

**CONTAINING THE UNCONTAINABLE:
DRAWING RICO’S BORDER
WITH THE PRESUMPTION AGAINST
EXTRATERRITORIALITY**

*Miranda Lievsay**

In Morrison v. National Australia Bank Ltd., the Supreme Court created a two-step test governing the extraterritorial reach of all federal statutes, radically altering the application of U.S. laws. Nowhere has this decision caused more upheaval than in the context of analyzing claims under the Racketeering Influenced and Corrupt Organizations Act (RICO). While courts widely agree that RICO does not apply extraterritorially, courts vehemently disagree about the proper standard to determine when a RICO case is appropriately domestic or impermissibly foreign. This Note explores RICO’s origins, its legislative history, and the evolution of its extraterritorial application in Morrison’s shadow. This Note then sifts through the conflicting approaches employed by courts faced with RICO cases involving foreign elements before ultimately advocating an alternative approach that accurately applies Morrison’s two-step test and faithfully embodies RICO’s legislative history and intent.

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* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2010, Georgetown University. I would like to thank the members of the *Fordham Law Review* for their guidance, as well as my family and friends for their unwavering support.

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INTRODUCTION

Enterprise *A* is organized in Los Angeles, California. The enterprise runs a lucrative money laundering scheme facilitated by its ironclad grip over municipal officials. Enterprise *A* directs hundred of its associates to engage in extortion, bribery, arson, and a massive level of fraud involving the forceful corruption of local businesses into dummy operations through which the enterprise launders illegally obtained funds.

Enterprise *B*, also organized in Los Angeles, California, enjoyed a profitable tenure controlling the city's shipping industry until two of its associates defected to form Enterprise *A*. Because of the violence erupting between the two rival factions, Enterprise *B* cut its losses and relocated to Mexico City, Mexico, where several of its leaders maintained close ties. From Mexico's sheltered shores, Enterprise *B* continues to launder over \$50 million annually through Los Angeles banks, enjoys a significant profit of illegally obtained funds totaling over \$10 million, and continues to cause unquantifiable collateral damage to the local Los Angeles economy. Despite the certain destruction caused by Enterprise *B*, instability in the interpretation and application of the Racketeering Influenced and Corrupt

Organizations Act¹ (RICO) raises the possibility that Enterprise *B* will never be brought to justice.

RICO, a central feature of the Organized Crime Control Act of 1970² (OCCA), is a powerful weapon used to combat dangerous enterprises. RICO was enacted in response to organized crime's grip on American society, which, unrestrained by traditional law enforcement methods and legal remedies, siphoned billions of dollars from the American economy.³ Since its inception, RICO has been used to take down the American Mafia⁴—the statute's original target—and, more recently,⁵ it has been used against an impressive range of defendants including street gangs like the Latin Kings,⁶ *legitimate* businesses,⁷ and social organizations such as pro-life activists.⁸ But globalization and the rise of transnational dealings have thrown a wrench into RICO's omnipotence.⁹ These modern phenomena have changed the face of organized crime: now, RICO enterprises orchestrate cross-border schemes and capitalize on technological innovations to orchestrate dispersed factions under the guise of complete anonymity.¹⁰ In turn, RICO litigation has shifted shape, forcing courts to confront cases involving foreign elements and decide when, if ever, a court may hear a RICO claim involving foreign conduct—when is a RICO case too far removed from American soil to be decided by an American court?

The tumultuous aftermath of the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*¹¹ has further complicated RICO's application, resulting in an attack on the statute's extraterritorial reach.¹² This decision, reviving the presumption against extraterritoriality for every

1. 18 U.S.C. §§ 1961–1968 (2012).

2. Pub. L. No. 91-452, 84 Stat. 922, 941–48 (1970).

3. See H.R. REP. NO. 91-1549, at 1–2 (1970), as reprinted in 1970 U.S.C.C.A.N. 1073, 1073; see also *Organized Crime Control: Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 106–07 (1970) [hereinafter *1970 Hearings*] (statement of Sen. John L. McClellan) (emphasizing the need for substantive legislation to fight organized crime in light of the anemic laws in existence).

4. See, e.g., *United States v. Gotti*, 413 F. Supp. 2d 287 (S.D.N.Y. 2005).

5. RICO's application has significantly increased since its enactment—and this rise shows no signs of slowing down. See, e.g., Caroline N. Mitchell, Jordan Cunningham & Mark R. Lentz, *Returning RICO to Racketeers: Corporations Cannot Constitute an Association-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 *FORDHAM J. CORP. & FIN. L.* 1, 3 (2008) (“From 2001 to 2006 alone, civil RICO plaintiffs filed, on average, 759 private civil claims each year.”).

6. See, e.g., *United States v. Tello*, 687 F.3d 785 (7th Cir. 2012).

7. *United States v. Turkette*, 452 U.S. 576, 580–82 (1981).

8. See, e.g., *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249 (1994).

9. See *infra* notes 107–09 and accompanying text (discussing transnationalism and the implications for RICO's application).

10. See, e.g., Gideon Mark, *RICO's Extraterritoriality*, 50 *AM. BUS. L.J.* 543, 545–47 (2013) (discussing transnational crime in relation to RICO litigation).

11. 561 U.S. 247 (2010).

12. Extraterritoriality refers to the application of domestic laws to foreign conduct. See, e.g., Kenneth W. Dam, *Economic and Political Aspects of Extraterritoriality*, 19 *INT'L L.* 887, 888–90 (1985). The significance of this doctrine has grown recently due to the prevalence of global organizations and corporate entities, as well as rising foreign investment and trade. *Id.* at 888.

federal statute, has caused immense upheaval in the RICO context as courts struggle to apply *Morrison*'s binary framework to the multifaceted RICO statute and, consequently, employ divergent approaches to determine RICO's reach.¹³

While courts agree that RICO is silent as to its extraterritorial application,¹⁴ the battle lines are drawn from the outset, with parties and courts alike disputing how to determine when a RICO case involving domestic and foreign elements is impermissibly extraterritorial. Three distinct methods have emerged to measure RICO's reach: (1) the "enterprise approach," pinpointing the location of the RICO enterprise as a way to determine when a case is sufficiently domestic; (2) the "predicate offenses approach," looking to the location of these offenses; and (3) the "pattern of racketeering activity approach," considering the location of the actions committed by the enterprise as a whole.¹⁵ Adding to this confusion, the Second Circuit has unilaterally held that RICO does in fact apply extraterritorially to the extent that its predicate offenses reach foreign conduct.¹⁶ These irreconcilable approaches render uncertain whether RICO enterprises directing operations on U.S. soil from the safe haven of foreign countries—such as Enterprise *B* discussed above—will be brought to justice for the destruction they cause to the American people and the economy.

This Note delves into RICO's evolution, its judicial interpretation in the context of extraterritoriality, and the various approaches taken by courts applying *Morrison* to the RICO context.¹⁷ Part I provides an overview of RICO's legislative history, the resulting statutory framework, and an analysis of the *Morrison* decision. Part II dissects the approaches taken by courts applying *Morrison* to the RICO context, including the split within the Second Circuit. Ultimately, this Note advocates an alternative approach in Part III that faithfully applies the *Morrison* framework while embodying RICO's core legislative intent.

13. See *infra* Part II (discussing the various approaches used by courts undergoing the *Morrison* analysis).

14. See, e.g., Patricia A. Leonard & Gerardo J. Rodriguez-Albizu, *Do Extraterritorial RICO Claims Still Exist in a Post-Morrison World?*, 59 FED. LAW. 60, 61 (2012).

15. See *infra* Part II.

16. See *European Cmty. v. RJR Nabisco, Inc. (RJR Nabisco III)*, 783 F.3d 123 (2d Cir. 2015) (denying rehearing en banc). The Supreme Court granted certiorari shortly after the Second Circuit denied rehearing en banc. *RJR Nabisco, Inc. v. European Cmty. (RJR Nabisco IV)*, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, 136 S. Ct. 28 (2015) (granting certiorari in the merits case); see also *infra* Part II.B (discussing *RJR Nabisco III* in detail).

17. There is significant scholarship examining RICO's application in a post-*Morrison* world. This Note aims to pick up where these efforts left off by first considering the most recent RICO jurisprudence, particularly that produced by the Second Circuit, and then by synthesizing the totality of approaches taken by courts applying *Morrison* to the RICO context.

I. TRACING RICO'S ORIGINS TO ITS MODERN STATE:
RICO'S LEGISLATIVE HISTORY, THE STATUTE,
AND THE PROBLEM OF EXTRATERRITORIALITY

This part first discusses RICO's legislative origins and the resulting statutory provisions. An understanding of RICO's legislative history is essential to resolving the question of RICO's extraterritoriality in light of *Morrison's* congressional intent-based inquiry.¹⁸ This part then analyzes the *Morrison* decision and its progeny, which breathed new life into the presumption against extraterritoriality for all federal statutes—including RICO.

A. *Exposing Organized Crime in America:
RICO's Legislative History*

By the 1950s, twenty-four organized crime syndicates, with over 5000 permanent members—and thousands more associates lying in wait across the country—threatened to disrupt the American economy and safety of the American people.¹⁹ Initially, collective skepticism about the very existence of crime syndicates operating on a national level allowed these organizations to prosper unrestrained by traditional law enforcement methods.²⁰ Finally, Congress launched a series of investigations to unearth the existence of and explore the nature of these networks.²¹ Chief among these congressional efforts were the findings produced by the Kefauver Senate Committee,²² which concluded publicly for the first time that crime syndicates had organized on a national level and were devastating the American economy through infiltration, a novel form of criminal activity

18. See *infra* Part I.C.2 (discussing *Morrison's* two-prong framework).

19. See *Mafia in the United States*, HISTORY (Feb. 8, 2016), <http://www.history.com/topics/mafia-in-the-united-states> [perma.cc/X8JB-S6JG].

20. Then-FBI Director J. Edgar Hoover was one of many prominent government officials to vocally doubt the existence of national criminal organizations, instead maintaining that such syndicates operated only as low-level street gangs. See *id.*; see also Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 215–17 (1984) (discussing early regulation of organized crime).

21. The three primary investigations that confirmed the existence of, and educated the American government and public about, the nature of organized crime—thereby providing the direct impetus for RICO's enactment—are the Kefauver Committee, the McClellan Committee, and the President's Task Force on Organized Crime. See Leslie Suzanne Bonney, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 588–92 (1993).

22. The United States Senate Special Committee to Investigate Crime in Interstate Commerce, known as the Kefauver Committee, was formed to investigate organized crime and its impact on interstate commerce in America. S. Res. 202, 81st Cong. (1950). The Committee played a significant role in RICO's infant legislative history by educating the government and American public for the first time about the nature of these organizations through televised hearings of over 600 witnesses. David R. Wade, Note, *The Conclusion That a Sinister Conspiracy of Foreign Origin Controls Organized Crime: The Influence of Nativism in the Kefauver Committee Investigation*, 16 N. ILL. U. L. REV. 371, 372–75 (1996). The Committee's interviews, conducted throughout fourteen major cities, featured law enforcement officers and suspected and convicted criminals, including infamous mobster Frank Costello. *Id.*

where “criminals and racketeers [use] the profits of organized crime to buy up and operate legitimate business enterprises.”²³ This activity signified a drastic shift from “traditional revenue raising activities such as gambling and prostitution” to “legitimate business activities.”²⁴ The report further revealed that nearly every business sector had succumbed to this parasitic activity, including bedrock industries such as advertising, banking, insurance, and oil, as well as small scale businesses such as florists, restaurants, and hotels.²⁵

Spurred into action by these unnerving findings, President Lyndon B. Johnson established the Commission on Law Enforcement and the Administration of Justice (“the Commission”), which then issued a task report²⁶ that later served as RICO’s blueprint.²⁷ Instead of adopting the traditional focus of preventing the individual crimes committed²⁸ by such organizations, this report focused on the highly organized nature of the crime syndicate.²⁹ Additionally, the report devoted significant attention³⁰ to the infiltration of legitimate business as the immediate threat posed by these newly discovered networks.³¹ This focus on infiltration was later adopted by RICO’s drafters³² and is thus reflected in RICO’s substantive prohibitions.³³

23. S. REP. NO. 82-141, at 33 (1951). The Committee was tasked with analyzing the impact of organized crime on interstate commerce, identifying individuals and corporations involved in such activities, and “determin[ing] the extent to which such organized criminal activity acts as a corrupting influence.” Wade, *supra* note 22, at 371.

24. Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO’s Remedial Provisions*, 43 VAND. L. REV. 623, 624 (1990). In response to the Committee’s findings regarding infiltration activity, Congress formed the McClellan Committee, which further exposed the structure of, and the harm produced by, these criminal syndicates operating in the labor sector. See S. REP. NO. 85-1417 (1958).

25. S. REP. NO. 307, at 170–81 (1951).

26. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter COMMISSION REPORT].

27. See Lee Coppola & Nicholas DeMarco, *Civil RICO: How Ambiguity Allowed the Racketeer Influence and Corrupt Organizations Act to Expand Beyond Its Intended Purpose*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 241, 246–47 (2012); see also Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666–67 (1987).

28. Echoing the findings of the Kefauver Committee, the Commission discussed activities traditionally associated with organized crime, such as gambling and loansharking, and also focused on infiltration of legitimate businesses. See COMMISSION REPORT, *supra* note 26, at 188–90.

29. *Id.* at 188–91. In an overlapping discussion of how to define organized crime, the Commission acknowledged the possibility of, but ultimately rejected, a definitional approach that would focus solely on the prohibited activities committed by such organizations. *Id.* This initial discussion foreshadowed a significant obstacle for RICO’s drafters, one that is particularly relevant to determining RICO’s extraterritoriality. See *infra* Part III.A (discussing how to determine RICO’s “focus” in light of its complex legislative history).

30. See Lynch, *supra* note 27, at 669–70 (noting that infiltration was afforded “the same space and weight . . . as the more traditional problem of the specifically criminal activities of organized crime”).

31. See COMMISSION REPORT, *supra* note 26, at 189–91.

32. Lynch, *supra* note 27, at 669–71.

33. See *infra* notes 56–58 and accompanying text (illustrating the relationship between infiltration and RICO’s operative section).

A cascade of legislative activity directly followed the Commission's stirring recommendations. Senate Bills 2048 and 2049,³⁴ often referred to as RICO's predecessors, explicitly adopted the Commission's emphasis on creating substantive legislation aimed squarely at infiltration.³⁵ After a series of similar anti-crime measures failed to gain traction, Senate Bill 1861, RICO's immediate relative, was introduced as the decisive measure to excise from the American economy the "cancer" of organized crime "by direct attack, by forcible removal[,] and prevention of return."³⁶ After a series of amendments,³⁷ the President signed Senate Bill 30 into law as Title IX of OCCA on October 15, 1970.³⁸

Congress directed OCCA broadly at "the eradication of organized crime in the United States" and aimed RICO more narrowly on attacking the problem of infiltration of legitimate businesses.³⁹ To accomplish this objective, Congress armed RICO with novel statutory provisions to overcome ineffective legal and law enforcement methods, emphasizing that "[t]he arrest, conviction, and imprisonment of a Mafia lieutenant can curtail operations, but does not put the syndicate out of business. As long as . . . organized crime remains, new leaders will step forward."⁴⁰ RICO thus represented a novel approach to "deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. . . . [A]n attack must be made on their source of economic power itself."⁴¹ Thus, to drain the crime network's source of income, Congress prohibited investing illegitimate profits into licit businesses and maintaining an interest in legitimate businesses by illegitimate means.⁴²

34. S. 2048, 90th Cong. (1967); S. 2049, 90th Cong. (1967). These bills, molded by existing antitrust laws, prohibited the investment of unreported income and the investment of income derived from certain crimes, respectively. See Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1016–17 (1980).

35. See Blakey & Gettings, *supra* note 34, at 1015–19 (discussing features of Senator Hruska's bills that are directly reflected in the RICO statute); see also Lynch, *supra* note 27, at 674 ("RICO's earliest ancestor was explicitly tied to the purpose of combatting [sic] organized crime infiltration into legitimate fields of business.").

36. 115 CONG. REC. 9509, 9567 (1969) (statement of Sen. John L. McClellan).

37. For a detailed discussion of the changes made to the original bill, see Blakey & Gettings, *supra* note 34, at 1017–21.

38. The Racketeering Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922 (1970).

39. Statement of Findings and Purpose, 84 Stat. at 922–23.

40. S. REP. NO. 91-617, at 78–79 (1969) (quoting H.R. Doc. No. 91-105, at 6 (1969)), as reprinted in 1970 U.S.C.C.A.N. 4007, 4032.

41. *Id.* at 79.

42. See Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 769–71 (1990). Indeed, "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with . . . organized crime." Statement of Findings and Purpose, 84 Stat. at 922–23.

Despite Congress's ambitions, RICO was not utilized against organized crime as intended for close to two decades.⁴³ Today however, RICO's broad language and tantalizing damages provisions⁴⁴ have transformed the once seldom-invoked statute into a key player in modern litigation, earning its nickname as "the litigation equivalent of a thermonuclear device."⁴⁵

B. *The Mechanics of the Statute*

Although RICO has been referred to as a statute of "daunting complexity,"⁴⁶ the statute's structure, organized over eight discrete sections, belies this description.⁴⁷ RICO's operative section sets forth four substantive offenses aimed at enterprise criminality, at least one of which is required for liability.⁴⁸ At its core, a RICO violation requires (1) a person participating in (2) a pattern of racketeering activity (3) in connection with the acquisition, maintenance, conduct, or control of an enterprise.⁴⁹

1. RICO's Operative Section: § 1962's Prohibitions

Congress created four substantive offenses prohibiting forms of enterprise activity, each of which involves "a pattern of racketeering activity" and an "enterprise."⁵⁰ First, § 1962(a) prohibits investing or using income derived from "a pattern of racketeering activity" in any enterprise,⁵¹ while § 1962(b) prohibits acquiring or maintaining an interest in an enterprise "through a pattern of racketeering activity."⁵² Next, § 1962(c)⁵³ prohibits participating in or conducting the activities of an enterprise through "a pattern of racketeering activity," and § 1962(d) prohibits conspiring to violate any of the previous three subsections.⁵⁴

43. During the first decade of its inception, referred to as its "dormant" period, only nine RICO cases were decided in the district courts. ARTHUR F. MATHEWS ET AL., REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 55 (1985).

44. See *infra* Part I.B.3.

45. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

46. *Lynch*, *supra* note 27, at 680.

47. Relevant definitions are set forth in 18 U.S.C. § 1961 (2012). Prohibited conduct is contained within § 1962. Criminal penalties are outlined in § 1963 and civil penalties in § 1964. Venue and process are addressed in § 1965. Expedition of civil actions brought by the government is provided for in § 1966. Courts are authorized to close civil proceedings to the public by § 1967. The Attorney General is granted authority by § 1968 to issue civil investigative demands for documents in certain limited circumstances specified by this subsection.

48. 18 U.S.C. § 1962(a)–(d).

49. See Dan A. Naranjo & Edward L. Piña, *Civil RICO: Overview on the Eve of the 200th Anniversary of the Federal Judiciary*, 21 ST. MARY'S L.J. 23, 28 (1989).

50. 18 U.S.C. § 1962(a)–(c).

51. *Id.* § 1962(a).

52. *Id.* § 1962(b).

53. *Id.* § 1962(c).

54. *Id.* § 1962(d).

Rather than focus on already-unlawful activities or prohibit the very existence of the criminal association,⁵⁵ Congress chose to make certain activities unlawful *in relation* to the enterprise.⁵⁶ That each substantive offense aligns with conduct associated with the enterprise's infiltration activities reflects Congress's focus on this connection: § 1962(a) corresponds to purchasing an enterprise with dirty money; § 1962(b) is aimed at preventing the acquisition of an enterprise through means of overt racketeering activity; and § 1962(c) seeks to prevent those employed by or associated with an enterprise from further participating in the enterprise's activities through unlawful racketeering conduct.⁵⁷ This focus on infiltration activities in connection with an enterprise, rather than on the criminal entity, has facilitated RICO's broad application to conduct and enterprises beyond the Italian American Mafia's infiltration of American business—the original impetus for the statute's enactment.⁵⁸

2. RICO's Central Concepts

Every RICO violation contains at least two common elements: an enterprise and a pattern of racketeering activity.⁵⁹ The statute provides definitions of these terms—and others central to RICO liability—which are discussed in this section.

a. Enterprise

“Enterprise” is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁶⁰ Free from restrictive language⁶¹ and limiting provisions, courts have broadly interpreted “enterprise” to include Mafia organizations like the Gambino family and La Cosa Nostra,⁶² illegitimate and legitimate associations,⁶³ and less traditional

55. Drafting this aspect of the statute presented a challenge: if the statute prohibited actions committed by a specified group, the statute could be subject to constitutional challenges for violating the deeply embedded precept that criminal prohibitions should apply only in general terms. Furthermore, a statute that prohibited actions committed by a particular group might narrow its application to only the group originally specified. *See generally* Lynch, *supra* note 27, at 685–88. For further ruminations on the legislative difficulties related to statutory classifications and prohibitions, see Randy D. Gordon, *Of Gangs and Gaggles: Can a Corporation Be Part of an Association-in-Fact RICO Enterprise?: Linguistic, Historical, and Rhetorical Perspectives*, 16 U. PA. J. BUS. L. 973, 976–77 (2014).

56. 18 U.S.C. § 1962(a)–(d).

57. *Id.* § 1962(a)–(c).

58. *See* Lynch, *supra* note 27, at 685 (maintaining that RICO's expansive application was made possible by the “fundamental definitional and criminological difficulties” inherent in creating a statute prohibiting certain actions when undertaken by a specified group).

59. *See* 18 U.S.C. § 1962(a)–(d).

60. *Id.* § 1961(4).

61. Indeed, Congress's inclusion of the word “any” as the modifier of “enterprise” may encourage a broad reading of this provision. *See Id.* § 1962(a)–(c).

62. *See* United States v. Pizzonia, 577 F.3d 455, 459 (2d Cir. 2009).

associations such as foreign corporations,⁶⁴ labor unions,⁶⁵ and even government offices.⁶⁶ Additionally, “enterprise” has been expanded to reach ad hoc organizations and shadowy associations-in-fact.⁶⁷ Further expanding the “enterprise” concept, courts have found that such amorphous groups need not feature traditional organizational hierarchies, share economic goals, or even be driven by economic incentives.⁶⁸

b. Racketeering Activity

“Racketeering activity” is defined as any act “chargeable” under state and federal laws, any act “indictable” under federal criminal provisions, as well as any offense involving bankruptcy or securities fraud or drug-related activities punishable under federal law.⁶⁹ The section containing this definition also incorporates by reference over one hundred provisions of currently prohibited acts indictable under Title 18, referred to as RICO’s predicate offenses.⁷⁰ These predicate offenses include acts implicating domestic conduct, such as Travel Act violations, and those reaching foreign conduct, such as providing material support to foreign terrorist organizations.⁷¹

c. Pattern of Racketeering Activity

It is not enough that a RICO defendant engages in racketeering activity: RICO requires that the defendant act through a “pattern of racketeering activity.”⁷² The statute defines “pattern” as requiring “at least two acts[,] . . . one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act.”⁷³ Because the pattern requirement appears in all four subsections of RICO’s operative section and is applicable to both criminal and civil violations, every RICO case must involve at least two RICO

63. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576, 583–85 (1981) (noting that RICO’s unrestricted language can properly be applied to both legitimate and illegitimate associations).

64. *See* *United States v. Parness*, 503 F.2d 430, 440 (2d Cir. 1974).

65. *See* *United States v. Robilotto*, 828 F.2d 940, 942 (2d Cir. 1987).

66. *See* *United States v. Shamah*, 624 F.3d 449, 452 (7th Cir. 2010) (including the Chicago Police Department as a RICO enterprise).

67. *See* *Boyle v. United States*, 556 U.S. 938, 945–46 (2009) (finding that a RICO enterprise need not contain a discernable hierarchy or strict structure so long as the enterprise has “a purpose, relationships among the associates, and longevity sufficient to permit the associations to pursue the enterprise’s purpose”).

68. *See, e.g.*, *Nat’l Org. for Women v. Scheidler*, 510 U.S. 249, 257–60 (1994).

69. 18 U.S.C. § 1961(1) (2012).

70. *Id.*

71. *Id.*; *see also id.* §§ 1341, 1343, 1952, 1956–1957, 2332b(g)(5)(B), 2339(B).

72. *Id.* § 1961(5).

73. *Id.* The effective date referenced by this section, October 15, 1970, was included to avoid violating the prohibition on ex post facto laws. *See, e.g.*, *United States v. Field*, 432 F. Supp. 55, 59–60 (S.D.N.Y. 1977).

predicate acts.⁷⁴ Accordingly, the Supreme Court described the pattern aspect as RICO's "key requirement."⁷⁵

In *Sedima, S.P.R.L. v. Imrex Co.*,⁷⁶ the Supreme Court interpreted this requirement and found that, more than merely "sporadic activity," a "pattern of racketeering activity" requires a showing of "continuity plus relationship."⁷⁷ This observation, however, was mere dicta appearing in a single footnote and failed to set forth a test for lower courts to apply this newly announced "continuity" requirement.⁷⁸ The Supreme Court later clarified this confusion in *H.J. Inc. v. Northwestern Bell Telephone Co.*⁷⁹ Grounding its holding on RICO's legislative history aimed squarely at infiltration and concerted enterprise activity, the Court held that the "pattern requirement" requires a showing of "continuity plus relationship," where the racketeering acts occur in a continuous manner⁸⁰ and are related to one another or to "some external organizing principle that renders [them] 'ordered' or 'arranged,'" as well as occurring in a continuous manner.⁸¹ While there is still no bright-line test for the "pattern requirement," courts have embraced the more flexible approach advocated in *H.J., Inc.* that places infiltration activity at the forefront of the RICO litigation.⁸²

d. Affecting Interstate or Foreign Commerce

For RICO liability, the enterprise or pattern of racketeering activity must affect interstate or foreign commerce.⁸³ To evaluate this element required by each of § 1962's substantive provisions, courts look to the enterprise's

74. See 18 U.S.C. § 1962; Roger T. Creager, *A Current Guide to Civil RICO in New York Federal Courts*, 66 N.Y. St. B.J. 18, 20 (1994).

75. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989).

76. 473 U.S. 479 (1985). Petitioner Sedima, a Belgian Corporation, alleged that respondent Imrex billed its corporation using inflated invoices with nonexistent expenses amounting to civil RICO violations. *Id.* at 483–84.

77. *Id.* The Court noted that the definition of a "pattern of racketeering activity" differs from the other definition provisions in § 1961 in that the "pattern" section uses the word "requires" as opposed to "means." *Id.* at 496 n.14. Thus, "The implication is that while two acts are necessary, they may not be sufficient." *Id.*

78. *Id.* Without further guidance of this interpretation, several different tests emerged among lower courts. See Patrick J. Ryan, *The Civil RICO Pattern Requirement: Continuity and Relationship, a Fatal Attraction?*, 56 FORDHAM L. REV. 955, 965–67 (1988).

79. 492 U.S. 229 (1989).

80. Continuity may be conceived of as both a "closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

81. *Id.* at 238–39.

82. See R. Davis Mello, Note, *Life After Morrison: Extraterritoriality and RICO*, 44 VAND. J. TRANSNAT'L L. 1385, 1398 (2011) (discussing the different approaches taken by courts undergoing the "continuity" analysis). For a more detailed discussion of this problem, see Kevin J. Murphy, Note, *The Resurrection of the "Single Scheme" Exclusion to RICO's Pattern Requirement*, 88 NOTRE DAME L. REV. 1991, 2007 (2013).

83. See 18 U.S.C. § 1962(a)–(d) (2012).

conduct (without regard to the activities of each defendant's behavior) and have required only a de minimis effect on interstate or foreign commerce.⁸⁴

While RICO's commerce phrase could plausibly function as merely providing a jurisdictional hook, it is also possible that Congress—imbuing the phrase with substantive meaning—intended the phrase to authorize the statute's prohibition of *any* infiltration activity that affected interstate or foreign commerce. This latter interpretation—reaching any type of infiltration activity regardless of its geographic location—is supported by RICO's legislative history, which demonstrates a recurring concern with infiltration's detrimental effect on the American economy, American businesses, and even American investors.⁸⁵ Furthermore, earlier versions of RICO included a notably restrictive version of this commerce phrase that defined “foreign commerce” as “commerce between any State and any foreign country.”⁸⁶ But, Congress removed this definition from the final version and left the term undefined, encouraging courts to broadly apply the statute.⁸⁷

3. RICO's Remedies

To realize Congress's goal of combating organized crime on all fronts, RICO provides both criminal and civil enforcement provisions. The Attorney General is authorized to prevent and enforce RICO violations under § 1964(a)–(b).⁸⁸ Additionally, § 1964(c) provides a private right of action to “[a]ny person injured in his business or property by reason of a violation of [§] 1962.”⁸⁹ Available remedies for a civil cause of action include injunctive relief, treble damages, and reasonable attorney's fees;⁹⁰ possible remedies for a criminal action are forfeiture, imprisonment, and fines.⁹¹

Congress intended these flexible provisions to address the traditional difficulties inherent to fighting criminal organizations, including the exacting procedural requirements and evidentiary burdens central to criminal proceedings.⁹² Similarly, the availability of civil sanctions and a

84. *See, e.g.*, *United States v. Shryock*, 342 F.3d 948, 984 (9th Cir. 2003) (finding that the district court had “correctly instructed the jury that a de minimis affect [sic] on interstate commerce was sufficient to establish jurisdiction under RICO”).

85. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (“[O]rganized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, [and] seriously burden interstate and foreign commerce . . .”).

86. H.R. 326, 91st Cong. § 2(3) (1969).

87. Some have suggested that the removal of this definition section may have been spurred by the hearings on the Sicilian Mafia as Congress fixated on conduct and enterprises situated *outside* the territorial United States. *See, e.g.*, Daniel Hoppe, *Racketeering After Morrison: Extraterritorial Application of Civil RICO*, 107 NW. U. L. REV. 1375, 1392–93 (2013).

88. 18 U.S.C. § 1963.

89. *Id.* § 1964(c).

90. *See id.*

91. *See id.* § 1963(a).

92. *See 1970 Hearings, supra* note 3, at 106–07.

private cause of action allow an individual citizen to join in the fight against organized crime without having to defeat the procedural protections afforded to criminal defendants.⁹³ Furthermore, the inclusion of treble damages reflects Congress's intention that RICO function as "a major new tool in extirpating the baneful influence of organized crime in our economic life."⁹⁴

The legislative history of this section reveals that Congress was primarily concerned with ensuring the availability of remedial provisions to those who suffered at the hands of criminal networks.⁹⁵ While debating this section, Representative Sam Steiger drove home this point:

It is the intent of this body . . . to see that innocent parties who are the victims of organized crime have a right to obtain proper redress. . . . It represents the one opportunity for those of us who have been seriously affected by organized crime activity to recover.⁹⁶

Furthermore, the remedial treble damages provision was explicitly formed in the likeness of the antitrust laws,⁹⁷ which the Supreme Court has found "seek[] primarily to enable an injured competitor to gain compensation for that injury."⁹⁸

C. Extraterritorial Application of Federal Statutes

Part I.C.1 discusses RICO's extraterritorial reach before the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.* Part I.C.2 then explores the *Morrison* decision, its progeny, and the policy underlying these rulings.

1. Initial Challenges and the Impending Crash

Before the Supreme Court drew a boundary limiting the reach of all federal statutes,⁹⁹ federal courts wrestled with RICO cases involving foreign defendants engaging in *domestic* racketeering activity or cases implicating foreign racketeering activity committed by *domestic* enterprises.¹⁰⁰ Faced with such hybrid cases, some courts held that RICO

93. See 18 U.S.C. § 1964(c). Specifically, a private citizen must only meet the preponderance of the evidence standard, as opposed to the beyond a reasonable doubt standard, and is also at liberty to take advantage of the more liberal discovery process in civil actions. See generally *1970 Hearings*, *supra* note 3, at 106–08.

94. 116 CONG. REC. 25135, 25190 (1970) (statement of Sen. McClellan).

95. *1970 Hearings*, *supra* note 3, at 107.

96. 116 CONG. REC. 35284, 35347 (statement of Rep. Steiger).

97. 15 U.S.C. § 15 (1982).

98. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

99. See *infra* Part I.C.2.

100. There are also a host of procedural challenges that must be overcome in such hybrid cases—including affecting proper service, establishing personal jurisdiction, enforcing judgments, and properly calculating damages against foreign defendants. For a full discussion of such difficulties, including the correlative implications for national sovereignty considerations, see Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET"*, 73 MINN. L. REV. 1023, 1070–71 (1989) (discussing measures taken by nations

does not apply extraterritorially because the statute lacks clear instructions for such an application.¹⁰¹ In place of this bright-line standard, other courts borrowed two tests from the securities and antitrust context—the “conducts test” and the effects test—to evaluate whether sufficient domestic effects or domestic conduct material to the racketeering activity had been alleged.¹⁰² Additionally, the Second Circuit employed a narrow version of the conducts test, allowing a RICO complaint to survive dismissal provided that the domestic conduct alleged was material to the completion of the racketeering scheme and was a direct cause of the RICO injury.¹⁰³ Further muddying the waters, the Ninth Circuit integrated the conducts and effects tests to find that RICO liability may attach as long as a RICO plaintiff alleges some racketeering activity affecting interstate commerce within the United States.¹⁰⁴

Courts will continue to face questions about RICO’s ever-expanding application—fostering uncertainty for both RICO plaintiffs and potential defendants—for several reasons. First, RICO’s unfettered language¹⁰⁵ and incentivizing remedies have facilitated the statute’s evolution into a prosecutorial powerhouse, now frequently invoked against a broad spectrum of defendants reaching even the tobacco industry and the Catholic Church.¹⁰⁶ Second, increasing global economic interdependence and the rise of transnationalism have encouraged the proliferation of multinational corporations, thereby raising the likelihood that an organization defending a RICO claim will touch on foreign elements.¹⁰⁷ Third, RICO enterprises

“perceiving United States extraterritorial jurisdiction as a threat,” including “statutes that block enforcement of foreign laws, regulations, or court orders”).

101. *See, e.g.,* *Jose v. M/V Fir Grove*, 801 F. Supp. 349, 357 (D. Or. 1991) (“[T]he language and legislative history of RICO fail to demonstrate clear [c]ongressional intent to apply the statutes beyond U.S. boundaries.”).

102. *See, e.g.,* *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1050–51 (2d Cir. 1996) (noting that, while “[t]he RICO statute is silent as to any extraterritorial application,” RICO’s extraterritoriality may be determined by looking to precedent in international securities transaction and antitrust matters because “[c]learly, a corporate defendant that is a foreign entity is not for that reason alone shielded from the reach of RICO”).

103. *See id.* at 1052–53. The Eleventh Circuit adopted and broadened the Second Circuit’s version of the conducts test in finding that a RICO claim could apply only where the conduct alleged was “material to the completion of the *racketeering*” or the racketeering activity’s effects were “significant[ly]” experienced in the United States. *See* *Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1351–52 (11th Cir. 2008) (emphasis added) (requiring the domestic conduct be material to the completion of the *racketeering activity* as opposed to the completion of the *fraud*).

104. *See* *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663–65 (9th Cir. 2004).

105. *See, e.g.,* *Lynch, supra* note 27, at 661–62 (maintaining that RICO’s “broad draftsmanship . . . has left it open to a wide range of applications, not all of which were foreseen or intended by the Congress that enacted it”).

106. *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28 (D.D.C. 2011); *Hall v. Tressic*, 381 F. Supp. 2d 101, 103–04 (N.D.N.Y. 2005); Amended Complaint, *Hoatson v. N.Y. Archdiocese*, No. 05-CV-10467, 2006 WL 548198 (S.D.N.Y. Jan. 10, 2006).

107. *See generally* Jerry Harris, *The World Economic Crisis and Transnational Corporations*, 74 *Sci. Soc’y* 394, 396 (2010); Melvin L. Otey, *Why RICO’s Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 *J. INT’L BUS. & L.* 33, 35 (2015).

similarly capitalize on globalized infrastructure¹⁰⁸—including the convenience and anonymity offered by the internet—to coordinate global conduct and perpetuate criminal activities such as electronic financial transfers.¹⁰⁹ The simultaneous evolution of RICO’s broad application and the increasingly global specter of both legitimate and illegitimate business operations ensure that courts will increasingly face RICO complaints involving extraterritorial elements. Against this tempestuous background, RICO plaintiffs must now confront the revived presumption against extraterritoriality applicable to all federal statutes—including RICO—as resurrected by the Supreme Court in *Morrison*.

2. The Presumption Against Extraterritoriality for All Federal Statutes

In *Morrison*, the Supreme Court responded to courts applying federal statutes to hybrid cases implicating foreign conduct with a bright-line standard.¹¹⁰ Concluding that section 10(b) of the Securities Exchange Act (“the 1934 Act”) does not apply extraterritorially, the Court affirmed the Second Circuit’s dismissal¹¹¹ of a putative class action lawsuit against National Australia Bank (“National”).¹¹²

As a threshold matter,¹¹³ the Court revived the canon of construction against extraterritoriality,¹¹⁴ elevating it to a presumption applicable to every federal statute.¹¹⁵ This reaffirmed presumption mandates that all federal statutes will be presumed to be without extraterritorial application

108. See Otey, *supra* note 107, at 46 (“The current world climates offers criminal organizations new avenues and a wider berth to ply their odious trades, which enables them to simultaneously operate in disparate and diverse countries in ways they never could before.”).

109. See *id.* at 47; U.N. OFFICE ON DRUGS & CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT, at 29, U.N. Sales No. E.10.IV.6 (2010).

110. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 273 (2010).

111. *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 175–76 (2d Cir. 2008) (dismissing the complaint where the acts committed domestically did not “comprise[] the heart of the alleged fraud”).

112. *Morrison*, 561 U.S. at 273. Plaintiffs, Australian investors, brought an action for fraud arising from securities transactions made on foreign exchanges where investors purchased National’s shares shortly before a series of write-downs. *Id.* at 252–53. Plaintiffs alleged that National purchased HomeSide, a Florida mortgage services company, and thereafter publicized HomeSide’s success through misleading statements and manipulated its financial models to artificially enhance HomeSide’s value. *Id.* at 252. Plaintiffs alleged that just a few months later, National wrote down the value of HomeSide’s assets by over \$2 billion, causing a significant fall in National’s shares. *Id.*

113. Before arriving at the merits, the Court clarified the Second Circuit’s earlier decision by emphasizing that a statute’s extraterritoriality is a question of failure to state a claim, as opposed to lack of subject matter jurisdiction. *Id.* at 254–55.

114. The Court noted that this canon reflects the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). This notion “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters.” *Id.*

115. *Id.*

“unless there is the affirmative intention of the Congress clearly expressed,” and, under this presumption, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”¹¹⁶ However, pointing to Congress’s “clear indication” for the statute to reach foreign conduct may rebut this presumption.¹¹⁷ In *Morrison*, though, the Court found that the presumption was not defeated as to section 10(b) because, “on its face, [section] 10(b) contains nothing to suggest it applies abroad.”¹¹⁸

In an attempt to avoid falling victim to the presumption against extraterritoriality, the petitioners and the solicitor general advanced three arguments.¹¹⁹ Responding to the first contention that Congress’s inclusion of the definition of “interstate commerce”¹²⁰ amounted to sufficient congressional indication for the statute to reach foreign conduct, the Court held that “[t]he general reference to foreign commerce in the definition of ‘interstate commerce’ does not defeat the presumption against extraterritoriality.”¹²¹ The Court similarly rejected the contention that section 10(b) was rendered applicable extraterritorially by virtue of the statute’s general reference to “the United States and foreign countries,”¹²² concluding that “this fleeting reference” to where prices are quoted cannot overcome this presumption.¹²³ Finally, the Court rejected the position that section 30(a)’s provisions making specified sections of the 1934 Act applicable to foreign conduct¹²⁴ rendered section 10(b) generally applicable extraterritorially.¹²⁵ Specifically, the Court concluded that, because section 30(a) is silent as to section 10(b)’s application in its explicit contemplation of other sections’ extraterritorial applicability, allowing section 10(b) to reach foreign conduct would render section 30(a) meaningless.¹²⁶

116. *Id.* (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248). In reaffirming this presumption, the Court abrogated the Second Circuit’s conduct and effects test, referring to this approach as “judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court.” *Id.* at 261.

117. *Id.* at 255 (concluding that, without such clear indication, a statute cannot apply extraterritorially).

118. *Id.* at 262.

119. *Id.* at 262–65.

120. As defined in the 1934 Act, “interstate commerce” means “trade, commerce, transportation, or communication . . . between any foreign country and any State.” *Id.* at 262 (quoting 15 U.S.C. § 78c(a)(17) (2012)).

121. *Id.* at 263.

122. *Id.* (quoting 15 U.S.C. § 78b(2)).

123. *Id.* In dismissing this argument, the Court noted that the phrase “such transactions” explicitly referred to transactions that “are affected with a national public interest” and that here, there was nothing further to “suggest[] that this *national* public interest pertains to transactions conducted upon *foreign* exchanges and markets.” *Id.*

124. *Id.* Specifically, section 30(a) provides:

It shall be unlawful . . . to make use of . . . any means or instrumentality of interstate commerce for the purpose of effecting an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe.

15 U.S.C. § 78dd(a).

125. *Morrison*, 561 U.S. at 263–64.

126. *Id.* at 265.

After decisively concluding that section 10(b) cannot overcome the presumption against extraterritoriality, the Court confronted an additional obstacle: whether the complaint in fact required an impermissibly extraterritorial application of section 10(b).¹²⁷ Conceding that “it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States,” the Court instructed that, in such hybrid cases, additional analysis is required because the presumption against extraterritoriality is not “self-evidently dispositive.”¹²⁸ Thus, when a statute cannot overcome the presumption, lower courts must discern its legislative “focus” to determine whether the case involves sufficient domestic conduct to survive dismissal.¹²⁹ Because “the object of the statute’s solicitude”¹³⁰ may only apply domestically in these cases, *Morrison*’s second prong protects the reaffirmed presumption against extraterritoriality from devolving into “a craven watchdog . . . retreat[ing] to its kennel whenever *some* domestic activity is involved.”¹³¹

Applying the focus test to section 10(b), the Court first turned to the 1934 Act’s plain language and concluded that the statute regulated only domestic securities listed on domestic exchanges.¹³² Similarly, the Court concluded that the 1934 Act’s structure, specifically referencing section 30(a)–(b)’s instructions for the 1934 Act to reach foreign conduct in limited situations, reaffirmed the 1934 Act’s overall inapplicability to extraterritorial transactions.¹³³ The Court also gleaned support from related legislation passed by the same Congress, which explicitly focused on domestic transactions.¹³⁴ Furthermore, the Court noted that if Congress had intended the 1934 Act to apply extraterritorially, it would have addressed the ensuing conflicts with foreign laws because of the obvious “probability of incompatibility with the applicable laws of other countries.”¹³⁵ Synthesizing the findings produced by its two-prong inquiry, the Court concluded that section 10(b) could not apply to the foreign transactions

127. *Id.* at 266. Petitioners argued that only a domestic application was required because “Florida is where HomeSide and its senior executives engaged in the deceptive conduct of manipulating HomeSide’s financial models.” *Id.*

128. *Id.*

129. *Id.* In this way, the focus test may be geographically restrictive in its facilitation of the partial dismissal of claims that are outside the relevant statute’s focus.

130. *Id.* at 267.

131. *Id.* at 266.

132. *Id.* at 267. Seemingly, the Court took judicial notice of this, stating that “[w]e know of no one who thought that the Act was intended to ‘regulat[e]’ *foreign* securities exchanges—or indeed who even believed that under established principles of international law Congress had the power to do so.” *Id.* As the only support for this proposition, the Court noted that the Act’s registration requirements apply to securities traded exclusively on national exchanges. *Id.*

133. *Id.* at 268.

134. *Id.* at 268–69. The Court cited to the Security Exchange Commission’s interpretation of the Securities Act of 1933 as explicitly excluding sales occurring outside the United States. *Id.* at 269 (citing 17 C.F.R. § 230.901 (2009)).

135. *Id.* (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991)). The Court’s focus on the location of the transaction as the measure of the 1934 Act’s extraterritorial reach neatly avoided such conflicts with foreign securities regulations.

alleged because section 10(b) was devoid of congressional indication sufficient to overturn the presumption against extraterritoriality.¹³⁶ Furthermore, the Court found that section 10(b), focused on *domestic* transactions, could not apply to the case at hand where the domestic conduct alleged was only tangentially related to the transactions section 10(b) otherwise seeks to regulate.¹³⁷

Three years later, the Supreme Court affirmed the *Morrison* framework in *Kiobel v. Royal Dutch Petroleum Co.*¹³⁸ The Court considered whether and under what circumstances courts may recognize a claim under the Alien Tort Statute (ATS) involving conduct occurring outside the territorial United States.¹³⁹ Applying the first prong of the *Morrison* framework, the Court considered whether the statute's plain language or legislative history could rebut the presumption against extraterritoriality.¹⁴⁰ Finding nothing in the statute to overcome this presumption, the Court then applied *Morrison*'s second prong and concluded that, because "all the relevant conduct took place outside the United States," the case was impermissibly extraterritorial.¹⁴¹

The Supreme Court's treatment of the presumption against extraterritoriality, first resurrected in *Morrison* and then reaffirmed in *Kiobel*, reflects an emerging trend to dismiss foreign-cubed¹⁴² cases where a foreign plaintiff alleges violations committed by a foreign defendant in a federal court of the United States. Lurking behind this development is the position that fragile policy questions in the realm of international relations are best left to Congress's unique capabilities and vantage point.¹⁴³ Thus, *Morrison*'s first prong, mandating the application of the presumption against extraterritoriality absent clear congressional indication otherwise, restricts the judiciary's involvement in traditionally legislative matters, thereby "serv[ing] to protect against unintended clashes between our laws and those of other nations which could result in international discord."¹⁴⁴

136. *Id.*

137. *Id.*

138. 133 S. Ct. 1659 (2013). The litigation involved a group of Nigerian nationals living in the United States who alleged that several foreign corporations aided and abetted the Nigerian Government in committing violent atrocities in violation of the Alien Tort Statute (ATS). *Id.* at 1662–63; see 28 U.S.C. § 1350 (2006). The ATS provides district courts with jurisdiction to hear a "modest number of international law violations" but does not explicitly provide a cause of action. *Kiobel*, 133 S. Ct. at 1663.

139. *Kiobel*, 133 S. Ct. at 1662.

140. *Id.* at 1664.

141. *Id.* at 1669. Specifically, the Court noted that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Id.* (citation omitted).

142. The term "foreign-cubed" refers to cases in which (1) a foreign plaintiff sues (2) a foreign defendant for violating American laws based on conduct occurring (3) in a foreign country. See, e.g., *Morrison*, 561 U.S. at 283 n.11 (Stevens, J., concurring).

143. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259 (1991) (noting that Congress is best situated to "calibrate its provisions in a way that [courts] cannot").

144. *Id.* at 248.

Similarly, *Morrison*'s second prong, the focus inquiry, integrates this belief about the judiciary's role in foreign policy matters by preventing courts from wading uninvited into international waters.

II. WHEN DOES RICO REACH EXTRATERRITORIAL CONDUCT?: APPLYING *MORRISON* TO THE RICO CONTEXT

In *Morrison*'s wake, courts have largely agreed that RICO, silent as to its extraterritorial reach, applies only domestically.¹⁴⁵ But chaos reigns when courts undergo *Morrison*'s focus inquiry to determine when a RICO complaint is sufficiently domestic to survive dismissal.¹⁴⁶ Part II analyzes the divergent approaches taken by courts applying *Morrison*'s second prong, the focus test, to the RICO context. Part II.A presents the approach taken by courts looking to the RICO enterprise to determine when a case is impermissibly extraterritorial. Part II.B considers the predicate offenses approach and examines the Second Circuit's decision employing this method,¹⁴⁷ as well as the split this decision created within the Second Circuit.¹⁴⁸ Part II.C then examines the "pattern of racketeering activity" approach.

Before wading through the confusion resulting from the application of *Morrison*'s focus inquiry to RICO cases, it is worthwhile to take a minor detour through the Second Circuit decision *Norex Petroleum Ltd. v. Access Industries, Inc.*¹⁴⁹ While the *Norex* decision is not germane to resolving RICO's extraterritorial reach, *Norex* plays a key role in the RICO landscape for two reasons. First, the decision's broad, categorical language regarding RICO's extraterritorial application has allowed subsequent courts to evade *Morrison*'s clear-indication framework by merely citing to *Norex*.¹⁵⁰ Second, the *Norex* decision forms the basis of the Second Circuit's split regarding whether, and under what circumstances, RICO applies extraterritorially, which the Supreme Court has taken on in granting certiorari.¹⁵¹

145. See *infra* note 150 and accompanying text; see also Mark, *supra* note 10, at 544–45 (discussing "[t]he uniform holding by post-*Morrison* federal courts that RICO has no extraterritorial application").

146. See *infra* Part II.A–C (discussing the conflicting approaches taken by courts applying *Morrison* to RICO cases).

147. See *European Cmty. v. RJR, Inc. (RJR Nabisco I)*, 764 F.3d 129 (2d Cir. 2014).

148. Specifically, Part II.B looks to the *RJR Nabisco III* decision, the Second Circuit's subsequent decision denying rehearing on the merits, and the Second Circuit's divergent decision in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (*per curiam*).

149. 631 F.3d 29 (2d Cir. 2010).

150. See, e.g., *Borich v. BP, P.L.C.*, 904 F. Supp. 2d 855, 861–62 (N.D. Ill. 2012) (concluding that RICO does not apply extraterritorially); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 239–40 (S.D.N.Y. 2012) ("RICO, like the Exchange Act, is silent as to extraterritorial application and, in consequence, . . . the presumption against extraterritorial application governs in RICO cases."); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012); *In re Le-Nature's, Inc.*, No. 9-1445, 2011 WL 2112533, at *2 (W.D. Pa. May 26, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28 (D.D.C. 2011).

151. *RJR Nabisco IV*, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, 136 S. Ct. 28 (2015).

The *Norex* decision arises from a backdrop fitting for an international spy thriller: the complaint details an ambitious racketeering and money laundering scheme perpetuated to seize a substantial portion of the Russian oil industry.¹⁵² Just three months after the Supreme Court issued its *Morrison* ruling, the Southern District of New York applied the newly revived presumption against extraterritoriality and dismissed the alleged RICO violations as impermissibly extraterritorial.¹⁵³ On appeal, petitioner *Norex* maintained that RICO's predicate offenses, some of which contained explicit extraterritorial reach, were sufficient to overcome *Morrison*'s presumption against extraterritoriality.¹⁵⁴ The Second Circuit did not bite and instead affirmed the dismissal,¹⁵⁵ categorically concluding that RICO cannot apply extraterritorially because "RICO is silent as to any extraterritorial application."¹⁵⁶ Sidestepping the required analysis regarding RICO's congressional intent,¹⁵⁷ the Second Circuit instead borrowed from *Morrison*'s findings to summarily reject *Norex*'s argument that RICO's reference to "interstate or foreign commerce" was sufficient congressional intent to overcome the presumption against extraterritoriality.¹⁵⁸ Similarly, the Second Circuit concluded that *Morrison* compelled the rejection of the petitioner's argument: because the predicate offenses alleged explicitly possessed extraterritorial reach, "RICO itself possesse[d] an extraterritorial reach."¹⁵⁹ Without further analysis under the *Morrison* framework as to

152. *Norex*, 631 F.3d at 31.

153. *Norex Petroleum Ltd. v. Access Indus. Ltd.*, 540 F. Supp. 2d 438, 449 (S.D.N.Y. 2007).

154. *Norex*, 631 F.3d at 32.

155. *Id.* at 31–32. The Second Circuit noted that, in light of *Morrison*, the lower court should not have granted the defendant's motion to dismiss for lack of subject matter jurisdiction because the question of extraterritoriality implicates the merits of a case. *Id.* at 32.

156. *Id.* (citing *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)). In lieu of determining whether RICO contained adequate congressional intent to overcome *Morrison*'s presumption, the court relied on a pre-*Morrison* decision for the proposition that "RICO is silent as to any extraterritorial application." *Al-Turki*, 100 F.3d at 1051. *Al-Turki* contains no analysis for this conclusion regarding RICO's reach. *See id.*

157. *See supra* Part I.C (discussing the *Morrison* framework applicable to all federal statutes).

158. *Norex*, 631 F.3d at 32–33 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 262–63 (2010)) ("[E]ven statutes that contain broad language in their definitions of commerce do not apply abroad."). While both courts did in fact consider the function of each statute's commerce phrase as part of the extraterritorial question, the context in which these commerce phrases arose is markedly different. First, the *Morrison* Court was inquiring whether the definition section of the lone phrase "interstate commerce" was sufficient to render an entirely separate section of the 1934 Act applicable extraterritorially. *See Morrison*, 561 U.S. at 262–63. In comparison, the phrase advanced by the petitioner in *Norex* appears in RICO's operative section. *See* 18 U.S.C. § 1962(a)–(c) (2012). Additionally, the language used in the RICO statute—prohibiting racketeering associated with "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce"—differs from the "interstate commerce" phrase discussed in *Morrison*. Compare 18 U.S.C. § 1962(a)–(c), with *Morrison*, 561 U.S. at 262–63 (citing 15 U.S.C. § 78c(a)(17) (2012)).

159. *Norex*, 631 F.3d at 33. The Second Circuit's analysis of this aspect of petitioner's argument is confined to one explanatory parenthetical that briefly references the Supreme Court's decision in *Morrison* in which the Court rejected an argument that, because an

RICO's congressional intent, the Second Circuit then concluded that "the slim contacts with the United States alleged by Norex are insufficient to support extraterritorial application of the RICO statute."¹⁶⁰

The Second Circuit's *Norex* decision skirted the *Morrison* analysis: the panel failed to determine whether RICO contains congressional intent powerful enough to overcome the presumption against extraterritoriality—*Morrison*'s first prong. The Second Circuit also avoided discerning whether the court need only apply the statute domestically by discerning RICO's focus—*Morrison*'s second prong. Despite this anemic analysis, many courts have since cited *Norex*'s conclusion, regarding RICO's lack of congressional indication sufficient to overcome the presumption against extraterritoriality, in lieu of analyzing the statute as mandated by the *Morrison* ruling.¹⁶¹

A. The Enterprise Approach

The enterprise approach is one method employed by courts determining whether a RICO case is sufficiently domestic under the *Morrison* framework. In *Cedeño v. Intech Group, Inc.*,¹⁶² a private Venezuelan citizen sued a group of Venezuelan government officials and their associates, alleging a lucrative scheme to launder funds obtained by "fraud, extortion, and private abuse of public authority" through American banks.¹⁶³ In determining whether the complaint should be dismissed as impermissibly foreign, the court first found that RICO's focus was the "enterprise as the recipient of, or cover for, a pattern of criminal activity."¹⁶⁴ In support of this finding, the court emphasized RICO's broad purpose, emphasizing: "RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts. Rather, it prohibits the use of such a pattern to impact an enterprise [through RICO's operative section]."¹⁶⁵ Thus concluding that RICO's focus is the enterprise,¹⁶⁶ the court then granted the defendants' motion to dismiss

unrelated section of the 1934 Act contains explicit foreign application, section 10(b) should similarly apply extraterritorially. See *Morrison*, 561 U.S. at 263–64.

160. *Norex*, 631 F.3d at 33.

161. See *supra* note 150. Thus, because courts are in agreement as to RICO's inability to overcome the presumption against extraterritoriality, Part II only discusses cases undergoing *Morrison*'s second line of inquiry, the focus test.

162. 733 F. Supp. 2d 471 (S.D.N.Y. 2010).

163. *Id.* at 472.

164. *Id.* at 474. Before arriving at *Morrison*'s second prong, the focus inquiry, the court found that RICO does not apply extraterritorially by citing to pre-*Morrison* precedent for the proposition that "[t]he RICO statute is silent as to any extraterritorial application." *Id.* at 473 (quoting *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)).

165. *Cedeño*, 733 F. Supp. at 473–74.

166. The court noted that this finding was contrary to Second Circuit precedent. See *id.* at 474 n.3.

because “RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign.”¹⁶⁷

Similarly centering on the RICO enterprise alleged, a court in the Southern District of New York dismissed RICO claims stemming from an alleged global money laundering scheme as impermissibly extraterritorial.¹⁶⁸ Undergoing *Morrison*’s focus inquiry, the district court concluded that “[b]ecause the ‘focus’ of RICO is the ‘enterprise,’ a RICO ‘enterprise’ must be a ‘domestic enterprise.’”¹⁶⁹ The lower court then applied the “nerve center” test¹⁷⁰ to determine the geographic location of the enterprise and thus pinpointed the enterprise’s “‘brains,’ that is, where the [enterprise’s] decisions are made, as opposed to the ‘brawn,’ that is, how the [enterprise] acts.”¹⁷¹ Using this test, the court found that the enterprise, controlled by Russian and Colombian narcotics gangs and European currency exchange brokers engaging in foreign transactions, was located abroad and thus dismissed the RICO complaint.¹⁷²

The enterprise approach—and its borrowed nerve center test—is not without criticism. Some have noted that this approach is overly simplistic¹⁷³ and that the nerve center test loses its value when applied to RICO enterprises, which often are dispersed, shadowy, and international in nature.¹⁷⁴ Similarly, courts have highlighted the enterprise approach’s

167. *Id.* at 474. Additionally, the court rejected the contention that RICO applies extraterritorially in this case because the predicate offenses alleged contain express extraterritorial instructions. *Id.* at 473–74.

168. *See* *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011).

169. *Id.* at *4–5 (citing *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 266–67 (2010)).

170. *See* *Hertz Corp. v. Friend*, 559 U.S. 77, 92–95 (2010) (discussing the nerve center test as a method to ascertain a corporation’s location for jurisdictional purposes). Other courts applying the enterprise approach have similarly employed the nerve center test. *See, e.g.,* *Mitsui O.S.K. Lines Ltd. v. Seamaster Logistics Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012) (concluding that the focus of the RICO statute is the RICO enterprise and noting that “[t]he nerve center test provides a familiar, consistent, and administrable method for determining the territoriality of RICO enterprises in cases . . . which blend domestic and foreign elements”).

171. *RJR Nabisco*, 2011 WL 843957, at *6.

172. *Id.* at *7.

173. Critiquing the *Cedeño* court’s use of the enterprise approach, one commentator noted that “every [RICO] case is not so easy” factually, especially because RICO reaches informal enterprises operating transnationally. *See* Mello, *supra* note 82, at 1407. Thus, Mello argues, it is illogical to maintain

that Congress intended RICO to target an . . . enterprise that does much of its planning in the United States but operates entirely overseas, but did not intend it to apply to an informal enterprise that does its planning overseas but conducts . . . racketeering activities in the United States.

Id. at 1408.

174. *See, e.g., In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 733 (S.D.N.Y. 2013) (noting that the nerve center test “has little value [in the RICO context because] . . . [t]he decisionmaking of the alleged enterprise likely occurred in several different countries[] and might even have been located in each of the countries in which a defendant was headquartered”).

“absurd results”: a RICO defendant may escape liability by merely relocating its headquarters outside the United States.¹⁷⁵

B. The Predicate Offenses Approach

The predicate offenses approach is an alternative method used to determine RICO’s extraterritoriality. Part II.B.1 discusses this approach as used by courts undergoing *Morrison*’s second prong, the focus inquiry. Part II.B.2 then explores the Second Circuit’s expansive version of this approach, which allowed the court to conclude that RICO contains sufficient congressional intent to overcome the presumption against extraterritoriality.

1. The Standard Method

In *CGC Holding Co. v. Hutchens*,¹⁷⁶ a Colorado district court, endorsing the predicate offenses approach, looked to the location of the RICO predicate offenses allegedly committed by Canadian defendants in furtherance of a fraudulent loan scheme to determine whether the complaint was insufficiently domestic.¹⁷⁷ Denying the motion to dismiss, the court found that “the racketeering activity . . . was directed at and largely occurred within the United States.”¹⁷⁸ In support of this finding, the court contrasted the facts of the scheme alleged with those in *Norex* and *Cedeño*, “where the actors, victims[,] and conduct were foreign, and the connection to the United States was essentially incidental.”¹⁷⁹ Thus, by pinpointing the location of the predicate offenses alleged in the complaint, the predicate offenses approach allowed the court to neatly conclude that the case at bar was sufficiently domestic to survive dismissal.¹⁸⁰

2. The Second Circuit Twist and the Resulting Intracircuit Split

Embracing the predicate offenses approach, the Second Circuit held for the first time that, by incorporating offenses with express extraterritorial application as racketeering activity within the statute, Congress unequivocally indicated that RICO may in fact reach extraterritorial conduct.¹⁸¹ Plaintiffs, the European Community and twenty-six of its member states (EC), alleged that RJR Nabisco directed a global scheme to smuggle cigarettes and launder money by engaging in racketeering activities including wiring illicitly obtained funds to RJR in the United

175. *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 242–43 (S.D.N.Y. 2012).

176. 824 F. Supp. 2d 1193 (D. Colo. 2011).

177. *Id.* at 1200–03.

178. *Id.* at 1209.

179. *Id.* at 1210.

180. *See id.* This approach mirrors the now-abrogated conduct test in requiring courts to ascertain where the *conduct*, RICO’s predicate offenses, occurs. *See Leonard & Rodriguez-Albizu*, *supra* note 14, at 61–63.

181. *RJR Nabisco I*, 764 F.3d 129, 139 (2d Cir. 2014).

States and filing fraudulent documents with the U.S. Customs Service and Bureau of Alcohol, Tobacco and Firearms.¹⁸² Reversing the lower court's dismissal,¹⁸³ the Second Circuit issued an unsettling ruling that RICO's extraterritorial application is coextensive with its predicate offenses, which the court found clearly evinced congressional indication to reach foreign conduct.¹⁸⁴ This is noteworthy for two reasons: First, the Second Circuit conflated *Morrison's* discrete two-step approach, resulting in a ruling entirely dissimilar from every other court applying *Morrison* to RICO. Second, the decision created an intracircuit split by diverging from its earlier *Norex* decision, which both explicitly rejected the predicate offenses approach as well as unambiguously held that RICO has no extraterritorial application.¹⁸⁵ While the split in the Second Circuit is not central to resolving RICO's reach in that the controversy centers mainly on the propriety of the predicate offenses approach, this intracircuit tension is nevertheless significant to RICO jurisprudence and cannot be ignored in light of the Supreme Court's impending decision.¹⁸⁶

Before extending RICO's reach, the Second Circuit first criticized the lower court's interpretation of its *Norex* ruling in an attempt to retrospectively limit this categorical precedent, thereby making room for the decisions to coexist.¹⁸⁷ To achieve this maneuver, the Second Circuit emphasized that the lower court had misconstrued *Norex's* expansive language—"RICO is silent as to any extraterritorial application"¹⁸⁸—to incorrectly mean that RICO can *never* have extraterritorial reach in *any* of its applications.¹⁸⁹ Instead, the Second Circuit retrospectively announced that this finding merely indicates that RICO cannot apply extraterritorially in *every* application.¹⁹⁰

Having attempted to distance its ruling from *Norex's* categorical language, the Second Circuit then reached the first prong of the *Morrison*

182. *Id.* at 133–34.

183. Concluding that the enterprise was RICO's focus, the lower court dismissed the complaint because the RICO enterprise alleged was overwhelmingly foreign. *See European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 WL 843957 (E.D.N.Y. Mar. 8, 2011).

184. *RJR Nabisco I*, 764 F.3d at 136–37. For the RICO offenses stemming from predicate offenses lacking explicit extraterritorial application, the Second Circuit found that the EC had adequately alleged domestic conduct to survive the motion to dismiss stage. *See id.* at 141.

185. *See supra* notes 150–60 and accompanying text.

186. *RJR Nabisco I*, 764 F.3d at 129. Because the *RJR Nabisco I* decision solidified the use of the predicate offenses approach, the Supreme Court will likely rule on the propriety of this approach. Thus, the potential ruling on this approach will affect every court applying *Morrison's* focus test to RICO complaints.

187. *Id.* at 136–37. The lower court relied on *Norex* for the finding that RICO, silent as to its extraterritorial application, cannot overcome *Morrison's* presumption against extraterritoriality. *See RJR Nabisco*, 2011 WL 843957, at *4.

188. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010) (quoting *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)).

189. *RJR Nabisco I*, 764 F.3d at 136 (citing *Norex*, 631 F.3d at 33).

190. *Id.* Similarly, the court affirmed *Norex's* rejection of the predicate offenses approach—the very approach embraced by the Second Circuit court—by maintaining that *Norex* had merely meant to convey that RICO's predicates could not render the statute *generally* applicable extraterritorially. *Id.*

inquiry, concluding that “RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate.”¹⁹¹ In support of this finding that RICO’s predicate offenses overcome *Morrison*’s presumption against extraterritoriality,¹⁹² the panel noted that some of RICO’s predicate offenses “unambiguously and necessarily involve extraterritorial conduct.”¹⁹³ Because Congress had incorporated certain offenses, which can *only* apply extraterritorially, the panel concluded that Congress intended RICO to apply extraterritorially when a RICO claim implicates these offenses.¹⁹⁴ Based on this analysis, the panel reinstated the EC’s claims, thus extending RICO liability to foreign racketeering activity, and asserted that “[w]hen . . . a RICO charge is based on an incorporated predicate that manifests Congress’s clear intention to apply extraterritorially, the presumption against extraterritorial application of U.S. statutes is overcome.”¹⁹⁵

Further extending the predicate offenses approach, the Second Circuit held that RICO reaches foreign enterprises so long as they are shown to engage in predicate offenses containing explicit extraterritorial instructions.¹⁹⁶ With limited support or explanation, the panel reasoned that restricting RICO to only domestic enterprises would erode Congress’s explicit instructions for predicate offenses to apply extraterritorially in the event that a RICO enterprise was found to be foreign.¹⁹⁷ To protect against the catastrophic consequence of “giving foreigners carte blanche to violate the laws of the United States in the United States,”¹⁹⁸ the panel concluded that it was “far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes.”¹⁹⁹ With no other textual support, the panel maintained that its holding would allow courts to consistently analyze when conduct is actionable and protect against “incongruous results” that would otherwise

191. *Id.*

192. *See supra* note 161 and accompanying text.

193. *RJR Nabisco I*, 764 F.3d at 136 (emphasis added). The court noted that certain predicate offenses contain clear congressional instructions regarding when foreign conduct may be actionable. *Id.* For example, § 2332 of Title 18, a RICO predicate offense, criminalizes killing a “national of the United States, *while such national is outside the United States.*” *Id.* (quoting 18 U.S.C. § 2332(a) (2012)).

194. *Id.*

195. *Id.* at 137.

196. *Id.* at 137–38.

197. *Id.* Highlighting the lower court’s purported misstep in focusing on the RICO enterprise, the panel concluded that this reading “would presumably have RICO apply extraterritorially in the same manner when claims are brought under [different predicates where some contain explicit instruction to apply extraterritorially and others are silent as to this application], effectively erasing carefully crafted congressional distinctions.” *Id.* at 138.

198. *Id.* Exposing a flaw inherent to the enterprise approach, the panel observed that if an enterprise formed in another nation sent emissaries to the United States to engage in domestic murders, kidnappings, and violations of the various RICO predicate statutes, its participants would be immune from RICO liability merely because the crimes committed in the United States were done in conjunction with a foreign enterprise.

Id.

199. *Id.* at 139.

arise if wholly domestic activity was shielded from liability “simply because the defendant has acted in concert with a foreign enterprise.”²⁰⁰

Turning to the predicate offenses alleged in the complaint, the court noted that it need not “decide precisely how to draw the line between domestic and extraterritorial applications” of the predicate offenses alleged because “the conduct alleged here clearly states a domestic cause of action.”²⁰¹ In response to the predicate offenses of money laundering and material support of terrorism, the panel concluded that RICO reaches these foreign activities because both predicate offenses contain explicit extraterritorial instructions.²⁰² Next, the panel held that while the predicate offenses of mail fraud, wire fraud, and Travel Act violations were silent regarding their extraterritorial application, the EC had alleged sufficient domestic conduct to survive dismissal.²⁰³

Thereafter, petitioners sought rehearing on the grounds that the panel had left unanswered the question of whether, regardless of the geographic reach of § 1962, civil plaintiffs bringing an action under § 1964(c) were required to allege a domestic injury.²⁰⁴ The panel asserted that, because the statute does not require a showing of a domestic injury, § 1964(c) also applies to extraterritorial injuries to the extent that predicate offenses with clear foreign application have been alleged.²⁰⁵ In support of this conclusion, the panel explained that *Morrison*’s presumption against extraterritoriality is “primarily concerned with the question of what *conduct* falls within a statute’s purview.”²⁰⁶

These decisions produced a divisive intracircuit split because the panel strayed from the *Norex* precedent as to (a) whether RICO contains sufficient congressional indication for the statute to overcome *Morrison*’s rebuttable presumption through the incorporation of predicate offenses and (b) whether RICO’s focus is the RICO enterprise or the RICO predicate offenses required for liability. Moreover, in allowing RICO to reach conduct, enterprises, and even injuries occurring outside the territorial United States by looking solely to RICO’s predicate offenses, the Second Circuit diverged from every court applying *Morrison* to RICO claims.²⁰⁷

200. *Id.*

201. *Id.* at 142.

202. *Id.* at 139.

203. *Id.* at 140–42. The panel emphasized that the defendants directed the scheme domestically by laundering millions of dollars from New York, filed false documents in the United States with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms, and communicated and directed the alleged scheme by U.S. “interstate and international wires . . . so as to mislead the authorities within the United States.” *Id.* at 141.

204. *European Cmty. v. RJR Nabisco, Inc. (RJR Nabisco II)*, 764 F.3d 149, 150 (2d Cir. 2014).

205. *Id.* at 151–52.

206. *Id.* at 151.

207. *See supra* note 150 and accompanying text.

3. The Second Circuit Chooses Permanent Instability:
Solidifying the Second Circuit's Expansive
Predicate Offenses Approach

In an 8-to-5 decision, the Second Circuit denied RJR's bid for an en banc rehearing—choosing instead to preserve its decision rendering RICO's extraterritorial application coextensive with its predicate offenses.²⁰⁸ In October 2015, the Supreme Court granted certiorari in this case to resolve the split created by the court's expansive predicate offenses approach.²⁰⁹

a. Judge Hall's Concurring Opinion

Writing to deny rehearing, Judge Hall concluded that the Second Circuit was “sound” in both its interpretation of RICO and its broad application of the predicate offenses approach.²¹⁰ Judge Hall first emphasized that the panel's decision was faithful to *Morrison* in its conclusion that RICO's “predicate offenses,” containing explicit congressional intention to reach foreign conduct, overcame the *rebuttable* presumption against extraterritoriality.²¹¹ Next, Judge Hall tackled the tension posed by the panel's earlier *Norex* decision, which broadly concluded that RICO cannot reach foreign conduct because the “statute is silent as to any extraterritorial application.”²¹² Just as the Second Circuit panel had one year earlier,²¹³ Judge Hall restricted *Norex*'s broad holding to mean that “RICO's clear manifestation of intent that *some* of its provisions apply to foreign conduct permits extraterritorial application of RICO in those situations, but does not justify” the statute's extraterritorial application in every single instance.²¹⁴ In support of this rereading, Judge Hall merely concluded that interpreting *Norex*'s holding as foreclosing RICO's extraterritorial application in every instance would be “flatly incorrect, or at least misleading,” given that some of the predicate offenses contain references to extraterritorial conduct.²¹⁵ Similarly, Judge Hall reinterpreted *Norex*'s rejection of the contention that RICO's predicate offenses render RICO applicable to foreign conduct as meaning that *Morrison* forecloses the extraterritorial application of RICO in *every* context based on these predicate offenses.²¹⁶ In support of this post hoc interpretation, Judge Hall summarily concluded that, if the sentence alternatively meant that RICO could *never* apply extraterritorially despite certain predicate offenses containing extraterritorial instructions, “one

208. RJR Nabisco III, 783 F.3d 123, 125 (2d Cir. 2015).

209. RJR Nabisco IV, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, 136 S. Ct. 28 (2015).

210. RJR Nabisco III, 783 F.3d at 125 (Hall, J., concurring).

211. *Id.* In so concluding, Judge Hall conflated *Morrison*'s clear-indication framework, analyzing whether the statute at hand contained congressional intent sufficient to overcome *Morrison*'s presumption against extraterritoriality, with *Morrison*'s focus inquiry, measuring RICO's reach with its predicate offenses.

212. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

213. *See supra* Part II.B.2.

214. RJR Nabisco III, 783 F.3d at 127.

215. *Id.* at 126.

216. *Id.* at 127.

would wonder why the panel came to that conclusion” because “the assertion would cry out for further explanation.”²¹⁷ As in the panel’s earlier decision in the litigation,²¹⁸ Judge Hall thus retrospectively tethered *Norex*’s broad language to the facts of the case in an attempt to alleviate the tension posed by these rulings.

b. Dissenting Opinions

The panel’s opinions dissenting from the decision to deny rehearing illuminate the predicate offenses approach.²¹⁹ Judge Cabranes first wrote to emphasize that the panel’s decision to preserve the predicate offenses approach would encourage an “end-run around the revived presumption against extraterritoriality” by allowing courts to focus on Congress’s intention in the statutes incorporated by reference (RICO’s predicate offenses) instead of inquiring into Congress’s intention as to RICO itself.²²⁰ Judge Cabranes disagreed with this approach: “This reasoning conflates the question of whether RICO applies extraterritorially with whether the statute’s definition of ‘racketeering activity’ includes predicate offenses that can be charged abroad.”²²¹

Penning the lengthiest dissent, Judge Raggi argued that the majority’s decision “untethers RICO from its mooring on United States shores and concludes, for the first time, that the statute reaches overseas . . . so long as one predicate act is alleged that references conduct that could be prosecuted under a criminal statute.”²²² Turning first to the intracircuit conflict created by *RJR Nabisco* and *Norex*,²²³ Judge Raggi explicitly disagreed with the majority’s recasting²²⁴ of *Norex*’s “categorical” language and instead maintained that this language compelled the conclusion that RICO’s predicate offenses may authorize extraterritorial jurisdiction “for prosecutions under the referenced proscribing criminal statutes, not for RICO claims alleging such predicates.”²²⁵ Furthermore, Judge Raggi maintained that the *Norex* decision should not have been dismissed as factually distinct because both complaints specifically alleged violations of the money laundering statute, a RICO predicate offense that explicitly authorizes extraterritorial jurisdiction.²²⁶

217. *Id.*

218. *See supra* Part II.B.2.

219. *See infra* Part III.A.2 (critiquing the predicate offenses approach).

220. *RJR Nabisco III*, 783 F.3d at 129 (Cabranes, J., dissenting).

221. *Id.* Judge Cabranes further noted that the EC’s success would be regarded as a “pyrrhic victory” because these foreign citizens could now be subject to RICO violations. *Id.* at 128–29.

222. *Id.* at 131 (Raggi, J., dissenting).

223. *Id.* at 133–34. Judge Raggi affirmed *Norex*’s conclusion that RICO cannot apply extraterritorially because it is silent as to congressional intent and asserted that the panel faithfully applied the *Morrison* framework. *Id.*

224. *See supra* note 214 and accompanying text.

225. *RJR Nabisco III*, 783 F.3d at 134 (Raggi, J., dissenting).

226. *Id.* at 135. Judge Raggi directly referenced the panel’s contention that *Norex*’s broad language should be limited to the facts alleged in that case because the *Norex* case, devoid of predicate offenses with explicit extraterritorial application, did not present an opportunity for

Next, Judge Raggi disagreed with the panel's reliance on RICO's predicate offenses as the vehicle to determine RICO's extraterritorial application for several reasons. First, Judge Raggi maintained that *Morrison* precluded reliance on congressional intent found within RICO's predicate offenses as sufficient affirmative indication for the entire RICO statute to apply extraterritorially.²²⁷ Refuting the Second Circuit's contention that ignoring certain predicate offenses' extraterritorial instructions would render meaningless Congress's decision to incorporate these offenses, Judge Raggi suggested that Congress may have referenced these offenses so that a civil plaintiff could satisfy the racketeering pattern requirement²²⁸ by alleging a foreign predicate offense within an otherwise wholly domestic pattern of activity.²²⁹ Next, Judge Raggi characterized the Second Circuit's concern that a "defendant associated with a foreign enterprise" could "escape liability for conduct that indisputably violates a RICO predicate" as "rais[ing] a false alarm" because the United States may rely on § 2332 to initiate such a prosecution.²³⁰

Moving past these arguments, Judge Raggi then emphasized the need for rehearing "to clarify how courts should distinguish RICO's domestic and extraterritorial applications."²³¹ Now, RICO litigants in the Second Circuit are forced to make sense of a decision that at once proclaimed that RICO applies extraterritorially to the extent a claim alleges extraterritorial predicate offenses while simultaneously holding that the EC's RICO claims were sufficiently *domestic* because the EC alleged predicates that occurred domestically within the United States.²³² Judge Raggi concluded that, without first determining RICO's proper focus as required by *Morrison*, the panel's sole "reliance on individual predicate acts to determine whether a RICO claim is domestic or extraterritorial is at odds with *Morrison*, *Norex*, and our RICO jurisprudence."²³³

the panel to decide whether RICO can apply extraterritorially based on such predicate offenses. *See id.* at 128–30.

227. *Id.* at 135. Judge Raggi argued that *Morrison* "declined to recognize such speculative reasoning as a substitute for Congress's clear expression of affirmative intent." *Id.* Central to Judge Raggi's disagreement with the *RJR Nabisco I* panel's contention that the predicate acts are RICO's focus is the panel's correlative assumption, implicit in the panel's focus on the predicate acts, that RICO merely "adds new criminal and civil consequences to the predicate offenses." *Id.* at 138 (quoting *RJR Nabisco I*, 764 F.3d 129, 135 (2d Cir. 2014)).

228. *See supra* Part I.B (discussing RICO's requirements).

229. *RJR Nabisco III*, 783 F.3d at 135 (Raggi, J., dissenting).

230. *Id.* at 136 (quoting *RJR Nabisco I*, 764 F.3d at 139).

231. *Id.* at 139.

232. *Id.*

233. *Id.* Thus, Judge Raggi called upon the Supreme Court to clarify RICO's focus or resolve the tension among the Second Circuit's precedent regarding the role of RICO's predicate offenses when determining the statute's extraterritorial application. *Id.*

C. *The Pattern of Racketeering Activity Approach*

In *United States v. Chao Fan Xu*,²³⁴ the Ninth Circuit endorsed the pattern of racketeering activity approach to determine RICO's reach in a multinational context.²³⁵ In *Chao Fan Xu*, four Chinese nationals appealed their RICO convictions stemming from a global scheme to steal millions of dollars from the Bank of China and to evade prosecution through immigration fraud in the United States.²³⁶ The first part of this scheme involved the defendants, employees at the Bank of China, engaging in various types of fraud, including speculating on foreign exchanges, that resulted in a loss of \$147 million to the Bank of China.²³⁷ Next, defendants entered into fraudulent marriages, falsified immigration documents, and fled to the United States with illegally obtained funds to evade Chinese law enforcement upon Bank of China's discovery of the fraudulent scheme.²³⁸ Affirming the defendants' RICO convictions,²³⁹ the Ninth Circuit found that the district court had properly applied RICO to the case at hand because a central portion of the convicted pattern of racketeering activity, RICO's focus,²⁴⁰ was "executed and perpetuated in the United States."²⁴¹

Acknowledging that *Morrison's* focus inquiry is "far from clear-cut" in the RICO context, the Ninth Circuit noted that courts had divided into two distinct camps: one that maintained that the enterprise is RICO's focus and one that looked to the racketeering activity alleged.²⁴² The Ninth Circuit blurred RICO's boundary further and formed a third camp, emphasizing RICO's "pattern of racketeering activity"—the "heart of any RICO complaint"—as the proper metric to measure RICO's reach.²⁴³ In support of this new approach, the court turned to RICO's legislative history, finding that it contained "express legislative intent to punish patterns of organized

234. 706 F.3d 965 (9th Cir. 2013).

235. *Id.* at 975.

236. *Id.* at 974.

237. *Id.* at 972–74. Defendants used the proceeds of these fraudulent activities to purchase real estate in North America and fund several gambling trips to Las Vegas made possible by wire transfers of \$80 million from Hong Kong to the United States. *Id.*

238. *Id.* at 972, 978.

239. Unlike the previous cases analyzed in this Note, *Chao Fan Xu* involves the extraterritorial application of RICO in the criminal context. Nevertheless, the inquiry undertaken by courts faced with civil or criminal applications of RICO in *Morrison's* wake is identical: the *Chao Fan Xu* court took note of this and concluded that the civil RICO cases relied on by the court were still "faithful to *Morrison's* rationale." *Id.* at 974. The analyses are similar because criminal and civil RICO cases are built upon the same substantive RICO framework. See 18 U.S.C. § 1962 (2012).

240. *Chao Fan Xu*, 706 F.3d at 975. The Ninth Circuit interpreted *Morrison* as "fram[ing] the extraterritorial inquiry in terms of 'the "focus" of congressional concern' in enacting the statute." *Id.* (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 261, 266 (2010)). However, beyond citing to precedent, such as *Norex*, for the proposition that RICO is silent as to its extraterritorial application, the Ninth Circuit did not engage in its own analysis of whether the statute in fact contained congressional intent. See generally *id.* at 975–79. Thus, the Ninth Circuit failed to properly apply *Morrison's* first line of analysis.

241. *Id.* at 979.

242. *Id.* at 975.

243. *Id.* (quoting *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 154 (1987)).

criminal activity in the United States,”²⁴⁴ thus making it “highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country.”²⁴⁵ Further emphasizing the central role of this element, the court noted that each of RICO’s operative sections prohibit activities conducted through or derived from “a pattern of racketeering activity.”²⁴⁶ Finally, the court noted that the enterprise approach, and its use of the nerve center test, was likely to produce “artificially simplified results” or to fail to provide a clear answer in less than clear-cut cases.²⁴⁷ For example, if the court applied the enterprise approach to the case at bar, where the “brains” of the enterprise were located in Asia but the entire enterprise violated U.S. law, there would be “no necessary or . . . even probable connection between where the RICO enterprise makes its decisions and whether the application of RICO to the racketeering activity at issue . . . was the sort of activity with which Congress would have been concerned.”²⁴⁸ Thus settling on the pattern approach, the Ninth Circuit affirmed the defendants’ convictions as falling within RICO’s ambit because the second part of the enterprise’s plan, occurring within the territorial United States, was essential to the success of the overall scheme.²⁴⁹

Similarly, the district court in *Chevron Corp. v. Donzinger*²⁵⁰ evaluated whether a case was impermissibly extraterritorial by looking to the pattern of racketeering activity alleged: “If there is a domestic pattern of racketeering activity aimed at or causing injury to a domestic plaintiff, the application of [RICO’s operative section] would not [be] an extraterritorial application of the statute.”²⁵¹ Embracing the general approach employed in

244. *Id.* at 978.

245. *Id.*

246. *Id.* at 977–78 (citing 18 U.S.C. § 1962(a)–(c) (2012)).

247. *Id.* at 977 (quoting *Mitsui O.S.K. Lines Ltd. v. Seamount Logistics, Inc.*, 871 F. Supp. 2d 933, 940 (N.D. Cal. 2012)). Further rendering the nerve center test inapplicable, the *Chao Fan Xu* court quoted *Morrison* to emphasize that these “harder” cases that evade the simplistic nerve center test arise frequently: “[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States.” *Id.* (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010)). In support of this proposition, the court cited to a hypothetical proffered by the *Chevron* court: the nerve center test would permit RICO claims against one enterprise located domestically while barring claims against an identical enterprise, located extraterritorially, despite the fact that both enterprises engaged in identical racketeering activity within the United States. *Id.* (citing *Chevron Corp. v. Donzinger*, 871 F. Supp. 2d 229, 240–42 (S.D.N.Y. 2012)).

248. *Id.* (alteration in original) (quoting *Chevron*, 871 F. Supp. 2d at 243).

249. *Id.* at 979. Specifically, the Ninth Circuit noted that the immigration fraud was essential to the success of the defendant’s scheme as it would have allowed the defendants to evade Chinese law enforcement while safely living in the United States with their illegally obtained proceeds. This outcome has led some scholars to praise this approach as “allow[ing] redress of conduct that occurred in the United States and potentially avoid[ing] the gross inequity of allowing foreign nationals in the United States to violate American law with impunity.” Otey, *supra* note 107, at 57.

250. 871 F. Supp. 2d 229 (S.D.N.Y. 2012).

251. *Id.* at 245.

CGC Holding,²⁵² the court emphasized that this approach “would afford a remedy to a U.S. plaintiff who claims injury caused by domestic acts of racketeering activity without regard to the nationality or foreign character of the defendants or the enterprise.”²⁵³ The court further bolstered this approach by referencing RICO’s legislative history, contending that RICO was intended to “protect[] American victims at least against injury caused by the conduct of the affairs of enterprises through patterns of racketeering activity that occur in this country.”²⁵⁴

The *Chevron* court then teased out the flaws inherent to the enterprise approach.²⁵⁵ In particular, the court disagreed with the *Cedeño* court’s contention that “RICO evidences no concern with foreign enterprises,” finding this unlikely “if the prohibited [RICO] activities injured Americans in this country and occurred here,” given that “foreign enterprises have been at the heart of precisely the sort of activities . . . that were exactly what Congress enacted RICO to eradicate.”²⁵⁶ Moreover, the court challenged the administrability of the enterprise approach, noting that importing the corporate jurisdictional nerve center test is “questionable” because, for example, RICO liability does not even require that the RICO enterprise is a “defendant charged with wrongdoing.”²⁵⁷

Following *Chevron*’s pattern of racketeering activity approach, a D.C. federal district court in *Hourani v. Mirtchev*²⁵⁸ dismissed as impermissibly foreign a RICO complaint because the pattern of racketeering activity occurred largely in Kazakhstan.²⁵⁹ Citing *Chao Fan Xu*, the court found that “RICO’s statutory language and legislative history support the notion that RICO’s focus is on the pattern of racketeering activity.”²⁶⁰ Thus, looking to the pattern of racketeering activity alleged, the court dismissed the RICO violations and concluded that “the predicate acts that proximately caused Plaintiffs’ injury . . . were squarely extraterritorial and therefore outside of RICO’s reach.”²⁶¹

252. The *CGC Holding* decision embraced the predicate offenses approach, while the *Chevron* court ultimately looked to the pattern of racketeering activity alleged. Compare *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1209–10 (D. Colo. 2011), with *Chevron*, 871 F. Supp. 2d at 245 (finding that the “focus properly is on the pattern of racketeering activity”). The *Chevron* court blurred the fine distinction between these two approaches by announcing its “general” approval of the method of discerning where the racketeering activity occurred (whether singularly or as a pattern). *Chevron*, 871 F. Supp. 2d at 245.

253. *Chevron*, 871 F. Supp. 2d at 244–45.

254. *Id.*

255. *Id.* at 241–42.

256. *Id.* The court specifically referenced the Italian Mafia, La Cosa Nostra, which operated in part out of Sicily. See *id.*; see also *United States v. Casamento*, 887 F.2d 1141, 1148–49 (2d Cir. 1989).

257. *Chevron*, 871 F. Supp. 2d at 243.

258. 943 F. Supp. 2d 159 (D.D.C. 2013).

259. *Id.* at 167–68.

260. *Id.* at 165 (quoting *United States v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013)).

261. *Id.* at 168. Although the court had announced its intention to apply the pattern approach, the court instead undertook an approach resembling the predicate offenses

III. RESOLVING RICO'S REACH: A BETTER APPROACH

In *Morrison*'s wake, turmoil abounds. While courts widely agree that RICO does not apply extraterritorially, they are deeply divided about what transforms a case into an impermissibly extraterritorial application of the RICO statute.²⁶² Adding to this confusion, the Second Circuit found that RICO contains congressional intent sufficient to rebut *Morrison*'s presumption against extraterritoriality, thereby extending the statute for the first time to foreign enterprises engaged in foreign racketeering activity as well as to enterprises causing foreign injuries.²⁶³ These conflicting approaches leave unanswered the question of whether those suffering at the hands of a RICO enterprise will obtain relief or, alternatively, whether international organizations will be hauled into U.S. courts. This instability is significant: RICO litigation is common in U.S. federal courts,²⁶⁴ and its application continues to grow in breadth as courts consistently interpret RICO broadly, extending the statute far beyond La Cosa Nostra.²⁶⁵ Moreover, approaches such as the unprecedented one championed by the Second Circuit²⁶⁶ raise the possibility that legitimate businesses situated halfway around the world will face liability for acts committed on foreign soil without injuring an American citizen, transforming American courts into "the Shangri-La . . . for lawyers" all over the world.²⁶⁷ Thus, RICO's instability threatens to bring to life the concerns that the Supreme Court hoped to guard against with *Morrison*'s prophylactic framework.²⁶⁸

A. RICO's Focus

This Note concludes that a RICO case alleging either a domestic enterprise or a domestic pattern of racketeering activity is sufficiently domestic under *Morrison*'s framework.²⁶⁹ To reach this conclusion, this section exposes the flaws inherent to the predicate offenses approach, as well as the problems stemming from an approach centering solely on either the enterprise or the pattern of racketeering activity.

approach by evaluating the location and nature of each predicate offense alleged. *See id.* at 167–68.

262. *See supra* Part II.B.3 (discussing the Second Circuit's aberrant holding among otherwise-unanimous decisions regarding *Morrison*'s first prong).

263. *See supra* Part II.B.3.

264. *See supra* note 5 and accompanying text.

265. *See supra* Part I.B.2 (discussing RICO's broad language and the expansive view courts have adopted when applying the statute).

266. *See supra* Part II.B.2–3 (discussing the Second Circuit's novel application of *Morrison* to the RICO context).

267. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 270 (2010).

268. *See supra* Part I.C.2 (discussing the policy considerations underlying the *Morrison* and *Kiobel* decisions).

269. This position is also advocated by the United States in an amicus brief filed in the latest installment of the RJR Nabisco litigation. *See* Brief for the United States as Amicus Curiae Supporting Vacatur, RJR Nabisco IV, 764 F.3d 129 (2d Cir. 2014), *cert. granted*, 136 S. Ct. 28 (2015) (maintaining that § 1962 does not focus merely on an enterprise but on the interaction of the RICO enterprise and the pattern of racketeering activity).

1. RICO's Dual Focus

Morrison mandates that courts discern the object of congressional solicitude when determining the extraterritorial application of an otherwise domestic statute.²⁷⁰ But RICO's complex legislative history makes clear that this unique statute cannot be forced into *Morrison*'s binary framework because unlike section 10(b) of the 1934 Act, RICO has more than just one singular focus. While section 10(b) centers on the domestic fraudulent transactions it expressly prohibits,²⁷¹ RICO prohibits conduct related to an enterprise as a proxy for accomplishing its principal concern: uprooting criminal organization's infiltration of the American economy.²⁷² Thus working by proxy to effectuate RICO's core purpose, Congress armed this multifaceted statute with two foci intended to be harnessed together in every RICO litigation: the pattern of racketeering activity and the enterprise.²⁷³ Embracing both elements as the statute's twin foci recognizes these complexities and avoids castrating its efficacy.

RICO's legislative history underscores the central importance of both requirements. Constitutionally barred from prohibiting the existence of the Italian American mafia as an entity,²⁷⁴ Congress resorted to prohibiting the activities, in connection with an enterprise, that are associated with such crime syndicates.²⁷⁵ An approach that recognizes only one of these elements as RICO's focus ignores the fact that Congress prohibited racketeering in relation to the enterprise—instead of merely prohibiting the criminal enterprise or the pattern of racketeering activity itself.²⁷⁶ Furthermore, RICO was explicitly enacted to promote “the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”²⁷⁷ This statement unambiguously recognizes the pattern of racketeering activity (“unlawful activities”) *when related* to RICO's enterprise (“those engaged in organized crime”) as central to RICO's goal of combating organized crime.²⁷⁸ This dual focus is further supported by Congress's vocal preoccupation with “long-term criminal conduct,” which prompted Congress to address the impact of the RICO enterprise's pattern of activity instead of

270. *See supra* Part I.C.2.

271. *See supra* notes 132–37 and accompanying text.

272. *See supra* notes 50–58 and accompanying text (discussing Congress's focus in enacting RICO and the rationale underlying the requirement that every RICO violation require a showing of a RICO enterprise and a pattern of racketeering activity).

273. *See supra* notes 50–56.

274. *See supra* note 55 and accompanying text.

275. *See supra* notes 55–58 and accompanying text.

276. *See supra* Part I.A (discussing the need for new law enforcement and evidence-gathering tools that go beyond merely prosecuting participants for already-prohibited offenses).

277. Organized Crime Control Act of 1970, Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 922, 923 (1970).

278. *See supra* notes 55–58 (discussing this approach taken during RICO's enactment).

“criminaliz[ing] isolated or discrete acts.”²⁷⁹ Finally, the plain language of the statute supports this dual approach as RICO’s operative section, § 1962, requires a finding of both elements for RICO liability.²⁸⁰

In addition to the ample legislative and textual support for this dual focus approach, looking solely to the enterprise as RICO’s focus would produce logistical consequences that are out of sync with the congressional intent at the heart of RICO’s enactment. First, the enterprise approach would allow a criminal enterprise to avoid liability by relocating the enterprise’s “brains” outside the United States while continuing to direct racketeering activity within the United States.²⁸¹ This approach fundamentally ignores RICO’s core purpose: Congress broadly conceived of RICO as a measure to eradicate the harmful effects of infiltration as produced by all criminal syndicates—not just those situated domestically.²⁸² Moreover, foreign enterprises, such as La Cosa Nostra,²⁸³ “have been at the heart of precisely the sort of activities—committed in the United States—that were exactly what Congress enacted RICO to eradicate.”²⁸⁴ Similarly, extending § 1962 to only cases involving domestic conduct and domestic enterprises would render meaningless those of RICO’s predicate acts containing express extraterritorial application.²⁸⁵

The fallibility of the enterprise approach is reinforced by the use of the nerve center test.²⁸⁶ This test is ill-suited to the nontraditional associations-in-fact and amorphous ad hoc groups falling under RICO’s reach.²⁸⁷ These enterprises do not resemble corporations: RICO enterprises may have no structure, no hierarchy, no meetings or general procedures and, significantly, may direct operations from multiple locations simultaneously, all of which may equally be the “brain” and the “brawn.”²⁸⁸ Thus, because

279. See *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 242 (1989); see also *supra* note 41 and accompanying text (discussing Congress’s desire to lead a powerful attack on all fronts).

280. See *supra* Part I.B (discussing RICO’s statutory mechanics); see also *supra* note 59 and accompanying text.

281. See *supra* INTRODUCTION; see also *Otey*, *supra* note 107, at 63–64; *supra* note 175 and accompanying text.

282. See *supra* Part I.B (discussing Congress’s fixation on infiltration); see also *supra* notes 85–87 and accompanying text (exploring the implications of RICO’s commerce phrase).

283. Indeed, the “pizza connection case,” one of the most memorable RICO cases, involved La Cosa Nostra’s decision to ship narcotics into the United States while operating out of Sicily. See *United States v. Casamento*, 887 F.2d 1141, 1148–49 (2d Cir. 1989). Similarly, one court has noted that, given RICO’s legislative history aimed squarely at the destructive threat of infiltration, it is “highly unlikely that Congress was unconcerned with the actions of foreign enterprises where those actions violated the laws of this country while the defendants were in this country.” *United States v. Chao Fan Xu*, 706 F.3d 965, 978 (9th Cir. 2013).

284. *Chevron Corp. v. Donzinger*, 871 F. Supp. 2d 229, 242 (S.D.N.Y. 2014).

285. See Brief for the United States as Amicus Curiae Supporting Vacatur, *supra* note 269, at 14–15.

286. See, e.g., *Mitsui O.S.K. Lines, Ltd. v. Seamasster Logistics, Inc.*, 871 F. Supp. 2d 933 (N.D. Cal. 2012).

287. See *Boyle v. United States*, 556 U.S. 938, 948 (2009); see also *supra* Part I.B.2 (discussing RICO’s enterprise requirement).

288. See *Boyle*, 556 U.S. at 946–48.

employing the nerve center test misapprehends the nature of RICO enterprises, this approach ultimately undermines Congress's intention to broadly protect American public safety and the American economy by reaching a myriad of enterprise associations.²⁸⁹

2. The Predicate Offenses Approach Is Wrong

It is contrary to *Morrison*'s mandate and unfaithful to RICO's legislative history to employ an approach that identifies RICO's predicate offenses as its focus. This method ignores Congress's explicit warning that merely addressing the unlawful activities of an enterprise will fail to effectively eradicate organized crime and, instead, will encourage criminal networks to flourish as the legal enforcement scheme is left merely to pick off fungible cogs from the organized crime wheel.²⁹⁰ Thus, the predicate offenses approach guts RICO from its core, reducing the statute to nothing more than the predicate offenses passively incorporated into the statute by reference.

In addition to overlooking RICO's core precepts, designating RICO's predicate offenses as the focus is incorrect for several further reasons. First, this approach mirrors the now-abrogated conduct test in directing courts to look to the geographical location of where the predicate offense was commissioned to determine whether the case is domestic or foreign in nature.²⁹¹ Next, the superficial simplicity of this method will encourage RICO plaintiffs merely toplead around this test to survive dismissal, cherry-picking which predicate offenses to allege based on the location of their commission. Furthermore, the predicate offenses approach encourages the very effects against which *Morrison* sought to zealously guard: allowing an entirely foreign-cubed case—where the defendants are foreign, the injury is foreign, and the pattern of racketeering activity is foreign—to survive dismissal as long as the RICO plaintiff alleges “magic” predicate offenses—offenses with explicit instructions to reach foreign conduct.

The Second Circuit's expansive version of this approach strays even further from RICO's legislative history and from the *Morrison* framework. The Second Circuit's predicate offenses approach directly conflicts with the *Morrison* framework, which directs courts to discern a statute's extraterritorial application by first discerning whether a statute contains affirmative congressional indication sufficient to overcome the presumption against extraterritoriality.²⁹² RICO's predicate offenses, many of which were already in existence at the time of RICO's enactment, do not meet this standard: clear indication for RICO to apply extraterritorially cannot be indirectly inferred from Congress's passive incorporation of predicate

289. See *supra* Part I.B (discussing RICO's legislative history).

290. See *supra* Part I.A.

291. See *supra* note 116 and accompanying text; see also *supra* note 180 and accompanying text (critiquing the predicate offenses approach for mimicking the conduct test).

292. See *supra* Part I.C (setting forth *Morrison*'s framework).

statutes.²⁹³ Similarly, the Second Circuit's logistical justification,²⁹⁴ maintaining that employing the predicate offenses approach will avoid incongruous results with the prosecution of the underlying predicate offenses, betrays the panel's unwillingness to faithfully recognize RICO as its own substantive offense.²⁹⁵

*B. RICO's Private Right of Action
Does Not Reach Foreign Injuries*

Morrison requires an additional, discrete inquiry to discern whether § 1964(c) applies extraterritorially. This section is entirely distinct from RICO's operative section: § 1964(c)'s remedial aim serves the separate function of providing redress for private injuries caused by violation of § 1962's substantive provisions.²⁹⁶ *Morrison* clarified that different sections of a single statutory framework may have separate aims²⁹⁷ and, thus, must be analyzed separately under *Morrison*'s two prongs.²⁹⁸ Moreover, the Court has observed that "the scope of the private right of action" may be "more limited than the scope of the statutes upon which it is based."²⁹⁹

Unlike Congress's explicit intent in creating a novel enforcement scheme embodied in § 1962, Congress's aim in creating § 1964(c) was to redress harm experienced by victims injured by RICO enterprises.³⁰⁰ This section's singular focus is reinforced by Congress's intentional molding of § 1964(c) on the civil action provisions of the federal antitrust laws, which courts have consistently interpreted as primarily intended to function as a compensation vehicle for injured competitors.³⁰¹ While there is legislative history unequivocally supporting Congress's fixation on rehabilitating injured American citizens, there is no legislative history or textual support indicating that this focus extends to injured *foreign* citizens.³⁰² Moreover, because the correct application of the *Morrison* framework to the RICO context may allow the statute to reach some foreign conduct,³⁰³ RICO's private cause of action must be limited to domestic injuries to avoid

293. Indeed, many of RICO's predicate offenses are incorporated passively by importing entire selections of the United States Code. *See supra* Part I.B (discussing the mechanics and structure of RICO); *see also supra* note 227 (emphasizing that this aspect of the predicate offenses approach does not conform to *Morrison*'s mandate).

294. *See* *RJR Nabisco I*, 764 F.3d 129, 138–39 (2d Cir 2014).

295. *See id.* at 137–40.

296. *See supra* Part I.B.3.

297. *See supra* Part I.C.2; *see also supra* note 133 and accompanying text (discussing *Morrison*'s separate treatment of section 10(b) and section 30(a)–(b) in evaluating their territorial reach).

298. *See supra* Part I.C.2.

299. *Chadbourn & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014).

300. *See supra* Part I.B.3 (discussing § 1964(c)'s legislative history).

301. *See supra* notes 97–98.

302. *See supra* Part I.B.3 (discussing § 1964(c)'s legislative history).

303. The dual focus advocated in Part III would allow RICO to reach some foreign elements provided that a RICO plaintiff sufficiently identified either a domestic enterprise or a domestic pattern of racketeering activity.

overextending the already expansively applied statute.³⁰⁴ Thus, a domestic injury requirement for § 1964(c) protects against conflicts between sovereign nations, which *Morrison* and *Kiobel* sought to guard against in resurrecting the presumption against extraterritoriality.³⁰⁵

CONCLUSION

Congress enacted RICO to protect American citizens and the American economy from the destruction caused by organized crime's infiltration of legitimate businesses. As the answer to the novel problem of infiltration, RICO offered effective evidence-gathering and enforcement tools as well as incentivized remedial provisions.³⁰⁶ Despite Congress's explicit intention for RICO to apply broadly, courts in a post-*Morrison* world have significantly handicapped RICO's once extensive reach. Courts have almost unanimously agreed³⁰⁷ that RICO's legislative history prohibits it from overcoming the revived presumption against extraterritoriality and thus have limited RICO's application by dismissing claims when a foreign enterprise or foreign pattern of racketeering activity is alleged. In light of the new face of organized crime—the transnational enterprise—these approaches dangerously stunt RICO's ability to adapt to the changing face of organized crime.

This Note advocates an alternative approach that embraces RICO's dual focus—the RICO enterprise and the pattern of racketeering activity—and concludes that a RICO claim is sufficiently domestic if it alleges either a domestic enterprise or a domestic pattern of racketeering activity. This alternative approach embraces *Morrison*'s mandate while remaining true to RICO's core intent by refusing to conform the statute to *Morrison*'s restrictive framework. Moreover, because this Note concludes that RICO's reach must be restricted to domestic injuries in the context of private actions, this Note faithfully embodies *Morrison*'s desire to discourage the judiciary from wading unwelcome into the murky waters of foreign relations.

304. See *supra* note 43 and accompanying text; see also Brief for the United States as Amicus Curiae Supporting Vacatur, *supra* note 269, at 32 (contending that § 1964(c) must be limited to domestic injuries because private plaintiffs, entitled to bring an action under this provision, may not “exercise the degree of . . . consideration of foreign governmental sensibilities generally exercised by the U.S. Government” when bringing a RICO claim on behalf of the United States (quoting *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 171 (2004))).

305. See *supra* Part I.C.

306. See *supra* Part I.B.

307. See *supra* Part II.B (discussing the Second Circuit's anomalous holding).