ONCE ACQUITTED, TWICE IN JEOPARDY: THE USE OF STATE CRIMES AS RICO PREDICATES

*Lily Wang**

Abstract

Since its enactment in 1970, the Racketeer Influenced and Corrupt Organizations Act (RICO) has been the target of—and survived—many constitutional challenges. While RICO passes constitutional muster as enacted, federal prosecution that uses state acquittals as predicate acts under RICO is barred by the Double Jeopardy Clause. Justice Neil Gorsuch's dissent in the recent Supreme Court case *Denezpi v. United States* sets the foundation for an assimilation exception to the same-sovereign element of the Double Jeopardy Clause analysis. The narrow *Bartkus* exception to dual sovereignty is a weak shield against the modern innovation of compound-complex offenses. Defining an assimilation exception to the dual sovereignty doctrine, thereby estopping the federal government from re-prosecuting a state acquittal, would protect the civil liberties of criminal defendants without diminishing cross-sovereign cooperation.

INTRODUCTION 1218

I. DUAL SOVEREIGNTY AND THE DOUBLE JEOPARDY CLAUSE 1219
- A. *The Modern Insufficiency of the* Bartkus *Exception* 1220
- B. *RICO's Lesser Included Offense Problem* 1225

II. FEDERAL RECOGNITION OF STATE ACQUITTALS 1226

III. DEFINING AN ASSIMILATION EXCEPTION 1232

IV. IMPLEMENTATION AND PRACTICAL EFFECTS 1235
- A. *Collateral Estoppel* 1235
- B. *The Power of the Jury* 1236
- C. *The Power of the Prosecution* 1240
- D. *No Harmless Error: Alleviation of Prejudice* 1241

CONCLUSION 1243

* J.D. 2025, University of Florida Levin College of Law. I wish to thank Professor Johnston for advising me on this Note. I also thank Professor Wolking and Professor De Sanctis for their mentorship throughout law school. I dedicate this Note to my family, past and future.

INTRODUCTION

The "pattern of racketeering activity"[1] element of the Racketeer Influenced and Corrupt Organizations Act[2] (RICO) "requires at least two acts of racketeering activity," or predicate acts, committed within the statutory period.[3] Substantive RICO violations result from the direct or indirect participation in such predicate acts,[4] while RICO conspiracy results from the act of conspiring to violate substantive RICO.[5]

There are two common, basic situations in which RICO prosecutions implicate double jeopardy. One situation arises when a defendant is prosecuted for both substantive RICO and RICO conspiracy for the same underlying conduct.[6] In 1975, the Supreme Court, relying heavily on legislative intent, held that this situation did not constitute double jeopardy.[7] Another situation arises when a defendant is prosecuted for substantive RICO and the predicate acts used to prove the "pattern of racketeering activity."[8] This case arises when a defendant faces both a federal prosecution of substantive RICO and a state prosecution of the predicate acts. As such, courts usually resolve this second situation under dual sovereignty principles.[9]

Double jeopardy issues become more complex when a defendant faces successive prosecutions for the same underlying conduct. Although overlapping charges or

1. 18 U.S.C. § 1961(5).

2. Pub. L. No. 91-452, tit. IX, 84 922, Stat. 941–48 (1970).

3. 18 U.S.C. § 1962.

4. *Id.* § 1962(c).

5. *Id.* § 1962(d). Although not the focus of this Note, the interplay between substantive RICO and RICO conspiracy raises separate double jeopardy concerns. *See, e.g.*, Jeff Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. 1961–68: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 8 (1978) ("It is common practice to indict persons for both the RICO offenses and the predicate offenses, using separate counts for each. This raises the issue of whether such a conviction violates the constitutional rule against double jeopardy or the rules against multiplicity." (footnotes omitted)).

6. U.S. SENT'G COMM'N, PRIMER ON RICO OFFENSES 9 (2023) [hereinafter RICO PRIMER].

7. Iannelli v. United States, 420 U.S. 770, 790–91 (1975) ("We think it evident that Congress intended to retain each offense as an 'independent curb' available for use in the strategy against organized crime." (quoting Gore v. United States, 357 U.S. 386, 389 (1958))).

8. RICO PRIMER, *supra* note 6.

9. *See, e.g.*, United States v. Burden, 600 F.3d 204, 228–29 (2d Cir. 2010); United States v. Pungitore, 910 F.2d 1084, 1106 (3d Cir. 1990); United States v. Farmer, 924 F.2d 647, 649 (7th Cir. 1991).

cumulative punishments may be constitutional if imposed within a single trial,[10] they are duplicative if brought over several trials. This multiplicity is exacerbated when the government seeks to retry conduct for which the defendant has been acquitted—for example, when a defendant is acquitted of the charged predicate acts in a trial for substantive RICO and the government brings a second trial for the same conduct as the object of a RICO conspiracy.[11] The dual sovereignty principle further complicates the analysis when the acquittals occurred in a state court and the federal government prosecutes the acquitted conduct as section 1961(1)(A) predicates.[12]

This Note addresses the use of state acquittals as predicate acts underlying a federal substantive RICO prosecution. Part I discusses how existing double jeopardy jurisprudence provides insufficient protections for compound-complex offenses, a relatively new legal innovation. Part II discusses the current legal landscape for the federal recognition of state acquittals. Part III proposes an assimilation exception for state crimes incorporated by reference or adoption into federal law. Finally, Part IV analyzes practical and policy concerns associated with the implementation of the assimilation exception.

I. DUAL SOVEREIGNTY AND THE DOUBLE JEOPARDY CLAUSE

The Fifth Amendment prohibits duplicative prosecutions or punishments for the same offense.[13] To determine whether two offenses are the "same," the first step is to determine whether Congress intended to allow one act to be prosecuted under both offenses.[14] When legislative intent is unclear based solely on the text and history of the statute, courts apply the *Blockburger* test,[15] under which two offenses are the "same offense" unless each offense "requires proof of a fact which the other does not."[16]

Blockburger and its progeny provide minimal guidance for complex conspiracy offenses.[17] Moreover, the *Blockburger* test

10. Missouri v. Hunter, 459 U.S. 359, 366 (1983).

11. This is the simplified version of *United States v. Zemlyansky*, 908 F.3d 1, 6 (2d Cir. 2018).

12. This is the simplified version of *Pungitore*, 910 F.2d at 1105.

13. U.S. CONST. amend. V.

14. Garrett v. United States, 471 U.S. 773, 778–79 (1985).

15. *Id.* (classifying the *Blockburger* test as a rule of statutory construction).

16. Blockburger v. United States, 284 U.S. 299, 304 (1932).

17. *See* Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 118–19 (1992) (discussing the *Blockburger* test). Although Professor Anne Bowen Poulin

does not apply across sovereigns—the Double Jeopardy Clause does not bar a prosecution brought under the law of a different sovereign.[18] It is well-established that the federal government can prosecute a defendant for conduct even if a state government has previously prosecuted the same defendant for the same conduct.[19] The dual sovereignty principle is rooted in the independent right of each sovereign to punish offenses against its own peace and dignity.[20] For double jeopardy purposes, two sovereigns are independent when they "derive their power to punish from wholly independent sources," which requires a "historical, not functional" analysis.[21] Under this framework, concurrent jurisdiction over a defendant's conduct arises only when the act "produces effects respectively within the sphere of state and federal regulation and thus violates the laws of both" or when only one sovereign may exercise jurisdiction but makes an "authoritative declaration that the paramount jurisdiction of one shall not exclude that of the other."[22]

A. *The Modern Insufficiency of the* Bartkus *Exception*

The *Bartkus* sham exception is the only major exception to the dual sovereignty doctrine in double jeopardy cases.[23] In *Bartkus v. Illinois*,[24] the Supreme Court suggested that a federal prosecution after a state acquittal could violate the Double Jeopardy Clause if the prior state prosecution was "a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution."[25] As *Bartkus* itself provided minimal guidance for the defining properties of a "sham" prosecution, lower court interpretations vary, such as

---

advocates for the now-overturned *Grady v. Corbin* totality of circumstances test, *see id.* at 119–20, her article notably contains what appears to be the earliest mention of the term "compound-complex offense," defined as a complex offense that involves predicate acts, *id.* at 96. Poulin notes that compound-complex offenses "tend[] to generate double jeopardy claims." *Id.*

18. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 77 (2016).

19. Abbate v. United States, 359 U.S. 187, 194 (1959) (citing United States v. Lanza, 260 U.S. 377, 382 (1922)).

20. *Id.*

21. *Sanchez Valle*, 579 U.S. at 68.

22. *Lanza*, 260 U.S. at 384 (quoting Southern Ry. Co. v. R.R. Comm'n Indiana, 236 U.S. 439, 445–46 (1914)).

23. United States v. Davis, 906 F.2d 829, 832 (2d Cir. 1990) ("The only legally binding exception to the dual sovereignty doctrine is a narrow one carved out by the Supreme Court in *Bartkus v. Illinois*.").

24. 359 U.S. 121 (1959).

25. *Id.* at 123–24.

requiring one sovereign to "act[] as a tool of the other,"[26] to "thoroughly dominate[] or manipulate[] the prosecutorial machinery of another,"[27] or to "pursue[] . . . a sham on behalf of the sovereign first to prosecute."[28] Although most circuits recognize the *Bartkus* exception as "good law",[29] they simultaneously limit its application: the subsequent prosecution cannot merely be a sham; it must be a deliberate domination by one sovereign of another to such an extent that "dual" sovereignty exists in name only. While the *Bartkus* exception does provide a check on outright prosecutorial misconduct, its sufficiency is limited by today's increased cooperation of both law enforcement and prosecuting authorities between and across jurisdictions.

The *Bartkus* exception can be read as just as narrow at the outset, sanctioning actual preparation by one sovereign in another sovereign's successive prosecution. In *Bartkus*, the defendant, Alfonse Bartkus, was acquitted of bank robbery in federal court and subsequently convicted under a state robbery statute.[30] Robbery is a simple offense; it requires and rests on one act or transaction.[31] The Justices disagreed about the level of cross-sovereign cooperation. The majority, led by Justice Felix Frankfurter, concluded that the state prosecution was not a sham for a federal prosecution, seemingly relying on the fact that the state and federal prosecutors were both acting within their discretion:

> The record establishes that the prosecution was undertaken by state prosecuting officials within their discretionary responsibility and on the basis of evidence that conduct contrary to the penal code of Illinois had occurred within their jurisdiction. It establishes also that federal officials acted in cooperation with state authorities, as is the

26. United States v. All Assets of G.P.S. Auto. Corp, 66 F.3d 483, 494 (2d Cir. 1995).

27. United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996).

28. United States v. Guy, 903 F.2d 1240, 1242 (9th Cir. 1990).

29. *Guzman*, 85 F.3d at 826.

30. *Bartkus*, 359 U.S. at 121–22. The statute in question was 18 U.S.C. § 2113 (bank robbery and incidental crimes). *Id.* at 122. The Court noted that the facts in the state indictment were "substantially identical to those contained in the prior federal indictment." *Id.*

31. *See* Poulin, *supra* note 17, at 96 (defining compound-complex offenses as offenses involving predicates).

> conventional practice between the two sets of prosecutors throughout the country.[32]

The majority provided no facts to support its conclusion, briefly noting that "[t]he state and federal prosecutions were separately conducted."[33] However, given the surrounding language, "separately conducted" suggests only that both sovereigns initiated their prosecutions independently. Justice William Brennan, dissenting, emphasized the state attorney's admission that federal officers "instigate[d] and guide[d] [the] state prosecution" and "actually prepared [the] case."[34] If "actually prepar[ing]" another sovereign's case does not constitute a sham prosecution, it is hard to imagine what would.

Aside from the high bar of a sham prosecution, *Bartkus* faced constitutional criticism from the outset. In a lengthy dissent, Justice Hugo Black wrote:

> If double punishment is what is feared, it hurts no less for two "Sovereigns" to inflict it than for one. If danger to the innocent is emphasized, that danger is surely no less when the power of State and Federal Governments is brought to bear on one man in two trials, than when one of these "Sovereigns" proceeds alone. In each case, inescapably, a man is forced to face danger twice for the same conduct.[35]

Justice Black's focus on the effect on the criminal defendant remains just as, if not more, relevant today. As federal laws

---

32. *Bartkus*, 359 U.S. at 123–24.

33. *Id.* at 122.

34. *Id.* at 165 (Brennan, J., dissenting). Justice Brennan also noted that both federal law enforcement and the federal trial judge were visibly displeased with the outcome of the first (federal) trial and that the judge "upbraided the jury for its verdict." *Id.*

35. *Id.* at 155 (Black, J., dissenting). Dissenting in both *Bartkus* and its sister case *Abbate v. United States*, Justice Black went a step further to argue that both state convictions and acquittals should bar federal prosecution for the same offense. *Id.* at 150. This Note does not address the context of convictions, which are more prevalent in the context of § 1962(d) RICO conspiracy. However, the use of convictions as predicates seems to be more widely accepted, especially by those who view RICO as a sentencing enhancement of sorts. *See, e.g.*, Benjamin Rolf, Note, *The Ends of Justice Revisited: How to Interpret RICO's Procedural Provision, 18 U.S.C. 1865*, 80 NOTRE DAME L. REV. 1225, 1226 (2005). In general, the concept of double punishment would seem instinctively more palatable than the concept of retrial after acquittal.

increase in number and overlap with state laws,[36] the preservation of civil liberties becomes more, not less, important. In *Bartkus*, the Court held that cooperation between federal and state authorities and prosecutors did not, alone, suggest that the state was "merely a tool" of the federal government.[37] Yet, because of the increasing overlap between state and federal laws combined with the increasing complexity of those laws, modern cross-sovereign cooperation is doubtlessly greater, both in frequency and degree, than the conventional cooperation alluded to in *Bartkus*.

Cross-sovereign cooperation has been on the rise since the enactment of RICO and the War on Drugs in the 1970s.[38] Today, cooperation across sovereigns and agencies is a valuable tool for both prosecutors and law enforcement.[39] For example, New Jersey's Violent Crime Initiative is a "collaborative, multi-agency program designed to combine the resources of New Jersey's federal, state, and local law enforcement."[40] Federal prosecutors and law enforcement officers credit the program for

---

36. Patrick McLaughlin & Liya Palagashvili, *Counting the Code: How Many Criminal Laws Has Congress Created?*, MERCATUS CTR. (Jan. 17, 2023), https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws [https://perma.cc/794N-N5UW] ("The federalization of crime has long been a concern among the legal community, which has suspected that Congress has been encroaching on matters that were traditionally left to the states."); *see also* Shima Baradaran Baughman, *Prosecution Deferred*, 77 FLA. L. REV. 1139, 1173 (2025) (commenting on the proliferation of federal criminal statutes and federal regulations accompanied by criminal provisions). According to the Mercatus Center, the number of federal crimes has increased by 1.27% per year since 1994. McLaughlin & Palagashvili, *supra*.

37. *Bartkus*, 359 U.S. at 123–24.

38. United States v. Aleman, 609 F.2d 298, 309 (7th Cir. 1979) ("Law enforcement cooperation between state and federal authorities is a welcome innovation."); Daniel C. Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 CRIME & JUST. 377, 401 (2006) ("[T]he latter part of the 1990s marked the high-water mark of a federal-state-local relationship based on violent crime enforcement . . . .").

39. *E.g.*, Dana Thiede & Lou Raguse, *14 Charged as Crackdown Against Minneapolis Gangs and Violent Crime Continues*, KARE 11 (Aug. 16, 2023, 6:19 PM), https://www.kare11.com/article/news/crime/more-charges-against-alleged-minneapolis-gang-members/89-f1225249-7cd8-4059-aaba-638f8ea65452 [https://perma.cc/8YK3-F8FJ]. Sheriff Dewanna Witt credited "the collective efforts of [Minneapolis's] local, state and federal partners" for the decrease in crime in her county. *Id.*

40. Press Release, U.S. Atty's Off. for the Dist. of New Jersey, U.S. Attorney Announces Coordinated Law Enforcement Actions to Combat Violent Organized Crime and Drug Trafficking (Oct. 26, 2022), https://www.justice.gov/usao-nj/pr/us-attorney-announces-coordinated-law-enforcement-actions-combat-violent-organized-crime [https://perma.cc/VJ8E-RJWT].

a twenty-three percent statewide decrease in shooting incidents and an uptick in narcotics arrests.[41]

Given the efficacy of cross-sovereign cooperation, there is no reason that its momentum will—or should—decline in the upcoming years. The fight against violent crime is a legitimate purpose for which cross-sovereign cooperation is a legitimate means. However, the widespread acceptance of this phenomenon renders the already narrow *Bartkus* exception nearly obsolete in practice.[42] The *Bartkus* Court might consider many cross-sovereign initiatives today to be sham prosecutions, but its failure to articulate a practical standard has led to inconsistent application.[43]

Bartkus was decided in 1959, a decade before the enactment of RICO in 1970 and the proliferation of compound-complex offenses[44] resulting from the perceived increase in the complexity of criminal behavior.[45] Unlike simple offenses, compound-complex offenses can be committed over long periods of time, such as RICO's ten-year period,[46] and the timelines of state and federal investigations and prosecutions are therefore less concrete, allowing greater opportunities to obfuscate "sham" prosecutions. The narrow and stringent *Bartkus* exception, even if sufficient for the 1950s, fails to provide a meaningful safeguard against double jeopardy today. The proliferation and federalization of complex statutes and offenses will likely continue, as will cross-sovereign cooperation between prosecuting and investigative authorities. Violent crime rose significantly during the COVID-19 pandemic, and it is unclear whether the annual decrease between 2022 and 2023

41. *Id.*

42. *See* ORGANIZED CRIME & GANG SECTION, DEPT. OF JUST., CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS 443 (6th rev. ed. 2016) [hereinafter OCGS MANUAL] (noting that every appellate court that has decided the state-crime predicate issue has resolved it in favor of the prosecution).

43. *See supra* notes 26–28 and accompanying text.

44. *See* Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL OF RTS. J. 239, 240 (1993) ("Until [1970], compound liability was a matter of common law; RICO and CCE [the Continuing Criminal Enterprise statute] were the first statutes explicitly incorporating it.").

45. *Id.* at 256–57. Professor Susan Brenner argues that a society will "embrace" compound liability if it comes to view simple liability as ineffectual. *Id.* For example, Congress believed that organized crime presented "a unique challenge to the administration of justice." *Id.* at 248–49 (quoting S. REP. NO. 1097, 90th Cong., 2d. Sess. 70 (1968)).

46. 18 U.S.C. § 1961(5).

signals a "return to pre-pandemic conditions."[47] Concurrently, the quality and accuracy of crime statistics have recently declined due to the FBI's 2021 overhaul of its National Incident-Based Reporting System, the avenue through which law enforcement agencies across the country submit crime data.[48] Therefore, by facilitating information exchange, cross-sovereign cooperation may even be necessary to keep pace with crime and to uphold justice. At the same time, however, it is necessary to preserve the civil liberties of criminal defendants.

B. *RICO's Lesser Included Offense Problem*

Whether one offense is a lesser included offense of another is largely based on legislative intent.[49] For double jeopardy purposes, a lesser included offense is the "same offense" as the greater, and a defendant may not be retried for the same incident under a lesser or greater charge.[50] This "same offense" determination is a straightforward application of the *Blockburger* test—a "lesser offense . . . requires no proof beyond that which is required for conviction of the greater."[51] However, RICO and similar complex statutes complicate the lesser included offense analysis because a violation of the statute does not require the commission of all of its enumerated predicate acts.[52] RICO itself is not merely a vehicle to confer power on the federal government to punish serious state offenses. Rather, through RICO, Congress intended to curtail the power of organized crime and its infiltration into legitimate enterprises.[53] Because RICO itself does not make new substantive crimes, it is sometimes regarded in effect as a sentencing enhancement.[54]

---

47. Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. FOR JUST. (July 12, 2022), https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime [https://perma.cc/Q843-H7G4].

48. Rachel Treisman, *Many Midterm Races Focus on Rising Crime. Here's What the Data Does and Doesn't Show*, NPR (Oct. 28, 2022, 6:14 AM), https://www.npr.org/2022/10/27/1131825858/us-crime-data-midterm-elections [https://perma.cc/7W8S-ZQBW].

49. *See* Jeffers v. United States, 432 U.S. 137, 148–49 (1977).

50. Brown v. Ohio, 432 U.S. 161, 168 (1977).

51. *Id.*

52. *See* 18 U.S.C. § 1961(5) (requiring "at least two acts" to form a pattern of racketeering activity).

53. Iannelli v. United States, 420 U.S. 770, 786 (1975).

54. *See, e.g.*, Rolf, *supra* note 35.

On the face of the statute, a section 1961(1)(A) predicate offense is not a lesser included offense of substantive RICO or RICO conspiracy because proof of the RICO offense does not require the proof of any one of its charged predicates.[55] For example, when a defendant is charged with a substantive RICO violation with the predicate state crimes of murder, extortion, and illegal gambling, the government need not prove murder if it can prove extortion and illegal gambling.[56] Therefore, murder is not a lesser included offense. However, this statutory construction does not make complete sense because the state crime is factually a lesser included offense of the substantive RICO offense—for example, the state crime of murder is a lesser included offense of murder in the aid of racketeering. Proving the greater crime necessarily proves the lesser crime; it has one extra element: that the crime be committed in the aid of racketeering. An additional consideration is that the rationale allowing successive prosecutions for choate and inchoate offenses is based on state criminal conspiracy statutes, which courts have acknowledged[57] are materially different from RICO conspiracy.[58] Therefore, under existing precedent, a RICO predicate cannot serve as a lesser included offense precluding a RICO prosecution.

II. FEDERAL RECOGNITION OF STATE ACQUITTALS

The Double Jeopardy Clause is an anomaly in the constitutional protections afforded to criminal defendants because legislative intent can eviscerate it completely.[59] Even in other areas of law, when Congress seeks to intrude on constitutional liberties, heightened scrutiny constrains the

55. *See* United States v. Esposito, 912 F.2d 60, 66–67 (3d Cir. 1990).

56. *See* United States v. Pungitore, 910 F.2d 1084, 1110–11 (3d Cir. 1990).

57. *See, e.g.*, United States v. Ruggiero*,* 754 F.2d 927, 931 (11th Cir. 1985).

58. *See* Poulin, *supra* note 17, at 144 ("In contrast, to establish a RICO violation the prosecution *must* prove a pattern of racketeering, which is defined to consist of at least two predicate offenses.").

59. *See* United States v. Haymond, 588 U.S. 634, 637, 655 (2019) (finding unconstitutional a statute that violated the right to a jury trial by imposing a mandatory minimum based on judicial factfinding); Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (holding that otherwise admissible hearsay must still be precluded if admission would violate the Confrontation Clause). The right to a jury trial supersedes legislative authority, and the right to confront witnesses supersedes judicial discretion.

extent of congressional power.[60] Although legislative intent is the foremost indicator of whether two offenses are "the same" for double jeopardy purposes,[61] it would contravene not only the Double Jeopardy Clause but also the very foundations of our Constitution to construe legislative power to such an extent as to circumvent the Clause entirely. Congress may be able to define a new crime or increase a statutory penalty,[62] but it cannot constitutionally mete out duplicative punishment based solely on perceived blameworthiness.[63] In other words, Congress cannot ignore or negate the Double Jeopardy Clause. This concern is especially relevant when a defendant has been acquitted of a charged offense. The federal government should not be permitted to use RICO for a second chance at convicting a defendant—not only because it would violate the Double Jeopardy Clause but also because it would delegitimize the state judiciary.

In *United States v. Mason*,[64] the Supreme Court held that, at least in some circumstances, a federal court must accept a lawful acquittal from a state court.[65] In *Mason*, the defendants were acquitted of murder in Colorado state court.[66] Subsequently, based on the same alleged murder, the defendants were tried under a federal conspiracy statute.[67] The Court acknowledged the significance of legislative intent, concluding that Congress, in enacting the statute, did not intend to "*require* the Federal court, *after* the defendants have been lawfully tried and acquitted as to the identical crime of murder . . . to ascertain whether the defendants committed the alleged crime against the State of the murder."[68] The Court

60. Jonathan H. Adler, *Super Deference and Heightened Scrutiny*, 74 FLA. L. REV. 267, 301–02 (2022). Professor Jonathan Adler emphasizes the importance of constitutional liberties in a heightened scrutiny balancing test, arguing that constitutional constraints on Congress's authority extend also to agencies to which Congress delegates power. *Id.*

61. Garrett v. United States, 471 U.S. 773, 778 (1985).

62. U.S. CONST. art. I, § 1.

63. *See* Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

64. 213 U.S. 115 (1909).

65. *Id.* at 123–24.

66. *Id.* at 120–21.

67. *Id.* at 119–20. The charge in question was "conspiracy to injure, oppress, threaten and intimidate certain named persons, citizens of the United States, in the free exercise and enjoyment of a right and privilege." *Id.* Notably, although far from the meaning of conspiracy in complex modern statutes such as RICO, the conspiracy in *Mason* was not conspiracy to murder (the state acquittal) but rather conspiracy to infringe on constitutional liberties, a broader offense.

68. *Id.* at 124.

further warned that, even if Congress did intend the federal court to disregard the state acquittal, "[s]uch a result should be avoided."[69] The Court's wording leaves an open question as to what would happen if Congress clearly intended a statute to permit a federal court to retry a crime against a state. Subsequent paragraphs seem to suggest that the analysis should heavily consider the "ends of justice" perpetuated by such intent[70]—in essence, a balancing test.

Moreover, it is well-established that Congress's power to enact statutes is conferred and constrained by the Constitution.[71] Legislative intent becomes relevant only if the legislation itself is indeed necessary and proper and otherwise constitutional.[72] And even if a statute is constitutional,[73] its effects must be construed to be constitutional as well.[74] Therefore, even if Congress intended RICO to allow the federal government to retry a defendant after acquittal in state court, this effect is unconstitutional and should be avoided. As in *Mason*, a retrial after a state acquittal can be avoided "without doing violence to the words of the statute."[75] Preventing such a retrial does not decrease RICO's power as a tool against organized crime. The same predicate offenses still create a pattern of racketeering; the substantive portions of the statute remain unchanged. A defendant who is convicted of a state predicate offense may still face federal penalties for that conviction.[76] The "ends of justice"[77] are yet furthered by this interpretation—it recognizes the state power essential to federalism and dual sovereignty while preserving procedural protections for criminal defendants.

By contrast, when the federal government re-prosecutes a case for the same underlying incident for which a defendant has been acquitted in a state court, the implication is that the state

---

69. *Id.* The Court found that, in this case, the result could be avoided "without doing violence to the words of the statute." *Id.*

70. *Id.*

71. *See* McCulloch v. Maryland, 17 U.S. 316, 323–24 (1819) (discussing the Necessary and Proper Clause).

72. United States v. Comstock, 560 U.S. 126, 135 (2010) ("[A] federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution." (quoting *McCulloch*, 17 U.S. at 324)).

73. While RICO has faced (and persevered over) many constitutional challenges, this Note does not challenge the constitutionality of the statute itself.

74. *See Mason*, 213 U.S. at 124.

75. *Id.*

76. *See* United States v. Pungitore, 910 F.2d 1084, 1111 (3d Cir. 1990).

77. *Mason*, 213 U.S. at 124.

court's verdict was inaccurate or illegitimate. As early as 1909, in *Mason*, the Supreme Court enshrined the notion of state verdict legitimacy in federal court:

> As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should the Federal court accept the judgment of a state court based upon a verdict of acquittal of a crime *against the State*, whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in the Federal court for an offense against the United States.[78]

As applied to RICO, judges have criticized the application of the dual sovereignty doctrine in the context of acquittals.[79] In his dissent in *United States v. Frumento*, Judge Ruggero Aldisert noted that "the defendants have previously been indicted, tried, and acquitted of the precise state crime assimilated into the federal crime by definition."[80] In *Frumento*, the defendants were acquitted in state court of bribery, extortion, and conspiracy.[81] Based on the same underlying activity, the defendants were prosecuted for substantive RICO under section 1962(c).[82] The majority based its opinion on two Supreme Court cases, *Abbate v. United States*[83] and *United States v. Lanza*,[84] both of which upheld federal prosecutions based on the same underlying facts as past state convictions.[85] The court briefly considered—but ultimately dismissed—the contention that *Mason* required a federal court to accept the judgment of a state court.[86] In doing so, the court relied on the fact that "*Mason* . . . is neither a double jeopardy nor a collateral estoppel holding. . . . *Mason* did not hold that a federal indictment predicated upon state offenses was barred by a prior

---

78. *Id.* at 125.

79. *See, e.g.*, United States v. Frumento, 563 F.2d 1083, 1099 n.6 (3d Cir. 1977) (Aldisert, J., dissenting).

80. *Id.* at 1099.

81. *Id.* at 1086 (majority opinion).

82. *Id.*

83. 359 U.S. 187 (1959).

84. 260 U.S. 377 (1922).

85. *Frumento*, 563 F.2d at 1088 n.9.

86. *Id.* at 1087.

state acquittal."[87] More tellingly, the court rejected *Mason* because it "has been cited rarely in its 68-year history."[88] However, infrequent citation does not diminish the force of precedent.[89]

The *Frumento* court's rejection of *Mason* rests on a selective misinterpretation of the Supreme Court's reasoning. Recall that in *Mason*, the defendants were acquitted of murder in Colorado state court.[90] They were subsequently accused of the same murder during the commission of a federal crime, conspiracy to interfere with voting rights of citizens.[91] Although the *Mason* opinion does not explicitly refer to estoppel, the Court emphasized that "after the defendants were acquitted of that crime . . . *as an offense against the State*, it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them."[92] The language in *Mason* is clearly an application of collateral estoppel, and the *Frumento* court declined to view it as such merely because the *Mason* Court did not write the word "estoppel." Furthermore, the *Mason* Court construed estoppel in this framework as a tool for recognizing the legitimacy of the state judiciary: "This interpretation recognizes the power of the state, by its own tribunals, to try offenses against its laws and to acquit or punish the alleged offender, as the facts may justify."[93]

Declining to disturb an acquittal by a state jury serves two important and separate constitutional goals. First, recognizing the legitimacy of a state jury's verdict and the state criminal justice system as a whole enforces the well-established doctrine of federalism and dual sovereignty, protecting individuals from abuses of power by the federal sovereign.[94] The importance of state sovereignty is rooted in the values underlying the American Revolution, during which the Founders expressed

---

87. *Id.*

88. *Id.* at 1087 n.8.

89. *See* Kimble v. Marvel Ent., 576 U.S. 446, 455 (2015) (noting that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles . . . and contributes to the actual and perceived integrity of the judicial process"); *cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 473 (2024) (Kagan, J., dissenting) (discussing overruling-through-enfeeblement).

90. United States v. Mason, 213 U.S. 115, 120–21 (1909).

91. *Id.*

92. *Id.* at 124.

93. *Id.*

94. *See, e.g.*, Bond v. United States, 564 U.S. 211, 222 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

clear intent to limit the power of the federal government.[95] When a state jury acquits an individual of a state crime, the federal government's relitigation of the same conduct as a predicate offense for a federal crime undercuts the legitimacy of the state verdict. In essence, the federal government simultaneously delegitimizes the state verdict while getting a second chance to punish the individual.

When would relitigating a state acquittal *not* call into question a state's legitimacy? The answer may be conceptualized by asking this question: is the federal government repeating the state's action anticipating a different or more favorable result? If the answer is yes, it calls into question the state's legitimacy. For example, if a defendant robs a gas station and is acquitted of battery in state court, a federal court could prosecute him for interfering with interstate commerce based on the same underlying transaction. In that hypothetical, the same conduct is used to prove a different offense—it satisfies the *Blockburger* test and does not call into question the state's legitimacy or ability to prosecute a case effectively.

Next, consider a homicide case that has multiple theories of proof. If a defendant is acquitted of felony murder, the government's prosecution for premeditated murder would not call into question the state's ability to prosecute effectively. It would not attack a state attorney's legitimacy. However, if the federal prosecutor relies on the same theory as the state, felony murder, it is effectively getting a second chance, implicitly attacking both the state's ability to prosecute the case and the legitimacy of a state jury. It is saying, "the state didn't do well enough; we can do better."

Second, granting repose to an acquitted individual goes to the heart of the Constitution's procedural protections such as the Double Jeopardy Clause—the enshrinement of civil liberties and protection against government overreach, especially in cases where vindictiveness is not just possible but rather likely. No government should be able to get a second chance to prosecute an individual for acquitted conduct, and viewing this issue as solely one of legislative intent or statutory construction sidesteps the fact that our constitutional system was designed to protect individuals from abuses of power by a

95. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

capricious government. Congress cannot circumvent the Constitution to facilitate the very type of abuse of power against which federalism is meant to protect.

III. Defining an Assimilation Exception

The recognition of functional assimilation provides a practical alternative to the strict *Bartkus* test. Justice Neil Gorsuch, joined by Justice Sonia Sotomayor and Justice Elena Kagan, argues that the assimilation of the law of one sovereign into the law of another negates the independence of the two sovereigns such that the sovereigns no longer derive their power from independent sources.[96] In *Denezpi v. United States*,[97] Merle Denezpi was convicted of assault and battery under tribal law.[98] His first trial took place in a Court of Indian Offenses (C.F.R. Court).[99] For the same incident, he was subsequently charged with aggravated sexual abuse in Indian country under the federal Major Crimes Act.[100] Importantly, Denezpi's first conviction, the tribal offense, was assimilated into federal law by classification as a federal regulatory crime.[101] In the Code's relevant part, the offense concerns "[a] person who violates the terms of *any tribal ordinance* duly enacted by the governing body of the tribe."[102] A divided Supreme Court held that the successive prosecutions did not violate the Double Jeopardy Clause because the tribal ordinance and the federal act were enacted by different sovereigns.[103]

Dissenting, Justice Gorsuch stated that "[t]he Constitution deals with substance, not shadows," emphasizing the need to "honor the Double Jeopardy Clause in substance as well as form."[104] He argued that, because the tribal ordinance had been assimilated into federal law, Denezpi's first prosecution was for a federal regulatory crime, not a tribal ordinance promulgated solely by a separate sovereign.[105] Justice Gorsuch noted that the decision to charge a defendant under two different sets of

96. *See* Denezpi v. United States, 596 U.S. 591, 610–12 (2022) (Gorsuch, J., dissenting).
97. 596 U.S. 591 (2022).
98. *Id.* at 596 (majority opinion).
99. *Id.* at 597.
100. *Id.* at 596.
101. *Id.* at 611 (Gorsuch, J., dissenting).
102. 25 C.F.R. § 11.449 (emphasis added).
103. *Denezpi*, 596 U.S. at 598–99 (majority opinion).
104. *Id.* at 614 (Gorsuch, J., dissenting).
105. *Id.* at 611.

laws does not alone satisfy the dual sovereignty doctrine.[106] Holding otherwise would open the door to allowing the federal government to "punish an individual twice for identical offenses, so long as one is proscribed by state law and the other by federal law."[107] Because Denezpi's first prosecution was for an ordinance that had been assimilated into federal law, the Double Jeopardy Clause should have barred the second prosecution.[108] And as even the majority noted, "*enactment* is what counts in determining whether the dual-sovereignty doctrine applies."[109]

Similarly, state-crime RICO predicates have been assimilated into federal law. In defining "racketeering activity," Congress incorporated by reference a number of predicate acts that are state crimes.[110] Along with the federal crimes enumerated in section 1961(1)(B)–(F), section 1961(1)(A) specifies a list of crimes "chargeable *under State law* and punishable by imprisonment for more than one year."[111] Although a section 1961(1)(A) predicate, such as murder, may affect spheres of state and federal regulation, it violates federal law only because the relevant state law was incorporated by reference into the federal statute. There is no federal penalty for murder that qualifies as a predicate act under section 1961(1)(A)—there is only the state's. Because the conduct underlying the predicate act alone is not punishable under federal law, for double jeopardy purposes, it should be considered a state offense that has been assimilated into federal law.[112]

A tribe may, through its own authority, punish the violation of a tribal ordinance,[113] even though the ordinance has been

106. *Id.* at 616–17.

107. *Id.* at 617.

108. *Id.* at 616–18. The majority discusses enactment (as opposed to enforcement) but does not respond to the assimilation argument, noting that "the assimilation question is complex, making it particularly imprudent to raise and resolve it *sua sponte*." *Id.* at 599 n.2 (majority opinion). Rather, the majority appears to treat *Bartkus* as the only double jeopardy exception for cross-sovereign prosecutions. *See id.* at 603 ("Denezpi points to only one case in which the Court dealt with an argument in the neighborhood of his.").

109. *Id.* (emphasis added).

110. 18 U.S.C. § 1961(1)(A).

111. *Id.* § 1961(1) (emphasis added).

112. *See* Karen J. Ciupak, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382, 397 n.75 (1982) (analyzing Judge Aldisert's dissent in *Frumento*).

113. United States v. Wheeler, 435 U.S. 313, 322 (1978).

assimilated into federal law.[114] However, the second prosecution in *Denezpi* was brought by the federal government, which had the power to punish the same offense only by adoption of the tribal ordinance.[115] Similarly, a state may, through its own authority, punish the violation of a state law, even where the law has been assimilated into federal law, such as through the enumeration of predicate offenses. But in a federal prosecution, the common law crimes in section 1961(1)(A)[116] are state laws and punishable by the federal government only through assimilation.[117] Therefore, just as the Double Jeopardy Clause should have barred the federal prosecution in *Denezpi*, it should bar a subsequent federal re-prosecution of section 1961(1)(A) common law predicates—at least for acquittals.

Successive prosecutions being a "danger to the innocent"[118] is a core aspect of the Double Jeopardy Clause,[119] so the Clause seemingly permits differential treatment for acquittals and convictions. Indeed, when the federal government seeks to re-prosecute a defendant for a crime for which he has already been convicted in state court, the government pursues a different state interest. In the acquittal context, the federal government gets a second bite at the apple to convict—in other words, it seeks to overturn or invalidate the state's verdict. When the government re-prosecutes a conviction, that does not imply that the federal government seeks to invalidate the verdict; rather, it seeks to affirm it. The federal government's pursuit of its own interest does not conflict with the state's enforcement of its interest. Therefore, to reconcile the *Denezpi* dissent with *Bartkus* and its progeny, the scope of the proposed assimilation exception may be limited to state acquittals.[120]

---

114. *See* United States v. Denezpi, 596 U.S. 591, 598–99 n.2 (2022).

115. *See id.* at 611 (Gorsuch, J., dissenting).

116. The enumerated common law crimes are "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, [and] dealing in a controlled substance." 18 U.S.C. § 1961(1)(A).

117. *See* John L. Gray, *Federal Jurisdiction—Common Law Crimes Against the U.S.*, 27 MARQ. L. REV. 221, 222 (1943) ("It has consistently been held that there are no common law crime against the United States.").

118. Bartkus v. Illinois, 359 U.S. 121, 155 (1959) (Black, J., dissenting).

119. *See* Green v. United States, 355 U.S. 184, 187–88 (1957) ("The underlying idea [of the Double Jeopardy Clause] . . . is that the State with all its resources and power should not be allowed . . . [to] enhance[e] the possibility that even though [an individual is] innocent he may be found guilty.").

120. *But cf. Denezpi*, 596 U.S. at 617 (Gorsuch, J., dissenting) ("[T]he Court's decision today leaves much open for the future.").

IV. IMPLEMENTATION AND PRACTICAL EFFECTS

A. *Collateral Estoppel*

The effect of considering state-crime predicates as assimilated-federal offenses is to allow collateral estoppel to bar the federal government from retrying a defendant for a crime after being acquitted under state law. When the government prosecutes a defendant, the collateral estoppel doctrine prevents the government from relitigating an issue of ultimate fact that is decided in the defendant's favor.[121] However, because collateral estoppel applies only when the same parties relitigate an issue, some courts have held that the federal government is not estopped from relitigating an issue that was decided in the defendant's favor during a *state* prosecution.[122] The proposed assimilation exception provides a straightforward framework for courts to consider the estoppel principles underlying *Mason* and Judge Aldisert's *Frumento* dissent.

However, another issue remains in the estoppel analysis: the determination of an "issue of ultimate fact."[123] In *Ashe v. Swenson*,[124] the Court expanded the civil doctrine of collateral estoppel in the context of acquittals, holding that "collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality."[125] When an acquittal is based on a general verdict, a court must examine the record of the prior proceeding to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[126] The Court emphasized that a more "technically restrictive" test would preclude estoppel based on a previous acquittal, which would be undesirable.[127]

A criminal defendant has the burden of proof to demonstrate that the issue barred by estoppel was "actually decided" in the

121. Ashe v. Swenson, 397 U.S. 436, 443 (1970).

122. *E.g.*, United States v. Brown, 604 F.2d 557, 559 (8th Cir. 1979). On its face, this holding contravenes the language in *Mason* and must be narrowly construed.

123. *Ashe*, 397 U.S. at 443 ("[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties . . . .").

124. 397 U.S. 436 (1970).

125. *Id.* at 444.

126. *Id.*

127. *Id.* at 444–46 ("For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." (internal citations omitted)).

previous prosecution.[128] When the ultimate issue is the defendant's actual innocence, the analysis nearly shifts the burden of proving his own innocence to the defendant—for a crime of which he has already been acquitted.[129] In *Dowling v. United States*,[130] however, the Court did not look at this burden shifting through a constitutional lens but rather declined to disturb the practice because it had been unanimously adopted by the circuit courts.[131]

B. *The Power of the Jury*

Because section 1961(1)(A) defines a predicate act as one "involving" a list of acts, a state-crime predicate need not *be* one of those acts but must only include it.[132] Therefore, a state racketeering statute can serve as a RICO predicate. The Second Circuit noted in *United States v. Russotti*[133] that the continuous nature of the conduct underlying RICO charges complicates the analysis for what has been actually litigated in a prior state RICO proceeding.[134] Although *Ashe* explicitly allows acquittals based on general verdicts to serve as the basis for collateral estoppel,[135] a general verdict for a compound-complex crime such as RICO does not necessarily indicate *which* issue of ultimate fact was decided—that is, which predicate or predicates the jury found insufficient. Further, circuits disagree on whether the jury must unanimously decide which, if any, predicate acts a defendant committed.[136] On one hand, the Third,[137] Fifth,[138] Seventh,[139] Ninth,[140] Tenth,[141] and

---

128. Dowling v. United States, 493 U.S. 342, 350–51 (1990).

129. *See* Paul Harper, Note, *Evidentiary Use of Prior Acquittals: When Analysis Exceeds Reality*, 24 AKRON L. REV. 199, 207 (1990).

130. 493 U.S. 342 (1990).

131. *Id.* at 350–51.

132. OCGS MANUAL, *supra* note 42, at 399 (explaining that a state statute is considered a RICO predicate by "generic designation" when the statute "identif[ies] generally the kind of activity made illegal by [RICO]").

133. 717 F.2d 27 (2d Cir. 1983).

134. *See id.* at 33–34.

135. Ashe v. Swenson, 397 U.S. 436, 444–46 (1970).

136. *See infra* notes 137–46. The First Circuit's model jury instructions, last updated in December 2023, do not refer to RICO. *See* MODEL CRIM. JURY INSTRUCTIONS, FIRST CIR., tit. 18. The Second and Sixth Circuits do not appear to have a uniform set of model charging instructions.

137. MODEL CRIM. JURY INSTRUCTIONS, THIRD CIR., 6.18.1962C-8 cmt.

138. MODEL CRIM. JURY INSTRUCTIONS, FIFTH CIR., 2.79.

139. MODEL CRIM. JURY INSTRUCTIONS, SEVENTH CIR., 1962(c).

140. MODEL CRIM. JURY INSTRUCTIONS, NINTH CIR., 18.12.

141. MODEL CRIM. JURY INSTRUCTIONS, TENTH CIR., 2.74.6.

Eleventh[142] Circuits recommend a charging instruction of jury unanimity as to which predicate acts the State has proven beyond a reasonable doubt. The Third Circuit further recommends a special post-verdict jury interrogatory to ensure actual unanimity.[143] However, the Third Circuit also notes that special interrogatories are disfavored in cases and only used after a finding of guilt, not acquittal.[144] On the other hand, the Fourth Circuit's model charging instructions are silent,[145] and the Eighth Circuit's drafters recommend but do not require such an instruction.[146]

The drafters of the Ninth Circuit's model instructions relied on *Richardson v. United States*,[147] a Continuing Criminal Enterprise (CCE) case, to support its requirement of juror unanimity for predicate acts.[148] In *Richardson*, the Supreme Court distinguished between a "series" of violations as a substantive element and a "violation" that is itself an individual element of a statute.[149] This was a test of statutory interpretation and legislative intent.[150] The Ninth Circuit, then, views RICO predicates as separate elements that must each be proven. Notably, the Court provided an alternative in *Richardson*, holding that "[i]f the statute creates a single element, a 'series,' . . . the jury need only agree that the defendant committed at least three of all the underlying crimes."[151] The "series of violations" language of the CCE statute[152] is remarkably similar to the "pattern of racketeering

142. MODEL CRIM. JURY INSTRUCTIONS, ELEVENTH CIR., O75.1.

143. MODEL CRIM. JURY INSTRUCTIONS, THIRD CIR., 6.18.1962C-8 cmt. ("To avoid this problem, the trial judge should provide special interrogatories for the jury to answer after it has agreed on a guilty verdict, to establish on which of the predicate offenses the jury relied."). The drafters also provide a sample special interrogatory template. *Id.* at 6.18.19.1962C-10.

144. MODEL CRIM. JURY INSTRUCTIONS, THIRD CIR., 6.18.1962C-10 cmt.

145. *See* MODEL CRIM. JURY INSTRUCTIONS, FOURTH CIR., 1962(c).

146. MODEL CRIM. JURY INSTRUCTIONS, EIGHTH CIR., 6.18.1962A cmt. ("The jury must be unanimous that predicate acts *had* been committed . . . . It is recommended that the instructions require the jury to be unanimous as to *which* acts have specifically been committed by the defendant." (emphasis added)). The first part of this comment seems redundant—as a substantive element of RICO, it must be proven beyond a reasonable doubt for a guilty verdict.

147. 526 U.S. 813 (1999).

148. MODEL CRIM. JURY INSTRUCTIONS, NINTH CIR., 18.12.

149. *Richardson*, 526 U.S. at 818.

150. *Id.* ("[I]f the statute makes each 'violation' a separate element, then the jury must agree unanimously about which three crimes the defendant committed.").

151. *Id.*

152. 21 U.S.C. § 848.

activity" language of RICO. The CCE statute proscribes "engag[ing] in a continuing criminal enterprise," which is satisfied by the violation of several enumerated offenses that is part of a "series of violations" committed "in concert with five or more other persons."[153] RICO proscribes "the conduct of [an] enterprise's affairs through a pattern of racketeering activity."[154] Colloquially known as the "Kingpin Statute," the CCE also targets organized crime, specifically drug trafficking.[155] Therefore, the legislative intent behind the CCE's enhanced penalties was likely similar to the intent behind RICO.

By categorizing RICO under the violation-as-substantive-element branch of the *Richardson* analysis, the Ninth Circuit implicitly rejected the alternative—that a "pattern of racketeering activity" could be a "single element." Therefore, even though RICO does not require the commission of specific predicate acts, each act proven by the prosecution becomes an element of the greater offense rather than an exchangeable unit of a "pattern" element. This treatment is similar to the felony-murder double jeopardy analysis. In *Illinois v. Vitale*,[156] the Supreme Court clarified that an element that may be satisfied in multiple ways could still bar successive prosecution of the greater offense.[157] John Vitale was convicted of a traffic offense, failing to reduce speed, and later prosecuted for involuntary manslaughter with a motor vehicle, arising out of the same underlying transaction.[158] The manslaughter statute involved "homicide by the reckless operation of a motor vehicle in a manner likely to cause death or great bodily harm."[159] Although failing to reduce speed could be used to prove the "homicide by reckless operation" element, the "homicide by reckless operation" element does not require the failure to reduce

153. 21 U.S.C. § 848(c).

154. 18 U.S.C. § 1962(c).

155. *See Continuing Criminal Enterprise — 21 U.S. Code § 848*, EISNER GORIN LLP, https://www.thefederalcriminalattorneys.com/continuing-criminal-enterprise [https://perma.cc/42GC-3G3N].

156. 447 U.S. 410 (1980).

157. *See id.* at 420–21.

158. *Id.* at 413.

159. *Id.* at 416–17 (internal quotations omitted).

speed.[160] The traffic charge was therefore not a simple lesser included offense of the manslaughter charge.[161]

Clarifying its holding in *Harris v. Oklahoma*,[162] the Court reasoned that, although "[t]he Oklahoma felony-murder statute on its face did not require proof of a robbery to establish felony murder; . . . a killing in the course of a robbery [is treated] as itself a separate statutory offense, and the robbery as a *species of lesser-included offense*."[163] This species of lesser included offense differs from a traditional lesser included offense because proof of the specific underlying felony—robbery—is not required to prove felony murder.[164] Similarly, none of RICO's predicate acts is required to establish a RICO violation.[165] These predicate acts are analogous to the *Harris* species of lesser included offense. The *Vitale* Court extends the *Brown* analysis to this species of lesser included offense, reemphasizing that "a conviction on a lesser-included offense bars subsequent trial on the greater offense."[166] In doing so, the Court held that the prosecution's theory of the case substantially affects which, if any, offenses will later be precluded by the Double Jeopardy Clause, stating, "[b]y analogy, if in the pending manslaughter prosecution [the state] *relies on* and proves a failure to slow . . . Vitale would have a substantial claim of double jeopardy."[167] This analysis differs from the elements-based *Blockburger* analysis, in which the language of the statute controls.[168] In a RICO prosecution, the state does rely on the charged predicates to prove a "pattern of racketeering activity." Because the pattern is constructed of predicates, each predicate is a single element under *Richardson*. Reliance on each predicate cannot be overstated because the majority of circuits require jury unanimity for a valid RICO conviction.[169]

160. *Id.* at 417.

161. *See id.* ("The [lower] court . . . stated that 'the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater . . . .'"). However, the failure to reduce speed was not *necessary* to the "greater" charge. *Id.* at 418.

162. 439 U.S. 970 (1978).

163. *Vitale*, 447 U.S. at 420.

164. *See id.*

165. *See* 18 U.S.C. 1962(a), (c).

166. *See Vitale*, 447 U.S. at 421.

167. *Id.* (emphasis added).

168. Blockburger v. United States, 284 U.S. 299, 304 (1932).

169. *See supra* notes 137–46 and accompanying text.

C. *The Power of the Prosecution*

In *Russotti*, the Second Circuit reasoned that in a RICO prosecution, Congress's "allowable unit of prosecution," which "determines the scope of protection afforded by a prior conviction or acquittal," was the enterprise and pattern, not the individual predicates.[170] Practically, expanding or changing the "allowable unit of prosecution" can cross—or dodge—the double jeopardy line. If a defendant commits a crime that is a RICO predicate without meeting the "pattern" or "enterprise" requirements, the unit of prosecution remains the state predicate. The federal government would have no power to punish the defendant for that state crime—this is the most basic of double jeopardy principles. However, RICO indictments, already complex by nature, are readily and enthusiastically modified to circumvent the Double Jeopardy Clause. For example, in *United States v. Zemlyansky*,[171] a federal grand jury indicted Mikhail Zemlyansky of slightly modified RICO indictments in 2013 and 2015 for overlapping underlying conduct.[172] The 2013 indictment pertained to a no-fault insurance organization, which served as the RICO enterprise, and included RICO conspiracy and eight counts mirroring the conspiracy's predicate offenses.[173] A federal jury acquitted Zemlyansky of all counts except RICO conspiracy, on which the jury was unable to reach a verdict.[174] The district court declared a mistrial on the RICO conspiracy count.[175]

In 2015, Zemlyansky was again indicted by a federal grand jury, this time on one count of RICO conspiracy and five counts mirroring the conspiracy's predicate offenses.[176] The enterprise included the no-fault insurance organization but was also expanded to cover acts pertaining to other enterprises within the meaning of RICO.[177] He was then convicted of all six counts.[178] The *Zemlyansky* case illustrates the discretionary element that arises under complex statutory schemes such as RICO, under which the elements of predicates, pattern, and

---

170. United States v. Russotti, 717 F.2d 27, 32–33 (2d Cir. 1983).

171. 908 F.3d 1 (2d Cir. 2018).

172. *Id.* at 6.

173. *Id.* at 7. Zemlyansky was charged with RICO conspiracy under § 1962(d), but the predicates are the same as those of § 1962(c) substantive RICO.

174. *Id.*

175. *Id.*

176. *Id.* at 7–8.

177. *Id.*

178. *Id.* at 8.

enterprise permutate to form the offense. The "allowable unit of prosecution" is a judicial animal born from judicial analysis of legislative intent[179] and necessarily varies by the inclinations of each court, prosecutor, and judge.

Governmental safeguards are already in place to prevent the failure of a RICO indictment for lack of valid predicates. The prevailing prosecutorial practice for drafting a RICO indictment is to include a large number of predicate offenses, and the Department of Justice's discretionary "Petite Policy" requires prior approval to bring a RICO charge that could raise cross-sovereign double jeopardy issues.[180] However, prior approval is not required if "the prior prosecution involved only a minor part of the contemplated federal charges," such as when there are "*a sufficient number of predicate offenses* to sustain the RICO charge if the previously prosecuted offenses were excluded."[181] In light of this practice, estopping the government from charging any specific predicate offense is unlikely to bar the indictment altogether. However, constitutional protections must still be preserved in every facet of the criminal justice system.

D. *No Harmless Error: Alleviation of Prejudice*

There is a clear distinction between when a prosecution is completely *barred* by Double Jeopardy and when an issue within that prosecution cannot be relitigated. For complex offenses, the distinction is more attenuated. Consider a situation in which you have been indicted on a RICO charge where the only two predicates are robbery and murder. If you were previously acquitted of the murder, it cannot be relitigated, leaving just the robbery predicate. Then, there is no longer a RICO offense and therefore no viable prosecution—but the Double Jeopardy Clause was not technically what got your indictment dismissed; statutorily, the sole predicate was insufficient for a RICO violation.

There are, of course, situations in which the estoppel bar on relitigation does not prevent a RICO prosecution—for example, if you are charged with five predicate acts, only one of which

179. United States v. Russotti, 717 F.2d 27, 32 (2d Cir. 1983) (applying an Eighth Circuit balancing test).

180. OCGS MANUAL, *supra* note 42, at 445–46 ("Pursuant to the Petite Policy, prior approval of the Assistant Attorney General for the Criminal Division is necessary to bring a RICO charge 'based on substantially the same act(s) or transaction(s)' involved in a prior *state* or federal proceeding." (emphasis added)).

181. *Id.* at 447 (emphasis added).

cannot be relitigated. However, estoppel still plays an irreplaceable role. It is well established that the cumulation of charges, as well as the charging process itself, has a prejudicial effect on the jury: courts recognize that joinder or cumulation of offenses can be prejudicial to a criminal defendant.[182] Data on trial convictions suggest that, as the number of charges increases, a defendant is more likely to be convicted on at least one charge.[183] While guilty pleas, which account for nearly ninety-seven percent of all federal convictions, may muddle the data,[184] common sense dictates that the number of charges also increases the rate of guilty pleas. Courts greatly restrict accusations not included in an indictment, such as past conduct,[185] because such accusations are prejudicial and likely to influence a jury to sidestep the merits of the case.[186]

If oral accusations during a trial are overly prejudicial, formalized accusations in an indictment are even more prejudicial. An indictment is the charging instrument and a manifestation of governmental power. The mere fact that a defendant has been charged with a crime may prejudice a jury and is a concern often raised in voir dire.[187] Each predicate in a RICO indictment is itself an accusation against the defendant. Where the statements of a government attorney can be attributed to the attorney, the indictment—a piece of paper—is readily attributable to the state itself. In other words, allowing the inclusion of a predicate in a RICO indictment, if that particular predicate cannot be relitigated because of estoppel, serves to tilt the scale illegitimately in the government's favor.

---

182. *See, e.g.*, FED. R. CRIM. P. 14(a).

183. Note, *Stacked: Where Criminal Charge Stacking Happens—and Where It Doesn't*, 136 HARV. L. REV. 1390, 1401 (2023).

184. *Id.* at 1402, n.88.

185. *See, e.g.*, FED. R. EVID. 404(b)(1).

186. CAL. L. REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE, 615 (1964) ("Character evidence . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion.").

187. *See, e.g.*, MODEL CRIM. JURY VOIR DIRE QUESTIONS 21 (N.J. CTS. 2007) ("Would the fact that the defendant has been arrested and indicted, and is here in court facing these charges, cause you to have preconceived opinions on the defendant's guilt or innocence?"); 6 MATTHEW BENDER & CO., CRIM. DEF. TECHS § 119.04(13) (2024) ("Do you believe that because the United States Government brings a criminal charge against the defendant that the defendant is probably guilty of the charge?").

CONCLUSION

RICO and other modern compound-complex offenses present unique problems for the Double Jeopardy Clause and its protections. Based on the Supreme Court's recent discussion in *Denezpi v. United States*, an assimilation exception may alleviate the prejudicial effects of lengthy RICO indictments based on state crimes for which a defendant has already been acquitted. Removing even one accusation from an indictment, even if it only slightly alleviates a juror's unconscious bias, makes the trial process just that little bit fairer.