKY, *supra* note 28, at 264.
97. *Id.*
98. Gonzales v. Raich, 545 U.S. 1 (2005).
99. *See* Brown, *supra* note 16, at 957-58.
100. *Raich*, 545 U.S. at 23.
101. Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, tit. XVII, § 1702, 104 Stat. 4844, 4844-45 (1990) (codified at 18 U.S.C. § 922(q)) (1988 & Supp. V 1990), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995), *amended by* Treasury, Postal Service, and General Government Appropriations Act of 1997, Pub. L. No. 104-208, tit. VI, § 657, 110 Stat 3009-353, 3009-369-70 (1996) (limiting GFSZA to guns moving in or otherwise affecting interstate commerce) (current version at 18 U.S.C. § 922(q) (2008)).
102. 18 U.S.C. § 922 (q)(2)(A) (1994). The term school zone is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25)(A)-(B) (1994).
103. United States v. Lopez, 514 U.S. 549, 567-68 (1995). On March 10, 1992, in San Antonio Texas, Alfonso Lopez Jr., a twelfth grade student at Edison High School was arrested "carrying a concealed .38 caliber handgun and five bullets." *Id.* at 551. Lopez was charged with violating the Gun Free School Zones Act of 1990. *Id.* Respondent moved to dismiss his federal indictment on the ground that § 922(q) was unconstitutional because it was beyond the power of Congress to legislate control over public schools. *Id.* The District Court denied the motion, concluding that "§ 922(q) 'is a constitutional exercise of Congress' well-defined power to

splitting along ideological lines: Chief Justice Rehnquist wrote the opinion of the Court and was joined by Justices O'Connor, Kennedy, Scalia, and Thomas; Justices Stevens, Souter, Ginsburg, and Breyer dissented.[104]

Writing for the majority, Chief Justice Rehnquist began by emphasizing the limited nature of the federal government.[105] The Chief Justice noted that the Constitution only granted the federal government enumerated powers, and, thus, all federal legislation must be authorized, either expressly or implicitly, by Article I.[106] Chief Justice Rehnquist explained that federalism is dependent on "a healthy balance of power between the States and the Federal Government [to] reduce the risk of tyranny and abuse from either front."[107] Justice Rehnquist explained that the Court has "identified three broad categories of activity that Congress may regulate under its commerce power":[108] 1) the channels of interstate commerce;[109] 2) the instrumentalities of interstate commerce;[110] and 3) activities that substantially affect interstate commerce.[111]

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regulate activities in and affecting commerce.'" *Id.* at 551-52. "The District Court conducted a bench trial, found [the respondent] guilty of violating § 922(q), and sentenced him to six months' imprisonment and two years' supervised release." *Id.* at 552. The respondent appealed his conviction on the basis that "§ 922(q) exceeded Congress' power to legislate under the Commerce Clause." *Id.* The Court of Appeals for the Fifth Circuit reversed respondent's conviction on the basis that, in light of the insufficient congressional findings and legislative history, "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." United States v. Lopez, 2 F.3d 1342, 1367-1368 (5th Cir. 1993). The United States Supreme Court granted certiorari. 511 U.S. 1029 (1994). The Supreme Court affirmed the Fifth Circuit's ruling, but on different grounds; the Court based its decision on the fact that the regulated activity did not substantially affect interstate commerce, not the lack of congressional findings. CHEMERINSKY, *supra* note 28, at 265; *see also Lopez*, 514 U.S. at 567.

104. *See* CHEMERINSKY, *supra* note 28, at 264.

105. *See Lopez*, 514 U.S. at 552.

106. *See id.*

107. *Id.*

108. *Id.* at 558 (citing Perez v. United States, 402 U.S. 146, 150 (1971)).

109. *Id.* at 558; *see also* Gonzales v. Raich, 545 U.S. 1, 17 (2005); *Perez*, 402 U.S. at 150; Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964) (stating that Congress has authority "to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question") (quoting Caminetti v. United States, 242 U.S. 470, 491 (1917)):

> While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power 'to prescribe the rule by which commerce is to be governed.

United States v. Darby, 312 U.S. 100, 113 (1941) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

110. *Lopez*, 514 U.S. at 558; *see also Raich*, 545 U.S. at 17; *see, e.g.*, Shreveport Rate Cases, 234 U.S. 342, 351 (1914) (upholding that Congress may regulate intrastate railroad rates because of the economic effects which they had upon interstate commerce); S. Ry. Co. v. United States, 222 U.S. 20, 26-27 (1911) (upholding amendments to the Safety Appliance Act as applied to vehicles used in intrastate commerce).

Section 922(q) could only fit within the third category of regulated activity, so the Court applied the "substantial affects" test.[112]

The Court rejected the government's claim that § 922(q) substantially affected interstate commerce because the possession of guns in school zones leads to violence, which ultimately harms the economy.[113] The majority concluded that the possession of a gun in a school zone did not substantially affect interstate commerce, and therefore § 922(q) was an unconstitutional exercise of congressional authority.[114]

Chief Justice Rehnquist first focused on the nature of the activity being regulated. Chief Justice Rehnquist emphasized that § 922(q) had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms";[115] nor was it "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[116] Thus, the Court determined that the effects of the regulated activity could not be viewed in the aggregate.[117]

The Court noted that "there is no indication that [the respondent] had recently moved in interstate commerce," and there was no requirement that the respondent's "possession of the firearm have any concrete tie to interstate commerce."[118] The Court concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would . . . convert . . . the Commerce Clause to a general police power of the sort retained by the States."[119]

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111. *Lopez*, 514 U.S. at 558-59; *see also Raich*, 545 U.S. at 17; Maryland v. Wirtz, 392 U.S. 183, 196, n.27 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

112. *Lopez*, 514 U.S. at 559.

> Within this final category, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.

Id. (citations omitted).

113. *Id.* at 563-68.

114. *Id.* at 567-68.

115. *Id.* at 561.

116. *Id.*

117. *Id.*; *see id.* at 567 (stating the possession of a gun in a local school zone is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce").

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

119. *Id.*

> Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. These suggested limitations, when viewed in light of the dissent's expansive

The Court did not specifically provide a test to determine whether the regulated activity has a sufficient relationship to interstate commerce.[120] Chief Justice Rehnquist explained that an "express jurisdictional element" limiting the statutes reach to a "discrete set of firearm possessions" explicitly related to interstate commerce[121] or adequate findings by Congress as to a substantial relationship between gun possession and interstate commerce could support a statute's constitutionality.[122] However, § 922(q) had neither an express jurisdictional element nor congressional findings.[123]

Justice Kennedy, joined by Justice O'Connor, filed a concurring opinion.[124] According to Justice Kennedy, the *Lopez* opinion did not alter the Court's "practical conception of commercial regulation," and, thus, Congress may still "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."[125] Noting that "education is a traditional concern of the States," which have always retained the general "police power," the concurring Justices emphasized that "States may perform their role as laboratories for experimentation to devise various solutions" to the problem of guns in school zones.[126]

Justice Breyer filed a passionate dissenting opinion.[127] He claimed that the majority engaged in judicial activism by ignoring fifty-six years of Supreme Court precedent.[128] According to Justice Breyer, guns are inherently part of interstate commerce and, thus, they have an economic impact on interstate commerce.[129] He argued that the Court should uphold the Gun-Free School Zones Act as long as Congress had a "rational basis" for the regulation.[130]

> analysis, are devoid of substance. . . . For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a 'significant' effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant 'effect on classroom learning,' and that, in turn, has a substantial effect on interstate commerce.

Id. at 564-65 (internal citations omitted).

120. *See id.* at 561-68.

121. *Id.* at 562.

122. *Id.* at 562-63; *see, e.g.*, Perez v. United States, 402 U.S. 146, 156 (1971) (explaining that although Congress need not make "particularized findings in order to legislate," the Court will consider the "setting of the problem as revealed to Congress").

123. *Lopez*, 514 U.S. at 561-563.

124. *Id.* at 568-83 (Kennedy, J., and O'Connor, J., concurring).

125. *Id.* at 573-74.

126. *Id.* at 580-81.

127. *Id.* at 615-31 (Breyer, J., dissenting).

128. *See id.* at 625-31.

129. *See Lopez*, 514 U.S. at 618-25 (describing the economic links between guns in schools and interstate commerce).

130. *Id.* at 618-19.

The *Lopez* decision was shocking because it was the first time since 1937 that the Court determined that a federal law exceeded Congress's commerce power.[131] Notably, Chief Justice Rehnquist did not directly explain to what extent the *Lopez* decision was intended to repudiate the highly deferential position the Court had taken in Commerce Clause cases for almost sixty years.[132]

Naturally, the question arose as to whether the *Lopez* decision was an aberration or a signal of the beginning of a shift in the Court's Commerce Clause jurisprudence.[133] Subsequent decisions, most notably *United States v. Morrison*,[134] were credited with affirming that the *Lopez* decision signaled a shift in the Court's approach to Commerce Clause jurisprudence.[135]

2. Reaffirming Limits on Congress's Commerce Power: *United States v. Morrison*

In *United States v. Morrison*,[136] the Court affirmed that the civil damages provision of the federal Violence Against Women Act of 1994[137] (VAWA)

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131. *See* CHEMERINSKY, *supra* note 28, at 272.

132. *See id.* at 272-73.

133. *See id.*

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

135. *See* CHEMERINSKY, *supra* note 28, at 272.

136. In *Morrison*, the petitioner, Christy Brzonkala, a student at Virginia Polytechnic Institute (hereinafter "Virginia Tech") alleged that the respondents, Antonio Morrison and James Crawford, two members of the Virginia Tech varsity football team, assaulted and raped her. *Morrison*, 529 U.S. at 602. Morrison and Crawford were not criminally prosecuted nor were they punished by the university (the school conducted hearings but ultimately decided not the punish them). *Id.* at 603. In December 1995, Brzonkala sued Morrison, Crawford, and Virginia Tech in the United States District Court for the Western District of Virginia under the civil damages provision of the Violence Against Women Act, Pub. L. No. 103-322, tit. IV, § 40302, 108 Stat. 1902, 1941-42 (1994) (codified at 42 U.S.C. § 13981 (2000)). *Id.* at 604. Morrison and Crawford moved to dismiss the complaint on the grounds that the petition failed to state a claim upon which relief can be granted and § 13981's civil remedy is unconstitutional. *Id.*

The district court, and each subsequent court that heard the case, rejected Morrison and Crawford's argument that Brzonkala failed to state a claim under § 13981. *Id.* at 604-05. The issue that was litigated was whether § 13981 could be upheld under Congress's commerce power or Section 5 of the Fourteenth Amendment. *Id.* The United States intervened to defend § 13981's constitutionality. *Id.* at 605.

The district court dismissed Brzonkala's complaint on the basis that the civil damages provision of the statute exceeded Congress's commerce authority. Brzonkala v. Va. Polytechnic & State Univ. (*Brzonkala I*), 935 F. Supp. 779 (W.D. Va. 1996). A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the district court and reinstated Brzonkala's § 13981 claim. Brzonkala v. Va. Polytechnic & State Univ. (*Brzonkala II*), 132 F.3d 949 (4th Cir. 1997). The Fourth Circuit vacated the panel's opinion and reheard the case en banc. *Id.* By a divided vote, the en banc court affirmed the district court's conclusion that Congress lacked constitutional authority to enact § 13981's civil remedy. Brzonkala v. Va. Polytechnic & State Univ. (*Brzonkala III*), 169 F.3d 820 (4th Cir. 1999) (en banc). The United States Supreme Court granted certiorari "[b]ecause the Court of Appeals invalidated a federal statute on constitutional grounds." *Morrison*, 529 U.S. at 605.

exceeded Congress's commerce power.[138] The Court rejected the petitioner's claim that violence against women has a substantial effect on interstate commerce.[139] In coming to this conclusion, the Justices split identical to how they split in *Lopez*.[140]

Chief Justice Rehnquist, writing for the majority, reaffirmed the three categories in which Congress has the authority to regulate under its commerce power.[141] The Chief Justice then identified four factors the Court will consider when deciding if an activity "substantially affects" interstate commerce: 1) whether the activity is economic or commercial in nature; 2) whether Congress included a jurisdictional element to "limit its reach to discrete set" of activities that substantially affect commerce; 3) whether Congress provided legislative

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137. § 13981. Section 13981 provides that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." § 13981(b). Subsection (c) states:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

§ 13981(c).

Section 13981 defines a "crim[e] of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." § 13981(d)(1). Section 13981 also provides that the phrase "crime of violence" includes

> (A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and
> (B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

§ 13981(d)(2).

Subsection (e)(2) states that "[n]othing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c) of this section." § 13981(e)(2). Subsection (e)(3) provides that federal and state courts "shall have concurrent jurisdiction" over complaints brought under the section. § 13981(e)(3).

138. *Morrison*, 529 U.S. at 627. The Court also held that Congress lacked the power to enact the civil damages provision under Section 5 of the Fourteenth Amendment. *Id.*

139. *Id.* at 617-18. Petitioner argued that § 13981 was a regulation of an activity that substantially affects interstate commerce. *Id.* at 609.

140. *See* CHEMERINSKY, *supra* note 28, at 272.

141. *Morrison*, 529 U.S. at 608-09.

findings regarding the activities substantial affects on interstate commerce; and 4) whether the link between the activity and the substantial effect on interstate commerce is too attenuated.[142] The Court addressed each of these factors; however, it did not emphasize all of these factors equally.[143] Rather, it largely focused on whether the regulated activity was economic and whether the nexus between the regulated activity and interstate commerce justified federal regulation.[144]

The Court concluded that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[145] While the Court did not "adopt a categorical rule against aggregating the effects of any noneconomic activity," Chief Justice Rehnquist noted that the Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[146]

Although Congress had made lengthy legislative findings that violence against women, when looked at across the country, affected interstate commerce, the Court rejected these findings as sufficient to sustain the legislation.[147] In rejecting the legislative findings, the Chief Justice emphasized that whether a particular activity "'affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate'" is a judicial determination to be settled by the Court, rather than a legislative question.[148] Chief Justice Rehnquist stated that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'"[149]

The Court rejected allowing Congress to regulate noneconomic activity, such as sexual assaults, by aggregating its impact on interstate commerce.[150] The Court determined that allowing the aggregation of noneconomic activity would inevitably extend Congress's commerce power to activities only tenuously connected with interstate commerce.[151] Chief Justice Rehnquist stated that "[i]f accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or

142. *Id.* at 610-12. These factors were first identified and applied by the Court in *Lopez*. *See* United States v. Lopez, 514 U.S. 549, 559-68 (1995).

143. Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 760 (2005).

144. *Id.* According to Adler, factors one and four were the core of the Court's opinion because they "would ensure that federal power remained limited." *Id.*

145. *Morrison*, 529 U.S. at 613. Chief Justice Rehnquist noted that the "noneconomic . . . nature of the conduct at issue was central" to the *Lopez* decision. *Id.* at 610.

146. *Id.* at 613.

147. *Id.* at 614-15.

148. *Id.* at 614 (citing United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).

149. *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557 n.2).

150. *Id.* at 615-18.

151. *Id.* at 615.

consumption."[152] The Chief Justice explained that petitioners' reasoning would allow Congress to regulate all violent crimes in the United States.[153] Further, the Chief Justice emphasized that allowing Congress to exercise unlimited commerce power would violate the ideals of federalism.[154] The Court concluded that: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[155]

After the *Lopez* and *Morrison* decisions, the Rehnquist Court was credited with making a noticeable move towards protecting states' rights and, possibly, narrowing the broad scope of Congress's commerce power.[156] *Morrison* was hailed as "the real breakthrough for enumerated powers jurisprudence."[157] Legal scholars claimed that *Morrison* confirmed the Court's allegiance to restoring the balance of power between Congress's commerce power and the state police power regulations.[158] However, the lasting effect of the *Lopez* and *Morrison* decisions became less certain after the Court decided *Gonzales v. Raich*.

D. Congress's Authority to Regulate Economic Activity: Gonzales v. Raich

In *Gonzales v. Raich*,[159] the Court upheld the constitutionality of the Controlled Substance Act[160] (CSA) as applied to the intrastate, non-commercial cultivation and possession of marijuana for medical purposes.[161] The CSA prohibited the use of all marijuana, except for use by the FDA for preapproved research.[162] However, California had provided for the limited use of marijuana for medical purposes under the California Compassionate Use Act[163] (CCUA).

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152. *Id.*

153. *Id.*

154. *Id.* at 617-19 (noting that the power to police violent crime was not given to the federal government, rather, that power was left to the states).

155. *Morrison*, 529 U.S. at 617-18.

156. *See* CHEMERINSKY, *supra* note 28, at 272-73 (explaining how the *Lopez* decision was the "beginning of a major change in the Court's approach to the [C]ommerce [C]lause").

157. Adler, *supra* note 143, at 759.

158. *See* CHEMERINSKY, *supra* note 28, at 272; Luck, *supra* note 26, at 238; Shunnara, *supra* note 24, at 575.

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

160. 21 U.S.C. §§ 801-904 (2006) (originally enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No 91-513, § 100, 84 Stat. 1242)).

161. *Raich*, 545 U.S. at 22.

162. *Id.* at 14 ("By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.").

163. In 1996, the CCUA was passed by California voters as Proposition 215. *See* CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007); *Raich*, 545 U.S. at 5. The Act allowed for the use of medical marijuana for treatment for "cancer, anorexia, AIDS, chronic pain, spasticity,

The users and growers of marijuana for medical purposes pursuant to the Compassionate Use Act argued that the CSA, as applied to them, was an improper exercise of Congress's commerce power.[164] Respondents, Angel Raich and Diane Monson, were California residents permitted to use marijuana to treat their symptoms under the CCUA.[165] Under medical supervision, both Raich and Monson used marijuana "to function on a daily basis."[166] Raich's physician believed that "forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal."[167] Monson cultivated her own marijuana.[168] By contrast, Raich, who was unable to cultivate her own, relied on two caregivers, who litigated as "John Does," to "provide her with locally grown marijuana at no charge."[169] Raich would then "process[] some of the marijuana into oils, balms, and foods for consumption."[170]

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) went to Monson's home.[171] Although the county officials concluded that Monson's use of marijuana was lawful under California law, the DEA agents nevertheless "seized and destroyed all six of her cannabis plants."[172] Raich and Monson then filed an action against the United States Attorney General and the head of the DEA "seeking injunctive and declaratory relief prohibiting the enforcement of the [CSA] to the extent it prevented them from possessing, obtaining, or manufacturing cannabis for their personal medical use."[173] In part, respondents claimed that enforcement of the CSA against them would violate the Commerce Clause.[174]

The district court denied respondents' motion for a preliminary injunction.[175] Although the district court determined that "the federal enforcement interests 'waned' when compared to the harm that California residents would suffer if denied access to medically necessary marijuana," the court concluded that Raich and Monson "could not demonstrate a likelihood of success on the merits of their legal claims."[176]

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glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." *Raich*, 545 U.S. at 5 n.4 (quoting § 11362.5(b)(1)(A)).

164. *Raich*, 545 U.S. at 8.
165. *Id.* at 6-7.
166. *Id.* at 7.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Raich*, 545 U.S. at 7.
171. *Id.*
172. *Id.*
173. *Id.* (citation omitted).
174. *Id.* at 8.
175. *Id.* at 8 (citing Raich v. Ashcroft (*Raich I*), 248 F. Supp. 2d 918 (N.D. Cal. 2003)).
176. *Raich*, 545 U.S. at 8 (citing *Raich I*, 248 F.Supp.2d at 931).

1. The Ninth Circuit: *Ashcroft v. Raich*

A divided panel of the Court of Appeals for the Ninth Circuit reversed and ordered the district court to enter a preliminary injunction.[177] Relying heavily on *Lopez* and *Morrison*, the court of appeals determined that the respondents had "demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress' Commerce Clause authority."[178] The court distinguished prior Ninth Circuit precedent by upholding the CSA against Commerce Clause challenges by finding that "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes, as recommended by a patient's physician pursuant to valid California state law," was a "*separate and distinct class of activities*."[179] The court of appeals determined that the possession of marijuana for medical use was an activity "'different in kind from drug trafficking' because interposing a physician's recommendation raises different health and safety concerns."[180] The Ninth Circuit concluded that the limited use of marijuana prescribed in the CCUA is a separate class of purely local activity beyond the reach of federal law.[181] The "obvious importance of the case" prompted the United States Supreme Court to grant certiorari.[182]

2. *Raich* Holding

In a 6-3 decision,[183] the Court upheld the CSA as applied to intrastate growers and users of marijuana for medical purposes.[184] Writing for the majority, Justice Stevens explained that the intrastate cultivation of a

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177. *Id.* (Raich v. Ashcroft (*Raich II*), 352 F.3d 1222 (9th Cir. 2003), *vacated sub nom.*, Gonzales v. Raich, 545 U.S. 1 (2005)).

> On remand, the District Court entered a preliminary injunction enjoining [the federal government] from arresting or prosecuting [Raich and Monson], seizing their cannabis, forfeiting their property, or seeking [sanctions] against them 'with respect to the intrastate, non-commercial cultivation, possession, use, and obtaining without charge of cannabis for personal medical purposes in accordance with [California] law.

Id. at 8 n.8 (citing Brief for Petitioners at 9, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454)).

178. *Raich II*, 352 F.3d at 1227.

179. *Id.* at 1228.

180. *Raich*, 545 U.S., at 8-9 (quoting *Raich II*, 352 F.3d at 1228).

181. *Id.* at 9 (quoting *Raich II*, 352 F.3d at 1228) (finding that the noncommercial cultivation and possession of cannabis for personal medical purposes pursuant to the CCUA "is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce").

182. *Id.*

183. Justice Stevens wrote the majority opinion, which was joined by Justices Kennedy, Souter, Ginsburg and Breyer. Justice Scalia concurred in the judgment. The Chief Justice and Justices O'Connor and Thomas dissented. *Id.* at 4.

184. *Raich*, 545 U.S. at 9, 22.

commodity sold in interstate commerce is economic activity and thus "substantial affect" can be based on aggregation.[185]

Justice Stevens began his analysis by noting that Congress has the authority to "regulate purely local activities that are part of an economic 'class of activities.'"[186] Citing *Wickard*, Justice Stevens observed that "'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.'"[187] Justice Stevens explained that as-applied challenges are available to statutes regulating an economic class-of-activities[188] because when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"[189]

Justice Stevens then performed a *Wickard*-driven analysis[190] of the CSA in the context of the respondents as-applied challenge.[191] Applying the "rational basis" test the majority applied in *Lopez*,[192] Justice Stevens determined that, as

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185. *Id.* at 17-22; CHEMERINSKY, *supra* note 28, at 272.

186. *Raich*, 545 U.S. at 17. Justice Stevens observed that, for more than a century, Congress's commerce power has extended to regulating the three categories of activities discussed in *Lopez*. *Id.* at 16-17. The Court determined that only the third category, whether Congress has the power to regulate activities that substantially affect interstate commerce, was implicated in the *Raich* case. *Id.* at 17.

187. *Id.* (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).

188. Brown, *supra* note 16, at 957-58.

189. *Id.* at 958; *Raich*, 545 U.S. at 17 (citing United States v. Lopez, 514 U.S. 549, 558 (1995)).

190. Justice Stevens argued that the Court's decision in *Wickard* was "of particular relevance" to the *Raich* decision because *Wickard* established "that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 17-18. The Court determined the similarities between *Raich* and *Wickard* were "striking." *Id.* at 18. Justice Stevens stated that:

> Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In Wickard, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

Id. at 18-19 (citations omitted).

191. *See* Brown, *supra* note 16, at 958 ("[Justice Stevens] treated the challengers as analogous to the farmer cultivating wheat, even though one of the plaintiffs did not grow her own marijuana. For Justice Stevens, the marijuana, like the wheat in the earlier case, could seep into the interstate market.").

192. *Raich*, 545 U.S. at 22 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a

in *Wickard*,[193] "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions"[194] and "a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[195]

Justice Stevens then distinguished the CSA from the statutes at issue in *Lopez* and *Morrison*.[196] First, he noted that in *Raich* the respondents were only challenging the CSA as it applied to them; in contrast, in *Lopez* and *Morrison* the parties asserted that a particular regulation exceeded Congress's commerce power in its entirety.[197] Justice Stevens stated that "'[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'"[198]

Justice Stevens emphasized that the crucial distinction between the statues at issue in *Lopez* and *Morrison*, and the CSA is that "the activities regulated by the CSA are quintessentially economic."[199] Employing a more expansive definition of commercial activity than the Court used in earlier cases,[200] Justice Stevens defined "[e]conomics" as the "the production, distribution, and consumption of commodities."[201] He reasoned:

> [The] CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market.[202]

'rational basis' exists for so concluding."); Brown, *supra* note 16, at 958; *see Lopez*, 514 U.S. at 557.

193. *Raich*, 545 U.S. at 19 ("In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions.").

194. *Id.* at 19; Brown, *supra* note 16, at 958.

195. *Raich*, 545 U.S. at 22.

196. *Id.* at 23-26.

197. *Id.* at 23.

198. *Id.* (emphasis omitted) (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).

199. *Id.* at 25.

200. *See* Bianchini, *supra* note 20, at 564. Prior decisions defined commercial activity more narrowly as activities that involved "'sell[ing], barter[ing], or exchang[ing].'" *Id.* (quoting Wickard v. Filburn, 317 U.S. 111, 119 (1942)).

201. *Raich*, 545 U.S. at 25-26 (citing Webster's Third New International Dictionary 720 (1966)).

202. *Id.* at 26 (citation omitted).

Justice Stevens concluded that "[b]ecause the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality."[203]

3. Justice Scalia's concurrence

Justice Scalia concurred in the judgment.[204] Justice Scalia agreed with the majority that CSA "may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use," but he filed a separate opinion to emphasize what he referred to as a "more nuanced" view of the interplay between the Commerce Clause and the Necessary and Proper Clause. [205]

According to Justice Scalia, the Court is "*misleading*" when it merely states that the Commerce Clause permits Congress to regulate activities that substantially affect interstate commerce.[206] Justice Scalia argues that rules governing activities that are not themselves part of interstate commerce, including activities that have a substantial effect on interstate commerce, cannot derive their authority from the Commerce Clause.[207] Rather, once Congress is regulating noncommercial activity, it is deriving its power from the Necessary and Proper Clause.[208]

Relying on *Lopez* and *Morrison*, Justice Scalia determined that if the regulated activity is economic, Congress may regulate if the activity substantially affects interstate commerce;[209] moreover, "Congress may regulate [ ] noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[210] According to Justice Scalia, "[t]he relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."[211]

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203. *Id.*

204. *Id.* at 33 (Scalia, J., concurring).

205. *Raich*, 545 U.S. at 33-34; Luck, *supra* note 26, at 270-71.

206. *Raich*, 545 U.S. at 34.

207. *Id. See generally* Luck, *supra* note 26, at 270-71 (explaining Scalia's opinion that the substantial effects category originates from the Necessary and Proper Clause).

208. *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

209. *Id.* at 35 ("*Lopez* and *Morrison* recognized the expansive scope of Congress's authority in this regard: '[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.'" (citations omitted)).

210. *Id.* at 37 (citing United States v. Lopez, 514 U.S. 549, 561 (1995)). Justice Scalia further explained that:

> [T]he Necessary and Proper Clause does not give "Congress . . . the authority to regulate the internal commerce of a State, as such,' but it does allow Congress 'to take all measures necessary or appropriate to' the effective regulation of the interstate market, 'although intrastate transactions . . . may thereby be controlled."

Id. at 38 (quoting Shreveport Rate Cases, 234 U.S. 342, 353 (1914).

211. *Raich*, 545 U.S. at 37.

Justice Scalia distinguished the case *sub judice* from both *Lopez* and *Morrison* because in the earlier cases Congress was not controlling intrastate activities in connection with a comprehensive regulatory scheme.[212] Justice Scalia stated that the fact that "simple possession is a noneconomic activity is immaterial as to whether it can be prohibited as a necessary part of a larger regulation."[213] Further, Justice Scalia explained that Congress had the authority to enact prohibitions of intrastate controlled-substance activities because they are an "appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce."[214] Justice Scalia determined that "Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents."[215]

4. *Raich* Dissents

Chief Justice Rehnquist and Justices O'Connor and Thomas dissented from the Court's opinion.[216] The primary dissent was written by Justice O'Connor and joined by Chief Justice Rehnquist and Justice Thomas.[217] Justice Thomas also filed a separate dissenting opinion.[218] All the dissenters agreed that the respondents had engaged in noneconomic activity and would have sustained the respondents' as-applied challenges to the Commerce Clause.[219]

Justice O'Connor opened her dissent by stating "[w]e enforce the 'outer limits' of Congress's Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal

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212. *Id.* at 36-37.

213. *Id.* at 40.

214. *Id.* Justice Scalia went on to reason:

> By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. Congress need not accept on faith that state law will be effective in maintaining a strict division between a lawful market for "medical" marijuana and the more general marijuana market.

Id. (citations omitted).

215. *Id.* at 42 (citations omitted).

216. *Id.*

217. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting). Justice Thomas joined all but Part III of the dissent written by Justice O'Connor. *Id.*

218. *Id.* at 57 (Thomas, J., dissenting).

219. *See* Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537, 553 (2007).

encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government."[220] She then emphasized that a chief virtue of federalism is that a state can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[221]

Justice O'Connor then argued that *Raich* was "irreconcilable" and "materially indistinguishable" from *Lopez* and *Morrison* when the same considerations were taken into account.[222] She accused the majority of disrupting the proper federalist balance between the federal government and state governments.[223] Further, she criticized the majority's reasoning for making *Lopez* and *Morrison* mere truisms and for encouraging Congress to legislate broadly:[224]

> *Lopez* and *Morrison* did not indicate that the constitutionality of federal regulation depends on superficial and formalistic distinctions. Likewise I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires, as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power. If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers.[225]

Justice O'Connor called the majority's definition of commerce "breathtaking[ly]" broad and suggested that economic activities are "activities . . . of an apparent commercial character"[226] or "activities that arise out of or are connected with commercial transactions."[227] Justice O'Connor considered being part of a larger regulatory scheme as insufficient to make an activity "economic."[228] She would require proof of a nexus to commerce of the particular statute at issue, and considered history inadequate proof.[229]

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220. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).

221. *Id.* at 42 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

222. *Id.* at 43-45 (stating that the *Lopez* decision "turned on" four considerations: 1) whether the activity is economic or commercial in nature; 2) whether Congress included a jurisdictional element establishing the activities connection to interstate commerce; 3) whether Congress provided legislative findings regarding the activities substantial affects on interstate commerce; and 4) the link between the activity and the substantial effect on interstate commerce).

223. *See id.* at 47.

224. *See id.*

225. *Id.* (citations omitted).

226. *Raich*, 545 U.S. at 50 (quoting United States v. Morrison, 529 U.S. 598, 611 n.4 (2000)).

227. *Id.* at 49-50 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

228. *Id.* at 46-51; Leslie Wepner, Comment, *The Machine Gun Statute: Its Controversial Past and Possible Future*, 75 FORDHAM L. REV. 2269, 2297 (2007).

229. *Raich*, 545 U.S. at 51-57; Wepner, *supra* note 228, at 2297.

In a separate dissent, Justice Thomas also objected to the definition of "economic activity" adopted by the majority. Justice Thomas took issue with the majority's definition of "economic activity" for being overly-inclusive.[230] He further criticized the majority for using a dictionary definition of "economic" that defined the term broader than other dictionaries and for failing to explain why that definition was chosen.[231] According to Justice Thomas, that definition was inconsistent with the original understanding of the term commerce.[232]

III. THE DIFFICULTY IN RESOLVING AS-APPLIED CHALLENGES TO COMPREHENSIVE REGULATORY SCHEMES AFTER *GONZALES V. RAICH*: THE CIRCUIT SPLIT REGARDING THE USE OF RICO TO PROSECUTE ENTERPRISES ENGAGED IN INTRASTATE NONECONOMIC ACTIVITY

Courts are currently divided on how to apply RICO's statutory "affecting commerce" requirement[233] in the context of as-applied challenges by defendants involved in street gangs engaged in noneconomic,[234] criminal activity.[235] After *Lopez* was decided, many lower courts were wary or unsure of how to apply the precedent.[236] After the Court reaffirmed its decision in *Morrison*, several lower courts began to take the change in Commerce Clause jurisprudence seriously.[237]

After *Morrison*, but prior to *Raich*, the Sixth Circuit used the rationale of *Lopez* and *Morrison* to sustain an as-applied challenge of RICO by litigants

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230. *Raich*, 545 U.S. at 69 (Thomas, J., dissenting); Jiang, *supra* note 219, at 552.

231. *Raich*, 545 U.S. at 69 n.7; Jiang, *supra* note 219, at 552-53.

232. *Raich*, 545 U.S. at 69-70; Jiang, *supra* note 219, at 553.

233. To make out a substantive RICO violation the government must show "the enterprise participated in or its activities affected interstate commerce." United States v. Nascimento, 491 F.3d 25, 31 (1st Cir. 2007), *cert denied*, 128 S. Ct. 1738 (2008) (citing United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002)).

234. In this context, the word "noneconomic" is specifically referring to the fact that there was insufficient evidence to establish that the enterprise was engaged in drug dealing.

> The indictment also charged that another purpose of the enterprise was "to sell crack cocaine and marijuana." However, the evidence at trial indicated that while individual Stonehurst members had engaged in drug trafficking, Stonehurst itself had not. Accordingly, the trial judge ruled as a matter of law that there was insufficient evidence to prove that the Stonehurst enterprise engaged in drug dealing. We assume the correctness of this ruling.

Id. at 30 n.1.

235. *See id.* at 30 ("[R]eluctant[ly] . . . creat[ing] a circuit split . . . .").

236. *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 371, 377-78 ("We find that lower courts have tended to limit *Lopez* to its facts, rather than using it as a springboard to enforce a more robust theory of federalism."); *see also* Shunnara, *supra* note 24, at 589.

237. Shunnara, *supra* note 24, at 589.

engaged in noneconomic intrastate criminal activity.[238] Relying on *Raich*, and expressly rejecting the Sixth Circuit's approach, the First Circuit held that RICO, as applied to an enterprise engaged exclusively in noneconomic criminal activity, did not violate the Commerce Clause because Congress's power to criminalize conduct pursuant to the Commerce Clause turns on the economic nature of the class of conduct defined in the statute, rather than the economic facts of a single case.[239]

A. The Lopez *and* Morrison *Approach:* Waucaush v. United States

Robert Waucaush challenged his conviction and sentence after pleading guilty to conspiracy to violate RICO.[240] Waucaush argued that in light of Congress's limited authority under the Commerce Clause, his conviction fell short of the RICO requirement that the regulated enterprise, in this case the streetgang Cash Flow Possee (hereinafter "CFP"), "affect[s] interstate" commerce.[241] The Sixth Circuit, in *Waucaush v. United States*,[242] determined that RICO exceeded Congress's commerce power in the context of as-applied challenges by defendants engaged in noneconomic activity.[243]

The court determined that even though RICO does not require that the violent acts themselves affect interstate commerce, "'other than that they were committed for the purpose of establishing or maintaining a position within the enterprise,' the predicate acts must still further the goals of an enterprise that itself affects commerce."[244] The Sixth Circuit rejected the government's contention that it need only show that that the CFP's activities had a minimal effect on commerce.[245] According to the court, a minimal effect only suffices when the enterprise itself had engaged in economic activity, for example, if it operated an illegal gambling business, extorted money, or fenced stolen merchandise.[246]

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238. *See, e.g.*, Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004).

239. *Nascimento*, 491 F.3d at 37-43.

240. *Waucaush*, 380 F.3d. at 253-54.

241. *Id.* at 255. The government alleged that to protect their "turf" Waucaush and his colleagues "murdered, conspired to murder, and (during less successful outings) assaulted, with intent to murder, members of two rival gangs that sought to expand their operations in Detroit." *Id.* at 253. On April 16, 1998, Waucaush moved to dismiss the indictment on that, within the meaning of the statute and the Constitution, those acts did not affect interstate commerce. *Id.* The district court denied the motion five days later, and, on May 7, 1998, Waucaush pled guilty to RICO conspiracy. *Id.* Waucaush met the procedural requirements to challenge the plea. *Id.* at 254-58.

242. *Id.* at 251.

243. *Id.* at 255-56.

244. *Id.* at 255 (quoting United States v. Crenshaw, 359 F.3d 977, 984 (8th Cir. 2004)).

245. *Id.* at 255-56.

246. *Waucaush*, 380 F.3d at 255-56 (citing United States v. Riddle, 249 F.3d 529 (6th Cir. 2001)) ("[A] minimal connection sufficed in *Riddle* only because the enterprise itself had engaged in economic activity—it operated an illegal gambling business, extorted money, and fenced stolen merchandise.").

The Sixth Circuit relied heavily on the Court's decision in *Morrison* holding, "[t]he Supreme Court in *Morrison* 'reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.'"[247] The Sixth Circuit asserted that *Morrison* "plainly classified" "violence *qua* violence" as noneconomic activity that could not be aggregated.[248] The court concluded that "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do."[249]

The court rejected the government's contention that, by eventually becoming associated with a national gang, the CFP substantially affected interstate commerce.[250] The Sixth Circuit also rejected the government's argument that the requisite connection to interstate commerce existed because some of the gang members discussed business while in Mexico.[251] The court reasoned that most individuals and organizations buy products that traveled in interstate commerce, talk to colleagues in other states, and/or travel to other states; therefore, if these occasional acts of interstate commerce are deemed "substantial," federal authority under the Commerce Clause would be virtually "limitless."[252] "'Allowing the government to meet the interstate commerce requirement [in a federal criminal prosecution] through only a nominal showing of a connection to interstate commerce would do as much to 'completely obliterate' the distinction between national and local authority as if no jurisdictional requirement existed at all.'"[253] The Sixth Circuit determined:

> [The gang'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 (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce."[254]

Thus, the court concluded that RICO, as applied to the appellant's violent, but noneconomic, criminal activity, exceeded Congress's power under the Commerce Clause.[255]

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247. *Id.* at 256 (citing United States v. Morrison, 529 U.S. 598, 617-18 (2000)).
248. *Id.*
249. *Id.*
250. *Id.* at 257-58.
251. *Id.*
252. *Waucaush*, 380 F.3d at 257.
253. *Id.* at 257-58 (quoting United States v. Odom, 252 F.3d 1289, 1296 (11th Cir. 2001)).
254. *Id.* at 258 (citing United States v. Morrison, 529 U.S. 598, 615 (2000)).
255. *Id.* at 256, 258.

B. The Raich *Approach:* United States v. Nascimento

Jackson Nascimento was convicted under RICO of racketeering,[256] racketeering conspiracy,[257] and conspiracy to commit murder in aid of racketeering.[258] A second appellant, Lance Talbert, was convicted on a RICO conspiracy count, a substantive RICO count, and a count charging Violent Crimes in Aid of Racketeering (VICAR) murder conspiracy.[259] A third appellant, Kamal Lattimore, was convicted on a RICO conspiracy count.[260] On appeal[261] the appellants argued, in relevant part, that RICO could not be applied to their noncommercial conduct: 1) the jury instructions, which stated that "the interstate commerce requirement would be satisfied by a showing that Stonehurst's actions had at least a *de minimis* effect on interstate commerce," misstated RICO's statutory requirement with respect to enterprises that have not engaged in economic activity; 2) "if the instruction is correct, as a matter of statutory interpretation, the statute is unconstitutional as applied to their enterprise"; and 3) "even if the instruction can withstand these attacks, the evidence was insufficient to satisfy even the modest *de minimis* standard."[262]

The First Circuit began by addressing the appellant's contention that, on the facts of this case, the RICO statute requires more than a *de minimis* effect on interstate commerce.[263] The Sixth Circuit noted that, in an earlier case, it had "squarely and explicitly" held that a *de minimis* effect on interstate commerce is

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256. Nascimento's conviction for racketeering was under 18 U.S.C. § 1962(c) (1988). United States v. Nascimento, 491 F.3d 25, 31 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008). Nascimento's racketeering conviction was supported by special findings that Nascimento had: 1) shot a person, and 2) conspired to murder members of Wendover, a rival gang. *Id.* "The jury rejected the government's contention that Nascimento had perpetrated a second shooting and acquitted him of a second count of violating 18 U.S.C. § 924(c)." *Id.* Nascimento was convicted under 18 U.S.C. § 1959(a)(5), a VICAR assault charge, and under § 1959(a)(3), for use of a firearm in the commission of a crime of violence. *Id.*

257. Nascimento's conviction for racketeering conspiracy was under § 1962(d). *Id.*

258. Nascimento's conviction for conspiracy to commit murder in aid of racketeering was under § 1959(a)(5). *Id.*

259. *Nascimento*, 491 F.3d at 31. The jury found that Talbert had shot a Wendover member and conspired to murder members of Wendover. *Id.* The government also charged Talbert with engaging in another shooting but later dropped those charges at the close of the evidence. *Id.*

260. *Id.* Lattimore was also convicted of a substantive RICO count, however, the district court immediately granted a judgment of acquittal on that count. *Id.* Further, the "jury acquitted Lattimore of a firearms charge and of charges of VICAR assault and VICAR conspiracy." *Id.*

261. *See id.* at 31. The appellants moved for judgments of acquittal or, in the alternative, new trials. *Id.* The United States District Court for District of Massachusetts denied these motions in full. *Id.* On December 15, 2005, the district court sentenced the defendants: Nascimento was sentenced to a 171-month incarcerative term; Talbert was sentenced to a fifty-seven-month incarcerative term; and Lattimore was sentenced to a forty-six-month incarcerative term. *Id.* These timely appeals ensued. *Id.*

262. *Id.* at 37 (emphasis added).

263. *See id.*

all that is required to satisfy RICO's commerce element.[264] The court then observed that the interpretation of RICO sought by the appellants is "peculiar" because it requires

> read[ing] a single phrase in the statute as requiring different things in different situations: in a case involving an enterprise engaged in economic activity, the government would have to show only a *de minimis* effect on interstate commerce, whereas in a case involving an enterprise engaged in violence but not in economic activity, the government would have to show a more substantial effect on interstate commerce.[265]

The court rejected that "iridescent" reading of the statute on the basis that neither the statutory language nor the legislative history supports that interpretation.[266]

The First Circuit then analyzed the Sixth Circuit's decision in *Waucaush*[267] holding that the RICO statute reached an enterprise engaged in noneconomic violent crime only if the enterprise's activities have a substantial effect on interstate commerce.[268] The *Nascimento* court specifically criticized the *Waucaush* court for failing to employ any of the usual tools of statutory construction.[269]

The *Nascimento* court concluded that the *Waucaush* court based its holding on a "professed desire to 'avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate.'"[270] The First Circuit then

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264. *Id.* (citing United States v. Marino, 277 F.3d 11, 35 (1st Cir. 2002)).

265. *Nascimento*, 491 F.3d at 37 (emphasis added).

266. *Id.* The court further explained:

> By its terms, the RICO statute applies to any "enterprise engaged in, or the activities of which affect, interstate or foreign commerce.". . . Courts are not charged with the task of writing statutes or improving upon them but, rather, with the more mundane task of figuring out, consistent with the statutory text, what the authoring Congress intended. This division of functions, as well as basic principles of statutory construction, counsels persuasively against a court trying to tease from the simple word "affect" sophisticated gradations of meaning that will vary from situation to situation.

Id. (citations omitted).

267. *See* Waucaush v. United States, 380 F.3d 251, 255-56 (6th Cir. 2004).

268. *Nascimento*, 491 F.3d at 38.

269. *Id.* ("The absence of anything in the reasoning of that court that explains how it is possible, consistent with sound canons of statutory construction, to read the word 'affect' as possessing two different meanings depending upon additional facts not mentioned in the statute itself, makes the decision suspect.").

270. *Id.* (quoting *Waucaush*, 330 F.3d at 255).

> [T]he Supreme Court has made it clear that the doctrine does not serve to give alternative meanings to statutory phrases in cases in which a statute's application might be constitutionally dubious. . . . That ends this aspect of the matter: because, in *Marino*, we already have defined the word 'affecting' as used in the RICO statute, we are not now free to alter the meaning of that term for a particular fact pattern.

observed: "[w]e think it is useful to note at this juncture that *Waucaush* was decided without the benefit of the Supreme Court's decision in *Gonzales v. Raich*, a precedent that we find instructive on the constitutional issue."[271] The First Circuit concluded that "we cannot say that the word 'affect,' as used in the RICO statute, is restricted to conduct that produces detrimental effects on commerce."[272]

The First Circuit then addressed the appellant's claim that RICO, as applied to an enterprise engaged exclusively in noneconomic criminal activity, is unconstitutional.[273] Relying on *Morrison*, *Jones*, *Lopez*, and *Waucaush*, the appellants maintained that "their criminal activities [were] almost an exact match for the violent criminal conduct that the *Morrison* Court refused to aggregate (and, thus, placed beyond the reach of Congress's commerce power)."[274] The appellants also claimed that the "federal regulation of noneconomic street crime under a theory of aggregation would obliterate any semblance of a constitutional limit on federal power" that the *Lopez* Court resurrected.[275]

The First Circuit adopted the "*Raich* approach" as the standard applicable to all as-applied challenges to the application of a concededly valid statutory scheme.[276] The First Circuit said this distinction was "'pivotal' because when 'the class of activities is regulated and the class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'"[277]

The *Nascimento* court claimed *Raich* "emphasized that it is the 'class of activity' that is relevant" and the fact that marijuana is a fungible commodity was not a determinative factor.[278] Accordingly, the court determined that Congress, not the courts, decides how to define a class of activity; moreover

> [a]ll that is necessary to deflect [an as applied] challenge to a general regulatory statute is a showing that the statute itself deals rationally with a class of activity

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Id.

271. *Id.* at 38 n.4 (citation omitted).

272. *Id.* at 40.

> This is especially true where, as here, we are asked to apply the definition in a subset of RICO cases (i.e., cases involving enterprises engaged exclusively in noneconomic activities), thereby creating an anomalous situation in which a single word in a single statute simultaneously would have varying meanings, depending on context.

Id.

273. *Id.* at 40.

274. *Nascimento*, 491 F.3d at 41.

275. *Id.*

276. *Id.*

277. *Id.* (quoting Gonzales v. Raich, 545 U.S. 1, 23 (2005) (*Raich* supplies a "gloss" on the earlier cases and "offers meaningful guidance as to how courts should approach as-applied challenges under the Commerce Clause.")).

278. *Id.* at 42 (citing *Raich*, 545 U.S. at 17) ("Such classes need not be delineated with 'scientific exactitude.'").

> that has a substantial relationship to interstate or foreign commerce.[T]he intrastate or noneconomic character of individual instances within that class is of no consequence.[279]

The court concluded that RICO by its terms is limited to racketeering enterprises that "affect . . . commerce."[280] Moreover, "[t]his jurisdictional element ties the statutes directly to commerce in a more explicit way than the statutes at issue" in *Lopez*, *Morrison*, or *Raich*.[281] The court observed that "[r]acketeering activity, as a general matter, is based largely on greed. Particular manifestations include loansharking, extortion, and a host of other financially driven crimes. Therefore, that class of activity is sufficiently economic in nature that it may be aggregated for Commerce Clause purposes."[282] The First Circuit determined that "[g]iven the obvious ties between organized violence and racketeering activity . . . we defer to Congress's rational judgment . . . ."[283]

IV. THE SUPREME COURT WOULD LIKELY FIND RICO PROSECUTIONS OF "VIOLENCE QUA VIOLENCE" CONSTITUTIONAL UNDER THE COMMERCE CLAUSE

A. Precedent Clearly Favors upholding RICO

If the Supreme Court reviewed a case with facts similar to those in *Nasciemento*, it would likely uphold the constitutionality of RICO as applied to intrastate noneconomic criminal activity. In *Raich*, the majority and the concurrence observed that Congress may regulate possession of noneconomic activity as long as commerce is ultimately affected.[284] The Court concluded that the CSA was part of an economic "class of activities" that have a substantial effect on interstate commerce.[285] Similarly, the Court already determined that the intrastate activities regulated in the statute at issue in *Perez*, activities of the same essential nature as those regulated under RICO, are part of an economic class of activities that substantially affect interstate commerce.[286]

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279. *Id.* at 42-43 (citations omitted).

280. *Nascimento*, 491 F.3d at 43.

281. *Id.*

282. *Id.* at 43 (citing 1 *Timothy* 6:10; 18 U.S.C. § 1961(1) (2006); Perez v. United States, 402 U.S. 146, 154 (1971)) (citations omitted).

283. *Id.* at 43 (citing *Raich*, 545 U.S. at 22 (describing judicial scrutiny of whether Congress had a rational basis for encompassing particular activity within the sweep of a statute as a "modest" task)).

284. *See Raich*, 545 U.S. at 17-18, 36-40.

285. *Id.* at 18-19, 22.

286. *See* United States v. Lopez, 514 U.S. 549, 559-60 (1995) (explaining that the statute at issue in *Perez* regulated an "economic activity" that substantially affects interstate commerce).

B. The CSA and RICO Share Significant Similarities

The *Raich* Court made three primary distinctions between that case and the *Lopez* and *Morrison* decisions: 1) *Raich* involved as-applied challenges while *Lopez* and *Morrison* were facial challenges; 2) the statute at issue in *Raich* was determined to be part of a comprehensive regulatory scheme while the statutes at issue in *Lopez* and *Morrison* were single-subject statutes; and 3) the statute at issue in *Raich* regulated economic activity while the statutes at issue in *Lopez* and *Morrison* did not.[287] These distinctions, especially the one involving economic activity, are the factors lower courts throughout the country have analyzed to decide as-applied challenges to Congress's commerce authority.[288] These distinctions work in favor of upholding RICO.

1. *Raich* as the Standard for As-Applied Challenges

In *Nascimento,* the First Circuit interpreted *Raich* as making the only determinative inquiry to an as-applied challenge of congressional commerce authority whether "'the class of activities is regulated and the class is within the reach of the federal power.'"[289] The child pornography cases are probably the best indication that *Nascimento* properly determined that a crucial inquiry is whether the activity regulated is part of class of activities that Congress may regulate. The child pornography statutes caused significant controversy between the circuits as to whether Congress's commerce power extended to the local possession/production of child pornography.[290]

United States v. Smith,[291] indirectly, supports the First Circuit's contention that *Raich* alone is the standard that should be applied to all as-applied challenges of Congress's Commerce Clause authority. In *Smith*, the defendant was engaged in production and possession of child pornography.[292] Smith was convicted of violating 18 U.S.C. § 2251(a) for taking sexually explicit pictures of minor girls.[293] The defendant challenged the statute as applied to his activities because he had not distributed, traded, or sold the material.[294] The Eleventh Circuit concluded that "intrastate, noncommercial production of child pornography"[295] could not be aggregated under *Wickard* because there

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287. Shunnara, *supra* note 24, at 590.

288. *Id.*

289. United States v. Nascimento, 491 F.3d 25, 41 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) (quoting *Raich*, 545 U.S. at 23 (internal quotations omitted)).

290. Shunnara, *supra* note 24, at 591.

291. United States v. Smith, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 545 U.S. 1125 (2005).

292. *Id.* at 1310-11.

293. *Id.* at 1309.

294. *Id.* at 1313.

295. *Id.* at 1316-17.

was nothing "commercial or economic"[296] about producing pornography for one's own consumption.[297] Immediately following the *Raich* decision, the Court vacated *Smith*, and remanded it for reconsideration in light of its decision in *Raich*.[298]

Since *Raich*, every similar child pornography case decided by the lower courts has rejected as-applied challenges to the Commerce Clause. However, as in *Raich*, in child pornography cases there is a fungible commodity that could, conceivably, affect interstate commerce.[299] Thus, while the Court's decision to vacate *Smith* supports the First Circuit's contention that *Raich* is now the standard applicable to all as-applied challenges, that proposition has not conclusively been determined.

2. RICO is a Comprehensive Regulatory Scheme

According to *Raich*, Congress may use its commerce power to regulate a noncommercial, intrastate activity if the regulation is an "'essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"[300] Moreover, the Court will defer to Congress as long as Congress had a rational basis for determining that failure to regulate the intrastate activity would "'undercut'" the comprehensive regulatory scheme: "'[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances' of the class.'"[301] Thus, practically speaking, when *Raich* applies, a constitutional challenge will inevitably fail.[302]

Clearly, Congress had a rational basis for concluding that racketeering is an essential part of the RICO statute. In finding that the CSA was an essential part of a larger regulation of economic activity the *Raich* majority explained:

> [T]he statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum [from the statute at issue in *Lopez*]. As explained above, the CSA, enacted in 1970 as part of the Comprehensive

296. *Id.* at 1318 (arguing that to aggregate defendant's conduct would be to expand congressional authority "beyond what the Supreme Court has suggested to be its outer limits").

297. *Smith*, 402 F.3d at 1317-18.

298. *See* United States v. Smith, 545 U.S. 1125 (2005).

299. The fungible nature of regulated activity has been cited as an important factor for upholding as-applied challenges to the child pornography statutes. *See* United States v. Forrest, 429 F.3d 73, 78 (4th Cir. 2005) (analogizing child pornography to marijuana based on both items being commodities with an interstate market).

300. Gonzales v. Raich, 545 U.S. 1, 24 (2005) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

301. *Raich*, 545 U.S. at 22-23 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)); *see also* Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2124 (2006).

302. *See* Brown, *supra* note 16, at 997 (observing that even though *Raich* established that individuals are "free to bring an-as applied challenge in such circumstances," the individual "will always lose").

> Drug Abuse Prevention and Control Act, 84 Stat. 1242-1284, was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of "controlled substances." Most of those substances—those listed in Schedules II through V—"have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people." 21 U.S.C. § 801(1). The regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of substances listed in Schedule I, except as a part of a strictly controlled research project.[303]

Similarly, in *Perez v. United States*, the Court made similar determinations about the "loan sharking" statute that was enacted to combat organized crime:

> Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. . . . [the] report shows the loan shark racket is controlled by organized criminal syndicates, either directly or in partnership with independent operators; that in most instances the racket is organized into three echelons, with the top underworld "bosses" providing the money to their principal "lieutenants," who in turn distribute the money to the "operators" who make the actual individual loans; that loan sharks serve as a source of funds to bookmakers, narcotics dealers, and other racketeers; that victims of the racket include all classes, rich and poor, businessmen and laborers; that the victims are often coerced into the commission of criminal acts in order to repay their loans; that through loan sharking the organized underworld has obtained control of legitimate businesses, including securities brokerages and banks which are then exploited; and that "*[e]ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.*" . . . The essence of all these reports and hearings was summarized and embodied in formal congressional findings. They supplied Congress with the knowledge that the loan shark racket provides organized crime with its second most lucrative source of revenue, exacts millions from the pockets of people, coerces its victims into the commission of crimes against property, and causes the takeover by racketeers of legitimate businesses.[304]

The Court cited *Perez* approvingly in *Lopez*,[305] *Morrison*,[306] and *Raich*[307] for the proposition that Congress has the power to regulate intrastate activities

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303. *Raich*, 545 U.S. at 24.

304. *Perez*, 402 U.S. at 154-56 (emphasis added) (citations omitted).

305. *Lopez*, 514 U.S. at 559-60 (citing an extortionate credit transactions statute as an example of an intrastate regulation the Court concluded substantially affected interstate commerce).

306. United States v. Morrison, 529 U.S. 598, 610 (2000) (citing *Perez* as support that the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce") (quoting *Lopez*, 514 U.S. at 559)).

307. *Raich*, 545 U.S. at 17 (using *Perez* to support the proposition that it is well-established that "Congress[] [has the] power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce").

that substantially affect interstate commerce. The basis of the legislative findings in *Perez* is the same one that Congress used when it enacted RICO.[308] Moreover, the statute at issue in *Perez* was a piece of legislation that Congress passed while trying to figure out how to eliminate organized crime's financial base.[309] Essentially, the Court has essentially already determined that RICO is the type of statute where the "'total incidence' of a practice poses a threat to a national market," and therefore it may regulate the entire class.[310]

3. RICO is Economic in Nature

Pursuant to *Lopez*, *Morrison*, and *Raich*, whether RICO is a valid exercise of congressional authority in the context of as-applied challenges to violent criminal activity largely depends on whether RICO sought to regulate an economic activity. In *Raich*, Justice Stevens emphasized that the noneconomic nature of the statutes at issue in *Lopez* and *Morrison* was "the reason" for their invalidity and the crucial distinction from the statute upheld in *Raich*.[311] Although the Court has clearly indicated that the economic or noneconomic nature of the regulatory scheme is essential to determine whether the statute is constitutional, the Court has given little guidance to what constitutes economic activity.[312] The *Lopez* Court first introduced the economic/noneconomic distinction into modern Commerce Clause analysis; however, the Court failed to define economic activity in *Lopez*, and then again in *Morrison*.[313] Then, in *Raich*, the majority defined "economic activity" as the "production, distribution, and consumption of commodities."[314]

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308. *See, e.g.*, *Perez*, 402 U.S. at 155-56 (describing the various reports and sources Congress relied on in making its findings with relation to the need for a comprehensive statute prohibiting organized crime); TASK FORCE ON ORGANIZED CRIME, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1-2, 16-24 (1967) (describing the ill effects of organized crime and recommendations of how to regulate it); Lesley S. Bonney, Comment, *The Prosecution of the Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 580 n.10 (1993) (listing several sources Congress relied on in its investigation to formulate a strategy to combat organized crime).

309. *See Perez*, 402 U.S. at 147 n.1 (listing the congressional findings relating to the legislation at issue, including those surrounding extortionate credit transactions).

310. *Raich*, 545 U.S. at 17 (citing *Perez*, 402 U.S. at 154) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.") (quoting Westfall v. United States, 274 U.S. 256, 259 (1927))).

311. Brown, *supra* note 16, at 981 (The "central point" of the economic/noneconomic distinction in *Raich* is that "federal statutes that did not directly regulate economic/commercial activity were struck down. The very reason for proceeding with the further analysis in *Raich* was that the CSA did regulate such activity").

312. *See* Lee Pollack, Student Article, *The "New" Commerce Clause: Does Section 9 of the ESA Pass Constitutional Muster After* Gonzales v. Raich*?*, 15 N.Y.U. ENVTL. L.J. 205, 238-39 (2007).

313. *See* Jiang, *supra* note 219, at 554-55.

314. *Raich*, 545 U.S. at 25-26 (citing Webster's Third New International Dictionary, *supra* note 201).

RICO appears to fall outside the scope of the *Raich* Court's definition of economic activity. RICO[315] defines racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . which is chargeable under State law and punishable by imprisonment for more than one year" in addition to a variety of federal offenses.[316] Although certain predicate offenses, such as dealing in a controlled substance, meet the *Raich* definition of "economic activity," in general, the qualifying offenses do not meet the majority's definition of "economic activity.[317]

The First Circuit interpreted *Raich* as emphasizing that the class of activities regulated need not be delineated with "scientific exactitude."[318] In *Nascimento*, the court properly concluded that RICO was economic in nature, however, it most likely inaccurately stated that the *Raich* Court did not deem the fungible nature of the commodity as decisive.[319] The *Nascimento* court essentially ignored that RICO did not meet the *Raich* definition of "economic activity" and concluded that "[a]ll that is necessary to deflect a Commerce Clause challenge to a general regulatory statute is a showing that the statute itself deals with a class of activity that has a substantial relationship to interstate or foreign commerce."[320]

Even though RICO does not meet the *Raich* majority's definition of "economic activity," the statute is economic in nature. The First Circuit's decision to practically ignore the *Raich* Court's definition of commerce illustrates why the majority's definition of commerce is considered so problematic. The *Raich* Court's definition of commerce excludes activities,[321]

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315. To secure a RICO prosecution, the government must prove a series of federal or state predicate crimes constituting a pattern of racketeering. 18 U.S.C. §§ 1961-1962 (2006); *see also* Gail A. Feichtinger, Case Note, *RICO's Enterprise Element: Redefining or Paraphrasing to Death*?, 22 WM. MITCHELL L. REV. 1027, 1031-32 (1996).

316. § 1961(1); *see also* Feichtinger, *supra* note 315, at 1032.

317. *See* Brown, *supra* note 16, at 980-81.

318. United States v. Nascimento, 491 F.3d 25, 30, 42 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008).

319. *See id.*

320. *Id.* (citing Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

321. *See generally* Jiang, *supra* note 219, at 560. Jiang argued that the *Raich* definition of economic activity may also call into question prior cases in which the Court had sustained exercises of federal authority over intrastate activities that had little to do with the regulation of commodities:

> *Raich*, for example, casts doubt upon Congress's ability to regulate unfair labor practices under the National Labor Relations Act (NLRA), which the Court upheld in *Jones & Laughlin*. After all, the NLRA was not aimed at regulating commodities but at protecting collective bargaining rights. *Raich* could also call into question Congress's ability to legislate against regulate racial discrimination under Title II of the Civil Rights Act, which the Court upheld in *Heart of Atlanta Motel* and *Katzenbach v. McClung*. Like the NLRA, Title II was not designed to prescribe limitations on goods or products (commodities), but rather to root out particular genres of discriminatory behavior.

Id.

including RICO predicate acts, which the Court has previously determined to be economic in nature.[322] For instance, in *Perez v. United States*, which *Lopez*, *Morrison*, and *Gonzales* all cited with approval, the Court determined that it was rational that Congress conclude intrastate loan sharking, a predicate act under RICO, would affect interstate commerce.[323] In *Lopez*, the Court reaffirmed that loan sharking is economic because it consists of "intrastate extortionate credit transactions."[324] Yet, loan sharking does not meet the *Raich* Court's definition of economic activity.[325]

The *Nascimento* court properly concluded that the "class of activit[ies] [regulated by RICO] is sufficiently economic in nature and it may be aggregated for Commerce Clause purposes."[326] As the United States District Court for the Eastern District of Michigan explained in 2000, in the context of noneconomic gang activity, RICO organized crime enterprises engage in activity that is economic in nature because the enterprises:[327]

> [F]requently cross state lines in the commission of their unlawful acts, and even if an enterprise does not cross state lines, the statute's prohibition of racketeering activity, as defined encompasses crimes that are economic in nature. *Lopez* and *Morrison* made clear that where activity is *economic in nature*, "the cases have upheld Commerce Clause regulation of [even] intrastate activity." Thus, although the question is not at issue here, RICO would survive a facial challenge.[328]

Moreover, RICO was enacted to combat organized crime's "influence of the economy and structure of the nation."[329] Congress's legislative findings

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322. *See id.* at 560. The majority's definition of commerce also includes activities the Court has previously held to be noneconomic, however, that does not pertain to evaluating RICO. *See generally id.* at 559 (discussing the *Raich* definition as being over-inclusive because it "potentially sweeps in activities the Court has previously held to be non-economic").

323. *See* United States v. Lopez, 514 U.S. 549, 559-60 (1995).

324. *Id.* (citing the intrastate loan sharking at issue in *Perez* as an "economic activity" that substantially affects interstate commerce). *But see id.* at 628 (Breyer, J., dissenting) ("Although the majority today attempts to categorize *Perez* . . . as involving intrastate 'economic activity,' the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce." (citations omitted)).

325. *See* United States v. Morrison, 529 U.S. 598, 656 (2000) (Breyer, J., dissenting) ("The 'economic/noneconomic' distinction is not easy to apply. Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?" (citing Perez v. United States, 402 U.S. 146 (1971) (aggregating local "loan sharking" instances))).

326. United States v. Nascimento, 491 F.3d 25, 43 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008).

327. United States v. Garcia, 143 F. Supp. 2d 791 (E.D. Mich. 2000).

328. *Id.* at 804 (citations omitted).

329. Bonney, *supra* note 308, at 580.

clearly demonstrate that RICO was enacted to target economic activity.[330] Moreover, as discussed above, RICO is part of a series of legislation the Court already determined was economic in *Perez* and reaffirmed was economic in *Raich*.

Furthermore, the modern Commerce Clause analysis is openly questioned by Justices that favor the "New Federalism" and those that favor the "practical conception." Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, argue that the definition of economic activity the *Raich* majority uses "threatens to sweep all of productive human activity into federal regulatory reach."[331] On the other hand, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, openly criticize the commercial/noncommercial distinction espoused by the "New Federalism."[332] In *Lopez*, Justice Souter stated:

> The distinction between what is patently commercial and what is not looks like the old distinction between what directly affects commerce and what touches it only indirectly. . . . Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago.[333]

Similarly, in *Morrison*, Justice Souter stated that the majority's decisions "can only be seen as a step toward recapturing the prior mistakes."[334]

> [The] revival of a distinction between commercial and noncommercial conduct is at odds with *Wickard,* which repudiated that analysis, and the enquiry into commercial purpose, first intimated by the *Lopez* concurrence, is cousin to the

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330. 18 U.S.C. § 1961 (1988 & Supp. III 1991) (Congressional Statement of Findings and Purpose) (current version at 18 U.S.C. § 1961 (2006)). Congress determined that, within the scope of RICO:

> (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking . . . [and] the importation and distribution of narcotics . . . ; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business[es] . . . ; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process . . . .

Id.

331. Gonzales v. Raich, 545 U.S. 1, 49 (2005) (O'Connor, J., dissenting).

332. *See* United States v. Lopez, 514 U.S. 549, 608 (1995) (Souter, J., dissenting).

333. *Id.*

334. *See* United States v. Morrison, 529 U.S. 598, 643 (2000) (Souter, J., dissenting).

intent-based analysis employed in *Hammer* but rejected for Commerce Clause purposes in *Heart of Atlanta* and *Darby*.[335]

V. AN ALTERNATIVE TO THE *RAICH* APPROACH: THE JURISDICTIONAL ELEMENT

Post-*Lopez*, the Court has yet to consider a statute that contains a jurisdictional element, commonly referred to as a "jurisdictional hook."[336] A jurisdictional hook "adds to the criminal activity a specific link to interstate commerce."[337] The jurisdictional hook is an element of the crime that the prosecution has the burden of proving.[338] RICO's jurisdictional element is that the enterprise's activities must have "affected interstate commerce."[339] Jurisdictional hooks are seen as a means of limiting federal authority.[340]

In *Lopez*, the Court observed that the statute at issue "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[341] In *Morrison*, the same majority repeated this quote and emphasized its importance by stating: "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce."[342]

Courts have been applying *Raich* to statutes with jurisdictional hooks, instead of applying the jurisdictional hooks.[343] Under this approach, "the nexus between the individual instances and interstate commerce is no longer required," thus the jurisdictional element is irrelevant.[344] This approach only requires that the federal statute regulates an activity that is essential to a larger regulatory scheme and that Congress had a rational basis for determining that failing to regulate that activity would "undercut" the larger regulatory scheme.[345]

In determining *Nascimento*, the First Circuit essentially ignored that RICO had a jurisdictional hook that requires that the activities of the enterprise "affect" interstate commerce, and instead applied *Raich*.[346] The First Circuit stated that "RICO . . . by its terms is limited to racketeering enterprises that

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335. *Id.* (citations omitted).

336. *See generally* Brown, *supra* note 16, at 997-1004 (explaining the role a jurisdictional element plays in courts' analysis of legislation under the Commerce Clause).

337. *Id.* at 998.

338. *Id.*

339. *See* 18 U.S.C. § 1962 (2006).

340. *See* United States v. Lopez, 514 U.S. 549, 561-62 (1995).

341. *Id.* at 561.

342. United States v. Morrison, 529 U.S. 598, 612 (2000); Brown, *supra* note 16, at 998.

343. *See* Brown, *supra* note 16, at 990-91.

344. Stuckey, *supra* note 301, at 2127.

345. *Id.* at 2127-28 (quoting Gonzales v. Raich, 545 U.S. 1, 24 (2005)).

346. *See* United States v. Nascimento, 491 F.3d 25, 41-43 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008).

'affect . . . commerce.'"[347] The court determined that "[t]his jurisdictional element ties the statutes directly to commerce in a more explicit way" than *Lopez*, *Morrison*, or *Raich*.[348] However, the First Circuit's statement is inconsistent with its holding that the appellant's activities did not have to affect commerce because the statute itself dealt rationally with a class of activities that has a substantial effect on commerce.[349]

George D. Brown argues that *Raich* itself is relevant to statutes with a jurisdictional hook because *Raich*'s emphasis on the distinction between economic/noneconomic activity "indicates the necessity for such conduct at some point in the case."[350] Using the prosecution of a Hobbs Act violation, a predicate act under RICO, as an example, Brown explains that when applying a jurisdictional element, the results differ depending on the defendant's conduct or victim's conduct:

> Consider a prosecution under the Hobbs Act for extortion of a public official. One might argue that extortion is itself a consensual economic transaction. Professor Bradley's analysis would focus on the importance to the national economy of the political process and its decisions. Either way, the effects element is satisfied. Robbery cases are harder to deal with under the Hobbs Act. Robbery is not an economic/commercial activity. Thus, federal jurisdiction would, initially, depend on the commercial nature of the person or entity robbed. Robberies of private individuals would probably not satisfy a rigorous application of the economic/commercial line, while those of businesses would. As Professor Bradley puts it, "robbery of a pizza deliveryman while he is on duty violates the Hobbs Act. Robbery of him off-duty does not."
>
> It is at this point that jurisdictional element statutes utilizing the effects approach diverge from their class-of-activities counterparts by apparently requiring a quantitative analysis of the individual case. Although the Hobbs Act uses the verb "affect," the lesson of *Lopez* would appear to be that a substantial effect is necessary in category three situations. Thus, even when the prosecution has gotten over the economic/commercial line, it still faces a quantitative dilemma.[351]

In *Waucaush*, the Sixth Circuit used the jurisdictional element in RICO to determine that RICO, as applied to intrastate noneconomic activities exceeded Congress's commerce power.[352] The Sixth Circuit's determination in *Waucaush* demonstrates the benefit jurisdictional elements sometimes provide; the court was able to determine the proper scope of RICO as-applied to the defendants

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347. *Id.* at 43.
348. *Id.*
349. *See id.* at 42-43.
350. Brown, *supra* note 16, at 999.
351. *Id.* at 999-1000 (citing Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 587-610 (2004); United States v. Lopez, 514 U.S. 549, 559 (1995).
352. *See* Waucaush v. United States, 380 F.3d 251, 255-58 (6th Cir. 2004).

without having to make a greater determination about the constitutionality of the statute.

CONCLUSION

As established above, the Supreme Court has remained consistent that Congress has the authority to regulate intrastate activities that substantially affect interstate commerce. Therefore, based on the precedent, RICO will likely survive any Commerce Clause challenges. Moreover, even under "new federalist" analysis, RICO is likely to survive a constitutional challenge because of its jurisdictional element.