Ignoring Legislative Intent, Double Standard Or Protecting International Tension - Rico after RJR Nabisco

Hannah Tavella

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IGNORING LEGISLATIVE INTENT, DOUBLE STANDARD OR PROTECTING INTERNATIONAL TENSION? - RICO AFTER RJR NABISCO

The Italian mafia, known as La Cosa Nostra, was a force to be reckoned with during the 1960s. In an attempt to control the mob’s increasing activities, Congress enacted 18 U.S.C. §§ 1961-1968, specifically, § 1962, popularly known as the Racketeering Influenced and Corrupt Organization Act (hereinafter “RICO”), allowing government officials to finally take down the Italian Mafia. RICO “allows federal prosecutors to stitch together” crimes going back years into one single

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(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

RICO's reach within the court system has expanded since its inception in 1970 and now has various uses in both criminal and civil proceedings. Private plaintiffs can use RICO in civil proceedings because § 1964(c) of the Organized Crime Control Act affords a private right of action to private plaintiffs to sue for RICO violations. RICO also gives plaintiffs the right to sue not only for domestic violations, but foreign conduct as well. However, for civil plaintiffs, the foreign application for RICO violations has been limited by RJR Nabisco v. European Community, in which plaintiffs must prove a domestic injury to satisfy standing in order to bring a lawsuit, unlike its criminal counterpart. A careful analysis will show the addition of this domestic injury requirement goes directly against the legislative intent, fails to ease international tension, and fails to follow precedent by not ruling in accordance with § 4 of the Clayton Act.

Part I will provide history on the development of RICO, including the congressional intent behind why Congress developed the RICO Act and how the Act has been used since its inception. Part II will provide background on standing, what a plaintiff needs to establish when bringing a
RICO violation and how it differs in criminal and civil cases. Part III provides an overview of how courts have ruled in prior decisions involving RICO on legal issues other than extraterritorial use, including statute of limitations, accrual rules, and predicate act issues. Part IV then provides an overview of Court rulings on acts similar to RICO involving their extraterritoriality, more specifically in *Morrison v. National Austria Bank Ltd.*, *Kiobel v. Royal Dutch Petroleum Co.*, and *Pfizer, Inc. v. Government of India*. Part V will discuss the facts and analysis behind the most recent case, *RJR Nabisco v. European Community*. Lastly, Part VI will explore reasons why the domestic injury standard used for civil cases should have never been created, and why the Court should view government plaintiffs and private citizens in the same light with equal standing requirements.

I. DEVELOPMENT OF RICO

A. Congressional Intent

The RICO Act was passed as Title IX of the Organized Crime Control Act of 1970 with the intention to principally be used as a tool for handling specifically the problem of organized criminal groups infiltrating legitimate businesses. Since that time, the Act has barely been used for the purposes of fighting the mob’s infiltration of businesses, with only a few notable prosecutions using RICO for directly infiltrating legitimate businesses by organized criminals.
Justice.\textsuperscript{20} The Organized Crime Control Act of 1970 was largely based on the findings of this report.\textsuperscript{21} Even though the report made no suggestions on creating new law, this was the path Congress decided to follow.\textsuperscript{22}

When first creating RICO, Congress’ main focus was organized crime’s infiltration into legitimate fields of businesses and that focus remains true today.\textsuperscript{23} This was made clear in Senator McClellan’s speech when he proposed the new bill.\textsuperscript{24} Ultimately, creating RICO was seen as a “direct

\begin{itemize}
  \item \textsuperscript{20} See id. at 666 (describing Commission report to be one of “the most comprehensive evaluations of crime and crime control.”). This Commission was called the “Katzenbach Commission” and was highly successful in producing substantial legislation, mostly in controlling crime. \textit{Id.; see also PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, The Challenge of Crime in a Free Society, U.S. GOV’T PRINTING OFFICE (Feb. 1976), https://www.ncjrs.gov/pdffiles1/nij/42.pdf} (noting Commission’s official report). This Commission was created by President Lyndon Johnson in 1965. Exec. Order No. 11,236, 3 C.F.R. § 329 (1965).
  \item \textsuperscript{21} See Lynch, \textit{supra} note 19, at 667 (discussing report’s findings). There were three aspects of the report that were most relevant to the creation of the RICO Act. \textit{Id.} Those three aspects were “its understanding of what organized crime is, its emphasis on the danger of organized crime’s infiltration of legitimate institutions, and its recommendations for dealing with the problem.” \textit{Id.} The report defined organized crime as “a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments.” \textit{Id.} at 667. When elaborating on the second relevant aspect in the report, the Commission described that the organized criminals infiltrate legitimate businesses and labor unions. \textit{Id.} at 669. More specifically, the Commission emphasizes that organized crime “employs illegitimate methods-monopolization, terrorism, extortion, tax evasion- to drive out of control lawful ownership and leadership and to exact illegal profits from the public.” \textit{Id.} at 670. Lastly, their recommendations generally concerned creating “new investigatory tools for law enforcement, rather than [changing] the substantive criminal law.” \textit{Id.} at 670.
  \item \textsuperscript{22} See id. at 671 (highlighting Commission’s recommendation of no innovations to penal code). The Commission did state that the infiltration problem was one that could be dealt with through enforcement of already existing civil procedures and regulations against the illegal activities of organized criminals in operating legitimate businesses. \textit{Id.} at 672; see \textit{also PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, supra note 20, at 208 (listing other ways to deal with infiltration problem). The Commission noted state income tax enforcement, food inspectors, liquor authorities, and certain civil proceedings as other avenues to try and control the problem aside from creating the RICO Act. \textit{Id.}
  \item \textsuperscript{23} See Lynch, \textit{supra} note 19, at 674 (examining Senate’s primary focus). The Senate had other worries surrounding organized crime, such as its infiltration into labor organizations and its corruption within government agencies. \textit{Id.} at 675.
  \item \textsuperscript{24} See Lynch, \textit{supra} note 19, at 677 (noting speech). McClellan’s speech stated:
\begin{quote}
[O]rganized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation’s standards. . . . To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill . . . designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President’s Crime Commission.
\end{quote}
\textit{Id.}
"attack" on the penetration of legitimate organizations by organized crime.\textsuperscript{25} It was said that this Act was to only target illegitimate business, but that intention was not reflected by Congress's broad drafting of the Act.\textsuperscript{26} Congress's theme of broad drafting remained true as each critical term of each subsection was meticulously drafted.\textsuperscript{27} The reason for expanding RICO's use and keeping the text broad was driven by the fundamental, definitional, and criminological difficulties within the project Congress embarked upon.\textsuperscript{28}

Congress then turned to an already existing statute they knew would encompass their intentions in keeping the RICO Act's uses broad, § 4 of the Clayton Act.\textsuperscript{29} The Supreme Court has repeatedly stated the RICO Act was drafted to resemble the same values and limitations as the Clayton Act.\textsuperscript{30} For instance, both statutes are "designed to remedy economic injury by providing treble-damages, costs, and attorney's fees."\textsuperscript{31} RICO and § 4 of the Clayton Act also penalize the same type of injury stating "any person injured in his business or property by reason of a violation of § 1962 ... may sue ....\textsuperscript{32} "Congress consciously patterned the civil RICO portion of the statute after the Clayton Act."\textsuperscript{33}

\textsuperscript{25} See id. at 678 (explaining need to protect public).
\textsuperscript{26} See id. at 679 (explaining why Congress drafted RICO broadly). Senators Blakey and Gettings described the legislative history of RICO explaining that its objective in infiltrating legitimate businesses was not its only purpose. Id. at 680.
\textsuperscript{27} See Lynch, supra note 19, at 682-83 (discussing how RICO was drafted broadly). The drafters of RICO made sure specific words were defined and used broadly in order to encompass more than just one specific meaning. Id. at 682. For example, the bill broadly defined "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Id. Additionally, the drafters defined organized crime by listing a variety of crimes to which the prohibitions of the act applied (i.e. what it did), rather than what organized crime was. Id. at 683. Lastly, the bill made sure the individuals to which the Act applied was defined broadly by applying the Act to anyone who "participate[s], directly or indirectly, in the conduct of [an] enterprise's affairs," and not just the infiltrating gangsters. Id.
\textsuperscript{28} See id. at 685-95 (discussing definitional difficulties Congress faced). Some of the words and terms Congress had trouble defining were organized crime, legitimate business, infiltration, and pattern of racketeering. Id. at 685.
\textsuperscript{29} See infra note 146 and accompanying text (detailing identical language in Clayton Act and RICO's civil enforcement provisions).
\textsuperscript{30} See Agency, infra note 146 (highlighting similarities between Clayton Act and RICO); see also Holmes v. Sec. Inv't Prot. Corp., 503 U.S. 258, 267 (1992) ("We have repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act ..."), Sedima v. Imrex Co., 473 U.S. 479, 487 (1985) ("similar to the private damage remedy found in the anti-trust laws. ...[T]hose who have been wronged by organized crime should at least be given access to a legal remedy.").
\textsuperscript{32} See id. at 150 (discussing RICO's civil enforcement provision).
B. The Application of RICO: From First Uses in Court Through Today

It took three years for the RICO Act to have its first reported judicial opinion. Because the RICO Act was such a novelty, prosecutors were hesitant to push the statute’s limitations to its full potential; at first, the cases attacked the statute in broad terms rather than focusing on the interpretation of its specific language. Early RICO cases involved classic racketeering schemes directly involving legitimate economic activity or entering legitimate business by criminal means. Prosecutors were now able to bring cases they would not typically have jurisdiction over, and defendants, who usually would have been tried separately, can now be tried together under the same indictment.

The uses of RICO have greatly expanded from its singular intent to take down the Italian Mafia and the mafia’s infiltration of legitimate businesses. Since RICO’s existence, there have been 250 indictments containing RICO counts, with a little more than one-third of them involving criminal transactions. Some of these indictments involve charges

34 See Lynch, supra note 19, at 695 (discussing first RICO opinion). See also United States v. Amato, 367 F. Supp. 547 (S.D.N.Y. 1973) (detailing first reported judicial encounter with RICO); United States v. Cross, 474 F.2d 1045, 1046 (5th Cir. 1973) (describing first RICO indictment).
35 See Lynch, supra note 19, at 695 (analyzing how prosecutors originally handled RICO). Many of the first RICO opinions were focused on the constitutionality of the Statute and attacked it on a broad scale. Id. The reason why it focused on the constitutionality of the Statute was because Congress did not define the required relationship needed between the racketeering activity and an enterprise. Id. This was intentionally done by Congress because they wanted RICO to apply whenever there was any relationship whatsoever between the racketeering and the operation of a legitimate enterprise. Id.
36 See id. at 696 (considering early RICO cases); see, e.g., United States v. Campanale, 518 F.2d 352, 354 (9th Cir. 1975) (convicting local teamsters to force meat packers to use truck companies through intimidation); United States v. Stofsky, 527 F.2d 237, 239 (2d Cir. 1975) (charging officers of union accepting bribes to permit violations of collective bargaining agreements); United States v. Green, 523 F.2d 229, 231-32 (2d Cir. 1975) (dismissing RICO counts for large conspiracy among officers and truck company to steal seafood).
37 See Lynch, supra note 19, at 706 (highlighting unique effect of RICO’s broad drafting). Defendants with different types of involvements, big or small, can be tied into the same indictment. Id.
38 See generally, id. at 723-34 (detailing how RICO is being used today compared to its intended use); see also Daniel Hoppe, Racketeering After Morrison: Extraterritorial Application of Civil RICO, 107 NW. U. L. REV. 1375, 1377 (2013) (“Over time, law enforcement agencies and plaintiffs began using RICO to reach groups beyond the original aim of the statute, the American Mafia. RICO is now used as a tool against legitimate enterprises, white-collar criminals, and organizations with a social or political agenda, in addition to the American Mafia.”).
39 See Lynch, supra note 19, at 724 (discussing indictments). The number of opinions containing RICO claims is actually greater than 250 because they have appeared in the appellate court system as well. See, e.g., United States v. Sutton, 700 F.2d 1078, 1079 (6th Cir. 1983) (ruling on RICO claims brought against Carl Sutton); United States v. Elkins, 683 F.2d 143, 144 (6th Cir.
regarding narcotics, prostitution, government corruption, contracts and purchasing, and business crime. The RICO Act has moved far from where it started, and the courts have hesitated to use its broad interpretation in order to narrow its scope.

II. PLAINTIFF'S STANDING PURSUANT TO RICO CLAIMS: DIFFERENCES BETWEEN CRIMINAL AND CIVIL STANDING INVOLVING RICO

To meet the standing requirements, the plaintiff generally must prove they are entitled to bring a legal action against the defendant. When dealing with foreign conduct in criminal RICO cases, prosecutors only have to prove the defendant allegedly violated such provisions addressed in the RICO Act. There is no need to prove anything further when dealing with extraterritoriality; the court will find standing when the prosecution sufficiently pleads the facts and shows the illegal activity affected foreign commerce in some way.

The requirements necessary to plead a civil RICO case are more complicated than the requirements for a criminal RICO case. The Plaintiff's alleged injury must be caused by predicate acts that establish the defendant's pattern of racketeering. A RICO plaintiff must also be the intended target of the RICO scheme, meaning the defendant meant to "attack" the plaintiff's business or property. The Supreme Court recently

1982) (discussing RICO convictions); United States v. Hill, 646 F.2d 247, 248 (6th Cir. 1981) (highlighting RICO cases that have reached federal appellate courts).

40 See Lynch, supra note 19, at 724 (listing case categories in which RICO claims were brought).

41 See Racketeering-RICO In Need Of [R]eform [sic], supra note 3 (highlighting Supreme Court's narrowing interpretation of RICO); see also Scheidler v. Nat'l Organ. for Women, 537 U.S. 393, 397 (2003) (holding RICO could not stop anti-abortion activists unless proof of underlying crime). This case is only one example of the Supreme Court's effort to limit the plaintiff's use of RICO. Id.


44 See id. at 307 (explaining nexus necessary for affecting foreign commerce).

45 See Polatsek, supra note 42, at 3-6 (expanding requirements of civil RICO standing).

46 See id. ("Simply put, if the injury does not arise out of one of the enunciated predicate acts pursuant to 18 U.S.C. section 1961(1), a RICO plaintiff is generally without standing.")

47 See id. (outlining requirements for plaintiffs). Being affected by the fraudulent scheme perpetrated upon someone else will not give the plaintiff standing to bring a RICO claim. Id. If one is an intended beneficiary of the fraudulent acts, one will also generally be without standing to
made it even more difficult to plead a civil RICO case involving foreign conduct. Now, if a private citizen wants to bring a case involving foreign conduct or companies, he or she must prove a domestic injury occurred and that such injury is the main conduct in the case.

III. PRIOR DECISIONS INVOLVING RICO

Since RICO's existence, the Supreme Court has provided direction on various issues involving its specific procedural rules. This includes: RICO's statute of limitations rule, RICO's accrual rule, and rules on additional criminal conviction and racketeering activity requirements. Addressing these rules, the Supreme Court followed precedent involving §4 of the Clayton Act.

to a two-year statute of limitation, the district court granted Crown Life’s motion for summary judgment. The Third Circuit Court of Appeals reversed the District Court’s opinion, stating the applicable statute of limitations was the catch all “six-year limitation set up in Pennsylvania.” The Supreme Court granted certiorari to decide upon the “appropriate statute of limitation for civil enforcement actions brought under RICO.”

The Court started its analysis by determining whether there should be one federal statute of limitations or if it should vary by state. The Court settled on a uniform statute of limitations for civil RICO cases. The Supreme Court then had to decide what the uniform statute of limitations was going to be, so the Court looked to similar statutes for guidance. It examined the similarities between civil RICO requirements and § 4 of the Clayton Act, and determined § 4 offers the closest analogy. Because of the

imposed an “impossibly high annual production quota,” and then terminated the company when it failed to meet said quota. Id. Malley also alleges that Crown Life and Agency obstructed justice during discovery of the first lawsuit. Id.

54 Id. at 146. The district court compared the RICO statute of limitations to the limitations for fraud claims, reasoning it was the best analogy. Id.

55 See id.

56 See id.

57 See id.

58 See Agency, 483 U.S. at 146 citing Delcostello v. Teamsters, 462 U.S. 151, 158-59 (1983) (“In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to ‘borrow’ the most suitable statute or other rule of timelines from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.”). While looking to state law for the statute of limitations remains the “norm” for courts, “where federal law provides a closer analogy than any available state law and when the federal policies are at stake, the court has not hesitated to turn away from state law.” Id. at 148. Because previous courts have not adopted a consistent statute of limitations for RICO cases, the Court believes a uniform statute of limitations should be selected. Id. at 148-49.

59 See id. at 150 (explaining next step in court’s analysis).

60 See Agency, 483 U.S. at 150-53 (examining similarities between Clayton Act and RICO). The court reasoned,

[b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees. Both statutes bring to bear the pressure of “private attorneys general” on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury “in his business or property by reason of” a violation.

Id. at 151. The Court also noted the legislative intent behind enacting RICO, which included proposals for treble damages and a civil remedy for private damages suits based on § 4 of the Clayton Act. Id. at 152.
similarities, the court ruled civil RICO cases should have a four-year statute of limitations.  

Correspondingly, in *Klehr*, Marvin and Mary Klehr filed a civil RICO action against A.O. Smith Harvestore ("Harvestore"), alleging Harvestore committed several acts of mail and wire fraud causing injury to their business.  

Harvestore moved to dismiss the claim because it was filed almost twenty years after the acts were committed, which the district court and the United States Court of Appeals for the Eighth Circuit found the lawsuit untimely because of the violation of the statute of limitations. The Supreme Court granted certiorari to consider the civil RICO's accrual rule.

The Court first examined the circuit court's "last predicate act" rule, and held the rule was inconsistent with the ordinary Clayton Act rule believing the analogy between the two acts was helpful. The Court held that even though the private civil RICO right of action was modeled after the Clayton Act, it does not offer all the solutions when ruling on aspects of RICO. Affirming the Circuit Court's decision, the court explained it had

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61 See id. at 156 (concluding Clayton Act offered best "federal law analogy").

[T]he Clayton Act clearly provides a far closer analogy than any available state statute, and...that the federal policies that lie behind RICO and the practicalities of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions, [,] the most appropriate limitations period for the RICO actions.


Harvestore sold the Klehrs a special Harvestore brand silo that was used for storing cattle feed, which they bought in reliance on Harvestore's representations that it would keep oxygen out of the feed. *Id.* at 183-84. The Klehr's alleged that the representations were false; the silo did not keep the oxygen out of the feed and it became moldy and fermented and because the cows ate the feed there was a decrease in the milk production and profits. *Id.* at 184.

63 See *id.* at 184 (highlighting District Court's decision). The Klehrs argued that the lawsuit was timely because they did not discover the mold hanging in the silo until 1991 when they opened the silo wall and chopped through the feed. *Id.* at 185. The Eighth Circuit received the evidence *de novo* and held that the Klehrs suffered one single continuous injury and that they should have discovered the source of the injury well before August of 1989. *Id.*

64 See *id.* at 185 (explaining why Supreme Court granted certiorari). A circuit split forced the Supreme Court to consider RICO's accrual rule. *Id.* There are three Circuit Courts that used the "injury and pattern discovery" RICO accrual rule, while other Circuits have applied an "injury discovery" rule. *Id.* The Third Circuit has used the "last predicate" rule. *Id.*

65 See *Klehr*, 521 U.S. at 186-88 (examining last predicate rule as only one that could help Klehrs). The last predicate act rule states the limitations period beginning to run when a plaintiff knew, or should have known, a RICO claim existed. *Id.* at 186. The Court ruled that the last predicate act rule was not proper in this case because it created a limitations period longer than what Congress could have contemplated, and was inconsistent with the ordinary Clayton Act rule. *Id.* at 186-88. The Court reasoned that the Clayton Act was helpful because "it makes clear precisely where, and how, the Third Circuit's rule goes too far." *Id.* at 189.

66 See *id.* at 193 (acknowledging shortfalls of Clayton Act).
no reason to believe the lower court made any obvious or exceptional errors.67

Lastly, in Sedima, a Belgian corporation filed an action against Imrex Co., asserting RICO claims under § 1964(c), including mail and wire fraud.68 The district court and the court of appeals found the complaint failed for two reasons: (1) it did not allege an injury "by reason of a violation of section 1962," and (2) it did not allege the defendants had already been criminally convicted of the "predicate acts of mail and wire fraud or a RICO violation."69 The Supreme Court granted certiorari to clarify the various approaches taken by district courts on this important issue.70

The Court started its analysis by briefly reviewing the legislative history of the private treble damages action through House Judiciary Committee hearings and determined the civil right of action was mirrored after § 4 of the Clayton Act.71 The Court then looked to the language of the statute, holding that there is no predicate act requirement or criminal

67 See id. (refusing to look at Eighth Circuit application of its rule). The Court refused to consider the Eighth Circuit's application of the rule because it would be highly fact based and the writ of certiorari only permits it to decide the purely legal question of whether a claim accrues where the respondent continued to commit the act during the four-year period immediately preceding suit. Id.

68 See Sedima v. Imrex Co., 473 U.S. 479, 484 (1985) (explaining RICO claim). Sedima entered into a joint venture with Imrex to provide electronic components to a different firm where the buyer would order parts through Sedima and Imrex would obtain the parts in the U.S. and send them to Europe. Id. at 483-84. After the orders were complete, the two companies would split the net proceeds. Id. at 484. Imrex filled around eight million dollars in orders through Sedima, thus Sedima was convinced that Imrex was presenting inflated bills and cheating Sedima out of some of the proceeds. Id. The complaint also alleged common law claims of unjust enrichment, conversion, breach of contract, breach of fiduciary duty, and constructive trust. Id.

69 Id. at 484-86. The Court of Appeals reasoned:

[analogizing to the Clayton Act, which has been the model for § 1964(c), the court concluded that just as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege an "racketeering injury"- an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." Id. at 485. The court of appeals found the complaint did not allege the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation, which is required in a RICO violation complaint. Id.

70 See id. at 486 (analyzing purpose for certiorari).

71 See Sedima, 473 U.S. at 486-97 (reviewing RICO's legislative history to rule on issues). During the House Judiciary Committee, Senator Steiger suggested adding a private treble-damages action similar to that which is found in the anti-trust laws, reasoning it would enhance the effectiveness of title IX's prohibitions. Id. at 487. At that time, the American Bar Association also proposed an amendment based on § 4 of the Clayton Act, which was approved and described as "another example of the antitrust remedy being adapted for use against organized criminality." Id. (quoting 116 CONG. REC. 35295 (1970)).
conviction requirement.\textsuperscript{72} Relying on legislative intent, history, and § 4 of the Clayton Act, the Court reasoned there was no indication of any intent to add the above mentioned requirements to the private RICO action for treble damages and attorney fees.\textsuperscript{73}

VI. EXTRATERRITORIAL USE AND APPLICATION

Throughout the Supreme Court’s history of dealing with a statute’s extraterritoriality and whether a U.S. federal law can govern foreign injuries, there have been three seminal cases where the Court laid out a foundation for their decision in \textit{RJR Nabisco}.\textsuperscript{74} \textit{Morrison}, \textit{Kiobel}, and \textit{Pfizer} all dealt with statutes in which the court vigorously examined and determined each statute’s application extraterritorially.\textsuperscript{75} Even though these cases do not include the RICO Act, the Supreme Court and lower courts have used each one to examine and compare their analysis when ruling on the civil application of RICO.\textsuperscript{76}

\textsuperscript{72} See id. at 488-99 (highlighting reasons Court ruled there is no predicate act requirement). The Court first found there is nothing in the language of the statute that indicated that there was a prior conviction requirement. \textit{Id}. The Court denied the court of appeals ruling that the prior conviction requirement came from the term “violation,” which this Court determined only refers to a failure to adhere to legal requirements. \textit{Id}. The Court then looked to the legislative history, where it found that when relying on the Clayton Act model, private and governmental actions are entirely separate and that if Congress had intended to impose this type of requirement, they would have at least mentioned it at some point in the history. \textit{Id}. at 489-90. The Court also rejected the court of appeals’ reasoning that, “[i]nstead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against ‘respected and legitimate ‘enterprises.”” \textit{Id}. at 499. The Court then explained that Congress wanted to reach both legitimate and illegitimate enterprises and “[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.” \textit{Id}. at 499-500.

\textsuperscript{73} See id. at 499-500 (concluding no legislative intent to add requirements to RICO actions).


\textsuperscript{75} See \textit{Morrison}, 561 U.S. at 252-53 (determining whether §§ 10(b) and 20(a) of Securities and Exchange Act of 1934 applied extraterritorially); see also \textit{Kiobel}, 133 S. Ct. at 1662 (exploring whether court recognizes Alien Tort Act statute applies to conduct abroad); \textit{Pfizer}, 434 U.S. at 311 (determining whether § 4 of Clayton Act applied extraterritorially).

\textsuperscript{76} See, e.g., \textit{RJR Nabisco}, 136 S. Ct. 2090, 2100-02 (using \textit{Morrison} and \textit{Kiobel} as guidance in analysis of RICO Act); United States v. Belfast, 611 F.3d 783, 811 (11th Cir. 2010) (highlighting circuit court who used \textit{Morrison} in analyzing Torture Act); Norex Petroleum Ltd. v. Access Indus., Inc., 631 F.3d 29, 32-33 (2d Cir. 2010) (using \textit{Morrison} to analyze RICO relating to Russian oil company).
A. Morrison v. National Australia Bank, Ltd.

Morrison involved violations of § 10(b) and § 20(a) of the Securities Exchange Act of 1934. The complaint alleged that the defendant manipulated financial models to make rates of early repayment unrealistically low in order for their mortgage-servicing rights to appear more valuable than they actually were. The plaintiffs were all Australians who purchased stock in National’s Ordinary Shares and sued in the United States District Court for the Southern District of New York.

The court was tasked with determining whether the Securities Exchange Act provides a cause of action to foreign plaintiffs suing American and foreign defendants in connection with securities traded on foreign exchanges.

The court began their analysis by looking at whether Congress intended the statute to apply extraterritorially. The court found no clear or affirmative intent by Congress for this statute to apply extraterritorially.

The court then turned to the focus of the Securities Act and compared it to the circumstances of the case. The court held the plaintiff failed to state a
claim, and the court did not have the jurisdiction to hear the case because most of the conduct allegedly happened outside the United States and, as previously determined, the Securities Exchange Act did not apply extraterritorially.\textsuperscript{84}

\textbf{B. Kiobel v. Royal Dutch Petroleum Co., et al.}

Similarly, in \textit{Kiobel}, the court looked to whether they recognized a claim for violations of the Alien Tort Statute that occurred outside the United States.\textsuperscript{85} The complaint alleged that after the plaintiffs protested the environmental effects of Petroleum, the defendants enlisted the Nigerian government in efforts to violently stop the protests.\textsuperscript{86} The plaintiffs escaped the violence and fled to the United States for asylum, and after arriving, decided to sue the Royal Dutch Petroleum for the conduct that happened in Nigeria.\textsuperscript{87} The court needed to decide if they had jurisdiction over this claim and whether it gave rise to violations of the law of nations.\textsuperscript{88}

\textsuperscript{84} See \textit{Morrison}, 561 U.S. at 273 (stating holding of \textit{Morrison}). The court adopts the transactional test, which looks to whether the purchase or sale is made in the United States or the security is listed on a domestic exchange. \textit{Id.} at 275. Under this test, the transactions alleged in \textit{Morrison} all occurred in foreign locations, establishing the Acts inapplicability. \textit{Id.} at 268.

\textsuperscript{85} See \textit{Kiobel} v. Royal Dutch Petro. Co., 133 S. Ct. 1659, 1662 (2013) (highlighting issue of case); see also Temchenko, supra note 13 and accompanying text (stating language of Alien Tort Act).

\textsuperscript{86} See \textit{Kiobel}, 133 S. Ct. at 1662 (discussing allegations alleged in complaint). The plaintiffs were residents of Ogoniland (located in the Niger delta of Nigeria), where the defendants owned a company that was "engaged in oil exploration and production in Ogoniland." \textit{Id.} After they protested the oil company's practices, the defendants hired the Nigerian government to stop the protests. \textit{Id.} The "Nigerian military and police forces attacked the Ogoni villages, beating, raping, killing, and arresting residents and destroying their property." \textit{Id.} The plaintiffs allege the defendants helped the Nigerians do this by providing them "with food, transportation, and compensation" for their actions. \textit{Id.} at 1662-63.

\textsuperscript{87} See \textit{id.} at 1663.

\textsuperscript{88} See \textit{id.} (stating court's holding). The Alien Tort Statute provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." \textit{Id.} (alteration in original) (quoting 28 U.S.C. § 1350). The petitioners alleged the respondents "violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction." \textit{Id.} The United States District Court for the Southern District of New York dismissed four out of the seven claims but "[t]he Second Circuit court dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability." \textit{Id.} The Supreme Court then granted certiorari to consider the corporate liability and then, after oral arguments the supplemental briefs addressed the question of extraterritoriality. \textit{Id.}
Again, the court began with an analysis of whether there had been legislative intent to make this statute apply extraterritorially. In this case, the Supreme Court found that no such intent existed from the textual words of the statute and the history of its use had never applied the statute extraterritorially. Next, the Court looked to the conduct of the case and how the focus of the statute compared to the main conduct the complaint alleged. All the conduct in this case occurred outside of the United States, resulting in the plaintiffs' inability to sue a United States entity for conduct that occurred abroad, forcing the court to dismiss the case.


Lastly, in Pfizer, the United States Supreme Court was faced with determining whether § 4 of the Clayton Act allows foreign plaintiffs that were injured abroad to bring an action within the United States. The plaintiffs alleged in their complaint that the defendants “conspired to restrain and monopolize interstate and foreign trade in the manufacturing, distribution, and sale of broad spectrum antibiotics.” “Each [plaintiff] claimed that as a purchaser of said antibiotics,” they incurred injuries to their

89 See id. (noting court's first analysis). The court justified the presumption against extraterritorial application by stating, "the presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches" and "this presumption serves to protect against unintended clashes between our law and those of other nations which could result in international discord." Id. (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

90 See id. at 1665-69 (analyzing extraterritorially of Alien Tort Act). The court recognized that "any civil action" does not "suggest [the] application to torts committed aboard," and that "it is well established that the word 'any' or 'every'" does not overcome "the presumption against extraterritoriality." Id. at 1665. The Act's historical background only applied to cases which involved "violation of safe conducts, infringement of the rights of ambassadors, and piracy" none of which provide any intent of extraterritorial application or intent. Id. at 1666-69.

91 See Pfizer, Inc. v. Government of India, 434 U.S. 308, 309 (1979) (describing issue of case). Specifically, the Court was asked to determine whether a foreign nation is entitled to sue in the United States' courts for treble damages under the antitrust laws. Id. at 310. The plaintiffs were "the Government of India, the Imperial Government of Iran, and the Republic of the Philippines" and the defendants were "six pharmaceutical manufacturing companies." Id. The defendants allegedly violated sections 1 and 2 of the Sherman Act. Id. Among these violations, the plaintiff's alleged the defendants engaged in "price fixing, market division, and fraud." Id.
“business or property by the alleged antitrust violations and sought treble damages under § 4 of the Clayton Act.”

The Court began by looking at Congress’s intent to whom they considered was a “person” under § 4 of the Clayton Act. When examining legislative history, Congress intended “person” to be naturally broad and inclusive, meaning that it established “the right of anybody to sue who chooses to sue.” The Court held both the Sherman and Clayton Acts explicitly include the words “corporations and associations existing under or authorized by ...the laws of any foreign country.” Therefore, Congress did not intend for the treble-damages remedy to be available to plaintiffs only in our country. The Court reasoned that if § 4 of the Clayton Act serves to deny a foreign plaintiff who has been injured by an antitrust violation, the right to sue, it would defeat the Act’s purpose.

The Court concluded that a foreign nation “may sue for treble damages under the antitrust laws to the same extent as any other plaintiff.”

V. RJR NABISCO, INC., ET AL. V. EUROPEAN COMMUNITY, ET AL.

RJR Nabisco is the latest case the Supreme Court has ruled upon dealing with the extraterritorially application of RICO. In RJR Nabisco, the complaint alleged an organization which included Colombian and Russian drug traffickers smuggling narcotics into Europe. The complaint

95 Id.
96 See id. at 312 (looking at where court began their analysis).
97 See id. at 312-13. During the floor debates for this statute, the word “person” was being used interchangeably with other terms with an even broader connotation than was being given to “any party.” Id.
98 See id. at 313.
99 See Pfizer, 434 U.S. at 314 (arguing Congress’ intent).
100 See id. at 314-15 (explaining Court’s reasoning). § 4 of the Clayton Act has two purposes, one is “to deter violators and deprive them of ‘fruits of their illegality,’ and the other is ‘to compensate victims of antitrust violations for their injuries.’” Id. at 314. The Court also mentioned that “an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages.” Id. at 315.
101 See id. at 319-20 (stating Court’s conclusion). The Court also mentioned their conclusion does not interfere with any matter of foreign policy because it is already established that governments who are recognized by the United States and who are at peace with the United States can use their court system. Id.
102 See RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2090 (2016) (noting additional Supreme Court cases brought on this topic).
103 See id. at 2098 (stating complaint’s allegations). The complaint alleges a scheme using a series of transactions involving black-market money brokers, cigarette importers, and wholesalers to pay for large shipments of cigarettes into Europe. Id. It is also alleged that RJR Nabisco dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in
further alleges that RJR Nabisco engaged in a pattern of racketeering activity, including money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act.\textsuperscript{104} RJR Nabisco allegedly formed an association that engaged in interstate and foreign commerce, constituting as a RICO enterprise.\textsuperscript{105} The Court held there is a two-step analysis when determining RICO’s extraterritorial application; the first step being: “do RICO’s substantive prohibitions, contained in § 1962, apply to conduct that occurs in foreign countries?” and the second: “does RICO’s private right of action, contained in § 1964(c), apply to injuries that are suffered in foreign countries?”\textsuperscript{106}

In order to determine whether RICO’s substantive prohibitions apply to conduct that occurs in foreign countries, the Court again looked to the Congressional intent behind creating the law.\textsuperscript{107} The Court found “[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.”\textsuperscript{108} The Supreme Court further emphasizes that Congressional intent is not whether “Congress would have wanted” a statute to apply to foreign conduct, but rather, whether Congress had “affirmatively and unmistakably instructed that the statute [would] do so.”\textsuperscript{109} This created a presumption that statutes do not apply extraterritorially.\textsuperscript{110}

If the statute is not extraterritorial, the second step the court must take is to look at the statute’s focus to determine whether it involves a violation of international sanctions and infiltrated Brown & Williamson Tobacco Corporation to expand those illegal activities. \textit{Id.}

\textsuperscript{104} See \textit{id.} (explaining what RJR Nabisco complaint alleges).

\textsuperscript{105} See \textit{id.} at 2098 (highlighting allegations plead by European Community). When putting all the allegations together, the complaint alleges that RJR Nabisco violated all of RICO’s prohibitions. \textit{Id.} The European Community alleges they were damaged in various ways, including competitive harm to their cigarette business, lost tax revenue from black-market sales, harm to European financial institutions, currency instability, and increased costs to law enforcement. \textit{Id.}

\textsuperscript{106} \textit{Id.} at 2099. The Court started its inquiry by considering each of these questions individually beginning by looking to the law of extraterritoriality to guide them. \textit{Id.}

\textsuperscript{107} See \textit{id.} at 2100 (explaining how court should start analysis of extraterritoriality).


\textsuperscript{109} \textit{RJR Nabisco}, 136 S. Ct. at 2100. The Court emphasizes the importance of finding clear and unequivocal congressional intent in order for them to conclude that the statute reaches activities abroad. \textit{Id.}

\textsuperscript{110} See \textit{id.} at 2100-101 (highlighting why courts have presumption). The court gave several reasons why the Supreme Court has set up such a presumption. \textit{Id.} First, it serves to avoid international discord that can result from United States law applying to conduct in foreign countries. \textit{Id.} Secondly, it reflects the commonsense notion that Congress legislates with a domestic concern in mind. \textit{Id.} Two examples of when the court applies this presumption can be seen in \textit{Morrison} and \textit{Kiobel. Id.; Morrison}, 561 U.S. at 262-65; \textit{Kiobel}, 133 S. Ct at 1665-69.
domestic application of the case. If the facts of the case that are relevant to the statute’s focus occurred in the United States, then the case has permissible domestic application, even if other events occurred abroad. If the conduct relevant to the statute’s focus occurred abroad, then the case involves impermissible extraterritorial application regardless of the other alleged conduct that may have happened in the United States. If during step one, the court finds the statute has extraterritorial effect, the focus of the statute does not need to be broken down because the conduct would then apply to the statute as a whole. The scope of the statute then turns on the limits Congress has or has not imposed on its foreign application.

In the majority’s opinion, the Court looked at the RICO act from two different viewpoints, the statute as a whole and the private right of action under the statute or connected with the statute. As a whole, the Court held Congress had the intention to incorporate extraterritorial predicates into RICO, that gives a clear and affirmative indication that RICO applies extraterritorially. RICO has a unique and rare structure that clearly evidences an extraterritorial effect although it is not expressly stated. The court then broke down each subsection and ruled § 1962 (a) only applies to domestic uses of the income, § 1962 (b) and (c) apply extraterritorially, and did not conclude on the issue of whether § 1962 (d) applied.

111 See RJR Nabisco, 136 S. Ct. at 2101 (looking at statute’s focus comparing it to main conduct of case).
112 See id. (discussing application in United States).
113 See id. (stating process if conduct took place abroad).
114 See id. (using Morrison to see where court looks after they found Congress did have intent).
115 See RJR Nabisco, 136 S. Ct. at 2101 (stating Congress’ ability to narrow statute).
116 See generally RJR Nabisco, 136 S. Ct. at 2101-111 (highlighting how court broke down analysis portion of this case).
117 See id. at 2102 (expressing Court’s holding). The most obvious textual clue the Court found to support their finding is that RICO defines racketeering activity to include some predicates that clearly apply to some foreign conduct. Id. The predicates include “the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies when the defendant is a United States person,” to offenses that “take place outside the United States.” Id. at 2101. Other examples include prohibitions against assassinating government officials, taking hostages, and killing a national of the United States while the national is outside of the United States. Id.
118 See id. at 2102 (furthering why Congress intended RICO to apply extraterritorially). “Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined ‘racketeering activity’- and by extension a ‘pattern of racketeering activity’- to encompass violations of predicate structures that do expressly apply extraterritorially.” Id. The court further noted it would be hard to imagine how Congress could have more clearly indicated that it intended RICO to apply extraterritorially. Id. at 2103.
extraterritorially. The second standard which must be met requires a RICO enterprise to engage in, or affect in some significant way, commerce directly involving the United States and foreign commerce. As a result of this analysis, the court held that European Community’s allegations that RJR Nabisco violated §§ 1962 (b) and (c) does involve a permissible application of RICO.

Lastly, the majority turned to the statute’s application of a private right of action. The private right of action, documented under § 1964(c), created an avenue allowing any person who is injured in their business or property in violation of RICO to sue for damages. The Court applied the same two step analysis as in § 1962 to § 1964(c), reasoning a private action raises issues beyond the mere consideration of whether Congress intended the statute to apply extraterritorially. However, the Court determined nothing in § 1964(c) provides a clear and affirmative indication that Congress intended for private action suits to apply extraterritorially. The Court further determined they would not read § 1964(c) as broadly as they would other acts, such as the Clayton Act, and held private action plaintiffs must allege and prove a domestic injury to business and property in order to bring a RICO violation.

Justice Ginsburg wrote a dissenting opinion, in which she agreed with the majority in all aspects except for the private right of action.

119 See id. at 2103 (describing how court ruled on each subsection of § 1962). § 1962(a) deals with certain uses of income derived from a pattern of racketeering and not the use of the pattern itself, indicating that it should only be used on domestic uses of the income. Id. §§ 1962(b) and (c) can be applied extraterritorially because of the predicates in its wording previously discussed. Id.; see also RJR Nabisco, 136 S. Ct. at 2102 (describing predicate acts).

120 See RJR Nabisco, 136 S. Ct. at 2105 (“Enterprises whose activities lack that anchor to United States commerce cannot sustain a RICO violation.”).

121 See id. at 2106 (stating court’s ruling).

122 See RJR Nabisco, 136 S. Ct. at 2106 (turning to private right of action portion of decision).

123 See id. (stating purpose of § 1964(c)).

124 See id. (expressing court’s reasoning). One of the issues of providing a civil remedy for foreign conduct is that it creates a potential for international friction beyond that presented by merely applying U.S. law to foreign conduct. Id. An example of this was given involving antitrust laws and anticompetitive conduct taking place abroad and it has generated controversy in other nations. Id. “[T]o apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.” Id. at 2106-07.

125 See id. at 2108 (stating Congress’ intent not to apply RICO extraterritorially). The Court reasoned the words “any”, “business or property” were insufficient to displace the presumption against extraterritoriality. Id. Adding those limitations, excluding personal injury, signals that Congress intended civil remedies to not be coextensive with § 1962. Id.

126 See id. at 2109 (“Although [Court has] often looked to the Clayton Act for guidance in construing § 1964 (c), [they] have not treated the two statutes as interchangeable.”).
decision.\textsuperscript{127} This dissent argued that there is no need to distinguish civil and criminal cases when dealing with extraterritorially because \textsection\ 1964(c) is triggered by a violation of \textsection\ 1962 and all \textsection\ 1964(c) does is give an additional avenue for one to use RICO.\textsuperscript{128} Justice Ginsburg used the Clayton Act, with its similar language, to argue that the Court should interpret \textsection\ 1964(c) similarly and allow for private citizens to apply RICO extraterritorially.\textsuperscript{129} Lastly, the dissent noted that despite the majority’s expressed concern regarding creating a double standard within foreign policy, this decision did just that.\textsuperscript{130}

VI. IGNORING CONGRESSIONAL INTENT, DOUBLE STANDARD OR PROTECTING INTERNATIONAL TENSION?

The Racketeering Influenced and Corrupt Organization Act has been used in such broad ways that its practices have surpassed Congress’ originally anticipated use.\textsuperscript{131} The legislature intentionally constructed RICO so it would reach both illegitimate and legitimate businesses for any racketeering activities.\textsuperscript{132} Since the statute is being used to attack legitimate businesses, the courts are now trying to narrow its scope to limit the available civil remedies.\textsuperscript{133} The biggest issue with this narrowing is that it is not for

\textsuperscript{127} See RJR Nabisco, 136 S. Ct. at 2112 (Ginsburg, J., dissenting) (explaining dissent’s position).

\textsuperscript{128} See id. at 2113 (Ginsburg, J., dissenting) (explain RICO position). “How can \textsection\ 1964(c) exclude them when, by its express terms, \textsection\ 1964(c) is triggered by ‘a violation of section 1962?’” Id.

\textsuperscript{129} See id. at 2114 (Ginsburg, J., dissenting) (comparing \textsection\ 1964(c) and Clayton Act). \textsection\ 4 of the Clayton Act, which is often used as guidance for \textsection\ 1964(c), has held a remedy for injuries both foreign and domestic. Id.

\textsuperscript{130} See id. at 2115-116 (Ginsburg, J., dissenting) (arguing civil remedies should be viewed in same capacity as criminal cases). “U.S. defendant commercially engaged here and abroad would be answerable civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy.” Id.

\textsuperscript{131} See Racketeering- Rico In Need of [R]eform [sic] (last visited October 13, 2016), http://law.jrank.org/pages/9629/Racketeering-RICO-IN-NEED-FEFORM.html (explaining RICO used in civil law when it was not originally intended to be). When critics called for congressional reform, the U.S. Supreme Court made it clear that, unless amended by Congress, RICO must be interpreted broadly. Id.

\textsuperscript{132} See Lynch, supra note 19, at 671-83 (explaining why and how Congress drafted RICO broadly); see also United States v. Campanale, 518 F.2d 352 (9th Cir. 1975) (detailing different ways RICO has been used since its creation).

\textsuperscript{133} See Sedima v. Imrex Co., 473 U.S. 479, 499 (1985) (highlighting Court of Appeals’ attempt to narrow scope of RICO). The Appeals Court’s main objection was that “[i]nstead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against ‘respected and legitimate ‘enterprises.’” Id.
the judiciary to limit or change the broad nature of RICO; it should be left to the legislature to change the limits, if necessary.134

A. Ignoring Legislative Intent

The Court typically looks to the legislative intent when dealing with extraterritorial applications and if there was an affirmative intent demonstrated by Congress as to whether the law should be applied beyond the borders of the United States, yet in this case, the Supreme Court ignored that intent when imposing a domestic injury requirement onto the private plaintiff.135 When Congress was creating RICO, they intentionally kept the statute broad and made the scope of § 1962, the predicate acts portion, reach foreign injuries.136 Congress then added § 1964(c) to give private suitors a civil remedy for violations of § 1962 to their business or property.137 When incorporating one statute into another, Congress has long understood to encompass into the statute “all that is fairly covered by the reference,” and in this case, it includes foreign injuries.138

In the present case at hand, the Court had no trouble finding that § 1962 extends extraterritorially, even though there was no express language in the statute that indicated as such.139 The Court reasoned that the express statement of extraterritoriality is not essential to overcoming the presumption against extraterritoriality, contradicting the Court’s reasoning in not one, but two previous cases.140 The Court further stated, “this unique structure makes

134 See id. at 499-500 (“Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.”); see also RJR Nabisco, 136 S. Ct. at 2112 (Ginsburg, J., dissenting) (stating Court had no authority to amend RICO when replacing Congress’s intent with domestic-injury requirement).
135 See RJR Nabisco, 136 S. Ct. at 2112 (Ginsburg, J., dissenting) (“Unsupported by RICO’s text, inconsistent with its purposes, and unnecessary to protect the comity interests the Court emphasizes, the domestic-injury requirement for private suits replaces Congress’ prescription with one of the Court’s own invention.”).
136 See supra Section I Part A (detailing Congress’ intent in creating RICO); see also RJR Nabisco, 136 S. Ct. at 2103 (emphasizing Congress’ clear intentions for RICO to have extraterritorially applied).
137 See 18 U.S.C. § 1964(c) (highlighting actual text of statute).
138 RJR Nabisco, 136 S. Ct. at 2113 (Ginsburg, J., dissenting) (noting statutory interpretation). RICO’s private right of action simply incorporates § 1962, which the Court incorrectly determined did not reach extraterritorialy. Id.
139 See RJR Nabisco, 136 S. Ct. at 2102-103 (“Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.”).
140 Compare id. at 2102 (“The presumption against extraterritoriality does not require us to adopt such a constructed interpretation. While the presumption can be overcome only by a clear
RICO the rare statute that clearly evidences extraterritorial effect despite lacking express statement of extraterritoriality.  

How can the Court be so bold as to state that RICO reaching foreign injuries is one of those rare statutes but § 1964(c), the section that simply adds an additional avenue for private suitors to remedy their injuries, does not reach extraterritoriality?  The fact that RICO is being used against respected businesses that allegedly engaged in a pattern under the statute is not a reason to assume the statute is being misconstrued.  Adding the domestic injury rule clearly undermines Congress’ intent for the statute to be applied to both legitimate and illegitimate enterprises extraterritorially.

B. Similarity to § 4 of the Clayton Act

The Supreme Court also ignored Congress’ clear intention to model the private suit portion of RICO after § 4 of the Clayton Act.  During the Committee meetings, Senators and the American Bar Association clearly referenced the Clayton Act when suggesting the addition of § 1964(c) and meant for the two statutes to work in the similar ways.  The two statutes are nearly identical, which is an obvious indication that Congress intended indication of extraterritoriality is not essential... Congress has not expressly said that § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined ‘racketeering activity’- and by extension a ‘pattern of racketeering activity’-to encompass violation of predicate statutes that do expressly apply extraterritorially.”), with Morrison v. National Australia Bank, Ltd., 561 U.S. 247, 247-62 (2010) (declining to find express language in statute enough to overcome presumption against extraterritorial application), and Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664-69 (2013) (refusing to rebut presumption against extraterritorially for Alien Tort Statute when historical context was present).

See id. at 2113 (Ginsburg, J., dissenting) (“The sole additional condition § 1964(c) imposes on access to relief is an injury to one’s ‘business or property.’ Nothing in that condition should change the extraterritoriality assessment...[i]f an injury abroad was proximately caused by the violation of a statute which congress intended should apply to injurious conduct performed abroad, [there is] no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute.”).


See id. (discussing breadth of RICO in comparison to its ambiguity).


See Sedima, 473 U.S. at 486 (highlighting Judiciary Committee and American Bar Association’s comments on creating RICO based on Clayton Act).
the two to encompass the same abilities.\textsuperscript{147} Since the Supreme Court has had no trouble finding that other aspects of RICO should be modeled after the Clayton Act, there is no reason for the Court not to do the same with its application to reach extraterritorially.\textsuperscript{148} The Court has gone so far as taking the statute of limitations from the Clayton Act and deeming it the universal RICO statute of limitations.\textsuperscript{149} There is no reason they should not do the same now with the statute’s extraterritorial application.\textsuperscript{150}

The Court was reluctant to read \$\textsuperscript{1964(c)} as broadly as they have read the Clayton Act because RICO lacks the language that \textit{Pfizer} found integral to its decision.\textsuperscript{151} What the Court overlooked was that they expressly did not want to rely on \textit{Pfizer} because years later, in \textit{Morrison}, the Court held that “even statutes . . . that expressly refer to ‘foreign commerce’ do not apply abroad.”\textsuperscript{152} However, the Court contradicts itself from the ruling seven

\textsuperscript{147} \textit{See Agency}, 483 U.S. at 150 (highlighting comparison between \$ 4 of Clayton Act and RICO). Congress mirrored the Clayton Act by using similar language present in the two statutes. \textit{Id.} For example, the Clayton Act provides:

\begin{quote}
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney’s fee.
\end{quote}

\textit{Id.} (quoting \textit{18 U.S.C. \$\textsuperscript{1964(c)}}). RICO’s civil enforcement provisions reads: “Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.” \textit{Id.} at 150-51 (quoting \textit{18 U.S.C. \$\textsuperscript{1964(c)}}).


\textsuperscript{149} \textit{See Agency}, 483 U.S. at 156 (holding four-year statute of limitations used in Clayton Act as most appropriate for RICO).

\textsuperscript{150} \textit{See RJR Nabisco}, 136 S. Ct. at 2090, 2114 (2016) (Ginsburg, J., dissenting) (“The similarity of language in [the two statutes] is, of course, a strong indication that [they] should be interpreted \textit{pari passu}, and I see no contradictory indication here.”) (quoting \textit{Northcross v. Board of Ed. of Memphis City Schools}, 412 U.S. 427, 428 (1973)). The Court has similarly aligned RICO’s private right of action with the private right afforded by the Clayton Act when there were gaps in \$\textsuperscript{1964(c)}. \textit{RJR Nabisco}, 136 S. Ct. at 2114 (dissent, J. Ginsburg).

\textsuperscript{151} \textit{See id.} at 2110 (explaining Court’s reluctance to read RICO broadly). “[T]he \textit{Pfizer} Court expressed concern that it would ‘defeat th[e] purposes’ of the antitrust laws if a defendant could ‘escape full liability for his illegal actions’. . . .[b]ut this justification was merely an attempt to ‘divin[e] what Congress would have wanted’ had it considered the question of extraterritoriality—an approach was eschewed in \textit{Morrison}.”

\textit{Id.}

\textsuperscript{152} \textit{Id.}
pages earlier that the "unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality."\textsuperscript{153} The Court should have ruled that because of the unique structure of RICO, and because § 1964(c) uses the exact language of § 4 of the Clayton Act, the private suitor provision of RICO also reaches extraterritorial conduct.\textsuperscript{154}

C. Other Methods of Protection

The Court's holding in RJR Nabisco went too far in its attempt to prevent situations where the United States courts have jurisdiction over solely foreign injuries.\textsuperscript{155} The Court failed to remember there are already methods placed in the court system to handle situations such as these.\textsuperscript{156} The doctrines of forum non conveniens and due process help the court provide a check against civil RICO litigation with little or even no connection to the United States.\textsuperscript{157} The Court's comity concerns that were not present in this case can be solved with the controls of due process and forum non conveniens, which makes that issue moot.\textsuperscript{158}

D. Increasing Foreign Tension?

Another point the Supreme Court made in its decision was that allowing a civil remedy for foreign conduct "creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."\textsuperscript{159} What the Court failed to realize

\textsuperscript{153}Id. at 2103.

\textsuperscript{154}See id. at 2113-14 (Ginsburg, J., dissenting) (explaining that statutes having similar language is strong indication to interpret both similarly).

\textsuperscript{155}See id. (explaining why Court did not need to worry about comity concerns).

\textsuperscript{156}See RJR Nabisco, 136 S. Ct. at 2115 (Ginsburg, J., dissenting) (stating due process and forum non conveniens are avenues available to courts).

\textsuperscript{157}See id. (describing United States courts' ability to use forum non conveniens to refuse jurisdiction). The doctrine of forum non conveniens enables the court to refuse jurisdiction when there is an alternative, more appropriate forum available. Id. Due process acts as a constraint on a court's personal jurisdiction over corporations unless the corporation has affiliations with the forum in which the suit is brought to render that forum the corporation's home essentially. Id. Due process and forum non conveniens are avenues available to courts.

\textsuperscript{158}See id. (explaining court's reasoning).

\textsuperscript{159}RJR Nabisco, 136 S. Ct. at 2106. Even though international tension is not a prerequisite for applying the presumption against extraterritoriality, the Court reasoned that when a risk is so evident, "the need to enforce the presumption is at its apex." Id. at 2107. The Court then continued by giving examples of international friction caused by applying U.S. law to foreign content. Id. One example the court gave was in the area of antitrust law. Id. The Court has previously observed that "'[t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place aboard has generated considerable controversy' in other nations, even when
is that baring foreign plaintiffs from bringing a civil suit for injuries to their business or property abroad is “hardly solicitous of international comity or respectful of foreign interests.”160 Typically, a foreign nation is “entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of comity and friendly feeling.”161 The Court attempted to protect foreign nations by limiting this double standard they were afraid of, but in reality, the Court created a double standard in which U.S. defendants commercially engaged domestically and abroad would now be answerable civilly to U.S. victims of their activities, but foreign parties similarly injured would have no RICO remedy.162

E. What the Supreme Court Should Have Done

The Supreme Court should have ruled that § 1964(c) overcomes the presumption against extraterritoriality and foreign parties injured by such activities should be given a private action remedy under RICO.163 The Court

those nations agree with U.S. substantive law on such things as banning price fixing.” Id. at 2106 (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004)). Another example the Court offered was in connection with Morrison, when France informed the Court that “most foreign countries proscribe securities fraud but ‘have made very different choices with respect to the best way to implement that proscription,’ such as ‘prefer[ring] state actions, not private ones’ for the enforcement of law.” Id. at 2107 (quoting Amicus Curiae, O.T. 2009, No. 08-1191). The Court furthered this example by stating, “[a]llowing foreign investors to pursue private suits in the United States, we were told, ‘would upset that delicate balance and offend the sovereign interests of foreign nations.’” Id.

160 Id. at 2115. Not allowing any private suit for injuries might spark international conflict rather than calm it. Id.

161 See RJR Nabisco, 136 S. Ct. at 2115 (noting right of foreign nation to prosecute civil claim). Additionally, RICO’s provisions already exclude activity that is conducted in its entirety in foreign countries. Id. For example, there would never be a RICO case where the injuries are a part of murders in Italy committed by Italian organized crime location in Italy. Id.

162 See id. at 2115-116 (Ginsburg, J., dissenting) (highlighting how Court actually created double standard). Cf Pfizer, Inc. v. Gov’t of India, 434 U.S. 308, 319 (1978) (allowing foreign nations to bring suit in U.S. for treble damages under antitrust laws). The Court in Pfizer addressed the issue of international tension by stating, “[t]o exclude foreign nations from the protections of our antitrust laws would, on the other hand, create a conspicuous exception to this rule, an exception that could not be justified in the absence of clear legislative intent.” Id.

163 See id. at 2113 (Ginsburg, J., dissenting) (“I would hold, RICO reaches extraterritorial injury when, pursuant to § 1964(c), the suitor is a private plaintiff.”); see also Owen Pell et al., Further Limiting the Extraterritorial Reach of US Law, the US Supreme Court Limits the Use of the RICO Statute, WHITE & CASE (July 8, 2016), https://www.whitecase.com/publications/alert/further-limiting-extraterritorial-reach-us-law-us-supreme-court-limits-use-rico (“[T]he RJR decision will significantly limit the ability of non-US plaintiffs to use RICO to reach non-US claims, will further limit the reach of civil damage claims arising under all other federal laws, and will likely influence how US states interpret the reach of state statutes to non-US conduct.”).
should have recognized that § 1964(c) was placed into RICO to give victims a civil remedy for the injuries they incurred to their business or property due to violations of §§ 1962-1964, and found the sections to encompass the benefits of extraterritoriality similar to its referenced sections.\textsuperscript{164} It should be left to Congress to add a domestic-injury requirement if it feels RICO’s private civil remedy needs it, not for the judiciary.\textsuperscript{165}

VII. CONCLUSION

The Racketeering Influenced Corruption Organization Act allows not only the government, but private citizens to be compensated for the injuries they have incurred due to violations of racketeering activities. Throughout its history, RICO has been interpreted in its broadest sense and has applied with this open-viewed approach. The Court in \textit{RJR Nabisco} took it into their own hands to narrow the reach of RICO’s private plaintiff actions, which was not theirs to do. The domestic-injury requirement should not have been created and may have further negative ramifications than the Court anticipated.

\textit{Hannah Tavella}

\textsuperscript{164} See \textit{RJR Nabisco}, 136 S. Ct. at 2115 (highlighting what Court should have ruled).

\textsuperscript{165} See Sedima v. Imrex Co., 473 U.S. 479, 499-500 (1985) (reasoning it is Congress’ job to change statutes as they see fit).