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COMBATING GOVERNMENT CORRUPTION: SUING THE FEDERAL GOVERNMENT VIA A PROPOSED AMENDMENT TO THE CIVIL RICO STATUTE

I. INTRODUCTION

A freely associated group of criminals claims sovereignty over a poverty-stricken neighborhood in New York City.¹ This family of lawbreakers, commonly known as the Mafia, possesses a shared organizational structure and code of conduct.² The Mafia's primary goal is protection racketeering, but it also engages in contract killing, drug trafficking, counterfeiting, fraud, loan sharking, and political corruption.³ The Godfather or the Don, who is the leader or boss of the Mafia, orders members of his Mafia family to commit these particular crimes to secure profit for the family and gain respect from the other members.⁴ Criminal organizations—such as the Mafia—have illegally accrued billions of dollars in revenue since approximately 1920; however, attempting to regulate organized crime, Congress enacted the Racketeer Influenced and Corrupt Organizations (“RICO”) Act.⁵

¹ This hypothetical was created by the author to illustrate the concept of organized crime.

² See Andrew Lawless, *Cosa Nostra—Rebranding the Mafia*, THREE MONKEYS ONLINE (June 2005), http://www.threemonkeysonline.com/als/_cosa_nostra_history_sicilian_mafia.html (discussing the origin of the Mafia, also known as *La Cosa Nostra*, which is a hierarchical criminal organization based in Sicily, Italy).

³ See *Racketeering: Organized Criminal Activities*, LAWYERS.COM, <http://criminal.lawyers.com/Criminal-Law-Basics/Racketeering-Organized-Criminal-Activities.html> (last visited Oct. 8, 2011) (defining protection racketeering as an extortion scheme through which a criminal group or individual coerces other less powerful entities to pay money for protection services).

⁴ See Jeffrey E. Grell, *Introduction*, RICOACT.COM LLC, http://ricoact.com/?page_id=21 (last visited Oct. 8, 2011) (explaining RICO in the Mafia context, with the Godfather as the target of the statute). One can comprehend RICO most easily in the Mafia context, where the defendant is the Godfather. *Id.* The “racketeering activity” consists of the Mafia’s continuous criminal acts, e.g., bribery, extortion, murder, illegal drug sales, prostitution, etc. *Id.* Since the Mafia has engaged in these illegal activities for generations, the criminal actions can be considered a “pattern of racketeering activity”; thus, the government can prosecute the Godfather under RICO, even if he never personally engaged in the criminal behavior, because he operated and managed an enterprise that engaged in these acts. *Id.* Also, the victims of the criminal activity can sue the Godfather civilly to recover the economic damages that they suffered as a result of the Mafia’s pattern of racketeering activity. *Id.*

⁵ 18 U.S.C. §§ 1961–1968 (2006). RICO has generally been categorized as the “organized crime” statute, but can also be used to fight government corruption. *United States v. Turkette*, 452 U.S. 576, 587 (1981). G. Robert Blakey, who played a major role in drafting the statute, will not expressly provide the reasoning for the title “RICO.” See G. Robert

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Unfortunately, the RICO Act can only regulate organized crime to a certain extent, so problems arise when corruption reaches the federal government.⁶

In light of the lack of supervision among government agencies, dishonest government officials have ultimately deprived “the public of its right to a government free from corruption, fraud, and dishonesty.”⁷ This is made evident when the government’s RICO violations directly result in environmental and economic catastrophes, such as the recent oil spill in the Gulf of Mexico.⁸ For example, British Petroleum (“BP”) is facing a class action suit under the federal civil RICO statute for its alleged scheme to secure revenue by committing a pattern of criminal

Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1025 n.91 (1980) [hereinafter Blakey & Gettings, *Basic Concepts*] (providing an explanation for the development of RICO’s title). *Contra Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 21 (N.D. Ill. 1982) (wondering if the awkward title was based on the first Hollywood gangster movie “Little Caesar”).

⁶ See 18 U.S.C. § 1961 (outlining the scope of RICO); see also *infra* Part II.C (illustrating one of many potential disasters resulting from a government immersed in corruption); *infra* notes 19–20 and accompanying text (presenting one of many obstacles limiting RICO’s scope).

⁷ Randy J. Curato et al., Note, *Government Fraud, Waste, and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1042 (1983). Government corruption often occurs when politicians intentionally fail to disclose a conflict of interest in matters involving their political authority. *Id.* Also, a politician who makes a statement to the public intending “to personally benefit from a program currently under consideration” —in effect “depriv[ing] citizens of the honest and faithful participation of [their] public official[s]” —corrupts governmental affairs. *Id.* at 1042–43; see *United States v. Bush*, 522 F.2d 641, 653 (7th Cir. 1975) (finding a city employee guilty of mail fraud in defrauding the citizens of the city, the mayor, and the employees and officials of the city out of their right to his loyal and faithful services, their right to have the city’s business conducted honestly and impartially, their right to be aware of all pertinent facts when analyzing, negotiating, entering into, and renewing contracts with persons in companies seeking to do business with the city by failing to disclose his interest in a company to which the city awarded a contract, and using the mails in furtherance of his scheme); *United States v. Barrett*, 505 F.2d 1091, 1098 (7th Cir. 1974) (finding the former clerk of Cook County, Illinois, guilty of mail fraud, interstate travel in aid of racketeering activities, and attempting to evade income taxes when using the mail to further his scheme to defraud the citizens of Cook County); *United States v. Isaacs*, 493 F.2d 1124, 1149 (7th Cir. 1974) (convicting former state Governor and former Director of State Department of Revenue of conspiracy, use of interstate facilities in furtherance of mail fraud, tax evasion and making false statements to Internal Revenue agents and the former Governor when defrauding the State of Illinois, its citizens, or the racing associations “out of something of definable value, money or property”).

⁸ See generally Amended Complaint, *Rinke v. BP, P.L.C.*, No. 3:10CV00206 (N.D. Fla. filed Aug. 17, 2010) (providing a background of the oil spill allegedly caused by BP’s greed and fraudulent conduct).

acts to obtain oil and billions of dollars in profits from offshore drilling.⁹ BP is suspected of fraudulently acquiring drilling permits and lease agreements of federal properties from Minerals Management Services (“MMS”), the federal agency responsible for the mineral leasing of submerged lands of the Outer Continental Shelf, who allegedly participated in ongoing racketeering activity with BP.¹⁰ Although MMS is an alleged “enterprise” within the meaning of 18 U.S.C. § 1961(4), it is not named as a defendant in the suit.¹¹ Allowing MMS to escape liability for its participation in BP’s scheme is unjustifiable; therefore, this Note proposes an amendment to the current federal civil RICO statute to directly address governmental liability when it serves as an enterprise to further a pattern of racketeering activity.¹²

First, Part II of this Note will briefly provide the historical context of the RICO statute; it will present the legislative history, the relevant background information, and other efforts to regulate government liability.¹³ Next, Part III offers an analysis of the current RICO statute and how it fails to accomplish its framers’ intentions.¹⁴ Further, Part III illustrates the potential effects of neglecting to resolve the issue in the

⁹ See generally *id.* (discussing how BP misrepresented the possible dangers of an oil spill and greatly overstated its ability to control a major spill so as to better its chances of securing the Deepwater Horizon exploration drilling permit and secure profits from offshore drilling through its scheme of criminal activity including mail fraud, wire fraud, and money laundering).

¹⁰ See *id.* ¶¶ 161-71 (explaining how BP infiltrated the MMS Enterprise to associate with and conduct or participate in the conduct of Enterprise’s affairs through the alleged racketeering activity); see also *infra* notes 98-99 and accompanying text (illustrating how BP bribed MMS officials with gifts, such as golf and ski trips and tickets to sporting events, and also reporting that MMS personnel habitually consumed alcohol, used cocaine and marijuana, and had sexual relations with representatives at oil industry functions).

¹¹ See Amended Complaint, *supra* note 8, ¶¶ 161-71 (discussing the RICO enterprises involved in the BP oil spill).

¹² See *infra* Part III (discussing why the government should be held accountable for its actions just like any other enterprise). Although those MMS agents who conspired with BP perhaps may be liable in their individual capacities under RICO because their acts are not within the scope of their authority as government employees, this will not sufficiently compensate *all* of the victims suffering as a result of the racketeering activity. *Id.*; see also *infra* notes 21-22 and accompanying text (discussing how individual government agents can face personal liability for RICO violations); *infra* note 150 and accompanying text (presenting an alternative measure to subject the government to civil liability); *infra* Part IV (proposing an amendment to the federal civil RICO statute that addresses claims against the United States for its participation in racketeering activity).

¹³ See *infra* Part II (providing the historical context of the RICO statute by presenting the legislative history, relevant background information, and an overview of the BP oil crisis).

¹⁴ See *infra* Part III (analyzing the current RICO statute and how it fails to accomplish its framers’ intent in creating the Act).

near future.¹⁵ Finally, Part IV proposes a solution that not only holds the government accountable for its unethical actions, but also attempts to restore justice, which, in turn, will lead to a more secure environment for the citizens of the United States.¹⁶

II. BACKGROUND

The prevalence of corruption among governmental entities has inadvertently led to a nation that permits its federal government to escape liability by granting it immunity from suit for violations of certain laws, including the RICO Act.¹⁷ Thus far, the Supreme Court has effectively avoided addressing whether the federal government is subject to civil or criminal liability for its participation in a “‘pattern of racketeering activity.’”¹⁸ To date, courts have held that a RICO action cannot be maintained against the United States absent an express waiver of sovereign immunity.¹⁹ The federal circuits that have considered this issue have given various reasons for allowing the government to escape liability under RICO.²⁰

¹⁵ See *infra* Part III (presenting the possible effects of allowing the government to continue avoiding liability for its illegal acts).

¹⁶ See *infra* Part IV (proposing an amendment to the RICO statute that directly addresses claims against the United States when the government operates as an enterprise to further a pattern of racketeering activity).

¹⁷ 18 U.S.C. §§ 1961–1968 (2006); see *infra* note 114 (presenting various instances where governmental entities served as an enterprise to further patterns of racketeering activity); see also *Examples of Public Corruption Investigations – Fiscal Year 2011*, IRS, <http://www.irs.gov/compliance/enforcement/article/0,,id=228095,00.html> (last updated Sept. 19, 2011) (providing numerous examples of public corruption investigations during the fiscal years 2009–2011 at all levels of government). Although the majority of corruption appears to be most prevalent among state and local governments, corruption is also common at the federal level, but sovereign immunity prevents it from reaching the federal courts. See *infra* Part II.B (discussing previous attempts to hold the federal government liable for unlawful actions and providing the jurisprudence under RICO); *infra* Part III.C (addressing how sovereign immunity prevents suits against the federal government); *infra* notes 68–70 and accompanying text (discussing governmental immunity).

¹⁸ See 18 U.S.C. § 1961(5) (“[P]attern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”).

¹⁹ See, e.g., *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 23 (2d Cir. 1989) (“It is elementary that ‘[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define the court’s jurisdiction to entertain the suit.’” (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941))); see *Andrade v. Chojnacki*, 934 F. Supp. 817, 831 (S.D. Tex. 1996) (reiterating that courts do not allow plaintiffs to bring claims against the United States for its agencies’ actions under RICO).

²⁰ See, e.g., *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996) (stating that “‘government entities are incapable of forming [the] malicious intent’ necessary to support a RICO

Although the government cannot be named as a defendant to a RICO claim, an individual government agent can still face personal liability for RICO violations.²¹ How can the federal government rationalize avoiding liability for RICO violations while subjecting its agents to personal liability?²² This notion seems unjust considering that state and local governmental bodies are generally subject to tort liability for the acts of their agents under the doctrine of respondeat superior.²³ Additionally, a government agency can serve as an “enterprise” through which a defendant may engage in patterns of racketeering activity; however, this does not expose the governmental entity to liability under RICO.²⁴

Allowing government agencies to circumvent liability poses a major problem for victims who suffer as a result of RICO violations, as their

action” (quoting *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991)); *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) (noting that federal governmental entities cannot possibly violate RICO because they are not subject to state or federal criminal prosecution).

²¹ See *Grell*, *supra* note 4 (discussing the unavailability of the sovereign immunity defense to a government agent who engages in racketeering activity because such acts are not within the scope of the agent’s authority as a government employee).

²² See *Lancaster Cmty. Hosp.*, 940 F.2d at 404 (providing the Ninth Circuit’s view that holding the “‘body politic’” liable for the criminal actions of its agents operating beyond the scope of their authority is bad policy, as “the taxpayers[] will pay if Lancaster’s RICO claim is successful”).

²³ See *infra* note 150 and accompanying text (presenting an alternate avenue to subject the government to civil liability). Compare *Castro v. California*, 138 Cal. Rptr. 572, 575 (Cal. Ct. App. 1977) (denying the existence of an employment relationship regarding a prospective juror), with *Hamay v. Wash. Cnty.*, 435 A.2d 606, 608 (Pa. 1981) (holding that a judge is not an agent or employee of the county, but an employee of the state; therefore, liability under respondeat superior is available because the principal has the ability to control the actions of its agents). See generally 57 AM JUR. 2D *Municipal, County, School, and State Tort Liability* § 145 (2001 & Supp. 2010) (discussing the application of respondeat superior to government agents as a theory of vicarious liability). To determine a state or local government entity’s liability for a tort committed by its officers, agents, or employees under respondeat superior, a relationship of agent-principal or employer-employee must exist between the governmental body and the officer, agent, or employee. *Id.* § 152. However, the *respondeat superior* theory does not apply to § 1983 claims against state or local governmental entities. See, e.g., *Monell v. Dep’t of Soc. Servs. of N.Y.*, 416 U.S. 658, 691 (1978) (concluding that “a municipality cannot be held liable *solely* because it employs a tortfeasor, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory”).

²⁴ See, e.g., 18 U.S.C. § 1961(4) (2006) (“‘[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”). A government agent extorting persons under “color of authority” is participating in the governmental entity’s affairs. *Grell*, *supra* note 4. A governmental entity that serves as a passive instrument through which racketeering activity is committed, advanced, or concealed is considered an enterprise; furthermore, the governmental entity may also serve as a victim enterprise. *Id.*

wrongful actions potentially cause severe economic injury or environmental disasters.²⁵ Federal officials have no interest in creating a law aimed to remedy and deter their own unethical activities, a fact which also elucidates the lack of federal efforts devoted generally to investigating and prosecuting economic crimes.²⁶ However, 18 U.S.C. § 201, among other statutes, has been used as an avenue to prosecute official corruption.²⁷ To date, numerous government officials have engaged in unlawful schemes to secure profits, which have involved various acts of fraud, deceit, and soliciting or accepting gifts from prohibited sources.²⁸ While racketeering activity among government officials is relatively common, and corruption continues to disrupt the

²⁵ See *infra* Part II.C (presenting a recent misfortune where a government agency's violation of the RICO statute resulted in significant economic loss to victims). For example, former Illinois governor Rod Blagojevich was accused of running a pay-to-play scheme that resulted in a \$267 million racketeering lawsuit. See Elizabeth de la Vega, *For Governor Blagojevich, It's Beginning to Look a Lot Like RICO*, TRUTHOUT (Dec. 11, 2008), <http://archive.truthout.org/121108J> (listing six charges against the governor of Illinois for his participation in a six year pattern of racketeering activity with the very state he was elected to serve and operating an illegal enterprise used to further his scheme of money laundering, bribery, extortion, etc.); see also IRS, *supra* note 17 (demonstrating various other corruptive plots where the government's criminal activity resulted in significant economic gain for government officials at the expense of United States citizens). While evidence of federal RICO violations is scarce due to the sovereign immunity doctrine, and corruptive acts most often occur through lesser included crimes, RICO violations at the federal level of government are perhaps the most severe form of corruption because of their detrimental effects and the considerable number of innocent people who are affected. See 115 CONG. REC. 5874 (1969) (noting Senator McClellan's statements about the severity of organized crime when Congress first began making efforts to control it, specifically emphasizing that "[a]s the scope of organized crime's activities has expanded, its efforts to corrupt public officials at every level of government have grown. . . . [W]ith the necessary expansion of governmental regulation . . . its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen").

²⁶ See G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 342-47 (1982) (noting that efforts against economic crime were underfunded, uncoordinated, and undirected at the federal level).

²⁷ See 18 U.S.C. § 201 (criminalizing federal officials for both the offer and receipt of bribes and illegal gratuities); *United States v. Sun-Diamond Growers*, 526 U.S. 398, 399 (1999) (suggesting that § 201 is supplemented by what the Supreme Court has called "an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials"); Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 701 (2000) (proposing that § 201 is the most important criminal provision dealing with federal political corruption).

²⁸ See IRS, *supra* note 17 (revisiting a substantial amount of recent unlawful schemes where government officials secured significant profits through criminal activity); see also *infra* notes 98-99 and accompanying text (depicting a recent example where government agents received gifts, drugs, sex, etc. from oil representatives in exchange for deepwater drilling permits).

government's integrity, this issue remains a rather unfinished area of federal court jurisprudence.²⁹

Part II.A of this Note examines the framework of the RICO statute, including the key elements and explanations of ambiguous language, while also recapping its legislative history.³⁰ Next, Part II.B recounts other efforts to hold the government liable for unlawful actions, using case law to illustrate the courts' various reasons for permitting corruption.³¹ Finally, Part II.C describes the events leading up to the BP oil spill and the government agency's history of participating in racketeering activity.³²

A. *The Framework of RICO*

The scope of a statute must be initially determined by examining its text.³³ Moreover, when interpreting the statutory language, ambiguities must be managed carefully by giving authoritative administrative constructions the appropriate deference to which they are entitled.³⁴

²⁹ See *supra* note 28 and accompanying text (discussing the prevalence of racketeering activity among government officials); *supra* text accompanying note 18 (noting that the Supreme Court has successfully avoided addressing whether the government is subject to civil or criminal liability for its participation in a "pattern of racketeering activity"). Sovereign immunity bars claims against the government; however, Congress has created some exceptions that enable citizens to file civil suits against the United States. See *infra* note 150 and accompanying text (discussing the Federal Tort Claims Act as a limited waiver of sovereign immunity for tort actions against the government).

³⁰ See *infra* Part II.A (examining the key elements and ambiguous language in the text of the RICO statute, while also outlining the legislative history).

³¹ See *infra* Part II.B (revisiting other efforts to hold the government liable for unlawful actions through case law).

³² See *infra* Part II.C (offering a detailed account of the turmoil that led to the recent oil spill in the Gulf of Mexico).

³³ *United States v. Turkette*, 452 U.S. 576, 580 (1981); see *Lewis v. United States*, 445 U.S. 55, 60 (1980) ("The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself."). Therefore, RICO falls within that basic rule, as the Supreme Court must look to RICO's language to ascertain the legislative intent. *Turkette*, 452 U.S. at 580; see also *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) ("It is a well-established principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language."); *United States v. Fisher*, 6 U.S. 358, 385-86 (1805) (reiterating that the legislature's words are to be "taken in their natural and usual sense... [and] every part [of a statute] is to be considered... [but] where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed").

³⁴ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations..." (footnote omitted)). However, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as

Therefore, Part II.A.1 will provide the foundation of the initiatives of RICO, including a detailed examination of the ambiguous language in the text.³⁵ Further, Part II.A.2 offers an overview of RICO's legislative history.³⁶

1. The Foundation of RICO

Section 1964(c) of RICO authorizes "[a] person injured in his business or property by reason of a violation of section 1962" to sue.³⁷

well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see also* *Iannelli v. United States*, 420 U.S. 770, 786-89 (1975) (discussing the construction of Title VIII of the Organized Crime Control Act and noting that the general rule of statutory construction must "defer to a discernible legislative judgment . . . [as] [t]he Act is a carefully crafted piece of legislation"). The Supreme Court has emphasized that an individual's personal evaluation of a specific legislative course should be allocated in the process of interpreting a statute; rather, its task is determining what Congress intended by the particular words it used in the text of the statute. *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980). To that end, the Sixth Circuit has found the literal reading of RICO to be consistent with the methodology used in *Turkette* where the Supreme Court recognized that Congress intended "RICO [to] be liberally construed to effectuate its remedial purposes" in a civil context. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982).

³⁵ *See infra* Part II.A.1 (providing the foundation of the RICO statute and offering a detailed discussion of the controversial language of the text).

³⁶ *See infra* Part II.A.2 (offering an overview of the legislative history).

³⁷ 18 U.S.C. § 1964(c) (2006). The full text of 18 U.S.C. § 1964 provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) 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, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

Under § 1961(3), a “person” includes any individual or entity capable of holding a legal or beneficial interest in property.³⁸ Although this word describes the entities to which the law assigns rights, Congress has failed to systematically define this ambiguous term; thus, issues arise when

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Id. § 1964. For § 1962, see *infra* note 42.

³⁸ 18 U.S.C. § 1961(3). See generally Michael J. Gerardi, *The “Person” at Federal Law: A Framework and a RICO Test Suite*, 84 NOTRE DAME L. REV. 2239 (2009) (providing an in-depth analysis of the term “person” in the context of RICO (internal quotation marks omitted)). The full text of 18 U.S.C. § 1961 defines all of the terms included in the elements that are necessary to establish a RICO violation:

As used in this chapter –

(1) “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), 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 . . . ;

(2) “State” means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) “person” includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) “enterprise” includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) “unlawful debt” means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

18 U.S.C. § 1961.

determining whether municipalities are subject to civil liability under RICO.³⁹ However, the language in the modern definition does not appear to include government entities in the term “person.”⁴⁰

Further, when analyzing the RICO statute, it is necessary to define what constitutes an “enterprise,” distinct from a “pattern of racketeering activity,” as one does not necessarily establish the other.⁴¹ Section 1962, which provides a list of prohibited activities under RICO, may be violated by “any person . . . associated with any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise’s affairs through a pattern of racketeering activity . . .”⁴² Racketeering

³⁹ See Gerardi, *supra* note 38, at 2240 (noting that personhood is difficult to elucidate succinctly in federal law because Congress’ approach to defining the term “person” has never been systematic).

⁴⁰ *Id.* But see *id.* at 2264–67 (proposing two changes to the definition of the word person that would provide courts with better guidance when determining what entities or individuals are included in the term).

⁴¹ See *Boyle v. United States*, 129 S. Ct. 2237, 2245 (2009) (“[T]he existence of an enterprise is an element distinct from the pattern of racketeering activity and ‘proof of one does not necessarily establish the other.’” (quoting *United States v. Turkette*, 452 U.S. 576, 583 (1980))). An “enterprise” is not the “pattern of racketeering activity,” but is an entity separate from the pattern of activity through which it engages; thus, the government has the burden of establishing the existence of an enterprise as a separate element in every case. *Turkette*, 452 U.S. at 583.

⁴² 18 U.S.C. § 1962 (2006). The full text of 18 U.S.C. § 1962 provides:

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

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

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or

activity consists of a wide range of crimes from state-defined felonies to embezzlement of pension and welfare funds under federal statutes.⁴³ Additionally, § 1961(5) requires at least two racketeering acts listed in § 1961(c) within a period of ten years.⁴⁴ Seeing as Congress did not express its intention to limit the application of RICO on the face of the statute, one must further examine the legislative history to determine its comprehensive objectives.⁴⁵

2. Legislative History

In 1951, the American Bar Association (“ABA”) established the ABA Commission on Organized Crime after the Special Committee to Investigate Organized Crime in Interstate Commerce revealed the emerging problem of organized crime among legitimate businesses and state and local governments.⁴⁶ Subsequently, the Commission reviewed numerous proposals to strengthen the laws concerning organized crime.⁴⁷ Around 1967, when organized crime and racketeering became well-known in the world of government, business, and unions, the President’s Commission on Law Enforcement and the Administration of

foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

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

Id.

⁴³ 18 U.S.C. § 1961(1); see Curato et al., *supra* note 7, at 1095 (highlighting murder, robbery, and arson among other state-defined felonies included in the definition of racketeering activity; the federal statutes include the Hobbs Act, the Travel Act, and bribery).

⁴⁴ 18 U.S.C. § 1961(5); see also *id.* § 1961(1) (presenting the list of possible predicate acts that may be used to establish a pattern of racketeering activity); *supra* note 18 (defining and providing the prerequisites to establish a “pattern of racketeering activity”).

⁴⁵ See *infra* Part II.A.2 (offering an overview of the legislative history of RICO).

⁴⁶ *Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 538, 544 (1970) (testimony of ABA President Edward L. Wright) [hereinafter cited as *House Hearings*]; see *id.* (noting that the ABA Commission on Organized Crime was established in response to Senator Estes Kefauver’s request; he was Chairman of the Special Committee to Investigate Organized Crime in Interstate Commerce (also called the Kefauver Committee)).

⁴⁷ See *House Hearings*, *supra* note 46 (noting that the ABA Commission on Organized Crime examined various legislative proposals to strengthen the laws concerning organized crime; for instance, some measures “recognized that money [was] the key to power in the underworld”). Hearings began to expose the structure of the Mafia or La Cosa Nostra by 1960, while the Department of Justice began attempts to control racketeer infiltration among unions through antitrust theories. See generally Blakey & Gettings, *Basic Concepts*, *supra* note 5, at 1015 n.23 (noting that the McClellan Committee held hearings exposing the structure of the “national syndicate of organized crime”).

Justice (“the Katzenbach Commission”) recommended a crime control strategy that advocated the use of new approaches to control infiltration of legitimate businesses.⁴⁸ After reexamining federal criminal jurisprudence between 1966 and 1971, the National Commission on Reform of the Federal Criminal Law further developed noteworthy perspectives regarding the disposition of the issues facing Congress.⁴⁹

⁴⁸ See PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200–09 (1967) (presenting the Commission’s recommendations of certain methods to successfully implement a full-scale commitment to destroy the power of organized crime groups). Additionally, “racketeering” has never been a term limited to organized crime in the mob sense and has been applied broadly to an assortment of criminal schemes, including illegal businesses; however, its origin remains unclear. GUS TYLER, ORGANIZED CRIME IN AMERICA: A BOOK OF READINGS 181–82 (1962). One theory notes that the term “racket” originates from young men in New York City, under the guidance of political leaders, giving affairs called rackets, whereby they associated themselves with gang-members who found it easy to force tradesmen to buy tickets. *Id.* For that reason, obtaining money by coercion or fraud developed into the term “racketeering.” *Id.* On the other hand, the Copeland Committee used the term loosely to describe any questionable, fraudulent, disliked, or immoral practice, regardless of whether it was criminal. S. REP. NO. 75-1189, at 2 (1937). Currently, RICO labels the accused as a racketeer, which has a prejudicial impact on adjudicators. ABA: REPORT TO THE HOUSE OF DELEGATES, SECTION ON CRIMINAL JUSTICE 4 (1982). In 1934, the Copeland Committee heard a convincing argument that it was the public’s and officials’ reluctance to control “white-collar crime” that led to the development of “organized crime” during prohibition, which persistently emphasized:

Both crime and racketeering of today have derived their ideals and methods from the business and financial practices of the last generation. . . . It is a law of social psychology . . . that the socially inferior tend to ape the socially superior. . . . It was inevitable that, sooner or later, we would succeed in “Americanizing” the “small fry” — especially the foreign small fry. . . . All was relatively safe, since the legal profession was already ethically impaired through its affiliations with the reputable racketeers. . . . The idea that when prohibition is ended the racketeers . . . will meekly and contritely turn back to blacking shoes . . . is downright silly. They will apply the technique they have mastered to the dope ring They will find crafty lawyers all too willing to defend them from the “strong arm” of the law for value received. . . . So long as the lawless can get protection in return for keeping corrupt politicians in office, we shall not be free from the crime millstone about our necks.

Investigation of So-Called “Rackets”: Hearings Before a Subcomm. of the Senate Committee on Commerce, 73d Cong. 710–12 (1934) (testimony of Harry Elmer Barnes).

⁴⁹ See G. Robert Blakey et al., *Introduction Memorandum and Excerpts from Consultants Report on Conspiracy and Organized Crime*, in 1 WORKING PAPERS: NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 381 (1970) (noting that the staff working for the Commission examined several concepts subsequently incorporated into RICO, such as “enterprise” and “pattern of racketeering”; also, the staff work indicated the narrow scope of predicate offenses in RICO during the earliest stages of the legislative process). The National Commission on Reform of the Federal Criminal Law was created by Act of Nov.

On January 15, 1969, Senator John L. McClellan drafted the Organized Crime Control Act (“S. 30”) to deploy the recommendations from the Katzenbach Commission.⁵⁰ Subsequently, he presented the evolution of organized crime in the United States, emphasizing the common practices of loan sharking, the infiltration of businesses, and the subversion of democratic processes.⁵¹ Focusing on Senator McClellan’s statements regarding the infiltration of the legitimate economy, Senator Hruska introduced the Criminal Activities Profits Act, which incorporated the features of his previous bills and identical bills sponsored by Richard Poff, the Congressman from Virginia, and was designed to attack “the economic power of organized crime” on two fronts—criminal and civil.⁵² However, Senator Hruska considered the

9, 1966, Pub. L. No. 89–801, 80 Stat. 1516 (1966); further, Edmund G. Brown was Chairman, and Congressman Richard H. Poff was Vice-Chairman. *Id.*

⁵⁰ See Blakey & Gettings, *Basic Concepts*, *supra* note 5, at 1017 (discussing the origin of the Organized Crime Control Act); see also *supra* notes 45–49 (examining the recommendations from the Katzenbach Commission); *infra* note 112 (providing the Statement of Findings and Purpose of the Organized Crime Control Act).

⁵¹ See 115 CONG. REC. 5872–74 (1969), reprinted in *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong.*, 493–511 (1969) [hereinafter cited as *Senate Hearings*] (noting Senator McClellan’s recognition of the growth of organized crime in the United States and discussing emerging illegal activities, such as loan sharking, the infiltration of legitimate business, and the subversion of the democratic processes). Also, Senator McClellan stressed the failure to prevent the growth of organized crime. 115 CONG. REC. 5874; *Senate Hearings*, *supra*, at 496. He further addressed the subversion of democratic processes:

To exist and to increase its profits, . . . organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can long tolerate. Today’s corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras. Organized crime operates even in the face of honest law enforcement, but it flourishes best in a climate of corruption. As the scope of organized crime’s activities has expanded, its efforts to corrupt public officials at every level of government have grown. For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen. The potential for harm today is thus greater if only because the scope of governmental activity is greater.

115 CONG. REC. 5874–75; *Senate Hearings*, *supra*, at 497.

⁵² 115 CONG. REC. 6993; see *id.* at 6993–94 (describing the criminal and civil provisions incorporated into The Criminal Activities Profits Act). The Criminal Activities Profits Act, S. 1623, also included provisions for private equitable relief and treble damages on its face. *Id.* at 6995–96; see also *Senate Hearings*, *supra* note 51, at 387–88 (examining Assistant Attorney General Wilson’s criticism of S. 1623, but expressing his fondness of S. 1861 because of its useful civil remedies that could be invoked by the lesser standard of proof); Robert Taylor Hawkes, Note, *The Conflict Over RICO’s Private Treble Damages Action*, 70

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criminal provision an ancillary to the civil provision, the intended focal point of the bill.⁵³ Less than a month later, the two Senators introduced the Corrupt Organizations Act (“S. 1861”), which offered express provisions for relief in government proceedings and criminal sanctions.⁵⁴ The Department of Justice also conveyed its concern with the breadth of predicate offenses, advising that they were overbroad and could result in the complete federalization of criminal justice.⁵⁵

While S. 30 was amended to incorporate S. 1861 as Title IX, it was not intended to punish individuals; rather, its purpose was remedial.⁵⁶ Although S. 1861 did not include “fraud” as one of the activities that

CORNELL L. REV. 902, 936 (1985) (“RICO claims can stigmatize defendants only if courts restrict the applicability of the broad statutory language to proven organized criminals.”). However, Congressional intent might be thwarted if a particularly defined limitation focusing on classic mobsters was adopted to circumvent the scope of civil RICO because it might be viewed as carrying a stigma, thus leading to the adoption of a higher burden of proof. *Id.* at 935–36. Therefore, the implementation of these new remedies should not warrant separate rules of evidence. *Id.*; see also *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 547 (1871) (noting that an injured party may recover double or treble damages in a civil suit; however, those suits can hardly be deemed penal actions requiring the application of different rules of evidence).

⁵³ See 115 CONG. REC. 6993–94 (discussing Senator Hruska’s belief that the civil provision is the more important feature of the bill and further expressing the need for innovation in the fight against organized crime). The bill expanded procedures that had been proven in the antitrust field and applied them in the organized crime domain. *Id.*; see also *State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 680 (N.D. Ind. 1982) (“[S]ection 1964(c) was . . . cast as a separate statute intentionally to avoid the restricted precedent of antitrust jurisprudence.”).

⁵⁴ See 115 CONG. REC. 9568 (discussing the Corrupt Organizations Act of 1969 and providing the reasoning for its enactment). More importantly, Senator McClellan never indicated that the express provisions for government proceedings were intended to exclude private parties. *Id.* at 9567. Although this Act focused heavily on the progressing remedies in antitrust law, he did not intend to bring that complicated field into the enforcement of the bill. *Id.* “There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field.” *Id.*

⁵⁵ *Senate Hearings*, *supra* note 51, at 404–07. Congress acted because “existing law, state and federal, was not adequate to address the problem, which was of national dimensions.” *United States v. Turkette*, 452 U.S. 576, 586–87 (1981). The American Civil Liberties Union opposed the breadth of S. 1861 because it was applicable to areas beyond the traditional definition of organized crime. *Senate Hearings*, *supra* note 51, at 475. The Supreme Court reversed the Sixth Circuit’s effort to read a “racketeering” limitation into the text of 18 U.S.C. § 1961 because of the lack of limitation in the text and vagueness problems associated with reading an undefined concept into the statute; moreover, the confusion indirectly concluded that Congress intended to criminalize all conduct addressed in the statutory language. *United States v. Culbert*, 435 U.S. 371, 380 (1978).

⁵⁶ See 115 CONG. REC. 9568 (1969) (emphasizing that the purpose of the bill was remedial, rather than penal). The bill was based upon the consideration that organizations affecting commerce through a pattern of racketeering activity are acting in opposition to the public interest. *Id.* Thus, the bill was designed to protect the public against parties engaging in organized criminal activity. *Id.*

“harm[ed] innocent investors and competing organizations,” S. 30 inserted it into its statement of findings and purpose; however, this blend of S. 30 and S. 1861 essentially narrowed the enumerated racketeering activities in Title IX.⁵⁷ Importantly, Title IX provided various avenues to attack government corruption, including the state offenses of bribery and extortion, as well as the federal offenses of fraud, bribery, obstruction of justice, and extortion.⁵⁸ When the bill was brought up for consideration in the House of Representatives, Judiciary Committee Chairman Emanuel Celler characterized Title IX as a means through which injured private parties could recover treble damages—one of the amendments the President had originally endorsed in his message on organized crime.⁵⁹

The House passed the bill by a vote of 431 to 26 after another debate regarding the scope of statutorily defined organized crime and racketeering activity.⁶⁰ The text and legislative history appear to support holding a government agency liable for its RICO violations, yet it is still necessary to examine the jurisprudence regarding Congress’ intentions.⁶¹

B. Previous Attempts to Hold the Federal Government Liable for Unlawful Actions

Only a few actions against federal government entities have been brought under RICO; these cases provide various reasons for the courts’ inability to hold the government accountable for its violations of the

⁵⁷ The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970); 115 CONG. REC. 9568 (1969); see Blakey, *supra* note 26, at 268 (noting that the list of racketeering activities was narrowed, but was also expanded to include mail fraud, wire fraud, and securities fraud). While Title IX was narrowed as suggested by the Department of Justice, the addition of fraud inherently included mail fraud, wire fraud, and securities fraud. *Id.*; see also 18 U.S.C. § 1341 (2006) (providing the definition of mail fraud); 18 U.S.C. § 1343 (defining wire fraud).

⁵⁸ See 18 U.S.C. § 201 (delineating the use of bribery to prevent government corruption); *id.* § 1510 (describing the federal offense of obstruction of justice); *id.* § 1951 (outlining the prohibited activities included in extortion).

⁵⁹ See 116 CONG. REC. 35, 37, 196, 264 (1970) (discussing Chairman Celler’s observations of Title IX and the President’s signing of the legislation). Also, Title IX was designed to impede the infiltration of businesses by organized crime, which led to new civil remedies, including orders of prohibition against business activity, dissolution, and treble damages for injured parties. *Id.* at 35, 196.

⁶⁰ See *id.* at 35, 204-05 (noting that Congressman Poff argued against an amendment—offered by Congressman Mario Biaggi—explicitly prohibiting membership in the Mafia because he disagreed with the idea of confining S. 30 to “organized crime”).

⁶¹ See *infra* Part II.B (discussing the jurisprudence under RICO); *supra* Part II.A (offering an overview of RICO’s legislative history and textual language).

statute.⁶² For instance, the Ninth Circuit has refused to acknowledge the government's ability to form the "malicious intent" necessary to support a RICO action, as demonstrated in *Lancaster Community Hospital v. Antelope Valley Hospital District*.⁶³ The Ninth Circuit also considers it bad policy to hold the "body politic" (taxpayers or citizens of a state) liable for the criminal actions of a single government agent or a group of government agents operating beyond the scope of their authority.⁶⁴ Moreover, public policy is offended if the body-politic is "made liable for extraordinary damages as a result of the actions of a few dishonest officials."⁶⁵

The Sixth Circuit takes a different approach, rejecting RICO's application to government agencies because § 1962 requires racketeering activity as a predicate for a civil RICO action, which can only occur if the defendant is "'chargeable,' 'indictable,' or 'punishable' for violations of specific state and federal criminal provisions."⁶⁶ In *Berger v. Pierce*, the insureds sued the Federal Insurance Administration ("FIA") for benefits under policies issued by the FIA, in accordance with the Flood Insurance Program. However, the court decided that subjecting a federal agency to federal criminal prosecution would be an abuse of legal practice.⁶⁷

In addition to these justifications for permitting the government to escape liability for its unethical actions, the foremost reason that there cannot be a RICO claim against the federal government relates to the sovereign immunity concern.⁶⁸ The jurisprudence regarding this issue

⁶² See *infra* notes 63–71 and accompanying text (providing various reasons for allowing government to escape liability under RICO).

⁶³ 940 F.2d 397 (9th Cir. 1991); see, e.g., *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996) (stating that "'government entities are incapable of forming [the] malicious intent' necessary to support a RICO action" (quoting *Lancaster Cmty. Hosp.*, 940 F.2d at 404)).

⁶⁴ *Lancaster Cmty. Hosp.*, 940 F.2d at 404.

⁶⁵ *Id.* The court held that exemplary damages are not available against municipal corporations "'because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer [i]s being chastised.'" *Id.*

⁶⁶ *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991). Although the Federal Insurance Agency ("FIA") engaged in a RICO conspiracy under § 1962(d), the claim against the federal agency failed, as it is self-evident that a federal agency is not subject to state or federal prosecution. *Id.* Racketeering activity is a predicate for a civil RICO violation, which requires a defendant to be punishable for criminal provisions; thus, the claim was defective as a matter of law. *Id.*

⁶⁷ *Id.* "Aside from the fact that the elements of RICO have not been adequately alleged, 18 U.S.C. §§ 1961–1962, it is clear that there can be no RICO claim against the federal government." *Id.*

⁶⁸ See, generally John F. Conway, Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 *FORDHAM L. REV.* 707 (1987) (discussing governmental immunity and equitable estoppel). The doctrine of sovereign immunity prevents suits against the government absent an express waiver. *Id.* at 710; see *infra* note 69 (demonstrating that the text of RICO does not present an unequivocal

under RICO is extremely limited because sovereign immunity bars claims against the government.⁶⁹ As a corollary to sovereign immunity, the government has also been immune from application of the doctrine of equitable estoppel, which prevents it from being estopped from asserting its rights absent consent.⁷⁰ Justification for these doctrines relies on the notion that claims against the government hinder the separation of powers between the legislative and judicial branches of the federal government.⁷¹

An additional concern is protecting public finances.⁷² Equitable estoppel may result in compelling the government to provide a benefit

expression of congressional intent to expose the government to liability). *But see, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b) (illustrating one of the limited circumstances in which Congress has passed legislation waiving sovereign immunity).

⁶⁹ See *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 99 (9th Cir. 1970) (noting that governmental immunity from equitable estoppel arises as an incidence of sovereign immunity, which prevents the government from being sued unless it consents); *supra* note 68 (reiterating that the sovereign immunity doctrine bars suits against the United States absent an express waiver). While the Fourteenth Amendment allows Congress to abrogate state sovereign immunity, the Eleventh Amendment bars citizens from bringing claims for relief or money damages in a federal court, unless the state waives immunity or Congress abrogates it. 32 AM. JUR. 2d *Federal Courts* § 981 (2007); *see also* U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Congress has the power to abrogate the states’ Eleventh Amendment immunity when a statute contains an unequivocal statement of congressional intent to abrogate, Congress identifies the history of unconstitutional action by the states, and the rights and remedies created under the statute are congruent and proportional to the violation Congress sought to prevent. 32 AM. JUR. 2d *Federal Courts* § 981 (2007). To determine whether Congress has abrogated a state’s Eleventh Amendment immunity, the court must clarify whether the “evidence of congressional intent [to abrogate the states’ immunity is] both unequivocal and textual,” and Congress must have the power to abrogate according to the Constitution. *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994). Congress did not possess the power to abrogate the states’ Eleventh Amendment immunity when enacting the Indian Gaming Regulatory Act under the Indian Commerce Clause. *Id.* at 1019.

⁷⁰ *Conway*, *supra* note 68, at 709–10. “The doctrine of equitable estoppel precludes a party from asserting a claim or defense that otherwise is available to him against his opponent who has detrimentally altered her position in reliance on the party’s misrepresentation or failure to disclose a material fact despite a duty to do so.” *Id.* at 709. Further, the primary principle behind equitable estoppel is that no one should benefit from his own wrong. *R. H. Stearns Co. v. United States*, 291 U.S. 54, 61–62 (1934).

⁷¹ See *Phelps v. Fed. Emerg. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986) (asserting that preventing the government from denying unlawful actions from its government agents results in the action of the official functioning as the law, as opposed to Congress’ enacted law).

⁷² See *Cnty. Health Servs. of Crawford Cnty. v. Califano*, 698 F.2d 615, 633 (3d Cir. 1983) (Meanor, J., dissenting) (“Where no substantive entitlement exists, to estop the government amounts to no more than a court authorized raid on the public treasury.”).

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for a party when there is a lack of sufficient funds authorized by Congress.⁷³

In *Schweiker v. Hansen*, an agent for the Social Security Administration (“SSA”) misinformed Mrs. Hansen by advising her that she was ineligible to receive benefits; yet, she only had to file a written application in order to receive them, which she did one year later.⁷⁴ The Supreme Court precluded the application of procedural equitable estoppel against the government agency because its activity was inherently sovereign.⁷⁵ For government activity to be classified as sovereign, its actions must be “unique, and without analogy in the private sector.”⁷⁶ Moreover, the policy considerations guiding the doctrine of sovereign immunity—ensuring the honest and effective administration of sovereign functions—must be strictly enforced.⁷⁷ To that end, the Court considered the risk of opening the floodgates to litigation and the burden on public funding too immense to permit “government agents’ misconduct to result in circumventing a procedural requirement.”⁷⁸

⁷³ See Conway, *supra* note 68, at 711 (recognizing that estopping the government from denying an official’s or agent’s representation that is contrary to congressional legislation would result in the judiciary’s usurping the legislative function; hence, the act of the agent or official would be the law as opposed to an act of Congress); see also Heckler v. Cmty. Health Servs. of Crawford Cnty., 467 U.S. 51, 62–63 (1984) (reiterating that estoppel is not justified when “the expansion of [an] operation [is] achieved through unlawful access to governmental funds”); Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947) (recognizing “the duty of all courts to observe the conditions defined by Congress for charging the public treasury”).

⁷⁴ *Schweiker v. Hansen*, 450 U.S. 785, 785–86 (1981) (per curiam). After she began receiving benefits, Mrs. Hansen sued the SSA for retroactive benefits. *Id.* at 786–87. She argued that the Secretary of Health and Human Services should be estopped from denying the retroactive benefits to which she was entitled because the government agent misinformed her. *Id.* at 787.

⁷⁵ See Conway, *supra* note 68, at 728 (“When the government functions in an inherently sovereign capacity, the application of immunity from equitable estoppel is most appropriate.”).

⁷⁶ *Id.* at 721. Sovereign activity for equitable estoppel purposes includes “social security administration, tax collection, imposition of import duties, granting citizenship and permits, and purchasing munitions.” *Id.* at 721–22.

⁷⁷ See *Schweiker*, 450 U.S. at 790 (stressing that experience has proven the written application requirement to be essential to honest and effective administration of Social Security laws).

⁷⁸ Conway, *supra* note 68, at 729. According to the government, the public fisc perhaps could be threatened if the government was bound every time a government agent failed to follow instructions to the utmost detail. *Id.*; see *Schweiker*, 450 U.S. at 788–89 (noting that the majority opinion agreed with Judge Friendly’s dissent in the court below, where he expressed his concern for opening the door of the federal fisc to thousands); see also *infra* notes 132–33 and accompanying text (discussing other legitimate concerns with subjecting

However, prior to *Schweiker*, the Supreme Court declined to estop the government in *Federal Crop Insurance Corp. v. Merrill*, where an agent selling insurance for a government-owned enterprise mistakenly informed the Merrills that their reseeded wheat crop was covered under the insurance policy.⁷⁹ When a drought destroyed the entire crop, the government enterprise denied the Merrills' claim for the insurance proceeds.⁸⁰ While the Court recognized that refusing to estop the government would result in hardship, it declined to do so and charged the Merrills with constructive notice of the regulations.⁸¹ In a dissenting opinion, Justice Jackson expressed his suggestion that the government be held to a certain level of honor and reliability in dealing with its citizens.⁸² Nevertheless, the Court held that the Federal Crop Insurance

federal agencies to civil suits and the principal setbacks to holding the government liable for its unlawful actions).

⁷⁹ *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). In *Merrill*, the Merrill Brothers purchased crop insurance from the Federal Crop Insurance Corporation ("FCIC"). *Id.* at 381-82. The Merrill Brothers informed the Bonneville Agricultural Conservation Committee, acting as FCIC's agent, that they were planting spring wheat and that they were reseeding on winter wheat coverage on all but sixty acres of the land. *Id.* at 382. The Committee notified respondents that the entire crop was insurable, and the FCIC accepted the application; however, the application itself did not disclose that any part of the insured crop was reseeded. *Id.*

⁸⁰ *See id.* at 382 (noting that FCIC refused to pay the loss after learning that the destroyed acreage had been reseeded). The Merrills attempted to insure the reseeded spring wheat; they believed that they had obtained insurance from the Government. *Id.* at 385; *see also* Wheat Crop Insurance Regulations, 10 Fed. Reg. 1585, 1591 (Feb. 7, 1945) ("The term wheat crop shall not include . . . spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year."); 7 C.F.R. § 418 (1986) (providing the current regulations regarding wheat crop insurance). Interestingly, § 418.5 currently provides, in part, where a party believing that he was insured bases that belief on the misrepresentation of an agent of the FCIC and suffers a crop loss, he shall be paid as though he were otherwise entitled. *Id.* § 418.5.

⁸¹ *Merrill*, 332 U.S. at 383-85. "[T]he Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance." *Id.* at 385.

⁸² *Id.* at 387 (Jackson, J., dissenting). Specifically, Justice Jackson stated:

In this case, the Government entered a field which required the issuance of large numbers of insurance policies to people engaged in agriculture. It could not expect them to be lawyers, except in rare instances, and one should not be expected to have to employ a lawyer to see whether his own Government is issuing him a policy which in case of loss would turn out to be no policy at all. There was no fraud or concealment, and those who represented the Government in taking on the risk apparently no more suspected the existence of a hidden regulation that would render the contract void than did the policyholder. It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.

Corporation (“FCIC”) was not bound by the unauthorized representation of its agent because the regulation expressly excluded reseeded wheat from insurance coverage.⁸³

The most controversial concept concerning government corruption entails holding the government liable as an “enterprise” under the RICO statute.⁸⁴ Many defendants object to RICO’s application to corruption cases by citing the definition itself, the absence of explicit legislative history, and the assumed inapplicability of civil remedies to governmental entities; however, federal circuit courts addressing this issue have extended the term “enterprise” to governmental units.⁸⁵ For instance, in *Lafayette v. Louisiana Power & Light Co.*, the Court avoided addressing remedies because—when considering comparable cases—it did not conclude that remedies appropriate to redress private parties would be equally appropriate for municipalities.⁸⁶ On the other hand, in *United States v. Thompson*, the court held that the plain meaning of “enterprise” included governmental units and extended the term to “‘The Office of Governor’ of the State of Tennessee.”⁸⁷

The Government asks us to lift its policies out of the control of the States and to find or fashion a federal rule to govern them. I should respond to that request by laying down a federal rule that would hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment.

Id. at 387–88 (Jackson, J., dissenting).

⁸³ See *id.* at 384–85 (stating that “[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority”).

⁸⁴ 18 U.S.C. § 1961(4) (2006); see *supra* note 38 (offering the text of RICO and defining “enterprise”).

⁸⁵ See, e.g., *United States v. Turkette*, 452 U.S. 576, 585 (1981) (“Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept.”); *United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir. 1982) (en banc) (“It seems clear to us that those who played the leading roles in the enactment of the RICO statute thoroughly understood organized crime’s impact upon government entities.”); *supra* Part II.A.2 (discussing Congress’ intent to refrain from limiting the scope of RICO terms); see also *infra* notes 87 and 114 (providing federal circuit court cases that apply the term “enterprise” to governmental entities).

⁸⁶ 435 U.S. 389, 402 (1978).

⁸⁷ 685 F.2d 993, 994 (6th Cir. 1982) (en banc). Until *Thompson*, the courts of appeals were unanimous in holding that governmental units could be “enterprises.” See *id.* at 994 (rejecting appellants’ allegation that The Office of Governor of the State of Tennessee was an enterprise due to the breadth of RICO’s statutory language, RICO’s legislative history, and the unanimity of judicial precedent on this issue in other circuits). But see *United States v. Angelilli*, 660 F.2d 23, 33 (2d Cir. 1981) (“[W]e view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO’s provisions

Just as numerous cases have demonstrated that a government agency may be considered an enterprise under 18 U.S.C. § 1961(4), perhaps plaintiffs in *Rinke v. BP* could also establish that MMS was an enterprise used to further BP's scheme, which ultimately led to the oil catastrophe.⁸⁸ Further, RICO's jurisprudence, as well as the "ecological Armageddon" in the Gulf of Mexico, reveals the need for an avenue to hold corrupt government agencies—acting as enterprises—liable for their unlawful actions.⁸⁹ To illustrate the need to control corruption among the federal government to a greater extent, it is critical to assess MMS's history of participating in racketeering activity.⁹⁰

demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities."); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (rejecting *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976)). "Finding nothing to the contrary in either the legislative history or the statute, we hold that the Wilson County Sheriff's Department is an 'enterprise' under 18 U.S.C. § 1961(4)." *Id.*; *United States v. Bachelor*, 611 F.2d 443, 450 (3d Cir. 1979) (holding that the Philadelphia Traffic Court was an enterprise within the meaning of the RICO statute); *United States v. Grzywacz*, 603 F.2d 682, 686 (7th Cir. 1979) (concluding that a municipal police department was an enterprise when the Mayor of Madison, police officers, and operators of business establishments engaged in a pattern of securing monetary payments and sexual favors from city tavern operators in exchange for protection from illegal activities); *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977) (holding that the Pennsylvania Bureau of Cigarette and Beverage Taxes was an enterprise); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (concluding that the Macon, Georgia municipal police department constituted an enterprise within the meaning of the RICO statute); *United States v. Ohlson*, 552 F.2d 1347, 1348 (9th Cir. 1977) (sub silentio) (holding that the State of California Bureau of Narcotic Enforcement and the Narcotic Bureau of the San Francisco Police Department was an enterprise conducting and participating in a racketeering scheme to assist various narcotics dealers in the manufacture and sale of narcotic and stimulant drugs).

⁸⁸ See Amended Complaint, *supra* note 8 (providing a background of the alleged events that ultimately led to the BP oil spill); *infra* Part II.C (describing the events leading up to the BP oil spill and the government agency's history of participating in racketeering activity); see also *supra* note 87 (demonstrating how numerous cases have applied the term "enterprise" to governmental entities in corruption cases); *infra* note 114 (providing additional cases that have applied the term "enterprise" to governmental entities in corruption cases).

⁸⁹ See Amended Complaint, *supra* note 8, ¶ 6 (emphasizing that "[t]he Gulf of Mexico is in the midst of an ecological Armageddon that could literally destroy the marine and coastal environment and way of life for generations of Americans"); see also *Global Corruption Barometer 2010*, TRANSPARENCY INTERNATIONAL (2010), http://www.transparency.org/policy_research/surveys_indices/gcb/2010 (providing relevant statistics regarding the increase in corruption over the past three years, specifically noting that corruption affecting political parties, legislature/parliament, and police ranked the highest among public perception).

⁹⁰ See *infra* Part II.C (presenting how the MMS enterprise allegedly played a crucial role in one of the largest environmental and economic disasters in history).

C. Government Agency as Enterprise in BP Oil Spill

On April 20, 2010, an offshore drilling rig explosion in the Gulf of Mexico resulted in the largest oil spill in history.⁹¹ This tragedy not only destroyed marine and wildlife habitats, but it also negatively affected economic output, jobs, and income along the coast.⁹² In an effort to secure the Deepwater Horizon exploration drilling permit, BP allegedly misrepresented the possible dangers of an oil spill in its Oil Spill Response Plan and greatly overstated its ability to control a spill if it occurred.⁹³ Nonetheless, MMS approved these false documents on two separate occasions and provided BP with an unconditional exclusion from the National Environmental Policy Act of 1969 (“NEPA”).⁹⁴ Under NEPA, MMS was required to produce an Environmental Impact Statement (“EIS”) assessing the prospective negative impact drilling could have on the environment, and exclusions were not to be given in cases where drilling operations took place in such deep water.⁹⁵ The

⁹¹ See Amended Complaint, *supra* note 8, ¶¶ 6–7 (describing how the enormous, uncontrolled spill caused a vigorous “oil slick that . . . covered tens of thousands of square miles of ocean,” which made its way to land on the coasts of Florida, Alabama, Mississippi, and Louisiana).

⁹² See *id.* ¶¶ 9–10 (specifically accentuating the billions of dollars in damage to businesses, property, and income of the people of Florida, including the closing of fishing waters throughout the region, and the loss of income to the tourism industry, hotels, resorts, and restaurant owners).

⁹³ See *id.* ¶¶ 44–45 (providing a detailed account of BP’s acts in furtherance of its fraudulent scheme via its Oil Spill Response Plan). MMS personnel are responsible for meticulously reviewing each Response Plan to ensure the company is capable of responding to an emergency oil spill. *Id.* ¶ 44. MMS neglected its responsibilities by failing to ensure that BP was capable of containing a major oil spill. *Id.* But see Matthew Dickinson, *Why the Minerals Management Service Should Not Be Blamed for the Oil Spill*, BLOGS DOT MIDDLEBURY (May 31, 2010), <http://blogs.middlebury.edu/presidentialpower/2010/05/31/why-the-minerals-management-service-should-not-be-blamed-for-the-oil-spill/> (blaming Congress for neglecting its responsibility to oversee MMS’s operations and providing a conflicting description of the Rinke allegations).

⁹⁴ Amended Complaint, *supra* note 8, ¶ 55; see also *id.* ¶¶ 48, 55 (noting BP’s mistakes in its Oil Spill Response Plan, including references to sea lions, seals, and walruses, which are Arctic marine mammals that do not dwell in Gulf waters). The Oil Spill Response Plan also referenced a professor—listed as a consultant for respondent—that died four years prior to its submission. *Id.* ¶ 48. Further, the document contained links to a Japanese home shopping website for one of BP’s Marine Spill Response Corp. (“MRSC”) main equipment providers in the region if rapid deployment resources were necessary to respond to a spill. *Id.*

⁹⁵ See *id.* ¶¶ 55–56 (presenting instances in which categorical EIS exclusions should not be given, as listed under NEPA and MMS internal policies, which include such instances where drilling “take[s] place in ‘relatively untested deep water,’ ‘areas of high biological sensitivity,’ [and] drilling operations ‘utilizing new or unusual technology’”). Although BP had obtained an MMS permit for 20,211 feet, the drilling had actually been taking place at 22,000 feet. *Id.* ¶ 66.

largest oil spill in history occurred when the oil rig was in the final phases of drilling the exploratory well.⁹⁶

Subsequent to the massive uncontrolled oil spill, BP misrepresented the rate at which the oil was leaking to avoid further likelihood of damages liability.⁹⁷ However, according to *Rinke*, the oil spill could have been avoided if the government had been doing its job correctly.⁹⁸ Investigative reports have found incidents where oil industry representatives unlawfully provided MMS agents with gifts, drugs, sex, and alcohol.⁹⁹ The federal government is now facing a major predicament because MMS supposedly continues to have inappropriate relationships with oil companies, and the public is denied honest services and environmental safeguards as a consequence.¹⁰⁰ MMS appears to have been more concerned with accommodating oil companies, including BP, than protecting the environment.¹⁰¹

⁹⁶ See *id.* ¶ 67 (revisiting BP's repeated unsuccessful attempts to stop the uncontrolled oil spill using untested technology after the ensuing spill occurred in the final phases of drilling).

⁹⁷ See *id.* ¶ 68 (reiterating that BP fraudulently low-balled its estimates to avoid the huge royalty payments it perhaps would incur from the oil spill). To that end, BP "fraudulently, knowingly and willingly misrepresented the oil flow rate and concealed the far higher rate at which the uncontrolled oil spill ha[d] spewed into the Gulf of Mexico." *Id.*

⁹⁸ See *id.* ¶ 112 (providing numerous violations of MMS ethics rules). The Inspector General presented reports revealing that oil industry representatives "'purchased meals, drinks, and other items of entertainment'" for MMS employees, who viewed the oil companies as "'partners'" or "'customers.'" *Id.* Further, the representatives instructed MMS employees to keep quiet about attending the oil industry social events. *Id.* ¶ 113. For instance, an MMS supervisor requested employees to privately RSVP to an oil industry social event. *Id.*

⁹⁹ See *id.* ¶ 114 (specifically emphasizing that a document concluded government personnel habitually consumed alcohol, used cocaine and marijuana, and had sexual relations with representatives at oil industry functions). The gifts included golf and ski trips, snowboarding rental and lessons, golf and garment bags, silver trays, tickets to sporting events and music concerts, meals and drinks, invitations to holiday parties in various locations, hunting and fishing trips, and paintball outings. *Id.* ¶ 116. BP has also vetoed MMS attempts to employ safety rules and regulations that would require a substantial amount of money to comply. *Id.* ¶ 119. Further, MMS professedly ignored findings of BP's spill risks, bypassed endangered species permits, and sometimes had reports changed completely to show no environmental risks at all. *Id.*

¹⁰⁰ See *id.* ¶ 122 (asserting that MMS government employees have been more interested in accommodating the oil companies, rather than providing American citizens with honest services in their public and environmental safeguarding responsibilities). Moreover, they have "rubber stamped and looked the other way [regarding] serious safety" information; instead protecting the greed of oil companies—including BP—in order to increase profits. *Id.*

¹⁰¹ See *id.* ¶ 126 (showing the federal agency's alleged regulatory regime that permitted response plans with false oil spill response assurances by the oil companies for possible accidental spills). Although MMS may have known that such an epic catastrophe—the Deepwater Horizon spill—could have occurred as early as the year 2000, they failed to

III. ANALYSIS

Private parties have struggled in their attempts to hold the federal government liable for RICO violations, just as courts have struggled to fully uncover Congress' intentions—mainly in defining its appropriate scope—when creating the statute. Part III of this Note discusses the various reasons why courts have struggled to hold the government liable for its wrongful actions, and the public policies that support the notion of creating an avenue to extend RICO liability to the federal government.¹⁰² Part III.A specifically analyzes the positive and negative aspects of the different approaches courts have taken when considering the conflicting language of the statute and its legislative history.¹⁰³ Part III.B evaluates the shortcomings of the various methods courts have employed to combat political corruption at the federal level, and why they are particularly insufficient to remedy the injustice suffered by victims of governmental RICO violations.¹⁰⁴ Part III.C further examines why sovereign immunity prevents civil suits against the federal government, and the policy reasons that support waiving this defense for RICO claims.¹⁰⁵ Ultimately, Part III concludes that the existing laws designed to fight government corruption fail to adequately address this phenomenon at its highest level, while leaving open possible solutions to remedy those negatively impacted by the unethical actions of government officials.¹⁰⁶

A. Courts' Interpretation of RICO's Conflicting Language

If RICO cannot be used as an avenue to prosecute federal corruption, how do courts construe the statute's designed purpose? And, could the

enact any additional safety measures. *Id.*; see *infra* Part III (discussing the possible impact of allowing enterprises, such as MMS, to continue avoiding liability for its RICO violations).

¹⁰² See *infra* Part III (providing various reasons why the courts have struggled to hold the government liable for its wrongful actions and public policies that encourage creating an avenue to extend RICO liability to the federal government).

¹⁰³ See *infra* Part III.A (analyzing the positive and negative aspects of the different approaches courts have taken when considering the conflicting language of the statute and its legislative history).

¹⁰⁴ See *infra* Part III.B (evaluating the shortcomings of the various avenues courts have employed to combat political corruption at the federal level, and particularly why they are not sufficient to remedy the injustice suffered by victims of government RICO violations).

¹⁰⁵ See *infra* Part III.C (examining why sovereign immunity prevents civil suits against the federal government and the policy reasons that support waiving this defense for RICO claims).

¹⁰⁶ See *infra* Part IV (proposing a solution to adequately address government corruption at the federal level).

government possibly be considered a “person” for purposes of RICO violations? Although § 1961(3) defines the controversial term “person,” courts in several states have struggled with who this definition was intended to address.¹⁰⁷ In the civil context, personhood in federal law emerges from tort law’s competing interests in increasing a tort victim’s chances of compensation, while limiting its scope to only those parties with the necessary quantum of responsibility.¹⁰⁸ While a government agency has never been liable for RICO violations as a “person” under the statute, the Supreme Court has extended the term to include municipalities in cases imposing civil liability for conduct also punishable by criminal sanctions, which the RICO statutes also permit.¹⁰⁹ As evident in federal jurisprudence, the courts’ propensity to make decisions when considering competing outlooks of statutory

¹⁰⁷ Compare *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941) (finding that, because it was “hardly credible” that Congress meant the term “person” to have different meanings within the same sentence of the Clayton Act’s treble damages action, Congress could not have intended to include the federal government in the term “person”), *with United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 23, 30 (2d Cir. 1989) (holding that the federal government was not a “person” with standing to seek treble damages under RICO, and that the alleged organized crime family was not a “person” subject to suit), *Georgia v. Evans*, 316 U.S. 159, 162–63 (1942) (holding that a state is a “person” for purposes of bringing Sherman Act claims and rejecting the argument that, because states were immune from such suits under the sovereign immunity doctrine, *Cooper Corp.* dictated a contrary result), *and Cnty. of Oakland v. City of Detroit*, 784 F. Supp. 1275, 1283 (E.D. Mich. 1992) (extending the term “person” to include a municipal corporation under RICO because of its ability to hold legal or beneficial property in Michigan).

¹⁰⁸ Compare *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 1, 5–6 (5th ed. 1984) (“[Tort law is that] body of law which [sic] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required.”), *with id.* § 2, at 9–15 (recognizing that certain features of the law of torts exist to punish the defendant). The Court in *Phile* further rationalizes this notion, stating:

The law never punishes any man criminally but for his own act, yet it frequently punishes him in his pocket, for the act of another. Thus, if a wife commits an offence [sic], the husband is not liable to the penalties; but if she obtains the property of another by any means not felonious, he must make the payment and amends.

Phile v. The Ship Anna, 1 U.S. (1 Dall.) 197, 207 (Pa. 1787).

¹⁰⁹ See *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 56 (1982) (noting that the Supreme Court has construed the term “person” to encompass a broad enough definition to include a municipality); *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 701 (1978) (holding that local governments are not immune from suit under 42 U.S.C. § 1983); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978) (“Since the Court has held that the definition of ‘person’ or ‘persons’ embraces both cities and States, it is understandable that the cities do not argue that they are not ‘persons’ within the meaning of the antitrust laws.”).

interpretation eradicates Congress' power to make fundamental policy decisions; this has led to inconsistency and unpredictability of the concept of legal personhood under federal law.¹¹⁰

To that end, the possible application of a civil RICO claim against a government agency in the class action suit against BP should not be surprising, as MMS may be considered an "enterprise" when "liberally constru[ing]" the ambiguous language of the statute "to effectuate its remedial purposes."¹¹¹ Moreover, applying RICO to the alleged facts in *Rinke* is consistent with RICO's express statement of findings and purpose.¹¹² When analyzing the statute on its face, nothing implies

¹¹⁰ See *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 180–85 (1994) (rejecting the argument that civil aiding and abetting is such a generally accepted notion of tort law that Congress presumes it will apply when drafting legislation); *id.* at 177 ("[T]he text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation. . . . [W]e think that conclusion resolves the case.").

¹¹¹ See The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 ("The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes."). While some judges have doubted the idea of applying the liberal construction clause in criminal prosecutions, no objection has been expressed to applying it in the civil context. Compare *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting) ("It is unclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX."), *United States v. Davis*, 576 F.2d 1065, 1070 (3d Cir. 1978) (Aldisert, J., dissenting) ("I detect nothing [in the liberal construction clause] that precludes the application of the rule of narrow construction of penal statutes."), *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976) ("Congress may instruct courts to give broad interpretations to civil provisions, [but] it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency."), and Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 860 n.126 (1980) ("Presumably, . . . the congressional statement is only applicable to the remedial civil portions of the statute . . ."), with *United States v. Thompson*, 685 F.2d 993, 997–98 (6th Cir. 1982) (en banc) (extending enterprise to The Office of the Governor of Tennessee when conspiring to solicit and accept bribes for influencing the granting of pardons and paroles to those previously convicted of or charged with a crime), and *United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1319 (7th Cir. 1981) (extending enterprise to the Madison County Sheriff's Office, who engaged in a scheme to extort payoffs for prostitution and towing companies within Madison County, Illinois).

¹¹² The Organized Crime Control Act of 1970, 84 Stat. 922–23 states:

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to

Congress' intent to limit its coverage to only those who have engaged in racketeering activity, but the language suggests an intention to incorporate those who have affected interstate commerce with their unlawful conduct.¹¹³

Also, extending the term "enterprise" to a government agency has garnered a profuse amount of debate in political corruption cases; defendants often object to its application in RICO claims by citing the definition itself, the legislative history, congressional policy, and various rules of construction.¹¹⁴ However, a government agency could qualify as

subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

§ 904(a), 84 Stat. at 922-23.

¹¹³ *United States v. Culbert*, 435 U.S. 371, 373 (1978); *see also* The Organized Crime Control Act of 1970, § 904(a) (noting that Congress acknowledged that organized crime effectively drains billions of dollars annually from the nation's economy, weakens the stability of the economic system, and heavily burdens interstate and foreign commerce); *supra* note 112 and accompanying text (analyzing Congress' intentions when creating The Organized Crime Control Act and emphasizing the negative impact organized crime has on the nation's economy and interstate commerce). Courts have used various methods to establish the requisite nexus with interstate commerce, which falls within the jurisdiction of RICO. *See, e.g., United States v. Martino*, 648 F.2d 367, 379 (5th Cir. 1981) (finding a group associated for the purpose of committing arson that used mail to obtain insurance proceeds by fraud guilty of conspiring to participate in the affairs of an enterprise affecting interstate commerce); *United States v. Altomare*, 625 F.2d 5, 8 (4th Cir. 1980) (finding a sufficient basis for RICO jurisdiction when a prosecutor's office purchased and used supplies outside of their state of residence).

¹¹⁴ *See Thompson*, 685 F.2d at 997-98 (extending enterprise to the Office of the Governor of Tennessee when conspiring to solicit and accept bribes for influencing the granting of pardons and paroles to those previously convicted of or charged with a crime); *United States v. Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981) (holding that New York City Civil Court was an "enterprise" within the meaning of RICO); *United States v. Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (holding the Philadelphia Traffic Court to be an "enterprise" under RICO). *Contra Mandel*, 415 F. Supp. at 1022 (holding that a state is not an enterprise within the meaning of RICO).

a “legal entity” described in the first clause because a government agency is an entity, and it is, by definition, legal.¹¹⁵ Permitting government agencies to be “enterprises” via these theories does not strain the statute; moreover, neither reading would cause internal contradictions within RICO.¹¹⁶ Additionally, restricting RICO to non-government cases would misinterpret the legislative history and congressional policy expressed in the Organized Crime Control Act.¹¹⁷ Precluding the application of RICO to government agencies not only subverts congressional policy by limiting its coverage to exclude other problems it was designed to remedy, but also disregards Congress’ concern for the feasibility of all levels of government in the face of a continuous and well-financed attack by organized crime.¹¹⁸

Taken as a whole, the legislative history of the Organized Crime Control Act, particularly Title IX, establishes that Congress did not intend to limit the scope of RICO.¹¹⁹ Furthermore, direct victims and competing organizations of racketeering activity were the intended beneficiaries for civil injunctions, damages, and other relief.¹²⁰ While attempting to prevent organized crime and corruption among government and legitimate businesses, Congress knew that it was enacting vital federal criminal and civil remedies in an area customarily regulated by common law fraud.¹²¹ As evident in the text and legislative history, government corruption conceivably motivated Congress to enact RICO; therefore, to properly apply RICO, the courts must consider the government’s interest in preventing its criminal activity when

¹¹⁵ See *Angelilli*, 660 F.2d at 31 (defining “entity” broadly). Further, a government agency or those corrupted within it could be classified as a “group of individuals associated in fact” under the second clause of the statute. 18 U.S.C. § 1961(4) (2006).

¹¹⁶ See *Turkette*, 452 U.S. at 580 (emphasizing the Supreme Court’s view that “absurd results are to be avoided and internal inconsistencies in the statute must be dealt with”).

¹¹⁷ See *supra* note 51 (noting Senator McClellan’s statements addressing the subversion of democratic processes). Senator Murphy also expressed his concern that “[o]rganized crime flourishes only where it has corrupted local officials.” 116 CONG. REC. 962 (1970).

¹¹⁸ 116 CONG. REC. 962; see *id.* at 35, 199–200 (highlighting the estimated \$2 billion paid out each year by organized crime to public officials in and out of the criminal justice system to buy immunity from the law as one of the most disturbing statistics revealed by the President’s Crime Commission).

¹¹⁹ See TYLER, *supra* note 48, at 181 (reiterating that racketeering has never been a term limited to organized crime in the mob sense). Also, Congress carefully drafted RICO outside of the antitrust statutes to avoid the limiting concepts of “competitive” and “commercial” injuries. Blakey & Gettings, *Basic Concepts*, *supra* note 5, at 1035.

¹²⁰ See 116 CONG. REC. 602 (1970) (recapping Senator Hruska’s speech on the importance of Title IX (now RICO), stating that its “principal value . . . may well be found to exist in its civil provisions”).

¹²¹ See *supra* Part II.A.2 (providing an overview of RICO’s legislative history and examining Congress’ intentions).

determining whether Congress' broadly-intended scope should extend to a government body that acts as an enterprise.¹²²

B. Fighting Corruption at the Federal Level

The federal government combats political corruption mostly through criminal statutes, professional and ethical regulations, and impeachment; however, these basic mechanisms do not adequately compensate for the injustice suffered by victims of government RICO violations.¹²³ Accordingly, Part III.B.1 discusses why these current attempts fail to sufficiently regulate federal corruption.¹²⁴ Further, Part III.B.2 evaluates the potential effects of neglecting to create a solution to this predicament, indicating the need for a legitimate avenue designed precisely to prevent government corruption.¹²⁵ Ultimately, Part III.B concludes that the current approaches to contest political corruption do not effectively prevent or remedy government RICO violations, which is perhaps the most severe form of government corruption because of its predisposition to result in economic disasters. Furthermore, the failure to correct this problem could lead to nation-wide turmoil.¹²⁶

1. Avenues Available to Fight Corruption

Although Congress has not enacted laws for the sole purpose of prosecuting official corruption, 18 U.S.C. § 201, among other statutes, has been interpreted as providing a means to do so; it is the primary criminal

¹²² See *supra* Part III.A (expressing Congress' intent to prevent government corruption, among other concerns, when enacting RICO); *infra* Part IV (proposing an amendment to the RICO statute that directly addresses government liability when it serves as an enterprise to further a pattern of racketeering activity); see also *supra* notes 33–34 and accompanying text (noting that the general rule of statutory construction must “defer to a discernible legislative judgment”).

¹²³ See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); 18 U.S.C. § 201 (2006) (prosecuting federal officials for both the offer and receipt of bribes and illegal gratuities); 5 U.S.C. app. §§ 101–111 (1999) (providing the Ethics in Government Act, which created a framework requiring extensive financial disclosure if the gifts from one source have an aggregate value of more than \$250 in one year).

¹²⁴ See *infra* Part III.B.1 (discussing why the current attempts to combat unethical behavior by government officials and employees fail to adequately regulate federal political corruption).

¹²⁵ See *infra* Part III.B.2 (assessing the potential effects of failing to create a solution to this predicament).

¹²⁶ See *infra* Part IV (proposing a solution to adequately address government corruption at the federal level by holding the government liable for its RICO violations).

provision currently buckling down on federal political corruption.¹²⁷ Bribery scholar Daniel Lowenstein has described political corruption as a series of concentric circles with the most severe form—bribery—at the “black core” surrounded by grey circles “growing progressively lighter as they become more distant from the center”¹²⁸ Because § 201 proscribes all forms of corruption, one must completely distinguish the unlawful behavior from any legal activity.¹²⁹ However, this is an extremely difficult task, and further problems stem from the lack of consensus as to what constitutes bribery or corruption, which, in turn, leads to confusion and inconsistency in application.¹³⁰ All the more problematic is the notion that bribery—the most severe form of corruption—is devoid of a clearly defined scope of prohibited conduct in the statute; nonetheless, officials are engaging in these unlawful activities without suffering the consequences of their unlawful actions.¹³¹

How can the central criminal provision dealing with the most extreme form of federal political corruption be so defective? And, who is supervising the government officials who prosecute those in violation of the statute? These are a couple of the principal setbacks to holding the government liable for its unlawful actions, as selectivity in investigations—putting aside minor acts of corruption that often turn out to be quite important and perhaps just as harmful to the well-being of the country—contributes to the long list of officials left unprosecuted for violations.¹³² Additionally, a variety of statutes and regulations

¹²⁷ See 18 U.S.C. § 201 (prosecuting federal officials for both offering and receiving bribes or illegal gratuities); *supra* note 27 (quoting *United States v. Sun-Diamond Growers*, 526 U.S. 398, 399 (1999)); see also Beale, *supra*, note 27, at 701 (suggesting that § 201 is the most important criminal provision dealing with federal political corruption); *supra* note 27 and accompanying text (discussing the use of 18 U.S.C. § 201 to prosecute official corruption).

¹²⁸ Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985). He also views the crime very narrowly, as a precise quid pro quo to perform or not perform an official duty in return for a personal benefit. *Id.* at 786–87.

¹²⁹ See Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1620 (1992) (describing the issues with bribery laws regarding political corruption).

¹³⁰ See, e.g., *United States v. Brewster*, 506 F.2d 62, 78–79 (D.C. Cir. 1974) (describing the difficulties in distinguishing between bribes, gratuities, and legitimate campaign contributions under the federal bribery statute).

¹³¹ See Whitaker, *supra* note 129, at 1622 (evidencing the difficulties in distinguishing between the levels of bribery that society aspires to prosecute and the problems with establishing certain provisions of the statute, i.e., the characterization of an improper payment, which depends on the intent of the payor and recipient, and the availability of evidence indicating the effect of the payment).

¹³² See Bertrand de Speville, *Empowering Anti-Corruption Agencies: Defying Institutional Failure and Strengthening Preventive and Repressive Capacities*, ISCTE, 5 (May 14–16, 2008), http://anorage-net.org/content/documents/de_speville.pdf (suggesting that selectivity in investigations contributes to loss of public confidence in an anti-corruption agency). The

impose ethical and professional restrictions upon federal officers and employees; yet, considering the constitutional impeachment process along with the other avenues available to prosecute federal corruption, they do not sufficiently cover all possible forms of official misconduct or misuse of office.¹³³

Generally, the current laws available to prosecute federal corruption are inadequate as a result of being overly complicated and unintelligible, or lacking in some basic offenses.¹³⁴ For example, § 201 only applies to public officials, while excluding the private sector; further problems arise when the unauthorized gifts received by a public official cannot be proven to be an inducement or reward.¹³⁵ As evidenced by the deficiency of the primary tool used to fight federal political corruption – 18 U.S.C. § 201 – and the reoccurring theme of corruption disrupting the integrity of the federal government, the current laws are ineffective; however, RICO violations often exist in juxtaposition to violations of the laws currently used, perhaps providing an alternative avenue to combat

failure to investigate some acts of corruption proclaims to all that corruption is of minor importance, and that “double standards apply”; thus, society and government officials themselves are under the impression that their corruptive acts are acceptable. *Id.* For example, commissioners have a duty to supervise the activities of IRS employees, and, after investing IRS resources, the Church Committee found that they had “contributed to an atmosphere in which excesses were possible by ignoring clear indications of excesses and failing to take corrective measures when confronted with improper behavior.” Intelligence Activities and the Rights of Americans: Final Rep. of the Senate Select Comm. on Intelligence Activities, S. REP. NO. 94-775 (1976), available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportllcg.htm>.

¹³³ See U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); 5 U.S.C. app. §§ 101-111 (1999) (providing a framework created by the Ethics in Government Act, which requires extensive financial disclosure, including the source and value of all gifts received from a source if the gifts have an aggregate value of more than \$250 in one year); 5 C.F.R. §§ 2635.201-2635.204 (2011) (presenting the ethical rules promulgated for officers and employees of the executive branch); see also *United States v. Sun-Diamond Growers*, 526 U.S. 398, 407-08 (1999) (suggesting that the federal ethics rules and regulations may give rise to a narrow interpretation of criminal statutes, further restricting the range of unlawful behavior covered, and thus permitting officials to escape liability for violations of the statutes); Beale, *supra* note 27, at 702-04 (discussing Title 18 of the United States Code, § 201 and the variety of statutes and regulations designed to prevent federal political corruption).

¹³⁴ See generally Speville, *supra* note 132 (providing a list of reasons why the current fight against corruption fails, including inadequate laws, fear of the pain caused by effective enforcement, lack of resources available, and weak political will).

¹³⁵ See 18 U.S.C. § 201(b)(2)(A)(2006) (noting that the public official – the recipient of the bribe – does not violate the federal bribery statute until he is actually influenced, because the statute proscribes the receipt of payment in return for “being influenced in the performance of any official act”).

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corruption.¹³⁶ Equally problematic is the lack of available laws designed to compensate private parties for their losses occurring as a result of the government's corruptive acts, such as those victims suffering from injuries to businesses and property allegedly as a result of the MMS Enterprise and BP's continuous pattern of racketeering activity.¹³⁷ Finally, it appears as though Congress has intentionally omitted laws providing remedies to private parties; failing to address this issue could lead to a nation drowning in corruption.¹³⁸

2. Nation in Turmoil

Why should Congress subject the federal government to liability for its participation in racketeering activity?¹³⁹ And, what will happen if Congress continuously overlooks the issue? To date, government corruption is so prevalent that those federal officials or agencies involved in dishonest activities overlook the severe effects that result from such activity, justifying it merely as a way of "doing business."¹⁴⁰ Although corrupt officials and private contractors may benefit financially from

¹³⁶ See 18 U.S.C. § 1961 (providing the pertinent definitions required to establish a RICO violation and a list of acts considered "racketeering activity" that may be used to establish a "pattern of racketeering activity"); *United States v. Garner*, 837 F.2d 1404, 1417-18 (7th Cir. 1987) (considering a state "official misconduct statute" as a RICO predicate bribery offense); *United States v. Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977) (holding that the defendant's conduct violated many statutes falling within the description of bribery, so the acts fell within the general category of the predicate offenses necessary to establish a RICO violation); see also *supra* Part III.B.1 (evidencing the inadequacy of 18 U.S.C. § 201 and other tools available to prosecute federal political corruption); *infra* Part IV (proposing a solution to adequately address government corruption at the federal level by holding the government liable for its RICO violations); cf. *United States v. Perkins*, 596 F. Supp. 528, 531 (E.D. Pa. 1984) (qualifying the federal gratuities provision as a RICO predicate offense).

¹³⁷ See *supra* Part III.B.1 (discussing the shortcomings of the current laws designed to prevent federal corruption); *supra* Part II.C (describing the events leading up to the BP oil spill and *Rinke's* report of MMS's history of participating in racketeering activity); *supra* Part III.B.1 (presenting the tools available to fight corruption, which only apply to government officials, indicating the absence of remedies available to private parties).

¹³⁸ See *infra* Part III.B.2 (assessing the negative impact government corruption has on the United States and the potential effects of failing to create a solution to this predicament); *infra* Part III.C (examining why sovereign immunity prevents civil suits against the federal government, evidencing Congress' intent to omit laws that provide avenues for private relief from the government).

¹³⁹ In other words, what interest does the government have in permitting suits against itself?

¹⁴⁰ See e.g., *Garner*, 837 F.2d at 1408 (stating that contractors who paid tips to sewer inspectors claimed it was simply a "cost of doing business" in Chicago"); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 27 (1999) (reiterating that corrupt payments to secure major contracts and concessions generally preserve large businesses and federal officials); see *supra* note 17 and accompanying text (discussing the prevalence of corruption).

their unlawful schemes, they are depriving the government budget of adequate returns from its concessions.¹⁴¹ Furthermore, as tax collectors and customs agents control access to the outside world—which firms value—businesses and individuals often conspire with them to decrease the sums collected and expedite services.¹⁴² As a result, the taxpayers and corrupt officials split the savings in taxes and duties, but the lower-class, the less well-connected taxpayers, and the general public essentially endure the costs as reduced services.¹⁴³

In addition to the detrimental effects the economy suffers as a result of the government's deceitful activity, the public interest concern, coupled with the need for government credibility, is essential to the proper functioning of a democratic nation.¹⁴⁴ The public must receive honest information about its government's actions, and if the actors are not held accountable for illegal actions, then they are more likely to continue this behavior, effectively undermining the government's credibility.¹⁴⁵ Moreover, fairness is crucial to the practice of good

¹⁴¹ See ROSE-ACKERMAN, *supra* note 140, at 31 (relaying how officials extract corrupt gains from government concessions and highlighting the likelihood that those officials support an inefficient time path of costs and social benefits).

¹⁴² See *id.* at 19 (describing an analogous scenario in which New York City workers reduced or eliminated tax liability for hundreds of property owners and collected bribes equal to ten percent of the tax liability they eliminated, sometimes even rising to twenty or thirty percent).

¹⁴³ See *id.* at 20 ("A corrupt tax and customs system that favors some groups and individuals over others can destroy efforts to put a country on a sound fiscal basis and discredit reform."). While the IRS is a law enforcement agency, it participates in many questionable activities; however, the commissioner's insane preoccupation with public image, rather than legality concerns, has led to frequent efforts to avoid learning about wrongful conduct by its employees. See *Moloney v. United States*, 375 F. Supp. 737, 741 (N.D. Ohio 1974) (noting that the public relations men present the IRS as a kindly and benevolent organization, which always bends over backwards to ensure that it does not do anything outside of helping taxpayers be certain that they do not pay a penny more than what the Government is entitled to, and quite perversely, these proclamations have little relation to the patent realities among this great bureaucracy).

¹⁴⁴ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (indicating that the foundation of democracy and good government is an informed public). Further, James Madison has expressed his belief that the public opinion sets boundaries for the government, and that it is the "real sovereign in every free one." See Larry D. Kramer, "The Interest of the Man": James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 717 (2006) (quoting Madison and describing his views on the importance of public opinion for democratic government).

¹⁴⁵ See Michael A. Haskel & Warren Haskel, *Truth, Justice, and a Healthy Fear of Deceiving the Public: An Argument for Imposing Constitutional Tort Liability for Fraudulent Misrepresentations by Executive Branch Officers*, 28 QUINNIPIAC L. REV. 491, 517 (2010) (stressing the need for government credibility as one of the key reasons to deny government officials immunity from constitutional tort cases); Sam Roberts, *Ideas & Trends: Keeping the Faith; in Government We Trust (As Far as We Can Throw it)*, N.Y. TIMES, Jan. 4, 2004, § 4, at 4, available at [Produced by The Berkeley Electronic Press, 2011](http://www.nytimes.com/2004/01/04/weekinreview/ideas-</p>
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government, while a lack of integrity and the ability to avoid facing the claims of injured individuals are strong indicators of a bad government.¹⁴⁶ The Bill of Rights is founded upon the guarantee that the government will honor individual rights despite the pragmatism of doing otherwise, and its purpose is “to provide protection from government acts that [have] oppressed private individuals”¹⁴⁷ In spite of the chilling effect that would flow from imposing liability upon government actors, the judiciary must defer to the government’s interest in protecting individual rights, as this effect is critical to restore justice and the public’s faith in the credibility of its government actors.¹⁴⁸

trends-keeping-the-faith-in-government-we-trust-as-far-as-we-can-throw-it.html?page-wanted=print&src=pm (emphasizing that public faith in government has declined since the Watergate scandal).

¹⁴⁶ See JOHN B. DILLON, NOTES ON HISTORICAL EVIDENCE IN REFERENCE TO ADVERSE THEORIES OF THE ORIGIN AND NATURE OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA 84 (1871) (quoting Alexander Hamilton at the Constitutional Convention, stating that “every individual of the community at large has an equal right to the protection of government”).

¹⁴⁷ Haskel & Haskel, *supra* note 145, at 518. Nothing in the Bill of Rights refers to elevating society’s needs above individual rights or determining whether corruptive actions can be justified on the basis of protecting economic interests. *Id.* Although there is no express constitutional right to private civil remedies, affording individual relief for those suffering injury as a result of the government’s unlawful conduct, “[c]onstitutional rights are not determined by whether the government abuse can be justified on the basis of economic, political, or social concerns.” *Id.* Perhaps this right is derived from other federal statutes, such as the Civil Rights Act, which provides that “[e]very person who, under . . . any statute . . . subjects . . . any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law” 42 U.S.C. § 1983 (2006). See *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (“[T]he Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) (“[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities”); see also *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 700–01 (1978) (“[T]he Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.”).

¹⁴⁸ See James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 409–10 (2003) (suggesting that the Civil War “gradually led the federal courts to play a more direct role in protecting individual rights”); *Bivens*, 403 U.S. at 396–97 (giving private individuals standing to sue officers and agents of the federal government for constitutional violations despite the fact that the Civil Rights Act did not explicitly cover the Federal Bureau of Narcotics agents). Notwithstanding the fact that no current law provides individuals with an avenue for private relief, the Supreme Court has given private individuals standing to sue federal officers and agents for constitutional violations; likewise, federal RICO violations are equally detrimental, and those violating the Act should be subject to similar consequences. *Id.* Imposing liability among individual government actors for RICO violations would effectively “over-deter government at the expense of constitutional innovation.” Haskel & Haskel, *supra* note 145, at 491 n.3; see also

Ultimately, if this country continues to tolerate corruption at its highest level of government, it will facilitate a downward spiral where the malfeasance of some officials encourages others to participate in corruptive activity over the course of time.¹⁴⁹

C. Sovereign Immunity

Although the common law doctrine of sovereign immunity generally bars suits against the federal government without its consent, Congress has authorized exceptions for those claims that meet the high threshold for obtaining a waiver of sovereign immunity.¹⁵⁰ While the federal courts are generally inclined to construe the statutes waiving immunity in favor of the government, they have employed more liberal approaches to comply with the movement toward broadening the scope of the defense waiver.¹⁵¹ Indeed, Congress has responded to this trend by

id. at 522 (concluding that strict liability damages for constitutional tort violations would have similar effects); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 98 (1983) (arguing that the current system, where individual officials are liable for damages rather than government entities, is flawed). Peter H. Shuck, graduate of Harvard Law School and current professor at Yale Law School, has expressed his discord with imposing liability strictly on government officials. *Id.* To that end, damage awards against individual officials may chill vital decision-making by lower-level officials. *Id.*

¹⁴⁹ See ROSE-ACKERMAN, *supra* note 140, at 26 (presenting some of the systematic costs associated with tolerating corruption).

¹⁵⁰ For example, the Federal Tort Claims Act ("FTCA") is a limited waiver of sovereign immunity for tort actions against the government. See 14 CHARLES ALAN WRIGHT ET AL. *FEDERAL PRACTICE AND PROCEDURE* § 3658 (3d ed., 1998) (stating that the purpose of the FTCA is to provide certain claimants with a remedy against the government when previously it had been precluded by the doctrine of sovereign immunity). Perhaps the right to private relief from the government for RICO violations is similar to the limited waiver for tort actions against the government in the sense that it is a civil action against the United States for money damages for injury or loss of property as a result of the government's wrongful actions, under circumstances in which the United States, if a private person, would be liable; further, RICO violations could be construed as occurring within the scope of employment, which is required under the FTCA. *Id.*; see also 28 U.S.C. § 1346(b) (creating an exception to the sovereign immunity doctrine by giving the federal courts subject matter jurisdiction over civil actions against the United States for money damages). However, subjecting the federal government to suit for civil RICO violations is more rational than the limited waiver, FTCA, as the statute requires a pattern of racketeering activity; thus, the government actors are undermining the integrity of the government on more than one occasion, providing reasonable grounds for a harsher punishment. See *infra* Part IV (proposing a solution to adequately address civil RICO violations by the federal government, which would provide an alternative avenue to fight corruption at its highest level); *infra* Part III.C (presenting the policy reasons that support waiving this defense for RICO claims); *supra* note 68 and accompanying text (defining sovereign immunity).

¹⁵¹ See *United States v. Yellow Cab Co.*, 340 U.S. 543, 554 (1951) (noting the Supreme Court's refusal to employ the strict construction rule because of its unwillingness to add to the severity of sovereign immunity); *United States v. Shaw*, 309 U.S. 495, 501 (1940)

taking steps to eliminate many of the injustices suffered following the recognition of the sovereign immunity doctrine.¹⁵² After abolishing large portions of the formerly omnipotent sovereign immunity doctrine—by creating exceptions to the express waiver requirement—there has never been an attempt to restore any part of it; accordingly, permitting this defense to bar suits against the federal government for engaging in unlawful behavior that infringes on an individual’s rights resurrects those once disfavored injustices created by the defense for which exceptions were made.¹⁵³

Several policy justifications support waiving the doctrine when considering suits against the government for violating the civil RICO statute.¹⁵⁴ Most importantly, “it is inconsistent for a democratic government to be exempt from responsibility for injuring its citizens.”¹⁵⁵ Likewise, the sovereign immunity doctrine is “archaic, outdated, and contributes nothing of value to the administration of justice in the

(recognizing the harsh results and injustice produced by allowing the federal government to avoid liability through the sovereign immunity defense, stressing that the “prerogatives of the government yield to the needs of the citizen”).

¹⁵² See Douglas Kahle, Note, *United States v. Nordic Village, Inc.: “Unequivocal,” Yet Unwarranted, Support for Sovereign Immunity*, 25 U. TOL. L. REV. 325, 328 n.24 (1994) (presenting: (1) the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976); (2) the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) (1976); and (3) the Court of Claims Act, 28 U.S.C. § 1491 (1976) as the main congressional statutory enactments waiving the federal government’s immunity defense). To that end, the recent expansive interpretations of the Eleventh Amendment have limited Congress’ ability to authorize private enforcement of federal environmental legislation—such as hazardous waste cleanups—against state governments. *Id.*; see also *MacPherson v. Dep’t of Admin. Servs.*, 130 P.3d 308, 315, 319, 320 (Or. 2006) (rejecting attacks on a statute concerning public health and safety, holding that the regulation of land use did not compel unconstitutional limitations on the government’s plenary power, and stating that it was not an impermissible waiver of the state’s sovereign immunity).

¹⁵³ See James Samuel Sable, Comment, *Sovereign Immunity: A Battleground of Competing Considerations*, 12 SW. U. L. REV. 457, 462 (1981) (“There has been no effort to overturn or rescind any of these ‘consents’ to suit against the sovereign.”); see also *supra* note 150 and accompanying text (referring to the portions eliminated from the sovereign immunity doctrine as a result of the major congressional statutory enactments).

¹⁵⁴ See Kahle, *supra* note 152, at 328 (providing the policy justifications that support waiving the sovereign immunity doctrine). *But see, e.g., Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“[T]he logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”).

¹⁵⁵ Lisa Naparstek Green, Note, *Limitations Periods Under Title VII: Has Time Run Out on the Sovereign Immunity Doctrine?*, 63 B.U. L. REV. 1157, 1175 (1983); see *United States v. Shaw*, 309 U.S. 495, 501 (1940) (“A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen.”). *But see supra* note 19 (providing examples of case law where courts have declined to apply RICO claims to the federal government).

courts.”¹⁵⁶ In due course, the legal system became more advanced and the substantial injustices that occurred as a result of the doctrine’s application began to accrue; therefore, those arguments supporting the sovereign immunity defense were scrupulously discredited.¹⁵⁷ Taken as a whole, considering the existing laws designed to fight government corruption at its highest level, the lack of available relief for private parties suffering injury as a result of the government’s participation in racketeering activity, and the trend to stray away from the sovereign immunity defense, Congress should amend the current civil RICO statute to create a limited waiver of sovereign immunity for actions against the government.¹⁵⁸

IV. CONTRIBUTION

RICO’s ambiguous language and inconsistent application have allowed various unprincipled governmental entities to escape liability for participating in racketeering activity.¹⁵⁹ The sovereign immunity doctrine, in concurrence with the deficiency of current laws available to prosecute government officials for illegal behavior, has encouraged society to view a corrupt government as the norm.¹⁶⁰ While private parties may recover from individual government actors, the negative aspects of the current system considerably outweigh its advantages.¹⁶¹ Also, the alternative methods of holding the government and its agents accountable for unlawful behavior fail, as government corruption

¹⁵⁶ See Kahle, *supra* note 152, at 328 (providing further policy considerations supporting and opposing the sovereign immunity doctrine).

¹⁵⁷ See *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 42 (1992) (Stevens, J., dissenting) (suggesting that the sovereign immunity doctrine’s “original reliance on the notion that a divinely ordained monarch ‘can do no wrong’ is, of course, thoroughly discredited”); see also Sable, *supra* note 153, at 467 (“The concerns expressed by those fearful of the abolition of sovereign immunity . . . can be readily dispelled.”).

¹⁵⁸ See *infra* Part IV (proposing a solution to adequately address corruption at its highest level by subjecting the United States to civil suits for RICO violations).

¹⁵⁹ See *supra* Part II.A.1 (examining the controversial language in the text); *supra* Part II.B (discussing the jurisprudence under RICO); *supra* Part III.A (analyzing the different approaches courts have taken when considering the conflicting language of the statute and its legislative history).

¹⁶⁰ See *supra* Part III.B.1 (discussing why the current attempts to combat government officials’ unethical behavior fail to adequately regulate federal political corruption); *supra* Part III.C (presenting the policy reasons supporting and opposing the sovereign immunity doctrine); *supra* notes 68–83 (discussing the application of the sovereign immunity and equitable estoppel doctrines).

¹⁶¹ See *supra* note 148 and accompanying text (presenting the disadvantages of permitting damage actions strictly against individual government actors, rather than government entities).

continues to grow.¹⁶² This section proposes a solution that takes into account the various flaws of the current paradigm.¹⁶³ Part IV.A proposes an amendment to the civil RICO statute, and discusses why it would provide the superior method for seeking private relief from governmental entities.¹⁶⁴ Next, Part IV.B discusses how the proposed amendment would affect the outcome of *Rinke*.¹⁶⁵

A. *Proposed Amendment to Civil RICO*

To address government liability for RICO violations, 18 U.S.C. § 1964(c) should be amended to provide an exception to the sovereign immunity doctrine. The amended statute appears as follows:

Proposed Amendment to 18 U.S.C. § 1964(c)¹⁶⁶

(c) Any person injured in his business or property by reason of a violation of § 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 *The district courts shall have exclusive jurisdiction of civil actions on claims against the United States for any violation of § 1962 of this chapter by an employee of the Government, while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act occurred.*

Commentary

The addition of the second provision creates an exception to the sovereign immunity doctrine, similar to 28 U.S.C. § 1346(b)(1), giving the federal district courts jurisdiction over claims against the United States

¹⁶² See *supra* Part III.B.1 (discussing why the current methods used to combat government officials' unethical behavior fail to adequately regulate federal political corruption); see also *supra* note 17 and accompanying text (discussing the prevalence of corruption).

¹⁶³ See *infra* Part IV.A (proposing an amendment to 18 U.S.C. § 1964(c) that specifically addresses violations by government entities, thus making RICO's civil statute the far superior method of fighting government corruption).

¹⁶⁴ See *infra* Part IV.A (discussing the various benefits of the proposed amendment to the civil RICO statute).

¹⁶⁵ See *infra* Part IV.B (examining the proposed amendment in the context of the alleged RICO violations by MMS Enterprise).

¹⁶⁶ The proposals are the contributions of the author. Specifically, proposed additions are italicized, and proposed deletions are struck. The language in regular font is taken from § 1964(c). See generally 18 U.S.C. § 1964.

for RICO violations by its employees.¹⁶⁷ Although the systematic costs of administering remedies to private individuals for claims against the United States appear to be high because this amendment could potentially lead to insurmountable government liability and losses to the public treasury, this law is more likely to deter government officials from participating in unlawful behavior that conceivably results in public loss or injury.¹⁶⁸ Indeed, holding government entities liable for RICO violations by individual officials would present plaintiffs with a more readily identifiable defendant, and would likely effectuate change because government agencies have more power to implement reform than lower-level officials.¹⁶⁹

While this amendment appears to resolve many of the obstacles private parties face when pursuing a claim against the United States, there are no crystalline solutions to government corruption. Critics disavow the idea of inherently punishing American citizens—compensating victims who prevail on a claim against a governmental entity with taxpayer dollars—to aid an individual suffering as a result of a dishonest government employee’s illegal actions.¹⁷⁰ Nonetheless, the costs of federal corruption and waste are imposed on taxpayers under any circumstances.¹⁷¹ Accordingly, spending taxpayer dollars to assist victims of government RICO violations is considerably more beneficial to citizens because their money is used to compensate innocent victims, rather than deceitful government officials.

Perhaps the proposed amendment to § 1964(c) would make the civil RICO statute the superior method of remedying government corruption, as racketeering activity prohibits an extensive range of criminal

¹⁶⁷ See 28 U.S.C. § 1346; see also *supra* notes 154–57 and accompanying text (discussing the policy justifications that support waiving the sovereign immunity doctrine for claims against the government). While some procedural issues will need to be adapted to accommodate claims against the United States, perhaps the Department of Justice could recommend the necessary amendments to the statute as those issues are beyond the scope of this Note.

¹⁶⁸ See *supra* note 78 and accompanying text (expressing concern for opening the door of the federal fisc to thousands); *supra* notes 132–33 and accompanying text (discussing other legitimate government concerns regarding civil claims against the United States); see also SCHUCK, *supra* note 148, at 98 (expressing discord with holding individual government officials liable for violations rather than government entities).

¹⁶⁹ See SCHUCK, *supra* note 148, at 100–07 (contrasting the current system of subjecting individual officials to civil liability with a system where governmental entities could be liable for torts by individual officials).

¹⁷⁰ See *supra* note 78 and accompanying text (discussing the Court’s fear of the burden on public funding).

¹⁷¹ See *supra* Part III.B.2 (demonstrating how corrupt officials benefit from their unlawful schemes while depriving the government budget of its returns and forcing the general public to bear the costs).

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activity.¹⁷² Because RICO proscribes the crimes most frequently committed by government employees, this amendment should deter them from engaging in virtually any dishonest behavior, in turn, cutting corruption and leading to a more secure, trustworthy environment for United States citizens.¹⁷³ Ultimately, the essence of the proposed amendment is to cure the injustice private individuals suffer as a result of the government employees' wrongful actions.¹⁷⁴

B. *Applying the Proposed Amendment to Rinke v. BP*

Not only would the proposed amendment to the federal civil RICO statute be revolutionary, but it would also dramatically change the outcome of *Rinke*.¹⁷⁵ Plaintiffs could name MMS as a defendant in the class action suit, and MMS would be civilly liable to them for injuries suffered as a direct result of the government agency's participation in racketeering activity. Furthermore, MMS would suffer the consequences of its corrupt behavior because it would be required to provide private relief to the plaintiffs in *Rinke*. If *Rinke* was decided under the current federal civil RICO statute, MMS would be permitted to escape liability for its participation in BP's unlawful scheme.¹⁷⁶ However, MMS appears to be equally responsible for the oil spill in the Gulf Coast, and has been participating in schemes similar to the one that led to the recent spill for

¹⁷² See 18 U.S.C. § 1961(1) (enumerating the criminal activities prohibited by RICO); see also *supra* Part III.B.1 (discussing the lack of available avenues addressing government corruption at the federal level).

¹⁷³ See *supra* Part III.B.2 (presenting the negative effects corruption has on the United States and the positive impact this amendment potentially could have on the country and its citizens).

¹⁷⁴ See *supra* notes 8-12 and accompanying text (exemplifying a particular instance in which many individuals suffered injury due to a government agency's alleged participation in racketeering activity). The public will also benefit due to the restoration of justice, and a government free from corruption, fraud, and dishonesty. See Curato, *supra* note 7, at 1042 and text accompanying note 7 (stating that dishonest government officials have ultimately deprived "the public of its right to a government free from corruption, fraud, and dishonesty"); see also Haskel & Haskel, *supra* note 145, at 491-92 (recognizing that immunizing the government from civil liability "promotes loss of public confidence in government actors as credible sources of information and will eventually erode the public's perception that the judiciary is fulfilling its role as guardian of the constitutional rights of private individuals against government abuse").

¹⁷⁵ See generally Amended Complaint, *supra* note 8 (providing *Rinke's* Class Action Amended Complaint, which contains *Rinke's* allegations that BP and MMS committed RICO violations); *supra* Part II.C (providing a detailed description of BP's alleged RICO violations).

¹⁷⁶ See Amended Complaint, *supra* note 8, ¶¶ 161-71 (claiming that MMS participated in BP's unlawful scheme while neglecting its watchdog policing responsibilities of ensuring that offshore drilling operations are conducted safely).

several years.¹⁷⁷ Therefore, the proposed amendment to the federal civil RICO statute is appropriate to assist all victims of the disastrous spill, as no person or enterprise—regardless of whether it is subject to government authority—should be free from liability for acts so detrimental to a nation’s economy, environment, and citizens.

V. CONCLUSION

To date, the Supreme Court has denied relief to private parties attempting to bring civil RICO actions against governmental entities, as a RICO claim cannot be maintained against the United States absent an express waiver of sovereign immunity. As a result of this fundamental doctrine, in concert with the deficiency of laws currently designed to regulate government officials’ behavior, the United States’ citizenry has become accustomed to a government immersed in corruption. While several private parties have successfully pursued claims against individual officials for their corrupt acts, a system in which governmental entities are also held liable would be more beneficial to the public. Furthermore, governmental entities that fail to administer to their employees and regularly undermine the integrity of the government—to the citizens’ detriment—should not be immune from civil liability for RICO violations.

When analyzing RICO’s text and the legislature’s intent when enacting 18 U.S.C. § 1964, Congress did not give the impression that it intended to limit its scope to protect government agencies, as RICO was constructed predominantly to prevent organized crime among government and legitimate businesses. Moreover, the Bill of Rights was created to honor individual rights and protect private individuals mistreated by the government. The courts’ current approach of deferring to government actors and immunizing government entities from liability is at odds with the government’s objective of instilling public confidence in its operations because it exonerates actors who subordinate private individuals’ rights. Additionally, the basic principles of fairness, government credibility, and public welfare all generate the need for a clear avenue conducive to the liberation of the government from such harmful acts.

Although RICO claims involving government representatives are relatively uncommon, racketeering activity among government agencies is becoming quite routine. Corruptive government entities participating

¹⁷⁷ See *supra* notes 100–01 and accompanying text (noting MMS’s willingness to accommodate the oil companies, rather than provide American citizens with honest services).

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in such activity have no incentive to terminate their illegal actions, as the individual perks significantly outweigh any fear of punishment that they perceive. Indeed, the United States has already suffered severe consequences for its failure to address this issue, as MMS appears to be partially responsible for the damages that accrued from the oil catastrophe. How much hardship do citizens have to endure before Congress takes action?

Perhaps the oil spill would never have occurred if the proposed amendment to the federal civil RICO statute had been in effect prior to the mishap because a government representative's fear of subjecting his entire agency—and the United States accordingly—to liability would deter most government officials from participating in unlawful schemes that negatively affect the public interest and ultimately the entire country. Therefore, enacting this proposed amendment would not only bolster the government's attempt to restore justice and integrity, but it would also give rise to a more secure nation in which the citizens can trust their leaders.

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* J.D. Candidate, Valparaiso University School of Law (2012); B.A., Criminal Justice, Indiana University-Bloomington (2009). First, I would like to thank God for all of the blessings and abundance in my life. I would also like to thank my family for their love and support throughout the years. My parents, Jeffrey and Candy Lipinski, suffered not only through the writing process, but through my entire law school career. My home visits have been few and far between, but my parents have remained supportive despite all of the negatives they have endured through this three-year battle. I greatly appreciate their patience and willingness to at least pretend to be interested in my Note. Also, I would like to thank Professor Robert Blomquist for providing me with ideas and feedback on earlier drafts of this Note. Special thanks to my siblings, Kylie, Rylee, and Brodee, for tolerating me after years of pushing them to follow in my footsteps. All of you are intelligent and talented in your unique ways, and I love you regardless of any disagreements we may have. Further, I want to thank my best friends, Kyle Irwin and Blair Stellhorn, for sticking by my side through thick and thin. Lastly, a special and heartfelt thanks to my friends and family whom I have not specifically named herein.