

Exercising the Passive Virtues in Interpreting Civil RICO “Business or Property”

Jacob Poorman[†]

INTRODUCTION

The Racketeering Influenced and Corrupt Organizations Act¹ (RICO) empowers “any person injured in his business or property by reason of a violation” of RICO’s prohibited activities provision to recover threefold damages in civil court.² To determine what is an injury to “business or property” is to ascertain what type of interest must be injured to confer standing under civil RICO.³ In other words, the definition of “business or property” defines the class of plaintiffs upon whom Congress chose to confer a civil cause of action.⁴ The breadth of “business or property,” then, must be the breadth necessary to effectuate the purposes of the Act. As injury to “business or property” de-

[†] BA 2003, Williams College; JD 2008, The University of Chicago.

¹ Organized Crime Control Act of 1970, Pub L No 91-452, 84 Stat 922, 941 (1970), codified at 18 USC §§ 1961–68 (2000). The individual sections pertain to: definitions to be used in the statute, 18 USC § 1961; what activities are prohibited by RICO, 18 USC § 1962; the criminal penalties that attach to a RICO violation, 18 USC § 1963; the civil remedies available to a private entity harmed by reason of a RICO violation, 18 USC § 1964; venue and process issues relating to RICO, 18 USC § 1965; expedition of RICO actions, 18 USC § 1966; evidentiary issues related to RICO, 18 USC § 1967; and demands for civil investigation of RICO claims, 18 USC § 1968.

² 18 USC § 1964(c).

³ An “injury to business or property” is the specific kind of harm necessary to constitute an “injury” in the familiar “injury-in-fact” requirement of constitutional standing in the civil RICO context. Constitutional standing requires an injury in fact that is proximately caused by the behavior of the defendant and that is redressable by the courts. See *Lujan v Defenders of Wildlife*, 504 US 555, 560–61 (1992). It seems that some civil RICO courts faced with defining civil RICO “business or property” have compressed the injury and proximate cause inquiries into a general standing inquiry, considering the type of interest as well as the remoteness of the injury in asking whether it is “business or property.” See *Van Schaick v Church of Scientology of California*, 535 F Supp 1125, 1137 (D Mass 1982) (refusing to “federaliz[e] . . . consumer protection law” and finding that personal monetary loss resulting from consumer fraud falls outside of RICO “business or property”). This Comment suggests that a more rigorous separation between the injury and proximate cause inquiries could help rationalize the jurisprudence on this issue.

⁴ Once a plaintiff has established the existence of a RICO violation, she need prove only that she has been injured “in her business or property by reason of” the violation in order to recover. 18 USC § 1964(c). See also Dan Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum J L & Soc Probs 41, 57 (1996). See note 24 for an explanation of why personal injuries do not trigger civil RICO liability.

finer the potential universe of civil RICO plaintiffs, those terms are animated by the Act's central purpose: "not merely . . . [to] compensate victims but to turn them into prosecutors, 'private attorneys general,'"⁵ and "to divest the association of the fruits of its ill-gotten gains."⁶

Courts struggling to define "business or property" as used in § 1964(c) have adopted markedly different approaches.⁷ The kernel of the problem is evident in the apparent split between the Fifth Circuit in *Leach v FDIC*⁸ and the Seventh Circuit in *Doe v Roe*.⁹ *Leach* states that "property" is "an inherently state law-related term,"¹⁰ while *Doe* notes that some other definition of "property" would prevail over state definitions if the state definition would restrict or frustrate the remedial purpose of RICO.¹¹

⁵ *Rotella v Wood*, 528 US 549, 557 (2000), quoting *Klehr v A.O. Smith Corp.*, 521 US 179, 187 (1997).

⁶ *United States v Turkette*, 452 US 576, 585 (1981). Some courts have expressed distaste for the uses to which civil RICO has been put. See *Sedima, SPRL v Imrex Co, Inc.*, 741 F2d 482, 487 (2d Cir 1984), reversed on other grounds 473 US 479 (1985) (describing the uses to which civil RICO has been put as "extraordinary, if not outrageous"); *In re Dow Company "Sarabond" Products Liability Litigation*, 666 F Supp 1466, 1471 (D Colo 1987) ("RICO is just, in my view, a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud."); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restraint*, 95 Harv L Rev 1101, 1103 (1982) (noting the tendency of courts "apparently concerned that RICO could replace whole bodies of state statutory and common law" to restrict private causes of action). But see *Morgan v Bank of Waukegan*, 804 F2d 970, 977 (7th Cir 1986) (insisting that "hostility to the extraordinary breadth of civil RICO is not a reason for courts to restrict its scope"). Though it is difficult to say that this concern is at work in any particular case, it seems likely that some courts will incline toward imposing a narrow definition of "business or property." See, for example, *Matsuura v E.I. du Pont de Nemours and Co.*, 330 F Supp 2d 1101, 1132 (D Hawaii 2004) ("The Ninth Circuit standard requires 'proof of concrete financial loss, and not mere injury to a valuable intangible property interest.'"), quoting *Berg v First State Insurance Co.*, 915 F2d 460, 464 (9th Cir 1990).

⁷ Though the pertinent language is "business or property," courts considering the meaning of the phrase have tended to focus on the term "property." This focus may be because there is broader agreement as to what constitutes a business, or because the more esoteric types of injuries generally fit more naturally within the definition of "property" than "business." See, for example, *Deck v Engineered Laminates*, 349 F3d 1253, 1259 (10th Cir 2003) (holding that a cause of action is itself civil RICO "property"); *Gaines v Texas Tech University*, 965 F Supp 886, 890 (ND Tex 1997) (stating that physical harm and loss of educational opportunity are not civil RICO "property"); *Allman v Philip Morris, Inc.*, 865 F Supp 665, 667-69 (SD Cal 1994) (holding that money spent buying nicotine patches as a result of the defendants' scheme to conceal the addictive nature of cigarettes was not civil RICO "property"). Therefore, though this Comment is concerned with the significance of the phrase "business or property," it will focus primarily on "property."

⁸ 860 F2d 1266 (5th Cir 1988).

⁹ 958 F2d 763 (7th Cir 1992).

¹⁰ 860 F2d at 1274 n 14.

¹¹ See *Doe*, 958 F2d at 768. In fact, *Doe* proceeds to base its decision entirely off of state law and does not explore what the intent of Congress might have been. See *id.* Intent is a particularly sticky wicket in RICO. Initially designed to combat organized crime of the Godfather variety, the courts have consciously moved beyond what they acknowledge to be the original purpose of RICO, privileging the language of the remarkably broad statute. See *Haroco, Inc v American National Bank and Trust Co of Chicago*, 747 F2d 384, 398 (7th Cir 1984).

Upon closer examination, the cases might more accurately be described as an impenetrable morass, as different courts (often within the same circuit) take markedly different approaches to ascertaining the nature of property for civil RICO purposes. Broadly, the approaches are divided between courts that try to ascertain a definition of “business or property” directly from congressional intent evident in the text and legislative history of the statute, and courts that look to different sources of law to define “business or property.” The pervasive disagreement as to what constitutes “business or property” results from scant evidence of congressional intent and the lack of compelling precedent as to what is “property.” The problem is compounded by courts conflating injury and proximate cause.

This Comment critiques the existing efforts to define “business or property” and provides an analytical framework to determine, upon a finding of injury, whether the injured interest is “business or property” under civil RICO. Part I lays out the language of the statute. Part II describes cases addressing the problem and the particular analytical methods employed. It then assesses the strengths and weaknesses of each approach. As no single approach to defining “business or property” is compelling, or even inherently consistent, Part III proposes interpreting “business or property” through a multitiered framework. This framework preliminarily recommends diligently separating the injury and proximate cause inquiries and then proceeds to draw upon several sources of law, particularly the Supreme Court’s opinion in *Sedima, SPRL v Imrex Co, Inc* (“*Sedima II*”).¹² The framework is also derived from the language, purposes, legislative history, and nature of RICO.

I. THE TEXT OF THE RICO STATUTE

Neither the context of the terms “business” or “property,” nor the language of the Act provides much guidance as to their meaning. At best, the text can provide only a general indication as to what might constitute “business or property.” What follows is a demonstration of just how little the text of the Act has to tell us, relying heavily on the

¹² 473 US 479 (1985). Though the *Sedima II* Court was not interpreting “business or property” but rather the phrase, “by reason of” in “injury to business or property by reason of” a racketeering violation, see *id.* at 495, its underlying logic is directly applicable to this question. The Court rejected a restrictive reading of civil RICO, holding that the very reason Congress enacted RICO as a separate law (instead of appending it to existing antitrust law) was precisely to *avoid* restrictions on RICO standing. *Id.* at 489–91. Because an injury to “business or property” is a standing requirement in civil RICO, and *Sedima* rejected narrow restrictions on civil RICO standing, by extension *Sedima* also rejects a narrow reading of “business or property.”

Supreme Court's interpretation of the phrase "business or property" as it appears in the Clayton Act.¹³

A. Section 1964(c)

The section conferring the ability to sue in civil court for harm resulting from RICO violations reads, in pertinent part:

Any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit.¹⁴

The text of § 1964(c) itself allows some general conclusions to be drawn. First, "business or property" does not refer exclusively to commercial interests (broadly defined as financial interests associated with one's business).¹⁵ Also, "business or property" cannot have the broadest possible meaning.¹⁶ These conclusions stem from the Supreme Court's exploration of the same phrase, "business or property," in *Reiter v Sonotone Corp.*¹⁷

The Court assumed that Congress meant "business or property" to have some sort of restrictive significance;¹⁸ otherwise, it would have used broader or unqualified language, such as "any person injured by reason of a violation of § 1962."¹⁹ The defendants in *Reiter* proposed to give effect to this "restrictive significance" by putting a commercial gloss on the phrase "business or property," instead asserting that "business or property" should mean "business activity or property related to one's

¹³ Clayton Act, Pub L No 63-212, 38 Stat 730 (1914), codified as amended at 15 USC § 12 et seq (2000 & Supp 2004). Many courts have looked to the Clayton Act to interpret civil RICO "business or property" because the language for civil RICO was borrowed from the civil provision of the Clayton Act. See Part II.A.3. The Acts are very similar; indeed, RICO was first proposed as an addition to the Clayton Act as opposed to an independent statute. See note 81.

¹⁴ 18 USC § 1964(c).

¹⁵ See *Reiter v Sonotone Corp.*, 442 US 330, 338-39 (1979) (arguing that an interpretation of "business or property" limited to commercial interests would "rob the term 'property' of its independent and ordinary significance").

¹⁶ See *id.* at 339 (noting that "business or property" reflects congressional intent to exclude some classes of injuries).

¹⁷ 442 US 330, 338-39 (1979). The discussion in *Reiter* interprets "business or property" without specific references to antitrust actions or the Clayton Act.

¹⁸ See *id.* at 339.

¹⁹ Compare 15 USC § 15(a) (2000) (authorizing recovery for "any person who shall be injured in his *business or property* by reason of anything forbidden in the antitrust laws") (emphasis added), with 15 USC § 26 (2000) ("[A]ny person . . . shall be entitled to sue for and have injunctive relief . . . against *threatened loss or damage* by a violation of the antitrust laws.") (emphasis added). See also *Reiter*, 442 US at 338 (noting defendants' argument that Congress had not employed generic language like that of 15 USC § 26).

business.”²⁰ The Court, however, rejected this argument because, by ignoring the fact that Congress chose to use the disjunctive “or,” the approach urged by the defendants would rob “property” of its independent significance.²¹ Further, this reading would convert the noun “business” into an adjective.²²

Similarly, an injury to “business” reasonably includes damage to intangible or expectation interests, such as good will. If “property” and “business” are overlapping but not coterminous,²³ then there is only a small set of conceivable injuries to one’s business that would not be construed as injuries to property—those to more attenuated business interests, such as business reputation or the right to participate in a market unaffected by RICO schemes. Likewise, if the term “business” is to have some independent significance, then property cannot include all of those attenuated interests.²⁴

Thus the Supreme Court’s examination of the phrase “business or property” sheds some helpful light on the phrase’s meaning in § 1964(c) but does not fully define property for civil RICO purposes. It is appropriate to continue by examining how the terms business and property are used elsewhere in the statute, as courts generally assume that the same terms used in different sections of a particular statute have the same meaning.²⁵

B. Interpretive Clues to Be Found in the Rest of the Statute

1. “Property.”

Having established above that the plain language of § 1964(c) does not compel any one specific meaning of “property,” this Comment now

²⁰ *Reiter*, 442 US at 338.

²¹ See *id* at 338–39.

²² See *id* at 339.

²³ The defendants in *Reiter* alleged that “money” could not constitute “property” because every business injury would entail a loss of money. See *id* at 338. Therefore, the term “business” would become redundant if “property” were construed to include “money.” *Id.* The Court rejected this argument, implicitly asserting that the two terms can overlap without being synonymous. See *id* at 339.

²⁴ Whatever “business or property” means, it does not include personal injuries. *Reiter*, 442 US at 339. The circuits are divided, however, as to what constitutes an excludable “personal injury.” See Patrick Wackerly, Comment, *Personal versus Property Harm and Civil RICO Standing*, 73 U Chi L Rev 1513, 1513 (2006) (arguing that losses derived from personal injury should constitute civil RICO property). At a minimum, the injury to “business or property” requirement will exclude recovery for direct personal injury losses, such as medical costs incurred due to battery. Whether the injury to “business or property” requirement also excludes losses derived from personal injury, however, is a question outside the scope of this Comment.

²⁵ See, for example, *Sullivan v Stroop*, 496 US 478, 484 (1990) (noting the rule of statutory construction that “identical words used in different parts of the same act are intended to have the same meaning”).

considers the language of the statute as a whole. The goal is to place “property” in § 1964 in its proper context.²⁶ “Property” is used in both the criminal penalties²⁷ and civil²⁸ provisions of RICO.

a) The criminal penalties provision. Section 1963 provides the criminal penalties for violations of RICO.²⁹ In addition to imprisonment, the violator must forfeit certain property interests acquired in violation of § 1962: (1) property affording influence over any enterprise established or operated in violation of § 1962; and (2) any property deriving from racketeering activity.³⁰ Subsection (b) specifies the property subject to criminal forfeiture: “(1) real property, including things growing on, affixed to, and found in land; and (2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.”³¹ Thus, the definition of property subject to forfeiture appears to be the broadest possible definition of “property interest” that one could draw.³²

b) The civil provision in context. Section 1964(a) contains a divestiture provision similar to the criminal forfeiture provision. It allows a district court to order any person to “divest himself of any interest, direct or indirect, in any enterprise.”³³ While not specifically mentioning property, the idea of property, referred to as “any interest,” is included in this language: “[A]ny interest, direct or indirect” would include any cognizable definition of “property.”³⁴

Presumably the use of “interest” in § 1964(a) in lieu of “property” was intentional. Assuming that the different parts of a particular provision are to be read in conjunction, then “property” in § 1964(c) is intended to be narrower than “any interest, direct or indirect.” Thus,

²⁶ See *United States National Bank of Oregon v Independent Insurance Agents of America*, 508 US 439, 455 (1993) (“[I]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

²⁷ 18 USC § 1963.

²⁸ 18 USC § 1964.

²⁹ 18 USC § 1963.

³⁰ 18 USC § 1963(a). Section 1962 is the substantive provision of RICO, defining what constitutes a RICO crime.

³¹ 18 USC § 1963(b).

³² The nature of the “forfeiture” process may undercut this inference. For example, it seems counterintuitive to say that one’s business reputation could be “forfeited” to the government. However, the breadth of the term “property” in § 1963 is reinforced by subsection (f):

Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States.” 18 USC § 1963(f). This provision makes clear that the “property” subject to § 1963 need not be presently convertible for value. As such, the plain, broad meaning of § 1963(b) prevails.

³³ 18 USC § 1964(a).

³⁴ *Id.*

by inference, the term “property” encompasses less than its broadest possible definition.

Assuming, as a general matter, that terms used in a statute are to have a uniform definition unless the context requires otherwise,³⁵ then, based on § 1963, “property” in § 1964(c) should be broadly construed. This construction, however, is undercut by the fact that the sections have different purposes. The purpose of § 1963 forfeiture is to entirely divorce a RICO criminal from the enterprise³⁶ and to “root out and keep out the influence of organized crime in legitimate business and labor organizations.”³⁷ On the other hand, the purpose of § 1964 is to ensure recovery for civil litigants harmed by virtue of violations of the RICO Act, to turn such litigants into “private attorneys general,” and to “divest the association of the fruits of its ill-gotten gains.”³⁸

Congress may have intended different definitions of property to effectuate different goals. Nevertheless, given the varied harms that may arise from the complicated ways an illegal enterprise could interfere with “business or property,” the harm suffered by the plaintiff could be any number of things, such as harm to one’s reputation or to the intangible interest in the quiet enjoyment of rental property.³⁹ Therefore the purposes of civil RICO—to compensate for harms and divest profits—lead one to conclude that “property” should be interpreted broadly.

2. “Business.”

The term “business” appears several times in the statute. For instance, it is used to describe where and when to serve a civil defendant⁴⁰ as well as in combination with “gambling” and “lending money,” as in “illegal gambling businesses” and “business of lending money.”⁴¹ “Business” therefore includes illegitimate business.

The use of “business” in the rest of the statute, however, has little bearing on the meaning of “business” found in § 1964(c). The other sections determine criminal liability; § 1964 provides a cause of action for civil litigants. One cannot sue for injury to one’s illegitimate business because there is no legally compensable interest in illegal activity.

³⁵ See note 25 and accompanying text.

³⁶ Section 1963(a)(2)(D) is particularly telling, requiring forfeiture of “property or contractual right of any kind affording a *source of influence* over; any enterprise which the person has established.” 18 USC § 1963(a) (emphasis added).

³⁷ *United States v Rubin*, 559 F2d 975, 991 (5th Cir 1977).

³⁸ *United States v Turkette*, 452 US 576, 585 (1981).

³⁹ See, for example, *Willis v Lipton*, 947 F2d 998, 999–1000 (1st Cir 1991); *Oscar v University Students Co-operative Association*, 939 F2d 808, 812 (9th Cir 1991) (“*Oscar I*”), reversed en banc 965 F2d 783 (9th Cir 1992).

⁴⁰ 18 USC § 1968(b).

⁴¹ 18 USC § 1961(1), (6).

Therefore, little about the meaning of “business” for civil RICO actions can be gleaned from the statute’s text. Evidence of congressional intent regarding its meaning is similarly scant.⁴²

II. CURRENT APPROACHES AND PROBLEMS THEREWITH

Courts have taken two basic approaches to defining what “business or property” must be injured to confer standing under civil RICO. Some courts rely on the RICO statute and its legislative history to define property, while others rely on other sources of law. The cases relying solely on RICO can be subdivided into three categories: those applying a general understanding of congressional intent, those examining the plain text to divine congressional intent, and those interpreting civil RICO in tandem with the Clayton Act, the statute upon which RICO was based. The cases relying on other sources of law have drawn from state law, due process, or constitutional requirements for standing. As this Comment shows, none of these approaches quite succeeds in getting all the way home to a definition of “business or property.”

A. Courts Relying on the Primacy of Legislative Intent

In *Doe*, the Seventh Circuit articulated the primacy of legislative intent as follows: “Of course, we are not required to adopt a state interpretation of ‘business or property’ if it would contravene Congress’s intent in enacting RICO.”⁴³ The *Doe* court did not go on to grapple with what congressional intent might have been, as the court considered the rendering of sexual services at issue in the case to be clearly beyond the bounds of “business or property” contemplated by Congress.⁴⁴ Other courts have taken several approaches to divining congressional intent.

1. Ascertaining legislative intent as a general inquiry.

When interpreting “business or property,” one line of cases looks to congressional intent behind RICO as an almost intuitive inquiry, latching onto the general idea that RICO is about businesses and organized crime. The result is something like a smell test for civil RICO and depends heavily on the fact that RICO was conceived in part to prevent

⁴² See Organized Crime Control Act of 1970, 84 Stat at 922. The term “business” appears thirteen times in the relevant text: thrice in the definitions section, 18 USC § 1961; once in 18 USC § 1964(c); eight times in 18 USC § 1968 governing demands for civil investigations; and once in the Statement of Findings and Purpose, Organized Crime Control Act of 1970, 84 Stat at 922. None of these include a definition of business. See 18 USC §§ 1961–68.

⁴³ *Doe*, 958 F2d at 768.

⁴⁴ See *id.* (“Recognizing sexual labor as a service which can be bought, sold and exchanged would open a proverbial pandora’s box of issues involving market valuation, let alone the collateral moral and societal considerations.”).

organized crime from interfering with business. Courts adopting this approach do not apply it in any logically rigorous way. Put informally, the analysis seems to be: (1) RICO is about business; (2) this suit is not really about business; (3) case dismissed.

For example, in *Van Schaick v Church of Scientology of California*,⁴⁵ the plaintiff alleged that she was fraudulently induced to purchase instructional materials from the Church of Scientology of California as a result of a RICO scheme.⁴⁶ The court rejected her claim for failing to state an injury to “business or property.”⁴⁷ “In construing ‘property,’” the court declared, “courts should be sensitive to the statute’s commercial orientation and to Congress’s obvious intention to restrict the plaintiff class.”⁴⁸

It is unclear where the *Van Schaick* court found the “commercial orientation” of the RICO statute and equally unclear where it found the “obvious intention” of Congress to limit the plaintiff class to exclude the type of plaintiff at issue in *Van Schaick*. The court assumed that consumer fraud injuries are not injuries to “business or property,” refusing to rebut that presumption “[a]bsent a clear statement that Congress intended such a result.”⁴⁹ While it may be generally true that RICO was conceived of as a way to prevent organized crime from interfering with legitimate business,⁵⁰ § 1964(c) has not always been construed as giving effect to that intention.⁵¹ The plain language must prevail over a general notion of the orientation of a statute.⁵²

Even if broad congressional intent to restrict the plaintiff class were discernible from the language of the statute or its legislative history, its very breadth undermines its rhetorical force—a generalized intent to restrict the plaintiff class could be implemented in any number of ways.⁵³ Further, this argument would likely fail in the face of the more

⁴⁵ 535 F Supp 1125 (D Mass 1982).

⁴⁶ See *id* at 1130.

⁴⁷ *Id* at 1137.

⁴⁸ *Id*. It would seem that the *Van Schaick* court’s real problem with the plaintiff’s claim was that her injury was not proximately caused by the defendants. Money, surely, is property. But the plaintiff voluntarily agreed to join the church and therefore could not complain about the financial loss attendant to that decision. *Id*.

⁴⁹ *Van Schaick*, 535 F Supp at 1137.

⁵⁰ See *United States v Rubin*, 559 F2d 975, 991 (5th Cir 1977).

⁵¹ Compare *Van Schaick*, 535 F Supp at 1137 (“[W]e believe courts should confine § 1964(c) to business loss from racketeering injuries.”), with *Haroco, Inc v American National Bank and Trust Co of Chicago*, 747 F2d 384, 391 (7th Cir 1984) (arguing that there is no principled way to limit the civil provisions of RICO to organized crime, especially in light of Congress’s refusal to use the concept of “organized crime” in the language of RICO).

⁵² See, for example, *United States v Rodgers*, 466 US 475, 484 (1984).

⁵³ To be fair, this question is particularly difficult. It is essentially the same issue that the defendants and the Supreme Court were grappling over in *Reiter*. See 442 US at 337–38. For example, in the RICO context, courts could insist that civil RICO claims must have an organized crime nexus.

specific textual evidence; if one is to take the counterintuitive stance that money lost due to fraud is not “property,” surely a more rigorous textual or legislative history–based response is necessary.⁵⁴ The antipathy many courts display to the mushrooming uses of civil RICO may animate the *Van Schaick* decision.⁵⁵

2. The plain text camp.

Another line of cases looks to the most direct evidence of congressional intent, the language of the statute itself, and ends the inquiry there. Relying heavily on the disjunctive (“or”), the court in *Malley-Duff & Associates v Crown Life Insurance*⁵⁶ asserted that “[i]f RICO’s reference to injury to ‘business or property’ is to be given meaning, RICO standing cannot be limited to ‘business’ injuries only.”⁵⁷ The court proceeded to assert without direct support that a “cause of action, of course, is a form of ‘property.’”⁵⁸ Surprisingly, the court then implicitly stated that a business injury may indeed be necessary to make a valid civil RICO claim: “[W]hen [the cause of action] arises out of the termination of a business, we think it is not unfair to characterize conduct tending to impair it as ‘business injury.’”⁵⁹ It is unclear why the court considered it necessary to categorize the injury as a business injury, having just established that such an injury is not a prerequisite.

Determining that “property” in the phrase “business or property” has a definition that is not tied to business establishes that property need not be *business* property—therefore, property *could* be any number of things.⁶⁰ More importantly, a plain text reading does not take

⁵⁴ Other cases also exemplify this approach to ascertaining legislative intent. See, for example, *Genty v Resolution Trust Corp*, 937 F2d 899, 918 (3d Cir 1991) (noting that a refusal to allow personal injury claims under civil RICO accords with the congressional intent behind RICO to prevent organized crime from invading legitimate businesses); *Hibbard v Benjamin*, 1992 WL 300838, *3 (D Mass) (“Mindful of Congress’ purposes in enacting RICO, courts have interpreted the phrase ‘business or property’ to mean only commercial interests.”).

⁵⁵ Indeed, this concern runs throughout civil RICO jurisprudence. It seems overwhelmingly likely (though difficult to prove authoritatively) that this concern is behind many of the judicial attempts to construe narrowly the meaning of “business or property.” See note 6.

⁵⁶ 792 F2d 341 (3d Cir 1986), affirmed, *Agency Holding Corp v Malley-Duff & Associates, Inc.*, 483 US 143 (1987).

⁵⁷ 792 F2d at 354–55 (holding that a plaintiff’s allegations of expenses incurred in the prosecution of a previous lawsuit were sufficient to allege an injury to “business or property”).

⁵⁸ *Id.* at 354.

⁵⁹ *Id.*

⁶⁰ See, for example, *Reynolds v Condon*, 908 F Supp 1494, 1519 (ND Iowa 1995) (rejecting the requirement that property injured as a result of a RICO violation be “business property” in deciding that the loss of a husband’s interest in the marital home was property). Consider also *Local 355, Hotel, Motel, Rest & Hi-rise Empl and Bartenders Union, AFL-CIO v Pier 66 Co*, 599 F Supp 761, 765 (SD Fla 1984) (holding that attorneys fees and costs “do not rise to the type of proprietary damage for which RICO provides compensation”); *Burnett v Al Baraka Investment*

into account the purposes or context of the statute.⁶¹ Such a reading could be narrower than that intended by Congress, because a more traditional definition of property would not include the attenuated harms that could arise from complicated RICO schemes. A literal interpretation of “property,” then, could be inherently insufficient, and the text provides no further clues as to how courts should apply the term.

3. Interpreting the civil RICO provision in tandem with the Clayton Act.

Another method that courts have used to reach the meaning of “business or property” considers a similar statutory provision in the Clayton Act, upon which Congress based the civil RICO provision. Indeed, Clayton Act analogies have been used repeatedly to interpret the civil RICO provision.⁶² A good example of this approach is *Canyon County v Syngenta Seeds, Inc.*,⁶³ in which an Idaho county sued the defendant for importing illegal immigrants.⁶⁴ Specifically, the county sought to recover municipal funds expended on the immigrants. The court rejected this claim as failing to state an injury to “business or property” because “the Clayton Act’s standing provision [] exclude[s] recovery for the cost of public services.”⁶⁵

The court offered several compelling reasons for applying Clayton Act precedent to define civil RICO “business or property.” First, “the similarity between RICO’s standing provision, [§] 1964(c), and the standing provision of the Clayton Act, 15 USC § 15(a), which grants standing to ‘any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws,’” is obvious.⁶⁶ Second, the general intent and approach of the two statutes is similar: “[B]oth statutes aim to compensate the same type of injury.”⁶⁷ Finally, there are explicit references to the fact that the civil RICO provision was based on 15 USC § 15(a): “The ‘clearest current’ in the legislative

and Development Corp., 274 F Supp 2d 86, 100 (DDC 2003) (holding that plaintiffs’ personal injuries could not support a RICO claim, as they had not alleged “any specific injuries to business or property that are separate from their personal injuries”).

⁶¹ Compare note 26.

⁶² See, for example, *Holmes v Securities Investor Protection Corporation*, 503 US 258, 272 (1992) (using the Clayton Act to find a proximate cause requirement in civil RICO); *Malley-Duff*, 483 US at 150 (using the Clayton Act to determine a statute of limitations for civil RICO causes of action).

⁶³ 2005 WL 3440474 (D Idaho).

⁶⁴ See *id.* at *1.

⁶⁵ *Id.* at *4.

⁶⁶ *Id.* See also 15 USC § 15(a); 18 USC § 1964(c) (granting standing to “[a]ny person injured in his business or property by reason of a violation of section 1962”).

⁶⁷ *Canyon County*, 2005 WL 3440474 at *4. See also *Malley-Duff*, 483 US at 151.

history of RICO ‘is the reliance on the Clayton Act model.’⁶⁸ A full exposition of this concept requires a review of RICO’s legislative history.

a) *An inquiry into civil RICO’s legislative history.* Though the legislative history of RICO in general is by no means thin, the legislative history pertaining to its civil provision is threadbare.⁶⁹

The Corrupt Organizations Act of 1969, as drafted, did not contain any explicit reference to a private cause of action,⁷⁰ but it did leave room for courts to infer the existence of such an action. In the House, however, a curious thing happened—an explicit provision providing for a private cause of action for treble damages was reinserted into the bill by the Judiciary Committee,⁷¹ yet without consideration, it seems, of the import of this addition.⁷² Nor do the subcommittee hearings provide much insight into the private cause of action.⁷³ In the middle of the last day of discussion of the bill in the House, a committee member observed, “[A]t the suggestion of the . . . American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.”⁷⁴

Indeed, it seems that aside from this, “there are only two indications that the House was even made aware of the fact that the bill included a

⁶⁸ *Canyon County*, 2005 WL 3440474 at *4, quoting *Malley-Duff*, 483 US at 151. Many cases take the antitrust analogy approach. See, for example, *Grogan v Platt*, 835 F2d 844, 847–48 (11th Cir 1988); *Drake v B.F. Goodrich Co*, 782 F2d 638, 644 (6th Cir 1986); *Burnett*, 274 F Supp 2d at 101–02; *Slade v Gates*, 2003 WL 21149789, *2 (CD Cal); *Rice v Janovich*, 742 P2d 1230, 1233 (Wash 1987).

⁶⁹ Indeed, § 1964’s legislative history has been described as a “clanging silence.” *Sedima, SPRL v Imrex Co, Inc*, 741 F2d 482, 492 (2d Cir 1984) (“*Sedima I*”), reversed on other grounds 473 US 479 (1985). See also G. Robert Blakey and Brian Gettings, *Racketeering Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temple L Q 1009, 1015–16 n 27 (1980) (“Actions for damages and cost were made available to the government . . . and actions for treble damages and attorneys’ fees were made available to the victims.”).

⁷⁰ See generally The Corrupt Organizations Act of 1969, S 1861, 91st Cong, 1st Sess, in 115 Cong Rec S 9568–71. See also Blakey, 53 Temple L Q at 1017 (cited in note 69) (“Victim treble damage and injunctive actions were not dealt with specifically in the new bill in an effort to streamline it.”).

⁷¹ The Second Circuit in *Sedima I* contains a thorough discussion of this process. See 741 F2d at 489–92. The Committee added the civil private damages provision in response to recommendations by Representative Sam Steiger and the ABA. See id at 489. The *Sedima I* court asserted that “[t]he addition was not considered an important one” based on the fact that the Judiciary Committee did not inform the House that it had made the addition. See id at 489–90.

⁷² See id at 490.

⁷³ See id at 490–91 (noting that most congressional debate took place before the civil provision was added).

⁷⁴ 116 Cong Rec H 35295 (Oct 7, 1970) (Rep Poff).

private cause of action.”⁷⁵ The revised bill then returned to the Senate on October 12, 1970,⁷⁶ where it was approved without further consideration.⁷⁷

What, then, can be made of this legislative history? In short, not much.⁷⁸ The legislative history of RICO reveals no explicit guidance in deciphering § 1964(c). The inquiry must turn, then, to indirect evidence—the statute on which § 1964 was modeled, § 4 of the Clayton Act.⁷⁹

b) *The Clayton Act.* Perhaps the most helpful guidance in interpreting civil RICO § 1964(c) stems from the fact that its language and the language of the civil suit provision in the Clayton Act, § 4, are nearly identical.⁸⁰ But a proposal to add a RICO-like provision to the existing antitrust laws was implicitly rejected; Congress allowed the proposal to lapse.⁸¹ Congress, then, sought to replicate certain aspects of the antitrust laws when it drafted § 1964(c) using language so similar to the Clayton Act but—as examined in more detail below—avoided other

⁷⁵ *Sedima I*, 741 F.2d at 490 n.22. Representative Steiger proposed an amendment, which was subsequently withdrawn, to add injunctive relief to the civil RICO plaintiff's existing remedies. 116 Cong. Rec. H 35227–28 (Oct. 6, 1970), 35346 (Oct. 7, 1970). Representative Abner Mikva proposed an amendment that would provide a cause of action for defendants subjected to frivolous RICO lawsuits. 116 Cong. Rec. H 35342–43 (Oct. 7, 1970). The proposal was quickly rejected. 116 Cong. Rec. 35342–43 (Oct. 7, 1970).

⁷⁶ Blakey, 53 Temple L.Q. at 1021 (cited in note 69).

⁷⁷ The Court in *Sedima I* speculated that the lack of further deliberations was due to the approaching close of the congressional session. See 741 F.2d at 489. See also The Corrupt Organizations Act of 1969, 115 Cong. Rec. S 9568–71 (noting timing of bill's process through the Senate); 116 Cong. Rec. S 36292–96 (Oct. 12, 1970) (reporting on the Senate's treatment of the Act); Douglas E. Abrams, *The Law of Civil RICO* 32 (Little, Brown 1991) (noting that Congress was pressured by upcoming national elections and the end of the congressional session).

⁷⁸ See *Sedima I*, 741 F.2d at 492 (“The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c).”).

⁷⁹ 15 USC § 15(a). A number of cases rely on Clayton Act jurisprudence to define civil RICO “business or property.” See note 68.

⁸⁰ Compare 15 USC § 15(a) (“Except as provided in subsection (b), any person who shall be injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.”), with 18 USC § 1964(c) (“Any person injured in his business or property . . . may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.”).

⁸¹ The absence of any further attempt to graft a RICO-like provision onto the antitrust laws lends additional credence to the inference that this approach was rejected. Further, it seems reasonable, in the absence of evidence to the contrary, to assume that the Senate heeded the ABA's criticism of this attempt, which was presented to the Senate during the debate by Edward L. Wright, President of the ABA:

Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as “standing to sue” and “proximate cause.”

Report of Antitrust Section of the American Bar Association (“ABA Report”), 91st Cong., 2d Sess., in 115 Cong. Rec. S 6995 (Mar. 20, 1969) (emphasis added).

aspects of those laws when it rejected the decision to draft RICO as an extension thereof.

The following section analyzes the aspects of the Clayton Act that Congress wanted to impart to RICO.

i. The relationship between civil RICO and the Clayton Act.

Congress considered criminal prosecution inadequate to combat organized crime because it “has suffered from two major limitations”: procedural limitations placed on the government in prosecuting criminal cases and the narrow range of remedies afforded by the criminal law.⁸² Congress intended RICO “to fill these gaps in our power to deal with criminal infiltration of legitimate organizations.”⁸³ Referring to the antitrust origins of the proposed legislation, Senator John McClellan stated that the proposed RICO statute “adapts the equitable remedies . . . brought to their fullest development [in federal] antitrust law[], as a means of [divesting individuals] of their ill-gotten interests.”⁸⁴

The intent, then, was not to import any technical or specific antitrust concepts into RICO. Rather, it was to provide a sweeping power of suit and remedy, unbound from criminal procedure and wielding equitable sanctions, that would resemble the antitrust laws’ breadth. Parsing the quoted language a bit finer, “brought to their fullest development [in federal] antitrust law[]” implies that there is nothing specific about the *manner* in which the antitrust laws operate that Congress sought to duplicate in RICO. Instead, it was the wide reach of that operation that Congress wanted to impart to RICO. Reinforcing this inference is the aforementioned statement that the treble damage action was “another example of the antitrust *remedy* being adapted for use against organized criminality.”⁸⁵ The civil provision was also described as “an adaptation of the machinery used in the antitrust field to redress violations.”⁸⁶

The legislative history for the Clayton Act indicates that Congress wanted to duplicate only the antitrust regime’s breadth of civil power but nothing more specific than that. In other words, Congress wanted the antitrust chassis and engine for its new RICO model, not its fins

⁸² Organized Crime Control: Hearings before the Subcommittee No 5, Committee on the Judiciary of the House of Representatives on S 30 and Related Proposals Relating to the Control of Organized Crime in the United States (“House Hearings”), 91st Cong, 2d Sess 106–07 (1970) (Sen McClellan). See also Blakey, 53 Temple L Q at 1015 n 25 (cited in note 69) (noting the lower standard of proof and different remedies available in civil cases).

⁸³ House Hearings at 107 (Sen McClellan).

⁸⁴ *Id.*

⁸⁵ 116 Cong Rec H 35295 (Oct 7, 1970) (Rep Poff) (emphasis added).

⁸⁶ *Id.* Other statements contained in the legislative history have similar import. See 91st Cong, 1st Sess, in 115 Cong Rec S 6993 (Mar 20, 1969) (Sen Hruska) (arguing that the act would “bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime”).

and paint job. Perhaps an examination of what Congress sought to avoid in the antitrust law will be more instructive in the search for the definition of “business or property.”

ii. What Congress sought to avoid by drafting RICO as an independent statute. Organized crime laws and antitrust laws have different scopes and aims. The former punishes a type of criminal operation; the latter is targeted at conduct that restricts competition. This distinction must be borne in mind while examining the particular aspects of standing and proximate cause that Congress sought to avoid in drafting RICO.⁸⁷ If Congress were comfortable duplicating the Clayton Act to combat organized crime, except insofar as it created overly strict requirements for standing and proximate cause, then presumably standing and proximate cause requirements in civil RICO should at least be less restrictive than the standing and proximate cause requirements in the Clayton Act. An injury to “business or property” has been construed as a standing requirement for civil RICO plaintiffs. Therefore, defining the extent of standing in the Clayton Act should provide the floor for how broadly to interpret civil RICO property.

Unfortunately, when RICO was drafted, the state of Clayton Act standing was unsettled and thus provides little clear guidance for the inquiry. Courts broadly agreed that the requisite injury conferring the ability to sue was an injury to a commercial interest, putting a commercial gloss on the phrase “business or property.”⁸⁸ In addition, Clayton Act standing required a direct injury, and courts considering the existence of such a direct injury looked to two criteria: (1) whether the plaintiff was the direct target or in the economic zone targeted by the defendant;⁸⁹ and (2) whether the plaintiff had direct relations with the wrongdoer.⁹⁰ But there was broad disagreement over how narrowly to construe these requirements.⁹¹

⁸⁷ See *Sedima I*, 741 F2d at 509 (noting congressional intent “not to incorporate technical antitrust standing and proximate cause notions” into the civil RICO statute).

⁸⁸ See *Broadcasters, Inc v Morristown Broadcasting Corp*, 185 F Supp 641, 644 (D NJ 1960). See also *Peller v International Boxing Club*, 227 F2d 593, 595–96 (7th Cir 1955) (holding that a plaintiff could not have sustained an injury to “business or property” under the Clayton Act through a failed fight promotion, as he had made only preliminary efforts to enter the promotion business); *Brownlee v Malco Theaters*, 99 F Supp 312, 316–17 (WD Ark 1951) (holding that a plaintiff could not maintain a Clayton Act suit when frustrated in an unsuccessful attempt to enter the theatre business).

⁸⁹ See *Conference of Studio Unions v Loews, Inc*, 193 F2d 51, 54–55 (9th Cir 1951).

⁹⁰ See *Loeb v Eastman Kodak Co*, 183 F 704, 709 (3d Cir 1910).

⁹¹ For an example of a stringent interpretation of “target,” see *Conference of Studio Unions*, 193 F2d at 54 (holding that the plaintiffs were “not in the business of producing motion pictures . . . they neither compete with the Majors nor purchase from them”). For a looser interpretation, see *Karseal Corp v Richfield Oil Corp*, 221 F2d 358 (9th Cir 1955). The *Karseal* plaintiff was a car polish supplier who alleged injury caused by the defendant due to the defendant’s exclusive supply contract with automobile service stations. See *id* at 360–61. The court, reasoning

An examination of Clayton Act jurisprudence allows two conclusions. First, because there was wide agreement that property under the Clayton Act had to have a commercial gloss, it is plausible that the commercial gloss given to “business or property” is one of the restrictions that the ABA counseled against. Second, due to the unsettled nature of Clayton Act jurisprudence governing standing and causation at the time RICO was drafted (aside from the general agreement on requiring the “property” to have a commercial gloss), it is unclear which specific aspects of the jurisprudence the ABA considered to be overly restrictive. Others have noted a general hesitancy among courts interpreting the Clayton Act to allow recovery for prospective or attenuated proprietary interests.⁹² Thus, the negative inference might be that Congress did not intend “business or property” to be narrowly construed, or at least not as narrowly as Clayton Act “business or property.” Courts, finding civil RICO’s legislative history insufficient, have looked to other sources of law to aid their inquiry.

B. Courts Relying on Other Sources of Law

The most common approach of courts relying on other sources of law is to examine state law definitions of property to determine what constitutes “business or property.” The beginning of this Part examines cases applying state law definitions. Some courts rely on state law barring some compelling reason not to, such as legislative intent that is clearly contrary to doing so. Other courts treat property as if it *must* be defined by state law and can have no definition aside from that source. In the second line of cases, courts have relied directly and solely on due process jurisprudence to establish definitively what is property and what is not. Finally, the third line of cases discussed below assumes, based upon an unwarranted expansion of the constitutional “injury in fact” requirement, that intangible forms of property are not RICO property.

that the scheme was aimed at competing products, and therefore at competing manufacturers, held that it sufficiently targeted the plaintiff so as to allow recovery. See *id.* at 364.

Some courts construed “direct relations” to require an extensive ongoing business relationship; others found a single business relationship sufficient. Compare *Harrison v Paramount Pictures, Inc.*, 115 F Supp 312, 316 (ED Pa 1953) (holding a mere landlord-tenant relationship too remote to support an antitrust injury), with *Congress Building Corp v Loews, Inc.*, 246 F2d 587, 592–95 (7th Cir 1957) (declining to follow *Harrison* and finding an injury to a lessor’s “business or property” from a lessee’s misconduct under the Clayton Act).

⁹² See, for example, Note, *Standing to Sue for Treble Damages under Section 4 of the Clayton Act*, 64 Colum L Rev 570, 580 (1964) (noting that claims of “interference with prospective economic advantage” are generally unsuccessful because “mere expectations and hopes are not the type of legal interest protected” by the Clayton Act).

1. Courts relying on state definitions of property.

Doe took a conservative approach to relying on state law. There, the court described property as “quintessentially” a question of state law.⁹³ It then qualified that statement by asserting that if the intent of Congress were to the contrary, such intent would trump a state law definition.⁹⁴

The court in *Leach*, on the other hand, articulated the categorical approach to relying on state definitions of property. In *Leach*, the plaintiff-shareholders sued for diminution in the value of their stock proximately caused by the mismanagement of a bank. The court found that the plaintiffs had not suffered an injury to their “property” sufficient to confer RICO standing because “Texas adheres to the general rule that a shareholder does not have a direct right of action against a director who has mismanaged the affairs of the corporation.”⁹⁵ Justifying this approach, the court asserted:

This incorporation of state law into federal law . . . implicates a serious problem of uniformity of federal law throughout the states. However, on balance, the incorporation of state law to determine whether a shareholder has been injured under RICO is preferable to generating federal common law in this area. Any definition of the term “property,” an inherently state law-related term, should look to state law.⁹⁶

The court then pointed out that its decision was “consistent with decisions of other circuits,” implicitly reaffirming that uniformity still matters.⁹⁷

Courts adhering to the state law approach have made a great deal of hay⁹⁸ over Supreme Court dicta stating that “property interests . . . are not created by the Constitution. Rather, they are created and their dimensions defined by existing rules or understandings that stem from an inde-

⁹³ *Doe*, 958 F2d at 768.

⁹⁴ *Id.* For instances of other courts adhering to the state law approach, see *Diaz v Gates*, 420 F3d 897, 900 (9th Cir 2005); *Oscar v University Students Co-operative Assn*, 939 F2d 808, 810–11 (9th Cir 1991) (“*Oscar I*”), reversed en banc 965 F2d 783 (9th Cir 1992); *Clark v Stipe Law Firm LLP*, 320 F Supp 2d 1207, 1214 (WD Okla 2004).

⁹⁵ *Leach*, 860 F2d at 1274. The analysis seems more like a proximate cause inquiry, as the court does not technically say that share value is not property but rather that individual shareholders are not directly injured sufficiently to confer standing as individuals. That said, the court styles the inquiry as one seeking to define “property.” See *id.* It is in the same sense that “injury to property” is a standing inquiry in civil RICO.

⁹⁶ *Id.* at 1274 n 14, citing *Reconstruction Finance Corp v Beaver County*, 328 US 204 (1946).

⁹⁷ See *Leach*, 860 F2d at 1274 n 15. The potential pitfalls this approach could create are apparent in the quotation in the text accompanying note 96. *Leach* relies, in part, on an earlier Fifth Circuit decision, *Crocker v FDIC*, 826 F2d 347 (5th Cir 1987), which was interpreting Mississippi state law. See *Leach*, 860 F2d at 1268.

⁹⁸ See, for example, *Oscar I*, 939 F2d at 810–11.

pendent source *such as* state law rules.”⁹⁹ This statement is not a fiat to use state law to interpret the term “property” in the RICO context. It is but a suggestion or example of how a court might begin its analysis in interpreting the term “property.” Thus, an examination of state law in discerning the meaning of “business or property” may be instructive, but it is not an independently sufficient resolution to the inquiry.

2. Courts relying on due process precedent.

While some of the cases interpreting “business or property” rely on due process precedent for guidance,¹⁰⁰ on rare occasions courts rely on it as their primary means of interpretation. *Deck v Engineering Laminates*¹⁰¹ is a good illustration of this approach.

In *Deck*, the defendant, who was the plaintiff’s former employer, fraudulently induced the plaintiff to settle a claim for breach of contract.¹⁰² The court held that the plaintiff had sufficiently suffered an injury to his property to confer standing because “a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause.”¹⁰³ In essence, the *Deck* court treated due process precedent as providing the meaning of the term “property.”¹⁰⁴

Like state law definitions, due process jurisprudence should not be rigidly applied in the civil RICO context. The two areas of law differ in scope and purpose, so much so that due process cannot be assumed to speak directly to civil RICO, or vice versa. By way of illustration, one may have a due process property interest in governmental benefits if “there are [] rules or mutually explicit understandings that support [the plaintiff’s] claim of entitlement to the benefit.”¹⁰⁵

⁹⁹ *Board of Regents of State Colleges v Roth*, 408 US 564, 577 (1972) (emphasis added) (including within the definition of “state law rules” any “rules or understandings that secure certain benefits and that support claims of entitlement to those benefits”).

¹⁰⁰ See, for example, *Diaz v Gates*, 354 F3d 1169, 1173 (9th Cir 2004), reversed en banc 420 F3d 897 (9th Cir 2005).

¹⁰¹ 349 F3d 1253 (10th Cir 2003).

¹⁰² *Id.* at 1256. In *Deck*, the plaintiff claimed that the defendant suborned perjury during a trial on plaintiff’s breach of contract claims and that the defendant settled with the intention of fraudulently divesting the liable entity of its assets. See *id.*

¹⁰³ *Id.* at 1259, quoting *Logan v Zimmerman Brush Co.*, 455 US 422, 428 (1982).

¹⁰⁴ See *Deck*, 349 F3d at 1256. Other courts do not adhere to this view, though there should be no room for argument on this score—it is a categorical approach. See, for example, *Nix v Hoke*, 62 F Supp 2d 110, 116 (DDC 1999) (holding that the plaintiff did not have a property interest in a cause of action untainted by RICO manipulation). Admittedly, whether a plaintiff can sue for interference with her cause of action is a slightly different question than whether a cause of action is property. But if a cause of action is property, then certainly false testimony given during the course of trial is an injury to that property. It seems inconsistent to say that one can have a property right in a cause of action but that cause of action may be perverted by false testimony and manipulation. A property right in a rigged trial is not much of a property right.

¹⁰⁵ *Perry v Sinderman*, 408 US 593, 601 (1972).

It makes sense to define government benefits as due process property because the purpose of due process is to ensure that the government acts fairly and consistently with respect to the benefits it confers and the burdens it imposes. It would make no sense, however, to allow an individual to vindicate his right to social security through a civil RICO suit. A person whose right to social security benefits is injured directly, for example through fraud, can style her injury as a loss of money and therefore bring suit under civil RICO. A person whose benefits are injured indirectly, on the other hand, by a scheme that delays road construction and slows the delivery of the mail, is injured in too attenuated a fashion to recover under civil RICO.

An interference with the procedural distribution of such benefits may harm an individual's due process rights but that does not make them a compensable harm under RICO. A whole variety of wrongs could be accurately styled as an injury that would not qualify as a due process takings claim, which could lead one to infer that a due process taking necessarily must be an injury to property for civil RICO purposes. An injury to property being inherently less severe than a taking indicates that RICO property should be a less restrictive set. On the other hand, due process jurisprudence seeks to determine some bare minimum definition of property or rights that are protected from arbitrary government action. This determination is an entirely different inquiry than considering what harm may have resulted from a RICO enterprise. Due process precedent does not define property in the civil RICO context, nor does it establish the minimum necessary content of that term in civil RICO.¹⁰⁶

Finally, a due process interest is defined with reference to an independent source of entitlement, which frequently is state law.¹⁰⁷ Therefore, an examination of due process is often merely an examination of state law. As a result, due process definitions carry with them the problems associated with state law definitions.

3. The “concrete injury” cases.

Many cases follow a line of reasoning illustrated by *Berg v First State Insurance Co.*,¹⁰⁸ holding that civil RICO standing requires “actual injury,” meaning “financial loss or injury.”¹⁰⁹ Courts relying on this

¹⁰⁶ In any event, the question of whether due process definitions of property are exportable to other areas of jurisprudence is murky, and it seems illogical to attempt to extricate oneself from the shallow (albeit cloudy) water of RICO “business or property” by plunging into the abyss of due process rights and the relation of those rights to other types of entitlement.

¹⁰⁷ See note 99 and accompanying text.

¹⁰⁸ 915 F2d 460 (9th Cir 1990).

¹⁰⁹ *Id* at 464.

proposition have construed financial loss or injury to require a concrete, already-realized loss of a current possessory interest, excluding any form of expectation interest or nonfinancial interest such as an interest in an educational opportunity.¹¹⁰

This proposition gained influence in the Ninth Circuit's en banc decision in *Oscar v University Students Co-operatives Association* ("*Oscar II*").¹¹¹ The issue was whether the plaintiffs had standing to sue for a diminution in the value of their rental property. In deciding the question in the negative, the court cited *Berg* for the proposition that it "unambiguously held that [] 'actual injury,' [] meant financial loss."¹¹²

Two flaws mar this conclusion. First, the citation from *Berg* is merely dictum. Second, it is unclear that the phrase "financial loss or injury" is relegated to financial injuries, as *Oscar II* and subsequent cases have held.¹¹³ What could possibly constitute a financial "injury" that is not also a "financial loss"? Theoretically, if one divided property between current possessory interests with market value and intangible property interests, then the two concepts could be separate, as an injury to property one cannot immediately possess may arguably not be a present "loss." Under this reading, however, "financial loss or injury" still encompasses injury to both tangible and expectation property interests. Therefore, *Oscar II* might have been a misreading, or an unwarranted expansion, of *Berg*.¹¹⁴ In any event, this idea derives from dicta and is insufficient cause to dismiss RICO plaintiffs who have suffered injury to their expectation interests.¹¹⁵

¹¹⁰ See *Gaines v Texas Tech University*, 965 F Supp 886, 890 (ND Tex 1997).

¹¹¹ 965 F2d 783 (9th Cir 1992).

¹¹² *Id* at 785 n 1, quoting *Berg*, 915 F2d at 464.

¹¹³ See, for example, *Diaz*, 354 F3d at 1171 (requiring proof of concrete financial loss to recover under RICO); *Maio v Aetna, Inc*, 221 F3d 472, 483 (3d Cir 2000) (same).

¹¹⁴ The merits of *Berg* itself are uncertain. See, for example, *Mendoza v Zirkle Fruit Co*, 301 F3d 1163, 1170–72 (9th Cir 2002) (holding that workers in the apple growing region of Washington—who were legal residents—had standing to sue the defendant for importing illegal workers, which had the practical effect of depressing the plaintiffs' wages). For other cases relying on the line of reasoning evident in *Berg*, see *In re Taxable Municipal Bond Securities Litigation*, 51 F3d 518, 523 (5th Cir 1995); *Imagineering, Inc v Kiewit Pacific Co*, 976 F2d 1303, 1310 (9th Cir 1992); *Matsuura v E.I. du Pont de Nemours and Co*, 330 F Supp 2d 1101, 1132 (D Hawaii 2004).

¹¹⁵ A significant number of cases interpreting civil RICO "property" have denied standing on the basis that an actual injury, or a change in status or position, is required before a plaintiff may recover under RICO. See, for example, *Guerrero v Gates*, 442 F3d 697, 707 (9th Cir 2006); *Chaset v Fleer/Skybox International, LP*, 300 F3d 1083, 1087 (9th Cir 2002) ("Injury to mere expectancy interests or to an 'intangible property interest' is not sufficient to confer RICO standing.").

In addition, some cases do not, at root, take a principled approach to defining civil RICO "property" but simply reject or accept such claims based upon an intuitive understanding of what injuries civil RICO was designed to compensate. See, for example, *Mendoza*, 301 F3d at 1168 n 4 (stating that plaintiffs had a property interest in conducting business unhampered by RICO schemes, a sort of amorphous catchall); *Van Schaick*, 535 F Supp at 1137 (requiring that civil RICO property have a "commercial orientation"). See also *Doe*, 958 F2d at 768 ("We find it

Having considered the mine run of cases interpreting civil RICO “business or property,” the best clue to the import of the civil RICO statute is the Clayton Act, which is nearly identical to the civil RICO provision and served as its basis. Yet “business or property” was already ill-defined in the Clayton Act, and its jurisprudence was unsettled when RICO was enacted. Further, there is explicit legislative history rejecting the idea of adding RICO to the Clayton Act to avoid the strict standards of causation and standing that have developed in that jurisprudence.¹¹⁶ The ultimate takeaways from this analysis, then, are that civil RICO “property” probably does not have a commercial gloss and that civil RICO standing was meant to be broader than Clayton Act standing.¹¹⁷

III. PUTTING “BUSINESS OR PROPERTY” IN ITS PLACE

The competing theories for interpretation of “business or property” are each imperfect, and no one approach is obviously superior to the others. The solution, in fact, may be that courts have placed undue emphasis on their interpretative efforts. This Part suggests a new basis for interpreting “business or property” by drawing on Supreme Court precedent in *Sedima II*. It then creates a framework based on the predicate acts underlying all civil RICO violations and on state law. Finally, it shows how that framework would apply in *Van Schaick* and *Oscar II* to reach the proper result.

impossible to believe that Congress intended to thwart [the invasion of legitimate business by organized crime] by recognizing a civil action to acquire a monetary recovery for the value of one’s sexual activity.”).

¹¹⁶ See ABA Report, 115 Cong Rec S 6995 (cited in note 81) (“[A] private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as ‘standing to sue’ and ‘proximate causation.’”). Specifically, this quote is from the ABA to the Senate, not from the Senate itself, and should therefore probably be discounted to some degree. That said, the specificity of the statement and its obvious application to the question at hand at the very least counsel caution in importing Clayton Act definitions of business and property. It may seem contradictory to assert that Clayton standing was unsettled and that “strict standards of standing and causation have developed in that jurisprudence.” Nevertheless, it would be accurate to characterize Clayton standing as “strict” as a very general and nonuniform matter.

¹¹⁷ The fact that the property need not be commercial in nature is of very limited application because few civil RICO courts advance the argument that “business or property” must be commercial. For what seems to be the only recent example, see *Van Schaick*, 535 F Supp at 1137 (requiring that civil RICO property be commercial in nature because of the general “orientation” of the statute). But see also *Bieter Co v Blomquist*, 987 F2d 1319, 1328 n 6 (8th Cir 1993) (noting that some early civil RICO cases imported a commercial injury requirement from antitrust law). This fact is also of limited application because most civil RICO claims are commercial in nature. See *Sedima II*, 473 US at 500 n 16 (reporting that of the “270 known civil RICO cases at the trial level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% allegations of criminal activity”).

A. *Sedima's* Underlying Logic Lights the Way

1. Confusing causation with injury.

It is apparent that some courts have mixed two requirements for standing—*injury* and *proximate cause*—and emphasized causation. These courts have held that injuries remotely caused by the defendant are not “business or property.”¹¹⁸ While the outcome of these cases may be correct, this approach confuses the jurisprudence. Interests that are clearly property, such as the money spent on instructional materials in *Van Schaick*, are paradoxically held not to be “property” because their loss is not proximately caused by the defendant. Courts grappling with intangible property interests should more properly channel the inquiry into causation—whether an attenuated injury deserves satisfaction under RICO is usually an issue of causation.¹¹⁹

When considering whether the harm to a given interest will confer standing to sue, courts should rigorously separate the type of interest at issue and the causal relationship between the defendant’s behavior and the harm. This is not to pretend that courts may make difficult decisions about whether an injury to an attenuated property right confers standing by waving the magic wand of proximate cause. Proximate cause analysis suffers from its own woes. But the virtue of this approach is not only that proximate cause provides an easy resolution but also that proximate cause is the correct place to look for a resolution in most of the cases involving novel or unorthodox types of harm. By channeling these inquiries into causation, federal courts could construct a cogent, coherent, and consistent approach to determining civil RICO liability.

If courts dispose of the injury question through some hazy “business or property” rubric, the standing jurisprudence is doomed to remain mired in confusion. If courts winnow out those cases that turn primarily on causation and not the nature of the property at issue, they will be able to focus on the precise nature of civil RICO “property.” An alternative to placing judicially constructed limitations on RICO prop-

¹¹⁸ See *Canyon County*, 2005 WL 3440474 at *5 (rejecting claims for costs of municipal services because they did not represent injuries to “business or property”); *Leach*, 860 F2d at 1274 (holding that minority shareholders did not have a “legally cognizable injur[y]” when their stock lost value); *Local 355, Hotel, Motel, Rest & Hi-rise Empl and Bartenders Union, AFL-CIO v Pier 66 Co*, 599 F Supp 761, 765 (SD Fla 1984) (labeling attorneys fees and costs incurred through a union decertification effort “incidental damages” that “do not rise to the type of proprietary damage for which RICO provides compensation”). See also note 48, discussing *Van Schaick*, 535 F Supp at 1137.

¹¹⁹ The connection between a plaintiff and her expectation or theoretical interests is often attenuated because of the ephemeral nature of those interests. Because her connection is attenuated, so is her injury when these interests are harmed.

erty is presented in the *Sedima* cases, and this alternative may avoid inconsistent outcomes and facilitate a coherent analytical approach.

2. *Sedima*—the Supreme Court enters the fray.

Sedima, SPRL v Imrex Co, Inc (“*Sedima I*”)¹²⁰ is arguably inapplicable to this inquiry because it was interpreting different language in the civil RICO provision (“by reason of,” to be exact).¹²¹ But *Sedima* in fact proves *dispositive* on whether “business or property” has special significance in the civil RICO context. In *Sedima II*, the Supreme Court rejected the Second Circuit’s attempt to constrain civil RICO. The lower court had found a “racketeering injury” requirement in the statute, a concept borrowed from Clayton Act jurisprudence (which requires an “antitrust injury” in order for a plaintiff to sue).¹²² The Second Circuit reasoned that because a plaintiff must be injured “as a result of” a RICO violation, and since a RICO violation requires more than the commission of predicate acts, a RICO injury must also require something more than an injury resulting from the predicate acts.¹²³

In response to this attempt to construe the language of civil RICO narrowly, the Supreme Court stated that “[t]here is no room in the statutory language for an additional, amorphous ‘racketeering injury’ requirement.”¹²⁴ The Court elaborated, “If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c).”¹²⁵ The Court, describing antitrust standing and proximate cause requirements as overly strict, asserted, “in borrowing its ‘racketeering injury’ requirement from antitrust standing principles, the court below created *exactly* the problems Congress sought to avoid.”¹²⁶

The “antitrust injury” requirement was not articulated until well after RICO was drafted—in *Brunswick Corp v Pueblo Bowl-O-Mat*,

¹²⁰ See 741 F2d 482 (2d Cir 1984), reversed on other grounds 473 US 479 (1985).

¹²¹ See *Sedima I*, 741 F2d at 486.

¹²² The *Sedima I* court reasoned that

the Supreme Court has defined [an antitrust injury] as “injury of the type the antitrust laws were intended to prevent.” By analogy, then, the “by reason of” language in section 1964(c) is intended to limit standing to those injured by a “racketeering injury,” by an injury of the type RICO was designed to prevent.

741 F2d at 494–95, quoting *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 489 (1977).

¹²³ See *Sedima I*, 741 F2d at 503.

¹²⁴ *Sedima*, 473 US at 495.

¹²⁵ *Id.*

¹²⁶ *Id.* at 498–99 (emphasis added).

*Inc.*¹²⁷ This chronology would seem to weaken the rhetorical force of *Sedima II*. Nevertheless, though Clayton Act jurisprudence did not have an “antitrust injury” requirement when RICO was drafted, it did have a variety of standing requirements designed to effectuate the purposes of the statute.¹²⁸

Thus, the “racketeering injury” requirement is not *exactly* the problem that Congress sought to avoid but is exactly the *type* of problem Congress sought to avoid—the introduction of a standing requirement into civil RICO that is appropriate for antitrust but overly restrictive for RICO purposes. The Supreme Court, therefore, has explicitly rejected attempts to apply constraints on standing developed in the antitrust context to the civil RICO context. In doing so, the Court has implicitly rejected grafting special requirements onto civil RICO standing, including restrictive interpretations of injury to “business or property.”

3. Giving effect to RICO’s purposes.

When considering the starkly different purposes of the Acts, it becomes clear that to preserve those purposes, civil RICO standing should logically be more generous than civil Clayton Act standing. Some technical violations of antitrust actually foster competition. If the Act is not to counter its own intent, then some limiting construction of “business or property” is essential. Not so with RICO—there is no way that a civil suit against someone who has violated RICO will punish behavior that RICO was meant to encourage. Thus, “taking RICO’s terms at face value might extend RICO *beyond* its expressly contemplated applications, but it in no way *undermines* RICO’s purposes.”¹²⁹ RICO was

¹²⁷ 429 US 477, 489 (1977). See also *Precision Surgical, Inc v Tyco International, Ltd*, 111 F Supp 2d 586, 588 (ED Pa 2000). But see Virginia G. Maurer, *Antitrust and RICO: Standing on the Slippery Slope*, 25 Ga L Rev 711, 718 (1991) (suggesting that the “legal antecedents of the antitrust injury doctrine” can be found in the “public injury” doctrine developed decades earlier in the Fifth and Tenth Circuits).

¹²⁸ See Note, 64 Colum L Rev at 585 (cited in note 92).

¹²⁹ *Haroco, Inc v American National Bank and Trust Co of Chicago*, 747 F2d 384, 391 n 8 (7th Cir 1984). The language preceding and subsequent to the quote also bears reproduction, for purposes of elucidating the point:

The central factor in *Brunswick* was that the plaintiffs claimed damages suffered by reason of *increased* competition. The Supreme Court recognized that such an award would be “inimical to the purposes” of the antitrust laws, and would “divorce[] antitrust recovery from the purposes of the antitrust laws.” By contrast, taking RICO’s terms at face value might extend RICO’s terms *beyond* its expressly contemplated applications, but it in no way *undermines* RICO’s purposes. As the Supreme Court has said of RICO, “[t]he aim is to divest the association of the fruits of its ill-gotten gains.”

Id (citations omitted), citing *Brunswick*, 429 US at 487–88; *United States v Turkette*, 452 US 576, 585 (1981). Restrictive standing requirements analogous to those in antitrust law would too often leave those gains in the hands of the RICO violators. *Haroco*, like *Sedima*, is instructive for this

not designed to foster a particular kind of behavior; instead, it was designed to criminalize a certain way in which crime was carried out—punishing a violator of RICO ipso facto serves the Act’s purposes.

Further, when Congress drafted RICO, it did not define new types of harm into legal existence. Unlike the Clayton Act, RICO did not criminalize any behavior that was not previously criminal because it did not expand the underlying wrongs beyond preexisting predicate acts. RICO’s contribution was criminalizing a *method* for carrying out crime. Its purpose was to net sophisticated criminals who avoided liability by committing predicate acts through an enterprise, while the purpose of the civil provision in particular was to encourage individuals to enforce RICO in civil court.¹³⁰ Neither of these purposes requires a RICO-specific definition of property. Thus, nothing in the Act’s purposes, functions, or language indicate that civil RICO “business or property” must have some special significance beyond what those two terms might have meant in the predicate act statutes.

Therefore, injury to “business or property” in civil RICO does not need to have special significance in order to effectuate RICO’s purposes. It need only serve the standard injury-in-fact requirements, ensure a party in interest, prevent duplicative recovery and the like, and may therefore have a broad definition.

B. Constructing the Interpretive Framework

The proposed framework for interpreting RICO “property” proceeds in several stages, making the most of available sources of law in order of their applicability. First, congressional intent indicates that courts should presume the existence of RICO property. Next, as Congress did not create new wrongs when it enacted RICO, but merely folded preexisting predicate acts into RICO, courts should consider the meaning of “property” within those acts. Finally, where the predicate acts are not instructive, courts should look to the traditional source of property rights—state law. These steps and their legal foundations are explained below in greater detail.

1. Giving effect to congressional intent.

Having established the importance of separating the “business or property” and causation inquiries, and having rejected attempts to

inquiry. The *Haroco* court was considering the propriety of a “racketeering injury” requirement, an issue related to, but distinct from, the central issue of this Comment. See 747 F2d at 404. As with *Sedima*, courts have apparently not drawn the connection between *Haroco* and interpreting “business or property.”

¹³⁰ See *Rotella v Wood*, 528 US 549, 557 (2000).

graft special meanings onto “business or property,” courts must give effect to the purpose of the statute by refusing to place special conditions on “business or property.” As explained above, there is ample support for the conclusion that Congress intended “business or property” to be interpreted *broadly*, including an express admonition in the Act.¹³¹ Where congressional intent clearly indicates that a provision is to be applied broadly, and where the language of the statute is similarly broad, it should apply broadly. Therefore, Congress’s strong yet vague intent would be best effectuated by approaching *every* civil RICO suit with the presumption that the interest at issue is “business or property.”

2. A foundation of predicate acts.

After giving effect to the clear congressional intent behind RICO by adopting this presumption of RICO property, the alternative framework suggested here proceeds by examining the predicate act statutes. RICO, like conspiracy or accomplice crimes, does not prohibit a particular criminal act. Rather, it prohibits a particular *method* of carrying out criminal acts. The underlying, or predicate, acts themselves define the prohibited behavior; RICO prohibits committing a pattern of these predicate acts through an enterprise.¹³² Many of the predicate acts (for example, mail fraud) contain the word “property.”¹³³ To determine whether a defendant harmed a plaintiff’s “property” by violating the mail fraud provision, a court would use the same analysis whether the crime was in isolation or was part of a RICO violation. If one’s property is injured within the meaning of the mail fraud act and that fraud was part of a RICO conspiracy, one’s property is *of necessity* also injured by the RICO violation. Therefore, to determine whether an injury is an injury to “property” within the meaning of RICO, courts must *first* look to the predicate acts making up the pattern of criminal behavior that was part of the RICO violation.¹³⁴ Because Congress folded

¹³¹ The RICO statute expressly instructs that “[t]he provisions of this title shall be liberally construed to effectuate its remedial purpose.” Organized Crime Control Act of 1970 § 904(a), 84 Stat at 947.

¹³² See, for example, *Morgan v Bank of Waukegan*, 804 F2d 970, 972–73 (7th Cir 1986).

¹³³ See, for example, 18 USC § 1341 (2000) (providing that anyone scheming to obtain “money or *property* by means of false or fraudulent pretenses” through the use of the mails will be fined or imprisoned) (emphasis added).

¹³⁴ These acts have been folded into RICO by the power of Congress. The Supremacy Clause therefore dictates that the meaning of “property” in these acts should prevail over the more traditional source of property rights, state law. Further, practically speaking, these acts often have been clearer as to what “property” is supposed to mean. Relying on such sources (in lieu of a general intuitive sense of what is RICO property based on the scant evidence in the statute) will reduce decision costs and allow for greater uniformity in the law.

the predicate acts into RICO, looking to the predicate acts to elucidate “property” is tantamount to looking at RICO itself.

For a predicate act to be instructive on this score, it must have three characteristics: it must (1) contain the word “property,” because an injury to “property” is necessary to sue under RICO; (2) have some precedent holding whether the property in question is “property” under the meaning of the predicate act because otherwise examining the act would not be instructive;¹³⁵ and (3) the complained-of harm must derive from violation of that predicate act. If all three of these factors are present, then the court should incorporate the definition from the jurisprudence of the predicate act. For example, there is a wealth of material interpreting the nature of “property” in the wire and mail fraud statutes: a provision of the mail fraud statute defines property to include the “intangible right of honest services.”¹³⁶ And courts have held that the entitlement to vote is also “property” within the meaning of the wire fraud statute.¹³⁷ It is not sensible to say that one may be injured in her “property” sufficiently to be the victim of a wire fraud scheme but insufficiently to bring suit under civil RICO. In such a situation, the predicate statute would conclusively answer that the interest injured is indeed property for civil RICO purposes.

It is conceivable, however, that one of these three factors will not be present. In that case, the court should look to state law to determine whether it considers the interest at issue to be “business or property.” If the state law speaks clearly in the negative, then the presumption is defeated and the interest is not “business or property.” Otherwise, the presumption of “business or property” will prevail.

3. Falling back on state law.

Case law is filled with statements to the effect that property is intrinsically a state law concept.¹³⁸ This is the essential virtue of relying

¹³⁵ The second factor, that there be precedent on the meaning of property under the predicate act, may seem unnecessary. But, in fact, the precedent provides the basis of finding injury to property. Consider, for example, someone who is injured by virtue of another’s fraudulent procurement of citizenship, which is the predicate act. Even if there were an abundance of precedent discussing what it is to be *injured* by this violation, if it is not an injury to *property*, it is not an injury sufficient to confer standing under civil RICO.

¹³⁶ 18 USC § 1346 (2000).

¹³⁷ See, for example, *United States v Townsley*, 843 F2d 1070, 1080 (8th Cir 1988); *United States v Girdner*, 754 F2d 877, 880 (10th Cir 1985).

¹³⁸ See, for example, *Logan v Zimmerman Brush Co*, 455 US 422, 430 (1982) (“The hallmark of property, the Court has emphasized, is an individual entitlement grounded in *state law*.”) (emphasis added); *Milens of California v Richmond Redevelopment Agency*, 665 F2d 906, 909 (9th Cir 1982) (“We look to local state law to determine what property rights exist and who is entitled to recover for a taking.”).

on state law definitions of property.¹³⁹ It is reasonable to determine if something is an “interest” by reference to the law creating that interest. Because state law is the source of most property interests, it necessarily largely defines the boundaries of those interests. This approach is not immune to criticism, but on balance the benefits and drawbacks examined below point in favor of relying on state law as a *fallback*.

The major problem with this approach in the civil RICO context is that it might ignore congressional intent. Where state law definitions conflict with congressional intent, congressional intent must prevail under the Supremacy Clause.¹⁴⁰ Using state law as a backstop, however, where congressional intent is not ascertainable (via a predicate act), presents no such Supremacy Clause concerns.

Further, this approach is more efficient and consistent where the predicate acts are unavailing than trying to determine whether Congress intended to include the interest at issue within the definition of “business or property.” By referencing a preexisting body of law, the courts avoid having to develop—more than is necessary to effectuate congressional intent—a separate federal common law for what constitutes property under civil RICO. State law will also promote judicial efficiency and legal clarity because state law will presumably be more developed than the predicate acts on any given property question it has addressed.

That said, an exclusive reliance on state law would not only be vulnerable to the Supremacy Clause, it would also create the possibility of inconsistent outcomes within and across circuits. This result might be problematic for two reasons. First, federal law is presumed to have uniform application.¹⁴¹ Uniformity is particularly important in the federal criminal context for all the same reasons that criminal laws are required to be clear. Citizens require notice so as to conform their behavior to the law, and the government’s latitude to coerce its citizenry should be restricted to those occasions where they have actually engaged in prohibited behavior.¹⁴²

Second, the classic argument against penal clarity—that it can create a roadmap to evasion—actually cuts in favor of uniformity in this context. A clearly articulated jurisprudence may provide the particularly savvy scofflaw with a plan as to how to evade it, but the state law

¹³⁹ See *Leach*, 860 F2d at 1274 n 14, citing *Reconstruction Finance Corp v Beaver County*, 328 US 204 (1946).

¹⁴⁰ See US Const Art VI, cl 2.

¹⁴¹ See *Leach*, 860 F2d at 1274 n 14. See also *Reconstruction Finance*, 328 US at 209 (1946).

¹⁴² See *City of Chicago v Morales*, 527 US 41, 56 (1999) (noting two independent vagueness problems: a statute “may fail to provide the kind of notice” that will enable people to understand what it prohibits, or “it may authorize and even encourage arbitrary and discriminatory enforcement”).

approach lends itself to such an evasion all the more. By carefully structuring her RICO scheme, the scofflaw could ensure that her civil liability will attach in states that do not recognize the types of harms she is causing.

But the framework suggested here significantly ameliorates the problems that would be presented by relying exclusively on state law. The presumption of “property” and the use of predicate acts come into play before state law, and apply in the same fashion in every federal court. Putting the presumption and predicate acts first ensures a much greater uniformity, as state law will frequently not enter the analysis. Though constructing a federal common law from a clean slate to define civil RICO property could achieve perfect uniformity, the benefits of clarity and efficiency from relying on state law outweigh the value of this perfection. Another consideration is that an approach relying entirely on state law could deny recovery in situations where state law is unclear. Not so with a presumptive approach—all such cases will involve civil RICO “business or property.”

This framework may have the potential to open a floodgate of novel and potentially unjustified property claims, in that any property will be civil RICO property unless there is clear evidence to the contrary. Nevertheless, the more debatable definitions of property are generally more attenuated in nature, and therefore whatever harm might befall them will inherently be a remote result of the defendants’ behavior. Therefore, truly bizarre or novel suits will typically fail for causation, if not for a lack of “business or property.” In addition, state law provides an important filtering mechanism. Tendentious claims of “property” that pass the proximate cause inquiry still have to confront state law and will fail when state law clearly states that they are not “property.” The framework, then, relies on state law to undercut the problems presented by the lack of applicable federal legal sources and draws on congressional intent expressed through the statute and the predicate acts to obviate the Supremacy Clause and uniformity problems presented by relying on state law.

C. Applying the Interpretive Framework

The ultimate framework is as follows: (1) rigorously separate the causation and injury inquiries and reject those suits with insufficient causation; (2) presume that the complained of injury is civil RICO “business or property”; (3) look to the definitions of “business” and “property” in the statutes defining the predicate acts to defeat this presumption if (a) they contain those terms, (b) courts have jurisprudence on point, and (c) the harm resulted from the commission of the predicate act in question. If the predicate acts have these characteristics, then they will provide guidance. If they do not, or if the interest at issue is

arguably “business or property” under the predicate act jurisprudence, then the presumption remains. If the predicate act inquiry is not helpful, courts should next (4) look to the applicable state law to determine whether it clearly holds that the interest is not “business or property.” If state law is not clear on the issue, or holds the interest to be “business or property,” then the plaintiff has standing to sue under civil RICO.

In *Van Schaick*, the court reasoned that the injured interest did not comport with RICO’s “commercial orientation.”¹⁴³ Applying this Comment’s framework, it is apparent that *Van Schaick* would fail the causation inquiry. The plaintiff’s losses consisted of money spent purchasing instructional materials and money paid to the church in satisfaction of various infractions. The plaintiff was not compelled by the defendant’s behavior in either situation; her actions were voluntary. Her loss is not fairly traceable to the defendant’s wrongdoing because she herself was an intervening cause. If the requisite causation had been found, it is clear that the plaintiff’s loss of money is RICO property. Therefore, the nature of the injured property is not a bar to suit.

The framework would look slightly different in application to the *Oscar* cases. Presuming that an interest in “rental property” is civil RICO property, the next step is to look to “property” in the predicate act statutes, which in this instance do not have a developed jurisprudence as to the meaning of “property.” The next step, then, turns to state law on the issue. The court in *Oscar I*¹⁴⁴ found that “[u]nder California law, lessees such as plaintiffs do have a property interest in their apartments,”¹⁴⁵ and that they also have a property interest in the enjoyment of that property.¹⁴⁶ Therefore, under this analysis, the presumption of RICO “property” stands. Because the defendants proximately caused an injury to an interest cognizable under state law, the plaintiff would have standing to bring a civil RICO suit. The application of this framework would produce the same result as in *Oscar II*, albeit by a different route. Because the *Oscar II* court found state law to be unclear,¹⁴⁷ the default would be to grant the plaintiff standing.

¹⁴³ *Van Schaick*, 535 F Supp at 1137 (“[C]ourts should be sensitive to the statute’s commercial orientation We do not believe Congress intended § 1964(c) to afford a remedy to every consumer who could trace purchase of a product to a violation of § 1962.”). See discussion of *Van Schaick* in text accompanying notes 45–51.

¹⁴⁴ 939 F2d 808 (9th Cir 1991), reversed en banc 965 F2d 783 (9th Cir 1992).

¹⁴⁵ *Oscar I*, 939 F2d at 811. See discussion of *Oscar II* in text accompanying notes 111–14.

¹⁴⁶ See *Oscar I*, 939 F2d at 812.

¹⁴⁷ See *Oscar II*, 965 F2d at 787. The *Oscar II* court recharacterizes the plaintiffs’ claim as one for nuisance, which is a personal injury “even when it flows from a valuable property interest.” *Id.* at 787. What complicates the issue, though, is that the court is discussing the loss of enjoyment in the context of what injury is necessary for a § 1964 claim. In comparison, the *Oscar I* court asserts that the tenant has a property interest in quiet enjoyment since it derives from (or is a part of) the property interest in the leasehold. See 939 F2d at 811, citing *Venuto v Owens-*

CONCLUSION

Deciphering the phrase “business or property” in § 1964(c) is not one of the paramount issues facing our federal courts. Why, then, explore the issue? Ignoring the manifest interest of those few civil litigants whose fortunes will turn on the phrase, it is important that the interpretation of this phrase be placed on solid logical footing. In light of the jaundiced view that many courts have towards civil RICO in general,¹⁴⁸ it is reasonable to assume that a growing number of courts will follow the *Berg* line of cases and seize on “business or property” to narrow improperly the available recovery. The poor reasoning behind according great independent significance to “business or property,” then, is not benign; it is merely dormant. Further, if civil RICO is indeed overbroad, the defect is inherent in the statute, “and its correction must lie with Congress.”¹⁴⁹ This is unlikely to occur if the courts obfuscate the problems of the statute with judicial gloss. Few situations of statutory interpretation more emphatically demonstrate the propriety of adhering to the plain language of the text than this one, where the breadth of the language is matched by the dearth of evidence as to its meaning.¹⁵⁰

Corning Fiberglass Corp., 22 Cal App 3d 116 (1971); *Brown Derby Hollywood Corp v Hatton*, 325 P2d 896 (Cal 1964); W. Page Keeton, et al, *Prosser and Keeton on the Law of Torts* § 87 at 621 (West 5th ed 1984). The court in *Venuto* stated, “[A]ny interest sufficient to be dignified as a property right will support an action based on a private nuisance, and this includes within its purview a tenancy for a term.” 22 Cal App at 125. Thus, even in the cases cited for support, there is not a clear statement of state law that enjoyment is, in itself, a property right.

¹⁴⁸ See note 6.

¹⁴⁹ *Sedima*, 473 US at 499–500 (“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.”).

¹⁵⁰ See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 21 (Princeton 1997) (criticizing an argument that asks the Court “to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent” as “nothing but an invitation to judicial lawmaking”).