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Eliminating Overlap, or Creating a Gap? Judicial Interpretation of the Private Securities Litigation Reform Act of 1995 and RICO

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ARTICLES

ELIMINATING OVERLAP, OR CREATING A GAP? JUDICIAL INTERPRETATION OF THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 AND RICO

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* William J. & Dorothy K. O'Neill Chair in Law Emeritus, Notre Dame Law School; A.B. 1957, University of Notre Dame; J.D. 1960, Notre Dame Law School. Professor Blakey was the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-70 when the Congress processed Pub. L. No. 91-452, 84 Stat. 922 (1970), *codified as,* 18 U.S.C. §§ 1961–1968 (2012) *as amended by* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382 (2001). *Compare* Kosak v. United States, 465 U.S. 848, 856–57 & n.13 (1984) (Marshall, J.) ("[I]t is significant that the apparent draftsman of the crucial portion" of the statute so construed it and "it seems to us senseless to ignore entirely the views of its draftsman.") *with* Banque Worms v. Luis A. Duque Pena & Hijos, Ltda, 652 F. Supp. 770, 772 n.4 (S.D.N.Y. 1986) (Goettel, J.) ("The rather broad draftsmanship of RICO has resulted in its expansive application. . . . A professor who served as a draftsman for the bill has stated that this broad application is what *he* intended. There is no indication, however, that the Congress which passed the bill was adopting *his* intentions.") (emphasis in original). Courts have not been so reluctant to accept the writings of other professors who have been drafters of bills. *See, e.g.,* James M. Landis, *Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29 (1959), *cited with approval in* Aaron v. SEC, 446 U.S. 680, 706 n.1 (1979) (Blackmun, J., concurring in part and dissenting in part); Sanders v. John Nuveen & Co., Inc., 619 F.2d 1222, 1226 (7th Cir. 1980); Woolf v. S.D. Cohn & Co., 515 F.2d 591, 605 n.6 (5th Cir. 1975); Vohs v. Dickson, 495 F.2d 607, 619 n.3 (5th Cir. 1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1296 n.52 (2d Cir. 1973); Klein v. Computer Devices, Inc., 591 F. Supp. 270, 277 (S.D.N.Y. 1984) (Goettel, J.); SEC v. Lowe, 556 F. Supp. 1359, 1363 (E.D.N.Y. 1983); *In re* New York City Mun. Sec. Litig., 507 F. Supp. 169, 175 (S.D.N.Y. 1980). The difference may lie, not so much in the source of the opinion, but its content; it ought to rest on the character of the reasons supporting (or not) the opinion. That some members of the judiciary do not have a high opinion of RICO is sometimes manifested. If you want to look at a typical judge, atypical if only because he set his feeling to paper, see David B. Sentelle, *Civil RICO: The Judges' Perspective*, 12 Campbell L. Rev. 145 (1990). His candor is as remarkable as his flat-out bias against RICO, which affects his interpretation of the statute. *See infra* n. 93. *See also* the dissenting opinion in Ideal Steel Supply Corp. v. Anza, 652 F.3d 310, 327–29 (2d Cir. 2011) (citing William H. Rehnquist, *Remarks of the Chief Justice,* 21 St. Mary's L.J. 5, 9–21 (1989); William H. Rehnquist, *Get Rico Cases Out of My Courtroom,* Wall St. J., May 19, 1989, at A14).

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"[T]his is the time that the unjust man doth thrive."
Autolycus, *The Winter's Tale*
Act 4, Scene 4 at 672–76.

"[A court's] duty is done when [it] enforce[s] the law as it is written." *Techtv. Hughes,* 128 N.E. 185, 186 (N.Y. 1920) (Cardozo, J.).

INTRODUCTION 436
I. RACKETEER INFLUENCED AND CORRUPT PRACTICES ACT OF 1970 441
A. *Enactment* 441
B. *Organized Crime Myth* 443
C. *Criminal and Civil Proceedings* 444
D. *Liberal Construction* 445
E. *Civil Enforcement* 446
F. *Key Elements* 459
II. THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 460
A. *History* 460
B. *Construing the Amendment's Language* 461
1. Structural Context 461
2. The Word "Actionable" 462
III. THE COEXISTENCE OF RICO AND SECURITIES LAWS 465
A. *Implicit Repeal* 465
1. Relative Timing 467
2. Clear Incompatibility 467
3. Billing *Test* 469
B. *Preemption of State RICO by Federal Securities Laws* 470
CONCLUSION 472

INTRODUCTION

In December 1939 eminent sociologist Edwin Sutherland coined the phrase "White-Collar Crime" in a short paper he delivered before the American Sociological Society.[1] He sought to draw attention to the role of class in anti-social behavior. As he saw it, "crime" was primarily thought of as violent offenses—assault, robbery, and rape—committed on otherwise law-abiding citizens. Society properly dealt with them by arrest, conviction, and incarceration. In fact, members of the lower

1. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940) ("[This article] is a comparison of crime in the upper or white-collar class, composed of respectable or at least respected business and professional men, and crime in the lower class, composed of persons of low socioeconomic status."). When Sutherland attempted to publish his thesis as a book, the corporations identified in it threatened suit against Holt, Rinehart & Winston, his publisher; the publisher omitted their names. WHITE-COLLAR CRIME, was finally published as a book 1949. Edwin H. Sutherland, WHITE-COLLAR CRIME (1949). Yale University published an uncensored version only in 1985, entitled, WHITE-COLLAR CRIME: THE UNCUT VERSION. This story of censorship is in the Preface of the 1985 edition. Edwin H. Sutherland, WHITE-COLLAR CRIME: THE UNCUT VERSION xii (Reprint ed. 1985).

socio-economic class tended to commit these offenses. In contrast, Sutherland wanted to draw attention to anti-social behavior by members of the upper socio-economic class, including fraud, embezzlement, tax evasion, price-fixing, and the like.[2] He made a study of offenses committed by seventy of the largest manufacturing, mining, and mercantile corporations in the United States. Over a "life-career" of forty-five years, the seventy corporations had an average of fourteen convictions each. Instead of arrest, conviction, and incarceration, law enforcement agencies tended to handle the offenders in a civil process of complaint and injunction, as if they were not crimes. In sum, few offenders went to jail. This phenomenon sadly persists today even in the aftermath of the worst world wide financial collapse since the Great Depression.[3]

Sutherland's book is universally acknowledged as a classic. Importantly, it changed the course of sociological and legal scholarship down to our day.[4] Yet, as this Article shows, Sutherland's book has not signifi-

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2. *See* Sutherland, *supra* note 1, at 9–10 (detailing three reasons why the theory that criminal behavior in general is due either to poverty or to the psychopathic and sociopathic conditions associated with poverty is invalid).

3. *See infra* note 11.

4. *See generally* STANTON WHEELER, *White-Collar Crime: History of An Idea, in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1652 (Sandford H. Kadish ed., 1983); HEBERT EDELHERTZ, U.S. DEPARTMENT OF JUSTICE, NATURE, IMPACT AND PROSECUTION OF WHITE-COLLAR CRIME (1970). On the impact of White-Collar Crime for only one year, *see,* BUREAU OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, WHITE COLLAR CRIME: SPECIAL REPORT 1 (1987):

> Although white collar offenses are less visible than crimes such as burglary and robbery, their overall economic impact may be considerably greater. Among the white collar cases filed by U.S. Attorneys in the year ending September 30, 1985, more than 140 persons were charged with offenses estimated to involve over $1 million each, and 64 were charged with offenses valued at over $10 million each. In comparison, losses from all bank robberies reported to police in 1985 were under $19 million, and losses from all robberies reported to police in 1985 totaled about $313 million.

Despite what some believe, White-Collar Crime also has serious consequences, well beyond its considerable and conceded economic impact. *See, e.g.,* PRESIDENT'S COM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 16 (1967) ("Serious erosion of morals accompanies [the white Collar offender's violation. Those who so] flout the law set an example for other businesses and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get."). For an excellent summary of how the criminal justice system handles (or mishandles) White-Collar Crime*, see* JOHN E. CONKLIN, ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA 129 (1977):

> [T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost non-existent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend towards more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage feelings of mistrust toward community morality, and general social disorganization in the general population. Discriminatory justice may also provide lower class and working class individuals with justifications for their own violation of the law,

cantly changed public policy in one small and largely unnoticed corner of the law: RICO and securities fraud.

On March 6, 1995, Rep. Charles Christopher Cox (R-CA)[5] introduced a measure on the House floor to amend the pending Private Securities Litigation Reform Act of 1995.[6] The Cox Amendment sought to limit the use of Civil RICO in securities fraud suits[7] and subsequently became part of the final bill.[8] The purpose of the amendment

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> and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal.

Id. (citations omitted).

5. Rep. Cox went on to become the Chairman of the Securities and Exchange Commission (SEC), where he presided, in part, over the collapse of the financial industry in 2007 and 2008. For a less than favorable review of Cox's term at the SEC, see Floyd Norris, *Christopher Cox Leaves*, N.Y. Times, Jan. 21, 2009:

> [Cox] claimed that the enforcement staff . . . increased . . . [and paid] investor protection . . . significant dividends [, but the] reality was that there was no 'investment in investor protection.' The commission's enforcement staff had declined in size under his chairmanship. It had just declined at a slower rate than the rest of the staff.

Id.; Scot J. Paltrow, *S.E.C. No Evil*, Politico (Sept. 18, 2008, 8:00 AM), http://www.portfolio.com/executives/features/2008/09/18/Profile-of-SEC-Chief-Christopher-Cox/ (under chairman Christopher Cox, the commission has undermined and demoralized its enforcement staff):

> [A] look at his record since he became chairman in 2005 suggests that, behind the scenes, Cox has engineered a series of procedural and tactical changes, effectively reducing the S.E.C. enforcement division's power. . . . [T]ensions between frontline investigators and the politically appointed commissioners to whom they report have become commonplace. . . . Cox and other commissioners have shifted the agency's focus away from strong enforcement action against big public companies and Wall Street firms, instead emphasizing what S.E.C. lawyers consider petty-fraud cases, such as small Ponzi schemes. Penalties against companies, individuals, and brokerage firms have sunk from a high of $1.5 billion in 2005 to $507 million last year.

Id. When Cox offered his amendment, he had personal familiarity with civil RICO suits. *See* Jeff Gerth, *Architect of House Measure To Limit Lawsuits is Himself the Subject of a Suit*, N.Y. Times, June 18, 1995, at 20 (describing suit brought by receiver of collapsed investment group against attorneys, including Cox, seeking damages for scam that cost thousands of investors more than $125 million; receiver alleged that actions by lawyers, three of whom pleaded guilty to federal fraud, allegedly prevented scam for being uncovered earlier by federal and state authorities, whereas a representative from Cox's former firm described the allegations as "baseless"). In contrast, Wikipedia's review of Cox is glowing. *Christopher Cox*, Wikipedia, en.wikipedia.org/wiki/Christopher_Cox (last visited Apr. 27, 2014).

6. 6. 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995).

7. The amendment created an exemption from civil RICO liability for "any conduct actionable as securities fraud." *Id.*

8. *Id.* at H2778–79 (daily ed. March 7, 1995). The vote was 292 to 124. *Id.* Senators Chris Dodd and Pete Domenici introduced a companion bill in the Senate. S. 240, 104th Cong., (1995). The Subcommittee on Securities of the Senate Banking, Housing, and Urban Affairs Committee held hearings for two days. Arthur Levitt, the chairman of the SEC, testified, as he had before a House committee, *see* note 45 *infra*, that it was desirable that the Committee "[e]liminat[e] the *overlap* between private remedies under RICO and the Federal securities laws." *Securities Litigation Reform Proposals S.240, S.667, and H.R. 1058: Hearings Before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 232 (Mar. 2, 22, and Apr. 6, 1995) (emphasis added). He reasoned that "because the securities laws provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases of the threat of treble damages *and* other extraordinary

was to eliminate the "overlap" between securities fraud and RICO.[9] A

remedies provided by RICO." *Id.* at 251 (emphasis added). The full Committee reported the legislation. S. REP. NO. 104-98, at 1 (1995). The Committee described the RICO amendment as "removing securities fraud as a predicate act of racketeering in a civil action under [RICO.]" *Id.* at 19. It added, "[A] plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicates act of racketeering under civil RICO if such offense are based on conduct that would have been actionable as securities fraud." *Id.* The Senate summarily passed the bill and then substituted the Senate text for the House bill; it passed 70 to 29. 141 CONG. REC. S9199 (daily ed. June 28, 1995). The Conference Report described the RICO amendment, quoting Chairman Levitt's rationale. H.R. REP. NO. 104-369, at 42–43 (1995) (Conf. Rep.). After the two houses passed the amended legislation, President Clinton vetoed it. H.R. DOC. NO. 104-159 (1995). The veto message did not discuss the RICO amendment. Both houses overrode the veto. 141 CONG. REC. S19, 047 (daily ed. Dec. 21, 1995); *Id.* at 219,180 (daily ed. Dec 22, 1995). Neither house discussed the RICO amendment when it overrode the Presidential veto.

9. Determining why Congress takes particular action is always perilous. Or so thinks one of our number, Blakey, who was a committee counsel in the Senate and House for more than seven years serving two senators and two congressional representatives. Nevertheless, the search for "congressional intent" is not a search for the individual "intent" of members (certainly not staff members) but collective "intent," embodied in their collective action: the text of the legislation. Linguistically, determining the "intent" of an individual (or any collective entity) involves the same process. *See generally* GEOFFREY LEECH, PRINCIPLES OF PRAGMATICS (1983) (pragmatics deals with utterance meaning, a question of sentence meaning plus context, while semantic meaning deals with sentence meaning, a question of verbal meaning plus grammar). To illustrate, "Can you pass me the salt" means one thing at a dinner table; it means another thing in a physical therapist's office. At the therapist's office, it *is* an interrogatory; the therapist wants to know if you "can" pass the saltshaker in light of your medical condition. At the table, the question is *not* an interrogatory ("can"), but an imperative ("pass"), where basic politeness among social equals requires the use of an indirect form of communication to obtain the speaker's simple "objective," the salt. See JOHN SEARLE, MIND, LANGUAGE AND SOCIETY 150–51 (1999) for a fuller treatment of the saltshaker example. In sum, the "rules" of pragmatics (language in use, as in law) are like the "rules" of statutory interpretation; they are "regulatory," not "constitutive." *Compare* LEECH at 8 (not constitutive but regulative) *with* Felix Frankfurter's classic article, *Some Reflections on the Reading of Statutes*, 47 COLUM. L REV. 527, 544 (1947) ("[R]ules of construction are not . . . rules of law. . . . [but] axioms of experience.") (citing Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) ("Axiom of experience.") (Holmes, J.)). Legislative history is nothing more than linguistic context. The relevance of context is an old and well-established legal principle. *See, e.g.,* United States v. Heirs of Boisdoré, 49 U.S. 113, 123 (1849) (Taney, C.J.) ("[W]hole context . . . [to] show . . . the intention of the legislature"); *accord* Perrine v. Chesapeake & Del. Canal Co., 50 U.S. 172, 190 (1850) (Taney, C.J.) ("[F]amiliar and well established . . . meaning . . . must be determined from the context . . . ."). Context is important, too, for ANTONIN SCALIA, A MATTER OF INTERPRETATION 16–25, 29–37 (1987), though he eschews legislative history as unreliable. The principle continues to animate judicial decisions. *See, e.g.,* Federal Aviation Administration v. Cooper, 132 S. Ct. 1441, 1445 (2012) (construction of "actual damages" in The Privacy Act of 1974, *codified in part at* 5 U.S.C.S. § 552a, (2012), is a question of context) ("Because of the term's [actual damages] chameleon-like quality, it must be considered in the particular *context* in which it appears.") (emphasis added). Because the intent is collective, the best sources are committee reports, a collective product of the drafting committee. Garcia v. United States, 469 U.S. 70, 76 (1984) (Rehnquist, J.) ("Committee Reports are 'more authoritative' than comments from the floor.") (citations omitted). Accordingly, our principal focus here in the legislative history is on the committee reports.

The financial industry has a long history of opposition to legislation regulating its activity. For example, as today in light of the Great Recession of 2007 and afterwards, despite the desperate crisis of the Great Depression, the president of the New York Stock Exchange led a fight against federal securities regulation in the 1930's. *See, e. g,* JOEL

SELIGMAN, THE TRANSFORMATION OF WALL STREET 90 (1982). Leading accounting firms (*e.g.*, Price Waterhouse & Co.) also opposed requirements for independent accountants. James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 35 n.12 (1959). Similarly, the Investment Bankers Association argued that it would "suspend the underwriting or distribution of many capital issues . . . ." *Id.* at 40 n.18. Congress was not impressed; in fact, it finally enacted the Securities Act of 1933 precisely to deal with "racketeering" on Wall Street. 77 Cong. Rec. 3801 (1933) (statement of Sen. Duncan Fletcher, chairman of the Senate Banking Committee, the chief counsel of which was Ferdinand Pecora, and the leading sponsor of the 1933 Act: "designed to protect the public from the financial racketeering of . . . 'investment bankers' . . . ."). Congress drew inspiration, instead, from the famous Pecora investigations. See *Stock Exchange Practices,* S. REP. NO. 73-1455 (1934); *see* FERDINAND PECORA, WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS (1939); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940 59 (1963) ("A tribune of righteousness, Ferdinand Pecora summoned the nation's financial rulers to the bar."), *Id.* at n.108 (reviewing the facts of the Great Recession).

The financial industry is not alone in its resistance to government regulation. *See generally* CHARLES FRANCIS ADAMS, JR., RAILROADS: THEIR ORIGINS AND PROBLEMS 117, 126 (1893) (recounting his service on the Massachusetts railroad commission in the late 19th century in light of the philosophy of the industry: "in all matters of trade, competition, if allowed perfectly free play, [the industry] could be relied upon to protect the community from abuses," while the "system was . . . fairly honeycombed with . . . corruption").

While Congress enacted RICO in 1970, its use in civil cases lagged for almost a decade. When the issue of its civil use first came before the Court in *Sedima v. Imrex Co., Inc.*, 473 U.S. 479 (1985), the industry sought to eviscerate civil RICO by imposing on it highly restrictive limitations (*e.g.*, prior criminal conviction). The Court wisely rejected it on the merits under the statute. *See id.* at 493. It also reviewed the substantial policy arguments against the limitation. *Id.* at 490 n.9. Reform efforts then focused on Congress to obtain the criminal conviction limitation. *See Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong. (1985). The securities industry and the accounting profession played leading roles. *Id.* at 629–39 (securities); *Id.* at 243–325 (accountants). Legislation passed the House, but failed by two votes in the Senate. 132 CONG. REC. 29309 (1986) (House); *id* at 32504 (Senate).

Ten years later, Rep. Cox renewed the fight for civil RICO reforms. Nevertheless, he only wanted, he said, to reform civil RICO "in the area of securities legislation." 141 CONG. REC. H2770 (daily ed. March 7, 1995). His amendment would only "prevent plaintiffs' attorneys from bringing actions alleging securities law violation under [RICO.]" *Id.* Cox also cited in support of his bill the ubiquitous and crucial testimony of Chairman Levitt, which reverberates in the floor debates and dominates the key committee reports. *Id.* at H2771 (citing *Litigation Reform Proposals: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Commerce*, 104th Cong. 2d Sess., 12 (1995) (statement of Arthur Levitt, chairman, SEC). Cox asserted that the committee "inadvertently" omitted the RICO amendment. 141 CONG. REC. H2765 (1995). Congressman John Conyers flatly contradicted him. *Id.* Cox said he wanted to prevent "frivolous" litigation. *Id.* at H2771. He did not add that it would also prevent meritorious litigation. Conyers said, "Do not throw the baby out with the bath water." *Id.* at H2773. Conyers also argued that RICO was "frequently the only effective means for victims" to recover their substantial losses. *Id.* Cox thought the securities provision in current law was a "loophole." *Id.* Congressman John Bryant read him the language of the statute and asked, "How can you describe this as a loophole?" *Id.* The arguments went back and forth as if they were railroad trains passing in the night on parallel tracks. Any attentive listener could tell that the outcome was foreordained without regard to the merits of the issue. G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning And Impact On Substantive, Accessory, Aiding Abetting And Conspiracy Liability Under RICO,* 33 AM. CRIM. L. REV. 1345, 1676–86 (1996) [hereinafter Blakey and Roddy] (summarizing the rest of the congressional debates in the House and the Senate). The only consistent theme that runs through them, in particular the key committee reports, is the testimony of Chairman Levitt. S. REP. NO. 104-98, at 19 (1995) (citing Levitt); H.R. CONF. REP. NO. 104-369, at 42–43 (1995) (citing Levitt). In sum, on the merits, if it had any at all, and it victim of fraud would have either a federal securities fraud remedy *or* a federal RICO remedy. Even Chairman Cox did not intend to create a "gap" between the securities statutes and RICO where victims would have *neither* a securities remedy *nor* a RICO remedy. That gap now exists, thanks to a series of unfortunate rulings from the federal courts. Until the courts of appeal or the Supreme Court corral it (congressional action is unforeseeable in the current political climate), victims of Wall Street fraud on Main Street or elsewhere may not get their day in a federal court. These materials tell the depressing story of how the nation arrived at this juncture.

I. Racketeer Influenced and Corrupt Organizations Act

A. *Enactment.*

In 1970, Congress enacted the Organized Crime Control Act; Title IX is the Racketeer Influenced and Corrupt Organizations Act ("RICO").[10] Congress drafted Title IX to deal with "enterprise crimi-

did not, it was about "overlap" between two parallel statutes; creating a "gap" between the statutes was beyond anyone's contemplation; whatever was on people's minds— opponents and defenders of RICO—enacting a backdoor to general RICO reform was not it.

The current history of the development of RICO, that is, the substantial efforts in the courts, ironically not at the Supreme Court level, to frustrate its policies, parallels early history of the Sherman Act, inversely at the Supreme Court level, and is a history beyond these materials. *See generally* Jonathan Lurie, Law and the Nation: 1865-1912 (1983), in particular, Chapter 2, *Law and Economic Growth: Courts, Corporations, and Constitutional Doctrines*, at 27–42, for a concise and an insightful examination of this history. That history teaches, "Those who cannot remember the past are condemned to repeat it." George Santayana, The Life of Reason or the Phases of Human Progress 284 (1905). *But see* George W. F. Hegel, Philosophy of History 6 (rev. ed. 1900) ("What experience and history teach is this - that people and governments never have learned anything from history.").

10. Pub. L. No. 91-452, Title IX, 84 Stat. 922, 941 (1970) (*codified as,* 18 U.S.C. §§ 1961–1968 (2012)) (hereinafter RICO); Blakey & Roddy, *supra* note 9, at 3 collected the best law review commentary on RICO in 1996. *See also* G. Robert Blakey, *Time-Bars: RICO-Criminal and Civil-Federal and State,* 88 Notre Dame L. Rev. 1581 (2013). Relevant student articles worth examining since then include: William S. McClintock, Note, *Could You Use That in a Sentence Please?: The Intersection of Prosecutorial Ethics, Relevant Conduct Sentencing, and Criminal RICO Indictments,* 89 Notre Dame L. Rev. 985 (2014); Kevin J. Murphy, Note, *The Resurrection of the 'Single Scheme' Exclusion to RICO's Pattern Requirement,* 88 Notre Dame L. Rev. 1991 (2013); G. Ryan Snyder, Note, *"Preserving" Civil RICO: How the Model Unfair Trade Practices Act Affects RICO's Private Right of Action Under the McCarran-Ferguson Act,* 86 Notre Dame L. Rev. 1767 (2011); Carli McNeill, Note, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations,* 85 Notre Dame L. Rev. 1231 (2010); Michael J. Gerardi, Note, *The "Person" at Federal Law: A Framework and a RICO Test Suite,* 84 Notre Dame L. Rev. 2239 (2009); Paul Edgar Harold, Note, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provision in Criminal And Civil Cases (With a Little Statutory Background to Explain Why),* 80 Notre Dame L. Rev. 781 (2005); Adam M. Snyder, Note, *Equitable Remedies in Civil RICO Actions: In Support of Allowing District Courts to Order Disgorgement,* 74 U. Chi. L. Rev. 1057 (2007); Julie Gunnigle, Note, *"Birds of a Feather" RICO: Trying Partners in Crime Together,* 34 Syracuse J. Int'l L. & Com. 41 (2006); Benjamin Rolf, Note, *The "Ends of Justice" Revisited: How to Interpret RICO's Procedural Provision,* 18 U.S.C. § 1965, 80 Notre Dame L. Rev. 1225 (2005); Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War,* 76 Notre Dame L. Rev. 257 (2000); Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms,* 75 Notre Dame L. Rev. 691 (1999);

nality,"[11] that is, "patterns" of (1) violence (e.g., murder, robbery, etc.) (2) the provision of illegal goods and services (e.g., drugs, gambling, prostitution, etc., including undocumented aliens) (3) corruption in labor or management relations (e.g., bribery, extortion, embezzlement, etc.) (4) corruption in government (e.g., bribery, extortion, fraud against the government, etc.), and (5) commercial and other forms of fraud (e.g., schemes to defraud, bankruptcy fraud, securities fraud, etc.) by, through, or against various types of licit or illicit enterprises.[12]

Melissa A. Rolland, Note, *Forfeiture Law, the Eight Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371 (1999); James M. Evans, Note, *"Don't Throw Me Into The Briar Patch": RICO and Rules of Evidence*, 73 NOTRE DAME L. REV. 433 (1998). The White-Collar Crime Survey of the American Criminal Law Review annually prints a helpful review of RICO jurisprudence. *See, e.g.* Sean M. Douglass & Tyler Layne, *Racketeer Influenced And Corrupt Organizations,* 48 AM. CRIM. L. REV. 1075 (2011). After 1970, thirty-five states passed legislation patterned on RICO. The best general analysis of these statutes is RICO STATE BY STATE: A GUIDE OF LITIGATION UNDER THE STATE RACKETEERING STATUTES (John E. Floyd ed., 2d ed. 2011). Largely unnoticed in the brouhaha over civil RICO and securities fraud on the federal level is the presence in state racketeering statutes of securities fraud predicates. These state RICO statutes incorporate the predicate acts from 18 U.S.C. § 1961(1), their own state predicate acts, or a combination of the two. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2301(D)(4)(b)(xviii) (2010) (§ 1961(1) and state); CAL. PENAL CODE § 186.2(a)(18) (West 1999 & Supp. 2012) (state); COLO. REV. STAT. ANN. § 18-17-103(5)(b)(XIII) (West 2004 & Supp. 2011) (both § 1961(1) and state); CONN. GEN. STAT. ANN. § 53-394(a)(15) (West 2007 & Supp. 2012) (state); DEL. CODE. ANN. tit. 11, § 1502(9)(a) (2007) (§ 1961(1) and state); FLA. STAT. ANN. §§ 895.02(1)(a)(5) and (1)(b) (West 2000 & Supp. 2012) (§ 1961(1) and state); GA. CODE ANN. §§ 16-14-13(9)(A)(xxi) (2011) (§ 1961(1) and state); IDAHO CODE ANN. § 18-7803 (2004) (predicate acts from state law but language, "any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction [,]" leaves ambiguity regarding whether the Idaho Code includes § 1961(1) offenses); IND. CODE ANN. § 35-45-6-1(e)(1) (West 2012) (state); LA. REV. STAT. ANN. § 15:1352(A) (2005 & Supp. 2012) (state); MICH. COMP. LAWS ANN. § 750.159g(g) (West 2004 & Supp. 2012) (§ 1961(1) and state); MISS. CODE ANN. § 97-43-3(a)(2) (West 2011) (state); NEB. REV. STAT. § 28-1354(5)(h) (Supp. 2010) (state); NEV. REV. STAT. ANN. § 207.360(30) (LexisNexis 2006 & Supp. 2011) (state) (federal courts created some confusion by assuming federal securities fraud could be included as predicate act. *See* Brown v. Kinross Gold, 378 F. Supp. 2d 1280, 1287–88 (D. Nev. 2005), and *In re* Stratosphere Corp. Sec. Litig., 66 F. Supp. 2d 1182, 1202 (D. Nev. 1999)); N.J. STAT. ANN. § 2C:41-1(a)(1)(p) (West 2005 & Supp. 2012) (§ 1961(1) and state); N.M. STAT. ANN. § 30-42-3(A)(17) (LexisNexis 2004 & Supp. 2011) (state); N.C. GEN. STAT. § 75D-3(c)(2) (2011) (§ 1961(1) and state); N.D. CENT. CODE § 12.1-06.1-01(2)(f)(16) (2012) (state); OHIO REV. CODE ANN. § 2923.31(I)(2)(a) (LexisNexis 2010) (§ 1961(1)); OKLA. STAT. ANN. tit. 22, § 22-1402(10)(x) (West 2003 & Supp. 2012) (state); OR. REV. STAT. § 166.715(6)(b) (2011) (§ 1961(1)); UTAH CODE ANN. § 76-10-1602(4)(iiii) (West 2008 & Supp. 2011) (§ 1961(1)); WASH. REV. CODE ANN. § 9A.82.010(4)(v) (West 2009 & Supp. 2012) (state); and WIS. STAT. ANN. § 946.82(4) (West 2005 & Supp. 2011) (§ 1961(1) and state). For an analysis of the possible federal preemption of state law, *see, infra,* III A.

11. United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) ("enterprise criminality" consists of "all types of organized criminal behavior [ranging] . . . from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors.") (citations omitted).

12. *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 300–06 (1982) (categorization of diverse predicate acts).

Because Congress found that the sanctions and remedies previously available to control these offenses were unnecessarily limited in scope and impact, it enacted RICO to provide enhanced criminal and civil sanctions, including fines, imprisonment, forfeiture, injunctions, and treble damage relief for persons injured in their business or property because of a violation of the statute.

B. *Organized Crime Myth.*

The legislative history of RICO demonstrates that Congress intended RICO to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.[13] The major purpose of RICO was to address the "infiltration of legitimate business by organized crime," but the statute was designed to reach both "'illegitimate' and 'legitimate' enterprises."[14] Similar to the antitrust statutes on which Congress modeled it, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions."[15] "[C]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law."[16] Significantly, Congress "drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."[17] "The occasion for Congress's action was the perceived need to combat organized crime. But Congress, for cogent reasons, chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."[18] As the Court observed, the contention that RICO is limited to "organized crime" finds no support in the Act's text, and it is at "odds with the tenor of its legislative history."[19] RICO is similar to other legislation enacted by Congress as general reform, aimed at a specific target, but not limited to a specific target.[20]

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13. Russello v. United States, 464 U.S. 16, 26 (1983).

14. United States v. Turkette, 452 U.S. 576, 590–91 (1981).

15. Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933), *overruled in part on unrelated issues by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (corporate subsidiary as single entity).

16. Agency Holding Corp. v. Malley-Duff & Assoc. Inc., 483 U.S. 143, 150 (1987).

17. H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248–49 (1989).

18. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994) (citations omitted); *accord* Sedima v. Imrex Co., Inc, 473 U.S. 479, 499 (not just "mobsters and organized criminals"; "[Legitimate enterprises] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.").

19. *H.J. Inc.*, 492 U.S. at 244.

20. RICO fits well into the traditional pattern of federal legislation aimed at a particular problem, but drafted in all-purpose language. *See, e.g.*, The Ku Klux Klan Act of 1871 (18 U.S.C. §§ 241–242 (2012) (criminal sanctions) and 42 U.S.C. § 1981 *et seq.* (2012) (civil sanctions)) is illustrative. The aim of the 1871 Act was the night-riding of the Klan, but courts impose its criminal and civil sanctions on "any person" who deprives another of his civil rights; its sponsors aimed the Act at the Klan, but it applies today to police officers anywhere. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961) ("[The KKK Act is] cast in general language and is applicable to Illinois as it is the States whose names were mentioned over and again in the debates."), *overruled on other grounds by* Monell v.

C. *Criminal and Civil Proceedings.*

RICO's two-track system of criminal and civil litigation that Congress designed to achieve its remedial purposes fits well into the federal system of justice.[21] RICO's criminal and civil provisions are:

(1) Section 1961 of Title 18 sets out RICO's building-block "definitions." They apply in all actions under RICO.
(2) Section 1962 of Title 18 sets out RICO's "standards" of "unlawful" (not "criminal") "conduct."[22] They apply in all actions under RICO.

Dep't of Soc. Servs., 436 U.S. 658 (1978); Koon v. United States, 518 U.S. 81, 85–88 (1996) (reviewing the prosecution of the Los Angeles police officers under § 242 for the beating of Rodney King). Subsequently, King obtained $3.8 million dollar in a private settlement of his civil rights claim under § 1983. Charlie LeDuff, *12 Years After the Riots, Rodney King Gets Along,* N.Y. Times, Sept. 19, 2004, at 18; Jennifer Medina, *Rodney King Dies at 47; Police Beating Victim Who Asked 'Can We All Get Along?',* N.Y. Times, June 17, 2012 (reporting that King accidentally drowned in his swimming pool).

21. *See generally* Gerardi, *supra* note 10 (reviewing varying concepts of "person" that defined the scope of perpetrators and victims in several federal statutory schemes that provide for parallel criminal and civil enforcement mechanisms).

22. 18 U.S.C. § 1962, entitled "Prohibited Activities," contains three substantive provisions. 18 U.S.C. § 1962 (2012). Each begins with the phrase "It shall be unlawful." For example, § 1962(c) provides that it is "unlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." Significantly, the words "prohibited" and "unlawful" do not say "criminal." Separate sections provide for the criminal (§ 1963) or civil sanctions (§ 1964) for a violation of § 1962's standard of "unlawful" conduct. The Court in *Sedima,* properly captured the distinction when it referred to § 1962 as "a failure to adhere to a legal requirement." *Sedima,* 479 U.S. at 489. In most situations, the distinction between "criminal" and "unlawful" is a distinction without a difference. In at least three situations, however, the distinction could be material: concurrent state court jurisdiction over civil RICO claims, arbitration of civil RICO claims, or foreign court jurisdiction over civil RICO claims. 18 U.S.C. § 3231 provides that "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all *offenses* against the laws of the United States." 18 U.S.C. § 3231 (2012) (emphasis added). If § 1962 reflected "offenses against the United States," jurisdiction over civil RICO claims would be exclusive in the federal courts. It is not. Tafflin v. Levitt, 493 U.S. 455, 464 (1990) (concurrent jurisdiction upheld; "civil RICO claims are not 'offenses against the laws of the United States . . . .' "). Similarly, arbitration over civil RICO claims would be impermissible. It is not. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987). Foreign court jurisdiction over civil RICO claims is a question of the conflict of laws of the particular foreign state's law. The general rule is that one state will not enforce the "penal laws" of another state. *See, e.g.,* Wisconsin v. Pelican Ins. Co. of New Orleans, 127 U.S. 265, 289–90 (1888). If § 1962 reflected "offenses against the United States," it would be a "penal" law, and a foreign jurisdiction would not enforce it. This issue is unresolved. *See* Andrew E. Kramer, *Russia Presses U.S. Bank Over Money Laundering,* N.Y. Times, July 4, 2008, at C3 ("In a novel legal theory on choice of law, the . . . Russian Customs Committee . . . [is] seeking to apply . . . RICO against the bank [of New York, Mellon] in a Russian court."). The matter settled before the Russian court ruled on the issue of jurisdiction. Gregory L. White, *Russia, BNY Mellon End $22.7 Billion Suit — Settlement for $14 Million in RICO Case Clears the Way for Bank to Open Lending Channels,* Wall Street J., Oct. 23, 2009, at C2. That said, the Supreme Court does not always follow precise terminology, as reflected in *Sedima.* Sometimes, it inaccurately refers in dicta to § 1962 as "criminal provisions." *See, e.g.,* Hemi Group, LLC v. City of New York, 559 U.S. 1, 6 (2010) ("Section 1962, in turn, contains RICO's criminal provisions.") (plurality opinion); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008) ("Section 1962

(3) Section 1963 of Title 18 sets out RICO's criminal sanctions for a violation of Section 1962.
RICO's criminal sanctions under Section 1963 require:
- A criminal trial;
- Instituted by the government;
- Through a grand jury indictment; and
- The testing of the government's proof by the standard of "beyond a reasonable doubt."

(4) Section 1964 of Title 18 sets out RICO's civil sanctions for a violation of Section 1962.
RICO's civil remedies under Section 1964 require:
- A civil trial;
- Instituted;
- Either by the government or a private plaintiff; and
- The testing of either the government's or a private party's proof by the standard of "preponderance of the evidence."[23]

D. *Liberal Construction.*

Congress directed that courts liberally construe RICO to achieve its remedial purposes.[24] If RICO's language is plain, it controls.[25] If its

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contains RICO's criminal prohibitions."). For these dicta to be holdings setting aside the holding of Sedima, a reference to it seemingly would be in order; in fact, matters not argued are not decided. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 386 n.5 (1992) ("It is . . . contrary to all traditions of our jurisprudence to consider the law on [a] point . . . resolved by broad language in cases where the issue was not presented . . . ."). More often, the Court accurately refers to the structure of RICO comprehensively. *See, e.g.,* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) ("The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968 (2000 ed. and Supp. III), prohibits certain conduct involving a 'pattern of racketeering activity.' § 1962 (2000 ed.). One of RICO's enforcement mechanisms is a private right of action, available to '[a]ny person injured in his business or property by reason of a violation' of RICO's substantive restrictions. § 1964(c).").

23. *See, e.g., Sedima,* 473 U.S. at 488–89 (§§ 1963 and 1964 use "violation" in the same sense) ("We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections."); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (government suit; preponderance of the evidence); Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1303 (7th Cir. 1987) (private suit; preponderance of the evidence).

24. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 942 (1970) ("liberally construed [RICO] to effectuate its remedial purposes"). *See* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO be Effective Only Against White-Collar Crime?,* 62 NOTRE DAME. L. REV. 526, 532 n.21 (1987) for a review of the history and construction of liberal construction clauses. They also review the history of treble damages and its economic rationale. *Id.* at 531 n.17. G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages,* 60 LAW & CONTEMP. PROBS. 97 (1997) dispels confusion over the classification of treble damages as necessarily either "actual" or "punitive" damages. They are neither. They are, as a matter or history, "accumulative" damages whose purpose is remedial, not punitive. *See, e.g.,* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. In *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.,* 483 U.S. 143, 151 (1987), we stated that '[b]oth RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages,

language, syntax, or context is ambiguous, Congress mandated the construction that would realize its remedial purposes of providing "enhanced sanctions and new remedies."[26] Courts must read its language in the same fashion, whatever the character of the suit.[27] The Court follows this outline.[28]

E. *Civil Enforcement.*

The civil enforcement mechanism of RICO provides sanctions of injunctions, treble damages, costs, and attorney fees. The government and private parties may bring civil suits. "[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice" to enforce the law.[29] As in RICO's model in the antitrust laws,[30] RICO creates "a private enforcement mechanism that "a private enforcement mechanism that [1] deter[s] violators, [2] deprive[s] them of [their illicit proceeds], and [3] provide[s] ample compensa-

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costs, and attorney's fees.' (emphasis in original). And in *Shearson/Am. Express Inc.* v. *McMahon,* 482 U.S. 220, 241 (1987) we took note of the 'remedial function' of RICO's treble-damages provision.").

25. NOW v. Scheidler, 510 U.S. 249, 261–62 (1994); United States v. Turkette, 452 U.S. 576, 587 n.10 (1981); Russello v. United States, 464 U.S. 16, 29 (1983); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 239 (1987); United States v. Monsanto, 491 U.S. 600, 606 (1989); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989).

26. *Turkette,* 452 U.S. at 587–88, 593; *Russello,* 464 U.S. at 27; *Sedima,* 473 U.S. at 497–98; Tafflin v. Levitt, 493 U.S. 455, 465 (1990). Congress stated RICO's remedial purposes in its Statement of Findings and Purpose. Pub. L. No. 91-452, § 904(a), 84 Stat. 923 (1970) ("[B]ecause the . . . remedies available . . . are unnecessarily limited in scope and impact . . . purpose . . . [to] provide [ ] enhanced sanctions and new remedies . . .").

27. *Sedima,* 473 U.S. at 489; *H.J. Inc.,* 492 U.S. at 236 (pattern "appl[ies] to criminal as well as civil applications of the Act"). The principle is, however, variable, depending on context. *See, e.g.* Klehr v. A.O. Smith Corp., 521 U.S. 179, 188 (1997) (different considerations apply to civil and criminal statutes of limitations); Beck v. Prupis, 529 U.S. 494, 501 n.6 (2000) (application of conspiracy implicates both criminal "violation" and civil "conspiracy" principles).

28. The Court's principal RICO decisions are: United States v. Turkette, 452 U.S. 576 (1981); Russello v. United States, 464 U.S. 16 (1983); Sedima S.L.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987); Shearson/Am. Ex. v. McMahon, 482 U.S. 220 (1987); United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale v. United States, 491 U.S. 617 (1989); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229 (1989); Tafflin v. Levitt, 493 U.S. 455 (1990); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); Reves v. Ernst & Young, 507 U.S.170 (1993); NOW v. Scheidler, 510 U.S. 249 (1993); United States v. Robertson, 514 U.S. 669 (1995); Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997); Salinas v. United States, 522 U.S. 52 (1997); Humana, Inc. v. Forsyth, 525 U.S. 299 (1999); Rotella v. Wood, 528 U.S. 549 (2000); Beck v. Prupis, 529 U.S. 494 (2000); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001); Scheidler v. NOW, 537 U.S. 393 (2003); PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); Wilkie v. Robbins, 551 U.S. 537 (2007); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008); Boyle v. United States, 556 U.S. 938 (2009); Hemi Group, LLC v. N.Y.C., 559 U.S. 1 (2010).

29. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

30. Holmes, 503 U.S. at 267 ("We have repeatedly observed, see Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 150–51; Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 241 (1987); Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 489 (1985), that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act . . . .").

tion to the victims . . . ."[31] In fact, RICO and the antitrust statutes are

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31. Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (antitrust). *See also Agency Holding Corp.*, 483 U.S. at 151 ("'private attorneys general' [for] a serious national problem for which public prosecutorial resources are deemed inadequate . . . ."); *Shearson/Am. Express*, 482 U.S. at 241 ("vigorous incentives for plaintiffs to pursue RICO claims . . . ."); *Sedima*, 473 U.S. at 493 ("private attorney general provision[ ] . . . designed to fill prosecutorial gaps.") (citing *Reiter*, 442 U.S. at 344). The classic—and in our opinion still unsurpassed—article is Michael K. Block et al., *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose[ ] a credible threat . . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages . . . .").

Because the 1995 exemption is to 18 U.S.C. § 1964, the provision warrants a general treatment and commentary for necessary context. § 1964(a) gives federal courts the power "to prevent and restrain" violations of RICO. The phrase "prevent and restrain" is a common law couplet. Anglo-Saxon peasants could not speak French. Thus, after the Norman Conquest, the common law courts used a couplet to express a single legal idea, a French and an Anglo-Saxon word. Ernest Weekley, Cruelty to Words 43 (1931). The couplet in § 1964(a) carries with it a general grant of the power to issue court orders. *See, e.g.,* De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 218–19 (1945) (antitrust: "to prevent and restrain . . . . power . . . traditionally exercised by courts of equity . . . ."); *see also* Joseph Story, Commentaries on Equity Jurisprudence § 866 at 575 (1st English ed. 1884) (Under Roman law, which English equity powers reflected, courts possessed prohibitory, restitutionary, and exhibitory powers). Even today, United Kingdom materials use the words synonymously. *See, e.g.*, Bici & Another v. Ministry of Defense [2004] EWHC 786 [¶ 101] (used to mean "stop" in connection with soldiers protecting themselves from possible harm); *see also* Planning (Hazardous Substances) (Scotland) Act of 1997, Ch. 10 § 25 (1) granting power to a court "to prevent or restrain" breaches of controls. Earlier uses include Smurthwaite v. Hannay, [1894] H.L. at 503 (Eng.) (Kay, L. J.) (plenary power of court "to prevent and restrain" abuse of it processes; [1874–1880] Rodoconachi v. Elliot, All E.R. 618 (Bramwell, J.) (embargo "prevent and restrain" commerce.).

The text of § 1964(a) itself illustrates the broad range of orders district courts may issue.

The text of § 1964(b) authorizes the government to sue under § 1964; it sets aside the common law rule that equity could not enjoin a crime. Gee v. Pritchard [1818] 36 Eng. Rep. 670, 674. Without this provision, the propriety of government civil suits to enjoin violations of RICO would be problematic. Suits under § 1964(a) do not require a showing of an inadequate remedy at law. United States v. Cappetto, 502 F.2d 1351, 1356–59 (7th Cir. 1974).

The government focuses its civil suits principally against unions with a history of significant organized crime influence. *See, e.g.,* United States v. Local 1804-1, Int'l. Longshoremen's Ass'n., 44 F.3d 1091 (2d Cir. 1995). Nevertheless, industries with a history of similar influence are also the target of government civil suits. *See, e.g.,* United States v. Private Sanitation Indus. Ass'n. of Nassau/Suffolk, Inc., 44 F.3d 1082 (2d Cir. 1995). Under § 1964, summary judgment for relief is properly based on the invocation of the privilege against compulsory self-incrimination *plus* corroborating evidence. *Id.* at 1084. Civil contempt sanctions may enforce orders, but the orders must be clear, and the showing of the violation established by clear and convincing evidence against a contemnor that is not reasonably diligent. *Local 1804-1, Int'l. Longshoremen's' Ass'n.*, 44 F.3d at 1096.

State attorneys general also have brought private civil suits under RICO (federal and state) to sanction corrupt city administrations. Indiana *ex rel.* Zoeller v. Pastrick, 696 F. Supp. 2d 970 (N.D. Ind. 2010) (final order for damages, but equity relief not available under federal RICO and discretion not exercised under IN RICO); Indiana v. Pastrick, No. 3:04 CV 506, 2008 U.S. Dist. Lexis 50170 (N.D. Ind. June 26, 2008) (summary judgment); Indiana *ex rel.* Carter v. Pastrick, 384 F. Supp. 2d 1261 (N.D. Ind. 2005) (motion to dismiss).

Under § 1964 (a), the disgorgement of illicit profits is a significant civil remedy. *See, e.g., Private Sanitations Ass'n. of Nassau/Suffolk*, 44 F.3d at 1084. The disgorgement of illicit profits is a general civil remedy; it is not unique to RICO. *See, e.g.,* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (rent control statute: disgorgement not mentioned in statute, but proper remedy; "Unless a statute . . . restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized . . . ."); *see generally* SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1474–77 (2d Cir. 1996) (measure of disgorgement: "reasonable approximation of profits . . . . "; credit given for prior settlements to victims; purpose: "to deprive violators of their ill-gotten gain[ ] . . . [and to deter] . . . ."); Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp., 788 F.2d 92, 94 (2d Cir. 1986) (purpose: "to depriv[e] the wrongdoer of his ill-gotten gains and dete[r] . . . ."). In addition, the general availability of the remedy of disgorgement is not limited to government suits. *See, e.g.,* Janigan v. Taylor, 344 F.2d 781, 786 (1st Cir. 1965) (securities statute: private suit; disgorgement measure: loss to victim or gain to wrongdoer; "[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.").

In *United States v. Carson,* 52 F.3d 1173 (2d Cir. 1995), the Second Circuit, however, reversed a RICO disgorgement requiring a former union official to return $76,000 in ill-gotten gains. The Court held that the test for RICO disgorgement is "whether the disgorgements . . . are designed to 'prevent and restrain' *future* conduct" and under that criterion "disgorgement of gains ill-gotten long [ago]" could not be justified. *Id.* at 1182. *Accord* Richard v. Hoechst Celanese Chem. Group, Inc., 355 F.3d 345, 354 (5th Cir. 2003) (following *Carson*). The holding of *Carson* (and *Richard*) is ill-reasoned; it is wrong for five reasons. First, consider that time is a continuum. An offender's pattern of illegal acts necessarily intertwine within this continuum to a point where determining where past profits stop and funding future illegal acts begin is problematic, save by an arbitrary line. If disgorgement's goal is to deter the offending party (individual deterrence), not others (general deterrence), from illicit conduct, then you cannot "limit" disgorgement, as the court characterizes it, to a "backward-looking remedy." Johannes Andenaes, *Deterrence, in* I Encyclopedia of Crime and Justice 591 (1983), ably discusses and distinguishes the concepts of general and individual deterrence. Second, contrary to the court's analysis that RICO's language "omits" ideas, the phrase "prevent and restrain" is not part of a series, but a common law couplet, as noted above; it embodies a single idea: general (not limited or future-focused) equity relief. In addition, the text of § 1964(a) expressly says "including"; the remedies—including "divestment"—set out are illustrative, not exhaustive; if any doubt exists (it does not), the legislative history says they are "not exhaustive." S. Rep. No. 91-617, at 160 (1969); H. R. Rep. No. 91-1549, at 57 (1970). Third, "divestment" itself—one of the three RICO remedies the court in *Carson* noted—is not solely future-focused, as the court mistakenly argued. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 366 (1961) (antitrust: divestment "deprives [violators] of the benefits of their conspiracy."); Schine Chain Theaters, Inc. v. United States, 334 U.S. 110, 128–29 (1948) (antitrust: divestment "[l]ike restitution . . . merely deprives a defendant of the gains from his wrongful conduct."), *accord* Einer R. Elhauge, *Disgorgement as an Antitrust Remedy,* 76 ANTITRUST L.J. 79 (2009) (finding disgorgement authorized under antitrust law, but inexplicitly underused) (citing, along with controlling Supreme Court decisions, the leading antitrust treatise, 2A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶325a (3d. ed. 2006)). Fourth, the legislative history of RICO favorably cites this antitrust law in justification of RICO. See Sen. Rep No. 91-617, at 80–83 (1969); 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan) ("Nor do I mean *to limit* the remedies available to those which have already been established.") (emphasis added). In light of this legislative history, a court ought not to hold that RICO's equitable remedies, including disgorgement, are in any fashion solely future-focused. *See* Lewis v. United States, 445 U.S. 55, 63 (1980) (sponsor's comments entitled to "weight"). Fifth, *Carson*'s holding is inconsistent, not only with the text and legislative history of RICO, and the general federal law of disgorgement, but it is also inconsistent with sound social policy. See RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 209–10 (4th ed. 1992) (a restitutionary remedy properly makes the tort "worthless to the tortfeasor").

The flatly inconsistent holding in *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) (Sentelle, J.) that disgorgement *never* applies as equitable relief under RICO is even more egregious on the merits. In addition to the points made against *Car-*

son, the court's opinion is thrice mistaken. First, at bottom, his opinion misreads RICO as a whole. It sees it as a statute that is self-contained; if something is not within it, Congress did not authorize it. Thus, it sees it as a statute requiring the application of a variant of the cannon expression *unius est exclusio alterius*, a principle of *strict* construction. That inference is unwarranted. *See* Cipollone v. Liggett Group, 505 U.S. 504, 517 (1992) ("Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius* . . . ." but court may reject it in light of other provisions of statute.); *see also* SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344, 350–51 (1943):

> Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

In fact, Congress provided the rule of construction for RICO: liberal construction in light of RICO's remedial purposes. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) ("The provisions of this [T]*itle* shall be liberally construed to effectuate *its* remedial purposes.") (emphasis added). The language is precise; it says "this title," that is, Title IX of the Act, or RICO as a whole. In fact, the *expressio unius* approach to legislative interpretation is "based on the assumption of legislative omniscience, because it would make sense only if all omissions in legislative drafting were deliberate." Richard A. Posner, The Federal Courts: Crisis and Reform 282 (1985). That assumption is, of course, nonsense. *See also* Reed Dickerson, The Interpretation and Applications of Statutes 234–35 (1975) ("[I]t is simply not true, generally, that the mere express conferral of a right . . . in one kind of situation implies the denial of the equivalent right . . . in other kinds. [It] depends on the particular circumstances of context."). The liberal construction clause is the key provision that resolves the issue in favor of recognizing all equitable remedies, including disgorgement. Second, the D.C. Circuit's opinion in *Philip Morris* also does not square with the Circuit's prior holding in *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). In construing Section 21 of the Securities and Exchange Act of 1934, 48 Stat. 899 (codified as amended at 15 U.S.C. § 780 (2012)), which then authorized courts to "enjoin" violations of the Act, the Circuit specifically, authorized disgorgement. "Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating [the Act]." *SEC,* 890 F.2d at 1230. Third, the court's arguments based on *Meghrig* lack substance, because they do not relate to the case at hand. In *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), the Court dealt with a private individual's relief under the *limited* remedies specific to Resource Conservation and Recovery Act (RCRA), 42 U.S.C.S. § 6972(a) (2012). *Meghrig* compared the statute in front of it to the more expansive Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (2012). Under CERCLA, private individuals could seek compensation from those liable. *Id.* at 485. In comparing those two Acts, the Court concluded that Congress never intended for RCRA to allow *private* individuals to seek compensation for toxic waste clean ups. *Id.* at 487. RCRA was unsuited for such a purpose, because it "contain[ed] no statute of limitations" or that "the . . . costs being sought are reasonable . . . ." *Id.* at 486. In sharp and unfavorable contrast to the RICO statute before him, no comparable comprehensive statute was also present. In addition, the plaintiffs in *Meghrig* sought compensation for the money they spent on cleaning up toxic waste; they never asked for disgorgement. *Id.*

Similarly, in *United States v. Universal Management Services, Inc.*, 191 F.3d 750 (6th Cir. 1999), the Sixth Circuit considered Section 332 of the Food, Drug, and Cosmetic Act of 1938. Food, Drug, and Cosmetic Act of 1938, Pub. L. 75-717, 52 Stat. 1043 (codified as amended at 21 U.S.C. § 332 (2012)) ("shall have jurisdiction, for cause shown to *restrain* violations of [the Act]") (emphasis added). That Act authorized courts to "restrain" violations, including disgorging profits. The court held, "[D]isgorgement [is] part of a courts' traditional equitable authority. . . . Absent a clear command by Congress that a statute providing for equitable relief excludes certain forms of relief, this court will presume the full scope of equitable powers may be exercised by the courts." *Universal*, 191 F.3d at 760–61. In brief, *Philip Morris* is, to put it mildly, in substantial tension with the analysis of other decisions.

Thus*, Carson, Hoechst,* but, particularly, *Philip Morris* represent a line of lamentable decisions narrowing equity relief under RICO that is indefensible as a matter of the normal rules of the reading of statutory language, legislative history, and sound public policy, as well as wholly inconsistent with the general jurisprudence on disgorgement. *See, e.g.*, SEC v. Tex. Gulf Sulphur Co., 446 F.2d 1301, 1307–08 (2d Cir. 1971) (construing § 21 of the Securities Exchange Act of 1934, 48 Stat. 899 (codified as amended at 15 U.S.C. § 78u (2012)), which at that time authorized courts to "enjoin" violations of the Act, to authorize restitution); SEC v. First City Fin. Corp. Ltd., 890 F.2d 1215, 1230 (D.C. Cir. 1989) (construing § 21 of the Securities Exchange Act of 1934, 48 Stat. 899 (codified as amended at 15 U.S.C. § 78u (2012)), which at that time authorized courts to "enjoin" violations of the Act, to authorize disgorgement) ("Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating [the Act]."); FTC v. Gem Merchandising Corp., 87 F.3d 466, 469 (11th Cir. 1996) (construing § 13(b) of the Federal Trade Commission Act of 1938 (codified at 15 U.S.C. § 53(b) (2012)), which at that time authorized courts to "enjoin" violations of the Act, to authorize disgorgement); ICC v. B & T Transp. Co., 613 F.2d 1182, 1183–85 (1st Cir. 1980) (construing § 332(b)(1) of the Motor Carrier Act of 1980 (codified as amended at 49 U.S. § 332(b)(1) (2012)), which at that time authorized courts to secure a "writ of injunction" against violations of the Act, to authorize restitution); Commodity Futures Trading Comm'n v. Hunt, 591 F.2d 1211, 1223 (7th Cir. 1979) (construing § 6(c) the Commodity Exchange Act of 1922, Stat. (codified at 7 U.S.C. § 13(a)(1) (2012)), which at that time authorized courts to "enjoin" violations of the Act, to authorize disgorgement); Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187, 191–93 (4th Cir. 2002) (preliminary injunction against nominal defendant in contemplation of disgorgement of fraudulent profits by sale of future contracts for precious metals upheld) ("[If the Commodities Exchange Act] affirmatively prohibits the relief ultimately sought by the Commission . . . [then it does not have it, but if] it does not, then the court possesse[s] the power to enter a preliminary injunction in order to preserve the existence of the [disgorgement] remedy") ("[T]he power to order disgorgement as a remedy for violations . . . [of the Act exists] for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law.") (citations omitted).

Even more significant, because its holding is under the antitrust statutes, the Ninth Circuit in *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 227–30 (9th Cir. 1978), appropriately found that "prevent and restrain" in the antitrust statutes, the model for RICO's language, included rescission (another equity name for "disgorgement") as against, not merely buyers, but also sellers in prohibited transactions. The district court had, the Court held, the power to order rescission, if necessary, "to eliminate the effects of an acquisition offensive to the statute." *Id.* In addition, the Court squarely rejected the Appellant's argument that "prevent" only extended to stop *future* illicit transactions, not undo past illicit transactions, saying the Appellant's "reading of [the statute] strain[ed] the normal meaning of the terms . . . far out of perspective." *Id.* If *Coca-Cola Bottling Co.* is a proper reading of the antitrust statutes, and it was, and Congress modeled RICO after that precise antitrust statute, and it did, then courts ought to read RICO in the same fashion, absent a distinguishing factor, not present here. In *Philip Morris*, neither the government nor the court cited, relied upon or distinguished *Coca-Cola Bottling Co.*, despite the cogency of its reasoning. *See generally* United States v. Paramount Pictures, 334 U.S. 131, 171–72 (1948):

> [S]uch an ownership is vulnerable in a suit by the United States under the Sherman Act if the property was acquired, or . . . maintained . . .[by unlawful] practices . . . . Otherwise, there would be reward from the conspiracy through retention of its fruits. Hence the problem of the District Court does not end with enjoining continuance of the unlawful restraints nor with dissolving the combination which launched the conspiracy. Its function includes undoing what the conspiracy achieved. . . . [T]he requirement that the defendants

> restore what they unlawfully obtained is no more punishment than the familiar remedy of restitution.

The courts of appeal are in conflict on the availability of private equitable relief under RICO. *Compare* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986) (no private equitable relief) *with* Nat'l. Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (private equitable authorized), *vacated on other grounds*, 537 U.S. 393 (2002). *Scheidler* is correctly decided. G. Robert Blakey & Scott Cessar, *Equitable Relief Under RICO*, 62 Notre Dame L. Rev. 526 (1987) (reasoning and holding of *Religious Technology Center* rejected on textual, legislative history, and policy grounds). For a recent district court review of the issue, see Chevron Corp. v. Donziger, 2014 U.S. Dist. LEXIS 28253 (S.D. NY 3-04-14) (holding equity relief available under RICO to a private party to vindicate systemic extortion, fraud, and obstruction of justice)

If courts recognize private equity relief, as they should, a question arises whether it is limited by the proximate cause remoteness requirements imposed by the Court on legal relief. In brief, the Court held in 1983 that to recover for antitrust damages, the injury must be not "remote." Assoc. Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 541–44 (1983) [hereinafter *AGC*]. There, the Court reasoned that the remoteness requirement appropriately differentiates between more immediate plaintiffs whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement and more remote plaintiffs, whose injuries might be (1) relatively more speculative and (2) involve a risk of duplicate recoveries, or (3) the danger of complex apportionment of damages. *Id.* Thus, *AGC* found that giving remote plaintiffs standing was unnecessary, because the immediate plaintiffs would protect the precepts of the antitrust laws. *Id.* The Court then adapted the remoteness concept (absent an antitrust injury requirement) to RICO in *Holmes,* 503 U.S. at 268–70. The concerns that informed *AGC* and *Holmes*, however, do not arise in the context of a request for most kinds of private equitable relief. In fact, the relevant Court teaching on equitable relief runs, not from *AGC* to *Holmes*, but from *AGC* to *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104 (1986). In *Cargill*, the Court carefully distinguished between the remoteness requirements for damage relief (Section 4 of the Clayton Act) and equitable relief (Section 16 of the Clayton Act):

> The treble-damages remedy, if afforded to "every person tangentially affected by an anti-trust violation," or for "all injuries that might conceivably be traced to an antitrust violation," would "open the door to duplicative recoveries" and to multiple lawsuits. . . . Conversely, under § 16, the only remedy available is equitable in nature, and, as we [have] recognized . . . "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors . . . that are appropriate to a determination of standing under § 4 are not relevant under § 16.

Cargill, 479 U.S. at 111 n.6 (citations omitted); *see also* In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979) (in antitrust law, the remoteness rule applies to damages, not equitable relief; "The implications of [the rules] reach only as far as the policy considerations informing them."). *Cessante ratione legis, cessat et ipsa lex* (When the reason of the law ceases, the law itself also ceases). In short, because claims for equitable relief generally present no risk of duplicative recoveries or complex allocation problems, the multi-factor approach of *Holmes* for determining remoteness is not applicable to private requests for equity relief under RICO. *See also* McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 856 (3rd Cir. 1996) (plaintiffs lacked standing to bring antitrust damage action, but were not barred from seeking equitable relief).

In *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21–27 (2nd Cir. 1989), the Second Circuit held that the government cannot sue for treble damages under § 1964. The court's opinion convolutedly focuses its attention on whether the government is a "person" in § 1964(c). It does not examine the plain meaning of the authorization under § 1964(b) to sue under "this section," a phrase, in fact, not limited by its language to § 1964(a), but that the Court curiously assumes applies only to § 1964(a). Thus, the court begs the question by this assumption; its holding, for this reason alone, is flatly wrong. In short, Congress plainly authorized government suits under § 1964. That authorization is not limited to a particular subsection of § 1964; manifestly, if it includes the whole, it includes the part: § 1964(c). *Bonanno* is unpersuasive.

§ 1964(c) authorizes recovery for a violation of RICO for "injury to business or property" where the injury is "by reason of" the violation. Proper application of RICO—or any other statute—begins with the understanding that the "language of the statute is the most reliable evidence of its intent." *Turkette*, 452 U.S. at 593; Henry Friendly, Benchmarks, 202 (1976) (quoting the three rules of Justice Frankfurter for interpreting statutes, "(1) read the statute, (2) read the statute, (3) read the statute.") Courts, too, should read RICO in its ordinary or plain meaning. *Russello,* 464 U.S. at 20 (citing *Turkette*, 452 U.S. at 580, 593).

In *Holmes,* 503 U.S. at 265–68, the Court held that "by reason of" imposed a "proximate cause" burden on a plaintiff, that is, a showing that his or her injury was not only caused in fact, but "proximately" caused by the violation. In *Holmes*, the Court reexamined the "direct or indirect" rule of the common law, and adopted a flexible "standard" for "remoteness." *Id.* at 268–74. Cass R. Sunstein, Legal Reasoning and Political Conflict 27–28, 106–15 and 130–35 (1993) explicates the distinction between a rule, i.e. drive 55 mph, and a standard, i.e. drive reasonably. Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 Tul. L. Rev. 475, 482–83, 485–86 (1933) gives the classic formulation of the distinction. The newly minted standard emphasizes three factors: (1) the relatively speculative character of the damages to the immediate and the remote victim, *see Anza*, 547 U.S. at 459, 461–62 (in a case involving tax evasion, where the state taxing authority was directly injured but the competitive damage to the plaintiff was indirect, holding that a motive to injure alone is not a substitute for directness); (2) the possibility of duplication of damages between the immediate and the remote victim under RICO, *see* California v. ARC Am. Corp., 490 U.S. 93, 104–05 (1989) (in an antitrust case, holding that duplication between federal and state law is permissible); *Turkette*, 452 U.S. at 586 n.9; Organized Crime Control Act, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947 (1970) ("Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for this title."); and (3) the *presence* of others, that is, the immediate victim, is better situated to sue under RICO to assure enforcement of law. *See Holmes,* 503 U.S. at 268–71 (noting that neither customers nor customers' insurer was the direct victim of scam on broker-dealer); *see Anza,* 547 U.S. at 460. While the Court used the terminology of "direct/indirect," it gave the old analytical distinction a new meaning as a flexible standard. *Holmes*, 503 U.S. at 272 n.20 ("[O]ur use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns [or factors] set out in the text. We do not necessarily use it in the same sense as courts before us have . . . ."). The purpose of the analysis of the three factors is to select the *best* plaintiff to bring the RICO claim, not to establish a barrier against anyone suing. *Id.* at 269–70 ("[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."); *Assoc. Gen. Contractors*, 459 U.S. at 542; Kansas v. Utilicorp United, Inc., 497 U.S. 199, 214 (1990); *ARC Am. Corp.*, 490 U.S. at 102 n.6. *See* Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 889 n.15 (10th Cir. 1997) (in an antitrust case, noting that because "the purchasers . . . are the targeted victims of an illegal tying agreement, these purchasers are in the best position to identify an illegal tie and have the most incentive to bring an action . . . ."). For excellent analyses of the *Holmes* factors, *compare* Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 380–85 (2d Cir. 2001) (holding that plaintiff company injured by competitor who paid lower wages to illegal immigrant employees had stated a RICO claim under the *Holmes* remoteness test), *and Mendoza*, 301 F.3d at 1168–72 (holding that employees who suffered depressed wages because of an illegal immigration scheme had stated a RICO claim under the *Holmes* remoteness test), *with* Serv. Emps. Int'l Union Health & Welfare Fund v. Phillip Morris, Inc., 249 F.3d 1068, 1072–73 (D.C. Cir. 2001) (comparing the *Holmes* approach and the antitrust approach to proximate cause; holding that fund was indirectly injured by tobacco health costs and did not have standing), *and* Callahan v. A.E.V., Inc., 182 F.3d 237, 260–67 (3d Cir. 1999) (holding that plaintiffs who filed RICO complaint against competitor with fraudulently obtained distributors' licenses were not directly injured and thus did not have RICO standing; noting improperly that the Commonwealth of Pennsylvania was sufficiently situated to vindicate the interests involved and to meet the concerns in *Holmes*; if that proposition were determinative, parallel criminal sanctions would always obviate the need for civil sanctions). On the effort by the courts using the "proximate cause" label that unjustifiably squelched tobacco health cost litigation, see G. Robert Blakey, *Federal Circuit Courts Wrong as a Matter of Law in Taft-Hartley Fund Litigation with Big Tobacco, Civil RICO Report*, July 10, 2000, at 1; Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished The Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000). For more recent tobacco health care decisions that met the same fate as the others, see Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 436–37 (3d Cir. 2000) (holding that quasi-governmental hospital was only indirectly injured by tobacco-related health care costs and lacked standing); Lyons v. Philip Morris, Inc., 225 F.3d 909, 914–15 (8th Cir. 2000) (holding that trustees of multi-employer health plan indirectly injured by tobacco health care costs); Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc., 199 F.3d 788, 789–90 (5th Cir. 2000) (holding that trustees of multi-employer health plan indirectly injured by tobacco health care costs; also collecting a list of relevant decisions). Under *Holmes*, the proper language is now not "direct or indirect" in the traditional or formal sense, but relative "remoteness" in the policy sense of *Holmes*. Thus, "remoteness" is a *conclusion* that follows from the balancing of the three policy factors, not a formal rule that has independent significance, an approach not always recognized in the language of the decisions. *Compare* Bieter Co. v. Blomquist, 987 F.2d 1319, 1325 n.4 (stating that target language is "foreclosed" by *Holmes*), *and* BCCI Holdings (Luxembourg), S.A. v. Khalil, 214 F.3d 168, 173–75 (D.C. Cir. 2000) (quoting *Holmes*, 503 U.S. at 265–68) (rejecting target theory), *with* Brokerage Concepts, Inc. v. U.S. Healthcare Inc., 140 F.3d 494, 521 (3d Cir. 1998) (holding that because the plaintiff business entity "was a direct target of the alleged scheme," the plaintiff had standing to sue), and Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 238–39 (2d Cir. 1996) (holding that because official was not a target of bribery scheme, he did not have standing under RICO; also holding that his injury may be proximately caused under another non-RICO claim). Accordingly, decisions—both before and after *Holmes*—*must* be examined with care, as they often apply or applied *Holmes* as if it were a black-letter "rule" rather than a "standard" that requires a case-by-case approach. In fact, *Holmes* specifically rejects the black-letter rule approach. 503 U.S. at 272 n.20 ("[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in very case.") (quoting *Associated Gen. Contractors*, 459 U.S. at 536)). *See also Assoc. Gen. Contractors*, 459 U.S at 536 n.33 ("[T]hese labels [, i.e., directness, target area, and zone of interests,] may lead to contradictory and inconsistent results. . . . In our view, courts should analyze each situation in light of the [proper antitrust] factors . . . .") (citations omitted). In sum, proximate cause is a policy issue, not the product of an analytical formula. *Holmes*, 503 U.S. at 268 ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'") (citations omitted).

Under RICO, "proximate cause" implicates more that remoteness; it also implicates the nexus traditionally characterized as "foreseeability" and "substantial factor." *See, e.g.*, Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 614–15 (6th Cir. 2004):

> RICO not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries, but it also incorporates other traditional proximate-cause limitations on claimants. Accordingly, while a RICO plaintiff and defendant may have a *direct* and not a *derivative* relationship, the causal link between the injury and the conduct may still be too weak to constitute proximate cause—because it is insubstantial, unforeseeable, speculative, or illogical, or because of intervening causes. . . . From a substantive standpoint, a RICO plaintiff who can show a direct injury may still lose the case if the injury does not satisfy other traditional requirements of proximate cause—that the wrongful conduct be a substantial and foreseeable cause and that the connection be logical and not speculative.

(citations omitted). Finally, where no nexus is shown between "violation" and "injury," the plaintiff has not met the "proximate cause" requirement. *See, e.g.*, McCaleb v. A.O. Smith Corp., 200 F.3d 747, 752–53 (11th Cir. 2000) (holding that farmer showed no injury to his feed and thus had no RICO claim).

In *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010) (plurality opinion), the Supreme Court rejected New York City's RICO claim against the Hemi Group, alleging that the online tobacco retailer's refusal, in violation of the federal Jenkins Act, to provide New York State with a list of its in-state customers deprived New York City of sales tax revenue and constituted the RICO predicate acts of mail and wire fraud. In the Court's plurality opinion, Chief Justice Roberts stated that the city failed to show proximate causation appearing to assert a RICO proximate cause doctrine rooted solely on the "direct relationship" paradigm. *Id.* at 9–12 (Roberts, C.J.) (plurality). Roberts went on to state that the city's causation theory failed because it would "extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 11. Justice Ginsburg provided the necessary fifth vote in support of the judgment, but she refused to address and restructure RICO proximate cause doctrine, stating merely that she "resist[ed] reading RICO to allow the City to end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the 'quite limited remedies' Congress has provided for violations of the Jenkins Act." *Id.* at 19. In cases where no majority opinion exists, the narrowest rationale in support of the judgment governs. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). Nevertheless, some of the circuit courts of appeal have erroneously treated Chief Justice Robert's plurality opinion as a majority opinion that states a new binding doctrine. *See, e.g.*, CDX Liquidating Trust v. Venrock Assoc., 640 F.3d 209, 214 (7th Cir. 2011) ("A common definition of [proximate cause] is that there must be proof of 'some direct relation between the injury asserted and the injurious conduct alleged.'" (quoting *Hemi Group, LLC*, 559 U.S. at 9)).

A majority of courts agree that "business or property" under § 1964 does not include personal injury. Grogan v. Platt, 835 F.2d 844, 845–48 (11th Cir. 1988) ("[T]he phrase 'injured in his business or property' excludes personal injuries, including the pecuniary losses therefrom.") is the leading decision. A majority of courts of appeal go a step beyond, as did *Grogan,* and hold that injury to "business or property" that is "incident" to "personal injury" is excludable. The Ninth Circuit is a minority of one in *Diaz v. Gates*, 420 F.3d at 898–904 [hereinafter *Diaz II*] (criticizing *Grogan* and clarifying *Oscar II,* 965 F.2d 783, which required "concrete financial loss"; holding that "injury to business or property" is generally a question of state law; further holding that injury to business relations and employment by false imprisonment is a personal injury, but may be "injury to business or property" under California law (citing *Mendoza*, 301 F.3d at 1168 n.4; *Doe*, 958 F.3d at 768)).

Grogan, the foundation of much misguided jurisprudence, requires examination on its own terms. The estates of murdered F.B.I. agents sought recovery, not for wrongful death, but for incidental property injuries, including funeral expenses. The court expressed frank (and telling) judicial distaste for civil RICO. It then looked not to the character of the predicate acts in RICO (that include murder), but to the treble damage provisions of antitrust (that include only economically motivated conduct, e.g. price fixing, and for which personal injuries are not compensable). Expressing a feigned sympathy with the claims of the estates, the court held that because of the origin of the language of RICO in the antitrust provisions, the estates lacked a property interest and standing to sue. *Grogan,* 835 F.2d at 845–46, 848.

Grogan is ill-reasoned. While generally helpful, looking to the antitrust statutes for particular results is not an approach that a court ought slavishly to follow. *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 465–67 (1990) (permitting state court jurisdiction over civil RICO actions, which is different from the antitrust statutes). In brief, *Grogan* denied the plaintiffs their just due under RICO out of judicial distaste for the civil provisions of the statute. In fact, the analysis of the minority view is far more compelling. In *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 74 F. Supp. 2d 221, 229 (E.D.N.Y. 1999), Judge Weinstein rightly observed that under the most natural interpretation of "business or property," RICO victims deprived of monetary resources should recover their pecuniary losses. The court illustrated the anomaly of the majority rule by hypothesizing that if racketeers throw a business owner through a window, breaking his arms and legs, the majority position permits recovery for the cost of the window, but not the owner's medical expenses. The court recognized a need to draw a line, but thought it more sensible to draw it between "pain and suffering" in connection with the homicide and outlays for "repairing windows and limbs." *Grogan* also ignored that RICO's treble damage provision appears *outside* of the antitrust statutes expressly to avoid narrow antitrust limitations, including limitations on "standing to sue." *Sedima,* 473 U.S. at 498. *Grogan* reintroduced, in fact, precisely the sort of debilitation that "Congress sought to avoid." *Id.* at 499. *Diaz II* also rejected a target limitation, rightly observing:

> The statute is broad, but that is the statute we have. Were the standard as the dissent claims, [that is, a target limitation,] we would have the anomalous result that one could be liable under RICO for destroying a business if one aimed a bomb at it, but not if one aimed at the business owner, missed and hit the business by accident, or if one aimed at the business owner who happened to be in the business at the time.

420 F.3d at 901–02. *Grogan* is an unjustifiable judicially designed limitation on RICO.

The proper general relationship between RICO and the antitrust statutes was well-captured by the Eighth Circuit in *Bennett v. Berg,* 685 F.2d 1053 (8th Cir. 1982) (rejecting antitrust competitive injury limitation):

> RICO should [not] be viewed as an extension of the antitrust law in all respects. Different policies underlie the two bodies of law. . . . In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. In other words, although RICO borrowed the tools of antitrust law, [it] . . . was [not] limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous.

Id. at 1059 (citations omitted). In sum, "The same words, *in different settings,* may not mean the same thing." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950) (emphasis added).

In sharp and unfavorable contrast with *Grogan,* the Supreme Court of Washington followed congressional intent. In United States v. Zemek, 634 F.2d 1159, 1163–65 (9th Cir. 1980), defendants were convicted under RICO for attempting to gain a monopoly in a certain area of the tavern-topless bar business by murder, arson, and extortion. In Rice v. Janovich, 742 P.2d 1230 (Wash. 1987) (en banc), a civil case arising from the *Zemek* depredations, a night watchman of a fire-bombed tavern sued for personal injuries under state law and for lost wages under RICO for the work he missed as a result of the bombing. The Supreme Court of Washington rejected arguments that claims for lost wages were not "injury to business or property." *Id.* at 1235–38. It had little difficulty in reading the liberal construction clause or *Sedima*'s holding that courts read RICO "broadly;" it easily awarded him damages for his lost wages. *Id. Rice,* not *Grogan,* deserves approbation. *See also* Libertad v. Welch, 53 F.3d 428, 437 n.4 (1st Cir. 1995) ("Plaintiffs . . . could have standing to sue under RICO, if they were to submit sufficient evidence of injury to business or property such as lost wages or travel expenses, *actual physical harm,* or specific property damage sustained as a result of a RICO defendant's actions.") (emphasis added).

The legislative history of RICO also supports a straightforward interpretation of "injury to business or property." Congress was concerned about the physical violence so characteristic of organized crime. *See, e.g.,* 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska: "[Organized crime] employs physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits."). Exclusion from RICO recovery of financial losses that arise from such violence is, therefore, anomalous.

Under "ordinary or plain meaning," "business" means "occupation," "work," "concern," or "activity," PAPERBACK OXFORD ENGLISH DICTIONARY 110 (2001), or "enterprise," "transactions," or "matters," OXFORD ENGLISH DICTIONARY 211 (8th ed. 2004). "Property" means "belonging" or "right." PAPERBACK OXFORD ENGLISH DICTIONARY 669 ("belonging"); OXFORD ENGLISH DICTIONARY 1252 ("right" "ownership," or "bundle of rights"). Thus, without special qualification, not found on the face of RICO, "'property' denotes a broad range of interests," *Russello,* 464 U.S. at 21, in particular, because Congress directed courts to read its concepts liberally. Indeed, if the liberal construction clause applies anywhere, it is in RICO's civil remedies provisions. *Sedima*, 473 U.S. at 491 n.10 ("Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident.")

Traditionally, "property" referred to real estate (land, etc.) and personal property (goods), where people then held the wealth of a pre-modern society. Thomas Holland, Elements of Jurisprudence 181 (Legal Classics ed. 1998). Today, the concept extends to "intangible" property, because that sort of "property" is now where a modern society holds its wealth. *Id.* ("The idea of ownership has been so far extended to make it applicable to certain closely coherent masses of rights . . . which are . . . by legal fiction treated . . . as if they were tangible objects."). For other examples of "property" in the modern world, see Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998) (right to receive interest on client funds in lawyers' accounts); Bd. of Regents v. Roth, 408 U.S. 564, 571–72, 577 (1972) ("[T]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (withdrawal of public assistance benefits); Sherbert v. Verner, 374 U.S. 398 (1963) (disqualification for unemployment compensation); Speiser v. Randall, 357 U.S. 513 (1958) (denial of a tax exemption); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956) (discharge from public employment).

Apart from the plain language of RICO, two other bodies of law are relevant to reading "business or property." First, the antitrust statutes, from which Congress took the "business or property" language. *Holmes,* 503 U.S. at 265. Second, the provisions that Congress set out as predicate offenses in RICO itself. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009) (related section in Title 28 read in *in pari materia*). In fact, it hardly makes sense to read the *remedy* of RICO narrower than the *substantive* standards for which Congress provided protection in the other statutes that it also incorporated into RICO, specifically finding that the remedies then current were "unnecessarily limited in scope and impact." Statement of Finding and Purpose, 84 Stat. 922–23 (1970). Under the antitrust statutes, that "[m]oney . . . is a form of property" is not a serious question. Reiter v. Sonotone Corp., 442 U.S. 330, 338 (1979) (antitrust). So, too, are increased costs, lost profits, and the reduction in value of a business "injury to business or property." *See generally* John P. Ludington, *Measure and Elements of Damages under* 15 U.S.C.A. § 15 *Entitling Person Injured in His Business or Property by Reason of Anything Forbidden in Federal Antitrust Laws to Recover Treble Damages,* 16 A.L.R. Fed. 14 (2010) ("Basically, an antitrust claimant may recover three types of damages: (1) his increased costs, (2) lost past profits, and (3) reduction in the value of his business.") (footnotes omitted).

While looking to the antitrust statutes is a recognized legal move in RICO dialectics, looking to the predicate offenses in Title 18 that are incorporated into RICO makes equally good, if not, better, sense. Congress would hardly have created a civil remedy in RICO to enforce the predicate offenses (when the other elements of RICO are present), if the civil remedy in RICO were not at least as broad in its protection of "business and property" as the predicate offenses included in its scope. *See* DeGuelle v. Camilli, 664 F.3d 192, 201 (7th Cir. 2011) ("[A holding of lack of pattern] . . . is troubling when one considers the purposes of the Sarbanes-Oxley Act and its addition of § 1513(e) to RICO . . . Retaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower. . . . Accordingly, we believe a relationship can exist between § 1513(e) predicate acts and predicate acts involving the underlying cause for such retaliation. Such a finding is consistent with the Court's flexible standard and acknowledges the rationale behind the Sarbanes-Oxley Act's whistleblower provisions."); *accord* Maiz v. Virani, 253 F.3d 641, 662–66, 674 (11th Cir. 2001) (court ought to construe RICO to include for relief any offense included by Congress in the predicate offenses). Thus, no sufficient reason appears why "property" under the rest of Title 18 ought not constitute "property" within § 1964(c). Courts rightly read Title 18 as a whole. *See* United States v. Hoang, 636 F.3d 677, 681 (5th Cir. 2011) ("We do not disregard 'the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context.'") (*citing* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)). The scope of the protection for "business" or "property" in RICO's predicate offenses is, significantly, capacious. *See, e.g.,* Pasquantino v. United States, 544 U.S. 349, 355–56 (2005) ("Valuable entitlements [to uncollected taxes] are 'property'" within mail fraud statute); Carpenter v. United States, 484 U.S. 19, 25–29 (1987) (confidential business information is "property" within wire fraud statute). *See also* §§ 201 (bribery: "thing of value"), 1341 (mail fraud: "property"), 1343 (wire fraud), 1951 (extortion: "property"). Indeed, such "things" as frequent flyer mileage, United States v. Loney, 959 F.2d 1332, 1336 (5th Cir. 1992), shareholder information, United States v. Wallach, 935 F.2d 445, 464–66 (2d Cir. 1991), spending control, United States v. Shyres, 898 F.2d 647, 651–52 (8th Cir. 1990), and postal services, United States v. Gelb, 881 F.2d 1155, 1162 (2d Cir. 1989) are now considered "property" in various federal criminal statutes. Similarly, "thing of value" traditionally meant a tangible object, yet the phrase is now extended to "intangible" property. *See, e.g.*, United States v. Girard, 601 F.2d 69, 71 (2d Cir. 1979) (law enforcement information "thing of value" within 18 U.S.C. § 641 (2012) (stolen property); collecting a wide range of decisions on "thing of value," including amusement under a gambling statue, sexual intercourse, and the testimony of a witness). *See also* United States v. Gorman, 807 F.2d 1299, 1304–05 (6th Cir. 1986) (promises of future employment); United States v. Schwartz, 785 F.2d 673, 679 (9th Cir. 1986) (assistance in arranging a union merger). Ironically, if the predicate offenses in themselves are subject to the rule of lenity, as they are, C.M. Flowers v. Cont'l Grain Co., 775 F.2d 1051, 1054 (8th Cir. 1985), while RICO's remedial provisions are subject to the liberal construction clause, reading RICO more narrowly than the predicate offenses is problematic and unjustified or unjustifiable.

That said, courts unjustifiably still give a restrictive reading to "business and property," confining it to "out of pocket expenditures." *See, e.g.*, *In re* Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 523 (5th Cir. 1995) (*citing* Oscar v. University Students Co-op. Ass'n., 965 F.2d 783, 786 (9th Cir. 1992) (en banc). *Oscar* held that a plaintiff, as the *tenant* of an apartment, did not suffer any injury to her business or property from a diminution of its value, because of fellow tenants' drug-related activities. *Oscar,* 965 F.2d at 786. *Oscar,* however, is no longer good law in the Ninth Circuit under *Diaz*; Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1055 (9th Cir. 2008) (prior rule "overturned"). The Ninth Circuit now reads "business or property" broadly, though in light of state law. Nevertheless, the court in *Oscar* pointedly commented that it was not addressing the claims of neighboring property *owners,* and that "one might measure an owner's loss by the diminution in fair market value . . . ." *Oscar*, 965 F.2d at 786–87. Maio v. Aetna, Inc., 221 F.3d 472, 488–89 (3rd Cir. 2000) also used similar language, "concrete financial loss." It held no RICO injury, because the plaintiffs suing an HMO for an "inferior health care product" alleged neither a denial of benefits nor inferior treatment. *Id.* That court, too, commented that the diminution in value of tangible property, "like a plot of land or diamond necklace," would constitute RICO injury. *Id.* (if injury is of a "tangible nature . . . the fact of damage under RICO . . . [shown by] the value of the real or personal property . . . reduced."). *Id. (citing* Genty v. Resolution Trust Corp., 937 F.2d 899, 918 (3d Cir. 1991) (the loss of the market value of homes because of fraud in sale of real property near toxic waste landfill). On the other hand, *Maio* rejected *Bennett v. Berg,* 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd on reh'g,* 710 F.2d 1361 (8th Cir. 1983), in which the court, in contrast, properly upheld a pleading of injury based on allegations that the value of their contracts for "life care" was different from what they were led to expect through the defendants' promises. *Maio,* 221 F.3d at 490 n.14 ("we will not follow it"). *Bennett,* not *Maio,* reflects the more persuasive view.

Similar precedents also talk of "concrete," "clear and definite," not "intangible," or an "expectancy," extra-statutory limitations that are plainly not justified by the text. *See, e.g.,* Patterson v. Mobil Oil Corp., 335 F.3d 476, 492 n.16 (5th Cir. 2003) (plaintiffs receiving workers' compensation benefits may have ended up better off, therefore "plaintiffs have failed to show that they were injured at all . . . ."); Price v. Pinnacle Brands, Inc., 138 F.3d 602, 607 (5th Cir. 1998) (plaintiffs who purchased trading cards received "precisely what they bargained for . . . ."); In re Taxable Mun. Bond Sec. Litig., 51 F.3d at 523 ("Anderson has not alleged that the plaintiffs have ever lost any money as a result of the RICO scheme."; lost opportunity for a low interest loan is "speculative"); Denney v. Deutsche Bank AG, 443 F.3d 253, 266–68 (2d Cir. 2006) (class members who have not been assessed a penalty by the IRS suffered no damage); Steele v. Hosp. Corp. of Am., 36 F.3d 69, 70–71 (9th Cir. 1994) (patients, who did not pay in overbilling scheme, suffered no financial loss). *Patterson* and *Steele* are doubly objectionable under the collateral source rule and the rational of RICO of concentrating recovery into one plaintiff. 2 Daniel Dobbs, Law of Remedies § 8.6(3) (1993) (collateral source rule); Carter v. Berger, well-integrated. The antitrust statutes protect against collusion; RICO

777 F.2d 1173, 1175 (7th Cir. 1985) (RICO; "A pedestrian is entitled to recover for loss caused by being run over by a speeding motorist, even though the pedestrian also has insurance. The 'collateral benefit' rule of tort law rests on the belief that the wrongdoer should be made to pay—the better to deter like conduct—whether or not the victim has providently supplied another source of compensation, unless the supplier of the compensation has a subrogation clause.").

Other courts are also sometimes less hospitable in construing "property" in the predicate offenses. *See, e.g.,* Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 404–05 (9th Cir. 1991) ("market share," that is, the "theft of customers" by fraud not "property" within mail fraud). *Lancaster Community Hospital* compares unfavorably with *United States v Tropiano,* 418 F.2d 1069, 1076 (2d Cir. 1969) (interference by violence with solicitation of customers obtaining "property" for "extortion" within Hobbs Act). The Court in *Scheidler* went out of its way to indicate that its decision did not disturb *Tropiano's* construction of "property." 537 U.S. 393, 403 n.6. *Accord* United States v. Gotti, 459 F.3d 296, 322–24 (2d Cir. 2006).

The general federal rule on ascertaining property damages draws a distinction between the *fact* of damage that must not be speculative and the *amount* of damages that may be evaluated under a relaxed standard, because a defendant ought not to be able to profit from an "uncertainty" created by his own illegal conduct. *See, e.g.*, Ham Marine Inc. v. Dresser Indus., Inc., 72 F.3d 454, 462 (5th Cir. 1995) (stating the general rule; "[t]he right to recover is not precluded by uncertainty regarding the exact amount of damages.") (citing Harrison v. Prather, 435 F.2d 1168, 1174–75 (5th Cir. 1970)); *see also* J. Truett Payne Co., Inc., v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981) (stating the general rule in antitrust context); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 123–25 (1969) (stating the general rule in an antitrust context). *Accord* Gen. Envntl. Sci. Corp. v. Horsfall, 800 F. Supp. 1497, 1504 (N.D. Ohio 1992) (stating the general rule in a RICO context (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)), *aff'd in part and vacated in part,* 25 F.3d 1048 (6th Cir. 1994) (unpublished opinion). Nevertheless, the status of applicability of this distinction to RICO is cast into doubt by Justice Thomas' expansive reading of the majority opinion in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), to impose an *independent* limitation of *speculative* on the remoteness inquiry. *Compare id.* at 455–61 (Kennedy, J.) ("[I]llustrat[ing] why Ideal's alleged injury was not the direct result of a RICO violation . . . is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. . . . The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation."), *with id.* at 466–67 (Thomas, J., concurring in part):

> The Court's reliance on the difficulty of ascertaining the amount of Ideal's damages caused by petitioners' unlawful acts to label those damages indirect is misguided. *Holmes* and *Associated General Contractors* simply held that one reason that *indirect* injuries should not be compensable is that such injuries are difficult to ascertain. We did not adopt the converse proposition that any injuries that are difficult to ascertain must be classified as indirect for purposes of determining proximate causation. . . . The question with which the Court expresses concern—whether Ideal can prove the amount of its actual damages 'with sufficient certainty' . . . to permit recovery—is simply not before the Court.

(footnotes omitted) (citations omitted). While Justice Thomas' reading of the majority opinion is plausible, it is not the only one, and it has to be put in the context of the general rule that what is not argued is not decided. R.A.V. v. St. Paul, 505 U.S. 377, 386 n.5 (1992) The application of the general rule distinguishing between fact and extent of damage is not in the arguments of the parties; thus, it was not before the Court, and it is a mistake to read the majority as resolving it. When it is argued, the Court will narrowly construe the "offending" language. Anything else is inconsistent with the duty to read RICO liberally.

protects against violence and fraud in the market. Together, they seek a free market characterized by integrity and freedom.[32]

F. *Key Elements.*

Restated in plain English—with Court commentary in the footnotes—RICO provides:

(a) A "*person*"[33] who has received income from a "*pattern of racketeering activity*"[34] cannot invest that income in an "*enterprise*,"[35]

(b) a "*person*" cannot get or keep control of an "*enterprise*" by a "*pattern of racketeering*,"

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32. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN AND DONALD F. TURNER, ANTITRUST POLICY 17 (1959). *Accord* American Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or agreement.").

33. 18 U.S.C. § 1961(3); *see generally* Gerardi, *supra* note 10.

34. In *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989), the Court, commenting that it is a limitation, *not* a definition, clarified the term "pattern" in 18 U.S.C. § 1961(5). It acted in light of its legislative history to reflect a "relationship" between the acts in the "pattern"—that is, that they were not isolated events—and "continuity" over time, or its threat. The threat was that the length of time of the "pattern" would go on for a substantial period, more than a few weeks or months, or was the regular way of doing business of an ostensibly legitimate or a plainly illegitimate business. *Id.* at 238–43. *See also* Murphy, *supra* note 10, at 2003.

A person may violate § 1962 by engaging in a "pattern of racketeering activity"; he may also violate it through "collection of an unlawful debt." 18 U.S.C. § 1962(a)–(c). *See, e.g.*, United States v. Oreto, 37 F.3d 739, 751 (1st Cir. 1994) (collection of unlawful debt alone is sufficient); United States v. DiSalvo, 34 F.3d 1204, 1211 (3rd Cir. 1994) ("used, or aided and abetted another person to use, implicit threats to collect a debt" is sufficient).

35. The Court in *Turkette,* 452 U.S. at 581–83, rejected an attempt to confine 18 U.S.C. § 1961(4)'s term "enterprise" to licit organizations, holding that in light of the word "includes," the definition of "enterprise" extended to licit and illicit organization of "any" type. *See* NOW v. Scheidler, 510 U.S. 249, 259 n.5 (1993) ("enterprise" may play the role of perpetrator, instrument, prize, or victim in violations of RICO). As the Court recognized in *Scheidler* (citations omitted), enterprises may play different "roles" in different configuration of RICO claims. The roles, not necessarily mutually exclusive, include "victim" (*e.g.,* an otherwise innocent "enterprise" or its members are or are injured or used); "prize" (*e.g.,* control is sought over an "enterprise" or its members); "instrument" (*e.g.,* an otherwise innocent "enterprise" or its members injured or used); or "perpetrator" (*e.g.,* the "enterprise" or its members are culpable). The concept of "role" in reading language is basic to linguistic theory. *See, e.g.,* GEORGE DILLON, INTRODUCTION TO CONTEMPORARY LINGUISTIC SEMANTICS 68–82 (1977) (reviewing the literature on "semantic roles"); Charles J. Fillmore, *The Case for Case,* in UNIVERSALS IN LINGUISTICS THEORY 24–25 (E. Bach and R. Harms ed. 1968); *see generally* Thomas O'Neill, Note, *Functions of The Enterprise Concept,* 64 NOTRE DAME L. REV. 646 (1989) (best student essay overall on ''enterprise'').

(c) a "*person*"[36] who is employed by or associated with an "*enterprise*" cannot "*conduct*"[37] the affairs of the "*enterprise*" through a "*pattern of racketeering*," and
(d) a "*person*" cannot "*conspire*" to violate RICO.[38]
This "outline is deceptively simple . . . [, however, because] each concept is a term of art which carries its own inherent requirement of particularity."[39]

II. The Private Securities Litigation Reform Act of 1995.

A. *History*.

Congress amended RICO's private civil remedy provision in 1995[40] as part of a suite of statutory modifications sought by the securities industry over prescient consumer and victim groups enacted to curtail more securities-related litigation.[41] The Private Securities Litigation Reform Act of 1995 (PSLRA)[42] amended the language of Section 1964(c) into its current form:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore 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, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.*[43]

The goal of the amendment, in the words of SEC Chairman Arthur Levitt, was to "[e]liminat[e] the overlap between private remedies

36. The Court in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162–63 (2001), while recognizing that the individual or entity that plays in § 1962(c) the role of a "person" defendant cannot also play the role of an "enterprise," held that the "enterprise-person" rule did not preclude charging the individuals or entities employed or associated with the "enterprise," including its owner, as long as the individuals or entities were not also charged as the "enterprise."

37. The Court in *Reves v. Ernst & Young*, 507 U.S. 170, 177–86 (1993), established that "conduct" meant some part in the "operation or management" of the enterprise's affairs. *See generally* Blakey & Roddy, *supra* note 9 (extensive discussion of background, *Reves*, and its early application in the circuits).

38. This plain language translation of RICO owes its origin to *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000).

39. Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989).

40. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 107, 109 Stat. 737, 758 (codified as 18 U.S.C. § 1964(c) (2012)) [hereinafter PSLRA or § 1964(c)].

41. *See* Blakey & Roddy, *supra* note 9, at 1676–702 (providing a detailed summary of the legislative history behind the passage of the PSLRA).

42. PSLRA (codified as amended in scattered Sections of 15 & 18 U.S.C.).

43. 18 U.S.C. § 1964(c) (2012) (emphasis added to amendment text).

under RICO and the federal securities laws."[44] In his written statement to the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, Chairman Levitt explained that because "the securities laws generally provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO."[45] The full committee in the Senate[46] and the Conference Report[47] on the bill endorsed the amendment and Chairman Levitt's testimony in support of it. Neither Chairman Levitt nor the various committees that considered the bill described any purpose or intent to effect general reform of RICO.

B. *Construing the Amendment's Language.*

1. Structural Context.

The first part of the first sentence of § 1964(c)—"[a]ny person injured in his business or property by reason of a violation of §1962 of this chapter may sue . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"[48]—sets forth a general remedy for parties harmed by a violation of RICO. The second part of the sentence, introduced by the PSLRA amendment, creates an exception to this general rule: "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of § 1962."[49] Linguistically, this exception, like any exception, is necessarily narrower than the general rule it qualifies.[50] Otherwise, it would not fit within the contors of "exception."[51] The term "person" describes the class of people with a remedy, including those with claims falling under the exception. The most natural reading of these terms, dictated by the rule of *noscitur a sociis*, is that the "persons" authorized to pursue a remedy under §1964(c) are also the "persons" barred from doing so under the PSLRA amendment.[52] The "persons" in the first part of the sen-

44. Securities Litigation Reform Proposals S. 240, S. 667, and H.R. 1058: Hearings Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs, 104th Cong. 232 (1995) (testimony of Arthur Levitt, chairman, SEC).

45. *Id.* at 251 (statement of Chairman Levitt).

46. S. Rep. No. 104-98, at 19 (1995) (citing Levitt).

47. H.R. Rep. No. 104-369, at 48 (1995) (Conf. Rep.) (citing Levitt).

48. 18 U.S.C. § 1964(c).

49. *Id.*

50. *See, e.g.*, United States v. Ryan, 225 F.2d 417, 425–26 (2d Cir. 1955) (Hand, J., dissenting), *rev'd*, 350 U.S. 299 (1956) (illustrating, in a Labor Management Relations Act case, the general principle that exceptions denote a narrower class than the general rule defines).

51. Oxford English Dictionary 498 (2d ed. 1989) ("[t]he action of exception (a person or thing, a particular case) from the scope of a proposition, rule, etc.; the state or fact of being so excepted.").

52. The Latin phrase *noscitur a sociis* literally translates to "it is known by its associates." Black's Law Dictionary 1087 (8th ed. 2004). Federal courts have long employed this principle in statutory interpretation. *See, e.g.*, Virginia v. Tennessee, 148 U.S. 503, 519 (1893) ("It is a familiar rule in the construction of terms to apply to them the meaning

tence, who may recover for injuries caused by a RICO violation, are the same "persons" who cannot rely on conduct that would be actionable as securities fraud. The second sentence of Section 1964(c) modifies the bounds of the securities fraud "exception" by excluding from its reach those who are "criminally convicted in connection with the fraud."[53]

Two other features of the remedial landscape created by RICO and the securities laws reinforce this focused reading of the 1995 statute. First, § 1962(b), which authorizes the government to pursue civil remedies under RICO, resides in a separate subsection of § 1964.[54] Second, the federal securities laws explicitly authorize the SEC to enforce the prohibition against securities fraud.[55] The PSLRA's amendment to RICO does not alter the scope of any remedies available under the securities acts.

2. The Word "Actionable"

A particular civil RICO action filed under § 1964(c) falls under the exception *only* if the predicate acts pleaded by the "person" seeking the remedy would be "actionable" by that "person" as "fraud in the purchase or sale of securities."[56] Because the subset of conduct "actionable" under § 10(b) or Rule 10b-5 is narrower than the set of possibly illegal activity involving securities fraud, the word "actionable" plays a crucial role in limiting the scope of the exception created by the PSLRA.

§ 10(b) and Rule 10b-5 do not offer "a cause of action . . . to the world at large" for any violation of law involving securities.[57] In its most recent cases interpreting these provisions, the Court has focused on the statutory text[58] and avoided constructions that unduly expand the class

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naturally attaching to them from their context."). More recently, in Gustafson v. Alloyd Co., 513 U.S. 561 (1995), the Court applied this rule in interpreting the meaning of the term "prospectus" within the Securities Act of 1933. The Court reasoned:

> The constructional problem is resolved by the second principle [respondent] overlooks, which is that a word is known by the company it keeps (the doctrine of *noscitur a sociis*). This rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving "unintended breadth to the Acts of Congress."

Gustafson, 513 U.S. at 575 (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)). The Court used a similar interpretative principle in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), when construing the word "security" in the Exchange Act of 1934. *Reves*, 494 U.S. at 63 ("the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts."). It should apply here.

53. 18 U.S.C. § 1964(c) (2012).

54. 18 U.S.C. § 1964(b) (2012) ("The Attorney General may institute proceedings under this section.").

55. 15 U.S.C. § 78u (2012) (giving SEC power to investigate violations of the securities laws, and to bring actions against responsible parties).

56. 18 U.S.C. § 1964(c) (2012).

57. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 733 n.5 (1975).

58. Cent. Bank of Denver, N.A. v. First Nat'l Bank of Denver, N.A., 511 U.S. 164, 175 (1994) ("[T]he statutory text controls the definition of conduct covered by § 10(b).").

of prohibited activity under the statutes.[59] A civil claim under § 10(b) and Rule 10b-5 requires a showing by the victim that a defendant made a misstatement or an omission of a material fact in connection with the sale of a security in the proper state of mind, and that the plaintiff's reliance on that misrepresentation or omission was the proximate cause of his or her injury.[60] Even in a scheme involving securities fraud, the plaintiff must show that each individual participant in the scheme filled the requirements of the statute.[61] When a plaintiff cannot allege that the defendant engaged in activities that are "actionable as fraud in the purchase or sale of securities," the exception created by the PSLRA is inapplicable as a matter of its plain language. Moreover, in this case, the plain language follows congressional purpose or intent. Congress was not undertaking general reform of RICO; it was creating an exception to RICO's civil liability to prevent *overlapping* remedies. Thus, the plaintiff can properly pursue a remedy under § 1964(c) to fill in the potential "gap" otherwise left between the securities laws and RICO. Certainly, Congress did not—in eliminating an "overlap"—intend to create a "gap," for it would deny a federal remedy to victims of fraud under either statute.

Nevertheless, a growing chorus of federal courts at the appellate level, and a veritable choir of courts at the trial level, interpret the word "actionable" expansively, resulting in general RICO reform. They hold that *any* illicit scheme involving the purchase and sale of securities, defined broadly, is excluded from RICO scrutiny, because of the PSLRA exception, even if the plaintiff is incapable of making a securities fraud claim against a defendant.[62] In addition, they take an aggressive view of what counts as "securities fraud," resisting attempts to recast behavior in

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59. *See, e.g.*, Stonebridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159–66 (2008) (rejecting "scheme" liability as a claim for relief under § 10(b) and Rule 10b-5); *Central Bank*, 511 U.S. at 175–78 (1994) (rejecting aiding and abetting liability under § 10(b) and Rule 10b-5).

60. Kline v. First W. Gov't Secs., Inc., 24 F.3d 480, 487 (3d Cir. 1994) (giving five-element test for a securities fraud violation); Huddleston v. Herman & MacLean, 640 F.2d 534, 543 (5th Cir. 1981) (articulating a similar five-part test), *rev'd on other grounds*, 459 U.S. 375 (1983); *see also Central Bank*, 511 U.S. at 180 ("A plaintiff must show reliance on the defendant's misstatement or omission to recover under 10b-5."); *Blakey & Roddy*, *supra* note 9, at 1686–93 (analyzing the elements of an "actionable" securities fraud claim in detail).

61. OS Recovery, Inc. v. One Group Int'l, Inc., 354 F. Supp. 2d 357, 369 (S.D.N.Y. 2005) ("Although a scheme may have involved securities fraud, the conduct of each participant in the fraud is not necessarily actionable under the securities laws. The relevant question, thus, is whether [the defendant]'s alleged conduct is actionable under those laws."); Renner v. Chase Manhattan Bank, No. 98 Civ. 926 (CSH), 1999 WL 47239, at *5–*7 (S.D.N.Y. Feb. 3, 1999) (holding that conduct amounting to aiding and abetting is not actionable under the securities laws and therefore is not barred by the PSLRA as a basis for asserting a RICO claim).

62. Howard v. Am. Online Inc., 208 F.3d 741, 749–50 (9th Cir. 2000) (dismissing private RICO claims involving securities fraud where a securities claim was unavailable because the plaintiff could not establish standing); *see also* MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268 (2d Cir. 2011); AFFCO Investments 2001 v. Proskauer Rose, L.L.P., 625 F.3d 185 (5th Cir. 2010); Bixler v. Foster, 596 F.3d 751 (10th Cir 2010); each of which dismisses a RICO claim under PSLRA, and not one of which includes a careful exegesis of the statute as opposed to prior court decisions. Bald Eagle Area Sch. Dist. v.

a way that avoids the PSLRA bar.[63] This approach inappropriately

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Keystone Fin., 189 F.3d 321 (3d Cir. 1999) stands on a different footing, though it dismissed a RICO claim for relief. *See infra* text accompanying notes 64–66.

District court decisions are legion. Here is a representative sample of some of the early decisions. Eagletech Communications Inc. v. Citigroup, Inc., No. 07-60668-CIV, 2008 WL 3166533, at *12–*14 (S.D. Fla. June 27, 2008) (rejecting argument that plaintiffs were entitled to a RICO action against financial institutions that assisted in a scheme to manipulate sales of securities, because the plaintiffs could not bring a securities claim against them; reliance on *Howard,* no analysis of the text of the exception); Baron v. Chehab, No. 05-3240, 2006 WL 156828, at *23–*24 (C.D. Ill. Jan. 20, 2006) (dismissing RICO claims against parties that aided and abetted securities fraud violations, because the SEC has the power to prosecute such individuals under the securities laws, although private individuals do not); Jacoboni v. KPMG LLP, 314 F. Supp. 2d 1172, 1178–79 (M.D. Fla. 2004) (denying application of RICO to a tax shelter scheme involving the sale of foreign securities to create "losses" that would offset federal income tax liability); Swartz v. KPMG, LLC, 401 F. Supp. 2d 1146, 1151 (W.D. Wash. 2004) ("The [PSLRA] exclusion applies even if the RICO plaintiff could not have asserted the securities fraud claim himself."), *aff'd in part and rev'd in part on other grounds,* 476 F.3d 756 (9th Cir. 2007); Gatz v. Ponsoldt, 297 F. Supp. 2d 719, 731 (D. Del. 2003) ("[T]he PSLRA's exclusion of securities fraud as a RICO predicate act applies regardless of whether a particular plaintiff has standing to bring a civil action under § 10b and Rule 10b–5."); *In re* Enron Corp. Sec., Derivative & ERISA Litig., 284 F. Supp. 2d 511, 620 (S.D. Tex. 2003) ("The RICO Amendment bars claims based on conduct that could be actionable under the securities laws even when the plaintiff, himself, cannot bring a cause of action under the securities laws."); Fla. Evergreen Foliage v. E.I. DuPont De Nemours and Co., 165 F. Supp. 2d 1345, 1357–58 (S.D. Fla. 2001) (Gold, J.) (followed *Howard*; holding that the PSLRA bars RICO claims, if they are actionable by "a plaintiff with proper standing," even if the plaintiffs themselves have no remedy under the securities laws; without reliance on text); Burton v. Ken-Crest Services, Inc., 127 F. Supp. 2d 673, 677 (E.D. Pa. 2001) ("Plaintiff's argument that some of the predicate acts are not actionable as securities fraud, and therefore, constitute separate and independent predicate acts for RICO purposes has been rejected . . . ."); Hemispherx Biopharma, Inc. v. Asensio, No. CIV.A.98-5204, 1999 WL 144109, at *4 (E.D. Pa. Mar. 15, 1999) ("The Court finds nothing in the language of the Reform Act to suggest that an exception will be made to the bar against securities fraud actions under RICO if a particular plaintiff cannot bring an action under the Securities Exchange Act, when others could bring an action on the basis of the same alleged conduct of the defendant.").

Florida Evergreen Foliage is a particularly unsatisfactory precedent. As in *Howard,* it lacks any analysis of the text of the 1995 bar; it should have been its first task. United States v. Turkette, 452 U.S. 576, 580 (1981) (RICO: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'") (citations omitted). In addition, it holds that RICO mail fraud requires reliance, an argument that did not carry the day with the Court for sufficient reasons, not the least of which is because it had no textual support. *Bridges,* 553 U.S. at 639. It also holds that obstruction of justice is fundamentally criminal, a mistaken notion that ignores history. Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956) (obstruction of justice extends to civil proceedings); district court opinions also ably support its application outside of criminal proceedings. *See, e.g.,* United States v. Lundwall, 1 F. Supp. 2d 249, 251–53 (S.D.N.Y. 1989) (applicable to civil discovery in civil rights litigation; enlightening and scholarly history of obstruction of justice traced to Judiciary Act 1789 and its modification in 1831, because of judicial abuse in holding journalist in contempt for out of court statements). In sum, it is particularly unpersuasive. *Contra* Richmark Corp. v. Timber Falling Consultants, Inc., 730 F. Supp. 1525, 1532–33 (D. Or. 1990). *Richmark,* too, ignores (or is unaware of) the history behind obstruction of justice; for that reason, too, it is unpersuasive.

63. *See, e.g., Eagletech,* 2008 WL 3166553, at *10–*12 (rejecting plaintiff's attempts to classify the defendants' scheme as one of "theft," rather than "securities manipulation");

broadens the scope of the PSLRA exception, and transforms the limited exception into an unqualified exemption with no real roots in the precise statutory language of RICO. The courts gratuitously are creating "collateral damage," when the Congress carefully took aim at only a narrow "supposed" problem. In sum, the PSLRA is a rifle shot, not a shotgun blast. The Third Circuit chose more wisely in *Bald Eagle Area School District v. Keystone Financial, Inc.*[64] *Bald Eagle* rejected an approach to the PSLRA that focused solely on whether or not a defendant's activities were "intrinsically connected to, and dependent upon conduct actionable as securities fraud."[65] Such a test, thought the court, was *too broad.* In *Bald Eagle,* the court properly focused its inquiry on "actionable" under the securities laws, rather than on "intertwined" with activities that the securities laws could enjoin.[66]

A case out of the Southern District of New York, *OSRecovery, Inc. v. One Groupe International, Inc.*,[67] uniquely illustrates the proper approach. The plaintiffs sought recovery under § 1964(c) after losses suffered through participation in an "internet currency" program that actually functioned as a giant Ponzi scheme.[68] One of the defendants, a Latvian bank, assisted in the scheme by providing ATM cards and other services to the codefendants.[69] The bank moved to dismiss the RICO claims against them because the charges involved the purchase and sale of securities, pointing to the PSLRA as authority.[70] The court rejected this argument.[71] It classified the behavior of the bank as "no more than aiding and abetting" a Section 10(b) violation.[72] Since aiding and abetting was not actionable by a private party under Section 10(b) and Rule 10b-5, the court properly held that the conduct could serve as predicate acts under RICO.[73]

III. The Coexistence of RICO and the Securities Laws.

A. *Implicit Repeal.*

The securities laws do not bring about an implicit repeal of RICO.[74] Implied repeal describes a situation where one federal law

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accord Burton, 127 F. Supp. 2d at 676–77 (barring plaintiffs from picking out discrete parts of a complaint sounding in "theft" if, as a whole, the behavior is most accurately described as securities manipulation).

64. 189 F.3d 321 (3d Cir. 1999).
65. *Id.* at 330 (internal quotation marks omitted).
66. *Id.*
67. 354 F. Supp. 2d 357 (S.D.N.Y. 2005).
68. *Id.* at 360.
69. *Id.* at 362.
70. *Id.* at 368.
71. *Id.* at 369–70.
72. *Id.* at 370.
73. *Id.*
74. Some lawyers in court use the term "preemption" to describe these questions; this usage is improper when two *federal* statutes are allegedly in conflict. Proctor v. United Parcel Serv., 502 F.3d 1200, 1205 n.2 (10th Cir. 2007) ("[O]ne federal statute cannot preempt another . . . ."); Baker v. IBP, Inc., 357 F.3d 685, 688 (7th Cir. 2004) (explaining that federal statutes do not "preempt" other federal statutes, though one may repeal

nullifies a pre-existing federal law. As a principle of statutory interpretation, it is a narrow exception to the well-established rule that "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both if possible."[75] While the Court has never addressed the issue of when, if ever, the securities laws preclude an application of RICO, it did closely analyze implicit repeal between securities and antitrust law in *Credit Suisse Securities (USA) LLC v. Billing.*[76]

The Court asked when it adjudicated an alleged conflict between antitrust and securities whether "there is a 'clear repugnancy' between the securities law and the antitrust complaint," or "whether the two are 'clearly incompatible.'"[77] The lower courts recognized an implicit repeal *only* in "two narrowly-defined situations."[78] The first was "when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged."[79] The second was "[w]hen the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm"[80] that animated the existing statute. The similarities between antitrust and RICO suggest that this methodology for analyzing implicit repeal question is correct to use when determining whether securities regulations preclude the application of RICO.

another implicitly if they are "irreconcilable," in holding that RICO claims based on the hiring of illegal aliens were not precluded by the National Labor Relations Act (NLRA), because RICO was enacted after the NLRA).

75. United States v. Borden Co., 308 U.S. 188, 198 (1939). Another gloss for this standard is the requirement of a "clear repugnancy" between the two statutes. As such, mere overlap among or between federal statutes is insufficient. Proponents of implied repeal must show that Congress intended one statute to be exclusive over a given area of law, blocking out the other statute. A statute "may be merely affirmative, or cumulative, or auxiliary" and survive this scrutiny.

76. 551 U.S. 264 (2007). Analysis of antitrust questions is typically relevant in discussions of RICO, because of the similar structural heritage of the two statutes.

77. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275 (2007); Atchison, Topeka and Santa Fe Ry. v. Buell, 480 U.S. 557, 564 (1987) ("The fact that an injury otherwise compensable under the [Federal Employers' Liability Act] was caused by conduct that may have been subject to arbitration under the [Railway Labor Act] does not deprive an employee of his opportunity to bring an FELA action for damages."); Morton v. Mancari, 417 U.S. 535, 549–51 (1974) (rejecting argument that Congressional silence can effectuate an implicit repeal).

78. Ne. Tel. Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981).

79. *Id.*; *see also* Gordon v. N.Y. Stock Exchange, Inc., 422 U.S. 659, 685–86, 688–89 (1975) (holding that antitrust law interference in the setting of commission rates would "unduly interfere . . . with the operation of the Securities Exchange Act.").

80. *Ne. Tel.*, 651 F.2d at 82; *see also* United States v. Nat. Ass'n of Secs. Dealers, Inc., 422 U.S. 694, 730 (1975) ("[T]he SEC's exercise of regulatory authority under this statute and the Maloney Act is sufficiently pervasive to confer an implied immunity [to the Sherman Act]."); Otter Tail Power Co. v. United States, 410 U.S. 366, 373–74 (1973) (denying claim that the Federal Power Commission had the authority to immunize a power supplier from antitrust scrutiny out of a "hesitan[cy] to conclude that Congress intended to override the fundamental national policies embodied in the antitrust policies"); Finnegan v. Campeau Corp., 915 F.2d 824, 832 (2d Cir. 1990) (holding that, with respect to disclosures of price information in the context of a tender offer, the Sherman Act was impliedly repealed by the Williams Act).

1. Relative Timing.

The principal reason for rejecting the argument that the securities laws impliedly repeal RICO is the timing of the two statutes. Congress enacted the primary securities statutes in 1933 and 1934. RICO became law in 1970, and did not include a securities exception until 1995. Analytically, implied repeal, as its name suggest, cannot work backwards, because it denies the right of Congress to change its mind on policy questions; it cannot "revers[e] the arrow of time" in the law.[81] Only if a court rejects timing should it move to the other considerations.

2. Clear Incompatibility.

No court ought to find a clear incompatibility between RICO and the securities statutes. In fact, the securities laws and RICO are compatible, because the securities laws themselves include provisions *preserving* other legal remedies through its inclusion of "savings clauses."[82] RICO, too, contains a similar savings clause to prevent its encroachment on other statutes.[83] Indeed, this clause in RICO was necessary, because, if unadorned, its list of predicate offenses could interfere with the enforcement of other state and federal laws, including the securities laws.[84] Had RICO not contained its saving clause, the question of whether RICO implicitly repealed portions of the securities law would not have been beyond the pale.

Cases examining the interaction between RICO and areas of law governed by administrative agencies in the main uphold the viability of RICO actions. For example, in *United States v. Philip Morris Inc.*,[85] the District Court for the District of Columbia rejected the argument that the FTC's regulatory jurisdiction over matters of commerce precluded a civil RICO claim for relief by the government.[86] The court acknowledged that RICO "overlap[ped]" with a number of statutes, and that the defendant's argument would effectively "nullify" a wide swath of RICO's coverage if taken to its logical conclusion. The settled law of implicit repeal requires rejection of this result; "mere overlap" is not a sufficient reason for invoking it.[87] Similarly, in *United States v. Palumbo*

81. United Rental Highway Techs., Inc. v. Ind, Contractors, Inc., 518 F.3d 526, 533 (7th Cir. 2008) (Posner, J.) (rejecting argument that the Sherman Act, passed in 1890, implicitly repealed an amendment to the labor laws passed in 1959).

82. *See* 15 U.S.C. § 77p(a) (2012) ("[T]he rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."); *accord* 15 U.S.C. § 78bb(a) (2012); Herman & MacLean v. Huddleston, 459 U.S. 375, 383 (1983) (explaining that these savings clauses "confirm that the remedies in each Act were to be supplemented by 'any and all' additional remedies").

83. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947 ("Nothing in . . . [RICO] shall supersede any provision of Federal, State or other law involving criminal penalties or affording civil remedies in addition to those provided in this title.").

84. 18 U.S.C. § 1961(1)(D) (2012) (listing "fraud in the sale of securities" as a predicate offense).

85. 263 F. Supp. 2d 72 (D.D.C. 2003).

86. *Id.* at 77.

87. *Id.* at 76. *See also id.* at 78:

Bros.,[88] the defendants argued that the NLRB's jurisdiction to address allegedly unfair labor practices precluded the government's attempt to bring criminal RICO charges against them.[89] The Seventh Circuit rejected this argument,[90] recognizing that "each Federal statute has equal effect under the law" and that "[c]ongressional intent behind one Federal statute should not be thwarted by the application of another Federal statute if it is possible to give effect to both laws."[91] A number of cases upholding and rejecting implicit repeal type arguments under RICO hold that implicit repeal is only possible if prosecution of the predicate acts cannot take place without regard to the alternative statutory framework with which RICO is in supposed conflict.[92]

> [T]he specificity of the FTC Act or the FCLAA is not by itself a reason to thwart the application of RICO, [because] the Defendants have not demonstrated any conflict between the Government's exercise of its authority under RICO and the FTC's authority under the FTCA or the FCLAA. Therefore . . . Defendant's Motion must be denied in order to give effect to all three of these overlapping, but not conflicting, statutes.

88. 145 F.3d 850 (7th Cir. 1998).

89. *Id.* at 858.

90. *Id.* at 862–63.

91. *Id.* at 862.

92. *See* Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 611 (6th Cir. 2004) (refusing to dismiss RICO claims due to primary jurisdiction of NLRB over labor law, because RICO claim did not hinge upon violations of NLRA); *Baker*, 357 F.3d at 689 ("When the predicate offenses of a particular claim under RICO are Federal crimes other than transgressions of the labor laws, no dispute falls within the Labor Board's primary jurisdiction, even if labor relations turn out to be implicated in some other fashion."); Tamburello v. Comm-Tract Corp., 67 F.3d 973, 979 (1st Cir. 1995) ("Because plaintiff's claim hinges upon a determination of whether an unfair labor practice has occurred, we conclude that his RICO claims are subject to the primary jurisdiction of the NLRB."); Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 662 (7th Cir. 1992) (holding, in dismissal of RICO claims, that RICO claims are only dismissed when "the underlying conduct of the plaintiffs' RICO claim is wrongful *only by virtue of the labor laws*"); Zalesiak v. UnumProvident Corp., Case No. 06 C 4433, 2007 WL 1280646 at *4 (N.D. Ill. 2007) (relying on *Talbot* not to dismiss RICO claims, because conduct in the case was not made unlawful solely by the Employee Retirement Income Security Act of 1974 (ERISA)); All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc., 282 F. Supp. 2d 1161, 1173 (C.D. Cal. 2003) (preserving RICO claims from preclusion by Americans with Disabilities Act (ADA) because the RICO claims did not arise from conduct constituting ADA violations).

Danielsen v. Burnside-Ott Aviation Training Center, 941 F.2d 1220 (D.C. Cir. 1991) (Sentelle, J.), inappropriately held to the contrary. The district court held that the Service Contract Act of 1965, 41 U.S.C. § 351 (SCA), *revised and codified by,* Pub. L. No. 111-350, § 3, 124 Stat. 3812 (2011) (codified as 41 U.S.C. §§ 6702–6704), "preempted" RICO, and that one federal statute may not "preempt" another federal statute. The *Danielsen* court reframed the issue as whether the remedy of the SCA was "exclusive." *Danielson*, 941 F.2d at 1217. It then conflated the question whether, in addition to its administrative remedy, the SCA included an *implied* private claim for relief (it did not), with the question whether RICO's *express* claim for relief, which encompassed conduct that fell within each statute, afforded the victim cumulative remedies. The D.C. Circuit held that because the administrative remedy was exclusive under the SCA, the civil claim for relief under RICO was not available to the plaintiff.

This reasoning lacks justification. First, it ignores the *express* language Title XI of Pub.L. 91-452 (1970) (which included RICO), providing that its criminal penalties and civil remedies were "in addition" to the criminal penalties or civil remedies in "any provision" of other law, federal or state. *Id.*, § 904(b) (1970). Second, holding that the SCA

3. Billing Test.

As to conflicts with the securities laws specifically, the *Billing* Court set out three critical factors to determine whether a "clear repugnancy" exists between securities laws and another federal legal regime:

> (1) The existence of regulatory authority under securities law to supervise the activities in question;
> (2) Evidence that the responsible regulatory entities exercise that authority; and
> (3) A resulting risk that the [two] laws if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.[93]

In addition, the Court's test takes into account whether "the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."[94]

The Court in *Billing* held that application of both the antitrust and securities laws to underwriting practices at the initial public offering of a security was "clearly incompatible" under its test.[95] The primary concern with allowing dual enforcement was the complexity of the legal standards in securities law.[96] Four observations about securities law tilted the balance heavily in favor of implicit repeal: "the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results."[97] The Court concluded, "[T]here is no practical way to confine antitrust suits so that they challenge only activ-

bars actions under RICO would require concluding that the SCA, enacted in 1965, "impliedly" repealed RICO, enacted in 1970. Calling it a question of "exclusivity" is a distinction without a difference. Apart from the theoretical difficulty of an older statute "impliedly" repealing a later statute, the Court square teaches that it is "a cardinal principle of statutory construction that repeals by implication are not favored." Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976). "So long as there is no 'positive repugnancy' between two laws, a court must give effect to both." Connecticut National Bank. v. Germain, 503 U.S. 249, 253 (1992); *see also* United States v. General Dynamics Corp., 19 F.3d 770, 774 (2d Cir. 1994) (Anti-Kickback Act does not preempt the FCA because implied preemption is strongly disfavored). The *Danielsen* opinion does not discuss the application of these principles of these decisions. Manifestly, overlapping remedies are not "repugnant" to each other. Congress frequently enacts overlapping statutes without replacing the earlier statute. *See, e.g.,* United States v. Batchelder, 442 U.S. 114, 118–21 (1979); United States v. Bishop, 412 U.S. 346, 350–61 (1973); United States v. Beacon Brass Co., 344 U.S. 43, 45–47 (1952); United States v. Gilliland, 312 U.S. 86, 95–96 (1941). Overlap between statutes "is neither unusual nor unfortunate." SEC v. National Secur., Inc., 393 U.S. 453, 468 (1969). The existence of cumulative remedies furthers remedial purposes. Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983).

93. Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275–76 (2007).

94. *Id.* at 276.

95. *Id.* at 279.

96. *Id.* ("[O]nly a fine, complex, detailed line separates activity that the SEC permits or encourages (for which Defendants must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on Defendants' theory, should be open to antitrust attack).").

97. *Id.* at 282.

ity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law."[98]

While this logic may apply to RICO in a particular case, no court ought to apply that conclusion indiscriminately. RICO requires a purposeful, organized effort to engage in conduct in violation of the relevant legal standards in play. If applied to an area at the regulatory edge of securities law, then a risk might exist that "the securities and [RICO] laws, if both applicable would produce conflicting guidance, requirements, duties, privileges, or standards of conduct." Nevertheless, not all areas of law involving securities have the same type of subjective, line-drawing problems[99] that the Court addressed in *Billing*. Ample room exists for both statutes to operate in related areas without RICO interfering in questions the SEC and the securities statutes should exclusively address.

B. *Preemption of State RICO by Federal Securities Law.*

State RICO statutes[100] are not subject to preemption by federal securities statutes because of conflict preemption. "Conflict preemption" applies either when "'compliance with both federal and state regulations is a physical impossibility'"[101] or when "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[102] In general, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so

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98. *Id.*

99. *See In re* Short Sale Antitrust Lit., 527 F. Supp. 2d 253, 260 (S.D.N.Y. 2007) (describing the rules requiring delivery of short-sold shares as involving "serious legal line-drawing problems," and rejecting application of antitrust law under *Billing* where it would create a *de facto* share-delivery requirement the SEC rejected).

100. *See supra* note 10 for a list of the state RICO statutes.

101. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Fl. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963)).

102. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). Federal regulations, including SEC regulations, have the same preemptive effect as federal statutes. Fla. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

ordained.' "[103] This rule places congressional intent to preempt state law at the center of the judicial inquiry.[104]

The compatibility of federal securities regulation with various state "blue sky" laws designed to target corruption is beyond serious dispute.[105] Thus, "state remedies are by federal statute coexistent with" the remedies provided by federal securities laws.[106] On occasion, when Congress believed that state regulation unduly interfered with securities law, it explicitly preempted state law in that area.[107] Even when Congress gave the SEC greater regulatory power over the states, as it did in the Securities Acts Amendments of 1975,[108] Congress did not find that the necessary the level of control conferred was sufficiently high to preclude established state claims for relief.[109] Given that some explicit

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103. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)); *see also* Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992) (instructing that any preemption analysis should start with the presumption that the powers of the states are not superseded by federal law; proponents of preemption must make a clear and manifest showing of a purpose by Congress to find preemption); Cliff v. Payco Gen. Am. Credits, Inc., 363 F.3d 1113, 1122 (11th Cir. 2004) ("When we consider issues that arise under the Supremacy Clause . . . we start with the assumption that the historic police powers of the states are not superseded by Federal law unless preemption is the clear and manifest purpose of Congress.").

This reasoning also applies when state law imposes a duty that the federal law has affirmatively chosen not to require. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 378 n.13 (2000) (ruling that Massachusetts law penalizing companies that buy products or services from companies with business relationships to Burma, which were not prohibited by federal law covering Burmese trade, were preempted, in part, because "Congress repeatedly considered and rejected targeting a broader range of conduct."); Franklin Nat'l Bank v. New York, 347 U.S. 373, 378 (1954) (finding "clear conflict" between federal law that authorized, but did not require, national banks to receive savings deposits and New York law that forbade use of the word "savings" in their advertising).

104. *See* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) ("[T]he question of whether a certain state [law question] is pre-empted by Federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.' " (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978))); *see also* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[A]ny understanding of the scope of a pre-emption statute must rest primarily on a 'fair understanding of *congressional purpose*' " (quoting Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 530 n.27 (1992) (opinion of Stevens, J.)).

105. Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 383 (1996) ("Congress plainly contemplated the possibility of dual litigation in state and Federal courts relating to securities transactions."); A.S. Goldman & Co. v. N.J. Bureau of Sec., 163 F.3d 780, 781 (3rd Cir. 1999) ("Congress, the courts, and the SEC have made explicit that Federal regulation was not designed to displace state blue sky laws that regulate interstate securities transactions."); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1107 (4th Cir. 1989) ("It is well-settled that federal law does not enjoy complete preemptive force in the field of securities.").

106. Gold v. Blinder Robinson & Co., 580 F. Supp. 50, 53 (S.D.N.Y. 1984).

107. *See* 15 U.S.C. § 77r(a) (2012) (preempting state securities registration requirements before sale); HAROLD S. BLOOMENTHAL, SECURITIES LAW HANDBOOK § 24:6 (2005) (noting the express preemption by Congress of state law through the National Securities Markets Improvements Act of 1996 (NSMIA) that amended Section 77r); *see also* 15 U.S.C. §§ 77p(b), 78bb(f)(1) (2012) (preempting and prohibiting certain state law causes of action in the class action context).

108. PSLRA (codified as amended in scattered Sections of 15 U.S.C.).

109. Raul v. Am. Stock Exch., Inc., 1996 WL 381781, at *7 (S.D.N.Y. 1996) ("Although the 1975 Amendments expand the SEC's oversight of the SROs, this authority

statutory pre-emptions in the field of securities law exist, Congress' silence in other areas is a telling indication that the courts should not read pre-emption into the statute.[110] The proper rule to apply in these cases should be that securities regulations only preclude state RICO when compliance with both the federal regulations and prosecution of state law claims is impossible.[111] Nevertheless, some courts have applied preemption principles to curtail use of state laws to affect substantially the operation of a federally regulated market.[112]

CONCLUSION

The rationale for the PSLRA was curtailing "unnecessary" RICO litigation that courts could adequately handle under the securities statutes. Currently, the results in litigation under the PSLRA are not what Congress intended. The courts use it to eliminate RICO litigation, not only by eliminating it when it *overlaps* the securities statutes, as Congress intended, but also to create a *gap* where neither securities nor RICO apply. Thus, deserving victims of fraud fall into a judicially created gap between the two remedial schemes. In brief, the courts, not Congress, are improperly denying victims of crime congressionally authorized access to a federal court. Accordingly, the White-Collar offender wins not only the "ice cream" he obtained from Congress, but also an extra "cherry" on the top.

Pretermitting these legal arguments, the events of 2007 and 2008 manifestly demonstrate that, as a nation, we need *more*, not *less* deter-

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does not indicate Congressional intent to preclude previously established state causes of action. This is especially true in light of § 28(a)'s express recognition of state law remedies."). Indeed, Congress included a "saving" clause in this statute for enforcement of state law regulation. 15 U.S.C. §§ 78q-1(b), (d)(4) (2012).

110. Pub. Intervener v. Mortimer, 501 U.S. 597, 611–12 (1991) (noting that where Congress has expressly preempted one aspect of state regulation, preemption for other, related areas is not inferred).

111. *See* California v. ARC Am. Corp., 490 U.S. 93, 100 (1989) ("[E]ven if Congress has not occupied the field, state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and Federal law is impossible."); Avenius v. Bank of Am. Secs. LLC, 2006 WL 4008711, *5–*6 (N.D. Cal. 2006) (granting plaintiff's motion to remand state law claims involving violations of federal securities regulations because defendants never intended to engage in behavior that raised a substantially disputed question of federal law).

112. *See* Levitin v. PaineWebber, Inc., 159 F.3d 698, 706–07 (2d Cir. 1998) ("[E]ven if [plaintiff's] interpretation of [New York U.C.C. law] w[as] not in direct conflict with federal rules, [state law] would nevertheless impermissibly intrude on federal regulation of broker-dealers and of margin and short sales" by "underm[ining] congressional objectives in creating an effective, uniform federal system of short sale and margin regulation"); Am. Agric. Movement v. Bd. of Trade, 977 F.2d 1147, 1156–57 (7th Cir. 1992) (determining, in spite of a savings clause allowing application of state law, that state law claims conflicted with the Commodity Exchange Act and unduly interfered with the operation of federally regulated commodities markets); Nanopierce Techs., Inc. v. Depository Trust & Clearing Corp., 168 P.3d 73, 85–86 (Nev. 2007) (dismissing all of plaintiff's state law claims asserting that defendants depressed the price of plaintiffs' stock through a "failure to deliver" after a short sale because of preemption by federal law).

rent of fraud, and the vindication of the rights of fraud victims by an appropriate measure of damages.[113]

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113. The facts of the Great Recession beginning in 2007 and 2008 and its lingering aftermath are sobering to examine. *The Financial Crisis Inquire Report*: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSE OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011) ("Final Report") begin its *Report* by observing, "More than two years after the worst of the financial crisis, our economy, as well as communities and families across the country, continue to experience the aftershocks. Millions of Americans have lost their job and their homes, and the economy is still struggling to rebound." *Final Report* at xi. Little has changed. *See, e.g.,* Floyd Norris, *In Economic Deluge, a World That Can't Bail Together,* N.Y. TIMES June 2, 2012, at A1. The Commission continued,

> The profound events of 2007 and 2008 were neither bumps in the road nor an accentuated dip in the financial and business cycles we have come to expect in free market economic system. This was a fundamental disruption—a financial upheaval, if you will—that wreaked havoc in communities and neighborhoods across this country. . . . [T]here are more than 26 million Americans who are out of work, cannot find full-time work, or have given up looking for work. About four million families have lost their home to foreclosure and another four and half million have slipped into the foreclosure process or are seriously behind on their mortgage payments. Nearly $11 trillion in household wealth has vanished, with retirement accounts and life savings swept away. Businesses, large and small, have felt the sting of a deep recession. . . . Many people who abided by all the rules now find themselves out of work and uncertain about their future prospects. The collateral damage of this crisis has been real people and real communities. The impacts of this crisis are likely to be felt for a generation. . . . While the vulnerabilities that created the potential for crisis were years in the making, it was the collapse of the housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string of events, which led to a full-blown crisis in the fall of 2008.

Id. at xv-xvi.

The Commission reached nine, black-letter, sobering conclusions, reflecting the major chapters of the *Final Report* that anyone thinking about the issues needs to study in detail:

> [(1) The] financial crisis was avoidable.
>
> [(2) W]ide spread failures in the financial regulation and supervision proved devastating to the stability of the nation's financial markets.
>
> [(3) D]ramatic failures of corporate governance and risk management in many systematically important financial institution were a key cause of this crisis.
>
> [(4) A] combination of excessive borrowing, risky investments, and lack of transparency put the financial system on a collision course with crisis.
>
> [(5) T]he government was ill prepared for the crisis, and its inconsistent responses added to the uncertainty and panic in the financial markets.
>
> [(6) T]here was a systemic breakdown in accountability and ethics.
>
> [(7) C]ollapsing mortgage-lending standard and the mortgage securitization pipeline lit and spread the flame of contagion and crisis.
>
> [(8) O]ver-the-counter derivatives contributed significantly to this crisis.
>
> [(9) T]he failures of credit rating agencies were essential cogs in the wheel of financial destruction.

Id. at xvii-xxv.

The United States Senate Permanent Subcommittee on Investigations also conducted an in-depth and similar, albeit a more limited study. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS Wall Street and the Financial Crises: Anatomy of a Financial Collapse, (Majority and Minority Staff Report, April 13, 2011) ("Senate Report"). The conclusion of the *Senate Report,* a detailed 600-page analysis, paralleled those of Commission's broader study. In brief, it concludes:

> In the fall of 2008, America suffered a devastating economic collapse. Once valuable securities lost most or all of their value, debt market froze, stock markets plunged, and storied financial firms went under. Millions of Americans lost their jobs; millions of families lost their homes; and good businesses shut down. These even cast the United States into an economic recession so deep that the country had yet to fully recover. . . .
>
> [T]he crisis was not a natural disaster, but the result of high risk, complex financial products; undisclosed conflicts of interest; and the failure of regulators; the credit rating agencies; and the market itself to rein in the excesses of Wall Street.

Id. at 1.

The investigations proceeded by closely examining four cases studies:
(1) The failure of Washington Mutual Bank (WMB), the largest in United States history,
(2) The inadequate performance of the Office of Thrift Supervision, which oversaw WMB,
(3) The equally inadequate performance of two credit agencies, Moody's and Standard & Poor's, the two largest credit agencies, and
(4) Goldman Sachs and Deutsch Bank, two leaders in the design, marketing, and sale of mortgage related securities whose greedy conduct, particularly shorting of securities they sold to their unwitting customers was reprehensible.

The investigation also had detailed recommendations on high-risk lending, regulatory failures, inflated credit ratings, and investment bank abuses.

Private, book length studies are also proliferating. The best is New York Times reporter ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM FROM CRISIS—AND THEMSELVES (2009). It took more than 500 hours of interviews to put fully human flesh, bone, names, and faces on the crisis by setting out its day-to-day course, as experienced by its major participants on Wall Street in New York City and Washington, D.C. HBO turned the book into a movie, "Too Big To Fail," which had a star-studded cast with William Hurt in the lead as Henry Paulsen, the Security of Treasury, and the man in the center of a perfect storm. (His memoir, ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM (2010), is also a necessary read). Sorkin, too, concluded that the crisis ("perhaps") could have been avoided, but that the government action required to accomplish that objective would have had to go back well before Paulsen became Secretary of Treasure. For Sorkin, the "seeds of the disaster had been planted years earlier with such measure as: the deregulation of the banks in the late 1990s; the push to increase home ownership, which encouraged lax mortgage standards; historically low interest rate, which created a liquidity bubble; the system of Wall Street compensation the rewarded short-term risking." *Id.* at 534. At the same time, the firms at the center of the storm recovered much more swiftly from the crisis than did the American economy in general. *See, e.g.*, TOO BIG TO FAIL, at 537 (reporting that Goldman Sachs quickly went "back to business as usual" by recording a profit of $5.2 billion just months after receiving TARP funds). Sorkin adds that,

> even today, "Wall Street, bent but not broken, rumbles on in search of new profits. Risk is being reintroduced into the system. Vulture investing is back in vogue. . . . [M]ost disturbing of, ego is still very much a central part of the Wall Street machine. . . . [W]hether an institution—or the entire system—is to big too fail has as much to do with the people that run these firms and those the regulate them as it does with any policy or written rules.

Id. at 539. Things change, but nothing is different.

Sorkin's piece is aptly book-ended by BETHANY MCLEAN AND JOE NOCERA, ALL THE DEVILS ARE HERE (2010) ("Devils"), which covers much of the same ground, but adds more perspective and commentary. They, too, could report that on July 21, 2010, President Barack Obama signed "The Dodd-Frank Wall Street Reform and Consumer Protection Act" (Public Law No. 111-203, 124 Stat. 1376)), which, they conclude, "marked, unquestionable, the biggest change in the regulation of the financial industry since the aftermath of the Great Depression." *Id.* at 358. (A full summary of its provisions and still in process regulations is beyond the scope of these materials). Nevertheless, despite multi-billion dollar losses and no end in sight, they rightly pointed out that the legislation did nothing about Fannie Mae and Freddie Mac, the quasi-governmental guarantors to the mortgage industry. *Id.* at 363 (covering more than 95% of all mortgages). Apparently, nobody knows what to do. *Id.* at 364. Moreover, they rightly noted that despite the Wall Street shenanigans, not much in terms of sanctions, civil or criminal, was in store for the malefactors. *Id.* at 362. Sadly, they are indubitably correct. *See* Louise Story & Gretchen Morgenson, *S.E.C. Case Stands Out Because It Stands Alone,* N.Y. TIMES, June 2, 2011, at A1 (reporting the sole civil proceedings for fraud brought again a mortgage trader at Goldman Sachs for mortgage-securities among hundreds of deals created during the bubble years). Finally, they looked at the net effects of an ocean of subprime lending: 1.4 million first-time buyers purchased their homes using subprime loans, roughly nine percent of overall subprime lending; the rest were refinancing or second home purchases. Moreover, by most estimates, more than 2.4 million borrowers who obtained subprime loans will lose their home to foreclosure. In fact, by the second quarter of 2010, the overall home ownership rate had fallen to 66.9 percent, precisely where it was before the housing bubble began to inflate. Thus, the violent wind of subprime lending was a net drain on home ownership. MCLEAN & NOCERA, *supra* note 112, at 362. In addition, they appropriately quote Paul Volker, a former Chairman of the Federal Reserve, on the value to society of the financial markets "innovations" of the past several decades: "I have found very little evidence that vast amounts of innovation in the financial markets in recent years have had a visible effect of the productivity of the economy." *Id.* at 363. Volker did not mention, but could have, the palpable effect on the compensation structure on Wall Street. *See Final Report* at xvii ("On the eve of the crises in 2006, financial sector profits constituted 27% of all corporate profits in the United States, up from 15% in 1980.") Additionally, in crediting their sources, McLean and Nocera helpfully give a useful listing of the numerous critical books and crucial memoirs recently written on the crisis. *Id.* at 365–66. *See also* the academy award-winning documentary by Charles Ferguson, INSIDE JOB (Sony Pictures 2010), *available at* http://www.sonyclassics.com/insidejob/.

Taking up the leitmotif of lack of personal accountability, but with more focus, GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS ENDANGERMENT (2011) studies particular persons (*e.g.*, Fannie Mae CEO James A. Johnson (nine years in office compensation roughly $100 million dollars)); Robert Rubin, former Secretary of the Treasury, who when in office advocated the repeal of Glass-Steagall Act, a Depression-era reform that separated investment from commercial banking to protect government guaranteed funds, later became Citigroup's Vice Chairman (pocketing $100 million over the following decade, etc.) who got richer though the boom years, and for whom no reckoning is in sight. They then express dismay that few, if any, have had to pay the criminal piper. Reviewing their book in the *Times* (5-27-11) Robert Reich, however, rightly comments, "True up to a point—but [they] don't show that any actual crimes were committed." Robert Reich, *Washington and Wall Street—The Revolving Door,* N.Y. TIMES, May 27, 2011 at BR9. Moreover, he adds, "Their major characters surely exhibited outsize ambition and greed, but these qualities are not exactly rare in modern capitalism." *Id.* On the other hand, Reich forgets that these exposés are the work of private individuals without any of the evidence-gathering tools available to the government. Reich, too, is distressingly mistaken in saying that blaming everyone involved is "tantamount to blaming no one."

In light of this Article's concern with White-Collar Crime, identifying the social-economic status of those who profited from our recent financial fling is also enlightening. In fact, it made our elites vastly richer, and the let the other part of our society pay the piper. *See generally The Few: A Special Report on Global Leaders,* ECONOMIST, Jan. 22, 2011 (reporting that the richest 1% of adults control 43% of the world's assets; the wealthiest 12% have 83%; the bottom 50% have only 2%; while the financial crisis caused the wealth of the wealthiest to tumble by 20%, by the end of last year, it had risen 19% that is, their wealth has bounced back, as had not been the case with the general run of society). Identifying the status of the elites in our society necessarily bring us to the literature on the relatively recent substantial growth of income and wealth inequality in the developed world, including the United States, considering its scope, causes, and adverse effects, is vast. *See, e.g.,* Organization for Economic Cooperation and Development, DIVIDED WE STAND; WHY INEQUALITY KEEPS RISING (2011) (reviewing the data from 34 democratic countries in the developed world that have free markets); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012) (An outgrowth of an incisive article in May 2010 of *Vanity Fair,* Stiglitz's book, is powerful in points, but it is wordy, and often redundant, but its extensive footnotes are worth the price of the book.); JACOB S. HACKER & PAUL PIERSON: WINNER-TAKE–ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER-AND TURNED ITS BACK OF THE MIDDLE CLASS (2010). Stiglitz and others rightly emphasize structural issues, touching mainly on the economy. Nevertheless, other ways, not necessarily ours, exist to focus on "the causes of poverty." As some would do, and we do not, you can also "blame the victims." In brief, individual initiative is a major factor in poverty and its intergenerational passage. If students did not drop out of high school after graduation, got and kept jobs, and got and stayed married, avoiding out of wedlock children, they (and their children) would have a 72% change of joining the middle class, making above $55,000 a year. *See Combating Poverty: Understanding New Challenges for Families, Hearing before Senate Committee on Finance,* June 5, 2012 (statement of Ron Haskins) *available at* http://www.brookings.3132research/testimony/2012/-6/05-poverty-families. Thus, social policies designed to encourage these behaviors, and discourage their reverse, would also offer a promise in reducing inequality.

Alexis De Tocqueville in his classic THE OLD REGIME AND THE FRENCH REVOLUTION 207 (Anchor ed. 1955) made a simple, but profound observation: the French peasant class before the outbreak of the revolution was "inured to hardship . . . indifferent to the amenities of life, intrepid in the face of danger, and faced misfortunate stoically." *Id.* At the same time, it had a "deeply rooted and long-standing . . . intense, indomitable hatred of inequality." *Id.* Once aroused, it "shatter[ed the] ancient system under which men were divided in classes . . . , and their rights were even more unequal than their social situations . . . ." *Id.* at 209. Politically, how long can we expect 50% with 2% to permit 12% to have 83% or 1% to have 43% and keep it in untroubled tranquility without accountability, when it inflicts extended distress on the 50% without apparent or real equal justice under the law? Maybe not tomorrow, or the next day, but some day, and soon, we run the real risk that demagogues will take power, and, without regard to law, they will sweep through our society indiscriminately, like a twister, destroying the United States, as we know it. In brief, if we do not reform today in cold reason will not change come tomorrow in hot passion?

Other recent publications on the financial crisis include JEFFREY G. MADRICK, AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT (1st ed. 2011); MICHAEL HIRSH, CAPITAL OFFENSE: HOW THE WASHINGTON'S WISE MEN TURNED AMERICA FUTURE OVER TO WALL STREET (2010); ROGER LOWENSTEIN, THE END OF WALL STREET (2010); CHARLES GASPARINO, THE SELLOUT: HOW THREE DECADES OF WALL STREET GREED AND GOVERNMENT MISMANAGEMENT DESTROYED THE GLOBAL FINANCIAL SYSTEM (2009); LAWRENCE G. MCDONALD PATRICK ROBINSON, A COLOSSAL FAILURE OF COMMON SENSE: THE INSIDE STORY OF THE COLLAPSE OF LEHMAN BROTHERS (2009); MICHAEL M. LEWIS PANIC: THE STORY OF MODERN FINANCIAL INSANITY (2009); WILLIAM M. ISAAC AND PHILIP C MEYER: SENSELESS PANIC HOW WASHINGTON FAILED AMERICA AND WILL AGAIN (2010); PAUL MASON, MELTDOWN: THE END OF THE AGE OF GREED (2009); JAMES R BARTH, THE RISE AND FALL OF THE U.S. MORTGAGE AND CREDIT MARKETS: A COMPREHENSIVE ANALYSIS OF THE MARKET MELTDOWN (2009). THE SQUAM LAKE REPORT: FIXING THE FINANCIAL SYSTEM (2010) is in a category by itself; it is the joint report of fifteen economists from varying economic opinions who gather together at New Hampshire's Squam Lake to map out a long-term plan for financial regulation reform. It merits careful study by students of the markets and their relation to government.

One final aspect of the financial crisis requires more extended comment. Insightfully, the *Senate Report, supra,* at 1, notes the failure of "the market itself to rein in the excesses of Wall Street." This basic finding needs the context. JUSTIN FOX, THE MYTH OF THE RATIONAL MARKET (2009) [hereinafter *Myth*] ably chronicles the rise and fall of the "myth" that the market is somehow "rational." In brief, the theory holds that millions of investors, acting on public information, trying to outsmart each other, provide the "best" judge of a securities "value;" that is, the market is always "right;" it is efficient in allocating resources to their best use; it corrects itself; and it does not need public regulation or intervention. *See id.* xii ("Financial markets . . . moved capital from those who had it o those who need it. They spread risk. They gathered and dispersed information they regulated global economic affair with a swiftness and decisiveness that governments couldn't match."). The most prominent former devotee of the theory was the then Chairman of the Federal Reserve, Alan Greenspan. His memoir, THE AGE OF TURBULENCE, published in 2007, ironically on the precipice of the crisis, is a paean to the theory, a celebratory run—then apparently successful—around the stadium at the end of his eighteen and one half years as the head of the Federal Reserve. Ayn Rand's unqualified, laissez-faire theory of capitalism captivated Greenspan as a young economist. *Devils* at 84–85. A telling road not taken best shows the pernicious influence of his captivation on the rest of us. *Final Report* at 45–51. Derivatives are financial contracts whose prices are determined by, or "derived from," an underlying asset, rate, index or other event. *Id.* They are not investment vehicles, but methods of hedging risk. *Id.* at 46. Derivatives trade in over-the-counter markets (OTC), which grew sharply after 1980. *Id.* Major losses, however, immediately occurred. Procter & Gamble, for example, sued Bankers Trust under civil RICO for $200 million. *See* Saul Hansell, *P. & G. Bolsters Its Suit Against Bankers Trust,* N.Y. TIMES, Oct. 4, 1995. The suit settled. In May 1998, Chairperson Brooksley Born of the Commodities Futures Trading Commission announced that the Commission would reexamine how it regulated the market. The Commission requested comments. It got them—all negative—from Treasury Secretary Robert Rubin, Deputy Treasury Secretary Lawrence Summers, Chairman Greenspan, and SEC Chairman Levitt: "[R]egulation of derivative transaction that are privately negotiated by professionals is unnecessary." *Final Report* at 47. After Born's inevitable resignation, Greenspan's view not only prevailed in the area of the bureaucracy; it also became law in the Commodity Futures Modernization Act of 2000 (Pub. L. No. 106-554, 114 Stat. 2763). That *unregulated* market played a key role in the development and scope of the financial crisis. *Supra Final Report* at 50 ("A key OTC derivative in the financial crisis was the credit default swap."). On Oct 4, 2008, former Chairman Greenspan testified before the House Committee on Government Oversight and Reform. Chairman Henry Waxman summed his testimony up: "In other words you found that your view of the world, your ideology, was not right. It was not working." Greenspan answered, "Precisely." This story, including Greenspan's testimony, appears in a Frontline Special, "The Warning"; *available at* http://video.pbs.org/video/1302794657. *Frontline: The Warning* (PBS Oct. 20, 2009).

Greenspan's confession also finds an echo in the academic world of Richard Posner, a federal judge and one of the leading exponents of economic analysis of law, sometimes called the Chicago School, which similar to Greenspan, eschewed governmental intervention in the market. The movement developed partly as a reaction to the work of John Maynard Keys in his classic THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936) (advocating government intervention in the market to level out its up and downs based on inadequate demand). Members of the movement believed that they had "consigned [Keynes] to history" and called his book completely outdated. John Cassidy, *After the Blowup,* 85 NEW YORKER 28 (Jan. 11, 2010) [hereinafter *After*]. Posner now has considerably more nuanced positions. *See* Richard Posner, *How I Became a Keynesian,* THE NEW REPUBLIC (SEP. 23, 2009); *see also id.* RICHARD POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009); RICHARD POSNER, THE CRISIS OF CAPITALIST DEMOCRACY (2010). Some of his fellow economists in Chicago are still recalcitrant. *See After, supra,* at 9 (describing Professors John Cochran and Eugene Fama as staunch defenders; Profess Robert Lucas refused to meet with the author). Ironically, Chicago's Fama and Yale's Robert J. Schiller, a prominent modern Keynesian, won Nobel Prizes in 2013 for their arguably contradictory work.

At least one definition of a scientific theory is that, in principle, it must be susceptible to falsification, as did the Myth of the Rational Market in 2007 and in 2008. *See, e.g.,* KARL POPPER, CONJECTURES AND REFUTATIONS: *The Growth of Scientific Knowledge* 33–39 (1963)*; see* Daubert v. Merrell Dow Pharms., 509 U.S. 579, 594 (1993) ("Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. 'Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.'") (citing CARL GUSTAV HEMPEL, PHILOSOPHY OF NATURAL SCIENCE 49 (1966) ("The statements constituting a scientific explanation must be capable of empirical test"); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989) ("The criterion of the scientific status of a theory is its falsifiability, or refutability, or testability")). The contemporary acceptance of Popper's views in philosophy is beyond the scope of these materials. *See, e.g.* Susan Haack, *Federal*

RICO is not ambiguous, as some argue; it is broad, as Congress designed it.[114] From its beginning in 1970, a focus of RICO was *expressly* on fraud.[115] Gaps between it and the securities statutes curtail RICO's benefits without a gain, if any, to securities enforcement. Fears of a "floodgate" of new civil RICO litigation, even if valid, "are policy consideration more properly addressed to Congress . . . ."[116] Nevertheless,

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Philosophy of Science: A Deconstruction And a Reconstruction, 5 N.Y.U. J.L. & Liberty 394 (2010) (describing Popper's logical negativist epistemology and its deflated status in the scientific community); William W. Bartley, *Biology & Evolutionary Epistemology,* 6 Philosophia 463, 494 (1976) (commenting on the "gulf" between Popper's view and the "bulk" of professional philosophers).

For those with a desire to place the crisis in historical perspective, see the extraordinary effort of Carmen M. Reinhart & Kenneth S. Rogoff, This Time Is Different: Eight Centuries of financial folly (2009); a primer on this history also appears in *Essay: Financial Crisis,* The Economist (April 12, 2014) (reviewing the crises of 1792, 1825, 1857, 1907, 1929 and the history of increasing governmental role in guaranteeing the the financial industry freedom from the risk of loss while allowing it to reap great rewards). For those who desire to read disturbing, but extraordinarily insightful, conclusions about the *continuing* ill health of the world economy by an economist who accurately predicted the events of 2007 and 2008, *see* Raghuram G. Rajamn, Fault Lines (2010).

114. Sedima S.L.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985) (RICO "demonstrate[s not] ambiguity [, but] breadth") (citation omitted); Russello v. United States, 464 U.S. 16, 21–22 (1983) ("Congress selected . . . ['interest'] apparently because it was fully consistent with the pattern of the RICO statute in utilizing terms and concepts of breadth. Among these are 'enterprise;' . . . 'racketeering activity;' and 'participate.'").

115. Pub. L. 91-452, Statement of Finding and Purpose, 84 Stat. 922-23 (1970) ("drains billions of dollars from America's economy by . . . the illegal use of force, *fraud* and corruption . . . harms innocent investors) (emphasis added); 18 U.S.C. § 1961(1) (2012) ("racketeering activity" means. . .(B) . . . section 1341 (relating to mail fraud), section 1343(relating to wire fraud) . . . or (D) any offense involving bankruptcy fraud, fraud in the sale of securities . . . .").

116. *Id.* at 345. Whenever a plaintiff files a civil RICO case, the defendants trot out the tired, old, and thoroughly refuted "opening the litigation floodgates" nightmare. It does not stand the light of day. Data, typically missing from defendants' briefs, refute their dire fears. Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, private plaintiffs instituted 84 percent. United States Department of Justice, Sourcebook of Criminal Justice Stat. 431 (1981). No one seriously suggests that antitrust litigation is at floodgate proportions then or today. The number of criminal to civil RICO suits has been running at roughly the same ratio as the statutes that served as its model at least since 1990. G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is this the End of RICO,"* 43 Vand. L. Rev. 851, 1020 (1990). Recent data indicates that criminal filings, for example, in 2010 were 70,013, of which 23 (.04% of the total) were criminal RICO, Table D-2, *Federal Judicial Caseload Statistic* (March 31, 2010), while civil filings in 2010 were 259,517 of which 840 (.3% of the total) were civil RICO, Table C-2A. *Id.* Blakey and Perry refute the litigation floodgate myth at 869–73. In fact, since 1989, the date of the Court's *H. J. Inc.* "pattern" decision, the number of civil RICO filings steadily *declined.* From 1980–1996, for example, the number of civil cases filed in Federal courts *increased* from 168,800 to 272,700 per year *U.S. Census Bureau, Statistical Abstract of the United States* (Table No. 346) (1997) at 216, but the total number of civil RICO filings *decreased* from 903 each year to 840 from 1993 to 1997. *Id.* Table C-2A, *Judicial Business of the United States Courts* (1997).

In fact, RICO claims for relief no longer routinely appear in commercial litigation; sophisticated litigators now use them only in systemic patterns of unlawful conduct. Where others attempt to use them improperly, a substantial minority of the filings is quickly dismissed. At one time, the business community shunned civil RICO, feeling that to use it would legitimize a litigation technique that in the early days of its implementaapart from the raw numbers, determining the volume of cases is pointless until the litigation is itself characterized, for, as the Court recognizes, "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."[117] Nor may a court, in any event, properly use a fear of "excessive" litigation to curtail congressional express claims for relief.[118] RICO's effectiveness, criminally and civilly, as a legal guarantor of the integrity of the nation's marketplace, is potentially crucial. The litany of major company names that faced fraud charges in the news is still dizzying.[119] RICO needs revitalization, not evisceration, in the securities area.

The irony is that a statute enacted to curtail "overlaps" is now creating "gaps." If the limited exception enacted by Congress is to morph into a general exemption, a "get out of jail card," or *lettre de cachet*, it ought to come, if at all, from a fully informed Congress.[120] Congress still sits; it can amend RICO, if it sees fit. After ample time—and in full possession of the facts—Congress has not enacted *general* limitations on RICO's civil enforcement of provisions in the area of fraud. As such, the courts are without the constitutional power to do it themselves

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tion was widely seen as illegitimate. That day is no more. *See, e.g.*, David R. Baker, *Chevron Files RICO in lawsuit on Ecuador*, THE S. F. CHRONICLE, Feb. 2, 2011, at D1 (reporting the Chevron filed civil RICO claim against lawyer who brought civil RICO case for environmental damage by oil company); Joseph Mallia, *Geico Suit Alleges No-Fault Fraud*, NEWSDAY, Sep. 30, 2010, at A41 (reporting the insurer Geico filing civil RICO lawsuits against Long Island and New York City medical companies and a law firm, alleging that they conspired to commit fraud by inflating claims for medical braces and other health care equipment); Bob Van Voris & Dale Crofts, *Alcoa Is Sued for Fraud, Bribery by Bahrain Firm*, WASH. POST, Feb. 29, 2008, at D8 (reporting that ALBA, the Bahrain aluminum company, filed racketeering claims against ALCO claiming it was overcharged for 15 years for alumina, an ingredient used to make aluminum, and claiming ALCO bribed unidentified Bahraini Government and company officials to get business); Edmund L. Andres, *None Prove So Stubborn as a Giant Spurned*, N.Y. TIMES, June 11, 1997, at C37 (reporting a Volkswagen settlement of a civil RICO case brought by General Motors against it); Saul Hansell, *Bankers Trust Settles Suit With P. & G.*, May 10, 1996, at D1 (reporting a settlement of a civil RICO suit between two major corporations over an investment fraud).

117. Zauderer v. Office of Disciplinary Couns. of the Supreme Court of Ohio, 471 U.S. 626, 643 (1985).

118. Reiter v. Sonotone, 442 U.S. 330, 344 (1979) ("We must take a statute as we find it. Congress created the treble damage remedy . . . precisely for the purpose of encouraging *private* . . . [litigation.] These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the . . . [law] and deterring violations.") (emphasis in original).

119. *See, e.g., Pigs, Pay and Power*, ECONOMIST, June 28, 2003, at 7 (citing Enron, WorldCom, Tyco, Adelphia, HealthSouth, ImClone, and Global Crossing); *see also id.* ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed.").

120. H.J. Inc. v. Northwestern Bell Co., 492 U.S. 229, 249 (1989) ("Legitimate businesses 'enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences'; and, as a result, § 1964(c)'s use 'against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued.' . . . If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect . . . it is one 'inherent in the statute as written,' and hence beyond our power to correct . . . [R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for . . . [a] Court.").

under a misguided guise of reading a limited exception, as if it were a general exemption.[121] It is time for the courts of appeals to set their houses in order or, if not, for the Court to intervene and do it for them.[122]

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121. United States v. Turkette, 452 U.S. 576, 587 (1981) ("There is no argument that Congress acted beyond its power . . . . That being the case, the courts are without authority to restrict the application of . . . [RICO].").

122. We began this piece with a reference to Shakespeare. As we reviewed the facts and the litigation dealing with fraud here, we came to think that the comments of Prince Hamlet are as cogent today in the United States, as they were in England more than 400 years ago:

> In the corrupted currents of this world
> Offense's gilded hand may shove by
> justice;
> And oft 'tis seen the wicked prize itself
> Buys out the law.

WILLIAM SHAKESPEARE, HAMLET, act 3, Sc. 3.