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RICO Overreach: How the Federal Government's Escalating Offensive Against Gangs Has Run Afoul of the Constitution

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NOTES

RICO Overreach: How the Federal Government's Escalating Offensive Against Gangs Has Run Afoul of the Constitution

I. INTRODUCTION

The United States has a problem with gangs. According to the Department of Justice, there are more than twenty thousand gangs[1] in the United States today, with over one million members.[2] There are gangs in every state and in the District of Columbia.[3] This is a dire problem in the eyes of federal government officials. According to Attorney General Michael Mukasey, "Gangs threaten our society . . . . They bring a culture of violence and drugs to our doorsteps, creating an atmosphere of fear, diminishing the quality of life, and endangering the safety, well-being, and future of our children."[4] In response, the federal government is becoming increasingly involved in investigating, prosecuting, and imprisoning gang members.[5]

The Racketeer Influenced and Corrupt Organizations Act ("RICO")[6] is central to this initiative.[7] RICO enables aggressive federal prosecution of criminal activities committed in connection with illicit organizations, or "enterprises."[8] Because modern gangs often display the level of cohesion and organization required to qualify as "enterprises" under the law, RICO seems an apt prosecutorial device.[9] Furthermore, the statute's stiff sentences,[10] accompanied by the

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1. While there is no universally accepted definition of "gang," the National Alliance of Gang Investigators Associations ("NAGIA") recommended a useful definition in its 2005 Gang Threat Assessment: "A group or association of three or more persons who may have a common identifying sign, symbol, or name and who individually or collectively engage in, or have engaged in, criminal activity . . . ." NAT'L ALLIANCE OF GANG INVESTIGATORS ASS'NS, 2005 GANG THREAT ASSESSMENT 54 (2005), *available at* http://www.nagia.org/PDFs/2005_national_gang_threat_assessment.pdf.

2. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT TO CONGRESS ON THE GROWTH OF VIOLENT STREET GANGS IN SUBURBAN AREAS (2008) [hereinafter ATTORNEY GENERAL'S REPORT], *available at* http://www.usdoj.gov/ndic/pubs27/27612/index.htm#Contents.

3. *Id.*

4. *Id.*

5. *See infra* Part II (detailing the federal government's efforts to curb gang violence).

6. 18 U.S.C. §§ 1961–68 (2000).

7. *See infra* Part II (describing the federal government's liberal use of the RICO statute in prosecuting gang members).

8. *Id.*

9. *See infra* note 58 and accompanying text (cataloging federal court decisions that have held that street gangs can be enterprises for the purposes of RICO).

10. JED. S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 1.08 (2008); Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Other Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2083–84 (2008). I would be remiss if I did not acknowledge Mr. D'Angelo's excellent Note on this subject, which was published after the instant Note was accepted for publication. While Mr. D'Angelo and I agree on much in this area, our pieces are sufficiently different in kind as to avoid redundancy.

unavailability of parole,[11] give the prosecutions teeth, while federal resources help augment overwhelmed state systems.[12]

This initiative entails an aggressive expansion of federal power that is constitutionally questionable at its outer bounds. Specifically, it is constitutionally problematic for the government to prosecute noneconomic street gangs for violent intrastate activities. A noneconomic street gang is a gang that (1) does not engage in economic activity, such as dealing drugs or providing prostitution or gambling, and (2) operates in neighborhoods, as opposed to in prisons or on motorcycles.[13] In the last four years, federal courts of appeals have scrutinized at least two RICO prosecutions against gangs of this sort for violent intrastate activity, and those courts reached divergent opinions about the constitutionality of such prosecutions.[14] This Note argues that such prosecutions are constitutional only when the gangs have had a substantial effect on interstate commerce.[15]

The Note proceeds as follows. Part II describes RICO's origin and the federal government's increasing use of the statute to combat gangs nationwide. Then, it describes the statutory elements that RICO prosecutions must satisfy: (1) that an enterprise existed, (2) that the enterprise engaged in or affected interstate commerce, (3) that the defendant was employed by or associated with the enterprise, and (4) that the defendant participated in the enterprise's conduct through (5) a pattern of racketeering activity.[16] Part II also briefly explores Commerce Clause doctrine and its evolution into a controversial basis for regulating intrastate criminal activity, as illuminated by the

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11. 3 CHARLES ALAN WRIGHT, NANCY J. KING & SUSAN R. KLEIN, FEDERAL PRACTICE AND PROCEDURE § 536 (3d ed. 2004).

12. *See infra* notes 35–39 and accompanying text.

13. Waucaush v. United States, 380 F.3d 251, 255–56 (6th Cir. 2004); ATTORNEY GENERAL'S REPORT, *supra* note 2.

14. United States v. Nascimento, 491 F.3d 25, 40–43 (1st Cir. 2007); *Waucaush*, 380 F.3d at 258; *see infra* Part III.

15. The term "noneconomic" arguably prejudges the commerce question. It is not intended to do so. Both the First and Sixth Circuits used this term to describe the subject gangs during their Commerce Clause analyses. *Nascimento*, 491 F.3d at 30 *passim*; *Waucaush*, 380 F.3d at 258 *passim*. The term denotes that the gang does not *engage in* economic activity, such as dealing drugs or organizing gambling. *Waucaush*, 380 F.3d at 256. This does not preclude the possibility that a "noneconomic street gang" may *affect* interstate commerce in such a way as to bring it within Congress' commerce power.

16. *See infra* notes 52–58 and accompanying text (outlining the components of a RICO prosecution).

modern trilogy of *United States v. Lopez*,[17] *United States v. Morrison*,[18] and *Gonzales v. Raich*.[19]

Part III examines conflicting decisions from the First and Sixth Circuits regarding the constitutionality of federal RICO prosecutions of noneconomic street gangs accused of intrastate violence.[20] In *Waucaush v. United States*, the Sixth Circuit held that a member of a noneconomic street gang could not be convicted under RICO unless the gang substantially affected interstate commerce.[21] In *United States v. Nascimento*, the First Circuit held that gangs need only have a de minimis effect on interstate commerce to be properly subjected to prosecutions of this sort.[22]

Part IV analyzes the constitutionality of these prosecutions as illuminated by Supreme Court precedent and the circuit split, and it argues that noneconomic street gangs must have a substantial effect on interstate commerce for these prosecutions to be constitutional. Under *Lopez* and *Morrison*, regulation of noneconomic intrastate violence is beyond the power of the federal government.[23] And while the *Raich* Court referred to classes of activity—instead of particular instances of activity—for the purposes of Commerce Clause analyses, noneconomic intrastate gang violence is not in the same class as the activity that RICO legitimately covers.[24] Furthermore, *Raich* may be distinguishable because it involved regulation of a fungible commodity.[25] Finally, allowing federal regulation of noneconomic intrastate gang violence impermissibly alters the delicate balance of power between federal and state governments.[26] Part V concludes.

II. RICO AND THE COMMERCE CLAUSE

The federal government's authority to bring prosecutions under RICO is predicated on the Commerce Clause of the United States Constitution. In order to inquire into the constitutionality of these prosecutions, it is useful to examine the origin and elements of the

17. 514 U.S. 549, 563–64 (1995).

18. 529 U.S. 598, 617–18 (2000).

19. 545 U.S. 1, 32–33 (2005).

20. The Sixth Circuit's opinion in *Waucaush* predated the Supreme Court's 2005 ruling in *Raich*. But, contrary to the First Circuit, this Note argues that *Raich* does not close the question.

21. Waucaush v. United States, 380 F.3d 251, 255–56 (6th Cir. 2004).

22. United States v. Nascimento, 491 F.3d 25, 37 (1st Cir. 2007).

23. *See infra* Part IV.

24. *Id.*

25. *Id.*

26. *Id.*

statute as well as the Commerce Clause doctrine that frames its proper limits.

A. RICO

From its origin as a weapon designed to destroy the Mafia to its utility as a device for dismantling modern gangs, the RICO statute has proven to be a potent and adaptable law. The federal government's escalating application of the law to gangs, however, invites renewed scrutiny as to its proper use. This Section describes the origins of the RICO statute, the rising trend of RICO prosecutions of gangs, and the elements that the government must establish to obtain convictions.

1. RICO's Origin

Congress passed RICO in 1970 for the purpose of dismantling organized crime.[27] The law announces that "[i]t is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies . . . ."[28] As the Supreme Court stated in 1983, "the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots."[29]

The Mafia was the particular species of organized crime with which Congress was concerned when it passed RICO.[30] And the statute proved remarkably effective at disrupting notorious crime families.[31] By 1989, a bombardment of RICO prosecutions had resulted in convictions of organized crime figures in New York, Los Angeles, Cleveland, Kansas City, Philadelphia, Boston, and Newark.[32] Several of the defendants received sentences of one hundred years or more.[33] A 1992 *Newsweek* article noted that, "due to successful RICO prosecutions, one of New York's five Mafia families is severely

27. Russello v. United States, 464 U.S. 16, 26–27 (1983).

28. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (2000)).

29. *Russello*, 464 U.S. at 26.

30. Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 580 (1993) (citing S. REP. NO. 91-617, at 36–43 (1969)).

31. *Id.* at 597 (citing Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 653 (1990); Rod Nordland, *The "Velcro Don": Wiseguys Finish Last*, NEWSWEEK, Apr. 13, 1992, at 34).

32. Dennis, *supra* note 31, at 653.

33. *Id.*

crippled; the leaders of the other four families are in jail or awaiting trial; and none of the nation's twenty-four Mafia families have escaped prosecution in recent years."[34] Emboldened by this success, the federal government identified a new public enemy against which to turn this powerful tool—the modern gang.

2. Applying RICO to Gangs: A Developing Trend

The United States Department of Justice is currently engaged in a campaign to eradicate American gang activity, notwithstanding the fact that states have traditionally played the lead role in combating localized crime. According to the Department of Justice's Criminal Resource Manual, "the heinous and uncontrollable nature" of gang activity has led to "an increasing federal effort to assist local law enforcement in targeting and federally prosecuting violent criminals."[35] The Manual argues that "[f]ederal assistance in prosecuting traditionally state-prosecuted crimes" is essential to curbing gang violence.[36] "Federal assistance" entails, among other things, federal resources, federal statutes, and federal prison sentences.[37]

The RICO statute is central to the federal government's increased involvement. According to former Attorney General Alberto Gonzales, "This use of federal RICO laws is an innovative approach to fighting criminals with tough penalties that may be unavailable in the state system."[38] The RICO statute lends itself to the task of combating gangs by virtue of its stiff sentences and the unavailability of parole in the federal system.[39] Also, federal intervention may be attractive in this area due to the relative bounty of resources in the federal system compared to that of state systems. In addition to federal prosecutors, federal agencies such as the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco, Firearms and Explosives; and Immigration and Customs Enforcement may add expertise and funding.

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34. Bonney, *supra* note 30, at 580 n.7 (citing Nordland, *supra* note 31, at 34).

35. UNITED STATES ATTORNEYS' MANUAL, tit. 9, § 106, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00106.htm.

36. *Id.*

37. *Id.*

38. *Attorney General Alberto R. Gonzales Delivers Remarks at the Noble Training Conference*, FDCH CAPITAL TRANSCRIPTS, 2007 WLNR 14758164, July 30, 2007.

39. *See supra* notes 10–11 (detailing the exceptionally harsh penalties resulting from a RICO conviction).

Between 2000 and 2007, federal prosecutors brought at least thirty RICO cases against alleged gang members.[40] These prosecutions occurred and are occurring in widely diverse locales throughout the country. For example, United States attorneys obtained RICO indictments against members of "Nuestra Familia" in San Francisco in June of 2001, the "King Mafia Associates" in Salt Lake City in May 2002, the "Boot Camp Gang" in Syracuse in June 2003, the "Hoover Crips" in Tulsa in June 2005, and the "Crips" in Wichita in September 2007.[41]

This is an escalating trend. While aggregate statistics are not available regarding the frequency with which the Justice Department brings RICO charges[42]—let alone RICO charges against gangs in particular—it is possible to discern a trend by resorting to print news coverage. A Westlaw search designed to identify articles regarding RICO prosecutions of gangs yielded six articles from 1986, thirty articles from 2001, ninety-nine articles from 2006, and 160 articles from 2007.[43] According to a similar search, news coverage of gang prosecutions in general, without regard to RICO, also increased during this time period, but at a lower rate than those stories involving RICO.[44]

In addition to the executive branch, Congress has taken an interest in using RICO to quell gang activity. For instance, between 1997 and 2007, at least seven bills were introduced in the Senate containing the terms "RICO" and "gangs."[45] Also, in 2007, Representative Tom Davis, ranking member of the House Committee on Oversight and Government Reform, requested that the Government Accounting Office undertake a study of the effectiveness

40. *See infra* Figure 1 (cataloging prosecutions of gangs under RICO since 2000).

41. *Id.* The novelty of this approach is illuminated by the fact that the case in Wichita marked the first time a defendant had ever been charged under RICO in Kansas. Tim Potter, *Accused Man is Denied Release*, WICHITA EAGLE (Kan.), Oct. 11, 2007, at A1.

42. The Organized Crime Division of the Department of Justice informed the author, via telephonic inquiry, that such statistics were not available to the public.

43. The search term parameters were: da(yyyy) & (RICO & gang /s prosecut! or charg!) % puerto. The term RICO is sufficiently unique that this search should only uncover stories involving the RICO statute. In addition, some stories covering RICO prosecutions may not mention the statute by its formal name, instead relying on informal terminology. Thus, I believe this research strategy is quite conservative, leading to false negatives but few false positives.

44. The search parameters were: da(yyyy) & gang /s prosecut! or charg!.

45. Fighting Gangs and Empowering Youth Act of 2007, S. 990, 110th Cong. (2007); Fighting Gangs and Empowering Youth Act of 2006, S. 4028, 109th Cong. (2006); Gang Prevention and Effective Deterrence Act of 2005, S. 155, 109th Cong. (2005); Gang Prevention and Effective Deterrence Act of 2003, S. 1735, 108th Cong. (2003); Criminal Gang Abatement Act of 2001, S. 1236, 107th Cong. (2001); Youth Gun Crime Enforcement Act of 1999, S. 995, 106th Cong. (1999); Anti-Gang and Youth Violence Act of 1997, S. 362, 105th Cong. (1997).

of RICO prosecutions against gangs to determine whether there may be ways to alter the law to make it more efficacious.[46]

Although federal RICO prosecutions of gangs are increasing, not everyone sees this as a positive development. Critics are concerned that the threat of long federal sentences may lead to coerced guilty pleas, false confessions, and unreliable incrimination of third parties.[47] Some commentators have also expressed concern about the inequitable impact of these prosecutions across races. According to one public defender, these prosecutions can be "perceived as heavy-handed use of force against the poorest in our community," such as African-Americans and Hispanics.[48] Indeed, during protests of the "Jena 6" incident, at least one speaker referenced RICO prosecutions as an instrument of government persecution of African-Americans.[49]

Critics also argue that these prosecutions are doing violence to traditional notions of federalism. As one Boston defense attorney argues, there is a " 'real risk' of federalizing all sorts of violent criminal activity that has traditionally been prosecuted by the states and, under the U.S. Constitution's Commerce Clause, has to be prosecuted by the states."[50] Moreover, it seems Congress is aware of, if not daunted by, the prospect of encroaching on states' domain. According to one Senate aide, in considering a 2004 anti-gang bill, " 'The big question was whether the federal government should be federalizing normal street crimes.' "[51]

3. RICO's Elements

Notwithstanding compelling policy arguments for and against RICO prosecutions of gangs, it is an examination of the elements of the crime that ultimately allows one to determine the prosecutions'

46. *Rep. Davis Requests Study of Racketeer Influenced & Corrupt Organizations, Task Forces in Gang Prosecutions*, U.S. FED. NEWS, 2007 WLNR 10593116, June 6, 2007.

47. Natalie Neysa Alund, *Racketeering Laws Hit Local Gangs*, BRADENTON HERALD (Fla.), Nov. 4, 2007, at 1 (quoting defense attorney Brett McIntosh).

48. Julie Kay, *Acosta Launches Federal Fight Against Gangs*, BROWARD DAILY BUS. REV. (Fla.), Apr. 16, 2007, at 1.

49. Maureen Sieh Urban, *Rallies Support "Jena 6", Speakers Use Opportunity to Reflect on Black Community*, POST STANDARD (Syracuse, N.Y.), Sept. 21, 2007, at B1.

50. Eric T. Berkman, *RICO Covers Violent, Noneconomic Activity, Rules 1st Circuit*, MASS. LAW. WKLY., July 16, 2007.

51. Beth Barrett, *Federal Anti-Gang Drive Resumes: L.A. Killers Worse than Mafia, Feinstein Says*, DAILY NEWS (L.A.), Dec. 30, 2004, at N1.

propriety. The substantive RICO criminal statute is codified at 18 U.S.C. § 1962(c).[52] It provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.[53]

Accordingly, in order to convict a defendant under RICO, the prosecution must prove that: (1) an enterprise existed, (2) the enterprise engaged in or affected interstate commerce, (3) the defendant was employed by or associated with the enterprise, and (4) the defendant participated in the enterprise's conduct through (5) a pattern of racketeering activity.[54] Regarding the first element, the statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[55] Regarding the fifth element, a "pattern of racketeering activity" must be manifested in at least two of the predicate acts enumerated in 18 U.S.C. § 1961.[56] These include crimes such as murder, gambling, and extortion.[57]

The statutory elements of RICO often track modern gang activity. A number of courts have held that gangs are "enterprises" as defined by the statute, given that they are "ongoing organizations" operating as "continuous units."[58] Whether a defendant was employed by or associated with a gang is a relatively simple factual question. Likewise, evidence may establish that the defendant participated in the gang's affairs by committing one or more of the predicate acts enumerated in the statute. It is at times more complex and problematic, however, to establish that a gang affects interstate commerce in a manner contemplated by the statute. When a federal

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52. There are also federal statutes providing for criminal conspiracy-based—as opposed to substantive—RICO charges, 18 U.S.C. § 1962(d), and civil RICO claims, 18 U.S.C. § 1964. These statutes are outside the scope of this article.

53. 18 U.S.C. § 1962(c).

54. United States v. Nascimento, 491 F.3d 25, 31 (1st Cir. 2007).

55. 18 U.S.C. § 1961(4).

56. *Id.* § 1961(5).

57. *Id.* § 1961(1).

58. *Nascimento*, 491 F.3d at 32 (citing United States v. Connolly, 341 F.3d 16, 25 (1st Cir. 2003)); *see also* United States v. Olson, 450 F.3d 655, 664 (7th Cir. 2006) (opining that a modicum of internal structure may make a gang an "enterprise" under RICO); United States v. Smith, 413 F.3d 1253, 1266–67 (10th Cir. 2005) (holding that gangs can be "enterprises" for RICO purposes). Some are skeptical about equating gangs with "enterprises," however. In at least one case, a "federal jury . . . couldn't make the leap of equating a street-corner crew to a Mafia-level criminal enterprise." Laurel J. Sweet, *Danger City: DA Open to Fed Tactics*, BOSTON HERALD, Apr. 4, 2007, at 6.

statute purports to regulate activity that "affects interstate commerce," it thereby evinces Congress's intention to invoke its utmost authority under the Commerce Clause.[59] Therefore, to understand what this element requires and allows, it is necessary to refer to the Commerce Clause[60] and the centuries of cases interpreting it.

B. The Commerce Clause

1. Brief History of Early Commerce Clause Jurisprudence

The Commerce Clause bestows on Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."[61] The complete evolution of this clause, from a basis to regulate ferry lines in 1824,[62] to a basis to criminalize medical marijuana in 2005,[63] is a subject largely outside the scope of this Note. However, certain aspects of that evolution are crucial to understanding whether RICO prosecutions against noneconomic street gangs are constitutional, and they are described briefly in this Section.

In *Gibbons v. Ogden*, the first Supreme Court case dealing with Congress's commerce power, the Court made clear that the power Congress derives from the Commerce Clause is both substantial and limited.[64] According to the Court, "[t]his power, like all others vested in congress, [sic] is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[65] However, according to the Court, "[t]he enumeration presupposes something not enumerated," and the powers not enumerated are the sovereign province of state governments.[66] Accordingly, the Court held that the commerce power did not extend to activity confined within states' borders.[67] Congress's power under the Commerce Clause was confined to truly *interstate* activity.

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59. *Nascimento*, 491 F.3d at 39.
60. U.S. CONST. art. I, § 8.
61. *Id.*
62. Gibbons v. Ogden, 22 U.S. 1, 2 (1824).
63. Gonzales v. Raich, 545 U.S. 1, 33 (2005).
64. 22 U.S. at 193–95.
65. *Id.* at 196.
66. *Id.* at 195.
67. *Id.* at 194.

The Supreme Court's analysis of the Commerce Clause evolved significantly in response to a spate of federal regulation following the enactment of the Sherman Antitrust Act in 1890.[68] During this period, the Court first held that in certain situations Congress may regulate *intrastate* activities in furtherance of its commerce power. According to the Court, "Where interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation."[69] Thus, during a post-reconstruction era marked by the expansion of federal laws, the Court recognized a corresponding growth in congressional authority.

The Court further expanded Congress's ability to enact intrastate regulation in furtherance of its national ends during the New Deal era.[70] If intrastate activities substantially affected interstate commerce or Congress's power over it, Congress was permitted to regulate those intrastate activities.[71] Furthermore, according to the Court in *Wickard v. Filburn*, particular instances of the intrastate activity being regulated did not need to have a substantial impact on interstate commerce in order to fall within Congress's commerce power.[72] As long as the economic effects of the activity were substantial when aggregated, federal regulation was constitutional.[73]

Notwithstanding this rising tide of Congress's commerce power under Supreme Court jurisprudence, however, the Court interspersed reminders that the power has limits. In 1937, the Court cautioned that the commerce power must be considered in the light of the nation's dual system of government. It may not be predicated upon effects on interstate commerce that are so indirect or remote as to effectually obliterate the distinction between what is national and what is local and thereby create a completely centralized government.[74]

It was important to the Court, in other words, that the delicate balance of power between national and state governments not be disrupted. According to the Court, Congress may not "use a relatively trivial impact on commerce as an excuse for broad, general regulation

68. United States v. Lopez, 514 U.S. 549, 553–54 (1995).

69. *Id.* at 554 (citing Shreveport Rate Cases, 234 U.S. 342 (1914)).

70. Wickard v. Filburn, 317 U.S. 111, 127–29 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110, 118–19 (1942); United States v. Darby, 312 U.S. 100, 121–26 (1941).

71. *Lopez*, 514 U.S. at 555 (quoting *Darby*, 312 U.S. at 118).

72. *Wickard*, 317 U.S. at 127–29.

73. *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125, 127–28).

74. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

of state or private activities."[75] In sum, as it moved into the modern era, the Supreme Court recognized capacious congressional authority under the Commerce Clause, but it also maintained that Congress's authority has limits.

2. The Modern Trilogy: *Lopez*, *Morrison* & *Raich*

Against this precedential backdrop, three recent cases shed further light on the constitutionality of using RICO to prosecute violent intrastate activity of noneconomic street gangs. In *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act of 1990, which made it a federal offense to possess a firearm within one thousand feet of a school.[76] The Court held that the law was an unconstitutional extension of Congress's power under the Commerce Clause.[77] According to the Court, "[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce," and it held that the statute in question "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[78] The Court acknowledged that firearms near schools contribute to crime, which in turn has costly effects on the national economy.[79] But these effects were too attenuated to qualify as "substantial" under Commerce Clause doctrine.[80] In addition, the aggregation principle from *Wickard* was inapplicable because, according to the Court, aggregation is only permissible with regard to economic activity.[81]

The Court also noted in *Lopez* that the statute in question dealt with criminal law and therefore threatened to impinge on the traditional territory of states. "Under our federal system," the Court said, "the 'States possess primary authority for defining and enforcing the criminal law.' "[82] Allowing the federal government to enact criminal laws on the grounds offered would shift the balance of power between it and the States, for "[u]nder the theories that the Government presents in support of [the Act], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been

75. *Lopez*, 514 U.S. at 558 (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968)).
76. *Lopez*, 514 U.S. at 551.
77. *Id.*
78. *Id.* at 559, 561.
79. *Id.* at 563–64.
80. *Id.* at 564.
81. *Id.* at 560–61.
82. *Id.* at 561 n.3.

sovereign."[83] It appeared after *Lopez*, therefore, that the Court would pay particular attention to questionable exercises of Congress's commerce power when criminal law was involved, with an eye toward preserving principles of federalism.

The Supreme Court further reined in Congress's commerce power in *United States v. Morrison*, in which it struck down as unconstitutional the Violence Against Women Act, which provided a civil cause of action for victims of violence motivated by gender.[84] The violence that the act targeted was noneconomic in nature and its individual manifestations did not by themselves have a substantial impact on interstate commerce.[85] The Court rejected the government's argument that the Commerce Clause covered the legislation because, under *Wickard*, the aggregate effects of such violence substantially affected interstate commerce.[86] According to the Court, the aggregation principle was inapplicable because gender-motivated violence was not commercial.[87] In sum, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[88]

As in *Lopez*, the Court in *Morrison* was concerned with Congress's attempt to enter into the traditionally state-based realm of violent crime. According to the Court, "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[89] Striking down the Violence Against Women Act was essential to respecting the states' police power, for "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence."[90]

Although the Supreme Court rejected Congress's attempts to regulate gender-motivated violence and guns near schools, the Court subsequently held in *Gonzales v. Raich* that the Commerce Clause gave Congress the power to criminalize "intrastate, noncommercial cultivation, possession and use" of medical marijuana.[91] *Raich* differed from *Lopez* and *Morrison* in that it addressed an as-applied challenge

83. *Id.* at 564.
84. 529 U.S. 598, 626 (2000).
85. *Id.* at 613.
86. *Id.* at 617.
87. *Id.* at 611 n.4.
88. *Id.* at 617.
89. *Id.* at 618.
90. *Id.* at 615.
91. 545 U.S. 1, 32–33 (2005).

to a statute, whereas *Lopez* and *Morrison* concerned challenges to the respective statutes in their entirety.[92] The petitioners in *Raich* did not argue that the Controlled Substances Act ("CSA") was unconstitutional as written, but only that it was unconstitutional as applied to their intrastate dealings with marijuana for medicinal purposes.[93] The Court rejected this argument, holding that even though the petitioners' activities had a de minimis effect on interstate commerce, those activities nevertheless could be regulated as part of a larger regulatory effort to address a *class of activity* that has substantial effects on interstate commerce—namely, dealings in controlled substances.[94] According to the Court, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence.' "[95]

Instead of focusing on the intrastate nature of the petitioners' particular activities, the Court held that the proper level of analysis regarded the class of activities being regulated. According to the Court, regulating the petitioners' activity was "an essential part of the larger regulatory scheme."[96] It was therefore acceptable that the statute criminalized some intrastate activity.[97] The Court held that Congress could regulate the petitioners' intrastate medical marijuana use because that activity was part of a larger class of activity—dealings in controlled substances—that Congress legitimately could regulate.

The Court found strong similarities between *Raich* and *Wickard* in that both involved intrastate use of fungible commodities that, if left unregulated, would adversely affect Congress's ability to regulate the interstate market for those commodities.[98] The petitioner's dealings with a fungible commodity distinguished *Raich* from *Lopez* and *Morrison* in that, "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic."[99] The Court held that, as in *Wickard*, "[T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption . . . has a substantial effect

92. *Id.* at 23.
93. *Id.* at 15.
94. *Id.* at 17–19.
95. *Id.* at 17.
96. *Id.* at 26–27.
97. *Id.* at 22.
98. *Id.* at 18–19.
99. *Id.* at 25.

on supply and demand in the national market for that commodity."[100] Therefore, while the class analysis in *Raich* constituted a new development in Commerce Clause doctrine, the economic nature of the activity in that case left room to distinguish it from the holdings of *Lopez* and *Morrison*.

III. USING RICO TO PROSECUTE NONECONOMIC STREET GANGS: THE CIRCUIT SPLIT

Within the confines of the precedents outlined above, federal courts are called upon to decide whether RICO prosecutions against gangs are permissible under the Commerce Clause. In many cases, arguments that gangs affect interstate commerce are well-founded. For example, when a gang engages in narcotics trafficking, it falls squarely within the realm of Congress's commerce power.[101] Drug dealing typically involves interstate (and even international) trade. Even if drugs are kept intrastate, their fungible nature and the economic character of drug dealing puts this activity within Congress's commerce power under *Raich* and *Wickard*. In at least two cases, however, federal prosecutors have used RICO to prosecute noneconomic street gangs—that is, gangs that do not engage in economic activity (such as dealing drugs, providing prostitution, or gambling) and that operate in neighborhoods instead of in prisons or on motorcycles.

In 1997, federal prosecutors charged a member of a Detroit-area street gang known as the Cash Flow Posse[102] ("CFP") with RICO violations.[103] The indictment alleged that the gang had waged a campaign of violence, which included murders, murder conspiracies, and attempted murders, in order to protect and acquire territory.[104] These alleged acts constituted the pattern of racketeering activity required by the RICO statute. The prosecution did not allege, however, that the gang had engaged in any economic activity, such as

100. *Id.* at 19.

101. *See, e.g.*, United States v. Nascimento, 491 F.3d 25, 37 (1st Cir. 2007).

102. The poignancy of the gang's name in a Commerce Clause case was not lost on Judge Cole, who wrote the opinion of the court. Waucaush v. United States, 380 F.3d 251, 253 (6th Cir. 2004) ("This case reminds us that names can be deceiving. We must determine whether, under [RICO], the activities of a Detroit-area street gang known as the Cash Flow Posse had a substantial effect on the nation's cash flow.").

103. *Id.*

104. *Id.*

drug dealing.[105] The defendant pled guilty but later challenged his conviction.[106]

The Sixth Circuit agreed with the defendant and held that he was actually innocent of the RICO charges because the government did not prove that the relevant enterprise—the CFP—had engaged in or affected interstate commerce.[107] The court held that the RICO statute only reaches a noneconomic enterprise engaged in violent intrastate crime if its activities substantially affect interstate commerce.[108] By holding that the defendant was actually innocent, the court avoided the conclusion that the RICO statute, as applied in prosecutions of this sort, was unconstitutional because it surpassed the limits of the Commerce Clause.[109] In the words of the court, "Because we should avoid interpreting a statute to prohibit conduct which [sic] Congress may not constitutionally regulate, RICO's meaning of 'affect[ing] interstate commerce' cannot exceed the bounds of the Commerce Clause."[110]

The Sixth Circuit elaborated on the "bounds" of the federal commerce power. It held that the Commerce Clause would only reach a noneconomic street gang if its activities had a substantial effect on interstate commerce without aggregation.[111] It relied on *Lopez* and *Morrison* and held that "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do."[112] Following *Morrison*, the Court asserted that Congress did not have the authority to criminalize noneconomic, violent conduct based on its aggregate commercial effects.[113] Because the CFP did not engage in economic activity and had, at most, a de minimis effect on commerce, the RICO statute could not reach its activities without exceeding the bounds of the Commerce Clause.[114] The court argued that this holding was consistent with sound notions of federalism.[115] If the federal government could regulate the CFP, there would be little left of the states' exclusive regulatory domain.[116]

105. *Id.* at 255–56.
106. *Id.* at 258.
107. *Id.*
108. *Id.* at 255–57.
109. *Id.* at 255.
110. *Id.* (citing Jones v. United States, 529 U.S. 848, 852 (2000)).
111. *Waucaush*, 380 F.3d at 255–57.
112. *Id.* at 256.
113. *Id.* at 262 (quoting United States v. Morrison, 529 U.S. 598, 617 (2000)).
114. *Waucaush*, 380 F.3d at 257–58.
115. *Id.*
116. *Id.*

In 2007, the First Circuit adopted a contrary stance when it held that the Commerce Clause allows federal prosecutors to charge noneconomic street gangs under RICO so long as the gangs have a de minimis effect on interstate commerce.[117] The U.S. Attorney's office brought RICO charges against a Boston-area street gang named Stonèhurst.[118] The alleged predicate acts included murders and assaults with intent to kill, which Stonehurst allegedly committed for the purpose of destroying a rival gang known as Wendover.[119] The First Circuit held that even though Stonehurst did not engage in economic activity, it nevertheless affected interstate commerce to such an extent as to bring the gang's activity under the umbrella of the Commerce Clause. In particular, the court found that Stonehurst had a de minimis impact on interstate commerce by virtue of its possession of approximately nine firearms manufactured out of state, as well as one firearm that a Stonehurst member had traveled out of state to purchase.[120]

According to the court, the Commerce Clause, and thus RICO, only required a de minimis impact on interstate commerce in order to permit federal prosecution of Stonehurst's members.[121] In reaching this conclusion, the First Circuit relied heavily on *Raich*, which had been handed down after the CFP decision. The court placed great emphasis on *Raich* because, unlike *Lopez* and *Morrison*, it dealt with a constitutional challenge to a statute as applied, rather than to the statute as a whole.[122]

Citing *Raich*, the First Circuit held that it was the *class* of activity being regulated, not the actual activity of the particular defendants, that was relevant to a Commerce Clause analysis.[123] According to the court:

> All that is necessary to deflect a Commerce Clause challenge to a general regulatory statute is a showing that the statute itself deals rationally with a class of activity that has a substantial relationship to interstate or foreign commerce. . . . The intrastate or noneconomic character of individual instances within that class is of no consequence.[124]

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117. United States v. Nascimento, 491 F.3d 25, 37, 58 (2007).

118. *Id.* at 30. The gang was named after Stonehurst Street, its home turf. *Id.*

119. *Id.* Unlike in the CFP case, the prosecution here alleged that Stonehurst also engaged in the economic activity of drug dealing, but the trial judge ruled the evidence on this point insufficient as a matter of law. *Id.* at 30 n.1.

120. *Id.* at 45.

121. *Id.* at 37.

122. *Id.* at 41.

123. *Id.* at 42–43.

124. *Id.* (citation omitted).

The court held that, as a class, racketeering activity falls firmly within Congress's power to regulate under the Commerce Clause.[125] And in the court's view, noneconomic intrastate gang violence is part of this class of activity that has the requisite substantial effect on interstate commerce.[126] According to the court, there are "obvious ties between organized violence and racketeering activity—the former is a frequent concomitant of the latter." Therefore, RICO prosecutions against noneconomic street gangs for intrastate violence are permissible under the Commerce Clause.

Like the Sixth Circuit, the First Circuit voiced concerns about its holding's impact on federalism.[127] Ultimately, however, it did not deem the federalism concerns to be dispositive.[128] According to the court, it "share[d] the appellants' concern that the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern. But though the argument has some bite, it ultimately fails to persuade."[129] The First Circuit thus parted ways with the Sixth and left an open question of when RICO may constitutionally be applied to noneconomic street gangs.

IV. DRAWING THE LINE: WHY NONECOMONIC STREET GANGS MUST HAVE A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE TO FALL UNDER RICO

The federal government lacks authority under the Commerce Clause to prosecute the CFP, Stonehurst, and other similar noneconomic street gangs for their violent intrastate activity. Such activity has a de minimis, rather than a substantial, impact on interstate commerce. Under *Lopez* and *Morrison*, de minimis effects of noneconomic criminal activity provide an insufficient basis for federal regulation.[130] And while it is true that the Supreme Court expanded its Commerce Clause analysis to "classes" of activity in *Raich*, the charged activity in these cases is not in the same class as the racketeering activity that the RICO statute addresses. Furthermore, *Raich* is distinguishable because it involved a fungible commodity and

125. *Id.* at 43.

126. *Id.*

127. *Id.* at 41.

128. *Id.*

129. *Id.*

130. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 617 (2000) (rejecting "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

a "quintessentially economic" statute.[131] These prosecutions impermissibly alter the balance between state and federal sovereignty. Accordingly, courts should only allow RICO prosecutions against noneconomic street gangs if the gangs have a substantial effect on interstate commerce.

A. The Effects of Noneconomic Street Gangs on Interstate Commerce

Neither the CFP nor Stonehurst substantially affected interstate commerce; their effects were de minimis. In the CFP prosecution, the government alleged that affiliates of the gang sold an unknown quantity of narcotics in Illinois at an unknown time.[132] The Sixth Circuit found this insufficient to establish a substantial effect on interstate commerce.[133] The court acknowledged that the CFP's alleged violence necessarily had some de minimis effect on interstate commerce, because "a corpse cannot show, after all."[134] Nevertheless, the effect was too attenuated to be "substantial" under Commerce Clause doctrine.[135] In the Stonehurst prosecution, the government alleged that the gang affected interstate commerce by (1) committing violence in a tire shop, which caused the shop to stay closed for several work hours; (2) using cellular phones; (3) possessing approximately nine weapons manufactured out of state; and (4) having as a member an individual who purchased a firearm out of state to use in Massachusetts.[136] The court held that this activity had a de minimis, rather than substantial, effect on interstate commerce.

Under *Lopez* and *Morrison*, these de minimis effects would not be enough to permit federal regulation of noneconomic activity. According to the Court in *Lopez*, "the proper test requires an analysis of whether the regulated activity substantially affects interstate commerce."[137] Furthermore, effects of this sort cannot be aggregated for Commerce Clause analysis, because the *Morrison* Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[138] Based on *Lopez* and *Morrison*, therefore, the activity engaged in by Stonehurst, the CFP, and other similarly

131. Gonzales v. Raich, 545 U.S. 1, 25 (2005).

132. Waucaush v. United States, 380 F.3d 251, 256–58 (2004).

133. *Id.*

134. *Id.* at 258.

135. *Id.*

136. United States v. Nascimento, 491 F.3d 25, 43–45 (1st Cir. 2007).

137. United States v. Lopez, 519 U.S. 549, 559 (1995) (internal quotation marks omitted).

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

situated noneconomic street gangs does not have an effect on interstate commerce sufficient to permit federal prosecution.

B. Class Analysis of Noneconomic Street Gangs Under Raich

The class-based approach to Commerce Clause analysis under *Raich* does not lead to the conclusion that noneconomic street gangs may be prosecuted by the federal government given a de minimis effect on interstate commerce, notwithstanding the First Circuit's holding in the Stonehurst case. In *Raich*, the Supreme Court held that when a "class of activities is regulated and the class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class."[139] Following *Raich*, the First Circuit held that the violent intrastate activities of noneconomic street gangs were part of a *class* of activity that had the requisite effect on interstate commerce to bring them within the ambit of the Commerce Clause.[140] Therefore, the de minimis nature of the gangs' economic effects on interstate commerce was of no consequence.[141]

Contrary to the First Circuit's holding, however, the defendants' activities in the subject prosecutions are not in the same class of activity that RICO legitimately regulates. When describing the class of activity that RICO regulates, the First Circuit noted that "[p]articular manifestations include loan-sharking, extortion, and a host of other financially driven crimes."[142] But the predicate acts with which CFP and Stonehurst members were charged differ entirely from those enumerated. Crucially, none of the alleged predicate acts involved economic activity or were "financially driven."

To support the supposed class identity, the First Circuit argued that regulating noneconomic street gang activity was an essential part of the government's larger regulatory scheme.[143] According to the court, "Given the obvious ties between organized violence and racketeering activity—the former is a frequent concomitant of the latter—we defer to Congress's rational judgment, as part of its effort to crack down on racketeering enterprises, to enact a statute that targeted organized violence."[144] This argument proves too much. Even if the relevant activities are "frequent concomitant[s]," that does not

139. *Id.* (quoting Perez v. United States, 402 U.S. 146, 154 (1971)) (internal quotation marks omitted).

140. *Nascimento*, 491 F.3d at 40–43.

141. *Id.*

142. *Id.* at 43.

143. *Id.*

144. *Id.*

prove that regulating one is an essential or appropriate means for regulating the other. Indeed, by that rationale the federal government could regulate any number of traditional state crimes. For instance, truancy "is a frequent concomitant" of teenage drug dealing. Surely it would not be permissible for Congress to criminalize truancy as part of its war on drugs.

In *Raich*, the Supreme Court rejected the argument that the marijuana-related activity in that case constituted a class of activity distinct from the activity appropriately regulated by the CSA.[145] Despite failing in *Raich*, however, the argument should prevail in cases of this sort. The CSA includes marijuana without exempting private medicinal use. RICO, on the other hand, says nothing of noneconomic intrastate gang activity. It speaks to enterprise activities that affect interstate commerce. This invokes the full power of the Commerce Clause,[146] but it also invokes the corresponding doctrinal requirement that noneconomic activity substantially affect interstate commerce without aggregation.[147]

It is far more plausible to argue that the private intrastate use of marijuana is an individual component of the marijuana trade than to argue that noneconomic gangs are an individual component of the insidious racketeering that RICO was meant to address. The use of marijuana—a commodity—actually is a part of commerce. Privately cultivated marijuana may affect the availability of and demand for marijuana generally in interstate commerce.[148] Therefore, in *Raich*, there was a concrete connection between the activity being prosecuted and the government's regulatory focus. As the Supreme Court noted, there was reason to believe that "failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[149] No such relationship is apparent in this case. The lack of federal regulation of noneconomic intrastate gang activity does not affect economically driven interstate criminal enterprises or the government's ability to regulate them, let alone leave a "gaping hole" in the federal government's regulatory capacity. In fact, were the federal government to leave prosecution of noneconomic violent acts to

145. Gonzales v. Raich, 545 U.S. 1, 28 (2005).

146. *See, e.g.*, *Nascimento*, 491 F.3d at 39 ("[S]tatutes regulating undescribed activities that 'affect' interstate commerce perforce must reach all activities that come within Congress's power.").

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

148. Controlled Substances Act, 21 U.S.C. § 801(4) (2000) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.").

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

the states, it would have more resources with which it could pursue prosecutions of illegal enterprises on a national scale.

C. Distinguishing Raich*: The Effects of Fungible Commodities*

The *Raich* class analysis may not even be applicable to cases questioning the constitutionality of RICO prosecutions of noneconomic street gangs. A crucial distinguishing factor between *Raich* and the subject prosecutions is the presence in *Raich* of a fungible commodity—marijuana. The fact that marijuana is a commodity was a clear factor in the Supreme Court's determination that partial decriminalization would have a powerful effect on interstate commerce. As the Court noted:

> One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.[150]

In the Stonehurst case, the First Circuit downplayed the influence that fungible commodities have on the Supreme Court's analysis. In its own words, the First Circuit "refuse[d] to accord decretory significance to a distinction that the majority in *Raich* did not deem decisive."[151] This gives unduly short shrift to the impact that the presence of a commodity had in *Raich*. In fact, the Court relied on the observation that marijuana was a commodity to distinguish *Raich* from the leading precedents of *Morrison* and *Lopez* and liken it instead to *Wickard*.[152] It noted that, "[u]nlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic."[153] Accordingly, "the regulation is squarely within Congress' [sic] commerce power because production of the commodity meant for home consumption . . . has a substantial effect on supply and demand in the national market for that commodity."[154]

The presence of this distinguishing factor suggests that *Lopez* and *Morrison* still offer more suitable guidance for cases involving the prosecution of noneconomic street gangs. In *Morrison*, the Court admonished that "[b]oth petitioners and Justice Souter's dissent downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis. But a fair reading of *Lopez*

150. *Id.* at 28.

151. *Nascimento*, 491 F.3d at 42.

152. *Raich*, 545 U.S. at 18–25.

153. *Id.* at 25.

154. *Id.* at 19.

shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."[155] The same criticism could be leveled against the First Circuit's opinion in the Stonehurst case—that it downplayed the importance of the noneconomic, criminal nature of the conduct at issue. Given this noneconomic, criminal nature, courts dealing with this issue would be well-served to distinguish *Raich* and follow *Lopez* and *Morrison* by concluding that prosecutions of this sort are beyond the federal government's commerce power.

D. Federalism, Criminal Law, and the Commerce Clause

Not only do RICO prosecutions of noneconomic street gangs not sit well within Commerce Clause doctrine, but they also threaten to disrupt the balance of power between the federal and state governments. From the founding until the present day, United States citizens have been assured that the powers of the federal government shall be substantially held in check in favor of the plenary police powers of the state. Madison wrote in Federalist No. 45 that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which [sic] are to remain in the State governments are numerous and infinite."[156] Over two centuries later, the Supreme Court reiterated in *Morrison* that "[t]he Constitution requires a distinction between what is truly national and what is truly local."[157] Federal prosecution of noneconomic street gangs blurs that line. It takes traditionally state-regulated crimes such as murder and assault and transforms them into matters of federal law.

In its cases interpreting the Commerce Clause, the Supreme Court consistently has espoused its commitment to maintaining the delicate balance of power between the two forms of government. For instance, in *Lopez* the Court acknowledged its "fear that [if it upheld the Gun-Free School Zones Act] there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[158]

Respect for the role of state government has been particularly pronounced with regard to criminal law. As the *Lopez* Court noted,

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155. United States v. Morrison 529 U.S. 598, 610 (2000) (citing United States v. Lopez, 514 U.S. 549, 551 (1995)).

156. THE FEDERALIST NO. 45 (James Madison).

157. *Morrison*, 529 U.S. at 617–18.

158. *Lopez*, 514 U.S. at 555 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935)).

"the States possess primary authority for defining and enforcing the criminal law,"[159] and "in areas such as criminal law . . . States historically have been sovereign."[160] In *United States v. Jones*, the Court noted that "arson is a paradigmatic common-law state crime."[161] The same can be said about murder, attempted murder, and the other violent crimes with which CFP and Stonehurst members were charged.

Of course, the CSA is a criminal statute, and its application to intrastate marijuana in *Raich* withstood Commerce Clause analysis. The regulation of marijuana is different in nature, however, from the prosecution of age-old violent crimes. As noted above, drugs are a commodity. Therefore, they have a natural connection to national economics and interstate commerce. In contrast, violent crimes committed for territorial control are not economic. Only through a nuanced class analysis can courts even attempt to escape the conclusion that RICO prosecutions against noneconomic street gangs infringe on state sovereignty.

The Sixth Circuit emphasized the threat to the balance of power that these federal prosecutions pose. It held that "[a]llowing the government to meet the interstate commerce requirement [in a federal criminal prosecution] through only a nominal showing of a connection to interstate commerce would do as much to completely obliterate the distinction between national and local authority as if no jurisdictional requirement existed at all."[162] The First Circuit also recognized this threat when it said that it "share[d] the appellants' concern that the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern."[163] That court nevertheless affirmed the Stonehurst conviction, in part because it was "confident that political checks and balances will prevent any such legislative overreaching."[164]

It is far from clear, however, that "political checks and balances" will adequately rein in federal law enforcement in this area. Congress is unlikely to check the executive branch. Being "tough on crime" is a veritable prerequisite for modern political candidacy. In the same vein, it may be undesirable for a member of Congress to explain to her constituents that Congress is rolling back federal

159. *Lopez*, 514 U.S. at 561 n.3 (citing Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982))) (internal quotation marks omitted).

160. *Id.* at 564.

161. Jones v. United States, 529 U.S. 848, 858 (2000).

162. Waucaush v. United States, 380 U.S. 251, 257–58 (2004) (internal citation omitted).

163. United States v. Nascimento, 491 F.3d 25, 41 (2007).

164. *Id.*

prosecution of gangs because it runs afoul of time-honored concerns of federalism and the Commerce Clause. In reality, using RICO to combat gangs has proven popular in Washington.[165] Contrary to the First Circuit's claim, the courts are charged with guarding the fringes of constitutionally delegated powers in this area.

E. Statutory Construction

On the basis of principles of statutory construction, the First Circuit objected to the conclusion that noneconomic street gangs must have a substantial effect on interstate commerce to fall under the umbrella of the Commerce Clause and RICO. According to the court:

> This argument is peculiar. Although nothing in the text of RICO suggests it, the [argument] urge[s] us to read a single phrase in the statute as requiring different things in different situations: in a case involving an enterprise engaged in economic activity, the government would have to show only a de minimis effect on interstate commerce, whereas in a case involving an enterprise engaged in violence but not in economic activity, the government would have to show a more substantial effect on interstate commerce.[166]

The court argued that giving dual meanings to a single term conflicts with the Supreme Court's holding in *Clark v. Martinez*, which "made it clear that the doctrine does not serve to give alternative meanings to statutory phrases in cases in which a statute's application might be constitutionally dubious."[167]

Even if courts must ascribe a single meaning to the statutory phrase "affects," however, surely the appropriate response is not to suffer a "constitutionally dubious" construction in the name of interpretive consistency, but rather to jettison the dubious construction in favor of a consistent, constitutionally sound doctrine. One possibility is to require that any activity being regulated under RICO—economic or noneconomic—have a substantial effect on interstate commerce. This reformulation need not overturn precedents so much as recast them. The so-called "de minimis effects" of economic activity previously regulated under RICO can be recast as substantial effects. For example, the drug dealer who never leaves his neighborhood, the gardener raising wheat, and the cancer patient growing marijuana all have substantial effects on interstate commerce. Even though the interstate effects of their activities are small, they are economic in nature and so are necessarily substantial. The same cannot be said for the de minimis effects of noneconomic

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165. *See supra* Part II.A.

166. *Nascimento*, 491 F.3d at 37.

167. *Id.* at 38 (citing Clark v. Martinez, 543 U.S. 371, 384 (2004)).

activity. Noneconomic activities do not have a substantial effect on interstate commerce in any sense.

V. CONCLUSION

The federal government is escalating its campaign against gangs and is using the RICO statute as one of its primary weapons. While these federal prosecutions seem in many cases to be on firm footing—both in terms of statutory and constitutional requirements—there is a subset of cases that is worthy of concern. Federal prosecutions of noneconomic street gangs with de minimis effects on interstate commerce exceed the bounds of the federal government's authority under the Commerce Clause. In addition to running afoul of Supreme Court doctrine, these prosecutions also run the danger of altering the fragile balance of power between the state and federal governments that the Constitution requires. Courts should require that RICO prosecutions against noneconomic street gangs only proceed against gangs that have had a substantial effect on interstate commerce.

Figure 1. RICO Gang Prosecutions Reported Since 2000

Location	Gang	Year (Indictment and/or Disposition)
Los Angeles, CA	18th Street Gang	2000[168]
Santa Rosa, CA	Nuestra Familia	2001[169]
Los Angeles, CA	Aryan Brotherhood	2002[170]
Salt Lake City, UT	King Mafia Associates	2002[171]
North Las Vegas, NV	Crips	2003[172]
Syracuse, NY	Boot Camp Gang	2003[173]
Salt Lake City, UT	Soldiers of the Aryan Culture	2003[174]

168. *Final Defendant Charged in 2000 RICO Indictment of 18th Street Gang Arrested in Indiana After Six Years as Fugitive*, U.S. FED. NEWS, 2007 WLNR 4166421, Jan. 19, 2007.

169. Maria L. La Ganga, *13 Indicted in Violence Led by Prison Gang*, L.A. TIMES, Apr. 24, 2001, at A3.

170. *Life Imprisonment for Two More Aryan Brotherhood Members*, U.S. FED. NEWS, 2007 WLNR 17795478, Sept. 10, 2007.

171. Hurst Laviana, *RICO Law Has Helped Some Cities Curb Gangs*, WICHITA EAGLE (Kan.), Oct. 7, 2007, at B1.

172. *Hammer: RICO A Strong Weapon Against Gangs*, WICHITA EAGLE (Kan.), Oct. 2, 2007, at A2.

173. Laviana, *supra* note 171.

174. *Id.*

Location	Gang	Year (Indictment and/or Disposition)
Boston, MA	Stonehurst Gang	2004[175]
Las Vegas, NV	Hells Angels	2005[176]
Santa Ana, CA	West Myrtle Street Gang; Mexican Mafia	2005[177]
Syracuse, NY	Elk Block Gang	2005[178]
Tulsa, OK	Hoover Crips	2005[179]
Albany, NY	Jungle Junkies	2006[180]
Atlanta, GA	Brownside Locos	2006[181]
Los Angeles, CA	Vineland Boys	2006[182]
Salt Lake City, UT	Tiny Oriental Posse	2006[183]
San Diego, CA	Mexican Mafia	2006[184]
Spokane, WA	Hells Angels	2006[185]
Syracuse, NY	Brighton Brigade	2006[186]
Tampa, FL	Latin Kings	2006[187]
Atlanta, GA	SUR-13	2007[188]
Dallas, TX	Texas Syndicate	2007[189]
Houston, TX	Texas Syndicate	2007[190]

175. Eric T. Berkman, *RICO Covers Violent, Noneconomic Activity, Rules 1st Circuit*, MASS. LAW. WKLY., July 16, 2007.

176. Bill Borlin, *Hells Angels President Sentenced to 90 Months*, SPOKESMAN-REVIEW (Spokane, Wash.), Sept. 18, 2007; David Bowermaster, *Jury Convicts 3 of 4 in Hells Angels Case*, SEATTLE TIMES, June 12, 2007.

177. H.G. Reza, *RICO Target in Santa Ana Is Convicted*, L.A. TIMES, May 10, 2007, at A2.

178. *Id.*

179. Laviana, *supra* note 171.

180. *Id.*

181. *Final Members of "Brownside Locos" Street Gang Sentenced in Federal RICO Case*, U.S. FED. NEWS, 2007 WLNR 7877389, Jan. 12, 2007.

182. Andrew Glazer, *Mob Mentality Used Against Gangs*, HOUSTON CHRON., Aug. 19, 2006, at A8.

183. Laviana, *supra* note 171.

184. *FBI Seeks Gang Fugitive*, U.S. FED. NEWS, 2007 WLNR 17053939, Aug. 17, 2007.

185. *Supra* note 176.

186. *Id.*

187. Thomas W. Krause, *2 in Raid: No Longer Face RICO Charges*, TAMPA TRIB., Mar. 31, 2007, at 2.

188. *Five Members of "Sur-13" Gang Convicted*, U.S. FED. NEWS, 2007 WLNR 17644188, Sept. 6, 2007.

189. Jason Trahan, *14 Members of Prison Gang Indicted in Racketeering Case: Dallas Feds Say They're Responsible for 12 Deaths, Drug Trafficking*, DALLAS MORNING NEWS, Oct. 10, 2007, at 3B.

190. *Anti-Gang Effort Leads to RICO Indictment of Seventeen Alleged Members or Associates of Texas Syndicate Prison Gang*, U.S. FED. NEWS, 2007 WLNR 2961669, Feb. 12, 2007.

Location	Gang	Year (Indictment and/or Disposition)
Los Angeles, CA	Florencia 13	2007[191]
McAllen, TX	Texas Syndicate	2007[192]
Nashville, TN	MS-13	2007[193]
Newark, NJ	Double II Bloods	2007[194]
Northern Virginia	Dragon Family	2007[195]
Prince George's County, MD	MS-13	2007[196]
Wichita, KS	Crips	2007[197]

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191. Jerry Seper, *Drug Agents Arrest 34 in L.A.*, WASH. TIMES, Oct. 17, 2007, at A9.

192. *Nine Alleged Members, Associates of Texas Syndicate Prison Gang Indicted for Violating RICO Statute*, U.S. FED. NEWS, 2007 WLNR 9091644, Apr. 3, 2007.

193. *Thirteen Alleged Members of MS-13 Gang Indicted on Racketeering Conspiracy Charges*, U.S. FED. NEWS, 2007 WLNR 570204, Jan. 10, 2007.

194. *Acting Deputy Attorney General Morford Announces 2007 Project Safe Neighborhoods Achievement Awards Recipients at National Conference*, U.S. FED. NEWS, 2007 WLNR 20653136, Sept. 17, 2007.

195. *Gang Member Pleads Guilty to RICO Conspiracy, Two Murders*, U.S. FED. NEWS, 2007 WLNR 17647388, Sept. 4, 2007.

196. *Id.*

197. *Federal Racketeering Charges Filed Against Crips Gang Members in Wichita*, U.S. FED. NEWS, 2007 WLNR 19326114, Oct. 1, 2007.

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