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RICO AND FEDERALISM: A CASE FOR CONCURRENT JURISDICTION†

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Editor's Note: Just prior to sending this article to press, the U.S. Supreme Court decided Tafflin v. Levitt. In a unanimous decision, the Court tacitly endorsed Mr. Kenny's argument and held that state courts may assert jurisdiction over civil RICO claims.

I. INTRODUCTION

Recent Supreme Court decisions reflect a renewed interest in the country with issues that concern the basic structure of our federal system.¹ Many of these controversial decisions involve the

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¹ These structural issues, for example, have led to important decisions with regard to the eleventh amendment, *see, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (holding that states and state agencies are immune from suits for money damages in federal courts for violations of federal law, unless Congress makes it unmistakably clear in the language of the statute itself that it intends to abrogate the states' immunity), and the tenth amendment, *see, e.g., South Carolina v. Baker*, 108 S. Ct. 1355, 1360 (1988) (holding that Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 does not violate the tenth amendment, because the "Tenth Amendment limits on Congress' authority to regulate state activities are . . . structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity"). The Court has also recently rendered significant opinions in the area of separation of powers. *See, e.g., United States v. Mistretta*, 109 S. Ct. 647, 654–75 (1989) (upholding the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission, a Commission created pursuant to the Sentencing Reform Act of 1984, 18 U.S.C. §§ 3552–3559 (1988)); *Morrison v. Olson*,

relationship between the national government and the states, and not surprisingly have sparked lively debate, both on the Court and among the commentators. For example, the Court's recent eleventh amendment decisions holding that state entities are immune from suits in federal court for money damages unless Congress expressly abrogates the immunity have been attacked by four dissenters as "fundamentally flawed" and "egregiously incorrect."² The Court's recent tenth amendment decision holding that "[s]tate sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power,"³ has also engendered hostile dissent.⁴

The lower federal courts and the state courts are now confronting another structural issue that involves one of the most controversial statutes in the country today: the Racketeer Influenced and Corrupt Organizations act ("RICO").⁵ The structural issue that has divided these courts is whether state and federal courts share concurrent jurisdiction over civil RICO claims, or whether the federal courts have exclusive jurisdiction over such claims.⁶ The federal

108 S. Ct. 2597, 2608-11 (1988) (holding that the Independent Counsel provision of the Ethics in Government Act of 1978 does not violate the doctrine of separation of powers). *But cf.* *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (holding that the provision of the Gramm-Rudman-Hollings Act allowing for congressional involvement in the removal of the Comptroller General violated the separation of powers doctrine).

² *See, e.g.*, *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 509-21 (1987) (Brennan, J., dissenting); *Atascadero State Hosp.*, 473 U.S. at 248 (Brennan, J., dissenting). *See generally* Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Harris & Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY LAW JOURNAL 645 (1988).

³ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

⁴ *Id.* at 580 (O'Connor, J., dissenting) ("The Court today surveys the battle scene of federalism and sounds a retreat"). *See generally* Rapacznski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 341-42 ("Garcia's importance lies, above all, in revealing the absence of anything approaching a well elaborated theory of federalism that would provide a solid intellectual framework for an articulation of the Justices' divergent views on state-national relations").

⁵ 18 U.S.C. §§ 1961-1968 (1982 & Supp. IV 1986).

⁶ The federal district courts and state courts are about evenly split on the issue. For cases finding exclusive jurisdiction, see *Broadway v. San Antonio Shoe*, 643 F. Supp. 584, 587 (S.D. Tex. 1986); *Kensey v. Nestor Exploration Ltd.*-1981A, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App. 3d 712, 718, 495 N.E.2d 1132, 1136 (1986); *Maplewood Bank & Trust Co. v. Acron*, 207 N.J. Super. 590, 594, 505 A.2d 819, 821 (1985). For cases holding that the states have concurrent jurisdiction, see *Karel v. Kroner*, 635 F. Supp. 725, 731 (N.D. Ill. 1986); *HMK Corp. v. Walsey*, 627 F.

appellate courts are also divided,⁷ but the Supreme Court, in *Tafflin v. Levitt*,⁸ will have the opportunity to resolve definitively this split of authorities.

These courts uniformly recognize the presumption that state courts have jurisdiction over cases arising under federal law, and uniformly agree that the presumption may be rebutted in one of only three ways: "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."⁹ The courts also agree that Congress, when it enacted RICO, did not explicitly divest state courts of the power to adjudicate RICO claims.¹⁰

The courts are diametrically opposed, however, on the issue of whether RICO's legislative history unmistakably implies that Congress intended to grant to the federal courts exclusive jurisdiction over civil RICO claims.¹¹ Exclusivity proponents rely on the similarity between the language of section 1964(c) of RICO, which creates a private right of action under the statute,¹² and the language of section 4 of the Clayton Act, which creates a private right of action under the Sherman Act,¹³ and the presumption that the

Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987); *Ciampi v. Superior Court*, 40 Cal. 3d 903, 916, 710 P.2d 375, 382, 221 Cal. Rptr. 575, 581-82 (1985).

⁷ Compare *Brandenburg v. Seidel*, 859 F.2d 1179, 1193 (4th Cir. 1988) (holding that state courts have concurrent jurisdiction over Rico claims) and *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) (same), *cert. denied*, 108 S. Ct. 1302 (1988) with *Chivas v. Owen*, 864 F.2d 1280, 1286 (6th Cir. 1988) (holding that the federal courts have exclusive jurisdiction over RICO claims). The Seventh and Fifth Circuits, in dicta, have expressed considerable doubt as to whether Congress intended to take RICO jurisdiction away from state courts. See *DuBroff v. DuBroff*, 833 F.2d 557, 562 (5th Cir. 1987); *County of Cook v. Midcon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985).

⁸ 865 F.2d 595 (4th Cir. 1989), *cert. granted* 109 S. Ct. 2428 (1989). In *Tafflin*, the Fourth Circuit followed *Brandenburg* and affirmed the district court's decision that plaintiff's RICO claims could be brought in state court. The Supreme Court has accepted certiorari on that issue.

⁹ *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

¹⁰ See *Chivas*, 864 F.2d at 1283; *Belzberg*, 834 F.2d at 736.

¹¹ Compare *Belzberg*, 834 F.2d at 736-37 (rejecting argument that RICO's legislative history implies exclusivity) and *Brandenburg*, 859 F.2d at 1193 (same) with *Chivas*, 864 F.2d at 1284 (adopting the argument that RICO's legislative history implies exclusivity).

¹² Section 1964(c) of RICO provides:

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.

18 U.S.C. § 1964(c) (1988).

¹³ Section 4 of the Clayton Act provides in pertinent part:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court

federal courts have exclusive jurisdiction over the federal antitrust laws.¹⁴ Although the statutory language of section 1964(c) of RICO and section 4 of the Clayton Act are substantially similar, the mere similarity between the two provisions does not demonstrate any congressional intent to divest the state courts of jurisdiction over civil RICO claims.¹⁵

The lower federal courts and state courts also disagree on whether the federal interests to be served by section 1964(c) of RICO and state-court jurisdiction over RICO claims are "clearly incompatible." The primary cause of this disagreement is the failure of these courts to recognize the principal federal interests implicated by section 1964(c) of RICO. In *Shearson/American Express v. McMahon*,¹⁶ the Supreme Court observed that the primary interest Congress sought to facilitate in creating a private right of action under RICO is the compensation of injured RICO victims.¹⁷ The Court also noted that the secondary interest of section 1964(c) is the deterrent function.¹⁸ The *McMahon* Court held that because injured RICO victims can effectively vindicate their rights in an

of the United States . . . and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1988).

¹⁴ See *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286-88 (1922) (federal courts have exclusive jurisdiction over Section 16 of the Clayton Act). *But see* *Marresse v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1153 (7th Cir. 1984), *rev'd on other grounds*, 470 U.S. 373 (1985) (questioning whether the federal courts should have exclusive jurisdiction over antitrust laws) and *Redish & Muench, Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 316-17 (1976) (questioning rationale supporting exclusive federal antitrust jurisdiction).

¹⁵ One commentator has argued that the "Clayton Act Analogy" provides "an unmistakable inference that subject matter jurisdiction under [RICO] is exclusively federal." Comment, *Adjudication of Civil RICO Actions—State Courts Get An Offer They Can't Refuse*, 62 Sr. JOHN'S L. REV. 301, 311-12 (1988). See *infra* notes 61-98 and accompanying text for an argument that the Clayton Act analogy requires a logical leap of faith that cannot be justified, and, by itself, does not overcome the undeniable fact that Congress did not even think about the jurisdictional issue when it provided for a private right of action under RICO.

¹⁶ 482 U.S. 220 (1987).

¹⁷ *Id.* at 240. The Court in *McMahon* adopted wholesale the reasoning in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), that "the treble-damages cause of action [under the federal antitrust laws] . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at 635. The Court in *Mitsubishi* held that private parties may agree to arbitrate antitrust disputes that arise out of international commercial transactions, concluding that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. The Court in *McMahon* held that the same reasoning applies in the context of civil RICO. 482 U.S. at 240-42.

¹⁸ *Id.* at 240.

arbitration forum, RICO claims are arbitrable.¹⁹ The *McMahon* Court based its decision on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, where it held that international federal antitrust claims are arbitrable.²⁰ The reasoning of these cases should apply with even greater force to the question of whether injured RICO victims can effectively vindicate their rights in the state courts.

The lower federal courts and state courts that have recognized state-court jurisdiction over RICO claims have failed to focus on the principal interests implicated by section 1964(c) of RICO, thus allowing the proponents of exclusivity to frame the "incompatibility" arguments.²¹ While some of these arguments are superficially sound, they are not, upon analysis, persuasive. Additionally, the federal interests identified by the proponents of exclusivity are either misplaced, or are interests that can be served in the state courts as well as they can be advanced in the federal courts.²²

This article argues that state courts should have concurrent jurisdiction over civil RICO claims. Part II analyzes the Supreme Court's decisions concerning concurrent jurisdiction.²³ This examination includes an analysis of historical sources, including *The Federalist Papers*, which demonstrate an original intent that state courts function as co-guarantors of federal rights. Part III examines RICO's legislative history and argues that, based on that history, Congress did not express any intent to divest the state courts of jurisdiction to adjudicate RICO claims.²⁴ Part III also questions the efficacy of the Clayton Act model for RICO jurisprudence. Part IV reviews the federal interests implicated by RICO and argues that state-court jurisdiction is not incompatible with those interests;²⁵ in fact, state-court jurisdiction over RICO claims will help further

¹⁹ *Id.* at 241.

²⁰ *Mitsubishi Motors Corp.*, 473 U.S. at 635.

²¹ For example, the Ninth Circuit in *Lou v. Belzberg* merely rebutted, albeit persuasively, some of the arguments that state-court jurisdiction is incompatible with federal interests. 834 F.2d 730, 737-39 (9th Cir. 1987).

²² For example, the strongest argument for exclusivity is the argument that the federal courts have exclusive jurisdiction over many of RICO's predicate acts offenses. *See, e.g.*, *Chivas v. Owen*, 864 F.2d 1280, 1285 (6th Cir. 1988); *Kinsey v. Nestor Exploration Ltd.*-1981A, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985). *See infra* notes 99-128 and accompanying text for a discussion of that fact that many of these offenses are "federal" in name only, and most RICO cases involve garden variety common law fraud claims. Under these circumstances, it is difficult to conceive of how federal law enforcement, through the aid of private attorneys general, will be undermined if state court judges preside over RICO cases.

²³ *See infra* notes 27-60 and accompanying text.

²⁴ *See infra* notes 61-98 and accompanying text.

²⁵ *See infra* notes 99-128 and accompanying text.

RICO's broad remedial purposes.²⁶ The article also argues that the Supreme Court's holding in *McMahon*, that RICO victims can effectively vindicate their rights in an arbitration forum, compels the conclusion that they also can, and should be able to, vindicate their rights in the state courts.

II. CONCURRENT JURISDICTION IN HISTORICAL PERSPECTIVE

A. *The First Congress Intended to Create a Dual System of Courts*

The presumption of state-court jurisdiction is as old as the republic itself. The state courts have an existence in time before the federal courts, and Article III of the Constitution, which gives Congress the power to create inferior federal courts and vest them with jurisdiction over cases arising under federal law,²⁷ did not reshape the jurisdiction of the state courts.²⁸ As the authors of *Moore's Federal Practice* have concluded after an examination of the historical record:

[Prior to the time of the Constitution], there was already a well-developed system of state courts The existence of these courts was not disturbed by the adoption of the Constitution; and in fact state courts were to continue to protect federally-created as well as state-created rights; existing jurisdiction of the state courts would not be disturbed; and . . . these courts would also have jurisdiction over matters within federal juridical power, unless a particular matter was exclusively committed by Congress to the federal courts.²⁹

Article III only gave Congress the power to create lower federal courts; it was not until the first Congress enacted the Judiciary Act of 1789³⁰ that Congress actually created such courts and prescribed their jurisdiction. By enacting the Judiciary Act of 1789, Congress

²⁶ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985) ("RICO is to be read broadly . . . [Congress's] express admonition [is] that RICO is to 'be liberally construed to effectuate its remedial purposes,' . . .") (quoting Pub. L. No. 91-452, 84 Stat. 922, 947 (1970); see also *United States v. Turkette*, 452 U.S. 576, 589 n.11 (1981) (Court observed that the evidence from the Congressional record required a broad reading of the statute).

²⁷ In pertinent part, Article III provides: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

²⁸ See 1 MOORE'S FEDERAL PRACTICE ¶ 0.6[1] (1988).

²⁹ *Id.* at ¶ 0.6[1], 207.

³⁰ Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

created a dual system of courts that would develop "one form of jurisprudence."³¹ Alexander Hamilton had perspicaciously articulated the concept of a dual court system in *The Federalist Papers*:

I hold that the State courts will be divested by no part of their primitive jurisdiction, further than any relate to an appeal; and I am even of opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will, of course, take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and, in civil cases, lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe When, in addition to this, we consider the State governments and the national government, as they truly are, in the light of kinder systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.³²

The Supreme Court in *Clafin v. Houseman* adopted Hamilton's astute political analysis of the proper balance of dual judiciaries that would create one jurisprudence.³³ The Court, even before its decision in *Clafin*, had recognized in the infamous case of *Dred Scott v. Sandford*³⁴ that state courts, as courts of general jurisdiction, "are presumed to have jurisdiction, unless the contrary appear." In *Claf-*

³¹ *Clafin v. Houseman*, 93 U.S. 130, 137 (1876). The Court in *Clafin* also noted that "it was assumed, in our early judicial history, that the state courts retained their usual jurisdiction concurrently with the Federal courts invested with jurisdiction in like cases." *Id.* at 139.

³² THE FEDERALIST NO. 82 (A. Hamilton). Professor Moore has argued persuasively that Congress, when it enacted the Judiciary Act of 1789, accepted Hamilton's theory of concurrent jurisdiction:

It seems, then, that there was no doubt in the minds of a majority of members of the 1st session of Congress that power existed in Congress to vest exclusive jurisdiction over certain matters in the federal courts . . . and to provide concurrent jurisdiction over certain matters in both federal and state courts.

1 MOORE'S FEDERAL PRACTICE ¶ 0.6[1], at 232 (1988). See also *Clafin*, 93 U.S. at 139 (Hamilton's "views seem to have been shared by the first Congress in drawing up the Judiciary Act of Sept. 24, 1789, . . .").

³³ 93 U.S. 130, 138 (1876).

³⁴ 60 U.S. (19 How.) 393, 401 (1856).

lin, the Court held that an assignee in bankruptcy could sue in state court under the Bankruptcy Act of 1867.³⁵ The Court opined, based on "the structure and true relation of the Federal and State governments," that "there is really no just foundation for excluding the State courts from all such jurisdiction."³⁶ Thus, the Court held that, while Congress has the power to confer exclusive jurisdiction on the federal courts over federal causes of action, jurisdiction is concurrent with the state courts "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."³⁷

By the end of the nineteenth century, it had been well established that state courts, as courts of general jurisdiction,³⁸ were presumed to have jurisdiction over federal causes of action unless Congress had granted exclusive jurisdiction to the federal courts.³⁹ Concurrent jurisdiction is "extremely important" to our federal system of government,⁴⁰ and the Supreme Court has not deviated from the presumption that state courts share jurisdiction with the federal courts over federal causes of action.⁴¹

B. *The Modern Supreme Court Approach*

In *Dowd Box Co. v. Courtney*⁴² and *Gulf Offshore v. Mobil Oil Corp.*⁴³ the Supreme Court reaffirmed the *Clafin* presumption of

³⁵ *Clafin*, 93 U.S. at 143.

³⁶ *Id.* at 136.

³⁷ *Id.*; see also *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898). The Court in *Clafin* warned that

[t]he disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relation of the state and federal governments. [I]t is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

93 U.S. at 137.

³⁸ Federal courts, by way of contrast, are courts of limited jurisdiction and have subject matter jurisdiction over particular claims only if Congress has granted such jurisdiction. See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 612 n.28 (1979); *Owen Equip. Co. v. Kroger*, 437 U.S. 365, 372 (1978).

³⁹ The Judiciary Act of March 3, 1875, which created for the first time federal statutory rights of action, granted the federal courts, concurrent with state courts, jurisdiction over federal causes of action. See 1 MOORE'S FEDERAL PRACTICE ¶ 0.6[1], at 234 (1988).

⁴⁰ *Id.* at 240.

⁴¹ See Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861, 864 (1985) (arguing that our federal system is not designed so that each "sovereign" is the exclusive interpreter of its own laws).

⁴² 368 U.S. 502 (1961).

⁴³ 453 U.S. 473 (1981).

concurrent state-court jurisdiction. In *Dowd Box*, the Court held that section 301(a) of the Labor Management Relations Act,⁴⁴ which provides that a suit for a contract violation between employees and labor organizations representing employees "may be brought in any district court," does not divest state courts of jurisdiction over such suits.⁴⁵ Section 301(a) of the Labor Management Relations Act does not expressly provide for exclusive federal jurisdiction, and the Court refused to construe section 301(a) as depriving "the state courts of a substantial segment of their established jurisdiction over contract actions," and thereby disregarding the "consistent history of hospitable acceptance of concurrent jurisdiction."⁴⁶

The Court in *Dowd Box* also rejected the argument that concurrent jurisdiction would result in a proliferation of diverse and conflicting interpretations of federal law, and thus defeat federal interests. The Court in fact seemed to embrace such a set of circumstances:

It is implicit in the choice Congress made that "diversities and conflicts" may occur, no less among the courts of the eleven federal circuits, than among the courts of the several states, But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court.⁴⁷

A narrow reading of *Dowd Box* might suggest that the Supreme Court placed primary emphasis on the fact that disputes to be adjudicated pursuant to section 301(a) would be contract actions, which are claims to be resolved in accordance with the appropriate

⁴⁴ 29 U.S.C. § 185 (1982).

⁴⁵ *Dowd Box*, 368 U.S. at 507. The Court approached the issue by noting that: We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule.

Id. at 507-08.

⁴⁶ *Id.* at 508.

⁴⁷ *Id.* at 514. The specter of a proliferation of diverse state court RICO decisions is something of a red herring, because the Supreme Court has appellate jurisdiction over state court decisions that concern federal law, and thus has the power to resolve any conflict over the proper interpretation of a federal statute. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

state's laws. Thus, *Dowd Box* would not be controlling in the context of disputes to be resolved in accordance with federal law. Such a limiting construction of *Dowd Box* should be rejected for two reasons. First, the language of the opinion overwhelmingly demonstrates an adherence to the general presumption of concurrent state-court jurisdiction and the concomitant burden of showing an exception to the presumption. Second, the Court in *Dowd Box* never suggested that its opinion was to be interpreted narrowly.

The *Gulf Offshore* Court, however, does provide some limited support for the view that different tests exist for determining whether the federal courts possess exclusive jurisdiction over federal claims, depending on whether the claim must be resolved in accordance with state or federal law. In *Gulf Offshore*, the Court held⁴⁸ that state courts enjoy concurrent jurisdiction over personal injury and indemnity claims arising under the Outer Continental Shelf Lands Act ("OCSLA").⁴⁹ OCSLA extended federal political jurisdiction over the outer continental shelf, and the petitioner in *Gulf Offshore* attempted to infer from this grant of political jurisdiction that the federal courts have exclusive jurisdiction over disputes arising from matters on the shelf.⁵⁰

Although the *Gulf Offshore* Court rejected the argument of exclusive federal court jurisdiction, it did "emphasize" in a footnote that the "case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provision of OCSLA."⁵¹ This emphasis should not be emphasized, however, because the Court, as is its practice, was simply declining to decide an issue of constitutional dimension which was not before it.⁵²

The Court's footnote must also be analyzed within the larger context of its opinion. In *Gulf Offshore*, the Court ratified the presumption of concurrent jurisdiction, and held that this presumption "can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility

⁴⁸ 453 U.S. 473, 484 (1981).

⁴⁹ 43 U.S.C. §§ 1331-1356 (1982 & Supp. V 1987).

⁵⁰ *Gulf Offshore*, 453 U.S. at 479-80.

⁵¹ *Id.* at 480 n.7.

⁵² See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J. concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it'").

between state-court jurisdiction and federal interests."⁵³ The Court found nothing in OCSLA or its legislative history to overcome the presumption, and also envisioned no federal interests that would be threatened by concurrent jurisdiction.⁵⁴ The *Gulf Offshore* Court therefore held that state courts enjoy concurrent jurisdiction for personal injury and indemnity claims arising under OCSLA.⁵⁵

The first Congress created a dual system of courts, and the Supreme Court has held repeatedly that state courts may be denied jurisdiction over federal claims only if Congress expressly or unmistakably takes it away,⁵⁶ or if concurrent jurisdiction would jeopardize federal interests.⁵⁷ As the Court in *Gulf Offshore* opined, the doctrine of concurrent jurisdiction is premised on our federal system of dual sovereignty⁵⁸ which respects the relationship between the states and the national government.⁵⁹ The doctrine of concurrent jurisdiction, by allowing state courts to adjudicate federal claims, also "facilitates the enforcement of federal rights."⁶⁰ Thus, unless Congress has expressly or by fair implication divested state courts of jurisdiction over a particular federal statute, proponents of exclusivity shoulder an onerous burden to show that state-court jurisdiction over claims brought under a federal statute will thwart the federal interests implicated by the statute.

III. RICO'S LEGISLATIVE HISTORY—THE SOUNDS OF SILENCE

Section 1964(c) of RICO provides:

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

⁵³ *Gulf Offshore*, 453 U.S. at 478.

⁵⁴ *Id.* at 482-84.

⁵⁵ *Id.* at 484.

⁵⁶ It appears beyond peradventure that Congress has the constitutional authority to grant the federal courts exclusive jurisdiction over federal causes of action. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429 (1867). See generally C. WRIGHT, A. MILLER, & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3527 (1988).

⁵⁷ See generally Redish & Muench, *supra* note 14; Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509 (1957).

⁵⁸ The concept of dual sovereignty has an exalted status in American jurisprudence, and the interests it implicates are deemed even more important than some fundamental individual liberties. See, e.g., *Heath v. Alabama*, 474 U.S. 82, 88-91 (1985) (holding that the fourteenth amendment proscription against double jeopardy does not bar separate state and federal prosecutions for the same behavior).

⁵⁹ *Gulf Offshore v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

⁶⁰ *Id.* at 478 n.4.

and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.⁶¹

This language does not provide that the federal courts have "exclusive" jurisdiction over such actions,⁶² and no court has held that the statute expressly provides for exclusive jurisdiction. This conclusion is supported by Congress's choice of the permissive "may sue" as opposed to the mandatory "shall sue" or "may sue only" in the statute.⁶³

Congress's failure to provide expressly that the district courts shall have exclusive, original jurisdiction over civil RICO actions is strong evidence that Congress did not intend to divest the state courts of jurisdiction over such actions. In *Omni Capital International, Ltd. v. Rudolf Wolf & Co.*,⁶⁴ the Supreme Court held that the Commodity Exchange Act⁶⁵ contains no implied provision for nationwide service of process. In so holding, the Court wrote:

It would appear that Congress knows how to authorize nationwide service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention.⁶⁶

The reasoning in *Omni Capital* is persuasive and suggests that Congress's failure to grant the federal courts exclusive jurisdiction over civil RICO claims is indicative of an intent *not* to divest the state courts of such jurisdiction. The Court's analysis in *Gulf Offshore*, however, would permit a court to divine a congressional intent to divest the state courts of jurisdiction over civil RICO claims if the statute's legislative history demonstrates "by unmistakable im-

⁶¹ 18 U.S.C. § 1964(c) (1988).

⁶² When Congress intends to vest the federal courts with exclusive jurisdiction, it is perfectly capable of clear, unambiguous communication. *See, e.g.*, 28 U.S.C. § 1338(a) (1982) ("The district courts shall have original jurisdiction of any civil actions arising under any Act of Congress relating to patents, plant variety, protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases"); 28 U.S.C. § 1334(a) (1982 & Supp. IV 1986) ("Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all [bankruptcy cases and proceedings]").

⁶³ It is a well-recognized principle of statutory construction that the starting point in statutory interpretation is the precise language of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1976) (Powell, J., concurring).

⁶⁴ 484 U.S. 97, 108 (1987).

⁶⁵ 7 U.S.C. §§ 1-24 (1988).

⁶⁶ *Omni Capital Int'l*, 484 U.S. at 106.

plication" an intent to grant to the federal courts exclusive jurisdiction.⁶⁷

Proponents of exclusivity, however, search RICO's legislative history in vain because, even as the Sixth Circuit in *Chivas v. Owen* discovered, there is "no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts."⁶⁸ Although RICO's principal draftsman—Professor Blakey of the Notre Dame Law School—has speculated that Congress would have made jurisdiction exclusive to the federal courts had they thought about the issue, even he concedes that "no one even thought of the issue."⁶⁹

The issue of exclusive or concurrent jurisdiction over private causes of action under RICO must be viewed in the historical context of section 1964(c). This section, which creates a private right of action under the statute, was an eleventh-hour addition to a statute designed to ferret out the infiltration of legitimate businesses by organized crime.⁷⁰ The inclusion of the treble-damage remedy for civil wrongs "was debated only briefly," and was described by Senator McClellan, the bill's co-sponsor, as a "minor change."⁷¹ Thus, the historical record provides no evidence that Congress even considered the jurisdictional ramifications of section 1964(c), but merely included the private cause of action as "an additional weapon to use against the corrupt infiltration of legitimate commercial activities by organized crime."⁷²

⁶⁷ 453 U.S. 473, 478 (1981).

⁶⁸ 864 F.2d 1280, 1283 (6th Cir. 1988).

⁶⁹ Flaherty, *Two States Lay Claim to RICO*, Nat'l L.J., May 7, 1984, at 3, Col. 1. (quoting Professor G. Robert Blakey). Professor Blakey's post hoc conjecture that Congress would have provided for exclusive jurisdiction had they thought about it, however, is of dubious reliability as an aid to statutory construction. See *A.P. Green Export Co. v. United States*, 284 F.2d 383, 386 (Ct. Cl. 1960) ("An explanatory tale should not wag a statutory dog").

⁷⁰ The Senate Report accompanying the bill that eventually became RICO succinctly stated the purpose of the statute: "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operated in interstate commerce." *Senate Comm. on the Judiciary, Report on Organized Crime Control Act of 1969*, S. REP. NO. 617, 91st Cong. 1st Sess. 76 (1969). See generally Bradley, *Racketeers, Congress and the Courts: Analysis of RICO*, 65 IOWA L. REV. 837, 852 & n.83 (1980); Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 676-78 (1987).

⁷¹ See Note, *Clarifying a "Pattern" of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1767 (1988).

⁷² *Id.* at 1768. As the Second Circuit has noted, "[t]he most important and evident conclusion to be drawn from the legislative history is that Congress was not aware of the possible implications of section 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 492 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

Proponents of exclusivity have nonetheless attempted to circumvent this obvious congressional silence on the jurisdictional issue by analogizing to section 4 of the Clayton Act.⁷³ While section 4 of the Clayton Act was used as a "model" in the drafting of civil RICO,⁷⁴ it is not the Rosetta stone that reveals a Congressional intent to divest the state courts of jurisdiction over civil RICO claims.⁷⁵

There are, indisputably, similarities between the language of section 1964(c) of RICO and section 4 of the Clayton Act.⁷⁶ Section 4 of the Clayton Act, however, by its terms, does not grant the federal courts exclusive jurisdiction over federal antitrust claims; instead, it is only judicial gloss that has provided the federal courts with exclusive jurisdiction over the federal antitrust laws.⁷⁷

⁷³ 15 U.S.C. § 15 (1988).

⁷⁴ See *Sedima*, 473 U.S. at 489.

⁷⁵ One commentator had unavailingly argued that the very fact that Congress modeled section 1964(c) after the Clayton Act "proves an unmistakable inference that subject matter jurisdiction is exclusively federal." Comment, *Adjudication of Civil RICO Action—State Courts Get An Offer They Can't Refuse*, 62 ST. JOHN'S L. REV. 301, 311-12 (1988). This Comment "infers" that the Congress that enacted section 1964(c) of RICO was "aware of the manner in which the Clayton Act had been construed" (i.e., that the courts have held that the federal courts have exclusive jurisdiction over federal antitrust claims), and therefore must have intended to divest state courts of jurisdiction over RICO claims. *Id.* at 308 and 311-12. This logical leap of faith is faulty as a matter of deduction, is improper as a matter of statutory construction, and overstates the importance of the Clayton Act as a model for RICO.

⁷⁶ Section 1964(c) of RICO provides:

Any person injured in his business or property by reason of a violation of section 1963 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.

18 U.S.C. § 1964(c) (1988).

The jurisdictional section of the Bank Holding Company Act, 12 U.S.C. § 1975, was also modeled after section 4 of the Clayton Act, and contains antitying provisions, 12 U.S.C. § 1972(1) (1988), which complement the antitrust laws. Nonetheless, at least one court has held that such similarity is insufficient to demonstrate a congressional intent to divest the state courts of jurisdiction to hear claims arising under the antitying provisions of the Bank Holding Company Act. See *Lane v. Central Bank of Ala., N.A.*, 756 F.2d 814, 816-18 (11th Cir. 1985).

Section 4 of the Clayton Act in pertinent part provides:

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

15 U.S.C. § 15 (1988).

⁷⁷ See *General Inv. Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 286-88 (1922). *But cf.* *Village of Bolingbrook v. Citizens Utils. Co.*, 864 F.2d 481, 484-85 (7th Cir. 1988) (questioning whether federal courts should have exclusive jurisdiction over the federal antitrust laws); *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1153 (7th Cir. 1984) (en banc) (same), *rev'd on other grounds*, 470 U.S. 373 (1985).

Based on the presumption that the federal courts have exclusive jurisdiction over the federal antitrust laws, the district court in *County of Cook v. Midcon Corp.* reasoned, by use of a non sequitur, that because RICO was modeled after section 4 of the Clayton Act, "[l]egislators must have known that section 4 of the Clayton Act gives federal courts exclusive jurisdiction and it would therefore be anomalous . . . to hold that the jurisdictional grant in the RICO statute did anything other than create exclusive federal jurisdiction."⁷⁸ The Sixth Circuit in *Chivas* did not attempt to psychoanalyze the Congress as did the district court in *Midcon*,⁷⁹ but did employ a similar faulty syllogism: the federal courts have exclusive jurisdiction over claims brought pursuant to the Clayton Act; Congress "closely patterned the civil RICO damages action on Section 4 of the Clayton Act"; therefore, RICO's legislative history unmistakably demonstrates a congressional intent to divest the state courts of jurisdiction over RICO claims.⁸⁰

This argument, however, overstates the importance of the minor premise and attempts to substitute tenuous analogical reasoning for the requirement of empirical evidence that Congress intended to remove civil RICO claims from the jurisdiction of state courts. Although the drafters of section 1964(c) undoubtedly relied on the "Clayton Act model,"⁸¹ this "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language."⁸² In *Sedima, S.P.R.L. v. Imrex Co.*, the Supreme Court refused to saddle RICO with all of the Clayton Act's baggage by refusing to engraft on the statute a requirement that RICO plaintiffs allege a "racke-

⁷⁸ 574 F. Supp. 902, 912 (N.D. Ill. 1983), *aff'd*, 773 F.2d 892 (7th Cir. 1985). The Seventh Circuit stated in dicta, however, that it doubts "whether the analogy to antitrust law is sufficiently strong to conclude that because jurisdiction over antitrust cases is exclusively federal, RICO jurisdiction necessarily must follow suit." 773 F.2d at 905 n.4; *see also* *Brandenburg v. Seidel*, 859 F.2d 1179, 1194 (4th Cir. 1988) ("the relationship between § 1964(c) and § 4 [Clayton Act] cannot serve as the basis for reading into § 1964(c) limitations that are not apparent from its plain language").

⁷⁹ Before courts attempt feats of Freudian analysis, they should heed the admonition of Justice Jackson that courts, when interpreting statutes, "must proceed by analysis of the statute instead of by psychoanalysis of Congress." *United States v. Public Utils. Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

⁸⁰ 864 F.2d 1280, 1283-84 (6th Cir. 1988).

⁸¹ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985).

⁸² *Lou v. Belzberg*, 834 F.2d 730, 737 (9th Cir. 1987); *see also* *Schact v. Brown*, 711 F.2d 1343, 1357 (7th Cir. 1983) (noting that RICO has broader aims than the Clayton Act and was enacted "as a separate tool in the fight against organized crime"), *cert. denied*, 464 U.S. 1002 (1983).

teering injury" in order to have standing to sue under the statute.⁸³ As one commentator has noted, Congress "did not see the objectives of RICO and the antitrust laws as coterminous."⁸⁴

The deduction in *Chivas* and *Midcon* from the Clayton Act premises to the conclusion of congressional intent of exclusivity is also seriously flawed. The conjecture that the RICO drafters "must have known" that Clayton Act jurisdiction is exclusive is pure speculation, and thus poor evidence of an "unmistakable implication" of congressional intent.⁸⁵ Moreover, the Seventh Circuit, in rejecting the district court's reasoning in *Midcon*, questioned the analogical reasoning in light of the presumption of concurrent jurisdiction:

We doubt whether the analogy to antitrust law is sufficiently strong to conclude that because jurisdiction over antitrust cases is exclusively federal, RICO jurisdiction necessarily must follow suit Particularly in light of the normal presumption that state courts share concurrent jurisdiction over federal statutes, we would be reluctant to conclude from congressional silence that Congress intended to depart from the usual rule.⁸⁶

The argument is also refuted by logical analogy. The form of the argument—the federal courts have exclusive jurisdiction over the antitrust laws and Congress patterned the civil RICO statute after the Clayton Act, therefore Congress unmistakably intended to divest the state courts of RICO jurisdiction—is the same form of argument that the Supreme Court flatly rejected when it held, in *Shearson/American Express v. McMahon*, that civil RICO actions are arbitrable.⁸⁷ With regard to congressional intent, RICO's similarities

⁸³ *Sedima*, 473 U.S. at 493–500. Under the Clayton Act, a plaintiff has standing to sue for an injury caused by defendant's violation of the Sherman Act only if plaintiff has suffered "antitrust injury"—that is, an injury of the type the antitrust laws were designed to prevent. See *Pueblo Bowl-O-Mat v. Brunswick*, 429 U.S. 477, 489 (1978).

⁸⁴ Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1112 (1982).

⁸⁵ Again, Justice Jackson has written wisely on such a judicial method of analysis: "When we decide from legislative history, . . . what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them That process seems to be not interpretation of a statute but creation of a statute." *United States v. Public Utils. Co.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

⁸⁶ 773 F.2d 892, 905 n.4 (7th Cir. 1985); see also *Beltzberg*, 834 F.2d at 737. In the past, the Supreme Court has pithily observed that "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11 (1942).

⁸⁷ 482 U.S. 220, 242 (1987).

to the Clayton Act "model" were simply irrelevant to the *McMahon* Court. The dispositive point for the Court was the fact that the "silence in the text is matched by silence in the statute's legislative history," and that there "is no hint in these legislative debates that Congress intended for RICO treble-damages claims to be excluded from the ambit of the Arbitration Act."⁸⁸ In the absence of such empirical evidence, the analogy to the Clayton Act is nothing more than a debater's point—rhetorically full but substantively empty.

The final reason for rejecting the Clayton Act analogy is that the Supreme Court's rationale for holding that the federal courts have exclusive jurisdiction over the federal antitrust laws is itself of questionable validity. The Court first held that the federal courts have exclusive jurisdiction over private rights of action under the antitrust laws in *General Investment Co. v. Lake Shore Railway*.⁸⁹ In *General Investment*, the issue before the Court was whether state courts had jurisdiction over injunction actions brought by private plaintiffs pursuant to section 16 of the Clayton Act.⁹⁰ The Court undertook no examination of the Clayton Act's legislative history,⁹¹

⁸⁸ *Id.* at 238.

⁸⁹ 260 U.S. 261, 287 (1922). In a subsequent case, the Court recognized this principle, but did not expound on the issue, as it was not presented to the Court for decision. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379–80 (1985) (holding that the preclusive effect of a state court judgment in a subsequent federal lawsuit must be determined by the law of the state in which judgment was rendered).

⁹⁰ *Gen. Inv. Co.*, 260 U.S. at 287. The operative language from the Clayton Act that the Court analyzed provided, in pertinent part: "That any person, firm corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, . . ." *Gen. Inv. Co.*, 260 U.S. at 287, citing section 16 of the Clayton Act, 15 U.S.C. § 26 (1914).

⁹¹ Redish and Muench, *supra* note 14, at 317 (legislative history of the Sherman Act indicates that the judicial finding of exclusive jurisdiction was very likely contrary to Congressional intent); Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 HARV. L. REV. 509, 510 n.13 (1957) (noting that the "legislative history of the Sherman Act indicates that exclusive jurisdiction was not intended."). Professors Redish and Muench have argued that the Clayton Act's legislative history suggests that Congress intended that the federal courts have exclusive jurisdiction over section 16, even though the statute itself does not expressly confer such jurisdiction on the federal courts. Redish and Muench, *supra* note 14, at 318. Their argument, however, is questionable because it is based on the House of Representatives' rejection of a proposed amendment to the Clayton Act which would have conferred exclusive jurisdiction on the federal courts. This amendment, however, would have prevented the removal of a cause of action under the new statute from state court to federal court, and was also intended to confer jurisdiction on the state courts over criminal (as well as civil) violations of the antitrust laws. *See* 51 CONG. REC. 9662–9663 (1914). These two aspects of the amendment, it appears from the record, were contributing factors in the amendment's narrow defeat. *Id.* at 9663–9664. Thus, the legislative history of the Clayton Act does not unmistakably show a congressional intent to confer on the federal courts exclusive jurisdiction over section 16 of the Clayton Act.

and in a terse opinion held that the federal courts have exclusive jurisdiction over section 16 of the Clayton Act because that statute grants jurisdiction "to the courts of the United States."⁹²

This rationale is flawed. The mere fact that Congress granted the federal courts jurisdiction over section 16 of the Clayton Act does not, by itself, divest the state courts of jurisdiction over the same statute.⁹³ As the Supreme Court in *Gulf Offshore v. Mobil Oil Corp.* succinctly put the matter: "[i]t is black letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action."⁹⁴ In *General Investment*, however, the Court held that the state courts do not have jurisdiction over claims arising from section 16 of the Clayton Act because Congress had conferred on the federal courts jurisdiction over such claims.⁹⁵

The Supreme Court's reasoning in *General Investment* is, at the very least, inconsistent with "black letter law." The Clayton Act does not confer exclusive jurisdiction on the federal courts over federal antitrust causes of action, and the mere grant of jurisdiction over

⁹² *Gen. Inv. Co.*, 260 U.S. at 286-88.

⁹³ See *United States Bank of N.Y. & Trust Co.*, 296 U.S. 463, 479 (1936) ("It is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive").

⁹⁴ 453 U.S. 473, 479 (1981) (rejecting the argument that the federal courts have exclusive jurisdiction over claims arising under OCSLA "merely" because Congress conferred jurisdiction on them over such claims).

⁹⁵ Although *General Investment* is relied on for the proposition that the federal courts have exclusive jurisdiction over the Clayton Act, see, e.g., *Chivas v. Owen*, 864 F.2d 1280, 1284 (6th Cir. 1988), the case only addressed the issue of section 16; it did not address the issue of whether the federal courts have exclusive jurisdiction over section 4 of the Clayton Act, the statute after which section 1964(c) of RICO was modeled. Only three other Supreme Court opinions have addressed the antitrust jurisdictional issue, but none of these cases holds that the federal courts have exclusive jurisdiction over section 4 of the Clayton Act. In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379-80 (1985), the Court in dicta cited *General Investment* for the general proposition that the federal courts have exclusive jurisdiction over the federal antitrust laws. See *supra* note 86. In *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U.S. 436, 437 (1920), the issue was whether plaintiff's claim under the Sherman Act, which had been brought in federal court, concerned transactions that were substantially involved in interstate commerce. The Court only briefly noted that claims under section 7 of the Sherman Act (not section 4 of the Clayton Act) could only be brought in a "District Court of the United States." *Id.* at 440. Finally, in *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 451 n.6 (1942), the Court observed in dicta that, based on *Blumenstock*, the Massachusetts state court would not have had jurisdiction over plaintiff's Sherman Act claim that was amended to the complaint after defendant removed the action to federal court. In sum, the Supreme Court has never held that the federal courts have exclusive jurisdiction over section 4 of the Clayton Act, and has never thoroughly analyzed the general proposition that the federal courts have exclusive jurisdiction over the antitrust laws.

such actions should not, in light of *Clafin* and its progeny, divest the state courts of jurisdiction over federal antitrust claims.⁹⁶ Judge Posner has, in an insightful analysis, also suggested in an en banc opinion that state-court jurisdiction over federal antitrust actions would not be incompatible with federal interests:

And it is hard to understand why state courts should be thought less competent to enforce the federal antitrust laws than the federal civil rights laws—which they have jurisdiction concurrently with the federal courts to enforce, . . . particularly when state courts can adjudicate federal antitrust defenses with preclusive effect on questions of fact under the doctrine of collateral estoppel in a subsequent federal antitrust suit.⁹⁷

The judicial gloss on the Clayton Act is a poor foundation upon which to build an edifice of exclusive jurisdiction over civil RICO actions in the federal courts. The Supreme Court's opinion in *General Investment*, it is submitted, was incorrectly decided. Further, as Judges Posner and Easterbrook have opined, the Court has valid reasons to reconsider its opinion in *General Investment*. Under these circumstances, courts should not invoke the Clayton Act analogy for guidance to decide the RICO jurisdictional issue.

Notwithstanding attempts to analogize the RICO jurisdictional issue to the Clayton Act, the unavoidable fact is that Congress never "thought of the issue" of RICO jurisdiction. There is no empirical evidence that Congress intended to divest the state courts of RICO jurisdiction; instead, the only "evidence" of such an intent is Congress's desire to pattern section 1964(c) after section 4 of the Clayton Act and provide injured RICO victims with the remedies of treble damages, litigation costs, and attorney's fees.⁹⁸ This evidence, quite simply, does not "unmistakably imply" an intent to alter the balance

⁹⁶ In *Village of Bolingbrook v. Citizens Utils. Co.*, 864 F.2d 481, 484–85 (7th Cir. 1988), the Seventh Circuit, in an opinion written by Judge Easterbrook, questioned whether the federal courts should have exclusive jurisdiction over the federal antitrust laws based on the inconsistency between the reasoning in *General Investment* and Supreme Court precedent such as *Gulf Offshore*, and in light of the Supreme Court's holding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985), that international antitrust disputes are arbitrable.

⁹⁷ *Marrrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1153 (7th Cir. 1984) (en banc) (citations omitted), *rev'd in part on other grounds*, 470 U.S. 373 (1985).

⁹⁸ See Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1112 (1982) ("the specific incorporation of the treble damages cause of action into RICO by the House Committee on the Judiciary, though 'based on section 4 of the Clayton Act,' did no more than adapt an antitrust tool to the attack on organized crime").

between the states and national government, especially in light of the 200 year old presumption of concurrent jurisdiction.

IV. NO FEDERAL INTERESTS WOULD BE JEOPARDIZED BY STATE-COURT ADJUDICATION OF RICO CLAIMS

The Supreme Court has held that the presumption of concurrent jurisdiction may be rebutted, even in the absence of unmistakable congressional intent, "by a clear incompatibility between state-court jurisdiction and federal interests."⁹⁹ An examination of section 1964(c) reveals no federal interests that would be threatened by permitting an injured RICO victim to bring his claims in state court. This section merely provides a remedy for such a victim, and allows the victim to bring his action in federal court. Numerous federal causes of action may be brought in federal and state courts, and nothing in the language of section 1964(c) or its legislative history even hints that Congress intended to protect some federal interests by precluding state courts from adjudicating RICO claims.

Although RICO has come under intense attack for being the darling of zealous prosecutors and for federalizing "garden variety" fraud and contract actions,¹⁰⁰ few would dispute that Congress's primary objective was a blitzkrieg on organized crime.¹⁰¹ Congress therefore decided to fight the war on many fronts and provided for both criminal and civil remedies for RICO violations. These actions, however, were held to be "entirely distinct" by the Court in *Sedima, S.P.R.L. v. Imrex Co.*¹⁰²

The Supreme Court in *Shearson/American Express v. McMahon* recognized this distinction when it held that there was no "irreconcilable conflict between arbitration and RICO's underlying purposes."¹⁰³ In *McMahon* the Court followed the view expressed in *Sedima* that the civil remedies provided for by section 1964(c) are not for "offenses criminal in nature."¹⁰⁴ In *McMahon* the Court also reiterated the observation that it had made in *Sedima* that "the fact that conduct can result in both criminal liability and treble damages

⁹⁹ *Gulf Offshore v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

¹⁰⁰ See, e.g., Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

¹⁰¹ See generally Lynch, *supra* note 70, at 676-78.

¹⁰² 473 U.S. 479, 489 (1985).

¹⁰³ 482 U.S. 220, 239 (1987).

¹⁰⁴ *Id.* at 239 (quoting *Sedima*, 473 U.S. at 492).

does not mean that there is not a bona fide civil action."¹⁰⁵ The Court in *McMahon* therefore rejected the argument that the criminal provisions of RICO "preclude arbitration of bona fide civil actions brought under § 1964(c)."¹⁰⁶

The Court's holding in *McMahon*, that private causes of action under RICO are arbitrable, should apply *a fortiori* in the context of concurrent jurisdiction. The Court has recognized that, while section 1964(c) serves a deterrent function in the war against organized crime, its compensatory function has even greater priority.¹⁰⁷ Thus, in *McMahon* the Court noted that the primary federal interest implicated by RICO is whether an injured RICO victim "may vindicate its statutory cause of action in the arbitral forum . . ."¹⁰⁸ It can not seriously be argued that an injured RICO victim who can effectively vindicate his rights in an arbitral forum can not also effectively vindicate his rights in a state court.¹⁰⁹

The Court's reasoning and holding in *McMahon* should compel the conclusion that the state courts share jurisdiction over RICO claims. While no court has analyzed the jurisdictional issue based on *McMahon*, some courts have rejected a "narrow" scrutiny and have recommended an "examination of the civil RICO damages remedy in the context of the entire RICO statutory scheme."¹¹⁰ An expanded examination of RICO undoubtedly uncovers important federal interests, but in no way leads to the conclusion that state-court jurisdiction over RICO claims would undermine those interests.

In *Chivas v. Owen*, the Sixth Circuit held that state-court adjudication of RICO claims is incompatible with the federal interests

¹⁰⁵ *Id.* at 239-40 (quoting *Sedima*, 473 U.S. at 492).

¹⁰⁶ *Id.* at 240.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 242.

¹⁰⁹ *Cf.* *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) ("we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States").

¹¹⁰ *Chivas v. Owen*, 864 F.2d 1280, 1284 (6th Cir. 1988); *Kinsey v. Nestor Exploration Ltd.*—1981A, 604 F. Supp. 1365, 1370-71 (E.D. Wash. 1985). The unsupported claim in *Chivas* that the "federal interests embedded in civil RICO are best assessed not by narrow scrutiny of Section 1964(c) in isolation but by examination of the civil RICO damages remedy in the context of the entire RICO statutory scheme," 864 F.2d at 1284, is of dubious validity. The best evidence of the interests Congress sought to promote by enacting a statutory provision clearly must be the language of the provision and its surrounding legislative history. In the context of civil RICO, the Supreme Court has already identified these interests: compensation and deterrence. To search for the federal interests embodied in civil RICO by ignoring civil RICO is to search for a will-o-the-wisp.

embedded in civil RICO for "three principal reasons": most of RICO's predicate offenses can only be prosecuted in federal court; state-court jurisdiction would multiply the risk of inconsistent decisions and RICO is complex and ambiguous; and, the "procedural apparatus" "seems inconsistent with concurrent state court adjudication."¹¹¹ While it is not clear why the Sixth Circuit identified any of the above as "federal interests embedded in civil RICO,"¹¹² none of these reasons supports the claim that state-court jurisdiction would undermine the assault on organized crime,¹¹³ or would jeopardize the goals of compensation and deterrence.

On the contrary, there is no reason in law or fact to believe that by expanding the choice of forums for private plaintiffs, RICO's goals of compensation and deterrence will be jeopardized. As the Ninth Circuit noted in *Lou v. Belzberg*, "[p]roviding a private plaintiff with a choice of fora encourage enforcement of RICO and preserves an appropriate role for state courts in cases involving essentially state law."¹¹⁴ These considerations, along with the Supreme Court's admonition that RICO is to be interpreted "liberally,"¹¹⁵ suggest only that concurrent state-court jurisdiction over RICO claims will enhance RICO's objectives of compensation and deterrence.

Even the reasons propounded by the Sixth Circuit in *Chivas*, however, fail to support the claim that state-court jurisdiction over RICO claims is incompatible with the federal interests embedded in civil RICO. For example, in *Chivas* the court erroneously assumed that "virtually all of the predicate offenses defined as 'racketeering activity' in section 1964(c) are themselves prosecutable only in the federal courts."¹¹⁶ Judge Krupansky, in his dissenting opinion in *Chivas*, however, correctly points out that the offenses typically implicated by civil RICO are only "nominally federal."¹¹⁷ Based on an empirical review of civil RICO cases, Professors Blakey and Cessar

¹¹¹ *Chivas*, 864 F.2d at 1285.

¹¹² *Id.* at 1284.

¹¹³ See *supra* note 98 and accompanying text for a discussion of the lack of congressional intent to divest state courts of RICO jurisdiction.

¹¹⁴ 834 F.2d 730, 738-39 (9th Cir. 1987).

¹¹⁵ *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 n.10 (1985).

¹¹⁶ 864 F.2d 1280, 1285 (6th Cir. 1988). Many of the predicate offenses, however, involve offenses that constitute violations of state law. See 18 U.S.C. § 1961(1) (1988) ("any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year").

¹¹⁷ *Chivas*, 864 F.2d at 1289 (Krupansky, J., dissenting).

concluded that in 1986, 54.9% of all civil RICO cases involved common law fraud.¹¹⁸ One district court has perceptively, and ironically, characterized the "federal" nature of the predicate offenses under RICO:

First, in adjudicating a RICO case, state courts only need to determine whether the alleged predicate acts did or did not occur. This type of factual finding is unlikely to involve any complex interpretation of the underlying federal statutes, which would require exclusive jurisdiction. Second, as a practical matter, state courts are unlikely to find themselves in the position of interpreting and applying the underlying federal statutes. The vast majority of RICO cases involve *garden variety state law fraud*, where the plaintiff has simply seized upon RICO to obtain federal jurisdiction, treble damages, and attorney [sic] fees. If anything, *RICO involves federal courts in the adjudication of state law claims*, rather than the other way around.¹¹⁹

The second rationale for exclusive jurisdiction articulated by the court in *Chivas*—RICO cases are "too complex" and concurrent jurisdiction would "multiply the risk of inconsistent decisions"¹²⁰—is equally unpersuasive. The Supreme Court has considered and rejected both of these components of the argument. In *Shearson/American Express v. McMahon*, the Court brushed aside the argument that RICO claims are "too complex to be subject to arbitration."¹²¹ If federal arbitrators possess the judicial capacity to adjudicate RICO claims, state court judges are equally capable of adjudicating the same claims.¹²² The Supreme Court, in *Dowd Box Co. v. Courtney*, has also dismissed the argument that the risk of inconsistent decisions justified exclusive federal jurisdiction, opining that "this not unnecessarily unhealthy prospect is no more than the usual conse-

¹¹⁸ Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 619-22 (1987).

¹¹⁹ *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986) (emphasis added), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987); see also *Lou v. Belzberg*, 834 F.2d 730, 738 (9th Cir. 1987).

¹²⁰ *Chivas*, 864 F.2d at 1285.

¹²¹ 482 U.S. 220, 239 (1987).

¹²² The Sixth Circuit's unsupported assumption that federal RICO claims are too complex for state court judges is belied by the fact that more than one half of the states and Puerto Rico have "little RICO" statutes, based in substantial part on the federal statute. See Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 715 n.236 (1987).

quence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law."¹²³

The final rationale for exclusive jurisdiction found in *Chivas* does not identify any discernible federal interest that would be thwarted by state-court jurisdiction, but rather unavailingly asserts that "RICO's procedural apparatus seems inconsistent with concurrent state court jurisdiction."¹²⁴ As Judge Krupansky argues in his dissent, however, "the federal venue and service provisions incorporated into the RICO statute [do not] afford a persuasive reason to support exclusive federal jurisdiction,"¹²⁵ observing that the Supreme Court has upheld concurrent jurisdiction in other contexts with procedural apparatus similar to RICO's.¹²⁶

The two principal federal interests embedded in civil RICO are compensation to injured victims and deterrence. These interests would be enhanced by expanding the choice of forums available to injured RICO victims. The arguments propounded by the proponents of exclusivity overlook these interests, mischaracterize the federal nature of RICO, and underestimate the ability of state court judges to handle admittedly complex issues.¹²⁷ Concurrent jurisdiction is not incompatible with any of the federal interests embedded in RICO, but rather helps advance RICO's broad remedial purposes.¹²⁸

V. CONCLUSION

As one distinguished scholar has noted, "the dual system [of court systems] has proved amazingly workable."¹²⁹ The time-honored presumption of concurrent state court jurisdiction recognizes

¹²³ 368 U.S. 502, 508 (1961).

¹²⁴ *Chivas*, 864 F.2d at 1285.

¹²⁵ *Id.* at 1290 (Krupansky, J., dissenting).

¹²⁶ See *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982) (state courts have concurrent jurisdiction over claims under the Voting Rights Act, 42 U.S.C. § 1973(c) (1982); *Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1961) (holding that state courts have jurisdiction over the Labor Management Relations Act); see also *Brandenburg v. Seidel*, 859 F.2d 1179, 1194 (4th Cir. 1988) ("the fact that [RICO's] expansive venue and service-of-process provisions are applicable only in federal court has no significance here, for the state courts retain the authority to promulgate procedural rules for their own courts, subject only to constitutional limitations").

¹²⁷ It also appears that the fears expressed by the proponents of exclusivity are more apparent than real because any civil RICO action that is filed in a state court would be removable to federal court. See *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); 28 U.S.C. § 1441 (1982 & Supp. V 1987).

¹²⁸ See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 497, 497-98 (1985).

¹²⁹ See MOORE'S FEDERAL PRACTICE, ¶ 0.6[1], at 201 (1988).

the delicate balance between the states and national government in our federal system. Although Congress may divest the state courts of jurisdiction over federal claims, it must do so expressly or by fair implication. The RICO statute does not expressly divest the state courts of jurisdiction over RICO claims, and the legislative history contains no evidence that Congress "even thought of the issue."¹⁹⁰ Additionally, concurrent state court jurisdiction over RICO claims is not incompatible with RICO's principal interests of compensation and deterrence. The federal courts, as courts of limited jurisdiction, should not do what Congress has failed to do and arrogate unto themselves exclusive jurisdiction over RICO claims.

¹⁹⁰ See *supra* note 66 and accompanying text for a similar point about Congress's failure to include something in a statute as evidence of its intention to leave it out.