

COMMENT

FEDERALIZING STREET CRIME: THE IMPROPER BROADENING OF RICO'S "AFFECTING COMMERCE" REQUIREMENT*

TABLE OF CONTENTS

I.	INTRODUCTION	140
II.	THE RICO STATUTE.....	142
	A. <i>The Inception of the RICO Statute</i>	142
	B. <i>RICO's Broadened Applicability</i>	145
	C. <i>Congressional Authority:</i> <i>The Commerce Clause</i>	146
III.	THE CIRCUIT SPLIT	148
	A. <i>United States v. Nascimento</i>	148
	1. <i>Overview</i>	148
	2. <i>Factual Background</i>	148
	3. <i>The Nascimento Court's Analysis</i>	149
	4. <i>Concurring Opinion</i>	157
	B. <i>Waucaush v. United States</i>	158
	1. <i>Overview</i>	158
	2. <i>Factual Background</i>	158
	3. <i>The Waucaush Court's Analysis</i>	158
	C. <i>Analysis and Comparison</i>	161
	1. <i>The Constitutional Avoidance Doctrine:</i> <i>The Nascimento Court Proved its Point</i>	161

* This Comment received the King & Spalding Award for Best Student Comment. The Author would like to thank Professor Leslie C. Griffin for her critique of this Comment and all of the editors of the *Houston Law Review* for their hard work. Additionally, the Author thanks his wife Lindsay for her enduring support and love throughout law school.

2. *The Correct Legal Inquiry: Is RICO Unconstitutional as Applied to a Noneconomic Enterprise that Does Not Substantially Affect Interstate Commerce?*164

IV. CONSEQUENCES OF RICO’S BROADENED APPLICABILITY169
 A. *Impingement on Police Power*169
 B. *Disparate Treatment of Criminals*.....171
 V. POTENTIAL REMEDY173
 VI. CONCLUSION.....174

“[H]ad the prosecution been brought in, say, Michigan, rather than in Massachusetts, the defendants in all likelihood would have gained acquittal Instead, my client has a 14-year sentence.”¹

I. INTRODUCTION

No one knows what was going through Jackson Nascimento’s head as he pulled out his gun on the streets of Boston and shot Zilla DoCanto in the leg.² It probably had something to do with his hatred of the Wendover gang, a rival street gang of which DoCanto’s brother (“Big Rocky”) was allegedly a member.³ Less likely, however, was that Nascimento was entertaining comparisons of himself to mob legends like “Lefty Guns” Ruggiero or “Matty the Horse” Ianniello.⁴ Even less likely is the notion that the shooting of DoCanto could constitute a “racketeering activity” that would serve as a basis for his 171-month stint in federal prison.⁵

1. This statement is by Ryan M. Schiff, an attorney who represented the appellant Nascimento in *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007). Eric T. Berkman, *RICO Covers Violent, Noneconomic Activity*, MASS. LAW. WKLY., July 16, 2007, at 1.

2. See *Nascimento*, 491 F.3d at 46 (describing the shooting).

3. See *id.* (discussing Big Rocky’s affiliation with the Wendover gang).

4. “Lefty Guns” Ruggiero was the subject of one of the first and most famous indictments obtained under the Racketeer Influenced and Corrupt Organizations Act (RICO). Gregory J. Wallace, *Outgunning the Mob*, 80 A.B.A. J. 60, 112–15 (1994). “Lefty,” a well known mobster, was portrayed by Al Pacino in the movie *Donnie Brasco*. Clare Heal, *The Real Donnie Brasco*; Review, SUNDAY EXPRESS, July 3, 2005, at 51. “Matty the Horse,” a former member of the Genovese crime family, was also a famous convict under RICO. See David Robinson, Jr., *From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 899–900 (1995).

5. See *infra* Part III.A.2 (discussing the factual background of *Nascimento*).

The Racketeer Influenced and Corrupt Organizations Act (RICO) was passed by Congress as Title IX of the Organized Crime Control Act of 1970 (OCCA).⁶ By its own terms, OCCA's primary goal is "the eradication of organized crime in the United States."⁷ Containing broad and seemingly ambiguous language,⁸ and both criminal and civil penalties,⁹ the RICO statute has had a tumultuous history.¹⁰ Although rarely used in the first years after its inception, prosecutors and plaintiffs alike eventually began employing RICO in a vast array of cases.¹¹ RICO's provisions have subsequently perplexed both judges and juries, and courts have inconsistently interpreted the statute.¹²

Even taking into consideration RICO's ambiguous provisions, the statute's application and interpretation in recent years have taken a troublesome turn. Passed under Congress's Commerce Clause power, RICO contains a jurisdictional nexus provision that requires any "enterprise" targeted by RICO to "affect . . . interstate or foreign commerce."¹³ In light of this requirement, it is surprising that federal prosecutors have begun to target low-level street gangs engaged exclusively in noneconomic violent activity with a *de minimis* connection to interstate commerce.¹⁴ Faced with challenges to convictions of this kind, the courts have been inconsistent in their interpretations of RICO's "affecting commerce" requirement. Most notably, the First

6. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified in various sections of 18 U.S.C.). RICO, Title IX of the Organized Crime Control Act, is codified at 18 U.S.C. §§ 1961–1968 (2006).

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

8. See *infra* notes 31–41 and accompanying text (analyzing Congress's rationale behind RICO's broad language). *But see* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) ("[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))).

9. See 18 U.S.C. §§ 1963–1964 (2006).

10. See Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 830–34 (1996) (discussing the roots of RICO's breadth and the inconsistent interpretations that resulted).

11. See G. Robert Blakely & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1011–12 (1980) (stating that prosecutors originally used RICO only infrequently, but have employed it more frequently since 1980 in a wide variety of cases).

12. See *infra* notes 272–74 and accompanying text (listing relevant cases and quoting Justice Scalia on RICO's ambiguity).

13. 18 U.S.C. § 1962(a) (2006); see also *infra* Part II.C (analyzing RICO's interstate commerce requirement).

14. See *United States v. Nascimento*, 491 F.3d 25, 30–31 (1st Cir. 2007) (describing the indictment of Stonehurst street gang members for RICO violations); *Waucaush v. United States*, 380 F.3d 251, 253–54 (6th Cir. 2004) (describing the indictment by federal prosecutors of members of the "Cash Flow Posse" for RICO violations).

and Sixth Circuit Courts of Appeals have diverged in their interpretations of the RICO statute as applied to enterprises engaged exclusively in noneconomic, violent criminal activity.¹⁵

The First Circuit in *Nascimento v. United States* allowed RICO to be applied to the Stonehurst street gang, an enterprise engaged exclusively in noneconomic, violent criminal activity.¹⁶ This interpretation delivered a blow to Commerce Clause jurisprudence, federalism, and criminal defendants. By allowing RICO to be applied to Stonehurst's activities, the First Circuit permitted blatant federal impingement on state police power,¹⁷ which results in disparate treatment of criminal defendants.¹⁸ En route to this decision, the First Circuit misinterpreted Commerce Clause precedent.¹⁹ The goal of this Comment is to analyze the negative consequences of RICO's vast expansion, as exemplified by the *Nascimento* opinion, and scrutinize the logic that has led to the current interpretation of RICO's "affecting commerce" requirement.

Specifically, Part II will briefly introduce the RICO statute and provide a historical context for RICO's current application and interpretation. Part III will analyze the two cases that have led to a circuit split on the issue of RICO's "affecting commerce" requirement as applied to noneconomic enterprises. Part IV will analyze the negative consequences of the First Circuit's interpretation of RICO, including federal encroachment on state police power and the disparate treatment of criminals due to the circuit split. Part V will offer a remedy for the current and untenable interpretation of RICO, and Part VI will conclude this Comment.

II. THE RICO STATUTE

A. *The Inception of the RICO Statute*

Richard Nixon heralded RICO as a "major tool in the war against organized crime" when he signed it into law in 1970.²⁰

15. See *infra* Part III (analyzing the circuit split).

16. See *Nascimento*, 491 F.3d at 30 ("[W]e conclude, after grappling with this difficult question, that the normal requirements of the RICO statute apply to defendants involved with enterprises that are engaged only in noneconomic criminal activity."); see also *infra* Part III.A (scrutinizing the decision reached in *Nascimento*).

17. See *infra* Part IV.A (discussing the implications of federal intrusion into the realm of state police power).

18. See *infra* Part IV.B (analyzing the circuit courts' differing treatment of defendants).

19. See *infra* Part III.C (analyzing the *Nascimento* court's interpretation and application of Commerce Clause precedent).

20. Michael Rowan, *Leaving No Stone Unturned: Using RICO as a Remedy for*

RICO contains both criminal and civil penalties for violations of its provisions.²¹ To prove a RICO violation, the government must establish: “(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity.”²² A “pattern of racketeering activity,” as defined in Section 1961, occurs when the defendant commits two acts of racketeering activity within a ten year period.²³ “Racketeering activity,” per Section 1961(1), is a broadly defined term and includes “murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.”²⁴ Finally, an “enterprise” is an open-ended term defined in Section 1961(4) that includes “any individual, partnership, corporation, association, or other legal entity.”²⁵

One does not have to look beyond the text of OCCA to discover the rationale behind its passage. As stated in the text of the statute, OCCA was passed by Congress based upon a finding that “organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy.”²⁶ The second justification for the act was the idea that organized crime derived powerful resources 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.”²⁷ Congress believed that the money and power obtained by organized crime was used to not only “infiltrate and corrupt legitimate business and labor unions” but also “to subvert and corrupt our democratic processes.”²⁸ This resulted in a laundry list of harms, including the inhibition of free competition, the weakening of the U.S. economy, and the burdening of interstate and foreign commerce.²⁹

Police Misconduct, 31 FLA. ST. U. L. REV. 231, 239 (2003).

21. See 18 U.S.C. §§ 1963–1964 (2006).

22. *United States v. Nascimento*, 491 F.3d 25, 31 (1st Cir. 2007) (quoting *United States v. Marino*, 277 F.3d 11, 33 (1st Cir. 2002)); see also 18 U.S.C. §§ 1961–1962 (2006) (providing relevant definitions and detailing the prohibited conduct).

23. 18 U.S.C. § 1961(5) (2006).

24. 18 U.S.C. § 1961(1) (2006).

25. 18 U.S.C. § 1961(4) (2006).

26. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922.

27. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23.

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

29. *Id.*

Finally, OCCA was passed in response to difficulties encountered by law enforcement officials in collecting admissible evidence against organized crime.³⁰

When Congress was debating RICO, much of the focus centered on whether the drafters' ambiguous language authorized a broad application of the act.³¹ Both the ACLU and the Department of Justice expressed concern about the broad scope of the statute.³² The proponents of the open-ended language of the bill³³ retorted that it was necessary for RICO to be able to cast a broad net, given the elusive nature of the targets.³⁴ Indeed, the text of the final statute mentions that organized crime is a "sophisticated, diversified, and widespread activity" and alludes to difficulties in obtaining convictions against enterprises engaged in organized crime.³⁵ Furthermore, Congress explicitly declared in the text of RICO, "The provisions of this title shall be liberally construed to effectuate its remedial purpose."³⁶

Some have suggested that the drafters of RICO chose broad language specifically to avoid the statute being declared unconstitutional for targeting a particular ethnic group or creating a status crime.³⁷ Congress actually had entities like La

30. *Id.*

31. See Parker, *supra* note 10, at 831–34 (discussing the debate over RICO's broad scope).

32. The ACLU was concerned that the RICO statute could potentially be applied to antiwar protestors. *Id.* at 832. Furthermore, the Department of Justice contended that the definition of "racketeering activity" was "too broad and would result in a large n[um]ber of unintended applications." *Id.* (quoting S. REP. NO. 91-617, at 121–22 (1969)).

33. See *supra* notes 10, 31–32 and accompanying text (discussing the broad language of the act); see also Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661 (1987) (stating that RICO's "broad draftsmanship" has contributed to the statute being "one of the most controversial statutes in the federal criminal code").

34. See Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 139–52 (1995) (stating that Congress has refused to narrow the language of RICO to give prosecutors wide latitude to pursue crime).

35. See Organized Crime Control Act of 1970 Pub. L. No. 91-452, 84 Stat. 922, 922–23 ("[D]efects in the evidence-gathering process of the law inhibit[] the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime . . .").

36. Organized Crime Control Act of 1970 Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947; see also *United States v. Turkette*, 452 U.S. 576, 586–87 (1981) (arguing that Congress intentionally passed RICO as a broad statute and that Congress was aware "of the fear that RICO would 'mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm'" (citing 116 CONG. REC. 35217 (1970) (remarks of Rep. Eckhardt)).

37. See Parker, *supra* note 10, at 831 n.67 (stating that Congress was concerned that the RICO statute could be declared unconstitutional "as a criminal sanction based on status").

Cosa Nostra³⁸ in its sights when RICO was drafted, but never used the words “organized crime” in the text of RICO.³⁹ Instead, the drafters chose to target “enterprise[s]” that engaged in a “pattern of racketeering activity.”⁴⁰ Thus, likely as a result of this concern about its constitutionality, RICO was signed into law with broad language that criminalized the typical activities of entities engaged in organized crime, but did not restrict the class of future RICO convicts to any particular group.⁴¹

B. RICO’s Broadened Applicability

Whatever the rationale for the broad language found in RICO, it is widely accepted that reviewing courts have pushed RICO’s text to its outer limits.⁴² Since its inception, RICO has been employed by prosecutors in creative ways in a multitude of different prosecutions. Taking advantage of the amorphous nature of RICO’s “enterprise” and “pattern of racketeering activity” language, RICO’s criminal provisions have been applied to corporations,⁴³ healthcare entities,⁴⁴ street gangs,⁴⁵ terrorists,⁴⁶ and even state actors.⁴⁷ Many applications of RICO go far beyond what Congress had originally envisioned for the statute.⁴⁸

38. See Rowan, *supra* note 20, at 240 (stating that the RICO statute targeted “*La Cosa Nostra*, the Mafia, the mob, gangsters, and the underworld”).

39. *Id.* (noting that the text of RICO does not include the words “organized crime”); see also 18 U.S.C. §§ 1961–1968 (2006).

40. 18 U.S.C. § 1962 (2006).

41. See Parker, *supra* note 10, at 831 (arguing that RICO’s overbreadth stems from “Congress’s decision to attack organized crime based not on what it is, but on what it does”).

42. See David Warner, *Are the Corporation and Its Employees the Same?: Piercing the Intracorporate Conspiracy Doctrine in a Post-Enron World*, 55 U. KAN. L. REV. 1057, 1062–63 (2007) (stating that RICO has been stretched to its “maximum breadth” (quoting Parker, *supra* note 10, at 820, 833–34)).

43. See Ross Bagley, Dorian Hurley & Peter Mancuso, *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901, 914 n.99 (2007) (citing *United States v. Goldin Industries, Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000), as holding that “several individual corporations named as defendants can be both individual persons and part of an enterprise for RICO purposes even though they are under the same ownership”).

44. See Joan H. Krause, *Healthcare Fraud and Quality of Care: A Patient-Centered Approach*, 37 J. HEALTH L. 161, 163 (2004) (describing how healthcare fraud can be prosecuted under RICO).

45. See, e.g., *United States v. Nascimento*, 491 F.3d 25, 29–30 (1st Cir. 2007) (applying RICO to a street gang engaged in violent, noneconomic activity).

46. See, e.g., *United States v. Bagaric*, 706 F.2d 42, 46 (2d Cir. 1983) (upholding a RICO conviction against a Croatian terrorist group), *abrogated by Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259–60 (1994).

47. See, e.g., *United States v. Ambrose*, 740 F.2d 505, 513 (7th Cir. 1984) (affirming the convictions of ten policemen under RICO for protecting narcotics traffickers), *abrogated by United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir. 1989).

48. See Lynch, *supra* note 33, at 662, 676–78 (analyzing the legislative history of

In addition to the multifarious criminal prosecutions under RICO, the statute's civil remedy provision has been widely used by various parties in numerous situations. For example, RICO has been employed on behalf of victims in securities and business fraud cases.⁴⁹ Civil claims have also been filed in cases involving sexual harassment,⁵⁰ antiabortion protestors, bank foreclosures, and disputes between doctors and hospitals, an automobile dealer and his supplier, and among competing rabbinical factions.⁵¹

C. Congressional Authority: The Commerce Clause

Congress promulgated RICO pursuant to its constitutional power to regulate interstate commerce.⁵² To suppress any notion that it lacked the authority to enact RICO, Congress inserted a jurisdictional nexus by targeting "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."⁵³ As the applicability of RICO expands, more battles are being fought in the courts over the meaning of this "affecting commerce" requirement.⁵⁴

RICO and concluding that "Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates"). *But see* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 860 n.18 (1990) (asserting that it is a "myth" that Congress only desired to target organized crime through RICO and that the "notion [that RICO] applies only to organized crime in the classic 'mobster' sense' also is rejected" (quoting *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir. 1980))).

49. *See* Barbara Black, *Racketeer Influenced and Corrupt Organizations (RICO)—Securities and Commercial Fraud as Racketeering Crime after Sedima: What is a "Pattern of Racketeering Activity"?*, 6 PACE L. REV. 365, 366 (1986) (noting that RICO claims are commonly added to securities and commercial fraud claims).

50. *See* Tricia Bozyk, *Disgorging American Business: An Examination of Overbroad Remedies in Civil RICO Cases*, 59 RUTGERS L. REV. 129, 150 (2006) (citing examples of RICO claims in sexual harassment suits).

51. Peter H. Gunst & Robert B. Levin, *RICO: A Runaway Anticrime Law*, NATION'S BUS., Jan. 1990, at 61.

52. *See* U.S. CONST. art. I, § 8, cl. 3 (enabling Congress to "regulate commerce with foreign nations, and among the several States").

53. 18 U.S.C. § 1962(a) (2006).

54. *See, e.g.*, *United States v. Nascimento*, 491 F.3d 25, 29–30 (1st Cir. 2007) (upholding RICO convictions against members of a street gang involved in noneconomic, violent activity with a minimal connection to interstate commerce); *Waucaush v. United States*, 380 F.3d 251, 256 (6th Cir. 2004) (requiring more than a minimal effect on commerce when the enterprise did not engage in economic activity); *United States v. Crenshaw*, 359 F.3d 977, 986, 1005 (8th Cir. 2004) (upholding RICO convictions and concluding that the "connection between *intra* state acts of violence committed by RICO enterprises and the enterprises' *inter* state commerce activity seems difficult to deny"); *United States v. Riddle*, 249 F.3d 529, 538 (6th Cir. 2001) (stating that a RICO conviction should be upheld if the "government establishes a connection between the . . . act of

“[A] corporation is generally ‘engaged “in commerce” when it is itself ‘directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.’”⁵⁵ Furthermore, the U.S. Supreme Court has established that purely intrastate activity may still be susceptible to a RICO violation if the activity substantially affects interstate commerce.⁵⁶ Additionally, courts have held that a “minor or minimal influence” on interstate commerce will suffice to support a RICO conviction.⁵⁷ However, “RICO jurisdiction ends where local activities have incidental effects on interstate commerce.”⁵⁸ To successfully establish a RICO violation, the enterprise itself, and not the individual defendants, must affect interstate commerce.⁵⁹

RICO and its “affecting commerce” requirement enter murky waters when the target of the RICO violation is a noneconomic, violent entity such as a street gang. Although courts have held that a minimal connection to interstate commerce will suffice, these cases almost exclusively deal with enterprises engaged in economic activity.⁶⁰ Furthermore, in the wake of several recent Supreme Court decisions limiting or refining Congress’s commerce power,⁶¹ the battle over RICO’s commerce requirement should become more intense. The dispute over the limit of RICO’s commerce requirement as applied to noneconomic enterprises engaged in violent criminal conduct culminated in the First Circuit Court of Appeals splitting with the Sixth Circuit in 2007.⁶²

violence and a RICO enterprise which has a de minimis interstate commerce connection”).

55. *United States v. Robertson*, 514 U.S. 669, 672 (1995) (quoting *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 283 (1975)).

56. The *Robertson* Court pointed to *Wickard v. Filburn*, 317 U.S. 111 (1942), for the general proposition that the “affecting commerce” test was developed in our jurisprudence to define the extent of Congress’ power over purely *intrastate* commercial activities that nonetheless have substantial *interstate* effects.” *Robertson*, 514 U.S. at 671.

57. *United States v. Farmer*, 924 F.2d 647, 651 (7th Cir. 1991).

58. *Musick v. Burke*, 913 F.2d 1390, 1398 (9th Cir. 1990).

59. *Farmer*, 924 F.2d at 651.

60. *See, e.g., Waucaush v. United States*, 380 F.3d 251, 255–56 (6th Cir. 2004) (distinguishing precedent that held that a RICO conviction can be upheld based only on a *de minimis* effect on commerce on the ground that these cases involved enterprises engaged in quintessentially economic activity).

61. *See Jones v. United States*, 529 U.S. 848, 850–51 (2000) (holding that an “owner-occupied residence not used for any commercial purpose does not qualify as property ‘used in’ commerce” under the federal arson statute); *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that the civil remedy provision of the Violence Against Women Act exceeded the scope of Congress’s commerce authority); *United States v. Lopez*, 514 U.S. 549, 567 (1995) (declaring unconstitutional a federal statute that criminalized possessing a firearm in a school zone because such possession was “in no sense an economic activity that might . . . substantially affect any sort of interstate commerce”).

62. *See United States v. Nascimento*, 491 F.3d 25, 30 (1st Cir. 2007) (“Although we

III. THE CIRCUIT SPLIT

Federal courts of appeals applying RICO to noneconomic enterprises have taken divergent paths in the past five years. This Part examines the circuit split that has occurred in regard to RICO's commerce requirement,⁶³ comparing the First Circuit's opinion in *United States v. Nascimento*⁶⁴ with the Sixth Circuit's opinion in *Waucaush v. United States*.⁶⁵

A. *United States v. Nascimento*

1. *Overview.* *Nascimento* scrutinized the activities of a Boston street gang and wrestled with the question of whether the actions of the gang satisfied the elements of RICO.⁶⁶ The *Nascimento* court quickly identified as the primary issue in the case the application of RICO's statutory "affecting commerce" requirement to enterprises engaged in noneconomic criminal activity. Specifically, the *Nascimento* court needed to articulate the appropriate standard for interpreting and applying RICO's commerce requirement.⁶⁷ The court had to accomplish this task in the face of the Sixth Circuit's "more rigorous" standard of interpretation⁶⁸ and the Supreme Court decisions of the previous two decades limiting Congress's power to legislate under the Commerce Clause.⁶⁹ The court immediately stated that this was a "difficult question," and Senior Circuit Judge Selya went so far as to explicitly state that the First Circuit was "reluctant to create" a circuit split through its decision in *Nascimento*.⁷⁰

2. *Factual Background.* *Nascimento* revolved around the rivalry between two Boston street gangs. The first gang consisted of a group of individuals who, beginning in the mid-1990s, gathered on a regular basis around Wendover Street. In 1995, one member of the Wendover group, Nardo Lopes, killed another member, Bobby Mendes, and subsequently went into hiding.

are reluctant to create a circuit split, we conclude, after grappling with this difficult question, that the normal requirements of the RICO statute apply to defendants involved with enterprises that are engaged only in noneconomic criminal activity.").

63. See 18 U.S.C. § 1962(c) (2006) (containing the commerce requirement).

64. *Nascimento*, 491 F.3d at 25.

65. *Waucaush*, 380 F.3d at 251.

66. *Nascimento*, 491 F.3d at 25, 30–31.

67. *Id.* at 40–41.

68. *Id.* at 37; see also *Waucaush*, 380 F.3d at 255–56 (distinguishing between economic and noneconomic activity for purposes of affecting interstate commerce).

69. See *supra* note 61 (listing recent Supreme Court cases that have interpreted the Commerce Clause).

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

Nardo's brother, Augusto, who was also a Wendover associate and who was in prison at the time, vowed to kill any witnesses to the killing. In addition to this desire, Augusto also harbored animosity toward other Wendover members.⁷¹

After his release from prison in 1996, Augusto came into contact with Manny Monteiro, who introduced him to a street gang that controlled Stonehurst Street in the Dorchester section of Boston. The Stonehurst gang considered the Wendover gang an enemy. From 1998 to 2000, violence erupted between the two gangs, and Stonehurst members regularly shot Wendover members.⁷²

The ensuing violence eventually resulted in the arrest and subsequent indictment of thirteen alleged Stonehurst members in September 2004, three of whom were appellants in the *Nascimento* case.⁷³ Among other counts, the federal grand jury charged the group with RICO violations based on their membership in Stonehurst, the alleged racketeering enterprise.⁷⁴ Augusto Lopes testified for the government against his former Stonehurst associates. At trial, four defendants were acquitted and the three appellants were convicted of various charges, including either RICO conspiracy or substantive RICO counts. The three appellants were sentenced to 171-, 57-, and 46-month prison terms, respectively. The appellants filed timely appeals leading to the instant case.⁷⁵

3. *The Nascimento Court's Analysis.* The court organized its analysis around the five elements that constitute a RICO violation.⁷⁶ According to the court, in order to prove a RICO violation, the government must show that "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity."⁷⁷ After addressing appellants' arguments in regard to the first element, the *Nascimento* court held that a reasonable jury could have concluded that Stonehurst

71. *Id.*

72. *Id.*

73. *Id.* The three appellants in the case were Jackson Nascimento, Lance Talbert, and Kamal Lattimore. *Id.* at 30–31.

74. *Id.* at 30.

75. *Id.* at 31.

76. *Id.* at 32.

77. *Id.* at 31 (quoting *United States v. Marino*, 277 F.3d 11, 33 (1st Cir. 2002)).

was an enterprise.⁷⁸ The court then turned its attention to the second element and proceeded to analyze whether or not Stonehurst's activities affected interstate or foreign commerce.⁷⁹

The jury instructions in the district court stated that RICO's interstate commerce requirement would be satisfied if Stonehurst had "at least a *de minimis* effect" on interstate commerce.⁸⁰ The court noted that this language is accepted and used frequently in RICO cases. The appellants, however, argued that the jury instruction was inappropriate because Stonehurst had not engaged in any sort of economic activity. Following from this assertion, the appellants put forth three arguments: (1) the instruction misstated RICO's commerce requirement in regard to enterprises that have not engaged in any economic activity; (2) in the alternative, if the instruction was correct, RICO was unconstitutional as applied to Stonehurst; and (3) not enough evidence existed to satisfy a mere *de minimis* connection to interstate commerce.⁸¹

The essence of the appellants' first argument was that the *de minimis* standard was not strict enough when applied to noneconomic enterprises.⁸² The court began its analysis by calling the appellants' argument an "uphill battle" and quickly pointed to *United States v. Marino*, in which the First Circuit held, "squarely and explicitly, that a *de minimis* effect on interstate commerce is all that is required to satisfy RICO's commerce element."⁸³

The appellants distinguished *Marino* by declaring that "the enterprise in question [in *Marino*] was found to be involved in drug trafficking—plainly a form of economic activity."⁸⁴ The court attacked this argument by noting that nothing in the text of RICO makes a distinction between enterprises engaged in economic activity and enterprises not engaged in economic activity. According to the court, the appellants were asking the court to "read a single phrase in the statute as requiring different things in different situations."⁸⁵ Specifically, the court declared that the appellants' argument would require that the government show a more substantial effect on interstate

78. *Id.* at 33.

79. *Id.* at 36–37.

80. *Id.* at 37.

81. *Id.*

82. *See id.* (stating the appellants' contention that RICO "requires more than a *de minimis* effect on interstate commerce").

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

84. *Id.*

85. *Id.*

commerce when a RICO violation was sought against enterprises engaged in violent but noneconomic activity.⁸⁶

The court squarely rejected the practice of reading additional requirements into statutory text, stating that “[c]ourts are not charged with the task of writing statutes.”⁸⁷ The appellants, however, cited the Sixth Circuit’s decision in *Waucaush v. United States* as support for their argument.⁸⁸ The *Waucaush* court held that enterprises engaged exclusively in noneconomic violent crime can only be convicted under RICO if the enterprise’s activities have a substantial effect on interstate commerce.⁸⁹ The appellants thus argued for the same standard that the Sixth Circuit expressly adopted.

The *Nascimento* court immediately criticized the *Waucaush* opinion for its lack of traditional statutory analysis.⁹⁰ The *Waucaush* opinion was thus “suspect” because it gave the word “affect” two different meanings depending on the factual situation.⁹¹ The court noted that instead of using statutory analysis, the *Waucaush* court had incorrectly employed the constitutional avoidance doctrine.⁹² Specifically, the *Waucaush* court stated that it wanted to “avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate.”⁹³ The *Waucaush* court thus decided it should refrain from reading the RICO statute as reaching noneconomic activities that have a mere *de minimis* effect on interstate commerce.⁹⁴ The appellants urged the *Nascimento* court to do the same.⁹⁵

The *Nascimento* court, however, declared that *Waucaush* had improperly employed the constitutional avoidance doctrine.

86. *Id.*

87. *Id.*

88. *Id.* at 38 (citing *Waucaush v. United States*, 380 F.3d 251, 255–56 (6th Cir. 2004)).

89. *Waucaush*, 380 F.3d at 255–56.

90. *See Nascimento*, 491 F.3d at 38 (stating that “the *Waucaush* court did not employ any of the usual tools of statutory construction”).

91. *Id.*

92. *Id.* The doctrine (or canon) of constitutional avoidance is a “tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The canon provides that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

93. *Nascimento*, 491 F.3d at 38 (quoting *Waucaush*, 380 F.3d at 255).

94. *Id.*

95. *Id.*

The doctrine, according to the court, “does not serve to give alternative meaning to statutory phrases in cases in which a statute’s application might be constitutionally dubious.”⁹⁶ Rather, the court stated, the doctrine allows courts to provide a single definition that is then applied to all cases, not just those that are constitutionally dubious.⁹⁷ The court asserted that this was made clear in *Clark v. Martinez*, which was decided after the *Waucaush* opinion.⁹⁸ According to the court, as a result of the true meaning of the constitutional avoidance doctrine, the First Circuit was simply not free to redefine the word “affecting” as used in the RICO statute.⁹⁹

The court then proceeded to address appellants’ claim that, based on the Supreme Court’s holding in *National Organization for Women, Inc. v. Scheidler*, the district court had erred in not instructing the jury that only conduct detrimental to commerce “affect[s]” commerce under the RICO statute.¹⁰⁰ The court conceded that the *Scheidler* opinion contains language suggesting the Supreme Court placed some emphasis on conduct that detrimentally affects commerce.¹⁰¹ However, the court asserted that the cited language in the *Scheidler* opinion was merely a “casual reference” and was not meant to limit the meaning of RICO’s commerce requirement.¹⁰²

The court then turned to the appellants’ second claim of error: that RICO was unconstitutional as applied to an enterprise engaged in noneconomic criminal activity.¹⁰³ As support for this claim, the appellants employed three oft-cited Supreme Court decisions that limited Congress’s ability to legislate under the Commerce Clause. The appellants first cited *United States v. Lopez*.¹⁰⁴ *Lopez*, decided in 1995, held that a federal statute

96. *Id.*

97. *Id.*

98. *Id.* (citing *Clark v. Martinez*, 543 U.S. 371, 384–85 (2005) (stating that courts are not free to interpret statutes as becoming inoperable when they approach constitutional limits)).

99. The court found further support in the case of *Jones v. United States*, in which the Supreme Court defined the word “use” as meaning “active employment.” *Jones v. United States*, 529 U.S. 848, 855 (2000). The court proceeded to point out that this statutory clarification was then applicable to all cases, not just those that are constitutionally dubious. *Nascimento*, 491 F.3d at 39.

100. *Nascimento*, 491 F.3d at 39 (citing *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994)).

101. *Id.* (“[A]n enterprise can surely have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives” (quoting *Scheidler*, 510 U.S. at 258)).

102. *Id.*

103. *Id.* at 40.

104. *Id.* (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

criminalizing the possession of a firearm in a school zone exceeded the bounds of Congress's commerce power and was thus unconstitutional.¹⁰⁵ The *Lopez* Court emphasized the fact that the federal statute at issue did not contain a jurisdictional requirement that the possession of a firearm actually affect interstate commerce.¹⁰⁶ Furthermore, the *Lopez* Court distinguished between economic and noneconomic activities and held that Congress could properly regulate economic activity that substantially affects interstate commerce.¹⁰⁷

The appellants then turned to *United States v. Morrison*, a 2000 Supreme Court decision that struck down part of the Violence Against Women Act, which provided a federal civil remedy for victims of gender-motivated violence.¹⁰⁸ The statute at issue in *Morrison* was supported by explicit congressional findings that gender-motivated violence had some impact on interstate commerce.¹⁰⁹ The *Morrison* Court, however, downplayed the importance of these congressional findings¹¹⁰ and held that Congress could not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."¹¹¹ The *Morrison* Court additionally held that the power to regulate the criminal conduct targeted by the Violence Against Women Act belonged exclusively to the states.¹¹²

The appellants last turned to *Jones v. United States* to support their case.¹¹³ The *Jones* Court narrowly interpreted the phrase "used in interstate or foreign commerce" in the federal arson statute as not reaching private residences.¹¹⁴ The rationale behind this narrow interpretation, according to the *Jones* Court, was to avoid "grave and doubtful constitutional questions."¹¹⁵

Drawing from these three Supreme Court decisions, the appellants asserted that their criminal conduct was analogous to the conduct that the Supreme Court deemed beyond the reach of

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

106. *Id.* at 561.

107. *Id.* at 560.

108. *Nascimento*, 491 F.3d at 40; see also *infra* Part III.C.2 (arguing the *Nascimento* court improperly disregarded appellants' arguments based on *Morrison*).

109. *United States v. Morrison*, 529 U.S. 598, 614 (2000).

110. *Id.* at 614–15. The *Morrison* Court attacked the credibility of these findings by asserting that they were based on faulty reasoning. Specifically, the Court stated that the findings were based on a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce." *Id.* at 615.

111. *Id.* at 617.

112. *Id.* at 617–18.

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

114. *Jones v. United States*, 529 U.S. 848, 850, 859 (2000).

115. *Id.* at 857.

Congress in *Morrison*.¹¹⁶ Furthermore, the appellants employed *Lopez* to argue that allowing the federal government to regulate noneconomic street crime would remove all constitutional checks on federal power.¹¹⁷

In addressing these arguments as a whole, the *Nascimento* court demonstrated a level of sympathy for the general thrust of the appellants' assertions by stating, "We share the appellants' concern that the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern."¹¹⁸ However, the court subsequently asserted that although the appellants' theory had "some bite," it "ultimately fails to persuade."¹¹⁹ The court primarily based this conclusion on its analysis of the 2005 Supreme Court decision in *Gonzales v. Raich*.¹²⁰

The *Nascimento* court asserted that *Raich* was of utmost importance to *Nascimento*, not only because it was the Supreme Court's most recent statement on the scope of federal commerce power, but also because *Raich*, like *Nascimento*, was "an as-applied challenge to a generally valid federal statute."¹²¹ *Lopez* and *Morrison*, by contrast, concerned facial challenges to federal statutes. Furthermore, because *Jones* turned on statutory construction of the federal arson statute, it did not carry the same precedential weight as *Raich*.¹²²

The *Raich* Court upheld the Controlled Substances Act as applied to intrastate, medicinal, and noncommercial cultivation and use of marijuana under the California Compassionate Use Act.¹²³ According to the *Nascimento* court, the Supreme Court in *Raich* rejected the plaintiffs' attempt at "miniaturization," or narrowing the activity in question to a level of specificity that fell out of the scope of federal commerce power.¹²⁴ Specifically, the plaintiffs in *Raich* attempted to define, or miniaturize, their activity of marijuana cultivation to the level of noneconomic, medicinal marijuana use that had no effect on interstate commerce.¹²⁵ The *Raich* Court, according to the First Circuit, rejected this argument, "preferring instead to defer to Congress's

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

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)).

121. *Id.* at 41.

122. *Id.*

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

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

125. *Id.* at 41–42.

declaration of the level of specificity with which an activity should be classified for the purpose of determining whether that activity, in the aggregate, affects interstate commerce.”¹²⁶ Therefore, the *Raich* Court decided not to distinguish between medicinal, noncommercial marijuana cultivation and marijuana cultivation “writ large” in its Commerce Clause analysis.¹²⁷

The First Circuit acknowledged that *Raich* is potentially distinguishable because marijuana is a “fungible commodity, capable of seeping into the interstate market regardless of the purpose for which it is grown.”¹²⁸ However, the court concluded that the general lesson of *Raich* is that the judiciary should be wary of interfering in a congressional solution to a legitimate problem and “respect the level of generality at which Congress chose to act.”¹²⁹ As a result, the court concluded that both the appellants and the *Waucaush* court misconceived the relevant “unit of analysis.”¹³⁰ It was the class of activity that was crucial to the analysis, and the appellants’ argument that the Stonehurst activities were noneconomic in nature held little weight as a result.¹³¹

The court expounded on this analytical framework by explaining that RICO is limited to racketeering activity that “affect[s] commerce” and is thus more explicitly tied to commerce than the statutes in *Lopez*, *Morrison*, or even *Raich*.¹³² The general class of activity targeted by Congress is racketeering, which, according to the court, is inherently economic in nature and “may be aggregated for Commerce Clause purposes.”¹³³ The court concluded that racketeering is therefore a “legitimate target of Commerce Clause legislation.”¹³⁴ Furthermore, racketeering and organized violence have “obvious ties,” which led the court to defer to Congress’s decision to regulate organized violence in conjunction with racketeering activity.¹³⁵ Armed with the above legal conclusions, the court held that the application of

126. *Id.* at 41.

127. *Id.* at 41–42.

128. *Id.* at 42.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 43.

133. *Id.* The court explained that “[r]acketeering . . . is based largely on greed” and manifestations of racketeering include “loansharking, extortion, and a host of other financially driven crimes.” *Id.*

134. *Id.*

135. *Id.*

RICO to Stonehurst's activities was valid under the Commerce Clause and is therefore constitutional.¹³⁶

The court then turned to appellants' argument that the prosecution failed to prove a mere *de minimis* connection between Stonehurst's activities and interstate commerce. The court announced that it would apply "heightened scrutiny" throughout the analysis because Stonehurst never engaged in racketeering activity of an economic nature.¹³⁷ Addressing the prosecution's evidence point by point, the court first scrutinized the government's "most loudly bruited" piece of evidence, showing that Stonehurst engaged in a shooting at a tire shop engaged in interstate commerce.¹³⁸ As a result of the shooting, the tire shop was closed for several hours.¹³⁹ The court was not persuaded by this evidence and proceeded to distinguish the cases cited by the government for support.¹⁴⁰ The court then turned to the prosecution's contention that Stonehurst members' use of cellular telephones satisfied the "affecting commerce" requirement of RICO. Again, the court distinguished the line of cases cited by the prosecution in support of this contention and appeared unconvinced that cellular telephone use was dispositive in regard to the commerce requirement.¹⁴¹

Finally, the court addressed evidence that Stonehurst had purchased and used numerous weapons that were manufactured outside of Massachusetts. These weapons thus moved in interstate commerce and therefore constituted "surer footing" for satisfaction of the commerce requirement.¹⁴² The court zeroed in on testimony that a Stonehurst member had crossed state lines to purchase one of the firearms. This transaction, according to the court, was a "paradigmatic example" of an activity that falls within the scope of the Commerce Clause.¹⁴³ The court concluded that the firearm purchase, in conjunction with Stonehurst's arsenal of firearms, satisfied RICO's commerce requirement.¹⁴⁴ Furthermore, the evidence of cellular telephone use and the

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 43–44.

140. *Id.* at 44.

141. *Id.*

142. *Id.* at 45.

143. *Id.*

144. *Id.*

shooting at the tire shop acted as “frosting on the cake.”¹⁴⁵ This conclusion ended the court’s Commerce Clause analysis.¹⁴⁶

4. *Concurring Opinion.* The concurring opinion, written by Chief Judge Boudin, sought to clarify and accentuate certain elements of the First Circuit’s conclusions regarding RICO’s commerce requirement.¹⁴⁷ Chief Judge Boudin again emphasized the importance of Stonehurst’s use of guns manufactured out-of-state and the trip by a Stonehurst member across state lines to purchase a firearm. He concluded that these activities clearly satisfied the Commerce Clause interstate nexus requirement.¹⁴⁸

To support the First Circuit’s conclusion that the activities of Stonehurst members satisfied the RICO commerce requirement, Chief Judge Boudin compared the satisfaction of the commerce nexus in the case at bar with the commerce nexus required in other federal statutes. First, Boudin asserted that the “commerce link” at issue in *Nascimento* was “at least as strong” as the commerce nexus required in the federal felon-in-possession statute.¹⁴⁹ He concluded, “If Congress can regulate the mere possession of a gun because the gun at one time traveled in interstate commerce, surely it can also regulate an enterprise that uses such guns to kill.”¹⁵⁰

Arriving at the most compelling point in his opinion, Chief Judge Boudin identified a key distinction between the statutes at issue in *Lopez* and *Morrison*, and RICO. According to Boudin, unlike the Gun Free School Zones Act (*Lopez*) or the Violence Against Women Act (*Morrison*), RICO requires a jury finding that the enterprise activities at issue in the particular case affect interstate commerce.¹⁵¹ This is a crucial distinction, according to the Chief Judge, because the constitutionality of the RICO statute, as applied in this case, does not depend on a “generalized Congressional determination” that a class of activities affects

145. *Id.*

146. The court continued to address the final element of a RICO offense: “that a defendant participated in the conduct of the enterprise ‘through a pattern of racketeering activity.’” *Id.* (quoting 18 U.S.C. § 1962(c) (2006)). The court ultimately affirmed the appellants’ convictions by deferring to the jury’s factual conclusions, rejecting the appellants’ Double Jeopardy Clause argument, and holding that the district court did not err in refusing to suppress evidence. *Id.* at 45–51.

147. *Id.* at 51–53 (Boudin, C.J., concurring).

148. *Id.* at 51–52.

149. *Id.* at 52.

150. *Id.*

151. *Id.*

interstate commerce, but rather a particularized jury finding specific to the facts at issue in the case at bar.¹⁵²

B. *Waucaush v. United States*

1. *Overview.* The *Waucaush* court, like the *Nascimento* court, faced the issue of whether or not the activities of a street gang satisfied RICO's requirement that the enterprise at issue affect interstate commerce.¹⁵³ Decided three years before *Nascimento*,¹⁵⁴ *Waucaush* addressed the issue of whether a noneconomic enterprise must have more than a minimal affect on interstate commerce to satisfy RICO.¹⁵⁵ The *Waucaush* court departed from *Nascimento* in concluding that when scrutinizing the activities of a noneconomic enterprise charged with a RICO violation, a more substantial effect on interstate commerce is needed.¹⁵⁶

2. *Factual Background.* *Waucaush* involved the activities of a Detroit street gang known as the Cash Flow Posse (CFP). The Sixth Circuit quipped that the key issue in the case was whether the CFP "had a substantial effect on the nation's cash flow."¹⁵⁷ Seven members of the CFP, including Waucaush, were charged with violating RICO or conspiring to violate RICO. According to the indictment, the CFP members had murdered, conspired to murder, and assaulted members of rival gangs. Waucaush moved to dismiss the indictment, asserting that CFP's activities did not affect interstate commerce within the meaning of the statute or the Constitution. After the district court denied his motion, Waucaush pled guilty to RICO conspiracy, but later moved to withdraw his plea, arguing that it was not intelligently made.¹⁵⁸ The district court denied this motion and sentenced Waucaush to life in prison.¹⁵⁹ Although the Sixth Circuit affirmed his conviction, Waucaush collaterally challenged his conviction after the Supreme Court decided *Morrison* and *Jones* in 2000, and his case found its way back to the Sixth Circuit.¹⁶⁰

3. *The Waucaush Court's Analysis.* The Sixth Circuit in *Waucaush* had to decide the basic question of whether Waucaush's activities, as a member of CFP, affected interstate commerce.¹⁶¹ If there was no effect on interstate commerce, then Waucaush was "actually innocent" of a RICO violation.¹⁶² The court began its analysis by stating that RICO's "affecting commerce" requirement "cannot exceed the bounds of the

152. *Id.*

Commerce Clause.”¹⁶³ As a result, according to the court, it was proper to rely on cases that interpret the Commerce Clause in light of other statutes besides RICO.¹⁶⁴

The court framed the analysis by stating that because RICO regulates enterprises and not individuals, it was proper to scrutinize whether CFP’s activities affected interstate commerce.¹⁶⁵ Arriving at the crucial issue in the case, the court examined the government’s contention that a minimal effect on interstate commerce would suffice to satisfy RICO.¹⁶⁶ In support of this assertion, the government relied on *United States v. Riddle*, which explicitly stated that an enterprise’s “de minimis connection” to interstate commerce satisfies the requisite RICO element.¹⁶⁷ The court, however, quickly pointed out that the enterprise at issue in *Riddle* was explicitly engaged in economic activity.¹⁶⁸ Reliance on *Riddle*, therefore, was improper.¹⁶⁹

The court turned to *Morrison* for the principle that Congress may not regulate “noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate

153. *Waucaush v. United States*, 380 F.3d 251, 255 (6th Cir. 2004); *see also Nascimento*, 491 F.3d at 29 (majority opinion) (“The pivotal issue in this case concerns the application of . . . [RICO] . . . to a street gang engaged in violent, but noneconomic, criminal activity.”).

154. *Waucaush*, 380 F.3d at 251.

155. *Id.* at 255–56.

156. *Id.* at 256.

157. *Id.* at 253.

158. *Id.*

159. *Id.* at 253–54.

160. *Id.* at 254.

161. *Id.*

162. *Id.* at 254–55.

163. *Id.* at 255. The rationale behind this declaration was the constitutional avoidance doctrine. *See infra* Part. III.C.1 (discussing *Waucaush*, *Nascimento*, and *Clark*’s use of the constitutional avoidance doctrine). The court stated that “[b]ecause we should avoid interpreting a statute to prohibit conduct which Congress may not constitutionally regulate,” RICO’s commerce requirement must fall within the scope of the Commerce Clause. *Waucaush*, 380 F.3d at 255.

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

165. *Id.* Specifically, the court stated that the individual’s predicate act of violence does not itself have to affect interstate commerce, but the predicate acts must have been performed “for the purpose of establishing or maintaining a position within the enterprise.” *Id.* The enterprise, in turn, must affect interstate commerce through its activities. *Id.*

166. *Id.*

167. *Id.* (citing *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001)).

168. *Id.* The enterprise in *Riddle* had “operated an illegal gambling business, extorted money, and fenced stolen merchandise.” *Id.*

169. *Id.* at 256.

commerce.”¹⁷⁰ One CFP member had been arrested for drug trafficking,¹⁷¹ but the government admitted that this previous arrest was unrelated to CFP’s activities.¹⁷² The court noted that the government had failed to prove that CFP had engaged in any activity that courts had previously held was economic in nature, like peddling cigarettes, credit fraud, or organized gambling.¹⁷³

The court proceeded to lay down the rule that “where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do.”¹⁷⁴ Within this framework, the court addressed the government’s argument that CFP’s murder of rival gang members substantially affected commerce because the slain gang members could no longer sell drugs.¹⁷⁵ The court, however, took issue with the sufficiency of the government’s evidence showing that the slain gang members, or even CFP as a whole, had actually sold drugs. As a result of the government’s lack of evidence in regard to this point, the court held that CFP’s intrastate violent acts of murder did not substantially affect interstate commerce.¹⁷⁶

The court then addressed the government’s final argument that CFP substantially affected interstate commerce because, per the district court’s finding, the gang eventually became associated with a national gang. The government presented evidence that some CFP members had talked over gang business while visiting Mexico City in 1996. The court called this specific finding a “needle in a haystack,” and ultimately rejected the government’s argument.¹⁷⁷ The court stated, “If we were to label these occasional acts of interstate commerce as ‘substantial,’ federal authority under the Commerce Clause would be virtually limitless.”¹⁷⁸ The court concluded its analysis by stating that CFP was unquestionably an enterprise that engaged in intrastate, noneconomic activity that did not substantially affect interstate commerce. As such, Waucaush was “actually innocent” of violating RICO.¹⁷⁹

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

171. Drug trafficking is an economic activity according to *United States v. Tucker*, 90 F.3d 1135, 1140 (6th Cir. 1996). *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 256–57.

176. *Id.* at 257.

177. *Id.*

178. *Id.*

179. *Id.* at 258. The court continued to analyze the intelligence of Waucaush’s plea and concluded that “[b]ecause Waucaush’s misunderstanding of the law led him to plead

C. Analysis and Comparison

1. *The Constitutional Avoidance Doctrine: The Nascimento Court Proved its Point.* The First and Sixth Circuit Courts of Appeals now have different standards for applying RICO's "affecting commerce" requirement to enterprises engaged in noneconomic violent activity.¹⁸⁰ As noted above, the *Waucaush* court invoked the constitutional avoidance doctrine in fashioning its test.¹⁸¹ Citing *Jones*, the court stated, "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."¹⁸²

The *Nascimento* court attacked the *Waucaush* court's use of the constitutional avoidance doctrine, especially in light of *Clark v. Martinez*.¹⁸³ The doctrine of constitutional avoidance is a tool of statutory construction, requiring that "when an Act of Congress raises 'a serious doubt' as to its constitutionality, '[a] [c]ourt will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"¹⁸⁴ Under this doctrine, it is presumed that Congress would not intend to pass an unconstitutional law.¹⁸⁵

In 2005, the *Clark* Court expounded upon the boundaries of the doctrine. *Clark* required the Supreme Court to interpret 8 U.S.C. § 1231(a), which requires the Secretary of Homeland Security to remove an inadmissible alien from the country within ninety days.¹⁸⁶ However, Section 1231(a)(6) also allows the

guilty to conduct which the law had not made a crime, his plea was unintelligent and his conviction cannot stand." *Id.* at 263.

180. Compare *United States v. Nascimento*, 491 F.3d 25, 30 (1st Cir. 2007) ("[W]e conclude . . . that the normal requirements of the RICO statute apply to defendants involved with enterprises that are engaged only in noneconomic criminal activity."), with *Waucaush*, 380 F.3d at 256 ("[W]here the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do.").

181. See *supra* notes 92, 163 (discussing the *Waucaush* court's use of the constitutional avoidance doctrine); see also *infra* Part III.C.1 (further analyzing the *Waucaush* court's use of the constitutional avoidance doctrine).

182. *Waucaush*, 380 F.3d at 255 (citing *Jones v. United States*, 529 U.S. 848, 853 (2000)).

183. See *supra* notes 92–99 and accompanying text (defining the doctrine of constitutional avoidance and discussing the *Clark* Court's interpretation of the doctrine).

184. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

185. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring) (discussing the canon of constitutional avoidance); see also *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (stating that the doctrine rests on "the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

186. *Clark*, 543 U.S. at 373 (discussing 8 U.S.C. § 1231(a)(1)(A) (2006)).

Secretary to detain an inadmissible alien beyond ninety days for as long as is reasonably necessary.¹⁸⁷ In *Zadvydas v. Davis*, the Supreme Court interpreted Section 1231(a)(6) as applied to aliens who have been admitted to the country and held that this class of aliens can be held beyond the ninety day period for as long as “reasonably necessary” to achieve removal.¹⁸⁸ The question raised in *Clark* was whether or not this interpretation should be applied to inadmissible aliens as well, even though the same constitutional concerns guiding the *Zadvydas* opinion were not applicable to inadmissible aliens.¹⁸⁹

The *Clark* Court quoted Justice Kennedy’s *Zadvydas* dissent, stating that the previous interpretation must be applied to inadmissible aliens as well because “it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another.”¹⁹⁰ The text of the statute, according to the Kennedy dissent, simply does not permit this bifurcated interpretation, even if the justification for the prior interpretation is absent in the current situation.¹⁹¹ The point repeatedly emphasized by Justice Scalia in *Clark* was that the doctrine of constitutional avoidance does not make statutes “chameleon[s]” that change meaning depending on the existence of constitutional doubts.¹⁹² The doctrine, therefore, is not a “method of adjudicating constitutional questions by other means.”¹⁹³ If this were the case, according to Scalia, the Court would never have to find a statute unconstitutional as applied.¹⁹⁴

The *Nascimento* court latched onto Scalia’s language in *Clark* and attacked the holding in *Waucaush*, which was decided before *Clark*.¹⁹⁵ The Sixth Circuit in *Waucaush* did not attempt to analyze or defend its use of the doctrine of constitutional avoidance, but merely stated in conclusory fashion that it would interpret the RICO statute so as not to exceed the scope of the Commerce Clause.¹⁹⁶ This approach to the critical questions

187. *Id.* at 377 (reviewing 8 U.S.C. § 1231(a)(6) (2006)).

188. *Zadvydas*, 533 U.S. at 689.

189. *Clark*, 543 U.S. at 378.

190. *Id.* at 379 (quoting *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting)).

191. *Zadvydas*, 533 U.S. at 710 (Kennedy, J., dissenting).

192. *Clark*, 543 U.S. at 382.

193. *Id.* at 381.

194. *Id.* at 384.

195. *See* *United States v. Nascimento*, 491 F.3d 25, 38 (2007) (stating in its critique of *Waucaush* that “[c]ourts simply are not free to interpret statutes as becoming inoperative when they approach constitutional limits” (quoting *Clark*, 543 U.S. at 384) (internal quotation omitted)).

196. *See* *Waucaush v. United States*, 380 F.3d 251, 255 (6th Cir. 2004) (stating that RICO’s “affect[ing] . . . commerce” requirement “cannot exceed the bounds of the

presented in *Waucaush* does indeed offend Scalia's reasoning in *Clark* that a statute cannot be a "chameleon" that changes meaning in the face of constitutional doubts. Under *Clark*, therefore, RICO's "affecting commerce" requirement cannot have different meanings in different factual situations.¹⁹⁷ This approach is tantamount to constitutional adjudication "by other means" and is improper under *Clark*. It has been established in both the First Circuit¹⁹⁸ and the Sixth Circuit¹⁹⁹ that a *de minimis* connection satisfies the RICO statute for an enterprise that affects interstate commerce and, according to *Clark*, it is this interpretation that should be applied, even if there are different constitutional considerations at play.²⁰⁰

The *Nascimento* court thus prevailed on its argument that the *Waucaush* court improperly employed the doctrine of constitutional avoidance.²⁰¹ As a result, the persuasiveness of the *Waucaush* opinion is arguably put into question. It is crucial, however, that the First Circuit's assault on the Sixth Circuit's opinion did not attack the merits of the *Waucaush* court's Commerce Clause arguments, but merely—albeit successfully—attacked the analytical framework used by the Sixth Circuit.²⁰² Thus, for the purpose of determining the correct standard to apply to noneconomic enterprises engaged in violent activity that does not substantially affect interstate commerce, the *Waucaush* court's substantive arguments cannot be ignored. It is necessary,

Commerce Clause").

197. See *Clark*, 543 U.S. at 382.

198. See *United States v. Marino*, 277 F.3d 11, 35 (1st Cir. 2002) ("[A]ll that is required to establish federal jurisdiction in a RICO prosecution is a showing that the individual predicate racketeering acts have a *de minimis* impact on interstate commerce." (quoting *United States v. Juvenile Male*, 118 F.3d 1344, 1347 (9th Cir. 1997))).

199. *United States v. Riddle*, 249 F.3d 529, 537 (6th Cir. 2001) (stating that "a RICO enterprise's necessary relationship to interstate commerce" is still "*de minimis*").

200. Specifically, the primary "constitutional consideration" was, as the *Waucaush* court stated, the constitutionality of RICO as applied to noneconomic enterprises that minimally affect interstate commerce in light of the *Morrison* Court's holding that "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Waucaush*, 380 F.3d at 255–56 (quoting *United States v. Morrison*, 529 U.S. 598, 617 (2000)).

201. See *United States v. Nascimento*, 491 F.3d 25, 38 (1st Cir. 2007) (stating that the *Waucaush* court's reasoning "reflects a misunderstanding of the operation of the doctrine of constitutional avoidance").

202. See *id.* (dismissing the persuasiveness of the *Waucaush* opinion on the ground that "the *Waucaush* court did not employ any of the usual tools of statutory construction"). The *Nascimento* court did briefly acknowledge the substantive arguments of the *Waucaush* court in passing. See *id.* at 40, 42 (stating that the Supreme Court's opinions in *Morrison*, *Jones*, and *Lopez* "galvanized the Sixth Circuit in *Waucaush*" and, "[g]iven the lessons of *Raich*, it is evident that the appellants' constitutional argument—like that of the *Waucaush* court—misapprehends the relevant unit of analysis").

therefore, to take the logical and relevant arguments put forth by the Sixth Circuit in *Waucaush* and compare them to the First Circuit's within the correct legal inquiry: Is the RICO statute unconstitutional as applied?

2. *The Correct Legal Inquiry: Is RICO Unconstitutional as Applied to a Noneconomic Enterprise that Does Not Substantially Affect Interstate Commerce?*

a. *The Courts' Arguments.* Although the *Waucaush* court employed the doctrine of constitutional avoidance to reach its holding, it also put forth arguments that support the contention that RICO is unconstitutional as applied to CFP's activities. The essence of this argument is that, under *Morrison*, Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."²⁰³ Furthermore, the reliance by the government in *Waucaush* on cases stating that a *de minimis* connection to interstate commerce suffices for a RICO violation is improper because the enterprises in those cases engaged in economic activity.²⁰⁴ CFP did not engage in any economic activity and did not substantially affect interstate commerce. RICO, therefore, cannot constitutionally reach CFP under the Commerce Clause.²⁰⁵

The *Nascimento* court explicitly addressed the question of whether RICO, "as applied to an enterprise engaged exclusively in noneconomic criminal activity, is unconstitutional."²⁰⁶ The *Nascimento* court acknowledged the persuasiveness of *Morrison*, but ultimately held that RICO was not unconstitutional as applied to Stonehurst's activities.²⁰⁷ The court relied exclusively on *Raich* for this determination.²⁰⁸

b. *The Nascimento Court Improperly Applied Raich.* The *Nascimento* court emphasized two points from *Raich*. First, *Raich*, like *Nascimento*, was an as-applied challenge.²⁰⁹ Second, *Raich* stood for the principle that when Congress properly regulates a class of activities under the Commerce Clause, it is

203. *Waucaush*, 380 F.3d at 256 (quoting *Morrison*, 529 U.S. at 617–18).

204. *Id.* at 255–56.

205. *Id.* at 258.

206. *Nascimento*, 491 F.3d at 40.

207. *See id.* at 41 (stating that although appellants' argument "has some bite, it ultimately fails to persuade").

208. *See id.* ("The principal problem with the argument is that it runs at cross purposes with the Supreme Court's decision in *Raich*.").

209. *Id.*

improper for a reviewing court to isolate, or miniaturize, individual instances within that class for scrutiny.²¹⁰ Although it is, of course, relevant that *Raich* and *Nascimento* are both as-applied challenges, the *Nascimento* court's heavy reliance on *Raich*'s miniaturization argument is misplaced given the important distinctions between the statutes at issue in *Raich* and *Nascimento*.²¹¹

Raich involved the constitutionality of a provision of the Controlled Substances Act (CSA) criminalizing marijuana possession as applied to noncommercial medicinal marijuana use.²¹² In reaching the conclusion that the CSA was constitutional as applied, the Supreme Court placed great emphasis on the fact that the activities regulated by the CSA are inherently economic.²¹³ Furthermore, the Court explicitly distinguished the activities governed by the CSA and those governed by the statute at issue in *Morrison*. Specifically, the Court emphatically stated that, “[u]nlike those at issue in . . . *Morrison*, the activities regulated by the CSA are quintessentially economic.”²¹⁴ “Economics,” according to the Court, “refers to ‘the production, distribution, and consumption of commodities.’”²¹⁵

The Court went on to make the important point that “[t]he CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”²¹⁶ Thus, although the Court laid down the extremely broad and rather vague miniaturization principle cited by the *Nascimento* court, the specific application of this principle clarifies the rule: Because the CSA regulates a lucrative, fungible commodity “for which there is an established . . . interstate market,” it is improper for a reviewing court to excise a particular use of this commodity and deem this use beyond the reach of the CSA.²¹⁷ This is a logical and sound application of Commerce Clause jurisprudence, but it is one grounded in the irrefutable fact that the class of activities involved a fungible commodity that was “quintessentially

210. *Id.* at 42.

211. *See infra* notes 238–45 and accompanying text (describing the statute at issue in *Raich*).

212. *Gonzales v. Raich*, 545 U.S. 1, 7–8 (2005).

213. *See infra* notes 214–16 and accompanying text (describing the *Raich* Court's assertion that the dispositive issue in *Raich* is the economic nature of the production, distribution, and consumption of banned substances).

214. *Raich*, 545 U.S. at 25.

215. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)).

216. *Id.* at 26.

217. *Id.*

economic.”²¹⁸ Understood in this light, the vague wording of the general *Raich* miniaturization principle cited by the *Nascimento* court was improperly employed and can easily be distinguished from the activity at issue in *Nascimento*.

In its application of the *Raich* miniaturization principle to RICO, the *Nascimento* court stated that the “general class of activity is a wholly legitimate target of Commerce Clause legislation.”²¹⁹ Racketeering, according to the court, “is based largely on greed” and is “sufficiently economic.”²²⁰ The court failed to point out the fundamental counterargument, however, that RICO convictions can, and often are, sustained against enterprises that never engaged in any economic activity.²²¹ Thus, “racketeering” loses its traditional economic connotation very quickly within a real-world RICO conviction. Indeed, the “racketeering” activity upon which Stonehurst’s RICO conviction rested was the noneconomic activity of violence.²²² This juxtaposition between the ambiguous, conceptual notion of “racketeering” (the class of activity) and the specific instance of a truly noneconomic enterprise engaged in violence is starkly different than the class of activity and specific instance at issue in *Raich*, both of which involved a “quintessentially economic” fungible commodity.²²³ In light of this important distinction, the court’s dispositive reliance on the general wording of the *Raich* miniaturization principle is misconceived.

c. The *Nascimento* Court Prematurely Dismissed *Morrison*. The striking similarity between the *Morrison* holding and the central issue in *Nascimento* cannot be ignored. Although the *Nascimento* court acknowledged and summarized *Morrison* while fashioning its RICO “affecting commerce” standard, it never scrutinized the holding of *Morrison*.²²⁴ Ultimately, the *Nascimento* court rejected the persuasiveness of *Morrison* solely as a result of *Raich*.²²⁵

218. *Id.* at 25.

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

220. *Id.* The court proceeded to cite Timothy 6:10 for the notion that “the love of money is the root of all evil.” *Id.*

221. The obvious example is the RICO conviction at issue in *Nascimento* against the Stonehurst gang, an enterprise that engaged exclusively, as the indictment alleged, in noneconomic activity. *See id.* at 30.

222. *See id.* at 30 (“The indictment alleged that Stonehurst’s primary purpose was ‘to shoot and kill members . . . of a rival gang in Boston known as Wendover.’”).

223. *Raich*, 545 U.S. at 25.

224. *See Nascimento*, 491 F.3d at 40–41 (summarizing the *Morrison* holding).

225. *See supra* note 208 and accompanying text.

The Supreme Court in *Morrison* operated under the guiding principle that legislation passed under the Commerce Clause will be sustained only if the legislation regulates economic activity that *substantially* affects interstate commerce.²²⁶ At the end of its analysis of the Violence Against Women Act, the *Morrison* Court laid down a firm principle when it stated, “We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”²²⁷ The Court went on to declare, “The Constitution requires a distinction between what is truly national and what is truly local.”²²⁸

The holding in *Morrison* is of utmost importance when seeking the correct standard for applying RICO’s “affecting commerce” requirement for noneconomic enterprises. As the *Waucaush* court pointed out, RICO regulates enterprises, not individuals.²²⁹ A crucial element of any RICO conviction is the nature of the activities of the enterprise at issue.²³⁰ In both *Nascimento* and *Waucaush*, the enterprises engaged in noneconomic, violent criminal activity.²³¹ Thus, a U.S. Supreme Court holding that Congress cannot freely regulate “noneconomic, violent criminal conduct”²³² should have great, if not dispositive, weight. The two primary counterarguments to this assertion, that RICO has a jurisdictional nexus requirement²³³ and that *Morrison* is a facial challenge, fail to defeat the *Morrison* holding and modern Commerce Clause jurisprudence. These arguments are, at best, nondispositive distinctions between the Commerce Clause issues in *Nascimento* and those in *Morrison*, and should not trump the *Morrison* Court’s holding that Congress cannot freely regulate “noneconomic, violent criminal conduct.”²³⁴

226. See *United States v. Morrison*, 529 U.S. 598, 609 (2000) (“Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce.” (quoting *United States v. Lopez*, 514 U.S. 549, 558–59 (1995))).

227. *Id.* at 617.

228. *Id.* at 617–18.

229. *Waucaush v. United States*, 380 F.3d 251, 255 (2004).

230. Specifically, RICO requires that the activities of the enterprise constitute a “racketeering activity” that “affect[s] . . . interstate or foreign commerce.” See 18 U.S.C. §§ 1961(1), 1962(a) (2006).

231. See *supra* Parts III.A.2, III.B.2 (discussing *Nascimento* and *Waucaush*).

232. *United States v. Morrison*, 529 U.S. 598, 599 (2000).

233. See *infra* Part III.C.2.d (discussing the effect of RICO’s jurisdictional nexus requirement on an as-applied challenge to RICO’s constitutionality).

234. *Morrison*, 529 U.S. at 599.

The Sixth Circuit in *Waucaush* recognized this fact and declared emphatically that as a direct result of the bright-line rule laid down in *Morrison*, “where the enterprise itself did not engage in economic activity, a minimal effect on commerce will not do.”²³⁵ The Sixth Circuit did not feel it necessary to distinguish *Morrison* on the ground that it was a facial challenge, even though the court was essentially engaged in an as-applied analysis in *Waucaush*.²³⁶ Furthermore, the *Waucaush* court, unlike the *Nascimento* court, correctly framed its analysis by scrutinizing the adequacy of RICO’s jurisdictional nexus requirement, rather than placing great weight on the mere fact that the requirement exists.²³⁷

d. RICO’s Jurisdictional Nexus. The *Nascimento* court and Chief Justice Boudin’s concurring opinion each noted that RICO, by its terms, has a jurisdictional nexus requirement.²³⁸ This requirement, as Boudin emphasized, requires a jury to find that the particular enterprise affected interstate commerce.²³⁹ The jurisdictional nexus requirement found in RICO does indeed distinguish it from the statutes at issue in *Raich*, *Morrison*, and *Lopez*.²⁴⁰

However, the *Nascimento* court, particularly the concurring opinion, blindly pointed to the existence of the nexus requirement as opposed to scrutinizing its adequacy within the context of the *Nascimento* facts.²⁴¹ In other words, the key issue should be whether a noneconomic RICO enterprise can satisfy the jurisdictional nexus requirement with a mere *de minimis* effect on interstate commerce and whether this is constitutional under the Commerce Clause. Given this framework, it is by no means dispositive that the jury in *Nascimento* concluded that Stonehurst’s activities affected interstate commerce, because they were instructed that a *de minimis* connection suffices.

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

236. *See id.* (analyzing the *Morrison* holding).

237. *See id.*

238. *See United States v. Nascimento*, 491 F.3d 25, 30 (1st Cir. 2007); *id.* at 51 (Boudin, C.J., concurring); *see also* 18 U.S.C. § 1962(c) (2006) (providing RICO’s jurisdictional nexus requirement).

239. *Nascimento*, 491 F.3d at 51 (Boudin, C.J., concurring).

240. *See id.* at 52 (“*Lopez* and *Morrison* concerned statutes that did not require any jury finding that the conduct in the particular case used facilities of interstate commerce or affected such commerce.”); *see also id.* at 43 (majority opinion) (noting that the Controlled Substances Act §§ 841(a)(1) and 844(a) at issue in *Raich* did not have a nexus requirement).

241. *See id.* at 52 (Boudin, C.J., concurring) (discussing RICO’s jurisdictional nexus requirement).

The *Nascimento* court concluded that RICO, as applied to an enterprise engaged exclusively in noneconomic violent activity, did not offend the Commerce Clause.²⁴² It based this assumption in large part on a vaguely worded principle set forth in *Raich*, a case that is clearly distinguishable on multiple grounds.²⁴³ The court improperly broadened the *Raich* miniaturization principle and, as a result, *Nascimento* effectively declared that any as-applied challenge to the RICO statute based on the Commerce Clause cannot stand.²⁴⁴ This simply cannot be the case. The appellants in *Nascimento* put forth, as the court itself acknowledged, convincing arguments that RICO violated the Commerce Clause as applied to Stonehurst's activities.²⁴⁵ The appellants deserved to have the arguments addressed on the merits, and the *Nascimento* court's conclusion has far reaching policy implications beyond the fate of the small-time Boston street gang.

IV. CONSEQUENCES OF RICO'S BROADENED APPLICABILITY

A. *Impingement on Police Power*

Although it is easy to get lost in the minutia of the *Nascimento* court's complicated opinion, it is important to note that at the end of the day, the First Circuit has allowed the U.S. Congress to regulate noneconomic, intrastate violent activity with a minimal effect on interstate commerce.²⁴⁶ Stonehurst was a low-level street gang engaged in garden-variety violent activity, and now some of its members are sitting in federal prison.²⁴⁷ This decision, along with RICO's continued expansion, constitutes federal impingement on state police power and raises real concerns about federalism in the United States.

As the Supreme Court has stated on numerous occasions, "The Constitution requires a distinction between what is truly national and what is truly local."²⁴⁸ The *Morrison* Court called this one of the "few principles that has been consistent since the

242. *Id.* at 40–41 (majority opinion).

243. *See supra* Part III.C.2 (analyzing whether RICO is unconstitutional as applied to a noneconomic enterprise that does not substantially affect interstate commerce).

244. *See supra* Part III.C.2 (distinguishing the activities at issue in *Nascimento* from the quintessentially economic activities at issue in *Raich*).

245. *Nascimento*, 491 F.3d at 40–43.

246. *See id.* at 30.

247. *Id.* at 30–31.

248. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 567–68 (1995)).

[Commerce] Clause was adopted” and noted that the Court has firmly established that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”²⁴⁹ Indeed, in 1821, the Supreme Court in *Cohens v. Virginia* stated that Congress has “no general right to punish murder committed within any of the States” and that “[i]t is clear, that Congress cannot punish felonies generally.”²⁵⁰ Sending a clear warning of the federalism implications found in Congress’s use of the Commerce Clause, the *Morrison* Court declared that “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”²⁵¹

The federal government has always walked a thin line with RICO.²⁵² Indeed, RICO defines “racketeering activity” as any number of crimes “chargeable under State law.”²⁵³ The U.S. Department of Justice recognized the federalism implications of RICO when it stated in its U.S. Attorney Manual, “Utilization of the RICO statute . . . requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes.”²⁵⁴

The breadth of RICO has been studied and debated at length, but it is well settled that RICO is a broad and amorphous statute.²⁵⁵ By its very terms, RICO targets state crimes. However,

249. *Id.* at 618.

250. *Cohens v. Virginia*, 19 U.S. 264, 426, 428 (1821).

251. *Morrison*, 529 U.S. at 618. The *Morrison* Court went on to point to language from *Lopez* stating that “[t]he Constitution . . . withhold[s] from Congress a plenary police power.” *Id.* (quoting *Lopez*, 514 U.S. at 566).

252. *See supra* Part II.A–B (discussing RICO’s inception and subsequent broadened applicability).

253. 18 U.S.C. § 1961(1) (2006). Commentators have also claimed that RICO’s civil provisions intrude upon areas typically regulated by state law. *See* Michael Goldsmith & Mark Jay Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735, 737 (1990). Expressing a similar concern, Justice Powell, in his dissent in *Sedima, S.P.R.L. v. Imrex Co.*, stated that the majority’s interpretation of the civil RICO statute has authorized the statute to apply to “the types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 524 (1985) (Powell, J., dissenting).

254. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, § 9–110.200 (1999), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html. As a result of the fact that many criminal statutes are broadly written, a great deal of responsibility lies with prosecutors. This is especially true with broad federal statutes. *See generally* Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000).

255. *See supra* notes 24–33 and accompanying text (describing the broad applicability of RICO resulting from the ambiguous language employed by its drafters).

when RICO is applied to noneconomic enterprises engaged exclusively in intrastate violent activity, federalism's last line of defense is RICO's "affecting commerce" requirement.²⁵⁶ By establishing a standard, as the First Circuit has done, that allows for a minimal effect on interstate commerce to suffice for a RICO conviction in this situation, the federal government is effectively given a free hand to punish state criminal activity.²⁵⁷ The fate of federalism, therefore, is subject to the whim of prosecutorial discretion.²⁵⁸

The First Circuit in *Nascimento* made clear that it had no intention of reining in this federal intrusion on state police power.²⁵⁹ For instance, Chief Judge Boudin stated, in regard to RICO's commerce requirement, "Conceivably, the link in a particular case may be too slight or faint; every murder is of someone whose next meal might otherwise have come from a large supermarket chain purchasing its products interstate."²⁶⁰ The principle of federalism deserves greater protection than this.

B. Disparate Treatment of Criminals

Ryan M. Schiff, an attorney who represented one of the defendants in the *Nascimento* case, lamented after the verdict was handed down, "[H]ad the prosecution been brought in, say, Michigan, rather than in Massachusetts, the defendants in all likelihood would have gained acquittal . . . Instead, my client has a 14-year sentence."²⁶¹ Mr. Schiff identified a key consequence that is likely to occur as a result of the split between

256. See *Morrison*, 529 U.S. at 618 (warning of the federalism implications of Congress's use of the Commerce Clause and asserting that the regulation of criminal activity is a key component of the states' police power).

257. See *Lynch*, *supra* note 33, at 714–15, 715 n.232 (calling RICO's jurisdictional requirement a "polite fiction" and stating that the statute has "swallowed large chunks of the state penal codes").

258. See *Simons*, *supra* note 254, at 930 (stating that "prosecutors enjoy wide, almost unfettered, discretion" in deciding whom to charge and what charges to bring); see also *Lynch*, *supra* note 33, at 716 ("[T]he division of responsibility between the states and the federal government should be organized on some rational principle, with the areas of federal involvement specifically defined, rather than permitting discretionary federal intervention into a broad range of local crimes whenever prosecutors choose to intervene."). For a discussion about the federalization of the effort to fight organized crime and the subsequent erosion of the Commerce Clause, see Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984).

259. The *Nascimento* court did, however, acknowledge that, in regard to RICO's "affecting commerce" requirement, "the government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern." *United States v. Nascimento*, 491 F.3d 25, 41 (1st Cir. 2007).

260. *Id.* at 53 (Boudin, C.J., concurring).

261. *Berkman*, *supra* note 1.

the First and Sixth Circuits: the disparate treatment of criminal defendants.²⁶² Defendants, as a result of the different standards set forth in *Nascimento* and *Waucaush*, will receive vastly different punishments for committing the same crime depending on their geographical location. As Mr. Schiff stated, “[t]his is a major concern within the federal system.”²⁶³

This discrepancy in criminal punishment is exacerbated by the fact that the federal system does not have parole, and federal sentencing guidelines for RICO violations are very strict.²⁶⁴ Thus, although Mr. Nascimento may receive some credit for “good time,” he will serve the vast majority of his 171-month federal prison sentence.²⁶⁵ This prison time is, of course, in addition to any state law prison time. Furthermore, as evidenced by Mr. Nascimento’s 171-month prison term, federal sentencing guidelines for a substantive criminal RICO violation are strict. According to section 2E1.1 of the Federal Sentencing Guidelines, violation of RICO is punishable by a base offense level 19 or the “offense level applicable to the underlying racketeering activity,” whichever is greater.²⁶⁶ Thus, according to the Federal Sentencing Guidelines, a RICO convict could be sentenced anywhere from thirty to seventy-eight months.²⁶⁷ However, if the underlying racketeering activity is, for example, first degree homicide, the RICO convict would in all likelihood receive an automatic life sentence.²⁶⁸ The consequences of a RICO conviction on top of state law punishment, therefore, are obviously severe and worthy of scrutiny.

Disparate treatment of criminals in the United States has many different implications for the national penal system as a whole, from both a practical and a policy standpoint. Although a detailed discussion is beyond the scope of this Comment, under any theory of criminal punishment, prosecuting some criminals and not others under federal law for the same crime based on arbitrary geographic location is bad policy.²⁶⁹ Indeed, disparate

262. See *supra* Part III (analyzing the circuit split).

263. Berkman, *supra* note 1.

264. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2008) [hereinafter SENTENCING GUIDELINES] (stating that the Comprehensive Crime Control Act of 1984 requires the offender to serve virtually all of any prison sentence imposed because it “abolishes parole and substantially reduces and restructures good behavior adjustments”); see also *infra* notes 266–68 and accompanying text (discussing the specifics of a RICO conviction).

265. See SENTENCING GUIDELINES, *supra* note 264, § 1A1.2.

266. SENTENCING GUIDELINES, *supra* note 264, § 2E1.1.

267. SENTENCING GUIDELINES, *supra* note 264, § 2A1.1.

268. See SENTENCING GUIDELINES, *supra* note 264, § 2E1.1.

269. For an analysis of the theories of criminal punishment, see WAYNE R. LAFAVE,

treatment of criminals arguably raises constitutional concerns as well.²⁷⁰ This disparate treatment, as created by the circuit split, offends the U.S. criminal justice system's goal of uniform administration of justice.²⁷¹

V. POTENTIAL REMEDY

The U.S. Supreme Court has on numerous occasions attempted to clarify the ambiguous provisions of RICO.²⁷² As Justice Scalia stated in his concurring opinion in *H.J. Inc. v. Northwestern Bell Telephone Co.*, “Four Terms ago . . . we gave lower courts . . . four clues concerning the meaning of the enigmatic term ‘pattern of racketeering activity’ . . . Thus enlightened, the District Courts and Courts of Appeals . . . promptly produced the widest and most persistent Circuit split on an issue of federal law in recent memory.”²⁷³ After criticizing the majority's guidance in regard to RICO's terms, Justice Scalia conceded that “[i]t is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more

SUBSTANTIVE CRIMINAL LAW § 1.5 (2d ed. 2003). According to LaFave, the “broad purposes of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable.” *Id.*; see also *Ewing v. California*, 538 U.S. 11, 25 (2003) (stating that criminal punishment can have many justifications, including “incapacitation, deterrence, retribution, or rehabilitation”).

270. See *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (“Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940))); *United States v. Berrigan*, 482 F.2d 171, 174 (3d Cir. 1973) (“[G]overnment is permitted ‘the conscious exercise of some selectivity’ in the enforcement of its criminal laws [but] any ‘systematic discrimination’ in enforcement or ‘unjust and illegal discrimination between persons in similar circumstances violates the equal protection clause and renders the prosecution invalid” (citations omitted)). State and federal criminal law do not have to be consistent, but under equal protection, the federal “body of law” must be “evenhanded.” See *United States v. Antelope*, 430 U.S. 641, 649 (1977). But see *People v. Haynes*, 664 N.W.2d 225, 228 (Mich. Ct. App. 2003) (“[T]he disparate treatment of criminal offenders . . . is generally viewed as not affecting an individual's fundamental interests.”).

271. In a somewhat analogous situation, the Tenth Circuit found itself in the midst of a circuit split in regard to the “plain error” rule in *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005). Judge Lucero, in his dissent, stated, “This wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court.” *Id.* at 763 (Lucero, J., dissenting).

272. See, e.g., *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 14–17 (2006) (discussing RICO's inclusion of extortion as a “pattern of racketeering activity”); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (holding that boxing promoter was a “person” separate and distinct from a RICO enterprise); *Sedima, S.P.R.L. Imrex Co.*, 473 U.S. 479, 488 (1985) (asserting that a criminal conviction is not a necessary prerequisite to a civil RICO action).

273. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring).

g[ul]diance concerning its application.”²⁷⁴ However frustrating the perennial cause of clarifying RICO may be, it is time to call upon the High Court to engage in this endeavor once again.

When the Supreme Court will be able to clarify RICO’s provisions is unclear, as the Court passed on the opportunity created by the *Nascimento* decision. The appellants filed a writ of certiorari with the Supreme Court on November 26, 2007.²⁷⁵ The Court rejected the writ on March 31, 2008.²⁷⁶

Although the Court declined to directly hear the *Nascimento* case and even though the road to RICO’s clarification is littered with obstacles of statutory construction, the Supreme Court must eventually attempt to rectify the *Nascimento* court’s expansive interpretation of RICO.²⁷⁷ When this time comes, the end result, as mandated by decades of Commerce Clause jurisprudence, must be a decree from the Court that the RICO statute is unconstitutional as applied to enterprises engaged exclusively in intrastate, violent activity with a *de minimis* connection to interstate commerce.

VI. CONCLUSION

The goal of this Comment is not to suggest that the United States should be softer on crime. Nor is it to cast blame on federal prosecutors for attempting to incarcerate criminals. It is, however, a goal of this Comment to identify a statute that has been greatly overextended to the detriment of the Constitution and the federal system. The fact that RICO has always been vague and ambiguous with multifarious interpretations is no excuse for its current application to noneconomic “enterprises” engaged exclusively in intrastate violent activity. The regulation of this type of activity is firmly within the province of the several states. As Justice Thomas noted in his *Lopez* concurrence, the first federal criminal act in 1790 did “not establish nationwide prohibitions against murder and the like.”²⁷⁸

The First Circuit in *Nascimento* improperly allowed RICO to reach the small-time Stonehurst street gang, a noneconomic “enterprise” engaged exclusively in intrastate violent activity.²⁷⁹

274. *Id.* at 254–55.

275. *See* Petition for Writ of Certiorari, *United States v. Nascimento*, 491 F.3d 25 (1st Cir. 2007) (No. 07-7925).

276. *Nascimento v. United States*, 128 S. Ct. 1738 (2008).

277. *See supra* Part III.A (analyzing the *Nascimento* opinion).

278. *United States v. Lopez*, 514 U.S. 549, 597 n.6 (1995) (Thomas, J., concurring).

279. *See Nascimento*, 491 F.3d at 30 (noting Stonehurst’s “primary purpose” of directing violence at a rival local gang).

The *Nascimento* court struggled with the issue of whether RICO was unconstitutional as applied to the Bostonian street gang and acknowledged the potential negative implications of its holding.²⁸⁰ Ultimately, however, the *Nascimento* court approved RICO's application to Stonehurst by improperly dismissing *Morrison* from its analysis and exclusively relying on the *Raich* "miniaturization" principle, a vague concept with little applicability to the *Nascimento* case.²⁸¹ This decision gives federal prosecutors in the First Circuit virtually unfettered discretion to apply RICO to any number of individuals who fall under the amorphous term "enterprise."²⁸² The end result is federal impingement on state police power and disparate treatment of criminals throughout the United States.²⁸³

Jackson Nascimento deserved to be punished. He deserves to be behind bars. Those bars, however, should be ones built and maintained by the state of Massachusetts, not the federal government.

William Roquemore Taylor

280. See *id.* at 41 ("[T]he government's theory here, aggressively pursued, might threaten to trespass on an area of traditional state concern.").

281. See *supra* Part III.C.2.b–c (discussing the *Nascimento* court's analysis of *Raich* and *Morrison*).

282. See *supra* note 254 (discussing the importance of prosecutorial discretion in RICO prosecutions).

283. See *supra* Part IV.A–B (discussing the consequences of RICO's broadened applicability).