GANGING UP ON RICO: NARROWING *GONZALES V. RAICH* TO PRESERVE THE SIGNIFICANCE OF THE JURISDICTIONAL ELEMENT AS A CONSTITUTIONAL LIMITATION IN THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

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I. INTRODUCTION

Almost four years after the Supreme Court decided *Gonzales v. Raich*,[1] its uncertain effect on as-applied constitutional challenges remains visible in many lower federal court decisions. Circuit courts struggle to determine when and how to apply *Raich*'s "broad regulatory-scheme principle," which, when liberally construed, states that Congress may regulate any intrastate activity so long as the regulation is rationally included within a broad statutory scheme.[2] Lower federal courts are faced with unanswered questions about the scope of the broad regulatory-scheme

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

2. The broad regulatory-scheme principle referred to throughout this Note was first introduced as the "comprehensive scheme" principle. Michael C. Blumm & George A. Kimbrell, Letter to the Editor, *Clear the Air:* Gonzales v. Raich*, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 492 (2005).

principle, particularly whether the principle applies to a statute that does not regulate a "fungible commodity,"[3] and whether *Raich* governs when the principle's application will extinguish the viability of as-applied challenges to criminal statutes that include explicit jurisdictional elements.[4] The latter of these two questions provides the basis for this Note, which suggests an answer to the jurisdictional-element question in the context of the Racketeer Influenced and Corrupt Organizations Act ("RICO")[5] as applied to noneconomic gang activity.[6]

In July of 2007, the First Circuit affirmed the convictions under RICO, a federal statute, of several young members of a Boston-area street gang for multiple offenses in *United States v. Nascimento*.[7] Although the street gang engaged only in violent criminal activity at the local level—activity that this Note will argue is both noneconomic and intrastate—and the RICO statute required a particular nexus with interstate commerce in order to convict thereunder, the members were tried for offenses violating RICO in federal court, found guilty of these federal crimes, and sentenced according to the federal sentencing guidelines.[8] The First Circuit found that the district court did not err by applying the firmly established de minimis standard to the jurisdictional element of RICO in order to satisfy the nexus with interstate commerce required by the federal statute.[9] In its opinion, the

3. *Raich*, 545 U.S. at 18. One court seized on the language in *Raich* concerning the fungible nature of marijuana as a means of justifying its decision to uphold federal regulation of child pornography, analogizing marijuana and child pornography based on the fact that both are commodities with an interstate market and implicitly suggesting that regulation of a fungible commodity was a necessary prerequisite for *Raich* to apply. United States v. Forrest, 429 F.3d 73, 78–79 (4th Cir. 2005); *infra* notes 195–98 and accompanying text.

4. *See* George D. Brown, *Counterrevolution?—National Criminal Law After* Raich, 66 OHIO ST. L.J. 947, 997 (2005) ("Attention will now turn to one of the most controversial issues in federal criminal law: the role of jurisdictional elements in criminal statutes passed under the commerce power.").

5. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68 (2000).

6. *See infra* Part V.

7. United States v. Nascimento, 491 F.3d 25, 29–30 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) (holding that a street gang involved in noneconomic, violent criminal activity may serve as an enterprise which affects interstate commerce for purposes of satisfying the jurisdictional requirement of RICO). Although the appellants were also convicted under the Violent Crimes in Aid of Racketeering Activity statute, 18 U.S.C. § 1959, only the RICO convictions are addressed in this Note. In addition, *Nascimento* has possible First Amendment implications, including concerns about the abridgment of the "right of the people peaceably to assemble," that are not addressed here. *See* U.S. CONST. amend. I.

8. *Nascimento*, 491 F.3d. at 30–31; *3 Gang Members Sentenced to Prison*, BOSTON GLOBE, Dec. 17, 2005, http://www.boston.com/news/local/massachusetts/articles/2005/12/17/3_gang_members_sentenced_to_prison/ (noting that pursuant to federal guidelines, Nascimento was sentenced to fourteen years and three months in jail).

9. *Nascimento*, 491 F.3d at 40 ("We conclude, therefore, that the district court did not err in

First Circuit refused to follow the logic employed three years earlier by the Sixth Circuit in *Waucaush v. United States*,[10] an almost factually identical case holding that the doctrine of constitutional avoidance[11] requires that a substantial effect on interstate commerce be established for the successful conviction of a member of a noneconomic street gang under RICO.[12] Instead, the First Circuit explicitly analogized *Nascimento* to *Raich*, a case decided after *Waucaush*, and applied the broad regulatory-scheme principle to the RICO statute to determine that the de minimis standard was indeed correct.[13] Because *Raich* and the broad regulatory-scheme principle governed, the First Circuit was also unmoved by the defendant's argument that the noneconomic street gang enterprise which purportedly satisfied the jurisdictional element of the RICO charge fell short of the requirement that it "affect[] interstate . . . commerce."[14] Thus, it did not invalidate RICO, as applied to intrastate violent criminal gang activity, as a constitutional exercise of Congress's commerce power based on the broad regulatory-scheme principle.[15]

Although the First Circuit applied *Raich* to RICO without hesitation in *Nascimento*, the lower federal courts are split as to how *Raich* should apply in cases involving statutes that state explicit jurisdictional requirements.[16] While insertion of a jurisdictional element is meant to ensure that a statute satisfies a required nexus to interstate commerce,[17] and thus supports the facial constitutionality of a statute,[18] applying the broad regulatory-scheme principle to a statute renders a potentially insufficient jurisdictional element

refusing to deviate from the accepted meaning of the phrase 'affect[ing] . . . commerce.'").

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

11. The doctrine of constitutional avoidance is described as follows: "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909).

12. *Waucaush*, 380 F.3d at 256–57 (stating that the government is "obligat[ed] to show that the [enterprise's] effect on commerce was substantial"); *Nascimento*, 491 F.3d at 41 ("The *Raich* decision . . . is more directly on point . . . .").

13. *Nascimento*, 491 F.3d at 41–43.

14. *Id.* at 37 (quoting 18 U.S.C. § 1962(c) (2000)).

15. *Id.* at 41–43.

16. *See infra* Part IV.

17. Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of* Raich*: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2102 (2006) (stating that a jurisdictional element is "a statutory clause requiring that the regulated activity have a connection with interstate commerce").

18. David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 48 (2006) (stating that a jurisdictional element is "a saving clause on the face of the law").

almost completely meaningless for constitutional purposes. The First Circuit's application of the broad regulatory-scheme principle in *Nascimento* demonstrates how *Raich* can affect a lower court's treatment of an as-applied challenge to a statute that contains a jurisdictional element in a way that, one scholar has argued, fails to respect the importance of the jurisdictional requirement, as "[t]here is no question that the Supreme Court intends for jurisdictional elements to carry significant meaning."[19]

An examination of the First Circuit's reasoning in upholding RICO as constitutional when applied to wholly noneconomic street gang activity highlights the need for Supreme Court clarification on the issue of whether the broad regulatory-scheme principle is applicable to RICO. The decision in *Nascimento* illustrates the way that courts are using *Raich* to prevent the success of as-applied constitutional challenges to the statute. In *Nascimento*, the First Circuit chose to diverge from the case-by-case substantial-effects analysis required by the jurisdictional element advocated in *United States v. Lopez*,[20] and utilized by the Sixth Circuit in *Waucaush*.[21] The First Circuit upheld RICO's constitutionality by relying on the Supreme Court decision in *Raich*.[22] In *Raich*, four plaintiffs argued that growing and possessing marijuana in California for noneconomic medicinal purposes should not subject them to federal prosecution; however, by a vote of 6-3, the Supreme Court held—without explicitly overruling or questioning *Lopez*—that Congress does have the constitutional authority to regulate the plaintiffs' marijuana cultivation and possession.[23] In *Nascimento*, the First Circuit stated that *Raich* "offers meaningful guidance as to how courts should approach as-applied challenges under the Commerce Clause," and thus is instructive on the constitutional issue of congressional regulation of noneconomic intrastate street gang activity under RICO.[24] Although *Raich* dealt with a fungible commodity and *Nascimento* dealt with noneconomic gang activity,[25] the First Circuit insisted that *Raich* allowed for and approved of congressional

19. Stuckey, *supra* note 17, at 2107.

20. United States v. Lopez, 514 U.S. 549, 558 (1995) (listing the categories of activity that Congress is permitted to regulate under the Commerce Clause).

21. Waucaush v. United States, 380 F.3d 251, 254–57 (6th Cir. 2004).

22. United States v. Nascimento, 491 F.3d 25, 41–43 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008).

23. Gonzales v. Raich, 545 U.S. 1, 3, 6–9 (2005).

24. *Nascimento*, 491 F.3d at 38 n.4, 41.

25. *See infra* Part III.B. The First Circuit addressed this issue but quickly dismissed it, stating that it "refuse[d] to accord decretory significance to a distinction that the *Raich* majority did not deem decisive. The majority emphasized that it is the 'class of activity' that is relevant." *Nascimento*, 491 F.3d at 42 (quoting *Raich*, 545 U.S. at 17).

regulation of noneconomic intrastate activity so long as that activity fell within the class of activity properly targeted by a broad federal regulatory scheme.[26] This formulation of *Raich* suggests that the class-of-activity framework replaces the jurisdictional element required by the criminal RICO statute,[27] and gives no credence to the intrastate and noneconomic nature of the activity.[28]

Unfortunately, the First Circuit's opinion in *Nascimento* failed to satisfactorily address the glaring differences between it and *Raich*. Also, in relying on *Raich*, the First Circuit implied that the broad regulatory-scheme principle always applies when a broad regulatory scheme is involved, limiting *Lopez*'s focus on case-by-case analysis provided by the jurisdictional element to only a few instances of narrow facial challenges to overbroad federal regulations. This interpretation creates a seemingly counterintuitive limitation that causes Commerce Clause jurisprudence to diverge from the Court's usual preference for as-applied challenges in almost all other areas.[29] Moreover, this application of the broad regulatory-scheme principle seems to eviscerate the significance of the jurisdictional element stressed in *Lopez* as an important tool in congressional legislation and allows limitless expansion of RICO, creating a constitutional problem that cannot easily be remedied. Interestingly, the *Raich* majority does not directly address the question of how a case involving wholly noneconomic intrastate violent gang activity should be analyzed, but the First Circuit argued forcefully that *Raich* dictated its decision to uphold federal regulation of noneconomic gang activity under RICO.[30] Other courts have dealt with similar quandaries with varying results, demonstrating the uncertainty concerning how broadly or narrowly *Raich* should be applied in contemporary Commerce Clause jurisprudence.[31]

This Note argues that, contrary to the First Circuit's opinion, *Raich*

26. *Nascimento*, 491 F.3d at 41–43.

27. The *Raich* Court did not limit *Raich*'s holding by describing the broad regulatory scheme as applying to only statutes without jurisdictional elements, but also did not explicitly state that the broad regulatory scheme applies to statutes with jurisdictional elements. *See Raich*, 545 U.S. 1.

28. *Nascimento*, 491 F.3d at 41–43.

29. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))). *See also* Alex Kreit, *Rights, Rules, and* Raich, 108 W. VA. L. REV. 705, 706 (2006) ("After *Raich* . . . facial challenges appear to be the only type of Commerce Clause challenge that remains viable."). *See generally* Franklin, *supra* note 18 (detailing the long history of the Supreme Court's strong preference for as-applied constitutional challenges over facial ones).

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

31. *See infra* Part IV.

and the broad regulatory-scheme principle should not govern an as-applied Commerce Clause challenge to the constitutionality of RICO. It focuses on the jurisdictional element contained in RICO, concluding that the presence of a jurisdictional element as a constitutional constraint should bar application of the broad regulatory-scheme principle. Part II discusses Congress's power under the Commerce Clause, focusing on the period of change in Commerce Clause jurisprudence from 1995 to the present and detailing the main doctrinal techniques available for congressional regulation after *Raich*: aggregation, the jurisdictional element, and the broad regulatory scheme. It also briefly discusses the doctrine of constitutional avoidance as an offshoot of the more restrictive interpretations of the Commerce Clause following *Lopez*. Part III examines the RICO statute and details the First Circuit's application of the broad regulatory-scheme principle to RICO in *Nascimento* as well as the Sixth Circuit's decision in *Waucaush*. Part IV examines the different approaches lower courts have employed in adjudicating whether *Raich* and the broad regulatory-scheme principle apply to statutes with jurisdictional elements. Part V concludes by advocating that the Supreme Court narrow *Raich* in the context of as-applied challenges to RICO in order to preserve meaning for the jurisdictional element and require case-by-case analysis of the economic nature and substantial effect on interstate commerce of the regulated activity, rather than blindly deferring to Congress regarding the class of activity constitutionally regulated by RICO.

II. COMMERCE CLAUSE HISTORY AND THE RECENT REEMERGENCE OF FEDERALIST PRINCIPLES

The Supreme Court has long struggled to define the scope of congressional authority within the context of our nation's federalist principles. Although the Court must interpret multiple sections of the Constitution and Bill of Rights which confer specifically enumerated powers upon Congress,[32] articulating the scope and limits of the Commerce Clause has presented the most difficulty over the years.[33] This part briefly introduces the history of Commerce Clause jurisprudence, concentrating on the Court's recent treatment of jurisdictional elements and the broad regulatory-scheme principle. Part II.A highlights the ever-changing views of the Supreme Court as reflected in early Commerce Clause cases. Part

32. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 (power to tax); U.S. CONST. art. I, § 8, cl. 4 (power to regulate naturalization); U.S. CONST. amend. XIII (power to enforce prohibition of slavery and involuntary servitude, except as punishment for crime).

33. *See infra* Part II.A.

II.B focuses on the period following *Lopez* in 1995 and before *Raich* in 2005, synthesizing the cases that defined Commerce Clause jurisprudence before *Raich* and introducing the concept of the jurisdictional element and the constitutional avoidance doctrine. Part II.C analyzes the developments in *Raich*, centering on the Court's focus on the broad regulatory-scheme principle as a statutory tool.

A. EARLY COMMERCE CLAUSE JURISPRUDENCE

The Commerce Clause serves as the authority for a wide range of federal legislation, including the 1964 Civil Rights Act, the Endangered Species Act, and RICO.[34] This provision vests authority in Congress "[t]o regulate Commerce . . . among the several States."[35] This authority, however, is limited by the Tenth Amendment and the foundational principles of federalism, and the uncertain breadth of these limitations has resulted in the current fragmented state of Commerce Clause jurisprudence. Two hundred years of conflicting Supreme Court Commerce Clause decisions illustrate the difficulty of interpreting this clause in light of our nation's historical emphasis on the protection of states' rights.

Beginning with *Gibbons v. Ogden*[36] in 1824, the Supreme Court has espoused shifting views on the significance and scope of the Commerce Clause. In *Gibbons*, the Supreme Court initially adopted an expansive interpretation of the commerce power, defining commerce among the states as "commercial intercourse between . . . parts of nations,"[37] requiring only that "[c]ommerce among the states []not stop at the external boundary line of each State, but . . . be introduced into the interior."[38] Further, the Court decreed that the power to regulate commerce, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[39] The Court did place limits on the commerce power, however, by acknowledging that Congress's authority under the Commerce Clause does not reach intrastate activities which "are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general

34. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000); Endangered Species Act, 16 U.S.C. §§ 1531–44 (2000); RICO, 18 U.S.C. §§ 1961–68 (2000).

35. U.S. CONST. art. I, § 8, cl. 3.

36. Gibbons v. Ogden, 22 U.S. 1 (1824).

37. *Id.* at 189–90.

38. *Id.* at 194.

39. *Id.* at 196.

powers of the government."[40] These different-facing messages from the Court in *Gibbons* led to more than sixty years of uncertainty, as the Court vacillated between broad and narrow conceptions of the commerce power.[41]

By the end of the nineteenth century, the Court began a general movement toward narrowing its interpretation of congressional commerce power to exclude intrastate activity, emphasizing the portions of *Gibbons* that placed limitations on the commerce power and striking down many laws as unconstitutionally exceeding its scope.[42] During this time, the Court restricted the definition of "commerce" to include only one stage of business, thereby excluding mining, manufacturing, and production from Congress's legitimate purview.[43] The Court stressed that this distinction between commercial power and police power was necessary to aid "the preservation of the autonomy of the states" which is "required by our dual form of government."[44] Additionally, the definition of "among the states" became confined to situations where a direct effect on interstate commerce existed.[45] Most drastically, the Court held that, even if a law was constitutionally within the scope of Congress's commerce power, if the law invaded the sovereignty of the states, it was unconstitutional.[46]

This generally narrow interpretation persisted until 1937, when the

40. *Id.* at 195.

41. *See, e.g.*, Trade-Mark Cases, 100 U.S. 82, 97–99 (1879) (invalidating a federal law which established a federal system for registering trademarks because it applied to wholly intrastate business transactions); The Daniel Ball, 77 U.S. 557, 566 (1870) (holding that Congress had broad authority to license ships, whether they operated entirely intrastate or interstate when the boats carried goods from or for another state), *superseded by* Clean Water Act, Pub. L. No. 92-500, § 502, 86 Stat. 816, 886 (1972).

42. *But see* Champion v. Ames (The Lottery Case), 188 U.S. 321, 363–64 (1903) (upholding a federal law prohibiting the interstate shipment of lottery tickets). Some scholars suggest that this late-nineteenth to early-twentieth century Court read the Commerce Clause expansively in "public morals" cases, like *Ames*, but narrowly when reviewing federal economic regulations. *See, e.g.*, Bradford C. Mank, *After* Gonzales v. Raich*: Is the Endangered Species Act Constitutional Under the Commerce Clause?*, 78 U. COLO. L. REV. 375, 382–83 (2007).

43. *See* United States v. E.C. Knight Co., 156 U.S. 1, 16–18 (1895) (holding that the Sherman Antitrust Act could not be used to stop a monopoly because the commerce power did not allow Congress to regulate manufacturing), *abrogated by* Wickard v. Filburn, 317 U.S. 111 (1942).

44. *Id.* at 13.

45. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (declaring the Live Poultry Code for New York City unconstitutional because it did not have a direct relationship to interstate commerce, stating that "where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power").

46. Hammer v. Dagenhart, 247 U.S. 251, 274 (1918) (invalidating federal regulation of the hours of child laborers as invading states' rights in "their exercise of the police power over local trade and manufacture"), *overruled by* United States v. Darby, 312 U.S. 100, 115–16 (1941).

Court turned again to a more expansive understanding of the Commerce Clause and refused to invalidate a single federal law as unconstitutionally exceeding the scope of congressional authority until 1995. The Court ushered in its more expansive interpretation of the Commerce Clause by overruling earlier, more conservative decisions, most notably, for purposes of this Note, in *Wickard v. Filburn*.[47] The Court extinguished the restrictive definition of commerce that excluded production and manufacturing from Congress's reach.[48] The Court also veered away from the interpretation that a federal law passed under the Commerce Clause could be "vetoed" by the Tenth Amendment.[49] Instead, the Court chose to include all phases of business within the scope of the commerce power and upheld federal laws regardless of their infringement on states' rights so long as they fell within the ambit of congressional authority. The Court stressed that intrastate activities that have "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress's broad reach.[50]

Most relevantly for this Note, the Court abandoned any distinction between direct and indirect effects on interstate commerce, instead announcing a rule allowing for regulation of any activity that, when aggregated with other like activities, had an effect on interstate commerce.[51] The Court announced this new technique in *Wickard*, holding that the Agricultural Adjustment Act, which set a quota for wheat production and gave each farmer an allotment, was constitutional as applied to a farmer who was fined for overproducing wheat primarily for home consumption.[52] The Court explained that, although the farmer's activities had only a negligible impact on interstate commerce, the Commerce Clause authorized Congress to regulate such intrastate activities if there was a rational basis for Congress to believe that those intrastate activities substantially affect interstate commerce when aggregated "together with that of many others similarly situated."[53] Thus, wholly intrastate activity was the subject of constitutional federal regulation during

47. *Wickard*, 317 U.S. 111.

48. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40 (1937) (finding "the fact that the employees . . . were engaged in production [was] not determinative").

49. *Darby*, 312 U.S. at 124 (holding that the Tenth Amendment is not used by the Court as a basis for invalidating federal laws because "[t]he amendment states but a truism that all is retained which has not been surrendered").

50. *Jones & Laughlin Steel*, 301 U.S. at 37.

51. *Wickard*, 317 U.S. at 127–28.

52. *Id.* at 113–29.

53. *Id.* at 127–28.

this period, while it almost certainly would not have fallen within the commerce power in the previous era, when a direct effect on interstate commerce was required.[54]

Wickard arguably served as the high-water mark of the Court's "deference to Congress's power to regulate intrastate activity under the Commerce Clause."[55] The effect of *Wickard*'s aggregation technique was to practically destroy the viability of both as-applied and facial Commerce Clause challenges.[56] Whether one's actions were purely local or had an effect on interstate commerce individually, the actions would be combined with those of other similarly situated individuals, and, if the activity in the aggregate had some impact on interstate commerce, a constitutional challenge would fail. Because every activity appears to impact interstate commerce if it is generally defined,[57] the requirement would be met every time, and the aggregation technique would leave no limit on Congress's commerce power.[58] This aggregation principle threatened the well-established noninfinity principle, which states that the "courts must guard federalism and state sovereignty by respecting the outer limits of Congress's Commerce Clause power."[59] Unfortunately, the Court left unclear which intrastate activities should be aggregated "in determining whether the effect upon interstate commerce justifies legislation under the Commerce Clause."[60]

Over the next fifty years, the Court continued to rely on economic effects to aggregate intrastate activities and to justify congressional regulation of commercial industries under the Commerce Clause, including civil rights legislation aimed at public accommodations.[61] In *Maryland v.*

54. *See supra* note 45 and accompanying text.

55. Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1860 (1997). *Perez v. United States*, 402 U.S. 146 (1971), discussed *infra* at notes 67–69 and accompanying text, is arguably more deferential than *Wickard*; however, *Wickard* is the main source of the substantive interstate commerce tool of aggregation, expanding on *Darby*.

56. *See* Kreit, *supra* note 29, at 710 (noting that the post-1937 Commerce Clause doctrine "functioned largely by eliminating even as-applied Commerce Clause challenges").

57. United States v. Lopez, 514 U.S. 549, 565 (1995) ("[D]epending on the level of generality, any activity can be looked upon as commercial.").

58. *See* Kreit, *supra* note 29, at 710.

59. Stuckey, *supra* note 17, at 2112.

60. Mank, *supra* note 42, at 387.

61. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 360 (1964) (holding that the commerce power, through the aggregation principle, authorized Congress to enact public accommodations provisions of the Civil Rights Act of 1964 prohibiting racial discrimination by motels serving interstate travelers, regardless of how local their operations might appear); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding that Congress had a sufficient basis to find that racial

Wirtz,[62] the Court provided some instruction with regard to the extent to which intrastate activities may be regulated. In *Wirtz*, the Court upheld an extension of the Fair Labor Standards Act ("FLSA"), which previously covered only employees "engaged in commerce or in the production of goods for commerce," to all employees employed in enterprises that engage in commerce or in the production of goods for commerce.[63] The Court held that the Commerce Clause authorized Congress to extend FLSA because federal regulation of workers in state schools and hospitals was necessary to FLSA's regulation of interstate competition among employers, among other reasons.[64] The Court stated that it was rational for Congress to believe that it was necessary to regulate an employer with employees not engaged in interstate commerce because, in the aggregate, the effect of "excis[ing], as trivial, individual instances" would undermine the effectiveness of FLSA as a whole.[65] The Court stressed that Congress could regulate intrastate activities with trivial impacts on commerce only if that regulation was part of a broad regulatory scheme bearing a substantial relationship to interstate commerce.[66] Thus, the Court approved aggregation of intrastate activities in the context of a broad regulatory scheme.

Later, in *Perez v. United States*, the Court again used aggregation to uphold the constitutionality of a federal law, this time a criminal law against "[e]xtortionate credit transactions."[67] In affirming the conviction of a man whose activities fell entirely intrastate and included lending money to the owner of a butcher shop and threatening violence when the butcher could not repay the loan within the agreed-upon time, the Court held that Congress could regulate a class of activities that significantly affected interstate commerce even though the regulated class might include some intrastate activities that might not affect interstate commerce.[68] The Court quoted *Wirtz* for the proposition that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class."[69]

discrimination at restaurants, which received a substantial portion of their food from out of state, had a direct and adverse effect on interstate commerce).

62. Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

63. *Id.* at 185–86.

64. *Id.* at 187, 190.

65. *Id.* at 193.

66. *Id.* at 189–90.

67. Perez v. United States, 402 U.S. 146, 147 (1971).

68. *Id.* at 148–55.

69. *Id.* at 154 (quoting *Wirtz*, 392 U.S. at 193).

Following this logic, there was a strong argument that Congress had the authority to regulate almost any activity—including criminal activity—without fear of overstepping its authority.

During this period, the Court suggested that Congress could regulate anything under the Commerce Clause power as long as a rational basis existed for believing that the activity had an effect on commerce.[70] Since the introduction of this rational basis test, Congress has regulated everything from purely intrastate strip mining[71] to stock in public utilities[72] pursuant to the Commerce Clause. This broad commerce power, which also served as the authority to enact many criminal laws, including RICO,[73] remained judicially unrestrained until the Supreme Court's 1995 Term.

B. THE *LOPEZ* TEST, JURISDICTIONAL ELEMENTS, AND CONSTITUTIONAL AVOIDANCE

In 1995, *Lopez* represented a dramatic reversion by the Supreme Court to long-dormant federalist principles that reemerged after sixty years of virtually limitless congressional regulation.[74] At the time, many saw *Lopez* as a landmark case ushering in the era of New Federalism.[75] In *Lopez*, the Court announced that *Wickard*'s aggregation technique did not, in fact, preclude all constitutional Commerce Clause challenges, whether facial or as applied.[76] In a very close 5-4 decision, the Court invalidated a federal law as unconstitutionally exceeding the commerce power for the first time since 1937.[77] The Court established the three-part *Lopez* test and held that the connection of the Gun-Free School Zones Act ("GFSZA") of 1990,[78] which made possession of a gun within a school zone a federal crime, to interstate commerce was far too attenuated for it to be a valid exercise of

70. Hodel v. Indiana, 452 U.S. 314, 323–24 (1981).

71. *Id.* at 323.

72. Am. Power & Light Co. v. SEC, 329 U.S. 90, 103–04 (1946) (holding that Congress has the power to regulate stock in a public utility).

73. *See infra* Part III.A.

74. *See supra* Part II.A.

75. The concept of New Federalism has a variety of connotations. For the purposes of this Note, New Federalism refers to the limits on federal regulatory authority under the enumerated powers of the Constitution. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 556–57 (1995); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430 (2002) (detailing "the Rehnquist Court's federalism revival"). For more information on the other connotations of New Federalism, see generally Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431 (2002).

76. *Lopez*, 514 U.S. at 556–57.

77. *See id.* at 550, 567.

78. 18 U.S.C. § 922(q)(1)(A) (2000).

the commerce power.[79] While insisting that the aggregation rule remained intact, the Court invalidated § 992(q) of the GFSZA and stated that *Wickard* was distinguishable because it "involved economic activity in a way that the possession of a gun in a school zone does not."[80]

In addressing the facial challenge to the GFSZA, the Court emphasized that the Constitution creates a national government of enumerated powers and set forth three types of activities that Congress may permissibly regulate under the commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce."[81] With respect to the third category, which was at issue in both *Lopez* and *Nascimento*, the Court noted that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce," and explained that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[82]

In distinguishing *Lopez* from *Wickard*, the Court first stressed that § 922(q) was not an essential part of a broader scheme regulating economic activity that would be undercut unless the intrastate activity was regulated.[83] Chief Justice Rehnquist then noted that the GFSZA included no jurisdictional element requiring proof that the gun in question had been part of interstate commerce, and also dismissed the government's findings concerning the activity's alleged substantial effects on interstate commerce.[84] Stressing the limiting—and saving—effect that a jurisdictional element would have on the GFSZA, the Court stated that a jurisdictional element would "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[85] The presence

79. *Lopez*, 514 U.S. at 551, 567.

80. *Id.* at 560. Curiously, however, *Wickard* involved noncommercial activity to which the aggregation doctrine was applied to uphold marketing quotas, and the "Court characterized the regulated activity . . . as something that 'may not be regarded as commerce.'" Kreit, *supra* note 29, at 711–12. Of course, in the language of economists, growing food for anyone or anything's consumption is economic activity, so the confusing distinction between commercial and noncommercial activity persists.

81. *Lopez*, 514 U.S. at 558–59.

82. *Id.* at 559–60.

83. *Id.* at 561. Later, however, the Court relied on the broad regulatory-scheme principle in *Raich*. *See infra* Part II.C. The Court defined economic in *Raich* as relating to the "production, distribution, and consumption of commodities." Gonzales v. Raich, 545 U.S. 1, 25 (2005) (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 720 (3d ed. 1966)).

84. *Lopez*, 514 U.S. at 561–63.

85. *Id.* at 561.

of a jurisdictional element would both "limit [the GFSZA's] reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce" and provide a useful signal to courts about the constitutionality of the statute on its face.[86] The dissenting judges criticized the majority's disregard for the rational basis test announced during the era of expansive interpretation, but the criticism was to no avail, as the *Lopez* majority demonstrated great concern that the dissent's deference to Congress would likely lead to regulation of "subjects such as family law and . . . education."[87] The *Lopez* majority clearly showed an interest in restricting its prior deference to Congress, stating that "[it] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . This we are unwilling to do."[88]

The test announced in *Lopez* seemed to solve at least some of the problems facing facial and as-applied constitutional challenges created by *Wickard*'s aggregation principle. By mentioning the broad regulatory scheme and jurisdictional element, the Court indicated two ways that the GFSZA failed to conform to proper federal legislative techniques, while at the same time reviving the viability of facial challenges to narrow, stand-alone federal laws. For the first time, and most relevant for this Note's purposes, the Court introduced the jurisdictional element into case law as a tool that would show that a statute is constitutional on its face, but still allow for case-by-case challenges of specific applications of the statute to intrastate activities which did not have a substantial effect on interstate commerce.[89] In fact, Congress later amended § 922(q) of the GFSZA to require that the gun "has moved in or . . . otherwise affects interstate commerce,"[90] which remedied the facial unconstitutionality of the statute, but still allowed for as-applied challenges to succeed if the government could not sufficiently prove the required nexus to interstate commerce.

Five years after *Lopez*, the Court again split 5-4 in addressing a facial challenge to the commerce power in *United States v. Morrison*, consequently reaffirming the viability of facial challenges by applying *Lopez*'s economic approach to the substantial effects test and finding a

86. *Id.* at 562.
87. *Id.* at 565.
88. *Id.* at 567–68.
89. *See* Stuckey, *supra* note 17, at 2107–08.
90. 18 U.S.C. § 922(q)(2)(A) (2000).

federal law unconstitutional.[91] In applying the *Lopez* test, the Court summarized the relevant considerations behind the third prong of the test: what the economic nature of the regulated activity is, whether the statute contains an express jurisdictional element to limit its reach, whether the statute's legislative history contains congressional findings on the impact of the regulated activity on interstate commerce, and whether the effects of the regulated activity on interstate commerce are attenuated.[92] Finding that the Violence Against Women Act ("VAWA")[93] failed to satisfy any of the four considerations behind the third prong, the *Morrison* Court invalidated the civil damages provision of the VAWA as exceeding the scope of Congress's commerce power because the regulated activity was "not, in any sense of the phrase, economic activity" and only tangentially related to interstate commerce.[94] The Court both noted that the statute in *Morrison* did not contain a jurisdictional element, and declared insufficient congressional findings concerning the effect of violence against women on the economy.[95] The Court explained further that "in those cases where [the Court] ha[s] sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."[96] Thus, it appeared that aggregation was appropriate only for economic activities.

Most significantly for purposes of this Note, the Court stated that "Congress elected to cast § 13981's remedy over a wider, and more purely intrastate, body of violent crime," instead of inserting a jurisdictional element that "would lend support to the argument that [the civil damages provision] is sufficiently tied to interstate commerce."[97] It seems clear here that the jurisdictional element would narrow the class of activities governed by the statute—thus supporting the facial constitutionality—not broaden it. The jurisdictional element would lend support to the contention that the statute was constitutional on its face, but it would also allow as-applied challenges to the VAWA to remain viable, something that would later be precluded by the application of the broad regulatory-scheme principle.[98] Finally, the Court stated, "regulation and punishment of intrastate violence

91. United States v. Morrison, 529 U.S. 598, 609–13 (2000) (restating the categories of activity that Congress may permissibly regulate under the Commerce Clause and concluding that violence against women is not such an activity).

92. *Id.* at 610–13.

93. 42 U.S.C. § 13981 (2000), *invalidated by Morrison*, 529 U.S. 598.

94. *See Morrison*, 529 U.S. at 613.

95. *Id.* at 613–15.

96. *Id.* at 611.

97. *Id.* at 613.

98. *See infra* Part II.C.

that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power . . . than the suppression of violent crime."[99] Thus, *Morrison* seemed to indicate that, in areas traditionally reserved for the states, Congress does not have authority to regulate noneconomic activity based on a cumulative substantial effect on interstate commerce.[100]

During its 2000 Term, the Court relied on the recent restrictive interpretations of the commerce power as a means to employ the constitutional avoidance doctrine in *Jones v. United States*.[101] In *Jones*, the Court limited the scope of the federal arson statute by holding that the incineration of private residences was beyond the reach of the statute.[102] The relevant part of the statute made it illegal for one to "damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building . . . used in interstate . . . commerce or in any activity affecting interstate . . . commerce."[103] The government argued that a private residence that had been set ablaze was "used" in activities affecting interstate commerce.[104] This interpretation of the statutory language would catch all arson in the sweeping net of federal jurisdiction, raising constitutional doubts as to whether Congress had exceeded the scope of its Commerce Clause power.[105] To avoid confronting the constitutional issue, the Court interpreted the statutory language narrowly so as to exclude private residences.[106] Thus, not finding the statute invalid, and remaining consistent with the New Federalist era ushered in by *Lopez* and *Morrison*, the Court rejected the government's reading of the statute as overly broad, consequently providing another tool for lawyers to challenge the potentially unlawful application of federal laws.

Thus, with *Lopez* and *Morrison*, the Court provided an answer to the questionable viability of facial challenges under *Wickard* and introduced jurisdictional elements as a way to ensure case-by-case analysis that would facilitate the viability of as-applied challenges to stand-alone statutes. With *Jones*, the Court demonstrated how constitutional avoidance might be used

99. *Morrison*, 529 U.S. at 618 (citations omitted).
100. *Id.* at 659–62 (Breyer, J., dissenting).
101. Jones v. United States, 529 U.S. 848 (2000).
102. *Id.* at 850–51.
103. 18 U.S.C. § 844(i) (2000).
104. *Jones*, 529 U.S. at 855.
105. *Id.* at 857.
106. *Id*. at 857–58.

to avoid the death-knell of constitutional doubt.[107] Unfortunately, however, the Court failed to clearly address the manner in which lower courts should address as-applied challenges to broad regulatory schemes in the wake of *Lopez*, *Morrison*, and *Jones*. The Court did not explain when constitutional avoidance is appropriate in Commerce Clause cases, nor did it clearly state the conditions for appropriate aggregation. The Court stated that, while it would not "adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[108] In leaving the possibility of aggregation open for purely intrastate noneconomic activity, the Court failed to distinguish when the aggregation technique and broad regulatory scheme would rule and when the *Lopez* test's economic focus would govern in an as-applied challenge to federal regulation of noneconomic activity. Because both *Lopez* and *Morrison* involved facial challenges, the Court did not address how the test might be used in as-applied challenges where the statute regulates commercial activity on its face but catches an individual's noncommercial actions as an offshoot, or what impact an explicit jurisdictional element might have in this situation.[109]

C. *GONZALES V. RAICH*: AN APPARENT MOVE TOWARD NONVIABILITY FOR AS-APPLIED CHALLENGES

For the purposes of this Note, the challenge to the Controlled Substances Act ("CSA")[110] in *Raich* serves as the most notable as-applied constitutional challenge the Court heard following *Lopez* and *Morrison*'s establishment of the New Federalism era. In *Raich*, Angel Raich, Diane Monson, and two caregivers filed suit seeking an injunction against the Drug Enforcement Agency after it seized six cannabis plants, cultivated and possessed for personal medicinal use, from Monson's home in 2002.[111] Pursuant to California's Compassionate Use Act,[112] the plaintiffs grew the medicinal marijuana for personal use, free of charge, exclusively in California, and using only California materials.[113] This situation fell perfectly into the realm of uncertainty left open by the Court's failure to

107. *See supra* notes 105–06 and accompanying text.
108. United States v. Morrison, 529 U.S. 598, 613 (2000).
109. See Kreit, *supra* note 29, at 711.
110. Controlled Substances Act, 21 U.S.C. §§ 801–904 (2000).
111. Gonzales v. Raich, 545 U.S. 1, 6–8 (2005).
112. CAL. HEALTH & SAFETY CODE §11362.5 (West 2006).
113. *Raich*, 545 U.S. at 7. *See also* Kreit, *supra* note 29, at 713 & n.44.

explain the relationship between *Wickard*'s aggregation principle and *Lopez*'s economic test. The plaintiffs challenged a generally valid federal law—a broad regulatory scheme without a jurisdictional element—that regulated commercial activity on its face but caught the plaintiffs' noncommercial conduct as an offshoot of the CSA's broad scheme to control the market for marijuana.

As a result, the Court was faced with the task of reconciling *Lopez*, *Morrison*, and *Wickard* in the context of federal regulation of wholly intrastate, noneconomic possession and cultivation of medicinal marijuana. At the appellate level, the Ninth Circuit sided with the plaintiffs.[114] It focused on the fact that Raich's conduct fell into a "separate and distinct class of activities—the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law"—and then applied *Lopez*'s test to that class of activity to hold that the CSA was unconstitutional as applied to Raich.[115] The Supreme Court, however, compared *Raich* to *Wickard* and upheld the CSA as a rational way for Congress "to regulate the interstate market in a fungible commodity."[116] The Court cited *Perez* for the proposition that case law "firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," defining economic as relating to the "production, distribution, and consumption of commodities."[117] Further drawing on the similarities between the case at bar and *Wickard*, the Court explicitly stated that in "both [*Wickard* and *Raich*], the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market."[118]

The majority in *Raich* distinguished *Lopez* and *Morrison* by stating that the CSA "directly regulates economic, commercial activity," while the regulations in *Lopez* and *Morrison* were not part of a broad statutory scheme that regulated economic activity.[119] Congress acted rationally, the

114. Raich v. Ashcroft, 352 F.3d 1222, 1228 (9th Cir. 2003) (emphasis omitted), *rev'd sub nom.* Gonzales v. Raich, 545 U.S. 1 (2005).

115. *Id.*

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

117. *Id.* at 17, 25.

118. *Id.* at 19.

119. *Id.* at 26. Recall that the *Lopez* Court referred to the broad regulatory-scheme principle as a means by which the GFSZA could have been found constitutional. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

Court proclaimed, "in determining that none of the characteristics making up the purported class, whether viewed individually or in the aggregate, compelled an exemption from the CSA."[120] By distinguishing *Lopez* and *Morrison* as cases dealing with single-subject statutes rather than broad regulatory schemes, the Court seemed to give Congress broad discretion to regulate noneconomic, intrastate activity so long as it does so in a broad economic regulatory scheme that "could be undercut unless the intrastate activity were regulated."[121] In addition, the Court employed the rational basis test in *Raich* in a way that it refused to do in *Lopez*.[122]

Despite *Morrison*'s indication that the Court would not aggregate the effects of noncommercial activity,[123] *Raich* relied on the aggregation rule to regulate "purely local activities that are part of an economic class of activities."[124] Thus, pursuant to a broad reading of *Raich*, a plaintiff cannot succeed on an as-applied challenge to a broad regulatory statute because the aggregation doctrine will always allow Congress to regulate instances of noncommercial activity so long as the activity is generally commercial. *Raich* is fascinating for many reasons, not the least of which is its solidification of the Court's preference for facial, rather than as-applied, Commerce Clause challenges. Although the Court has long held that as-applied constitutional challenges should be preferred to facial ones,[125] it has seemingly diverged from this principle in the area of Commerce Clause jurisprudence as a result of the broad regulatory-scheme principle.

In addition, the *Raich* Court cut against the suggestion in *Lopez* that a jurisdictional element is the best tool for Congress to ensure facial constitutionality while not overstepping its authority when it affirmed the broad regulatory-scheme principle as a means by which Congress may regulate a seemingly intrastate activity.[126] Rather than requiring that a jurisdictional element be inserted into the CSA to legitimize the federal regulation while still allowing for as-applied challenges, the Court demonstrated in *Raich* that local production of medicinal marijuana may be federally regulated without case-by-case analysis.[127] More striking is the

120. *Raich*, 545 U.S. at 26.

121. *See id.* at 36 (Scalia, J., concurring).

122. *Id.* at 22 (majority opinion). *See supra* note 88 and accompanying text.

123. *See supra* note 108 and accompanying text.

124. *Raich*, 545 U.S. at 17.

125. *E.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998) ("Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973))).

126. Stuckey, *supra* note 17, at 2102.

127. *See id.* at 2102–03.

idea that, even if the CSA had a jurisdictional element, it would bypass any case-by-case analysis because the activity in *Raich* was regulated by a federal statutory provision that was part of the CSA, and because Congress had a rational basis to believe that the failure to regulate the activity would "undercut" the larger economic scheme.[128] Thus, by devising a broad regulatory scheme, Congress could regulate even those activities that would fail case-by-case analysis in a statute that includes a jurisdictional element.

Some courts have stated that, on an as-applied basis, "a jurisdictional hook . . . limit[s] the reach of a particular statute to a discrete set of cases that substantially affect interstate commerce,"[129] but a broad reading of *Raich* seems to twist the meaning of this statement. Because application of the broad regulatory-scheme principle would allow for aggregation of wholly noneconomic intrastate activity that fits into the broad class of economic activities described by Congress, the jurisdictional element would expand to allow for regulation of a broad range of activities, not all of which substantially affect interstate commerce or include an economic component. Of course, some courts argue that *Raich* merely allows the jurisdictional element to be satisfied by the class of activity, rather than the specific conduct of a particular defendant.[130] For many years, scholars have suggested that the wide use of jurisdictional elements will come under increasing scrutiny for this very reason,[131] and this seems to be the case as more and more courts address the issue of whether the broad regulatory-scheme principle takes precedence over statutes that contain jurisdictional elements.

III. RICO AND *RAICH*

Part III.A briefly introduces RICO's elements and origins, focusing particularly on its jurisdictional element. Part III.B explores the circuit split between the First and Sixth Circuits with respect to the appropriate standard applied to the jurisdictional element of RICO in cases of noneconomic gang activity. It also demonstrates the staggering effect that application of the broad regulatory-scheme principle had on RICO's jurisdictional element in *United States v. Nascimento* and discusses the reasoning employed by the Sixth Circuit in applying the constitutional

128. *Id.* at 2103.

129. United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003).

130. *See infra* Part IV.

131. *See, e.g.*, George D. Brown, *Constitutionalizing the Federal Criminal Law Debate:* Morrison, Jones, *and the ABA*, 2001 U. ILL. L. REV. 983, 1009–13.

avoidance doctrine and loose construction principles in *Waucaush v. United States*.

A. RICO: ELEMENTS AND ORIGINS

Congress has inserted jurisdictional elements into many important statutes in effect today.[132] For example, RICO includes an explicit jurisdictional element that must be satisfied to convict a defendant under the statute.[133] To prove a criminal RICO violation, the government must show beyond a reasonable doubt that "(1) an enterprise existed; (2) the enterprise participated in or its activities affected interstate commerce; (3) the defendant was employed by or was associated with the enterprise; (4) the defendant conducted or participated in the conduct of the enterprise; (5) through a pattern of racketeering activity."[134] The most relevant section of RICO for the purposes of this Note is § 1962(c), which provides the statute's jurisdictional element and deals with "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" who "conduct[s] or participate[s], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[135] RICO lists a number of activities which qualify as "racketeering activity," such as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance."[136] Thus, in order to be convicted under RICO, one must be associated with an enterprise connected to interstate commerce through racketeering activity.

Congress designed RICO with a focus on the threat organized crime posed to society and drafted it, in part, to prevent and punish the financial infiltration of legitimate business operations affecting interstate

132. *E.g.*, Hobbs Act, 18 U.S.C. § 1951 (2000) (federal law prohibiting actual or attempted robbery or extortion affecting interstate or foreign commerce); 18 U.S.C. § 844(i) (2000) (federal arson statute prohibiting actual or attempted malicious damage or destruction by means of fire or explosive to any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce).

133. RICO is title IX of the Organized Crime Control Act of 1970, which became law on October 15, 1970, and is codified at 18 U.S.C. §§ 1961–68 (2000). Many states have also enacted their own RICO statutes which differ greatly from both each other and the federal RICO statute. These state statutes will not be discussed in this Note due to its federal focus. For a comparison of the federal RICO statute to a survey of state RICO statutes, see RICO CASES COMM., AM. BAR ASS'N CRIMINAL JUSTICE SECTION, A COMPREHENSIVE PERSPECTIVE ON CIVIL AND CRIMINAL RICO LEGISLATION AND LITIGATION app. C (1985).

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

135. 18 U.S.C. § 1962(c) (2000).

136. *Id.* § 1961(1)(A).

commerce.[137] With the implementation of RICO, "Congress intended to bring the full force of federal law enforcement into the effort to destroy organized crime";[138] however, the statute is not limited to organized crime.[139] In enacting the statute, Congress included a Statement of Findings and Purpose in which the jurisdictional nexus to interstate commerce was addressed.[140] Congress stated that "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."[141] The legislative history of RICO demonstrates that it was "designed to attack the infiltration of legitimate business."[142]

Although RICO has been challenged many times as an unconstitutional expression of Commerce Clause authority, courts have upheld it as a proper exercise of the federal commerce power.[143] The statute has withstood countless allegations that it is unconstitutionally uncertain and vague, along with a multitude of other constitutional challenges;[144] however, RICO has been upheld by federal courts as a facially valid statute.[145] The relevant question for this Note, then, concerns

137. *See* United States v. Mazzei, 700 F.2d 85, 89 n.5 (2d Cir. 1983). *See also* G. Robert Blakey, *Foreword*, 65 NOTRE DAME L. REV. 873, 874 (1990) (explaining that RICO directed the law's focus to organizations and detailing the wide variety of criminal and civil sanctions available in a RICO prosecution); Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1039 (1990) (stating that the RICO statute was designed "with the mob in mind").

138. United States v. Sutton, 642 F.2d 1001, 1003 (6th Cir. 1980).

139. Cianci v. Superior Court, 710 P.2d 375, 376–77 (Cal. 1985) (stating that the RICO statute applies beyond the organized crime context); Blakey, *supra* note 137, at 879 (discussing the background of RICO and detailing a legislative history replete with congressional intent to address and punish both illegitimate and legitimate enterprise).

140. *See* Origanized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922–23 (1970).

141. *Id.*

142. 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan).

143. *See, e.g.*, United States v. Vignola, 464 F. Supp. 1091, 1098 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3d Cir. 1979). *See also* CRIM. DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 156–57 (1988) (reviewing the constitutionality of RICO).

144. *See, e.g.*, United States v. Parness, 503 F.2d 430, 440–42 (2d Cir. 1974).

145. United States v. Martino, 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982) (finding that RICO (1) does not punish associational status, (2) does apply to enterprises engaged solely in criminal activity, (3) is not unconstitutionally vague, (4) does not operate ex post facto, and (5) is not contrary to the Ninth and Tenth Amendments and is therefore facially valid); *Vignola*, 464 F. Supp. at 1098 ("We also find that the means by which Congress has chosen to rid the channels of commerce of racketeering influences . . . are rational and appropriate, and that RICO is therefore a proper exercise of the federal commerce power.").

the viability of as-applied challenges to RICO and the appropriateness of applying the broad regulatory-scheme principle to the statute in a constitutional analysis.

B. APPLICATION OF *RAICH* AND THE BROAD REGULATORY-SCHEME PRINCIPLE IN *NASCIMENTO*

As-applied challenges to federal statutory schemes will inevitably fail if *Raich* is applied.[146] Recently, courts have been applying *Raich* in cases involving criminal statutes with jurisdictional elements, leading to dramatic and life-altering consequences for some defendants who are suddenly faced with federal prosecution for their local, noneconomic activities.[147] Most relevant for this Note is that the application of *Raich* and the broad regulatory-scheme principle have serious effects in RICO cases in which the underlying enterprise is both wholly intrastate and noncommercial in nature. The Supreme Court must address the question of whether the broad regulatory-scheme principle applies to RICO in order to clear up any future confusion, as well as the confusion already present within the circuit courts. In the past five years, both the Sixth Circuit and the First Circuit have addressed this Commerce Clause issue in relation to the RICO statute, and each came to a different conclusion about the viability of as-applied challenges to RICO.[148]

The First Circuit's treatment of this issue in *Nascimento* demonstrates the reasoning behind applying *Raich* in RICO cases and the effect that *Raich* has on the jurisdictional element of RICO. In acknowledging a split with the Sixth Circuit on the applicability of RICO to street gang activity, the First Circuit stated, "Although we are reluctant to create a [split with the Sixth Circuit], 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."[149] While the Sixth Circuit decision, which required a more stringent connection to interstate commerce and came down before the

146. *See* Stuckey, *supra* note 17, at 2125.

147. *See, e.g.*, United States v. Nascimento, 491 F.3d 25, 30 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008). *See also* Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at A1; *U.S. Uses RICO Against California Street Gangs*, CRIME CONTROL DIGEST, Sept. 29, 2006, http://findarticles.com/p/articles/mi_qa4440/is_200609/ai_n17196424.

148. *Nascimento*, 491 F.3d at 40–43 (permitting only a de minimis connection with interstate commerce to satisfy the jurisdictional element of RICO); Waucaush v. United States, 380 F.3d 251, 256–58 (6th Cir. 2004) (requiring a substantial effect on interstate commerce to establish a conviction under RICO).

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

Supreme Court decided *Raich*, was based on statutory construction and constitutional avoidance rather than an application of the broad regulatory-scheme principle,[150] the clear split in the circuits demands Supreme Court attention and guidance in order to prevent defendants from receiving different treatment based on the location of an enterprise within the United States.

When confronted with the applicability of the broad regulatory-scheme principle to a RICO violation based on wholly noneconomic gang activity, the First Circuit held that applying the RICO statute to the appellants' activities did not exceed the commerce power because, as a whole, the class of activity regulated by the general regulatory statute had a substantial relationship to interstate commerce.[151] The fact that the particular defendant's conduct was both intrastate and noneconomic was of no consequence for Commerce Clause purposes.[152] Consequently, the First Circuit seemed to take the position that *Raich* and the broad regulatory-scheme principle undoubtedly apply in RICO cases.[153] As a result, the court essentially foreclosed any as-applied constitutional challenges to RICO.[154] A closer examination of the facts of *Nascimento* and the First Circuit's logic is necessary to understand how the broad regulatory-scheme principle affects the constitutional purpose of RICO's jurisdictional element.

In *Nascimento*, three defendants appealed convictions for violating RICO through their membership in an alleged racketeering enterprise—a noneconomic street gang located in the Stonehurst Street area in Boston, Massachusetts.[155] To prove the noneconomic nature of the enterprise, the defendants pointed to the allegations in the indictment and the evidence produced at trial.[156] The indictment alleged that the primary purpose of the Stonehurst gang was "to shoot and kill members . . . of a rival gang in Boston."[157] The indictment referenced "nearly two dozen instances of murder and assault with intent to kill purportedly committed by Stonehurst members."[158] While the indictment also alleged that a purpose of the enterprise was "to sell crack cocaine and marijuana," the evidence

150. *See Waucaush*, 380 F.3d at 254–58.
151. *Nascimento*, 491 F.3d at 42–43.
152. *Id.* at 43.
153. *See id.* at 42–43.
154. *See id.*
155. *Id.* at 30–31.
156. *Id.* at 37.
157. *Id.* at 30.
158. *Id.*

presented at trial indicated that the Stonehurst gang itself had not participated in drug trafficking.[159] As a result, the trial judge ruled that insufficient evidence existed to prove that Stonehurst engaged in drug dealing; thus, the government was unable to tie the Stonehurst gang to drug trafficking or any other economic activity.[160]

Along with challenging the sufficiency of evidence related to other elements of RICO, the appellants challenged their convictions based on the district court's jury instruction concerning the applicable standard to prove the second element—that the street gang had an effect on interstate commerce.[161] The district court had instructed the jury that the second element of RICO would be satisfied by a showing that the Stonehurst gang had at least a de minimis effect on interstate commerce.[162] The appellants put forth two theories to challenge this instruction: (1) "the instruction misstate[d] RICO's statutory requirement with respect to enterprises that have not engaged in economic activity"; and (2) "in the alternative, that if the instruction is correct as a matter of statutory interpretation, the statute is unconstitutional as applied to their enterprise."[163] This Note deals only briefly with the first argument and focuses mainly on the second.

The appellants first argued that the de minimis standard was erroneous when applied to street gang activity because the gang did not take part in any economic activity, and because extension of RICO to noneconomic street gang activity would raise "grave constitutional concerns."[164] The appellants relied on these constitutional concerns to suggest that the court "should abstain from reading the statute as encompassing noneconomic activities that have only a de minimis effect on interstate commerce."[165] Although a de minimis standard had already been judicially established as the correct standard required to satisfy RICO's commerce element,[166] the

159. *Id.* at 30 n.1. Several news sources erroneously reported that the gang was involved in "dealing drugs." *E.g.*, *3 Gang Members Sentenced to Prison*, *supra* note 8.

160. *Nascimento*, 491 F.3d at 30 n.1.

161. *See id.* at 32–33, 37. The appellants also challenged the government's proof of the first and fifth elements of RICO as insufficient, but the First Circuit's analysis of the evidence offered in relation to these elements is not pertinent to this Note.

162. *Id.* at 37.

163. *Id.*

164. *Id.* at 38.

165. *Id.*

166. *See, e.g.*, United States v. Shryock, 342 F.3d 948, 984 n.6 (9th Cir. 2003) (upholding a RICO conviction based only on a de minimis effect on interstate commerce because the "crimes, drug trafficking and extortion, [were] quintes-sential [sic] illegal economic activities"); United States v. Riddle, 249 F.3d 529, 537 (6th Cir. 2001) (holding that "a de minimis connection suffices for a RICO enterprise that 'affects' interstate commerce").

appellants forcefully urged the First Circuit to follow the Sixth Circuit's logic in *Waucaush v. United States* and hold that a special standard applied to noneconomic activities.[167] *Waucaush* involved a similar RICO conviction based on street gang activity, but the Sixth Circuit determined that a substantial effect on interstate commerce was necessary for the conviction of a member of a noneconomic street gang, basing its decision on statutory construction and constitutional avoidance.[168] Noting that the Sixth Circuit in *Waucaush* was "galvanized" by *Lopez*, *Morrison*, and *Jones*, the First Circuit carefully reviewed these cases in *Nascimento*.[169] It found that the Sixth Circuit had essentially interpreted *Jones* to allow for two different meanings of the same word—"affect"—in the RICO statute, depending on the underlying conduct.[170] Thus, the Sixth Circuit suggested that a de minimis effect is sufficient when the underlying conduct involves commerce, but a de minimis effect will not suffice when the underlying conduct is noneconomic.[171] Condemning the unorthodox and nontraditional statutory-interpretation technique employed by the Sixth Circuit, the First Circuit asserted, to the contrary, that *Jones* requires that only one meaning be attributed to a single statutory word; thus, because the First Circuit had already established that RICO's jurisdictional element is satisfied by a de minimis connection to interstate commerce, the de minimis standard must be applied to all cases prosecuted under RICO.[172]

Although an argument might be made that the constitutional avoidance technique employed in *Waucaush* is convincing on some level, the First Circuit's reasoning here appears sound. The First Circuit appropriately analyzed RICO using strict interpretation techniques because the statute does not contain language that allows a court to apply different standards regarding the effect on interstate commerce for different types of conduct. The Sixth Circuit improperly construed the statute to include meanings not publicly expressed by Congress when RICO was enacted. RICO simply requires that the underlying conduct affect interstate or foreign commerce, and does not contain any reference to different treatment for economic and noneconomic activities. Thus, the First Circuit was correct in refusing to follow *Waucaush*'s application of constitutional avoidance.

167. *Nascimento*, 491 F.3d at 30, 37–38, 40 (citing Waucaush v. United States, 380 F.3d 251, 255–56 (6th Cir. 2004)).

168. *See Waucaush*, 380 F.3d at 257.

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

170. *See id.* at 37–39.

171. *See id.* at 38.

172. *Id.* at 38–39.

After rejecting the appellants' statutory claim, the First Circuit focused on the appellants' second argument concerning as-applied constitutionality.[173] It is here that the First Circuit erred. The appellants asserted that their conduct was almost identical to the conduct that the Supreme Court refused to aggregate in *Morrison*, and thus, applying RICO to violent criminal activity would overstep the commerce power.[174] The appellants relied on *Lopez* and *Morrison* to argue that even if the de minimis standard was correct under statutory interpretation, application of this standard to noneconomic, criminal street gang activity is unconstitutional, making RICO unconstitutional as applied.[175] Again, the First Circuit rejected the appellants' argument and upheld the statute as constitutional as applied to noneconomic criminal activity.[176] Oddly, the First Circuit acknowledged as valid the appellants' concerns that using the aggregation theory to validate federal regulation of noneconomic street gang activity could obliterate any semblance of constitutional limits on federal power, but quickly dismissed such worries.[177] The court based its dismissal on the Supreme Court's decision in *Raich*, an as-applied constitutional challenge to a federal statute, stating that *Raich* "is more directly on point than any case in the earlier trilogy" and that "it is useful to note . . . that *Waucaush* was decided without the benefit of the Supreme Court's decision in *Raich*, a precedent that we find instructive on the constitutional issue."[178]

Because *Lopez* and *Morrison* involved facial challenges to federal statutes, and *Nascimento* posed an as-applied challenge to a generally valid federal statute, the First Circuit insisted that *Raich* governed.[179] Relying on the Supreme Court's assertion that when "the class of activities is regulated and the class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class," the First Circuit applied *Raich*.[180] While the court noted that *Raich* is "arguably distinguishable from the case at hand on the ground that marijuana is a fungible commodity, capable of seeping into the interstate market," it again quickly dismissed the significance of this difference due to the class of

173. *Id.* at 40–43.
174. *Id.* at 41.
175. *Id.* at 40–41.
176. *Id.* at 43.
177. *Id.* at 41.
178. *Id.* at 38 n.4, 41 (citation omitted).
179. *Id.* at 41.
180. *Id.* (quoting Gonzales v. Raich, 545 U.S. 1, 23 (2005)).

activity stressed by the *Raich* Court.[181] In determining that *Raich* is the appropriate precedent, the court failed to recognize that the type of activity RICO regulated was far more similar to the activities regulated in *Lopez* and *Morrison* than in *Raich*, thus making *Lopez* and *Morrison* more on point than *Raich*.

Most importantly for the purposes of this Note, the First Circuit made a point to emphasize that the court's role in adjudicating Commerce Clause matters is a deferential one.[182] "Refined to bare essence," the First Circuit wrote, "*Raich* teaches that when Congress is addressing a problem that is legitimately within its purview, an inquiring court should be slow to interfere."[183] Then, in explaining whether a problem is "legitimately within [Congress's] purview," the court stated that

> the class of activity is the relevant unit of analysis and, within wide limits, it is Congress—not the courts—that decides how to define a class of activity. All that is necessary to deflect a Commerce Clause challenge to a general regulatory statute is a showing that the statute itself . . . has a substantial relationship to interstate . . . commerce.[184]

The First Circuit referenced the jurisdictional element in RICO only in order to support its finding that the statute generally has a substantial relationship to interstate commerce, never discussing the role of the jurisdictional element as a constitutional limitation that might require further analysis.

After finding that the general class of activity regulated by RICO was "a wholly legitimate target of Commerce Clause legislation," the First Circuit stated that "[r]acketeering activity . . . is based largely on greed. . . . Therefore, that class of activity is sufficiently economic in nature that it may be aggregated for Commerce Clause purposes."[185] This determination fails to recognize that RICO does not regulate a fungible commodity in the way *Raich* does, consequently raising questions as to *Raich*'s applicability. Finally, the court again demonstrated its deference to Congress's "rational judgment, as part of its effort to crack down on racketeering enterprises, to enact a statute that targeted organized violence" by stating that applying RICO to violent criminal activity does not offend the Commerce Clause.[186] In a footnote, the First Circuit addressed the fact

181. *Id.* at 42.
182. *See id.* at 42–43.
183. *Id.* at 42.
184. *Id.*
185. *Id.* at 43 (citation omitted).
186. *Id.* The court cited *Raich* for the proposition that judicial scrutiny of whether Congress had a

that this degree of deference afforded to congressional classifications of activity might create perverse incentives, but dismissed this concern as inconsequential because of the fact that Justice O'Connor had made this argument in her dissent in *Raich* and the majority had flatly rejected it.[187]

Thus, applying *Raich* to RICO, as the First Circuit did, renders the jurisdictional element meaningless for constitutional purposes. Under *Raich*, as displayed in *Nascimento*, courts may easily find that the statutes are broad regulatory schemes that regulate economic activity that is rationally within Congress's ambit of authority. Even though Congress intentionally inserted a jurisdictional hook into RICO, courts applying *Raich* will simply overlook this element when adjudicating as-applied challenges. This creates quite a puzzle in Commerce Clause jurisprudence. While the conservative members of the Court have expressed a preference for jurisdictional-element statutes as a technique for limiting federal authority, application of *Raich* removes any semblance of limitation, as the jurisdictional element is essentially ignored in a constitutional challenge analysis[188] in favor of deference to Congress. Applying *Raich* seems increasingly problematic in light of *Lopez*, which requires a case-by-case analysis for statutes with jurisdictional elements,[189] and leads to questions about how courts should determine whether *Raich* applies when jurisdictional elements are involved.

IV. COURT DETERMINATIONS OF WHETHER *RAICH* APPLIES TO STATUTES WITH JURISDICTIONAL ELEMENTS

This part identifies two different ways that courts in the past have approached the question of whether *Raich* and the broad regulatory-scheme principle apply to statutes containing jurisdictional elements.[190] It also

rational basis for including a certain activity within the sweep of a statute is a "modest" task. *Id.*

187. *Id.* at 43 n.6. One of the defendant's attorneys expressed disagreement with the court's dismissal, summing up the consequences of the decision by stating that "the ruling could give individual federal prosecutors 'unfettered discretion,' which he called a 'dangerous thing.'" Eric T. Berkman, *RICO Covers Violent, Noneconomic Activity*, MASS. LAWYERS WEEKLY, July 16, 2007 (quoting Albert F. Cullen Jr.). Ryan Schiff, who represented another defendant, expressed his disagreement with the court in an interview, stating that the decision creates a "real risk of federalizing all sorts of violent criminal activity that has traditionally been prosecuted by the states and, under the U.S. Constitution's Commerce Clause, *has* to be prosecuted by the states." *Id.* (quoting Ryan M. Schiff).

188. *See* Brown, *supra* note 4, at 997.

189. *See supra* Part II.B.

190. This part describes two of the four approaches presented by Tara Stuckey. Stuckey, *supra* note 17, at 2127–39. The other approaches she details are the "*Raich* Applies to Some Jurisdictional Hooks, but Not Others" approach and the "*Raich* Never Applies" approach. *Id.* at 2132–36.

demonstrates the fact that the lower federal courts need guidance in adjudicating these matters. Some courts have read *Raich* to provide for a mechanism that allows them to disregard a statute's jurisdictional element almost entirely, while others have distinguished the CSA in *Raich* from statutes containing jurisdictional elements and have ignored the broad regulatory scheme when a jurisdictional element is present. Relevant for this Note, the two approaches that courts have taken when dealing with application of the broad regulatory-scheme principle to statutes with jurisdictional elements are: (a) the broad regulatory-scheme principle applies to statutes containing jurisdictional elements, rendering the jurisdictional elements meaningless for constitutional purposes; and (b) the broad regulatory scheme does not apply to statutes containing jurisdictional elements, preserving the constitutional limitation of the jurisdictional element.[191] This part argues that the latter of these options is the most sound in the context of RICO cases, and Part V argues that employment of this approach in the context of RICO helps to preserve the constitutional limitation of RICO's jurisdictional element in a way that is consistent with the Court's interpretations of jurisdictional elements.

A. THE BROAD REGULATORY-SCHEME PRINCIPLE APPLIES EVEN WHEN A STATUTE CONTAINS A JURISDICTIONAL ELEMENT

The Fourth, Sixth, Tenth, and Eleventh Circuits have all employed the broadest view of *Raich*, holding that the broad regulatory-scheme principle applies to statutes containing jurisdictional elements.[192] This view was also adopted by the First Circuit in *Nascimento*, when it stated that all that is necessary for the broad regulatory-scheme principle to apply in a RICO case is that the activity regulated by a federal statutory provision be essential to a larger regulatory scheme, and that a rational basis exist for a determination that failure to regulate the activity at issue would undercut the larger scheme.[193] In each of the following cases, a fungible commodity and economics, as defined by *Raich*, are involved in a way that ties the regulation to some type of market. RICO, conversely, deals with conduct that is not necessarily commercial,[194] and can be completely unrelated to a fungible commodity.

191. *Id.* at 2127–32, 2136–39.

192. *See, e.g.*, United States v. Maxwell, 446 F.3d 1210, 1214–15 (11th Cir. 2006); United States v. Jeronimo-Bautista, 425 F.3d 1266, 1272–74 (10th Cir. 2005); United States v. Forrest, 429 F.3d 73, 79 (4th Cir. 2005); United States v. Gann, 160 F. App'x 466, 472 (6th Cir. 2005).

193. *See supra* Part III.B.

194. *See supra* Part III.A.

The Fourth Circuit rejected an as-applied challenge to congressional regulation of intrastate activity involving child pornography in *United States v. Forrest* and indicated the nullity of the jurisdictional element in a footnote.[195] The court relied on *Raich* to uphold the appellant's conviction for "wholly intrastate production and possession of child pornography,"[196] noting three similarities between the case at bar and *Raich*: (1) both broad regulatory schemes governed "quintessentially economic" activities and regulated economic activity in a "fungible commodity"; (2) Congress had a rational basis for concluding that regulation of both commodities on an intrastate level was essential to interstate regulation of the class of activity; and (3) Congress made findings of the local activities' effect on the interstate markets, although it is not required to do so.[197] When addressing the sufficiency of the jurisdictional element in a footnote, the Fourth Circuit cited *Raich* for the proposition that "an effective jurisdictional element is certainly not required where, as here, the statute directly regulates economic activity."[198] As noted, the statute in *Raich* did not contain a jurisdictional element, nor did the Court address the significance of the jurisdictional element or its role in connection with the broad regulatory-scheme principle, making the Fourth Circuit's reasoning here rather suspect.

The Sixth Circuit adopted similar reasoning in *United States v. Gann*, another case involving a child pornography statute.[199] The appellant argued that the materials-in-commerce jurisdictional element of the statute was insufficient and should be supplemented by a separate showing of a substantial effect on interstate commerce.[200] The Sixth Circuit's decision relied on *Raich* and announced that no separate showing of substantial effects was necessary, because the statute was a broad regulatory scheme which regulated "the interstate market in a fungible commodity," and Congress had a "rational basis for believing that 'homegrown' child pornography can 'feed[] the national market and stimulate[] demand.'"[201] This case again emphasizes the connection to the market by regulation of a fungible commodity, which is not present in *Nascimento* or *Waucaush*, and relies on broad deference to Congress's definition of the class of activities.

United States v. Jeronimo-Bautista gave the Tenth Circuit an

195. *Forrest*, 429 F.3d at 76–77 & n.1.
196. *Id.* at 78.
197. *Id.* at 78–79 (quoting Gonzales v. Raich, 545 U.S. 1, 18, 25 (2005)).
198. *Id.* at 787 n.1 (citing *Raich*, 545 U.S. 1).
199. United States v. Gann, 160 F. App'x 466 (6th Cir. 2005).
200. *See id.* at 470 & n.1, 472.
201. *Id.* at 473 (citations omitted).

opportunity to rule on the issue of the broad regulatory scheme's applicability to a statute containing a jurisdictional element.[202] The Tenth Circuit also applied *Raich* and the broad regulatory-scheme principle, holding that a statute which prohibits inducing minors to engage in sexually explicit conduct used to produce child pornography using materials that have been transported in interstate commerce is constitutional as applied to intrastate production of child pornography.[203] The Tenth Circuit viewed the statute as a comprehensive scheme to eliminate child pornography and accepted that Congress had a rational basis for determining that regulation of child pornography at the local level is an essential part of the comprehensive scheme; thus, the court struck down the appellants' as-applied challenge.[204] The Tenth Circuit utilized a footnote, just as the Fourth Circuit did, to acknowledge the presence of a jurisdictional element and then quickly dismiss its significance:

> [The provision] includes a jurisdictional element as required by the *Lopez*/*Morrison* factors. . . . [W]e need not linger on this issue. In light of the Supreme Court's ruling in *Raich*, and our conclusion that the activity regulated in this case has a substantial impact on interstate commerce, any "failure of the jurisdictional element effectively to limit the reach of the statute is not determinative."[205]

By applying the broad regulatory-scheme principle, the Tenth Circuit avoided the difficult task of determining the sufficiency of a questionable jurisdictional element, instead ignoring the constitutional limitation placed on the statute by the jurisdictional element.[206] Here, the child pornography statute comes closer to regulating noncommercial conduct; however, it still tied the activity to economic production of a fungible commodity and the market for that commodity in a way that RICO does not.

Finally, in *United States v. Maxwell*, the Eleventh Circuit applied the broad regulatory-scheme principle to a statute which prohibits the possession of child pornography—a fungible commodity—that has traveled in interstate commerce or was produced using materials that have traveled in interstate commerce—again tying the statute to the market.[207] In *Maxwell*, the appellant had been convicted of possession of child pornography on computer disks that had traveled in interstate commerce

202. *See* United States v. Jeronimo-Bautista, 425 F.3d 1266 (10th Cir. 2005).
203. *Id.* at 1272–73.
204. *Id.* at 1269, 1273.
205. *Id.* at 1273 n.4 (citations omitted).
206. Stuckey, *supra* note 17, at 2130.
207. United States v. Maxwell, 446 F.3d 1210, 1214–16 (11th Cir. 2006).

prior to their use for pornographic purposes.[208] The Eleventh Circuit upheld the conviction, placing no import on the jurisdictional element as a constitutional limitation.[209] The court stated that "where a jurisdictional element is required, a meaningful one . . . must be offered"; but in the case of the child pornography statute, the jurisdictional element was not required because application of the broad regulatory-scheme principle caught the intrastate activity within its net.[210] As a result, the jurisdictional element was essentially erased from the statute by the court, which extended the statute's reach more broadly than its language indicates.[211]

In each of these cases, the courts clearly established that the regulations involved a broad regulatory scheme that regulated both a fungible commodity and economic activity, as defined by the Court in *Raich*.[212] While great deference to Congress's definition of a class of activities may be justifiable in the context of these broad regulatory schemes because they deal with fungible commodities and tie statutes to markets, RICO's failure to deal with a fungible commodity detracts from the support these cases might give to an application of *Raich* to RICO. As a result, this approach does not seem to be the soundest way to adjudicate as-applied challenges to RICO.

B. *RAICH* DOES NOT APPLY TO STATUTES WITH JURISDICTIONAL ELEMENTS

The Second Circuit and the Ninth Circuit have espoused the idea that *Raich* does not directly apply to statutes that contain jurisdictional elements; however, these courts have employed *Raich* to support regulation of intrastate activity through narrow aggregation.[213] Employing this technique allows courts to reach the jurisdictional element in their analyses in a way that the other approach does not. The Second Circuit applied this approach to a statute that regulated conduct[214]—not a fungible commodity—lending support to the idea that this approach is appropriate in

208. *Id.* at 1211.

209. *See id.* at 1216–19.

210. *Id.* at 1218.

211. Stuckey, *supra* note 17, at 2128–29 (citation omitted).

212. *See supra* text accompanying note 117.

213. United States v. Logan, 419 F.3d 172 (2d Cir. 2005); United States v. Tashbook, 144 F. App'x 610 (9th Cir. 2005); Stuckey, *supra* note 17, at 2136–39. Narrow aggregation involves applying a *Raich*-like aggregation principle only within the parameters of the typical pre-*Raich* substantial effects test and grouping like things together only to aid in determining a jurisdictional element's constitutional sufficiency on a case-by-case basis. *See* Stuckey, *supra* note 17, at 2144.

214. *Logan*, 419 F.3d at 174.

the context of RICO, a statute that also regulates conduct. The Ninth Circuit, however, went even further by applying this approach to a child pornography case that does involve a fungible commodity.[215] Applying this approach to RICO would not be quite as radical as the Ninth Circuit's application to the child pornography statute, but exploring the Ninth Circuit's reasoning bolsters the argument that *Raich* does not apply in the context of RICO.

In *United States v. Logan*,[216] the Second Circuit upheld a conviction based on the jurisdictional element of a statute that makes it a crime for one to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[217] Although this case came after *Raich*, the Second Circuit chose to follow the framework from *Jones*, not *Raich*'s broad regulatory-scheme principle, to uphold the statute as valid, although the Second Circuit did mention *Raich* to support aggregation of rental homes as part of a class of activities that affect interstate commerce.[218] *Logan* seems to be the case on point for determining whether *Raich* applies to broad regulatory schemes containing jurisdictional elements and regulating conduct, but not involving a fungible commodity. The Second Circuit's refusal to apply *Raich* supports the idea that *Raich* and the broad regulatory scheme should not apply to RICO because it does not regulate a fungible commodity and includes a jurisdictional element.

A Ninth Circuit case, *United States v. Tashbook*, which deals with whether *Raich* applies to statutes with jurisdictional elements, also supports the view that *Raich* does not directly apply to RICO.[219] The Ninth Circuit considered the individual regulated activity within the frame of a case-by-case analysis when it decided whether the jurisdictional element of a child pornography statute was satisfied.[220] Noting in *Tashbook* that, where *Raich* is applicable, as-applied challenges might not be valid at all,[221] the Ninth Circuit found *Raich* inapplicable to *Tashbook*'s visual depictions of minors

215. *Tashbook*, 144 F. App'x at 614.

216. *Logan*, 419 F.3d 172.

217. *Id.* at 174 (quoting 18 U.S.C. § 844(i) (2000)).

218. Stuckey, *supra* note 17, at 2136.

219. *See Tashbook*, 144 F. App'x at 614 n.2 ("[W]e need not address any effect *Raich* may have on the current case.").

220. *Id.* at 614. (discussing the defendant's use of instrumentalities of interstate commerce, including the Internet, telephone, and email, and his pursuit of victims in other states as evidence of an affect on interstate commerce).

221. *Id.*

engaged in sexually explicit conduct without providing any clear reasoning for this decision.[222] But, in avoiding *Raich*, the Ninth Circuit still found a way to uphold the statute in question based on the validity of the jurisdictional element and the satisfactory nexus with interstate commerce,[223] supporting the notion that the Ninth Circuit recognizes the conundrum presented by applying *Raich* to a statute with a jurisdictional element.[224]

Thus, courts have found that the presence of a jurisdictional element precludes application of the broad regulatory-scheme principle. By doing so, these courts have preserved the meaning of the jurisdictional element. This is the most sound approach when dealing with the RICO statute, because applying *Raich* causes courts to simply overlook the case-by-case analysis required by the jurisdictional element of the criminal statute. The fact that *Raich*'s application precludes consideration of an element of the crime makes its application suspect, and the propriety of this application requires further Supreme Court guidance.

V. NARROWING *RAICH*

This Note has suggested that neither the Sixth Circuit, with its employment of constitutional avoidance, nor the First Circuit, with its application of *Raich*, correctly adjudicated the issue of whether RICO is constitutional as applied to noneconomic gang activity. This part advocates a new approach to the issue based on the jurisdictional element in RICO and argues that not every designation of a class of activities is within the permissible realm of congressional power. RICO is an example of a statute that designates a class of activities that is far too broad and should not be afforded the deference to Congress suggested by the First Circuit in *Nascimento*.[225] Thus, this Note proposes that the Supreme Court should narrow *Raich* so that it applies to broad regulatory statutes containing jurisdictional elements only if those statutes deal with fungible commodities that present a connection to the market. By limiting *Raich* in this way, the Court will remain faithful to *Lopez*'s language concerning

222. The Ninth Circuit's reasoning hinged on the fact that *Tashbook* was distinguishable from previous child pornography cases; however, this distinction does not explain why *Raich* would not apply to the statute in *Tashbook*, and the Ninth Circuit provided no further wisdom on this issue. *Id.* at 614 n.2.

223. *Id.* at 613–14.

224. Stuckey, *supra* note 17, at 2137–38.

225. *See* text accompanying notes 182–86.

jurisdictional elements[226] while still affording *Raich* its place in the doctrine. In doing so, the Court will solve the problem presented by RICO's application to intrastate, violent criminal activity by deciding that a member of a noneconomic street gang may not be charged with a violation of RICO in connection with his activity as a gang member.

In *Raich*, the Court stepped back from its recent narrow interpretations of the Commerce Clause to hold that Congress may regulate noneconomic intrastate activity under a broad regulatory scheme so long as Congress has a rational belief that the regulated conduct has a substantial effect on interstate commerce and that excising the intrastate activity would undercut the broad regulatory scheme.[227] The Court, however, established this principle in the context of a regulation without a jurisdictional element that dealt with a fungible commodity, and the holding should be limited to these situations. While the First Circuit held in *Nascimento* that *Raich* allows for RICO's application to intrastate noneconomic violent criminal activity,[228] in reality it does not, and the Supreme Court should provide further guidance to lower courts by narrowing *Raich* and declaring that *Raich* does not apply to RICO cases.

In adjudicating Commerce Clause challenges to RICO, courts should not apply the broad regulatory-scheme principle or use *Raich* in order to apply a de minimis standard to intrastate noneconomic gang activity's effect on commerce. While it is true that, with respect to the third category of the *Lopez* test, the individual instances of regulated conduct need not be substantial as long as the aggregate conduct exerts a substantial effect on interstate commerce,[229] aggregation is appropriate only as to economic activities, as defined by *Raich*. Because street gangs are not involved in production, distribution, or consumption of commodities (and thus, according to *Raich*, are noneconomic),[230] and the RICO statute itself contains a jurisdictional element and regulates conduct and not a fungible commodity,[231] street gang activity cannot and should not be aggregated with other racketeering enterprises to reach the substantial-effects threshold. The Second Circuit's treatment of a similar issue in *Logan*[232] demonstrates how courts give jurisdictional elements meaning even in the wake of *Raich*, and supports the idea that courts should apply *Raich* to a

226. *See supra* Part II.B.
227. *See supra* Part II.C.
228. *See supra* Part III.B.
229. United States v. Lopez, 514 U.S. 549, 558–59 (2005).
230. *See supra* note 117 and accompanying text.
231. *See supra* Part III.A.
232. *See supra* text accompanying notes 216–18.

statute that contains a jurisdictional element only if that statute regulates an economic fungible commodity.

Contrary to the conclusion reached by the First Circuit, *Morrison* deals with the same kind of activity—criminal violence—that RICO does, and so it and *Lopez* are the applicable precedent, not *Raich*. Because the suppression of violent crime is the quintessential police power of the states[233] and because *Lopez* and *Morrison* explicitly state that Congress shall not regulate that which is left for the police power,[234] noneconomic street gang activity is not the type of activity that should be regulated by Congress. The Court should acknowledge that the level of deference to Congress employed by the First Circuit is inappropriate in this context. Whether *Raich* applies to RICO depends on the function and purpose of the jurisdictional element, and, in RICO, the jurisdictional element must be afforded the meaning intended by Congress. The de minimis standard adopted by lower courts for the jurisdictional element in RICO forces the Court to take a position on this issue, and, in order to avoid granting Congress power that the Constitution does not afford it, the Court must rule that RICO does not apply to intrastate street gang activity.

Just as the Court narrowed *Lopez* and *Morrison* in *Raich*, it should also narrow *Raich* to the particular facts of the case. The Supreme Court should limit the high level of deference to Congress regarding classes of activities advocated in the *Raich* opinion to the facts of *Raich*. Justice Thomas argued fervently in his *Raich* dissent that as-applied challenges should be permitted in order to curb Congress's "overreaching on a case-by-case basis."[235] Narrowing *Raich* in this way addresses Justice Thomas's concerns because the jurisdictional element's purpose is to allow for case-by-case constitutional analysis. By stating that Congress cannot regulate a sweeping class of activities in a way that will extinguish the constitutional limits put in place by a jurisdictional element, the Court will prevent the broad regulatory-scheme principle from negating this purpose.

The Court must also respect the explicit jurisdictional elements placed within a statute by Congress. Application of *Raich* and the broad regulatory scheme places as-applied challenges in jeopardy, but the jurisdictional element steers courts toward case-by-case analyses that will allow for successful as-applied challenges in RICO cases. The fact that the Court

233. *See* United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . than the suppression of violent crime . . . .").

234. *See supra* text accompanying notes 88, 99.

235. Gonzales v. Raich, 545 U.S. 1, 73 (Thomas, J., dissenting).

showed a belief and acceptance of as-applied challenges for statutes containing jurisdictional elements when it complained of the absence of such elements in *Lopez* and *Morrison* demonstrates the important role jurisdictional elements must play in our understanding of the application of the broad regulatory-scheme principle. In addition, *Lopez*'s concern that blind deference to Congress will allow Congress to invade the province of the states must be addressed by eliminating application of the broad regulatory-scheme principle in the context of RICO. Because of the nature of the activity regulated by RICO and the explicit jurisdictional element, the Supreme Court should provide this much needed guidance to the lower courts to avoid the constitutional concerns presented in *Nascimento*.

VI. CONCLUSION

A review of the history of the Commerce Clause demonstrates the incredible difficulty courts have had interpreting this important grant of congressional authority. In affirming the convictions of the appellants in *Nascimento*, the First Circuit suggested that the broad regulatory-scheme principle articulated in *Raich* has usurped the case-by-case analysis that a statutory jurisdictional element requires. This Note has argued that the First Circuit's insistence that Congress holds absolute discretion in defining a class of activity gives Congress unlimited power in a way that violates the jurisdictional element and the Constitution. The First Circuit's formulation of current Commerce Clause jurisprudence is far too broad, as the power of Congress to define the level of generality or specificity could arguably allow it to place anything within the commerce power by defining some global class of activities into which the regulated activity falls. Thus, it must be true that not every designation of a class of activities is within the permissible realm of congressional power, and the Court should demonstrate this fact by holding that *Nascimento* incorrectly applied *Raich* to RICO because RICO is a statute with a jurisdictional element that does not involve a fungible commodity. Thus, the Court should narrow *Raich* to preserve the purpose of the jurisdictional element in RICO as a necessary constitutional constraint.