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COMMENTS

WHAT CAN RICO NOT DO?: RICO AND THE NON-ECONOMIC INTRASTATE ENTERPRISE THAT PERPETRATES ONLY NON-ECONOMIC RACKETEERING ACTIVITY

BY: BRIAN NISBET*

The First and Sixth Circuits Courts of Appeal have split on whether § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act requires the Government to prove substantial effects on interstate commerce where the defendant commits non-economic racketeering activity and is associated with a non-economic intrastate enterprise. This Comment concludes that while requiring substantial effects on interstate commerce represents a jurisprudential sea change, federal courts should employ a more stringent standard to determine whether an enterprise or the defendant's racketeering activity affects interstate commerce. This Comment also visits the First Circuit Court of Appeals' erroneous application of the principles set forth in the Supreme Court's decision in Gonzales v. Raich *to the Racketeer Influenced and Corrupt Organizations Act, and discusses the potential impact of* Raich *on future RICO decisions.*

I. INTRODUCTION

Jackson Nascimento belonged to a local street gang that claimed territory on the south side of Boston, Massachusetts.[1] The gang operated exclusively in that area and did not actively participate in economic

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[1] United States v. Nascimento, 491 F.3d 25, 30-31 (1st Cir. 2007).

activity.[2] For several years, Nascimento's gang waged a murderous war against a similarly local street gang.[3] In 2005, Jackson Nascimento was convicted of racketeering and racketeering conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).[4] He was sentenced to 171 months in federal prison.[5] In support of the racketeering conviction, the jury found that Nascimento shot and killed one member of the rival street gang and conspired to kill many others.[6] These crimes were violent but non-economic in nature.

RICO is one of the federal government's most sweeping criminal laws.[7] It is aimed at the commercial effects of enterprise criminality,[8] but can be used to prosecute non-economic racketeering activity perpetrated by individuals, like Nascimento, who are associated with non-economic intrastate enterprises.[9]

The Supreme Court of the United States addressed the scope of Congress's power under the Commerce Clause to regulate non-economic intrastate criminal activity in *United States v. Lopez*,[10] *United States v. Morrison*,[11] and *Gonzales v. Raich*.[12] *Lopez* and *Morrison* stand for the principle that Congress cannot regulate local, non-economic, violent criminal activity unless it has substantial effects on interstate commerce.[13] In *Raich*, the Court held that Congress may regulate non-economic intrastate activity as an essential part of a larger and valid regulatory scheme so long as there is a rational basis for so doing.[14] The impact of these decisions on federal criminal law is hotly debated,[15] but commentators

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[2] *Id.* at 30.

[3] *Id.*

[4] *Id.* at 31.

[5] *Id.*

[6] *Id.*

[7] Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-68 (2006)); *see* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1036 (1990).

[8] G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 866 (1990).

[9] *See Nascimento*, 491 F.3d 25.

[10] 514 U.S. 549 (1995).

[11] 529 U.S. 598 (2000).

[12] 545 U.S. 1 (2005).

[13] *See Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549.

[14] *See Raich*, 545 U.S. 1.

[15] *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of* United States v. Lopez *and* United States v. Morrison, 68 TENN. L. REV. 605 (2001); 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 (2006); Andrew Weis,

generally agree that prosecutions under major criminal statutes, like RICO, have not slowed.[16]

The Supreme Court's recent Commerce Clause jurisprudence, however, has had some effect on RICO's enforcement. Two federal circuit courts recently split over whether RICO's jurisdictional element requires the Government to prove substantial effects on interstate commerce where the defendant, associated with a non-economic intrastate enterprise, commits only non-economic "racketeering activity." In *Waucaush v. United States*, the Sixth Circuit held that RICO's jurisdictional element required the Government to demonstrate substantial effects on interstate commerce to prosecute an individual, associated with a non-economic intrastate enterprise, accused of only non-economic racketeering activity.[17] In *United States v. Nascimento*, the First Circuit diverged from that opinion and held that RICO's jurisdictional element required proof of only a *de minimis* effect on interstate commerce.[18] In the same case, the First Circuit analyzed RICO under the principles set forth in *Raich*—an analysis that may subjugate the role of RICO's jurisdictional element altogether.[19]

This Comment will discuss these two important and related issues. Part II of this Comment will provide an overview of RICO's original design and subsequent application. Part III addresses RICO's jurisdictional element and whether it requires that non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises *substantially affect* interstate commerce or only *affect* interstate commerce. Part III is divided into several sections. Section 1 describes § 1962(c) of RICO, its text, important terms, liberal construction, and potential reach.[20] Section 2 examines *Lopez* and *Morrison* to elucidate the scope of Congress's commerce power. Section 3 examines the Sixth and First Circuits' split in *Waucaush* and *Nascimento*, respectively. Section 4

Note, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431 (1996).

[16] Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 574-75 (2004) ("The key question was, and remains, what impact these cases will have on prosecutions under other statutes that have been used successfully by the federal government to prosecute its core concerns . . . . Surprisingly, the nearly unanimous answer from the federal courts to date is: 'No Impact!'").

[17] 380 F.3d 251 (6th Cir. 2004).

[18] 491 F.3d 25, 30 (1st Cir. 2007).

[19] *See id.* at 41-42; Stuckey, *supra* note 15 (discussing the implications of *Raich* for federal criminal statutes that contain jurisdictional elements).

[20] The application of § 1962(c) to non-economic, criminal enterprises perpetrating non-economic "racketeering activity" is the focus of this Comment. 18 U.S.C. § 1962(c) (2006). Any reference to violating RICO, prosecuting a RICO violation, or applying RICO is a reference to § 1962(c).

explores what evidentiary standard the federal courts should require. Though this Comment recognizes that requiring substantial effects on interstate commerce would be a jurisprudential sea change, it ultimately concludes that the affecting commerce standard should mean more than a speculative or incidental effect on interstate commerce. Non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises should fall outside RICO. Part IV examines what impact the Supreme Court's holding in *Raich* will have on RICO's jurisdictional element. Part IV is also divided into several sections. Section 1 examines the Supreme Court's holding in *Raich.* Section 2 discusses the implications of applying *Raich*'s holding to § 1962(c) of RICO. Section 3 concludes that the First Circuit erred in its holding, and argues that because non-economic racketeering activity perpetrated by an individual associated with a non-economic intrastate enterprise is separate and distinct from the class of activity regulated by RICO, there is no rational basis for incorporating it into RICO's larger regulatory scheme.

II. BACKGROUND

The Racketeer Influenced and Corrupt Organizations Act, known generally as RICO, is Title IX of the Organized Crime Control Act.[21] Generated amidst public fear over the perceived strength of organized crime,[22] RICO's stated purpose is to "seek the eradication of organized crime . . . by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[23] As drafted, however, RICO's broad statutory language reaches all types of "enterprise criminality."[24] Enterprise criminality encompasses a wide range of criminal activity and has been defined as "'patterns' of violence, the provision of illegal goods and services, corruption in the labor or management relations, corruption in government, and criminal fraud by, through, or against various types of licit or illicit 'enterprises.'"[25]

In furtherance of its broad language, RICO commands that it be liberally construed to effectuate its remedial purposes.[26] Since 1970, RICO

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[21] 18 U.S.C. §§ 1961-68 (2006); Blakey & Perry, *supra* note 8, at 853.

[22] Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 AM. J. COMP. L. 671, 686-88 (2006).

[23] Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923.

[24] Blakey & Perry, *supra* note 8, at 866.

[25] G. Robert Blakey & John Robert Blakey, *Civil and Criminal RICO: An Overview of the Statute and Its Operation*, 64 DEF. COUNS. J. 36, 36 (1997).

[26] Organized Crime Control Act of 1970 § 904, 84 Stat. at 947.

has been used to prosecute many crimes beyond classic organized crime, including political corruption and other white collar crimes.[27]

III. RICO'S JURISDICTIONAL ELEMENT

A. SECTION 1962(C) OF RICO

Section 1962(c) of RICO states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[28]

To successfully prosecute a RICO charge, the Government must prove beyond a reasonable doubt that: "'(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.'"[29]

Like the rest of RICO, § 1962(c) contains broad terms.[30] *Enterprise* and *racketeering activity*, defined in § 1961(1) and (4) of RICO, are generous in scope.[31] "[A]ny individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" can constitute a RICO enterprise.[32] Federal courts have a significant amount of discretion in recognizing a RICO enterprise.[33] There is no rigid standard that must be satisfied.[34] Minimally, a RICO enterprise must be an ongoing organization, formal or informal, whose associates operate as a continuous unit.[35] A RICO enterprise can be a legitimate or illegitimate organization,[36] and need

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[27] Blakey & Blakey, *supra* note 25, at 42.

[28] 18 U.S.C. § 1962(c) (2006).

[29] United States v. Nascimento, 491 F.3d 25, 31 (1st Cir. 2007) (citation omitted).

[30] *See* Russello v. United States, 464 U.S. 16, 21 (1983).

[31] 18 U.S.C. § 1961(1), (4) (2006).

[32] *Id.* § 1961(4). For an explanation of the several judicially created standards to determine RICO's vertical reach within an organization, see Scott Paccagnini, *How Low Can You Go (Down the Ladder): The Vertical Reach of RICO*, 37 J. MARSHALL L. REV. 1 (2003).

[33] *See* Ross Bagley et al., *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901, 911 (2007).

[34] *See id.* (citing United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (recognizing the fluid nature of criminal organizations and the need for a shifting definition of "enterprise")).

[35] United States v. Turkette, 452 U.S. 576, 583 (1981).

[36] *See id.* at 587 ("[N]either the language nor structure of RICO limits its application to legitimate 'enterprises.'").

not be economically motivated.[37] The Government can establish a RICO enterprise by providing evidence of some decision-making structure or cohesion within a group.[38] RICO has been used to prosecute defendants associated with a variety of different enterprises.[39] Courts have found marriages, schools, labor unions, and even county prosecutors' offices to be RICO enterprises.[40]

The definition of "racketeering activity" is almost as broad. Racketeering activity is a sweeping term that is defined by over sixty different crimes,[41] including nine state crimes and fifty-two federal crimes.[42] The nine state crimes are any act or threat of murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in narcotics, or dealing in an obscene matter.[43] Some of the fifty-two federal crimes involve embezzlement from pension and welfare funds, wire fraud, the trafficking in persons, and "white slave" traffic.[44] For the Government to successfully prosecute a substantive RICO charge under § 1962(c), the trier of fact must conclude that the defendant is guilty of "a pattern of racketeering activity."[45] In other words, the trier of fact must conclude that the defendant committed at least two crimes that define racketeering activity.[46]

Racketeering activity is a unique crime. Though related, it is separate and distinct from its many predicate acts.[47] The predicate acts are referred to in RICO for definitional purposes only.[48] RICO does not criminalize the

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[37] Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994) ("We hold that RICO requires no such economic motive.").

[38] *See* United States v. Nascimento, 491 F.3d 25, 32 (1st Cir. 2007); United States v. Fernandez, 388 F.3d 1199, 1223 (9th Cir. 2004).

[38] United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991).

[39] *See* Bagley et al., *supra* note 33, at 912-13.

[40] *See id.*

[41] *See* 18 U.S.C. § 1961(1) (2006).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] 18 U.S.C. § 1962(c) (2006).

[46] 18 U.S.C. § 1961(5). Two predicate acts are necessary, but not sufficient, to prove the pattern element in § 1962(c). There must also be proof of relatedness and continuity between the predicate acts. United States v. Fernandez, 388 F.3d 1199, 1221 n.11 (9th Cir. 2004) (citing H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239-41 (1989)); *see also* United States v. Marino, 277 F.3d 11, 27 (1st Cir. 2002) ("A sufficient nexus or relationship exists between the racketeering acts and the enterprise if the defendant was able to commit the predicate acts by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of his association with the enterprise.").

[47] *See* United States v. Forsythe, 560 F.2d 1127, 1135 (3rd Cir. 1977) ("State law offenses are not the gravamen of RICO offenses."); *see also* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 923 (1987).

[48] United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir. 1984) (quoting United States

predicate acts per se,[49] but rather, the impact they have on interstate commerce in furtherance of enterprise criminality.[50] Because the crimes are different, a charge of racketeering activity will survive even if the defendant was previously acquitted of the predicate acts.[51] If a defendant is convicted under § 1962(c), RICO calls for a prison sentence of up to twenty years, or, if authorized by the predicate act, a term sentence of life in prison.[52]

B. RECENT COMMERCE CLAUSE JURISPRUDENCE

The Supreme Court recently addressed the scope of Congress's commerce power in three landmark decisions. Because Congress enacted RICO with its power to regulate interstate commerce, these holdings may dictate how § 1962(c) of RICO is ultimately applied to non-economic intrastate enterprises whose associates commit only non-economic racketeering activity.

For the first time in nearly sixty years, the Supreme Court ruled that Congress exceeded its power under the Commerce Clause in *United States v. Lopez*.[53] The case involved § 922(q)(1)(A) of the Gun-Free School Zones Act of 1990.[54] This federal statute criminalized the knowing possession of a firearm within one thousand feet of a school.[55] After a lengthy discussion of Commerce Clause jurisprudence, Chief Justice Rehnquist, writing for a slim majority, identified three broad categories of activities that fall within Congress's commerce power.[56] First, Congress may regulate the channels of interstate commerce.[57] Second, Congress may regulate the instrumentalities of interstate commerce.[58] Third, Congress may regulate those activities that have a substantial effect on interstate commerce.[59] The Court analyzed the statute under this third prong and struck it down.[60]

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v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971)).

[49] *Id.* (quoting *Cerone*, 452 F.2d at 286).

[50] *Forsythe*, 560 F.2d at 1135.

[51] *See Licavoli*, 725 F.2d at 1047; *see also* Bagley et al., *supra* note 33, at 923-24; Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 991 (2003).

[52] 18 U.S.C. § 1963(a) (2006).

[53] 514 U.S. 549, 551 (1995); *see* Diane McGimsey, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1677 (2002).

[54] *Lopez*, 514 U.S. at 551.

[55] *Id.* (quoting 18 U.S.C. § 921(a)(25)).

[56] *Id.* at 558-59.

[57] *Id.* at 558.

[58] *Id.*

[59] *Id.* at 558-59. The Court noted that within this final category, the case law was not

In the eyes of the Court, § 922(q)(1)(A) failed to meet the "substantial effects" test for three reasons. First, the Court noted that the criminal statute had nothing to do with commerce or economic activity, and that it was not an essential part of a larger regulatory scheme.[61] Therefore, the statute could not be sustained as a regulation of activities that, considered together, substantially affected interstate commerce.[62] Second, the majority observed that the statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[63] Though not dispositive, a jurisdictional element would support the argument that the regulated firearms had the appropriate connection to interstate commerce.[64] Finally, though not required to do so, Congress had not made formal findings as to how the regulated activity substantially affected interstate commerce.[65] The absence of these findings made it more difficult for the Court to conclude that the knowing possession of a firearm within one thousand feet of a school substantially affected interstate commerce.[66]

To support the statute's constitutionality, the Government argued that possession of a firearm in a school zone might lead to violent crime, and that violent crime substantially affected interstate commerce because it placed a serious burden on the tourism and insurance industries.[67] The Government also argued that gun possession in a school zone posed a substantial threat to the educational process and, in turn, interstate commerce.[68] The majority rejected both lines of reasoning.[69] The Court noted that if it were to accept these arguments, it would be "hard pressed to posit any activity by an individual that Congress [was] without power to regulate."[70]

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clear whether an activity must "affect" or "substantially affect" interstate commerce. *Id.* at 559. The Court concluded that the proper test was whether a regulated activity "substantially affects" interstate commerce. *Id.*

[60] *Id.* at 551.

[61] *Id.* at 561.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 561-62.

[65] *Id.* at 562-63.

[66] *Id.*

[67] *Id.* at 563-64. The Court referred to these arguments as "cost of crime" and "national productivity." *Id.* at 563.

[68] *Id.* at 564.

[69] *Id.*

[70] *Id.* This includes activities with respect to family law or education, areas traditionally regulated by the states. *Id.*

Without overruling precedent, the Court declined to extend Congress's commerce power any further.[71] The Court was very concerned with maintaining the distinction between what is truly national and what is truly local.[72] It refused "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[73]

Five years after *Lopez*, the Supreme Court handed down its decision in *United States v. Morrison*.[74] The case involved § 13981 of the Violence Against Women Act.[75] Under this statute, a person who committed a crime of violence motivated by gender was civilly liable to the party injured.[76] Though § 13981 did not contain a jurisdictional element, it was supported by voluminous congressional findings regarding the regulated activity's substantial effects on interstate commerce.[77] Despite this, the Court invalidated it as an unconstitutional exercise of Congress's commerce power.[78]

In so doing, the majority reiterated that the existence of Congressional findings as to an activity's substantial effects on interstate commerce, alone, is insufficient to uphold the constitutionality of Commerce Clause legislation.[79] Whether an activity substantially affects interstate commerce is a question to be finally answered by the Court.[80] The Court also addressed the "cost of crime" reasoning that the Government had previously put forth in *Lopez* and again rejected it.[81] That reasoning, the Court believed, would enable Congress to regulate any crime so long as its aggregate commercial impact had "substantial effects on employment, production, transit, or consumption."[82] Ultimately, the Court held that Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[83] The Court could "think of no better example of the police power, which the

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[71] *Id.* at 566-67.
[72] *Id.* at 567-68.
[73] *Id.* at 567.
[74] 529 U.S. 598 (2000).
[75] *Id.* at 601.
[76] *Id.* at 605 (quoting 42 U.S.C. § 1398(c)).
[77] *Id.* at 614.
[78] *Id.* at 617-18.
[79] *Id.* at 614.
[80] *Id.* (quoting United States v. Lopez, 514 U.S. 549, 557 n.2 (1995)).
[81] *Id.* at 615.
[82] *Id.*
[83] *Id.* at 617.

Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[84]

In dissent, Justice Breyer criticized the economic activity versus non-economic violent crime distinction as being unworkable.[85] Justice Breyer emphasized his point by highlighting the economic grey area in which so many crimes reside: "Does the local street corner mugger engage in 'economic' activity or 'non-economic' activity when he mugs for money?"[86] He was also troubled by the fortuitous or back door constitutionality that might result from strategic statutory drafting. Recognizing that Congress could regulate a purely intrastate activity that was an essential part of a larger regulatory scheme, he pondered whether Congress could save § 13981 by including it in a broader, more comprehensive regulation.[87] The Supreme Court has not since answered those questions.

The Supreme Court in *Lopez* and *Morrison* firmly established that Congress's power to regulate interstate commerce is an enumerated power[88] and not a plenary power.[89] Congress's authority under the Commerce Clause has judicially enforceable outer limits,[90] the precise contours of which remain unclear.[91] Notwithstanding this uncertainty, all nine justices on the Supreme Court agreed that, under the Commerce Clause, Congress is not empowered to regulate every activity.[92] Even in light of an increasingly connected and national economy, not everything can qualify as commerce.[93]

C. THE CIRCUIT SPLIT

Because of these principles, § 1962(c) of RICO presents a unique constitutional quandary. Racketeering activity, as a general class of activity, is not limited to or characterized by one type of crime.[94] Though distinct, the individual predicate acts that constitute racketeering activity

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[84] *Id.* at 618 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.").

[85] *Id.* at 656 (Breyer, J., dissenting).

[86] *Id.*

[87] *Id.* at 657.

[88] United States v. Lopez, 514 U.S. 549, 566 (1995).

[89] Ronald D. Rotunda, *The Implications of the New Commerce Clause Jurisprudence: An Evolutionary Court or Revolutionary Court?*, 55 ARK. L. REV. 795, 834 (2003).

[90] *Lopez*, 514 U.S. at 566.

[91] *Id.*; Andrew St. Laurent, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 62 (1997).

[92] Rotunda, *supra* note 89, at 836.

[93] *Id.*

[94] *See* United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007).

represent an eclectic mix of economic crimes and non-economic crimes.[95] This is especially true with respect to the nine state crimes it encompasses. Extortion, gambling, dealing in narcotics, and dealing in an obscene matter are all crimes of a commercial nature.[96] Murder, on the other hand, is not.[97] According to *Lopez* and *Morrison*, murder, per se, falls outside the scope of Congress's commerce power because it does not substantially affect interstate commerce.[98] Congress cannot regulate an individual instance of murder merely because it, in some strained way, affects commerce.[99]

According to § 1962(c), however, an individual instance of racketeering activity and the activities of the enterprise at issue need not *substantially affect* interstate commerce.[100] RICO's jurisdictional element only requires an *effect* on interstate commerce.[101] *Affecting* interstate commerce implies a very minimal nexus between the racketeering activity or enterprise and interstate commerce.[102] Thus, under RICO, an individual who commits racketeering activity predicated solely on murder, and who is associated with a non-economic intrastate enterprise, may be prosecuted when that activity or enterprise has only a minimal effect on interstate commerce. This conundrum faced the First and Sixth Circuits in *Waucaush v. United States*[103] and *United States v. Nascimento*,[104] respectively. The circuits split over whether non-economic racketeering activity perpetrated

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[95] *Compare* Perez v. United States, 402 U.S. 146 (1971) (affirming petitioner's conviction for perpetrating intrastate, extortionate credit transactions and confirming the impact of that conduct on interstate commerce), *with* United States v. Morrison, 529 U.S. 598 (2000) (characterizing traditional, local, violent crime, like gender-motivated, violent crime, as non-economic in nature).

[96] *See* Lynch, *supra* note 47, at 923. With its power to regulate interstate commerce, Congress has enacted legislation that makes each crime, independently, a federal offense. *Id.*; *see* 18 U.S.C. § 224 (2006) (prohibiting sports bribery); 18 U.S.C. § 844(i) (2006) (prohibiting the destruction by fire or explosion of buildings or property used in any activity affecting interstate or foreign commerce); 18 U.S.C. § 1951 (2006) (prohibiting extortion or robbery that affects interstate commerce); 18 U.S.C. § 1955 (2006) (prohibiting illegal gambling businesses); 18 U.S.C. § 2252 (2006) (prohibiting the manufacture or possession of child pornography produced with materials that have passed through interstate commerce); 18 U.S.C. § 2314 (2006) (prohibiting the interstate transportation of stolen property valued in excess of $5000); 21 U.S.C. §§ 801-970 (2006) (prohibiting manufacture, possession, and distribution of narcotics).

[97] *See Morrison*, 529 U.S. at 615.

[98] *Id.*

[99] *Id.*

[100] 18 U.S.C.S. § 1962(c) (2006) (requiring that the racketeering activity or enterprise only affect interstate commerce).

[101] United States v. Juvenile Male, 118 F.3d 1344, 1348 (9th Cir. 1997).

[102] *Id.* at 1348-49.

[103] 380 F.3d 251 (6th Cir. 2004).

[104] 491 F.3d 25 (1st Cir. 2007).

by individuals associated with non-economic intrastate enterprises must *substantially affect* interstate commerce or only *affect* interstate commerce.

1. Waucaush v. United States

In *Waucaush v. United States*, the Sixth Circuit held that non-economic racketeering activity perpetrated by an individual associated with a non-economic intrastate enterprise must substantially affect interstate commerce.[105] The case involved the Cash Flow Posse (CFP), a Detroit area street gang whose membership did not extend beyond the city's limits.[106] Petitioner Robert Waucaush was a member of CFP.[107] He and his cohorts allegedly murdered and conspired to murder members of at least two rival street gangs to expand CFP's territory.[108] Their crimes did not cross state lines or impede any economic organization, and were not committed to advance any economic interest.[109] CFP's criminal enterprise was territorial only. The court characterized its crimes as "violence *qua* violence."[110] CFP was not involved in drug trafficking, extortion, or gambling.[111] Additionally, no evidence was presented to show that CFP actively engaged in interstate commerce, and no evidence was presented to show that its targeted victims did either.[112]

Waucaush pled guilty to conspiring to violate RICO, but appealed his conviction and sentence.[113] Waucaush argued that he did not violate RICO, and that his guilty plea was null and void, because his racketeering activity and the activities of CFP did not substantially affect interstate commerce.[114]

The Sixth Circuit had previously held that a *de minimis* effect on interstate commerce satisfied RICO's jurisdictional element where the defendant's predicate acts were commercial in nature or the enterprise at issue engaged in economic activity.[115] On these facts, however, the court thought it inappropriate to apply the *de minimis* standard.[116] CFP did not engage in economic activity and was, therefore, distinct from those

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[105] *Waucaush*, 380 F.3d at 256-57.

[106] *Id.* at 253. The Government argued that CFP "eventually became associated with a national gang," but the record did not contain supporting evidence. *Id.* at 257.

[107] *Id.* at 253.

[108] *Id.*

[109] *Id.* at 256.

[110] *Id.*

[111] *Id.* at 257.

[112] *Id.* at 256-57.

[113] *Id.* at 254.

[114] *Id.* at 258.

[115] *Id.* at 255-56 (citing United States v. Riddle, 249 F.3d 529 (6th Cir. 2001)).

[116] *Id.* at 256.

enterprises involved in earlier RICO cases.[117] Relying on *Morrison*, the court noted that Congress may not regulate non-economic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.[118] Thus, the Sixth Circuit held that where the enterprise itself did not engage in economic activity, the Government would have to show a substantial effect on interstate commerce to successfully prosecute a RICO violation.[119]

The Sixth Circuit concluded that CFP was a completely intrastate, non-economic violent criminal enterprise that did not produce substantial effects on interstate commerce.[120] The court conceded that CFP's activities did affect interstate commerce in some strained way, but these effects were too attenuated to survive constitutional scrutiny.[121] The court believed that to apply RICO to CFP and other similar enterprises would obliterate the distinction between national and local criminal conduct.[122]

The Sixth Circuit decided *Waucaush v. United States* before the Supreme Court decided *Gonzales v. Raich*. It did not prophetically address the issues raised or analytical methods used in *Raich*. Rather, the court focused on the enterprise's effects on interstate commerce and RICO's jurisdictional element. The Sixth Circuit tried to reconcile its own precedent with the then-recent Supreme Court opinions in *Lopez*, *Morrison*, and *Jones v. United States*.[123] In so doing, the Sixth Circuit decided to interpret and apply RICO's affecting-commerce language differently depending on the type of enterprise involved.[124]

Also, the Sixth Circuit did not address whether CFP had a *de minimis* effect on interstate commerce. The *de minimis* standard would have required CFP to have only a minimal effect on interstate commerce. The court's discussion indicated the record was void of evidence that linked CFP to interstate commerce. Why the court did not simply rule that CFP lacked a *de minimis* effect on interstate commerce and was, therefore, outside the reach of RICO is unclear. One must conclude that the evidence

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[117] *Id.*

[118] *Id.* at 256 (citing United States v. Morrison, 529 U.S. 598, 617-18 (2000)).

[119] *Id.*

[120] *Id.* at 258. The Government argued that CFP's criminal conduct had a substantial effect on interstate commerce because it prevented the murdered rival gang members from selling drugs. *Id.* at 256. The court did not find sufficient evidence in the record to support that contention, however. *Id.* at 256-57. The Government also argued that CFP "'eventually became associated with a national gang.'" *Id.* at 257. The court, again, did not find substantial evidence that CFP's dealings ever crossed state lines. *Id.*

[121] *Id.* at 258 ("[A] corpse cannot shop, after all.").

[122] *Id.* at 257-58.

[123] 529 U.S. 848 (2000).

[124] *Id.*

presented was sufficient to establish a *de minimis* effect on interstate commerce or the Sixth Circuit would not have carved out a special standard for non-economic enterprises. From the Sixth Circuit's perspective then, the *de minimis* standard is an extremely low evidentiary threshold.

2. United States v. Nascimento

In contrast, the First Circuit in *United States v. Nascimento* held that the normal textual requirements of RICO—the plain "affecting commerce" language—applied to non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises.[125] The case centered on Jackson Nascimento and Stonehurst, a local street gang that controlled Stonehurst Street in Boston, Massachusetts.[126] Nascimento was a member of Stonehurst, a bitter rival of a similarly local street gang known as Wendover.[127] Between 1998 and 2000, a wave of violence transpired between the two street gangs.[128] Members of Stonehurst repeatedly shot and killed members of Wendover, and members of Wendover retaliated in an equally violent fashion.[129] In 2004, thirteen members of Stonehurst, including Nascimento, were charged with violating RICO.[130] The indictment alleged that Stonehurst's primary purpose was to shoot and kill those individuals associated with Wendover.[131] There was no evidence that Stonehurst or its members participated in any other criminal activity.[132] Stonehurst did not traffic drugs, extort, rob, or otherwise engage in crimes of a commercial nature.[133] Nascimento was convicted of racketeering and racketeering conspiracy in violation of RICO.[134] The jury concluded that he shot one rival gang member and conspired to kill others.[135] Nascimento appealed.[136]

In this case, the First Circuit reluctantly diverged from the Sixth Circuit's holding in *Waucaush*.[137] The court ruled that RICO's jurisdictional element required only a *de minimis* nexus to interstate

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[125] 491 F.3d 25, 30 (1st Cir. 2007).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 30-31.
[133] *Id.* at 30 n.1.
[134] *Id.* at 31.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 30.

commerce even where the defendant was involved with a non-economic intrastate enterprise.[138] In reaching its conclusion, the court dispatched of the Sixth Circuit's reasoning set forth in *Waucaush*, analyzed RICO under *Raich*,[139] and determined, based on the evidence before it, that Stonehurst had a *de minimis* effect on interstate commerce.[140]

Nascimento urged the court to adopt the Sixth Circuit's evidentiary standard for RICO's jurisdictional element.[141] In *Waucaush*, the Sixth Circuit held that the Government must demonstrate substantial effects on interstate commerce in cases involving non-economic racketeering activity and a non-economic intrastate enterprise.[142] After an analysis of the statute's text and legislative history, the First Circuit found no reason to follow *Waucaush*.[143] Correctly, the court noted that the Sixth Circuit improperly employed the doctrine of constitutional avoidance.[144] The doctrine of constitutional avoidance, it wrote, does not permit the courts to interpret a statute in such a way that "give[s] alternative meanings to statutory phrases in cases in which a statute's application might be constitutionally dubious."[145] To the contrary, when, after a proper textual analysis, a statute is susceptible to more than one construction, the doctrine

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[138] *Id.* at 37.

[139] *See infra* Part IV.B.

[140] *Id.* at 38.

[141] *Id.*

[142] *Id.* at 37.

[143] *Id.* at 38.

[144] *Id.*

[145] *Id.* (citing Clark v. Martinez, 543 U.S. 371, 384 (2005)). One commentator supporting the Sixth Circuit's application of the constitutional avoidance doctrine in *Waucaush* wrote that "[r]equiring a substantial effect for non-economic enterprises does not render the statute a chameleon; it simply says that enterprises that fall outside the spirit of the Act must meet a higher threshold to qualify under the language of the Act." Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2110 (2008) (citation omitted). To the contrary, this statement describes perfectly a chameleonic statute. Under this posited regime of statutory interpretation, a particularized statutory interpretation might include within that statute's reach circumstances that would otherwise be excluded, or exclude from that statute's reach circumstances that would otherwise be included.

A statute must be interpreted evenly and uniformly; it either applies or it does not. *See Clark*, 543 U.S. at 383-84. To satisfy RICO's jurisdictional element, *Waucaush* required a *de minimis* effect on interstate commerce when the enterprise at issue engaged in economic activity; and it required a substantial effect on interstate commerce when the enterprise at issue did not engage in economic activity. Waucaush v. United States, 380 F.3d 251, 258 (6th Cir. 2004). The defendant dictated RICO's interpretation and application. *See id.* This method of statutory interpretation is inconsistent with the constitutional avoidance doctrine. *See Clark*, 543 U.S. at 383-84. It would have been proper if the Sixth Circuit required a substantial effect on interstate commerce in every RICO case. *See id.* The existing dichotomy, though, is problematic.

of constitutional avoidance exists to evoke the construction that avoids a constitutional question.[146] That construction is then applied evenly in every circumstance.[147] The First Circuit had already defined RICO's jurisdictional element as requiring only a *de minimis* effect on interstate commerce.[148] Bound by precedent, it could not now alter that definition.[149] Therefore, RICO required only a *de minimis* effect on interstate commerce for non-economic racketeering activity perpetrated by an individual associated with a non-economic intrastate enterprise.[150]

The First Circuit then considered whether the evidence presented at trial was sufficient to establish Stonehurst's *de minimis* effect on interstate commerce.[151] The record indicated that a member of Stonehurst traveled out of state to purchase one of the nine firearms shared by others in the gang.[152] Crossing state lines to make a commercial transaction is an activity encompassed by the commerce power.[153] This evidence satisfied RICO's *de minimis* standard.[154] The fact that the other weapons used by Stonehurst had traveled through interstate commerce, the fact that one of the shootings perpetrated by Stonehurst had temporarily, though insignificantly, closed a business engaged in interstate commerce, and the fact that members of the gang used cell phones to communicate only bolstered the court's position.[155]

D. HIGHER THRESHOLD FOR THE *DE MINIMIS* STANDARD

Currently, RICO's jurisdictional hook is an element of any substantive RICO prosecution[156] and must be proved beyond a reasonable doubt in each case.[157] The federal government can establish a sufficient nexus to interstate commerce by presenting evidence regarding the defendant's enterprise or the defendant's individual acts of racketeering.[158] If the

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[146] *Clark*, 543 U.S. at 384.

[147] *Id.* at 383.

[148] *Nascimento*, 491 F.3d at 39.

[149] *Id.*

[150] *Id.* at 37.

[151] The court employed heightened scrutiny in making this determination because Stonehurst was not engaged in activity of an economic nature. *Id.* at 43.

[152] *Id.* at 45.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *See, e.g.*, United States v. Farmer, 924 F.2d 647, 651 (7th Cir. 1991).

[157] *See, e.g.*, United States v. Espinoza, 52 F. App'x 846, 847 (7th Cir. 2002).

[158] *See* United States v. Robertson, 514 U.S. 669, 671-72 (1995) (finding the defendant's gold mine, the alleged RICO enterprise, sufficiently engaged in interstate commerce because it employed individuals from other states and used supplies that traveled through interstate

Government seeks to establish a sufficient nexus between interstate commerce and the defendant's enterprise, it can do so in one of two ways.[159] First, it can present evidence demonstrating that the defendant's enterprise was engaged in interstate commerce.[160] To be considered "engaged in interstate commerce," the enterprise itself must be "'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'"[161] The Government can also present evidence demonstrating that the enterprise's activities affected interstate commerce.[162] Alternatively, the Government can present evidence that establishes a sufficient nexus between interstate commerce and the defendant's individual racketeering or predicate acts.[163] The Government is not required to prove beyond a reasonable doubt that both the enterprise and the individual acts of racketeering affected interstate commerce.[164]

The Supreme Court has addressed RICO's jurisdictional element only once, in *United States v. Robertson*, decided five days after *Lopez*.[165] The Court concluded that the defendant's enterprise had engaged in interstate commerce.[166] It did not, therefore, consider whether the enterprise's activities met, or needed to meet, the requirement of substantially affecting interstate commerce to satisfy RICO's jurisdictional element.[167] The Supreme Court has not provided the lower federal courts with any additional guidance on whether to apply the affecting interstate commerce standard or the substantially affecting interstate commerce standard.

Historically, the Government needed to provide evidence sufficient to establish only a *de minimis* nexus between interstate commerce and the

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commerce); United States v. Johnson, 440 F.3d 832, 836 (6th Cir. 2006) (finding that defendants burned several houses that, though intrastate, were sufficiently involved in interstate commerce); United States v. Juvenile Male, 118 F.3d 1344, 1349 (9th Cir. 1997) (finding that defendants robbed several Subway restaurants and that those robberies sufficiently affected interstate commerce).

[159] *Robertson*, 514 U.S. at 671-72.

[160] *Id.*

[161] *Id.* at 672 (quoting United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975)).

[162] *Id.* at 671; *see* United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001) (finding that the activities of an Ohio-based RICO enterprise sufficiently affected interstate commerce because the enterprise purchased Pennsylvania lottery tickets).

[163] Bagley et al., *supra* note 33, at 918.

[164] *Id.*

[165] *Robertson*, 514 U.S. 669.

[166] *Id.* at 671-72.

[167] *Id.* The Court noted that "the 'affecting commerce' test was developed . . . to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects." *Id.* at 671.

defendant's enterprise or individual predicate acts.[168] Since *United States v. Lopez*, countless defendants have argued that in order to prove RICO's jurisdictional element, the Government must demonstrate that the defendant's enterprise or individual racketeering acts had a substantial effect on interstate commerce.[169] The federal circuit courts have almost uniformly rejected this proposition.[170] Many[171] have relied on the principle set forth by the Supreme Court in a footnote in *Maryland v. Wirtz*: "[W]here 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."[172] Because RICO is a general regulatory scheme that bears a substantial relation to interstate commerce, the *de minimis* economic character of the individual instances of racketeering or an enterprise's activities is of no consequence.[173]

In most RICO prosecutions, ample evidence exists to establish a *de minimis* nexus between interstate commerce and either the enterprise or the individual predicate acts. Often, the Government can even demonstrate that the defendant's enterprise or individual predicate acts had substantial effects on interstate commerce. Many of the enterprises involved in RICO prosecutions engage in economic activity or participate in activities that affect interstate commerce.[174] They purchase large quantities of goods that have traveled through interstate commerce or employ service providers that originate out of state.[175] Many also perpetrate crimes that are commercial in

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[168] *See* United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981) ("The effect on commerce is an essential element of a RICO violation, but the required nexus need not be great. A minimal effect on interstate commerce satisfies this jurisdictional element."); United States v. Barton, 647 F.2d 224, 233 (2d Cir. 1981); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979).

[169] *See, e.g.*, United States v. Marino, 277 F.3d 11, 33-34 (1st Cir. 2002).

[170] *See* United States v. Delgado, 401 F.3d 290 (2005); *Marino*, 277 F.3d 11; United States v. Riddle, 249 F.3d 529 (6th Cir. 2001); United States v. Gray, 137 F.3d 765 (4th Cir. 1998); United States v. Torres, 129 F.3d 710 (2d Cir. 1997); United States v. Juvenile Male, 118 F.3d 1344 (9th Cir. 1997); United States v. Maloney, 71 F.3d 645 (7th Cir. 1995).

[171] *See, e.g., Maloney*, 71 F.3d at 663.

[172] 392 U.S. 183, 196 n.27 (1968).

[173] United States v. Nascimento, 491 F.3d 25, 43 (1st Cir. 2007); *see also* United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is not an essential part of a larger regulation of economic activity . . . . It cannot, therefore be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."); Perez v. United States, 402 U.S. 146, 154 (1971) (holding a federal law criminalizing loan sharking constitutional as applied to individual instance of intrastate loan sharking).

[174] United States v. Robertson, 514 U.S. 669, 670 (1995) (entering business contract with individual out of state, investing in facilities out of state, and conducting business operations out of state constitute being engaged in interstate commerce).

[175] *See, e.g., id.* at 669.

nature. They deal drugs, launder money, rob, extort, or gamble.[176] These activities affect interstate commerce. Additionally, many enterprises are multi-state in membership.[177] Their communications and regularly conducted business cross state lines, affecting interstate commerce in the process.[178] Under these circumstances and by virtue of the aggregation principle, the *de minimis* standard does not necessarily offend the principles set forth in *Lopez* and *Morrison.*

A *de minimis* nexus to interstate commerce is an evidentiary standard not unique to RICO. It is shared by many other federal criminal laws.[179] With respect to these statutes, the standard has been upheld against the same type of *Lopez* and *Morrison* challenges that have been levied against RICO.[180] However, in some cases the federal courts have retreated from the *de minimis* standard's strict application.[181] In *United States v. Wang*, the Sixth Circuit recognized the traditionally low threshold required by the *de minimis* standard in Hobbs Act cases.[182] The Hobbs Act states: "[W]hoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both."[183] When an enumerated offense is directed at a

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[176] *See, e.g.*, United States v. Espinoza, 52 F. App'x 846, 849 (7th Cir. 2002) (finding a RICO enterprise where defendant's gang was involved in marijuana trafficking).

[177] *See, e.g.*, United States v. Crenshaw, 359 F.3d 977, 991 (8th Cir. 2004) (involving a defendant who was a member of a Minnesota unit of a larger, national gang based in California).

[178] *See Nascimento*, 491 F.3d at 45 ("[C]rossing state lines for purpose of engaging in a commercial transaction is a paradigmatic example of an activity that falls within the compass of the commerce power.").

[179] *See, e.g.*, 18 U.S.C. § 844(i) (2006); 18 U.S.C. § 1951(a) (2006); *see also* Bradley, *supra* note 16, at 592-610

[180] United States v. Baylor, 517 F.3d 899, 901-04 (6th Cir. 2008) (rejecting *Lopez* and *Morrison* challenges to *de minimis* standard applied under the Hobbs Act, and citing like decisions made by other federal circuits).

[181] Jones v. United States, 529 U.S. 848, 857 (2000); United States v. Davis, 473 F.3d 680, 682 (6th Cir. 2007) (citing United States v. Wang, 222 F.3d 234 (6th Cir. 2000)); *see also, e.g.*, Bradley, *supra* note 16, at 592-8 (arguing that robbery or extortion of private individuals not in the course of business should not be subject to federal jurisdiction); Kelly D. Miller, Recent Development, *The Hobbs Act, The Interstate Commerce Clause, and* United States v. McFarland*: The Irrational Aggregation of Independent Local Robberies to Sustain Federal Convictions,* 76 TUL. L. REV. 1761, 1773-74 (2002) (arguing that the speculative, miniscule and future impact of local robberies on interstate commerce does not sufficiently affect interstate commerce and should not qualify for federal jurisdiction under the Hobbs Act); Thomas Heyward Carter, III, Note, *The Devil in* U.S. v. Jones*: Church Burnings, Federalism, and a New Look at the Hobbs Act,* 59 WASH. & LEE L. REV. 1461, 1490-1500 (2002) (noting, and arguing for the consistent avoidance of, the constitutional questions raised by an expansive reading of the Federal Arson Act and the Hobbs Act).

[182] *Wang*, 222 F.3d at 237.

[183] 18 U.S.C. § 1951(a).

business establishment, the court observed that the Government need only demonstrate a realistic probability that the offense had an effect on interstate commerce.[184] The court recognized, though, that when the criminal act is directed at a private citizen, the required showing is of a different order.[185] For example, the robbery of a private citizen that causes only a speculative effect on interstate commerce will not satisfy the *de minimis* standard.[186] In *Wang*, the defendants robbed two private citizens of $4,200 in their home.[187] The court refused to "pile inference upon inference" to establish an effect on interstate commerce, and reversed the defendant's conviction, finding no violation of the Hobbs Act.[188] "[U]pholding federal jurisdiction over Wang's offense would . . . acknowledge a general federal police power with respect to the crimes of robbery and extortion."[189]

The Federal Arson Act also contains a jurisdictional element that is similar to RICO's. It has, on occasion, been narrowly construed. In *Jones v. United States*,[190] the Supreme Court employed tools of statutory construction to limit the statute's reach. Under the Federal Arson Act, it is a crime to damage or destroy "by means of fire or an explosive . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[191] The Supreme Court recognized that with an expansive reading of the statute's jurisdictional element, "hardly a building in the land would fall outside the federal statute's domain."[192] A construction of this sort would render traditionally local criminal conduct, arson, a matter for federal enforcement.[193] The Court called on the doctrine of constitutional avoidance and narrowly construed the Federal Arson Act to circumvent this constitutionally dubious conclusion. The majority keyed in on the term *used*, and held that the statute applied to only those buildings that were actively employed in commercial purposes.[194]

Expansive readings of the Hobbs Act and the Federal Arson Act raise troubling constitutional questions that are analogous to those raised by an expansive reading of RICO. All three statutes regulate certain criminal

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[184] *Wang*, 222 F.3d at 237.
[185] *Id.* at 238.
[186] *Id.* at 239.
[187] *Id.* at 241.
[188] *Id.* at 239-40 (internal quotations and citations omitted).
[189] *Id.*
[190] 529 U.S. 848 (2000).
[191] 18 U.S.C. § 844(i) (2006).
[192] *Jones*, 529 U.S. at 857.
[193] *Id.* at 858.
[194] *Id.* at 855.

conduct for its effects on interstate commerce and not for the criminal conduct per se. All three contain a jurisdictional element that links the regulated criminal conduct to interstate commerce. All three, when liberally construed, are sweeping and pervasive in the individuals, enterprises, and acts they regulate. If their jurisdictional element is expansively read, all three have the potential to blur the line between what is truly local and what is truly national, and to essentially regulate traditionally local criminal conduct for its incidental effects on interstate commerce. In *Lopez* and *Morrison*, the Supreme Court expressly rejected this use of Congress's commerce power.

As with the Hobbs Act and the Federal Arson Act, the federal courts should interpret RICO's jurisdictional element to reconcile the statute's text with the enumerated nature of Congress's commerce power. While it would be a jurisprudential sea change to require that the government prove substantial effects on interstate commerce to prosecute a RICO violation, the federal courts, as they have with the Hobbs Act and the Federal Arson Act, should exercise some restraint in analyzing RICO's jurisdictional element.[195]

Since RICO's jurisdictional element is an evidentiary standard, this restraint must manifest in an evidentiary threshold. In every case, the federal courts should hold the state to a higher evidentiary threshold than what has traditionally satisfied the *de minimis* standard. The *de minimis* standard should have some teeth. When the enterprise or individual acts of racketeering have only a potential or speculative affect on interstate commerce, RICO's jurisdictional element should not be satisfied.[196] In other words, evidence showing only violent crime, cell phone use, email use, or a small number of shared weapons or vehicles should be insufficient to establish a *de minimis* connection to interstate commerce. The stricter *de minimis* standard will excise from RICO's reach those cases that involve

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[195] The First Circuit hinted at the need for exercising some caution. United States v. Nascimento, 491 F.3d 25, 43 (1st Cir. 2007) ("Because Stonehurst had not been engaged in racketeering activity of an economic nature, we employ heightened scrutiny throughout this examination."). The First Circuit also noted the constitutional questions that might arise from an expansive reading of RICO's jurisdictional element. *Id.* at 41 ("We share appellants' concern that the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern."); *see also* United States v. McFarland, 311 F.3d 376, 409 (5th Cir. 2002) (en banc) (discussing the need for a "meaningful and rational basis for aggregation" when the criminal activity suppressed by federal statute is essentially local violent crime).

[196] This incidental effects standard has received support from the Ninth Circuit. Musick v. Burke, 913 F.2d 1390, 1398 (9th Cir. 1990) ("That is to say, RICO jurisdiction ends where local activities have incidental effects on interstate commerce, exactly at the point where Sherman Act jurisdiction ends.").

defendants who commit non-economic racketeering activity on behalf of non-economic intrastate enterprises without requiring proof of a substantial effect on interstate commerce. Moreover, it does not resemble the misapprehension of the doctrine of constitutional avoidance employed in *Waucaush*, as it would apply evenly in every circumstance.

IV. RICO AND THE REGULATORY NET

A. *GONZALES V. RAICH*

The extrapolation by lower courts of the Supreme Court's holding in *Gonzales v. Raich* may undermine the import of RICO's jurisdictional element.[197] In *Raich*, the Supreme Court held that Congress may regulate any intrastate activity that is rationally included within, and an essential part of, a larger and valid regulatory scheme.[198] In so doing, the Court suggested that Congress need not legislate with a jurisdictional element.[199] It implied that Congress may regulate an intrastate activity even where an individual instance would not otherwise satisfy a preexisting jurisdictional element.[200]

Raich concerned the Controlled Substances Abuse Act (CSA), a federal statute that criminalized the manufacture, distribution, or possession of marijuana.[201] The CSA did not contain a jurisdictional element.[202] The respondents conceded that the CSA was facially valid, but argued that its blanket prohibition exceeded Congress's commerce power as applied to the intrastate manufacture and possession of medicinal marijuana pursuant to state law.[203] The Court rejected their position.[204]

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[197] *See* Stuckey, *supra* note 15, at 2126-27 ("Even if Congress chooses to utilize the *Raich* net when drafting statutes from this point forward, it has already cast its power using a jurisdictional hook in a significant number of statutes. Does *Raich* permit courts to disregard the case-specific hooks and use the *Raich* net to catch intrastate and interstate activity alike, regardless of whether the regulated activities would be 'keepers' using solely a hook? Or should the CSA in *Raich* be distinguished from statutes containing jurisdictional elements, thereby requiring courts to ignore the *Raich* principle when a jurisdictional hook is present? Several courts of appeals have already confronted these questions (explicitly or implicitly) and approached the issue in different ways, and the Supreme Court has vacated and remanded at least two cases involving as-applied challenges to jurisdictional elements for review in light of *Raich*." (footnote omitted)).

[198] Gonzales v. Raich, 545 U.S. 1, 26-27 (2005).

[199] Stuckey, *supra* note 15, at 2102.

[200] *Id.* at 2104.

[201] *Raich*, 545 U.S. at 14.

[202] *Id.*

[203] *Id.* at 15.

[204] *Id.* at 24.

The Court assessed whether Congress had exceeded its authority under the Commerce Clause as applied to the facts of the case. The majority stressed that it need not determine whether respondents' activities, when taken in the aggregate, substantially affected interstate commerce in fact, but only whether a rational basis existed for so concluding.[205] The Court noted that the *de minimis* character of individual instances arising under a general regulatory scheme is of no consequence so long as the general regulatory scheme bears a substantial relationship to interstate commerce.[206] Drawing from its holding in *Wickard v. Filburn*, the Court reiterated that Congress can regulate a purely intrastate activity that is not itself "commercial" or produced for sale, if failure to do so "would undercut the regulation of the interstate market in that commodity."[207]

In reaching its decision, the Court focused on a primary purpose of the CSA, to effectively control the nationwide supply and demand of marijuana.[208] According to the court, "the regulation [was] squarely within Congress's commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity."[209] As such, the Court believed that Congress had a rational basis for incorporating the intrastate manufacture and possession of marijuana in the CSA.[210]

Respondents supported their contrary position—that the intrastate manufacture and possession of medicinal marijuana was a separate and distinct class of activity, isolated from the interstate market by state law and state enforcement, and not an essential part of the larger regulatory scheme[211]—with arguments that relied heavily on *Lopez* and *Morrison*.[212] The Court quickly distinguished those cases because they involved facial challenges to the constitutionality of two federal statutes.[213] The majority also highlighted key differences between the CSA and the regulations in *Lopez* and *Morrison*.[214] Unlike the isolated prohibition set forth in § 922(q)(1)(A) of the Gun-Free School Zones Act, regulating marijuana is

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[205] *Id.* at 22.

[206] *Id.* at 17.

[207] *Id.* at 18 (citing Wickard v. Filburn, 317 U.S. 11 (1942)).

[208] The Court analogized the purpose and factual circumstance of the CSA to the statute regulating wheat that was at issue in *Wickard v. Filburn*. *Id.* at 19 (citing *Wickard*, 317 U.S. 11).

[209] *Id.*

[210] *Id.* at 22.

[211] *Id.* at 30.

[212] *Id.* at 23.

[213] *Id.*

[214] *Id.* at 24.

one of the many essential parts of the CSA's larger regulation of drug-related economic activity.[215] The larger regulatory scheme would be undercut unless the intrastate manufacture and possession of marijuana were regulated.[216] As opposed to § 13981 of the Violence Against Women Act, the CSA regulates a quintessentially economic activity.[217] *Lopez* and *Morrison* shed no doubt on the constitutionality of the CSA.[218] After discussing the characteristics of the respondents' purported class of activity, the majority had no difficulty in concluding that it was rationally included within, and an essential part of, a larger regulatory scheme.[219]

In dissent, Justice O'Connor criticized the Court's decision for allowing Congress to set the terms of constitutional debate through strategic legislative design.[220] The majority's decision suggests that Congress could regulate local activity without impunity, so long as it did so with an ambitious, all-encompassing federal regulation.[221] Any meaningful limit on the commerce power is removed when Congress is permitted to package regulation of local activity in larger regulatory schemes.[222] Justice O'Connor argued that such a holding reduces *Lopez* to nothing more than a drafting guide.[223]

B. *RAICH* AND ITS IMPLICATIONS FOR RICO

Because the CSA did not contain a jurisdictional element, federal courts have wrestled with how *Raich*'s principles apply, if at all, to statutes that do.[224] Generally, the federal courts have applied *Raich* with varying deference.[225] In some cases, federal courts have upheld the constitutionality of a particular statute as applied to an individual instance of the regulated activity regardless of its effects on interstate commerce.[226] The

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[215] *Id.*

[216] *See id.* at 24.

[217] *Id.* at 25.

[218] *Id.*

[219] *Id.* at 26-27. The characteristics of the respondents' purported class and the Court's analysis of them are discussed *infra* at Part IV.C.3.

[220] *Id.* at 46 (O'Connor, J., dissenting).

[221] *Id.* at 45.

[222] *Id.*

[223] *Id.* at 46.

[224] Stuckey, *supra* note 15, at 2104.

[225] *Id.*

[226] The Eleventh, Tenth, Ninth, Sixth, and Fourth Circuits have applied *Gonzales* to cases involving the Child Pornography Prevention Act. Stuckey, *supra* note 15, at 2128-30. This Act prohibits the possession of child pornography that has "been mailed, or shipped or transported in interstate" commerce. 18 U.S.C. § 2252 (2006). Each Circuit held that Congress had a rational basis for concluding that the regulation of intrastate possession of

jurisdictional element is rendered inconsequential and irrelevant.[227] In a RICO context, this might mean that non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises would violate RICO regardless of whether the racketeering activity or the enterprise had at least a *de minimis* affect on interstate commerce. In the least, it might completely gut any as-applied constitutional challenge.

The First Circuit is the only federal circuit court to analyze RICO under *Raich*.[228] In *United States v. Nascimento*, Nascimento asserted that RICO as applied to non-economic racketeering activity perpetrated by an individual associated with a non-economic intrastate enterprise was unconstitutional.[229] The First Circuit rejected his claim.[230] The court held that a general regulatory statute will be sustained if the statute deals rationally with a class of activity that has a substantial relationship to interstate commerce.[231] It maintained that so long as the class of activity was within the reach of the federal government, it had no power to isolate and exclude individual instances of the class.[232] The court then noted that "'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.'"[233]

The court employed the methodology of *Raich* and focused its analysis on the class of activity that RICO regulates.[234] The First Circuit found racketeering activity to be sufficiently economic in nature because, as a general matter, it "is based largely on greed."[235] It was, therefore, a wholly legitimate target of Congressional legislation.[236] As such, individual instances of racketeering activity, even those that are intrastate or of non-

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child pornography was an essential part of the statute's comprehensive scheme to eliminate the interstate market for child pornography. Stuckey, *supra* note 15, at 2128-30. These decisions have rendered the Act's jurisdictional element inconsequential and irrelevant. *Id.* It did not matter that the individual instance of child pornography possession failed to meet the statute's jurisdictional element. *Id.*

[227] Stuckey, *supra* note 15, at 2128-30.

[228] A search of LexisNexis for "Gonzales v. Raich" and "racketeer influenced" in the federal circuit courts returned only *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007).

[229] *Nascimento*, 491 F.3d at 40.

[230] *Id.* at 43.

[231] Stuckey, *supra* note 15, at 2128-30.

[232] *Id.*

[233] *Nascimento*, 491 F.3d at 42 (quoting United States v. Morales-de Jesus, 372 F.3d 6, 18 (1st Cir. 2004) (omissions in original)).

[234] Gonzales v. Raich, 545 U.S. 1, 42 (2005).

[235] *Nascimento*, 491 F.3d at 43.

[236] *Id.*

economic character, cannot be excised from RICO's purview.[237] The First Circuit deferred to "Congress's rational judgment, as part of its effort to crack down on racketeering enterprises, to enact a statute that targeted organized violence" because organized violence is so obviously tied to racketeering activity.[238] It held that applying RICO to racketeering activity predicated on non-economic crime did not offend the Commerce Clause.[239]

C. NO RATIONAL BASIS FOR CONGRESS TO INCORPORATE

The First Circuit erred in *Nascimento* when it held that *Raich* governed RICO in any as-applied constitutional challenge.[240] It found that regulating non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises was an essential part of RICO's larger regulatory scheme and that Congress had a rational basis for so concluding.[241] However, the court failed to recognize three key distinctions

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[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] The First Circuit did not, though, explicitly discount or undercut RICO's jurisdictional element. It still determined whether the Government had proved that element of the offense. *Nascimento*, 491 F.3d at 43-45.

[241] According to one critique, the First Circuit failed to fully appreciate RICO's jurisdictional element as evidence of Congressional intent. Recent Case, United States v. Nascimento, *491 F.3d 25 (1st Cir. 2007)*, 121 HARV. L. REV. 1961, 1964 (2008). RICO's jurisdictional element demonstrates that Congress did not intend to regulate racketeering activity comprehensively. *Id.* The State must prove, as an element of the offense, the jurisdictional element in a substantive RICO charge. *Id.* Constitutional regulation of racketeering activity, therefore, is ensured through case-by-case inquiry. *Id.* Racketeering activity that does not meet RICO's jurisdictional element is removed from the statute's regulatory scheme without undercutting it. *Id.* Thus, *Gonzales* should never apply to RICO. *Id.* This critique is sound.

For a version of this logic as applied to the Hobbs Act, see *United States v. Parkes*, 497 F.3d 220, 230 (2d Cir. 2007) ("We now reject the proposition . . . that findings recited by Congress in the CSA, dispense with the need for a jury finding that each element of the Hobbs Act has been proven beyond a reasonable doubt. This proposition conflates distinct inquiries. Under the CSA, an effect on interstate commerce is *not* an element; so the inquiry for the Court was the sufficiency of findings by Congress to support that legislative act. Under the Hobbs Act, an effect on interstate commerce *is* an element of the offense; so the inquiry for this Court is the sufficiency of evidence to support a jury finding on that point.").

Whether it is ultimately persuasive, though, may depend on one's frame and analytical point of origin. The "affecting commerce" language has been interpreted as a "jurisdictional term of art that indicates a Congressional intent to assert its full Commerce Clause power." United States v. Carter, 981 F.2d 645, 647 (2d Cir. 1992) (citing Scarborough v. United States, 431 U.S. 563, 571 (1977)). With the "affecting commerce" language employed in RICO, one might conclude that Congress intended to regulate racketeering activity with its full Commerce Clause power. One might conclude that Congress, exploiting its full Commerce Clause power, intended to regulate RICO as comprehensively as it intended to regulate marijuana. Further, as evidenced by the First Circuit, applying *Gonzales* to RICO

between RICO and the statute at issue in *Raich*, and greatly underestimated the importance of these distinctions.[242]

1. Commodity Versus Conduct

In *Raich*, the CSA regulated a fungible commodity.[243] The First Circuit recognized this factual distinction, but refused to accord it "decretory significance."[244] A close reading of *Raich*, however, reveals that it was exactly the characteristics of a fungible commodity that, in the Supreme Court's opinion, provided Congress with the rational basis to reach its conclusion about the CSA's breadth.

The CSA controlled the interstate market for a fungible commodity, marijuana.[245] The Court was troubled by the apparent impact that home-grown medicinal marijuana would have on the drug's nationwide supply and demand.[246] The majority was also bothered by the ease with which intrastate medicinal marijuana could find its way into the stream of interstate commerce.[247] The Court believed that intrastate medicinal marijuana would never be more than a moment from interstate commerce.[248] With marijuana's high street demand, any intrastate stash could be effortlessly drawn out and injected into the flow of interstate commerce.[249]

RICO controls the figurative interstate market for racketeering activity. Racketeering activity, however, is not a fungible commodity—it is an action or behavior. The interstate market for racketeering activity is not like the interstate market for marijuana. The same market concerns, pressures, demands, and exchanges do not exist. Racketeering activity is transactional and finite. Unlike marijuana, intrastate racketeering activity cannot be resold on the interstate market. It cannot be easily drawn out and

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and maintaining the jurisdictional hook as an element of the offense are not mutually exclusive. The jurisdictional element can be viewed as a limit on *Raich*, and not a dispositive impediment to the application of its principles. In other words, though Congress, under *Raich*, may constitutionally regulate non-economic "racketeering activity" perpetrated by an individual associated with a non-economic, intrastate enterprise, the State must still prove beyond a reasonable doubt a minimal effect on interstate commerce to obtain a conviction.

[242] Though he relies more heavily on the Court's definition of economic activity, Mr. D'Angelo and I ultimately reach the same conclusion on this issue.

[243] *Nascimento*, 491 F.3d at 42.

[244] *Id.*

[245] Gonzales v. Raich, 545 U.S. 1, 19 (2005).

[246] *Id.*

[247] *See id.* at 25-31.

[248] *See id.*

[249] *Id.* at 19.

injected into the stream of interstate commerce and, as opposed to a nondescript fungible commodity, it is never a thin veil away from the flow of interstate commerce.

2. Purpose and Enforcement

The Court in *Raich* was troubled by the difficulty in determining the intended purposes and origins of two quantities of the same fungible commodity.[250] Functionally, medicinal marijuana is the same as marijuana intended for recreational use.[251] Medicinal marijuana grown locally is the same as recreational marijuana grown out of state. Administratively, it is virtually impossible to quickly distinguish one from the other.[252]

It would not, however, be difficult for law enforcement to determine the purposes and origins of two instances of racketeering activity. Individual instances of racketeering activity are sufficiently distinct. Non-economic violent racketeering activity differs from racketeering activity predicated on commercial crime. Racketeering activity perpetrated in furtherance of a non-economic intrastate enterprise is different from racketeering activity perpetrated in furtherance of an economic interstate enterprise. One cannot be mistaken for the other. Additionally, RICO was designed to help federal prosecutors put forth a coordinated effort against enterprise criminality.[253] The multi-jurisdictional nature of interstate racketeering activity made it difficult for state officials to prosecute such conduct.[254] State officials, though, have no problem prosecuting those defendants who are associated with non-economic intrastate enterprises and who commit non-economic violent racketeering activity. Most states, in fact, have enacted their own versions of RICO to address this specifically.[255]

3. Separate and Distinct Class of Activity

In determining constitutionality, the First Circuit found that the majority in *Raich* "emphasized that it [was] the 'class of activity' that [was]

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[250] *Id.* at 22.

[251] *Id.*

[252] *Id.* at 22, 32.

[253] *See* Lynch, *supra* note 47, at 923 ("Such multi-state activity may be difficult to prosecute efficiently under conventional doctrines of criminal law and procedure. Substantive criminal acts may be committed in a variety of jurisdictions, making it impossible to join all related transactions in the same venue.").

[254] *Id.*

[255] JOHN E. FLOYD, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (1998).

relevant."[256] This is not entirely accurate, however. The majority in *Raich* often referred to an *economic* "class of activity."[257] The Supreme Court defined *economic* as dealing with the production, distribution, or consumption of a commodity.[258] The CSA made it unlawful to manufacture, distribute, dispense, or possess any of the enumerated controlled substances, including marijuana.[259] The statute was exclusively economic in nature.[260] It regulated exclusively an economic "class of activity"; and, thus, Congress had the power to regulate purely local instances of that activity.[261]

RICO, on the other hand, does not exclusively address an *economic* class of activity. Racketeering activity is considered economic because it can be defined by crimes of a commercial nature. Because it is so defined, racketeering activity, as a class of activity, substantially affects interstate commerce. However, racketeering activity is not consumed by the production, distribution, and consumption of a commodity. It is not of the same economic nature as, for example, marijuana, and it does not have substantial effects on interstate commerce in the same economic way as does the production, distribution, and consumption of marijuana. Moreover, racketeering activity, as a class of activity, can be entirely non-economic. It can consist of entirely non-economic violent crime. This should give federal courts some pause when analogizing the CSA to RICO. Otherwise, *Lopez* and *Morrison* melt into the strategic drafting guide that so greatly concerned Justice O'Connor's dissent in *Raich*. So long as Congress defined the regulated class of activity to be or include *some* activity that was commercial in nature, Congress could regulate all instances of local violent crime.

For the reasons already mentioned, non-economic racketeering activity perpetrated by an individual associated with a non-economic intrastate enterprise is compellingly separate and distinct from the economic class of activity regulated by RICO. This fact distinguishes non-economic intrastate racketeering activity from the intrastate loan sharking discussed in *Perez v. United States*.[262] Loan sharking can only be commercial in nature.[263] There is no form of loan sharking that involves only non-economic violent

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[256] United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007).
[257] *Raich*, 545 U.S. at 25-27.
[258] *Id.* at 26.
[259] *Id.* at 24.
[260] *Id.* at 26.
[261] *Id.* at 17.
[262] 402 U.S. 146 (1971).
[263] *Id.* at 147.

crime.[264] It must, by definition, include an extortionate credit transaction.[265] Individual instances of intrastate loan sharking are no different in character than the economic class of activity regulated by the federal statute. The only difference between an individual instance of loan sharking and loan sharking that substantially affects interstate commerce is scale. Loan sharking is therefore subject to the aggregation principle; individual instances of the class cannot be excised as trivial.[266]

Thus, the regulatory scheme established in RICO would not be undercut by failing to regulate non-economic intrastate enterprises perpetrating non-economic violent racketeering activity. Congress had no rational basis for concluding otherwise. The aforementioned demonstrates that *Raich* is distinguishable, and should not govern RICO in an as-applied constitutional challenge. Alternatively, if *Raich* is the reigning test of constitutionality, then RICO as applied to individuals who commit non-economic racketeering activity on behalf of non-economic intrastate enterprises is unconstitutional.

V. CONCLUSION

In *Waucaush v. United States* and *United States v. Nascimento*, the Sixth and First Circuits Courts of Appeal, respectively, examined the jurisdictional element of § 1962(c) of RICO.[267] The Sixth Circuit held that despite the statute's text, non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises must substantially affect interstate commerce to violate RICO.[268] The First Circuit diverged from that opinion and held that non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises must only minimally affect interstate commerce to violate RICO.[269] Traditionally, the *de minimis* standard is a very low evidentiary threshold.

Though the majority of circuits agree with the First Circuit, the federal courts should exercise some restraint when applying the *de minimis* standard in light of the principles set forth in *Lopez* and *Morrison*. A rigid application of the *de minimis* standard in this type of RICO case raises several constitutional concerns. The federal courts therefore should require more than a speculative or incidental effect on interstate commerce, such

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[264] *Id.* at 148.

[265] *Id.*

[266] *Id.* at 154-55.

[267] United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007); Waucaush v. United States, 380 F.3d 251, 256-57 (6th Cir. 2004).

[268] *Waucaush*, 380 F.3d at 256-57.

[269] *Nascimento*, 491 F.3d at 38.

that non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises will not fall under RICO's purview.

As evidenced by the First Circuit's holding in *Nascimento*, the Supreme Court's holding in *Gonzales v. Raich* may impact the future treatment and significance of RICO's jurisdictional element. In *Raich*, the Court held that Congress may regulate a purely intrastate activity that is rationally incorporated into, and an essential part of, a larger regulatory scheme, regardless of the individual instance's nexus to interstate commerce.[270] Though the federal courts have not fully explored this issue, non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises should not be viewed as an essential part of RICO's larger regulatory net. This type of racketeering activity is compellingly separate and distinct from the larger economic class of activity regulated by RICO, and there is no rational basis for Congress to include it within the statute's reach. The principles set forth in *Raich* should not apply, but if they do, RICO as applied to non-economic racketeering activity perpetrated by individuals associated with non-economic intrastate enterprises should be held unconstitutional.

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