INTRODUCTION

I. Constitutional Background: Two Revolutionary Commerce Clause Cases
   A. United States v. Lopez
   B. United States v. Morrison

II. Statutory Background: Civil RICO
   A. Confirming the Omniscience of § 1964(c):
      Sedima, S.P.R.L. v. Imrex Co.
   B. Extending § 1964(c)'s Reach to Non-Economic Conduct:
      National Organization for Women, Inc. v. Scheidler

III. A Challenge to Civil RICO in the Anti-Abortion Protest Context
   A. Federal Regulation of Anti-Abortion Protest Under Lopez
   B. Federal Regulation of Anti-Abortion Protest Under Morrison

IV. What Can Be Done about § 1964(c)?
   A. Congressional Amendment
   B. Invalidation

CONCLUSION

INTRODUCTION

During my childhood, say, roughly "between the end of the Chatterley ban and the Beatles' first LP," a common response to overreaction was "don't make a federal case out of it."

—Philip Frickey

† Law Clerk to the Honorable Karen LeCraft Henderson, Circuit Judge, United States Court of Appeals for the D.C. Circuit. Once again, I owe the largest debt of gratitude to Salima Parmar, whose patience never seems to falter. I thank Nancy King for essential comments on an earlier draft. Also, I would like to make clear at the outset that the views expressed in this Article are my own and are not to be imputed to the federal judiciary or any member thereof.

No constitutional challenge to this [RICO] law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today’s meager guidance bodes ill for the day when that challenge is presented.

—Justice Scalia, concurring in the judgment, H.J. Inc. v. Northwestern Bell Telephone Co.²

The Court’s interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law . . . .

—Justice Marshall, dissenting, Sedima, S.P.R.L. v. Imrex Co., Inc.³

Until quite recently, the civil enforcement mechanism contained in the Racketeer Influenced and Corrupt Organizations Act (“RICO”), in conjunction with the United States Supreme Court’s open-ended Commerce Clause jurisprudence, empowered private litigants to “make a federal case out of it,” apparently no matter what “it” might have been.⁴ The Court’s decision in United States v. Morrison⁵ suggests that this is no longer true. This Article seeks to demonstrate that by striking down the civil enforcement provision of the Violence Against Women Act (“VAWA”), the Supreme Court in Morrison continued on its path toward a monumental shift in the enforcement of criminal law. It shows that the Morrison ruling casts serious doubt on the constitutionality of a federal enforcement provision not all that different from the one contained in VAWA—namely, 18 U.S.C. § 1964(c) (“Civil RICO”).⁶

Congress enacted RICO in 1970 as Title IX of the Organized Crime Control Act.⁷ For this Article’s purposes, it suffices to say that

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⁴ As Justice Marshall stated in his Sedima dissent, “[t]he single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations.” Id. at 501. The sweeping language and case law of the mail and wire fraud statutes can be construed to reach almost any conduct whatsoever. See 18 U.S.C. §§ 1341, 1343 (1994) (providing that any use of mail or “wires” in furtherance of a fraudulent scheme is a federal offense); see also, e.g., United States v. Margiotta, 688 F.2d 108, 123-25 (2d Cir. 1982) (allowing federal prosecution of political party leaders who deprive a citizen’s right to know what agreements they have made with other political leaders); United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981) (allowing federal prosecution of attorneys who deprive their clients of “undivided loyalty”); United States v. Bohonous, 628 F.2d 1167, 1172 (9th Cir. 1980) (allowing federal prosecution of employees who deprive their employers of honest and faithful service).
⁵ 529 U.S. 598 (2000).
⁶ For a background discussion of this provision, see infra Part II.
§ 1962, RICO’s substantive provision, makes it “unlawful for any person through a pattern of racketeering activity . . . to acquire . . . any interest in or control of any enterprise which . . . affect[s] . . . interstate . . commerce.”8 Every term in this prohibition has been defined and interpreted broadly, in accordance with the Act’s mandate that its provisions “be liberally construed to effectuate its remedial purposes.”9 Primary among these purposes is “the eradication of organized crime . . . [which] is a highly sophisticated, diversified and widespread activity that annually drains billions of dollars from America’s economy.”10 RICO’s expansiveness for pursuit of this objective is strikingly demonstrated by the fact that § 1962 has been interpreted as requiring only that a person participate in the affairs of a racketeering enterprise11 to be subjected to criminal penalties and, more importantly, to costly civil suits under § 1964(c).

In general, this Article explains why (as an ideological matter) and how (as a doctrinal matter) the present Supreme Court might continue its quest for a “New Federalism”12 by striking down § 1964(c),


12. This catchy label—which intermingles several distinguishable strands of significant constitutional doctrine—can be attributed to any number of authors. A Westlaw search reveals that since 1976 (the year the Court decided National League of Cities v. Usery, 426 U.S. 833 (1976)), at least 76 legal publications have used the phrase in their titles. See Westlaw, JLR database (Search: Title “New Federalism”). The majority of these were written after 1995, the year the Court struck down the Gun-Free School Zones Act of 1990 in United States v. Lopez, 514 U.S. 549 (1995). At least 1806 scholarly works have utilized the New Federalism catchphrase within their text. See Westlaw, JLR database (Search: “New Federalism”). At its most general, the New Fed-
either in whole or in part. The Article demonstrates that, after *Morrison*, the Commerce Clause no longer allows Congress to regulate—via private lawsuits—non-economic intrastate conduct. Indeed, it argues that *Morrison* has returned to the states the power to police the non-economic intrastate crime that § 1964(c) plaintiffs have unconstitutionally prosecuted as “racketeering activity.”

This undertaking is necessarily limited in scope. First, it does not and cannot comprehensively recapitulate the Supreme Court's Commerce Clause jurisprudence. Second, it does not address many of the issues raised in the literature concerning the federalization of crime. Moreover, the Article does not challenge RICO in its entirety; the only provision examined in depth is § 1964(c), which enables (and encourages) private litigants to sue and collect treble damages from individuals or institutions violating the substantive prohibitions contained in the remainder of the Act. Finally, discussion about the constitutional challenge of § 1964(c) under *Morrison* is, in large measure, limited to one specific set of factual circumstances—those cases in which plaintiffs have used the section to sue anti-abortion activists who protest outside of health clinics.13

...eralism can be described as a “revamped pledge . . . not to ‘the Republic,’ but to the country’s fifty-one republics, state and federal—not to the Nation alone but to the system of federal and state power.” Daniel A. Farber, Essay, Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism, 75 NOTRE DAME L. REV. 1133, 1134 (2000).

In the Commerce Clause context specifically, the terminology apparently refers to the Supreme Court's newfound willingness to declare federal legislation beyond the limits of Congress's authority under Article I, § 8 of the Constitution “(t)o regulate Commerce with foreign Nations, and among the several States . . . .” See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-4 to -5, at 817-33 (3d ed. 2000) (concluding that *Lopez*, the most significant indicator of a New Federalism, represents the Court's search for “meaningful judicial review of Congress'[s] exercise of the commerce power”); Laurence H. Tribe, Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services, 90 HARV. L. REV. 1065, 1067 (1977) (noting that in *National League of Cities*, “for the first time in four decades, the Supreme Court held a congressional regulation of commerce to be an unconstitutional intrusion upon the sovereignty of state and local governments”); see generally Symposium, The New Federalism After United States v. *Lopez*, 46 CASE W. RES. L. REV. 631 (1996) (in which a dozen notable constitutional scholars debate the nature and long-term ramifications of the New Federalism). For a background discussion of the Court's recent Commerce Clause cases, see infra Part I.


15. I use only one set of facts to help focus attention on the overarching statutory and constitutional issues at stake. I use this particular set of facts for a number of reasons. First, it was this very scenario from which the Supreme Court's now-unconstitutional interpretation of § 1964(c) sprung; therefore, it is the most relevant fact pattern available. See generally Nat’l Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994); infra Part II(B). Second, I have chosen this real-life scenario (instead of a hypothetical
Having made these disclaimers, the Article proceeds in four major parts. Following this Introduction, Part I briefly outlines the Court's New Federalist Commerce Clause jurisprudence, which necessarily underlies any Commerce Clause challenge to a congressional enactment. Part II sketches the (virtually unlimited) boundaries of RICO's civil enforcement mechanism, § 1964(c), and it also lays the factual groundwork for the case-specific constitutional challenge that Part III raises. At the heart of the Article, Part III demonstrates that § 1964(c) is unconstitutional as applied to anti-abortion protest because Congress lacks authority under the Commerce Clause to empower private plaintiffs to prosecute individuals engaged in non-economic intrastate activity. Building on Part III's conclusions, Part IV briefly summarizes what can be done about this head-on collision between the Court's RICO jurisprudence, which includes a landmark interpretation of the statute in National Organization for Women, Inc. v. Scheidler,16 and the current Court's watershed Commerce Clause
jurisprudence, which is embodied in United States v. Lopez\textsuperscript{17} and United States v. Morrison.\textsuperscript{18}

I. CONSTITUTIONAL BACKGROUND: TWO REVOLUTIONARY COMMERCE CLAUSE CASES

In the wake of the Supreme Court's 1995 Lopez decision, there seemed to exist a rough consensus among scholars that it would not likely "inaugurate a major change in the Court's inclination to uphold federal legislation" under the Commerce Clause.\textsuperscript{19} The consensus might have evaporated two Terms ago when the Court handed down Morrison. Thus, this is once again "an occasion to pause and take stock"\textsuperscript{20} to determine what threat, if any, these two cases pose to the enforcement of other federal criminal legislation—namely RICO.

A. United States v. Lopez

By striking down the Gun Free School Zones Act ("GFSZA") of 1990,\textsuperscript{21} the Lopez Court, for the first time since 1936, re-introduced and imposed limits on the federal government's commerce power.\textsuperscript{22} Because it refused "to convert congressional authority under the Commerce Clause [into] a general police power of the sort retained by the

\textsuperscript{17} 514 U.S. 549 (1995).
\textsuperscript{18} 529 U.S. 598 (2000).
\textsuperscript{19} Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 Mich. L. Rev. 554 (1995); see also, e.g., Lino A. Graglia, United States v. Lopez: Judicial Review Under the Commerce Clause, 74 Tex. L. Rev. 719, 767 (1996) (finding it unlikely that "the Court will be able to muster five votes to invalidate a commerce power measure when Congress does not commit the oversight that explains Lopez"); Jesse H. Choper, Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court?", 46 Case W. Res. L. Rev. 663, 664, 670 (1996) (answering the title question in the negative); Robert F. Nagel, The Future of Federalism, 46 Case W. Res. L. Rev. 643, 661 (1996) (arguing that Lopez "recedes[] into relative insignificance" in constraining federal power when compared to much more powerful political and cultural undercurrents); Deborah J. Merritt, Commerce!, 94 Mich. L. Rev. 674, 675-76 (1995) (conceding that Lopez surprised most academics and judges, but predicting that its "practical effect . . . will be small"); Louis H. Pollak, Foreword, 94 Mich. L. Rev. 533 (1995) (asserting "there is less in Lopez than meets the eye"); H. Jefferson Powell, Enumerated Means and Unlimited Ends, 94 Mich. L. Rev. 651, 652 (1995) (suggesting that Lopez may have little effect on the post-1937 norm of congressional omnicompetence).

But see Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 Mich. L. Rev. 752, 752 (1995) (arguing that the decision "marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers").

\textsuperscript{20} Regan, 94 Mich. L. Rev. at 554.
\textsuperscript{22} Lopez, 514 U.S. at 561. Before Lopez, the last case (that is still standing) to find a federal law beyond the reach of the Commerce Clause was Carter v. Carter Coal Co., 298 U.S. 238 (1936).
States," the Court rebuffed Congress's attempt to federalize the local crime of knowingly possessing a firearm within one thousand feet of a public, parochial, or private school. It made clear that the commerce power only enables Congress to regulate 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; or 3) intrastate activity "which viewed in the aggregate, substantially affects interstate commerce."

The Lopez Court found that the GFSZA "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." Therefore, the Court held, the statute was beyond Congress's power to regulate any of the foregoing categories. In finding the provision unconstitutional, the Court emphasized that the primary authority for enacting and enforcing criminal laws resides with the States. When Congress impinges on

23. Lopez, 514 U.S. at 567.
26. Id.
27. Id. at 561.
28. Id. (emphasis added).
29. Id. at 561 n.3 (citing Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion)). In his concurrence, Justice Kennedy (joined by Justice O'Connor) took this point a bit further, taking seriously the Court's "particular duty" in the criminal sphere to ensure that Congress does not trample on state sovereignty. Id. at 581 (Kennedy, J., concurring). (The first) President Bush had been concerned that the Act "inappropriately overrides" legitimate state measures. Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. Pres. Doc. 1944, 1945 (Nov. 29, 1990). Apparently, Justice Kennedy similarly feared that the Act obliterated one of the structural values of federalism—encouraging States to "perform their role as laboratories for experimentation to devise...the best solution" to problems like school violence. Lopez, 514 U.S. at 581 (Kennedy, J., concurring); see also Barry Friedman, Valuing Federalism, 82 MINN. L. REV. 317, 397 (1997) ("Intuition suggests that with fifty different parallel state governments, and countless substate governments as well, innovations in governing or problem solving will occur that inure to the benefit of the entire populace in the long run."); Deborah Jones Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 COLUM. L. REV. 1, 9 (1988) (arguing that "[s]tate governments repeatedly have proved the truth" of Justice Brandeis's States-as-laboratories theory "by pioneering new social and economic programs").

Indeed, Justices Kennedy and O'Connor seemed to subscribe to the position that—in light of the Tenth Amendment—the Court should construe the commerce power more narrowly in the criminal realm than in other areas where the States have less sovereign authority. Lopez, 514 U.S. at 580-83 (Kennedy, J., concurring); see also U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Herbert Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543, 544 (1954) (observing that congressional action has "always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case"); cf. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (stating that, in preemption cases, courts should start with the baseline presumption that con-
that reserved power by criminalizing conduct it has no power to
criminalize, the Court concluded, "it effects a 'change in the sensitive
relation between federal and state criminal jurisdiction.'"30

The Lopez Court's emphatic language infuses into the constitu-
tional dialogue a healthy dose of skepticism of federal laws purporting
to criminalize non-economic behavior. No doubt surprising many aca-
demics,31 the Supreme Court re-affirmed its commitment to that
skepticism two Terms ago in Morrison.

B. UNITED STATES v. MORRISON

The early report from Court pundits had it that the Morrison
Court, in striking down the civil remedy provision of VAWA,32 "de-
clared constitutional war on Congress."33 Though such comments
probably overstate the case, the hyperbole captures a fact to which the
Lopez Court had already alerted many observers (be they academics,
lawmakers, or lower courts)—gone are the days when Congress was
able to criminalize non-economic activity on Commerce Clause
grounds.34 Indeed, if Lopez itself was not a call to arms by the Court

gressional enactments do not displace "the historic police powers of the States . . . unless
that was the clear and manifest purpose of Congress").
30. Lopez, 514 U.S. at 561 n.3 (quoting United States v. Enmons, 410 U.S. 396, 411-12 (1973)).
32. United States v. Morrison, 529 U.S. 598, 627 (2000). The Violence Against Wo-
men Act of 1994 declares that "[a]ll persons within the United States have the right to
be free from crimes of violence motivated by gender." 42 U.S.C. § 13981(b) (1994). Con-
gress purported to enforce the mandate through § 13981(c), which provides that any
person "depriv[ing] another of the right declared in subsection (b) . . . shall be liable to
the party injured, in an action for the recovery of compensatory and punitive damages,
injunctive and declaratory relief, and such other relief as a court may deem appropria-
tate." 42 U.S.C. § 13981(c) (1994). It was only subsection (c) that the Court found be-
yond congressional authority, both under the Commerce Clause, Morrison, 529 U.S. at
607-19, and under § 5 of the Fourteenth Amendment, id. at 619-27.
33. Tony Mauro, Court Declares Constitutional War on Congress, LEGAL INTELLI-
gENCER, May 22, 2000, at 5; see also Tony Mauro & Jonathan Ringel, Supreme Court
Rejects VAWA Civil Lawsuits, N.Y.L.J., May 16, 2000, at 1 (declaring that the Morrison
Court dealt Congress a "resounding rebuke"). But see Marcia Coyle, What's Left After
Morrison, Nat'l L.J., May 29, 2000, at A1 (stating that the Morrison Court's "ruling
leaves Congress quite a few commerce powers"). One early academic account of Mor-
rison would have it that the Court not only declared war on Congress but on women as
Morrison, 114 Harv. L. Rev. 135, 136-37 (2000) ("Morrison is not an abstract applica-
tion of neutral institutional priorities, but a refusal to allow Congress to redress vio-
lence against women . . . . [T]he Court revived and deployed against women the odious
'states' rights' doctrine, the principal legal argument for the maintenance of slavery that
was used to deny equality rights on racial grounds well into this century.").
34. See Morrison, 529 U.S. at 610-11 (emphasizing that the non-economic nature of
the regulated conduct in both Lopez and Morrison explains the lack of congressional
power in those cases); see also infra notes 37-45 and accompanying text.
to proponents of civil RICO, its reaffirmation in *Morrison*, if anything at all,\(^35\) is exactly that.\(^{36}\)

The *Morrison* decision made *Lopez* more relevant to civil RICO by taking its analysis two steps further. First, the *Morrison* Court refused to "downplay the role that the economic nature of the regulated activity plays in our Commerce Clause analysis,"\(^{37}\) stating that "a fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to [the] decision in that case."\(^{38}\) *Lopez* had left some Court observers wondering whether Congress could regulate intrastate activity that "in the aggregate substantially affects interstate commerce,"\(^{39}\) where the activity is non-economic.\(^{40}\) *Morrison* cleared all doubt, demonstrating at length that under *Lopez*'s third category, congressional regulation of non-economic intrastate activity is constitutionally impermissible.\(^{41}\)

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35. Even those commentators believing that *Morrison* provides only a minor roadblock to the exercise of congressional power should readily acknowledge that it "ends any doubts that *Lopez* . . . was an aberration or a limited ruling." Coyle, *Nat'l L.J.*, at A1.

36. Of course, I do not mean to suggest that the Supreme Court actually had the civil RICO provision in mind when striking down VAWA's civil remedy provision in *Morrison*; I merely assert that *Morrison* would be controlling precedent in a Commerce Clause challenge on the facts of clinic protest cases.

37. *Morrison*, 529 U.S. at 610.

38. *Id.* (citing *Lopez* v. United States, 514 U.S. 549, 551 (1995)).


40. See, e.g., Tribe, *supra* note 12, § 5-4, at 819, 823 (explaining that the *Lopez* Court did indeed recognize the significance of whether the "intrastate activity itself is 'commercial' or 'economic,'" but emphasizing that the Court "did not expressly *hold* that only economic or commercial activities could be regulated by Congress whenever they meet" the substantial effects test (emphasis added)); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 Case W. Res. L. Rev. 801, 807 (1996) (stating that, notwithstanding the *Lopez* decision's emphasis on economic activity, "the Court has never held that Commerce Clause jurisdiction extends only to commercial or economic actors").

The principal dissent in *Morrison*, written by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, de-emphasizes the non-economic nature of the conduct at issue. *Morrison*, 529 U.S. at 637-45 (Souter, J., dissenting). Even after *Lopez*, the dissenting justices would hold that Congress can regulate any (economic or non-economic) activity having a substantial effect on interstate commerce. *Id.* at 628-36 (Souter, J., dissenting). As the majority notes, the *Morrison* dissenters "apparently would cast [*Lopez*] aside" because, like the majority (and unlike the commentators mentioned *supra*), they read *Lopez* to allow only regulation of economic activity. *Id.* at 611 n.4.

41. *Id.* at 610-15. It remains unclear after *Morrison* what standard the Court might use to decide which intrastate activities are "economic" in nature and which ones are not. *Cf.* Andrew Weis, *Note, Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1450 (1996) (wondering if the *Lopez* Court "implicitly posited a standard reminiscent of former Justice Potter Stewart's test for pornography—you know it when you see it" (citing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

Nonetheless, this definitional problem should have no bearing whatsoever on the Court's willingness to use the "economic/non-economic" classification to distinguish between constitutionally acceptable and unacceptable civil RICO claims. See *Lopez*, 514
Morrison also brought to the fore the notion of state sovereignty in a way that Lopez did not. Just as it did in Lopez, the Supreme Court in Morrison expressed concern that federal legislation could be applied "equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant." In contrast to the simple congressional prohibition challenged in Lopez, however, the federal civil remedy at issue in Morrison allowed Congress to cast its regulatory net over an even "wider, and more purely intrastate, body of violent crime" by delegating to (litigious) private parties the responsibility for enforcing the statute. The Morrison Court held that this civil scheme could not be sustained because it was too intrusive of state regulatory initiatives.

U.S. at 566 (responding to dissenting Justice Breyer's charge that a commercial/non-commercial distinction results in "legal uncertainty" by stating: "Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'"). Eschewing the economic/non-economic classification mandated by Morrison would fly not only in the face of that decision but also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.), which set out the Court's duty "to say what the law is." Id. at 177; see also Lopez, 514 U.S. at 566 ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation."). As Professor Tribe puts it:

It may be that the Court's new focus on "economic" activity, too, will prove to be arbitrary, manipulable, or otherwise ill suited to its constitutional mission. The Court's apparent desire to make some such distinction, however, is understandable. As long as the Court adheres to the principle that a limitless commerce power is inconsistent with the text and structure of the Constitution and believes that its role is to strike down legislation that exceeds the commerce power (rather than relying on Congress to exercise self-restraint), it will need to apply some sort of administrable test to distinguish among classes of activities.

Moreover, the economic/non-economic test does not seem utterly unadministrable. While it has yet to define "economic," the Court has offered at least some guidance as to what "commercial" might be, in the constitutional sense—"Commerce, undoubtedly, is traffic ... between nations, and parts of nations, ... (and it includes) navigation, ... (and) the actual employment of buying and selling, or of barter." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824) (Marshall, C.J.). We might expect a similar definition of "economic" to be forthcoming, through incremental development and case-by-case Commerce Clause adjudication; the only reason such guideposts have been lacking is that the distinction has not mattered, constitutionally, until now.

While the majority in Lopez expressed some concern about impingement on state sovereignty, it did not give the issue nearly as much attention as did Justice Kennedy, whose concurring opinion relied heavily on a Tenth Amendment rationale. Lopez, 514 U.S. at 565-68, 580-83 (Kennedy, J. concurring).

Morrison, 529 U.S. at 615-16 (emphasis added).

Id. at 613.

Id. at 615-19.
Morrison thus stands for the broad proposition that Congress may not, via federal provision, empower individuals effectively to regulate non-economic intrastate conduct, especially when those parties might incidentally encroach into areas traditionally reserved for state legislation. More symbolically, when read in conjunction with Lopez, Morrison indicates that we are "[l]iving in a Constitutional Moment" for the defederalization of non-economic crime and it signals the end of a heretofore limitless civil RICO enforcement regime.

II. STATUTORY BACKGROUND: CIVIL RICO

To understand how civil RICO broke loose of its organized crime moorings to apply to a seemingly infinite range of conduct—and how Morrison significantly narrows that range—a brief overview of the statute and its relevant interpretations is necessary.

A. CONFIRMING THE OMNISCIENCE OF § 1964(c): SEDIMA, S.P.R.L. v. IMREX CO.

18 U.S.C. § 1964(c) provides, in pertinent part, that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." At the appellate level in Sedima, the United States Court of Appeals for the Second Circuit construed this provision to allow private actions only against defendants who had been convicted on criminal charges, and only where a "racketeering injury" had occurred. While the Supreme Court sympathized with the Second Circuit's "concern over the consequences of an unbridled reading of the statute," it


47. Cf. George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law, and Post-Lopez Analysis, 82 CORNELL L. REV. 225, 227 (1997) (arguing that Lopez's "symbolic[] statement as to the importance of federalism" will in the long run make the Court "increasingly willing to narrow or strike down national laws infringing upon state interests," and that Lopez raises serious questions about the constitutionality of the federal mail and wire fraud statutes (citations omitted)).


51. Sedima, 741 F.2d at 494-96.
rejected both parts of its holding. The Court stated that the plain language and legislative history of § 1964(c) revealed that the section does not require a plaintiff to show that he has suffered a "racketeering injury" or that the defendant has been convicted. It concluded that such obstacles would impede the "[p]rivate attorney general" function of § 1964(c) and would prevent private plaintiffs from filling "prosecutorial gaps." Surprisingly, the Court did acknowledge that plaintiffs have put § 1964(c) to "extraordinary" uses and recognized that the section was already "evolving into something quite different from the original conception of its enactors." Nonetheless, it found that the enforcement mechanism served well the broad remedial purposes of RICO.

Justice Marshall’s dissent, joined by Justices Brennan, Blackmun and Powell, emphasized the fact that private plaintiffs lack the restraining discretion that prosecutors might exercise with regard to putative RICO violators. "Unlike the Government," Justice Marshall explained, "private litigants have no reason to avoid displacing state common-law remedies." The Sedima dissent evinced a concern that civil RICO plaintiffs, attracted to treble damages and attorneys’ fees, have too strong an incentive to bring marginal cases, subjecting civil RICO defendants to costly litigation and giving them too strong an incentive to settle baseless claims. Thus, the dissenters found the

54. Id. at 488-500.
55. Id. at 500; see also Lisa Pritchard Bailey et al., Racketeer Influenced and Corrupt Organizations, 36 AM. CRIM. L. REV. 1035, 1083 (1999).
56. Sedima, 473 U.S. at 500.
57. Id. at 503-04 (Marshall, J., dissenting). United States Representatives John Conyers, Abner Mikva and William Ryan aired similar concerns in the statute’s legislative history, observing that § 1964(c) provides invitation for disgruntled and malicious competitors to harass innocent businessmen . . . . A competitor need only raise the claim that his rival has derived gains from two games of poker, and . . . litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish—destruction of the rival’s business.
59. Id. (Marshall, J., dissenting); see also Terrence P. Canade, Case Note, Civil RICO—Incentive to Litigate: The Court’s Rejection of Standing Requirements, 76 J. CRIM. L. & CRIMINOLOGY 1086, 1093-94 (1985).
majority's interpretation of § 1964(c) "revolution[ary]" in the worst sense of the word.

B. EXTENDING § 1964(c)'S REACH TO NON-ECONOMIC CONDUCT:
NATIONAL ORGANIZATION FOR WOMEN, INC. v. SCHEIDLER

In National Organization for Women, Inc. v. Scheidler, the most controversial unanimous decision by the Supreme Court since Brown v. Board of Education, the Court held that RICO (specifically § 1962) does not require that a defendant's racketeering enterprise or predicate acts be motivated by an economic purpose for liability to be imposed. In the abstract, this simple statutory holding seems unremarkable, considering that a cursory glance at sections 1961 and 1962 reveals that the words "economic" and "motive" are nowhere to be found. Indeed, as one commentator notes, the Scheidler Court's "unanimity was eminently justified, for the Court did nothing more than hold that a federal statute meant exactly what it said." Nonetheless, the Court's perfectly defensible interpretation was just as "revolutionary" as that in Sedima simply because of the factual setting from which it sprung.

The Scheidler fact pattern is an important one, not only because it is politically divisive, but also because it constantly repeats itself in significant constitutional contexts. As summarized by the Supreme

64. 18 U.S.C. §§ 1961, 1962 (1994); see also Scheidler, 510 U.S. at 257 ("Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.").
66. As noted above, the Scheidler fact pattern has reappeared at the Supreme Court level several times since that case, most notably in the First Amendment context. See supra note 15 and accompanying text. Perhaps encouraged by Justice Souter's Scheidler concurrence, where (joined by Justice Kennedy) he stressed that "the Court's opinion does not bar First Amendment challenges to RICO's application" in similar cases, Scheidler, 510 U.S. at 263 (Souter, J., concurring), protestors have brought numerous challenges to regulations preventing them from disrupting abortion clinic operations. See, e.g., Hill v. Colorado, 530 U.S 703 (2000) (upholding a Colorado statute providing for an eight-foot buffer zone outside of health clinics—where speakers are prohibited from approaching unwilling listeners—after determining that the law was a narrowly-tailored content-neutral time, place, and manner regulation protecting patients from confrontations and assaults); Schenck v. Pro-Choice Net., 519 U.S. 357, 358-60 (1997) (upholding a preliminary injunction imposing a buffer zone to restrict abortion protestors' activities outside clinics); McGuire v. Reilly, 260 F.3d 36 (1st Cir. 2001) (finding Hill fully applicable and reversing the district court's holding that a Massachusetts buffer-zone law violated the First Amendment); United States v. Mahoney, 247 F.3d 279, 286 (D.C. Cir. 2001) (holding that an injunction prohibiting protestors "from coming within a twenty-foot radius of any facility inside the Capital Beltway that pro-
Court, the Scheidler facts are as follows. The National Organization for Women, Inc. (NOW), which supports the legal availability of abortion, filed a complaint alleging that the defendant coalition of anti-abortion groups, called the Pro-Life Action Network (PLAN), was engaged in a "nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity." The plaintiffs alleged, as the predicate wrongdoing for civil RICO, that the defendants had conspired to extort the plaintiff clinics by using "threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics."

The District Court in Scheidler dismissed the complaint on a 12(b)(6) motion because it found that the defendants had no economic motive, rendering civil RICO inapplicable to their conduct. The

vides counseling, medical or referral services 'relating to the human reproductive system' was overbroad); United States v. Gregg, 226 F.3d 253, 267 (3d Cir. 2000), cert. denied, 532 U.S. 971 (2001) (finding that Congress's Freedom of Access to Clinic Entrances Act (FACE) "does not regulate speech and expression protected by the First Amendment"). For a concise discussion of clinic buffer zones, see generally The Supreme Court, 1996 Term—Leading Cases, 111 Harv. L. Rev. 197, 339 (1997).

A First Amendment attack on civil RICO has yet to be launched in the Supreme Court, possibly because of the failed attempts at challenging other statutes on the same grounds. Under the Hill Court's prevailing "legislative purpose" approach, which inquires "whether the government has adopted a regulation of speech because of disagreement with the message it conveys," Hill, 530 U.S. at 719 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)), § 1964(c) would probably withstand (intermediate) constitutional scrutiny because Congress certainly did not enact civil RICO to silence the anti-abortion protest message. See infra note 123 and accompanying text (explaining that Congress enacted civil RICO to help eradicate organized crime). Under the effects-based methodology that Justice Scalia proposes in his biting Hill dissent (and that I defend elsewhere), civil RICO (as applied to anti-abortion protestors) would most likely fail First Amendment (strict) scrutiny because it would be content-based "to the extent that anti-abortion protestors [are] substantially more likely to have their message curtailed than [are] pro-choice advocates or anyone else." Oestreicher, 12 Geo. Mason U. Civ. RTS. L.J., draft at 13-14. For complete post-Scheidler accounts of RICO's First Amendment implications, see generally Bradley, 1994 Sup. Ct. Rev. 129 (discussing Scheider's troubling impact on free speech); Brian J. Murray, Note, Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms, 75 Notre Dame L. Rev. 691, 691 et seq. (1999) (concluding that, after Scheider, protestors will be "fearful of the costs of [RICO] litigation [and]—even if they ultimately 'win'—will be intimidated into limiting the exercise of their rights to some level far below that to which they are entitled under the First Amendment for fear of crossing the murky line from protest to trespass"); Fay Clayton & Sara N. Love, NOW v. Scheidler: Protecting Women's Access to Reproductive Health Services, 62 Alb. L. Rev. 967 (1999) (arguing that the use of civil RICO to combat protest is perfectly consistent with the First Amendment).

68. Id. (citing Plaintiffs' Second Amended Complaint ¶ 97).
A CHALLENGE TO CIVIL RICO IN THE ANTI-ABORTION PROTEST CONTEXT

The Scheidler litigation has dragged on for fifteen years and is now entering its final stages. After several remands from the Seventh Circuit and denials of certiorari on various issues from the Supreme Court, the jury returned a verdict for the plaintiffs on their civil RICO claims in 1998. Subsequently, the District Court for the Northern District of Illinois granted the plaintiffs’ petition for a permanent injunction against the defendants. The defendants challenged the in-

71. Scheidler, 510 U.S. at 262; see also supra notes 61-65 and accompanying text.
74. One constitutional challenge has been brought to the application of substantive (criminal) RICO to the activities of an Alaskan gold mine, but the Court did not answer whether the mine’s activities were economic because it found that the mine’s operators had transported equipment and employees (i.e., “persons or things”) in interstate commerce. See United States v. Robertson, 514 U.S. 669, 671 (1995) (per curiam) (decided the same week as Lopez). Thus, on the Robertson facts, RICO’s application was well within Congress’s commerce power under either of Lopez’s first two categories.
75. See Nat’l Org. for Women, Inc v. Scheidler, No. 86 C 7888, 1999 WL 571010, at *1 (N.D. Ill. 1999). As reported in the American Criminal Law Review’s Fourteenth Annual Survey of White Collar Crime, the jury awarded the clinics $86,000 “for extortion, conspiracy, and threats of violence” under § 1964(c) for violation of § 1962. Bailey et al., 36 AM. CRIM. L. REV. at 1093 (citing Telephone Interview with Fay Clayton, counsel for the National Organization for Women (Mar. 4, 1999)).
76. See Scheidler, 1999 WL 571010, at *1. All other post-trial motions were “denied as moot.” Id.
junction on First Amendment grounds, but the Seventh Circuit affirmed.  

If, hypothetically, the defendants could raise a *Morrison* challenge to § 1964(c) on certiorari review before the Supreme Court (even though they did not preserve that challenge by raising it below), the Court would be bound under *Lopez* and *Morrison* to find civil RICO unconstitutional as applied to their conduct. The following two sections endeavor to explain why.

### A. Federal Regulation of Anti-Abortion Protest Under *Lopez*

Civil RICO defendants challenging § 1964(c)'s constitutionality are best served by arguing, as a threshold matter, that their activities are purely *intrastate* in character. Where they can establish this on the facts, they can successfully assert that *Lopez*’s first two categories are inapplicable to their conduct and that Congress only has the power to enable plaintiffs to sue them for activities “which viewed in the aggregate . . . substantially affect[,] interstate commerce.”

In the case of anti-abortion protestors, the argument should be a successful one. The evidence that NOW presented in the *Scheidler* litigation is illustrative. That evidence “spann[ed] a period of twelve years” and “included incidents across the United States.”  In other words, each of the following incidents occurred *separately*, as the first sentence in each paragraph suggests:

In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed.

In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. “They surrounded me and my car. Telling me I wasn’t a Christian, a baby killer. That I’m going to hell for this. . . .” The patient was visiting the clinic to receive her pap smear results.

In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protestors destroyed medical equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets,

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77. *See Nat’l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 706 (7th Cir. 2001) (“We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities.”).*  
destroyed medication and medical equipment, and chained themselves to medical and operating room tables.

In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. . . . The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. . . . “All of a sudden, a crowd of people came running from both sides of the building . . . . They were shouting ‘murderer, baby murderer’ [and] somebody grabbed me by the back of my hair, and I fell up against the car. . . . I remember rolling down the side of the car, and the people were hitting me. . . . [A] man hit me in the head with a big old sign. . . .” The patient lost consciousness as she began to bleed from her abdomen . . . . Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. 80.

Even more horrifying than the incidents NOW reported was the 1998 murder of Buffalo, New York abortion doctor Barnett Slepian, who “was shot in his home, leaving his wife without a husband and his four children without a father.” 81

While each of the incidents is appalling, none fits squarely within either of Lopez’s first two categories of conduct; as in Lopez itself, those categories “may be quickly disposed of” as jurisdictional hooks for congressional regulation (via private suit) of such incidents. 82 First, the protestors have not “use[d] the channels of interstate commerce,” 83 which generally carry cargo 84 or interstate travelers. 85

80. Id. at *1-2. Professor Amar’s recent discussion of Morrison is particularly instructive here:

[Violence against women may be an economic issue of sorts. It is definitely a national problem—that is, a problem everywhere. But is it truly a federal problem—that is, an inter-state problem, a problem among or between the several states, a problem involving genuine interjurisdictional spillovers? If not, then the majority has a plausible argument that the Interstate Commerce Clause is an inapt basis for federal power.]


81. Note, 113 Harv. L. Rev. at 1210; see also Editorial, The Shooting of Dr. Slepian, Wash. Post, Oct. 27, 1998, at A22 (stating that the shooting “marks the extent to which some objectives of the antiabortion movement are being achieved not by politics but by simple terrorism”).

82. Lopez, 514 U.S. at 559.
83. Id. at 558.
Under the first category, Congress might, for instance, have the power to regulate protestors' blocking of interstate highways at state borders to prevent women from obtaining abortions in other states. In none of the incidents, however, have the anti-abortion protestors dammed the stream of commerce in this fashion. Second, the protestors in these cases are not "instrumentalities of interstate commerce, [n]or persons [n]or things in interstate commerce." Most of them probably never even left their states of residence, much less traveled "through the channels of commerce" to engage in protest activities.

Thus, only Lopez's third category remains as authority for federal regulation of the protestors' purely intrastate activities. While such activities "viewed in the aggregate" probably do "substantially affect[] interstate commerce," that fact is now inconsequential under Morrison, at least when the conduct at issue, as here, is non-economic in nature.

B. FEDERAL REGULATION OF ANTI-ABORTION PROTEST UNDER MORRISON

While much of the protestors' conduct can be described as "economically motivated" in some sense—they hope to prevent the clinics from doing further business—the conduct itself is not economic or commercial in character. Protestors do not engage in shipping or manufacturing but in advocacy and acts of violence. Murder can be classified as "economic" to the extent that the murderer kills the victim to garner some financial benefit (e.g., a husband plots to kill his wife to collect on her life insurance, or a hit-man is paid $10,000 for

84. See, e.g., United States v. Darby, 312 U.S. 100, 114 (1941) ("Congress ... is free to exclude from ... commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals, or welfare ... ").
85. See, e.g., Heart of Atlanta Motel v. United States, 379 U.S. 241, 247, 258-59 (1964) (upholding, against a Commerce Clause challenge, Title II of the Civil Rights Act of 1964, which prohibits racial discrimination in "any inn, hotel, motel, or other establishment which provides lodging to transient guests").
86. Cf. id.
87. Lopez, 514 U.S. at 558.
88. Id. at 559 (emphasis added).
89. Id. at 561. One can imagine a situation in which the anti-abortion protest in some states is more vehement and violent than in others. Viewed in the aggregate, such a disparity could conceivably affect interstate commerce by encouraging women to travel interstate for the purpose of obtaining an abortion under less duress or harassment than they would suffer in their home states.
90. Judge Posner has shown that anything, even sex, can be described as "economic" in some sense. See, e.g., Richard A. Posner, Sex and Reason 33-36 (1992) (applying law-and-economics analysis to sexual behavior, and citing Malthus for the proposition that the economic "danger of producing more children than can be fed" can be attributed to the fact that "we like sex"). Judge Posner's approach demonstrates (in a rather frightening way) the need to draw a line in the Commerce Clause sand somewhere.
rubbing out a rival), but that classification is not sufficient to trigger congressional power to prohibit such violence.\(^9\)

This is where *Scheidler* and *Morrison* meet. *Scheidler* is a statutory decision holding that Congress enacted a RICO statute that does not require a private § 1964(c) plaintiff to prove, or even allege, that a defendant's racketeering conduct (intrastate or not) was economically motivated.\(^9\) *Morrison*, on the other hand, is a constitutional decision ruling that Congress exceeds its Commerce Clause authority when it enacts a private remedy effectively prohibiting non-economic intrastate conduct.\(^9\) After *Morrison*, then, § 1964(c) is unconstitutional to the extent that it empowers individuals to sue other individuals for engaging in non-economic intrastate conduct.\(^9\) While clinic protest cases are not the only ones in which private "attorneys-general" might "prosecute" other individuals under *Scheidler* and § 1964(c) for engaging in non-economic intrastate conduct, they do provide concrete (and socially significant) examples of the unconstitutional application of civil RICO.\(^9\)

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91. Federal prosecutors, with just a little creativity, could easily extend the reach of the mail and wire fraud statutes to the first situation. They would probably be able to extend RICO's provisions to the second. Nonetheless, the Court has, since at least 1821, exercised the utmost skepticism in dealing with congressional pretenses to regulate intrastate violence. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) ("Congress has... no general right to punish murder committed within any of the S[tates].").


93. United States v. Morrison, 529 U.S. 598, 599-600 (2000) (striking down VAWA's civil remedy provision on Commerce Clause grounds because a "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").

94. In the aftermath of *Lopez*, Professor Brickey addressed (in passing) the status of RICO under the New Federalism that *Lopez* had introduced. See Brickey, 46 Case W. Res. L. Rev. at 808-11. She noted that, on its face, *Scheidler* seems at odds with *Lopez*. *Id.* at 811 ("Where in the protest enterprise . . . is the commercial activity or economic enterprise that *Lopez* demands?"). Nonetheless, like many scholars supposed before the advent of *Morrison*, Professor Brickey concluded that "even though the [*Lopez*] majority insisted that intrastate activity must be commercial or economic, noncommercial activity that adversely affects an economic enterprise engaged in commerce is subject to Commerce Clause jurisdiction." *Id.* Her reading of *Lopez* was defensible at the time but is simply not the one the *Morrison* Court subsequently adopted. *Morrison*, 529 U.S. at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."); see also supra Part I (B).

95. Indeed, Congress has recently considered adding provisions to § 1964(c) that would create even more opportunities for individuals "to recover under civil RICO for personal injury." Bailey et al., 36 Am. Crim. L. Rev. at 1091 (citing Telephone Interview with Caroline Lynch, office of Congressman John Shadegg (Sept. 15, 1998)). This, of course, would ignore the fact that the States have traditionally had primary responsibility for the enforcement of tort law.
Moreover, the facts of the divisive health clinic setting help illustrate why *Morrison* forbids individuals from taking federal prosecution of RICO into their own hands. Upon returning to the *Scheidler* incidents, one notices that all of the protestors' actions are subject to regulation and prosecution at the state level. In each scenario, a doctor, staff member or patient suffered injuries (physical, mental, emotional or economic) that would be actionable under any number of state tort theories—assault, battery, false imprisonment, intentional infliction of emotional distress, negligent infliction of mental distress, invasion of privacy, interference with business relations, loss of consortium or negligence generally. Depending on the jury, damages—especially punitive damages—could be costly. In some of the scenarios, the offending protestors would additionally be subject to prosecution under state criminal law for murder (in the Slepian case), assault, battery or destruction of property.

*Morrison* makes clear that neither the history nor the function of the Commerce Clause can support § 1964(c) as it stands after *Scheidler*. It demonstrates that federal prosecution (via private suit) of the protestors' conduct—much of which is already prohibited by the states—effects a coercive delegation of regulatory power from the States to Congress. In our system of dual sovereignty, this usurpation of criminal jurisdiction violates the Tenth Amendment. As Justice Thomas's concurrence indicates, permitting Congress to regulate the non-economic intrastate conduct of protestors “under the guise of regulating commerce” is the functional equivalent of granting it a generalized police power never countenanced by the “original un-

96. See supra notes 79-81 and accompanying text.

97. A First Amendment defense would not be available against any of these state causes of action or prosecutions. See *Hill v. Colorado*, 530 U.S. 703, 703-05 (2000) (holding that a state statute prohibiting protestors from approaching clinic patients is constitutional under the First Amendment as a time, place, and manner regulation); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that a State does not violate the First Amendment when it convicts a speaker whose “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce” such action); 4 *RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 20.12-20.15 (3d ed. 1999) (discussing governmental wherewithal to regulate the advocacy of violence and illegal conduct). But cf. Matthew Blickensderfer, *Unleashing RICO*, 17 HARV. J.L. & PUB. POL’Y 867, 888-93 (1994) (arguing that, after *Scheidler*, RICO is more intrusive of First Amendment values than is state regulation).

98. See *Morrison*, 529 U.S. at 618 (“The 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.”).

99. The *Morrison* Court noted the “constitutionally mandated balance of power” between the States and the Federal Government [that was adopted by the Framers to ensure the protection of our fundamental liberties.” Id. at 616 n.7 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

100. Cf. *Morrison*, 529 U.S. at 618 (refusing to uphold congressional regulation of intrastate violence because it is an area reserved for “traditional state regulation”).
derstanding" of the limited delegation contained in Article I, section 8.101

Direct congressional regulation of the non-economic intrastate conduct at issue in *Scheidler* and similar cases would be suspect enough under *Morrison*, but § 1964(c) goes much further than a simple prohibition to be enforced by government prosecutors. Justice Marshall’s *Sedima* dissent highlights the problems presented by private prosecution of anything, but his concerns are especially relevant in the anti-abortion protest context. “Unlike the Government,” NOW

101. *Id.* at 627 (Thomas, J., concurring). The original understanding of federal power generally, as expounded by James Madison, was that

[t]he powers delegated ... to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce ... . The latter will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The *Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Chief Justice Marshall similarly observed that the “powers of the [federal] legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the [C]onstitution is written.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.) (quoted in *Morrison*, 529 U.S. at 607). Under such descriptions, the prosecution of anti-abortion protest seems to fit much more logically within the amorphous powers of the States because it has everything to do with “internal order” and the “liberty[.]” to have an abortion, and nothing at all to do with “commerce,” either foreign or domestic.

The original understanding of “commerce” specifically is summed up best in Justice Thomas’s oft-cited *Lopez* concurrence:

At the time the original Constitution was ratified, “commerce” consisted of selling, buying, and bartering, as well as transporting for these purposes. ... This understanding finds support in the etymology of the word, which literally means “with merchandise.” ... In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. ... As one would expect, the term “commerce” was used in contradistinction to productive activities such as manufacturing and agriculture.

and similar pro-choice groups "have no reason to avoid displacing state common-law remedies" like the tort doctrines mentioned above. Because Congress has handed them the power to bury their ideological opponents with costly litigation, well-heeled organizations like NOW have every incentive to invoke § 1964(c) at the expense of state remedies, even where anti-abortion protestors engage in peaceful, expressive conduct. Unlike federal prosecutors, whom the political process restrains, organized pro-choice groups have a very personal stake not only in prevailing on their federal claims, but in even bringing them at all. While one might argue that these organizations could just as easily bring baseless state claims to achieve the same systematic shutdown of protest, there are two interrelated reasons why that prospect is far less troubling than the use of § 1964(c) as a means to harass or even as a legitimate means to recover for injury.

First, civil RICO defendants face the possibilities of treble damages and plaintiffs' recovery of attorneys' fees; such "tremendous financial exposure," as Justice Marshall pointed out, gives defendants "a strong interest in settling...dispute[s]," probably stronger than at the state level. Even if the conduct at issue would be better prosecuted at the state level, private pro-choice plaintiffs with a political stake in defendants' financial demise will always prefer a § 1964(c) action because they can recover a substantial settlement without having to go to trial on a potentially baseless claim.

103. See supra text accompanying notes 96-97.
104. See Sedima, 473 U.S. at 503-04 (Marshall, J., dissenting). The prediction Representatives Conyers, Mikva and Ryan offered at the inception of § 1964(c)—that it would invite "disgruntled and malicious competitors to harass innocent businessmen," 1970 U.S.C.C.A.N. at 4083 (dissenting views)—rings true in the anti-abortion protest setting. Furthermore, such harassment is, if anything, less tolerable in the protest context than in a normal business context; unlike the protestors, the "innocent businessman" is engaged in economic conduct the federal government's commerce power might actually reach.
105. Sedima, 473 U.S. at 504.
106. Cf. Cramer, 53 VAND. L. REV. at 289 (recommending application of a "[f]unctional analysis" to help answer the question of "[w]hich body of government within our Constitutional structure should regulate?" and concluding that Congress should only criminalize conduct germane "to the integrated national economy," which "the States cannot effectively regulate by themselves").
107. I do not mean to suggest that the brutal scenarios described in Scheidler would be bases for only meritless claims; I simply mean to assert that the risk of prosecutorial abuse is high in any politically divisive arena. Private attorneys general, who lack prosecutorial expertise and political accountability, exacerbate this risk because (in the protest setting particularly) they have every incentive to sue even those parties engaged in otherwise lawful activity.

Obviously, private plaintiffs lack the legal training and substantive knowledge that credentialed United States Attorneys possess. Furthermore, they are oblivious to what
Second, by allowing unelected, unrepresentative, unaccountable individuals to sue others for violent intrastate conduct in federal court when it could be prosecuted or regulated at the state level, § 1964(c) circumvents what Professor Wechsler, in his seminal article, dubbed the "political safeguards of federalism." As he explained:

The continuous existence of the [S]tates as governmental entities and their strategic rôle in the selection of the Congress and the President are so immutable a feature of the system that their importance tends to be ignored. . . . The actual extent of central intervention in the governance of our affairs is determined far less by the formal power distribution than by the sheer existence of the [S]tates and their political power to influence the action of the national authority.

Under Wechsler's view, it makes little practical difference that RICO's substantive criminal prohibitions, at least when applied to non-economic intrastate conduct, are quite possibly beyond the scope of Congress's commerce power under Morrison. Although criminal RICO—as interpreted by Scheidler—might well violate the "formal power distribution" outlined in Article I and the Tenth Amendment, at least the States may exert some control over the criminal prosecution (and, just as significantly, the non-prosecution) of non-economic conduct like that of the anti-abortion protestors. That is, each State has a proportionate influence over who is elected to the federal govern-

conduct is actually criminal and even more ignorant of what Congress has the constitutional wherewithal to regulate. More subtly, they lack the expansive and extremely useful "modern evidence-gathering techniques [such] as court-ordered electronic surveillance" that U.S. Attorneys have at their fingertips. G. Robert Blakey, Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion, 46 HASTINGS L.J. 1175, 1207 n.69 (1995). Such investigative expertise is not just used in the affirmative to assist in putting away the guilty. It is utilized also in the negative, as a means for filtering out cases for which the United States (as "plaintiff") lacks an evidentiary basis to justify further invasion into a suspect's life, privacy, time, energy and financial resources.

Additionally, the United States Attorneys' Manual states that a prosecutor should eschew federal prosecution of a person when "[n]o substantial federal interest would be served by prosecution" or when "[t]he person is subject to effective prosecution in another jurisdiction." ISRAEL ET AL., supra note 7, at 33 (quoting U.S. ATTORNEYS' MANUAL § 9-27.220). While these guidelines are probably followed only sporadically, see Sara Sun Beale, Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction, 46 HASTINGS L.J. 979, 999 (1995), one can rest assured that § 1964(c) plaintiffs never follow them.

108. See generally Wechsler, 54 COLUM. L. REV. at 544. 109. Id. 110. Morrison does not allow the very provisions Scheidler held RICO's substantive prohibitions to be—ones that reach non-economic intrastate conduct. Thus, after Morrison, RICO's criminal prohibitions could be unconstitutional as applied to non-economic intrastate conduct, but only to the extent that Congress can find no other jurisdictional foundation besides the Commerce Clause on which to rest such legislation.
ment. Each exercises a discrete amount of authority over selection of prosecutors and, in turn (through much dilution), over selection of criminal cases to be prosecuted federally. Conversely, civil RICO specifically should be cause for great alarm under Professor Wechsler's description of federalism because it short-circuits the political check that the States exercise over the “national authority” (be it Congress or the President). Because a State can exert no political influence over individuals prosecuting non-economic conduct under § 1964(c), those unelected plaintiffs are unilaterally able to “make a federal case out of” behavior the State, through popular election and legislative deliberation, either condemns (and seeks state vindication for) or allows (and presumes will be left unpunished).

These concerns, to be sure, are more political than constitutional in nature. Undoubtedly, they are considerations that members of Congress should take into account in their ongoing efforts to amend the statute. Perhaps more importantly, however, the foregoing concerns might motivate the Court—or at least a few of its justices—to take a closer look at § 1964(c). They may even heighten the justices’ awareness of civil RICO’s deeper constitutional infirmity: The statute has been used to prosecute non-economic conduct that has no bearing on an integrated national economy.

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111. See Wechsler, 54 COLUM. L. REV. at 546-52.
112. This seems acceptable in the abstract but it ignores an important reality. The least populous States, many of which have needs and views quite distinct from the most populous States, will often have their political preferences entirely expunged as minority voters. This phenomenon is known as the “Majoritarian Problem.” See Christopher L. Eisgruber, Democracy, Majoritarianism, and Racial Equality: A Response to Professor Karlan, 50 VAND. L. REV. 347, 354 (1997) (explaining that there is a significant difference between democracy, which is a government by the whole people, and majoritarianism, which is “a system wherein 40% of the people lose 100% of the time” (emphasis in original)).
113. See infra Part IV(A).
114. A writ of certiorari will issue where four justices agree to hear the case at hand. See 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4004.2 (3d ed. 1996). Because at least four justices have indicated that they detect fundamental problems with RICO, see infra note 135, these practical political concerns could well get the more important constitutional challenge in front of the whole Court.
115. The function of the Commerce Clause only justifies congressional exercise of that power where at least one of two conditions is met: 1) the activities to be regulated, though they be intrastate, “have such a close and substantial relation to interstate commerce that their control is essential to protect that commerce from burdens and obstructions,” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-37 (1937) (emphasis added); or 2) the activities to be regulated cannot be regulated satisfactorily by the States themselves because of their interstate character. See Deborah Jones Merritt, The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems, 66 GEO. WASH. L. REV. 1206, 1216-17 (1998) (concluding that the Commerce Clause reaches only those areas “in which the national government has competence to govern,” and in which “the [States cannot govern effectively on their own”); Regan, 94
Three potential remedies for this constitutional infirmity are available to the States. First, the States might exert their national political influence, via congressional representation, to amend § 1964(c) so that it comports with Morrison and expressly requires a plaintiff to plead and prove economic conduct. Second, they could encourage constitutional challenges like the one above in the hope that the federal courts would welcome them and eventually declare § 1964(c) unconstitutional on its face. Similarly, they could test the waters to see if the courts would declare the statute invalid as applied to non-economic conduct; in light of the so-called "revolution" taking place at the Supreme Court, such a declaration seems to be a distinct possibility. The next Part briefly summarizes these three remedies in turn.

IV. WHAT CAN BE DONE ABOUT § 1964(C)?

A. CONGRESSIONAL AMENDMENT

Congressional ineptitude has taken its toll on § 1964(c) since the statute's inception, and one should not be too hopeful that Congress will amend the statute without some insistent prodding from the judiciary. Professor Abrams, who has written extensively on civil RICO, comments that:

RICO's story illustrates the dangers inherent in congressional consideration of high-profile crime bills amid the passions of a political campaign. . . . In the months preceding the [Organized Crime Control Act's] enactment, Congress paid virtually no attention to the likely efficacy of private RICO relief. . . . When the private remedy was inserted shortly before the final House and Senate votes on the OCCA bill, the

Mich. L. Rev. at 594 (same). The availability of state law remedies in the context of anti-abortion protest, see supra text accompanying notes 96-97, thus seems to indicate that Congress lacks a functional justification for regulating protestors through § 1964(c)'s private suits.

116. See Wechsler, 54 Colum. L. Rev. at 546-52 (discussing the States' relative influences in the Senate and in the House of Representatives).

117. A legislative effort to amend § 1964(c) would not be a novel undertaking. As one commentator notes:

Congressional amendment efforts began in early 1985, even before Sedima opened the door to broad application of civil RICO. . . . In 1986, legislation restricting civil RICO's scope passed the House but was defeated in the Senate. . . . After much rancor, renewed efforts to enact compromise amending legislation [have repeatedly] failed [since].


lawmakers were racing against the clock to pass crime legislation before adjourning for last minute campaigning. In their haste to appear before the electorate as “tough on crime,” they enacted civil RICO with “only abbreviated discussion,” and without anticipating the breadth of its ultimate operation.\textsuperscript{120} Members of Congress have realized since then that § 1964(c) is dysfunctional.\textsuperscript{121} Nearly every year representatives propose changes; every year those proposals break down because proponents fear that their counterparts will label them “soft on crime.”\textsuperscript{122} The legislature’s ongoing inability to restrict § 1964(c)’s application to its original targets—“gambling, drug trafficking, prostitution, extortion, arson, terrorism, loan-sharking, bootlegging, usury, robbery, larceny, and arson”\textsuperscript{123}—is troubling enough. More disturbing still is that civil RICO has not effectively served to deter even those crimes.\textsuperscript{124} In fact, while other RICO provisions have had measured success in deterring true “racketeers,” § 1964(c) seems to have punished only “legitimate defendants rather than . . . the archetypal intimidating mobster.”\textsuperscript{125} Civil RICO’s unmitigated failure has come at great expense to the federal court system.\textsuperscript{126} Caught up in the “law-and-order climate”\textsuperscript{127} prevailing at the time on Capitol Hill and in the Nixon White

\textsuperscript{120} Abrams, 50 SMU L. Rev. at 35.
\textsuperscript{121} Congress attempted to amend the statute each year for ten years after a 1985 ABA Task Force reported that § 1964(c)’s remedies were “grossly overbroad.” Id. at 77 (quoting REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORP., BANKING & BUSINESS LAW 1 (1985)).
\textsuperscript{122} Id. at 88 (“In the age of sound bites and negative political advertising . . . [RICO] [s]upporters can boast about being ‘tough on crime,’ and they can tar opponents with the obloquy of being ‘soft on crime.’”).
\textsuperscript{123} Id. at 45 n.99 (citing the comments of ten legislators, including Senators Kennedy and Thurmond, all of whom had remarked at the time of enactment that these were specifically the crimes they sought to eliminate with § 1964(c)).
\textsuperscript{124} See id. at 37 (concluding that, “[w]hatever the efficacy of the government’s RICO remedies, civil RICO has had no perceptible effect on the fight against organized crime and racketeering”).
\textsuperscript{125} David B. Sentelle, Civil RICO: The Judges’ Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 145, 150 (1990) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (majority opinion of White, J.)). Even the Sedima majority recognized as early as 1985, before Scheider had extended § 1964(c)’s reach to non-economic conduct, that of the “known civil RICO cases at the trial court level, . . . only 9% [involved] allegations of criminal activity of a type generally associated with professional criminals.” Sedima, 473 U.S. at 499 n.16 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE, supra note 121).
\textsuperscript{126} See generally Abrams, 50 SMU L. Rev. at 63-75 (illustrating at length how civil RICO has caused an “explosion” of litigation because lawyers may invoke it under a broad range of circumstances, and demonstrating how its amorphous and complex nature results in cumulative, fact-intensive hearings and trials-within-trials); Sentelle, 12 Campbell L. Rev. at 148-61 (describing the difficulty judges have in applying civil RICO’s intricate, ill-defined provisions).
\textsuperscript{127} Abrams, 50 SMU L. Rev. at 34 n.9.
House,\textsuperscript{128} § 1964(c)'s enactors miscalculated the burden they were imposing on courts and judges.\textsuperscript{129} In their haste, they did not account for the fact that in supplementing the U.S. Attorneys' limited resources with private attorneys-general, they were proportionately draining resources from the courts that would be forced to handle private claims.

Despite empirical evidence revealing civil RICO's deficiencies—and twenty-twenty hindsight of the less-than-ideal circumstances under which the statute was enacted—the House and Senate have balked at amendment. Indeed, certain members of Congress are still considering enactment of "provisions creating new opportunities to recover under civil RICO for personal injury."\textsuperscript{130} Hence, the current Supreme Court and the lower federal courts might view a constitutional challenge to § 1964(c) as an opportunity to provoke federal lawmakers to take a step in the right direction. With well-placed dicta about Morrison in cases applying the statute, the judiciary might allow congressional proponents of civil RICO reform to save face and achieve what they have been unable to work out on their own—overhaul of § 1964(c) without the appearance of being too “soft on crime” in the eyes of their constituents. While this solution sounds politically palatable enough, Morrison seems to require more, at least in cases involving non-economic intrastate conduct. In such cases, Morrison—along with Marbury v. Madison—mandates some sort of declaration of unconstitutionality.\textsuperscript{131} Therefore, rather than viewing a constitutional challenge to § 1964(c) as an occasion to provoke congressional amendment, the judiciary might allow congressional proponents of civil RICO reform to save face and achieve what they have been unable to work out on their own—overhaul of § 1964(c) without the appearance of being too “soft on crime” in the eyes of their constituents.

\textsuperscript{128} See id. at 34 nn.8-9 (explaining that the Nixon administration perceived organized criminal activities as "symptoms of an incipient national breakdown of law and order" (citing William Safire, Before the Fall: An Inside View of the Pre-Watergate White House 316-40 (1975))).

\textsuperscript{129} See id. at 66 (explaining that Congress's "evident assumption was that courts could place Mafia and Cosa Nostra mobsters inside RICO's confines without precisely defining these confines," and that its errant assumption has led to a "time-consuming . . . judicial process").

\textsuperscript{130} Bailey et al., 36 AM. CRIM. L. REV. at 1091 (citing Telephone Interview with Caroline Lynch, office of Congressman John Shadegg (Sept. 15, 1998)); see also supra note 95 and accompanying text.

\textsuperscript{131} 5 U.S. (1 Cranch) 137, 176-78 (1803).

\textsuperscript{132} As Chief Justice Marshall announced in Marbury:

If an act of the legislature, repugnant to the [Constitution], is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.

amendment, the courts might see it more appropriately as the perfect chance to eliminate private attorneys-general altogether by expunging § 1964(c) and forcing Congress to start from scratch.

B. INVALIDATION

As Justice Scalia has (colorfully) put it, the Supreme Court is not "some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome... suits or offends its collective fancy." Nonetheless, those interested in the outcome of a constitutional challenge to civil RICO would do well to examine briefly whether—and which of—the justices would be ideologically receptive to the claim that § 1964(c) exceeds Congress's commerce authority. In Lopez and Morrison, both five-to-four decisions, the (familiar) "voting blocs" were identical: Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas were in the majority; Justices Stevens, Souter, Ginsburg and Breyer dissented. The sole point to make here is that there is no doctrinal or ideological reason why the voting blocs would shift in a constitutional challenge to § 1964(c). Indeed, the record

Exercise of Jurisdiction Which is Given" that "literal reliance on Marbury v. Madison" could potentially render judicial review "a deviant institution in a democratic society"). 133. Dickerson, 530 U.S. at 455 (Scalia, J., dissenting).

134. Several scholars would counsel advocates to make themselves aware of the justices' supposed ideologies. See, e.g., LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 23 (1998) ("[M]embers of the Court are by and large policy seekers."); Anthony D'Amato, Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought, 85 Nw. U. L. Rev. 113, 118 n.15 (1990) (suggesting that federal judges in cases involving "broad social ramifications" thinly veil their "personal legislative preferences... in the publicly venerated language of a judicial decree").

135. In a surprisingly frank 1989 Wall Street Journal article, Chief Justice Rehnquist left little to the imagination in expressing his views about civil RICO:

[S]ome limitations on civil RICO actions [are] required so that federal courts are not required to duplicate the efforts of state courts... Plaintiffs make the choices that best suit their interests, and if treble damages are available in federal court, but not in state court, the cases will gravitate to the former... I think that the time has come for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court.

Abrams, 50 SMU L. Rev. at 53 n.164 (citing William H. Rehnquist, Get RICO Cases Out of My Courtroom, WALL ST. J., May 19, 1989, at A14 (excerpted from the Chief Justice's speech at the Eleventh Seminar on the Administration of Justice)). In light of the Court's Lopez and Morrison opinions (both of which he authored), the Chief Justice is likely to view Congress's continued failure to amend § 1964(c) with a skepticism of constitutional proportions.


...
indicates that, if anything, the justices would likely become more entrenched in their positions if a Morrison challenge were presented in an ideologically divisive case involving anti-abortion protest.\footnote{136}

No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented. \textsuperscript{id} at 255-56. The fact that Justice Scalia would cite Justice Marshall for any proposition whatsoever cannot be a good sign for proponents of civil RICO; if nothing else, it demonstrates that justices of widely divergent judicial philosophies have sensed inherent problems with § 1964(c). Justice Thomas has not yet had occasion to comment similarly on the statute, but his qualms about “Congress appropriating State police powers under the guise of regulating commerce,” \textit{United States v. Morrison}, 529 U.S. 598, 627 (2000) (Thomas, J., concurring), are (rather ironically) reminiscent of his predecessor’s refusal in \textit{Sedima} “to effect such fundamental changes” in the division of criminal jurisdiction between the federal government and the States. \textit{Sedima}, 473 U.S. at 501 (Marshall, J., dissenting).

Justices O'Connor and Kennedy are known notoriously as the “swing votes” on the Court. \textit{See, e.g., Tinsley E. Yarborough, The Rehnquist Court and the Constitution} 43 (2000) (“Justices O'Connor and Kennedy, the key swing votes on the current Court, are the most influential justices, to such a degree that some question whether the Rehnquist Court should not more aptly be dubbed the 'Kennedy Court.'”); \textit{cf. Bush v. Gore}, 531 U.S. 98 (2000) (per curiam). This empirical reality makes it all the more significant that they would probably welcome a constitutional challenge to § 1964(c). They joined Justice Scalia’s “ill-boding” \textit{H.J. Inc.} concurrence. \textit{H.J. Inc.}, 492 U.S. at 251 (Scalia, J., concurring in the judgment). In their \textit{Lopez} concurrence, moreover, Justices O'Connor and Kennedy suggested (for the first time) that the Court should construe Congress’s commerce power much more narrowly in the regulation of criminal conduct than in other areas because the Tenth Amendment embodies the principle that the States have more sovereign authority in the criminal realm. \textit{See United States v. Lopez}, 514 U.S. 549, 580-83 (1995) (Kennedy, J., concurring); \textit{see also supra} note 29.

Finally, those challenging civil RICO should expect no support from the \textit{Lopez} and \textit{Morrison} dissenters, Justices Stevens, Souter, Ginsburg and Breyer. Under their reading of the Commerce Clause, “Congress has the power to legislate with regard to [any] activity that, in the aggregate, has a substantial effect on interstate commerce.” \textit{Morrison}, 529 U.S. at 628 (Souter, J., dissenting). The four dissenters “would cast aside” \textit{Lopez} and \textit{Morrison}, id. at 611 n.4, because, they argue, those decisions erroneously put non-economic subject matter beyond the commerce power’s purview. \textit{Id.} at 639 (Souter, J., dissenting) (“[I]t follows only that Congress may claim no authority under that section to address any subject that does not affect commerce. It does not at all follow that an activity affecting commerce nonetheless falls outside the commerce power, depending on the specific character of the activity, or the authority of a State to regulate it along with Congress.” (emphasis added)).

\footnote{136} Professors Cross and Tiller have reported empirical evidence tending to show that judges selectively invoke the federalism doctrine “to promote policy objectives.” Frank B. Cross, \textit{Realism About Federalism}, 74 N.Y.U. L. Rev. 1304, 1309 n.22 (1999); Emerson H. Tiller, \textit{Putting Politics into the Positive Theory of Federalism: A Comment on Bednar and Eskridge}, 68 S. Cal. L. Rev. 1493, 1498 (1995) (hypothesizing that the justices’ ideologies explain the outcome of each of the Court’s federalism cases).

If Professor Cross is correct (in his somewhat irreverent assertion) that the Court’s five “conservative justices . . . invoke federalism to turn down prisoners’ habeas corpus petitions” or the like, yet “show no respect for federalism when striking down state redistricting plans aimed at increasing minority representation or striking down state and local affirmative action programs,” see Cross, 74 N.Y.U. L. Rev. at 1310, then the majority might prove sympathetic to a challenge brought by anti-abortion protestors. As they frequently do in such cases, Justices O’Connor and Kennedy might exercise the
More important to the enforcement of RICO than the (rather illegitimate) question of raw votes is this: If the courts were to hold § 1964(c) unconstitutional, would they declare it facially invalid, or would they void it only to the extent that it applies to non-economic intrastate conduct? Professor Fallon has recently illustrated, in an exchange with Professor Adler, that “[t]here is no distinctive category of facial, as opposed to as-applied, litigation. All challenges to statutes arise when a litigant claims that a statute cannot be enforced against her.”137 Adler appears to concede the point; nevertheless, he emphatically responds that “reviewing courts are not vindicating the personal rights of claimants, but are rather repealing or amending invalid rules.”138 Both of these propositions help illustrate how the Supreme Court might deal with § 1964(c) in the context of anti-abortion protest. The constitutional challenge discussed here is of course initiated when anti-abortion protestors claim that § 1964(c)’s costly treble damages suits cannot be enforced against them. While the protestors may not care who else the provision affects,139 the Court is necessarily concerned with its broader application; a writ of certiorari will issue only where legal questions with broad doctrinal and social implications are at stake.140 Whether Congress had the constitutional authority under Morrison to empower individuals to sue other private citizens for en-

"swing votes" in the challenge, likely producing a five-to-four decision. See Stephen E. Gottlieb, Morality Imposed: The Rehnquist Court and Liberty in America 106-08 (2000) (describing how Justices O'Connor and Kennedy have largely determined the Court's path on issues of abortion by voting to "affirm[,] Roe" while simultaneously "gutting it").

It should not be ignored that the outcome of the 2000 presidential election will eventually have some bearing on the direction of the Court in federalism (as well as abortion) cases. See, e.g., William G. Ross, Points of View, Fighting Over the Court: It's Tough to Make the Supreme Court into an Election Issue, LEGAL TIMES, Oct. 9, 2000, at 75 (demonstrating that, "[w]ith the retirement of more than one justice likely during the next several years, and with the Court closely divided on many controversial issues, Democrats and Republicans agree that [George W. Bush's victory] could have a critical impact on the Court's direction"). For a recent historical account of the increasingly politicized Supreme Court nominee selection and approval process, see generally David Alistair, Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees (1999).


139. One would indeed assume that, if given the opportunity, the protestors would utilize the private enforcement mechanism in the same aggressive, tactical way that pro-choice advocates have.

140. See Sup. Ct. R. 10 ("Considerations Governing Review on Certiorari").
gaging in patterns of racketeering activity is, to be sure, that type of question.\textsuperscript{141}

Fallon and Adler would apparently agree that if the courts were to find § 1964(c) invalid, they would have to “repeal[ ] or amend[ ]” it to the extent that it fails the relevant constitutional test.\textsuperscript{142} In § 1964(c)’s case, \textit{Morrison} contains the two-pronged test: 1) Does the conduct that Congress has enabled individuals to prosecute, taken in the aggregate, substantially affect interstate commerce? and 2) Is the conduct economic?\textsuperscript{143} It is a truism to say that non-economic intrastate conduct always fails the test. It logically follows, then, that the courts are bound under \textit{Morrison} to declare § 1964(c) unconstitutional (i.e., “amend” it) to the extent that it enables individuals to sue others for engaging in non-economic intrastate conduct because that is precisely what Congress lacks the power to regulate.

What does not necessarily follow is that the courts should strike down (i.e., “repeal”) civil RICO in its entirety simply because, on its face, it results in some unconstitutional applications. A compelling case, based primarily on policy arguments, can be made for the judiciary to remove § 1964(c) and the private attorneys-general that it authorizes from the statutory landscape altogether.\textsuperscript{144} Nonetheless, when faced with a default rule laid down by the Supreme Court in \textit{United States v. Salerno},\textsuperscript{145} the courts might limit their holdings to non-economic intrastate conduct. \textit{Salerno} demonstrates that in order to succeed on a facial challenge, a challenger has a heavier burden than merely proving that civil RICO “operate[s] unconstitutionally under some circumstances.”\textsuperscript{146} Under \textit{Morrison}, § 1964(c) can be applied constitutionally to economic intrastate conduct that substantially affects interstate commerce when taken in the aggregate. Thus, even though the Court has recently derogated from the \textit{Salerno}

\textsuperscript{141} That the Chief Justice would go on record in the \textit{Wall Street Journal} pleading Congress to “Get RICO Cases Out of My Courtroom” seems to bolster this point. Rehnquist, \textit{Wall St. J.} at A14.

\textsuperscript{142} See Fallon, 113 \textit{Harv. L. Rev.} at 1368 (concluding that the “crucial . . . general principles or doctrinal tests that courts apply in deciding constitutional cases . . . require [those] courts to engage in processes of reasoning with the potential to mark a statute as invalid on its face, not merely as applied”); Adler, 113 \textit{Harv. L. Rev.} at 1385 (asserting that the touchstone in examining a statute is whether “the rule satisfies[ ] [relevant] rule-validity tests”).

\textsuperscript{143} See supra Part I.

\textsuperscript{144} See, e.g., supra notes 57-59 and accompanying text.

\textsuperscript{145} 481 U.S. 739 (1987).

\textsuperscript{146} Id. at 745 (emphasis added); see also id. (“A facial challenge to a legislative act is . . . the most difficult to mount successfully since the challenger must establish that no set of circumstances exists under which the [legislation] would be valid.”) (cited in Fallon, 113 \textit{Harv. L. Rev.} at 1322 nn. 11-12).
rule, the judiciary should avoid affirmatively reaching out to strike down § 1964(c) in toto, especially because the same policy objectives can probably be reached on narrower grounds.

The courts can stay within judicial constraints by simply declaring § 1964(c) unconstitutional as applied to non-economic intrastate conduct. Such a holding would be in tune with 1) the principle of state sovereignty, under which the States may punish violence and other non-economic criminal conduct within their borders as they see fit; 2) the purpose of the Commerce Clause, which empowers Congress to regulate conduct germane to the national economy; and 3) Morrison, which is the Court’s most recent drawing of the boundary between the two. Just as importantly, the courts’ narrower holdings would still help cage what Judge Sentelle of the United States Court of Appeals for the D.C. Circuit calls an “amorphous and seemingly boundless... RICO monster” because they might still induce Congress to amend or scrap § 1964(c) as it stands.

Judge Sentelle states:

[E]very single district judge with whom I have discussed the subject (and I’m talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice’s title in the Wall Street Journal [to “Get Civil RICO Cases Out of My Courtroom”]. This obviously raises the necessity for some... explanation of... what it is that RICO litigants are doing in our federal courts.150


148. Holdings of facial invalidity would also be inconsistent with Morrison and all of the Commerce Clause cases preceding it. Under those cases, Congress still has the power to regulate economic activity that substantially affects interstate commerce when taken in the aggregate. If the courts ignored that jurisprudence and struck down § 1964(c) to the extent that it regulates economic conduct, they would be engaging in what is known loosely (and derisively) as “Lochnerizing”—striking down economic legislation with which unaccountable judges do not politically agree—in much the same way that the justices had prior to the “switch in time that saved nine.” Barry Friedman, The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics, 148 U. Pa. L. Rev. 971, 973-74, 984-88, 1046-49 (2000) (discussing the pre-1937 Supreme Court’s willingness to strike down economic legislation and the turn of events in 1937, including a more expansive reading of the Commerce Clause, that reversed the trend). A super-legislative imposition of the courts’ own policy judgments about economic conduct that substantially affects interstate commerce is no longer constitutionally acceptable. Cf. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

149. Sentelle, 12 Campbell L. Rev. at 148.

150. Id. at 148-49.
After Morrison, district judges must act as "gatekeepers" at the 12(b)(6) stage by dismissing § 1964(c) claims grounded on non-economic intrastate conduct. The gate-keeping function in itself can solve many of the problems § 1964(c) causes. More importantly, it would do so without interfering with private prosecution of the very crime RICO's enactors created it to deter—investment of the proceeds of "drug sales, prostitution, illegal gambling, extortion, and other criminal undertakings [that are a] threat to interstate commerce" into lawful "profit-making enterprises." Protest, anti-abortion or other...

151. Rule 12(b) provides in pertinent part that "the following defenses may at the option of the pleader be made by motion ... (6) failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). One would assume that defense attorneys will make a 12(b)(6) motion to civil RICO claims as a matter of course. One would also assume that after a certain amount of time and a certain number of Morrison dismissals under 12(b)(6), attorneys assisting the initiation of § 1964(c) claims against persons engaged in non-economic intrastate conduct—such as anti-abortion protest—would be sanctioned under Rule 11 for:

(1) . . . present[ing] [them] for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [or]

(2) [presenting a claim that is not] warranted by existing law [namely Morrison] [and failing to make] a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

FED. R. CIV. P. 11. Even before Lopez and Morrison, Judge Sentelle suggested that Rule 11 sanctions should be imposed where an attorney "file[s] a civil RICO claim for purposes of harassment" or engages in "an overzealous effort to obtain a fee award" under § 1964(c). Sentelle, 12 CAMPBELL L. REV. at 170.

152. Chief among these problems, of course, is the sort of harassing-suit that both Justice Marshall (in his Sedima dissent) and Judge Sentelle (in his article) mention. Empirical and anecdotal evidence suggests that many § 1964(c) plaintiffs' attorneys could be subjected to Rule 11 sanctions, as Judge Sentelle proposes, for violation of that Rule's first and second prongs. See Abrams, 50 SMU L. REV. at 51-52; cf. also Sentelle, 12 CAMPBELL L. REV. at 178-79 (pleading practitioners to "frame your complaint carefully" and to resist temptation to "engage in legalized blackmail" or to "sell out your ethical standards" for "enhanced damages and an award of counsel fees"); James D. Gordon III, Essay, How Not to Succeed in Law School, 100 YALE L.J. 1679, 1697 (1991) (quipping that an honest label for a law school class on the subject would be "RICO: Learn how to use this powerful anti-extortion law to extort large settlements out of honest business people"). A less obvious problem is that § 1964(c) may undermine public confidence in the federal government because it makes Congress "look silly [while] persons from all walks of life [find] themselves named as a racketeering statute's defendants." Abrams, 50 SMU L. REV. at 87-88.

153. Sentelle, 12 CAMPBELL L. REV. at 149. Of course, the possibility remains that district judges will be too skeptical of any § 1964(c) claims brought, even valid ones grounded on economic conduct. Because the line between "economic" and "non-economic" is a murky one, some economic conduct that might otherwise be constitutionally prosecuted under § 1964(c) will probably fall between the cracks because judges in close cases might mistakenly find it non-economic. Nonetheless, one should not assume that judges are institutionally unable to cope with such fine distinctions. Judges are presumed to know the precise boundaries of many amorphous standards, such as "preponderance of the evidence," "great weight of the evidence," "substantial evidence in the record as a whole," "beyond a reasonable doubt," "reasonably prudent person," "abuse of discretion," "sound business judgment," "rational basis," "compelling governmental interest," "totality of the circumstances" and so on. Case-by-case adjudication of countless claims involving these standards has, over time, provided judges with certain guide-
wise, is not this sort of interstate commerce-threatening economic crime and, therefore, a district judge would be bound under *Morrison* to dismiss its private prosecution.

CONCLUSION

James Madison observed that “[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”154 In the criminal sphere, the federal government is “constituted” with the Commerce Clause,155 a provision whose purpose is ensuring a soundly functioning national economy in which fifty-one separate sovereigns participate.156 *Morrison* leaves most of RICO in-

posts and factors to consider when making determinations as to whether a particular standard has been met. The same legal process in the context of “economic” and “non-economic” conduct under § 1964(c) would give district and appellate judges similar guideposts.

In any event, *Morrison* requires a court to make the determination. See supra note 41; see also United States v. Lopez, 514 U.S. 549, 566 (1995) (“Any possible benefit from eliminating this ‘legal uncertainty’ [resulting from the murky definition of ‘economic’] would be at the expense of the Constitution’s system of enumerated powers.”); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.) (warning that the hazy question “respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist”). At worst, if the Court is forced to refer to a dictionary for the definition—as Justices Scalia and Thomas might—one dictionary provides that “economic” things relat[e] to . . . or [are] concerned with the production, distribution, and consumption of commodities . . . [or] hav[e] practical or industrial significance, uses, or application . . . [or are] operated or produced on a profitable basis . . . .

WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 720 (1981). While this may be a broad, rough-and-ready constitutional standard, it seems much more satisfactory than a § 1964(c) plaintiff’s definition of “economic,” which could reasonably be summarized as “anything for which a court will allow me to recover treble damages and attorneys’ fees.”


155. Additionally, among its powers, Congress has the authority to impeach and convict (or acquit), see U.S. CONST. art. I, § 2, cl. 5; art. I, § 3, cl. 6; to punish the counterfeiting of securities and currency, see U.S. CONST. art. I, § 8, cl. 6; to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” U.S. CONST. art. I, § 8, cl. 10; to discipline the militia, see U.S. CONST. art. I, § 8, cl. 16; to enforce the Thirteenth Amendment “by appropriate legislation,” U.S. CONST. amend. XIII, § 2; and to enforce the Fourteenth Amendment “by appropriate legislation,” U.S. CONST. amend. XIV, § 5. While the prospect remains to be addressed elsewhere, none of these powers seems to encompass § 1964(c).

156. See United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring). A full reading of Justice Kennedy’s *Lopez* concurrence evinces his belief that the function of the Commerce Clause is all-important: “Congress [may only] regulate in the commercial sphere, on the assumption that we have a single market and a unified purpose to build a stable national economy.” *Id.* This somewhat moderate, functional approach to the Commerce Clause also reveals why Congress cannot, under that enumeration of power, regulate the non-economic conduct for which § 1964(c) plaintiffs have prosecuted anti-abortion protestors—their conduct, while often contemptible, does not threaten the building or maintenance of “a stable national economy.”
tact; the decision allows Commerce Clause regulation of the very con-
duct the statute's substantive provisions were originally meant to
target—economic activity that when taken in the aggregate threatens
interstate commerce and our smoothly functioning economy.\footnote{157} But
\textit{Morrison} also demonstrates that Congress exceeded its Commerce
Clause authority by empowering § 1964(c) plaintiffs to "make a fed-
eral case out of" non-economic intrastate conduct such as (but not lim-
ited to) anti-abortion protest. Because only the states are
"constituted" with a general police power,\footnote{158} the prosecution of this
latter type of conduct is "reserved to the States respectively."\footnote{159}

\footnote{157. See \textit{supra} notes 123, 153 and accompanying text.}
\footnote{158. See \textit{Lopez}, 514 U.S. at 566 ("The Constitution \ldots withhold[es] from Congress a
plenary police power that would authorize enactment of every type of legislation."); see \textit{also id.} at 567 (refusing "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"); \textit{TRIBE, supra} note 12, § 5-1, at 789 (finding it
"noteworthy that Article I, § 1 endows Congress not with 'all legislative power,' but only
with the 'legislative Powers herein [expressly] granted'").}
\footnote{159. \textit{U.S. Const.} amend. X.}