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Was *Gonzales v. Raich* the Death Knell of Federalism? Assessing Meaningful Limits on Federal Intrastate Regulation in Light of *U.S. v. Nascimento*.

The powers delegated by the . . . Constitution to the federal government, are few an defined. Those which . . . remain in the State governments are numerous and indefinite.¹

I. INTRODUCTION

When the Supreme Court decided *Gonzales v. Raich*² in 2005, it marked the first occasion in over a decade that the Court broadly construed the Commerce Clause to permit federal regulation of intrastate activity. More importantly, *Raich* signaled an abrupt end to the Rehnquist Court's "federalism revolution" by circumscribing three recent cases delineating meaningful limits on Congress's Commerce Clause powers.³ It represents the boldest assertion of congressional power to "regulate commerce . . . among the several states" in the history of the Court.⁴ Indeed, *Raich* and its progeny threaten to undermine the delicate balance of federal and state power structurally imbued in our constitutional republic by acquiescing to the unbridled exercise of federal power. Though some have expressed skepticism about the ostensibly broad effect *Raich* might have on federalism jurisprudence, recent circuit court cases decided pursuant to the standards set forth in *Raich* demonstrate federal appropriation of "core" state powers,⁵ including, in particular, state police powers.

This Comment argues that the Supreme Court should limit *Raich* by reviving the limitation on congressional regulation of noneconomic intrastate activity to circumstances where failure to regulate such activity

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

2. 545 U.S. 1 (2005).

3. Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507, 508 (2006) ("If [*Raich*] has not quite put an end to the Rehnquist Court's 'federalism revolution,' it certainly represents . . . a major—possibly even terminal—setback for efforts to impose meaningful judicial constraints on Congress' Commerce Clause powers.")

4. *Id.* (quoting U.S. CONST., art. I, § 8, cl. 3).

5. *Gonzales v. Raich*, 545 U.S. at 42–43 (O'Connor, J., dissenting) ("The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.") (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977)).

would undermine a broader regulatory program. The Court should also narrowly confine *Raich*'s definition of "economic activity" to prevent lower courts from "piling inference upon inference" to demonstrate otherwise tenuous connections to interstate commerce. This approach would not require the Court to overrule *Raich*, but merely to enforce the clear standards articulated in *United States v. Lopez*⁶ and *United States v. Morrison*.⁷

Part II provides background on the Supreme Court's Commerce Clause jurisprudence between 1937 and 1994—a period of virtually unchecked federal expansion—and the Rehnquist Court's "federalism revolution" between 1995 and 2005 that reestablished limits on federal commerce powers. This section examines in particular how *United States v. Lopez* and *United States v. Morrison* limited the scope and nature of activity within Congress's regulatory purview by (1) moving away from the "rational basis" test when evaluating Commerce Clause challenges, (2) limiting regulation to quintessential "economic" activity, and (3) enforcing the "essential" component of the broader regulatory regime exception.

Part III explains how *Raich* largely unraveled the progress made by the Rehnquist Court. First, the Court adopted a definition of "economic" that fails to limit the scope of activity within Congress's regulatory purview. Second, the decision opens the door to federal regulation of noneconomic, intrastate activity that falls within a broader regulatory scheme regardless of whether such activity is "essential" to the larger regulatory program. Finally, the Court reasserted a "rational basis" test that effectively eliminates judicial scrutiny of the *actual* aggregate effect of a regulated activity on interstate commerce, inquiring rather "whether a 'rational basis' exists for so concluding."⁸ These standards have reduced judicial review of Commerce Clause challenges to a rubber-stamping exercise where the regulated activity is rationally related to commerce. More important, they have rendered "as-applied" challenges to otherwise valid statutes nearly impossible.

Part IV considers one of the first casualties in the breakdown of meaningful limits on federal commerce powers in *Raich*'s jurisprudential wake: appropriation of state police powers through RICO prosecutions. This section contrasts two nearly identical cases in which federal prosecutors charged local street gangs members with racketeering for engaging in intrastate, noneconomic criminal activity. The Sixth Circuit

6. 514 U.S. 549 (1995).

7. 529 U.S. 598 (2000).

8. *Somin, supra* note 3, at 509–10 (citing *Lopez*, 514 U.S. at 561).

reversed the federal conviction in *United States v. Waucaush*⁹ by applying the clear principles articulated in *Morrison* and *Lopez* without the encumbrances of *Raich*. The First Circuit, however, affirmed the criminal convictions in *United States v. Nascimento*¹⁰ by taking *Raich* to its logical end, which is to say, by not imposing meaningful limits on the federal government’s prosecutorial powers under RICO. These cases aptly demonstrate how *Raich* encourages judicial acquiescence to federal appropriation of traditional state powers by narrowly limiting the force of judicial review.

II. CONGRESS, THE COMMERCE CLAUSE, AND THE COURTS

A. *Mediating the Tension Between Federalism and the Commerce Clause Powers*

The Commerce Clause of the U.S. Constitution empowers Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution’ its authority to ‘regulate Commerce with foreign Nations, and among the several States’”¹¹ This power is theoretically tempered by the unique principle of federalism imbued in our compound republic of duly empowered state and national governments.¹² While this Comment will not exhaustively consider the virtues of federalism, our system of decentralized government uniquely provides for responsiveness to diverse regional preferences,¹³ horizontal

9. 380 F.3d 251 (6th Cir. 2004).

10. 491 F.3d 25 (1st Cir. 2007).

11. *Raich*, 545 U.S. at 5 (quoting U.S. CONST., art. I, § 8, cl. 3, cl. 18).

12. *Lopez*, 514 U.S. at 549, 575 (Kennedy, J., concurring) (“[F]ederalism was the unique contribution of the Framers to political science and political theory Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. ‘In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.’”) *Id.* at 575–576 (quoting THE FEDERALIST NO. 51, p. 323 (James Madison) (C. Rossiter ed. 1961)).

13. Somin, *supra* note 3, at 540–41 (“Public preferences on many issues diverge widely across state lines. On many social and economic controversies, majority views in conservative ‘red states’ understandably differ from those in liberal ‘blue states.’ Where such regional differences in opinion exist, a system of decentralized federalism can satisfy a higher proportion of citizens than can a unitary policy adopted by the federal government. Red staters can live under conservative policies while their blue state neighbors can simultaneously enjoy liberal ones.”); John McGinnis & Ilya Somin, *Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106–07 (2004) (“To the extent that local majorities in different states have divergent preferences from each other, a federal system can ensure a higher degree of citizen satisfaction than a unitary polity A unitary government with a one-size-fits-all policy will, by contrast, likely leave a larger proportion of the population dissatisfied with the resulting mix of

competition between states for citizens who can “vote with their feet,”¹⁴ policy innovation through social and economic experimentation,¹⁵ and the protection of liberty through diffusion of government power.¹⁶

The role of the judiciary in preserving this balance is somewhat controversial because the Constitution sheds little light on how federalism should be protected.¹⁷ To be sure, the Framers created several political and structural safeguards to ensure the vitality of our compound republic. Some argue, however, that the first among these safeguards—the political process—is the *principal* or even the *sole* guarantor of state sovereignty.¹⁸ The United States Senate, in particular, served an

policies. Federalism’s accommodation of diverse preferences can ease racial, ethnic, religious, and ideological conflicts by allowing each of the opposing groups to control policy in its own region.”).

14. McGinnis & Somin, *supra* note 13, at 108 (“[T]he theory of interstate competition asserts that states actively compete with each other to attract new citizens, who can improve their lot through the power of ‘exit rights.’ Conversely, they also strive to ensure that current residents will not depart for greener pastures offered by competitors. Citizens dissatisfied with state policy not only have the option of lobbying for change, but also of moving to another state that deliberately seeks to attract them with more favorable policies.”); Ilya Somin, *Revitalizing Consent*, 23 HARV. J. L. & PUB. POL’Y 753, 795–97 (2000).

15. *Raich*, 545 U.S. at 42–43 (O’Connor, J., dissenting) (“One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.’”) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); McGinnis & Somin, *supra* note 13, at 108.

16. *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring); *Gregory v. Ashcroft*, 501 U.S. 452, 458–459 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front In the tension between federal and state power lies the promise of liberty.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759, (1991) (Blackmun, J., dissenting)).

17. *Lopez*, 514 U.S. at 575 (1995) (Kennedy, J., concurring) (“Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers Our role in preserving the federal balance seems more tenuous.”).

18. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) (“It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections.”); RALPH A. ROSSUM, *FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY* 93 (2001) (“The framers understood that federalism would be protected structurally—the mode of electing (and reelecting) the Senate making it in the self-interest of senators to preserve the original federal design and to protect the interests of states as states.”). *Id.* at 93; Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954)

important role in representing state interests at the national level until the Seventeenth Amendment undercut the states' influence by replacing state legislatures' appointment powers with popular election.¹⁹

The political process was not, however, the sole mechanism envisioned by the Framers for warding off federal encroachment. Indeed, they saw the Supreme Court as a final check on the national government, and frequently raised this argument in ratification debates to ward off claims that the proposed constitution would facilitate a unitary government.²⁰ Even the early Court acknowledged the role of the judiciary in defining the limits of federal power vis-à-vis the states.²¹ Historically, judicial intervention—rather than political safeguards—has been the surest check on federal encroachment, though the Court's willingness to impose limits on federal power fluctuates according to the philosophical posture of the majority.

Professor Erwin Chemerinsky explains that the Court vacillates between two views about the underlying structure of American government: one that treats federalism as “empowerment” and another that treats federalism as a fundamental limit on government power.²² The first model—federalism as empowerment—emphasizes the benefit of having multiple levels of government deal with social and economic problems where the failures of one can be compensated by the other.²³ Those who view federalism as empowerment give the Commerce Clause

(arguing that “federal intervention as against the states is thus primarily a matter for congressional determination,” that judicial review in the context of federalism is primarily limited to the maintenance of national supremacy against nullification or usurpation by states, and “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the States . . .”).

19. See Jay Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

20. See John Yoo, *Federalism and Judicial Review*, in *THE TENTH AMENDMENT AND STATE SOVEREIGNTY* 147–59 (Mark R. Killenbeck, ed., 2002); see generally John Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997); Roger G. Brooks, *Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J. L. & PUB. POL'Y 189 (1987).

21. See *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (“Th[e] [federal] government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.”); *id.* at 423 (“Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of *this tribunal*, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.”) (emphasis added).

22. Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–67 (2006).

23. *Id.* (“The benefit of having many levels of government is that there are multiple power centers capable of acting. Federal and state courts, from this view, both should be available to protect constitutional rights.”).

and the Fourteenth Amendment expansive readings to facilitate federal action while leaving limitations on federal action to the political process and other constitutional mechanisms, such as the separation of powers.²⁴

Those who treat federalism as a limit on federal power, however, see it as the Court's responsibility to narrowly define the parameters of Congress's Commerce Clause powers.²⁵ Since the Court plays an active role in safeguarding other aspects of our constitutional framework—namely, separation of powers, checks and balances, and judicial review²⁶—the responsibility to preserve balance between federal and state power—an equally important component of the Framers' design—is no less incumbent upon the judicial branch.²⁷ Indeed, proponents of limits see the Court's failure to fulfill this responsibility as a threat to our entire system of government,²⁸ and thus read the Tenth Amendment broadly to protect the prerogatives of state governments.²⁹ The following provides a brief treatment of the vacillating trends in the Court's Commerce Clause jurisprudence.

B. *The First Death of Federalism*³⁰

The history of Commerce Clause jurisprudence could be summed up as a general trend of federal empowerment punctuated by short-lived attempts to establish meaningful and enduring limits on federal

24. *Id.* at 1767.

25. *Id.*

26. *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (“Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers.”). Though the standards for preserving separation of powers and checks and balances are “well accepted,” and those for judicial review are “beyond question,” the Court has yet to establish enduring standards for preserving federalism despite the fact that it ranks among the four primarily, structural elements of the Framers’ constitutional design. *Id.* at 577–76.

27. Chemerinsky, *supra* note 22, at 1767.

28. *Id.* During the early twentieth century—a period of judicial limitation—the Court took seriously its charge to limit federal commerce powers. *See, e.g.*, *A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495, 548 (1935) (“[Limiting federal Commerce Clause powers is] essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government.”); *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (“The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.”).

29. Chemerinsky, *supra* note 22, at 1767.

30. *See* A. Christopher Bryant, *The Third Death of Federalism*, 17 CORNELL J.L. & PUB. POL’Y 101, 102–06 (2007) (describing the three historical “deaths” of federalism in Supreme Court jurisprudence).

commerce authority. The first such attempt began around the turn of the twentieth century³¹ and gained momentum as the Court tried to impose limits on President Roosevelt's expansive New Deal programs.³² In the face of overwhelming support for President Roosevelt's vision for the country, in addition to his famous threat to "pack the court" with additional justices amenable to New Deal policy, the Court ultimately relented in its fight against the burgeoning national government.³³ Beginning with a series of cases in 1937, the Court embarked on a trajectory of federal empowerment that persisted for a period of fifty-seven years during which the court sustained nearly every exercise of the Commerce Clause powers.³⁴

The Court not only abandoned serious review of federal regulatory activity, but went on to provide a very broad reading of the Commerce Clause in *Wickard v. Filburn*—allowing Congress to regulate wholly intrastate, non-commercial activity³⁵—and introduced an impossibly high barrier to Commerce Clause challenges with a "rational basis" test for congressional action in *Katzenbach v. McClung*.³⁶ In the first case, Filburn challenged wheat marketing quotas imposed by the Agricultural Adjustment Act of 1938 by arguing that his private consumption of wheat grown in excess of the quota was a wholly intrastate, non-commercial activity, and thus not subject to regulation under the Commerce Clause.³⁷ The Supreme Court rejected this argument, holding that even if an activity is local and not strictly commercial, "it may still, whatever its nature, be reached by Congress if it exerts a substantial

31. During this period the Court attempted to limit federal commerce powers by excluding activities deemed "purely local" from the purview of congressional regulation. *See, e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251, 275–76 (1918) (striking down the Keating-Owen Act of 1916 prohibiting the interstate transfer of any merchandise manufactured by children because manufacturing is a "purely local" activity); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12–13 (1895) (dismissing a federal antitrust suit against a sugar refining company because manufacturing is a "local" activity exclusively within the states' police powers).

32. Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 763–64 (2008). *See, e.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936); *United States v. Butler*, 297 U.S. 1, 62–63 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528–29 (1935).

33. Graglia, *supra* note 32, at 763 (noting that "[i]n the end, President Roosevelt did not even need to make good on his 'court packing' threat to win over the support of the Court, as his landslide reelection in 1936 apparently convinced Justice Owen Roberts, the swing vote in most of the New Deal cases, that he could not save the country from a centralization of power from which it did not want to be saved.").

34. *Id.*; *see* *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *NLRB v. Freidman-Harry Marks Clothing Co.*, 301 U.S. 58, 75 (1937); *NLRB v. Freuhauf Trailer Co.*, 301 U.S. 49, 57 (1937).

35. *Wickard v. Filburn*, 317 U.S. 111 (1942).

36. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

37. *Wickard*, 317 U.S. at 113–15.

economic effect on interstate commerce.”³⁸ The Court explained that while Congress was attempting to stabilize wheat prices by limiting supply, private consumption of wheat that would otherwise be purchased from the market would reduce the demand for—and thus the price of—that commodity.³⁹ Although Filburn’s individual consumption was seemingly insubstantial, such activity taken in the aggregate has a “substantial influence” on interstate price and market conditions and therefore lends itself to congressional regulation.⁴⁰

Later, in *Katzenbach*, the Court rejected a challenge to the constitutionality of the Civil Rights Act of 1964 as applied to a restaurant serving primarily intrastate customers.⁴¹ The Court applied a “rational basis” test to Congress’s determination that racial discrimination in the restaurant adversely affected interstate commerce, and should thus be rectified through federal intervention.⁴² Although the tenuous links between Ollie’s Barbecue and interstate commerce included only consumption of food that had travelled through interstate commerce and close proximity to an interstate highway,⁴³ the Court deferred to Congress, stating, “where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, *our investigation is at an end.*”⁴⁴

Under the “rational basis” paradigm conceived in *Katzenbach*, the Commerce Clause indeed “acknowledged no limitations.”⁴⁵ To be sure, the Court recognized an extreme limit on commerce regulation, warning in *Jones & Laughlin Steel* that the scope of the commerce power

must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually

38. *Id.* at 125, 129.

39. *Id.* at 128.

40. *Id.* at 128–29.

41. 379 U.S. 294, 303–04 (1964).

42. *Id.*

43. *Id.* at 296–97.

44. *Id.* at 303–04 (emphasis added).

45. *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). Although Chief Justice Marshall gave the Commerce Clause a profoundly broad reading in *Gibbons*, his understanding of Congress’s power did not find application until after the refitting of the New Deal Court. *See also Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276 (1981) (holding that the Court “must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding”). The *Hodel* Court reiterated Chief Justice Marshall’s assessment of the Commerce Clause power as one that is ““complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”” *Id.* (quoting *Gibbons*, 22 U.S. at 196).

obliterate the distinction between what is national and what is local and create a completely centralized government.”⁴⁶

Three decades passed, however, before the Court again found the wherewithal to impose meaningful limits on the Commerce Clause powers.

C. The “Rehnquist Revolution”

Following a half-century of nearly unquestioned judicial acquiescence, the Rehnquist Court revived federalism as a substantive limit on the Commerce Clause powers with renewed emphasis on the Tenth and Eleventh Amendments.⁴⁷ As an associate justice, Rehnquist found initial success in articulating the outer limits of congressional power in *National League of Cities v. Usery*,⁴⁸ but the Burger Court reversed course shortly thereafter in *Garcia v. San Antonio Metropolitan Transit Authority*.⁴⁹ The true force and substance of the “Rehnquist Revolution” came later when the composition of the Court became more amenable to the idea of resuscitating constitutional constraints on the commerce powers.⁵⁰ The following sections provide a brief review of the Rehnquist Court’s most significant contributions to contemporary Commerce Clause jurisprudence.

I. United States v. Lopez

In 1995, the Court affirmed a facial attack on the Gun-Free School Zones Act (“GFSZ Act”) as an unconstitutional exercise of Congress’s authority to regulate commerce.⁵¹ The GFSZ Act made it a federal offense to “knowingly possess a firearm at a place that the individual

46. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1301 U.S. 1, 37 (1937).

47. DAVID L. HUDSON, JR., *THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY* 58–59 (2007).

48. 426 U.S. 833, 852 (1976) (holding that the Tenth Amendment bars Congress from exercising its commerce powers to regulate wages, hours and benefits of state employees because such action infringes upon the states’ independent plenary authority over traditional government functions), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); HUDSON, *supra* note 47, at 56–58.

49. 469 U.S. 528 (1985) (holding that Congress has the power under the Commerce Clause to extend the Fair Labor Standards Act—which regulates wages, hours and benefits—to state and local governments), *rev’g National League of Cities*, 426 U.S. 833 (1976).

50. HUDSON, *supra* note 47, at 58–62. The appointment of Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas gave Chief Justice Rehnquist and Justice O’Connor a pro-federalism majority.

51. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

knows, or has reasonable cause to believe, is a school zone.”⁵² Alfonso Lopez, a 12th-grade student in San Antonio, Texas, challenged the GFSZ Act after federal prosecutors charged him for carrying a concealed .38-caliber handgun to school. The district court found him guilty, but the Court of Appeals for the Fifth Circuit reversed, holding that in light of insufficient congressional findings and legislative history, “section 922(q) . . . is invalid as beyond the power of Congress under the Commerce Clause.”⁵³

In its watershed opinion affirming the Fifth Circuit, the Supreme Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the “use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “those activities that substantially affect interstate commerce.”⁵⁴ Reasoning that the Gun-Free School Zone Act could only fall within the third category, the Court explained that such regulation may only target intrastate economic activity that substantially affects interstate commerce, or activity that is an essential part of a larger regulatory or economic activity “in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”⁵⁵

The Court concluded, however, that the GFSZ Act in question is a “criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”⁵⁶ Since the targeted activity is not part of a larger regulatory scheme, and the statute provides neither a case-by-case jurisdictional hook to interstate commerce nor congressional findings to substantiate such a relationship, the statute is facially unconstitutional as beyond the bounds of Congress’s commerce authority.⁵⁷ The Court ultimately refused to equate firearm possession with economic activity, stating that “the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”⁵⁸

The Court also rejected the notion that a “rational basis” test for Congressional action can be applied to all Commerce Clause disputes. The dissenting justices argued that the Constitution demands leeway

52. *Id.* (quoting 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)).

53. *Id.* at 552 (quoting 2 F.3d 1342, 1367–68 (1993)).

54. *Id.* at 558–59 (internal citations omitted).

55. *Id.* at 559–61.

56. *Id.*

57. *Id.* at 561–63.

58. *Id.* at 567.

from the Court in determining the existence of a significant connection between the regulated activity and interstate commerce, and that a reviewing court need only find a rational basis for Congress's policy judgment.⁵⁹ The dissenting justices accordingly found a rational link between gun-related violence in schools and interstate commerce worthy of deference.⁶⁰ The majority, however, explicitly rejected the dissent's reasoning that "(1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce."⁶¹ This approach, Chief Justice Rehnquist explained, requires the Court 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."⁶² Indeed, the traditional "rational basis" test proposed by Justice Breyer admits to no substantive limits on Congress's power because "any activity can be looked upon as commercial."⁶³ For the first time in more than fifty years, the Court drew the proverbial line in the sand. To further acquiesce to Congress's encroachment, Justice Rehnquist reasoned, would require the Court to conclude "that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there will never be a distinction between what is truly national and what is truly local."⁶⁴

59. *Id.* at 616–17 (Breyer, J., dissenting) (Justices Stevens, Souter, and Ginsburg joining in the dissent) ("[T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words 'rational basis' capture this leeway.").

60. *Id.* at 621–24. ("The evidence of (1) the extent of the gun-related violence problem, . . . (2) the extent of the resulting negative effect on classroom learning, . . . and (3) the extent of the consequent negative commercial effects, . . . when taken together, indicate a threat to trade and commerce that is 'substantial.' At the very least, Congress could rationally have concluded that the links are 'substantial.'") *Id.* at 623.

61. *Id.* at 565 (Rehnquist, C.J., majority).

62. *Id.* at 567.

63. *Id.* at 564–65 (emphasis added) ("Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. Justice Breyer posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.") *Id.*

64. *Id.* at 567–68 (internal citations omitted).

2. United States v. Morrison

Five years later, the Rehnquist Court rearticulated the constitutional limits on federal regulation of noneconomic, intrastate activity by invalidating section 13981 of the Violence Against Women Act as an unconstitutional exercise of Congress's commerce powers.⁶⁵ Two Virginia Tech students challenged the Act, which provides a federal civil remedy for victims of crimes motivated by gender,⁶⁶ after they were sued under the Act for allegedly assaulting and raping a female colleague.⁶⁷ The Supreme Court affirmed the District Court and an *en banc* panel of the Fourth Circuit Court of Appeals in deciding that Congress's attempt to regulate noneconomic, intrastate, violent criminal conduct through section 13981 of the Act exceeded Congress's Commerce Clause powers.⁶⁸

As with the Gun-Free School Zone Act in *Lopez*, the Violence Against Women Act was enacted under the third category of Congress's commerce powers, or, more specifically, Congress's authority to regulate those activities which have a substantial affect on interstate commerce.⁶⁹ Guided by *Lopez*, the Court articulated four standards that govern review of statutes enacted pursuant to this power: first, the regulated activity must be quintessentially *economic*;⁷⁰ second, reviewing courts should consider whether the statute includes a jurisdictional element in pursuance of Congress's commerce powers;⁷¹ third, courts may consider Congressional findings to evaluate the legislative judgment that a targeted activity substantially affects interstate commerce, particularly where such effect is not readily visible;⁷² and fourth; courts should be wary of "attenuated" links between a regulated activity and its effect on interstate commerce.⁷³

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

66. *Id.* at 605–06.

67. *Id.* at 602–04.

68. *Id.* at 604–05, 617–19.

69. *Id.* at 609.

70. *Id.* at 610–11 (“[A] fair reading of *Lopez* shows that the *non-economic*, criminal nature of the conduct at issue was central to our decision in that case *Lopez*'s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of *economic* endeavor”) (emphasis added); *id.* at 613 (“[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only* where that activity is economic in nature.”) (emphasis added).

71. *Id.* at 611–12.

72. *Id.* at 612.

73. *Id.* at 612–13.

With respect to the final criterion, the Court reiterated its warning in *Lopez* that accepting attenuated links between a targeted activity and its effect on commerce “would permit Congress to ‘regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.’”⁷⁴ Indeed, “Congress could regulate any activity that it found was related to the economic productivity of individual citizens: [including] family law [I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.”⁷⁵

In its review of the Violence Against Women Act, the Court found that the Act not only failed to target economic activity,⁷⁶ but relied on highly attenuated links between violence against women and interstate commerce.⁷⁷ Although Congress provided ample evidence to support its finding that gender-motivated violence has a substantial effect on interstate commerce, the Court explained that the existence of congressional findings is not independently sufficient to sustain the constitutionality of Commerce Clause legislation.⁷⁸ Indeed, although “the political branches have a role in interpreting and applying the Constitution, . . . ever since *Marbury* this Court has remained the *ultimate expounder* of the constitutional text.”⁷⁹ Thus, whether a particular operation affects interstate commerce sufficiently to fall within Congress’s constitutional purview “is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”⁸⁰

The *Morrison* Court ultimately rejected the notion that “Congress may regulate non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁸¹ This decision is consistent with the Court’s long-standing recognition that “regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”⁸² As Chief Justice Rehnquist emphasized, the suppression of violent crime and the vindication of its

74. *Id.* at 613 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

75. *Id.* (quoting *Lopez*, 514 U.S. at 564).

76. *Id.* (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity”).

77. *Id.* at 613–16.

78. *Id.* at 614.

79. *Id.* at 616 (emphasis added).

80. *Id.* at 614 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

81. *Id.* at 617.

82. *Id.* at 618.

victims are perhaps the best examples of the police power that the Founders denied the National Government.⁸³ The Court accordingly refused to sustain section 13981 of the Violence Against Women Act, noting that the Commonwealth of Virginia must provide the due remedy.

3. *Jones v. United States*⁸⁴

Decided concurrently with *Morrison*, *United States v. Jones* applies the principles articulated in *Lopez* and *Morrison* to “as-applied” challenges to otherwise valid statutes. The unanimous *Jones* Court held that federal authorities could not pursue charges under a federal arson statute—making it a crime to “damage or destroy, ‘by means of fire or an explosive, any . . . property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce’”⁸⁵—against a defendant involved in the arson of a private, owner-occupied residence not used for any commercial purpose.⁸⁶

In 1998, a federal jury convicted petitioner-defendant Dewey Jones under 18 U.S.C. section 844(i)—enacted as part of Title XI of the Organized Crime Control Act of 1970—for throwing a Molotov cocktail through the window of his cousin’s home and causing substantial damage to the residential structure.⁸⁷ The Seventh Circuit affirmed, and Jones appealed arguing that section 844(i), as applied to the arson of a private residence not used for commercial purposes, exceeded the authority vested in Congress under the Commerce Clause.⁸⁸

The government defended Jones’ conviction by relying on the “affecting . . . commerce” language of the statute, arguing that the homeowner’s use of the property to obtain a mortgage loan and natural gas resources from out-of-state companies established sufficient effects on interstate commerce.⁸⁹ The Court noted, however, that the statute requires the affected building to be “used” in an activity affecting commerce, which ostensibly means “active employment for commercial purposes.”⁹⁰ Since “everyday living” does not constitute a commercial

83. *Id.* at 618–19 (“The Constitution . . . withhold[s] from Congress a plenary police power.”) (quoting *United States v. Lopez*, 514 U.S. 549, 566 (1995)); *id.* (“We *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”) (quoting *Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring)).

84. 529 U.S. 848 (2000).

85. *Id.* at 850 (quoting 18 U.S.C. § 844(i) (1994 ed., Supp. IV)).

86. *Id.* at 850–51.

87. *Id.* at 851.

88. *Id.* at 851–52.

89. *Id.* at 855.

90. *Id.*

activity,⁹¹ the Court reversed, explaining that to hold otherwise would permit Congress to criminalize the arson of virtually any building in the country since they all were seemingly constructed with supplies that moved in interstate commerce, are served by utilities that have an interstate connection, were financed or insured by out-of-state enterprises, or bear some other “trace” of interstate commerce.⁹² The Court warned further that when a statute is “susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided,” the Court’s duty is to accept the latter.⁹³ Thus, as in *Lopez*—where the federal government sought to regulate a criminal activity “of traditional state concern”—the Court rejected any construction of section 844(i) that would render the “traditionally local criminal conduct” in which Jones engaged “a matter for federal enforcement.”⁹⁴

D. Reasserting Limits of Congress’s Commerce Powers

Lopez, *Morrison*, and *Jones* breathed new life into the notion that Congress’s Commerce Clause powers do not provide an unlimited reservoir of regulatory authority extending to every activity rationally linked to interstate commerce. More than anything, the Rehnquist revolution reasserted an analytical framework mindful of the Court’s role in asserting limits on commerce regulation necessary to protect the structural division of power between state and national governments.

The first—and perhaps the most “revolutionary”—of the several principles articulated during this era of renewed limitation is that the Supreme Court is not limited to a “rational basis” test when evaluating challenges to Commerce Clause legislation.⁹⁵ While legislative findings may inform the Court’s judgment, *Marbury* unequivocally established the principle that “[i]t is emphatically the province and duty of the *judicial department* to say what the law is,”⁹⁶ and, accordingly, the Court has reasserted its role in articulating limitations on federal commerce authority. Second, the Court limited Congress’s regulatory powers under the Commerce Clause to quintessential “commercial” or “economic” activity, though the majority never defined the specific

91. *Id.* at 856.

92. *Id.* at 857.

93. *Id.*

94. *Id.* at 858 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

95. See *supra* text accompanying notes 78–80.

96. *United States v. Morrison*, 529 U.S. 598, 616 (2000) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)) (emphasis added).

parameters of these categories.⁹⁷ Third, *Lopez* and *Morrison* reaffirmed the pre-New Deal test requiring that regulated activity, taken in the aggregate, must exert a “substantial effect” on interstate commerce,⁹⁸ and thus refused to validate tenuous legislative judgments that pile inference upon inference to establish some connection between intrastate activity and interstate commerce.⁹⁹ Finally, the Court stressed the imperative of protecting areas of “traditional state concern” from federal encroachment¹⁰⁰ by exempting intrastate criminal conduct from Congress’s regulatory purview where such conduct does not target instrumentalities, channels, or goods in interstate commerce.¹⁰¹

These standards would not prove resilient, however, in the face of a uniquely challenging case pitting the rights of state-sanctioned medicinal marijuana users against the federal government’s anti-drug regime. In the case that follows, the Court abruptly reverted to its pre-*Lopez* analytical framework and upset the promise of the Rehnquist revolution.

III. *RAICH* AND THE “THIRD DEATH OF FEDERALISM”: AN END TO MEANINGFUL LIMITS ON CONGRESS’S COMMERCE POWERS?

A. *Gonzales v. Raich*¹⁰²

When the Supreme Court decided *Raich* in 2005, the majority effectively eviscerated the constitutional limits established by the previous decade of Commerce Clause jurisprudence.¹⁰³ Indeed, the majority came to its conclusion by reviving principles of analysis utilized during the pre-Rehnquist period of general acquiescence, including, principally, the rational basis test. The Court reassumed a position of substantial legislative deference by refusing to make an aggressive inquiry into the federal government’s policy justification, namely that failing to regulate purely intrastate, medicinal use of marijuana would undercut the federal government’s larger anti-drug regulatory program under the Controlled Substances Act.

97. *Id.* at 610–13; Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 881 (2005).

98. *Morrison*, 529 U.S. at 609; *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); Pushaw, *supra* note 97, at 881 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34–43 (1937); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).

99. *Morrison*, 529 U.S. at 612; *Lopez*, 514 U.S. at 567.

100. *Morrison*, 529 U.S. at 611–19; *Lopez*, 514 U.S. at 564–68; Pushaw, *supra* note 97, at 881.

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

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

103. Somin, *supra* note 3 (“If [*Raich*] has not quite put an end to the Rehnquist Court’s ‘federalism revolution,’ it certainly represents an important step in that direction.”).

1. Facts and procedural history

In 2002, two California medical patients—Raich and Monson—using physician-recommended marijuana to treat serious medical conditions brought suit to enjoin the U.S. Attorney General and the DEA from enforcing the Controlled Substances Act (“CSA”) to the extent that it prevented them from possessing, obtaining, or manufacturing marijuana for personal medical use.¹⁰⁴ Although the patients were using cannabis pursuant to the California Compassionate Use Act—adopted by initiative in 1996 to allow “seriously ill” residents to gain access to marijuana for medical purposes—federal agents seized and destroyed their plants under the auspices of the CSA.¹⁰⁵ The patients argued, among other things, that enforcing the CSA violated the Commerce Clause because personal medicinal marijuana use is a noneconomic, intrastate activity outside the constitutional jurisdiction of the federal government.¹⁰⁶ The district court denied their motion for an injunction, however, noting that although “federal enforcement interests ‘wane[d]’ when compared to the harm that [they] would suffer if denied access to medically necessary marijuana,” they could not demonstrate likely success on their legal claims.¹⁰⁷

The Ninth Circuit reversed and ordered the District Court to enter a preliminary injunction on their finding that the CSA, as applied to the patients, was likely “an unconstitutional exercise of Congress’s Commerce Clause authority.”¹⁰⁸ The Court of Appeals distinguished this case from prior cases dismissing Commerce Clause challenges to the CSA by identifying the patients’ use of medicinal marijuana as a “separate and distinct class of activit[y],” namely, “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.”¹⁰⁹ The court explained that medicinal marijuana use is different from drug trafficking because it is a narrowly limited activity, disconnected from the broader commercial market for marijuana, and involves the use of cannabis that is not intended for, and does not enter, the stream of commerce.¹¹⁰ The Ninth Circuit relied

104. *Raich*, 545 U.S. at 7–8.

105. *Id.*

106. *Id.* at 8–9.

107. *Id.* at 8 (quoting *Raich v. Ashcroft*, 248 F. Supp. 2d 918 (N.D. Cal. 2003)).

108. *Id.* (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (2003)).

109. *Id.* (quoting *Raich*, 352 F.3d at 1228).

110. *Id.* a 8–9.

heavily on *Lopez* and *Morrison* in off-setting this “separate class of purely local activit[y]” beyond the reach of federal power.¹¹¹

2. Majority holding

In a 6–3 decision, the Supreme Court reversed the Ninth Circuit and held that regulation of intrastate medicinal marijuana consumption falls well within Congress’s commerce authority.¹¹² Writing for the majority, Justice Stevens explained that Congress’s authority to regulate activities that “substantially affect interstate commerce” is very well established,¹¹³ and that *Wickard* in particular controlled the outcome of this case because under remarkably similar circumstances, the *Wickard* Court held that “Congress can regulate purely intrastate activity that is not itself ‘commercial’ . . . if it concludes that failure to regulate that class of activity would *undercut* the regulation of the interstate market in that commodity.”¹¹⁴ Just as the plaintiff in *Wickard* challenged the Agricultural Adjustment Act by arguing that his consumption of excess wheat was a purely intrastate, non-commercial activity,¹¹⁵ Raich and Monson argued that their medicinal marijuana use should be excepted from the CSA. In both cases, however, private consumption of a “fungible commodity,” taken in the aggregate, would directly impact the interstate market for that commodity, and thus interfere with Congress’s prerogative to control the supply and demand in both lawful and unlawful markets.¹¹⁶

Instead of keeping to a narrow decision, the Court went on to breathe new life into *Wickard*’s “rational basis” test for congressional legislation implemented under the auspices of the Commerce Clause.¹¹⁷ Justice Stevens explained that since the Court has “never required Congress to make particularized findings in order to legislate,”¹¹⁸ the majority was content with a finding that Congress “could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.”¹¹⁹

111. *Id.* at 9.

112. *Id.* at 10, 22.

113. *Id.* at 16–17 (citing *Perez v. United States*, 402 U.S. 146, 150 (1971); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 27 (1937)).

114. *Id.* at 18 (quoting *Wickard v. Filburn*, 317 U.S. 111, 118 (1942)) (emphasis added).

115. See *Wickard*, 317 U.S. at 113–15.

116. *Raich*, 545 U.S. at 19, 22.

117. *Id.* 18–19, 22.

118. *Id.* at 21.

119. *Id.* at 32.

Indeed, the Court went to great lengths to distinguish *Raich* from *Lopez* and *Morrison* to avoid the burden of actually assessing the effect of the targeted activity on interstate commerce or even the likelihood that such activity would “undercut” a larger regulatory scheme.¹²⁰ Justice Stevens correctly asserted that the pivotal distinction between *Lopez* and *Morrison* and the case at bar was that the former cases challenged the constitutionality of a particular statute as beyond Congress’s commerce authority, while *Raich* sought to excise individual applications of an otherwise valid statute.¹²¹ Moreover, the former challenges were sustained because the statutes at issue did not target “economic activity,”¹²² while those activities regulated by the CSA are “quintessentially economic.”¹²³ In reaching this conclusion, the Court broadly defined “economic activity” to include “the production, distribution, and consumption of commodities.”¹²⁴

Justice Stevens explained further that where a class of activity thus regulated falls within the reach of federal power—such as regulation of the interstate drug market—“the courts have no power ‘to excise, as trivial, individual instances’ of the class.”¹²⁵ Thus, when “a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”¹²⁶ Since the CSA is a generally valid statute regulating the production and consumption “of commodities for which there is an established, and lucrative, interstate market,”¹²⁷ and the exemption of marijuana cultivated for personal use may have a substantial effect on the interstate market for that commodity,¹²⁸ the Court refused to excise the

120. *See id.* at 23–27.

121. *Id.* at 23.

122. *See id.* (“The [Gun-Free School Zones Act of 1990] did not regulate any economic activity and did not contain any requirement that the possession of a gun have any connection to past interstate activity or a predictable impact on future commercial activity.”); *id.* at 25 (“The Violence Against Women Act of 1994 . . . created a federal civil remedy for the victims of gender-motivated crimes of violence Despite congressional findings that such crimes had an adverse impact on interstate commerce, we held the statute unconstitutional because, like the statute in *Lopez*, it did not regulate economic activity. We concluded that ‘the noneconomic, criminal nature of the conduct at issue was central to our decision’ in *Lopez* . . .”).

123. *Id.* at 25.

124. *Id.* at 25–26 (citing WEBSTER’S THIRD INTERNATIONAL DICTIONARY 720 (1966)).

125. *Id.* (quoting *Perez v. United States*, 402 U.S. 146, 154 (1971) (internal quotations omitted)).

126. *Id.* at 17 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)) (internal quotations omitted)).

127. *Id.* at 26.

128. *Id.* at 28 (“[A] nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.”).

narrow class of medicinal marijuana from the larger class of substances covered by the CSA.

3. *Scalia's concurrence*

Justice Scalia tried—unsuccessfully¹²⁹—to limit the scope of *Raich* by arguing that Congress may exert its commerce authority over noneconomic intrastate activity only where the failure to do so “‘could . . . undercut its regulation of interstate commerce.’”¹³⁰ Congress’s regulatory authority over activities that substantially affect interstate commerce—and are thus not *part* of interstate commerce—derives from the Necessary and Proper Clause of the Constitution.¹³¹ The Constitution thus provides that if Congress has the authority to regulate some activity affecting interstate commerce, “it [also] possesses every power needed to make that regulation effective,”¹³² even if some intrastate transactions may thereby be controlled.¹³³ Since this power extends only to activity *necessary* to make a comprehensive, interstate regulation effective,¹³⁴ Justice Scalia did not view it as a serious threat to federalism.¹³⁵ He accordingly concluded that because the Commerce Clause unquestionably permits federal regulation of the interstate market for Schedule I controlled substances,¹³⁶ and excising personal marijuana use for medical purposes would undercut Congress’s objective of prohibiting marijuana from the interstate market,¹³⁷ the federal government has constitutional authority to enforce the CSA against intrastate, non-commercial use of that commodity.

129. Subsequent U.S. Circuit Court decisions have disregarded this assertion. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 42 (1st Cir. 2007) (explaining that the majority in *Raich* does not require Congress to delineate regulated classes with “scientific exactitude”) (quoting *Raich*, 545 U.S. at 17).

130. *Raich*, 545 U.S. at 38 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561) (emphasis added).

131. *Id.* at 34; *see* U.S. CONST., art. I, § 8, cl. 18 (“The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . .”).

132. *Raich*, 545 U.S. at 36 (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942) (internal quotations omitted)).

133. *Id.* at 38 (citing *Shreveport Rate Cases*, 234 U.S. 342, 353 (1914)).

134. *Id.* at 37–38.

135. *Id.* at 38–39.

136. *Id.* at 39–40.

137. *Id.* at 40–42.

B. Raich's Effect on Commerce Clause Jurisprudence

As the broadest assertion of Congress's Commerce Clause authority yet upheld by the Supreme Court,¹³⁸ *Raich* not only threatens to undermine the limiting framework articulated in *Lopez* and *Morrison*, but also demonstrably signals a return to the pre-*Lopez* era of nearly unchecked federal incursion into traditional state powers. First, *Raich* provides a definition for economic activity—"the production, distribution, and consumption of commodities"¹³⁹—that admits to no limit on the scope of activity within Congress's regulatory power.¹⁴⁰ Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, criticized this definition as excessively broad,¹⁴¹ warning that it threatened to sweep all "productive human activity" into Congress's regulatory purview. The dissenting Justices warned further that drawing the line where every private activity affects the demand for a regulated market good "is to draw no line at all, and to declare everything economic."¹⁴² Indeed, virtually all activity involves the "distribution" or "consumption" of a commodity that has traveled through interstate commerce or affects the market demand for that product.¹⁴³ It is difficult to imagine how the simple constitutional directive "[t]o regulate Commerce . . . among the several States"¹⁴⁴ has come to encompass regulation of any activity involving the production, distribution, or consumption of a commodity whose aggregate effect exerts a substantial impact on interstate commerce. As some predicted,¹⁴⁵ circuit courts have even found a way to construe violent criminal conduct as economic activity.¹⁴⁶

138. Somin, *supra* note 3.

139. *Raich*, 545 U.S. at 25–26 (Stevens, J., majority).

140. *Id.* at 49–50 (O'Connor, J., dissenting); Somin, *supra* note 3, at 513–17.

141. *Raich*, 545 U.S. at 49–50 (O'Connor, J., dissenting) ("The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because the intrastate activity is itself economic, or because regulating it is a rational part of regulating its market.").

142. *Id.*

143. Somin, *supra* note 3, at 514.

144. U.S. CONST., art. I, § 8, cl. 3.

145. *Id.* at 515–16 (speculating that a court might rationally construe murder, rape, or theft as economic activity subject to congressional regulation under the *Raich* definition of economic activity) (quoting U.S. CONST. art. I § 8).

146. See, e.g., *United States v. Nascimento*, 491 F.3d 25, 43 (1st Cir. 2007) (explaining that racketeering is "sufficiently economic in nature that it may be aggregated for Commerce Clause purposes").

Second, *Raich* makes it easier for Congress to regulate noneconomic, intrastate activity—which is traditionally beyond Congress’s constitutional reach—if such activity is incident to a broader regulatory scheme.¹⁴⁷ Referring to this as a “superficial and formalistic distinction[],”¹⁴⁸ Justice O’Connor lamented in her dissent that *Raich* relegates *Lopez* to “nothing more than a drafting guide,” directing Congress to legislate broadly to include activities that might not otherwise fall within its regulatory authority.¹⁴⁹ Although the *Raich* Court reiterated the *Lopez* standard permitting federal regulation of noneconomic, intrastate activity only where it is an “essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated,”¹⁵⁰ it gave little credence to the words “essential” and “undercut.” Indeed, the Court emphasized that Congress is not required to provide “particularized” findings of a need to include intrastate, noneconomic activity in its broader regulatory scheme.¹⁵¹ Thus, Congress can shoehorn virtually any regulation by implicitly or explicitly designating it as an essential component of a larger interstate regulatory scheme.¹⁵² As one constitutional scholar has suggested, this approach would allow Congress to reenact the Gun Free School Zone Act struck down in *Lopez* by simply incorporating it into the No Child Left Behind Act.¹⁵³ This standard consequently leaves no activity beyond Congress’s regulatory grasp.

Third, *Raich* reasserted the “rational basis” test for assessing congressional determinations that a particular activity, taken in the aggregate, substantially affects interstate commerce.¹⁵⁴ Even though *Lopez* and *Morrison* cast doubt on the “rational basis” test,¹⁵⁵ and *Morrison* in particular struck down the Violence Against Women Act notwithstanding extensive congressional findings asserting substantial

147. *Raich*, 545 U.S. at 46 (O’Connor, J., dissenting); Somin, *supra* note 3, at 516–18.

148. *Raich*, 545 U.S. at 47 (O’Connor, J., dissenting).

149. *Id.* at 46 (“Today’s decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential . . . to the interstate regulatory scheme.”).

150. *Raich*, 545 U.S. at 24–25 (Stevens, J., majority) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995) (internal quotations omitted)).

151. *Id.* at 21; Somin, *supra* note 3, at 516–17.

152. *Raich*, 545 U.S. at 46 (O’Connor, J., dissenting); Somin, *supra* note 3, at 517.

153. Somin, *supra* note 3, at 518.

154. *Raich*, 545 U.S. at 22 (Stevens, J., majority) (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

155. *See supra* text accompanying notes 92–93.

effects on interstate commerce,¹⁵⁶ *Raich* suggests that the Court will uphold regulations touching even intrastate, noneconomic activity if a rational basis for such an effect exists.¹⁵⁷

Justice O'Connor also argued in her dissent that the majority's reliance on *Wickard*—the most “far reaching example of Commerce Clause authority of intrastate activity”¹⁵⁸—to support a revival of the “rational basis” test is misplaced. She distinguished the case on two bases: first, the *Wickard* Court “looked to ‘the actual effects’¹⁵⁹ of the activity in question” by consulting substantial evidence provided by the parties sufficient to leave “no doubt” about the activity's substantial effects on interstate commerce;¹⁶⁰ and second, *Wickard* did not hold or imply that small-scale production of commodities is always economic, substantially affects interstate commerce, or is automatically within Congress's reach.¹⁶¹

Indeed, the Agricultural Adjustment Act (AAA) at issue in *Wickard* specifically exempted small-scale, non-commercial wheat cultivation, and, thus, the Court could not possibly have approved congressional regulation of such limited activity.¹⁶² By contrast, the CSA reaches much further than the AAA into small-scale, intrastate, non-commercial production of commodities by, for example, regulating the production and consumption of small quantities of medicinal marijuana for personal use. Moreover, the *Raich* Court came to its conclusion with little evidence to support the government's claim that homegrown medicinal marijuana users constitute, in the aggregate, a substantial enough class to

156. *United States v. Morrison*, 529 U.S. 598, 614 (2000); Somin, *supra* note 3, at 518.

157. *See, e.g., Raich*, 545 U.S. at 32 (explaining the Court is content with a finding that Congress “could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial”).

158. *Id.* at 50 (quoting *United States v. Lopez*, 514 U.S. 549, 560 (1995)).

159. *Id.* at 53 (citing *Wickard v. Filburn*, 317 U.S. 111, 120, 125 (1942)).

160. *Id.* (citing *Wickard*, 317 U.S. at 128–29) (emphasis added) (“After reviewing in detail the picture of the industry provided in [the stipulated summary of the economics of the wheat industry], the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent.”).

161. *Id.* at 51.

162. *Id.* (“*Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. The AAA itself confirmed that Congress made an explicit choice not to reach—and thus the Court could not possibly have approved of federal control over—small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres.”) (internal citations omitted).

have any discernable—let alone substantial—effect on the interstate drug market, or might otherwise undercut the CSA regime.¹⁶³

Finally, *Raich*'s expansion of the broader regulatory scheme exception and the "rational basis" test for substantial effects make "as-applied" Commerce Clause challenges nearly impossible.¹⁶⁴ While lower courts already demonstrated some reluctance to take seriously the standards articulated in *Lopez* and *Morrison*,¹⁶⁵ *Raich* confirmed their doubts about the lasting effects of the "Rehnquist Revolution."¹⁶⁶ Indeed, *Raich* effectively limited the principles articulated in *Lopez* and *Morrison* to facial statutory challenges by dismissing potentially unconstitutional applications of otherwise-valid statutes as matters of "no consequence."¹⁶⁷

This principle was confirmed in *United States v. Stewart*,¹⁶⁸ a case remanded concurrently with *Raich*,¹⁶⁹ in which the Ninth Circuit explained that, in light of *Raich*, an as-applied challenge to a federal statute prohibiting possession of machine guns could not be sustained even though the defendant manufactured and assembled his own machine guns.¹⁷⁰ The Ninth Circuit originally reversed Stewart's conviction, finding that the statute at issue failed all four parts of the *Morrison* test,¹⁷¹ but it subsequently held that *Raich* permits Congress to regulate even intrastate noneconomic activity when that activity falls incident to a larger regulatory program.¹⁷² Since Congress could rationally conclude that possession of a homemade machine gun could affect the national market for machine guns, Stewart's as-applied challenge was of "no consequence" in light of the broader regulatory program in the balance.¹⁷³ The same principle guided the outcome of other cases remanded after or concurrently with *Raich* in the context of

163. *Id.* at 53.

164. See Somin, *supra* note 3, at 518; Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 916–18 (2005); Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme Drug (Law) Overdose*, 9 LEWIS & CLARK L. REV. 751, 753–54 (2005).

165. Reynolds & Denning, *supra* note 164, at 916; see also Glenn H. Reynolds & Brannon P. Denning, *What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (2000).

166. Reynolds & Denning, *supra* note 164, at 918 ("[T]he as-applied challenges to which lower courts had been warming are likely over.").

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

168. 451 F.3d 1071 (9th Cir. 2006).

169. *United States v. Stewart*, 545 U.S. 1112 (2005).

170. *Stewart*, 451 F.3d at 1078.

171. *Id.* at 1074.

172. *Id.* at 1076–78.

173. *Id.* at 1077–78.

federal child pornography statutes.¹⁷⁴ What follows, however, is perhaps the most egregious example of federal incursion on traditional state powers pursuant to the standards articulated in *Raich*. In contrast to as-applied challenges to statutes regulating economic commodities—marijuana, machine guns, and pornography—*United States v. Nascimento*¹⁷⁵ took the *Raich* framework a step further by applying it to noneconomic criminal activity.

IV. A CLARION CALL FOR LIMITS: FEDERAL APPROPRIATION OF STATE POLICE POWERS IN *UNITED STATES V. NASCIMENTO*

In *United States v. Nascimento*, the First Circuit allowed federal prosecutors to convict local street gang members under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) for noneconomic violent criminal conduct that neither targeted interstate commerce nor reached beyond the borders of the Commonwealth of Massachusetts.¹⁷⁶ The Sixth Circuit, however, squarely rejected a nearly identical case just a few years prior—unencumbered by *Raich*—as an unconstitutional exercise of Congress’s Commerce Clause powers.¹⁷⁷ These cases aptly demonstrate how courts are using *Raich* to obliterate the distinction between what is truly national and what is truly local by blindly acquiescing to federal appropriation of even core state powers.

A. *United States v. Nascimento*

In the late 1990s, two rival gangs in Boston—named after the streets Wendover and Stonehurst—commenced a violent campaign of murder that culminated in a string of federal criminal prosecutions. After a lengthy investigation, a federal grand jury indicted thirteen members of the Stonehurst gang on three criminal counts, including, principally, an alleged violation of RICO based on their membership in Stonehurst, a so-called racketeering enterprise.¹⁷⁸ The government’s indictment alleged that Stonehurst’s primary purpose was “to shoot and kill members, associates, and perceived supporters of a rival gang in Boston known as Wendover,” and offered evidence of nearly two dozen murders and

174. See *United States v. Maxwell*, 446 F.3d 1210 (11th Cir. 2006) (affirming on remand a conviction under the Child Pornography Prevention Act of 1996); *United States v. Smith*, 459 F.3d 1276 (11th Cir. 2006).

175. 491 F.3d 25 (1st Cir. 2007).

176. *Id.* at 30–32.

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

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

instances of assault with intent to kill to support the indictment.¹⁷⁹ Although some members of Stonehurst sold drugs, the gang was not primarily or collectively engaged in drug trafficking, and its criminal activity was limited to the Dorchester area of Boston.¹⁸⁰ After a brief trial, the federal court sentenced defendant Nascimento and others to prison for terms ranging between four and fifteen years.

1. The missing elements of federal jurisdiction: economic activity and substantial effects

The Nascimento prosecution is troubling because although the Stonehurst gang engaged in violent criminal conduct, their activities were confined to the Boston area and did not target interstate commerce. RICO's principal liability provision targets criminal enterprises "engaged in, or the activities of which affect, interstate commerce . . . through a pattern of racketeering activity."¹⁸¹ To convict a defendant of a substantive RICO violation, the government must demonstrate: "(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."¹⁸² Thus, RICO's key "jurisdictional hook" to Congress's Article I Commerce Clause powers requires that the defendants' conduct in some way affect interstate commerce.¹⁸³

In *Nascimento*, the effect of Stonehurst's criminal conduct on interstate commerce was tenuous at best. The district court instructed the jury, however, that federal jurisdictional requirements would be satisfied if the government demonstrated that Stonehurst's activities had at least a *de minimis* effect on interstate commerce, regardless of the economic nature of such conduct.¹⁸⁴ Nascimento appealed, arguing among other things that the RICO statute as applied to an enterprise engaged exclusively in noneconomic criminal activity is unconstitutional.¹⁸⁵

179. *Id.*

180. *Id.*

181. Frank D'Angelo, Note, *Turf Wars: Street Gangs and the Outer Limits of RICO's "Affecting Commerce" Requirement* 76 *FORDHAM L.REV.* 2075, 2076 (2008) (citing 18 U.S.C.S. § 1962(c)). RICO defines racketeering as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance." 18 U.S.C.S. § 1961(1)(A).

182. *Nascimento*, 491 F.3d at 31 (quoting *United States v. Marino*, 277 F.3d 11, 33 (1st Cir. 2002)).

183. D'Angelo, *supra* note 181, at 2075.

184. *Id.*

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

Relying on the trilogy of recent Supreme Court cases establishing limits on the federal government's Commerce Clause powers—*Morrison*, *Jones*, and *Lopez*—Nascimento asserted that the effect of noneconomic criminal activity could not be aggregated to establish the *substantial* effect on interstate commerce requisite to federal intervention.¹⁸⁶ Although the Court has long maintained that individual instances of conduct need not be substantial if the conduct, taken in the aggregate, would substantially affect interstate commerce, *Lopez* limits aggregation to strictly “economic” activity.¹⁸⁷ Indeed, the Court in *Morrison* explicitly “reject[ed] the argument that Congress may regulate non-economic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce,”¹⁸⁸ adding that the “suppression of violent crime and the vindication of its victims’ was quintessentially within the police power of the several states (and, by implication, not within the federal commerce power per se).”¹⁸⁹

Nascimento argued further that Stonehurst’s criminal conduct was indistinguishable from the type of conduct the *Morrison* Court refused to aggregate, namely noneconomic violent crime.¹⁹⁰ Stonehurst was an organization committed principally to killing members of the Wendover gang.¹⁹¹ They were not engaged in the interstate drug trade, nor did they kill for money.¹⁹² The untenable links to commerce offered by federal prosecutors included a single incident in which members of Stonehurst incidentally ambushed and shot a Wendover gang member at a 24-hour tire service center catering to interstate traffic, causing the store to close for several hours in the middle of the night;¹⁹³ and Stonehurst members’ use of cellular phones to coordinate their criminal activities.¹⁹⁴

Though seemingly indistinguishable from cell-phone use, the court inexplicably latched onto Stonehurst’s maintenance and use of a small arsenal of firearms as an incontrovertible link to commerce.¹⁹⁵ The court thought it significant that all but one of the nine firearms was manufactured in another state, and that one convicted member of the gang traveled from Massachusetts to neighboring New Hampshire to

186. *Id.* at 40–41.

187. *Id.* at 40 (citing *United States v. Lopez*, 514 U.S. 549, 558–560 (1995)).

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

189. *Id.* (quoting *Morrison*, 529 U.S. at 618).

190. *Id.* at 41, 43–44.

191. *Id.* at 30.

192. *Id.*

193. *Id.* at 43–44.

194. *Id.* at 44.

195. *Id.* at 45. Upon learning that Stonehurst maintained an arsenal of at least nine firearms, the district court concluded that the gang was a “massive purchaser of guns.” *Id.*

purchase a firearm that later became part of the Stonehurst arsenal and was allegedly used to shoot at a car thought to be carrying members of the Wendover gang.¹⁹⁶ Noting that other circuit courts have refused to uphold federal criminal convictions on the basis of a defendant's use of a weapon that had traveled through interstate commerce,¹⁹⁷ the court concluded that the arsenal of weapons manufactured in another state combined with the out-of-state firearm purchase was a sufficient link to commerce.¹⁹⁸

More importantly, the First Circuit held that *Raich* does not require courts to analyze the effect of a particular activity on interstate commerce if federal regulation of that activity falls within a comprehensive regulatory scheme.¹⁹⁹ Thus, because Nascimento's appeal entails a challenge to a generally valid statute—RICO—*Raich* only requires the court to determine whether Congress acted “rationally” when making a policy judgment that a purely intrastate criminal activity is an essential part of the larger anti-racketeering regime.²⁰⁰ If the statute is based on a rational policy judgment—as the court concluded here—*Raich* prohibits courts from “excising” individual components of a larger “class of activity” targeted by Congress.²⁰¹ The court noted that although Justice Scalia attributes to the majority a limitation “that Congress may regulate non-economic intrastate activities ‘only where the failure to do so could . . . undercut its regulation of interstate commerce,’” their understanding of the *Raich* opinion is that regulated classes need not be delineated with “scientific exactitude.”²⁰² In other words, “*Raich* teaches that when Congress is addressing a problem that is legitimately within its purview, an inquiring court should be slow to interfere.”²⁰³

In the instant case, therefore, the court determined only whether Congress rationally targeted a “class of activity” that has a substantial relationship to interstate commerce rather than determining whether the specific activity at issue—which falls within the larger class—independently affects interstate commerce. As the court reiterated, “the intrastate or non-economic character of individual instances within the

196. *Id.* at 45.

197. *Id.* (“[I]t is one thing for Congress to prohibit possession of a weapon that has itself moved in interstate commerce, but it is quite another thing for Congress to prohibit homicides using such weapons.”) (quoting *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000)).

198. *Id.* at 45.

199. *Id.* at 41–43.

200. *Id.* at 42.

201. *Id.*

202. *Id.* (quoting *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring)).

203. *Id.* at 42.

class is of no consequence.”²⁰⁴ Stated differently, federal infringements on core state powers are mere collateral damage if such infringements are incident to—*not even necessary for*—a larger regulatory program.

Since the RICO statute focuses narrowly on racketeering, and racketeering is, as the court described it, “based largely on greed,” the court concluded that the general class of activity known as racketeering was “sufficiently economic in nature that it may be aggregated for Commerce Clause purposes.”²⁰⁵ In other words, because intrastate gang warfare falls within a class of activity known as “racketeering,” and because racketeering falls within a class of activity motivated by “greed,” and because activities motivated by greed fall generally within a broader class of “economic activity,” Congress could rationally target local street gang warfare as an activity that has a “substantial relationship” to interstate commerce. The court hence transformed a common form of violent criminal misconduct into “economic activity” to avoid the *Lopez* limitation that only “economic” activity be aggregated for purposes of Commerce Clause regulation. Thus, the First Circuit did exactly what the *Morrison* Court would not: equate violent criminal conduct with economic activity.²⁰⁶

B. United States v. Waucaush: A Pre-Raich Result

In 1997, the Sixth Circuit confronted a RICO prosecution²⁰⁷ nearly identical to that in *Nascimento* but came to a different conclusion unencumbered by *Raich*. The case involved seven members of a Detroit-area gang known as the Cash Flow Posse (CFP)—including Robert Waucaush—charged with violating and conspiring to violate RICO.²⁰⁸ The federal indictment alleged that Waucaush and his colleagues murdered, conspired to murder, and assaulted with intent to murder, members of two rival gangs in a citywide turf war.²⁰⁹ Despite the gang’s name, however, CFP did not engage in any economic activity. Waucaush accordingly moved to dismiss, arguing that his criminal acts did not “affect interstate commerce” within the meaning of the RICO statute and the Constitution.²¹⁰ The district court denied Waucaush’s motion and sentenced him to life in prison.²¹¹ Although initially denied, the Sixth

204. *Id.* at 43 (citing *Raich*, 545 U.S. at 17).

205. *Id.* at 43.

206. *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000).

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

208. *Id.* at 253.

209. *Id.*

210. *Id.*

211. *Id.* at 253–54.

Circuit reconsidered Waucaush's appeal after the Supreme Court decided *Jones* and *Morrison* in 2000. The crux of his appeal required the court to determine whether prosecutors could demonstrate that Waucaush violated RICO by assisting an enterprise whose activities "affected" interstate commerce and that regulation of such activity was within Congress's Commerce Clause powers.²¹²

While CFP was not directly involved in interstate commerce, the indictment against Waucaush alleged that he and others traveled on interstate highways to commit crimes, used guns manufactured outside of Michigan, and killed members of rival gangs engaged in drug trade.²¹³ The court explained, however, that *Lopez* established two basic limitations in Commerce Clause jurisprudence: (1) Congress can regulate purely intrastate activity only when that activity "substantially affects" interstate commerce, and (2) courts may not "pile inference upon inference" to demonstrate a substantial effect for activities with otherwise tenuous connections to interstate commerce.²¹⁴

More importantly, the *Morrison* Court introduced a categorical rule that ultimately controlled the outcome in *Waucaush*: "We . . . reject the argument that Congress may regulate non-economic, violent, criminal conduct based solely on that conduct's aggregate effect on interstate commerce."²¹⁵ The Sixth Circuit accordingly held that the federal government could not maintain RICO charges against the defendants because the effects of CFP's intrastate, noneconomic violent criminal activity could not be aggregated—by piling inference upon inference, or otherwise—to establish "substantial effects on interstate commerce."²¹⁶ Even though CFP's violent enterprise inevitably produced some incidental effect on commerce—"a corpse cannot shop, after all"—the court refused to "follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce."²¹⁷

212. *Id.* at 262.

213. *Id.* at 256–57.

214. *Id.* at 261; D'Angelo, *supra* note 181, at 2098.

215. *Waucaush*, 380 F.3d at 261 (quoting *United States v. Morrison*, 529 U.S. 598, 617 (2000)) (internal quotations omitted).

216. *Id.* at 258.

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

C. Why Nascimento and Waucaush Take Divergent Paths

Understanding how *Raich* guided the First Circuit's conclusion in *Nascimento* notwithstanding the Sixth Circuit's conclusion in *Waucaush* will explain how *Raich* threatens to unravel the judicial safeguards of federalism. The *Nascimento* court ignored the outcome in *Waucaush* because the *Raich* framework clearly supersedes the standards employed in *Waucaush*.²¹⁸ First, *Raich*'s expansive definition of economic activity allowed the *Nascimento* court to somehow equate organized gang violence with economic activity within Congress's Commerce Clause authority.²¹⁹ Second, *Raich* required the *Nascimento* court to defer to Congress's decision to include organized violence in the larger class of activity known as racketeering.²²⁰ Since the court saw an obvious tie between organized violence and racketeering activity—given that the former is a frequent concomitant of the latter—it concluded that such activity is an essential part of the broader anti-racketeering regime, even without evidence that failing to regulate intrastate gang violence would somehow “undercut” Congress's larger RICO policy objectives.²²¹ Finally, *Raich* allowed the *Nascimento* court to punt on the issue of whether the targeted activity—intrastate street gang violence—substantially affects interstate commerce because it falls within Congress's regulatory purview pursuant to a comprehensive regulator scheme.²²² *Raich*, after all, prohibits courts from excising individual components of a larger class of activity targeted by Congress, and thus effectively kills any as-applied challenge to Commerce Clause legislation.

While *Nascimento* may suffer from other analytical problems,²²³ it aptly demonstrates how *Raich* enables judicial acquiescence to federal appropriation of traditional state powers, including the very police powers deemed sacrosanct in *Lopez* and *Morrison*.²²⁴

218. *United States v. Nascimento*, 491 F.3d 25, 51–53 (1st Cir. 2007).

219. *Id.* at 43; *see supra* text accompany notes 205–06. Even if *Nascimento*'s explanation of the link between racketeering and economic activity proves untenable, the act of murder could still be classified as an economic commodity that can be bought and sold by criminal perpetrators, bringing such activity within *Raich*'s definition of economic activity. *See Somin, supra* note 3, at 515.

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

221. *Id.* at 43.

222. *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)).

223. Some argue that the *Nascimento* court failed to give sufficient weight to RICO's jurisdictional hook as evidence of Congress's intent to regulate pursuant to its fullest constitutional authority under a case-by-case inquiry. *See, e.g., First Circuit Upholds Application of RICO to Criminal Gang Not Engaged in Economic Activity*, 121 HARV. L. REV. 1961, 1964 (2008).

224. *See supra* text accompanying notes 62 and 83.

V. CONCLUSION

The progeny of *Gonzales v. Raich* demonstrates that meaningful judicial review of laws enacted under the Commerce Clause may be at an end. While *Raich* muddled the standards raised in *Lopez* and *Morrison*, however, it did not distinguish or overrule them. Thus, *Lopez*, *Morrison*, and *Jones* still provide a workable limit on the Commerce Clause powers if the Court will give effect to their guiding principles. Since *Raich* simply exploited the ambiguities of *Lopez* and *Morrison* to vitiate the force of their precedents while still purporting to work within their framework, a new coalition amenable to “federalism as substantive limits”²²⁵ could just as easily exploit *Raich*’s lip service to the *Lopez-Morrison* standard to limit *Raich*.²²⁶

A return to meaningful limits on the Commerce Clause powers requires the Court, first and foremost, to give effect to the words “essential” and “undercut” in the broader regulatory program exception.²²⁷ If the Court gives any credence to the constitutional limits on federal power, it cannot accept at face value Congress’s whimsical inclusion of an activity otherwise beyond its regulatory purview in a broader regulatory program. Second, the Court should refine the definition of “economic activity” to preclude courts from transforming activity universally understood to be outside of Congress’s commerce authority—such as intrastate criminal misconduct—into economic activity. Finally, the Court should reassert its role in protecting the federal balance by eschewing the “rational basis” test without meaningful inquiry.

As Justice Kennedy aptly lamented, of the various structural elements in the Constitution—separation of powers, checks and balances, judicial review, and federalism—only concerning the *last* does there seem to be apprehension about the Court’s role in preserving the Framers’ carefully wrought safeguards.²²⁸ If the Court does not correct its dithering federalism doctrine, nothing will impede federal incursion into matters of state sovereignty. A return to meaningful limits does not require the Court to overturn *Raich*, however. The Court must simply give effect to the clear standards articulated in *Lopez* and *Morrison*, and take seriously its charge to decide controversies “arising under [the]

225. See Chemerinsky, *supra* note 22.

226. Somin, *supra* note 3, at 550.

227. *Raich*, 545 U.S. at 24–25 (explaining that intrastate, noneconomic activity included in the broader regulatory scheme exception must be an “essential part[] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)) (internal quotations omitted).

228. *Lopez*, 514 U.S. at 575 (1995) (Kennedy, J., concurring).

Constitution”²²⁹ rather than deferring blindly to Congress’s regulatory judgments.

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229. U.S. CONST. art. III § 2, cl. 1.

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