BYU Law Review

Volume 2004 | Issue 2 Article 13

5-1-2004

Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in Lerner v. Fleet Bank and Baisch v. Gallina

Ryan C. Morris

Proximate Cause and Civil RICO Standing: The Narrowly Restrictive and Mechanical Approach in *Lerner v. Fleet Bank* and *Baisch v. Gallina*

"The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules."
Roscoe Pound[1]

I. INTRODUCTION

In the context of civil RICO, standing is an important and difficult issue. The complexity of the civil provisions of the Racketeer Influenced and Corrupt Organizations (RICO) statute of the Organized Crime Control Act makes standing particularly problematic.[2] One of the primary dilemmas of the RICO statute is the tension resulting from the treble damages provision of §

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 731 (1906). Pound acknowledges the necessity of legal rules and uniform application of the law but also the need to consider each case and allow for flexibility depending on the case at hand. *Id.* at 731–32. Moreover, Pound describes the divergence between ethics and the law, between the individual and the jurist: "The individual looks at cases one by one and measures them by his individual sense of right and wrong. The lawyer must look at cases in gross, and must measure them largely by an artificial standard." *Id.* at 733. As this Comment will show, standing in a civil RICO context should follow a case-by-case approach and resist any mechanical exercise.

2. 18 U.S.C. § 1964 (2000) allows for civil actions, but in order to bring a civil RICO claim, the plaintiff must establish that she was injured by violations of § 1962, which contains the criminal prohibitions of the RICO provision. *See id.* § 1964(c). Section 1962 refers to § 1961, the definition section, which in turn lists a plethora of predicate acts that one must establish in order to show the pattern of racketeering activity necessary to violate § 1962. *Id.* § 1962. *See generally* Antonella M. Madonia, Comment, Holmes v. Securities Investor Protection Corp.*: Standing to Sue Under Section 1964(c) of RICO for the Securities Fraud Plaintiff*, 18 DEL. J. CORP. L. 923 (1993) (discussing the standing requirements and their complexities under civil RICO); Virginia G. Maurer, Holmes v. SIPC*: A New Direction for RICO Standing?*, 5 U. FLA. J.L. & PUB. POL'Y 73 (1992) (same); Eric W. McNeil, Comment, *Civil RICO Standing: Direct/Indirect Distinction Should Not Be Taken Sitting Down*, 64 TUL. L. REV. 1239 (1990) (same); Daniel Joseph Shapiro, Note, Holmes v. Securities Investor Protection Corporation*: Proximate Cause Dims the Bright-Lines of RICO Standing*, 53 LA. L. REV. 1911 (1993) (same).

1964(c).[3] While many litigants have a large incentive to transform their fraud cases, for example, into RICO suits in order to obtain treble damages, courts are tempted to limit the availability of the federal court system for just such attempts.[4] In light of this friction, courts have long employed standing as a powerful tool to rid themselves of civil RICO cases.[5] At the same time, federal circuit courts have either created standing rules that have been overturned as needlessly restrictive[6] or have yet to set down a standard that is consistent and uniform with other circuits or the broad purposes of the RICO statute.[7] Circuit courts, however, are not left afloat on troubled waters without any guiding light to bring them safely ashore.[8] Even though courts have applied various standards in judging civil RICO standing, the Supreme Court set forth an appropriate three-factor approach to decide proximate cause, and therefore standing, under civil RICO.

3. *See* 18 U.S.C. § 1964(c).

4. *See* Michael Goldsmith & Evan S. Tilton, *Proximate Cause in Civil Racketeering Cases: The Misplaced Role of Victim Reliance*, 59 WASH. & LEE L. REV. 83, 98–99 (2002) (noting the "broader judicial assault on civil RICO"); Albert A. Citro, III, Note, *After* Sedima*: The Lower Courts' Use of Proximate Cause as a Limitation on Civil RICO*, 16 DEL. J. CORP. L. 607, 610 & nn.14–15, 616 (1991); *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485–86 (1985) (noting the "variety of approaches taken by the lower courts" as a reaction to the "proliferation of civil RICO litigation," specifically the implementation of two novel standing requirements for plaintiffs).

5. Maurer, *supra* note 2, at 74 & n.12 (discussing the attempts by courts to restrict the availability of civil RICO, especially by the use of standing rules). The Supreme Court rejected the vast majority of these standing rules. *See, e.g.*, *Sedima*, 473 U.S. at 479 (rejecting the argument that a plaintiff must allege that the defendant be convicted of a predicate act or a RICO violation and also rejecting "racketeering injury" as a necessary component of standing); H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 232 (1989) (rejecting a restrictive notion of "pattern" under the civil RICO statute).

6. *See, e.g.*, *Sedima*, 473 U.S. at 479; *H.J., Inc.*, 492 U.S. at 232.

7. An example of the inconsistency is the current division among circuit courts in developing the proper proximate cause standard for standing under civil RICO. *Compare, e.g.*, Green Leaf Nursery v. E.I. Dupont De Nemours & Co., 341 F.3d 1292, 1306 (11th Cir. 2003) (requiring some amount of reliance in which fraud is part of the predicate acts of RICO), *with* Perry v. Am. Tobacco Co., 324 F.3d 845, 850–51 (6th Cir. 2003) (employing common-law principles for proximate cause), *and* Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000) (using a three-factor test to determine standing under proximate cause).

8. *Cf.* Allen v. Wright, 468 U.S. 737, 751 (1984) ("The absence of precise definitions, however . . . hardly leaves courts at sea in applying the law of standing.").

Historically, although the Supreme Court has struck down several lower court attempts at fashioning standing requirements,[9] the Court, in the eyes of many other courts, has less successfully provided any concrete guidelines for standing under civil RICO.[10] In 1992, the Supreme Court faced a case that gave ample opportunity to delineate some of the details of civil RICO standing in *Holmes v. Securities Investor Protection Corp.*[11] The Court, however, read a proximate cause element into the civil RICO statute and decided the case on proximate cause grounds without addressing the exact standing question presented.[12] This decision has led the vast majority of courts to adopt proximate cause as the primary tool for judging standing under civil RICO.[13] Although the Court discussed proximate cause at length in the *Holmes* decision, lower courts have found no general standard explicated by the Court[14] and have subsequently employed a variety of proximate cause tests to determine civil RICO standing.[15] Courts have principally derived

9. *See, e.g.*, *Sedima*, 473 U.S. at 493, 495 (rejecting the argument that a plaintiff must allege that the defendant be convicted of the predicate acts and also rejecting "racketeering injury" as a necessary component of standing); *H.J., Inc.*, 492 U.S. at 232 (rejecting a restrictive notion of "pattern" under the civil RICO statute).

10. Civil RICO standing, then, may be considered by some as very much in line with the Court's overall standing jurisprudence: "incoherent," "permeated with sophistry," and "a word game." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221 (1988) (internal quotations and citations omitted).

11. 503 U.S. 258 (1992).

12. *Id.* at 265–69.

13. *See* Perry v. Am. Tobacco Co., 324 F.3d 845, 848 (6th Cir. 2003); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168–69 (9th Cir. 2002); Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc., 262 F.3d 260, 264 (4th Cir. 2001); Maiz v. Virani, 253 F.3d 641, 654–55 (11th Cir. 2001); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000).

14. *See* Madonia, *supra* note 2, at 960. The idea that there was no general standard set forth by the Court arises from the fact that circuit courts have developed a variety of different standards for proximate cause under RICO. *See, e.g.*, *Sedima*, 473 U.S. at 485–86 (noting the "variety of approaches taken by the lower courts" as a reaction to the "proliferation of civil RICO litigation"). To the contrary, however, the Supreme Court did provide a standard to decide proximate cause standing for civil RICO. *See* discussion *infra* Part III.B.

15. *See supra* note 7. *Compare, e.g.*, Green Leaf Nursery v. E.I. Dupont De Nemours & Co., 341 F.3d 1292 (11th Cir. 2003) (requiring some amount of reliance in which fraud is part of the predicate acts of RICO), *with Perry*, 324 F.3d at 845 (employing common-law principles for proximate cause), *and Allegheny Gen. Hosp.*, 228 F.3d at 443 (using a three-factor test to determine standing under proximate cause), *and* Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000) (discussing a zone-of-interest test derived from Justice Scalia's concurrence in *Holmes*), *and* Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237–38 (2d Cir. 1996) (same), *and* Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc., 61

these tests from dicta found throughout the majority and concurring opinions of *Holmes*.[16] The Supreme Court's decision in *Holmes*, however, did provide a proper tripartite standard for determining proximate cause, and therefore standing, under civil RICO.[17] It set forth three factors, none of which are rigid or per se rules, to determine whether a plaintiff satisfies the proximate cause requirement of civil RICO standing.[18] This fluid approach allows courts to account for the limits of standing as well as the policies and compromises embodied in the RICO statute.

In 2003, the Second Circuit declared its standard for standing in federal court under the civil provisions of the RICO statute in *Lerner v. Fleet Bank*[19] and *Baisch v. Gallina*.[20] In both cases, the Second Circuit appropriately decided to rely on a proximate cause analysis as the primary test to determine standing under civil RICO.[21] The court in each case focused on proximate cause and eliminated any zone-of-interest analysis,[22] which many courts (including the district court in *Lerner*)[23] have employed to decide standing under civil RICO.[24] The Second Circuit, however, required a "direct injury that

F.3d 1250, 1258 (7th Cir. 1995) (same). A more detailed discussion of these tests is found in *infra* Part II.E.

16. *See, e.g.*, *Green Leaf Nursery*, 341 F.3d 1292; *Perry*, 324 F.3d at 845; *Newton*, 207 F.3d at 447.

17. *See infra* Part III.B.

18. *See infra* Part III.B; *see also* Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 269–70, 273–74 (1992).

19. 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 532 (2003).

20. 346 F.3d 366 (2d Cir. 2003).

21. *See id.* at 372–73 ("[B]ecause our RICO proximate cause analysis adequately incorporates the zone-of-interests test's concerns in most cases, we have never applied that test independently from our RICO proximate cause analysis. We now clarify that it is inappropriate to apply a zone-of-interests test independent of this circuit's proximate cause analysis."); *Lerner*, 318 F.3d at 122 ("[T]he better approach is . . . if the standing issue may be resolved on proximate cause grounds . . . .").

22. *Baisch*, 346 F.3d at 373; *Lerner*, 318 F.3d at 122.

23. Lerner v. Fleet Bank, 146 F. Supp. 2d 224, 231–32 (E.D.N.Y. 2001) (determining standing based on a "'zone-of-interest test,'" which is designed to determine whether "the plaintiff is within the class of persons sought to be benefited by the provision at issue" (citing *Holmes*, 503 U.S. at 287 (Scalia, J., concurring))), *aff'd in part, vacated in part*, 318 F.3d 113 (2d Cir. 2003).

24. *See* Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000); Abrahams v. Young & Rubicam Inc., 79 F.3d 234, 237–38 (2d Cir. 1996); Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc., 61 F.3d 1250, 1258 (7th Cir. 1995); *see also infra* notes 166–71 and accompanying text.

was foreseeable,"[25] which it specifically defined, coupled with a complete absence of any intervening causes to establish proximate cause and therefore standing.[26] The court's analysis rested squarely on a narrowly focused, mechanical test, allowing standing only to plaintiffs that can prove strict standards of proximity. This directness test flies in the face of the Supreme Court's adoption of a more fluid three-factor approach for proximate cause.

Contrary to the Supreme Court's appropriate tripartite analysis for standing in *Holmes*, which correctly addresses the concerns of civil RICO, standing, and the tensions and balances between RICO's broadness and standing limitations, the Second Circuit formulated a mechanical and categorical proximate cause test that focuses too narrowly on directness in order to find standing under civil RICO. Part II gives a brief overview of the Court's standing doctrine and the background for the Second Circuit's decisions in *Lerner* and *Baisch*, examining 18 U.S.C. § 1964, otherwise known as civil RICO, and its legislative history, as well as the Court's principal decisions on civil RICO standing—*Sedima, S.P.R.L. v. Imrex, Co.*[27] and *Holmes v. Securities Investor Protection Corp.*[28]—and the circuit decisions that have followed. Part III discusses the pertinent policies underlying the Court's standing analysis and how the Court's decision in *Holmes* properly set forth a three-factor analysis for civil RICO standing that addresses the concerns of standing in federal court and the policies of RICO. Contrary to the Court's decision in *Holmes*, the Second Circuit created a narrowly focused and mechanical test for directness in deciding proximate cause. Ultimately, the Second Circuit *sub silentio* rids itself of the analysis found in *Holmes* and its own decision in *Commercial Cleaning*

25. *Baisch*, 346 F.3d at 373 (discussing *Lerner*, 318 F.3d at 123). Other circuits have similarly required a "direct injury" to satisfy proximate cause. *See* Perry v. Am. Tobacco Co., 324 F.3d 845, 848–49 (6th Cir. 2003); Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n, 298 F.3d 768, 773 (9th Cir. 2002); Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc., 262 F.3d 260, 264 (4th Cir. 2001). *But see* Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169 (9th Cir. 2002) (employing a three-part analysis based on *Holmes v. Securities Investor Protection Corp.*); Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 381 (2d Cir. 2001) (same); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 439 (3d Cir. 2000) (same).

26. *Baisch*, 346 F.3d at 373 (discussing *Lerner*, 318 F.3d at 123).

27. 473 U.S. 479 (1985).

28. 503 U.S. 258 (1992).

Services v. Colin Service Systems, Inc.[29] in favor of a standard that mechanistically and directly disrupts the policies and compromises formulated by the Court and Congress to determine civil RICO standing. Part V offers a brief conclusion.

II. THE BACKGROUND TO CIVIL RICO AND THE SECOND CIRCUIT'S DOCTRINE OF STANDING

Standing is a complex issue that courts have not defined or explicated with great clarity or consistency. The Supreme Court, however, has provided basic premises upon which to base an analysis of both constitutional minimum standards for standing in court and judicially self-imposed restraints that limit a plaintiff's access to federal court. Specifically, standing under civil RICO has had a fairly long and contentious history. Although written broadly to remedy a variety of crimes,[30] the statute has given rise to a plethora of interesting and novel standing requirements.[31] Part II.A explains both the constitutional and prudential elements of the Court's standing doctrine. Part II.B details the statutory provisions and history of civil RICO, demonstrating both its broad reach and its complexity. Part II.C delineates some of the standing requirements initially constructed by courts to inhibit civil RICO suits, the Supreme Court's subsequent elimination of those limits, and the Court's institution of general standing requirements as decided in *Sedima, S.P.R.L. v. Imrex Co.*[32] Part II.D explains the Court's opinion in *Holmes v. Securities Investor Protection Corp.*,[33] illustrating the rise of the proximate cause requirement of civil RICO standing. Part II.E reviews some of the Second Circuit's decisions regarding

29. *Commercial Cleaning*, 271 F.3d at 381.

30. *See* 18 U.S.C. § 1961 (2000); Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922, 923 ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."); *see also* Goldsmith & Tilton, *supra* note 4, at 88 (noting that the RICO provisions "sweep[] broadly"); Elizabeth Anne Fuerstman, Note, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 169–70 (1991).

31. *See generally* Citro, *supra* note 4, at 613–16; Goldsmith & Tilton, *supra* note 4, at 98–99 (noting the "broader judicial assault on civil RICO"); Fuerstman, *supra* note 30, at 170 (noting the "novel applications of the statute"); *Sedima*, 473 U.S. at 485–86 (noting the "variety of approaches taken by the lower courts" as a reaction to the "proliferation of civil RICO litigation").

32. 473 U.S. 479 (1985).

33. 503 U.S. 258 (1992).

civil RICO standing and its proximate cause standards leading up to *Lerner v. Fleet Bank*[34] and *Baisch v. Gallina*.[35] Part II.F provides the factual background to the Second Circuit's recent cases, which announced the new test for proximate cause in the Second Circuit.

A. The Supreme Court's Standing Doctrine

Unfortunately, the doctrine of standing espoused by the Supreme Court is "not . . . defined with complete consistency."[36] Some have accused the Court's standing analyses of being "incoherent,"[37] "'permeated with sophistry,'"[38] "'a word game played by secret rules,'"[39] and "largely meaningless."[40] This may explain why many courts have used standing in civil RICO cases as an adaptable and effective tool to relieve themselves of unwanted suits.[41] Despite the apparent negativity towards this principle, the Supreme Court has articulated certain standards and policies necessary for standing in federal court.[42]

In essence, standing is "whether the litigant is entitled to have the court decide the merits of the dispute or of [the] particular issues."[43] In other words, standing determines whether the "plaintiff has a right to judicial relief" in the federal court system.[44] The focus

34. 318 F.3d 113 (2003).

35. 346 F.3d 366 (2003).

36. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982).

37. Fletcher, *supra* note 10, at 221.

38. *Id.* (citing 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983)).

39. *Id.* (citing Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting)).

40. *Id.* (summarizing the Court's doctrine as "a largely meaningless 'litany' recited before 'the Court . . . chooses up sides and decides the case'" (citing Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 22–23 (1982))).

41. *Cf.* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3531 (2d ed. 1987) ("[S]tanding doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits." (citing *Valley Forge*, 454 U.S. at 490 (Brennan, J., dissenting))).

42. A complete explication of the Court's standing doctrine is beyond the scope of this Comment and therefore this discussion will necessarily exclude certain nuances of the Court's doctrine.

43. Warth v. Seldin, 422 U.S. 490, 498 (1975).

44. Fletcher, *supra* note 10, at 229.

of standing is centered on the plaintiff[45]—whether the particular litigant is "properly situated to be entitled to . . . judicial determination."[46] Thus, although a claim may have merit, the claimant may be denied access to the courts because he or she is not the proper party to bring such a suit.[47] Although judges and scholars seem to suggest that the merits of a case are considered to some extent in determining standing,[48] because the focus supposedly falls squarely on the plaintiff, the exact nature of the determination of the merits of the case in deciding standing is somewhat vague.[49] The "standing question" is thus a mixed bag of jurisdictional and merit-based considerations and boils down to "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[50] Part of this imprecision or vagueness surrounding

45. *Valley Forge*, 454 U.S. at 484 ("The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" (citing Flast v. Cohen, 392 U.S. 83, 99 (1968))).

46. WRIGHT & MILLER, *supra* note 41, at § 3531 ("The focus is on the party, not the claim itself. The party focused upon, moreover, is invariably the plaintiff."); *see also* Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the *particular plaintiff* is entitled to an adjudication of the particular claims asserted.") (emphasis added). Wright and Miller also note, however, that there are rare occasions in which a court's focus turns to the defendant rather than the plaintiff. WRIGHT & MILLER, *supra* note 41, at § 3531.

47. *See* WRIGHT & MILLER, *supra* note 41, at § 3531; *see also Warth*, 422 U.S. at 500 ("[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . .").

48. *See, e.g.*, *Allen*, 468 U.S. at 752 ("[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."); *Warth*, 422 U.S. at 500 (explaining that standing "often turns on the nature and source of the claim asserted"); Fletcher, *supra* note 10, at 234 (discussing the standing question as a look to the merits but only "a sort of nibble at the apple before plaintiff takes a real bite").

49. *See generally* Fletcher, *supra* note 10, at 221. Fletcher argues that instead of treating standing as a preliminary jurisdictional issue and as something somewhat divorced from the merits of the case, as the Supreme Court has done, the proper analysis for standing is "simply . . . a question on the merits of plaintiff's claim." *Id.* at 223; s*ee also* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). *Compare* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (discussing standing as a threshold matter before even reaching the merits of the case), *with Warth*, 422 U.S. at 500 (discussing standing as "in no way depend[ing] on the merits" but nevertheless being connected to the "source of the claim asserted"). Fletcher argues that his admonition to view standing as a merit-based consideration is simply the recognitions of an emerging trend in scholarly and judicial discussions. Fletcher, *supra* note 10, at 223 n.18.

50. *Warth*, 422 U.S. at 500.

standing rests on the fact that standing "incorporates concepts concededly not susceptible of precise definition."[51]

The Court's standing analysis is essentially composed of constitutional and prudential limits to a litigant's access to federal court.[52] "Constitutional standing" arises from the "case or controversy" requirement of Article III of the Constitution.[53] The requirement of justiciability—"a case or controversy"—is the "threshold question in every federal case."[54] The need for a case or controversy forms the very basis of standing, and neither the Court nor Congress can expand or tighten the restrictions of constitutional standing.[55] Constitutional standing is a baseline below which neither the Court nor Congress can go. In determining constitutional standing, courts look to three components: (1) the plaintiff must have an "injury in fact," (2) that is "fairly traceable" to the defendant's actions, and (3) "the injury will likely be redressed by a favorable decision" of the court.[56]

None of these requirements of constitutional standing is intended to place insurmountable obstacles in the way of the claimant. Rather, the requirements ensure that there is a proper case before the court. The "injury in fact" component simply requires

51. *Allen*, 468 U.S. at 751.

52. *See, e.g.*, *id.* at 750–51; Bennett v. Spear, 520 U.S. 154, 162 (1997) (citing *Warth*, 422 U.S. at 498).

53. *Warth*, 422 U.S. at 498; *see also Bennett*, 520 U.S. at 162; Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982). Article III provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1.

54. *Warth*, 422 U.S. at 498.

55. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting that "the irreducible constitutional minimum of standing" are these constitutional limits); *Bennett*, 520 U.S. at 162 ("[U]nlike their constitutional counterparts, [prudential limits] can be modified or abrogated by Congress."); *Warth*, 422 U.S. at 501 (noting that even if Congress changes prudential requirements, constitutional requirements remain).

56. *Bennett*, 520 U.S. at 162 (citing *Lujan*, 504 U.S. at 560–61; *Valley Forge*, 454 U.S. at 471–72 (1982) (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976))).

that the plaintiff have "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual and imminent,' not 'conjectural' or 'hypothetical.'"[57] Likewise, the second prong, requiring that the injury be fairly traceable, asks whether there is a "causal connection between the injury and the conduct complained of" and not merely a complaint resulting from "the independent action of some third party not before the court."[58] Lastly, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[59] Ultimately, constitutional standing creates the minimum standard for a case (and, more to the point, a plaintiff) to enter into federal court.

Unlike constitutionally imposed minimum requirements, prudential limitations rest upon "the proper—and properly limited—role of the courts in a democratic society."[60] The prudential limits of standing are "judicially self-imposed,"[61] although the policies and concerns underlying them deal essentially with the separation of powers between an "anti-majoritarian federal judiciary" and a properly elected legislative body.[62] Through a variety of prudential standing limits, courts eliminate or restrict various potential plaintiffs. Plaintiffs may be denied access to federal court if they simply base their claim on "raising another person's legal rights."[63] Thus, plaintiffs are required to "assert [their] own legal rights and interests, and cannot rest [their] claims" on injuries to another.[64]

57. *Lujan*, 504 U.S. at 560 (citations omitted).

58. *Id*. at 560–61.

59. *Id*. at 561.

60. *Bennett*, 520 U.S. at 162 (citing *Warth*, 422 U.S. at 498); *see also infra* notes 208–13 and accompanying text.

61. *Lujan*, 504 U.S. at 560 (explaining that "some . . . elements [of standing] express merely prudential considerations that are part of judicial self-government"); Allen v. Wright, 468 U.S. 737, 751 (1984).

62. Fletcher, *supra* note 10, at 222. One of the central concerns governing standing is that an unelected judiciary may begin to assume the role of a superlegislature, creating laws and imposing its will in a domain more properly delegated to the legislature. *Id*. (citing A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962)); *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983). If courts began to hear cases without regard to the propriety of the case, then the courts may become a superlawmaking body and, more importantly, one without the normal democratic check.

63. *Allen*, 468 U.S. at 751 (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 474–75 (1982)).

64. *Warth*, 422 U.S. at 499.

This requirement, in some ways, echoes the minimum requirements of constitutional standing.[65] Also, courts generally exclude plaintiffs who attempt to adjudicate "generalized grievances more appropriately addressed [by] representative branches."[66] For example, harms or injuries that are "shared in substantially equal measure by all or a large class of citizens . . . do[] not warrant exercise of jurisdiction."[67] Courts have additionally required, in some contexts, "that a plaintiff's complaint fall within the zone of interests protected by the law invoked" in order to satisfy prudential standing.[68] This generally means that in order to have standing, the plaintiff, or the harm suffered by the plaintiff, must come within the class of persons or injuries Congress meant to protect.[69] This latter standing limitation typically arises in interpreting the standing criteria of statutes.[70]

Unlike constitutional limits, however, these prudential concerns may "be modified or abrogated by Congress."[71] By statute, Congress may grant standing to a much wider class of litigants than would have standing based on court-imposed prudential limits alone. Of course, Congress cannot circumvent constitutional standing, which is always a baseline minimum for all cases.[72] But a statute may effectively eliminate the prudential limits traditionally imposed by courts.[73] The shift from considerations of the court to issues of

65. *Id.* at 498–99 ("[T]he [constitutional] standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." (citing Baker v. Carr, 369 U.S. 186, 204 (1962))).

66. *Allen*, 468 U.S. at 751 (citing *Valley Forge*, 454 U.S. at 474–75).

67. *Warth*, 422 U.S. at 499.

68. *Allen*, 468 U.S. at 751 (citing *Valley Forge*, 454 U.S. at 474–75).

69. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 (1998); Bennett v. Spear, 520 U.S. 154, 161–65 (1997).

70. *See Steel Co.*, 523 U.S. at 97 (noting that the zone-of-interest test "is an issue of *statutory* standing"); *see also Bennett*, 520 U.S. at 162 (suggesting that the zone-of-interest test applies to interests "protected or regulated by the statutory provision *or* constitutional guarantee invoked in the suit" (emphasis added)); Fletcher, *supra* note 10, at 222–23; Craig R. Gottlieb, Comment, *How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns*, 142 U. PA. L. REV. 1063, 1066 (1994).

71. *Bennett*, 520 U.S. at 162 (citing *Warth*, 422 U.S. at 501).

72. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (explaining that constitutional standing is "the irreducible constitutional minimum").

73. *See infra* Part III.A.

congressional enactment is sometimes called "statutory standing."[74] Once Congress has enacted a statute, the focus of a court's standing determination turns to considerations of which persons or interests the statute protects,[75] or how the statutory enactment has modified or abrogated traditional prudential concerns.[76] Ultimately, provided a litigant still satisfies the Article III limits placed on the judiciary, he or she may have standing through a congressionally granted right of action, even though such a litigant would have been barred by normal considerations, such as the bar against asserting the rights of others.[77]

B. Section 1964 and Its History

The Racketeer Influenced and Corrupt Organizations statute was enacted as Title IX of the Organized Crime Control Act of 1970.[78] In addition to the criminal prohibitions of the RICO statute,[79] Congress also provided for civil remedies,[80] specifically for treble

74. *See, e.g.*, Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 286–87 (1992) (Scalia, J., concurring) (discussing the focus on whether the plaintiff falls within the class that the statutory provision was intended to benefit). The problem with "statutory standing" is that it has not been defined consistently, if at all, by courts.

75. *See Steel Co.*, 523 U.S. at 97; *Bennett*, 520 U.S. at 162.

76. *See Bennett*, 520 U.S. at 164 (examining whether the statutory provision at hand had modified or even eliminated the normal standard for determining standing).

77. Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that constitutional standing is an "irreducible . . . minimum"); Proctor & Gamble Co. v. Amway Corp., 242 F.3d 539, 560 (5th Cir. 2001) ("Although Congress cannot change constitutional standing requirements, it 'can modify or even abrogate prudential standing requirements, thus extending standing to the full extent permitted by Article III.'" (citation omitted)).

78. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922, 942 (codified at 18 U.S.C. §§ 1961–1968 (2000)).

79. *See* 18 U.S.C. §§ 1962–1963.

80. *Id.* § 1964. Section 1964 contains four provisions: subsection (a) authorizes the courts to employ a variety of civil remedies to effectuate the purpose or goal of the statute; subsection (b) authorizes the Attorney General to institute proceedings under § 1964; subsection (c) allows for any person to bring suit for treble damages; and subsection (d) delineates some of the effects of the civil remedies. "Civil RICO," as it is typically referred to, is located in § 1964(c) and reads:

> (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

damage awards in civil suits.[81] Civil RICO is both complex and expansive.[82] Although the statute is riddled with cross references and complexities, the general language of civil RICO broadly provides standing to "any person."[83] Specifically, § 1964(c) of the RICO statute provides in relevant part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including any reasonable attorney's fee."[84]

Although facially broad, civil RICO standing rests on proving that the defendant violated the criminal RICO provisions, an understanding of which requires examining a complex maze of cross references. Section 1962 enumerates four possible RICO violations: first, subsection (a) prohibits any person from investing any income derived from a "pattern of racketeering activity" in any enterprise that affects interstate commerce;[85] second, subsection (b) prohibits any person from acquiring or maintaining any interest in, or control of, any enterprise affecting interstate commerce through a pattern 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 which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Id. § 1964(c).

81. *Id.*

82. *See* G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1011–12, 1014, 1031 (1980) (noting the broadness of the RICO statute as it is meant to reach a variety of new and illusive crimes, while also acknowledging RICO as "one of the most sophisticated statutes ever enacted by Congress").

83. 18 U.S.C. § 1964(c); *see also* United States v. Turkette, 452 U.S. 576 (1981). The Court in *Turkette* held that "the courts are without authority to restrict the application of the [RICO] statute" beyond its statutory language. *Id.* at 587. Essentially, this means that courts are to read the term "person," as with all definitions within the statute, as broad as the statute intends without restriction. *See, e.g.*, Schact v. Brown, 711 F.2d 1343, 1353 (7th Cir. 1983) (finding that there is no serious argument that the term "person" be restricted in any sense, including "requiring that the [term] 'person' be affiliated with 'organized crime'").

84. 18 U.S.C. § 1964(c).

85. 18 U.S.C. § 1962(a). The subsection states:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . 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.

Id.; *see also* Blakey & Gettings, *supra* note 82, at 1021.

racketeering activity;[86] third, subsection (c) prohibits any person who is employed or associated with an enterprise affecting interstate commerce to conduct or participate in the enterprise's affairs through a pattern of racketeering activity;[87] and fourth, subsection (d) prohibits any person from conspiring to violate any of the other three criminal provisions.[88]

The general terminology and prerequisites to a civil RICO suit are set forth in § 1961. A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity," one act occurring after the enactment of the statute and the last act occurring no later than ten years after the first violation.[89] "Racketeering activity" in turn is composed of any one of numerous, far-reaching acts defined under the statute, taken from the common law, or found under federal and state statutes.[90] These "predicate acts" range from murder,

86. 18 U.S.C. § 1962(b). The subsection reads, "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." *Id.*; *see also* Blakey & Gettings, *supra* note 82, at 1022.

87. 18 U.S.C. § 1962(c). The subsection states:

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

Id.; *see also* Blakey & Gettings, *supra* note 82, at 1022.

88. 18 U.S.C. § 1962(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."); *see also* Blakey & Gettings, *supra* note 82, at 1022.

89. 18 U.S.C. § 1961(5).

90. *See id.* § 1961(1). Subsection 1 defines "racketeering activity" as:

> (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: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to

kidnapping, gambling, arson, and robbery to federal statutory prohibitions, such as passport or securities fraud.[91] This list of

the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).

Id.

91. *See id.*

predicate crimes is sizeable and covers a wide variety of acts and far-reaching offenses, such as mail or wire fraud, which are even more expansive than traditional concepts of fraud and are designed as catchall offenses to ensnare newly imagined forms of deception.[92] Mail fraud is generally considered "the most inclusive of the federal statutes, since it covers a broad range of criminal activity rooted in fraud."[93] Thus, although complex, civil RICO is written broadly—liability results from any injury to business or property inflicted through a pattern of racketeering activity (satisfied by a wide variety of far-reaching acts) affecting an enterprise (which is also defined broadly.)[94]

The RICO statute, including its civil provisions, was designed as an expansive and sweeping tool to defeat organized crime's infiltration and exploitation of American economic systems.[95] The criminal and civil penalties were designed to deliver the "mortal blow against the property interests of organized crime."[96] The treble damages provision of civil RICO was based on similar, but not identical, antitrust laws, which had been successful in helping to deter and curb economic crimes.[97] Except for slight changes, the broad language used in antitrust statutes and civil RICO laws is substantially the same, although the policies behind each and their intended applications differ.[98] Not only are the provisions of the

92. *See* Goldsmith & Tilton, *supra* note 4, at 86 (describing mail and wire fraud as "a 'stop-gap' device which permits the prosecution of newly-conceived fraud until such time that Congress enact[s] particularized legislation to cope with the new frauds" (quoting United States v. McNeive, 536 F.2d 1245, 1248 n.5 (8th Cir. 1976))).

93. Blakey & Gettings, *supra* note 82, at 1031 (citing 1 CORNELL INST. ON ORGANIZED CRIME, MATERIALS ON RICO 120–53 (1980–1981)).

94. *See* 18 U.S.C. § 1961(4) ("'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any other union or group of individuals associated in fact although not a legal entity.").

95. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922, 923 (codified at 18 U.S.C. §§ 1961–1968 (2000)); *see also* Fuerstman, *supra* note 30, at 169 & n.2. *See generally* Blakey & Gettings, *supra* note 82, at 1010–21.

96. 116 CONG. REC. 602 (daily ed. Jan. 21, 1970) (statement by Sen. Hruska).

97. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486–88 (1985) (recounting the legislative history and explicit adoption of antitrust-like treble damage provisions in civil RICO); *see also* Blakey & Gettings, *supra* note 82, at 1040 (explaining that civil RICO "is modeled after, but is not identical to, section 4 of the Clayton Act").

98. *See also* Blakey & Gettings, *supra* note 82, at 1040–43 (explaining that although the language is borrowed and is very similar to antitrust statutes, the policies behind each counsel against applying the same stringent standards under antitrust standing to RICO standing). *Compare* 18 U.S.C. § 1964(c) (2000) ("Any person injured in his business or property by

RICO statute written broadly, but Congress also explicitly mandated that the statute be read generously: "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."[99] Some members of Congress viewed the liberal mandate, and the civil RICO provisions in particular, as troublesomely expansive.[100] They understood the proposed civil RICO sections to reach far and wide, affecting legitimate businesses in no way associated or touched by organized crime.[101] Despite those reservations concerning the scope and reach of the statute, in the end, Congress enacted a wide-ranging law nonetheless.[102]

C. Early Attempts at Standing Restrictions and Sedima*'s Broad Concept of Civil RICO Standing*

Because the plain language of § 1964 appears on its face to generally grant standing with little restriction—"any person injured in business or property"—and because civil RICO created a powerful temptation to transform most economically based fraud claims into RICO suits, courts fashioned a variety of standing requirements for

reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages . . . ."), *with* 15 U.S.C. § 15(a) (2000) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . .").

99. § 904, 84 Stat. at 947; *see also* Blakey & Gettings, *supra* note 82, at 1032–33 ("[The] construction of RICO is one of a generous, rather than a parsimonious reading of its promise of new criminal and civil remedies. The statute was drafted from the perspective of the victim, not the perpetrator.").

100. For the dissenting views of Representative John Conyers, Jr., Representative Abner Mikva, and Representative William F. Ryan, on the Organized Crime Control Act, see H.R. REP. NO. 91-1549, at 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4076. These "dissenters" specifically felt that § 1964(c) posed great problems for legitimate businesses and businesspeople, as it

> provides invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce by authorizing private damage suits. A competitor need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the "indirect use" of such gains—a provision with tremendous outreach—litigation has begun.

Id., *reprinted in* 1970 U.S.C.C.A.N. 4007, 4083.

101. *See id.*, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4076.

102. *See* H.R. REP. NO. 91-1549, at 58 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034 ("civil remedies . . . contain[] broad provisions"). *See generally* Blakey & Gettings, *supra* note 82, at 1014–21 (describing the legislative process of the RICO statute, including the detractors and the enactment of a far-reaching law despite those detractors).

civil RICO cases, intending to limit access to federal courts.[103] Only apparently exacerbating the problem, the Supreme Court expanded civil RICO's reach as far as its language would allow. In *United States v. Turkette*,[104] the Court declared that courts "are without authority to restrict the application of the [civil RICO] statute" beyond its statutory language.[105] Thus, even though enacted primarily to combat organized crime,[106] RICO was not restricted to such purposes, but reached legitimate businesses and businesspeople as well as mobsters and organized criminal groups.[107] Without the ability to restrict civil RICO claims to cases involving organized crime, courts began, intentionally or not, to create alternative standing requirements, many of which were based on analogous antitrust standing criteria,[108] to limit the RICO cases on their dockets.[109] Two of these standing requirements, created by the Second Circuit, included only allowing private RICO claims against (1) "defendants who had been convicted of criminal charges, and [(2)] only where there had occurred a 'racketeering injury,'"[110]

103. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485–86 (1985) (noting the "recent proliferation of civil RICO litigation within" the circuits and "variety of approaches taken by the lower courts"); *see also* Goldsmith & Tilton, *supra* note 4, at 93–99; Maurer, *supra* note 2, at 79–81; McNeil, *supra* note 2, at 1242–55.

104. 452 U.S. 576 (1981).

105. *Id.* at 587.

106. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922, 923 (codified at 18 U.S.C. §§ 1961–1968 (2000)). Congress's declared purpose was "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." *Id.*; *see* Fuerstman, *supra* note 30, at 169–70 ("[T]here has been a recent explosion of civil RICO litigation, and courts have become more receptive to novel applications of the statute. . . . This current use of civil RICO was never anticipated by Congress, which crafted the statute as a means of combating criminal enterprises involved in murder, extortion and drug-smuggling."); *cf.* Blakey & Gettings, *supra* note 82, at 1013 & n.15 (acknowledging that RICO targets organized crime specifically but also pointing out that "'[o]rganized crime' is a phrase with many meanings," which do not necessarily mean only Mafia-type organizations but may broadly encompass a variety other types of criminal behavior).

107. *See* Fuerstman, *supra* note 30, at 169–70; Madonia, *supra* note 2, at 926–27.

108. Maurer, *supra* note 2, at 79–86.

109. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 486–88 (1985); Goldsmith & Tilton, *supra* note 4, at 97–98 (noting the "artificial" restrictions imposed by the courts, such as "jurisdictional limitations, onerous pleading requirements, and other obstacles designed to curtail civil RICO litigation").

110. *Sedima*, 473 U.S. at 481 (summarizing the Second Circuit's formulation of standing standards).

which was "an injury 'different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.'"[111]

In *Sedima, S.P.R.L. v. Imrex, Co.*,[112] the Supreme Court eliminated these novel standing requirements created by the circuit courts and expressed the general requirement that civil RICO standing be read broadly. *Sedima* involved a Belgian company that entered a joint venture with another corporation, Imrex.[113] Imrex contracted to furnish electronic components to Sedima.[114] The agreement provided that buyers would place their orders through Sedima, and Imrex would then "obtain the necessary parts in [the United States] and ship them to Europe"; the two companies would split any proceeds.[115] Sedima, however, alleged "that Imrex was presenting inflated bills, cheating [it] out of a portion of its proceeds by collecting for nonexistent expenses."[116] Among other things, Sedima filed civil RICO claims against Imrex, contending that Imrex violated § 1964 through the predicate acts of wire and mail fraud.[117] The district and appellate courts both found that RICO required a "racketeering injury."[118] Additionally, the court of appeals mandated that the defendant in a civil RICO action must also have been "criminally convicted of the predicate acts . . . or of a RICO violation."[119]

After reviewing the broad language and legislative history of the private remedy provisions of RICO,[120] the Court concluded that these two standing requirements were inconsistent with the broad purposes of RICO and, therefore, untenable.[121] Although the Court recognized the "proliferation of civil RICO litigation within the

111. *Id.* at 485 (citations omitted).

112. *Id.* at 479.

113. *Id.* at 483.

114. *Id.*

115. *Id.* at 483–84.

116. *Id.* at 484.

117. *Id.*

118. *Id.* at 484–85. The "racketeering injury" was an analogy to antitrust law that required an "antitrust injury." *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 269 n.15 (1992).

119. *Sedima*, 473 U.S. at 485.

120. *Id.* at 486–88.

121. *Id.* at 493, 495.

Second Circuit and in other Courts of Appeals,"[122] it also acknowledged the fact that § 1964 was designed as a "[p]rivate attorney general provision[]"—"to fill [in] prosecutorial gaps."[123] Consistent with the statute's purpose, its language, and its enactors' intent, courts are to read civil RICO standing broadly.[124] Accordingly, as the Court instructed, "if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."[125]

After determining the broad nature of civil RICO, the Court then provided the standard for private RICO standing by turning to the expansive language of the statute: a "plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation."[126] The Court also noted a potential limitation, however, in that "the compensable injury necessarily is the harm caused by predicate acts, sufficiently related to constitute a pattern."[127] Keeping with the broad reach of RICO, the Supreme Court additionally found significant the fact that an attempt was made to add "RICO-like provisions to the Sherman Act."[128] Congress abandoned this attempt, however, because antitrust-type laws, if adopted completely in a RICO context, "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'"[129] Such problems are precisely "the problems Congress sought to avoid."[130] According to the Court, therefore, strict requirements on standing and proximate cause are inappropriate under civil RICO.

122. *Id*. at 485–86.

123. *Id*. at 493.

124. *Id*. at 491 n.10, 493, 496–97; *see also* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 922, 947 ("The provisions of this title shall be liberally construed to effectuate its remedial purposes.").

125. *Sedima*, 473 U.S. at 496; *see supra* note 97 and accompanying text for Congress's liberal mandate.

126. *Sedima*, 473 U.S. at 496.

127. *Id*. at 497; *see* Maurer, *supra* note 2, at 82–83 (noting the "potential narrowing of private RICO" arising from this statement).

128. *Sedima*, 473 U.S. at 498 (citing 115 CONG. REC. 6995 (1969) (ABA comments on S. 2048)).

129. *Id*. (quoting 115 CONG. REC. 6995 (1969)).

130. *Id*. at 499.

Although *Sedima* provided an expansive standing analysis, the precise standing requirements for civil RICO suits remained a contentious battlefield of warring constraints. Among the issues raised or lingering in the wake of *Sedima* were whether the proximate cause standard under civil RICO standing required direct or only indirect injury,[131] and whether a plaintiff must meet the conditions for standing under the predicate acts as well as RICO, especially in securities fraud actions.[132] After *Sedima*, courts split over whether standing for a civil RICO action required a direct injury or allowed a more pervasive, indirect injury.[133] Many courts chose to limit standing for private RICO actions by employing a direct proximate cause standard that required the plaintiff to have sustained "a direct, personal injury."[134] In other decisions, the question arose as to whether a plaintiff must not only satisfy the civil RICO standing requirements, but also the standing components of the predicate acts.[135] This latter question principally arose in the context of securities fraud litigation,[136] in which, under Rule 10b-5, a plaintiff must be a purchaser or seller of securities to gain standing to sue.[137]

131. *See* Maurer, *supra* note 2, at 83–86; McNeil, *supra* note 2, at 1245–46.

132. *See* Madonia, *supra* note 2, at 932–33.

133. *See* Citro, *supra* note 4, at 623; Maurer, *supra* note 2, at 82–83 (noting that the Court's holding in *Sedima* concerning "the proximate cause test arguably could result in recovery for both direct and indirect consequences of the defendant's actions, particularly those injures that flowed from competitive losses"); McNeil, *supra* note 2, at 1245. *Compare* Roeder v. Alpha Indus., Inc., 814 F.2d 22, 29 (1st Cir. 1987), *and* Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843, 849 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 579 (1986), *and* Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985) ("[A]n indirectly injured party should look to the recovery of the directly injured party, not to the wrongdoer, for relief."), *and* Warren v. Mfrs. Nat'l Bank of Detroit, 759 F.2d 542, 544–46 (6th Cir. 1985), *and* Levey v. E. Stewart Mitchell, Inc., 585 F. Supp. 1030, 1034–35 (D. Md. 1984), *aff'd*, 762 F.2d 998 (4th Cir. 1985), *with* Terre du Lac Ass'n. v. Terre du Lac, Inc., 772 F.2d 467, 472–73 (8th Cir. 1985).

134. Crocker v. FDIC., 826 F.2d 347, 352 (5th Cir. 1987); McNeil, *supra* note 2, at 1248 (noting the development of direct proximate cause and its roots in the common law; also commenting on the improper nature of common law proximate cause analysis under civil RICO: "the direct injury requirement is a rule of common-law standing and not of RICO standing, and its use thus should be limited strictly to those cases that justify the rule"); *see also Rand*, 794 F.2d at 849; *Warren*, 759 F.2d at 544–46; *Carter*, 777 F.2d at 1176; *Levey*, 585 F. Supp. at 1034–35; *Roeder*, 814 F.2d at 29; *Terre du Lac*, 772 F.2d at 472–73.

135. *See* Madonia, *supra* note 2, at 932–33.

136. *Id.*

137. *Id.*; *see also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749 (1975) (adding a purchaser-seller requirement for a 10b-5 violation). Rule 10b-5 provides:

D. Holmes v. Securities Investor Protection Corp.[138] *and Civil RICO Proximate Cause Standing*

Although it granted certiorari to resolve the split concerning the necessity of securities fraud predicate act standing as opposed to only RICO standing,[139] the Supreme Court decided *Holmes v. Securities Investor Protection Corp.* on proximate cause grounds and established proximate cause as the essential standing question for civil RICO. *Holmes* arose from a suit initiated by the Securities Investor Protection Corporation (SIPC), alleging a fraudulent conspiracy on the part of seventy-five defendants that led to the ruin of a corporation and a broker-dealer.[140] Authorized by Congress,[141] SIPC, a private nonprofit corporation, was designed to aid failing broker-dealers in liquidating their businesses when they failed to meet their obligations.[142] When a broker-dealer failed to satisfy her obligations, SIPC could obtain a decree by which it would appoint a trustee to liquidate a member's business, return registered securities, pool remaining unregistered securities with cash, and distribute the pool of assets to satisfy customer claims.[143] If the pool was

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2003). *Blue Chip Stamps* affirmed the requirement that to have standing in a 10b-5 action the plaintiff must be a purchaser or seller of securities. 421 U.S. at 749 (upholding the rule in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), *cert. denied*, 343 U.S. 956 (1952)).

138. 503 U.S. 258 (1992).

139. *Id.* at 264–65. The Court in *Holmes* was asked to resolve the circuit split concerning whether standing under civil RICO required the plaintiff to satisfy the standing requirements of the underlying 10b-5 Rule, which required that the plaintiff be either a purchaser or seller of securities per *Blue Chip Stamps.*

140. *Id.* at 262.

141. *See* The Securities Investor Protection Act of 1970 (SIPA), Pub. L. No. 91-598, 84 Stat. 1636 (codified as 15 U.S.C. § 78aaa-78lll); *see also Holmes*, 503 U.S. at 261.

142. *Holmes*, 503 U.S. at 261.

143. *Id.*

inadequate, SIPC was required to "advance up to $500,000 per customer."[144]

SIPC's suit rested on a rather complex series of events. The basis for SIPC's RICO claim alleged that

> the defendants manipulated stock of six companies by making unduly optimistic statements about their prospects and by continually selling small numbers of shares to create the appearance of a liquid market; that the broker-dealers bought substantial amounts of the stock with their own funds; that the market's perception of the fraud in July 1981 sent the stock plummeting; and that this decline caused the broker-dealers' financial difficulties resulting in their eventual liquidation and SIPC's advance of nearly $13 million to cover their customers' claims.[145]

The district court ruled that SIPC did not meet the purchaser-seller standing requirements of the predicate 10b-5 acts, lacked proximate cause, and therefore did not have standing to sue.[146] The Ninth Circuit reversed, stating that there was no such limit on civil RICO standing and that the district court was incorrect in its proximate cause analysis.[147] The Supreme Court granted certiorari to determine the sole issue of standing.[148]

The majority opinion in *Holmes* authoritatively determined that civil RICO's "by reason of" language "carries a proximate-cause requirement within it."[149] In announcing this necessary element of a civil RICO action, the Court turned to the legislative history of RICO and specifically noted that RICO's private remedies provisions were modeled on similar antitrust laws.[150] In discussing the idea of directness in proximate cause standards under the Clayton Act, which the Court found applicable to the civil RICO statute, the Court isolated three factors: (1) the difficulty of "ascertain[ing] the

144. *Id*. at 261–62.

145. *Id*. at 262–63.

146. *Id*. at 263–64.

147. *Id*. at 264.

148. *Id*. at 264–65. The Court in *Holmes* was presented with two issues: (1) "whether SIPC had a right to sue under RICO and [(2)] whether Holmes could be held responsible for the actions of his co-conspirators." *Id*. The Court "granted the petition on the former issue alone." *Id*. at 265.

149. *Id*. at 265, 266 n.11, 268. The court noted the fact that "Courts of Appeals have overwhelmingly held that not mere factual, but proximate, causation is required." *Id*. at 266 n.11.

150. *Id*. at 267.

amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors"; (2) the need "to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts"; and (3) the idea that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."[151] The Court, in relying on these three policies, acknowledged that it would be "virtually impossible" to announce "a blackletter rule that will dictate the result in every case."[152] After

151. *Id*. at 269.

152. *Id*. at 272 n.20. In light of the Court's standing analysis, which focuses on eliminating any mechanical process for finding standing, *see* Allen v. Wright, 468 U.S. 737, 751 (1984), the Court's inability to set forth a blackletter rule may be due to the undesirability of doing so. *See infra* Part III.A (discussing the case-by-case approach of the Court in determining standing and the associated benefits).

The two concurring opinions in *Holmes* have, to some extent, given rise to many of the problems concerning the proximate cause standard employed by courts, as well as the creation of new proximate tests. Justice O'Connor's concurring opinion primarily focuses on resolving the conflicted purchaser-seller requirements of the predicate securities action. *See Holmes*, 503 U.S. at 276 (O'Connor, J., concurring) ("[W]e should first consider the standing question that was decided below . . . and . . . was the only clearly articulated question on which we granted certiorari."). However, she also comments on the proximate cause standard, resulting in somewhat misleading notions of the majority's position on proximate cause.

Justice O'Connor delineates the court's proximate cause standard as limiting "the availability of RICO's civil remedies to those who have suffered *injury in fact*." *Id*. at 279 (O'Connor, J., concurring) (emphasis added). Later, she also states the standard as limiting standing to one who is "injured in some meaningful sense." *Id*. (O'Connor, J., concurring). Although these summations accurately describe standing or proximate cause standards, they are not necessarily the same as those espoused by the majority opinion in *Holmes*. First, "injury in fact," although related to standing, is one of the essential requirements necessary for constitutional standing—the bare minimum that one must plead in order to gain access to suit in federal court. *See supra* note 56 and accompanying text. If the test for civil RICO standing boils down to constitutional limits, then the causation requirement must only satisfy the fairly broad test of "fairly traceable." *See id*. But Justice O'Connor also speaks of "meaningful injury," i.e., a direct injury. Justice O'Connor seems to implicate notions of direct proximate cause without even addressing the policy factors discussed by the majority. This, however, deviates from the majority's admonition to look to the three factors to establish proximate cause. *See infra* Part III.B (discussing the proper *Holmes* tripartite approach).

Justice Scalia's concurrence, which some try to fuse with the majority opinion, *see* Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000); Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc., 61 F.3d 1250, 1258 (7th Cir. 1995) (looking to *Holmes* and causation but talking of zone-of-interest); *see also* Lerner v. Fleet Bank, 318 F.3d 113 (2d Cir. 2003) (looking at *Israel Travel* and *Newton* as a hybrid of the proximate cause of *Holmes* and zone-of-interest), *cert. denied*, 124 S. Ct. 532 (2003), provides, however, a completely distinct formulation of standing and proximate cause for civil RICO. Justice Scalia's concurring opinion, contrary to the majority's, focuses on traditional notions of "statutory standing"—

determining the appropriately balanced proximate causation requirement under civil RICO standing, the Supreme Court then declined to address whether a plaintiff must be a purchaser-seller of the predicate securities act to have standing.[153] Proximate cause resolved the case, according to the Court, and would have solved the previous cases that gave rise to the circuit split.[154]

The *Holmes* decision, therefore, provides the essential requirement of proximate cause in civil RICO standing. The Supreme Court's pronouncement of proximate cause in determining

that is, "whether the . . . *nexus* . . . between the harm of which [the] plaintiff complains and the defendant's . . . predicate acts is of the sort that will support an action under civil RICO." *Holmes*, 503 U.S. at 286–87 (Scalia, J., concurring). Like the other two opinions, Justice Scalia's discussion includes a proximate cause element for standing in federal court. *See id*. at 287 (Scalia, J., concurring). Proximate cause, however, according to Justice Scalia, arises from traditional requirements of standing and not necessarily because RICO has language similar to the Clayton Act, which had been read to include proximate cause by the time RICO was enacted. *Id*. (Scalia, J., concurring). Therefore, the causality component for civil RICO standing is the common-law standard found in most other standing analyses. *Id*. at 287–88 (Scalia, J., concurring).

However, in addition to the proximate cause analysis, statutory standing has the added requirement that the plaintiff fall within the "zone-of-interest" that the statute was designed to protect or benefit, a test which varies according to the underlying law. *Id*. at 287 (Scalia, J., concurring). The "zone-of-interest" requirement was set down in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (noting that the "'legal interest' test . . . concerns . . . the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."). This zone-of-interest test is a traditional requirement of prudential limitation. *See supra* note 68 and accompanying text. Like proximate cause, zone-of-interest is a "background practice against which Congress legislates." *Holmes*, 503 U.S. at 287. The idea that Congress legislates against this background was reaffirmed in *Bennett v. Spear*, 520 U.S. 154, 163 (1997) ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."). Both the zone-of-interest and proximate cause tests, according to Justice Scalia, "vary according to the nature of the criminal offenses upon which those causes of action are based." *Holmes*, 503 U.S. at 288 (Scalia, J., concurring). Thus, the degree of each differs according to the predicate acts, *id*. (Scalia, J., concurring), and therefore on a case-by-case basis. Ultimately, Justice Scalia's zone-of-interest analysis is probably the best analysis for civil RICO standing, in addition to various other standing contexts. For many of the reasons discussed *infra* Part III.A–B, the zone-of-interest test most correctly considers the policies and compromises associated with civil RICO standing. In the end, however, the *Holmes* decision has created a set of factors for determining proximate cause in civil RICO standing. Unfortunately, after *Holmes*, the standing analysis for RICO has been ripped from the Court's generally accepted approach (i.e., zone-of-interest) and replaced by a similar approach, but one in which courts are confused and have felt somewhat free to fashion new and various "tests" while still claiming fidelity to *Holmes*.

153. *Holmes*, 503 U.S. at 275–76.

154. *Id*. at 276 (noting that "all could have been resolved on proximate-causation grounds").

standing seems clear. Although, ultimately, the three policy considerations discussed in *Holmes* provide for the best proximate cause analysis in deciding civil RICO standing,[155] that principle has been only partially apparent to lower courts.

E. Subsequent Decisions Following Holmes

After the *Holmes* decision, numerous standards for proximate cause under RICO's civil remedies standing requirements arose in several federal courts, an occurrence that has not necessarily been remedied by subsequent Court precedent for standing.[156] Various criteria cropped up in circuit court decisions, requiring reliance, direct injury, zone-of-interest, and, occasionally, the three-factor approach of *Holmes*. After *Holmes*, and specifically in fraud cases, some courts began to impose various standards of proximate cause in civil RICO cases that specifically required a showing of reliance.[157] In these cases, courts required plaintiffs to "demonstrate that the defendant's misrepresentations were relied on."[158] This requirement not only bypasses the "tripartite analysis" of *Holmes*, but also eliminates a "century of mail fraud jurisprudence," which has evolved into a capable and powerful tool to combat new, complex forms of fraud and schemes to defraud that in no way rest on reliance.[159] Yet courts have continued to employ this overrestrictive requirement.

Other courts mandated a strict direct injury requirement to establish proximate cause in civil RICO cases.[160] Although these decisions have formulated a variety of ways in which to express their

155. *See infra* Part III.B.

156. *See Bennett*, 520 U.S. at 163 (noting that "Congress legislates against the background of our prudential standing doctrine," which includes zone of interest). In cases such as *Bennett*, the Court has announced *the* standards by which standing is determined. Unfortunately, without clear guidance on how or if civil RICO is different from those standards, courts are left trying to reconcile various Court pronouncements.

157. *See* Goldsmith & Tilton, *supra* note 4, at 103–08.

158. Metromedia Co. v. Fugazy, 983 F.2d 350, 368 (2d Cir. 1992) (citing County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1311 (2d Cir. 1992)); *see also* Green Leaf Nursery v. E.I. Dupont de Nemours & Co., 341 F.3d 1292, 1306 (11th Cir. 2003); Goldsmith & Tilton, *supra* note 4, at 106.

159. *See* Goldsmith & Tilton, *supra* note 4, at 110–11.

160. Perry v. Am. Tobacco Co., 324 F.3d 845, 848–49 (6th Cir. 2003); Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n, 298 F.3d 768, 773 (9th Cir. 2002); Potomac Elec. Power Co. v. Elec. Motor & Supply, Inc., 262 F.3d 260, 264 (4th Cir. 2001).

strict requirement,[161] they all nonetheless have created a stringent directness standard, essentially holding that only the most directly injured plaintiffs can establish proximate cause.[162] For example, in *Pillsbury, Madison & Sutro v. Lerner*,[163] the Ninth Circuit found that the directly injured party in a sham building sale was the "master tenant" and that the sublessee, which was ultimately required to pay a huge increase in rent, was not directly injured, even though the "master tenant" simply passed on the increases.[164]

Still other courts followed Justice Scalia's concurrence in *Holmes*,[165] instituting a zone-of-interest analysis to determine standing.[166] Almost a combination of proximate cause and the

161. *Perry*, 324 F.3d at 848 (requiring a "direct injury"); *Oki Semiconductor*, 298 F.3d at 773 ("Some 'direct relationship' between the injury asserted and the injurious conduct is necessary."); *Potomac Elec.*, 262 F.3d at 264 n.2 (noting that a plaintiff must demonstrate "that damages flowed from racketeering activity itself"); *see also* Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1137 (4th Cir. 1993) (affirming the requirement that "the person allegedly *deceived* by the misrepresentations must be the same party who was *injured* by the misrepresentations in order to allege sufficiently the predicate acts of mail and wire fraud").

162. *See, e.g.*, *Oki Semiconductor*, 298 F.3d at 771–72. In *Oki*, there was a conspiracy in which bandits robbed Oki of millions in semiconductors and then laundered the proceeds of selling those semiconductors through Tran, an employee of Wells Fargo. *Id.* at 771. Tran established several accounts and moved money back and forth, finally funneling money to the conspirators. *Id.* The court found Tran did not proximately cause the injury to Oki. *Id.* at 772. Rather, the robbery was the direct injury. *Id.* at 774. Although it is hard to argue that the result should be different in this case, it is easy to see that courts simply look for any easy first step elimination of causation, rather than to broader notions of causality or policy considerations, especially in light of the fact that racketeering schemes are generally more complicated than mere robbery.

163. 31 F.3d 924 (9th Cir. 1994).

164. *Id.* at 928–29. The court found that the party that should bring suit was SRC, the master tenant, and that if the sublessees wished to obtain any recovery from the injury they should turn to SRC. *Id.* The court found that the sublessees depended on intervening parties and therefore could not recover, even though they were the major renters in the building and were responsible for the vast majority of the rent. *Id.* at 927–28. The court, in effect, created a per se rule out of *Holmes.* They focused on the *Holmes* statement that "a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Id.* at 929 (alterations in original) (citing Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 268 (1992)).

165. *See supra* note 152 (discussing the concurrences by Justices O'Connor and Scalia).

166. Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000); Isr. Travel Advisory Serv., Inc. v. Isr. Identity Tours, Inc., 61 F.3d 1250, 1258 (7th Cir. 1995) ("A plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law."). Although both decisions discuss zone-of-interest in analyzing standing for civil RICO, their precise adoption of the test is less than clear. Both seem to suggest that it may be helpful in understanding proximate cause, but whether they adopt zone-of-interest wholesale remains

traditional zone-of-interest test, this zone-of-interest requirement focuses on whether the plaintiff "is among the persons protected by the law."[167] The Second Circuit actually followed this line of reasoning in *Abrahams v. Young & Rubicam, Inc.*[168] The court found the proper test, in statutory contexts, to be whether "the plaintiff . . . [is] in the category the statute meant to protect, and . . . [whether] the harm that occurred . . . [is] the 'mischief' the statute sought to avoid."[169] Acknowledging the importance of "difference in terminology,"[170] the Second Circuit concluded that its formulation of this standing test roughly equated to common-law notions of foreseeability in proximate cause, although under a different banner.[171]

Finally, some courts, including the Second Circuit,[172] have employed the tripartite policy analysis of *Holmes* in determining proximate cause,[173] and therefore standing, under civil RICO. These courts have used the "directness" approach of *Holmes* as the appropriate means to determine proximate cause for civil RICO,[174] acknowledging the variety of standards possible under the broad banner of proximate cause and the Court's specific endorsement of the three-part analysis.[175] Specifically, the Second Circuit in *Commercial Cleaning Services v. Colin Service Systems, Inc.* identified the three-factor approach of *Holmes* as the proper standard.[176] In

undetermined. *See, e.g.*, *Newton*, 207 F.3d at 447 (noting the "concept of 'zone of interests' . . . can be helpful in analyzing RICO standing"). *But see* Baisch v. Gallina, 346 F.3d 366, 373 (2d Cir. 2003) (noting that both *Israel Travel* and *Newton* employed a zone-of-interest test independent of proximate cause).

167. *Isr. Travel*, 61 F.3d at 1258.

168. 79 F.3d 234 (2d Cir. 1996).

169. *Id.* at 237.

170. *Id.* at 237 n.3.

171. *Id.* The court discussed standing requirements in terms of causation, which the court then suggested equated roughly to zone-of-interest when speaking in similar terms of statutory standing. *Id.*

172. Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374, 381–85 (2d Cir. 2001).

173. Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1169 (9th Cir. 2002); Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443–44 (3d Cir. 2000).

174. *See, e.g.*, *Commercial Cleaning*, 271 F.3d at 381 ("We have accordingly turned to those policy considerations explained in *Holmes* to guide any application of the Court's direct relation test." (citing Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 239 n.4 (2d Cir. 1999))).

175. *See id.*; *see also Holmes*, 503 U.S. at 268, 272 n.20.

176. *Commercial Cleaning*, 271 F.3d at 381.

explaining the propriety of the tripartite test, the court noted the impossibility of formulating a blackletter rule for standing under civil RICO.[177] Additionally, the court found that proximate cause, as used by *Holmes*, is a generic term to describe judicial tools and that *Holmes* defined those tools.[178] The court then proceeded to analyze standing according to the three *Holmes* factors.[179]

F. The Second Circuit's Decisions in Lerner v. Fleet Bank *and* Baisch v. Gallina

In 2003, the Second Circuit altered its proximate cause standing test from the *Commercial Cleaning Services* and *Holmes* analysis to a direct and mechanical approach. In January, the court decided *Lerner v. Fleet Bank*,[180] which involved the aftermath of a lawyer's Ponzi scheme.[181] In *Lerner*, a lawyer, Schick, devised a scheme in which he convinced people to invest with him based on his practice of bidding "on distressed mortgage pools" and, upon winning the auction, immediately reselling the pool for a quick profit.[182] The foolproof aspect of this plan arose from a ninety-day due diligence period, in which he could rescind the purchase if he found no seller.[183] In order to carry out the scheme, however, he needed a "deposit of substantial sums of cash as evidence of his good faith."[184] Investors deposited money in escrow accounts, apparently "covered

177. *See, e.g.*, *id.* (noting that "[t]he Court stressed the difficulty of achieving precision in fashioning a test for determining whether a plaintiff's injury was sufficiently 'direct' to permit standing under RICO. . . . It expressly warned against applying a mechanical test . . . . We have accordingly turned to those policy considerations explained in *Holmes* to guide any application of the Court's direct relation test.").

178. *See id.*

179. *See, e.g.*, *id.* at 381–85 (noting in section headings the "Difficulty of Determining Damages Attributable to the RICO Violation," the "Difficulty of Apportioning Damages Among Injured Parties," and the "Ability of Other Parties to Vindicate Aims of the Statute").

180. 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 532 (2003).

181. *Id.* at 117–19. This type of scheme is named after Charles Ponzi, who was convicted for "fraudulent schemes he conducted in Boston" in the 1920s. BLACK'S LAW DICTIONARY 1180 (7th ed. 1999). This scheme typically involves "[m]oney from . . . new investors . . . used directly to repay or pay interest to old investors, usually without any operation or revenue-producing activity other than the continual raising of new funds." *Id.*

182. *Lerner*, 318 F.3d at 117.

183. *Id.*

184. *Id.*

by restrictive provisions," for which Schick would act as fiduciary.[185] "Before the investors discovered his fraud, Schick had raided the accounts repeatedly and managed to steal approximately $82 million."[186]

The suit in *Lerner* arose when defrauded investors tried to recover against the banks that had held the accounts. Under New York law, banks were required to report dishonored checks to the Lawyer's Fund for Client Protection.[187] The investors alleged that the banks "corrupt[ed] this enterprise"—the Lawyers Fund for Client Protection and Attorney Discipline System—by failing to fulfill the reporting requirements.[188] During the course of Schick's scheme, he wrote several dishonored checks from the investors' accounts.[189] The predicate acts of wire and mail fraud arose by virtue of the banks' mailing fraudulent statements concerning the dishonored checks.[190] The plaintiffs argued that by failing to report the bounced and improper checks, the Attorney Discipline System was prevented from acting against Schick, which would have led the investors "to distrust Schick and discontinue their investments."[191] The court held that the plaintiffs' injuries were not caused by the RICO predicate acts but by violations of state reporting requirements.[192] Moreover, "[t]he racketeering activities [were] not a substantial factor . . . . [n]or were [the plaintiffs'] losses a reasonably foreseeable consequence of that conduct."[193] Therefore, the plaintiffs lacked standing.

In October, the Second Circuit clarified its approach in *Baisch v. Gallina*,[194] which involved a financier who was allegedly defrauded by a father-and-son construction business in league with an insurance

185. *Id.*; *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 1300.1(c) (2003) ("[A] dishonored check report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains sufficient available funds, and the banking institution dishonors the instrument for that reason.").

186. *Lerner*, 318 F.3d. at 117–18.

187. *Id.* at 118.

188. *Id.* at 118–19.

189. *Id.*

190. *Id.*

191. *Id.* at 119.

192. *Id.* at 123.

193. *Id.*

194. 346 F.3d 366 (2d Cir. 2003).

company.[195] Nassau County contracted Raycon, the father-and-son company, to perform various construction projects.[196] Nassau County, under its agreement, required Raycon to hire only employees, excluding independent contractors, for example, and additionally mandated that the employees be covered by workers' compensation, disability, and general liability insurance.[197] Moreover, Nassau County required that Raycon obtain performance bonds.[198] According to Baisch, the plaintiff in this case, Frank Gallina, a shareholder and vice president of McKinnon-Doxsee Insurance Agency, helped Raycon obtain insurance policies and performance bonds knowing that Raycon submitted inflated estimates and falsified claim vouchers.[199]

Furthermore, Baisch's suit against Gallina rested on the claim that Raycon and Gallina defrauded him of nearly a half a million dollars. Based on Gallina's representations, Baisch agreed to enter a factoring agreement with Raycon, whereby he would advance money to Raycon based on claim vouchers submitted to him for work done for Nassau.[200] When Nassau County paid Raycon, Baisch was supposed to receive payment for money lent.[201] Baisch alleged that Raycon submitted forty-four vouchers, which were fraudulent, and some of which were never submitted to Nassau County and could, therefore, never be repaid.[202] Baisch was left, therefore, with having lent the money but without the possibility of repayment. The court held that Gallina's "racketeering pattern of mail fraud proximately caused [Baisch's] injury."[203] Furthermore, Baisch's injury was reasonably foreseeable because "Baisch was a 'target[]' and 'intended victim[]' of the racketeering enterprise."[204]

195. *Id.* at 369.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 369–70.
201. *Id.* at 370.
202. *Id.*
203. *Id.* at 374.
204. *Id.*

III. THE SECOND CIRCUIT'S NEW STANDARD FOR PROXIMATE CAUSE: A DIRECT AND MECHANICAL REMOVAL OF THE PROPER TRIPARTITE APPROACH

An analysis of the background to standing, and civil RICO standing specifically, provides two general conclusions. First, the general history of civil RICO standing illustrates the broad and expansive nature of RICO and specifically the broad standing requirements of civil RICO. Second, the standards employed by courts have increasingly led to a variety of tests and analyses for RICO standing, specifically for proximate cause. A proper understanding of both the Court's doctrine of standing and the Court's decision in *Holmes* shows that *Holmes* provides the proper approach to proximate cause and standing under civil RICO. Contrary to the proper *Holmes* analysis, however, the Second Circuit created a mechanical and narrowly focused test for directness in determining proximate cause, which tacitly disregards not only the *Holmes* approach but also the policies and tensions underlying standing generally and standing under civil RICO specifically.

Part III.A discusses two primary principles for understanding standing, specifically as standing relates to statutory causes of action. These two principles are, first, the need for taking special notice of the tension between courts and Congress resulting from statues and, second, the need for careful case-by-case determinations of standing. Part III.B posits that the Court in *Holmes* appropriately accounted for the tensions between standing and the policies of civil RICO by providing for a fluid three-factor approach for determining proximate cause. Part III.C argues that the Second Circuit ignored the Court's analysis in favor of a categorical and stringent directness approach to proximate cause, which ultimately disrupts the policies balanced by the Court and Congress in determining civil RICO standing.

A. Two Principles of Standing Properly Understood

Although the Court's standing doctrine has been criticized for its vagueness and inconsistency,[205] a proper understanding of the concerns and policies underlying standing suggests two fundamental considerations in understanding and analyzing standing, especially in

205. *See supra* notes 36–40 and accompanying text.

a statutory context: (1) courts must take special notice of the tension statutes create between courts and Congress, and (2) standing generally rests on a careful case-by-case determination of the case at hand rather than on any mechanical exercise.

First, standing in a statutory context requires courts to consider the tension statutes create between the courts' traditional prudential limits and Congress's directives. When courts judge aspects of law removed from congressional enactment, such as common law or constitutional issues, the policies of standing typically follow those set down as constitutional or prudential limits on courts.[206] Courts are free to examine a variety of policies that counsel for or against allowing a litigant into federal court.[207] As discussed previously, the traditional purpose of prudential standing is essentially to limit the role of the federal judiciary.[208] Without some form of limitation, the federal "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent."[209] These concerns boil down to considerations of "truly adverse" litigants,[210] "judicial restraint,"[211] ensuring that only the most directly affected parties litigate, ensuring that there is a "concrete case," and "preventing the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches"[212] (i.e., "deference to the legislature"

206. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498–502 (1975).

207. *See supra* notes 60–70 and accompanying text.

208. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) (noting that standing is grounded in the "idea of separation of powers" and reiterating the concern in *Warth* that standing is based in the concern over the limited role of the judiciary); *Warth*, 422 U.S. at 498 (finding that standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society"); Fletcher, *supra* note 10, at 222 (noting that standing is designed to "prevent[] the anti-majoritarian federal judiciary from usurping the policy-making functions of the popularly elected branches"); *see also supra* notes 60–70 and accompanying text.

209. *Warth*, 422 U.S. at 500.

210. Fletcher, *supra* note 10, at 222 (citing Baker v. Carr, 369 U.S. 186, 204 (1968); *Warth*, 422 U.S. at 498–99).

211. Kurt S. Kusiak, Note, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. REV. 667, 678 (1991) (citing Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220–21 (1974)).

212. Fletcher, *supra* note 10, at 222 (citing BICKEL, *supra* note 62); *see* Scalia, *supra* note 62, at 881.

and "separation of powers").[213] However, when dealing with statutes, courts are faced with the fact that the traditional prudential limits courts place upon themselves are called into question.[214]

In terms of determining standing for violation of a statute, a court's concern typically centers on authorizing access to federal courts only to those litigants that Congress intended.[215] Essentially, the court's role, in a statutory context, is to enforce the legislature's choices and compromises without extending or restricting a statute's reach.[216] Some courts and commentators have called this concern

213. Kusiak, *supra* note 211, at 678 (citing *Allen*, 468 U.S. at 760, and *Schlesinger*, 418 U.S. at 220–21, respectively). Although the Court's standing jurisprudence has been criticized, standing is not a trivial concept in federal jurisprudence:

> Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 476 (1982).

214. Although prudential limitations may be called into question, it is worth noting that the constitutional standing limitations remain intact, as they are unalterable—they are an "irreducible constitutional minimum." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

215. *See generally* William W. Buzbee, *Standing and the Statutory Universe*, 11 DUKE ENVTL. L. & POL'Y F. 247, 263 (2001) (noting that in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Court approached its "[s]tanding analysis . . . in a manner that explicitly wrapped this Article III constitutional question with judicial deference to the statutory universe of interests and incentives created by the legislature"); *id.* at 274 (noting also that within Justice Scalia's discussions on standing there exists the proper view that a "judiciary that seeks to enforce the substantive and procedural choices of the legislature, but avoids expanding on particular preferred statutory purposes or changing the procedural devices chosen, is showing fealty to the discernible legislative bargain manifest in a statute," even though Justice Scalia, according to Buzbee, is not necessarily consistent with this view); *see also* Gottlieb, *supra* note 70, at 1077 (discussing the legal interests created by Congress and the Court's deferment to Congress because of those interests). What "Congress intended" could fill volumes. The point, however, is that a court's focus is taken away from issues purely dealing with the proper role of the judiciary and centered on issues that Congress has decided the courts should consider. *See also* Bennett v. Spear, 520 U.S. 154, 163–66 (1997) (examining the statutory language to determine congressional intent on standing).

216. Buzbee, *supra* note 215, at 248–49 (noting that "the 'statutory universe' of legislatively created goals, procedures, and incentives remains central to standing analysis"; also noting the "persistent . . . strain in standing jurisprudence that calls for a more limited and deferential judicial standing role [for] [l]egislative judgments about statutory goals and means [otherwise] refer[ed] to as 'the statutory universe'"); *see also Bennett*, 520 U.S. at 163–66

statutory standing.[217] Regardless of the title, a court's duty is to determine whether a plaintiff has proper standing in court based on the congressional compromises inherent within a statute and not purely on traditional court-centered issues. A court's duty in this respect arises from Congress's power to alter or eliminate the traditional prudential grounds for limiting access to federal court.[218] Congress may decide to extend standing to any party that meets the core constitutional requirements or to otherwise place the appropriate constraint on litigants anywhere else along the spectrum of possible limits.[219]

For example, in interpreting the language of statutes, the Court has acknowledged the judiciary's submission to legislative will concerning standing. The Court has determined that, based on the language of the statute authorizing citizens to sue, courts should look to the legislation to determine how Congress has struck the balance in providing for entry into court.[220] In *Bennett v. Spear*, the Court compared the statute at hand with other previously interpreted statutes to determine how broadly or narrowly Congress

(discussing the same principle in terms of zone-of-interest, or giving deference to the choices of Congress). This deference in following Congress's admonitions specifically in standing comports with Justice Scalia's views on following congressional directives generally. Justice Scalia has noted that

> [e]ven where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided. . . . The trick is to carry a general principle as far as it can go in substantial furtherance of the precise statutory or constitutional prescription.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989).

217. *See* Ass'n of Data Processing Serv. Orgs, Inc. v. Camp, 397 U.S. 150 (1970); Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1282 (1989) (discussing the rise of statutory standing and the zone-of-interest test in administrative law). Although the concept has been employed outside the administrative law framework, it has not been done with much success or consistency. Therefore, for purposes of this Comment, I have chosen to discuss the impact of statutes on traditional notions of constitutional and prudential standing. How statutory standing has subsumed or duplicated anything discussed in this Comment must remain for another day. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 (1998). Statutory standing is a difficult concept because of the almost complete lack of consistency or treatment. Statutory standing initially arose in the context of administrative law as courts began to consider whether a statute creating and authorizing an administrative agency also gave private citizens, arguably harmed by an agency, standing to sue under that statute.

218. *See supra* notes 71–77 and accompanying text.

219. *See id.* discussing Congress's ability to modify or abrogate prudential standing.

220. *See Bennett*, 520 U.S. at 165.

had formulated standing in that case.[221] The Court examined language such as "any person may commence a civil suit," which had "remarkable breadth,"[222] in comparison with "[any person] having a valid legal interest which is or may be adversely affected,"[223] or "any person injured in his business or property."[224] Although each one of these statutes allowed standing to a broad class of litigants, the language of each determined, to some extent, the reach of the standing analysis along a spectrum of breadth or restriction.[225] In other words, Congress's specific authorization in these statutes altered the Court's typical prudential analysis, as the Court was required to pay heed to the delicate balance struck by Congress rather than focus only on the concerns of the judiciary.

The requirement that courts focus on congressional compromises and balances embodied in a statute creates a tension between this concern and the courts' own prudential limits. Courts must evaluate the ways in which a litigant's standing is not only altered by notions of judicial restraint but, more importantly, how it is either restricted or broadened by the statute giving rise to the cause of action.[226] When confronted with a statute that sweeps broadly or may raise "abstract questions" that are best left to "other governmental institutions . . . more competent to address [these types of] questions,"[227] courts face the dilemma of how best to utilize the prudential limits traditionally employed. The result is that in interpreting broadly sweeping legislation, courts may feel empowered with tools that restrict, albeit contrary to the legislative will, the intended reach of the statute.

221. *Id.* at 164–65 ("The first question . . . is whether the [statute's] citizen-suit provision . . . negates the [standing] test (or, perhaps more accurately, expands the [test])."). The court then considered the language of the statute to determine how broad or restricted standing was along a spectrum of possible standing requirements.

222. *Id.* at 164 (citing 16 U.S.C. § 1540(g) (2000)).

223. *Id.* (citing 33 U.S.C. § 1365(g)) (alterations in original).

224. *Id.* (citing 7 U.S.C. § 2305(c)).

225. *Id.* at 164–65 (discussing the breadth of each statutory formulation of standing in comparison to others and which of these formulations completely eliminated prudential standing so that only constitutional limits remained).

226. This may be one reason for Fletcher's argument that standing be determined on the merits alone, without regard for traditional ideas of standing. *See* Fletcher, *supra* note 10, at 222–24.

227. Warth v. Seldin, 422 U.S. 490, 498–502 (1975).

Such use of judicial standing tools to craft barriers to legislative action intended to remedy broad concerns is inappropriate, as courts, in limiting standing, alter or eliminate the purpose and delicate balance created by Congress.[228] Because standing rests, traditionally, on concerns of separation of powers and antimajoritarian difficulties,[229] courts have typically employed standing as a limit on access to court.[230] But in circumstances in which Congress has specifically created standing through a statutory cause of action, the typical standing concerns run in the opposite direction. By disregarding the thrust of a statute and limiting access to the litigants to whom Congress intended to grant right of entry into the courts, courts violate the same principles of separation of powers and antimajoritarian difficulty as if they had allowed virtually every litigant imaginable into federal court. Rather than leave the decision with Congress, the courts answer those congressional questions and address those legislative concerns by effectively ignoring Congress's choice. The effect of disregarding Congress is the same as if the court had taken license with certain powers of the legislature.

Second, standing is intended to deny any attempt at formulating a "mechanical exercise"[231] but rather engenders careful judicial examination on a case-by-case basis.[232] The Court has avoided any blackletter rules in its standing analysis.[233] The result of not laying down any rigid approach requires courts to consider cases one by one and determine, based on standing policies and in light of other cases, whether a litigant has standing in federal court.[234] Rather than employing categorical limits, the Court advocates a standing doctrine designed to consider standing on a case-by-case basis, especially in

228. *See* Buzbee, *supra* note 215, at 274 (discussing Court precedent that does not adequately account for Congress or its enactments and therefore destroys the statutes and their purpose); *cf.* Gottlieb, *supra* note 70, at 1134–38 (discussing the use of unalterable constitutional standing limits in place of prudential limits and the harm arising from not respecting "Congress's discretion to weigh countervailing considerations in its decision-making process").

229. *See supra* notes 60–62 and accompanying text.

230. *See supra* notes 60–70 and accompanying text.

231. Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* Kusiak, *supra* note 211, at 683–84.

232. *See Allen*, 468 U.S. at 751 (noting that the doctrine of standing is intended to avoid making standing a "mechanical exercise"); *see also* Kusiak, *supra* note 211, at 683–84.

233. *See, e.g.*, Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475–76 (1982).

234. *See Allen*, 468 U.S. at 751.

situations wherein judicial limits stand in contrast to broadly sweeping legislation.[235] The Court's standing doctrine is somewhat vague, amorphous, and without exact definition precisely because the Court wishes to avoid creating a mechanical exercise that would detract from the careful deliberation necessary.[236] This approach ensures that courts contemplate the important compromises between limiting access to federal court and congressional will, as well as the specific policies and concerns underlying standing. Naturally, Congress has the upper hand in any standing match because it may modify any prudential limits. Thus, a flexible approach, as advocated by the Court, strives for constant realignment with the congressional will in light of judicial limits. Both concern for the policies of RICO and the case-by-case check on the judiciary are present in and characterize the Court's proper tripartite approach to RICO proximate cause standing.

B. Holmes *and the Proper Proximate Cause Standard for Civil RICO Standing*

Although a variety of standards for proximate cause have arisen in the wake of *Holmes*,[237] a proper understanding of the *Holmes* decision reveals that the correct basis for private RICO standing based on proximate cause is the three-factor approach employed by the Court. The tripartite analysis of *Holmes* provides for a proximate cause analysis that accounts for the policies underlying civil RICO as well as the concern for a case-by-case determination necessary for standing. Even though the Supreme Court mentioned the common law's influence on the Sherman Act's, and later the Clayton Act's, inclusion of proximate cause principles, the Court focused on something related to, but apart from, traditional common law or specific antitrust notions of proximate cause when espousing the standard necessary to assert standing under civil RICO.[238]

235. *See id.*

236. *Id.*

237. *See supra* Part II.E.

238. Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 267–68 (1992); Goldsmith & Tilton, *supra* note 4, at 101, 115–18. Although Goldsmith and Tilton argue that the three factors of *Holmes* roughly equate to common-law principles of proximate cause, they still conclude that the three factors are a distinct approach to balance the various concerns arising from civil RICO claims. *Id. But see* Madonia, *supra* note 2, at 960–61; Shapiro, *supra* note 2, at 1928 (finding that the *Holmes* decision endorsed common-law proximate cause generally).

True, the Court emphasized directness in its formulation of proximate cause,[239] but it adopted a distinct form of directness that focuses on three specific, flexible policies as opposed to general or strict common-law notions of direct proximate cause.[240] The Court determined that the "use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text. [The Court] do[es] not necessarily use it in the same sense as courts before [it] have . . . ."[241] The "concerns set out in the text" consist of three policy considerations. First, a court must consider what difficulties arise in "ascertaining the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors."[242] Second, courts must consider how they may be required to "adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts."[243] Third, courts must deal with balancing how "the general interest in deterring injurious conduct" is met, paying special attention to the fact that "directly injured victims can generally be counted on to vindicate the law . . . without . . . the problems attendant upon suits by plaintiffs injured more remotely."[244]

Although some courts have not specifically followed these three factors in analyzing whether a plaintiff satisfies proximate cause, and therefore standing,[245] the Court makes clear that its "directness" admonition consists of analyzing proximate cause standing based on the three policy factors outlined. The Court explicitly states that

The difference between Goldsmith and Tilton and other authors is in how other authors conceive of the common law relating to the *Holmes* approach. Goldsmith and Tilton "roughly equate" the *Holmes* analysis to common law proximate cause but still consider the proper approach to be the tripartite factors in *Holmes* and not notions of proximate cause generally. Goldsmith & Tilton, *supra* note 4, at 115–18. Other authors, however, see *Holmes* as licensing the use of traditional proximate cause tests generally, rather than requiring adherence to a balanced *Holmes* factor approach. Madonia, *supra* note 2, at 960; Shapiro, *supra* note 2, at 1928.

239. *Holmes*, 503 U.S. at 268 (asserting that proximate cause carries "a demand for some direct relation between the injury asserted and the injurious conduct alleged").

240. *Id*. at 269; *see supra* notes 150–54 and accompanying text.

241. *Holmes*, 503 U.S. at 272 n.20 (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983)).

242. *Id*. at 269.

243. *Id*.

244. *Id*. at 269–70.

245. *See supra* Part II.E.

"direct," as it uses the word, means specifically those factors laid out in the majority opinion and not general notions of directness.[246] Thus, the proximate cause approach in *Holmes* does not arise from any prior notion of causation's scope or reach; rather, it comes from the Court's discussion of these factors.[247] Essentially, the Court gives the old name of proximate cause to its new policy approach in civil RICO cases. This fact is evidenced by the Court's own analysis, which walks step by step through the three-part examination to determine whether SIPC satisfied the proximate cause element necessary to have standing under civil RICO.[248] The Supreme Court ultimately found that it did not.[249] The Court determined that if SIPC were allowed to sue, the courts would first need to investigate "the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate" and not some other unrelated occurrence, such as the broker-dealers' own "poor business practices."[250] Second, the courts would then be required to "find some way to apportion the possible respective recoveries" by both the dealers and customers, each of whom may be entitled to the threefold recovery of civil RICO.[251] Third, "the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication."[252] Thus, even though the Court speaks of proximate directness in standing causality, it has its own formulation consisting of a three-factor policy consideration.

In light of the Court's attempt to formulate a standing doctrine that adequately balances the concerns of restricting access to the judiciary and allowing for the full impact of a broad statute,[253] the Court's formulation of the tripartite test adequately accounts for the strain between the courts and Congress. This approach does not force a blackletter rule on courts or overly restrict plaintiffs. Rather, this policy approach allows courts to balance various factors when deciding standing. Although the Court announced general concerns

246. *Holmes*, 503 U.S. at 272 n.20.

247. *Id*.

248. *Id*. at 272–74.

249. *Id*.

250. *Id*. at 273.

251. *Id*.

252. *Id*. The broker-dealers from *Holmes* did in fact bring suit. *Id*.

253. *See supra* notes 215–16, 226–36 and accompanying text.

over directness, such as "a plaintiff who complained of harm flowing merely from the misfortunes [of] a third person . . . was *generally* said to stand at too remote a distance,"[254] these pronouncements remain mere concerns and not hard and fast rules. One factor alone does not require the court to exclude a plaintiff, but mandates that a court consider the case in accordance with RICO and its precedent. Of course, each of the components looks to the limits inherent in the judiciary, for example, whether it is equipped to make "complicated rules."[255] But the analysis accounts for both limitations of courts and Congress.

This approach also allows for RICO's broad purposes. The broad provisions of RICO[256] and the Court's precedent,[257] which interpreted civil RICO broadly, suggest that courts should consider the expansive remedial nature of RICO in determining standing.[258] Although the Court emphasizes directness,[259] there is no rigid or inflexible rule to eliminate suits.[260] Rather, judges are to consider these elements in light of civil RICO and its purposes, including novel forms of fraud that may require looking past the harm done to immediate plaintiffs.[261] This test also rests on standing's same concern for case-by-case determinations, considering the policies and tensions underlying the law.[262] Ultimately, civil RICO standing cannot derive from a mechanical formulation of directness but must rest on considerations of the Court's three-factor approach, which represents an understanding of a court's role in light of congressional will.

254. *Holmes*, 503 U.S. at 268–69 (emphasis added) (citing 1 J. SUTHERLAND, LAW OF DAMAGES 55–56 (1882)). The court does not suggest that this is a per se rule. Rather the court uses the term "generally" instead of "always."

255. *Id*. at 269.

256. *See supra* Part II.B.

257. *See supra* Part II.C.

258. *See* Blakey & Gettings, *supra* note 82, at 1040–43.

259. *See id*.

260. *See supra* notes 239–52 and accompanying text.

261. *Cf*. Goldsmith & Tilton, *supra* note 4, at 110–12.

262. *See* Allen v. Wright, 469 U.S. 737, 751 (1984); *see supra* notes 226–36 and accompanying text.

C. The Second Circuit's Direct and Mechanical Disruption of the Proper Standing Analysis

Contrary to general principles of standing and the flexible approach of *Holmes*,[263] the Second Circuit created a direct and mechanical test for proximate cause in civil RICO standing. This test not only creates an almost categorical approach to proximate cause in civil RICO standing, but also narrowly focuses its attention on the predicate acts, making causation extremely restrictive. Although the Second Circuit reached different results in each case,[264] the court declared its new direct and mechanical proximate cause analysis for civil RICO standing in both *Lerner v. Fleet Bank*[265] and *Baisch v. Gallina*.[266] Following its decision in *Commercial Cleaning Services v. Colin Service Systems, Inc.*[267] and the language of § 1964,[268] the Second Circuit properly stated that a "plaintiff must plead . . . (1) the defendant's violation of [§] 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation."[269] The first two prongs of this standing analysis seem to conform to the broad standing requirements under civil RICO.[270] In discussing the third requirement, however, the court departed from its precedent and the proper analysis under civil RICO.

1. The Second Circuit's standard for proximate cause

The Second Circuit's new proximate cause analysis for standing takes the form of a two-part test. Both components of the test focus on mechanistic application of directness. "First, the plaintiff's injury

263. *See supra* Part III.A–B.

264. Baish v. Gallina, 346 F.3d 366, 366 (2d Cir. 2003) (finding that the plaintiff did have standing to sue); Lerner v. Fleet Bank, 318 F.3d 113 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 532 (2003) (finding that the plaintiff did not have standing to sue).

265. 318 F.3d 113 (2d. Cir. 2003).

266. 346 F.3d 366 (2d. Cir. 2003).

267. 271 F.3d 374, 380 (2d Cir. 2001) (stating the standing requirements as "(1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation").

268. 18 U.S.C. § 1964(c) (1970).

269. *Baisch*, 346 F.3d at 372 (citing *Lerner*, 318 F.3d at 120).

270. *See* 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue . . . ."). For a discussion of the generally expansive standing requirements of civil RICO, see *supra* Parts II.B–C, III.B.

must have been 'proximately caused by a pattern of racketeering activity violating [18 U.S.C. §] 1962 or by individual RICO predicate acts.'"[271] The court flatly concludes that if a plaintiff suffers "an injury that was indirectly . . . caused by the racketeering activity or RICO predicate acts," he or she does not have standing.[272] A litigant, therefore, who may have been injured, but not primarily, by a pattern or individual racketeering act has no standing to sue, even if the injury is sizeable. The court's analysis of this prong centers on whether there was some larger intervening wrong other than a predicate act under RICO allegedly committed by the defendant. The court in *Lerner* determined that the primary injury arose not from the predicate acts, but from "violations of state reporting requirements."[273] Although the defendant had allegedly used the mails to carry out the supposed violation and it was the corruption of the Lawyer's Fund enterprise that allegedly caused the plaintiff's injury,[274] the court focused on the reporting requirements.[275] The court did not suggest that the plaintiffs were not injured by the predicate acts or that the racketeering injuries were not substantial, just that such injuries were not the primary injury.

Second, even if a litigant meets the first element, he must then show that the injury was not too attenuated—that is, that it was a "direct injury that was foreseeable."[276] This component, in turn, has two elements: (1) the defendant's acts must be a "substantial factor in the sequence of . . . causation," and (2) the injury must be "reasonably foreseeable or anticipated as a natural consequence."[277] Additionally, the court found fit to define the exact parameters of foreseeability. The enumerated, satisfying elements of foreseeability are "the targets, competitors and intended victims."[278] Although the court determined that there can be more than one directly injured plaintiff,[279] and that, generally, directness itself is a necessary element

271. *Baisch*, 346 F.3d at 373 (citing *Lerner*, 318 F.3d at 122–23).

272. *Id*.

273. *Lerner*, 318 F.3d at 123.

274. *Id*. at 119.

275. *Id*. at 123.

276. *Baisch*, 346 F.3d at 373.

277. *Id*. at 374 (citing *Lerner*, 318 F.3d at 123).

278. *Id*. (citing *Lerner*, 318 F.3d at 124).

279. *Id*. ("RICO standing extends to all directly injured parties, not just the most directly injured among them."). Although the court seems to broaden its approach by allowing more than the most directly injured, it is important to note that the court's standard is only slightly

of causation, traditional or otherwise, the Second Circuit modified the test into an "extraordinarily demanding test of causality."[280] The court employed terms and phrases typically associated with flexibility, or even expansiveness, such as "reasonably foreseeable," when, in fact, its test is restrictive. True, foreseeability is a test designed to cut off liability, but it is a malleable test, generally not stringent or mechanical.[281] Rather than employ a flexible standard, the court defines proximate cause, and therefore standing, outright and limits standing to a rather select group of potential plaintiffs.

2. The elimination of Holmes' *flexibility in favor of categorical and mechanical "directness"*

The Second Circuit ultimately sets forth a fairly mechanical approach to proximate cause and civil RICO standing, which is squarely focused on directness and which flies in the face of the flexible *Holmes* approach. The first part of the "*Lerner-Baisch*"[282] test asks whether there is a larger intervening cause of the injury alleged.[283] If there is such a cause, the court excludes the plaintiff from recovery. The essential problem with this component of the

more lenient. What is even more problematic is the implication that arises from this maneuver, which seems almost to suggest that the court is operating on a result-oriented basis, proximate cause being a tool to exclude unless the judges think it should not.

280. *Cf.* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1191 (1993).

281. *See, e.g.*, Michael A. Hanzman, *Establishing Injury "By Reason of" Racketeering Activity: A Critical Analysis of the 11th Circuit's Per Se Detrimental Reliance Requirement and its Impact on RICO Class Actions*, 77 FLA. B.J. 36, 41 (2003) ("Proximate cause is an elusive concept, one 'always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.'" (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 42, at 279 (5th ed. 1984))).

282. Admittedly, the origin of this "first prong" is questionable. The court in *Lerner* was trying to wrestle with the fact that the plaintiffs lacked any real particularized showing of predicate acts but instead focused on the violation of reporting requirements almost entirely. *See Lerner*, 318 F.3d at 123. The court, in order to drive the point home, found that the "plaintiffs principally contend that their injuries were caused by defendants' violations of state reporting requirements." *Id.* The court noted that "[a]t worst" this violation merely rose to the level of breach of contract between the banks and the "Lawyer's Fund," not the fulfillment of a predicate act under RICO. *Id.* The difficulty arises from the *Baisch* decision which transformed the court's problem in *Lerner* into an actual prong of their proximate cause analysis. Rather than identify the predicate act problem as such, the *Baisch* court determined that finding another intervening cause actually fell within the proximate cause test. *Baisch*, 346 F.3d at 373–74. To its credit, the court was most likely correct in finding as it did based on *Lerner*.

283. *See supra* notes 272–75 and accompanying text.

"test" is that it acts as a mechanical tool to remove standing. A defendant must simply isolate another cause of the injury in order to bypass any civil RICO suit. The effect of this rule is to give defendants engaged in complex schemes to defraud or otherwise commit racketeering violations a "get-out-of-treble-damages-free card." The purpose of the RICO statute is, to some extent, to infiltrate and weed out complex schemes and plans that were otherwise untouchable under previously existing law enforcement tools.[284] The result of this first prong is to blunt a new tool provided for the express purpose of carving out and punishing, civilly or criminally, new and increasingly complex forms of racketeering.[285] Instead, a defendant blessed by the winds of fate may find she is not liable for treble damages because the "primary" cause of a plaintiff's alleged injuries was in fact a breach of contract, not the use of mails to carryout the fraudulent scheme planned.

Another vexatious element of this first prong is its application. In *Lerner*, the court found that the failure to report bounced checks was the principal injury the plaintiffs alleged and that, therefore, the plaintiffs could not establish proximate cause.[286] In *Baisch*, the court determined that Baisch's suit against Gallina was valid even though one could argue that the true, primary injury to Baisch was Rubino's breach of the factoring agreement.[287] The court found that "Baisch's injury was directly caused by Rubino's fraudulent factoring agreement," and that because Gallina had a hand in inducing Baisch to enter into the agreement, there was a direct link between Gallina's fraudulent conduct (inducing Baisch to enter an agreement with parties Gallina knew to be engaged in fraudulent activity) and the harm resulting from the fraud.[288]

In both cases, the defendant allegedly committed some form of fraud in the transaction between the parties.[289] In *Lerner*, the banks

284. *See supra* notes 95–102 and accompanying text.

285. *See, e.g.*, Blakey & Gettings, *supra* note 82, at 1013; *supra* notes 95–102 and accompanying text.

286. *Lerner*, 318 F.3d at 123.

287. *Baisch*, 346 F.3d at 374. The district court in fact found precisely that the direct injury was the factoring agreement, which cut off liability to Gallina. The plaintiffs, therefore, had no standing against Gallina.

288. *Id.* at 374, 376–77.

289. Both cases involved mail or wire fraud as the predicate act. *Lerner*, 318 F.3d at 119 ("Plaintiffs . . . allege that defendants committed several predicate acts of mail and wire fraud . . . by: stamping dishonored checks 'refer to maker' rather than 'insufficient funds' and

allegedly committed mail fraud against the defendants directly, as well as against the Lawyer's Fund, by misrepresenting Schick's illicit activities.[290] In *Baisch*, Gallina fraudulently induced Baisch to enter a factoring agreement partially through the use of the mails.[291] Admittedly, the connection is closer in *Baisch*, as Gallina allegedly induced Baisch to enter an agreement that ultimately became the source of his injury,[292] whereas the banks in *Lerner* merely prolonged Schick's activities through their alleged fraud.[293] The sticky point, however, rests on the cause of the injury: an allegedly third, more primary injury. The injury in both cases arose principally from a third-party violation. In *Lerner*, the harm that allegedly befell the plaintiffs derived from the banks' failure to report fraudulent checks, which prolonged the plaintiffs' injury by Schick.[294] In *Baisch*, the injury came from Rubino's ultimate breach of their factoring agreement.[295] The difference between these two cases is obvious in that *Baisch* involved a plaintiff who was a party to the breached agreement.[296] The point remains, however, that each case involved a suit not against the primary, violating party, but against the more removed party. Although at varying degrees, each case involves RICO claims that were only incidental to the real infringement. Part of the reason for this difference is the court's overly narrow focus on the predicate acts, which is discussed in more detail below.[297] Additionally, it may have been difficult to pass up a situation that smacks of common-law fraud, that is, reliance on misrepresentations. However, the court never discusses such implications, and reliance is not an element of civil RICO proximate cause.[298]

returning bounced checks to the payees, including plaintiffs . . . mailing bank statements . . . that neglected to mention the dishonored checks; and reassuring some of those notified of the dishonored checks that the checks had been dishonored because of a computer glitch . . . ."); *Baisch*, 346 F.3d at 369–70.

290. *Lerner*, 318 F.3d at 119.

291. *Baisch*, 346 F.3d at 370–71.

292. *Id*. at 374.

293. *Lerner*, 318 F.3d at 119.

294. *Id*.

295. *Baisch*, 346 F.3d at 374.

296. *Id*.

297. *See infra* notes 308–17 and accompanying text.

298. *See* Goldsmith & Tilton, *supra* note 4, at 110–11; *see also infra* notes 318–23 and accompanying text.

The mechanistically direct nature of the Second Circuit's proximate cause test is even more evident in the second prong, which states that the injury must be both a substantial factor and reasonably foreseeable in order for the plaintiff to satisfy the demands of proximate cause.[299] On its face, this prong of the *Lerner-Baisch* test seems more like the policy considerations and flexibility normally attributed to proximate cause.[300] The idea that the cause of the plaintiff's alleged injuries must be a substantial factor comports with traditional ideas of proximate cause.[301] Additionally, in some respects, it appears to be similar to the first prong of the *Holmes* tripartite test, as its purpose is to focus the court's attention on the primary causes of the injury.[302] Although the court does not elaborate on the substantiality portion of this test, the test seems more rigid than the policy concerns and spectrum approach of *Holmes*. *Holmes* did not create a hard and fast rule[303] but rather isolated one factor for courts to consider in determining whether a plaintiff should be given the opportunity to have her case heard. The court here invoked this standard in such a way so as to suggest that failure to meet it ends the inquiry.

The more problematic aspect of this prong of the test is the court's focus on "reasonably foreseeable or anticipated as a natural consequence,"[304] thereby eliminating a flexible standard in favor of a categorical rule. Standing on its own, this aspect of the court's opinion appears as though it may be a mere reformulation of the Court's policy considerations in *Holmes*.[305] However, the Second Circuit goes far beyond reformulation and simply defines the

299. *Lerner*, 318 F.3d at 123; *Baisch*, 346 F.3d at 373–74.

300. *See* Hanzman, *supra* note 281, at 41 ("Proximate cause is an elusive concept, one 'always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.'" (citing KEETON, *supra* note 281, § 42, at 279)).

301. Goldsmith & Tilton, *supra* note 4, at 115–16 (connecting the first prong of the *Holmes* factor approach with the common law requirement that "the defendant's activities were a substantial factor in causing plaintiff's injuries").

302. *Id*.

303. *See supra* notes 257–61 and accompanying text.

304. *See, e.g.*, *Baisch*, 346 F.3d at 373.

305. Because proximate cause has traditionally been viewed as a policy consideration, *see* Hanzman, *supra* note 281, at 41, a flexible approach to proximate cause in the civil RICO context may not do harm to *Holmes*' policy considerations, or at least not the type of harm that the Second Circuit's strict directness inflicts.

necessary requisites for proximate cause under civil RICO.[306] Moreover, the court sees fit to state outright those persons who may bring a civil RICO suit—"reasonably foreseeable victims of a RICO violation are the targets, competitors and intended victims of the racketeering enterprise."[307] Thus, even if a plaintiff manages to satisfy the first prong and the first half of the second prong, she may nevertheless be denied standing to sue by reason of her failure to fall within one of these categories. Viewed differently, the court's test ought to begin by determining whether the plaintiff is a "target[], competitor[,] or intended victim[]" of the RICO violation. If so, then the plaintiff must still show that not only was the defendant's violation a substantial factor in causing his harm, but also that there was no other intervening cause that more appropriately characterizes the harm suffered. Compare this formulation of the proximate cause standard for standing under civil RICO with the broad language of § 1964: "Any person injured in his business or property by reason of a violation of section 1962 . . . ."[308] Apparently, the formulation is actually any person injured in his business or property except anyone not a target, competitor or victim, and then only if an injury is sufficiently focused on that plaintiff.

In addition to being mechanically direct in theory, the Second Circuit's proximate cause test is even more mechanical and restrictive in application by effectively limiting its proximate cause determination to causes arising from the predicate acts and not a violation of § 1962. The court's test boils down to an overly narrow focus on proximate cause from the predicate acts. Initially, the Second Circuit uses broad language to describe its proximate cause test: plaintiffs must show "that their injury was proximately caused 'by a pattern of racketeering activity violating section 1962 or by individual RICO predicate acts.'"[309] The court in *Lerner* derives this language from a prior case, *Hecht v. Commerce Clearing House, Inc.*[310] *Hecht* in turn relies on the broad analysis of *Bankers Trust Co.*

306. *Baisch*, 346 F.3d at 373–74 ("[T]he reasonably foreseeable victims of a RICO violation are the targets, competitors, and intended victims of the racketeering enterprise." (quoting *Lerner*, 318 F.3d at 124)).

307. *Id.* at 374; *see Lerner*, 318 F.3d at 120.

308. 18 U.S.C. § 1964(c) (2000).

309. *Lerner*, 318 F.3d at 122–23 (citing Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir. 1990)).

310. 897 F.2d 21 (2d. Cir. 1990); *see also Lerner*, 318 F.3d at 122–23.

v. Rhoades[311] in finding that "the injury must be caused by a [violation of] section 1962 or by individual RICO predicate acts."[312] The court in *Bankers Trust* essentially followed the expansive lead of the Court in *Sedima*—that is, that civil RICO be read broadly and with "no special limitation on standing."[313] By including the possibility of finding proximate cause based not only on a violation of § 1962, but also on a violation of the individual predicate RICO acts, the court was, in essence, attempting to retain the expansive and far-sweeping impact of the civil RICO provision.[314] The court noted that a plaintiff's "injury is not limited to damages suffered from the RICO violation as a whole, but also includes injuries suffered from each predicate act."[315]

The Second Circuit in *Lerner* and *Baisch*, however, transforms this broad finding into a narrow and restrictive limit on proximate cause in RICO standing. Rather than determine whether the defendant's alleged activity, as a whole, violated a provision of § 1962 that in turn proximately caused an injury to the plaintiffs, the court in each case chose to focus only on causation arising from the predicate acts.[316] Rather than determine whether the defendants in *Lerner* had violated any predicate acts which in turn allowed them to maintain, invest, or control an enterprise, the result of which proximately injured the defendants, the court focused on whether the specific predicate acts proximately caused the injury.[317] While explaining that the plaintiffs' mere recitation of a chain of causation cannot sustain RICO standing, the court stated that "[i]n order to demonstrate some link between the RICO violations alleged and the loss of their investments, plaintiffs must show that, if the defendant

311. 859 F.2d 1096 (2d Cir. 1988).

312. *Hecht*, 897 F.2d at 23.

313. *Bankers Trust Co.*, 859 F.2d at 1100.

314. *See id.*; *see also supra* Part II.B–C (discussing the broad sweep of the RICO statute and the expansive standing requirements of *Sedima*).

315. *Bankers Trust Co.*, 859 F.2d at 1100.

316. This has been labeled as "convergence" causation by some attorneys. *See* Green Leaf Nursery, Inc. v. E.I. Du Pont De Nemours & Co., 341 F.3d 1292, 1306 (11th Cir. 2003), *petition for cert. filed*, 2004 WL 114472, *18–*22 (U.S. Jan. 20, 2004) (No. 03-1050); Lerner v. Fleet Bank, 318 F.3d 113 (2d Cir. 2003), *petition for cert. filed*, 2003 WL 22428715, at *11–*23 (U.S. Aug. 5, 2003) (No. 03-189). In essence, these petitioners argue that the courts have needlessly restricted the proximate cause test to only those plaintiffs who suffered the underlying predicate injury as well as the civil RICO injury.

317. *See Lerner*, 318 F.3d at 123–24.

banks had not committed the predicate acts of mail and wire fraud," a variety of third party actions would then occur, which in turn would alleviate the fraud perpetrated by Schick.[318] The court's focus on the predicate acts as the starting point from which the "chain of causation" begins is far too narrow.

The end result of this test, which focuses on the predicate acts for determining whether the injury was proximately caused by the defendant, is an overly restrictive standard. In essence, the court requires that the plaintiff be the person, or among the select few persons, duped by the fraudulent scheme in order to recover.[319] Nothing in the language of the RICO statute, however, states that proximate cause is determined from the predicate acts.[320] In fact, one wonders how, in many circumstances, this test requiring that the predicate acts and the RICO violation be perpetrated on the same plaintiff operates in the case of murder.[321] The statute itself creates no such limitation on proximate cause. Section 1964 simply states that "[a]ny person injured in their business or property *by reason of a violation of section 1962* . . . may sue therefor."[322] And the emphasis in § 1962 is on investing, maintaining, or conducting an enterprise by virtue of the predicate acts.[323] Thus, a person may be injured by the investment of a racketeer, who in no way perpetrated fraud on the plaintiff but merely used fraud or murder as a means to further or complete the investment which itself gave rise to the injury. Under the Second Circuit's rule, however, that person may not recover. The result of this focus on the predicate acts as the point by which to judge proximate causation is that the test severely and mechanically limits standing to the plaintiff who can demonstrate this "convergence" of predicate injury and RICO injury.[324]

318. *Id.* at 124.

319. *See, e.g.*, Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924 (9th Cir. 1994); Mylan Labs., Inc. v. Matikari, 7 F.3d 1130, 1137 (4th Cir. 1993).

320. 18 U.S.C. § 1964(c) (2000) states, "by reason of a violation of section 1962," not necessarily the predicate acts.

321. 18 U.S.C. § 1961(1). Section 1961(1)(A) lists "any act or threat involving murder" as a predicate act.

322. *Id.* § 1964(c) (emphasis added).

323. *Id.* § 1962; *see also supra* notes 85–88 and accompanying text.

324. *See, e.g.*, Green Leaf Nursery, Inc. v. E.I. Du Pont De Nemours & Co., 341 F.3d 1292, 1306 (11th Cir. 2003), *petition for cert. filed*, 2004 WL 114472, *18–*22 (U.S. Jan. 20, 2004) (No. 03-1050); Lerner v. Fleet Bank, 318 F.3d 113 (2d Cir. 2003), *petition for cert. filed*, 2003 WL 22428715, *11–*23 (U.S. Aug. 5, 2003) (No. 03-189).

3. Implications of the Second Circuit test

Ultimately, the Second Circuit's proximate cause analysis is a needlessly limiting and mechanical test for causation and standing. A defendant may first eliminate the plaintiff's standing by attributing the injury to some other cause. If the other cause is significant enough, then the defendant is relieved of the suit. This aspect of the court's test is further restricted by the court's narrow focus on the predicate acts—a focus that makes the first part of the court's test overly stringent, as it is extremely likely that a court may find that a breach of contract actually caused the injury to the plaintiff over an act of mail fraud, when in fact the overall harm may be attributable to the maintenance of or investment in an enterprise by virtue of the mail fraud. Even if the plaintiff passes this first barrier to standing, she must still show that the predicate acts themselves proximately caused the injury (of course, first taking into account the fact that the plaintiff must ultimately be a target, competitor, or intended victim to even entertain a suit).

In the end, the Second Circuit's test for proximate cause, and therefore standing, obliterates the *Holmes* standing approach which accounts for the policies of standing and civil RICO.[325] Rather than follow an approach that allows for policy considerations on all sides and on a case-by-case basis to see whether the policies of RICO are upheld and the victim is made whole,[326] the Second Circuit instead creates a test that grants standing to only a select few plaintiffs. In essence, the Second Circuit has created a blackletter rule for standing where the Supreme Court has determined none exists.[327]

The Second Circuit has created a test that provides no deference to Congress, but merely imposes the judiciary's own policies. Rather than considering the compromises and the tension between the courts and Congress—which would account for RICO's broad reach and attempt at eliminating new and novel forms of racketeering—the court simply creates standing requirements that allow for only a

325. *See supra* Part III.B.

326. Blakey & Gettings, *supra* note 82, at 1042 ("RICO . . . is more concerned with compensating victims and making them whole than in maintaining a competitive economy where the 'competitive acts' are racketeering in character.").

327. *See supra* notes 152, 245–55 and accompanying text; *see also* Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 272 n.20 (1992) (noting that it is "virtually impossible to announce a blackletter rule").

limited number of potential plaintiffs—a class much narrower than civil RICO was intended to redress. The ultimate result is that this test destroys the balance struck by Congress, which the courts have been asked to uphold.[328]

Moreover, because the result of the Second Circuit's test is so narrow, the court will continue to alter and modify its rule with the ebb and flow of new RICO cases, especially as people become more adept at racketeering. The problem is that the legitimacy of the court might be called into question. For example, in *Baisch*, the lower court found that the plaintiff did not have standing to sue based on *Lerner*'s analysis because he did not satisfy the direct injury of both the predicate act and the RICO violation.[329] According to the court, the party that was harmed most directly was Nassau County, and Nassau County was therefore the only party that had standing.[330] In order to find that Baisch had standing, the court was required to ease back on the rule in *Lerner* by allowing more than one "target[], competitor[] and intended victim[]."[331] Because RICO was initially intended as a far-reaching and powerful tool against complex schemes and plans of racketeering, the Second Circuit will likely find that it must constantly revise and broaden its rule to find "justice." The ultimate dilemma is that with such a mechanical and categorical rule, the perception might be that a court is making up the rules as it goes along. A flexible, policy-based, case-by-case approach has the advantage of allowing a court the leeway necessary to accommodate new and novel forms of fraud or racketeering while still requiring the court to explicate its thinking process. Any concerns that this flexible standard also loses its legitimacy is countered by Justice O'Connor's observation that "standing concepts have gained considerable definition from developing case law. . . . [T]he standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases."[332] The precedential quality of a case-by-case policy approach is sufficiently grounded for legitimacy but flexible enough for new situations and cases.

328. *See supra* notes 215–30, 253–62 and accompanying text.

329. Baisch v. Gallina, 346 F.3d 366, 371 (2d Cir. 2003).

330. *Id.* ("Nassau County, not Baisch, was the target of the racketeering enterprise.").

331. *Id.* at 374.

332. Allen v. Wright, 468 U.S. 737, 751–52 (1984).

The Second Circuit's standard, in the end, is one in which the court focuses exclusively on the limits associated with standing in federal court, rather than the balance between court and Congress. The court seems to dwell on the concerns and problems surrounding allowing access to federal court.[333] But the court's adherence to the limits placed on standing flies in the face of the purpose of standing, which attempts to balance the choices and compromises of the legislature and their impact on the courts.[334] The court would seemingly rather mow through fields of litigants with a plow than selectively pick the ripe and proper plaintiffs it was sent to find.

IV. CONCLUSION

The Court's standing doctrine, although at times inconsistent, sets forth the various principles necessary to enter federal court. The civil provisions of the RICO statute formulated a rather broad standard for allowing plaintiffs to redress their potential racketeering claims. The Court, in interpreting civil RICO, followed the congressional mandate to allow for a wide class of litigants. This concern for the policies and compromises embodied by RICO is reflected in the Court's tripartite policy approach to civil RICO proximate cause. Contrary to the policies underlying standing and specifically civil RICO standing, however, the Second Circuit disregarded the *Holmes* approach and even its own precedent in *Commercial Cleaning Services v. Colin Service Systems, Inc.* Instead, the court moved toward a mechanical, direct test for proximate cause—a test that pays no heed to the delicate balance necessary to weigh the concerns between court and Congress—and pays no homage to the proper standards announced before it. Although the outcome may have been the same in either case, the Second Circuit should still have applied the three-factor proximate cause test of *Holmes*.

Ryan C. Morris[335]

333. *See supra* notes 209–13 and accompanying text.

334. *See supra* notes 215–16, 226–36 and accompanying text.

335. The Author would like to thank all those who have assisted him in this endeavor, especially his wife, Brooke, and son, William. He would also like to thank the BYU Law Review for its efforts in his behalf.