COMMENTS

APPLYING RICO TO STREET GANG THUGS: USING THE COMMERCE ELEMENT TO KEEP SOME CRIMES OUT OF FEDERAL REACH

I. INTRODUCTION

Ripped from the headlines: "11 L.A. '18th Street' Gang Members Face RICO Charges for Aiding Mexican Mafia,"[1] and "Two Dozen Members of Florencia 13 Gang Named in RICO Indictment That Alleges Drug Trafficking and Shootings of African-Americans."[2] The presence of gangs in the United States has grown rapidly in recent decades, plaguing nearly every city and state, and leading to new challenges for law enforcement.[3] These gangs are often highly sophisticated, relying heavily on drug trafficking and the drug industry in general, and carrying out violent crimes such as murder, armed robbery, kidnapping, and extortion, to ensure their survival.[4] In some respects, these gangs mimic the classic Mafia crime organization, having many of the same characteristics and infrastructure, and carrying out the same crimes.[5]

The Racketeer Influenced and Corrupt Organizations Act ("RICO")[6] was adopted in 1970 to help combat the nation's growing organized crime problem.[7] RICO was considered largely successful in contributing to the dismantling of the country's major Mafia organizations by attacking their financial bases and making it more difficult for these groups to infiltrate legitimate business organizations.[8] When sophisticated urban street gangs replaced the Mafia on the forefront of the American criminal scene, RICO served as a useful tool to attack these groups just like it did the Mafia, and the federal government's involvement

1. *11 L.A. '18th Street' Gang Members Face RICO Charges for Aiding Mexican Mafia*, ASSOCIATED PRESS, Sept. 13, 2006, *available at* http://www.foxnews.com/story/0,2933,213635,00.html.

2. Press Release, U.S. Drug Enforcement Admin., Two Dozen Members of Florencia 13 Gang Named in RICO Indictment That Alleges Drug Trafficking and Shootings of African-Americans (Oct. 16, 2007), *available at* http://dea.gov/pubs/states/newsrel/la101607.html.

3. *See* Institute for Intergovernmental Research, NYGC: National Youth Gang Center, http://www.iir.com/nygc/ (last visited May 10, 2009) (discussing proliferation of gang problems).

4. *See* Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 602–03 (1993) (outlining characteristics of activities of highly sophisticated urban gangs).

5. *Id.* at 607–09 (construing similarities between Mafia and sophisticated urban street gangs).

6. 18 U.S.C. §§ 1961–1968 (2006).

7. *Id.* § 1961 (Congressional Statement of Findings and Purpose).

8. Bonney, *supra* note 4, at 583.

did not raise many eyebrows.[9] After all, highly organized gang activity can be a major drain on the economy, as well as a serious threat to personal safety that transcends state boundaries.[10]

However, the sweeping reach of RICO must be retracted when it simply goes too far. And it goes too far when the government uses RICO to prosecute ordinary, yet violent, street thugs. These street thugs commit crimes, yes, but crimes typically and properly left to the states to prosecute.[11] This Comment argues for a limit to RICO's application and advocates that the line be drawn between the sophisticated urban street gang involved in economic and commercial activities and the ordinary street gang that carries out no economic activity at all. This restraint must be made or RICO will literally become the federal government's one stop shop for combating all crimes, including those typically left to the states to handle.

The RICO statute contains a commerce element,[12] meant to ensure the statute is applied without violating the Constitution, namely Congress's permissible regulatory power under the Commerce Clause.[13] When RICO is applied to intrastate activity with an economic component and the government must only show a minimal connection to interstate commerce, there is no constitutional concern because that intrastate activity, when aggregated, creates a substantial effect on interstate commerce, thus bringing that activity within Congress's permissible realm of control.[14] Examples of this kind of application would be RICO prosecutions of Mafia members or sophisticated urban street gangs carrying out crimes such as robbery, extortion, or drug trafficking.[15]

9. *See id.* at 607 (favoring use of RICO charges against sophisticated gangs due to similarities to Mafia, thus meeting design of statute).

10. *See, e.g.*, United States v. Juvenile Male, 118 F.3d 1344, 1349 (9th Cir. 1997) (describing robbery and murder by defendants and noting ways in which those actions impacted interstate commerce).

11. *See* United States v. Morrison, 529 U.S. 598, 615–18 (2000) (commenting on line between federal and state regulation, where noneconomic intrastate violence is properly left to states).

12. 18 U.S.C. § 1962(c) (listing elements necessary to substantiate criminal violation of RICO, including commerce element, which limits prosecution to "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce").

13. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to, inter alia, regulate interstate commerce). Congress may regulate three categories of activity under its Commerce Clause power: (1) "use of the channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce." United States v. Lopez, 514 U.S. 549, 558–59 (1995).

14. *See, e.g.*, *Juvenile Male*, 118 F.3d at 1347 (finding that because RICO is aimed at activities that directly affect interstate commerce, government need only show individual predicate act has de minimis impact on commerce in order to justify federal regulation).

15. *See, e.g.*, United States v. Riddle, 249 F.3d 529, 531 (6th Cir. 2001) (prosecuting illegal gambling and violent crimes under RICO); United States v. Rone, 598 F.2d 564, 566–67 (9th Cir. 1979) (prosecuting fraudulent check scheme, murder, and extortion under RICO).

However, when RICO is applied to an enterprise participating in noneconomic activity, serious constitutional doubt arises.[16]

In July 2007, the First Circuit acknowledged its holding was about to create a circuit split in the arena of prosecutions under RICO. Nevertheless, the court in *United States v. Nascimento*[17] determined, after "grappling with [a] difficult question," that the government need only show a de minimis connection between the activities of a gang engaged in purely violent, noneconomic conduct and interstate commerce.[18] The Sixth Circuit, on the other hand, came to the opposite conclusion three years prior. The court in *Waucaush v. United States*[19] held that where a gang is not involved in any economic activity at all, a de minimis standard would not suffice to justify a federal RICO prosecution.[20]

The *Waucaush* court was correct in advocating a "substantial effects" standard, whereby the government would have to show that a gang, engaged exclusively in noneconomic criminal activity, carried out activities that had a substantial effect on interstate commerce.[21] This standard is necessary in order to respect Commerce Clause jurisprudence, the recent Supreme Court decisions addressing the need for an economic component to Congress's regulation, as well as the original intent and purpose of RICO.[22] Even though the Sixth Circuit's holding in *Waucaush* is the proper standard, the court's analysis lacks the appropriate reasoning and leaves the decision open for serious criticism.[23] Because of the important constitutional and federalism questions it faced, the court should have addressed rather obvious counterarguments and should have explored in more detail the fundamental constitutional underpinnings of its holding.

II. Overview

The following overview addresses the circuit split between the First and Sixth Circuits, but first attempts to put the split into context. Part II.A discusses the history and structure of RICO, detailing the elements of the statute, its original purpose, and its most recent application. Because the focus of this Comment is on the commerce element of RICO, Part II.B summarizes the major

16. *See, e.g.*, Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004) (holding that defendants could not be found guilty of violating RICO for violent acts because actions of enterprise did not affect economy).

17. 491 F.3d 25 (1st Cir. 2007).

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

19. 380 F.3d 251 (6th Cir. 2004).

20. *Waucaush*, 380 F.3d at 256.

21. *See id.* at 257 (obligating government to show that gang's effect on commerce was substantial).

22. *See id.* at 257–58 (holding that Commerce Clause requires violence to have greater than attenuated effect on interstate commerce in order to fall within Congress's ability to regulate).

23. Some commentators, however, endorse both the outcome and the reasoning of the Sixth Circuit opinion. *See, e.g.*, Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement*, 76 FORDHAM L. REV. 2075, 2097–2100 (2008) (agreeing with *Waucaush* court's holding without critique of its analysis).

cases in Commerce Clause jurisprudence and the Commerce Clause's general effect on RICO. Part II.C highlights the split in decisions between the First and Sixth Circuits where the issue presented was what kind of connection is required between interstate commerce and the activities of a noneconomic, violent gang under the application of criminal RICO charges.

A. *The Racketeer Influenced and Corrupt Organizations Act*

1. History and Structure of the Act

The Racketeer Influenced and Corrupt Organizations Act[24] was enacted in 1970 as one portion of the Organized Crime Control Act of 1970.[25] As the name of the statute implies, one of Congress's principal aims in enacting RICO was to diminish the role of organized crime in the United States by impairing the financial bases of these criminal organizations.[26]

RICO consists of eight sections, containing both criminal and civil provisions. For criminal use, the most important sections are 18 U.S.C. § 1962, which lists the substantive violations of RICO, and 18 U.S.C. § 1961, the definitional section.[27] The government must prove five elements in order to substantiate a violation of § 1962(c), which reads:

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

Essentially the government must show "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the

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24. 18 U.S.C. §§ 1961–1968 (2006).

25. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.).

26. Bonney, *supra* note 4, at 583; *see also* 18 U.S.C. § 1961 (Congressional Statement of Findings and Purpose) (listing Congress's findings, including emphasis on detrimental effects on U.S. economy caused by "illegal use of force, fraud, and corruption").

27. This Comment and the cases discussed within it focus on § 1962(c). Section 1962(a) states that

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a). Section 1962(b) states, "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* § 1962(b).

28. *Id.* § 1962(c).

defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity."[29]

"Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[30] The Supreme Court has held that the term "enterprise" includes both legitimate and illegitimate enterprises,[31] and the enterprise is not required to have an economic motive.[32]

"Pattern of racketeering activity" requires at least two acts of "racketeering activity," one of which "occurred after the effective date of [the statute]" and the "last of which occurred within ten years . . . after the commission of a prior act."[33] Under the statute, "racketeering activity" encompasses "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical,"[34] plus fifty-two predicate federal statutes.[35] The legislative history of RICO demonstrates Congress's intent to define "pattern" rather broadly, and with the flexibility to prove pattern through "a range of different ordering principles or relationships between predicates."[36] Ultimately, the government need only show "continuity plus relationship," meaning "that the racketeering predicates are related" and that they amount to "a threat of continued criminal activity."[37]

2. The Original Purpose of RICO

Because of Congress's declared purpose to eradicate organized crime through the use of RICO, it comes as no surprise that the initial target for federal criminal prosecutions was the Mafia, also referred to as "La Cosa Nostra."[38] Throughout the 1970s and early 1980s, approximately thirty RICO prosecutions occurred per year, and they focused on traditional organized crime offenses such as extortion, gambling, and labor racketeering.[39] Congress believed that organized crime could be dismantled by attacking its economic position in

29. United States v. Marino, 277 F.3d 11, 33 (1st Cir. 2002).

30. 18 U.S.C. § 1961(4).

31. United States v. Turkette, 452 U.S. 576, 591–93 (1981).

32. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994) (holding that government does not need to prove motivation by economic purpose as part of RICO elements of enterprise or predicate racketeering acts).

33. 18 U.S.C. § 1961(5).

34. *Id.* § 1961(1).

35. Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1036 (1990).

36. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 238 (1989).

37. *Id.* at 239.

38. *See* Bonney, *supra* note 4, at 580, 583 (commenting on RICO creators' hope to finally have means of diminishing Mafia's role within United States).

39. Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 652 (1990); *see also* Bonney, *supra* note 4, at 586 (noting primary activities of Mafia are narcotics trafficking, gambling, prostitution, labor and business racketeering, and black marketing).

society.[40] Thus, RICO was originally intended to give the government a means of prosecuting entire organizations that derived profits from illegal activities and frequently reinvested those profits to infiltrate legitimate businesses.[41]

Starting in the 1990s, a new target for RICO emerged—the sophisticated urban street gang.[42] The government could justify, relatively easily, prosecution of these urban gangs because of RICO's broadly defined "enterprise" requirement and Congress's flexible approach to the "pattern" element.[43] Moreover, sophisticated street gangs have gained the same economic and political power traditionally associated with the Mafia due to the structural similarities between these sophisticated gangs and the Mafia, as well as their heavy reliance on the drug trafficking industry.[44]

3. The Government's Newest RICO Target

Although some argue that RICO's intended elasticity should allow for the statute to evolve with society's changing definition of organized crime,[45] others feel that that the statute has become the "monster that ate jurisprudence."[46] Controversy is even more likely when the target enterprise is not structurally sophisticated or economically motivated.[47] The new enterprise currently targeted for federal prosecution under RICO is the ordinary street gang.[48] These gangs are violent and criminal but lack the organization and reliance on illegal profits that facilitated the correlation between sophisticated urban street gangs and the

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40. Bonney, *supra* note 4, at 587.

41. *Id.* at 590–91.

42. *See id.* at 600 (discussing differences between "street corner gang" and sophisticated criminal group that has become "urban street gang" and target of RICO prosecutions in 1990s).

43. *See id.* at 607 (noting that because of similarities to Mafia, urban street gangs fit within "the narrow group of entities that RICO is designed to prosecute").

44. *Id.* at 602–03. The drug trade, especially crack cocaine, is the main source of income for these "sophisticated urban street gangs." Bonney, *supra* note 4, at 602. Moreover, robbery, extortion, bribery, and kidnapping are examples of crimes these urban street gangs have gotten involved with, primarily to promote and protect their narcotics business. *Id.* at 603.

45. *See* Ross Bagley et al., *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901, 902 (2007) (advocating RICO's broad application beyond organized crime in order to carry out Congress's desire that statute be liberally construed to effectuate its remedial purpose); Bonney, *supra* note 4, at 607 (commenting on Congress's intent for RICO to continuously apply to evolving concept of organized crime in our country).

46. *See* Coffey, *supra* note 35, at 1037 (referring to luncheon address given by D.C. Circuit Court of Appeals judge entitled "RICO: The Monster That Ate Jurisprudence").

47. *See* Waucaush v. United States, 380 F.3d 251, 258 (6th Cir. 2004) (holding that ordinary street gang without economic activity or substantial effects on commerce does not warrant RICO charges, especially not based on government's attenuated arguments).

48. *See* United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007) (reviewing government RICO charges against gang members of Boston-area street gang with no group drug or commercial activity); *Waucaush*, 380 F.3d at 253 (analyzing government RICO charges against members of Detroit-area street gang, including murder and assault with intent to murder rival gang members). *See generally* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 110 (Oct. 1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00110.htm (giving advice to U.S. Attorneys on how to prosecute gang activity).

Mafia.[49] Because RICO's enterprise and pattern elements have been defined so broadly,[50] and because the Supreme Court has determined that no economic motive is required in either of these elements,[51] the requirement of some commercial or economic connection is made through the interstate commerce element.[52] This commerce element consists of two parts, thereby encompassing two types of enterprises—those "engaged in" interstate commerce and those whose activities "affect" commerce.[53]

B. The Commerce Clause

1. The U.S. Supreme Court Cases: *Lopez* and *Morrison*

Statutes containing interstate commerce elements trigger potential challenges under the Commerce Clause of the Constitution,[54] which gives Congress the power to enact statutes that regulate activities having a substantial relation to interstate commerce.[55] The two most influential recent Supreme Court cases relating to the Commerce Clause are *United States v. Lopez*[56] and *United States v. Morrison*.[57]

In *Lopez*, the Supreme Court struck down the Gun Free School Zones Act of 1990 ("GFSZA") as an invalid use of Congress's power under the Commerce Clause.[58] First, the Court found that the GFSZA itself had nothing to do with

49. *See* Institute for Intergovernmental Research, National Youth Gang Center: National Youth Gang Survey Analysis (2007), http://www.iir.com/nygc/nygsa/defining_gangs.htm (noting definitional characteristics of committing crimes together, having a name, displaying colors or symbols, socializing together, claiming territory, and having leaders with group criminality ranking highest in importance with leadership lowest).

50. *See* Bonney, *supra* note 4, at 611 (noting that in context of RICO prosecutions of gangs, "pattern" element is usually not difficult to demonstrate after "enterprise" has been established).

51. *See* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994) (holding RICO does not require proof that either enterprise or predicate racketeering acts were motivated by economic purpose).

52. *See* 18 U.S.C. § 1962(c) (2006) (making it unlawful for any person to be associated with "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" or to participate in that enterprise through pattern of racketeering activities).

53. *Id.*; *see also* United States v. Robertson, 514 U.S. 669, 671–72 (1995) (acknowledging two parts to RICO's commerce element through discussion of enterprises whose activities affect commerce as well as the "alternative criterion" of enterprises engaged in interstate commerce).

54. U.S. CONST. art. I, § 8, cl. 3.

55. United States v. Lopez, 514 U.S. 549, 559 (1995). Congress may regulate three categories of activity under its Commerce Clause power: (1) "use of the channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce." *Id.* at 558–59. This last category is the focus of *United States v. Morrison*, 529 U.S. 598 (2000), and *Lopez*, as well as *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007), and *Waucaush v. United States*, 380 F.3d 251 (6th Cir. 2004). See *infra* Part II.C.1 and II.C.2 for further discussion of *Waucaush* and *Nascimento*.

56. 514 U.S. 549 (1995).

57. 529 U.S. 598 (2000).

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

interstate commerce or the regulation of economic activity.[59] Moreover, the statute lacked a jurisdictional element,[60] which would ensure "through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[61] Finally, the Court rejected the government's attempts to demonstrate how possession of a firearm in a school zone "substantially affects" interstate commerce.[62]

United States v. Morrison, which followed a few years later, involved a section of the Violence Against Women Act ("VAWA") that "provided a federal civil remedy for the victims of gender-motivated violence."[63] The Court, relying heavily on the principles it announced in *Lopez*, invalidated the statute because it found that gender-motivated crimes simply were not economic activity.[64] In fact, the Court stated, "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, 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."[65] Like the GFSZA, the statute at issue in *Morrison* lacked a jurisdictional element that would "lend support" to the requirement that the statute be sufficiently related to interstate commerce.[66]

2. The "Class of Activities" Test

Generally speaking, once a federal statute passes a facial constitutional challenge, meaning the statute has been shown to be within Congress's enumerated powers,[67] the only challenge remaining is based on the statute "as applied" to particular individuals in a single case.[68] The challenging parties argue

59. *Id.* at 561.

60. *See* United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001) (explaining that "jurisdictional element" refers to federal jurisdiction over an individual prosecution, not subject matter jurisdiction).

61. *Lopez*, 514 U.S. at 561. After the *Lopez* case, Congress amended the GFSZA to include a provision that the prosecution must show that the gun in question "has moved in or . . . otherwise affects interstate or foreign commerce." 18 U.S.C. § 922(q)(2)(A) (2006).

62. *Lopez*, 514 U.S. at 563–64. The government relied upon "cost of crime" and "national productivity" arguments to prove the "substantially affects commerce" requirement. *Id.*

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

64. *Id.* at 613.

65. *Id.*; *see also* Jones v. United States, 529 U.S. 848, 858–59 (2000) (holding that federal arson statute at issue only covered property used in commerce or activity affecting commerce, and finding it appropriate, in light of *Lopez*, to avoid turning local criminal activities into federally enforceable matters).

66. *Morrison*, 529 U.S. at 613. Unlike the GFSZA, the Violence Against Women Act was supported by congressional findings showing the serious impact that gender-motivated violence has on victims, their families, and potentially the economy as a whole through such a victim's perspective. *Id.* at 614–15. Nevertheless, the Court invalidated the statute. *Id.*

67. *See id.* at 607 (observing that judiciary ought to invalidate statute only upon showing that Congress exceeded its enumerated powers); City of Chi. v. Morales, 527 U.S. 41, 55 (1999) (plurality opinion) (commenting generally on facial challenge doctrine by noting that facial challenge aims to protect rights of party as well as others who may suffer negative consequences under statute).

68. *See* Gonzales v. Raich, 545 U.S. 1, 15 (2005) (noting that respondents did not challenge

that the statute's application to them, or their activity, in particular is unconstitutional.[69] Typically, to determine whether application of a federal statute offends the Commerce Clause, a court examines the statute under a "class of activities" test, looking at the class of activities Congress intended to regulate, not the individual acts of a particular case, which may in fact be intrastate in nature.[70] The "class of activities" test is exemplified in *Wickard v. Filburn*,[71] a case that involved the application of the Agricultural Adjustment Act to the homegrown wheat used by a farmer for personal consumption.[72] More importantly, the case stands for the proposition that Congress has the power to regulate purely local activities if those activities are part of an economic "class of activities" that has a substantial effect on interstate or foreign commerce.[73]

Consequently, under the class of activities test, once a statute as a whole is deemed valid, the "substantial effects" test does not need to be applied to the individual act or activity of the case.[74] Put another way, when "the type of activity at issue has been found by Congress to have a substantial connection with interstate commerce, the government need only prove that the individual subject transaction has a *de minimis* effect on interstate commerce."[75]

3. Constitutionality of RICO as a Whole and as Applied

To date, RICO as a whole has withstood constitutional challenge despite arguments that Congress lacked authority to pass the legislation under the

Congress's authority to pass statute in question, rather they argued the statute should not have been applied to their intrastate activity).

69. *See id.* at 15 (hearing argument that statute's application to defendant's intrastate activity exceeded Congress's authority under Commerce Clause); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 732 (2003) (explaining that facial constitutional challenge encompasses claim that legislation in question has denied party individual rights guaranteed by Constitution); Antony Barone Kolenc, Note, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867, 925 (1998) (mentioning that "as-applied" challenges come in three varieties, challenging (1) nexus between regulated activity and interstate commerce, (2) sufficiency of government's evidence concerning that nexus, and (3) time-frame of that nexus).

70. United States v. Vignola, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979), *aff'd without opinion*, 605 F.2d 1199 (3d Cir. 1979); *see also* Perez v. United States, 402 U.S. 146, 153–54 (1971) (utilizing class of activities test to validate application of Consumer Credit Protection Act to loan sharking activities of defendant by finding that individual belonged to class engaging in activities covered by Act).

71. 317 U.S. 111 (1942).

72. *Wickard*, 317 U.S. at 114–15.

73. *Raich*, 545 U.S. at 17; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (utilizing "class of activities" test to validate application of legislation against individual hotel, requiring accommodations for African American guests).

74. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) (affirming that "where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence" (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968))); *Perez*, 402 U.S. at 154 (holding 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" (quoting *Wirtz*, 392 U.S. at 193)).

75. United States v. Miller, 116 F.3d 641, 674 (2d Cir. 1997).

Commerce Clause.[76] This validation is likely due in part to the fact that RICO contains the jurisdictional element that was missing in *Lopez* and *Morrison*.[77] Because RICO condemns association with any enterprise "engaged in, or the activities of which affect, interstate or foreign commerce,"[78] RICO theoretically can survive any facial constitutional challenge.[79]

The Supreme Court has not yet decided whether *Lopez* alters the interstate commerce element of RICO *as applied* to criminal gang enterprises engaged in intrastate activities.[80] In *United States v. Robertson*,[81] however, the Supreme Court did analyze the application of RICO to an individual who invested funds from illegal operations into the running of an Alaskan gold mine.[82] The Court commented briefly on the importance of making sure an enterprise's activities affect commerce, but ended its inquiry by holding that the goldmine itself was an enterprise "engaged in" interstate commerce, thereby clearly satisfying the requisite connection to interstate commerce.[83] According to other courts, *Robertson* left the question open as to whether a RICO prosecution of an enterprise not engaged in, but whose activities merely affect, interstate commerce must show a substantial effect on commerce.[84]

With RICO considered a valid exercise of congressional authority, many courts have applied the class of activities test to RICO criminal prosecutions and required evidence that the enterprise has only a slight, or de minimis, effect on commerce.[85] Requiring proof of only a de minimis effect has not proven overly

76. *See* United States v. Garcia, 143 F. Supp. 2d 791, 804 (E.D. Mich. 2000) (holding that congressional findings of effects of organized crime on interstate commerce plus jurisdictional element allow RICO to sustain constitutional challenge); United States v. Vignola, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979) (finding RICO "proper exercise of the federal commerce power" based on Congress's rational belief that class of activities encompassed by racketeering activities burdens interstate commerce and undermines general welfare), *aff'd without opinion*, 605 F.2d 1199 (3d Cir. 1979).

77. *See* United States v. Marino, 277 F.3d 11, 35 (1st Cir. 2002) (finding RICO's jurisdictional element to be key part of statute's constitutionality); United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001) (emphasizing importance of jurisdictional requirement in RICO statute compared to those statutes found unconstitutional because jurisdictional element was lacking). See *supra* Part II.B.1 for a discussion of *Lopez* and *Morrison*.

78. 18 U.S.C. § 1962(c) (2006).

79. *Garcia*, 143 F. Supp. 2d at 804.

80. *See* United States v. Juvenile Male, 118 F.3d 1344, 1347 (9th Cir. 1997) (noting that neither Supreme Court nor Ninth Circuit had yet weighed in on whether *Lopez* affects interstate commerce aspect of RICO).

81. 514 U.S. 669 (1995).

82. *Robertson*, 514 U.S. at 670.

83. *Id.* at 671–72. The Court's analysis seems to suggest that if an enterprise is itself engaged in interstate commerce, then there is no "substantial effects" requirement. *See* United States v. Riddle, 249 F.3d 529, 536 (6th Cir. 2001) (viewing *Robertson* as holding that when RICO enterprise is engaged in interstate commerce, government does not need to show its effect on commerce was substantial).

84. *See, e.g.*, *Riddle*, 249 F.3d at 537 (noting that *Robertson* did not address issue of whether RICO prosecutions must show substantial effect when enterprise affects interstate commerce).

85. *See Juvenile Male*, 118 F.3d at 1348 (holding that because RICO is aimed at activities that directly affect interstate commerce, all that is required to establish federal jurisdiction in individual case is showing that individual predicate acts have de minimis impact on commerce); United States v.

controversial as applied to the Mafia, sophisticated street gangs, and other defendants involved in illegal economic activities.[86] However, when the enterprise itself has no profit motive and the predicate racketeering acts are not economic in nature, a difference in opinion emerges.[87] This difference in opinion stems from the government's application of RICO to violent and criminal street gangs who lack financial motive, economic activity, and commercial funding.

C. *The Circuit Split over the Commerce Element*

1. The Sixth Circuit: De Minimis Is Not Enough

In *Waucaush v. United States*,[88] the Sixth Circuit held that under RICO, where an enterprise itself is not engaged in economic activity, a minimal effect on interstate commerce will not suffice to permit prosecution.[89] Instead, the government had an obligation to show that the activities of a Detroit street gang, Cash Flow Posse ("CFP"), had a substantial effect on commerce.[90] Despite its name, the gang members were charged under RICO for the predicate acts of murder, conspiracy to murder, and assault with intent to murder, none of which were economic in nature.[91] Because these acts of violence were perpetrated principally to protect the "turf" of the gang, the government never contended that the CFP was "engaged in" interstate commerce.[92] Instead, to satisfy RICO's commerce element, the government argued that CFP's activities "affected" interstate commerce.[93] The key question before the court was whether this effect had to be substantial or minimal.[94]

Robinson, 763 F.2d 778, 781 (6th Cir. 1985) (noting that criminal enterprise activity must have merely minimal repercussions for interstate commerce); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (finding that RICO requires government to show at least minimal nexus between enterprise, not each predicate racketeering act, and interstate commerce).

86. For a discussion of cases in which proof of a de minimis effect on interstate commerce has not been controversial because of the nature of the case, see, for example, United States v. Shryock, 342 F.3d 948, 969 (9th Cir. 2003) (extortion and drug trafficking); *Juvenile Male*, 118 F.3d at 1344 (gang involved in armed robberies to purchase firearms); *Robinson*, 763 F.2d at 778 (conspiracy to sell contraband and share in its proceeds); United States v. Allen, 656 F.2d 964, 964 (4th Cir. 1981) (bribing police officers in exchange for protection in illegal bookmaking operation); United States v. Altomare, 625 F.2d 5, 6 (4th Cir. 1980) (illegal gambling activities); *Rone*, 598 F.2d at 567 (murder plus extortion, fraudulent insurance policy scheme, stealing social security checks).

87. *Compare* Waucaush v. United States, 380 F.3d 251, 256–57 (6th Cir. 2004) (disallowing application of RICO to noneconomic, purely violent street gang, and requiring government to show that gang's effect on commerce was "substantial"), *with* United States v. Nascimento, 491 F.3d 25, 29, 37 (1st Cir. 2007) (permitting prosecution of gang members engaged in violent and noneconomic activity by showing only de minimis connection between enterprise and interstate commerce).

88. 380 F.3d 251 (6th Cir. 2004).

89. *Waucaush*, 380 F.3d at 256.

90. *Id.* at 257.

91. *Id.* at 253–54.

92. *Id.* at 255.

93. *Id.*; *see also* United States v. Robertson, 514 U.S. 669, 672 (1995) (defining "engaged in commerce" as "'directly engaged in the production, distribution, or acquisition of goods or services in

Arguing in favor of the de minimis standard, the government relied on an earlier Sixth Circuit case, *United States v. Riddle*.[95] In *Riddle*, members of an Ohio branch of La Cosa Nostra challenged the level of proof the government needed to show in order to connect their activities and interstate commerce.[96] Based on the Supreme Court case *United States v. Lopez*, the defendants in *Riddle* argued that the government was obligated to show that their intrastate enterprise had a "substantial effect on interstate commerce."[97] The court dismissed the defendants' *Lopez* arguments by ruling *Lopez* inapplicable because RICO contained a jurisdictional element.[98] Instead, the *Riddle* court found *United States v. Robertson* more persuasive, standing for the proposition that "when a RICO enterprise is 'engaged in' interstate commerce, the government does not need to show that the enterprise's effect on commerce is 'substantial.'"[99] In the end, the *Riddle* court concluded that a de minimis connection to interstate commerce would also be sufficient "for a RICO enterprise that 'affects' interstate commerce."[100]

The *Waucaush* court distinguished *Riddle*, pointing to the fact that "a minimal connection sufficed [in that case] only because the enterprise itself had engaged in economic activity—it operated an illegal gambling business, extorted money, and fenced stolen merchandise."[101] The CFP, a street gang involved in turf wars and acts of violence, was not involved in any economic enterprise.[102] Thus, the court reasoned that "where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do."[103]

The government, having the burden of showing that CFP's activities had a substantial effect on commerce, offered evidence that CFP's murder of rival gang members removed potential drug dealers from the marketplace.[104] After

interstate commerce'" (quoting United States v. Am. Building Maintenance Indus., 422 U.S. 271, 285 (1975))).

94. *See Waucaush*, 380 F.3d at 255 (mentioning parties' disagreement on whether effect on commerce must be substantial or only minimal).

95. 249 F.3d 529 (6th Cir. 2001).

96. *Riddle*, 249 F.3d at 535–36.

97. *Id.* at 536. See *supra* Part II.B.1 for a discussion of *Lopez*.

98. *Riddle*, 249 F.3d at 536 (stating that *Lopez* does not control RICO issues because RICO "contains a jurisdictional requirement").

99. *Id.*

100. *Id.* at 537. The *Riddle* court appeared to be answering a question left open by *United States v. Robertson*, 514 U.S. 669 (1995). In *Robertson*, the Supreme Court held that when a RICO enterprise is "engaged in" interstate commerce, the government does not need to show the connection with interstate commerce is "substantial." 514 U.S. at 671–72. The Court left open the question of whether a RICO enterprise that merely "affects" interstate commerce must have a substantial effect. *Riddle*, 249 F.3d at 537.

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

102. *Id.* at 256.

103. *Id.*

104. *Id.* at 256–57. The court also rejected the idea that the government could show CFP's conduct affected interstate commerce through the removal of a consumer from the marketplace, because "a corpse cannot shop, after all." *Id.* at 258.

this argument proved futile, the government attempted to meet its burden by showing that CFP eventually became associated with a national gang, implicating the gang's effect on interstate commerce through correspondence and travel.[105] Rejecting this attenuated argument, the court held that to allow the government to satisfy the commerce element only by a nominal showing "'would do as much to completely obliterate the distinction between national and local authority as if no jurisdictional requirement existed at all.'"[106]

The *Waucaush* court concluded that the CFP was a gang involved in intrastate, noneconomic activity, without substantial effect on interstate commerce; therefore, the government could not proceed under a federal RICO charge.[107] The court stressed that this form of conduct has always been under the control of each state's police power.[108] To string together "'the but-for causal chain'" from the initial act of pure, non-profit-driven violence, to some effect on interstate commerce, would be to offend the Commerce Clause as well as the Supreme Court's holding in *United States v. Morrison*.[109]

Apparently underlying the court's ultimate decision was its reliance on a constitutional interpretive tool known as the constitutional avoidance doctrine.[110] The court, looking to the Supreme Court case of *Jones v. United States*[111] for guidance, felt it should use this principle in order to avoid interpreting a statute to prohibit conduct Congress cannot constitutionally regulate.[112] As a result, RICO's "affecting commerce" element could not encompass the type of noneconomic, noncommercial conduct at issue in the case because, according to the *Waucaush* court, Congress's authority under the Commerce Clause did not extend that far.[113]

105. *Waucaush*, 380 F.3d at 257.

106. *Id.* at 257–58 (quoting United States v. Odom, 252 F.3d 1289, 1296 (11th Cir. 2001) (internal quotation marks omitted)); *see also* United States v. Garcia, 143 F. Supp. 2d 791, 810 (E.D. Mich. 2000) (applying post-*Morrison* de minimis standard "with teeth," and refusing to pile inferences together to meet commerce element).

107. *Waucaush*, 380 F.3d at 258.

108. *Id.* at 258 (citing United States v. Morrison, 529 U.S. 598, 615 (2000)).

109. *Id.* (quoting *Morrison*, 529 U.S. at 615).

110. *Id.* at 255. For a general explanation of how the constitutional avoidance doctrine functions, see *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

111. 529 U.S. 848 (2000).

112. *Waucaush*, 380 F.3d at 255; *see also* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001) (utilizing constitutional avoidance doctrine when interpretation invoked outer limits of Congress's power, a concern which is heightened when interpretation alters federal-state framework); *Jones*, 529 U.S. at 857–58 (following principle that where statute is susceptible to two interpretations court should avoid interpretation that raises serious constitutional considerations, in decision to avoid interpretation of federal arson statute to include local criminal conduct within federal enforcement).

113. *Waucaush*, 380 F.3d at 255 (holding that meaning of RICO's commerce element "cannot exceed the bounds of the *Commerce Clause*" (emphasis added)).

2. The First Circuit: De Minimis Standard Applies to All RICO Violations

In *United States v. Nascimento*,[114] the First Circuit "create[d] a circuit split" by concluding that a de minimis effect on interstate commerce is sufficient to satisfy RICO's commerce element when applied to a street gang engaged in violent but noneconomic criminal activity.[115] The appellants were three members of a Boston street gang known as Stonehurst.[116] They were charged with violation of RICO through their membership in Stonehurst and participation in the predicate racketeering activities of murder and assault with intent to kill.[117] Notably, there was insufficient evidence to show that Stonehurst, as an enterprise, engaged in any drug trafficking.[118]

Dealing with the "enterprise" element of RICO, the *Nascimento* court resolved that it was reasonable for a jury to conclude that Stonehurst was an enterprise due to the group sharing a cache of firearms, self-identifying as belonging to an organization, and training as a group.[119] Moreover, the court found the group to have a shared purpose or "well-honed" goal of killing members of a rival gang.[120]

Next, the court concentrated on the second element of RICO at issue on appeal, the effect on interstate commerce.[121] The district court instructed the jury that the requirement would be satisfied if the government proved that "Stonehurst's actions had at least a de minimis effect on interstate commerce."[122] Attempting to distinguish their case from other RICO cases where this instruction would "unarguably" apply,[123] the appellants argued that because Stonehurst did not engage in any economic activity, the government would have to show more than a de minimis effect.[124] The appellants argued that the de

114. 491 F.3d 25 (1st Cir. 2007).

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

116. *Id.*

117. *Id.*

118. *Id.* at 30 n.1.

119. *Id.* at 33.

120. *Nascimento*, 491 F.3d at 33.

121. *Id.* at 36.

122. *Id.* at 37.

123. *Id.* To validate their position that the district court's jury instruction would be "unarguably correct in most RICO cases," the court cited *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) and *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001). *Id.* Presumably, the instruction would be correct in most RICO cases where the "class of activities" test makes sense, based on the idea that RICO as a whole is constitutional and RICO covers activities that have a substantial effect on commerce, so Congress can regulate intrastate activities within that larger class covered by the statute. However, the appellants in *Nascimento* sought to differentiate their situation because they engaged in no economic activity at all. Thus, their noneconomic, violent conduct fell outside the "class of activities" regulated by RICO and, therefore, the instruction for the de minimis standard could not be correct. *See Nascimento*, 491 F.3d at 37 (rejecting appellants' urging for more rigorous standard when RICO enterprise has not engaged in economic activity).

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

minimis standard misstated RICO's commerce requirement with respect to noneconomic enterprises.[125]

In dismissing appellants' argument, the court pointed to *United States v. Marino*,[126] a case the court considered on point and controlling.[127] In *Marino*, gang members affiliated with the Patriarca Family of La Cosa Nostra were charged under RICO for their involvement in various criminal activities, including murder and drug distribution.[128] Addressing the sufficiency of the degree to which the enterprise's activities related to interstate commerce, the court of appeals upheld the district court's jury instruction that the enterprise's activities "need not show any particular degree of or effect on interstate commerce. All that is required is some effect on interstate commerce."[129]

The appellants in *Nascimento* attempted to distinguish *Marino* based on the fact that the enterprise in *Marino* was involved in drug distribution, clearly an economic activity, while Stonehurst members were being charged with violent but noneconomic criminal acts.[130] The *Nascimento* court did not find this argument persuasive.[131] As a matter of strict and literal statutory interpretation, the First Circuit refused to read a single phrase in two different ways depending on the situation.[132] The court found it injudicious to require the government to show a heightened connection to interstate commerce if the enterprise was not engaged in an economic activity, but only a de minimis effect if engaged in economic activity, when nothing in the statute's language suggested "affecting commerce" could mean different things for different types of enterprises.[133] In fact, the *Nascimento* court heavily criticized its sister circuit for engaging in this exact analysis.[134] According to the *Nascimento* court, the *Waucaush* court failed to "employ any of the usual tools of statutory construction" in forming its "suspect" decision.[135]

125. *Id.* Appellants argued in the alternative that even if the district judge's jury instructions were correct as a matter of statutory interpretation, RICO was unconstitutional as applied to them. *Id.* Finally, they argued that even if their other points failed, the government would not be able to meet the lower de minimis standard. *Id.*

126. 277 F.3d 11 (1st Cir. 2002).

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

128. *Marino*, 277 F.3d at 18.

129. *Id.* at 34 (internal quotation marks omitted).

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

131. *Id.*

132. *Id.*

133. *Id.* at 37–38 (finding nothing in "sound canons of statutory construction" to warrant reading of word "affect" as containing two different meanings depending on circumstances not mentioned in statute itself).

134. *Id.* at 38.

135. *Nascimento*, 491 F.3d at 38 (opining that *Waucaush* court's holding was based not on principles of statutory construction but a "professed desire to 'avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate'" (quoting Waucaush v. United States, 380 F.3d 251, 255 (6th Cir. 2004))).

Looking to the *Waucaush* decision, the appellants in *Nascimento* attempted an argument based on the constitutional avoidance doctrine.[136] They appealed for the court to abstain from reading RICO as encompassing noneconomic activities because to do so would raise "grave constitutional concerns."[137] Refusing to employ this interpretive tool, the court felt it was not free to simply interpret a statute as inoperative when it approached the limits of Congress's constitutional authority.[138] Instead, the court noted that it was wiser to apply one definition uniformly to all RICO charges, and to do so would not be "constitutionally dubious."[139]

In a similar vein, the appellants in *Nascimento* next made an argument based on *Lopez* and *Morrison*, claiming their intrastate activity was "beyond the reach of Congress' Commerce Clause power."[140] They argued that their noneconomic criminal activity was precisely what the Supreme Court dealt with in *Morrison*, and that to aggregate such criminal activity without showing a substantial connection to interstate commerce would be to "obliterate any semblance of a constitutional limit on federal power."[141] In response, the court distinguished the *Lopez/Morrison* line of cases and deemed them inapplicable.[142] The court reasoned that in both *Lopez* and *Morrison*, the Supreme Court dealt with facial challenges to the constitutionality of the statutes at issue.[143] Unlike RICO, neither statute contained a jurisdictional requirement that would ensure every application would satisfy its required Commerce Clause connection.[144]

Notably, the First Circuit in *Nascimento* highlighted the Supreme Court decision, *Gonzales v. Raich*,[145] as instructive in its approach to handling as-applied challenges under the Commerce Clause.[146] In the First Circuit's view, *Raich* was illustrative as a case that "entails an as-applied challenge to a generally valid federal statute"[147] and was therefore more on point than *Morrison* and *Lopez*.[148] In *Raich*, the Supreme Court upheld the application of the Controlled Substances Act to prohibit possession and manufacture of

136. *Id.* (relying, just as the *Waucaush* court did, on the Supreme Court's use of constitutional avoidance doctrine in Jones v. United States, 529 U.S. 848, 857–58 (2000)).

137. *Id.*

138. *Id.* (citing Clark v. Martinez, 543 U.S. 371, 384 (2005)).

139. *Id.* See *supra* notes 132–33 and accompanying text for a discussion of the definition of "affecting" found in RICO, which the First Circuit previously set forth.

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

141. *Id.*

142. *Id.*

143. *Id.*

144. *See id.* at 43 (finding that RICO's jurisdictional element ties statute directly to commerce more explicitly than statutes in *Lopez* or *Morrison*).

145. 545 U.S. 1 (2005).

146. *Nascimento*, 491 F.3d at 38 n.4.

147. *Id.* at 41.

148. *Id.* (viewing *Raich* as more analogous because *Morrison* and *Lopez* were facial challenges to statutes).

homegrown marijuana intended for medicinal purposes.[149] Although the activity was intrastate and permitted by state law, the Court held that "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'"[150] Drawing upon the lessons of *Raich*, the First Circuit held that the noneconomic nature of Stonehurst's activities was irrelevant.[151] Because the RICO statute as a whole regulates a "class of conduct" that Congress has chosen to criminalize, and the class of activity bears a substantial relationship to interstate commerce, it is of no consequence that the individual instances of the case have no economic character.[152]

Eventually, the court in *Nascimento* dealt with the appellants' final argument—that the government failed to demonstrate even a de minimis connection between Stonehurst's criminal activities and interstate commerce.[153] Although the government offered evidence including the fact that one of the shootings occurred near a tire shop engaged in interstate commerce, and Stonehurst members regularly used cellular phones to coordinate their activities, the court principally relied on evidence that Stonehurst maintained an arsenal of firearms, the contents of which were mostly manufactured outside of Massachusetts.[154] Thus, it was on this "surer footing" that the court found the government to have satisfied the "affecting commerce" element of RICO.[155]

III. DISCUSSION

Neither the Sixth Circuit nor the First Circuit utilized proper standards or engaged in completely well-informed analysis, but in the end, the "substantial effects" test advocated by the court in *Waucaush v. United States*[156] ought to be the standard applied to gangs not engaged in interstate commerce and not participating in economic activities. However, because RICO's application to noneconomic, violent conduct requires a careful balance of Commerce Clause principles and fulfillment of RICO's original purpose, a new method of reasoning needs to underlie the substantial effects application.

In the following discussion, Part III.A analyzes the First Circuit's holding, focusing specifically on its decision to follow the class of activities test, thereby requiring only a de minimis standard. Part III.B analyzes the Sixth Circuit's

149. *Raich*, 545 U.S. at 9.

150. *Id.* at 17 (quoting Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

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

152. *Id.* at 42–43.

153. *Id.* at 43. Interestingly, the court applied "heightened scrutiny" to the government's offerings of proof to show a de minimis connection because "Stonehurst has not been engaged in racketeering activity of an economic nature." *Id.*

154. *Id.* at 45. Moreover, the court felt that the arsenal evidence was bolstered by the fact that one Stonehurst member traveled from Massachusetts to New Hampshire to purchase a firearm and then returned to Massachusetts. *Nascimento*, 491 F.3d at 46.

155. *Id.* at 45.

156. 380 F.3d 251, 261 (6th Cir. 2004). See *supra* Part II.C.1 for a discussion of *Waucaush* and the "substantial effects test."

reasoning in *Waucaush*, where the result is fair and logical, but the court's analysis lacks appropriate and detailed reasoning. Part III.C attempts to not only explain why the substantial effects test is the proper standard, but also explores its underlying justifications. These justifications should then serve as the foundation for a future court's analysis when faced with applying RICO to a noneconomic, violent gang.

A. *The First Circuit's De Minimis Standard Is Inappropriate*

1. Extreme Deference to the Government Leads to an Unjust Outcome

Three years after the Sixth Circuit decided *Waucaush*, its sister circuit faced an almost identical situation: the government brought RICO charges against violent gang members who were charged with the predicate acts of murder and assault, yet not charged with a crime containing an economic component or commercial purpose.[157] After addressing what the *Waucaush* court had done, the First Circuit in *United States v. Nascimento*[158] went the opposite direction, requiring the government to show only that the gang's activities had a de minimis effect on interstate commerce.[159] In a thorough opinion, the court discusses the need to follow its own precedent set forth in *United States v. Marino*,[160] analyzes its view of proper statutory interpretation through the "class of activities" test, and finally details its decision to distinguish *United States v. Morrison*[161] and *United States v. Lopez*[162] and discard the constitutional avoidance doctrine.[163]

Nevertheless, the court's analysis, while detailed and supported by "sound canons of statutory construction,"[164] fails to produce a fair result. Not only does the result fly in the face of RICO's intent and purpose, it also takes a dangerous step towards eliminating the boundaries between state and federal jurisdiction.[165]

To begin with, while not wanting to read a single phrase in RICO as "requiring different things in different situations,"[166] similar to what the

157. *Nascimento*, 491 F.3d at 29–30.

158. 491 F.3d 25 (1st Cir. 2007).

159. *Nascimento*, 491 F.3d at 30. The court acknowledged the difficulty of the question presented by the case before it, concluding that the "normal requirements of the RICO statute," namely the de minimis standard, would apply to enterprises "engaged only in noneconomic criminal activity." *Id.*

160. 277 F.3d 11 (1st Cir. 2002).

161. 529 U.S. 598 (2000).

162. 514 U.S. 549 (1995).

163. *Nascimento*, 491 F.3d at 41, 43–44.

164. *Id.* at 38 (using phrase to describe what *Waucaush* court did *not* do, thereby implying this court was using proper statutory construction).

165. *See Morrison*, 529 U.S. at 613 (noting that under government's argument, "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 sovereign" (quoting Lopez v. United States, 514 U.S. 549, 564 (1995))).

166. *Nascimento*, 491 F.3d at 37. The First Circuit did not want to read "affect" in the phrase "affecting commerce" as requiring, on the one hand, a de minimis standard if the enterprise is engaged in economic activity, but, on the other hand, a heightened substantial effects standard if the enterprise

Waucaush court did, the First Circuit crafts a holding that opens the door to the government bringing RICO charges against any organization that commits violent crimes yet has no involvement in commercial activity.[167] Under the low threshold of the de minimis standard,[168] the government, as it did in *Nascimento*, is free to offer only a scant amount of evidence, or perhaps just a string of inferences, to satisfy the commerce element nexus.[169]

Interestingly, the *Nascimento* court ends up employing a "heightened scrutiny" throughout the government's offering of evidence to show a de minimis connection because "Stonehurst ha[d] not been engaged in racketeering activity of an economic nature."[170] Thus, despite its quick criticism of the *Waucaush* court and its refusal to read the RICO element in two different ways, the First Circuit declares a "heightened scrutiny" because the gang was not involved in any economic activity. The court distinguishes its analysis from that in *Waucaush* and what appellants urged it to do by simply saying its heightened scrutiny related to "the degree of scrutiny, not the quantum of proof."[171]

Whatever real difference this distinction was meant to produce, the end result in *Nascimento* proves that the First Circuit was, in reality, not holding the government to any more than a de minimis standard. To satisfy the commerce element, the government only had to show evidence that the gang had an arsenal of guns, and many of these guns were manufactured outside of Massachusetts.[172] Apparently gang members then used these guns in "carrying out Stonehurst business."[173] This "business" was not loan sharking, drug trafficking, extortion, or robbery; this "business" was murder and assault, purely violent and noneconomic crimes—crimes properly left to the states to prosecute. Thus, regardless of what "scrutiny" the court said it was applying, its holding says otherwise.

2. The Class of Activities Test Is Improper

The *Nascimento* court blindly follows the "class of activities" test and simultaneously ignores the macro-lessons of *Morrison* and *Lopez*. Addressing appellants' argument that *Morrison* and *Lopez* specifically disallowed the aggregation of exclusively noneconomic violent criminal conduct, the First

was not carrying on economic activity. *See* Waucaush v. United States, 380 F.3d 251, 256–57 (2004) (outlining two different standards within "affecting commerce element").

167. *See Nascimento*, 491 F.3d at 41 (sharing appellants' concern that "the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern," but nevertheless dismissing appellants' *Morrison* argument).

168. *See* United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001) (acknowledging "low threshold" of de minimis standard).

169. *See Nascimento*, 491 F.3d at 45 (relying on government evidence that one shooting took place near tire shop, gang members used cell phones to coordinate activities, and gang maintained arsenal of guns, most of which were manufactured out of state).

170. *Id.* at 43.

171. *Id.* at 37 n.3.

172. *Id.* at 45.

173. *Id.* at 45.

Circuit chose to apply *Gonzales v. Raich*[174] as proper Supreme Court precedent and deemed *Morrison* and *Lopez* inapplicable simply because RICO, unlike the statutes in *Morrison* and *Lopez*, is generally valid on its face.[175]

While utilizing the "class of activities" test espoused in *Raich*, the court follows this precedent as if it were a perfect match.[176] *Raich* focused on the relevant class of activity at issue, namely "marijuana cultivation writ large,"[177] and was then able to say that the individual application of the statute to intrastate "noncommercial cultivation of medical marijuana,"[178] was constitutional because aggregation of this intrastate activity (i.e., multiplication of individual instances of homegrown marijuana production) would have the necessary substantial effect on interstate commerce.[179] Thus, because the class of activities as a whole does have a substantial effect on interstate commerce, the individual transaction can be aggregated and thereby upheld alone by a mere de minimis standard.

Unlike application of the Controlled Substances Act to the intrastate activity of homegrown marijuana,[180] the class of activities test is wholly inappropriate when RICO is applied to noneconomic gang activity for two reasons. First, this type of pure violent crime, without any commercial component, does not constitute a member of the "class of activities" RICO was originally meant to cover.[181] Murder and assault alone without some commercial purpose or economic tie are not instances that fit within the class of activities RICO was intended to regulate.[182] The class of activities Congress sought to

174. 545 U.S. 1 (2005).

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

176. *See id.* at 41–43 (applying principles of *Raich* because it is "of the same genre" as case before court—namely as-applied challenge to facially valid federal statute).

177. *Id.* at 42.

178. *Id.* at 41. "Noncommercial" in this sense simply means "not produced for sale." *Raich*, 545 U.S. at 18. Throughout this Comment, "commercial" is used interchangeably with "economic" to connote some kind of activity that has a quality affecting markets or the economy in general. Thus, intrastate commercial or economic activity simply means activity that, when aggregated, would have an effect on market prices, conditions, or the economy generally. *See id.* (clarifying principle of Congress regulating intrastate activity).

179. *Nascimento*, 491 F.3d at 41–42; *see also Raich*, 545 U.S. at 19 (finding that primary purpose of Controlled Substances Act is to control supply and demand of controlled substances, and leaving home-consumed marijuana, viewed in aggregate, outside of federal control would have substantial influence on drug markets).

180. *See Raich*, 545 U.S. at 9 (discussing application of Controlled Substance Act).

181. See Part II.A.2 for a detailed discussion of the original purpose behind RICO, focusing on the prevalence of organized crime in the United States, and Congress's desire to attack its financial bases.

182. In *Raich*, the Court focused on the question of whether leaving homegrown marijuana out of the reach of the federal statute would "frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety." 545 U.S. at 19. In contrast, if murder and assault were removed from the sphere of RICO, it would be difficult to see how RICO's purpose would not be left intact. Thus, one could conclude that, unlike homegrown marijuana, which fits into the general class of the controlled substances statute, murder and assault, without more, do not fit into the general class of RICO activities.

regulate, and rationally could regulate because of its proven substantial relationship to interstate or foreign commerce, related to organized crime. These activities, originally framed from the perspective of the Mafia and later applied to white collar criminals and sophisticated urban street gangs, consistently related to financial or economic activity such as loan sharking, extortion, and drug trafficking.[183]

Second, *Raich*'s class of activities test cannot be utilized because the aggregation principle fails when the intrastate activity in question is not economic in nature.[184] Contrary to the First Circuit's view, *Raich* is clearly distinguishable since it dealt with the aggregation of an economic activity, a fungible commodity, while the activities at issue in *Nascimento* were noneconomic, violent crimes.[185] Aggregating an economic activity, regardless of how local or "intrastate" it may be, adds up to some level where that activity eventually has a substantial effect on commerce.[186] This principle is at work in the application of RICO to enterprises engaged in, for example, loan sharking, armed robbery, or drug trafficking.[187] The government need only show a de minimis connection between the individual transaction and interstate commerce because that individual activity fits within the larger class of activities that, when aggregated, have a substantial effect on commerce.[188] However, when the intrastate activities in question are noneconomic, purely violent, and local in nature, the aggregation principle fails because repeating this sort of conduct will not "create a substantial effect on interstate commerce."[189]

Furthermore, requiring only a de minimis connection between an enterprise's noneconomic activities and interstate commerce under the class of

183. *See* United States v. Garcia, 143 F. Supp. 2d 791, 802–03 (E.D. Mich. 2000) (reviewing Congress's published findings about problems associated with organized crime, then stating RICO primarily targets economic crimes).

184. *See* United States v. Morrison, 529 U.S. 598, 617 (2000) (refusing to allow aggregation of "noneconomic, violent criminal conduct").

185. *See Raich*, 545 U.S. at 19 (noting that Congress's intent with statute was to control supply and demand of controlled substances in both lawful and unlawful drug markets, which homegrown marijuana affects because it is a "fungible commodity").

186. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 123–24 (1942) (establishing concept that Congress can regulate intrastate activity if failure to regulate that activity will undercut regulation of interstate markets).

187. *See, e.g.*, United States v. Marino, 277 F.3d 11, 27 (1st Cir. 2002) (charging defendant with predicate acts of drug trafficking conspiracy under RICO); United States v. Juvenile Male, 118 F.3d 1344, 1346 (9th Cir. 1997) (prosecuting gang members under RICO for, among other things, armed robbery). Drug trafficking and armed robbery are examples of crimes that, when aggregated, clearly affect various kinds of interstate markets.

188. *See* United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001) (permitting de minimis standard for RICO enterprise affecting interstate commerce, where activities in question clearly have economic component, i.e., illegal gambling and extortion). Crimes such as illegal gambling and extortion fit within the class of activities RICO was intended to regulate and aggregation of these activities would clearly have a substantial effect on interstate commerce. See *supra* note 85 for a discussion of cases holding that only a minimal effect upon interstate commerce is necessary to sustain a RICO conviction arising from criminal activity with an economic component.

189. United States v. Garcia, 143 F. Supp. 2d 791, 812 (E.D. Mich. 2000).

activities test ignores the Commerce Clause precedent recently set forth by the Supreme Court.[190] These opinions not only stress the economic nature of the intrastate activity to be regulated, they also reiterate the limits of Congress's authority over intrastate activity typically left to the states.[191] A central point of *Lopez*, in commenting on the GFSZA's lack of a jurisdictional element, was to guarantee that every activity the statute reached would have an effect on interstate commerce.[192] Even though RICO has a jurisdictional element, and thus might have the presumption of being constitutional as applied to most transactions with a minimal effect on interstate commerce,[193] there is no guarantee that ordinary violent gang members charged with RICO offenses will have committed any act having any effect on commerce at all if the class of activities test is followed and only a de minimis connection is required.[194] If *Nascimento*'s holding is carried out to its logical limit, the federal government, under RICO, could charge any street thug committing any violent crime.

3. Variations of the De Minimis Standard Are also Inappropriate

Not only is the pure de minimis standard, which is extremely deferential to the government's offering of evidence, improper in light of the inapplicability of the class of activities test, any variation of that standard is also inappropriate in the context of noneconomic, yet violent, gang activity. First, these variations are theoretically unsound in that they are built on a foundation of the de minimis standard. As previously discussed, this standard and the class of activities test violate Commerce Clause jurisprudence when applied to noneconomic intrastate activity and therefore cannot be the basis upon which any court requires the government to demonstrate a connection to interstate commerce.[195] Second, variations of the de minimis standard lead to holdings based on unclear analysis and set confusing precedent. Two examples of courts using variations of the de minimis standard help demonstrate this point.

190. *E.g.*, Jones v. United States, 529 U.S. 848, 858 (2000) (finding it appropriate, in light of *Lopez*, to avoid federal intrusion into criminalization of arson); United States v. Morrison, 529 U.S. 598, 617–18 (2000) (striking down federal statute providing civil remedies for victims of domestic violence on basis that Commerce Clause does authorize congressional regulation thereof); United States v. Lopez, 514 U.S. 549, 561 (1995) (invalidating federal law prohibiting possession of gun in school zones on basis that regulated activity did not substantially affect interstate commerce and was not part of larger regulatory scheme).

191. *See, e.g.*, *Jones*, 529 U.S. at 857–58 (invalidating application of federal arson statute to residential home and cautioning against federal encroachment into traditionally local conduct).

192. *Lopez*, 514 U.S. at 561–62.

193. *See Garcia*, 143 F. Supp. 2d at 809 (noting presumption that attaches with jurisdictional element of RICO, namely that application to individual cases requires only de minimis connection to interstate commerce).

194. *See id.* at 812 (commenting on notion that repeating murder and assault does not equal substantial effect on interstate commerce).

195. See *supra* Part III.A.2 for a discussion of the inappropriateness of the class of activities test, and consequently the inapplicability of the de minimis standard, in the context of noneconomic, intrastate criminal conduct.

In *Nascimento*, the First Circuit applied the de minimis standard but with a supposed heightened degree of scrutiny.[196] On the one hand, the court believed it had to abide by the class of activities test mandating only a minimal connection, but on the other hand, the court seemed to think that minimal connection should be viewed "with heightened scrutiny" precisely because the gang was noneconomic in nature.[197] Nevertheless, this method of analysis still resulted in the court's deference toward the government's offering of only a scant amount of evidence connecting the gang's activities to interstate commerce.[198] Thus, having a heightened level of scrutiny did nothing to effectively alter the unfair outcome.

Another example of the constraints of the de minimis test can be seen in *United States v. Garcia*,[199] where the Eastern District of Michigan applied a de minimis standard with "added teeth."[200] Although it is not exactly clear if the court in *Garcia* abandoned the de minimis test for a standard slightly above that, or applied the de minimis standard but with a different level of scrutiny, the court undoubtedly struggled with the implications of the de minimis standard.[201]

According to the *Garcia* court, "although the de minimis test may survive for RICO purposes, it cannot be applied in a way that would require the Court to pile inferences together to reach the required jurisdictional nexus."[202] In rejecting the government's offer of proof to satisfy the requisite connection to interstate commerce,[203] the court was intent on having a standard that meant something, a standard that would ensure the gang's activities either be commercial in nature or have some economic effect.[204] The court refused to allow the government to satisfy RICO's commerce element, whether it was called de minimis or not, through "layering inference upon inference" just to

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

197. See *supra* notes 170–72 and accompanying text for a discussion of *Nascimento*'s purported heightened scrutiny.

198. See *supra* notes 153–55 and accompanying text for a discussion of the evidence the government offered in *Nascimento* to satisfy the commerce element.

199. 143 F. Supp. 2d 791 (E.D. Mich. 2000). Interestingly, the gang involved in *Garcia* was the same gang as in *Waucaush*, the Cash Flow Posse. Waucaush v. United States, 380 F.3d 251, 253 (6th Cir. 2004).

200. *Garcia*, 143 F. Supp. 2d at 810 (reasoning that Sixth Circuit "added teeth to the de minimis requirement" post-*Morrison*).

201. On the one hand the court says "[e]ven under the most generous interpretation of what it means for a connection to commerce to be de minimis, however, the Government cannot satisfy the jurisdictional nexus here," and then later says that none of the gang's activities are "effects of commercial activity or that they could, in the aggregate, constitute substantial effects on commercial activity." *Id.* at 810, 817.

202. *Id.* at 812.

203. *See id.* at 814 (rejecting government's attempt to satisfy nexus through evidence of gang's gun arsenal, and distinguishing United States v. Juvenile Male, 118 F.3d 1344 (9th Cir. 1997), in which government proved gang members committed crimes to earn money to buy guns, from present case, in which purpose of gang was to commit crimes to protect turf).

204. *See id.* at 815 (making clear that its holding did not mean economic motive is required, just that gang's activities must have commercial or economic nature).

show a "highly attenuated" impact on commerce.[205] While this analysis is admirable in refusing a deferential standard, it would have been clearer had the court simply rejected the de minimis standard all together and applied a substantial effects test.

B. The Sixth Circuit's Approach: Abandoning the De Minimis Test to Attain the "Fairer" Result

"This case reminds us that names can be deceiving."[206] These first words from the Sixth Circuit's opinion in *Waucaush v. United States* describe the irony behind the name "Cash Flow Posse."[207] Apparently the gang earned its reputation by protecting its turf, committing violent crimes, and targeting members of a rival gang as victims, but it never brought in any "cash flow."[208] The Sixth Circuit was faced with an interesting scenario. The government brought federal RICO charges against seven ordinary, albeit violent, street thugs. None of the CFP members were charged with crimes containing an economic or commercial component, not even drug offenses.[209]

When the main issue in the case became whether the effect of CFP's activities on interstate commerce had to be substantial, or, as the government urged, minimal, the court decided that the government had the obligation of showing CFP's effect on commerce was substantial.[210] While the result in *Waucaush*, namely that a minimal effect on commerce will not suffice for an enterprise not engaged in economic activity,[211] is fair, more appropriately conforms to RICO's purpose, and protects the line drawn between state and federal crimes, the court's opinion lacks detailed reasoning and sound explanation.[212] Thus, the court's analysis is not a worthy example for other courts to follow because the court fails to fully explain the basis for its decision and address key counterarguments. Consequently, the opinion is left vulnerable to attack and skepticism.[213]

205. *Garcia*, 143 F. Supp. 2d at 812.

206. Waucaush v. United States, 380 F.3d 251, 253 (6th Cir. 2004).

207. *Id.*

208. *Id.*

209. Although one member of CFP had previously been arrested for selling drugs, the government conceded that this drug charge was unrelated to the activities of CFP. *Id.* at 256.

210. *Id.* at 257.

211. *Waucaush*, 380 F.3d at 256.

212. The main tactics of the court's reasoning are to (1) distinguish the key case offered by the government, then (2) cite *Morrison* and *Lopez* for the general idea of restricting the scope of the Commerce Clause. *Id.* at 256–58. After these two points, the court seems to work under an assumption that the government must show that the gang's activities had a substantial effect on commerce without fully explaining why. The one principle the court does rely on from the outset is that it should avoid interpreting a statute to prohibit conduct Congress cannot regulate under its Commerce Clause authority. *Id.* at 255.

213. *See* United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007) (criticizing *Waucaush* court's failure to rely on principles of statutory construction and calling decision "suspect").

1. The Strengths of the Sixth Circuit's Opinion

The strengths of the *Waucaush* decision rest mostly on its fair outcome. First, requiring a substantial effects nexus to interstate commerce protects the traditional state-federal regulation boundary, the line beyond which the federal government cannot exercise control.[214] The predicate racketeering acts that the defendants were charged with were murder, conspiracy to murder, and assault with intent to kill.[215] These violent crimes are all covered under state criminal codes and ought to be left to the states to prosecute.[216]

Second, the Sixth Circuit's refusal to hold the government to a mere de minimis standard comports with the original purpose of RICO. RICO's purpose was to "seek the eradication of organized crime in the United States"—the kind of organized crime that Congress found to "derive[] a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation."[217] While one of the many crimes qualifying as a predicate act under RICO is murder, one cannot imagine Congress's intent was to permit RICO charges based on murder or assault alone, thereby having the effect of federalizing these traditional and well-established state crimes.[218]

2. The Analytical Weaknesses

Although the court arrived at the proper result, its analysis rests too heavily on the distinguishing of one case, *United States v. Riddle*.[219] *Riddle* was offered by the government to support its contention that it only needed to show that CFP's activities had a minimal effect on commerce.[220] The court, with a concise and authoritative tone, distinguishes *Riddle*, a case decided by that same court only three years prior.[221] In doing so, the *Waucaush* court makes it seem very simple and logical—*Riddle* stood for the proposition that an enterprise, which itself engages in economic activity,[222] need only have a de minimis connection with interstate commerce.[223] The enterprise in *Waucaush*, on the other hand, was

214. See *supra* Part II.C.1 for a discussion of the "substantial effects" test in *Waucaush*.

215. *Waucaush*, 380 F.3d at 253.

216. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) (noting consistently held principle that intrastate violence, unless directed towards interstate commerce, is regulated by the states).

217. 18 U.S.C. § 1961 (2006) (Congressional Statement of Findings and Purpose).

218. *See* United States v. Garcia, 143 F. Supp. 2d 791, 812 n.7 (E.D. Mich. 2000) (describing intent behind RICO as reducing criminal corruption of existing businesses rather than federalizing prosecution of all violent crimes).

219. 249 F.3d 529 (6th Cir. 2001).

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

221. *Id.* at 255–56.

222. The enterprise in *Riddle* operated an illegal gambling business and extorted money. *Riddle*, 249 F.3d at 537.

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

not involved in any sort of economic or commercial enterprise.[224] Thus, where the enterprise itself does not engage in economic activity, a de minimis effect will not suffice.[225]

The court's reasoning, while logical, neglects to address key statutory interpretation principles and explain difficult Commerce Clause concepts.[226] First, the Sixth Circuit does not mention the effect of RICO's jurisdictional element.[227] Through this void, the court fails to explain away the fact that historically, statutes containing jurisdictional elements are not subject to the "substantial effects" test in each individual application but instead require only a de minimis connection to commerce.[228] Despite mentioning *Lopez* and *Morrison* in passing for their general propositions,[229] the court does not discuss the important fact that unlike the statutes at issue in those cases, RICO is constitutionally valid on its face.[230]

Second, the *Waucaush* court makes no mention of the "class of activities" test.[231] Under such a test, if RICO is a valid exercise of federal power and it aims to regulate a permissible class of activities (such as organized crime) and the individual transaction or act falls within that class, then only a de minimis standard need apply.[232] Instead of explaining that perhaps the activities of the CFP did not fit within the "class" which RICO covered or another reason why the test ought not to be applied, the court simply determines that a heightened substantial effects test is more appropriate because CFP's activities were not tied to an economic enterprise.[233]

224. *Id.* at 256.

225. *Id.*

226. The only mention of statutory interpretation is the following statement: "Because we should avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate, RICO's meaning of 'affect[ing] interstate or foreign commerce' cannot exceed the bounds of the Commerce Clause." *Id.* at 255 (alteration in original) (quoting Jones v. United States, 529 U.S. 848, 852 (2000)).

227. The presence of a jurisdictional element in a statute creates the assumption that the statute's application only requires a de minimis connection to interstate commerce. United States v. Garcia, 143 F. Supp. 2d 791, 809 (E.D. Mich. 2000). It also leads courts to conclude *Lopez* and its progeny are not controlling. *E.g.*, *Riddle*, 249 F.3d at 536 (holding that *Lopez* is inapplicable where statute at issue contains jurisdictional requirement). Thus, given the often outcome-determinative nature of a jurisdictional element, and the importance the Supreme Court placed on it in *Lopez* and *Morrison*, one would assume the *Waucaush* court would attempt to address how RICO's jurisdictional element played a role, if any, in the outcome.

228. *See Garcia*, 143 F. Supp. 2d at 809 (noting historical pattern of statutes containing jurisdictional elements).

229. *See Waucaush*, 380 F.3d at 256 (mentioning *Morrison* for its general view on classifying "violence *qua* violence" as "conduct of the noneconomic strain").

230. See *supra* notes 76–79 and accompanying text for a discussion of the validity of RICO as a whole.

231. See *supra* notes 70–73 and accompanying text for a discussion of the class of activities test.

232. *See, e.g.*, United States v. Juvenile Male, 118 F.3d 1344, 1348 (9th Cir. 1997) (finding that since activities that substantially affect interstate commerce in the aggregate are regulated by RICO, there is no relevance to whether individual cases are de minimis in nature).

233. *Waucaush*, 380 F.3d at 256–57.

Perhaps the court's greatest downfall is its failure to fully explain and substantiate its valid reasons for distinguishing the enterprise in *Waucaush* based on its lack of economic activity.[234] In support of the concept that the presence or lack of *economic activity* ought to be the litmus test for what level of commerce connection the government would need to show, the court does a cursory overview of *Lopez* and *Morrison*,[235] and only briefly mentions the doctrine of constitutional avoidance.[236]

It is precisely this shallow analysis and only terse mention of Commerce Clause jurisprudence that opens *Waucaush* up for attack, and leads other courts to view the holding on its face as simply "read[ing] the word 'affect' as possessing two different meanings depending upon additional facts not mentioned in the statute itself."[237] The court should have explained that RICO's commerce element is already broken down into two parts—enterprises "engaged in" interstate commerce versus enterprises whose activities "affect" interstate commerce.[238] Then the *Waucaush* court essentially breaks down RICO's "affecting commerce" element into two prongs—enterprises engaged in economic activity and enterprises not engaged in economic activity.[239] Consequently, there could be three types of enterprises: (1) enterprises *engaged in* interstate commerce;[240] (2) enterprises whose activities *affect* interstate commerce, and in which the enterprise itself is engaged in *economic activity*;[241] and (3) enterprises whose activities affect interstate commerce, but in which the enterprise itself is not engaged in *economic activity*.[242]

The court then goes one step further by requiring a different standard, or connection to interstate commerce, depending on whether the enterprise

234. *Id.* at 256 (distinguishing present case, where no evidence showed CFP participating in any economic enterprise, from line of RICO cases government relied upon, where there was such participation).

235. *See id.* (quoting *Morrison* for proposition that Congress cannot regulate noneconomic, violent conduct based on aggregation, but not delving further into that Court's opinion, discussing background of aggregation principle, or explaining how *Morrison*'s lessons can apply when RICO is already considered generally valid).

236. *Id.* at 255.

237. United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007).

238. 18 U.S.C. § 1962(c) (2006) (condemning participation with "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce"); *see also* United States v. Robertson, 514 U.S. 669, 671–72 (1995) (acknowledging implicitly two strands to commerce element of RICO by discussing "'affecting commerce' test," as well as "alternative criterion" of any enterprise *engaged in* interstate commerce).

239. *Waucaush*, 380 F.3d at 255–56.

240. *E.g.*, *Robertson*, 514 U.S. at 672 (defining "engaged in commerce" as directly producing, distributing, or acquiring goods or services in interstate commerce).

241. *E.g.*, United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001) (acknowledging enterprise in question did not fit within *Robertson*'s definition of enterprise "engaged in" interstate commerce, and therefore evaluating organization as enterprise whose activities "affect" commerce and concluding that their economic activities (i.e., illegal gambling and extortion) need only have de minimis effect on interstate commerce).

242. *E.g.*, *Waucaush*, 380 F.3d at 255–56 (noting government contended only that CFP's activities affected commerce, and not that CFP itself was engaged in interstate commerce).

affecting interstate commerce is an enterprise engaged in economic activity or not.[243] By doing so, the court essentially treats an enterprise engaged in interstate commerce the same way it treats an enterprise whose activities affect interstate commerce *and* that is actually engaged in economic activity because both enterprises necessitate a showing of only de minimis connection with interstate commerce. Enterprises not engaged in either interstate commerce or economic activity are held to their own standard, the "substantial effects" test.[244]

Unfortunately, any value that comes from the result of *Waucaush*—that the government must demonstrate more than a de minimis effect on interstate commerce if the enterprise is not engaged in any economic activity—is lessened by the court's failure to fully explain the analysis set forth above. Moreover, the court should have further explored *Lopez* and *Morrison* to help explain the importance of an economic component to intrastate activity. In addition, the court should have delved into a discussion of the aggregation principle and its shortcomings when the intrastate activity has no economic or commercial character. Finally, the court should have further clarified its use of the constitutional avoidance doctrine. While the *Waucaush* court does express a desire to avoid interpreting a statute to prohibit conduct outside Congress's authority,[245] the court fails to explain why RICO's application to CFP's activities would fall outside Congress's scope of power. The court never connects the constitutional avoidance doctrine to the aggregation principle, or explains how these concepts play a role in requiring that substantial effects be the appropriate standard.

Despite a proper outcome and several sound points, the *Waucaush* opinion simply leaves too many questions unanswered. Not only does the court fail to address the relevant counterarguments, namely the use of the class of activities test or the assumptions that accompany a generally valid statute, it also fails to properly develop the reasons why the analysis for an enterprise whose activities merely affect interstate commerce depends on whether that enterprise is economic or not. By failing to provide a substantial explanation for requiring different standards for the same element to a statute, the court misses a key step in advocating an otherwise fair outcome and leaves its opinion open for attack.[246]

243. *Id.* at 256 (requiring "[m]ore significant interstate commercial ripples" where enterprise itself did not engage in economic activity).

244. *See id.* at 257 (requiring government to show gang's activities had substantial effect on commerce).

245. *Id.* at 255.

246. *See* United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007) (attacking *Waucaush* court's method of statutory analysis and using this weakness to view entire outcome skeptically).

C. What Federal Courts Must Do to Be Both "Proper" and "Fair"

1. The Problem

RICO was meant to target organized crime and attack its financial bases by making it easier to prosecute entire organizations.[247] To facilitate that goal, Congress defined the terms of RICO broadly, and the Supreme Court has upheld that interpretation.[248] Consequently, if "enterprise" is defined to such a point that it literally encompasses every organization or group association imaginable, and the "racketeering activities" listed in the statute contain both economic and noneconomic acts, without specifying a requirement that the activities be commercial in nature, then the last obstacle standing in the way of the federal government using a single statute to federalize all violent crime is the commerce element.[249]

Understandably, RICO easily made the transition from targeting the Mafia to prosecuting sophisticated urban street gangs.[250] The organizational structure and hierarchy of power of each group make them an easy comparison. These two groups also share one major commonality—they typically carry out violent yet profit-seeking activities.[251] These sophisticated urban street gangs targeted by the government in the 1990s were heavily involved in drug trafficking.[252] In contrast, the street gangs prosecuted in *Waucaush* and *Nascimento* were enterprises "engaged exclusively in noneconomic criminal activity."[253]

That leaves the question of how federal courts should apply RICO to gangs not having any economic ties at all.[254] Thus, the problem facing the two courts of appeals was essentially how to treat an enterprise, not "engaged in" interstate commerce directly, but whose activities, noneconomic in nature, must somehow affect interstate commerce. The First Circuit answered this question improperly

247. Bonney, *supra* note 4, at 583.

248. See *supra* notes 30–37 and accompanying text for a discussion of the breadth of RICO's elements.

249. *See generally* United States v. Lopez, 514 U.S. 549, 577 (1995) (rejecting federal regulation of guns in school zones and warning that federal government's regulation of areas of state concern that lack interstate commercial elements would blur lines between federal and state authority and eliminate political responsibility).

250. See *supra* notes 42–44 and accompanying text for a discussion of the parallels between the Mafia and the sophisticated urban street gang.

251. *See* Bonney, *supra* note 4, at 600–01 (distinguishing street corner gang from sophisticated criminal group by latter's solidified economic base, established territory, and involvement in illegal marketplace).

252. *See id.* at 602 (pointing out that drug trade becomes main source of income for sophisticated urban street gang).

253. United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007); *see also* Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004) (declining to find participation by CFP in any economic enterprise).

254. This Comment's suggested solution concerns only those enterprises not "engaged in" interstate commerce. *Robertson* has clearly resolved that issue in favor of the de minimis test. *See* United States v. Robertson, 514 U.S. 669, 671–72 (1995) (declining to consider substantial effects test for interstate activity).

by requiring the government to show only a de minimis connection between the noneconomic enterprise and interstate commerce.[255] The Sixth Circuit almost got it right.[256] Although the substantial effects test should be applied to gangs not having any economic ties whatsoever, this conclusion needs to rest on sounder reasoning than that employed by the Sixth Circuit in *Waucaush v. United States*.

2. Economic Versus Noneconomic Intrastate Activity Within Commerce Clause Jurisprudence

Working within the "affecting commerce" element, the courts of appeals should have considered the purpose of RICO's commerce element. It is crucial to realize that its purpose is to put some kind of limitation on Congress's authority.[257] According to the Supreme Court, the "affecting commerce" test was originally developed in order to "define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effect."[258] It is not by accident the Court included the word "commercial" to modify the kind of intrastate activities that might come within the permissible realm of federal regulation.[259] Without the commercial characteristic of intrastate activities, all that remains is "violence *qua* violence,"[260] the kind of conduct that belongs to the states to control.[261] And the Supreme Court has recently restated that there is "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."[262]

It is not debated that if RICO were applied to an enterprise "engaged in" interstate commerce, the de minimis standard would apply.[263] This is in large part because the assumption that the activities are economic in nature is much greater for an enterprise directly engaged in interstate commerce, and so the

255. See *supra* Part III.A for a discussion of the First Circuit's incorrect holding in *Nascimento*.

256. See *supra* Part III.B for a discussion of the strengths and weaknesses of the *Waucaush* opinion.

257. *See* United States v. Morrison, 529 U.S. 598, 608 (2000) (recognizing boundaries of Congress's authority under Commerce Clause).

258. *Robertson*, 514 U.S. at 671 (citing Wickard v. Filburn, 317 U.S. 111 (1942) as its example for this proposition).

259. *See* Jones v. United States, 529 U.S. 848, 857–58 (2000) (citing Justice Kennedy's concurring opinion in *Lopez* discussing fact that activity Congress tried to regulate had neither actors nor conduct of commercial character); *Morrison*, 529 U.S. at 611 (reinforcing idea in Commerce Clause jurisprudence that federal regulation of intrastate activity has always been based on economic nature of activity).

260. Waucaush v. United States, 380 F.3d 251, 256 (6th Cir. 2004).

261. *See Jones*, 529 U.S. at 857 (cautioning that if government's interpretation of statute prevailed, thereby allowing application to an owner-occupied residence not used for any commercial purpose, then "hardly a building in the land would fall outside the federal statute's domain").

262. *Morrison*, 529 U.S. at 618.

263. *See, e.g.*, *Robertson*, 514 U.S. at 671–72 (1995) (requiring government to show less than substantial effects for enterprise engaged in interstate or foreign commerce).

class of activities analysis cleanly applies.[264] For enterprises whose *economic* activities "affect" interstate commerce, the aggregation principle is at play and again the class of activities test is relevant.[265] Therefore, the government would only have to demonstrate a minimal connection between the individual transaction and interstate commerce for an enterprise engaged in loan sharking or involved in a national drug ring, for example. When the economic factor is removed from the equation, the aggregation principle fails, and the class of activities test cannot be applied.[266] Then the government must prove the activities alone cause a substantial effect on interstate commerce.[267]

Requiring substantial effects in the context of noneconomic intrastate activity can be satisfactorily justified on two separate grounds. The first is based upon the Supreme Court's recent holdings in *Morrison* and *Lopez*. The second justification stems from the theoretical underpinnings of the doctrine of constitutional avoidance.

To begin with, the substantial effects standard in this context is the only way to respect the lessons of *Lopez* and *Morrison*. The *Garcia* court reminds us that *Lopez* stands for the proposition that economics are "the lynchpin of the Commerce Clause jurisprudence."[268] In fact, the Supreme Court in *Morrison*, attempting to emphasize the role economics plays in Commerce Clause decisions, cited eight instances in *Lopez* where it stressed the central importance of the economic nature of the intrastate activity at issue,[269] thereby concluding that such an intrastate activity has always been some kind of "economic endeavor."[270]

Without something more than a de minimis test, which would allow the government to show only the slightest effect on commerce, even attenuated and inferred, RICO's application to noneconomic and noncommercial activity would violate the principles of *Morrison* and its progeny.[271] Looking at *Nascimento*, the

264. *See* United States v. Garcia, 143 F. Supp. 2d 791, 809 (E.D. Mich. 2000) (noting "engaged in" prong signifies direct or active engagement with interstate commerce).

265. See *supra* notes 184–89 and accompanying text for a discussion of application of aggregation principle to economic intrastate activities.

266. *See Garcia*, 143 F. Supp. 2d at 812 (stating that aggregating effects of noneconomic, violent criminal conduct cannot justify federal jurisdiction because repetition of such conduct cannot substantially affect interstate commerce).

267. This conclusion is based on the idea that once the aggregation principle is no longer an option, the reach of congressional authority must once again fit within the three categories Congress is permitted to regulate. The relevant category is the "power to regulate . . . those activities that substantially affect interstate commerce." United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citation omitted).

268. *Garcia*, 143 F. Supp. 2d at 812; *see also Robertson*, 514 U.S. at 671 (1995) (reiterating commercial nature of intrastate activities affecting interstate commerce that are meant to come within Commerce Clause).

269. *Garcia*, 143 F. Supp. 2d at 799.

270. United States v. Morrison, 529 U.S. 598, 611 (2000). It is unclear why the *Waucaush* court would not have emphasized these cases' specific pronouncement of the importance of economics when it chose to distinguish enterprises based solely on their economic quality.

271. *Garcia*, 143 F. Supp. 2d at 812 n.7 (finding that if court allowed government to satisfy its

federal government was permitted to prosecute gang members for murder and assault. Such an application undoubtedly violates what the Supreme Court had in mind when it said, "We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[272] Thus, under *Morrison* and *Lopez*, the noneconomic activity cannot be aggregated, but must itself have a substantial effect on interstate commerce.[273]

The second ground for utilizing a substantial effects test is based on the constitutional avoidance doctrine.[274] If the intrastate activity in question, namely violent, noneconomic gang activity, does not have its own independent substantial effect on interstate commerce, then a court can make use of this principle. The doctrine is a statutory interpretation tool, normally functioning as a means of choosing between two plausible interpretations of a statute.[275] If one interpretation would raise a "multitude of constitutional problems" then the court should choose the alternative.[276] By choosing the less acrimonious interpretation, the court is reading the statute to avoid Congress's overreaching

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commerce requirement against CFP based on murder and violence alone, it would "clearly violate the underlying principles set forth in *Morrison* and *Jones*").

272. *Morrison*, 529 U.S. at 617. Relevant to this discussion is the *Morrison* Court's statement that petitioners' reasoning seeks to

> follow the but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615.

273. *Id.* at 617–19; United States v. Lopez, 514 U.S. 549, 567–68 (1995). The lessons from *Morrison* and *Lopez*, requiring an activity itself to have a substantial effect on interstate commerce when that activity is noneconomic and therefore outside the class of activities regime, applies to the present problem concerning RICO's application, despite the fact that *Morrison* and *Lopez* involved facial challenges while the question posed by the circuit split involves application of a valid statute. *Morrison*, 529 U.S. at 617–19; *Lopez*, 514 U.S. at 567–68. Principles from cases involving facial challenges can apply to questions concerning proper application of a valid statute. *See* Jones v. United States, 529 U.S. 848, 858 (2000) (borrowing principles from *Morrison* and *Lopez* even though issue presented was not facial challenge to statute but its application to certain intrastate activity).

274. The Sixth Circuit, without much explanation beyond stating its use, incorporated the principle in its decision, while the First Circuit deemed it outright inapplicable. *Compare* Waucaush v. United States, 380 F.3d 251, 255 (6th Cir. 2004) (incorporating constitutional avoidance doctrine), *with* United States v. Nascimento, 491 F.3d 25, 38 (1st Cir. 2007) (rejecting *Waucaush* court's application of constitutional avoidance doctrine). *But see* D'Angelo, *supra* note 23, at 2109–10 (noting with satisfaction *Waucaush* court's use of constitutional avoidance doctrine through its citation of *Jones*).

275. Clark v. Martinez, 543 U.S. 371, 381 (2005).

276. *Id.* at 380–81 (requiring courts to consider consequences of their decision when choosing between two plausible interpretations if one alternative would raise serious constitutional doubt).

beyond its permissible authority and simply concluding the conduct in question is outside the reach of the statute.[277]

In this situation, the doctrine of constitutional avoidance can be read side-by-side with the substantial effects test. RICO as a whole is aimed at regulating activities that either directly or in the aggregate affect interstate commerce.[278] Since RICO passes constitutional muster via having a substantial effect on interstate commerce, all the activities properly within its coverage also pass the constitutional commerce requirement.[279] But an enterprise conducting noneconomic activity falls outside RICO's umbrella of coverage and consequently must stand alone and meet the substantial effects test.[280]

Since the government, under *Morrison* and *Lopez*, is unlikely to be able to demonstrate a substantial relation between an intrastate noneconomic activity and interstate commerce, the court could choose to utilize the doctrine of constitutional avoidance.[281] The court would then base its decision on an interpretation of RICO's reach as not going beyond a certain point, namely enterprises whose economic intrastate activities affect interstate commerce.[282] This interpretation will avoid a result where Congress's authority goes beyond its permissible boundaries.[283] Moreover, the court will be able to maintain the constitutionality of RICO as a whole, while avoiding its application to an individual whose alleged illegal conduct lies outside the permissible realm of congressional regulation.[284]

277. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001).

278. *See* United States v. Juvenile Male, 118 F.3d 1344, 1348 (9th Cir. 1997) (observing that RICO regulates activities which, when aggregated, have substantial effect on interstate commerce).

279. See *supra* Part I for a discussion of RICO and the Commerce Clause.

280. *Cf. Solid Waste Agency*, 531 U.S. at 173–74 (avoiding answering respondents' argument that extension of statute's definition of "navigable waters" fell within Congress's power to regulate intrastate activities that substantially affect interstate commerce, because such argument raised serious constitutional questions and there was no clear indication from Congress such extension was warranted into area of traditional state power).

281. *See* Jones v. United States, 529 U.S. 848, 858 (2000) (considering concerns of *Lopez* in decision to avoid constitutional question that would arise if Court would expand federal arson statute into area of traditional state law).

282. *See id.* at 857–58 (basing decision on interplay between constitutional avoidance doctrine, lessons of *Lopez*, and notions of avoiding federal encroachment into conduct having no commercial character).

283. See *supra* notes 275–77 and accompanying text for a discussion of the constitutional avoidance doctrine.

284. *See Solid Waste Agency*, 531 U.S. at 174 (declining to follow respondents' interpretation of statute in order to avoid serious constitutional and federalism issues); *Jones*, 529 U.S. at 859 (leaving category of noncommercial, private residence outside reach of federal statute without questioning constitutionality of statute or its application elsewhere).

3. The Substantial Effects Test Is Consistent with RICO's Precedent and Purpose

The substantial effects solution is also consistent with the Supreme Court's only opinion on the commerce element of RICO, *United States v. Robertson*.[285] There, the government sought to prosecute an individual for investing funds from illegal racketeering activities into an Alaskan gold mine.[286] The Court concluded that the government "assuredly brought the gold mine within § 1962(a)'s alternative criterion of 'any enterprise . . . *engaged in* . . . interstate or foreign commerce.'"[287] In doing so, the Court left open the question of whether, in order to bring that same gold mine within the "affecting commerce" provision, the government would have had to meet the "substantially affecting interstate commerce" test.[288] By leaving the question open, the Court essentially acknowledged that the two parts of the commerce element may be treated differently depending on the circumstances.[289]

Finally, the substantial effects test comports with RICO's original intended purpose.[290] This standard would result in RICO prosecutions of individuals who participated in organizations having some kind of profit motive, commercial purpose, or economic activity, thereby bringing those individuals within the original intent of RICO's reach.

Congressional findings in support of RICO's enactment resonate with Congress's intention of attacking the financial bases of organized crime associations. Of absolute importance, perhaps the driving force behind the Organized Crime Control Act of 1970, was the single fact that "organized crime . . . drains billions of dollars from America's economy by unlawful conduct and the illegal use of force."[291] From this fact, it is clear that Congress was concerned about the economy generally, and money being diverted from illegal to legal organizations. Making it a crime to be a member of a gang that merely engages in violent acts to intimidate rival gangs or protect certain territory from infiltration by other gangs does not further this purpose.

285. 514 U.S. 669 (1995).

286. *Robertson*, 514 U.S. at 670.

287. *Id.* at 671–72 (emphasis added).

288. *Id.* at 671.

289. The "engaged in" prong of RICO connotes direct involvement in interstate commerce, whereas activities that "affect" interstate commerce connotes broader, indirect involvement. United States v. Garcia, 143 F. Supp. 2d 791, 809 (E.D. Mich. 2000). Therefore, if the Supreme Court in *Robertson* has specifically said the "engaged in" prong required less than "substantial" effects, which is presumably only a de minimis showing, then a logical conclusion, with reference to the Supreme Court's concerns in *Lopez*, would be that the government must show something more than a de minimis connection for an enterprise whose activities merely affect interstate commerce.

290. See *supra* Part II.A.2 for a discussion of RICO's original purpose.

291. 18 U.S.C. § 1961 (2006) (Congressional Statement of Findings and Purpose).

IV. Conclusion

The Sixth Circuit's decision to require the government to show that a noneconomic, criminal gang's activities have a substantial effect on interstate commerce is more appropriate than the First Circuit's holding that a de minimis showing is sufficient.[292] The de minimis standard is inappropriate because both the class of activities test and the aggregating principle of intrastate activity are inapplicable. The reason these two statutory interpretation tools cannot apply is because the activity in question has no commercial or economic component at all. The lessons of the recent Supreme Court Commerce Clause cases require that an economic characteristic be associated with any intrastate activity if the federal government is going to be able to regulate it.

Although the Sixth Circuit reached the proper outcome and mentioned valid reasons for its opinion, the court simply fails to provide a solid and well-explained opinion to support such an important question involving complex Commerce Clause and federalism issues. But more importantly, the court's sparse explanation and misplaced emphasis leads other courts to view the opinion skeptically. The court should have anticipated counterarguments based on the general validity of RICO, the typical (but arguably mistaken) assumption that *United States v. Morrison*[293] and its progeny are inapplicable to as-applied cases, and the common use of the class of activities test in RICO prosecutions. Finally, the *Waucaush v. United States*[294] court should have included more discussion on why the economic nature of an enterprise's activities is so outcome determinative in light of recent Supreme Court opinions as well as RICO's original purpose.

The substantial effects test properly restrains RICO's overzealous application.[295] By permitting a de minimis standard for enterprises engaged in interstate commerce or enterprises whose economic activities affect commerce, but requiring a substantial connection for enterprises not engaged in interstate commerce or economic activities, a necessary line has been drawn that protects the balance between federal and state regulation and ensures the original intent of RICO is carried out.

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292. See *supra* Part III.C for a discussion endorsing the Sixth Circuit's decision.

293. 529 U.S. 589 (2000).

294. 380 F.3d 251 (6th Cir. 2004).

295. See *supra* Part III.C for a discussion of the substantial effects test.

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