

# RICO AND THE COMMERCE CLAUSE: A RECONSIDERATION OF THE SCOPE OF FEDERAL CRIMINAL LAW

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*This Note considers the tension between two recent trends in federal law. On the one hand, the Supreme Court has recently attempted to place limits on the scope of congressional commerce power. On the other hand, the past forty years have seen a rapid expansion of federal criminal law, with many federal criminal statutes relying on the Commerce Clause for their authority. This tension has led to uncertainty regarding the constitutionality of many federal criminal statutes, and general disagreement over the circumstances under which Congress may ever regulate or criminalize intrastate noneconomic activity. An examination of the Supreme Court's Commerce Clause jurisprudence reveals that the Court has answered this question consistently by using a two-step inquiry. If the regulated activity is noneconomic, the Court first asks whether Congress has occupied the field with a regulatory scheme that deals with interstate commercial activity. Second, it asks whether regulation of the noneconomic activity is necessary to prevent the broader regulatory scheme from being undercut. The Note derives this two-step inquiry from the Supreme Court's cases and considers how this understanding would affect the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other federal criminal laws.*

## INTRODUCTION

One of the “first principles” of American constitutional law is that the federal government is limited to its enumerated powers.<sup>1</sup> But courts and commentators are often unsure of the precise contours of those enumerated powers, and they are especially unsure of the limits of congressional power under the Commerce Clause.<sup>2</sup> It appears well settled that Congress has the power to regulate any activity that involves traffic across state lines,<sup>3</sup> as well as activity within a state as long as it is economic in nature.<sup>4</sup> But many congressional statutes, especially criminal statutes, can apply to purely intrastate noneconomic activity, creating significant confusion about whether these applications of congressional power are constitutional.<sup>5</sup> The uncertainty about how to apply the Commerce Clause to federal criminal statutes arises out of two contrasting trends in federal law: The Supreme Court has recently attempted to rein in the congress-

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1. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

2. See *infra* Part II (discussing range of views on scope of commerce power).

3. See *infra* notes 18–21 and accompanying text.

4. See *infra* note 67 and accompanying text.

5. See, e.g., Paul Tzur, Comment, *I Know Economic Activity When I See Economic Activity: An Operational Overhaul of the Measure by Which Federal Criminal Conduct Is Deemed “Economic,”* 94 *J. Crim. L. & Criminology* 1105, 1108 (2004) (“[T]he new Commerce Clause analysis has been haphazardly applied by the lower courts . . .”).

sional commerce power, especially in the area of criminal law,<sup>6</sup> but these attempts have taken place in the wake of a period of rapid federalization of criminal law, with many federal criminal statutes relying on the Commerce Clause for their authority.<sup>7</sup> These two trends stand in tension with one another.

The Racketeer Influenced and Corrupt Organizations Act (RICO), a broad-reaching statute directed at organized crime, is one of the most prominent federal criminal statutes.<sup>8</sup> Many RICO prosecutions target large-scale criminal operations conducting interstate commercial activities.<sup>9</sup> But the statute has also been applied to small-scale localized enterprises that do not engage in economic activity at all.<sup>10</sup> This second, broader understanding of racketeering has created a controversy among the circuit courts over the application of RICO to localized noneconomic criminal activity.<sup>11</sup> Does the Commerce Clause allow Congress to regulate any ongoing criminal conspiracy, no matter how local, or are there limits beyond which congressional power may not reach? This Note argues that the Supreme Court has only approved congressional regulation of intrastate noneconomic activity in particular sets of circumstances, and that courts should usually not permit prosecutors to apply federal criminal statutes to such activity.

Part I of this Note summarizes two recent trends in federal law that are in tension: the expansion of federal criminal law and the Supreme Court's restriction of the scope of federal power under the Commerce Clause. It then examines the specific tensions involved in the circuit split over the use of RICO to prosecute noneconomic criminals. Part II places the controversy in perspective by discussing a variety of competing theories about the meaning of the Commerce Clause. Academic commentators and lower courts alike have struggled to identify a working doctrine, resulting in a wide range of opinions and a number of disagreements

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6. The Court's most important recent Commerce Clause cases have dealt with federal criminal statutes. See *Gonzales v. Raich*, 545 U.S. 1 (2005) (considering congressional power to criminalize narcotics possession and consumption); *Jones v. United States*, 529 U.S. 848 (2000) (arson); *United States v. Morrison*, 529 U.S. 598 (2000) (gender-based violence); *Lopez*, 514 U.S. at 549 (gun possession near schools). For discussion, see *infra* Part I.B.

7. See, e.g., Craig M. Bradley, *Anti-Racketeering Legislation in America*, 54 *Am. J. Comp. L. (Supp.)* 671, 672 (2006) [hereinafter Bradley, *Anti-Racketeering*] ("[T]he commerce clause has been eroded into near meaninglessness by the expansion of federal laws directed at organized crime . . ."); cf. *infra* Part I.A (discussing how federal criminal statutes have relied on increasingly expansive views on the Commerce Clause).

8. 18 U.S.C. §§ 1961–1968 (2000); see also *infra* notes 43–54 and accompanying text.

9. See, e.g., *United States v. Robertson*, 514 U.S. 669 (1995) (involving defendant charged under RICO for investing proceeds of illegal interstate narcotics trafficking operation in Alaskan gold mine).

10. See, e.g., *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007) (involving RICO prosecution of local street gang that did not engage in economic activity).

11. See *infra* Part I.C.

among the circuits over how to follow the direction of the Supreme Court.

In response, Part III returns to the cases in which the Court discusses the “substantial effects” doctrine and finds a surprising consistency in the Court’s reasoning, from the watershed New Deal cases to the more recent jurisprudence embodied in *United States v. Lopez* and its progeny. Time after time, the Court has asked two questions to determine whether Congress has overstepped its constitutionally enumerated powers. First, the Court asks whether Congress has occupied the field with a regulatory scheme that governs a class of interstate economic activity. Second, it asks whether the application of that statute to the particular class of activity in the case at hand is necessary to prevent the overall regulatory scheme from being undercut. Only if the answer to both of these questions is yes will the Court conclude that Congress has acted within its authority under the Commerce Clause. This Note argues that lower courts should explicitly follow this reasoning to ensure greater clarity and uniformity in constitutional interpretation. The balance the Constitution strikes between state and federal governments has long functioned as an important safeguard of individual liberty,<sup>12</sup> and the Court’s recent Commerce Clause cases provide a template for ensuring that this balance endures. The Court’s reasoning leaves Congress with broad latitude to regulate interstate commerce while preventing that power from becoming an unlimited ability to regulate any and all local activity.

## I. THE COLLISION BETWEEN EXPANDING FEDERAL CRIMINAL LAW AND A CONTRACTING VIEW OF THE COMMERCE CLAUSE

While the Supreme Court’s recent cases have given increasing weight to the principle of federalism in constitutional law, the reach of federal criminal law has expanded significantly over the past thirty years. Part I.A discusses the federalization of criminal law and the corresponding significant growth in federal criminal prosecutions. Part I.B examines the Supreme Court’s recent Commerce Clause jurisprudence, paying special attention to *United States v. Lopez*, *United States v. Morrison*, and *Gonzales v. Raich*. Part I.C provides an overview of the resulting disagreements in the circuit courts and in particular of the circuit split over the application of RICO to noneconomic criminal activity.

### A. *The Increasing Federalization of Criminal Law*

1. *Early History of Federal Criminal Law.* — Before the twentieth century, criminal law was not a significant concern of the federal government; rather, it was almost exclusively the province of the state govern-

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12. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991))).

ments.<sup>13</sup> However, as modern technology greatly increased the amount of traffic and communication across state lines, the federal government likewise expanded into the realm of criminal law.<sup>14</sup> Thus, during the Progressive Era, in the first few decades of the twentieth century, Congress “burst out of its cage” by crafting significant criminal statutes which relied on the Commerce Clause.<sup>15</sup> This expansion of federal power provoked constitutional challenges, but the Supreme Court generally upheld the new criminal statutes, often relying on the fact that the statutes were only invoked in those cases where the defendant had traveled across state lines as a part of the criminal plan.

The Mann Act,<sup>16</sup> which prohibited the transportation of women and girls across state lines for immoral purposes, provides an example of how Congress and the Court worked together to expand the reach of federal criminal law. The Court first heard a challenge to the Mann Act in 1913, when Effie Hoke challenged her conviction for transporting another woman across state lines to engage in prostitution.<sup>17</sup> The Court rejected Hoke’s challenge to the Act’s constitutionality, holding that “Congress has power over transportation ‘among the several states’; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”<sup>18</sup> This principle provided at least a small opening for the creation of federal crimes.

Also during the Progressive Era, Congress relied upon the “transportation across state lines” principle to criminalize other interstate traffic that it viewed as immoral, such as shipments of lottery tickets<sup>19</sup> or obscene literature.<sup>20</sup> The most expansive congressional regulation of interstate transport was the Dyer Act, which initially prohibited interstate transport of stolen motor vehicles when it was enacted in 1919, but was amended and broadened in 1948 to criminalize interstate transport of any stolen property worth more than \$5,000.<sup>21</sup>

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13. Lawrence M. Friedman, *Crime and Punishment in American History* 261–62 (1993).

14. *Id.* at 264.

15. *Id.* at 265 (noting that new criminal laws such as the Mann Act and the Dyer Act “seemed to stretch the power of Congress under the ‘interstate commerce’ clause of the Constitution”).

16. Ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2000)). Representative James Robert Mann authored the Act, which was originally entitled the White Slave Traffic Act. See *Caminetti v. United States*, 242 U.S. 470, 497–98 (1917) (McKenna, J., dissenting) (discussing legislative history of Mann Act).

17. *Hoke v. United States*, 227 U.S. 308 (1913).

18. *Id.* at 323 (citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 215 (1885)).

19. See *Champion v. Ames* (Lottery Case), 188 U.S. 321, 363 (1903) (upholding congressional statute criminalizing “carriage of [lottery] tickets from state to state”).

20. Act of Feb. 8, 1897, ch. 172, 29 Stat. 512 (codified as amended at 18 U.S.C. §§ 1461–1462).

21. *Bradley, Anti-Racketeering*, *supra* note 7, at 675–77. The Dyer Act was also challenged as a violation of the Commerce Clause, provoking an explicit discussion by the

2. *Federal Criminal Law and the Expanding Commerce Clause.* — In the New Deal era, the Supreme Court famously reversed its previous holdings that the federal government could not regulate purely intrastate activity. The Court upheld a series of New Deal economic regulations of intrastate activity, creating a new space for the exercise of federal power.<sup>22</sup> Congress took advantage of the new understanding of its power to enact more expansive federal criminal laws. Responding to national concern over organized crime, the federal government passed antiracketeering legislation in the 1960s.<sup>23</sup> The first laws focused primarily on banning gambling.<sup>24</sup> Although these laws generally maintained a jurisdictional tripwire, requiring either interstate transport or the use of interstate communications for federal jurisdiction, they nevertheless signaled an increasing willingness by the federal government to participate in the states' traditional law enforcement functions.<sup>25</sup>

Later in the decade, Congress further tested the constitutional Commerce Clause waters by enacting criminal statutes without explicit jurisdictional hooks tying each particular crime to interstate commerce—for example, Title II of the Consumer Credit Protection Act of 1968.<sup>26</sup>

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Supreme Court of the “radical change in transportation” that had necessitated a more expansive congressional power to defeat those criminals who sought to avoid prosecution by crossing state lines. See Friedman, *supra* note 13, at 265 (quoting *Brooks v. United States*, 267 U.S. 432, 438 (1925)). Thus the Court used the increasing ability of criminals to travel throughout the country as a key justification for a newly expansive federal power. *Id.*

22. The Supreme Court reinterpreted congressional power to permit regulation of some intrastate activity in three watershed cases: *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (upholding regulation of noneconomic production that “affect[s] interstate commerce”); *United States v. Darby*, 312 U.S. 100 (1941) (upholding regulation of production of goods to be shipped across state lines); and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding congressional power to regulate intrastate unions). As a practical matter, these cases appear to have given Congress “unfettered authority to control all economic activity.” Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969–1986*, at 61 (2000); cf. *infra* note 67 and accompanying text (quoting *Lopez* Court’s statement of principle of broad deference to congressional regulations of any economic activity). The scope of congressional power to regulate or criminalize noneconomic activity remains widely disputed. See *infra* Part II.

23. See Bradley, *Anti-Racketeering*, *supra* note 7, at 681–85 (discussing growth of anti-organized crime sentiment in federal government and consequent growth in federal antiracketeering legislation).

24. See, e.g., *Gambling Devices Act of 1962*, Pub. L. No. 87-840, 76 Stat. 1075 (codified as amended at 18 U.S.C. §§ 1171–1178 (2006)) (banning interstate shipment of gambling materials); *Act of Sept. 13, 1961*, Pub. L. No. 87-228, 75 Stat. 498 (codified at 18 U.S.C. § 1952) (prohibiting interstate travel in aid of racketeering); *Act of Sept. 13, 1961*, Pub. L. No. 87-216, 75 Stat. 491 (codified at 18 U.S.C. § 1084) (banning use of interstate communication facilities for gambling purposes). See generally G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 *Cornell L. Rev.* 923 (1978).

25. For a discussion of the growing salience of crime as a national political issue, especially from the 1960s onward, see generally Friedman, *supra* note 13, at 274–76.

26. Pub. L. No. 90-321, §§ 201–203, 82 Stat. 146, 159–62 (codified at 18 U.S.C. §§ 891–896).

This provision incorporated a congressional finding that all extortionate credit transactions (“loan sharking”) affected interstate commerce, and accordingly banned loan sharking categorically without any jurisdictional requirement that a particular crime have a connection to interstate commerce.<sup>27</sup> The Supreme Court duly upheld the loan sharking statute in 1971’s *Perez v. United States*.<sup>28</sup> This case is now seen as having been the high water mark in the Supreme Court’s willingness to defer to expansions of congressional power under the Commerce Clause,<sup>29</sup> and it was in this case that the Court established the basic three-part framework of contemporary Commerce Clause jurisprudence.<sup>30</sup>

In upholding federal criminalization of loan sharking, the Court identified three areas in which Congress could regulate under the Commerce Clause: the channels of interstate commerce, the instrumentalities of interstate commerce, and “those activities affecting commerce.”<sup>31</sup> The *Perez* Court’s inquiry focused on the third category, asking whether loan sharking, the regulated activity, affected interstate commerce.<sup>32</sup> To find effects on commerce, however, the Court did not look at the activities of the specific criminal defendant in the case. Rather, the Court asked whether the overall “*class of activities*” regulated by Congress lay within the reach of federal power.<sup>33</sup> Because the statute in question was a regulation of the interstate market in loan sharking, and there was a “tie-in between local loan sharks and interstate crime,” the Court was unwilling to excise particular prosecutions as being trivial and outside of congressional power under the Commerce Clause.<sup>34</sup> After *Perez*, the class-of-activities analysis became the foundation for federal criminal law. When Congress regulates a class of activities involved with interstate commerce, the courts permit prosecution of local crimes that are a part of the larger class, regardless of whether the particular crime has a substantial effect on interstate commerce.<sup>35</sup>

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27. *Id.* § 201(a), 82 Stat. at 159.

28. 402 U.S. 146 (1971).

29. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 106 (16th ed. 2007) (“In [*Perez v. United States*], the Court appeared to reach the outer limits of the ‘affecting commerce’ rationale for federal criminal laws.” (citation omitted)).

30. See Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 *Lewis & Clark L. Rev.* 823, 839 (2005) (discussing how tripartite classification of Commerce Clause regulations, established in *Perez*, is now the Supreme Court’s “fixed menu of the permissible options available to Congress”).

31. *Perez*, 402 U.S. at 150. This was the first time the Court identified these three categories. See *supra* note 30.

32. *Perez*, 402 U.S. at 150.

33. *Id.* at 154.

34. *Id.* at 154–55.

35. This analysis clearly applies to economic crimes, of which loan sharking is an example. The critical unresolved question is to what extent, if any, the class-of-activities framework should be applied to noneconomic crimes, such as crimes of violence. See *infra* Part III.

3. *The Results of Expanding Congressional Power in Criminal Law.* — The years following the passage of the loan sharking statute saw several other significant expansions of the federal criminal law. In particular, Congress enacted two laws in 1970 that have become integral parts of contemporary federal criminal law: the Controlled Substances Act (CSA)<sup>36</sup> and RICO.<sup>37</sup>

The CSA was not the first attempt by the federal government to regulate the narcotics market, but it was by far the most comprehensive.<sup>38</sup> The CSA eliminated the bulk of previous anti-drug laws and created a comprehensive new regulatory scheme.<sup>39</sup> Congress, with the goal of eliminating drug abuse, sought to control commerce in narcotics; a particular concern of the CSA was to “prevent the diversion of drugs from legitimate to illicit channels.”<sup>40</sup> To accomplish this, the statute banned the manufacture, distribution, and possession of any controlled substance in a manner not authorized by the CSA’s regulatory scheme.<sup>41</sup> Through vigorous enforcement of this regulatory scheme, the CSA has become one of the primary sources of federal criminal prosecutions.<sup>42</sup>

RICO was enacted within a few months of the CSA; like its sister statute, it stands as one of the most prominent federal criminal statutes.<sup>43</sup> An important aspect of RICO is its substantial broadening of the definition of “racketeering.” The general definition of the word outside of the RICO context is the commission of crimes in furtherance of illegal busi-

36. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801-971 (2000)).

37. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (2000)).

38. For useful background on the history of anti-drug laws in America and the CSA in particular, see generally *Gonzales v. Raich*, 545 U.S. 1, 10-15 (2005). Early attempts to regulate narcotics took the form of revenue laws, under which all producers, sellers, and purchasers of the regulated drug were required to register with the Treasury Department and pay prohibitively high taxes. The two primary such laws were the Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (repealed 1970), and the Marihuana Tax Act of 1937, Pub. L. 75-238, 50 Stat. 551 (repealed 1970). Both of these laws were repealed in 1970 when the Controlled Substances Act was passed. See *Raich*, 545 U.S. at 10-11.

39. *Raich*, 545 U.S. at 11.

40. *Id.* at 12-13.

41. 21 U.S.C. §§ 841(a)(1), 844(a).

42. According to the Department of Justice, more than half of all federal prisoners have violated the narcotics laws. William H. Sabol, Heather Couture & Paige M. Harrison, Bureau of Justice Statistics Bulletin: Prisoners In 2006, at 9 (2007), available at <http://www.ojp.gov/bjs/pub/pdf/p06.pdf> (on file with the *Columbia Law Review*) (stating 93,751 of the 176,268 federal prisoners in 2006 were incarcerated for drug offenses); cf. Kathleen F. Brickey, Criminal Mischief: The Federalization of American Criminal Law, 46 *Hastings L.J.* 1135, 1148-50 (1995) (citing CSA and related statutes in federal “war on drugs” as the “single most significant contributor” to the increasing federalization of criminal law).

43. See, e.g., Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 263 (3d ed. 2006) (calling RICO “one of the broadest and most important contemporary statutes”).

ness activities.<sup>44</sup> The legislative history of RICO indicates that Congress had this common definition in mind. The “racketeers” that were the primary focus of Congress in enacting RICO were organized criminal businesses that made profits from “gambling, narcotics, and other criminal enterprises” and then used these profits for the “infiltration of legitimate businesses.”<sup>45</sup> Congress wanted to give federal prosecutors the tools to go after the nation’s big organized criminal rings.

But the language of the RICO statute goes far beyond this goal. The statute defines “racketeering” to include almost any serious federal or state crime,<sup>46</sup> and then authorizes federal prosecution of anyone who has committed more than one such crime<sup>47</sup> in furtherance of or to gain an interest or control in “any enterprise which is engaged in, or the activities of which affect, interstate commerce.”<sup>48</sup> The breadth of this language demonstrates that RICO was a sweeping congressional attempt to strike a decisive blow against organized crime. The bill’s sponsors recognized the breadth of the statute, acknowledging that RICO “encompasses a wide range of criminal activities and consequently applies to many individuals who are not associated with” organized crime, but they believed that such broad regulation was necessary to ensure the effectiveness of the statute.<sup>49</sup> Essentially, Congress was so intent on catching the sharks that it cast its statutory net as broadly as it could, ensuring more than a few minnows would be swept up as well.

Furthermore, RICO relies on an expansive view of the commerce power. Unlike the earlier antiracketeering statutes discussed above,<sup>50</sup> RICO does not require interstate travel or transport or use of interstate communications. Rather, federal jurisdiction is satisfied when the criminal enterprise “affects” interstate commerce.<sup>51</sup> While RICO has been used more extensively in civil litigation than in criminal cases,<sup>52</sup> it has

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44. See, e.g., *The American Heritage Dictionary of the English Language* 1441 (4th ed. 2006) (defining “racketeering” as “[t]o carry on illegal business activities that involve crimes”). The word derives from “racket,” used in the sense of “dishonest business.” *Id.*

45. Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 *Iowa L. Rev.* 837, 838–40 (1980) [hereinafter *Bradley, Analysis of RICO*].

46. See 18 U.S.C. § 1961(1) (2000) (enumerating panoply of crimes included in definition of “racketeering”).

47. *Id.* § 1961(5) (defining “pattern of racketeering activity” to mean commission of two racketeering crimes within ten years of each other).

48. *Id.* § 1962(a)–(c); cf. *Black’s Law Dictionary* 1287 (8th ed. 2004) (noting RICO “greatly broadened” the original sense of the term “racketeering”).

49. *Bradley, Analysis of RICO*, *supra* note 45, at 845 & n.39 (citing Senator McClellan, the bill’s sponsor, as arguing that minor criminal offenses must be included as part of RICO to ensure the statute would effectively reach perpetrators of organized crime rings).

50. See *supra* notes 23–25 and accompanying text.

51. 18 U.S.C. § 1962.

52. *Bradley, Anti-Racketeering*, *supra* note 7, at 688.

also become an important tool in the federal prosecutor's arsenal.<sup>53</sup> RICO has not been used merely to prosecute traditional organized crime, but also to prosecute a range of smaller, localized crimes.<sup>54</sup>

The loan sharking statute, the CSA, and RICO epitomized a new view of an expansive federal role in criminal prosecution; they were the first rumblings in an avalanche of new federal criminal statutes.<sup>55</sup> Over forty percent of all federal criminal provisions enacted since the Civil War were enacted after 1970.<sup>56</sup> This growth in legislation has spawned a corresponding growth in federal prosecutions, so that criminal cases now account for around one-half of all federal trials.<sup>57</sup> This had significant effects on the federal courts—changing the nature of the federal docket as well as increasing the caseload—and it has prompted a critical reaction from both the bar and the bench. Former Chief Justice Rehnquist was particularly concerned with the expansion of federal criminal law, identifying it as one of the key problems facing the federal judiciary.<sup>58</sup> Fittingly, he originally voiced these concerns at the beginning of a renewal of federalism as a limiting principle on the extent of congressional power. It is to this renewal of federalism that this Note now turns.

## B. *The Supreme Court's Recent Restriction of Federal Power Under the Commerce Clause*

1. *Lopez and Morrison and the Commerce Clause.* — After declining for decades to invalidate a congressional statute as violative of the Commerce Clause, the Supreme Court dramatically did so twice over a short period, with *Lopez* in 1995 and *Morrison* in 2000.<sup>59</sup> More than thir-

53. Chemerinsky, *supra* note 43, at 263; Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 *Hastings L.J.* 573, 574 (2004) [hereinafter Bradley, *Federalism*] (describing RICO as one of the “Four Horsemen” of federal criminal law).

54. See Bradley, *Anti-Racketeering*, *supra* note 7, at 688 (providing examples of RICO prosecutions of defendants who committed a few small-scale robberies, defrauded Medicare, or operated a “weekend dice and card game” in a trailer park).

55. See Brickey, *supra* note 42, at 1145 (noting passage of multiple significant federal criminal statutes since 1968 as well as steady increases in federal penalties for crimes).

56. Task Force on the Federalization of Criminal Law, *Am. Bar Ass'n, The Federalization of Criminal Law* 7 (1998) [hereinafter Task Force].

57. Bradley, *Federalism*, *supra* note 53, at 590; cf. Friedman, *supra* note 13, at 268 (noting significant growth of federal criminal docket from 1960s through 1980s).

58. See William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary, Third Branch*, at 1, 2 (1999) (warning that federalizing crime taxes judicial resources and “also threatens to change entirely the nature of our federal system”); William H. Rehnquist, *Chief Justice's 1993 Year-End Report Highlights Cost-Saving Measures, Third Branch*, at 1, 3 (1994) (arguing against expansion of role of federal courts in administration of criminal justice). The American Bar Association echoed Rehnquist's concerns. Task Force, *supra* note 56, at 15, 26–31 (1998) (noting multiple disadvantages of trend toward federalization of criminal law); cf. *infra* notes 237–240 and accompanying text (discussing criticisms of federalization of criminal law).

59. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000). *Lopez* marked the first time in fifty years that the Court invalidated a congressional statute under the Commerce Clause. Madhavi M. McCall & Michael A.

teen years after *Lopez*, the legacy of these two cases remains unclear. They have spawned a library's worth of academic commentary and debate over what they mean for the future of congressional power<sup>60</sup> as well as a range of responses in the lower courts.<sup>61</sup> In light of the wide-ranging nature of this debate, some commentators have thrown up their hands and declared that the cases are open to almost limitless interpretation.<sup>62</sup> Nonetheless, these two cases are the lynchpin of the Court's current Commerce Clause jurisprudence. Consequently, any serious attempt to understand the workings of the Commerce Clause must begin with a discussion of *Lopez* and *Morrison*.

a. *United States v. Lopez*. — In *Lopez*, the Court held that the Gun-Free School Zones Act (GFSZA), prohibiting gun possession near schools, was an unconstitutional extension of Congress's power under the Commerce Clause.<sup>63</sup> The opinion reiterated the Court's view—originally expressed in *Perez*—that the Commerce Clause permits Congress to regulate three categories of activity: “the channels of interstate commerce,” the “instrumentalities of interstate commerce,” and those activities that “substantially affect interstate commerce.”<sup>64</sup> As in *Perez*, the Court focused on substantial effects, the third prong of this doctrine. The first two prongs were irrelevant—as they are in almost all of the cases over which there is a contemporary controversy—because the statute at issue did not directly regulate either the channels or the instrumentalities of interstate commerce.<sup>65</sup>

In considering the issue of whether the regulated activity substantially affected interstate commerce,<sup>66</sup> the Court differentiated between economic and noneconomic activity. Without providing a clear definition of what constitutes economic activity, the Court said that where “eco-

McCall, Chief Justice William Rehnquist: His Law-and-Order Legacy and Impact on Criminal Justice, 39 *Akron L. Rev.* 323, 361–65 (2006).

60. For an overview, see Symposium, *Federalism After Gonzales v. Raich*, 9 *Lewis & Clark L. Rev.* 743 (2005); Arthur B. Mark, III, *Currents in Commerce Clause Scholarship Since Lopez: A Survey*, 32 *Cap. U. L. Rev.* 671 (2004); see also *infra* Part IIA–B.

61. For a discussion of lower court responses to these cases, see Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 *Ark. L. Rev.* 1253 (2003) [hereinafter Denning & Reynolds, *Rulings and Resistance*]; 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 [hereinafter Reynolds & Denning, *Lower Court Readings*]; see also *infra* Part II.C.

62. See, e.g., Reynolds & Denning, *Lower Court Readings*, *supra* note 61, at 392 (describing *Lopez* as a “judicial Rorschach Test”).

63. *Lopez*, 514 U.S. at 551.

64. *Id.* at 558–59; see *supra* notes 30–31 and accompanying text (discussing origin of tripartite division of commerce power in *Perez*).

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

66. *Perez* and other cases had used “affects commerce” and “substantially affects commerce” relatively interchangeably. In *Lopez*, the Court decided that the “proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” *Id.*

conomic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>67</sup> The apparent reason gun possession was not an economic activity in the Court’s analysis was because it did not “arise out of” nor was it “connected with a commercial transaction.”<sup>68</sup> The noneconomic nature of the activity eliminated the class-of-activities analysis that the Court had employed in *Perez* and other cases.<sup>69</sup>

After refusing to aggregate the effects of gun possession to find a substantial effect on interstate commerce, the Court next asked whether the statute was an essential part of a larger regulation of economic activity. In dicta, the Court appeared to indicate that regulation of gun possession would pass constitutional muster if the regulation was incidental to an overarching regulatory scheme that targeted economic activity, and if “the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>70</sup> The Court found that this was not the case. On the contrary, the GFSZA was an independent statute narrowly aimed at gun possession. Moreover, there was no jurisdictional element in the statute ensuring a case-by-case connection to interstate commerce.<sup>71</sup> In light of these factors, the Court overturned the law.

b. *United States v. Morrison*. — In *Morrison*, the Court considered the constitutionality of a provision of the Violence Against Women Act that provided a federal civil remedy for victims of gender-motivated violence.<sup>72</sup> Relying on essentially the same reasoning as *Lopez*, the Court held that the provision was not a permissible use of the commerce power. It found that gender-motivated violence was not economic in nature—although again without providing an explicit definition of “economic”—and that therefore the effects of gender-based violence could not be aggregated to meet the “substantially affects interstate commerce” prong of the Court’s Commerce Clause jurisprudence.<sup>73</sup>

The Court’s reasoning went even further, however. While the majority opinion declined to “adopt a categorical rule,” it did claim that the Court’s opinions were universal in upholding congressional regulations of intrastate activity only “where that activity is economic in nature.”<sup>74</sup> Thus, the Court dismissed the government’s arguments that the statute in question dealt with activity that affected interstate commerce, despite the

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67. *Id.* at 560.

68. *Id.* at 561.

69. *Id.* (holding GFSZA regulates noneconomic activity, unlike statutes examined in previous cases, which precludes application of the aggregated substantial effects test).

70. *Id.*

71. *Id.* at 561–62.

72. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000).

73. *Id.* at 617–18.

74. *Id.* at 613; cf. Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 *Lewis & Clark L. Rev.* 751, 759–62 (2005) (noting that *Morrison* was a “breakthrough for enumerated powers jurisprudence” in its emphasis on the economic or noneconomic “nature of the regulated activity or the regulatory scheme”).

fact that Congress had made substantial findings to that effect.<sup>75</sup> To accept such arguments about a noneconomic activity, in the Court's view, would create virtually no limits on congressional power and impermissibly blur the distinction between "what is truly national and what is truly local."<sup>76</sup>

*Morrison* can be read as a broad and potent precedent limiting congressional power. The Court's reasoning concluded by saying: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>77</sup> This language strongly suggests that Congress could never regulate intrastate noneconomic activity after *Morrison*, although commentators were quick to question the breadth of *Morrison*'s holding.<sup>78</sup>

*Morrison*'s broad language notwithstanding, the case has not been widely followed. The years since 2000 have not seen a wave of cases overturning federal statutes on the ground that they violated the Commerce Clause. Why is this so? One possible reason is *Morrison*'s lack of a clear definition of economic activity.<sup>79</sup> Courts may have trouble following a test that puts such weight on whether the activity in question is economic if they do not have a satisfactory definition of "economic." Others have suggested more troubling reasons, including the possibility of "willful judicial foot-dragging" caused by disagreement with the Supreme Court.<sup>80</sup> Before considering the fate of *Lopez* and *Morrison* in the lower courts, however, it is important to consider how the Supreme Court itself has dealt with these precedents in its recent cases. The two most notable post-*Morrison* Commerce Clause cases are *Jones v. United States* and *Gonzales v. Raich*.

2. *The Narrow Statutory Construction of Jones v. United States.* — In the same term as *Morrison*, the Court also handed down a case that significantly narrowed the scope of the federal arson statute.<sup>81</sup> In *Jones v. United States*, the Court read this statute to be inapplicable to the burning of a

75. *Morrison*, 529 U.S. at 614.

76. *Id.* at 617–18.

77. *Id.* at 617.

78. See, e.g., Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 *Const. Comment.* 563, 566–67 (2001) (noting confusion over whether the economic activity factor was dispositive in questions about the scope of the commerce power).

79. See, e.g., *id.* at 567 (discussing range of possible definitions of "economic activity"); see also 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, 618 (2001) (criticizing Court for failure to provide adequate definition of "economic activity").

80. Denning & Reynolds, *Rulings and Resistance*, *supra* note 61, at 1256–57 (arguing that unwillingness to follow Supreme Court precedent raises questions about the "legitimacy of the Article III judiciary").

81. The arson statute is codified at 18 U.S.C. § 844(i) (2000) ("Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign

private home.<sup>82</sup> The Court, relying on the canon of constitutional avoidance, did not explicitly state that an alternative statutory interpretation would run afoul of the Constitution. But according to Justice Ginsburg's opinion for a unanimous Court, interpreting the statute to criminalize arson of a private residence would raise "grave and doubtful constitutional questions" about the extent of congressional power.<sup>83</sup>

The way in which the Court limited the statute sheds valuable light on its approach to the question of what makes for economic activity. The Court stressed that the defendant had burned down a home that was used as a private residence, rather than being used in any "trade or business."<sup>84</sup> The Court rejected the Government's contention that the house in question was used in interstate commerce because it was collateral on a mortgage from an out-of-state lender, was insured by an out-of-state insurer, and received natural gas from outside the state.<sup>85</sup> Such logic, in the Court's view, would have swept virtually every "building in the land" inside the statute's domain, and raise "doubtful . . . questions" about the Commerce Clause.<sup>86</sup> Thus, the statute was best interpreted to only apply to buildings used for business purposes.<sup>87</sup> The Court was distinctly reluctant to allow federal regulation to extend to all acts of arson in the country, and interpreted the statute narrowly to prevent such an extension of congressional power.

3. *Regulation of Noneconomic Drug Use: The Raich Decision.* — In *Gonzales v. Raich*, the Supreme Court considered a constitutional challenge to the Controlled Substances Act as applied to noneconomic drug use, specifically the home-based cultivation and consumption of marijuana for medical purposes.<sup>88</sup> While *Morrison* and *Jones* appeared to raise the possibility that the Commerce Clause never permitted Congress to regulate noneconomic activity, *Raich* upheld the Controlled Substances Act as applied to the production and use of marijuana for medical purposes, a class of activity that the Court acknowledged to be

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commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . .").

82. 529 U.S. 848 (2000).

83. *Id.* at 857–58 (quoting *United States ex rel. Attorney Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)).

84. *Id.* at 856.

85. *Id.* at 855–56. The refusal to consider these connections to interstate commerce is similar to the *Morrison* Court's refusal to allow a "but-for causal chain from the initial occurrence of violent crime to every attenuated effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 599 (2000).

86. *Jones*, 529 U.S. at 855, 857.

87. Subsequent lower court decisions have disagreed about the application of this holding. For example, should the statute apply to the burning of churches? See Thomas Heyward Carter, 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, 1481–89 (2002) (discussing different approaches taken by courts in prosecuting church burnings in light of the decision in *Jones*). The issue is further discussed *infra* Part III.C.

88. 545 U.S. 1, 5 (2005).

noneconomic.<sup>89</sup> Moreover, the Court upheld the CSA's application to medical marijuana despite the fact that the statute does not include any jurisdictional element to ensure that each case has a substantial connection to interstate commerce, but rather operates as a "categorical prohibition" on the manufacture and possession of marijuana.<sup>90</sup>

Unlike the previous cases, *Raich* provided a definition of "economic" activity, quoting a dictionary definition that the word "economic" referred to "the production, distribution, and consumption of commodities."<sup>91</sup> Based on this definition, the Court found that the CSA as a whole regulated activities that were "quintessentially economic."<sup>92</sup> Marijuana is a "fungible commodity for which there is an established, albeit illegal, interstate market," and the CSA represented a legislative attempt to comprehensively regulate that market.<sup>93</sup>

While this reasoning is sufficient to explain why the CSA itself was a valid use of the congressional commerce power, it does not explain why it was constitutionally acceptable to apply the statute to the noneconomic activity of the actual defendants in *Raich*. To reach this conclusion, the Court made a critical logical step. It noted that Congress had been concerned about the possibility that, if intrastate use were permitted, narcotics would be diverted from legitimate channels into the interstate market for illegal recreational drugs.<sup>94</sup> The legislature had concluded that exempting medical uses of drugs from prosecution would undercut the CSA

89. See, e.g., *id.* at 32 (defining class of activity in case as the "intrastate, noncommercial cultivation, possession and use" of a controlled substance (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2003))).

90. *Id.* at 14–15. This distinction has been characterized as the difference between a "jurisdictional hook"—an element of a statute that must be satisfied in order to confer federal jurisdiction—and a "regulatory net"—a broad statutory scheme that sweeps in an entire class of activity without asking if individual cases have a needed jurisdictional element. E.g., 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, 2101–02 (2006).

91. *Raich*, 545 U.S. at 25–26 (citing Webster's Third New International Dictionary 720 (1966)). Some have argued that this definition allows for an overly broad reach of federal power. See *id.* at 49 (O'Connor, J., dissenting) ("[T]he Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach."). But the definition is "far from unlimited" and it would appear to exclude activity of the type Congress sought to regulate with the GFSZA and the VAWA. Randy E. Barnett, Foreword: *Limiting Raich*, 9 *Lewis & Clark L. Rev.* 743, 749 (2005) [hereinafter Barnett, Foreword] (noting that definition would exclude "most violent crimes"); see also *infra* notes 173–179 and accompanying text (discussing *Raich's* definition of "economic activity").

92. *Raich*, 545 U.S. at 25–26.

93. *Id.* at 18.

94. *Id.* at 12–13. The Court further noted the existence of congressional findings that local distribution and possession of narcotics contributed to the interstate trade, and that the impossibility of differentiating between locally produced narcotics and narcotics that had traveled in interstate commerce made statutory distinction "not feasible." *Id.* at 12 n.20 (quoting congressional findings codified at 21 U.S.C. § 801(1)–(6) (2000)); see also *id.* at 21 & n.32.

and facilitate evasions of the law.<sup>95</sup> In the Court's words, "an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme."<sup>96</sup>

This reasoning was a mirror image of the Court's prior statement in *Lopez* that the Gun-Free School Zones Act had not been an "essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated."<sup>97</sup> Both *Lopez* and *Raich*, then, first looked into the existence of a broad congressional scheme regulating economic activity, and then into whether it was necessary to regulate the particular activity in question to protect the overall scheme. In *Raich*, the Court answered both of these questions in the affirmative.<sup>98</sup>

### C. *The Circuit Split over RICO*

1. *The General Commerce Clause Jurisprudence of the Lower Courts.* — The apparent conflict between the federalization of criminal law and the Court's contraction of the commerce power has generated some turbulence, if not outright "resistance," among the circuit courts.<sup>99</sup> After *Lopez* and *Morrison*, most circuit courts remained reluctant to cast down statutes as being facially unconstitutional extensions of the Commerce Clause. While they were somewhat more willing to sustain as-applied challenges to statutes under the Commerce Clause, there has certainly not been a rush to limit the reach of federal criminal law on the part of the lower courts.<sup>100</sup>

The lower courts' reluctance to sustain Commerce Clause challenges has grown even more pronounced since *Raich*. The limited openness to as-applied challenges that federal courts had previously displayed seems

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95. See *id.* at 22 ("[W]e have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.").

96. *Id.* at 28.

97. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

98. Justice Scalia submitted a concurring opinion, making essentially the same argument as the majority but relying more heavily on the Necessary and Proper Clause of Article I, Section 8, in addition to the Commerce Clause. Scalia's *Raich* opinion adds little, if anything, to the majority's reasoning, aside from fleshing out the Necessary and Proper Clause analysis that is only briefly addressed by the majority opinion. See *Raich*, 545 U.S. at 33–34 (Scalia, J., concurring) (relying on Necessary and Proper Clause, while acknowledging that this may still be consistent with the majority opinion); cf. *id.* at 22 (majority opinion) (discussing Necessary and Proper Clause only briefly); Michael C. Blumm & George A. Kimbrell, *Gonzalez v. Raich*, The "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act, 35 *Env'tl. L.* 491, 496 (2005) (describing majority opinion and Scalia's concurrence as having same "constitutional moorings" in both Commerce Clause and Necessary and Proper Clause).

99. Denning & Reynolds, *Rulings and Resistance*, *supra* note 61, at 1253–57.

100. *Id.* at 1262 (noting very few cases in which facial or as-applied challenges to congressional statutes under the Commerce Clause have been successful in the circuit courts).

to have largely disappeared. Indeed, lower courts have been so willing to uphold congressional statutes against Commerce Clause challenges that one leading commentator has raised the possibility that the *Raich* decision may have marked “the end of judicially enforced limits on Congress’s Commerce power for the foreseeable future.”<sup>101</sup> The circuit split over RICO provides an illustration of the general retreat from upholding Commerce Clause challenges after *Raich*. The Sixth Circuit accepted an as-applied challenge to RICO in 2004, while the First Circuit rejected a similar challenge in 2007, relying heavily on *Raich*.

2. *Rejecting the Application of RICO to Intrastate Noneconomic Activity.* — In *Waucaush v. United States*, the Sixth Circuit held that RICO could not constitutionally be used to prosecute the members of a local street gang whose crimes were not economic in nature.<sup>102</sup> *Waucaush* involved a former member of a Detroit street gang called the Cash Flow Posse.<sup>103</sup> The defendant had been convicted under RICO for the murder and assault of rival gang members as a part of the Cash Flow Posse’s turf war against two rival gangs.<sup>104</sup> The Cash Flow Posse itself, however, did not engage in any economic enterprise such as drug trafficking or gambling operations.<sup>105</sup> The question before the court, therefore, was whether RICO could reach criminal enterprises engaged in “racketeering” in the broadest sense envisioned under RICO, but not engaged in economic criminal activity.<sup>106</sup>

First, the court noted that “RICO regulates enterprises, not people.”<sup>107</sup> The statute can be used to prosecute individuals for virtually any crime, no matter how local or noneconomic, so long as the predicate crime is committed in order to further the goals of an enterprise that affects commerce.<sup>108</sup> Thus, in deciding whether the defendant could be constitutionally reached by RICO pursuant to the Commerce Clause, the relevant consideration in the court’s view was not whether the defen-

101. Boris I. Bittker & Brandon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce § 5.04, at 87 (Supp. 2008). For further discussion of recent Commerce Clause cases in the federal courts, see *infra* Part II.C.2.

102. 380 F.3d 251, 258 (6th Cir. 2004).

103. The irony of the gang’s name in light of the defendant’s Commerce Clause challenge was not lost on the circuit court. See *id.* at 253 (noting that “names can be deceiving” and that case presented question of whether the activities of the “Cash Flow Posse . . . had a substantial effect on the nation’s cash flow”).

104. *Id.* at 253.

105. *Id.* at 256.

106. The court’s reasoning rests on the assumption that seeking profits through violent crime is not itself economic activity. This is an assumption that can be and has been challenged, but it accords with the reasoning of the Supreme Court in its recent Commerce Clause cases. Crucially, none of these cases inquired into possible economically based motives for the crime in question. Rather, the Supreme Court has looked at the activity itself—gun possession, gender-based violence, drug production—and asked whether the activity involves participation in an exchange of goods or services. This issue is discussed in detail, *infra* Part III.

107. *Waucaush*, 380 F.3d at 255.

108. *Id.*

dant's individual crimes had any relationship with interstate commerce. Rather, the court considered whether the activities of the enterprise—the Cash Flow Posse—had substantial effects on interstate commerce. The court had previously held that if a racketeering enterprise engages in economic activity, then Congress can regulate that enterprise even if its activities have only a de minimis effect on interstate commerce.<sup>109</sup> In such a case, all the minimal effects of the entire class of economic racketeering enterprises can be aggregated to find a substantial effect on interstate commerce. This is a direct application of the Supreme Court's holding in *Perez*, which had permitted Congress to regulate economic crimes based on the aggregated effect of those crimes on interstate commerce.<sup>110</sup>

For criminal enterprises that do not engage in economic activity, however, the Sixth Circuit set a much higher bar to establish federal jurisdiction. The court held that Congress may only regulate noneconomic activities that substantially affect interstate commerce in and of themselves and that the effects of noneconomic crimes cannot be aggregated to show substantial effects on interstate commerce. Any attenuated or speculative effects on interstate commerce that might have been caused by the Cash Flow Posse's violent criminal behavior were not substantial in and of themselves, and no aggregation was constitutionally permissible.<sup>111</sup> This reasoning stems from what the Sixth Circuit saw as the “categorical rule” announced in *Morrison*: “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.”<sup>112</sup> In the view of the Sixth Circuit, the class of activity in which the Cash Flow Posse's enterprise participated—violent criminal conduct—was exactly the type of activity that could not be aggregated to meet the “substantially affects interstate commerce” test established by the Supreme Court.

3. *The First Circuit Disagrees.* — Three years after the Sixth Circuit's *Waucaush* decision, the First Circuit confronted the same issue in *United States v. Nascimento* and came to the opposite conclusion.<sup>113</sup> As in the earlier case, *Nascimento* involved a prosecution of members of a street

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109. *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (“[A] de minimis connection suffices for a RICO enterprise that ‘affects’ interstate commerce.”). The *Waucaush* court distinguished *Riddle* on the ground that *Riddle* involved an economic criminal enterprise. *Waucaush*, 380 F.3d at 255–56.

110. See *supra* notes 32–34 and accompanying text.

111. *Waucaush*, 380 F.3d at 258. Although it may seem strange that an element of a crime—in this case, the “affecting interstate commerce” element—would have different meanings depending on whether the crime was economic in nature, the court relied on the Supreme Court's opinion in *Jones v. United States* as evidence that courts should interpret federal criminal statutes differently for different types of crimes in order to avoid constitutionally dubious expansions of congressional power. *Id.* at 265.

112. *Id.* at 262 (quoting *United States v. Morrison*, 529 U.S. 598, 617 (2000)).

113. *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007).

gang—the Stonehurst gang in Boston—engaged in violent, noneconomic criminal activity.<sup>114</sup> The court held that Congress could regulate noneconomic criminal activity as part of a larger regulatory scheme targeting a “general class of activity [that] is a wholly legitimate target of Commerce Clause legislation.”<sup>115</sup> In the court’s view, so long as the overall statute deals with activity that can be regulated by Congress, the intrastate or noneconomic character of particular instances is irrelevant.

This reasoning relied primarily on *Raich*, which had been handed down between the *Waucaush* and *Nascimento* cases. The First Circuit read *Raich* to mean that courts should defer to congressional judgments about the proper classification of the regulated activity, meaning that as-applied challenges to statutes under the Commerce Clause should rarely be upheld.<sup>116</sup> The court glossed over *Raich*’s special emphasis on the fact that permitting the class of activity at issue in *Raich*—medical marijuana use—could ultimately undermine the entire regulatory scheme of the CSA by leading to the diversion of narcotics from legitimate to illegitimate channels. Despite a dissenting opinion on this point,<sup>117</sup> the First Circuit decided that the Supreme Court’s desire not to allow unregulated noneconomic activity to undermine enforcement of the CSA in *Raich* was not a “decisive” part of the Court’s analysis.<sup>118</sup>

As applied to the Stonehurst gang, this reasoning enabled the court to avoid the question of whether the gang’s activities had substantially affected interstate commerce. Because racketeering itself is a class of activity with substantial effects on interstate commerce, any particular enterprise need only have a de minimis effect on commerce, regardless of whether that enterprise engages in economic activity.<sup>119</sup> Under this stat-

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114. *Id.* at 30–31.

115. *Id.* at 43.

116. *Id.* at 41–42.

117. Judge Boudin concurred in the result but declined to endorse the *Nascimento* majority’s reading of *Raich*. *Id.* at 52–53 (Boudin, C.J., concurring). He argued that the central principle of *Lopez* and *Morrison*—that aggregating the effects on commerce of an entire class of activities was only permitted in cases of economic activity—had been left undisturbed by *Raich*. This implies that Congress cannot reach noneconomic racketeering by means of the class-of-activities analysis applied by the *Nascimento* majority. Judge Boudin would have affirmed the conviction, however, on the alternate ground that the defendants had purchased guns that had traveled in interstate commerce. See *id.*

118. *Id.* at 42 (majority opinion) (criticizing economic-noneconomic distinction as requiring too “rigid a taxonomy”).

119. *Id.* at 37. The court refused to follow the statutory construction employed in *Waucaush*, which had interpreted RICO in one way when dealing with economic enterprises and another way when dealing with noneconomic ones. See *id.* at 38 (“Courts simply are not ‘free to interpret statutes as becoming inoperative when they approach constitutional limits.’” (internal quotation marks omitted) (quoting *Clark v. Martinez*, 543 U.S. 371, 384 (2005))). But the concurring opinion took issue with this statutory construction, arguing that RICO should be interpreted in light of constitutional limits. See *id.* at 51 (Boudin, C.J., concurring) (noting RICO uses “affects interstate commerce,” which is a “term of art usually signifying Congress’s intent to regulate to the limit of its

utory interpretation, the acts of the Stonehurst gang met the “affecting interstate commerce” element, as almost any violent criminal action would. The court thus differed from the Sixth Circuit and upheld the RICO conviction.

## II. THE UNSETTLED MEANING OF THE COMMERCE CLAUSE

The dispute over whether RICO can be constitutionally applied to noneconomic activity reflects a broader disagreement over the Supreme Court’s Commerce Clause jurisprudence. The field, which was thought to be fairly settled before *Lopez*,<sup>120</sup> has become one of the most contested areas of constitutional law. This Part offers an outline of the major positions in the continuing debate. Part II.A considers academic interpretations of the Commerce Clause in the decade between *Lopez* and *Raich*. Part II.B looks at the shift in the Commerce Clause debate after *Raich*, analyzing how scholars have addressed what many perceive to be an inconsistency between *Raich* and the *Lopez/Morrison* line of cases. The goal of this Part is not to establish a definitive theory of how the Commerce Clause ought to be interpreted, but rather to illustrate the failure of most commentators to propose a Commerce Clause theory that satisfactorily fits with the Supreme Court’s actual case law.

Finally, Part II.C examines how lower federal courts have addressed both facial and as-applied challenges to congressional statutes under the Commerce Clause in the years since *Lopez*, both before and after *Raich*. This Part will show that the years following *Lopez* and *Morrison* were marked by some confusion, and no single unified approach to the Commerce Clause emerged in the courts. More recently, after *Raich*, the lower courts have declined to undertake sustained analyses of the Commerce Clause, and it appears that the continuing vitality of the rule announced in *Morrison* is now very much in doubt. The question of whether *Morrison*’s holding is still the law of the land has serious implications for the future of federal criminal law, including the possible scope of RICO.

### A. Overview of Post-Lopez Commerce Clause Scholarship

1. *The Debate Over the Clause’s Original Meaning.* — One of the more active areas of debate in the years since *Lopez* involves the question of what the Commerce Clause was originally understood to mean by the Framers’ generation. This debate responds to Justice Thomas’s concurring opinion in *Lopez*, which argued that the Court should fundamentally

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Commerce Clause powers”); see also *Scarborough v. United States*, 431 U.S. 563, 571 (1977) (finding congressional use of “affecting commerce” language signifies intention to assert commerce power to its maximum extent).

120. Many legal observers had come to treat the Commerce Clause almost as an intellectual joke, a power so “swollen” beyond limit that “Congress could regulate any conduct” at all. See, e.g., Deborah Jones Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 674–75 (1995).

reconsider its Commerce Clause jurisprudence and perhaps abandon the “substantially affects” doctrine altogether.<sup>121</sup> Justice Thomas expressed two concerns: that the “substantially affects” doctrine has no basis in the text or history of the Constitution,<sup>122</sup> and that it has no “stopping point,” especially when combined with the method of aggregating the effects of an entire class of activity.<sup>123</sup> Justice Thomas supported the *Lopez* majority’s view that the Gun-Free School Zones Act exceeded Congress’s power, but felt that the Court should have considered venturing further to provide a clearer limit to the reach of the commerce power.<sup>124</sup>

Several scholars have taken up Justice Thomas’s challenge to inquire more deeply into the text and history of the Commerce Clause, but they have come to divergent results. One theory, proposed by Grant Nelson and Robert Pushaw, holds that “commerce” was originally understood as a broad term incorporating the “voluntary sale or exchange of property or services and all accompanying market-based activities.”<sup>125</sup> This view essentially reads “commerce” in the Constitution to mean “economic activity” in the way that the Court defined it in *Raich*.<sup>126</sup> Thus, rather than use the three categories of regulation identified by the Court, this view proposes that congressional regulation be permitted when it regulates economic activity but not when it regulates noneconomic activity.<sup>127</sup>

The Nelson and Pushaw view can be read in either a “hard” or a “soft” way, both of which depart significantly from the actual recent case law of the Supreme Court. Under the “hard” interpretation, Congress could not regulate any noneconomic activity, including such activities as

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121. *Lopez v. United States*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

122. *Id.* at 585 (“I believe that we must further reconsider our ‘substantial effects’ test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause . . .”).

123. *Id.* at 600 (“Under our jurisprudence, if Congress passed an omnibus ‘substantially affects interstate commerce’ statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional.”).

124. See *id.* at 602 (urging Court to fundamentally reconsider its Commerce Clause jurisprudence in light of original understanding at an “appropriate juncture”).

125. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 *Iowa L. Rev.* 1, 9 (1999).

126. See *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (using dictionary to define “economics” in terms of production and exchange of commodities).

127. See Nelson & Pushaw, *supra* note 125, at 107–08 (urging tripartite definition of commerce to include only (1) buying and selling goods, (2) buying and selling services, and (3) the “means by which commerce is transacted—for example, the documents used to facilitate commerce”). This view would even limit the scope of congressional power to regulate traffic across state lines, permitting such regulation only in cases where the traffic is economic in nature. See *id.* at 127–31 (arguing that Supreme Court precedents upholding a nearly complete congressional power to regulate traffic across state lines were wrongly decided). Such a view represents a significant departure from Supreme Court precedents dating to even before the New Deal expansion of the commerce power. See *supra* notes 18–21 and accompanying text (discussing early Supreme Court approval of plenary congressional power to regulate traffic across state lines).

drug possession.<sup>128</sup> This view runs counter to the Supreme Court's *Raich* decision, so it is unlikely to be accepted by the Court. Nelson and Pushaw do provide a "softer" alternative, however, in the form of their "protective principle," by which Congress would have the power to regulate crimes targeted at persons and entities engaged in commerce.<sup>129</sup> But the "protective principle" as articulated by Nelson and Pushaw appears to suffer from the same defect that Justice Thomas identified in the Court's "substantially affects" doctrine—a lack of an adequate stopping point. In particular, given the existence of widespread insurance coverage of buildings, automobiles, and individuals' health and life, regulation of almost any crime at all could be justified in terms of protecting the insurance market.<sup>130</sup> In light of *Morrison* and *Jones*, it is difficult to imagine the Court endorsing such a broad view. Nelson and Pushaw fail to provide a clear and justiciable limiting principle that is consistent with the Court's precedents which permit Congress to regulate certain noneconomic activity, but not all violent criminal conduct.

Other scholars who have sought the original understanding of the Commerce Clause have criticized Nelson and Pushaw's view on historical grounds as well. Randy Barnett has conducted the most extensive examination of the use of the word "commerce" in the eighteenth century.<sup>131</sup> His conclusion is at direct odds with the argument of Nelson and Pushaw. After conducting a systematic analysis of the use of the word "commerce" in the Constitution, the state ratifying conventions, and newspapers of the period, Barnett concludes that the word originally referred only to the "trade and exchange of goods," rather than economic activity more broadly conceived.<sup>132</sup> Barnett's marshaling of the historical record is noteworthy, but his claims have also come under fire from other scholars

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128. Nelson & Pushaw, *supra* note 125, at 138.

129. *Id.* at 148–49 (contrasting laws aimed at protecting commercial actors, which Nelson and Pushaw would permit, with laws aimed at protecting persons or property generally, which they would not permit).

130. See *id.* at 155 (arguing that presence of housing insurance would allow Congress to regulate virtually all arson, but apparently not recognizing that same reasoning would permit regulation of other violent crimes due to their effect on markets for health, property, and other types of insurance). But see *Jones v. United States*, 529 U.S. 848, 849 (2000) (holding that such an interpretation of the arson statute would raise "grave and doubtful constitutional questions"); Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 Ark. L. Rev. 731, 740 (2003) (criticizing Nelson and Pushaw's theory on ground that it could allow Congress to regulate most violent crimes).

131. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 850 (2003) [hereinafter Barnett, *New Evidence*] (describing extensive survey of use of "commerce" in founding-era sources); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 104 (2001) [hereinafter Barnett, *Original Meaning*] (same).

132. Barnett, *Original Meaning*, *supra* note 131, at 111–25. This theory differs from Nelson and Pushaw's view in that the trade and exchange of goods is just one category within the broader universe of economic activity that Nelson and Pushaw would permit Congress to regulate. See *supra* note 127 and accompanying text.

who argue that “commerce” had a far broader meaning and understanding in the eighteenth century.<sup>133</sup>

Whether or not the Barnett view is consistent with the original meaning, it remains unclear whether the Supreme Court is likely to pursue such a lean view of federal power.<sup>134</sup> The Court’s *Raich* opinion did not discuss the debate over the original meaning of the Constitution. *Raich*, like *Lopez* and *Morrison* before it, expressly stated the Court’s intention not to depart from the view of the Commerce Clause that predominated at least for most of the twentieth century.<sup>135</sup> Only Justice Thomas has expressed the view that the core of modern Commerce Clause analysis—the “substantial effects” test—is at odds with the “original understanding of Congress’ powers,”<sup>136</sup> and even he has expressed reluctance to undo too much of the Court’s Commerce Clause jurisprudence because of stare decisis and widespread reliance on the contemporary understanding of congressional power.<sup>137</sup> Neither originalist view, then, is in harmony with the Court’s actual jurisprudence as expressed in its recent cases.

2. *The Political Safeguards View of the Commerce Clause.* — Rather than trying to find a definitive and justiciable original meaning of the word “commerce” in the text of the Constitution, another group of academic commentators has looked to political forces to find a limit on congress-

133. For examples of this argument, see, e.g., Akhil Reed Amar, *America’s Constitution: A Biography* 107–08 (2005) (discussing broader meanings of “commerce” in founding period as “referring to all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets”); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 *Ark. L. Rev.* 1185, 1199–202 (2003) (citing founding-era sources using “commerce” in broader sense and criticizing scholars who ignore these uses); cf. Dral & Phillips, *supra* note 79, at 618 (criticizing economic-noneconomic distinction as unrooted in language of Constitution).

134. Barnett himself does not provide a clear application of his Commerce Clause research to contemporary statutes. See, e.g., Barnett, *New Evidence*, *supra* note 131, at 855 (noting that manufacturing and agriculture are examples of economic activities that are not included in his definition of commerce, but not specifying what impact this would have on federal law). Other proponents of the “trade and exchange of goods” theory of the Commerce Clause have also hesitated to give precise examples of the practical applications of the theory. See, e.g., Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 *Va. L. Rev.* 1387, 1455 (1987) (discussing reluctance to support “dismantling of large portions of the modern federal government” as would arguably be required by originalist reading of Commerce Clause).

135. *Gonzales v. Raich*, 545 U.S. 1, 23 (2005) (“[T]he larger context of modern-era Commerce Clause jurisprudence [was] preserved by [*Lopez* and *Morrison*].”); cf. *United States v. Morrison*, 529 U.S. 598, 608 (2000) (placing *Lopez* within the Court’s “modern, expansive interpretation of the Commerce Clause”); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (emphasizing the Court’s holding was “consistent with the great weight of [its] case law,” including the New Deal-era precedents).

136. *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); see also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 *Notre Dame L. Rev.* 167, 191 (1996) (identifying Justice Thomas as only Justice who has expressed willingness to reconsider Commerce Clause as foundation of modern administrative state).

137. *Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring).

sional power. While this view predates *Lopez* and was the leading interpretation of the Commerce Clause prior to *Lopez*, it has also been relied on by recent scholars seeking to criticize the Supreme Court's "new federalism." The political safeguards view draws inspiration from *Gibbons v. Ogden*,<sup>138</sup> the Supreme Court's first major ruling on the Commerce Clause. In *Gibbons*, Chief Justice Marshall upheld a congressional license for the operation of a ferry between New York and New Jersey. Justice Marshall indicated that the commerce power was "absolute[ ]," and that the "sole restraints" upon its exercise were the political process and the accountability of congressional representatives to their constituents.<sup>139</sup>

Some scholars have pointed to this language as indicating that the scope of congressional power under the Commerce Clause is best understood as a political question, one that should be settled by the interplay between the political branches of the federal and state governments rather than by judicial review in the federal courts.<sup>140</sup> Whatever the merits of this view, however, it seems to be at odds with the Supreme Court's decisions.<sup>141</sup> In the years since *Lopez*, the Court has continued to entertain constitutional challenges to congressional legislation under the Commerce Clause.<sup>142</sup> The Commerce Clause has not slipped off to the sidelines and become a nonjusticiable political question; rather, it has enjoyed a renewed force in the debate over federal power and the meaning of the Constitution.

3. *The National Interest Test*. — A third scholarly perspective on the Commerce Clause is the view that Congress has power to regulate fields that are uniquely or inherently federal, but issues that are of local con-

138. 22 U.S. (9 Wheat.) 1 (1824).

139. *Id.* at 197. Justice Marshall conceded the power is confined by the limitations "prescribed in the constitution," but he did not specify what those limits might be and focused instead on the concept of political accountability preventing Congress from overstepping. *Id.* at 196–97.

140. See, e.g., Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 *Tex. L. Rev.* 719, 771 (1996) (criticizing *Lopez*'s holding and arguing that federalism is a value to be enforced by "elected representatives of the people" rather than by courts).

141. Cf. Merrill, *supra* note 30, at 824–25 ("[T]he Rehnquist Court can be seen as a nineteen-year campaign by the late Chief Justice and his allies to repudiate the underlying thesis . . . that the respective spheres of authority between the federal government and the states should be determined solely by the political process."). The "political safeguards" view waned after *Morrison* but has again become more prominent after *Raich*. See *infra* notes 151–152 and accompanying text.

142. In addition to *Morrison* and *Jones*, the Court upheld Commerce Clause challenges in two recent cases dealing with the Clean Water Act as well. See *infra* note 227. Even *Raich*, which rejected a Commerce Clause challenge to a federal statute, cannot be read as adopting the political safeguards view. The *Raich* majority conducted a sustained discussion of the limits on the commerce power before concluding that the CSA passed constitutional muster. Cf. Choper, *supra* note 130, at 731 (noting that the Court is "really serious about the existence of true limits on Congress's power under the Commerce Clause" and that theorists can no longer argue that courts should not enforce federalism without abandoning Supreme Court's jurisprudence).

cern should be left to the states.<sup>143</sup> This view is rooted most clearly in dicta in Justice Rehnquist's majority opinion in *Morrison*, which sought to distinguish between "truly national" issues that are appropriate for congressional legislation and "truly local" issues that are best left to the states.<sup>144</sup> Indeed, the Court's federalism jurisprudence more generally is marked by a concern that traditional spheres of state authority be respected; the Commerce Clause cases are just one strand of this trend.<sup>145</sup>

This approach suffers from two significant drawbacks, however. First, it is unclear what the justiciable standard would be for deciding what issues are part of the "national interest," and what issues are "truly local."<sup>146</sup> Second, and more importantly, the decision about what issues are truly national appears to be a quintessential policy judgment. There is no reason to think that judges are more competent than legislators to decide as a policy matter which problems should be solved by the federal government and which problems should be solved by the states.<sup>147</sup> While background principles of federalism inform the Court's analyses in the Commerce Clause cases, these concerns are best understood in terms of constitutional interpretation rather than in terms of the Court's desired policy outcomes.<sup>148</sup> A "national interest" test, rather than simply asserting the enumerated constitutional limits on congressional power, would

143. For examples of this view, see Amar, *supra* note 133, at 108 (arguing Commerce Clause gives Congress power to regulate issues of national concern and should be rechristened the "international-and-interstate" clause or the "with-and-among" clause); Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 *Pepp. L. Rev.* 547, 548 (2001) (proposing that Commerce Clause should be understood to allow congressional regulation "to vindicate a well-defined national interest").

144. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

145. See *United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution . . . withhold[s] from Congress a plenary police power . . ."). For examples of reluctance to upset the federal-state balance in other areas, see *New York v. United States*, 505 U.S. 144, 155 (1992) (expressing concern about Congress "invad[ing] the province of state sovereignty"); *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (interpreting 42 U.S.C. § 1983 so as not to interfere with the traditional province of state tort law).

146. Kmiec concedes that the "national interest" test is too "vague and manipulable" to operate as a clear rule, but nonetheless contends that his test would assist the judiciary in decisionmaking. Kmiec, *supra* note 143, at 561. Other scholars have observed that there is no clear definition of which areas are matters of traditional state concern. See Choper, *supra* note 130, at 754 (arguing Supreme Court has failed to provide guidance in this area).

147. Cf. *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) (noting Congress has a far greater institutional capacity to gather facts and make policy decisions than the Court).

148. See *id.* at 607 (majority opinion) (emphasizing enumerated limits on congressional power, not desirability of solving problem at state rather than federal level). One could apply a legal realist analysis to the Court's Commerce Clause cases and conclude that each case merely reflects the Court's policy judgments about the particular statute being challenged. But the task of the lower federal courts, at least, is to follow Supreme Court precedent. Consequently, it is important to provide interpretations of the case law that reconcile these precedents around common constitutional principles, rather than merely ascribing the Court's decisionmaking to political whim.

come dangerously close to substituting the Court's policy judgments for those of Congress. The Court has indicated that it is unwilling to abandon rational basis review of congressional policy judgments.<sup>149</sup>

In sum, the major academic theories about the Commerce Clause before *Raich* often failed to engage with the actual jurisprudence of the Supreme Court. Commentators criticized the concept of "substantial effects" as not having any clear limits,<sup>150</sup> and argued either for a return to some strictly identified original meaning or for an abandonment of judicial review in this area altogether.

### B. *Interpretations of the Commerce Clause after Raich*

As discussed in the previous section, *Lopez* and *Morrison* initiated a flurry of debate over the proper interpretation of the Commerce Clause, sparked by the expectation that the Supreme Court was beginning to take limits on the commerce power seriously. The *Raich* decision damaged that expectation, with many observers claiming that the Court's ruling was a "mortal blow" to the "New Federalism" of the Rehnquist Court.<sup>151</sup> After the Court had appeared willing to assert new limits on congressional power, judicial review was apparently once again taking a back seat to a reliance on the political process to safeguard the proper allocation of power between the states and the federal government.<sup>152</sup>

The academic discussion of *Raich* has identified two elements of the case as particularly salient: the Court's rejection of an as-applied challenge to a congressional statute<sup>153</sup> and its reliance on the presence of a larger congressional scheme regulating interstate commerce as a determi-

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149. See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (noting congressional policy judgments are entitled to rational basis review rather than inquiry into whether policy is in national interest).

150. See Choper, *supra* note 130, at 736–37 (noting that using substantial effects test to define clear limits on congressional power is "remarkably difficult"); Kmiec, *supra* note 143, at 565 (arguing that substantial effects test is overbroad and should be abandoned); Nelson & Pushaw, *supra* note 125, at 11 (stating that substantial effects test as well as Court's two other categories are "infinitely elastic").

151. Adler, *supra* note 74, at 753; cf. Barnett, Foreword, *supra* note 91, at 744 (questioning whether any limits on national power are enforceable after *Raich*); Craig M. Bradley, What Ever Happened to Federalism?, *Trial*, Aug. 2005, at 52, 52 (asserting that with *Raich* decision, "the Court strangled in its infancy the so-called federalism revolution that began a mere 10 years" earlier). But see Ernest A. Young, Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After *Gonzales v. Raich*, 2005 Sup. Ct. Rev. 1, 3 (characterizing *Raich* as difficult case that "should not necessarily be seen as a portent that the Federalist Revival has ground to a halt").

152. See Adler, *supra* note 74, at 762 (arguing *Raich* "displaced judicial review in favor of the political safeguards of federalism"). But see *Raich*, 545 U.S. at 25–26 (reaffirming the judicial review exercised in *Lopez* and *Morrison*).

153. See *Raich*, 545 U.S. at 23 (distinguishing facial from as-applied challenge to congressional statute and stating "[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" (internal quotation marks omitted) (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971))).

native factor in the constitutionality of a law.<sup>154</sup> On the first point, some have questioned whether the Court's reasoning would preclude all future as-applied challenges to federal statutes under the Commerce Clause. Under this interpretation, the Court's refusal to separate noneconomic marijuana cultivation from the interstate trade in narcotics may signal a broader unwillingness to make any attempt to separate constitutional from unconstitutional applications of statutes in the Commerce Clause context.<sup>155</sup> On the second issue, the Court's emphasis on the presence of a broader regulatory scheme has also been read to pose a serious obstacle to future Commerce Clause challenges. Many have concluded, along with the *Raich* dissenters,<sup>156</sup> that the holding of the case undermines any judicial limits on the commerce power by permitting Congress to employ broadly phrased statutory schemes to regulate intrastate classes of conduct which it could not regulate directly. In this view, the message of the case was that "the more Congress regulates, the more it can regulate,"<sup>157</sup> meaning that effective judicial review of congressional power should no longer be expected.

### C. *The Debate in the Lower Federal Courts*

1. "Substantial Effects" in the Circuit Courts After *Lopez* and *Morrison*. — Immediately after it was handed down, the *Lopez* decision was widely viewed as revolutionary, with many commentators speculating that it might unleash a flood of judicial review of congressional statutes.<sup>158</sup> The actual results were comparatively underwhelming. As of 2003, the circuit courts had upheld no facial challenges under the Commerce Clause and only nine as-applied challenges to federal statutes.<sup>159</sup> While a thorough review of the decisions of the circuit courts is beyond the scope of this

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154. See *id.* at 24 (emphasizing comprehensiveness of CSA).

155. See, e.g., Barnett, Foreword, *supra* note 91, at 744–45 (discussing whether as-applied challenges are viable after *Raich*); David L. Franklin, Facial Challenges, Legislative Purpose, and the Commerce Clause, 92 Iowa L. Rev. 41, 43 (2006) (noting *Raich* "strongly suggest[s] that 'as-applied' challenges under the Commerce Clause will not receive a friendly reception at the Court"); Stuckey, *supra* note 90, at 2125 (arguing that when *Raich* applies, as-applied challenges "will inevitably fail"); Young, *supra* note 151, at 25 (contrasting *Raich*'s reluctance to uphold as-applied challenge under Commerce Clause with Supreme Court's "strong preference for as-applied challenges in other areas").

156. See *infra* note 191.

157. John T. Parry, "Society Must Be [Regulated]": Biopolitics and the Commerce Clause in *Gonzales v. Raich*, 9 Lewis & Clark L. Rev. 853, 862 (2005); cf. Adler, *supra* note 74, at 764 (questioning whether there is any limit to congressional power if Congress classifies conduct at a sufficiently high level of generality). But see Barnett, Foreword, *supra* note 91, at 747 (arguing that the *Raich* holding can be limited to the unique factual situation of a regulated market in a fungible commodity).

158. See Denning & Reynolds, Rulings and Resistance, *supra* note 61, at 1256 & n.18 (citing "fears of numerous critics" that *Lopez* and *Morrison* would lead to a major increase in opinions holding statutes unconstitutional).

159. *Id.* at 1262.

Note,<sup>160</sup> it is worth identifying two standard types of analysis that courts have used. Each provides evidence of the potential slipperiness of common understandings of the “substantial effects” doctrine.

One tack taken by some lower courts was to employ an extremely broad definition of “economic activity” in order to allow the court to aggregate the effects of the class of activity, unlike the Supreme Court in *Morrison*. For example, in a challenge to a federal bank robbery statute, the Third Circuit classified bank robbery as an “economic activity,” because it is motivated by economic gain and causes monetary loss.<sup>161</sup> This rationale has similar shortcomings to that rejected by *Lopez* and *Morrison*: It ultimately would allow Congress to regulate almost any activity, and certainly any violent crimes that result in economic losses. If “economic activity” were to have such a broad definition, then the Court’s attempts to find a limiting principle to the “substantial effects” doctrine would be frustrated.<sup>162</sup>

A second common theme in lower court decisions was a dispute over the level of generality by which to classify the regulated activity, which anticipated the dispute among the members of the Supreme Court in *Raich*.<sup>163</sup> The higher the level of generality by which the activity is classified, the more likely that a court could find that the class of activity had substantial effects on interstate commerce. In one colorful example of this, the District of Columbia Circuit considered a challenge to the Endangered Species Act (ESA).<sup>164</sup> A real estate developer, prevented from building a hospital because it would interfere with the habitat of an endangered fly species, challenged the application of the ESA as an unconstitutional extension of congressional power under the Commerce Clause. The three-judge panel split three ways, with one judge discussing the effect of endangered species as a whole on interstate commerce, one discussing the effect of the hospital on interstate commerce, and a third discussing the effect of the particular fly species on interstate commerce.<sup>165</sup> Given this basic failure to reach any consensus, the third

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160. For a more complete review of how lower courts have applied *Lopez* and *Morrison* to a range of federal statutes, see Bittker & Denning, *supra* note 101, § 5.04[E]–[H]; *id.* at 1262–99; Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 *Harv. Women’s L.J.* 57, 64–67, 76–92 (2002).

161. *United States v. Spinello*, 265 F.3d 150, 156 (3d Cir. 2001).

162. The Third Circuit’s definition of economic activity in *Spinello* also runs afoul of the definition later used by the Court in *Raich*, which focused on participation in the production, exchange, and consumption of goods (and, perhaps, services). *Gonzales v. Raich*, 545 U.S. 1, 25 (2005); see also *infra* Part III.A.1 (discussing distinction between economic and noneconomic activity).

163. See *infra* note 191 and accompanying text.

164. *Nat’l Ass’n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997). The case is analyzed in detail in John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 *Mich. L. Rev.* 174 (1998).

165. See Nagle, *supra* note 164, at 178.

judge, dissenting, cynically referred to the Commerce Clause as the “hey-you-can-do-whatever-you-feel-like clause.”<sup>166</sup>

2. *The Circuit Courts Respond to Raich*. — On its face, *Raich* neither claims to eliminate judicial review of congressional exercises of the commerce power, nor is it difficult to reconcile with the Court’s previous Commerce Clause holdings.<sup>167</sup> *Raich* upheld an application of a congressional statute to noneconomic activity, but in doing so it provided a working definition of “economic activity,” and it appeared to require that Congress only be permitted to regulate noneconomic activity when such regulation is an essential element of a broader regulatory scheme.<sup>168</sup> This reasoning can easily be read as a limited exception to the broad non-aggregation principle of *Morrison*.<sup>169</sup> In practice, however, the lower courts have tended to interpret the case as removing any significant limits on congressional power that might have been put in place by *Lopez* and *Morrison*.

A number of circuit courts have interpreted *Raich* as always governing Commerce Clause analysis, and as permitting Congress to regulate any local activity, whether economic or not, as long as the regulation is part of a larger federal regulatory scheme.<sup>170</sup> While this Note argues that this is an incorrect understanding of *Raich*, it has quickly established itself as the predominant view of the circuit courts. Just as some scholars had predicted,<sup>171</sup> the *Raich* principle has been interpreted as preserving few restrictions on congressional power, particularly in cases where a congressional statute is broad enough to sweep a wide category of activity within its purview. It is thus little wonder that some observers have questioned the continued viability of any challenges to congressional use of the commerce power at all.<sup>172</sup>

In sum, the circuit courts have tended to view *Raich* as resurrecting the pre-*Lopez* understanding of the Commerce Clause—an understanding that provides few limits on congressional power. In the view of most circuits, so long as the class of activity regulated by Congress substantially affects commerce when taken as a whole, the statute can be freely applied

166. *Babbitt*, 130 F.3d at 1061 (Sentelle, J., dissenting) (quoting Alex Kozinski, Introduction to Volume Nineteen, 19 Harv. J.L. & Pub. Pol’y 1, 5 (1995)).

167. See *infra* Part III.A.

168. See *supra* Part I.B.3.

169. This Note argues that the narrow exception reading of *Raich* is the best way to reconcile the Supreme Court’s Commerce Clause cases. See *infra* Part III.

170. See Stuckey, *supra* note 90, at 2127–28 (discussing lower court readings of *Raich* as applying to all Commerce Clause challenges to federal statutes). For examples of lower courts relying on *Raich* to reject as-applied challenges, see, e.g., *United States v. Davis*, 473 F.3d 680, 682–83 (6th Cir. 2007) (rejecting as-applied challenge against Hobbs Act); *United States v. Stewart*, 451 F.3d 1071, 1073–75 (9th Cir. 2006) (federal prohibition on machine gun possession); *United States v. Jeronimo-Bautista*, 425 F.3d 1266, 1271 (10th Cir. 2005) (federal child pornography statute).

171. See *supra* notes 151–152 and accompanying text.

172. See *supra* notes 151–157 and accompanying text.

to any activity within that class without significant inquiry into whether the particular activity has any rational relationship to interstate commerce. Is this view of *Raich* appropriate? Part III of this Note proposes a different understanding.

### III. FINDING A JUSTICIABLE LIMIT TO THE DOCTRINE OF SUBSTANTIAL EFFECTS: A PROPOSED SYNTHESIS OF THE SUPREME COURT'S COMMERCE CLAUSE JURISPRUDENCE

Part II of this Note showed that academic commentary has tended to criticize the substantial effects doctrine as being unworkable and that scholars generally propose either that the doctrine should be abandoned in favor of a stricter limit on the commerce power or that the Court should concede the entire area of regulating federalism to the political process. At the same time, lower courts have tended not to follow *Lopez* or *Morrison* in striking down particular applications of congressional statutes, and have read *Raich* as a free pass for Congress to legislate broadly even if particular cases do not involve activity that is economic or that has substantial effects on interstate commerce. This Part will argue that both views misread the actual substance of the Supreme Court's Commerce Clause doctrine for noneconomic activity, which has been remarkably consistent not only in *Lopez*, *Morrison*, and *Raich*, but dating back to the New Deal and watershed cases such as *Wickard v. Filburn*. While lower federal courts have not always followed the Court's signposts in this area, there is a straightforward and principled way to synthesize the Court's Commerce Clause precedents and enunciate a standard for when Congress may regulate intrastate noneconomic activity. The Supreme Court has consistently refused to permit congressional regulation of such activity unless that regulation is an essential part of a larger statutory scheme that regulates economic activity. This standard, when applied to RICO, would prune back the more expansive applications of the statute and limit congressional power to displace the states' traditional role in addressing violent crime.

Part III.A sets forth the general principles that emerge from the Supreme Court's cases and the basic two-step inquiry the Court has invariably engaged in when deciding whether Congress may regulate intrastate noneconomic activity. Part III.B applies these principles to the RICO cases and argues that the First Circuit in *Nascimento* got it wrong: Application of RICO to the Stonehurst gang or other noneconomic criminal enterprises is an unconstitutional extension of congressional power. Finally, Part III.C considers several other contested areas as well as the broader real world effects of this Note's proposed test.

A. *Identifying the Core Principles of the Supreme Court's Commerce Clause Jurisprudence*

1. *Distinction Between Economic and Noneconomic Activity.* — Although the distinction has been criticized as unworkable,<sup>173</sup> each of the Supreme Court's recent Commerce Clause cases has focused on the distinction between economic and noneconomic activity. The Court's strongest statement came in *Morrison*, where it stated that the Commerce Clause does not allow Congress to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."<sup>174</sup> This strong principle—that only economic activity may be aggregated—was not overturned by *Raich*. Instead, *Raich* was the first time where the Court offered a working definition of the word "economic," as referring to "the production, distribution, and consumption of commodities."<sup>175</sup> In essence, under the Court's definition, economic activity is participation in a market for particular goods and services.<sup>176</sup> The determinative factor is not the motives or intentions of the actors,<sup>177</sup> but their involvement in production or voluntary exchange.<sup>178</sup> The Court relied on that definition for its finding that the

173. See Choper, *supra* note 130, at 742 ("The distinction between 'economic' or 'commercial' issues and 'political, social, cultural, and moral' matters is exceedingly blurred."); Dral & Phillips, *supra* note 79, at 618 ("[T]he determination of what is economic is problematic in itself . . ."); The Supreme Court, 2004 Term—Leading Cases, 119 Harv. L. Rev. 169, 174 (2005) ("[T]here is no principled basis for the distinction between economic and noneconomic activities."). But see Nelson & Pushaw, *supra* note 125, at 11 (arguing that national uniformity is beneficial for economic regulation but detrimental for "social, cultural, and moral issues").

174. *United States v. Morrison*, 529 U.S. 598, 617 (2000).

175. *Gonzales v. Raich*, 545 U.S. 1, 25–26 (2005) (quoting Webster's Third New International Dictionary 720 (1966)).

176. This definition stakes out a middle ground between two possible extremes. The most expansive possible definition of "economic" would encompass all "rational choices," whether tied to market exchange or not. See, e.g., Richard A. Posner, *Economic Analysis of Law* 3 (7th ed. 2007) ("[E]conomics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants."). Such a broad definition would provide little guidance in interpreting the Commerce Clause. The least expansive definition would limit "economic" to the exchange of goods, without including production or consumption. See *supra* note 132 and accompanying text (discussing Barnett's narrow view of what constitutes "economic activity"). The Court's reliance on a middle ground definition of "economic" that accounts for all the stages of market-related activity resonates with historical Commerce Clause jurisprudence. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 229–30 (1824) (Johnson, J., concurring) (including productive labor as incident to the exchange of goods and therefore subject to congressional regulation); *infra* note 180.

177. *Contra United States v. Nascimento*, 491 F.3d 25, 43 (1st Cir. 2007) (arguing racketeering is economic because it is motivated by greed).

178. For examples of economic criminal activity, see, e.g., *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004) (distinguishing violent crimes from economic crimes such as cigarette trafficking, consumer credit fraud, and gambling operations).

CSA was a regulatory scheme aimed at “quintessentially economic” activities.<sup>179</sup>

The Court is clearly willing to aggregate a class of economic activity in order to establish the requisite substantial effects on interstate commerce. This consistent principle has persisted since the New Deal era and was unchallenged by *Lopez* and *Morrison*.<sup>180</sup> However, in *Morrison*, the Court said that it was inappropriate to aggregate the effects of noneconomic activity to permit congressional regulation.<sup>181</sup> Moreover, the Court also stated that while it declined to adopt a “categorical rule,” its cases were uniform in permitting Commerce Clause regulation of intrastate activity “only where that activity is economic in nature.”<sup>182</sup>

If the Court’s Commerce Clause jurisprudence were actually this straightforward, it would be difficult to explain why scholars and lower courts have had such trouble following it. The major wrinkle that *Morrison* glossed over was the fact that the Court had allowed congressional regulation of noneconomic activity at least once, in *Wickard v. Filburn*,<sup>183</sup> and it was just a few years away from doing so again, in *Raich*.

179. *Raich*, 545 U.S. at 25. The definition offered in *Raich* is partially incomplete, although it provides valuable insight into how one should interpret the Court’s use of the word “economic.” A more complete definition of economic activity would include the production and distribution of other goods and services in addition to commodities. See, e.g., American Heritage Dictionary, supra note 44, at 566 (defining “economics” as having to do with the “production, distribution, and consumption of goods and services”). This is essentially the definition used by Nelson & Pushaw, supra note 125, at 107–08. This Note’s reading of the Supreme Court’s Commerce Clause jurisprudence differs from Nelson and Pushaw’s Commerce Clause proposal in that this Note’s reading only employs the economic-noneconomic distinction when the regulated activity is intrastate, while permitting Congress to regulate any activity involving traffic across state lines. Nelson and Pushaw, on the other hand, contend that Congress should only have power to regulate interstate traffic if undertaken for business purposes, or by a common carrier. *Id.* at 109. This Note’s reading is closer to the Court’s historic jurisprudence in this area than is Nelson and Pushaw’s proposal. See supra note 127.

180. See *United States v. Morrison*, 529 U.S. 598, 611 (2000) (“[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”). In general, the landmark Supreme Court cases upholding expansive views of the Commerce Clause have involved economic activity. See *Perez v. United States*, 402 U.S. 146, 146–47 (1971) (allowing regulation and criminalization of extortionate credit transactions); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (intrastate restaurant business); *United States v. Darby*, 312 U.S. 100, 115 (1941) (employment conditions in manufacturing); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (same). The primary exceptions are *Raich* and *Wickard v. Filburn*. See discussion infra Part III.A.2.

181. See supra note 77 and accompanying text.

182. *Morrison*, 529 U.S. at 613.

183. 317 U.S. 111 (1942) (upholding federal criminal prosecution of defendant who grew wheat for home consumption). In *Lopez*, Chief Justice Rehnquist attempted to reclassify *Wickard* as being a case that “involved economic activity in a way that the possession of a gun in a school zone does not.” *United States v. Lopez*, 514 U.S. 549, 560 (1995). This is probably an inaccurate characterization of *Wickard*, but the Court’s holding in *Lopez* does not depend on reclassifying *Wickard* as a case about economic activity. Even

What accounts for the Court's willingness to permit federal regulation of the noneconomic activity involved in these cases? Either these cases are inconsistent with the strong statements in *Morrison* or they represent a narrow exception to the general principle that Congress may not regulate intrastate noneconomic activity. The answer to this question is critical to our conception of congressional power in the overall constitutional scheme, and it is to this question that this Note now turns.

2. *The Narrow Exception to the Morrison Rule.* — The similarities between *Wickard* and *Raich* are “striking.”<sup>184</sup> Each case dealt with home-based production and consumption of a crop for which an established interstate market existed.<sup>185</sup> In both cases, Congress had chosen to comprehensively regulate the interstate market of the crop in question. Because of these similarities, the *Raich* Court held that *Wickard*'s rationale was controlling: “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 . . . .”<sup>186</sup>

There is a fairly straightforward two-step analysis implicit in this holding. The Court first asks whether Congress has created a regulatory scheme to govern a particular class of interstate economic activity. Second, it asks whether it is necessary to apply the regulatory scheme to noneconomic activity in order to ensure that the overall scheme is not undercut.<sup>187</sup> Unless the answer to both of these questions is in the affirmative, Congress may not regulate noneconomic intrastate activity.

Although the Supreme Court did not classify this reasoning as a two-step test in either *Wickard* or *Raich*, there are at least three significant benefits that flow from explicitly identifying it in this way. First, this ex-

allowing that the domestic wheat growing in *Wickard* was noneconomic, the rationale for allowing Congress to regulate this activity was that a failure to regulate home production would undercut the valid congressional attempt to regulate the interstate wheat market. See *Wickard*, 317 U.S. at 128–29.

184. *Raich*, 545 U.S. at 18–19.

185. *Id.* *Wickard*'s crop was wheat; *Raich*'s was marijuana.

186. *Id.* at 18.

187. Scholars and courts have focused on *Raich*'s statement 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,” as evidence that as-applied challenges are likely to fail. *Raich*, 545 U.S. at 23 (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971)); see *United States v. Nascimento*, 491 F.3d 25, 41 (1st Cir. 2007) (arguing that as-applied challenges are inappropriate after *Raich*); *supra* note 155 (noting scholarly arguments that *Raich* signaled a preference for facial challenges). But this statement, in context, is a reference to the unique case of a comprehensive scheme that regulates a “quintessentially economic” class of activities and a subset of the larger class that was “an essential part of the larger regulatory scheme.” *Raich*, 545 U.S. at 25, 27. When those circumstances are not present, *Raich* would not preclude an as-applied challenge. See *id.* at 35 (Scalia, J., concurring) (emphasizing that congressional power to regulate intrastate activities only extends to cases where it is “necessary to make a regulation of interstate commerce effective”).

planation neatly harmonizes the Court's jurisprudence in this area. In each case where the Court has had to confront the question of whether to allow Congress to regulate intrastate noneconomic activity, it has asked whether there is a comprehensive legislative scheme governing interstate commerce and whether the noneconomic activity in question threatens to undercut that scheme.<sup>188</sup> Only when both prongs were met did the Court allow the statute to be applied.

The second benefit of this test is that it provides a much more straightforward, justiciable, and predictable limit to congressional power than other conceptions of the "substantial effects" analysis. The problem with many applications of the "substantial effects" doctrine is that they appear to pose little, if any, limit on congressional power. After all, if any class of activity can be aggregated to establish substantial effects on interstate commerce, then Congress could regulate virtually anything, and the Commerce Clause would be transformed into a grant of plenary legislative power. This was a primary concern of the *Lopez* Court.<sup>189</sup> However, if Congress may only regulate intrastate noneconomic activity that is necessarily incidental to a broader regulation of actual economic activity, the scope of the commerce power is more sharply limited. For challenged legislation to be upheld, Congress would need to have reason to believe that regulation of the noneconomic activity at issue could not be severed from the regulatory scheme without undermining the overall scheme.<sup>190</sup>

An additional, closely related benefit of this understanding of the Commerce Clause is that it prevents Commerce Clause jurisprudence from becoming a mere legislative drafting exercise. Under one reading of *Raich*, Congress may regulate any activity whatsoever, as long as it does so with a statute that categorizes the activity at a sufficiently high level of generality so as to also include some economic activity.<sup>191</sup> Such an ap-

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188. *Raich*, 545 U.S. at 22 (holding Congress could regulate intrastate manufacturing and possession of marijuana because it had reason to believe failure to do so "would leave a gaping hole in the CSA"); *United States v. Morrison*, 529 U.S. 598, 615 (2000) (noting lack of congressional scheme governing any economic activity); *Lopez*, 514 U.S. at 561 (finding ban on gun possession in schools was not an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *Wickard*, 317 U.S. at 128–29 (concluding regulation of noneconomic wheat production was appropriate because necessary to protect legislative purpose in regulatory scheme governing wheat market).

189. See *Lopez*, 514 U.S. at 564–65 ("[I]f we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.")

190. One possible argument against this reasoning is that it is difficult to precisely define what sort of activity to classify as economic. See Choper, *supra* note 130, at 737–39 (criticizing economic-noneconomic criterion as having no clear limit). This criticism is addressed *infra* Part III.C.

191. This appears to be the reading with which both Justice O'Connor and Justice Thomas were concerned in their dissenting opinions in *Raich*. See *Raich*, 545 U.S. at 43 (O'Connor, J., dissenting) ("[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with

proach would indeed be a curious way to define the limits of Congress, so it is reassuring to conclude that this was not the actual reasoning of the *Raich* majority. Rather, the Court repeatedly emphasized the risk that the CSA's regulation of interstate commerce would be undermined if intra-state noneconomic production and consumption were declared off limits to congressional regulation.<sup>192</sup>

In conclusion, when courts are asked to decide whether application of a statute to a particular class of noneconomic activity is permissible, they should consider whether the statute operates as a regulatory scheme over a class of interstate commerce, such as railroad rates, securities markets, or the interstate market in a commodity or service. If such a scheme exists, courts should then consider whether the particular class of noneconomic activity at issue threatens to undercut the congressional scheme.<sup>193</sup> Application of the statute should only be allowed if the answer is yes. This reasoning helps to resolve the circuit split over RICO.

## B. *Applying Raich to RICO*

1. *How Nascimento Misinterpreted Raich*. — The First Circuit did not draw the same lessons from *Raich* as this Note does. Rather, the court stated that a Commerce Clause challenge to a statute can be defeated by showing that “the statute itself deals rationally with a class of activity that has a substantial relationship to interstate . . . commerce.”<sup>194</sup> As long as the class of activity regulated by the statute meets this requirement, in the court's view, the statute can be validly applied to all activities within that class. Under such an interpretation, RICO can be applied to any instance

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precision.”); *id.* at 73 (Thomas, J., dissenting) (arguing that congressional power should not be made to “turn[ ] on the manner in which Congress packages legislation”). This has also been the frequent interpretation of academic commentators, see *supra* Part II.B, and the circuit courts, including the First Circuit in *Nascimento*, see *supra* Parts I.C.3, II.C.2.

192. See, e.g., *Raich*, 545 U.S. at 12–13 (“Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.”); *id.* at 19 (“Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions.”); *id.* at 28 (“The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong presumption of validity.”).

193. As a general rule, noneconomic activity will threaten to undercut congressional regulations of economic activity when it interferes with the market forces of supply and demand. *Id.* at 19 (noting that home production of marijuana could affect price and market conditions). While it is possible that there are other ways in which noneconomic activity might undercut regulation of interstate commerce, courts should probably be more willing to accept market-based arguments from the government than other “indirect” arguments of the sort rejected in *Lopez*. Unlike other indirect connections to interstate commerce, market-based arguments have been accepted by the Supreme Court in *Wickard* and *Raich*. Moreover, a strict focus on supply and demand issues reduces the possibility that the rationale for congressional regulation will be expanded beyond any constitutional limitation.

194. *United States v. Nascimento*, 491 F.3d 25, 42 (1st Cir. 2007).

of racketeering, whether the enterprise being prosecuted engages in economic activity or not.

This view conflicts with the reasoning of *Raich* itself, however. In fact, such a reading of *Raich* places the case in sharp tension with *Lopez* and *Morrison*.<sup>195</sup> As discussed above, *Raich* only allowed the regulation of noneconomic activity under the CSA because there was a rational basis to conclude that this was essential to the overall regulatory scheme of the statute.<sup>196</sup> This reasoning simply does not apply in the RICO context. RICO certainly satisfies the first part of the two-part test: It operates as a regulatory scheme governing a class of economic activity—illegal business activities—that substantially affects interstate commerce. Taken on the whole, racketeering tends to be economic behavior, and the economic class of racketeering was the core target of RICO.<sup>197</sup>

However, as for the second question that the Supreme Court has asked, there is not a rational basis to believe that prosecution of noneconomic criminal enterprises is an “essential part” of RICO or that failure to prosecute such enterprises would threaten to undercut the legitimate congressional goal of regulating the interstate effects of economic criminal enterprises. The market-based reasoning that the Court relied on in *Wickard* and *Raich* does not apply, as there is not an integrated market for all classes of criminal conspiratorial activity that would somehow be affected by not prosecuting certain categories of racketeering.<sup>198</sup> Further, there is no indication in the statute or the legislative history of a congressional belief that prosecution of local, noneconomic criminal enterprises was necessary to prevent the regulatory scheme from being undercut.<sup>199</sup> This was in sharp contrast with *Raich*, where legislative findings clearly showed that the passage of CSA was animated by con-

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195. The concurrence in *Nascimento* recognizes this fact. See *id.* at 52–53 (Boudin, C.J., concurring) (arguing that the case could have been decided on narrower grounds and refusing to join in the court’s discussion of the extent to which *Raich* affects *Lopez* and *Morrison*).

196. *Raich*, 545 U.S. at 26–27.

197. *Nascimento*, 491 F.3d at 43 (noting that racketeering activity generally involves financial crimes such as loan-sharking). On the issue of congressional intent to target criminal businesses rather than generalized criminal activity, see, e.g., Bradley, Analysis of RICO, *supra* note 45, at 840 (discussing congressional concern about various methods by which organized crime was infiltrating legitimate businesses as a key motivation for passage of RICO).

198. The *Nascimento* opinion acknowledges the lack of an integrated market for racketeering. See *Nascimento*, 491 F.3d at 42 (conceding that *Raich* was distinguishable because of this market-based argument, but claiming that this distinction was not important to the *Raich* majority). This appears to be a failure to adequately follow the *Raich* majority’s reasoning, which expressly depends on market analysis to explain why regulation of noneconomic activity is appropriate under the CSA. See *supra* Part III.A; see also Recent Cases, 121 Harv. L. Rev. 1961, 1965–66 (2008) (“There is no national market for racketeering, and leaving one instance of racketeering to be covered by other criminal laws will not make it more difficult to prevent or address other instances of racketeering.”).

199. See Frank D’Angelo, Note, Turf Wars: Street Gangs and the Outer Limits of RICO’s “Affecting Commerce” Requirement, 76 Fordham L. Rev. 2075, 2109 (2008) (arguing

gressional concern that noneconomic drug production and consumption could undermine the attempt to regulate the interstate narcotics market.<sup>200</sup>

Furthermore, it is easily possible to distinguish the class of economic criminal enterprises from the class of noneconomic criminal enterprises. The federal government's efforts to enforce laws against the former, by targeting enterprises involved in illegal gambling, prostitution, narcotics trafficking, and the like, would not be undermined by an inability to prosecute noneconomic enterprises engaged in violent crimes only, such as the Stonehurst gang or the Cash Flow Posse.<sup>201</sup> In contrast, homegrown wheat or marijuana cannot be easily distinguished from commercially grown versions of the same crop, especially given the existence of "unscrupulous people" who would exploit an exemption in the federal law for commercial gain.<sup>202</sup> It would thus be irrational and self-defeating to permit Congress to regulate the interstate markets in these commodities but not their intrastate noneconomic production and consumption.<sup>203</sup> These considerations, which counsel strongly in favor of the Court's rulings in *Raich* and *Wickard*, counsel against permitting extension of RICO to every intrastate criminal enterprise, whether it engages in economic activity or not.

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there is no evidence that "regulation over noneconomic intrastate activity is 'essential' to [RICO's] continued success").

200. See *Raich*, 545 U.S. at 12–13 nn.20–21 (identifying legislative findings that control of intrastate activity was essential to control of the interstate commerce in narcotics).

201. Note that this argument is not a policy-based argument of the sort criticized in *supra* Part II.A.3. The argument is rooted in a textual understanding of the Commerce Clause as directed at interstate and economic activity and a willingness to sever applications of federal statutes that go beyond this textual understanding. The severability of particular applications of a criminal statute is a longstanding component of constitutional law that is rooted in constitutional text and structure, not in a court's policy preferences. See *Raich*, 545 U.S. at 72–73 (Thomas, J., dissenting) (discussing as-applied challenges to congressional legislation).

202. *Raich*, 545 U.S. at 32 (majority opinion).

203. This argument about an integrated market justifying congressional power to regulate even intrastate activity is similar to the reasons the Court gave for permitting prosecution of local loan sharks. See *Perez v. United States*, 402 U.S. 146, 155–56 (1971) (discussing legislative history indicating that monies from intrastate loan sharking flowed back and forth to interstate organized criminal enterprises). Loan sharking is an easier case for congressional regulation than medical drug possession and use because all credit transactions are by definition economic activity, but the reasoning in the two cases is similar. Both *Perez* and *Raich* relied on congressional findings that intrastate activity was tied to the interstate market that was the primary target of the statute. See *Raich*, 545 U.S. at 12 & n.20 (noting congressional findings about infeasibility of distinguishing between interstate and intrastate distribution of controlled substances); *Perez*, 401 U.S. at 147 n.1 (noting congressional findings about necessity of regulating intrastate extortionate credit transactions in order to ensure effective regulation of interstate extortionate credit transactions).

C. *The Two-Prong Raich Test in Practice*

The previous section argued that the *Nascimento* majority opinion—which permitted prosecution of noneconomic criminal activity based on a minimal effect on interstate commerce—rested on a misreading of the Supreme Court’s opinions in *Morrison* and *Raich*. This section discusses the implication of this Note’s proposed test. First, this section discusses how a substantial effects requirement would be administered. Second, it considers whether Congress could amend RICO to include a defined jurisdictional hook. Third, the broader application of this Note’s test is considered. Finally, some possible arguments against this Note’s test are discussed.

1. *Finding Substantial Effects on a Case-by-Case Basis.* — The test advocated in this Note—only permitting aggregation of economic activity with a narrow exception for noneconomic activity that is essential to a larger regulatory scheme—leaves open the question of whether a single instance of noneconomic activity can have a substantial effect on interstate commerce, so as to justify federal prosecution. In other words, might a federal prosecutor be able to demonstrate a substantial effect on commerce in an individual case, rather than aggregating the effects of all cases to show a substantial effect? The Sixth Circuit in *Waucaush* allowed for such a possibility, but did not provide a precise criterion for when an individual act has a substantial effect on interstate commerce.<sup>204</sup>

Because the circuit courts have generally held that minimal effects can be aggregated to allow federal prosecutions of noneconomic activity, there is some uncertainty on when a local noneconomic crime would meet a substantial effects test without any aggregation, and whether such a finding would even be possible as a matter of law. One possibility is that no individual criminal act or enterprise should be seen as having substantial effects on interstate commerce, and that federal prosecution is inappropriate in all cases of noneconomic intrastate activity that are inessential to the enforcement of a larger regulatory scheme.<sup>205</sup>

Another possibility is to draw from the Supreme Court’s opinion in *Jones*, which prohibited federal prosecution of arson of a private home but apparently left undisturbed the Court’s prior case law upholding congressional ability to regulate arson of buildings that are being actively used in interstate commerce.<sup>206</sup> The *Nascimento* majority itself illustrates

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204. See *Waucaush v. United States*, 380 F.3d 251, 256–57 (6th Cir. 2004) (holding that minimal effect on commerce is insufficient and the government has obligation to demonstrate entity’s substantial effect on interstate commerce).

205. This possibility finds support in the *Morrison* Court’s claim that “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *United States v. Morrison*, 529 U.S. 598, 613 (2000). Under this view, if a case of noneconomic intrastate crime does not fit within the *Wickard/Raich* exception, then federal prosecution is presumptively invalid.

206. *Jones v. United States*, 529 U.S. 848, 853 (2000). The *Jones* Court’s reliance on the canon of constitutional avoidance for its narrow holding leaves some uncertainty about

similar reasoning, distinguishing a crime that incidentally took place at a tire store from a hypothetical crime that actually targeted the tire store as a place of business.<sup>207</sup> One key component of showing a substantial effect, then, might be whether the crime in question targets entities that are actively engaged in interstate commerce.<sup>208</sup>

While it would not go as far as prohibiting all federal prosecutions of intrastate noneconomic crimes that are inessential to a regulatory scheme, such a substantial effect requirement would still create a higher threshold for federal prosecution. Requiring a prosecutor to show a minimal effect on interstate commerce has been called “a polite fiction, equivalent to no required jurisdictional nexus at all.”<sup>209</sup> By contrast, a requirement that the prosecutor prove the specific criminal entity had a substantial effect on interstate commerce raises a greater hurdle to federal prosecution.<sup>210</sup> Rigorous adherence to this reasoning would prevent indiscriminate expansion of RICO and other federal criminal statutes into all areas of local crime fighting.<sup>211</sup> Rather, federal jurisdiction would only be invoked when prosecutors can establish that the criminal or criminal enterprise itself had a substantial effect on interstate commerce.

2. *The Commerce Clause and Statutory Drafting.* — A second important issue is whether Congress could legislate around the Commerce Clause limitations advocated by this Note. For example, Congress could amend RICO to permit federal prosecution of any criminal enterprise that travels across state lines in furtherance of its criminal aims, or any criminal enterprise that uses a gun that has traveled in interstate commerce.<sup>212</sup>

the status of prior case law applying the arson statute. *Id.* at 858. Subsequent criminal defendants have argued that *Jones* implicitly overruled the Supreme Court’s earlier case law permitting congressional regulation of arson against commercial buildings, but these arguments have been unsuccessful in the courts. See, e.g., *United States v. Logan*, 419 F.3d 172, 180–81 (2d Cir. 2005).

207. *United States v. Nascimento*, 491 F.3d 25, 43–44 (1st Cir. 2007).

208. This standard would probably also preclude federal prosecution of crimes targeting commercial activity that was merely intrastate, unless regulation of the crime in question was an essential part of a congressional regulatory scheme. See *United States v. McFarland*, 311 F.3d 376, 393–94 (5th Cir. 2002) (en banc) (Garwood, J., dissenting) (arguing robbery of small local retailers that did not engage in interstate commerce was beyond congressional power under Commerce Clause).

209. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 *Colum. L. Rev.* 661, 715 n.232 (1987).

210. See *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004) (discussing cases upholding federal authority to prosecute crimes against businesses engaged in interstate commerce as example of substantial effect burden).

211. See *infra* notes 220–225 and accompanying text (discussing Commerce Clause implications of other criminal statutes).

212. Such jurisdictional hooks are common in federal criminal statutes. See, e.g., 18 U.S.C. § 922(g) (2000) (forbidding felons from possessing a firearm “in or affecting commerce,” or receiving a firearm that has traveled in interstate commerce); 18 U.S.C. § 1952 (criminalizing interstate travel in furtherance of certain types of defined illegal business activity). These types of jurisdictional provisions have been accepted by the courts. See *Scarborough v. United States*, 431 U.S. 563, 564 (1977) (upholding

Either of these amended statutes would directly enable federal prosecution of the Stonehurst gang without any need to show that the criminal enterprise affected interstate commerce, substantially or otherwise.<sup>213</sup> Indeed, Judge Boudin’s *Nascimento* concurrence argued that RICO should be read in the same way as the federal felon-in-possession statute to enable prosecution of any criminal entity using guns that have traveled in interstate commerce.<sup>214</sup> While the current version of RICO does not identify the use of firearms as a jurisdictional element, an amended version of the statute could do so.<sup>215</sup>

It is likely that such an amended RICO would survive constitutional scrutiny under the Supreme Court’s current case law and the test advocated by this Note, but this fact alone does not indicate that attempts to limit the “substantially affects” doctrine are futile. Rather, a judicial

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prosecution of defendant under felon-in-possession statute upon “proof that the possessed firearm previously traveled in interstate commerce”); *supra* notes 18–21 and accompanying text (discussing travel across state lines principle).

213. The evidence indicated that one member of the Stonehurst gang had traveled across state lines to purchase a firearm. *United States v. Nascimento*, 491 F.3d 25, 45 (1st Cir. 2007).

214. *Id.* at 52 (Boudin, C.J., concurring). Read literally, Judge Boudin’s concurrence says that federal prosecution is permissible if a jury finds that the criminal enterprise “affect[ed] interstate commerce,” without any reference to whether the effect is substantial. *Id.* at 53. This reasoning is flatly contradicted by *United States v. Lopez*, 514 U.S. 549, 559 (1995):

[A]dmittedly, 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.

One way to interpret Judge Boudin’s concurrence is that it argues that RICO’s broad language makes for a *de facto* regulation of participation in the interstate firearms market, and thus the statute is akin to the felon-in-possession statute or other federal statutes that criminalize certain types of participation in interstate commerce. *Nascimento*, 491 F.3d at 52 (Boudin, C.J., concurring) (comparing RICO with felon-in-possession statute, federal car-jacking statute, and mail fraud statute). This reasoning is problematic. Because each of the other statutes is tied directly to the criminal’s use of the commercial good itself—the gun, car, or mailing—the analogy to RICO is strained. See *United States v. Dorris*, 236 F.3d 582, 586 (10th Cir. 2000) (noting felon-in-possession statute “addresses items sent in interstate commerce”).

215. Likewise, after *Lopez*, Congress amended the Gun-Free School Zones Act to criminalize possession of a “firearm that has moved in or that otherwise affects interstate commerce” near a school zone. 18 U.S.C. § 922(q)(2). The current statute has been upheld as constitutional. E.g., *United States v. Danks*, 221 F.3d 1037 (8th Cir. 1999) (*per curiam*). Commentators have raised concerns about the consistency of the amended statute with the Supreme Court’s jurisprudence. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 *Harv. J. on Legis.* 319, 332 n.93 (2005) (“[I]f the addition of such boilerplate language is sufficient to overcome the *Lopez* barrier, then that case will have little practical impact.”); Seth J. Safra, Note, *The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains*, 50 *Duke L.J.* 637, 640 (2000) (arguing “grave doubt” exists as to constitutionality of amended GFSZA).

requirement that a statute have a clear statement about how federal jurisdiction is invoked can be a significant restraint on congressional ability to legislate beyond its constitutional powers.<sup>216</sup> Such a rule could also have the benefit of encouraging Congress to legislate precisely rather than vaguely, stimulating greater legislative consideration of the Constitution<sup>217</sup> and also “constraining executive branch officials—federal regulators and prosecutors—from unilaterally changing the scope of federal authority.”<sup>218</sup> Finally, an amended version of RICO would still be more limited than the expanded version endorsed by the First Circuit in *Nascimento*. While the Stonehurst gang might be liable under an amended version of RICO, many small local street gangs—those that neither travel across state lines nor use firearms—would still be outside of congressional reach, even if a prosecutor could show a minimal effect on interstate commerce.

3. *Application to Other Federal Statutes.* — Because this Note attempts to synthesize the Supreme Court’s jurisprudence rather than propose a new formulation of Commerce Clause jurisprudence, the reasoning proposed here would not require a radical change in interpretation of federal statutes. As discussed above, this Note argues that the application of RICO to noneconomic criminal actors based on their minimal effect on interstate commerce is an unconstitutional extension of the commerce power. The same reasoning can be extended to other areas of federal law as well.

Under the reasoning presented here, the Court’s longstanding willingness to allow Congress to regulate economic activity, even localized and intrastate economic activity, would be left undisturbed. However, courts should be more willing than they have been after *Raich* to take as-applied challenges to statutes seriously when dealing with noneconomic activity, and to conduct inquiries into whether these applications of federal statutes are really an “essential part” of a federal regulatory scheme. Many federal criminal statutes, like the CSA, regulate or prohibit interstate commerce in a good or service. This Note’s analysis of the Commerce Clause would permit the application of these statutes to local noneconomic activities when it would be difficult for law enforcement to distinguish between economic and noneconomic cases and easy for

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216. In the context of another congressional power, the spending power, the Supreme Court’s use of clear statement rules has been described as “the only meaningful constraint” on congressional overreaching. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 621 (1992).

217. See Merrill, *supra* note 30, at 828 (discussing how clear statement rules could foster cooperation between courts and Congress in interpreting extent of commerce power).

218. *Id.* at 834; see also Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 *Ohio St. L.J.* 1669, 1722–23 (2007) (defending argument that federal officials and courts should “wait for a clear statement from Congress before assuming some authority traditionally exercised by the states”).

criminals to channel fungible goods from noneconomic to economic purposes.<sup>219</sup>

Other federal criminal statutes, however, are less amenable to this type of market analysis—for example, consider the federal arson statute.<sup>220</sup> If Congress were to force the issue by passing a statute explicitly authorizing prosecution of arson of a private residence, this Note’s reasoning counsels against upholding such a law.<sup>221</sup> Arson is not a marketable good or service, and thus to permit some arson prosecutions while prohibiting others, as the Court did in *Jones*, does not undercut a congressional regulatory scheme.<sup>222</sup> The same analysis raises serious questions about Hobbs Act prosecutions. The Hobbs Act criminalizes “robbery or extortion” that “obstructs, delays, or affects commerce.”<sup>223</sup> Some courts have permitted Hobbs Act prosecutions for the robbery of individuals, based on the theory that the effects of such robberies, when aggregated

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219. For example, Congress has chosen to regulate (by prohibiting) the interstate markets in machine guns, see Firearm Owners’ Protection Act § 102(9), 18 U.S.C. § 922(o)(1), and child pornography, see Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2251. This Note’s proposed test would permit application of these statutes even to intrastate noneconomic possession of the regulated items. For further discussion of the constitutional challenges to these statutes, see generally Lauren Bianchini, Comment, Homegrown Child Pornography and the Commerce Clause: Where to Draw the Line on the Intrastate Production of Child Pornography, 55 Am. U. L. Rev. 543 (2005); Leslie Wepner, Comment, The Machine Gun Statute: Its Controversial Past and Possible Future, 75 Fordham L. Rev. 2269 (2007).

220. See *supra* notes 82–87 and accompanying text.

221. See Bradley, Federalism, *supra* note 53, at 585 (arguing such a hypothetical statute would be unconstitutional). This is not to say that Congress could never authorize federal prosecution of arson of a residential home. For example, if Congress enacted a statutory scheme regulating the insurance industry, and included provisions criminalizing home arson for the purpose of insurance fraud, the *Raich* analysis would permit such prosecutions as rationally necessary to the underlying regulatory scheme.

222. The close reading of *Raich* advocated by this Note raises a more fundamental question about whether the federal arson statute is ever constitutional. Arson is quintessentially a local, noneconomic activity, and thus under *Morrison* is not subject to aggregation for purposes of finding substantial effects. The argument in favor of permitting some congressional regulation might be that some individual acts of arson, when committed against buildings used for business purposes, have a sufficiently substantial effect on interstate commerce by themselves to support the application of congressional power. See *supra* Part III.C.1 (discussing the possibility that individual crimes could be held to have substantial effects on interstate commerce). But this Note’s reading of *Raich* suggests that the issue remains open to challenge, and an unexplored area of analysis is what degree of effects rise to the level of “substantial” after the aggregation of effects is forbidden for noneconomic crimes. There are also sound federalism reasons for questioning the substitution of congressional policy judgments for state policy judgments in purely localized crimes. See *Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting concerns about disparate treatment when federal and state arson law overlap); Bradley, Federalism, *supra* note 53, at 591 (noting no persuasive reason why federal government needs to prosecute routine local crimes); see also *infra* notes 237–240 and accompanying text (identifying criticisms of overly expansive federal criminal power).

223. 18 U.S.C. § 1951.

as a class, substantially affect interstate commerce.<sup>224</sup> But robbery is not an economic crime under the definition used in this Note and in *Raich*. It may be conducted for monetary gain, but it does not involve the production or voluntary exchange of a good or service. Therefore, aggregation of the effects of the class would violate the principle of *Morrison*, and would not be susceptible to the *Raich/Wickard* exception for those noneconomic activities which would undercut a broader congressional scheme if left unregulated.<sup>225</sup>

An examination of federal environmental regulations such as the Endangered Species Act (ESA) provides further examples of the effect of this Note's reading of *Raich*. Most observers have concluded that the *Raich* holding should be read to prevent as-applied challenges to the ESA and other environmental regulations.<sup>226</sup> But this Note's analysis could support the argument that environmental regulations should be upheld as valid only when applied to actors such as businesses and real estate developers, who are engaged in economic activity. Application of these regulations to private residences and other property owners who do not use their property for economic activity seems unacceptable under the reasoning of *Raich*, and courts should be willing to consider as-applied challenges to environmental as well as criminal statutes.<sup>227</sup>

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224. See, e.g., *United States v. Bailey*, 227 F.3d 792, 797–98 (7th Cir. 2000) (upholding robbery conviction against as-applied challenge based on theory that robbery depleted victim's assets and made him less able to purchase goods in interstate commerce, a substantial effect if aggregated among all instances of the class). Currently, almost all circuits permit federal prosecution of any robbery having a minimal effect on interstate commerce, rather than requiring proof of a substantial effect. See *United States v. Baylor*, 517 F.3d 899, 901–03 (6th Cir. 2008) (collecting cases finding Hobbs Act requires only minimal effect on interstate commerce). The one partial exception appears to be the Fifth Circuit, which has evenly split on the subject. *United States v. McFarland*, 311 F.3d 376, 377 (5th Cir. 2002) (en banc) (per curiam).

225. See Bradley, *Federalism*, supra note 53, at 592–98 (collecting and analyzing Commerce Clause challenges to Hobbs Act prosecutions, concluding that courts should not permit federal jurisdiction in cases of robbery or extortion of private individuals); see also id. at 607–09 (applying similar analysis to federal carjacking statute).

226. See, e.g., Blumm & Kimbrell, supra note 98, at 496 (“We think the Court’s recent embracing of the comprehensive scheme rationale immunizes the ESA take provision from the sort of as-applied attacks property rights activists have previously brought against its application.”).

227. The Supreme Court has twice in the past decade heard as-applied Commerce Clause challenges to the Clean Water Act (CWA), and each time it has relied on the canon of constitutional avoidance to adopt a narrow reading of the statute consistent with the view put forth in this Note. See *Rapanos v. United States*, 547 U.S. 715, 737–39 (2006) (citing Commerce Clause concerns to support a reading of CWA as not applying to lands with intermittent flows of water); *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 173–74 (2001) (noting same concerns to support reading CWA as not applying to wetlands not adjacent to navigable waters). For a different view on the Commerce Clause and environmental regulation, see Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. Colo. L. Rev. 375, 455–58 (2007) (arguing that *Raich*'s reasoning affirms constitutionality of Endangered Species Act and other environmental regulations).

Application of this Note's proposed approach would also lead to an increased role for congressional findings. *Morrison* made clear that the presence of such findings, no matter how extensive, would not save statutes which do not regulate economic activity at all, such as the Violence Against Women Act.<sup>228</sup> When a statute clearly regulates economic activity, however, as does the Controlled Substance Act, the inquiry turns from a consideration of the constitutionality of the statute as a whole to a consideration of its application to a particular category of cases. In this context, *Raich* suggests that courts should show deference to legislative judgment when Congress has explicitly identified the regulation of intrastate incidents of the regulated activity as an essential part of the legislative scheme.<sup>229</sup> Such findings may not be a necessary condition for permitting federal regulation of intrastate noneconomic activity,<sup>230</sup> but they are likely to provide helpful guidance to courts. Likewise, such findings should not be viewed as a mere formality—even rational basis review would require some logical support for the particular extension of congressional power that is being asserted. In general, such findings are most likely to involve a concern about how the noneconomic activity could affect the market's supply and demand.<sup>231</sup>

4. *Potential Criticisms.* — A serious potential criticism of this Note's interpretation of the Commerce Clause is that the distinction between economic and noneconomic activity is no more justiciable than other attempts to limit the substantial effects doctrine.<sup>232</sup> However, this criticism is only valid if the definition of "economic" is left open. This Note proposes a clear and straightforward definition of economic: the production, sale, and voluntary exchange of goods and services.<sup>233</sup> If economic

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228. *United States v. Morrison*, 529 U.S. 598, 614 (2000) ("[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.").

229. See *supra* note 192 (discussing *Raich's* reliance on congressional findings that intrastate narcotics distribution threatened workability of CSA if left unregulated).

230. Some proposed applications of a congressional regulatory scheme may be sufficiently straightforward so that no statement from Congress, whether in the statute or in the legislative history, is necessary. Cf. *Gonzales v. Raich*, 545 U.S. 1, 28 (2005) ("One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance.").

231. For example, passage of the CSA was accompanied by specific legislative findings that noneconomic production and consumption of narcotics could be diverted into the interstate market and interfere with the overall regulatory scheme. See *supra* note 94 and accompanying text (noting difficulties in maintaining distinction between intrastate and interstate market for drugs).

232. See *supra* note 173 and accompanying text.

233. This definition is similar to the proposal of Nelson & Pushaw, *supra* note 125, at 9 (advocating two-part test permitting Congress to regulate only activity that is "commerce" and that implicates more than one state). However, the test derived from this definition would be different from the test advocated by Nelson and Pushaw. The two-part analysis advocated by this Note permits certain regulation of intrastate noneconomic activity, such as growing wheat for home use. This Note's test also avoids Nelson and Pushaw's

activity is defined by the profit motive of the actor or the economic harm caused by the activity, it is not a particularly helpful concept. If it is defined by the nature of the activity itself, however, then it becomes much easier and more predictable for courts to apply.<sup>234</sup>

A second potential criticism is that this Note's test might excessively constrain federal crime-fighting capability.<sup>235</sup> Undoubtedly, a more restrictive understanding of the Commerce Clause would reduce Congress's freedom to regulate as it pleases, but this alone is no reason to criticize a more limited view of the commerce power. Rather, such a limit is in keeping with the very concept of enumerated legislative powers.

The primary activities that would be left off limits to federal power are those localized, traditional crimes that have long been the purview of state law.<sup>236</sup> It is worth noting that the federal government's record of intervention in this area is far from perfect. Federal criminal statutes can create "dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court."<sup>237</sup>

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"protective principle," *id.* at 147–49, which provides few ultimate limits on the range of congressional regulation. The difference is subtle but significant: Nelson and Pushaw would permit congressional regulation of noneconomic activity to protect persons and entities engaged in commerce. This Note contends that the Supreme Court's cases have carved out a much more narrow exception, only permitting congressional regulation of intrastate noneconomic activity to protect a broader congressional regulatory scheme which governs interstate commerce.

234. For example, loan sharking is economic activity, as it provides a good—an extension of credit—that is commonly traded in the marketplace. See *Perez v. United States*, 402 U.S. 146, 147–48 (1971) (discussing defendant's loan sharking operation). The same is true of prostitution, gambling, and narcotics trafficking, although the goods and services involved in these activities are usually prohibited from sale altogether. A violent crime, however, such as assault or robbery, is not economic activity, as no good or service is being exchanged. This is true regardless of the motivations of the actors in any of these activities. A drug dealer may be motivated primarily by desire for prestige in his gang, but that does not mean that selling drugs is noneconomic activity. Likewise, a highwayman may be motivated purely by desire for money, but that does not make a stickup an economic transaction in the way the Court has defined the term. See *supra* notes 175–180 and accompanying text.

235. Extension of the Commerce Clause analysis could have dramatic effects on other areas of law, such as environmental law, as well. Because most of the Supreme Court's major Commerce Clause cases in recent years have dealt with criminal law, it is more difficult to predict how the test proposed in this Note would map onto other major areas of federal law.

236. Limitation of federal criminal power is a longstanding aspect of constitutional law. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) ("Congress has . . . no general right to punish murder committed within any of the States."); *The Federalist* No. 17, at 118 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contrasting federal government's power to regulate "[c]ommerce, finance, negotiation, and war" with state governments' power over "[t]he administration of private justice between the citizens of the same State").

237. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 646 (1997). Some prosecutors have deliberately exploited this disparate treatment, such as Rudy Giuliani, who as U.S. Attorney for the Southern District of New York instituted a "federal day" once a week during which drug dealers would be prosecuted

Moreover, almost all federal criminal laws duplicate state law, creating overlapping enforcement that undermines the autonomy of state governments, without any evidence that federalizing purely local crimes causes any reduction in their incidence.<sup>238</sup> The growth of federal power in this area creates unnecessary strains on the federal justice system while sapping the ability of states to “exercise discretion in a way that is responsive to local concerns.”<sup>239</sup> A central insight of the Constitution’s framers was that a division of power between the states and the national government would result in greater liberties for the people.<sup>240</sup> Under this understanding, the Commerce Clause is just one of the ways in which the Framers “split the atom of sovereignty,”<sup>241</sup> by envisioning a nationally integrated economy but local control over most noneconomic issues. That split sovereignty is an important part of the American constitutional tradition, one that merits preserving.

#### CONCLUSION

This Note’s reasoning relies on two propositions, neither of which is particularly controversial. First, Congress has the power under the Commerce Clause to regulate classes of interstate commercial activity. Second, Congress also has the power to apply its statutes to activities that would otherwise undermine its legitimate legislative purposes. Taken together, these two propositions inexorably lead to the unsurprising conclusion that Congress may regulate at least some intrastate, noneconomic activity under the Commerce Clause. But an analysis of the Court’s cases

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for federal rather than state offenses, stating a desire to create a “Russian roulette effect” for drug dealers. Ashwini Jayaratnam, *Prosecuting Stock-Option Backdating: The Ethics of Enforcement Techniques*, 20 *Geo. J. Legal Ethics* 755, 764 (2007).

238. See Task Force, *supra* note 56, at 18 (“Increased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern Americans . . . .” (emphasis omitted)); John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 *Temp. L. Rev.* 673, 678–80 (1999) (noting, *inter alia*, that over ninety-five percent of federal prosecutions in 1997 involved federal statutes that duplicated state statutes); see also Bradley, *Anti-Racketeering*, *supra* note 7, at 690–92 (noting that expansion of federal racketeering prosecutions has not succeeded in fight against organized crime and calling for a narrowing or even abolishing of RICO).

239. Brickey, *supra* note 42, at 1173. But cf. Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 *Cal. L. Rev.* 1541, 1541–43 (2002) (acknowledging value of local control over criminal law but arguing most federal measures pose little threat to this value).

240. See *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring) (“Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.”); *The Federalist No. 51* (James Madison), *supra* note 236, at 323 (“In the compound republic of America . . . a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”).

241. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

also leads to a corollary conclusion that is surprising: These two criteria actually explain the entirety of the noneconomic intrastate activity that the Court has allowed Congress to regulate.

Indeed, it is this Note's contention that these two propositions are the entire content of the "substantial effects" doctrine as it relates to noneconomic local activity. The Court has only allowed Congress to regulate such activity in isolated cases where such regulation is essential to a broader congressional scheme. Thus, while courts and commentators have tended to see the "substantial effects" doctrine as leaving the door open for wide-ranging congressional regulation of all kinds of activity, the Court's actual reasoning is significantly more narrow. The majority's reasoning in *Raich* should not be seen as an abandonment of the limitations of the Commerce Clause. Rather, a proper understanding of the *Raich* Court's holding has the strong merit of giving the courts and Congress a significantly more concrete understanding of the reach of the federal legislative powers.