"the agency's institutional interests in expanding its own power";[92] commentators have similarly noticed the conflict of interest.[93] Agency self-aggrandizement reaches its zenith here, for if an agency (or delegee group) is not properly constituted, officials have no power and their office is essentially worthless. Agency leaders will often view the agency's continued operation to be at least as vital as Congress does, and probably far more so. Deference would result in continuing operation beyond Congress's intent. Justice Brennan also argued that a statute limiting jurisdiction showed a Congressional intent *not* to delegate to the agency the power to administer the statute or fill in gaps;[94] if anywhere this is true, it seems to be where the law being interpreted is whether the agency has law-interpreting power at all. Under *Mead*, this ought to be a Step Zero inquiry.[95]

It may be some time before the import of *New Process Steel* is clear. Ambiguity over proper constitution of a delegee group is rare. Yet this issue could prompt reconsideration of the deference owed to agencies when they interpret jurisdictional provisions of their organic statutes that are not within their subject matter expertise. Although more *Chevron* Step Zero variants may complicate analysis, they may also prevent agency self-aggrandizement without any harm to legitimate agency action that furthers Congress's intent.

F. RICO Act

Proximate Causation. — In 1949, Congress passed the Jenkins Act[1] to help facilitate the collection of state tobacco taxes. Out-of-state vendors are not responsible for collecting state taxes themselves, but the Act requires them to file a report with the state tobacco tax administrator providing the names and addresses of state residents who have purchased their products, along with the quantities of cigarettes purchased.[2] Congress prescribed criminal penalties for failure to comply with the Act, but declined to include a provision that would give individual litigants a right of action to enforce it.[3] Last Term, in *Hemi Group, LLC v. City of New York*,[4] the Supreme Court held that New York City could not use the Racketeer Influenced and Corrupt Orga-

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92 Miss. Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354, 387 (1988) (Brennan, J., dissenting).

93 *See, e.g.*, Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 244–46, 287 (2004); Sales & Adler, *supra* note 66, at 1548–49.

94 *Moore*, 487 U.S. at 386–87.

95 *See* Sales & Adler, *supra* note 66, at 1510.

1 Pub. L. No. 363, 63 Stat. 884 (1949) (codified as amended at 15 U.S.C. §§ 375–378 (2006)), *amended by* Pub. L. No. 111-154, 124 Stat. 1087 (2010).

2 *Id.*

3 *Id.*

4 130 S. Ct. 983 (2010).

nizations Act[5] (RICO) to sue a cigarette vendor for its failure to file these Jenkins Act reports because the City could not establish that its loss of tax revenue had been proximately caused by the vendor. The Court reached this result by applying two extremely flexible legal concepts — proximate causation and city status — in a manner suggesting that unstated policy preferences may underlie its legal analysis. In so doing, the Court missed an opportunity to provide full transparency and to acknowledge the extent to which the judiciary often must rely on policy considerations in order to decide cases, like *Hemi*, where the application of legal standards is indeterminate.

New York City imposes a $1.50-per-pack tax on the possession of cigarettes.[6] Under an agreement between New York City and New York State, the State forwards the Jenkins Act reports it receives to the City, which can then track down city residents who have purchased cigarettes from out-of-state vendors and assess the local tax.[7] Hemi Group, an out-of-state online cigarette retailer whose customers include New York City residents, did not file the required report with the State.[8] The City claimed that Hemi's failure to comply with the terms of the Jenkins Act had cost the City "tens if not hundreds of millions of dollars a year" in tax revenue.[9]

The City filed a civil RICO claim against Hemi in the Southern District of New York.[10] It alleged that Hemi's sale of cigarettes to city residents without filing Jenkins Act reports constituted mail and wire fraud — predicate acts included within RICO's definition of "racketeering activity" — which would permit the City to invoke RICO's private right of action.[11] Judge Batts dismissed the complaint for fail-

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[5] 18 U.S.C. §§ 1961–1968 (2006 & Supp. III 2009).

[6] *Hemi*, 130 S. Ct. at 987 (plurality opinion); N.Y.C., N.Y., ADMIN. CODE § 11-1302(a) (2007).

[7] *Hemi*, 130 S. Ct. at 987 (plurality opinion).

[8] *Id.*

[9] *Id.* (internal quotation mark omitted). The City asserted that Hemi's failure to comply with the Jenkins Act was "part of [its] business model" because Hemi could undercut local cigarette retailers by allowing its customers to avoid the tax, City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 434 (2d Cir. 2008), and it advertised its cigarettes as "tax free," *Hemi*, 130 S. Ct. at 996 (Breyer, J., dissenting) (internal quotation marks omitted).

[10] The City also alleged common law fraud and violations of the New York State General Business Law. The district court dismissed these claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See* City of New York v. Cyco.net, Inc., 383 F. Supp. 2d 526, 561–66 (S.D.N.Y. 2005).

[11] *See* 18 U.S.C. § 1961(1) (2006 & Supp. III 2009) (defining "racketeering activity" to include wire and mail fraud); *id.* § 1962(c) (making it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity"); *id.* § 1964(c) (providing private right of action to persons injured by a violation of § 1962); *Hemi*, 130 S. Ct. at 987 (plurality opinion).

ure to state a claim.[12] She held that because Kai Gachupin, owner of Hemi, did not herself have a duty to comply with the Jenkins Act, the City could not establish that Gachupin and Hemi had formed a RICO "enterprise."[13] The City appealed, and the case was consolidated with three other New York City suits against online cigarette vendors.[14]

The Second Circuit vacated and remanded.[15] Judge Straub, writing for the majority,[16] found that certain groups of defendants — including Hemi and Gachupin — did in fact constitute valid RICO enterprises.[17] Judge Straub also rejected the defendants' proposed alternative grounds for upholding the district court's dismissal: that the City had failed to demonstrate that it suffered an injury to its "business or property . . . by reason of the alleged RICO violations."[18] Judge Straub held that the City's alleged loss of tax revenue was proximately caused by the defendants' illegal actions and that the City therefore had standing to bring its claim.[19] In doing so, he distinguished the facts of Hemi's case from two decisions in which the Supreme Court had found that proximate causation had not been established: *Holmes v. Securities Investor Protection Corp.*[20] and *Anza v. Ideal Steel Supply Corp.*[21] In *Holmes*, the Court rejected a corporation's RICO claim against an individual who had participated in a scheme to manipulate stocks — preventing two broker-dealers from compensating their customers and thereby triggering the corporation's obligation to reimburse those customers.[22] In *Anza*, the Court held that a steel supplier could not establish proximate causation in its RICO claim against competitors that defrauded the New York State tax authority and used the proceeds from the fraud to offer lower prices and attract customers away from the plaintiff.[23] Judge Straub

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[12] *See* City of New York v. Nexicon, Inc., No. 03 CV 383 (DAB), 2006 U.S. Dist. LEXIS 10295, at *31 (S.D.N.Y. Mar. 13, 2006).

[13] *See id.* at *25–26. Consistent with § 1962(c)'s language condemning racketeering activity conducted by a "person employed by . . . [an] enterprise," 18 U.S.C. § 1962(c), for RICO liability to be imposed, a RICO "person" must commit the RICO predicate acts, and "the enterprise as alleged must be distinct from the person conducting the affairs of the enterprise." *Nexicon, Inc.*, 2006 U.S. Dist. LEXIS 10295, at *20 (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001)).

[14] *Smokes-Spirits.com*, 541 F.3d at 432.

[15] *Id.*

[16] Judge Straub was joined by then-Judge Sotomayor.

[17] *Smokes-Spirits.com*, 541 F.3d at 447–48 (reasoning that the RICO "person" and "enterprise" need only be "legally, and not necessarily actually, distinct" (citing *Cedric Kushner Promotions*, 533 U.S. at 163)).

[18] *Id.* at 439 (quoting 18 U.S.C. § 1964(c)) (internal quotation marks omitted).

[19] *Id.* at 441.

[20] 503 U.S. 258 (1992).

[21] 547 U.S. 451 (2006).

[22] *Holmes*, 503 U.S. at 261.

[23] *Anza*, 547 U.S. at 458–59.

reasoned that whereas the harm suffered by the plaintiffs in those cases was "derivative" and "attenuated," here the City's injury was "direct."[24] Judge Winter dissented with respect to the majority's finding that the City's RICO claim could proceed. Emphasizing that the "City was at best an expectant gratuitous donee of information from the State," he described as "unsustainable" the contention that the harm suffered by New York City was any less "attenuated" from the defendant's conduct than that suffered by the plaintiff in *Anza*.[25]

The Supreme Court reversed. Chief Justice Roberts, writing for the plurality,[26] held that the City could not show that its loss of revenue had "c[o]me about 'by reason of' the allegedly fraudulent conduct."[27] In finding that the proximate causation requirement had not been satisfied, Chief Justice Roberts focused on the directness of the link between the defendant's actions and the City's harm. Because "[p]roximate cause for RICO purposes . . . should be evaluated in light of its common-law foundations," any "link that is 'too remote,' 'purely contingent,' or 'indirec[t]' is insufficient."[28] Chief Justice Roberts rejected the "foreseeability" approach to proximate causation advocated by the dissent, observing that the Court's prior RICO decisions, particularly *Anza*, had not embraced this type of analysis, but had instead adopted the "directness" test.[29]

In this case, the chain of events leading from Hemi's action to the City's injury was simply too extended for any harm to be considered "direct." Chief Justice Roberts noted that while "[t]he general tendency of the law . . . is not to go beyond the first step,"[30] the City's "theory of causation requires [the Court] to move well beyond the first step."[31] In fact, the City's claim was even more "attenuated" than that rejected in *Anza*, because the middle links in the chain involved "separate actions carried out by separate parties."[32] Emphasizing the role played by a third party (the State) and a fourth party (the taxpayer), Chief Justice Roberts observed that "Hemi's obligation was to file the Jen-

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[24] *Smokes-Spirits.com*, 541 F.3d at 441.

[25] *Id.* at 460 (Winter, J., dissenting in part and concurring in part).

[26] Chief Justice Roberts was joined in full by Justices Scalia, Thomas, and Alito, and in part by Justice Ginsburg. Justice Sotomayor recused herself.

[27] *Hemi*, 130 S. Ct. at 988 (plurality opinion) (quoting 18 U.S.C. § 1964(c) (2006 & Supp. III 2009)). Because the City could not demonstrate that its injury was proximately caused by the defendant, the Court did not address the question of whether lost tax revenue constituted RICO "business or property." *Id.*

[28] *Id.* at 989 (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 271, 274 (1992)) (second alteration in original).

[29] *Id.* at 991 (citing Anza v. Ideal Steel Supply Co., 547 U.S. 451, 470 (2006) (Thomas, J., concurring in part and dissenting in part)).

[30] *Id.* at 989 (quoting *Holmes*, 503 U.S. at 271–72) (internal quotation marks omitted).

[31] *Id.*

[32] *Id.* at 990 (emphasis omitted).

kins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi."[33] Supporting this holding was the fact that there was another plaintiff that could have attempted to bring this claim: the State of New York. The State also imposed a cigarette tax ($2.75 per pack), and thus would have the incentive to sue for lost revenue.[34] While Chief Justice Roberts declined to say whether the State could successfully bring such a RICO action, he observed it was "certainly . . . better situated" to do so.[35]

The Court went on to rebuff a series of arguments offered by the City. The City asserted that Hemi's violation was not simply the failure to file Jenkins Act reports, but a "systematic scheme to defraud the City of tax revenue."[36] Chief Justice Roberts rejected this alternative characterization as semantic, refusing to allow the City to "escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct."[37] Characterizing the injury as the "lost 'opportunity to tax' rather than 'lost tax revenue'" was likewise of no avail: even assuming there were some sort of "substantive distinction" between these two descriptions, "Hemi's filing obligation would still be to the State, and any harm to the City would still be caused directly by the customers' failure to pay their taxes."[38] Nor did the recent decision in *Bridge v. Phoenix Bond & Indemnity Co.*[39] weigh in the City's favor. In *Bridge*, the Court had unanimously held that the plaintiffs — bidders in a county land auction — could establish proximate causation in a RICO suit against competing bidders that had allegedly defrauded the county, leading the county to allocate the defendants a disproportionate share of parcels.[40] According to Chief Justice Roberts, however, the theory of causation in that case was "straightforward" because only the plaintiffs were harmed by the defendants' fraud, whereas in this case the City's causal theory "rest[ed] on the independent actions of third and even fourth parties."[41]

Justice Ginsburg filed a brief opinion concurring in part and concurring in the judgment. She noted that the Commerce Clause prevented the City from collecting taxes directly from an out-of-state seller like Hemi, and that the Jenkins Act itself did not provide the City

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 991 (quoting Brief for Respondent at 42, *Hemi*, 130 S. Ct. 983 (No. 08-969), 2009 WL 2993910, at *42) (internal quotation marks omitted).

[37] *Id.*

[38] *Id.* at 992–93.

[39] 128 S. Ct. 2131 (2008).

[40] *Id.* at 2135–36, 2144.

[41] *Hemi*, 130 S. Ct. at 992 (plurality opinion).

with a cause of action.[42] She was unwilling to join the "broader range of the Court's proximate cause analysis."[43] She joined the plurality's judgment, however, because she was reluctant to allow the City to use RICO to "end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the 'quite limited remedies' Congress has provided for violations of the Jenkins Act."[44]

Justice Breyer dissented.[45] He argued that the plurality had erred in focusing exclusively on "directness" in order to determine whether proximate causation had been established. "Directness" had previously been used by courts not to limit the scope of potential liability, but to expand it beyond what was foreseeable; thus, even under the directness theory, "there is liability for both 'all "direct" (or "directly traceable") consequences and those indirect consequences that are foreseeable.'"[46] Here, the loss of City revenue was not just the foreseeable result of Hemi's action, it was the "intended" result.[47] The presence of a foreseeable intervening actor, such as the resident taxpayer, did not break the causal chain, nor did the fact that the City received the Jenkins Act reports from the State. Given the agreement between the State and City, the State was nothing more than "a conduit . . . roughly analogous to a postal employee."[48] Moreover, the City's revenue loss was specifically within the "set of risks that Congress sought to prevent" in passing the Jenkins Act;[49] the *Holmes* and *Anza* plaintiffs, in contrast, alleged harms "neither squarely within the class of harms at which the relevant statutes were directed, nor of a kind that typical violators would intend or even foresee."[50]

Hemi demonstrates the extent to which legal analysis can often be ultimately indeterminate. Under either the directness or the foreseeability standard, the Court could have justifiably found the presence or absence of proximate cause in this case. The indeterminacy of the proximate cause analysis thus left substantial room to decide the case on other, perhaps unstated, grounds. The potential for judicial manipulation — and results-oriented legal analysis — was multiplied in *He-*

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[42] *Id.* at 994 (Ginsburg, J., concurring in part and concurring in the judgment). The City had "effectively admit[ted]" that it had no cause of action under the Jenkins Act by failing to even plead such a claim. *Id.*

[43] *Id.* at 995.

[44] *Id.* (quoting *id.* at 993 n.2 (plurality opinion)).

[45] Justice Breyer's dissent was joined by Justices Stevens and Kennedy.

[46] *Hemi*, 130 S. Ct. at 998 (Breyer, J., dissenting) (emphasis omitted) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 42, at 273 (5th ed. 1984)).

[47] *Id.* at 997.

[48] *Id.* at 998.

[49] *Id.* at 997–98.

[50] *Id.* at 1000. Having determined that the City had established proximate causation, Justice Breyer went on to answer the question of whether its tax revenue loss constituted RICO "business or property" in the affirmative. *Id.* at 1000–01.

mi by a second ambiguous legal concept: the status of the city, and its relationship with the state, under federal law. Because the indeterminacy of proximate cause analysis was layered on top of an indefinite conception of the state-city relationship, there is good reason to suspect that the Court's ultimate holding was influenced by underlying questions of policy that went beyond its discussion of the remoteness of Hemi's actions to New York City's injury. Only Justice Ginsburg's concurrence provides full transparency, quite appropriately recognizing the extent to which policy considerations may often be a factor in a case such as this one. When such considerations do play a role in resolving indeterminate legal questions, the Court would do well to follow Justice Ginsburg's lead and more explicitly acknowledge them.

While the plurality and the dissent take conflicting positions with regard to how proximate causation should be assessed — with the plurality considering the number of steps between the defendant's action and the resultant harm to the plaintiff, and the dissent considering the foreseeability of the defendant's actions causing harm to the plaintiff[51] — it is not clear that either approach convincingly leads to the conclusions that the plurality and dissent reach in this case. One might quite reasonably argue that one standard is preferable to the other as a policy matter.[52] But regardless of the standard applied, causation is a legal concept that a court can easily manipulate in order to achieve a particular outcome.[53] A "directness" standard provides definitive legal conclusions only if there is a metric for assessing the "directness" of a causal chain. The plurality opinion provides the illusion of utilizing some sort of definitive metric when it notes the general unwillingness of courts to "go beyond the first step."[54] But the Court has certainly demonstrated its willingness to go more than one step in RICO suits.[55] Even if the Court were to definitively establish a maximum number of intervening steps in a causal chain after which it could not be said that one actor had proximately caused harm to another, the ultimate finding of causation would still turn on the way

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[51] *Compare id.* at 989 (plurality opinion), *with id.* at 998 (Breyer, J., dissenting).

[52] *Compare, e.g.*, Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 105 (N.Y. 1928) (Andrews, J., dissenting) (arguing for a directness standard because "[i]n fairness [the defendant] should make good every injury flowing from his negligence"), *with, e.g.*, Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 81 (1975) ("[I]n terms of collective deterrence the argument for a foreseeability requirement excluding many causally linked actions from liability is very strong.").

[53] *See* Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2142 (2008) ("Proximate cause . . . is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.'" (quoting Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 272 n.20 (1992))).

[54] *Hemi*, 130 S. Ct. at 989 (plurality opinion) (quoting *Holmes*, 503 U.S. at 271) (internal quotation mark omitted).

[55] *See, e.g.*, *Bridge*, 128 S. Ct. at 2144 (holding that plaintiffs could recover from bidders that had defrauded the county, not plaintiffs, directly).

in which the causal chain was described. In *Hemi*, one might describe two links in the chain, as the City suggests;[56] three, as the plurality does;[57] or indefinitely more if, for example, one were willing to count separately each individual through whom the Jenkins Act report would have transferred before reaching the hands of the particular tax collector assessing the City's tax on each cigarette-purchasing resident. The dissent's "foreseeability" standard does not, however, fare any better in terms of generating definitive legal conclusions. Because of the "multiple-description problem" — the fact that "there are many equally accurate ways to describe any particular" event — an injury can be rendered more or less foreseeable depending on the level of generality at which one describes it.[58]

The indeterminacy of the Court's causation analysis is exacerbated by its use of an equally ambiguous, although somewhat more subtle, legal concept: the relationship between state and city.[59] In describing the causal chain linking Hemi to the City, Chief Justice Roberts emphasized that the State and the City are distinct entities: the harm caused the City is rendered less direct by the fact that the Jenkins Act requires disclosure to the State, and the City only gets its information secondhand.[60] He even went so far as to suggest that were the State to bring this suit against Hemi in order to collect its lost cigarette tax revenues, it might prevail.[61] Treating the State and the City as separate entities in this respect might seem to flow straightforwardly from the fact that the Jenkins Act speaks only of the "state," and makes no reference to local units of government.[62] That they entered into an agreement regarding the transferal of Jenkins Act information suggests that both the City and State of New York likewise saw themselves as

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[56] *Hemi*, 130 S. Ct. at 991 (plurality opinion).

[57] *Id.* at 990.

[58] Michael S. Moore, *Foreseeing Harm Opaquely*, *in* ACTION AND VALUE IN CRIMINAL LAW 125, 126–27 (Stephen Shute et al. eds., 1993).

[59] *See generally* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83. Professor Joan Williams argues that "courts and commentators have been able to redefine city status without the textual constraints that limit reformulations of the status of the state and federal governments," allowing them to incorporate "their attitudes toward governmental power (inseparable from their political beliefs) into municipal law." *Id.* at 85–86. She focuses in particular on the Burger Court's decisions in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which rejected an equal protection challenge to Texas's school financing system, and *Milliken v. Bradley*, 418 U.S. 717 (1974), which overturned a federal court's school desegregation decree. Both are cases in which the language of local sovereignty was used to reach decisions consistent with a conservative agenda. *See* Williams, *supra*, at 107–11.

[60] *See Hemi*, 130 S. Ct. at 990 (plurality opinion).

[61] *See id.*

[62] *See* Jenkins Act, Pub. L. No. 363, 63 Stat. 884 (1949) (codified as amended at 15 U.S.C. §§ 375–378 (2006)), *amended by* Pub. L. No. 111-154, 124 Stat. 1087 (2010).

distinct actors.[63] But the city has long held an uncertain place in American law. Sometimes it is conceived of as a "creature of the state" — a mere subdivision of an amorphous government entity[64] — while at other times it is seen as a distinct entity.[65] Neither the use of language referring only to the "state," nor the understanding of the state and city themselves, is necessarily determinative: quite often a provision of federal law referring to the "state" is understood to encompass local as well as state governments,[66] and a city's claim that it is an independent sovereign entity is ignored.[67] The Court might well have considered New York City and State to be one actor with respect to the loss of the Jenkins Act reports, seeing the State, as Justice Breyer characterized it, as merely "a conduit . . . roughly analogous to a postal employee."[68] Saying there is a causal "step" when information is transferred from the State to the City would then be as absurd as describing an exchange between separate agencies within the same level of government — or between employees within the same agency — as rendering causation more "remote."

The combination of these two ambiguous legal concepts in *Hemi* suggests that the Court was effectively free to choose in whose favor it would hold, and that it did so based on unstated preferences. Although it is possible that the Court saw its holding to follow unerringly from its application of legal standards to the facts of the case, both proximate cause analysis and the manipulation of city status can be

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[63] *See Hemi*, 130 S. Ct. at 987 (plurality opinion).

[64] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 575 (1964) ("[S]ubdivisions of States — counties, cities, or whatever — never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State . . . ."); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.").

[65] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 623 (1996) (holding that Colorado state constitutional amendment banning legal protection of homosexuals as a class at all levels of government was unconstitutional); *id.* at 639 (Scalia, J., dissenting) (characterizing the majority opinion as striking down the law because it impermissibly required this group to seek "recourse to a more general and hence more difficult level of political decisionmaking" — or, in other words, improperly denied recourse to local government); Milliken v. Bradley, 418 U.S. 717, 741 (1974) (emphasizing the importance of "local autonomy," and noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools"); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 578 (1999) (arguing that the Court has suggested "there is a distinction of constitutional significance between states and their local governments").

[66] The most obvious example is the Fourteenth Amendment's "no state shall" language. U.S. CONST. amend. XIV, § 1; *see, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that the city's affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment).

[67] *See, e.g.*, *Hunter*, 207 U.S. at 178–79 (rejecting the city of Allegheny's attempt to prevent its annexation by Pittsburgh).

[68] *Hemi*, 130 S. Ct. at 998 (Breyer, J., dissenting).

understood as legal tools employed to generate desired results in a given case.[69] To the extent that proximate causation and city status were used in this way in *Hemi*, what were the desired results? The likely answer is that the plurality saw a need to limit the extent to which RICO can be used as a catchall federal cause of action where Congress has not otherwise expressly provided private litigants with standing to sue. Chief Justice Roberts's opinion contains hints of such a policy justification,[70] one that is embraced more fully in Justice Ginsburg's concurrence.[71] The suggestion that in the same situation a state might have a valid RICO claim[72] could also lead one to suspect that the Court sought to undermine the powers of local governments more generally.[73] Alternatively, one might surmise that the plurality's decision was motivated by a general aversion to government taxation of the private sector. Speculation is required because the Court declined to overtly set forth its motivations for reaching the result that it did.

The dissent may, of course, have been influenced by underlying policy considerations to the same extent as the plurality. Its opinion is only marginally less opaque. In finding that the City's loss of tax revenue constituted RICO "business or property," Justice Breyer suggested that finding liability here need not turn RICO into a "tax collection statute,"[74] but did not otherwise reveal any underlying purpose for concluding that Hemi had proximately caused the City's injury. Likely, the dissent saw its holding as being faithful to the policies underlying the Jenkins Act. Other possible motivations are the inverse of those that potentially influenced the plurality — perhaps the dissent sought to expand the powers of local government, or the ability of government to tax more generally.

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[69] *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3052 (2010) (Scalia, J., concurring) ("Indeterminacy means opportunity for courts to impose whatever rule they like . . . ."); Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."); Williams, *supra* note 59, at 86 ("[T]he history of cities' legal status is a startlingly pure example of politics as black letter law.").

[70] *See Hemi*, 130 S. Ct. at 993 n.2 (plurality opinion) (observing that the dissent's position "poses the troubling specter of turning RICO into a tax collection statute"); *id.* at 994 (opining that the case "is about imposing [RICO] liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them").

[71] *See id.* at 995 (Ginsburg, J., concurring in part and concurring in the judgment).

[72] *See id.* at 990 (plurality opinion).

[73] *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059–60 (1980) ("[O]ur highly urbanized country has chosen to have powerless cities, and . . . this choice has largely been made through legal doctrine.").

[74] *Hemi*, 130 S. Ct. at 1000 (Breyer, J., dissenting). Justice Breyer suggested that liability could be limited to cases such as this, where there was "an extensive pattern of fraudulent conduct, large revenue losses, and many different unrelated potential taxpayers." *Id.* at 1001.

When *Hemi* is understood in this light, Justice Ginsburg's concurrence emerges as the most laudable of the three opinions issued by the Court. Refusing to engage in the exercise of defining proximate causation, Justice Ginsburg expressly stated her reasons for dismissing the City's claim: she was reluctant to allow the City — an entity that, as a first matter, could not constitutionally impose a tax on out-of-state sellers like Hemi — to recover damages for a violation of an Act in which Congress declined to include a private right of action.[75] In so doing, she provided a measure of transparency. One might argue, of course, that allowing the judiciary to make policy judgments in lieu of strict legal analysis undermines the rule of law and has antidemocratic implications.[76] But while the Court might attempt to define proximate causation and the state-city relationship in a way that provides less interpretive flexibility, such definitions have proven elusive for generations of jurists. Some legal questions may always be indeterminate. In such cases, courts can and should rely on policy considerations. When they do so, however, they need not mask their thought process, but should, as Justice Ginsburg did in *Hemi*, lay bare their reasons for holding as they do.[77] Such transparency increases the legitimacy of judicial decisions made in areas "not amenable to bright-line rules."[78]

G. Sherman Act

Quick Look Rule of Reason. — Section 1 of the Sherman Antitrust Act famously makes illegal any "contract, combination . . . or conspiracy, in restraint of trade,"[1] a prohibition whose scope has been debated for well over a century.[2] Because a flat prohibition of contracts that restrain trade would outlaw nearly every business agreement, the Supreme Court has created a narrow category of conduct that is per se illegal and has held that all other contracts and conspiracies in restraint of trade are subject to the "rule of reason."[3] This more permis-

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[75] *See id.* at 995 (Ginsburg, J., concurring in part and concurring in the judgment).

[76] *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[77] *Cf.* McDonald v. City of Chicago, 130 S. Ct. 3020, 3118 (2010) (Stevens, J., dissenting) (advocating an approach in which "the judge's cards are laid on the table for all to see, and to critique"). *But cf. id.* at 3058 (Scalia, J., concurring) ("In a vibrant democracy, usurpation should have to be accomplished in the dark.").

[78] Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008).

[1] 15 U.S.C. § 1 (2006).

[2] *See, e.g.*, Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672–82 (1991) (describing the conflict between the broad scope of the procompetitive Sherman Act section 1 and the anticompetitive effects of state and local regulations).

[3] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) ("[T]he construction which we have deduced from the history of the act and the analysis of its text is . . . that in every case where it is claimed that an act or acts are in violation of the [antitrust] statute the rule of reason,