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Douglas E. Abrams

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The Place of Procedural Control in Determining Who May Sue or Be Sued: Lessons in Statutory Interpretation from Civil RICO and *Sedima*

*Douglas E. Abrams**

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I. INTRODUCTION

The dust has begun to settle. After dozens of decisions that split the lower courts into insular camps, a sharply divided Supreme Court has decided *Sedima, S.P.R.L. v. Imrex Co.*¹ Over four dissents, the Court held that in creating the private civil cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO),² Congress did not limit the plaintiff class to persons who allege "racketeering injury."³ The five Justice majority also held that Congress did not limit the defendant class to persons previously convicted under RICO's criminal provision or the predicate acts that establish the RICO violation.⁴ The Court's decision

1. 105 S. Ct. 3275 (1985).
 2. 18 U.S.C. §§ 1961-1968 (1982).
 3. 105 S. Ct. at 3284-87. For a discussion of RICO "racketeering injury," see *infra* notes 172-92 and accompanying text.
 4. *Id.* at 3281-84. The Chief Justice and Justices Rehnquist, Stevens, and O'Connor joined Justice White's majority opinion. In an opinion joined by Justices Brennan, Blackmun, and Powell, Justice Marshall dissented from the majority's holding concerning the

is expected to produce a new tide of "civil RICO" litigation.

By breathing new vitality into civil RICO, *Sedima* may quiet some of the immediate questions that have surrounded this cause of action ever since private plaintiffs began to discover its potential reach in 1981. A more vexing question, however, persists in today's "age of statutes,"⁵ when the judiciary routinely must determine the meaning of imprecise legislation. In the crucible of adversary litigation, federal courts determine legislative meaning by interpreting statutory language and legislative history. How shall a court proceed when it reaches "equipoise" after concluding, as Judge Harry T. Edwards recently defined, that competing arguments drawn from the record and pertinent legal materials are "equally strong"?⁶

Because of the sheer volume of legislation that finds its way to the courts, the question of equipoise holds continuing relevance. The "statutorification" of American law⁷ has reached the furthest corners of our national life, and today a sizable percentage of litigation concerns dispute about the meaning of statutes. The scope of dispute is as broad as the scope of legislative activity itself.

Sedima resolved two recurrent disputes that affect the fundamental question of access to judicial redress. One dispute concerns the claim that in creating a private civil cause of action, Congress limited "statutory standing" to exclude plaintiff, and persons similarly situated, from membership in the plaintiff class.⁸ A related

plaintiff class. Justice Marshall concluded that because his analysis would have led to dismissal of the RICO claims at issue, he "[did] not need to decide" whether the majority was correct in its holding concerning the defendant class. *Id.* at 3304 n.2. Justice Powell filed a dissenting opinion that likewise criticized the majority's holding concerning the plaintiff class without reaching its holding concerning the defendant class. *Id.* at 3288.

In a companion case, the Court affirmed per curiam a Seventh Circuit decision that it viewed as consistent with its *Sedima* opinion. *American Nat'l Bank and Trust Co. v. Haroco, Inc.*, 105 S. Ct. 3291 (1985). Justice Marshall submitted his *Sedima* dissenting opinion, again joined by Justices Brennan, Blackmun, and Powell. *Id.* at 3292.

5. See generally G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

6. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 390 (1984).

7. G. CALABRESI, *supra* note 5, at 1.

8. *E.g.*, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 105 S. Ct. 1459, 1462-65 (1985) (Presidential Election Campaign Fund Act); *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 580-85 (1982) (Federal Election Campaign Act of 1971); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100-09 (1979) (Fair Housing Act of 1968).

As a limit on the exercise of judicial power, standing operates at both the constitutional and statutory levels. To have constitutional standing, a plaintiff must satisfy article III's case-or-controversy requirement. The "core component" requires allegation of "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed

dispute concerns the claim that Congress excluded defendant, and persons similarly situated, from membership in the defendant class.⁹ In either circumstance, the court must determine whether Congress created a broad class advanced by one party or a narrower one advanced by another.

Civil RICO litigation is an apt vehicle for examining the way courts reach this determination once they conclude, in the exercise of judgment, that statutory interpretation produces equipoise.¹⁰ In the five years before *Sedima*, lower courts struggled to determine the contours of civil RICO's litigant classes. Courts analyzed statutory language and legislative history but could not agree about their meaning. They analyzed legislative purpose but could not agree about what that purpose was. Some courts even analyzed the context in which Congress acted but could not agree about what that context was. The utter confusion, reflected in the Supreme Court's own sharp division, suggests that in their deliberations, many judges were considerably less certain about legislative meaning than their written opinions ultimately demonstrated. Courts might have arrived not at a determination of meaning but at equipoise.

When a federal court resolves equipoise in its effort to determine the contours of a litigant class created by an express private cause of action, the court should consider the control that the Federal Rules of Civil Procedure, taken as a whole, exercise on the conduct of litigation. With civil RICO as background, part II presents this thesis and discusses the circumstances in which procedural control would be an element supporting a determination

by the requested relief." *Allen v. Wright*, 104 S. Ct. 3315, 3325 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Constitutional standing also embraces several judicially self-imposed limits on the exercise of federal jurisdiction, including the general prohibition on a litigant's raising another person's legal rights and the requirement that the complaint fall within the zone of interests protected by the law invoked. *Id.* at 3324-25.

When this Article discusses determination of the plaintiff class, the focus is on statutory standing. A person has statutory standing if the person is within the plaintiff class created by the statute. *E.g.*, *National Conservative Political Action*, 105 S. Ct. at 1462-65.

9. *E.g.*, *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248, 1253-55 (1984) (Rehabilitation Act of 1973); *United Ass'n of Journeymen & Apprentices v. Local 334*, 452 U.S. 615, 622-26 (1981) (Labor Management Relations Act).

10. The terms "statutory interpretation" and "statutory construction" are synonymous in current usage. R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 283 (1975). Some writers, however, have drawn a distinction. "Interpretation" is the process of determining the meaning of the language itself, while "construction" includes the process of determining whether a statute otherwise clear in its express meaning should be applied to situations not clearly falling within it. *Id.* at 283-84.

that Congress created a broad litigant class. Implicit in the notion of equipoise is the threshold recognition that when a court engages in statutory interpretation, it exercises judgment that might affect the outcome and thus make law. This recognition did not come quickly or easily to mainstream jurisprudence, and even today the role of judgment in judicial decisionmaking is a subject of spirited public discussion. Part III surveys American legal thought about judicial decisionmaking from the early years of the Republic until judgment and judicial lawmaking won general recognition in this century. To amplify the Article's thesis, parts IV and V focus on civil RICO decisions that struggled to determine the litigant classes before the sharply divided Supreme Court spoke in *Sedima*. Part IV compares the courts' disparate determinations, which show how the sources of legislative meaning sometimes may be so contradictory or otherwise unilluminating that they leave a judge at equipoise. Part V isolates civil RICO procedural holdings to demonstrate the control that the Rules exercise on the conduct of litigation.

II. EQUIPOISE AND ITS RESOLUTION

A. *The "Serious Business" of Sedima*

Sedima's lineage reaches back as far as 1967, when the Katzenbach Commission called on Congress and the states to "make a full-scale commitment to destroy the power of organized crime groups."¹¹ Three years later Congress enacted the Organized Crime Control Act (OCCA),¹² Title IX of which was entitled Racketeer Influenced and Corrupt Organizations, dubbed "RICO." According to the Senate Report, RICO's purpose was to "eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."¹³

RICO authorizes the government to move against defendants in criminal prosecutions,¹⁴ civil proceedings,¹⁵ or both. It also au-

11. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 200 (1967) [hereinafter cited as PRESIDENT'S COMMISSION]. For a discussion of RICO's origins, see Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-80 (1982).

12. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in various sections of 18, 28 U.S.C. (1982)).

13. S. REP. NO. 617, 91st Cong., 1st Sess. 76, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007.

14. 18 U.S.C. § 1963 (1982).

15. 18 U.S.C. § 1964(a), (b) (1982).

thorizes private plaintiffs to sue and recover treble damages and costs, including reasonable attorneys' fees.¹⁶ The foundation of this Article is the express private cause of action, called "civil RICO" here in accordance with the shorthand adopted by most commentary.

The name of Title IX—Racketeer Influenced and Corrupt Organizations—suggests that the roll of civil RICO defendants would include primarily organized-crime figures, but events have put this suggestion firmly to rest. Few organized-crime figures have ever been named as civil RICO defendants.¹⁷ By 1981, however, private plaintiffs began to discover that broad interpretation of RICO would enable them to assert a civil RICO claim in nearly any fraud action.¹⁸ Plaintiffs have asserted civil RICO claims against such nonracketeer defendants as banks,¹⁹ law firms,²⁰ Big Eight accounting firms,²¹ insurance companies,²² and securities and investment firms.²³ Individuals and corporations large and small have not been immune. Neither have the Ku Klux Klan,²⁴ Church of Scientology,²⁵ or Comptroller of the Currency.²⁶

As plaintiffs began to aim civil RICO at nonracketeer defen-

16. 18 U.S.C. § 1964(c) (1982).

17. An American Bar Association task force found that of the 270 pre-1985 district court civil RICO decisions, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% "allegations of criminal activity of a type generally associated with professional criminals." Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55-56 (1985), *cited in* Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275, 3287 n.16 (1985) [hereinafter cited as ABA Report].

18. Of the 270 pre-1985 district court civil RICO decisions, 3% were decided in the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. ABA Report, *supra* note 17, at 55, *cited in* Sedima, 105 S. Ct. at 3277 n.1.

19. *See, e.g.,* American Nat'l Bank and Trust Co. v. Haroco, Inc., 105 S. Ct. 3291 (1985).

20. *See, e.g.,* King v. Lasher, 572 F. Supp. 1377 (S.D.N.Y. 1983); Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47 (N.D. Cal. 1982).

21. *See, e.g.,* Schacht v. Brown, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983).

22. *See, e.g.,* Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983).

23. *See, e.g.,* Moss v. Morgan Stanley Inc., 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); Jensen v. E.F. Hutton & Co., [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,674 (C.D. Cal. Jan. 26, 1984); Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983); Mauriher v. Shearson/American Express, Inc., 567 F. Supp. 1231 (S.D.N.Y. 1983).

24. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982).

25. Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125 (D. Mass. 1982).

26. Gordon v. Heimann, 715 F.2d 531 (11th Cir. 1983).

dants, many courts limited membership in one or both litigant classes by statutory interpretation. Standing was limited to persons alleging "competitive," "racketeering," or similarly labeled injury.²⁷ The defendant class was limited to persons connected with organized crime or previously convicted under RICO or the predicate acts that establish the RICO violation.²⁸

A profound split of authority emerged between courts that limited one or both litigant classes and courts that declined to limit one or both. In its *Sedima* decision in mid-1984, a Second Circuit panel accurately stated the law when, after attempting to synthesize the more than 100 civil RICO decisions then reported, it concluded that "there is simply no consensus on what RICO requires."²⁹ A common thread did join courts on each side of the judicial divide—their written opinions parsed statutory language and legislative history, and each side found support in these sources for its conclusion.

Throughout much of our history, mainstream American jurisprudence viewed the legislature as the sole lawmaking organ in cases such as *Sedima*, which require statutory interpretation. Courts found and declared preexisting meaning but did not make law themselves. For at least the past fifty years, however, it generally has been recognized that courts possess the capacity to make law when they render decisions. In statutory decisionmaking, the judicial role is subordinate, confined to the ascertainment and application of legislative meaning. The capacity for judicial lawmaking exists, however, because statutory interpretation necessarily includes exercising the sort of judgment evident in civil RICO

27. See *infra* notes 156-92 and accompanying text.

28. See *infra* notes 193-245 and accompanying text.

29. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 486, 492 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985). The profound split of authority was nowhere more apparent than in the Second Circuit itself. On July 25, 1984, a divided panel decided *Sedima*, which limited civil RICO's plaintiff class to persons alleging "racketeering injury" and its defendant class to persons previously convicted under RICO or the predicate acts. 741 F.2d at 496, 503. A day later a different divided panel limited civil RICO to plaintiffs alleging "a distinct RICO injury." *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985). A day after *Rhoades* a third panel unanimously disagreed with the *Sedima* and *Rhoades* majorities and reaffirmed the views of Judge Richard J. Cardamone, the dissenter in those cases. *Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985). The *Furman* panel held that civil RICO did not require allegation of a "separate, distinct racketeering enterprise injury" but concluded that it was "compelled" to affirm dismissal of the complaint on the authority of the two earlier decisions. 741 F.2d at 525, 533. The prior-conviction limit was not reached in *Rhoades, id.* at 516 n.5, and was not before the *Furman* panel, *id.* at 526-27.

decisions.

Once the capacity for judicial lawmaking achieved wider recognition in this century, attention turned to the proper place of that lawmaking within our constitutional framework. Holmes and Cardozo instructed that judges rightfully legislate, but only "interstitially," or "between gaps" in the legal fabric.³⁰ Cardozo's classic 1921 lectures on *The Nature of the Judicial Process* not only defended judicial legislation but also acknowledged that "often there are no gaps."³¹ Some statutes are fixed in their meaning.³² Others contain language and legislative history that carry sufficient imprecision to permit colorable arguments by adversary litigants, but statutory interpretation ordinarily produces a prevailing argument that satisfies the court that it has ascertained the meaning most in accord with the record and pertinent legal materials. Only in "occasional and relatively rare instances," as Cardozo stated, does "[o]bscurity of statute"³³ or other authority lead to the overriding doubt and even equipoise that civil RICO might have produced in judges' minds. In these instances, according to Cardozo, "the serious business of the judge begins."³⁴ With a nod to Cardozo, Harry Jones has spoken of "serious business" cases, in which "the rule can be set, and justified with all traditional case-law proprieties, either way."³⁵ Cardozo estimated that serious-business cases comprise about ten percent of a typical docket,³⁶ a figure corroborated by some writers³⁷ but viewed as too low by others.³⁸

30. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."); B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113 (1921) (The judge "legislates only between gaps. He fills the open spaces in the law.").

31. B. CARDOZO, *supra* note 30, at 129.

32. An example is the statute that establishes district court filing and miscellaneous fees. 28 U.S.C. § 1914 (1982).

33. B. CARDOZO, *supra* note 30, at 128.

34. *Id.* at 21. ("It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.").

35. Jones, *An Invitation to Jurisprudence*, 74 COLUM. L. REV. 1023, 1038-39 (1974) [hereinafter cited as Jones, *Invitation*]; see also Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 803 (1961).

36. "Nine-tenths, perhaps more, of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate preestablished by inevitable laws that follow them from birth to death." B. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924).

37. See, e.g., Clark and Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 256 n.7 (1961); Edwards, *supra* note 6, at 390 (five to fifteen percent).

38. See, e.g., K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 25 n.16

Most twentieth century writers conclude that judges may resolve equipoise by exercising essentially legislative discretion.³⁹ Cardozo was influential in articulating this traditional view. In the third of his 1921 lectures, entitled "The Judge as a Legislator," he offered this comparison between the roles of judges and legislators:

The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law . . . None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom.⁴⁰

H.L.A. Hart expanded on Cardozo's discretion model a generation ago.⁴¹ Statutes, Hart began, are "verbally formulated general rules."⁴² They produce decision in ordinary cases, but the legal system recognizes that "there is a limit, inherent in the nature of language, to the guidance which general language can provide."⁴³ Beyond the borderline of legal rules lies "open texture,"⁴⁴ which is "the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact."⁴⁵ When a court ventures into open texture, for example when "resolving the uncertainties of statutes,"⁴⁶ it has "discretion"⁴⁷ to make "a fresh choice between open alternatives."⁴⁸ The court may engage in "cre-

(1960) (suggesting about twenty percent); Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 *YALE L.J.* 218, 222 n.23 (1961); Jones, *Invitation*, *supra* note 35, at 1038-39 ("On any account of the judicial process, even the most conservative, there is a substantial incidence of [serious-business cases]. Whatever this incidence may be—a fifth, a fourth, or a third—it is indisputable that judicial decision-making involves, at certain times anyway, the inescapability of choice between alternatives . . ."); Sneed, *The Art of Statutory Interpretation*, 62 *TEX. L. REV.* 665, 686 (1983) ("More frequently than one would like, neither [statutory language or legislative history] nor the briefs of the parties adequately identify the legislative will.").

39. See Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 *MICH. L. REV.* 473, 507 n.115 (1977); see also R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 30 (1977) ("[T]he notion of judicial discretion has percolated through the legal community . . .").

40. B. CARDOZO, *supra* note 30, at 113-15.

41. H. HART, *THE CONCEPT OF LAW* 121-50 (1961).

42. *Id.* at 123.

43. *Id.*

44. *Id.* at 124.

45. *Id.* at 125.

46. *Id.* at 132.

47. *Id.* at 124, 132.

48. *Id.* at 125.

ative or legislative activity,"⁴⁹ subject to standards that are central to the system⁵⁰ but that are not part of the law.⁵¹

Ronald Dworkin has challenged the view that judges may exercise essentially legislative discretion in cases in which, for example, statutory interpretation does not produce decision.⁵² Dworkin maintains that law consists not only of "rules" such as statutes, but also of "principles." A rule dictates the decision in an "all-or-nothing fashion."⁵³ When no applicable rule exists, principles merely "incline a decision one way, though not conclusively."⁵⁴ In "hard cases"—"when no settled rule dictates a decision either way"⁵⁵—the court must identify relevant principles, evaluate their relative weight and importance, and decide according to the principle that "best justifies settled law."⁵⁶ A principle's weight and importance depends on the extent to which it enjoys "a sense of appropriateness developed in the profession and the public over time."⁵⁷ Because principles are part of law as Dworkin conceives it,⁵⁸ he denies the existence of interstices, gaps, or open texture that would permit courts to exercise discretion on matters of law.⁵⁹

49. *Id.* at 131.

50. *Id.* at 141-42.

51. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 612-14 (1958).

52. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), reprinted in *LAW, REASON & JUSTICE* 3 (G. Hughes ed. 1969) and as Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* (R. Summers ed. 1968); Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter cited as Dworkin, *Hard Cases*]; Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972). A collection of these and other essays appears in R. DWORKIN, *supra* note 39. See also Dworkin, "Natural Law" Revisited, 34 U. FLA. L. REV. 165 (1982); Dworkin, *Seven Critics*, 11 GA. L. REV. 1201 (1977); Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 (1963).

53. R. DWORKIN, *supra* note 39, at 24, 35. As examples of rules, Dworkin offers, "The maximum legal speed limit on the turnpike is sixty miles an hour" and "A will is invalid unless signed by three witnesses." *Id.* at 24.

54. *Id.* at 35. As an example of a principle, Dworkin offers, "No man may profit from his own wrong." *Id.* at 26. Dworkin distinguishes principles from policies: "Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal." Dworkin, *Hard Cases*, *supra* note 52, at 1067. Only in cases of "special urgency" may decisions be based on policy. R. DWORKIN, *supra* note 39, at 84, 92, 96-97.

55. Dworkin, *Hard Cases*, *supra* note 52, at 1060.

56. R. DWORKIN, *supra* note 39, at 283.

57. *Id.* at 40.

58. *Id.* at 28-39.

59. *Id.* at 32-69.

B. Resolving Equipoise in the Determination of a Litigant Class

When a court reaches equipoise in its effort to determine the contours of a statutory litigant class, the court must look beyond statutory language and legislative history to determine whether Congress previously created a broad class advanced by one party or a narrower one advanced by another. Among other sources, the court should consider the control that the Federal Rules of Civil Procedure, taken as a whole, exercise on the conduct of litigation.⁶⁰ Because equipoise places the court in open texture, Hart's formulation would permit the court to consider procedural control to guide the exercise of essentially legislative discretion. Under Dworkin's formulation, procedural control would lay claim to status as a principle enjoying a time-honored sense of appropriateness derived from the positive reception that the bench and bar have accorded the Rules ever since their adoption in 1938; the court would evaluate the weight and importance of procedural control in relation to the weight and importance of other extant principles. Under either formulation, procedural control remains relevant to resolution of

60. Because the court is charged with determining the litigant class that Congress previously created, consideration of procedural control in the resolution of equipoise does not transgress the Rules Enabling Act, 28 U.S.C. § 2072 (1982). That Act provides in part that the Rules "shall not abridge, enlarge or modify any substantive right." *Id.* Nor does this consideration transgress Rule 82, which provides in part that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts." FED. R. CIV. P. 82. The court at equipoise has concluded that statutory language and legislative history do not permit determination of the previously created class. Consistent with historically developed notions about legislative supremacy and the judiciary's constitutional role, the court must determine the class by exercising essentially legislative discretion or by evaluating the relative weight and importance of extant principles. In either event, the court does not begin with a clean slate, but rather determines meaning from among ascriptions within the inarticulate statute's interstices or gaps. *See supra* notes 30-38 and accompanying text.

For example, civil RICO provides a private cause of action in favor of "[a]ny person injured in his business or property." 18 U.S.C. § 1964(c) (1982); *see infra* note 152. Before the Supreme Court's *Sedima* decision, lower courts might have resolved equipoise by concluding, for example, that Congress limited (or did not limit) the plaintiff class to persons alleging "racketeering injury" to their business or property. *See infra* notes 172-92 and accompanying text. A fundamentally different matter would have been presented, however, if a court purported to resolve equipoise by concluding that the plaintiff class included persons alleging personal injury. *Cf. Bankers Trust Co. v. Rboades*, 741 F.2d 511, 515 (2d Cir. 1984) (§ 1964(c) does not create right to recover for personal injury), *vacated and remanded on other grounds*, 105 S. Ct. 3550 (1985). Because RICO's language and legislative history do not reasonably suggest that Congress created a private right of action to recover for personal injury, expansion of the plaintiff class to encompass that injury would constitute judicial activity beyond RICO's interstices or gaps and thus would amount to primary law-making, which is the province of Congress.

equipoise because substance and procedure do not operate in mutually exclusive vacuums. Each affects the other and reflects legislative judgments about the nature of legal rights and obligations and the way they should be determined and enforced. The Rules are held to have statutory effect, and they expressly apply to causes of action, such as civil RICO, that Congress creates without prescribing procedure.⁶¹ The Rules, as a whole, provide the frame-

61. The Rules are held to have statutory effect because under the Rules Enabling Act, a rule or amendment becomes effective only with congressional approval or acquiescence. 28 U.S.C. § 2072 (1982); see *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941); *United States ex rel. Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); *Rumsey v. George E. Failing Co.*, 333 F.2d 960, 962 (10th Cir. 1964); *Nordmeyer v. Sanzone*, 315 F.2d 780, 781-82 (6th Cir. 1963). The Enabling Act occasioned some early scholarly dispute about whether Congress had the power to prescribe rules of federal practice and procedure. Compare Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928), reprinted in 20 J. AM. JUD. SOC. 159 (1936) (retitled *Legislature Has No Power in Procedural Field*) with Beardsley, *Legislative Regulation of Procedure Not Unconstitutional*, 24 J. AM. JUD. SOC. 115 (1940). Contemporary courts and commentators, however, generally agree that this power resides in Congress. *E.g.*, *Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *Sibbach v. Wilson & Co.*, 312 U.S. at 9-10; see also W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 38-39 (1981). The Enabling Act delegated the power to the Supreme Court, which acts on advice from the Judicial Conference of the United States. 28 U.S.C. § 331 (1982). The Court prescribes rules and amendments, which the Chief Justice reports to Congress. A rule or amendment may not take effect until 90 days after the Chief Justice's report, though the Court may specify this or a later effective date. *Id.* § 2072. Congress may permit a rule or amendment to become effective by taking no action, it may reject or amend the rule or amendment, or it may defer effectiveness. If Congress defers effectiveness, it eventually may allow the rule or amendment to take effect, may reject or amend it, or may enact its own rule or amendment. See W. BROWN, *supra* at 5-8.

Congress may create a cause of action such as civil RICO and provide for its assertion by procedure that supersedes the Rules in whole or part. Superseding would be consistent with the canon of statutory construction that a subsequent statute modifies a prior one on the same subject. J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 51.02 (C. Sands 4th ed. 1972). The Supreme Court has held, however, that congressional intent to supersede the Rules must be "direct" and "clear." *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979); see also *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1134 n.50 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979); *Markowitz v. Brody*, 90 F.R.D. 542, 549 (S.D.N.Y. 1981). The *Califano* holding is in accord with the canon of statutory construction that implied repeal of a statute is not found in the absence of a "clear and manifest" legislative intent to repeal. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 456-57 (1945).

In nearly a half century, Congress apparently has enacted legislation superseding the Rules in only one minor instance. 4 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1001 n.22 (1969 & Supp. 1985) (citing 35 U.S.C. § 282 (1982)) [hereinafter cited as WRIGHT & MILLER]. The almost universal approach, taken in the enactment of the OCCA, is to create a private right of action but remain silent about procedure in the statutory language and legislative history. In accordance with Rule 1, the Rules and the case law applying them govern. FED. R. CIV. P. 1 (with exceptions not relevant in civil RICO actions, the Rules govern procedure "in all suits of a civil nature" in the district courts); see also *United*

work for achieving the general legislative goal, expressed in Rule 1, of securing "just, speedy, and inexpensive" civil determinations.⁶²

Civil RICO demonstrates the often conflicting considerations that operate in equipoise cases in which the court must determine the contours of a litigant class created by Congress. Courts endeavored to reach "just" determinations about whether Congress had limited civil RICO to certain potential plaintiffs (for example, persons alleging "racketeering injury"), or to certain potential defendants (for example, persons connected with organized crime). At the same time, courts recognized that the scope of civil RICO's litigant classes might affect the caseload and thus affect judicial ability to secure "speedy" and "inexpensive" determinations.⁶³

Resolution of equipoise is likely to result in either overinclusion or underinclusion, each with its own effect on these often conflicting considerations. Because certain persons will be members of both a broad and a narrower litigant class, the result depends on the "swing" persons—those who would be members of the first class but not the second. If the court defines a broad class, it concludes that a just determination makes private redress available against a broad range of conduct. Breadth increases the possibility of including conduct outside the inarticulate Congress' intentment, but it decreases the possibility of excluding conduct within that intentment. Breadth also might swell the dockets and impede efforts to maintain efficiency conducive to speed and inexpensiveness. On the other hand, definition of a narrower class might advance efficiency by reducing the dockets, but it would restrict

States v. Powell, 379 U.S. 48, 58 n.18 (1964).

62. Fed. R. Civ. P. 1 The rulemakers increasingly have called on courts to assume a managerial role that directly exercises control over the conduct of civil litigation. *E.g.*, Fed. R. Civ. P. 16 (pretrial conferences; scheduling; management); Fed. R. Civ. P. 26(f) (discovery conference).

63. *See, e.g.*, *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) ("Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts . . . , however much we may regret . . . the burdens that the decision has cast on the federal courts") (citations omitted). Compare *Terre du Lac Ass'n v. Terre du Lac, Inc.*, 601 F. Supp. 257, 261 (E.D. Mo. 1984) (adopting prior-conviction limit on defendant class, with observation that contrary holding would "have a severe effect on the court's dockets") with *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 255 (D. Kan. 1984) (rejecting prior-conviction limit, with observation that it "reflect[s] a well-intentioned attempt to slow the growing burden which civil RICO cases have placed on federal court dockets already laden with backlogs of cases").

availability of private redress and increase the risk of excluding some conduct within congressional intentment.

In the resolution of equipoise, consideration of efficiency requires more than examination of caseload projections. A broad litigant class indeed might increase the caseload, a circumstance that judges recognize should not be taken lightly.⁶⁴ Equipoise cases, however, invite not only the potential of that increase but also the potential of excluding conduct from private redress. Consideration of efficiency requires recognition that commencing a civil action is not a license to proceed at will. Under both the Hart and Dworkin formulations, the court rightfully may consider the reality that the Federal Rules of Civil Procedure control the conduct of litigation because a party may litigate and proceed to judgment only by complying with their prescriptions. Some actions suffer dismissal for noncompliance; others proceed, but only according to these prescriptions. Litigation involving one or more swing persons thus would be controlled by, and proceed in accordance with, prescriptions that Congress previously has approved for the orderly determination of civil actions. In equipoise cases in which private redress against a broad range of conduct otherwise is considered just, procedural control thus would be an element supporting a determination that Congress created a broad litigant class.

III. RETROSPECT AND PROSPECT: THE EFFECT OF JUDICIAL JUDGMENT ON LEGISLATIVE MEANING

Implicit in the notion of equipoise is the threshold recognition that when a court engages in statutory interpretation, it exercises judgment that might affect the outcome and thus make law. Until this century, however, mainstream American jurisprudence perceived the separation of powers as establishing a bright line of demarcation between the legislative and judicial functions. Members of Congress were "lawmakers," and courts were "law interpreters."⁶⁵ Congress made law by enacting statutes within boundaries staked out by the Constitution. Courts interpreted statutes, but

64. See, e.g., Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777 (1981); McGowan, *The View from an Inferior Court*, 19 SAN DIEGO L. REV. 659 (1982); see also *supra* note 63 and accompanying text.

65. *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962), *overruled on other grounds*, *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

only to discover and declare preexisting meaning. According to this traditional scheme, statutory interpretation did not require exercise of judgment that would create a capacity for judicial lawmaking.

The difficulty with the traditional scheme lies in the simple truth that judicial decisions do not announce themselves. The Supreme Court begins statutory interpretation with analysis of statutory language,⁶⁶ followed by analysis of legislative history, either to determine which plausible meaning Congress intended or to reaffirm a plain meaning.⁶⁷ No matter how neatly the formula is articulated, however, statutory interpretation requires what Justice William J. Brennan recently called "the interaction of reader and

66. See, e.g., *INS v. Phinpathya*, 104 S. Ct. 584, 589 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

67. The plain meaning rule formerly precluded analysis of legislative history once statutory language was found to yield a plain meaning. E.g., *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929) ("[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed."); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Hamilton v. Rathbone*, 175 U.S. 414, 419, 421 (1899).

The plain meaning rule evoked sustained criticism for establishing an inherently unreliable method of ascertaining legislative meaning. "The notion that because the words of a statute are plain, its meaning is also plain," Justice Frankfurter inveighed, "is merely pernicious oversimplification." *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). Judge Learned Hand warned that "[t]here is no surer way to misread any document than to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J., concurring), *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). Judge Hand called on courts "not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). Years later, Justice Roger J. Traynor warned that "[p]lain words, like plain people, are not always so plain as they seem." Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615, 618 (1961).

Some voices, however, have urged courts to eliminate or restrict resort to legislative history. They argue that legislative history is ordinarily a dubious source of meaning whose value is outweighed by the costs it imposes on litigants and courts. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-97 (1951) (Jackson, J., concurring); R. DICKERSON, *supra* note 10, at 137-97.

Today the Supreme Court examines legislative history even after it finds that statutory language yields a plain meaning. See, e.g., *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 105 S. Ct. 658, 663 (1985); *Securities Indus. Ass'n v. Board of Governors*, 104 S. Ct. 3003, 3011 (1984). When the Court finds "clear evidence" of a "clearly expressed legislative intention . . . contrary" to plain language, it stands ready to implement that intention. E.g., *Bread Political Action Comm. v. Federal Election Comm'n*, 455 U.S. 577, 581 (1982) (quoting *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980), and *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

text.”⁶⁸ This interaction necessarily requires exercise of judicial judgment. The impact of this human ingredient on final resolution varies from case to case; nevertheless, this ingredient is usually present, as it was in civil RICO litigation, because only rarely does language or legislative history hold meaning amenable to mechanical ascertainment or application.

Even when words are carefully chosen, language suffers from at least some imprecision as a method of communication. Justice Frankfurter offered these insights on the intrinsic difficulties of interpreting statutory language:

Anything that is written may present a problem of meaning The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.⁶⁹

Legislative history also invites imprecision because, to a large degree, it measures subjective intent.⁷⁰ A court examines legislative history to ascertain the intent of particular legislators who enacted the statute whose meaning the parties placed in dispute. Especially when that history appears murky, courts frequently consider the legislation’s broader purpose or the context in which the legislature acted.⁷¹ Even legislative history that appears instructive, however, frequently contains the imprecision present in other circumstances that require determination of subjective intent. If anything, the imprecision inherent in determining one person’s subjective intent is magnified when the goal is to determine the subjective intent of a collectivity such as a legislature.

The imprecision of language and legislative history is fortified by the nature of the legislative process. The court’s decision might turn on a statute whose drafters did not foresee, and perhaps could

68. W. Brennan, *The Constitution of the United States: Contemporary Ratification 1*, Presentation at Georgetown University Text and Teaching Symposium (Oct. 12, 1985) (available from Supreme Court of the United States Information Office).

69. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528 (1947); see, e.g., R. DICKERSON, *supra* note 10, at 34-53; Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 382 (1941) (“Words are the principal tools of lawyers and judges, whether we like it or not So we need to know more about their imperfections.”); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 3 (1939) (“A legislative direction must be expressed in words, and words are notoriously inexact and imperfect symbols for the communication of ideas.”) (citation omitted).

70. See R. DICKERSON, *supra* note 10, at 67-86.

71. *Id.* at 87-136.

not have foreseen, the statute's application to the facts at hand; it might turn on a statute whose language or legislative history became saddled with internal inconsistencies on the run through the legislative obstacle course; it might turn on a statute laden with inadvertent imprecision; or it might turn on a statute whose drafters purposely avoided precision, either from a conviction that case-by-case judicial determination would serve the legislative purpose best or from a sense that passing the burden of decision to the courts would be less painful than facing the hard facts of political compromise and accountability.⁷²

The confluence of language, intent, and legislative process may produce a mosaic that resists ascertainment of legislative meaning and its application to facts. In some cases, the strength of this resistance might leave the court at equipoise. For the judge who interprets a statute, then, the first step in decisionmaking is to seek meaning in statutory language and legislative history. In this century mainstream jurisprudence has recognized a further step, the capacity for judicial lawmaking created when the court's human judgment intervenes during the deliberations.

A. *The Rise and Decline of the Oracular Theory*

During most of the nineteenth century, dominant legal thought embraced the oracular, or declaratory, theory—that courts do not make law but merely find and declare preexisting, transcendent principles.⁷³ The theory's name derives from Blackstone's classic description of judges as “depositories of the laws; the living

72. On and off the hench, judges frequently point to inartfully drafted legislation as a persistent cause of judicial lawmaking. See, e.g., Edwards, *supra* note 6, at 425 (“Statutory incoherence and vagueness . . . impose enormous burdens on the courts when trying to give life to the legislature’s language.”); Friendly, *Judicial Control of Discretionary Administrative Action*, 23 J. LEGAL EDUC. 63, 69 (1970) (“[E]xperience . . . teaches that the degree to which the courts can be expected to restrain themselves is a function of what other branches of government do to avoid the need for interposition”); Ginsburg, *Inviting Judicial Activism: A “Liberal” or “Conservative” Technique?*, 15 GA. L. REV. 539, 547 (1981) (discussing “the murky, buck-passing brand of legislation that casts unwanted construction and application burdens on the courts”); McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1174 (1977) (“A Congress genuinely concerned about delegated power has one effective contribution that it, and only it, can make—the identification and definition, as precisely as possible, of that power, and of the standards to be observed in its exercise.”); see also *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 668 (1980) (Powell, J., concurring in part and concurring in the judgment) (“[O]ne might wish that Congress had spoken with greater clarity”); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 595 (1980) (Rehnquist, J., dissenting) (“The effort to determine congressional intent here might better be entrusted to a detective than to a judge.”).

73. G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 2 (1976).

oracles . . . bound by an oath to decide according to the law of the land."⁷⁴ Blackstone viewed judicial decisions as the "principal and most authoritative evidence" of law but not as law itself.⁷⁵ In cases requiring statutory interpretation, this view meant that law was made solely by the legislature.

Blackstone's hold on early American legal thought is illustrated by the Supreme Court's 1842 decision in *Swift v. Tyson*,⁷⁶ which determined the role of state law in diversity actions for nearly a century until *Erie Railroad Co. v. Tompkins*.⁷⁷ *Swift* was a commercial dispute heard in New York federal court between a Maine plaintiff and a New York defendant. No New York statute spoke to the commercial issue raised. The question for the Court was whether the forum state's decisional law must be applied in diversity actions. The answer turned on the 1789 Rules of Decision Act: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply."⁷⁸ With Justice Story's opinion showing Blackstone's profound influence,⁷⁹ the unanimous Court held that the word "laws" did not include judicial decisions. "In the ordinary use of language," Justice Story wrote,

it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not, of themselves, laws The laws of a state are more usually understood to mean the rules

74. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (Sharswood ed. 1871).

75. *Id.* Although Blackstone generally is recognized as the foremost exponent of the oracular theory, Sir Matthew Hale had stated a similar theory in a work published posthumously in 1713, ten years before Blackstone's birth. M. HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (C. Gray ed. 1971) ("[T]he Decisions of Courts of Justice . . . do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . . ; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons . . .").

76. 41 U.S. (16 Pet.) 1 (1842).

77. 304 U.S. 64 (1938).

78. 1 Stat. 92 (1789), quoted in *Swift*, 41 U.S. (16 Pet.) at 17 (emphasis added). With minor changes in language, the Rules of Decision Act is now codified at 28 U.S.C. § 1652 (1982).

79. Blackstone's *Commentaries* profoundly influenced leading pre-Civil War judges, including Story. See Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U.L. REV. 731, 755-59 (1976). On the *Commentaries'* influence in the United States generally, see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 88-89, 98, 279-80, 285 (1973); W. HOLDSWORTH, SOME LESSONS FROM OUR LEGAL HISTORY 173-76 (1928); A. SUTHERLAND, THE LAW AT HARVARD 23-31 (1967).

and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.⁸⁰

Pre-Civil War America remained content with the oracular theory, even as common-law courts frequently assumed active roles as catalysts of national economic development.⁸¹ For its part, the Supreme Court invoked broad constitutional provisions, notably the commerce and contract clauses, to reach decisions that made as much law as any other decisions ever handed down by the Court.⁸² The oracular theory survived, one commentator suggested, because most activist decisions reflected dominant values and thus occasioned little sustained scrutiny.⁸³

The Supreme Court's 1857 decision in *Dred Scott v. Sandford*⁸⁴ momentarily shook the oracular theory at its moorings. The Court was called on to decide whether Scott, originally a slave in Missouri, had become free when taken into a free territory. The majority held that he could not invoke diversity jurisdiction because he was not a "citizen." The Court reasoned that when the framers drafted the Constitution, "the civilized portion of the white race"⁸⁵ held blacks to be "a subordinate and inferior class of beings;"⁸⁶ to be "altogether unfit to associate with the white race, either in social or political relations;"⁸⁷ to be possessed of "no rights which the white man was bound to respect;"⁸⁸ and to be "treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it."⁸⁹ Then the Court exposed its political side to public view by reaching out to hold the Missouri Compromise unconstitutional. To broad segments of a nation irretrievably divided by slavery's moral and political questions, the Justices appeared not as oracles declaring higher truths but as par-

80. *Swift*, 41 U.S. (16 Pet.) at 17.

81. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, at 1-4 (1977); see also Dorfman, *Chancellor Kent and the Developing American Economy*, 61 COLUM. L. REV. 1290 (1961).

82. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (commerce clause); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (contract clause); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See generally 4 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 220-39, 397-460 (1919).

83. White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1224 (1976), reprinted in G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 32 (1978).

84. 60 U.S. (19 How.) 393 (1857).

85. *Id.* at 407.

86. *Id.* at 404-05.

87. *Id.* at 407.

88. *Id.*

89. *Id.*

tisans delivering a stump speech.⁹⁰

After Appomattox, courts rebounded and continued their activism during the remainder of the nineteenth century. As statutes became increasingly visible on the legal landscape, judges demonstrated a marked affinity for decisionmaking-by-axiom. A court would begin by announcing an axiom whose universal truth would be assumed without call for empirical analysis. The court then would apply that axiom to the facts and reason by syllogism toward the seemingly inevitable conclusion.⁹¹ Judges' uncritical embrace of axioms stemmed in part from the contemporary view of law as a science consisting of principles grounded in logic and found in the laboratory.⁹² Science or no science, however, "inevitable" conclusions in major cases increasingly seemed to favor railroad and industrial interests at the expense of remedial and social legislation.

The Supreme Court's 1895 decision in *United States v. E.C. Knight Co.*,⁹³ for example, concerned a challenge to the recently enacted Sherman Act's proscription against monopolies in interstate commerce. The Court began with a terse axiom: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state."⁹⁴ From this major

90. G. WHITE, *supra* note 73, at 53; see also D. FEHRENBACHER, *THE DRED SCOTT CASE* 417-49 (1978); C. HAINES & F. SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1835-1864*, at 430-32 (1957); 1 A. NEVINS, *THE EMERGENCE OF LINCOLN* 96-118 (1950); 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 302-19 (1922); Swisher, *Aftermath of the Scott Case*, in 5 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE TANEY PERIOD 1836-64*, at 631-52 (P. Freund ed. 1974).

91. K. LLEWELLYN, *supra* note 38, at 38.

92. The leading exponent of this view was Harvard's Christopher Columbus Langdell. 1 C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* viii (2d ed. 1879) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . ."). In 1886 Langdell reiterated that "[l]aw is a science," and that "all the available materials of that science are contained in printed books." A. SUTHERLAND, *supra* note 79, at 175; see also R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 51-64 (1983). Holmes, however, dissented:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

O. HOLMES, *THE COMMON LAW* 1 (1881).

93. 156 U.S. 1 (1895).

94. *Id.* at 12.

premise, the Court proceeded to distinguish commerce from manufacturing: "Commerce succeeds to manufacture, and is not a part of it."⁹⁵ The Court needed only a few more pages to eviscerate the Sherman Act by holding that its proscription against monopolies in commerce did not apply to a company that manufactured more than ninety percent of the nation's sugar.

The oracular theory and decisionmaking-by-axiom escaped sustained intellectual criticism during the Gilded Age, when prevailing judicial attitudes about economic development and individual self-reliance reflected prevailing popular attitudes. The rise of Progressivism in the first years of the twentieth century, however, changed popular attitudes. As courts invoked broad constitutional provisions to strike down legislation designed to ameliorate industrial displacement, suspicion grew that in the guise of declarers of transcendent principles, judges frequently wrote their own policy preferences into law.⁹⁶

On his retirement in 1897, Justice Stephen J. Field steadfastly maintained that the Supreme Court "has indeed no power to legislate. . . . [I]t possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction."⁹⁷ As the nineteenth century yielded to the twentieth, however, a growing number of observers no longer perceived judges as the passive oracles that Blackstone had described more than a century before. As cases requiring statutory interpretation multiplied, judges occasionally justified their own interpretations as avoiding "judicial legislation,"⁹⁸ a phrase that had little place in the judicial lexicon while the oracular theory held general acceptance. In the same year that Justice Field spoke, Holmes pointed the way toward twentieth-century jurispru-

95. *Id.*

96. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1002 (1972), reprinted in G. WHITE, *supra* note 83, at 104.

97. Letter from Mr. Justice Stephen J. Field to the Chief Justice and the Associate Justices of the Supreme Court of the United States (Oct. 12, 1897) (discussing his retirement from the Court), reprinted in Appendix, 168 U.S. 713, 717 (1897). Denial of lawmaking power remained a persistent theme of late-nineteenth-century judges. L. FRIEDMAN, *supra* note 79, at 333. For example, Justice Field's colleague and nephew, Justice David Brewer, maintained in 1893 that courts "make no laws, . . . establish no policy, . . . never enter into the domain of public action. They do not govern. Their functions in relation to the state are limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law." E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* xxv (1934).

98. See, e.g., *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340 (1897).

dence. Still five years away from assuming his own seat on the Supreme Court, Holmes decried the "fallacy . . . that the only force at work in the development of the law is logic."⁹⁹ Anticipating both Realism and Sociological Jurisprudence, he observed that "[y]ou can give any conclusion a logical form"¹⁰⁰ and chastised judges for having "failed adequately to recognize their duty of weighing considerations of social advantage."¹⁰¹ "Behind the logical form," Holmes wrote, "lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding."¹⁰²

B. *The Emergence of Sociological Jurisprudence*

Suspicion about judicial lawmaking created fertile ground for Sociological Jurisprudence, the first twentieth-century intellectual movement to challenge the oracular theory. Its leader was Roscoe Pound, but the spark was Holmes' 1905 dissent in *Lochner v. New York*.¹⁰³ A state statute regulating the maximum hours of bakery workers, the Supreme Court majority held, violated "liberty of contract" guaranteed by fourteenth amendment due process. Holmes rebuked the majority not only for engaging in flawed reasoning but also for failing to credit the emerging view that liberty of contract was anachronistic when workers held little semblance of equality in bargaining with their employers. "General propositions do not decide concrete cases," Holmes attacked decision-making-by-axiom. "The decision will depend on a judgment or intuition more subtle than any articulate major premise."¹⁰⁴

Pound baldly asserted that "[l]aymen know full well that [courts] may make laws" ¹⁰⁵ Far from acting as passive oracles, he argued, judges "in practice tend to overturn all legislation which they deem unwise."¹⁰⁶ Discussion of "judicial lawmaking," a

99. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897).

100. *Id.* at 466.

101. *Id.* at 467.

102. *Id.* at 466.

103. 198 U.S. 45 (1905).

104. *Id.* at 76 (Holmes, J., dissenting). The decision, he continued, must be in accord with "the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.*

105. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 610 (1907).

106. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (citation

phrase that Pound used openly,¹⁰⁷ became fashionable. In 1908 he attacked decisionmaking-by-axiom for producing a "mechanical jurisprudence," many of whose "rules and decisions . . . , tested by their practical operation, defeat liberty."¹⁰⁸ By adjusting "principles and doctrines to the human conditions they are to govern rather than to assumed first principles," he wrote, Sociological Jurisprudence would "[put] the human factor in the central place and relegate logic to its true position as an instrument."¹⁰⁹ Pound urged courts to "seek the basis of doctrines, not in Blackstone's wisdom of our ancestors, not in the apocryphal reasons of the beginning of legal science, . . . but in a scientific apprehension of the relations of law to society and of the needs and interests and opinions of society of to-day."¹¹⁰

As the 1920's drew to a close, the Sociological Jurisprudents' enduring contribution to American literature about judicial decisionmaking transcended their individual or collective writings. They were a watershed, a link between the nineteenth and twentieth centuries. By arguing that decisionmaking should reflect the contemporary situation, they argued that consistent with the Constitution's judicial power, courts may consider external stimuli and thus exercise judgment that might affect the outcome. Moreover, they argued that, consciously or unconsciously, American courts had always exercised this judgment but that dominant legal thought largely had overlooked this exercise.¹¹¹ This broader assault, sympathetically received during the Progressive years, gravely wounded the oracular theory. Its demise occurred at the

omitted).

107. *E.g., id.* at 24; see also Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 380 (1907); B. CARDOZO, *supra* note 30, at 10 ("I take judge-made law as one of the existing realities of life.").

108. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908) (footnote omitted).

109. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909).

110. Pound, *supra* note 105, at 610-11; see also Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 489 (1912); Pound, *Do We Need A Philosophy of Law?*, 5 COLUM. L. REV. 339, 344 (1905). Pound's exposition of Sociological Jurisprudence evolved over time. In 1923, for example, he qualified his earlier outright rejection of mechanical jurisprudence, concluding instead that it held a rightful place in American law. He distinguished between cases concerning commercial transactions and property, which he said required certainty provided by mechanical jurisprudence, and cases concerning the general welfare, which he said required flexibility provided by Sociological Jurisprudence. Pound, *The Theory of Judicial Decision* (pts. 1-3), 36 HARV. L. REV. 641, 802, 940 (1923) [hereinafter cited as Pound, *Judicial Decision*].

111. See Pound, *Judicial Decision*, *supra* note 110, at 948 (Judges draw on "[c]urrent moral ideas . . . continually, although seldom consciously.").

hands of the Legal Realists, who shared the view that courts exercise judgment but were more strident in their own assault on the "myth" of oracular judging.¹¹²

C. *Legal Realism and Beyond*

Throughout the 1920's a few writers took the oracular theory—that courts reason deductively from preexisting principles toward a conclusion—and stood the theory on its head. Max Radin, for example, wrote that judges "act more frequently than otherwise by discovering the desirable result first and . . . justify[ing] it, afterwards."¹¹³ Influenced by the behavioral sciences, writers such as Radin argued that psychology held the key to judicial behavior. A decision, wrote Hessel E. Yntema, "is reached after an emotive experience in which principles and logic play a secondary part."¹¹⁴ To determine whether a particular rule controls a decision, "we must ultimately probe the purposes and the prejudices implicit in the judge's reaction to the concrete case."¹¹⁵ Herman Oliphant sounded the same theme, calling on scholars to shift their focus from "the *vocal behavior* of judges in deciding cases" to "their *non-vocal behavior*, . . . what the judges actually do when stimulated by the facts of the case before them."¹¹⁶ The new focus, he said, would make law "more a science of realities and less a theology of doctrines."¹¹⁷

These voices presaged Legal Realism, whose emergence was heralded by Karl Llewellyn in 1930. A loose collection of academic

112. J. FRANK, *LAW AND THE MODERN MIND* 11-12, 33-34 (1930).

113. Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925). "If . . . we could rid ourselves of the personal interest in [a controversy]," he advised advocates, "we might shrewdly guess that a great many judges would like to see the same person win who appeals to us." *Id.* at 359; see also Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96, 104 (1922) ("Approval is here given to the type of judge who looks at the equities of a cause and then searches for precedents to sustain the desired results.").

114. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480 (1928).

115. *Id.* at 481; see also Haines, *supra* note 113, at 104-05 ("Just as is the case with other opinions of individuals, judicial opinions necessarily represent in a measure the personal impulses of the judge, in relation to the situation before him, and these impulses are determined by the judge's lifelong series of previous experiences.") (footnote omitted); Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918) ("Judicial acts may . . . be expressive of emotional tones or values, and of emotional associations acquired in past experiences.").

116. Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159, 161 (1928) (emphasis in original).

117. *Id.* at 159.

writers whose most prominent spokesmen were Llewellyn and Jerome Frank, Realism dominated American jurisprudence throughout much of the 1930's. Its model of judicial decisionmaking seemed like judgment and lawmaking run rampant. Llewellyn argued that decisions turned not on "paper rules" found in books but on "real rules" that explained how courts actually decided cases.¹¹⁸ Frank dissected the decisionmaking process this way in his provocatively entitled *Law and the Modern Mind*:

The process of judging . . . seldom begins with a premise from which a conclusion is subsequently worked out. Judging begins rather the other way around—with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it. . . . [S]ince the judge is a human being and since no human being in his normal thinking processes arrives at decisions . . . by . . . syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.¹¹⁹

According to Frank, decisionmaking was an essentially idiosyncratic process that the judge's own political, economic, and social biases often influenced.¹²⁰ The operation of "the personal element in court justice" was "inescapable."¹²¹ Frank's behavioral model of decisionmaking was attacked by Pound¹²² but supported

118. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930); see also Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 7 (1934) ("[T]he theory that rules decide cases seems for a century to have fooled not only library-ridden recluses, but judges."); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

119. J. FRANK, *supra* note 112, at 100-01 (footnote omitted).

120. According to Frank,

the judge's sympathies and antipathies are likely to be active with respect to the persons of the witness, the attorneys and the parties to the suit. His own past may have created plus or minus reactions to women, or blonde women, or men with heards, or Southerners, or Italians A certain twang or cough or gesture may start up memories painful or pleasant in the main.

Id. at 106.

Cardozo had expressed a similar thought in his 1921 lectures:

[T]he forces of which judges avowedly avail to shape the form and content of their judgments . . . are seldom fully in consciousness Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.

B. CARDOZO, *supra* note 30, at 167-68.

121. Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 23 (1931).

122. See Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 704-06 (1931).

by Realists,¹²³ including a district judge who had vouched for its accuracy in 1929. Joseph C. Hutcheson had confided that a judge "really decides by . . . 'hunching' and not by ratiocination, and that ratiocination appears only in the opinion."¹²⁴ "[T]he vital, motivating impulse for the decision," Judge Hutcheson explained, "is an intuitive sense of what is right or wrong,"¹²⁵ followed by a search for authorities that "support [the] desired result."¹²⁶

The New Deal, according to Justice Harlan F. Stone, brought "days of facile legislation."¹²⁷ For Realists to address the effect of judicial judgment on statutory interpretation, then, was only natural. Radin argued that because a statute is a "general statement [that] describes a general situation . . . , [i]t can be extended pretty widely and contracted pretty narrowly." If the judge is "a little clever," he advised, the statute "will catch or let out the situation you are deciding."¹²⁸ Frank concurred. "Except in those cases which happen to be explicitly covered by the code," he wrote in 1930, "the judicial interpreter takes out of the code provisions exactly what he puts in."¹²⁹

In 1936 Justice Stone announced that American legal thought was on the verge of assimilating the dominant strains of Sociological Jurisprudence and Realism. "We are coming to realize more completely," he wrote,

123. See *supra* notes 113-18 and accompanying text.

124. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 285 (1929).

125. *Id.* at 285.

126. *Id.* at 286. Thirty-two years later, Judge Hutcheson sought to explain that in his earlier article he

undertook, in a personal sort of way to make the point that, while a judge may not completely reject settled, that is established, law merely because he does not like the results of its application to a particular case, he has the right, indeed the duty to make use of all lawful expedients supporting him in the result he desires to reach and announce

Hutcheson, *Epilogue*, 71 YALE L.J. 277, 278 (1961).

127. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 9 (1936).

128. Radin, *supra* note 113, at 360-61; see also Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 884 (1930) ("What is desirable will be what is just, what is proper, what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains.").

129. J. FRANK, *supra* note 112, at 191. After Frank assumed a seat on the Second Circuit in 1941, he took a more restrained view. See, e.g., *Guisseppi v. Walling*, 144 F.2d 608, 620-21 (2d Cir. 1944) ("Courts in their interpretation of statutes often cannot avoid some . . . legislation That activity should always, of course, be modest in scope. But the necessary generality in the wording of many statutes, and ineptness in the drafting of others, frequently compels the courts, as best they can, to fill in the gaps") (footnote omitted), *aff'd sub nom.* *Geinsco, Inc. v. Walling*, 324 U.S. 244 (1945).

that . . . within the limits lying between the command of statutes on the one hand and the restraints of precedents and doctrines . . . on the other, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another. Within this area he performs essentially the function of the legislator, and in a real sense makes law.¹³⁰

The Realist ascendancy was short-lived. Barely a decade after its heralded emergence in 1930, Realism was on the defensive, a decline that has been attributed to two external influences, the 1937 Court-packing battle and the totalitarian threat before and during World War II.¹³¹ By appearing to portray judges as free agents, Realism invited association with the unsuccessful effort to add members to the Supreme Court, an initiative that emanated from an essentially Realist interpretation of judicial decisionmaking.¹³² By appearing to define law as whatever idiosyncratic lawmakers said it was, Realism invited association with incipient enemies of the American system as war clouds hovered.¹³³

In apparent reaction to the Realist model of idiosyncratic judging, the Legal Process school surfaced during World War II and reached fuller expression throughout the 1950's. This school recognized that courts exercise judgment and participate in lawmaking but called on judges to restrain lawmaking through reasoned opinions whose articulated analysis would demonstrate the thought processes that led to the result.

Dean Erwin N. Griswold summarized the tenets of the Legal Process school in 1960.¹³⁴ Because "human judgment is an inevitable element in the application of law,"¹³⁵ he began, "it is clear that judges do 'make law,' and have to do so."¹³⁶ Echoing the Realists,

130. Stone, *supra* note 127, at 20.

131. See White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 282-83 (1973), reprinted in G. WHITE, *supra* note 83, at 139-40.

132. See generally E. CORWIN, *supra* note 97.

133. E.g., E. BODENHEIMER, *JURISPRUDENCE* 316 (1940) ("preparing the intellectual ground for a tendency toward totalitarianism"); Harris, *Idealism Emergent in Jurisprudence*, 10 TUL. L. REV. 169, 179-81 (1936); Pound, *Disappearance of the Law*, 2 ALA. LAW. 363, 368, 378-79 (1941). See generally L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940).

134. Griswold, *Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960); see also Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959); Sacks, *The Supreme Court, 1953 Term: Foreword*, 68 HARV. L. REV. 96, 99-100 (1954); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

135. Griswold, *supra* note 134, at 92.

136. *Id.* at 94.

Griswold acknowledged that "it is far from easy for the human mind to avoid result-oriented decisions,"¹³⁷ and recognized that judges "have convictions, predilections, even prejudices."¹³⁸ The Legal Process school called on judges to "put these things aside, or at least to make a determined effort to hold them in check,"¹³⁹ and reach decisions, "as far as humanly possible, on intellectually valid and disinterested grounds."¹⁴⁰

As Griswold wrote, the Legal Process school's call for reasoned elaboration faced the stern test of Warren Court decisionmaking. Popular debate about the Warren Court was reflected in scholarly writing. When the Chief Justice retired in 1969, for example, Alexander Bickel upbraided the Court for having "relied on events for vindication more than on the method of reason for contemporary validation."¹⁴¹ A year earlier Judge J. Skelly Wright had lauded the process that Bickel found objectionable. "[T]he Warren Court has not simply decreed the right results," the Judge concluded, "but . . . it was right to have decreed them. Its active role in shaping our society has been a necessary and proper one."¹⁴²

Throughout the 1970's and into the 1980's, litigants have advanced claims of constitutional or statutory right in such volatile areas as public school desegregation, affirmative action, abortion, and church-state relations. The courts' involvement has fueled the ongoing debate about the nature of judicial decisionmaking. The Attorney General, for example, recently expressed the Reagan Administration's standard for selecting nominees to the federal bench. "We . . . want people," he said, "who have . . . an understanding that the function of a judge is to interpret the law, not to make the law."¹⁴³

137. *Id.* at 91.

138. *Id.* at 92.

139. *Id.*

140. *Id.* at 91.

141. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 12 (1970) (1969 Holmes Lectures at Harvard Law School).

142. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 *CORNELL L. REV.* 1, 3 (1968).

143. *Reagan Seeks Judges With "Traditional Approach,"* *U.S. NEWS & WORLD REP.*, Oct. 14, 1985, at 67 (interview with Edwin Meese III, Attorney General). Other members of the Administration have expressed similar views. Speaking about the Constitution and its Framers, for example, Assistant Attorney General William Bradford Reynolds said that "Article 1 . . . concerns the Legislative branch, which was alone to make the law And Article 3 . . . concerns the Judicial Branch, which was designed to interpret the law." W. Reynolds, *Remarks at the American Jewish Committee Learned Hand Award Dinner* 5 (Jan. 23, 1985) (available from United States Department of Justice).

From another perspective, the Critical Legal Studies movement has examined basic in-

Our jurisprudential heritage, however, demonstrates recognition that when a court engages in interpretation, it must exercise judgment that might affect the outcome and thus make law. Judges are not slot machines dispensing preordained results, but rather human actors who reason toward a conclusion. In a case requiring statutory interpretation, it is true that the court first might conclude that the record and pertinent legal materials hold particular meaning but then consciously might reject that meaning for one that accords with the court's own predilections. As the Attorney General suggests, conscious lawmaking would invite charges that the court usurped legislative power. A court might conclude, however, that because of limits inherent in language, intent, or legislative process, a statute is sufficiently imprecise to support more than one plausible meaning and to require ascertainment of the meaning most in accord with the record and pertinent legal materials. The court might be required to fill interstices or gaps before applying the imprecise statute to the facts; reasonable minds might differ concerning which competing ascription of meaning prevails. Even if the court remains within the confines of the subordinate judicial role, some measure of lawmaking is inevitable. In a small percentage of cases, a court might conclude that the legislature's signals appear so contradictory or otherwise unilluminating that they produce equipoise, requiring the court to exercise discretion or evaluate principles.

Justice John Paul Stevens recently expressed the contemporary perception of judges as neither free agents nor automatons. "[T]he repeated need to add new stitches in the open fabric of our statutory . . . law," he wrote, "foreclose[s] the suggestion that judges never make law."¹⁴⁴ "[E]very practicing lawyer," he ex-

stitutions, including the courts, since the late 1970's. *E.g.*, Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984). See generally *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

144. Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 180 (1982). Contemporary judges generally have recognized judicial participation in the lawmaking process. See, e.g., *Arizona v. California*, 373 U.S. 546, 628 (1963) (Douglas, J., dissenting) ("[E]very scholar knows that judges who construe statutes must of necessity legislate interstitially . . ."); Aldisert, *What Makes a Good Appellate Judge?*, 22 JUDGES' J. 14, 16-17 (1983) ("To adjudicate properly, a judge must sometimes legislate, but judicial legislation is only a means to an end."); Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 765 (1965) ("It is now a commonplace that courts, not only of common-law jurisdictions but also those which have codified statutory law as their base, participate in the lawmaking process."); Edwards, *supra* note 6, at 388; Friendly, *The Gap in Lawmaking—Judges Who Can't and*

plained elsewhere, "knows that the judgment of human beings—[including] the judgment of judges—determines the precise meaning of our law as it is applied in countless situations. Rules of law constrain and guide the exercise of judgment in our legal system"145

IV. POINT-COUNTERPOINT: JUDICIAL DETERMINATION OF CIVIL RICO'S LITIGANT CLASSES

[A] civil RICO complaint must allege "a distinct RICO injury"

We regard this as the plain meaning of § 1964(c), and we see no basis for inferring that Congress did not intend what it plainly said.

— Second Circuit, July 26, 1984¹⁴⁶

[T]he language of § 1964(c) is clear. . . . [I]t grants civil relief for "injury", which logically includes *any* injury, "by reason of a violation of § 1962"

. . . .
[C]ongress intended to provide the victims with the private civil RICO remedies . . . for all injuries caused by the defendant's conduct.

— Second Circuit, July 27, 1984¹⁴⁷

Before the Supreme Court's five-to-four decision in *Sedima*, did civil RICO produce equipoise in the minds of judges called on to determine the contours of a litigant class? To be sure, observers occasionally speculated that a few courts abandoned the search for legislative meaning and limited membership in one or both classes by conscious lawmaking.¹⁴⁸ Whether and to what extent legislative

Legislators Who Won't, 63 COLUM. L. REV. 787, 798 (1963) ("[I]n dealing . . . with . . . imperfect statutes . . . , judges perform quite useful work and do a certain amount of lawmaking. . . ."); Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 6 (1984) ("[C]ollective political bodies that create law must, of necessity, accept that there will be some judicial additions to or modifications of the work they have produced."); McGowan, *supra* note 64, at 664 ("[I]n inevitable gaps . . . in the reach of statutes, as well as express statutory language in some cases, leave [the courts of appeals] with large 'lawmaking' responsibilities. . . ."); Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 998 (1982) ("[J]udicial lawmaking must take statutes into account virtually all of the time.") (footnote omitted); Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 4 (1966) ("It is generally agreed that judges make law and that it is inevitable that they should do so."); Traynor, *Reasoning in a Circle of Law*, 56 VA. L. REV. 739, 742 (1970) ("Paradoxically, the more legislators extend their range of lawmaking . . . at a hare's speed, the more significant becomes the judge's own role of lawmaking . . . at the pace of the tortoise.").

145. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 5 (1983) (footnote omitted).

146. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516-17 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985).

147. *Furman v. Cirrito*, 741 F.2d 524, 528-29 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985) (emphasis in original).

148. *E.g.*, *A RICO Crisis*, NAT'L L.J., Aug. 13, 1984, at 1, 30 (calling Second Circuit *Sedima* decision a "classic example of result-orientitis").

directive “constrains and guides” a court in its exercise of judgment, however, is to some degree a matter of conscience. Unless a court announces a meaning at odds with ordinary understanding, critics are apt to find that reading judges’ minds is no easier than reading anyone else’s. By comparing the disparate interpretations reached by civil RICO courts, this part IV cannot disprove speculation that a few civil RICO decisions abandoned the effort to ascertain and apply legislative meaning. The imprecision that permeates civil RICO, however, demonstrates how courts sometimes reach equipoise in the age of statutes while striving to exercise judgment in accordance with the model of legislative supremacy.

While reviewing a criminal RICO conviction in *United States v. Turkette*,¹⁴⁹ the Supreme Court reiterated the formula for ascertaining legislative meaning: “In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of ‘a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.’”¹⁵⁰

Civil RICO, which the Seventh Circuit has likened to a “treasure hunt,”¹⁵¹ is codified at 18 U.S.C. §§ 1961-1968. The treasure hunt begins with section 1964(c), which creates a private cause of action in favor of “[a]ny person injured in his business or property by reason of a violation of section 1962.”¹⁵² Section 1962, in turn, makes it unlawful for “any person” to engage in a “pattern of racketeering activity” while holding any of various relationships enumerated in that section with an “enterprise” engaged in or affecting interstate commerce.¹⁵³

149. 452 U.S. 576 (1980).

150. *Id.* at 580 (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *see also* *Russello v. United States*, 104 S. Ct. 296, 299 (1983) (quoting *Turkette* in action involving 18 U.S.C. § 1963(a)(1), RICO’s forfeiture provision); *supra* notes 66-67 and accompanying text.

151. *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 652 (7th Cir. 1984).

152. 18 U.S.C. § 1964(c) (1982) provides in full:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.

RICO defines “person” to include “any individual or entity capable of holding a legal or beneficial interest in property.” 18 U.S.C. § 1961(3) (1982).

153. Subsection (a) of § 1962 in essence makes it unlawful for any person to establish, operate, or acquire an interest in an enterprise by using or investing income derived directly or indirectly from a pattern of racketeering activity. Subsection (b) in essence makes it unlawful for any person, through a pattern of racketeering activity, to acquire or maintain directly or indirectly an interest in or control of an enterprise. Subsection (c) in essence

A person engages in "racketeering activity," according to section 1961(1), by committing any of more than two dozen "predicate acts."¹⁵⁴ Certain of these predicate acts—for example, "any act or threat involving murder, kidnaping, gambling, arson, [or] robbery"—might well be committed by persons generally labeled "racketeers." But nonracketeers routinely commit at least three other predicate acts—any "indictable" act of mail fraud or wire fraud, and "any offense involving . . . fraud in the sale of securities."

The final step in the civil RICO treasure hunt is to find a "pattern" of racketeering activity. According to section 1961(5), a pattern "requires at least two acts of racketeering activity, one of which occurred after [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) af-

makes it unlawful for any person employed by or associated with an enterprise to conduct or participate directly or indirectly in the conduct of the enterprise's affairs through a pattern of racketeering activity. Subsection (d) makes it unlawful for any person to conspire to violate any of the first three subsections. 18 U.S.C. § 1962 (1982). RICO defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1982).

154. 18 U.S.C. § 1961(1) (1982) provides that "racketeering activity" means:

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States.

ter the commission of a prior act of racketeering activity.”¹⁵⁵

Together with legislative history, this statutory language provided the basis for determining who may sue or be sued under civil RICO. Courts focused not only on words and documents but also on context and legislative purpose. Before the Supreme Court itself split five to four in *Sedima*, the search for legislative meaning had approached the end of the road with few answers in sight.

A. Determining the Plaintiff Class

Many courts held that by creating a private right of action in favor of “[a]ny person injured . . . by reason of a violation of section 1962,”¹⁵⁶ Congress limited civil RICO standing to plaintiffs who alleged something more than injury from defendant’s commission of at least two predicate acts. Some courts embraced an anti-trust analogy that limited standing to plaintiffs alleging “competitive” injury.¹⁵⁷ When the Supreme Court narrowly rejected a “racketeering injury” limit in *Sedima*,¹⁵⁸ courts were closely di-

155. 18 U.S.C. § 1961(5) (1982).

156. 18 U.S.C. § 1964(c) (1982) (emphasis added). For the text of § 1964(c), see *supra* note 152.

157. Decisions that required allegation of competitive injury include *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff’d on other grounds sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985); *Noland v. Gurley*, 566 F. Supp. 210, 218 (D. Colo. 1983); *Erlbaum v. Erlbaum*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,772, at 93,923 (E.D. Pa. July 13, 1982), *appeal dismissed*, 709 F.2d 1491 (3d Cir. 1983); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980). Most decisions rejected the competitive injury requirement. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494-96 (2d Cir. 1984), *rev’d*, 105 S. Ct. 3275 (1985); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 n.6 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287-88 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *rev’d in part, aff’d in part, and remanded en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S. Ct. 527 (1983); *Slattery v. Costello*, 586 F. Supp. 162, 165 (D.D.C. 1983); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 95 (E.D. Pa. 1983); *Ralston v. Capper*, 569 F. Supp. 1575, 1580-81 (E.D. Mich. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983); *Crocker Nat’l Bank v. Rockwell Int’l Corp.*, 555 F. Supp. 47, 49-50 (N.D. Cal. 1982); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 98,742, at 93,737 (N.D. Ohio June 11, 1982).

158. 105 S. Ct. 3275, 3284-87 (1985). At the least, the Court in *Sedima* rejected the racketeering-injury limit on the plaintiff class and the prior-conviction limit on the defendant class. *See supra* notes 1-4 and accompanying text. The Court also cast doubt, however, on the continued vitality of the other limits discussed in part IV of this Article. In rejecting the racketeering-injury limit, the Court expressed confusion about whether the Second Circuit also had meant to limit the plaintiff class to persons alleging antitrust-type injury. 105 S. Ct. at 3284. Because it held that injury from the predicate acts themselves is sufficient to establish injury under RICO, the Court concluded that it “need not pinpoint the Second Circuit’s precise holding.” *Id.* at 3285. The Court did say in a footnote, however, that civil

vided on whether Congress had created that limit.¹⁵⁹

RICO damages "include, but are not limited to, . . . competitive injury." *Id.* at 3286 n.15.

In rejecting the prior-conviction limit, the Court approved use of civil RICO against the *Sedima* and *Haroco* defendants in the absence of any suggestion that they were connected with organized crime. *Sedima* concluded that "Congress wanted to reach both 'legitimate' and 'illegitimate' enterprises The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Id.* at 3287 (citation omitted). The Third Circuit has held that this conclusion rejects the organized-crime limit on the defendant class. *Gilbert v. Prudential-Bache Sec., Inc.*, 769 F.2d 940, 942 (3d Cir. 1985).

To the extent that doubt remains, the competitive-injury and organized-crime limits appear doomed by this guidance that the *Sedima* majority provided to lower courts:

RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes" The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity

RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime While few of the legislative statements about novel remedies and attacking crime on all fronts . . . were made with direct reference to § 1964(c), it is in this spirit that all the Act's provisions should be read.

105 S. Ct. at 3286 (citations omitted); *see also id.* at 3290 (Powell, J., dissenting) ("By constructing such a broad premise for its rejection of the 'racketeering injury' requirement, the Court seems to mandate that all future courts read the entire statute broadly."). The Court also has read the statute broadly in its two criminal RICO decisions. *See Russello v. United States*, 104 S. Ct. 296 (1983); *United States v. Turkette*, 452 U.S. 576 (1981).

159. Decisions that required allegation of "racketeering," or similarly labeled, injury include *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1427-30 (D. Or. 1984); *Dakis v. Chapman*, 574 F. Supp. 757, 761 (N.D. Cal. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 718-19 (D.D.C. 1983); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982); *Harper v. New Japan Sec. Int'l, Inc.* 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1136-37 (D. Mass. 1982); *Erlbaum v. Erlbaum*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772, at 93,922 (E.D. Pa. July 13, 1982), *appeal dismissed*, 709 F.2d 1491 (3d Cir. 1983); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

Decisions that declined to require allegation of "racketeering," or similarly labeled, injury include *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam*, 105 S. Ct. 3291 (1985); *Furman v. Cirrito*, 741 F.2d 524 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 166-67 (D.D.C. 1983); *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,737 (N.D. Ohio June 11, 1982).

1. The Antitrust Limit

(a) Reasoning of Courts That Adopted the Antitrust Limit

Emphasizing that the language of section 1964(c) closely tracks that of section 4 of the Clayton Act,¹⁶⁰ some courts held that Congress limited civil RICO standing to plaintiffs alleging injury that placed them at a competitive disadvantage in the marketplace. The Supreme Court has held that to recover treble damages under section 4, plaintiffs must prove “*antitrust injury*, . . . injury of the type the antitrust laws were intended to prevent.”¹⁶¹ Some courts held that to recover treble damages under civil RICO, plaintiffs also were required to prove antitrust injury.

Courts found support for the RICO competitive-injury limit in the legislative history. After the Katzenbach Commission in 1967 suggested using civil antitrust remedies against organized crime,¹⁶² two bills were introduced in the Senate to amend the antitrust laws to reach organized crime’s infiltration into legitimate business.¹⁶³ Congress ultimately abandoned these bills and enacted RICO as Title IX of the OCCA, but some courts concluded that the antitrust influence remained. When RICO’s chief sponsor summarized the proposed legislation on the House floor, he stressed the efficacy of antitrust.¹⁶⁴ The OCCA’s statement of findings and purpose expressed concern that “organized crime activities in the United States weaken the stability of the Nation’s economic system, harm . . . competing organizations, interfere with free compe-

160. See *supra* note 152 for the text of 18 U.S.C. § 1964(c). When RICO was enacted, § 4 of the Clayton Act, 15 U.S.C. § 15, provided in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee . . .

Congress amended § 4 in 1980, Pub. L. No. 96-349, § 4 (b), 94 Stat. 1156; and in 1982, Pub. L. No. 97-393, § 4(A)(1), 96 Stat. 1964. Neither amendment is pertinent to the present analysis.

161. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis in original).

162. PRESIDENT’S COMMISSION, *supra* note 11, at 208 (“Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses.”).

163. See Blakey, *supra* note 11, at 253-56.

164. 116 CONG. REC. 35,295 (1970) (remarks of Rep. Poff) (“[P]rivate 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.”).

tition, [and] seriously burden interstate and foreign commerce"¹⁶⁵

(b) Reasoning of Courts That Rejected the Antitrust Limit

Most courts rejected the competitive-injury limit as contrary to RICO's language and legislative history. These courts acknowledged the similarity between the language of section 1964(c) and that of the Clayton Act; however, they concluded that by providing a cause of action in favor of any person "injured in his business or property," without further restricting the type of injury, section 1964(c) encompassed private proprietary injury that had no impact on the plaintiff's ability to compete or on competition itself.¹⁶⁶

These courts concluded that Congress enacted RICO outside the antitrust sphere because it intended to create a private cause of action not limited to business or commercial plaintiffs who alleged competitive injury. Drawing from statements of the OCCA's chief sponsors¹⁶⁷ and from the Act's statement of findings and purpose,¹⁶⁸ courts held that Congress aimed at evils that transcended antitrust objectives. Some courts moved a step further, concluding that an antitrust limit overlooked the distinction between RICO's purposes and the purposes of the antitrust laws. Antitrust is designed to promote competition and increasingly is concerned with market efficiency rather than harm suffered by individual businesses; RICO, in contrast, is designed to inflict severe economic injury on violators and perhaps to destroy them.¹⁶⁹

Some courts stressed that Congress abandoned early proposals to amend the antitrust laws shortly after the American Bar Association's Antitrust Section advised in 1969 that "use of antitrust laws themselves as a vehicle for combating organized crime could

165. 84 Stat. 923 (1970); see *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd on other grounds sub nom. Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985).

166. For the text of § 1964(c), see *supra* note 152. See also *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 516 n.6 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985).

167. *E.g.*, 115 CONG. REC. 9567 (1969) (remarks of Sen. McClellan) ("There is . . . no intention here of importing the great complexity of antitrust law enforcement into this field.").

168. The statement recited that "organized crime activities . . . harm innocent investors, . . . threaten the domestic security, and undermine the general welfare of the Nation and its citizens . . ." 84 Stat. 923 (1970).

169. *E.g.*, *Furman v. Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985); *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983).

create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery . . . such as 'standing to sue' . . ."¹⁷⁰ The Section's report advised that "[b]y placing the antitrust-type enforcement and discovery procedures in a separate statute," Congress would avoid "a commingling of criminal enforcement goals with the goals of regulating competition . . ."¹⁷¹ Limiting civil RICO to plaintiffs who alleged competitive injury, the courts concluded, would ignore congressional intent to avoid that limit.

2. The "Racketeering Injury" Limit

(a) Reasoning of Courts That Adopted the "Racketeering Injury" Limit

Courts that limited civil RICO's plaintiff class to persons alleging "racketeering," or similarly labeled, injury advanced two major grounds to support this limitation. The first ground was the language of section 1964(c), which creates a private cause of action in favor of "[a]ny person injured . . . by reason of a violation of section 1962."¹⁷² This language, which some courts found "ambiguous,"¹⁷³ was held to require allegation of injury from the pattern of racketeering activity prescribed in section 1962 and not merely injury from defendant's commission of predicate acts.¹⁷⁴ A Second Circuit panel reasoned: "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured by the pattern, and the pattern cannot be said to be the but-for cause of the injury."¹⁷⁵

The second ground borrowed the antitrust analogy but de-

170. 115 CONG. REC. 6995 (1969); e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *Furman v. Cirrito*, 741 F.2d 524, 531 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985); *Schacht v. Brown*, 711 F.2d 1343, 1358 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1432 (E.D. Pa. 1984); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983).

171. 115 CONG. REC. 6995 (1969).

172. 18 U.S.C. § 1964(c) (1982) (emphasis added). For the text of § 1964(c), see *supra* note 152.

173. E.g., *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 488 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

174. E.g., 741 F.2d at 494 & n.38; *Bankers Trust Co. v. Rhoades*, 741 F.2d 511, 517 (2d Cir. 1984), *vacated and remanded*, 105 S. Ct. 3550 (1985); see also *Sedima*, 105 S. Ct. at 3292 (Marshall, J., dissenting).

175. *Bankers Trust Co. v. Rhoades*, 741 F.2d at 517 (emphasis in original).

parted from it. As indicated above, plaintiffs suing under section 4 of the Clayton Act must allege "injury of the type the antitrust laws were intended to prevent."¹⁷⁶ Many courts held that because section 1964(c) closely tracks the Clayton Act's language, Congress meant for civil RICO plaintiffs to allege injury of the type RICO was intended to prevent, usually called "racketeering injury" or something similar.¹⁷⁷ To identify this injury, some courts focused on legislative purpose. They concluded, as Justice Marshall later expressed in his *Sedima* dissent, that RICO's "principal target was the economic power of racketeers, and its toll on legitimate businessmen. To this end, Congress sought to fill a gap in the civil and criminal laws and to provide new remedies broader than those already available"¹⁷⁸ Justice Marshall concluded that Congress limited civil RICO's plaintiff class to persons alleging "RICO injury—injury to their competitive, investment, or other business interests resulting from the defendant's conduct of a business, or infiltration of a business or a market, through a pattern of racketeering activity."¹⁷⁹

(b) *Reasoning of Courts That Rejected the "Racketeering Injury" Limit*

Most courts that rejected a "racketeering injury" limit held, as the Supreme Court ultimately did,¹⁸⁰ that RICO's plain language required allegation only that the defendant committed at least two predicate acts within ten years.¹⁸¹ These courts began with section

176. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see supra* notes 160-61 and accompanying text.

177. *E.g.*, *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 851-52 (E.D. Va. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 718-19 (D.D.C. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 49 (S.D.N.Y. 1982); *Harper v. New Japan Sec. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1136 (D. Mass. 1982); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981); *see also Sedima*, 105 S. Ct. at 3302 (Marshall, J., dissenting).

178. *Sedima*, 105 S. Ct. at 3299 (Marshall, J., dissenting); *see also Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 495-96 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 209 (E.D. Mich. 1981).

179. *Sedima*, 105 S. Ct. at 3302 (Marshall, J., dissenting).

180. *Id.* at 3285 ("There is no room in the statutory language for an . . . amorphous 'racketeering injury' requirement.").

181. *E.g.*, *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd per curiam*, 105 S. Ct. 3291 (1985); *Furman v. Cirrito*, 741 F.2d 524, 528 (2d Cir. 1984), *vacated and remanded sub nom. Joel v. Cirrito*, 105 S. Ct. 3550 (1985); *Econo-Car Int'l, Inc. v. Agency Rent-a-Car, Inc.*, 589 F. Supp. 1368, 1377-78 (D. Mass. 1984); *In re*

1964(c), which authorizes an action by “[a]ny person injured . . . by reason of a violation of section 1962.”¹⁸² A defendant violates section 1962, they continued, by engaging in a “pattern of racketeering activity” while holding an enumerated relationship with an enterprise.¹⁸³ RICO defines “racketeering activity” to mean the predicate acts,¹⁸⁴ and a “pattern of racketeering activity” requires commission of at least two acts of “racketeering activity” within the prescribed time period.¹⁸⁵ These courts acknowledged, as the Supreme Court’s narrow majority ultimately stated, that “RICO is evolving into something quite different from the original conception of its enactors”;¹⁸⁶ that evolution, they concluded, “does not demonstrate ambiguity. It demonstrates breadth.”¹⁸⁷

These courts found RICO’s legislative history consistent with the statutory language. In *Furman v. Cirrito* a Second Circuit panel concluded that a racketeering-injury limit ignored “the larger purposes of RICO.”¹⁸⁸ The primary purpose may have been to reach organized crime, the panel reasoned, but Congress recognized that fraud was a pervasive societal problem that caused billions of dollars in economic loss each year. RICO includes predicate acts routinely committed by nonracketeers and “provide[s] no exception for businessmen, for white collar workers, for bankers, or for stockbrokers.”¹⁸⁹ To the *Furman* panel this breadth indicated that Congress “wanted”¹⁹⁰ RICO to reach nonracketeers.¹⁹¹

Most courts did not emphasize that Congress had legislated in so broad a context. They concluded that Congress aimed at racketeers, recognized that RICO’s broad language might reach nonracketeers, but determined that this breadth was a price worth paying in the effort to reach the intended target. These courts reasoned

Catarella and E.F. Hutton and Co. Sec. Litig., 583 F. Supp. 1388, 1437 (E.D. Pa. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 167 (D.D.C. 1983); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 96 (E.D. Pa. 1983); *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. 273, 279 (D. Md. 1983).

182. For the text of 18 U.S.C. § 1964(c) (1982), see *supra* note 152.

183. 18 U.S.C. § 1962 (1982); see *supra* note 153.

184. 18 U.S.C. § 1961(1) (1982); see *supra* note 154.

185. 18 U.S.C. § 1961(5) (1982); see *supra* note 155 and accompanying text.

186. *Sedima*, 105 S. Ct. at 3287.

187. *Id.* (quoting *Haroco, Inc.*, 747 F.2d at 398).

188. 741 F.2d at 528.

189. *Id.* at 529.

190. *Id.* at 530.

191. According to the panel, Congress recognized that “fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm.” *Id.* at 529.

that if civil RICO plaintiffs were required to allege racketeering injury rather than defendant's mere commission of at least two predicate acts, some direct victims might be denied private redress. Moreover, some racketeers might evade regulation, a result contrary to congressional intent.¹⁹²

B. Determining the Defendant Class

The difficulties courts encountered in determining civil RICO's plaintiff class were mirrored in their efforts to determine the defendant class. Several district courts held that Congress limited the defendant class to persons connected with organized crime,¹⁹³ a holding rejected by the courts of appeals¹⁹⁴ and most district courts¹⁹⁵ that considered the issue. In *Sedima* the Second

192. *E.g.*, *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); *Econo-Car Int'l, Inc. v. Agency Rent-a-Car, Inc.*, 589 F. Supp. 1368, 1377-78 (D. Mass. 1984); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1320 (N.D. Ill. 1983).

193. *E.g.*, *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632, 633 (D. Mass. 1984); *American Sav. Ass'n v. Sierra Fed. Sav. and Loan Ass'n*, 586 F. Supp. 888, 889 (D. Colo. 1984); *Divco Constr. & Realty Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 575 F. Supp. 712, 715 (S.D. Fla. 1983); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 642-44 (C.D. Cal. 1983); *Noland v. Gurley*, 566 F. Supp. 210, 218 (D. Colo. 1983); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 558 F. Supp. 1348, 1351 (S.D.N.Y. 1983); *Moss v. Morgan Stanley Inc.*, 553 F. Supp. 1347, 1358-62 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); *Wagner v. Bear, Stearns & Co.*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,032, at 94,913 (N.D. Ill. Sept. 17, 1982); *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975).

194. *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.), *cert. denied*, 105 S. Ct. 118 (1984); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 20-21 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1343, 1353-56 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 457 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Bennett v. Berg*, 685 F.2d 1053, 1063-64 (8th Cir. 1982), *cert. denied*, 104 S. Ct. 527 (1983).

195. *E.g.*, *Ora Corp. v. Vinson*, 596 F. Supp. 1546, 1548 n.1 (D.S.C. 1984); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 568 (N.D. Cal. 1984); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1426-30 (E.D. Pa. 1984); *Jensen v. E.F. Hutton & Co.*, [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,674, at 97,712 (C.D. Cal. Jan. 26, 1984); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1425-26 (D. Or. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 164-65 (D.D.C. 1983); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 269 (W.D. Okla. 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 680-82 (N.D. Ga. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 719-20 (D.D.C. 1983); *Ralston v. Capper*, 569 F. Supp. 1575, 1578-80 (E.D. Mich. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 490-93 (E.D. Pa. 1983); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *D'Iorio v. Adonizio*, 554 F. Supp. 222, 229-31 (M.D. Pa. 1982); *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391, 396 (S.D.N.Y. 1982); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,737

Circuit held that Congress limited the defendant class to persons previously convicted under RICO or the predicate acts,¹⁹⁶ a holding that split the lower courts¹⁹⁷ before the Supreme Court's narrow majority rejected it.¹⁹⁸

1. Reasoning of Courts That Adopted the Organized-Crime Limit

Most courts that limited civil RICO to organized-crime defendants acknowledged or assumed that the statutory language did not impose that limit.¹⁹⁹ The courts found in the legislative history, however, "a clearly expressed legislative intent . . . contrary" to the statutory language.²⁰⁰ These courts concluded that Congress

(N.D. Ohio June 11, 1982); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247-48 (S.D.N.Y. 1981); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979).

196. 741 F.2d at 503.

197. Decisions that adopted the Second Circuit holding include *Spinelli, Kehiayan-Berkman, S.A. v. Imas Gruner, A.I.A. & Assocs.*, 602 F. Supp. 372, 376-77 (D. Md. 1985); *Viola v. Bensalem Township*, 601 F. Supp. 1086, 1090-91 (E.D. Pa. 1984); *Bernstein v. Bank Leumi Le-Israel B.M.*, 598 F. Supp. 922, 924-25 (E.D. Pa. 1984); *Southgate Bank v. Public Water Supply Dist. No. 7*, 601 F. Supp. 262, 263-64 (E.D. Mo. 1984); *Berg v. First Am. Bankshares, Inc.*, 599 F. Supp. 500, 505-06 (D.D.C. 1984). Decisions that rejected the Second Circuit holding include *Alfaro v. E.F. Hutton and Co.*, No. 84-3276 (E.D. Pa. Apr. 2, 1985) (available on LEXIS, Genfed library, Dist file); *Poling v. Morgan*, 598 F. Supp. 686, 690 (D. Ariz. 1984); *Ora Corp. v. Vinson*, 596 F. Supp. 1546, 1548 (D.S.C. 1984); *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 254-56 (D. Kan. 1984); *Grado v. Gross*, [1984 Transfer Binder] *FED SEC. L. REP. (CCH)* ¶ 91,660, at 99,337 (D. Mass. Aug. 20, 1984).

Before the Second Circuit decided *Sedima*, the prior-conviction limit had been rejected with little or no discussion by courts that had considered it. *E.g.*, *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *Hudson v. LaRouche*, 579 F. Supp. 623, 626 n.2 (S.D.N.Y. 1983); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 270-71 (W.D. Okla. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 490 (E.D. Pa. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 356 (E.D. Mich. 1983); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 646-47 (N.D. Ill. 1980); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1279-80 (D. Del. 1978).

198. 105 S. Ct. at 3281-84.

199. *E.g.*, *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632, 633 (D. Mass. 1984); *American Sav. Ass'n v. Sierra Fed. Sav. & Loan Ass'n*, 586 F. Supp. 888, 889 (D. Colo. 1984); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1308 (D. Colo. 1984); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983); *Wagner v. Bear, Stearns & Co.*, [1982-1983 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 99,032, at 94,912 (N.D. Ill. Sept. 17, 1982); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112 (S.D.N.Y. 1975).

200. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see supra* notes 66-67, 149-50 and accompanying text.

clearly expressed an intent that civil RICO operate against only organized crime. Some courts found the committee hearings,²⁰¹ floor debates,²⁰² and committee reports²⁰³ replete with concern about organized crime. A few courts also emphasized a portion of the OCCA's statement of findings and purpose: "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."²⁰⁴

These courts were unmoved by Congress' failure to limit civil RICO expressly to organized-crime defendants. They concluded that in the context in which RICO was enacted, legislative silence was a persuasive indication of intent to establish that limit. RICO includes the mail fraud and wire fraud statutes in its list of predicate acts.²⁰⁵ Because courts consistently had held that these expansive statutes do not afford implied private rights of action,²⁰⁶

201. *E.g.*, *Measures Relating to Organized Crime: Hearings on S.30, S.974, S.975 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 1 (1969) (remarks of Sen. McClellan) ("In varying degrees, most of our larger metropolitan areas are beset with the problem of organized crime") [hereinafter cited as *Senate Hearings*]; *id.* at 150 (remarks of Sen. Hruska) ("The target presented by organized crime . . . is elusive").

202. *E.g.*, 116 CONG. REC. 591 (1970) (remarks of Sen. McClellan) ("[T]itle IX is aimed at removing organized crime from our legitimate organizations."); *id.* at 602 (remarks of Sen. Hruska) ("Title IX . . . is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods."); *id.* at 603 (remarks of Sen. Yarborough) ("[RICO] is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channeled . . ."); *id.* at 607 (remarks of Sen. Byrd) ("[RICO] constitute[s] a carefully structured program which can drastically curtail—and eventually eradicate—the vast expansion of organized crime's economic power . . ."); *id.* at 819 (remarks of Sen. Scott) (OCCA's "purpose is to eradicate organized crime in the United States"); *id.* at 845 (remarks of Sen. Kennedy) ("[T]itle IX . . . may provide us with new tools to prevent organized crime from taking over legitimate businesses and activities."); *id.* at 953 (remarks of Sen. Thurmond) ("[R]acketeers are very much interested in gaining inroads into legitimate business . . ."); *id.* at 35,199 (remarks of Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime groups").

203. *See, e.g.*, *supra* note 13 and accompanying text.

204. 84 Stat. 923 (1970); *e.g.*, *Divco Constr. & Realty Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 575 F. Supp. 712, 714 (S.D. Fla. 1983); *Minpeco, S.A. v. ContiCommodity Servs., Inc.*, 558 F. Supp. 1348, 1350 (S.D.N.Y. 1983).

205. 18 U.S.C. § 1961(1) (1982); *see supra* note 154 and accompanying text.

206. *E.g.*, *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178-79 (6th Cir. 1979) (mail fraud); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974) (wire fraud), *cert. denied*, 423 U.S. 837 (1975); *see also Sedima*, 105 S. Ct. at 3293 (Marshall, J., dissenting).

courts reasoned that broad interpretation of RICO would displace vast areas of federal and state law. "It is implausible," wrote Judge Pollack in *Moss v. Morgan Stanley Inc.*,²⁰⁷ "that Congress could have meant to alter this accepted rule to the extent of creating a right of action for treble damages without a single mention of such a revolutionary consequence anywhere in the legislative history."²⁰⁸

Once these courts found clearly expressed legislative intent to limit civil RICO to organized-crime defendants, they effected that intent. A few courts cited *Church of the Holy Trinity v. United States*,²⁰⁹ in which the Supreme Court, declining to apply a statute according to its plain meaning, held that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."²¹⁰ Judge Pollack was more direct in *Moss*. RICO did not define "organized crime," he concluded, because

by its very nature, "organized crime" is not susceptible to a clear, concise definition. [But] [l]egislative failure to establish a "bright line" does not imply that Congress intended that Courts repudiate their proper function of legislative interpretation and application. The Courts are routinely called on to apply general criteria on a case by case basis . . . especially . . . where the underlying subject matter is not well suited to simple definition.²¹¹

2. Reasoning of Courts That Adopted the Prior-Conviction Limit

In its *Sedima* decision the Second Circuit limited civil RICO's defendant class to persons previously convicted under RICO or the predicate acts.²¹² The *Sedima* panel noted that although section

207. 553 F. Supp. 1347, 1361 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984).

208. 553 F. Supp. at 1361; *see also Minpeco, S.A.*, 558 F. Supp. at 1350 ("strains credibility" to conclude that Congress, "without comment or explanation," intended civil RICO to create treble-damage private right of action for offenses that previously did not provide private rights of action); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 753 (N.D. Ill. 1981) ("[H]ad Congress intended to turn all securities fraud actions into treble damage suits, it would have, at the very least, given some indication of that purpose.").

209. 143 U.S. 457 (1892), *quoted with approval in United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979).

210. 143 U.S. at 459; *e.g.*, *Aliberti v. E.F. Hutton & Co.*, 591 F. Supp. 632, 633 (D. Mass. 1984); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983); *Wagner v. Bear, Stearns & Co.*, [1982-1983 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 99,032, at 94,912 (N.D. Ill. Sept. 17, 1982); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746 (N.D. Ill. 1981).

211. 553 F. Supp. at 1359.

212. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 503 (2d Cir. 1984), *rev'd*, 105 S. Ct. 3275 (1985).

1964(c) closely tracks section 4 of the Clayton Act, the sections are not worded identically. The panel emphasized an "instructive" difference.²¹³ Section 4 permits suit by "[a]ny person who shall be injured in his business or property by reason of anything *forbidden* in the antitrust laws";²¹⁴ section 1964(c) permits suit by "[a]ny person injured in his business or property by reason of a *violation* of section 1962."²¹⁵ The panel found it plausible that Congress used the word "violation" in the latter section "with a specific intent . . . to require that conviction at least of the predicate acts be had" before a civil RICO action could be brought.²¹⁶ The panel observed that section 1961(1) includes only predicate acts that are "chargeable," "punishable," or "indictable."²¹⁷ "All these terms," wrote Judge Oakes, "speak along criminal rather than civil lines."²¹⁸

Citing *Church of the Holy Trinity v. United States*,²¹⁹ the *Sedima* panel viewed civil RICO as "a classic case of a statute whose ambiguous language need[ed] to be construed in light of Congress's purpose in enacting it."²²⁰ As it reviewed the legislative history, the panel "[found] nothing conclusive, but discern[ed] in the legislative silence a purpose . . . entirely at odds with [an] open-ended reading."²²¹ The panel concluded that Congress, when it considered the bill that became RICO, "was not aware of the possible implications of section 1964(c)."²²² Finding that RICO's "general purpose" was to "combat organized crime,"²²³ the panel reasoned that "had Congress considered"²²⁴ the problems created by an open-ended reading, it would have advanced the general purpose by establishing a prior-conviction limit on the defendant class.²²⁵

213. 741 F.2d at 498.

214. 15 U.S.C. § 15 (1982) (emphasis added). For the text of § 4, see *supra* note 160.

215. 18 U.S.C. § 1964(c) (1982) (emphasis added). For the text of § 1964(c), see *supra* note 152.

216. 741 F.2d at 498-99.

217. *Id.* at 499. For the text of § 1961(1), see *supra* note 154.

218. 741 F.2d at 499.

219. 143 U.S. 457 (1892); see *supra* notes 209-10 and accompanying text.

220. 741 F.2d at 488 & n.17.

221. *Id.* at 503.

222. *Id.* at 492.

223. *Id.* at 487; see also *Southgate Bank v. Public Water Supply Dist. No. 7*, 601 F. Supp. 262, 264 (E.D. Mo. 1984); *Bernstein v. Bank Leumi Le-Israel B.M.*, 598 F. Supp. 922, 925 (E.D. Pa. 1984).

224. 741 F.2d at 501.

225. Judge Oakes' majority opinion posed various problems, each of which the Supreme Court later held insufficient to justify the proposed limit. 105 S. Ct. at 3283-84. Judge

3. Reasoning of Courts That Rejected the Proposed Limits on the Defendant Class

Courts rejecting the proposed limits on civil RICO's defendant class held these limits to be contrary to the plain statutory language. The courts held an organized-crime limit to be contrary to section 1962, whose four subsections each operate against "any person," and section 1961(3), which defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."²²⁶ "It is the violation of the statute which controls," one court concluded, "not the status of the violator."²²⁷

Courts held a prior-conviction limit to be contrary to section 1964(c), which authorizes an action by any person injured in his business or property by reason of a "violation" of section 1962, and to section 1961(1), which includes only predicate acts that are "chargeable," "punishable," or "indictable."²²⁸ As one district court explained its disagreement with the Second Circuit's *Sedima* decision, "[a] person 'violates' a law at the time he does what the law forbids, not when he is convicted of doing so."²²⁹ Concluding

Oakes wrote that absent a prior-conviction limit a plaintiff would be required to prove defendant's commission of the predicate acts beyond a reasonable doubt, thereby requiring the court to instruct the jury about different standards of proof in different aspects of the same case. 741 F.2d at 501-02. Civil RICO also would raise "serious constitutional questions" because it "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." *Id.* at 500 n.49.

226. 18 U.S.C. §§ 1962, 1961(3) (1982) (emphasis added); see *supra* notes 152-53; see also *Schacht v. Brown*, 711 F.2d 1343, 1353-54 (7th Cir.), *cert. denied*, 104 S. Ct. 508, 509 (1983); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1428 (E.D. Pa. 1984); *Willamette Sav. & Loan v. Blake & Neal Fin. Co.*, 577 F. Supp. 1415, 1426 (D. Or. 1984); *Guerrero v. Katzen*, 571 F. Supp. 714, 719 (D.D.C. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667, 670 (W.D. Mich. 1983); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982).

227. *Lode*, 557 F. Supp. at 680.

228. 18 U.S.C. §§ 1964(c), 1961(1) (1982); see *supra* notes 152, 154; see also *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982); *Grado v. Gross*, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,660, at 99,335 (D. Mass. Aug. 20, 1984); *Ora Corp. v. Vinson*, 596 F. Supp. 1546, 1548 (D.S.C. 1984); *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 254-55 (D. Kan. 1984); *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978).

229. *Grado*, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,660, at 99,335; see also *Sedima*, 105 S. Ct. at 3281 ("[T]he term 'violation' does not imply a criminal conviction It refers only to a failure to adhere to legal requirements.") (citation omitted).

that "[i]f Congress had intended to require a prior conviction it could have easily said so,"²³⁰ these courts anticipated the Supreme Court's holding that RICO "racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be."²³¹

These courts also concluded that Congress did not intend to limit the defendant class to persons connected with organized crime or previously convicted. Courts recognized that RICO was intended to strike at organized crime, but they stressed that Congress rejected suggestions that RICO be limited expressly to defendants whose behavior smacked of organized criminal activity. Some courts noted that because proving organized-crime membership traditionally had been difficult and often impossible, Congress feared that an express limit would enable racketeers to evade regulation.²³² Courts also noted that Congress feared that an express limit might lead courts to strike down RICO for creating an unconstitutional status offense.²³³

These courts concluded that Congress was aware that certain of RICO's predicate acts were broad enough to reach nonracketeers. The Attorney General, for example, told the House Judiciary Committee that the OCCA contained provisions that "do not relate solely to organized crime."²³⁴ The Association of the Bar of

230. *Ora Corp.*, 596 F. Supp. at 1548.

231. 105 S. Ct. at 3281.

232. *E.g.*, *Maxwell v. Southwest Nat'l Bank*, 593 F. Supp. 250, 255 n.2 (D. Kan. 1984) (quoting Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1107-09 (1982)); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1429 & n.60 (E.D. Pa. 1984); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 269 (W.D. Okla. 1983); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 681-82 (N.D. Ga. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 491-93 (E.D. Pa. 1983); *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. 273, 277 (D. Md. 1983); *Hanna Mining Co. v. Norcen Energy Resources Ltd.*, [1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742, at 93,736-37 (N.D. Ohio June 11, 1982).

233. In addition to the cases cited *supra* note 232, see *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 21 n.17 (2d Cir. 1983) (discussing only constitutional difficulties), *cert. denied*, 104 S. Ct. 1280 (1984); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982) (same), *cert. denied*, 104 S. Ct. 527 (1983). The courts pointed out that after objections had been raised in the House that the proposed legislation was not limited to organized-crime defendants, *e.g.*, 116 CONG. REC. 35,204-05 (1970) (statements of Reps. Mikva and Poff), an amendment was offered that would have made unlawful any person's being a "member of a Mafia or a La Cosa Nostra organization," which the amendment would have defined. *Id.* at 35,343 (statement of Rep. Biaggi). After the constitutionality of status-based legislation was questioned, the House rejected the amendment. *Id.* at 35,343-46.

234. *Organized Crime Control: Hearings on S. 30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 185 (1970) (state-

the City of New York recommended that RICO be "sufficiently circumscribed so as to exclude from its scope those against whom it is not directed."²³⁵ The New York County Lawyers' Association called the predicate acts "overly broad."²³⁶ Before the Senate Judiciary Committee, the American Civil Liberties Union expressed concern that although the OCCA was "justified by and aimed only at *organized* crime, . . . its consequences are potentially much more far-reaching . . . and the possibilities for abuse are manifold."²³⁷ The ACLU advised with some prescience that "we cannot rely alone on good intentions to prevent use of limited-purpose legislation in other contexts."²³⁸

Several courts²³⁹ cited a floor speech by Senator McClellan, RICO's sponsor, who acknowledged that the predicate acts reached beyond organized-crime defendants. "It is impossible," the Senator told his colleagues, "to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." Moreover, "[t]he Senate report does not claim . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime."²⁴⁰

When the Senate Judiciary Committee reported in favor of the OCCA, Senators Hart and Kennedy held to their view that the Act reached "beyond organized criminal activity" and expressed

ment of John Mitchell, Attorney General) [hereinafter cited as *House Hearings*].

235. *Id.* at 331 (communication of the Association of the Bar of the City of New York, Comm. on Federal Legislation).

236. *Id.* at 403 (communication of New York County Lawyers' Association, Comm. on Federal Legislation).

237. *Senate Hearings, supra* note 201, at 456 (statement of Lawrence Speiser, Director, Washington Office, American Civil Liberties Union) (emphasis in original).

238. *Id.* The ACLU expressed the same view before the House Committee, testifying that although the OCCA's "stated ultimate purpose is to destroy the power of organized crime, . . . the bill goes far beyond that," and that RICO's predicate acts "go well beyond those associated with racketeering." *House Hearings, supra* note 234, at 490, 499 (statement of Lawrence Speiser, Director, Washington office, American Civil Liberties Union).

239. *E.g., Guerrero v. Katzen*, 571 F. Supp. 714, 720 (D.D.C. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983).

240. 116 CONG. REC. 18,940 (1970). Senator McClellan continued:

The listed offenses lend themselves to organized commercial exploitation, . . . and experience has shown they are commonly committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Id. In an effort to allay fears that "commission of such offenses by [persons outside organized crime] would subject them to proceedings under [RICO]," Senator McClellan stated that RICO would reach only a person who "engages in a pattern of such violations." *Id.*

dismay that the Act had not been "[a]mended to restrict its scope solely to organized criminal activity."²⁴¹ Later, when the House Judiciary Committee concurred with its Senate counterpart, three members dissented, complaining that RICO "makes no discrete segregation of mobsters. It is a tool to be employed for all."²⁴² The OCCA passed by wide margins in both houses²⁴³ and was signed into law by the President.²⁴⁴

Viewing legislative history to confirm unambiguous statutory language, courts found that Congress realized that its wide net might catch nonracketeers but determined that this possibility was a price worth paying in the battle against organized crime. Courts concluded that the judicial role is not to question the wisdom of legislation but to apply civil RICO in accordance with its language and legislative history.²⁴⁵

V. PROCEDURAL CONTROL IN CIVIL RICO ACTIONS

Two related policy considerations underlie enactment of a private statutory cause of action such as civil RICO. Congress identifies conduct that it concludes is contrary to operative social norms, and it identifies persons whom this conduct is likely to injure in a way that makes private judicial redress desirable. If legislation were an exact art, the statute's plaintiff class would consist of the persons likely to be injured and its defendant class would consist of the persons who engage in the conduct.

Part IV of this Article demonstrates, however, that legislative definition of litigant classes, like other legislative pronouncements, may suffer from imprecision. Whether the source of imprecision is language, legislative intent, or legislative process, a statute ordinarily becomes the subject of litigation only after the parties have concluded that their respective ascriptions of meaning hold some prospect of success. Even so, judges report that in most cases stat-

241. S. REP. NO. 617, 91st Cong., 1st Sess. 215 (1969).

242. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 187, reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4007, 4083.

243. The Senate passed the OCCA by a vote of 73-1 (26 not voting), 116 CONG. REC. 972 (1970); the House passed the Act with minor amendments by a vote of 341-26 (63 not voting), *id.* at 35,363. The Senate agreed by voice vote to accept the House amendments. *Id.* at 36,296.

244. *Id.* at 37,264.

245. *E.g., Schacht*, 711 F.2d at 1361 ("The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime.") (citation omitted).

utory interpretation yields a meaning that, in their judgment, best accords with the record and pertinent legal materials. This Article, however, studies the small percentage of statutory litigation in which the legislature's signals appear so contradictory or otherwise unilluminating that interpretation might lead the court not to a determination of meaning but to equipoise. Before the sharply divided Supreme Court spoke in *Sedima*, a lower court could not have been faulted for concluding that litigation requiring determination of a civil RICO litigant class qualified for membership in the equipoise percentage of the docket.

When a court reaches equipoise in its effort to determine the contours of a statutory litigant class, the court must look beyond statutory language and legislative history to determine whether Congress previously created a broad class advanced by one party or a narrower one advanced by another. Among other sources, the court should consider the control that the Federal Rules of Civil Procedure, taken as a whole, exercise on the conduct of litigation. Hart's formulation would permit courts to consider procedural control to guide the exercise of essentially legislative discretion.²⁴⁶ Under Dworkin's formulation, procedural control would lay claim to status as a principle enjoying a time-honored sense of appropriateness derived from the positive reception that the Rules have been accorded ever since their adoption in 1938; courts would evaluate the weight and importance of procedural control in relation to the weight and importance of other extant principles.²⁴⁷

Civil RICO demonstrates the often conflicting considerations that operate in equipoise cases in which the court must determine the contours of a litigant class created by Congress. Resolution of equipoise is likely to result in either overinclusion or underinclusion, each with its own effect on the general legislative goal, expressed in Rule 1, of securing "just, speedy, and inexpensive" civil determinations.²⁴⁸ Because certain persons will be members of both a broad and a narrower class, the effect depends on the "swing" persons, who would be members of the first class but not the second. If the court resolves equipoise by defining a broad class, it concludes that a just determination makes private redress available against a broad range of conduct. Breadth increases the possibility of including conduct outside the inarticulate Congress' in-

246. See *supra* notes 41-51 and accompanying text.

247. See *supra* notes 52-59 and accompanying text.

248. FED. R. CIV. P. 1.

tendment, but it decreases the possibility of excluding conduct within that intendment. Breadth also might swell the dockets and impede efforts to maintain efficiency conducive to speed and inexpensiveness. On the other hand, definition of a narrower class would restrict availability of private redress, perhaps advancing efficiency by reducing the dockets, but at the risk of excluding some conduct within congressional intendment.

Under both the Hart and Dworkin formulations, the court at equipoise rightfully may consider the reality that the Federal Rules of Civil Procedure control the conduct of litigation because a party may litigate and proceed to judgment only by complying with their prescriptions. As this part V demonstrates, some actions suffer dismissal for noncompliance while others proceed according to these prescriptions. Litigation involving one or more swing persons thus would be controlled by, and proceed in accordance with, prescriptions that Congress previously has approved for the orderly determination of civil actions. In equipoise cases in which private redress against a broad range of conduct otherwise is considered just, procedural control thus would be an element supporting a determination that Congress created a broad litigant class.

Before the Supreme Court decided *Sedima*, civil RICO decisions illustrated the control that the Rules, taken as a whole, exercise on the conduct of litigation.

A. *Rule 8(a), (e): Failure to Provide Short and Plain Statement of Claim*

Consistent with the Rules' aim to encourage determinations on the merits and not on technicality, Rule 8 calls for simplified notice pleading. By requiring that the pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief,"²⁴⁹ the Rule controls an affirmative pleader's ability to invoke the judicial process. Each averment must be "simple, concise, and direct."²⁵⁰ The Supreme Court has held that an affirmative pleader satisfies Rule 8 by providing "fair notice of what the . . . claim is and the grounds upon which it rests."²⁵¹ Notice is fair if the court and opponent sufficiently can determine whether a claim has been stated, with further detail postponed until discovery.

What qualifies as "simple, concise, and direct" depends on the

249. FED. R. CIV. P. 8(a)(2).

250. FED. R. CIV. P. 8(e)(1).

251. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

circumstances, including the number and nature of claims and parties. A long, confusing, or redundant pleading may place an unfair burden on the resources of both the court and the opponent. Absent dismissal on motion, the court or opponent may have to guess what the pleader means to say, whether the action should proceed and thus consume even greater resources, and how best to mount a defense.

When a pleading is dismissed for failure to satisfy the Rule 8 simplicity requirement, the court usually grants leave to replead, except in certain instances when the pleader has had previous opportunities to replead or when repleading would be fruitless. Leave to replead was denied in *Taylor v. Weissman*.²⁵² Two days after the court dismissed the action for lack of subject-matter jurisdiction, plaintiff Taylor filed a second complaint, which included a civil RICO claim. According to the court, the second complaint contained "page after page of rambling, pseudo-legalese allegations which drift in and out of the realm of coherence and intelligibility."²⁵³ The court found that plaintiff "woefully" had failed to satisfy Rule 8 and had "demonstrated his inability, or unwillingness, to submit a short plain statement of his claims."²⁵⁴

B. Rule 9(b): Failure to Plead Fraud with Particularity

A fraud claimant's ability to invoke the judicial process is controlled not only by Rule 8, but also by Rule 9(b), which requires that "the circumstances constituting fraud . . . be stated with particularity."²⁵⁵ The higher command of Rule 9(b) arises from the rulemakers' perception, based on experience at common law and under the codes, that fraud allegations hold special potential for abuse and thus require closer judicial control. Rule 9(b) seeks to control a fraud claimant's ability to injure the opponent by randomly charging misconduct involving moral turpitude. The Rule

252. No. 84-CV-357 (N.D.N.Y. June 14, 1984) (available on LEXIS, Genfed library, Dist file). A motion to dismiss a civil RICO count for failure to satisfy the Rule 8 simplicity requirement was denied in *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1401 (E.D. Pa. 1984).

253. *Taylor*, No. 84-CV-357.

254. *Id.*

255. FED. R. CIV. P. 9(b). Courts seek to harmonize Rule 9(b) with Rule 8. A fraud averment passes muster if it contains a short and plain statement of the claim, but it must state with particularity the circumstances constituting the alleged fraud, such as the time, place, and contents of false representations; the identity of the person making the misrepresentation; and what was obtained or lost. *E.g.*, *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), *cert. denied*, 104 S. Ct. 527 (1983).

also seeks to control the claimant's ability to raise tenuous and perhaps unprovable allegations, either with insufficient forethought or with an eye toward inducing settlement from an opponent that concludes, regardless of its assessment of the merits, that it can ill afford the notoriety of a public trial. Finally, the Rule seeks to control the claimant's ability to assert nebulous claims that prevent the opponent from adequately framing the answer, preparing for discovery, or mounting a defense.

By 1981 broad interpretations of RICO suggested that little semantic wizardry was needed to assert a civil RICO claim in ordinary fraud litigation, usually by alleging predicate acts of mail fraud, wire fraud, or fraud in the sale of securities. When a predicate act sounds in fraud, courts have required civil RICO pleadings to comply with Rule 9(b) and have dismissed claims that lack requisite particularity.²⁵⁶ *Saine v. A.I.A., Inc.*,²⁵⁷ for example, was an action by a former employee of defendant insurer who sought to recover commissions allegedly due him on sales of defendant's policies. Defendant A.I.A. asserted civil RICO claims in its counterclaim against Saine and in its third-party complaint against Saine's subsequent employer, National Health Insurance Company, a competing insurer. The counterclaim and third-party complaint each alleged that "NHI representatives" had committed predicate acts of wire fraud by fraudulently misrepresenting

256. See, e.g., *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984); *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982), cert. denied, 104 S. Ct. 527 (1983); *McKee v. Pope Ballard Shepard & Fowle, Ltd.*, 604 F. Supp. 927, 930-32 (N.D. Ill. 1985); *Bennett v. E.F. Hutton Co.*, 597 F. Supp. 1547, 1560 (N.D. Ohio 1984); *Modern Settings, Inc. v. Prudential-Bache Sec., Inc.*, 602 F. Supp. 511, 513-14 (S.D.N.Y. 1984); *Carbone, Inc. v. Proctor Ellison Co.*, 102 F.R.D. 951 (D. Mass. 1984); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 584-85 (N.D. Cal. 1984); *Gallagher v. Canon U.S.A., Inc.*, 588 F. Supp. 108, 111-12 (N.D. Ill. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 168 (D.D.C. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 356 (E.D. Mich. 1983); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248-49 (S.D.N.Y. 1981). For representative decisions that denied motions to dismiss civil RICO claims for failure to comply with Rule 9(b), see *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 790-91 (3d Cir. 1984), cert. denied, 105 S. Ct. 1179 (1985); *Banowitz v. State Exch. Bank*, 600 F. Supp. 1466, 1469-70 (N.D. Ill. 1985); *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388, 1397-1400 (E.D. Pa. 1984); *Yancoski v. E.F. Hutton & Co.*, 581 F. Supp. 88, 97 n.20 (E.D. Pa. 1983); *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061, 1070-71 (S.D.N.Y. 1983); *Kirschner v. Cable/Tel Corp.*, 576 F. Supp. 234, 241-44 (E.D. Pa. 1983); *In re Longhorn Sec. Litig.*, 573 F. Supp. 255, 263-64 (W.D. Okla. 1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 480-82 (E.D. Pa. 1983); *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. 273, 279-80 (D. Md. 1983); *Haber v. Kobrin*, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,259, at 96,161 (S.D.N.Y. June 3, 1983); *Hellenic Lines, Ltd. v. O'Hearn*, 94 F.R.D. 48, 51-52 (S.D.N.Y. 1982).

257. 582 F. Supp. 1299 (D. Colo. 1984).

A.I.A.'s financial condition in telephone calls to A.I.A. policyholders.²⁵⁸ The court dismissed the counterclaim against Saine because A.I.A. failed to allege that he was one of the representatives or that he was responsible for their acts.²⁵⁹

C. Rule 12(e): Motion for a More Definite Statement

If a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," Rule 12(e) permits the party to "move for a more definite statement before interposing his responsive pleading."²⁶⁰ When the assailed pleading must satisfy only Rule 8, courts ordinarily view Rule 12(e) motions with disfavor as being tools for delay and harassment or for seeking discovery at the pleading stage. Rule 12(e) holds a broader office, however, when the motion is directed against fraud averments, which must satisfy not only Rule 8 but also the higher command of Rule 9(b). Because Rule 9(b) provides no method for enforcing its control, courts often look to Rule 12(e).

In *Umstead v. Durham Hosiery Mills, Inc.*,²⁶¹ for example, minority shareholders of Durham Hosiery Mills sued after a majority of voting shares had approved the North Carolina corporation's merger into a Virginia corporation. The complaint alleged that defendants had controlled the shareholder vote after conspiring to purchase a control bloc of Durham voting shares and after disseminating materially misleading disclosure. The court concluded that the civil RICO count stated a claim "in a minimally sufficient manner" but ordered plaintiffs to file a more definite statement.²⁶² The court sensed, but was not certain, that plaintiffs had alleged predicate acts of mail fraud, wire fraud, and fraud in the sale of securities. "The Complaint sets out several transactions of securities purchases and notices to plaintiffs via the mails," the court found, but it "does not plainly identify which specific acts the plaintiffs contend are RICO predicate acts"²⁶³ After plaintiffs served the more definite statement, the court denied the individual defendants' motions to dismiss the civil RICO count for failure to state a claim but granted the corporate defendant's motion on the ground that it could not be both the "enterprise" and the "liable

258. *Id.* at 1303.

259. *Id.*

260. FED. R. CIV. P. 12(e).

261. 578 F. Supp. 342 (M.D.N.C. 1984).

262. *Id.* at 347 (citing 5 WRIGHT & MILLER, *supra* note 61, § 1378, at 773).

263. 578 F. Supp. at 347.

person."²⁶⁴

D. Rule 12(f): Motion to Strike

When a pleading satisfies Rule 8 (and any applicable subdivision of Rule 9) and otherwise states a claim or defense, Rule 12(f) controls the pleader's ability to include certain extraneous allegations that might affect the conduct or outcome of the action. The court is authorized, on motion by a party or on its own initiative, to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."²⁶⁵ Because courts ordinarily view motions to strike (like motions for a more definite statement) with disfavor as being tools for delay and harassment, orders to strike are the exception rather than the rule. As one civil RICO court stated, "only allegations that are 'so unrelated to plaintiffs' claims as to be unworthy of any consideration as a defense' should be stricken."²⁶⁶

The court granted defendants' motion to strike in *Frogner v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*²⁶⁷ Merrill Lynch and its broker and supervisor were charged with fraud and churning in connection with plaintiff's account. The civil RICO count included allegations that plaintiff had suffered emotional distress and had incurred medical expenses. The court held that because these allegations did not concern injury to plaintiff's business or property, they were not cognizable in a civil RICO claim.²⁶⁸

264. 592 F. Supp. 1269, 1272 (M.D.N.C. 1984); see *supra* note 153 and accompanying text; see also Kaplan, *Civil RICO After Sedima: An Overview*, in *CIVIL RICO LITIGATION AFTER Sedima* 43, 81-84 (ALI 1985); Nathan & Bograd, *RICO Litigation's New Battleground: "Pattern" and "Enterprise,"* *id.* at 143, 160-68. Other civil RICO decisions granting Rule 12(e) motions include *Muscarello v. Regency Federal Savings*, No. 83 C 4001 (N.D. Ill. May 1, 1984) (available on LEXIS, Genfed library, Dist file); *Gallagher v. Canon U.S.A., Inc.*, 588 F. Supp. 108 (N.D. Ill. 1984); see also *Bennett v. Berg*, 685 F.2d 1053, 1061 n.10 (8th Cir. 1982), *cert. denied*, 104 S. Ct. 527 (1983) (suggesting that on remand defendants might tender, and the district court might consider, a Rule 12(e) motion). A decision denying a motion seeking a more definite statement of the civil RICO claim was *In re Catanella and E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp. 1388 (E.D. Pa. 1984).

265. FED. R. CIV. P. 12(f).

266. *In re Catanella*, 583 F. Supp. at 1400 (quoting *EEOC v. Ford Motor Co.*, 529 F. Supp. 643, 644 (D. Colo. 1982)).

267. [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,504, at 96,930 (N.D. Cal. Sept. 26, 1983); see also *Platsis v. E.F. Hutton & Co.*, [1984-1985 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,963, at 90,805 (W.D. Mich. Jan. 11, 1985) (Rule 12(f) motion to strike civil RICO request for punitive damages granted).

268. *Frogner*, [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) (99,P)504, at 96,930; see *supra* note 152 and accompanying text. Decisions denying Rule 12(f) motions in civil RICO actions include *In re Catanella* and *E.F. Hutton and Co. Sec. Litig.*, 583 F. Supp.

E. Rule 15(a): Motion to Amend Pleading

Rule 15(a) controls the parties' ability to amend their pleadings. After a brief period during which a party may amend once as a matter of course, amendment may be made only by leave of court or by written consent of the adverse party. Consistent with the Rules' philosophy that procedure is not an end in itself but rather a means to reach and determine the merits, Rule 15(a) instructs that "leave shall be freely given when justice so requires."²⁶⁹ The policy of liberal amendment, however, is not boundless. The Supreme Court has held that leave to amend may be denied for such reasons as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment"²⁷⁰

Courts frequently have granted leave to amend pleadings to add or restate civil RICO claims²⁷¹ but have denied leave when undue delay has been found.²⁷² Leave to amend was denied in *Gordon v. Terry*,²⁷³ in which plaintiff alleged that he had invested approximately four million dollars in five Florida real estate syndications. After substantial profits failed to materialize, he filed suit in 1976 against the syndication's promoters and sellers, alleging federal securities law violations. The Fifth Circuit ordered the dis-

1388 (E.D. Pa. 1984); *Hellenic Lines, Ltd. v. O'Hearn*, 94 F.R.D. 48, 52 (S.D.N.Y. 1982).

269. Fed. R. Civ. P. 15(a).

270. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

271. *E.g.*, *Peters Fabrics, Inc. v. Textiles Fabricato de Nicar., S.A.*, No. 77 Civ. 1774 (S.D.N.Y. Apr. 15, 1985) (available on LEXIS, Genfed library, Dist file); *In re Olympia Brewing Co. Sec. Litig.*, No. 77 C 1206 (N.D. Ill. Jan. 31, 1985) (available on LEXIS, Genfed library, Dist file); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 739-40 (N.D. Ill. 1981).

272. *E.g.*, *Thorn v. Reliance Van Co.*, 736 F.2d 929, 931 n.3 (3d Cir. 1984) (motion to amend made one day before trial); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (four years after original complaint, motion to file fourth amended complaint made one month before trial); *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 105 F.R.D. 553 (S.D.N.Y. 1985) (motion to amend made after court of appeals reversed district court decision, more than four and one-half years after trial); *Peil v. Speiser*, No. 82-1289 (E.D. Pa. Mar. 13, 1985) (available on LEXIS, Genfed library, Dist file) (motion to amend made almost three years after original complaint and after "vigorous" discovery); *Morrison v. Syntex Laboratories, Inc.*, 101 F.R.D. 743, 744 (D.D.C. 1984) (almost two years after original complaint and after discovery, motion to amend made three months before trial); *Sanders v. Thrall Car Mfg. Co.*, 582 F. Supp. 945, 951-53 (S.D.N.Y. 1983) (motion to file third amended complaint made almost three years after original complaint), *aff'd per curiam*, 730 F.2d 910 (2d Cir. 1984).

273. 684 F.2d 736 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983).

strict court to dismiss the complaints, with leave to amend, for failure to provide a short and plain statement of the claim. The court of appeals noted that “[t]he various complaints, amendments, amended amendments, amendments to amended amendments, and other related papers are anything but short, totaling over 4,000 pages, occupying 18 volumes, and requiring a hand truck or cart to move.”²⁷⁴

On remand the undaunted plaintiff filed a first set of amended complaints, which the district court dismissed for failure to provide a short and plain statement of the claim. His second set apparently suffered the same disposition before the district court found the third set adequate. Defendants then moved for summary judgment. One day before the hearing on the motion—six years after the original complaint—Gordon submitted a fourth set of amended complaints, which sought to allege a civil RICO claim for the first time. The district court denied leave to amend. The Eleventh Circuit affirmed on the ground that “[a]llowing amendment at this late date would be prejudicial to the defendants and would not serve the ends of justice.”²⁷⁵

F. Rule 23: Judicial Control of Class Actions

When plaintiffs sue as a class, Rule 23(c)(1) requires the court, “[a]s soon as practicable” after commencement of the action, to determine whether to certify the class.²⁷⁶ The court may certify the proposed class; it may certify a refashioned class; or it may deny certification and require plaintiffs to proceed, if at all, individually or in accordance with the Rules’ other joinder provisions.

When a would-be class member’s financial interest is relatively small, denial of certification may be a significant control because proceeding as a class may be the only economically sensible approach. Regardless of the size of a member’s interest, however, certification may provide plaintiffs a valuable bargaining chip by pressuring the defendant into a settlement to avoid the prospect of expensive discovery, protracted proceedings, and potentially crushing liability. On the other hand, if the court denies certification, the same defendant, feeling no more than the ordinary pressure of adversary litigation, might be encouraged to contest an individual

274. *Gordon v. Green*, 602 F.2d 743, 744-45 (5th Cir. 1979) (citation omitted), *cert. denied*, 459 U.S. 1203 (1983).

275. 684 F.2d at 739.

276. FED. R. CIV. P. 23(c)(1).

plaintiff's allegations. It is little wonder, then, that litigants and their lawyers often look on class certification as the most important event in the entire action and hold their collective breaths as the court proceeds to its determination.

Some civil RICO courts have denied class certification or have certified refashioned classes.²⁷⁷ Certification was denied in *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A.*²⁷⁸ The named plaintiffs had obtained a loan from the Bank with interest at prime rate plus two percent. They claimed that in making the loan, the Bank and its holding company fraudulently had misrepresented the meaning of "prime rate." Alleging that the defendants had mailed inflated interest demands, and thus had committed predicate acts of mail fraud, plaintiffs asserted a civil RICO claim. They then moved to certify a class consisting of "all borrowers from [the Bank] who have been charged interest on an obligation pursuant to an evidence of indebtedness utilizing the term 'prime rate' or words having the equivalent meaning."²⁷⁹ Plaintiffs estimated that the Bank had made at least 6500 loans based on the prime rate during the relevant period.²⁸⁰

The court held that the proposed class failed to satisfy Rule 23(b)(3). Because a class member could recover only by proving that it had the same understanding of "prime rate" as the named plaintiffs, common questions of law or fact did not predominate over individual questions. After finding that the need to take individual proof of injury and damages would have meant that "trial of just the damages portion of [the case] would take almost three years,"²⁸¹ the court held that a class action was not superior to other methods of adjudication.

G. Rules 26-37: Judicial Control of Discovery

Once the pleadings are closed, discovery normally is conducted by the parties. The court exercises control, however, in the discovery conference and in situations in which a dispute arises or in

277. See, e.g., *In re Data Access Sys. Sec. Litig.*, 40 Fed. R. Serv. 2d (Callaghan) 54, 73 (D.N.J. 1984); *Waldo v. North Am. Van Lines, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,170 (W.D. Pa. July 12, 1984); *Swanson v. Wahash, Inc.*, 577 F. Supp. 1308, 1326 (N.D. Ill. 1983). A proposed civil RICO class was certified in *Thillens, Inc. v. Community Currency Exch. Ass'n*, 97 F.R.D. 668 (N.D. Ill. 1983).

278. 97 F.R.D. 440 (D. Or. 1983). *Wilcox* disposed of certification motions in two cases whose facts and legal issues were similar. This discussion states the facts of one case.

279. *Id.* at 443.

280. *Id.* at 445.

281. *Id.* at 447 (emphasis in original) (footnote omitted).

which the rights of a party or witness otherwise might be compromised. The court may act on motion; or it may act on its own initiative,²⁸² as the court apparently did in *Spencer Companies v. Agency Rent-A-Car, Inc.*²⁸³

Defendant Agency had purchased approximately 36.2% of Spencer's outstanding shares on the open market.²⁸⁴ The complaint alleged that defendant's purchases violated federal securities laws and civil RICO. The court denied Agency's motion to dismiss the civil RICO count for failure to state a claim. The court stayed discovery pending its further order, however, on the ground that RICO's "very breadth and vagueness" obliges courts to "assume some control of such counts in civil actions."²⁸⁵ The court particularly was troubled that when a plaintiff seeks to prove a pattern of racketeering activity, "a defendant may be exposed to pretrial discovery of every aspect of its business for a ten-year period."²⁸⁶ The stay remained in effect for nearly thirteen months.²⁸⁷

H. Rule 11: Sanctions for Abuse of the Civil Litigation Process

The American Rule precludes civil litigants from recovering attorneys' fees in the absence of statutory authorization or enforceable contract. Under the bad faith exception, however, federal courts have discretion to assess attorneys' fees as punishment for abuse of the litigation process.²⁸⁸ In *Alyeska Pipeline Service Co.*

282. FED. R. CIV. P. 26(b) advisory committee notes.

283. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981). Courts hearing civil RICO actions frequently have stayed or otherwise controlled discovery pending determination of pleading-stage motions. *E.g.*, *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984); *Gordon v. Heimann*, 715 F.2d 531, 533 (11th Cir. 1983); *Grado v. Gross*, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,660, at 99,338 n.2 (D. Mass. Aug. 20, 1984); *Overland Bond & Inv. Corp. v. Mahoney*, No. 82-C-2283 (N.D. Ill. July 30, 1984) (available on LEXIS, Genfed library, Dist file); *Bourdages v. Metals Ref., Ltd.*, No. 84 Civ. 743 (S.D.N.Y. July 25, 1984) (available on LEXIS, Genfed library, Dist file); *Friedlander v. Nims*, 571 F. Supp. 1188, 1199 (N.D. Ga. 1983), *aff'd*, 755 F.2d 810 (11th Cir. 1985); *In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 626 (S.D. Ohio 1983); *Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1130 (D. Mass. 1982); *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245, 249 (D. Md. 1980).

284. *Spencer Cos. v. Agency Rent-A-Car, Inc.*, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,301, at 91,894 (D. Mass. Sept. 21, 1981).

285. [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361, at 92,217.

286. *Id.*

287. The court vacated the stay in an unreported bench ruling. *Spencer Cos. v. Agency Rent-a-Car, Inc.*, No. 11-2097-H (D. Mass. Dec. 15, 1982) (docket entry of bench ruling concerning docketed motion No. 95-102 and transcript of hearings at 17).

288. *See Hall v. Cole*, 412 U.S. 1, 5 (1973) (In bad-faith exception cases, "the underlying rationale of 'fee shifting' is, of course, punitive.").

*v. Wilderness Society*²⁸⁹ in 1975, the Supreme Court reaffirmed the federal courts' "unquestionable" inherent equitable power to assess attorneys' fees when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."²⁹⁰ Two years earlier the Court had clarified that bad faith might be found either in the decision to commence the action or "in the conduct of the litigation."²⁹¹ Congress augmented the courts' inherent equitable power by enacting 28 U.S.C. § 1927, which is directed against abuse by counsel. When counsel "so multiplies the proceedings in any case unreasonably and vexatiously," this section authorizes the court to require the offender "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."²⁹² In addition, Congress expanded on the bad faith exception in its 1983 amendment to Rule 11.²⁹³

Ever since its adoption in 1938, Rule 11 has required good faith in pleading and has held out the prospect of sanctions for violation. The Rule was amended effective August 1, 1983, however, after the Advisory Committee on Civil Rules concluded that it had been ineffective in controlling abuse, partly because of judicial reluctance to impose sanctions.²⁹⁴ The language of the original Rule applied only to counsel, operated only against pleadings, and

289. 421 U.S. 240 (1975).

290. *Id.* at 258-59 (quoting *F. D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974)). A year later the Court emphasized that an assessment of attorneys' fees should be based on a "factual predicate" of bad faith; the mere fact that the losing party has lost is insufficient to support a finding that the party acted in bad faith. *Runyon v. McCrary*, 427 U.S. 160, 183-84 (1976).

291. *Hall*, 412 U.S. at 15.

292. 28 U.S.C. § 1927 (1982). From its enactment in 1813 until 1980, § 1927 permitted recovery of only "costs." In 1980 the Supreme Court held that costs recoverable under that section did not include attorneys' fees. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-61 (1980). Later that year Congress amended § 1927 to provide expressly for recovery of expenses and attorneys' fees, as well as costs. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156.

To be distinguished from § 1927 are various statutory provisions, including civil RICO, 18 U.S.C. § 1964(c), that authorize mandatory or discretionary award of attorneys' fees without regard to abuse of the litigation process. *E.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 260 n.33 (citing provisions). These provisions generally are intended to encourage private enforcement of the statute concerned.

293. For discussions of the relationship among the sources of judicial authority to overcome the American Rule, see Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997 (1983); Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976); and Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980).

294. FED. R. CIV. P. 11 advisory committee notes.

did not express clearly either the required standard of good faith or the range of sanctions a court might impose for violation. In 1980 one writer found only fifteen reported decisions that had held pleadings to violate the Rule.²⁹⁵

"[B]y building upon and expanding" the bad faith exception,²⁹⁶ amended Rule 11 seeks to control abuse of the litigation process that escapes control by other Rules. Amended Rule 11 expressly applies to counsel, represented parties, and parties appearing *pro se*; it operates against motions and other papers as well as pleadings; and it is more explicit than its predecessor in defining the standard of good faith and the range of available sanctions, which for the first time expressly includes awarding attorneys' fees. Signature of counsel or a party

constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.²⁹⁷

The federal bench greeted amended Rule 11 with less than unanimous approval,²⁹⁸ but courts since have used their newly articulated authority to impose sanctions, including assessment of attorneys' fees, against litigants and counsel.²⁹⁹ By assessing attorneys' fees on findings of objective rather than subjective bad faith, recent decisions have given the Rule greater impact as a control.³⁰⁰

The bad faith exception has found a place in civil RICO litigation. A few courts have denied motions for Rule 11 sanctions

295. Note, *supra* note 293, at 756 n.127 (citing cases).

296. FED. R. CIV. P. 11 advisory committee notes.

297. FED. R. CIV. P. 11.

298. Compare Weinstein, *Reflections on the 1983 Amendments to U.S. Rules of Civil Procedure*, 190 N.Y.L.J., Nov. 14, 1983, at 1, col. 3 ("I do not want to hear arguments about lawyers' good faith. Unless a lawyer is stupid (and few are) there is good reason for what he or she does . . . Please do not waste our time with this kind of motion. We will not like it.") with Mansfield, *Compliance with 1983 Changes in Rules of Civil Procedure*, 190 N.Y.L.J., Dec. 19, 1983, at 1, col. 3 ("Judicial compliance is . . . urged not simply upon the basis that judges are expected to respect and enforce the law of the land regardless of their personal views but also on the additional ground that these changes in the law can hardly be disregarded as hasty or ill-conceived.") (footnote omitted).

299. See, e.g., Vairo, *Analysis of August 1, 1983 Amendments to the Federal Rules of Civil Procedure*, in 1 CIVIL PRACTICE AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 55, 72, 76-82 (ALI Aug. 1985); Strasser, *Sanctions: A Sword is Sharpened*, NAT'L L.J. Nov. 11, 1985, at 1, col. 2.

300. See, e.g., *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253-54 (2d Cir. 1985).

against civil RICO claimants, holding that in view of civil RICO's uncertain reach before the Supreme Court decided *Sedima*, a court could not conclude that the claims were made in bad faith.³⁰¹ Other courts, however, have held out the prospect of sanctions to deter the sort of abuse that would invite their imposition.³⁰² In *Friedlander v. Nims*,³⁰³ for example, the civil RICO complaint named Timex Corporation as one of several defendants but failed to allege that Timex had committed any wrongdoing. When the failure was pointed out, plaintiff made no effort to include allegations in an amended complaint or to drop Timex as a party. After finding it "hard to believe" plaintiff's explanation of why the complaint named Timex,³⁰⁴ the court granted Timex's motion to dismiss for failure to state a claim. Calling civil RICO "a cause of action that is subject to abuse,"³⁰⁵ the court granted leave to replead, but cautioned counsel that "the strictest compliance with Rule 11 . . . will be expected if amendment is made. The Court will not hesitate to enter sanctions for false pleadings."³⁰⁶

In civil RICO actions in which abuse of the litigation process has been found, courts have imposed Rule 11 sanctions. In *Gordon v. Heimann*,³⁰⁷ for example, the Eleventh Circuit approved awards of attorneys' fees against both the civil RICO plaintiff and his attorney.³⁰⁸ In 1980, after he already had brought twenty-one actions

301. See, e.g., *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1415 (S.D.N.Y. 1984); *Hudson v. LaRouche*, 579 F. Supp. 623, 631 (S.D.N.Y. 1983).

302. See, e.g., *Club Assistance Program, Inc. v. Zukerman*, 598 F. Supp. 734, 737 n.8 (N.D. Ill. 1984); *Pete Thoessen Tractor & Equip. Repair Co. v. City of Chicago*, 101 F.R.D. 734, 735 (N.D. Ill. 1984); *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1306, 1309 n.5 (D. Colo. 1984); *Laterza v. American Broadcasting Co.*, 581 F. Supp. 408, 415 (S.D.N.Y. 1984); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 683 (N.D. Ga. 1983); *In re Longhorn Sec. Litig.*, [1983-1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,537, at 97,118 (W.D. Okla. July 28, 1983); *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 745 (N.D. Ill. 1981); *Katzen v. Continental Ill. Bank & Trust Co.*, No. 80-C-1378 (N.D. Ill. Aug. 14, 1980) (available on LEXIS, Genfed library, Dist file).

303. 571 F. Supp. 1188 (N.D. Ga. 1983), *aff'd*, 755 F.2d 810 (11th Cir. 1985).

304. 571 F. Supp. at 1191.

305. *Id.* at 1194.

306. *Id.* at 1194-95. On appeal plaintiff asserted that he chose not to amend the complaint because the district court's warnings about Rule 11 sanctions had "intimidated" him. 755 F.2d at 814 n.5. "Without expressly endorsing the warnings," the Eleventh Circuit held that the warnings did not justify failure to amend. *Id.*

307. 715 F.2d 531 (11th Cir. 1983).

308. *Id.* at 533. Other civil RICO decisions imposing Rule 11 sanctions include *WSB Elec. Co. v. Rank & File Comm. to Stop the 2-Gate System*, 103 F.R.D. 417, 421 (N.D. Cal. 1984); *Financial Fed'n, Inc. v. Ashkenazy*, [1984 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,489, at 98,441 (C.D. Cal. May 9, 1983); *King v. Lasher*, 572 F. Supp. 1377, 1385 (S.D.N.Y. 1983).

arising from the same events, plaintiff Gordon brought action number twenty-two by filing a complaint charging thirty-eight defendants with civil RICO violations. The district court dismissed the complaint for failure to state a claim and denied the motion for leave to amend. The persistent Gordon then brought action number twenty-three by filing an almost identical complaint charging forty-four defendants with civil RICO violations, a complaint that the district court dismissed on res judicata grounds. Defendants in the two civil RICO actions then moved for awards of attorneys' fees on the ground that plaintiff had pursued the litigation in bad faith. Based on its inherent power, the original Rule 11, and section 1927, the district court granted the motions of all defendants named in the second civil RICO action. The court awarded attorneys' fees to only one defendant named in the first civil RICO action, however, and denied the other defendants' motions as untimely.³⁰⁹

The Eleventh Circuit affirmed the district court's awards but held that all defendants' motions had been timely in the first action. In remanding the cause for consideration of the merits of the motions previously denied, the panel observed that "[t]he present purely frivolous actions are precisely the kind of suits which necessitate a bad faith exception to the American rule."³¹⁰

VI. CONCLUSION

One commentator recently observed that judges serve as teachers, with courtrooms as their classrooms.³¹¹ When *Sedima* rejected proposed limits on membership in the litigant classes, the Supreme Court delivered the "lesson" that "RICO is to be read broadly."³¹² That lesson doubtlessly will be instructive during the expected proliferation of civil RICO actions. *Sedima* and the preceding five years of lower court confusion, however, hold broader lessons about statutory interpretation that transcend the immediate statute concerned.

In an era of heightened sensitivity to finite judicial budgets and resources, dozens of inconsistent civil RICO decisions teach once again about the burden that rampant legislative imprecision casts on the judicial system. Imprecision is virtually inevitable

309. *Gordon*, 715 F.2d at 533-34.

310. *Id.* at 539.

311. Ward, *The Federal Judges: Indispensable Teachers*, 61 TEX. L. REV. 43, 46 (1982).

312. 105 S. Ct. at 3286; see *supra* note 158.

when communication depends on language, intent, and the foibles of the legislative process. *Sedima's* broader lessons, however, emanate not from the presence of imprecision but from its degree. In the relatively brief span of five years, courts found civil RICO so imprecise as to preclude consensus about the contours of the litigant classes. Before the Supreme Court spoke through a hair-breadth majority, judges reviewing the countervailing positions compared in part IV could have reached equipoise.

In the age of statutes, judges report that legislative imprecision invites equipoise with sufficient frequency³¹³ to insure continued discussion about the way courts may tip the scale consistent with historically developed notions about legislative supremacy and the judiciary's constitutional role. Jurisprudence provides no ready answer. Until the twentieth century, in fact, mainstream jurisprudence did not perceive courts as exercising judgment that might produce equipoise. Judges were perceived as finders and declarers of preexisting legislative meaning, not as agents whose judgmental processes created capacity for lawmaking.³¹⁴ As the role of judicial judgment won wider recognition in this century, most writers embraced Hart's formulation that courts may resolve equipoise by exercising essentially legislative discretion.³¹⁵ Now Dworkin has challenged that formulation by positing that law consists not only of rules such as statutes but also of principles that preclude courts from rightfully exercising discretion on matters of law.³¹⁶

The control that the Federal Rules of Civil Procedure, taken as a whole, exercise on the conduct of litigation is relevant to resolution when a court reaches equipoise in the effort to determine whether Congress created a broad litigant class advanced by one party or a narrower one advanced by another.³¹⁷ Rule 1 expresses the general legislative goal of securing "just, speedy, and inexpensive" civil determinations. The reality is that litigation involving members of the litigant classes will be controlled by the Rules' prescriptions, which have prior congressional approval for the orderly determination of civil actions. In equipoise cases in which private redress against a broad range of conduct otherwise is considered just, both the Hart and Dworkin formulations would view proce-

313. See *supra* notes 30-38, 72 and accompanying text.

314. See *supra* notes 73-102 and accompanying text.

315. See *supra* notes 41-51 and accompanying text.

316. See *supra* notes 52-59 and accompanying text.

317. See *supra* notes 60-64, 246-310 and accompanying text.

dural control as an element supporting a determination that Congress created a broad litigant class.