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NOTE

"Mother of Mercy—Is This The End of Rico?"—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “Pattern”

Arthur Liman [Michael Milken’s defense lawyer] called the Racketeer Influenced and Corrupt Organizations (RICO) law “vague” and said prosecutors use of it reminded him of “an earlier era in which a sheriff could arrest almost anyone he didn’t like” on vagrancy charges . . . The way RICO presently is enforced, “there probably isn’t an investment banking firm or a securities trader that is not a felon,” Liman said.

—The Federalist Society

[I]f ever there were a case outside the organized crime area that seemed appropriate for RICO prosecution, it is the case against Milken and Drexel . . . Milken built . . . “the brass-knuckles, threatening, market-manipulating Cosa Nostra of the securities world.”

—Connie Bruck, The Predators’ Ball

I. Introduction: RICO Comes to Wall Street:
“Well, Rico, business good?”

During the spring and summer of 1989 RICO struck with a fury, sweeping the headlines of most major business publications. First, Michael Milken, junkbond king-pin for the investment firm Drexel Burnham Lambert, was indicted on ninety-eight counts of federal racketeering which sought $1.85 billion in forfeitures. Mr. Milken later pleaded guilty to six lesser felonies and agreed to pay a record $600 million in fines and restitution. Simultaneously, Drexel was negotiating its RICO charges.

1 This famous last line of the movie Little Caesar was uttered by the principal character Rico—played by Edward G. Robinson—at his death. LITTLE CAESAR 174 (G. Peary ed. 1981) (Screen play by Francis Edwards Faragoh, from the novel by W.R. Burnett) [hereinafter LITTLE CAESAR]. The 1931 Warner Bros. movie firmly etched the Edward G. Robinson caricature into the minds of Depression America as the ultimate gangster. Indeed, Jack Warner suggested in his autobiography that he made the movie because he thought the Rico character “was a thinly disguised portrait of Al Capone.” J. WARNER & D. JENNING, MY FIRST HUNDRED YEARS IN HOLLYWOOD 199 (1964). Several commentators have speculated that RICO’s title was derived from the Edward G. Robinson character. See, e.g., Blakey, The RICO Civil Fraud Action In Context: Reflections On Bennett v. Berg, 58 NOTRE DAME L. REV. 237 n.3 (1982). As noted therein, amid all the speculation, Professor Blakey “who had a major role in drafting the statute . . . will neither admit nor deny that the title was [so] constructed.” The Legal Times, Oct. 8, 1979, at 32, col. 1.


4 LITTLE CAESAR, supra note 1, at 120.

5 See N.Y. Times, April 25, 1990, at A1, col. 4. The Milken saga needs no in-depth analysis; droves of Wall Street lawyers are now entertained with the project, even following Milken’s guilty plea to six felonies. For an interesting chronology of Milken’s rise and fall, see generally C. BRUCK, supra note 3. See United States v. Milken, S.D.N.Y., No. 89 Cr. 41 [KBW] for the actual indictment.
with the federal government and eventually settled by agreeing to pay $650 million in fines. Second, one of Milken's associates at Drexel and five members of Princeton/Newport Partners Ltd. were convicted of twelve counts of federal racketeering, forced to disgorge themselves of $1.5 million, and were sentenced to three to six months in prison. Third, a two-year investigation of the Chicago Mercantile Exchange and Chicago Board of Trade culminated in the indictment of forty-six traders, eighteen of them on substantive federal racketeering charges.

The original allegations included one count of running a racketeering conspiracy, one count of participating in a racketeering enterprise, 55 counts of mail and wire fraud, 11 counts of fraud in the sale of securities, 20 counts of fraud in the purchase and sale of securities, three counts of fraud in connection with a tender offer, six counts of filing false statements with the SEC, and one count of assisting in the preparation of a false tax return. The racketeering charges threatened 40 years of imprisonment and $500,000 in fines. The 96 other counts theoretically could have amounted to 480 years in prison and $24 million in fines. The government could also have sought more than $11 billion in forfeitures and fines if the racketeering charges are sustained. The stakes were large. It is little wonder that Milken pleaded guilty rather than stand trial.


7 James Sutton Regan, a managing partner, Charles M. Zarecki, Jack Z. Rabinowitz and Paul Berkman, all general partners, and Steven Barry Smotrich, the controller, as well as Bruce Lee Newberg, the former Drexel trader named in the Milken indictment, were convicted of substantive RICO violations stemming from their scheme to create fraudulent tax losses. The scheme involved "parking" of stock, aimed chiefly at creating $13 million in illegal tax losses. 1989 Civ. RICO Lit. Rep. (Andrews) 4945 (August). Securities "parking" involves selling a security to another party with an agreement to repurchase it. This "parking" is illegal to the extent it is designed to conceal ownership of the security to generate tax losses, mount a takeover attempt, or similarly avoid federal law reporting requirements. "The case has been widely viewed as the most significant to be tried since the Government began its investigation of crime on Wall Street after the fall of Ivan F. Boesky." N.Y. Times, Aug. 1, 1989, at A26, col. 2. Critics of the Princeton/Newport conviction have argued that, "RICO means they can win convictions without bothering to prove any underlying crime." Crovitz, RICO Needs No Stinkin' Badges, Wall St. J., Oct. 4, 1989, at A30, col. 3. Regardless of the justice meted, such convictions should not reoccur. "[T]he Justice Department has issued new guidelines to prevent any such prosecution ever again . . . . The memo tells federal prosecutors not to try another Princeton/Newport by bringing RICO or mail fraud charges based on alleged tax violations." Id. Although not binding, such guidelines appear to be more restrictive now that Mr. Giuliani has left the U.S. Attorney's office in Manhattan.

8 On August 2, 1989, a federal grand jury in Chicago returned indictments against 46 traders at the Chicago Board of Trade and the Chicago Mercantile Exchange on charges that they systemically cheated their customers. See United States v. Dempsey, N.D. Ill., Nos. 89 CR 666, 89 CR 667, 89 CR 668, and 89 CR 669. The traders worked in four separate pits: the U.S. Treasury bond pit and the soybean pits at the CBOT, and the Japanese Yen and Swiss Franc pits at the MERC. Former U.S. Attorney Anton Valukas said, "What we are talking about here are hundreds and thousands of trades in which fraud was perpetrated and losses incurred by those customers because of the scheme." 1989 Civ. RICO Lit. Rep. (Andrews) 5027 (August). As of press time at least 20 traders had pleaded guilty to federal crimes. Two traders pleaded guilty to substantive RICO charges. N.Y. Times, Aug. 29, 1990, at C16, col. 5. In the first of three trials stemming from the government's investigation of futures traders, two members of the Chicago Mercantile Exchange were convicted of cheating customers (while a third was acquitted). Dozens of other criminal charges against the traders resulted in a hung jury, however. N.Y. Times, Jul. 10, 1990, at D1, col. 6.

9 Not all the press has been over-critical of RICO. See, e.g., Newkirk, No Way To Ride Out Hurricane RICO, Chicago Trib., Aug. 6, 1989, § 7, at 3, col. 1 ("The exchanges can use Hurricane RICO as a tremendous opportunity for reform, to demonstrate to the business and financial world that they will act decisively to find and to punish corruption wherever it exists. With this attitude, they have a good chance of keeping the futures market here and making them the strongest, cleanest and most efficient in the world.").
Street and LaSalle Street seemed overrun with RICO allegations. Was "white-collar" America mired in a pool of corruption and unmitigated greed, or was the RICO net uncontrollably broad?

In the midst of this uproar, the Supreme Court had an opportunity to circumscribe the scope of RICO. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, the Court unanimously rejected the offering, choosing instead to invalidate the Eighth Circuit's "multiple scheme" requirement for RICO "pattern." RICO's scope, and thus RICO's "pattern," may best be understood by beginning with Justice Brennan's majority opinion in *H.J. Inc.*


In *H.J. Inc.* several Northwestern Bell officers and employees allegedly bribed members of the Minnesota Public Utilities Corporation (MPUC) over a six year period in order to obtain higher phone billing rates from their customers. This bribery formed the predicate acts necessary to allege a "pattern of racketeering activity under section 1961(5)." This pattern formed the basis of allegations under sections 1962(a), (b), (c) and (d). The district court dismissed the case for failure to state a claim. This disposition was consistent with the controlling pattern case in the Eighth Circuit, *Superior Oil Co. v. Fulmer*, which required the allegation of "multiple illegal schemes." The Eighth Circuit upheld the lower court decision in *H.J. Inc.* based on this "multiple schemes" requirement for pattern allegations. As the Supreme Court noted, the vast majority of circuits had rejected this "multiple schemes" requirement producing a split among the circuits. On this basis the

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12 See, e.g., Rakoff, *Three Unlikely Cures for Bad Breadth*, 10 *RICO L. REP.* 217 (1989) ("[U]ntil some lower court adopts Justice Scalia's suggestion that RICO is unconstitutionally vague . . . the great-bellied monster of civil RICO will continue to roam the land, gobbling all in sight."). The Supreme Court used the metaphor of the "net" as applied to RICO in *Fort Wayne Books v. Indiana*, 109 S. Ct. 916, 937 n.24 (1989) ("RICO casts wide nets") citing *United States v. Elliot*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978) ("The federal RICO net is woven tightly to trap even the smallest fish.").


14 Justice Brennan's majority opinion was joined by Justices Marshall, Stevens, White and Blackmun.


17 109 S. Ct. at 2898.

18 785 F.2d 252 (8th Cir. 1986).

19 109 S. Ct. at 2898 (citing 829 F.2d 648, 650 (8th Cir. 1987)).

20 See Roeder v. Alpha Indus., Inc., 841 F.2d 22, 30-31 (1st Cir. 1987) (rejecting multiple schemes); United States v. Indelicato, 865 F.2d 1370, 1381-84 (2d Cir. 1989) (en banc) (rejecting multiple schemes); Bartichek v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39-40 (3d Cir. 1987) (rejecting multiple schemes); International Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 154-55 (4th Cir. 1987) (rejecting multiple schemes); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355
Court granted certiorari in *H.J. Inc.* to resolve the divergence of opinion among the circuits.\(^{21}\)

The Court began its analysis by acknowledging that it had asked the circuits to develop meaningful concepts of pattern in its previous decision *Sedima, S.P.R.L. v. Imrex Co.*\(^{22}\) Nonetheless, the Court observed that neither the text nor the legislative history of the RICO statute provided a basis for the Eighth Circuit's "multiple scheme" requirement. Similarly, the requirement that a pattern be limited to only "organized crime," (a limitation repeatedly urged in briefs by Amici), had no support within the text or legislative history. Rather, analysis of the meaning of pattern must begin with the text of the statute and follow the ordinary meaning of the term. A pattern, therefore, is an "arrangement or order of things or activity."\(^{23}\)

The Court had established in previous cases that the legislative history requires "continuity plus relationship" in order to demonstrate "pattern."\(^{24}\) In *H.J. Inc.*, the Court explained that conduct demonstrates "relationship" if it "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics. . . ."\(^{25}\) The second requirement of "pattern," "continuity," is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition."\(^{26}\) Moreover, the Court provided several examples to illustrate this "continuity" prong of "pattern." Continuity exists in a closed period of conduct if it extends over a substantial period of time: a few weeks or months alone with no threatened future activity are not substantial.\(^{27}\) Conversely, the threat of future criminality or repetition establishes an open-ended continuous "pattern."\(^{28}\) A scheme by hoodlums to sell "insurance" to storekeepers is one example of such a threat of future criminality. Additionally, "a regular way of conducting defendant's ongoing legitimate business" would similarly establish an open-ended continuous "pattern."\(^{29}\)

\(\text{(5th Cir. 1985) (rejecting multiple schemes, two predicate acts enough); United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988) (rejecting multiple schemes); Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986) (multiple schemes not the general rule); Superior Oil Co. v. Fulmer, 785 F.2d 252 (8th Cir. 1986) (requiring multiple schemes); Sun Savs. & Loan Ass'n v. Dierdorf, 825 F.2d 187, 193 (9th Cir. 1987) (rejecting multiple schemes); Torwest DBC, Inc. v. Dick, 810 F.2d 925, 928-29 (10th Cir. 1987) (requiring multiple schemes); Bank of Am. Nat'l Trust & Savs. Ass'n v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (rejecting multiple schemes); Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 839 F.2d 782, 789 (D.C. Cir. 1988) (requiring related acts that are not isolated events).}

\(21\) 109 S. Ct. at 2898.
\(23\) 109 S. Ct. at 2900 (citing XI OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).
\(25\) *Id.* at 2901 (citing 18 U.S.C. § 3575(e) (repealed in 1985)).
\(26\) *Id.* at 2902.
\(27\) *Id.*
\(28\) *Id.*
\(29\) *Id.*
B. Scalia's "Concurrence": "They're out lookin' for Rico . . . And once they find 'im, it won't be no banquet Rico gets . . . it'll be a wake." 30

While concurring in the result, Justice Scalia, 31 joined by the Chief Justice, and Justices O'Connor and Kennedy, accused the majority of "vagueness" in attempting to clarify pattern within federal RICO. They chastised the Court by adding, "[i]t seems to me this increases rather than removes the vagueness." 32 Moreover, they invited a challenge to RICO on void-for-vagueness grounds 33 when they concluded:

No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in this land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented. 34

30 Little Caesar, supra note 1, at 120.
31 Several Court commentators, including Linda Greenhouse for the New York Times, suggested that perhaps Justice Scalia had initially been assigned to write the opinion, but that his "inventive" had been unable to carry a majority of the Court. See Greenhouse, Broad Use of RICO Upheld, N.Y. Times, Jun. 27, 1989, at 29, col. 4.
32 109 S. Ct. at 2898. The New York Times editorial staff commented on the impropriety of these, and other comments by the Scalia faction toward the majority. N.Y. Times, July 9, 1989, at E26, col. 1 (“What's [not] acceptable is the raucous tone and unruly language.”). Perhaps Roscoe Pound put it best when he said, "The opinions of the judge . . . are no place for intemperate denunciation of the judge's colleagues, violent invective, attributions of bad motives to the majority of the court, and insinuations of incompetence, negligence and obtuseness of fellow members of the court." Pound, Heated Judicial Dissents, 39 A.B.A.J. 795 (1953).
33 See also 58 U.S.L.W. 3099 (Aug. 22, 1989) (“He [Scalia] even suggested that the time may be ripe for a constitutional challenge to the statute.”); 10 RICO L. REP. 5, 6 (1989) (“Justice Scalia emphasized that the same lack of guidance stemmed from the vagueness of the statute itself. And in what may have been the most interesting aspect of the Court's opinions, openly suggested that the next fruitful arena for attack could be based upon that same perceived infirmity . . .”); Rakoff, Three Unlikely Cures for Bad Breath, 10 RICO L. Rep. 217 (1989) (“Justice Scalia concludes that RICO quite possibly could not survive an appropriate constitutional challenge for vagueness.”). Further Rakoff speculated, “[j]oining in Justice Scalia's 'concurrence' were Justices Kennedy and O'Connor and Chief Justice Rehnquist. The notion that the four most conservative members of the Court are seemingly prepared to strike down RICO as unconstitutionally vague may come as a rude shock to those who view any judicial limitation of RICO as an undemocratic exercise of judicial activism.” Accord Razzano, RICO's Death Watch?, 10 RICO L. Rep. 223-7 (1989) (“However, Justice Scalia also candidly conceded that he, himself, would be unable to provide an interpretation of RICO that would give more guidance than the majority opinion. For this reason, he concluded that the statute may be unconstitutionally vague.”) ("Therefore, Justice Scalia concluded that, in light of the High Court's very inability to derive from the statute any coherent definition of the term 'pattern of racketeering,' future constitutional challenges on grounds of vagueness may well prove successful"). Furthermore, Razzano attempts to distinguish prior holdings of RICO's constitutionality on temporal (and hence analytical) grounds by noting, "[t]he RICO statute has survived a number of claims that it is unconstitutionally vague. However, each of those challenges were made before the Supreme Court's admonition in Sedima's footnote 14 that a 'pattern of racketeering' required proof of more than two predicate acts . . . . Because the Supreme Court itself has now demonstrated that it is unable to formulate such a definition, a constitutional challenge based on the vagueness of this statutory term may well be possible . . . the next meaningful challenge to the statute can only rest upon vagueness grounds."); Brodsky, Civil RICO And The Definition Of "Pattern", 10 RICO L. Rep. 497 (1989) (“Thus, one of the next major battles to be fought over RICO, assuming that the statute is not amended in the interim, is the vagueness issue that will undoubtedly be raised in many cases upon Justice Scalia's invitation.”).
34 109 S. Ct. at 2909.
It is not surprising then, that as of this writing, several litigants are broaching this argument in the lower courts. To further fuel this fire many Court observers have latched onto the dissenting opinion in *Fort Wayne Books, Inc. v. Indiana*, in which Justice Stevens, joined by Justices Brennan and Marshall suggested that RICO pattern was unconstitutionally vague as applied to state obscenity predicate acts. These observers say that perhaps a majority of seven Justices exists that would find pattern unconstitutionally vague. This speculation comes at a time when the furor over RICO has reached a fevered pitch.

In order to squelch such speculation, this Note will address four arguments. First, it will address the conceptual framework of the void-for-vagueness doctrine as applied by the Supreme Court. Second, it will demonstrate that pattern within the RICO statute is not unconstitutionally vague. Third, it will dissect the policy choices implicit in Justice Scalia's argument. Last, this Note will illustrate the catastrophic consequences that holding RICO pattern unconstitutional might produce.

II. Void-for-Vagueness Doctrine: The Conceptual Framework

A. Definitions: "Rico is over here . . . That's plain, ain't it?"

The starting point for any analysis of vagueness is the definition of the word vague itself. "Vague" comes from the Latin "vagus," to

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35 53 Banking Rep. (BNA) 552 (October 16, 1989) ("The first case to raise questions regarding the constitutionality of the Racketeer Influenced and Corrupt Organizations Act in the aftermath of H.J. Inc. v. Northwestern Bell Telephone Co.—and Justice Scalia's 'invitation' to defendants to challenge RICO on constitutional grounds—was dismissed Sept. 11 on alternative grounds by the U.S. District for Central Illinois (Orchard Hills Cooperative Apartments Inc. v. Germania Federal Savings and Loan Ass'n, DC C Ill, No. 85-356, 9/1/89)."). This decision was merely a trickle of the outpouring yet to come. See 10 RICO L. Rep. 496 (1989) ("What may become a flood of challenges to the statute involving the issue of vagueness has already begun. See Supplemental Brief for Appellees, Busby v. Crown Supply, Inc. The Appellees have asked the Fourth Circuit Court of Appeals to consider whether, in light of H.J. Inc., RICO's pattern requirement is unconstitutionally vague and therefore violative of the Due Process Clause of the Fifth and Fourteenth Amendments." [Busby was remanded to the lower courts for further consideration without expressly ruling on the merits of the constitutional challenge]) ("The constitutionality of the statute has also been raised in the same appellate court in Walk v. Baltimore & Ohio R.R., No. 87-3585 (4th Cir.), following the latter's remand from the Supreme Court."); 5 Civ. RICO Rep. (BNA) 5 (Dec. 12, 1989) ("In a petition for Certiorari filed Oct. 28, the U.S. Supreme Court was asked to decide . . . whether RICO is unconstitutionally vague . . . [Big Apple Industrial Buildings Inc. v. Procter & Gamble, U.S. Sup. Ct., No. 89-692, Oct. 28, 1989.").


37 See 10 RICO L. Rep. 401 (1989) ("Justice Stevens, dissenting in part and joined by Justices Brennan and Marshall, maintained that Indiana's scheme [of RICO 'pattern'] was unconstitutional as applied to obscenity violations.").

38 See, e.g., Reed, The Defense Case For RICO Reform, 43 Vand. L. Rev. 691, 726 (1990) ("Thus, at least seven Justices have alluded to the potential vagueness problems inherent in RICO's pattern element."). Most other authors who have discussed whether RICO pattern is void-for-vagueness have rejected such a contention. See Blakey & Perry, An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This The End of RICO?", 43 Vand. L. Rev. 851, 962-64 n.342 (1990) [hereinafter Myths]; Note, RICO's "Pattern" Requirement: Void for Vagueness?, 90 Colum. L. Rev. 489 (1990); but see Freeman & McLarrow, RICO and the Due Process "Void for Vagueness" Test, 45 Bus. Law. 1003 (1990).

39 Little Caesar, supra note 1, at 75.
wander, or "wanderer." With this definition in mind, one might mistakenly suggest that if the meaning of a word "wanders," it is vague. This is not true. A truly vague term has no statutory meaning at all. Nevertheless, such a distinction has eluded the lower courts many of whom have bandied about the terms "ambiguity," "vagueness," and "overbreadth" interchangeably.

Therefore, to illustrate what "vagueness" is, we must first say what "vagueness" is not: vagueness is not ambiguity; vagueness is not overbreadth. "Ambiguity" is what its parts imply: two meanings. Thus if a term may mean one thing in one context, and have another meaning in another context, it is ambiguous. Obviously, to the extent all statutory terms are context-specific their meanings are all somewhat ambiguous. The classic illustration of ambiguity is the "Peerless Case," where a contract to buy 125 bales of cotton could equally have referred to the first "Peerless" ship in port in October, or the second "Peerless" ship due in December. In the words of the court, the contract contained "latent ambiguity;" the terms of the contract could refer to either "Peerless." Of course, in the case of a statute, this ambiguity can easily be rectified by explicitly defining the terms to determine the intended reach of the statute.

"Overbreadth" similarly means exactly what its word parts imply: a term that is overly broad. Thus if it is desired only to prohibit a's behavior, but b's behavior also falls within the ambit of the statute's terms, the statute suffers from "overbreadth." The overbreadth doctrine has traditionally been confined to the free speech area. This is so because "overbreadth" implies a judicial exception to all doctrines of standing and justiciability. Only in the free speech area may a's claim rest on the justiciability of b's hypothetical claim. Even though a statute may be both "overbroad" and "vague" in the First Amendment context, this is not

40 XIX THE OXFORD ENGLISH DICTIONARY 396 (2d ed. 1989). Vague is defined as "[c]ouched in general or indefinite terms; not definitely or precisely expressed; deficient in details or particulars" and "[n]ot precise or exact in meaning." Id.

41 See T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND xix IV 303 (1855) ("A motion was made so vaguely worded that it could hardly be said to mean anything."). Similarly, the Supreme Court bemoaned in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819), "[s]uch is the character of the human language, that no word conveys to the mind, in all situations, one single definite idea...." Critics of RICO pattern could similarly rely on history for the proposition that "[v]ague and insignificant forms of speech, and abuse of language, have so long passed for mysteries of science." J. LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1690). Conversely, those who view Scalia's concurrence as mere invective might cite to history by noting, "[m]en often extenuate their own guilt, only by vague and general charges upon others." S. JOHNSON, RAMBLER No. 76 Par. 8 (1750). Regardless of their position in this debate, all should recognize that "[p]ure vagueness of speech abounds." R.H. HORNE, A NEW SPIRIT OF THE AGE 436 (1849).

42 R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 39 (1986) ("Whereas 'ambiguity' in its classical sense refers to equivocation, 'vagueness' refers to the degree to which, independent of equivocation, language is uncertain in its respective application to a number of particulars.")


necessarily so—a statute may be quite specific (thus not vague) while encompassing “overly broad” behavior.\(^{47}\) Moreover, outside of the first amendment context “overbreadth” loses its rationale of chilling speech.\(^{48}\)

Thus, the concepts of “ambiguity” and “overbreadth” are judicial creatures that are quite distinct from the doctrine of “vagueness.” A proper analysis the void-for-vagueness doctrine must, necessarily, recognize these as separate doctrines. Only one of them is truly applicable.\(^{49}\)

**B. Void-for-Vagueness Doctrine in the Supreme Court: “Cheatin’ yourself at solitaire.”\(^{50}\)**

Since 1926 a series of cases in the Supreme Court has defined the contours of the void-for-vagueness doctrine.\(^{51}\) In his seminal piece The

\(^{47}\) G. Gunther, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1134 n.5 (1976). (“An ‘overbreadth’ challenge should not be confused with one on grounds of ‘vagueness,’ though a challenger will often assert both grounds of invalidity. An unconstitutionally vague statute, like an overbroad one, creates ‘chilling effect’ risks to protected speech. But a statute can be quite specific—i.e., not ‘vague’—and yet be overly broad.”).

\(^{48}\) For the difference between “vagueness” and “overbreadth” as described by the Supreme Court, see Zwicker v. Koota, 389 U.S. 241, 256 (1967) (Justice Brennan noted that a statute is vague when it “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily question its meaning and differ as to its application” whereas overbreadth is a concern when “the statute, although lacking neither clarity nor precision is void... [because] it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms”).


\(^{50}\) Little Caesar, supra note 1, at 177 n.22.

\(^{51}\) The void-for-vagueness doctrine is a uniquely American construct. Although some authors suggested it was a variant of the English common law canon requiring strict construction of criminal statutes, the void-for-vagueness doctrine had entirely different beginnings. The genesis of the doctrine may be traced to pre-Civil War 19th Century state courts which held vague legislative commands to be inoperative. The earliest case was Drake v. Drake, 15 N.C. 110 (1833). The North Carolina Supreme Court stated “[w]hether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative [not unconstitutional, only inoperative].” Id. at 115-16. As the volume of such state cases grew, the U.S. Supreme Court took notice, and while skirting the issue directly, Chief Justice Waite said in dictum “if the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind.” United States v. Reese, 92 U.S. 214, 220 (1876). The first federal judge to hold a statute inoperative because of vagueness was Justice Brewer in Chicago N.W. Ry. v. Dey, 35 Fed. 866, 876 (C.C.S.D. Iowa 1888) who said, “no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.” It must be remembered that the doctrine still did not command constitutional significance, only a functional invalidation. The first Supreme Court decision to accord the doctrine constitutional dimension was Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 108 (1909). Both litigants briefed and argued the issue of whether the Texas anti-trust laws were “so vague, indefinite, and uncertain as to deprive them [the laws] of their constitutionality [under the fourteenth amendment].” Id. Nonetheless, the statutes in Waters-Pierce Oil were upheld as sufficiently definite. The first case where a statute was invalidated as unconstitutionally vague was
Void-for-Vagueness Doctrine in the Supreme Court,\textsuperscript{52} then student, Anthony Amsterdam analyzed these decisions through 1960. Since the Court has cited Professor Amsterdam more than a dozen times following, the initial guidance for any scholarly analysis of the doctrine, must ultimately follow Professor Amsterdam.

The void-for-vagueness doctrine draws its sustenance and power from the due process fair-warning provisions of the fifth and fourteenth amendments.\textsuperscript{53} Implicit within the void-for-vagueness doctrine is also a notion that article III separation of powers commands the courts to invalidate improperly framed legislation.\textsuperscript{54} Mistakenly, the Court has even suggested that the doctrine may rely on the sixth amendment\textsuperscript{55} for analytic support. Given a standard of Constitutional dimension, and a backdrop of nearly one hundred cases where the Court has applied the void-for-vagueness doctrine, what principles can we apply to modern constitutional challenges? Moreover, how do these principles apply to the assault on RICO "pattern?"

1. Vagueness Standards: The Twin Aims

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . ." This component of due process from the oft-quoted \textit{Connally v. General Construction Co.}\textsuperscript{56} is fair warning.\textsuperscript{57} The second due

\textsuperscript{52} Note, supra note 45, at 90.

\textsuperscript{53} For a colorful opposing opinion see Case Note, \textit{Constitutional Law — Vagueness in the Definition of a Crime}, 7 ARK. L. REV. 135, 137 (1953) ("But the armour [due process foundation of void-for-vagueness] is debased by a shotgun wad of quotations from various cases and other more dubious authorities that cover practically the full range of possible constitutional objections to a vague statute.").

\textsuperscript{54} The notion operative here was that the statute violated separation of powers by passing Congress' job to the judiciary. \textit{See} James v. Bowman, 190 U.S. 127 (1903); \textit{Trade-Mark Cases}, 100 U.S. 82 (1879); \textit{United States v. Reese}, 92 U.S. 214 (1875). Of course, this notion was operative long before the void-for-vagueness doctrine was formulated. The English Privy Council voided colonial laws "because they were carelessly written or so garbled to be absurd." \textit{L. Freeman, A History of American Law} 44 (1973). \textit{See also} Drake v. Drake, 15 N.C. 110 (1833). The Supreme Court has on occasion explicitly addressed this rationale for the void-for-vagueness doctrine. \textit{See} United States v. Evans, 333 U.S. 483, 486, 495 (1948) ("But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions."). \textit{See also} Dunn v. United States, 442 U.S. 100, 113 (1979) ("Thus to ensure that a legislature speaks with special clarity when making the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed."); \textit{United States v. Bass}, 404 U.S. 336, 347-48 (1971) ("[B]ecause of the seriousness of criminal penalties, and because punishment usually represents moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the 'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'").

\textsuperscript{55} Most notably in \textit{United States v. L. Cohen Grocery Co.}, 225 U.S. 81, 89 (1921).

\textsuperscript{56} 269 U.S. 385, 391 (1925).

\textsuperscript{57} The Roman Emperor Caligula (37-41 A.D.) posted his laws in fine print atop the highest pillars of the Forum so that they would be read by as few as possible. \textit{Dio's Roman History} 357 (E.
process essential implicated by vague statutes is the requirement that standards of enforcement be sufficiently precise that they avoid "involving so many factors of varying effect that whether the person to decide in advance nor the jury after the fact can safely and certainly judge the result." The twin essentials, or aims, of the void-for-vagueness doctrine as a command of due process are thus (1) fair warning to the potential offender, and (2) precise standards to guide the judge and jury in ascertaining the offense.

60 See also United States v. Cardiff, 344 U.S. 174, 176 (1952) ("Words which are vague ... may be as much of a trap for the innocent as the ancient laws of Caligula."); A. Camus, CALIGULA AND THREE OTHER PLAYS 165 (S. Gilbert trans. 1962) ("The less these people understand, the better they'll behave."). Justice Douglas noted in Huddleston v. United States, 415 U.S. 814, 823 (1974) (Douglas, J., dissenting):

Caligula's practice ... [was] printing the laws in small print and placing them so high on a wall that the ordinary man did not receive fair warning. 'When taxes of this kind have been proclaimed, but not published in writing, in as much as many offenses were committed through ignorance of the letter of the law, he at last, on the urgent demand of the people, had the law posted up, but in a very narrow place, and in excessively small letters, to prevent the making of a copy. ' Suetonius, THE LIVES OF THE TWELVE CAESARS 192 (Modern Lib. ed. 1931).

In a very real sense, this was to thwart the provision of fair warning to Roman Citizens. Rather than constitutional due process, analytically, the concept of fair warning, and ultimately the void-for-vagueness doctrine, is grounded in the Principle of Legality. As Professor Hall has elegantly argued for over 40 years, the Principle of Legality had its antecedent in Roman Law. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28-30 (2d ed. 1960). Interestingly, Professor Jeffries supra note 49, can be read to imply that the Principle of Legality was as much a jurisprudential outgrowth of the need to provide foundation for the void-for-vagueness doctrine and the strict construction of criminal statutes. This may be overstating Professor Jeffries case, however, because the early void-for-vagueness cases demonstrated a judiciary more willing to premise the doctrine on broader notions: separation of powers, or invalid delegation of legislative function. The Courts were implicitly stating, "[n]o Legislative crime, no punishment." This is by no means divergent from the Roman maxim "[n]ulla poena sine lege" [no punishment without law]. Nonetheless, Professor Jeffries' work is invaluable to a proper understanding of the theoretical basis of the void-for-vagueness doctrine.
2. Bill of Rights Buffer Zone

Professor Amsterdam's central thesis is that "the doctrine of unconstitutional indefiniteness has been used by the Supreme Court almost invariably for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms."61 This buffer zone was originally extended to protect property rights under the commerce power. Since the New Deal, the buffer zone has been extended to protect free speech in the first amendment context, and civil rights in the equal protection context. Indeed, a perusal of the more than seventy cases since 1960 citing the void-for-vagueness doctrine bears out this observation. Many of the cases implicated privacy freedoms: abortion,62 obscenity,63 censorship64; or civil rights: anti-picket-

61 Note, supra note 45, at 75.
62 Vagueness challenges in the abortion context are subject to a stricter standard, since the mother's right to an abortion is a constitutionally fundamental right. See Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 769 n.14 (1986) ("We agree with the Court of Appeals [that the adverb 'significantly' modified the risk imposed on the woman] and therefore find the statute to be facially invalid... This makes it unnecessary for us to consider appellee's further argument that section 3210(b) is void for vagueness."); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 451 (1983) ("Section 1870.16 of the Akron ordinance requires physicians performing abortions to 'insure that the remains of the unborn child are disposed of in a humane and sanitary manner.'... The phrase 'humane and sanitary' does... suggest a possible intent to mandate some sort of 'decent burial' of an embryo at the earliest stages of formation. This level of uncertainty is fatal where criminal liability is imposed. Because Section 1870.16 fails to give a physician 'fair notice that his contemplated conduct is forbidden' we agree that it violates the due process clause.") (citations omitted); Planned Parenthood Assoc., Inc. v. Ashcroft, 462 U.S. 476, 492 (1983) ("Plaintiffs argue that the word 'emancipated' in this context is void for vagueness, but we disagree. Although the question whether a minor is emancipated turns upon the facts and circumstances of each individual case, the Missouri Courts have adopted general rules to guide that determination, and the term is one of general usage and understanding in the Missouri common law.") (citations omitted); Harris v. McRae, 448 U.S. 297, 311 (1980) (the Hyde Amendment is not unconstitutionally void-for-vagueness insofar as physicians are able to understand and implement the exceptions under which abortions are reimbursable); Colautti v. Franklin, 439 U.S. 379, 390 (1979); Doe v. Bolton, 410 U.S. 179, 191-92 (1973) (The phrase "best clinical judgment that an abortion is necessary" is not unconstitutionally void-for-vagueness); United States v. Vuitch, 402 U.S. 62, 72 (1971) ("Under such law which prohibits abortion unless necessary for the preservation of the mother's life or health... We therefore hold that properly construed the District of Columbia abortion law is not unconstitutionally vague...") ("The requirement of a narrowly drawn statute when the regulation touches a protected constitutional right (Cantwell v. Connecticut, 310 U.S. 296; Thornhill v. Alabama, 310 U.S. 88, 100) is only another facet of the void-for-vagueness problem.").
63 Fort Wayne Books Inc. v. Indiana, 109 S. Ct. 916, 925 (1989) ("Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."); Trinkler v. Alabama, 414 U.S. 955, 956 (1973) (Douglas, J., dissenting) ("[O]bscene publications, so adjudged by the application of community standards that the publications were patently offensive and lacked serious literary, artistic, political or scientific value, should have been found not obscene based on the void for vagueness unconstitutionality of such a community standard"). This view by the liberal minority of the Court was similarly expressed in three famous obscenity cases. See Miller v. California, 413 U.S. 15, 43 n.7 (1973) ("If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes shows or displays that particular book or film, then a vague law has been made specific."); Paris Adult Theatre v. Slaton, 413 U.S. 49, 96 (1973) (Brennan, J., dissenting) ("The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of 'what the State commands or forbids.' In the service of this general principle we have repeatedly held that the definition of obscenity must provide adequate notice of exactly what is prohibited from..."
ing ordinances, trespass, vagrancy, discrimination. Other cases address the more traditional free speech concerns. City ordinances

dissemination. While various tests have been upheld under the Due Process Clause... I have grave doubts any of these tests could be sustained [today].") (citations omitted); Ginsberg v. New York, 390 U.S. 629, 643 (1969) (Douglas, J., dissenting) (The fact that definition of "knowingly" in statute prohibiting sale to minors under age of 17 of obscene materials harmful to them encompassed having reason to know or believe or grounds for belief warranting further inspection or inquiry as to character and content of material and age of minor did not render statute void-for-vagueness.).


65 Cameron v. Johnson, 390 U.S. 611 (1968) (Mississippi anti-picketing law prohibiting picketing which obstructs or unreasonably interferes with free ingress or egress to and from public buildings and property is not void-for-vagueness.); Walker v. City of Birmingham, 388 U.S. 307 (1967) (Even though substantial constitutional questions could be raised in view of the generality of the language contained in city parade ordinance and vagueness of temporary injunction restraining petitioners from participating in or encouraging mass street parades or processions without a permit as required by the ordinance, petitioners who did not attempt to have injunction dissolved or modified or to secure parade permit and who deliberately violated injunction with expectation of going to jail were not entitled to have the constitutional issues considered and were properly convicted of criminal contempt.); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965); Cox v. Louisiana, 379 U.S. 559, 567 (1965) ("Appellant was convicted for demonstrating not 'in' but 'near' the courthouse... The question is raised as to whether the failure of the statute to define the word 'near' renders it unconstitutionally vague... It is clear that there is some lack of specificity in a word such as 'near'... this lack of specificity may not render the statute unconstitutionally vague, at least as applied to the demonstration within the sight and hearing of those in the courthouse.") (citations omitted).

66 Adderly v. Florida, 385 U.S. 39, 42 (1966) ("Petitioners seem to argue that the Florida trespass law is void for vagueness because it requires a trespass to be 'with a malicious and mischievous intent'... The Florida trespass statute... cannot be challenged on this ground. It is aimed at conduct of one limited kind, that is, for one person or persons to trespass on the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary."). Compare a triumvirate of cases during the 1964 term in which the Court weighed the competing values of property owners to trespass statutes, the right of negroes to protest "Apartheid" and the vagueness that inhered in those trespass statutes. See Bouie v. City of Columbia, 378 U.S. 347, 351-52 (1964) (retroactive and unexpected construction of the South Carolina trespass statute by the South Carolina Supreme Court was constitutionally void-for-vagueness and fundamentally violated notions of fair-warning); Bell v. Maryland, 378 U.S. 226, 325 (1964) (Majority does not reach Constitutionality) (Black, J., dissenting) ("We reject the contention that the statute as construed is void for vagueness... [W]e do not doubt that one purpose of these 'sit-ins' was to express a vigorous protest against Hooper's policy of not serving Negroes. But it is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country. And none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private owner to furnish his property as a platform to criticize the property owner's use of that property."); Barr v. City of Columbia, 378 U.S. 146, 151 n.6 (1964) (Prosecutions for trespass and breach of peace against negroes who sat, waiting for service at lunch counter were reversed) ("We do not reach petitioner's contention that their breach-of-peace convictions were void for vagueness under the doctrine of Lanzetta v. New Jersey, 306 U.S. 451 (1939).").


have been attacked for vagueness on a variety of fronts. Communists\(^\text{71}\) and subversives have also been singled out for this "buffer zone" protection. Aliens\(^\text{72}\) have also been the center of controversy involving the doctrine. Analytically, the first amendment and due process freedoms of the early 20th century have blossomed into the freedoms of expression, marriage and procreation, and locomotion.\(^\text{73}\)

3. Civil Statutes Definite

But these seventy cases merely assert or discuss constitutional vagueness challenges. These cases belie the fact that since 1960 only a dozen statutes have been held void-for-vagueness by the Supreme Court. Of these, fully half of the statutes were facially unconstitutional as vague

\(70\) Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982) (Village ordinance which required retailer to obtain license if it sold items, effects, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs was sufficiently clear that the speculative danger of arbitrary enforcement did not render it void-for-vagueness.); City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283 (1982), rev'd in part, 464 U.S. 927 (1983) (section of city licensing ordinance governing coin-operated amusement establishments and directing police chief to consider whether license applicant has "any connections with criminal elements" is not unconstitutionally vague.); Grayned v. City of Rockford, 408 U.S. 104, 107 (1972) (Held that city antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague.);

\(71\) Cole v. Richardson, 405 U.S. 676, 684 (1972) (Requirement that employees of Commonwealth of Massachusetts subscribe to oath that they will uphold and defend Constitution of the United States and Constitution of Commonwealth and that they will oppose the overthrow of government of United States by force, violence or illegal unconstitutional method is not void-for-vagueness.); Samuels v. Mackell, 401 U.S. 66 (1971) (New York anarchy statute was allegedly void-for-vagueness in violation of due process.); Dombroski v. Pfister, 380 U.S. 479 (1965); Albertson v. Millard, 345 U.S. 242, 243 (1953) ("These definitions are challenged by the appellants as void for vagueness. The definition of a Communist as ... a member of the communist party, notwithstanding the facts that he may not pay dues to, or hold a card in, said party ... is said to be vague since once dues and cards are eliminated as criteria there are no readily apparent means of determining who is a member ... It is contended there are no standards as to what is a satellite.").

\(72\) United States v. Mendoza-Lopez, 481 U.S. 828 (1987) (discusses vagueness argument); Boutilier v. INS, 387 U.S. 118, 123 (1967) (The statute under which deportation order issued provided for no warning to alien who was homosexual at time of first entry into United States that he was then subject to exclusion, did not render statute void-for-vagueness) ("It is true that this Court has held the 'void for vagueness' doctrine applicable to civil as well as criminal actions. See Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925). Nevertheless, this is where 'the exaction of obedience to a rule or standard ... was so vague and indefinite as really to be no rule or standard at all ...': United States v. Spector, 343 U.S. 169 (1952) (Defendant was indicted for violations of Internal Security Act which didn't indicate to whom, and for what, the alien should apply, and was therefore found unconstitutional.) ("But the present statute, in my judgment, entangles aliens in a snare of vagueness from which few can escape. I think the Constitution requires more than a 'bad guess' to make a criminal.").; Jordan v. De George, 341 U.S. 223 (1951) (The statute relating to deportation of alien sentenced more than once because of conviction of crime involving 'moral turpitude' would be tested under the void-for-vagueness doctrine, notwithstanding that statute was not criminal statute, in view of grave nature of deportation.);

\(73\) Doe v. Bolton, 410 U.S. 179, 209-12 (1973) (Douglas, J., concurring) ("First is the autonomous control over the development of one's intellect, interests, tastes and personality ... Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children ... Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.").
regulations of first amendment rights.\textsuperscript{74} Two other statutes were found void-for-vagueness because they abridged a mother's fundamental privacy right to an abortion.\textsuperscript{75} Three other statutes were exclusively criminal in scope, regulating the crimes of vagrancy,\textsuperscript{76} and communist activity.\textsuperscript{77} RICO conversely, contemplates the regulation of neither first amendment liberties nor fundamental privacy rights. Moreover, only

\textsuperscript{74} Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Smith v. Gougen, 415 U.S. 566 (1974) (lack of ascertainable standards for “treating contemptuously” the American flag) (“Where a statute's literal scope ... is capable of reaching expression sheltered by the First Amendment, the doctrine [void-for-vagueness] demands a greater degree of specificity than in other contexts.”); Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968) (An ordinance providing for classification of films as suitable for young persons or not suitable for young persons, and in defining unsuitable class, using standards depending upon individual censors, was invalid for want of narrowly drawn standards, and void-for-vagueness) (“Thus to the extent that vague standards do not sufficiently guide the censor, the problem is not cured merely by affording de novo judicial review. Vague standards, unless narrowed by interpretation, encourage erratic administration whether the censor be administrative or judicial: ‘individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.’”); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (N.Y. Teachers Oath which inquired “whether he had advocated or been a member of a group which advocated forceful overthrow of the government” constitutionally void-for-vagueness) (“The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.”); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965) (“Literally read, therefore, the second part of this ordinance says that a person may stand on public sidewalks in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration.”); Bouie v. City of Columbia, 378 U.S. 347, 351-52 (1964) (South Carolina Supreme Court in applying its 1961 construction of statute prohibiting entry on lands of another after notice not to enter, to affirm convictions of negroes who in 1960 refused to leave booth in luncheonette department of drugstore after request to leave deprived negroes of liberty and property without due process of law.) (“The thrust of the distinction, however, is to produce a potentially created deprivation of their right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforseeably and retroactively expanded by judicial construction, than in the typical ‘void for vagueness’ situation. ... There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”); NAACP v. Button, 371 U.S. 415, 423-33 (1963) (“[S]tandards of permissible statutory vagueness are strict in the area of free expression ... Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).

\textsuperscript{75} City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 474 (1983); Colutti v. Franklin, 459 U.S. 379, 390-91 (1979) (Pennsylvania Abortion Control Act imposing standard of care on persons for performing abortion where such person determines that the fetus “is viable”, or there is sufficient reason to believe that the fetus “may be viable” is impermissibly vague both with respect to the viability determination requirement and the stated standard of care.) (“This [void-for-vagueness] appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.”).

\textsuperscript{76} Kolender v. Lawson, 461 U.S. 352, 357 (1983) (California statute requiring persons who loiter or wander on the streets to provide a “credible and reliable” identification when requested by a police officer was held unconstitutionally vague by failing to clarify what was contemplated by the requirement that a suspect provide a “credible and reliable” identification.); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (Vagrancy ordinance containing the archaic classifications of vagrancy laws held void-for-vagueness because it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden, it encouraged arbitrary and erratic arrests and convictions, made criminal those activities which by modern standards are normally innocent and placed almost unfettered discretion in the hands of the police) (“This ordinance is void for vagueness, both in the sense that it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute, and because it encourages arbitrary arrests and convictions.”) (citations omitted).

\textsuperscript{77} Dombrowski v. Pfister, 380 U.S. 479 (1965) (provision of Louisiana Subversive Activities and Communist Control Law defining “subversive organization” violated due process in that language was unduly vague, uncertain and broad.).
one of the twelve cases invalidated a civil statute—the very defect RICO opponents accuse the RICO statute of.

Indeed, with the exception of *Giaccio v. Pennsylvania* no civil statute, before 1966 nor afterward, has been found unconstitutionally void-for-vagueness. *Giaccio*, however, was so clearly void-for-vagueness that there could be no possible application of its holding to the factual instance of a RICO “pattern.” In *Giaccio*, the Pennsylvania statute directed that “in all cases of acquittals by the petit jury . . . the jury trying the same shall determine . . . whether the county . . . or the defendant shall pay the costs.” There were “no standards at all, nor d[id] it place any conditions of any kind upon the jury’s power.” Thus the Pennsylvania statute openly transgressed the second prong of the void-for-vagueness doctrine because it “le[ft] . . . jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.” RICO, conversely, has clearly enumerated predicate acts that constitute a “pattern.” The judge or jury may not “invent” a pattern based upon their discretion. As such, *Giaccio* will likely have no precedential value for any vagueness cases, as few statutes could ever conceivably grant a jury such wide ambit. Civil statutes will remain presumptively definite.

4. Line-Drawing

As Professor Amsterdam pointed out, demonstrating vagueness necessitates line-drawing. Justice Holmes similarly commented that “[t]he law is full of instances when a man’s fate depends on his estimating rightly, that is as the jury subsequently estimates it, some matter of degree.” Line-drawing is of course endemic to the function of law: to apportion blame or damages in some cases, and not in others. Thus merely because pattern requires some line-drawing distinctions is not fa-
tal to its operation. As Lord Nottingham stated in the Duke of Norfolk's Case two hundred years ago, "I will stop where-ever any visible Inconvenience doth appear." In this case the legislative history makes it clear that "[i]nconvenience doth appear" where two predicate acts of racketeering activity evidencing "continuity plus relationship" are demonstrated. Justice Scalia does not quibble with instances of at least two acts of racketeering activity which do not evidence "continuity plus relationship." Nor does he categorically analyze the majority's examples and guidelines of continuity plus relationship. What irks Justice Scalia is that he must draw the line. Yet, as Justice Holmes suggested, that is essentially the primary command of the legal process.

Another complaint of line-drawing is that it does not normatively say what pattern is. To sustain a statute by analogy, to say it is "as definite as" an earlier statute, is "singularly unilluminating." Indeed, Justice Brennan used "as definite as" analysis when he provided examples that constituted continuity plus relationship and therefore demonstrated a "pattern."

But this criticism ignores the fundamental linguistic content, or lack thereof, used in all statutory terms. Professor Freund argued that statutory terms are comprised of three grades: precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree. Precisely measured terms are never challenged on vagueness grounds (and rarely found). Terms which involve a question of degree comprise the majority of vagueness challenges. "Reasonable" rates, "restraint" of trade, "unneeded" employees, "near" a forest, "political" purposes, "ordinary" fees, and "undesirable" residents all require the defendant and the jury to assess the term, make a value judgment, and draw the line. Professor Amsterdam affectionately labelled this perplexing class of terms "phrases of inherent discontrol."

"Pattern," however, falls squarely within the middle grade of professor Freund's classifications: abstractions of common certainty. Amsterdam explains that these terms are commonly ascertainable because their meaning may be affixed by an external object-referent. Words which refer to external objects may be ambiguous, but once defined, never vague. This external semantic reference is critical, for it is the key mechanism by which all the United States district courts and circuit courts of appeal have found RICO pattern constitutionally definite. Pattern does not

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86 See supra note 84 and accompanying text.
87 109 S. Ct. at 2902, see supra notes 27-29 and accompanying text.
88 Freund, The Use of Indefinite Terms in Statutes, 30 Yale L.J. 437 (1921).
90 Nash v. United States, 229 U.S. 373 (1913).
94 Kay v. United States, 303 U.S. 1 (1938).
95 Mahler v. Eby, 264 U.S. 32 (1924).
96 Note, supra note 45, at 93.
97 See infra notes 165-227 and accompanying text.
stand alone within the statute; rather, a “pattern of racketeering activity” is prohibited. This “racketeering activity” is statutorily enumerated in the form of predicate offenses. It was this “external” or “contextual” reference that the Supreme Court itself said was determinative in ascertaining pattern in *Fort Wayne Books*.98

5. Scienter

Inherent in vagueness doctrine is a requirement of “scienter.” Of the statutes that have independent scienter, or mens rea requirements, none have been found unconstitutionally void-for-vagueness.99 Of course since RICO pattern is composed of predicate racketeering acts statutes with independent scienter requirements of their own, it begs the question: Is fair warning satisfied by “racketeering act” scienter, pattern scienter, or both? First, does RICO have an independent state-of-mind requirement apart from that of the predicate offenses? The circuits are split. The Second Circuit has chosen to follow the *Scotto*100 line of cases where no separate state of mind requirement is read into “pattern of racketeering activity.” The Seventh Circuit held in *United States v. Melton*101 that “pattern of racketeering activity” requires a state of mind, while the Eighth Circuit has expressed “grave doubts as to the propriety of these [Scotto] holdings.”102 The Supreme Court should hold, according to *United States v. Bailey*,103 that absent legislative intent, scienter should only be read into common law offenses, not regulatory offenses. Considering RICO’s severe penalties—twenty years and $250,000 fine maximum—as well as the fact that a pattern must be composed of common law predicates, the better reasoned position would require an independent pattern scienter.

Second, the “racketeering activity” predicate acts overwhelmingly require scienter showings. Federal mail and wire fraud predicates draw most of the fire from critics,104 yet *Durland v. United States*105 established

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99 See Note, supra note 45, at 86 n.98, for a review of the cases through 1960. See Collings, supra note 49, at 227. See also Harris v. McRae, 448 U.S. 297 (1980) (“[T]he Hyde Amendment is not void for vagueness because (1) the sanction provision in the Medicaid Act contains a clear scienter requirement under which good faith errors are not penalized”); United States v. Guest, 383 U.S. 745 (1966) (“[T]he Court holds a stringent scienter requirement saves § 241 from condemnation as a criminal statute failing to provide adequate notice of the proscribed conduct.”); Colautti v. Franklin, 439 U.S. 379, 395 (1979) (“This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of mens rea. See, eg., United States v. Gypsum, 438 U.S. 422, 434-46 (1978); Papachristou v. Jacksonville, 405 U.S. at 168; Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952). Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statute is little more than a ‘trap for those who act in good faith.’ United States v. Ragen, 314 U.S. 513, 524 (1942).”); Screws v. United States, 325 U.S. 91, 101-02 (1945) (plurality opinion) (“[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.”).
101 689 F.2d 679, 684-85, 687 (7th Cir. 1982) (state of mind required).
103 444 U.S. 393, 402-09 (1980).
104 See, e.g., 9 RICO L. REP. 923 (1989) (Chief Justice Rehnquist criticized the expansion of mail and wire fraud through the use of the RICO statute). For a general discussion of the historical
conclusively that "good faith" is a complete defense against such statutes. An "intent to defraud" is necessary to sustain convictions under these federal fraud statutes—an independent scienter requirement. Moreover, this "intent to defraud" or "scheme to defraud" provides "specific intent"—a level of scienter arguably not required by the prevailing Supreme Court jurisprudence in Screws v. United States.\textsuperscript{106} Nevertheless, should we find Justice Jackson's dissent in Screws more compelling (many commentators including professor Amsterdam do), the requisite intent to both cause the act and to perpetrate a knowingly "unlawful fraud" would be found.

The other predicate racketeering acts similarly require scienter in order to sustain conviction. For instance, in the leading securities fraud\textsuperscript{107} case of Dirks v. SEC,\textsuperscript{108} the Court held that this requisite scienter was equivalent to an intent to defraud (again meeting Justice Jackson's requisite level). The general rule in the drug offenses of the Comprehensive Drug act is to require an "intentionally" or "knowingly" level of scienter. Similarly, section 2314, Transportation of Stolen Goods, requires "knowing" violations;\textsuperscript{109} section 152, Concealment of Assets, requires the defendant to "knowingly" and "fraudulently" violate the statute;\textsuperscript{110} section 1951, commonly known as the Hobbs Act, requires violations that are "in furtherance of" or "wrongful";\textsuperscript{111} section 1952, commonly known as the Travel Act, prohibits acts "with intent to" violate the statute;\textsuperscript{112} even the new money laundering statutes of sections 1956 and 1957 require "knowingly" unlawful violations.\textsuperscript{113} In sum, "[t]he presence of scienter has been found significant in many cases, and in no cases where it has been found and discussed has the statute in question been held unconstitutionally vague."\textsuperscript{114}

\textsuperscript{106} 325 U.S. 91 (1945).
\textsuperscript{114} Collings, supra note 49, at 227.
6. Federal Presumption

Another empirical observation of Professor Amsterdam is that state legislation is more commonly invalidated on vagueness grounds than federal legislation. This is not intuitive, because absent a first amendment or equal protection shield, state legislative enactments are normally shown more, not less, deference. This is implicit in the workings of vertical federalism. But virtually all the state statutes invalidated were criminal statutes, and the corpus of substantive criminal law is state enacted. Fair-warning rationale is most compelling in the context of the criminal. Justice Holmes was prompted to say that "although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed."

Perhaps a more compelling justification for this federal presumption of definiteness is the role of the federal judiciary as watchdog. Federal enactments are presumptively less suspect to grossly violate human freedoms of speech, marriage and procreation, and locomotion. Moreover, where the federal statute infringes on these freedoms, the court more frequently resorts to its powers to construe and administer the statutes and rarely resorts to invoking the Constitution. As Professor Amsterdam concluded, "[n]ot only is the Court's ultimate power to interpret and police federal statutes a ready instrument of mastery, but it must be remembered that federal statutes will come under adjudication of the federal judiciary, presumably more sensitive to claims of federal Bill of Rights freedoms than are state judges." The vagueness buffer zone of isolation thus operates more severely with respect to state legislation, while presumptively deferring to federal legislation. RICO pattern should thus enjoy a presumption of definiteness as a federal statute. This is so because it implicates no fundamental Bill of Rights freedoms.

7. Vagueness Summation

The void-for-vagueness doctrine has been well developed in its attendant sixty years of use by the Supreme Court. Statutes with independent scienter requirements are never vague. Federal statutes are rarely vague. Civil statutes which do not impinge upon the first amendment are almost never vague. For the Supreme Court to violate all these contours of the void-for-vagueness doctrine would be unprincipled, indeed, nothing less than "Cheatin' yourself at solitaire."

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115 Note, supra note 45, at 82-83.
117 Note, supra note 45, at 83 n.80.
III. Void-for-Vagueness As Applied to RICO "Pattern"

A. Legislative History of Pattern: "You're growin' Rico. This is what you been after all the time, eh? I saw it in your eyes the first time I met you . . ."

Such an assertion of vagueness cannot be examined alone, but rather, must be viewed against the backdrop of RICO's legislative history—an eleven year process of synthesizing, re-drafting and improving. When examined in its entirety, the legislative drama that unfolds illustrates that "pattern," and its attendant prongs "continuity and relationship," were as much legislative responses to a demanding bar as they were preconceived notions. As such, Title X is exceedingly instrumental in demonstrating and defining RICO pattern.

118 Little Caesar, supra note 1, at 131.

119 See Goldsmith, RICO and "Pattern:" The Search for "Continuity Plus Relationship", 73 CORNELL L. REV. 971, 1000 n.182 (1988) [hereinafter Continuity Plus Relationship] ("Moreover, the legislative record suggests that Congress intended pattern to have similar applications to both Title IX and Title X. Congress adopted section 3575(e) in response to criticism by the ABA that Title X, as proposed, failed to define pattern. Organized Crime Control: Hearings before Subcommittee No. 5 of the House Comm. on the Judiciary, on S. 30 and Related Proposals, 91st Cong., 2d Sess. 698 (1970) (statement of ABA President Edward L. Wright); 116 CONG. REC. 35,202 (1970). Congress adopted a description of pattern, proposed by the ABA that was drawn from the Senate Report and designed to provide more "specificity." Organized Crime Control Act of 1969, S. REP. No. 617, 91st Cong., 1st Sess. 165 (1969)."). Professor Goldsmith's work is the most rigorous analysis of RICO pattern to date—he preceded, but largely anticipated, the holding of H.J. Inc. For an interesting look at Professor Goldsmith's work, see the three part debate between he and Professor Lynch of Columbia (a staunch opponent of RICO) in Lynch, RICO: The Crime of Being Criminal, (pts. I-IV), 87 COLUM. L. REV. 661, 920 (1987); Goldsmith, RICO and Enterprise Criminality, 88 COLUM. L. REV. 774 (1988); Lynch, A Reply to Michael Goldsmith, 88 COLUM. L. REV. 802 (1988). Ironically, Mr. Lynch is now the Chief of the Criminal Division in the Office of the United States Attorney for the Southern District of New York. His tune is suprisingly harmonic with the voices of his fellow associates—the former subjects of his criticism. See L.A. Times, Jan. 7, 1990, at 1, col. 6 ("Lynch said in an interview 'There's nothing that prevents you from using it [RICO] in fairly trivial, run-of-the mill cases' . . . He also said it would be wrong to assume that as a prosecutor he won't make use of every available tool, including RICO. 'It would be wrong to think anybody, including me . . . is going in with the attitude that we're going to do something different with RICO.' Lynch said.").

120 Although the majority opinion found § 3575(e) instrumental in interpreting the legislative history of RICO "pattern," Justice Scalia intoned to the contrary:

Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of § 3575(e)—which is the definition contained in another Title of the Act that was explicitly not rendered applicable to RICO—suggests that whatever "pattern" might mean in RICO, it assuredly does not mean that.

109 S. Ct. at 29. This conclusion must be viewed as a central tenet to his objection to the majority's reading of RICO's legislative history. The tenet is flawed on several levels.

First, it was rejected by a majority of the Court. Several briefs noted, like Justice Scalia, its express inclusion only in Title X. The majority wisely noted that Sedima had previously looked to this section for guidance; there was ample precedent which pre-dated Justice Scalia's objection.

Second, and most important, § 3575(e) was a direct response by the House to a request by the American Bar Association to provide "further elaboration" and "increased specificity." 115 CONG. REC. 5,202 (1970). "The inclusion of a more precise illustration of "pattern" in Title X but not Title IX thus does not reflect an intention to give the term 'pattern' different meanings in the two statutes." Continuity Plus Relationship, supra note 119, at 1000 n.182. Moreover, as Professor Goldsmith has argued, because § 3575(e) is illustrative rather than definitional, the general maxim Justice Scalia refers to is not applicable.

Third, many of the states have been more faithful to the federal legislative history, and explicitly included the language of § 3575(e) in their respective RICO statutes. Thus, the "general assumption" Justice Scalia refers to was not general nor was it assumed. Overwhelmingly, the states viewed
1. The Earliest Attempts

In an effort to systematize the attack on the entire underworld family structure, the 1960 Select Committee on Improper Activities in the Labor or Management Field\(^1\) (spearheaded by Senator McClellan), reported a national syndicate of organized crime known as the Mafia or La Cosa Nostra.\(^2\) In 1967 the President’s Commission on Law Enforcement and the Administration of Justice (Katzenbach Commission) suggested that new structural approaches should be created at the federal and state levels to combat “business infiltrated by organized crime.”\(^3\) One such approach had previously been proposed in 1965 by Congressman Biaggio of New York City who proposed prohibiting “knowingly” becoming or remaining “a member of the Mafia.” This bill was rejected as unconstitutional on its face and violative of Equal Protection because it applied exclusively to “mafia” criminals. Primarily, it was rightfully perceived as constituting a “status based offense”—i.e., punishing

\(^{1}\) Title X as illustrative of the “relationship” and “continuity” prong the Senate and House repeatedly implored the courts to heed.

\(^{2}\) Fourth, analytically the same construction would be reached anyway. Section 3575(e) is largely tautological. RICO consists of “enterprises,” “participants,” “victims,” “predicate acts,” and “prohibited activities.” The 240 different contexts of pattern thus derive from three sections (“prohibited activities,” “results”) times five kinds of (“enterprises”) times four kinds of predicate offense (“methods of commission”) times four roles in violations (“victims,” “participants,” “prize,” and “passive instrument.”). Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?,* 62 NOTRE DAME L. REV. 526, 536 n.37 (1987). In the absence of § 3575(e), if one were thus asked to demonstrate “relationship” it would be largely expected that “relationship” would be demonstrated by “acts” that have similar “purposes,” “results,” “participants,” “victims,” or “methods of commission.” Equally important, the legislative mandate of the second prong—“continuity”—was explicitly addressed in the Senate and House hearings as well as § 3575(e). The illustration in § 3575(e) that pattern includes “acts that . . . are not isolated events” certainly addressed the continuity of the pattern, rather than relationship — the illustration is purely temporal. Thus, this portion of § 3575(e) only reiterated the second prong of continuity, but certainly was, and is, applicable to Title IX—both in the abstract sense, and as a guide for divining Congress’ intention.


criminals for their status as mafia members, and not for their substantive acts.\footnote{124}

In response to the Katzenbach Commission’s plea, two bills were introduced in the Senate, S. 2048\footnote{125} and S. 2049.\footnote{126} Both bills\footnote{127} were scrutinized by the A.B.A. which specifically recommended that they be removed from the corpus of anti-trust law and stand independently, so that “standing” and “antitrust injury” not be used to thwart their intent.\footnote{128}

2. Birth of RICO

In January 1969, Senator John L. McClellan of Arkansas introduced S. 30,\footnote{129} an integrated, comprehensive crime control measure. On March 2, 1969, Senator Roman Hruska of Nebraska introduced S. 1623,\footnote{130} a redraft of S. 2048 and S. 2049. After Hearings on S. 30 and S. 1623, Senators McClellan and Hruska introduced S. 1861\footnote{131} (less than one month later), which combined the provisions of S. 30 and S. 1623, and introduced for the first time the term “pattern of racketeering activity.” After review by the Department of Justice\footnote{132} and others,\footnote{133} S. 1861 was incorporated, with certain changes, into S. 30 as Title IX.\footnote{134} One of the principal changes was that the definition of pattern was narrowed\footnote{135} by requiring at least two acts, one of which must have been committed after the effective date of the law. Senator McClellan reported S. 30 out of the Senate Judiciary Committee on December 18, 1969, and the Sen-


\footnote{125} S. 2048, 90th Cong., 1st Sess. (1967).

\footnote{126} S. 2049, 90th Cong., 1st Sess. (1967).

\footnote{127} H.R. 11766 and 11268, 90th Cong., 1st Sess., 113 CONG. REC. 17,976 (1967).


\footnote{133} Id. at 268.


\footnote{135} Also the requirements of “continuity plus relationship” were established. ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969) [hereinafter Senate Report].
ate passed it overwhelmingly, 73 to 1, on January 23, 1970.\textsuperscript{136} The House Judiciary Committee suggested the adoption of treble damages, and following several attempts to excise the new amendment,\textsuperscript{137} the House passed S. 30 by a vote of 431 to 26.\textsuperscript{138} By a voice vote, the Senate accepted the House amendments.\textsuperscript{139} President Richard M. Nixon signed the legislation October 15, 1970.\textsuperscript{140}

3. Specificity of “Pattern”

The drafting of S. 30 was the “culmination of a year of detailed study, hearings, and consultation.”\textsuperscript{141} Much of the debate focussed on the more revolutionary aspects of the Organized Crime Control Act. The pattern provisions of Title IX (RICO) and Title X (Special Dangerous Offenders) received comparatively little attention. In May, 1969 the Department of Justice reviewed S. 30 and Title X. They demanded that pattern be given adequate legislative “gloss” in the form of more “specificity”:

The definition of professional offender appears to be so vague as possibly to violate due process. Lanzetta v. New Jersey, 306 U.S. 451 (1939). It includes no limits and can easily be read to include any criminal ... In order to withstand a constitutional attack on grounds of vagueness, therefore, it is felt that the definition of professional offender must be made more specific and must emphasize a pattern of specific criminal activity ...\textsuperscript{142}

Similarly, the The Association of the Bar of the City of New York,\textsuperscript{143} and the American Bar Association in statements by President-elect Edward L. Wright\textsuperscript{144} criticized Title X for failing to define “pattern.” As a solution to this short-coming, Mr. Wright “took the liberty of consulting some of the Senate Subcommittee staff on this issue. They drafted suggested language ... which would seem to satisfy the need for increased specificity.”\textsuperscript{145} Indeed, this language drafted by the Senate Subcommittee members was incorporated into Title X of the Organized Crime Control Act. Section 3575(e) thus read: “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or are interrelated by...”

\textsuperscript{137} Also, Congressman Biaggi again tried to amend the bill by outlawing being a “member of the mafia.” 116 Cong. Rec. 35,343. Congressman Biaggi was recently disbarred, see In re Disbarment of Biaggi, 110 S. Ct. 557 (1989) (disbarment order entered), and was convicted of a violation of the federal Travel Act for his acceptance of bribes (paid vacations) in return for his attempts to induce favorable rent, and utility rates from New York City. United States v. Biaggi, 853 F.2d 89 (2d Cir. 1988).
\textsuperscript{139} 116 Cong. Rec. 36,296 (1970).
\textsuperscript{140} 116 Cong. Rec. 37,264 (1970).
\textsuperscript{142} Senate Report, supra note 135, at 116.
\textsuperscript{143} House Hearings, supra note 128, at 336 (May 12, 1970) (“nowhere defines what is a sufficient pattern of conduct” “pattern of conduct ... vague”).
\textsuperscript{144} 116 Cong. Rec. 35,202 (1970).
\textsuperscript{145} House Hearings, supra note 128, at 698 (Letter of Edward L. Wright, Sept. 11, 1970).
distinguishing characteristics and are not isolated events.” The analytic building-blocks of the Brennan majority in *H.J. Inc.*—“relationship” (“similar purposes, results, participants, victims, or methods of commission”) and “continuity” (“not isolated events”)—were thus the result of a scrutinizing bar and the federal government.

This intensive consideration and shaping of RICO pattern similarly extended to the potential application of the void-for-vagueness doctrine. The Senate Report of S. 30 is invaluable for its discussion of the void-for-vagueness doctrine and its primary aim, fair warning:

It is this factor of continuity plus relationship which combines to produce a pattern. The concept “pattern” is thought to provide no due process constitutional barriers to criminal sanctions, as a “racketeering activity” defined above, must be an act in itself subject to criminal sanction and any proscribed act in the pattern must violate an independent statute. *See United States v. Nardello*, 393 U.S. 286 (1969).... Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

The Department of Justice reached the same conclusion in the House Report on S. 30 when they stated “[w]e believe that the criteria used to delineate these special offenders [i.e., they must have engaged in a pattern] have been stated so as to withstand serious challenge on grounds of ‘vagueness’. The specter of vagueness first raised by the Department of Justice in 1969 was thus firmly put to rest by late 1970 after the inclusion of the limiting language of “continuity plus relationship” in the accompanying Senate Report, and its express incorporation in section 3575(e).

RICO opponents claim that the legislative history of RICO was aimed exclusively at the “mafia” and organized criminal activity. This view is incorrect. As *H.J. Inc.* held, RICO was targeted at, but not limited to, “organized crime.” Similarly, when it comes to RICO pattern these legislative historians have a selective memory. RICO pattern as an operative term, as well as its attendant prongs “continuity plus relationship” were legislative responses to a demanding bar. Indeed, the Senate Report, properly considered and rejected the claim that pattern would violate due process precisely because any act within the pattern must “violate an independent statute.” This is indeed, is what RICO’s framers were “... after all the time ...”

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146 18 U.S.C. § 3575(e) (1970) (section 3575(e) was repealed and replaced by a similar provision, 28 U.S.C. § 994(i)(2) (1988)).
147 Indeed, one student authored Note discussed the void-for-vagueness doctrine as applied to RICO pattern. Note, *supra* note 38, at 489-92. The Note merely recounted the legislative history relevant to previous cases and challenges. The Note failed to discuss the repeated debates in the House and Senate which identified, and later solved, the alleged void-for-vagueness infirmities in the pattern concept. In this sense, the legislative history reported in this Note can be misleading.
B. Fort Wayne Books: "You got so you can dish it out, 
but you can't take it no more."\(^{150}\)

Not only did the legislature raise, contemplate, and ultimately reject 
void-for-vagueness infirmities in RICO pattern, but the Supreme Court 
too has rejected a similar challenge in the RICO context. In *Fort Wayne 
Books, Inc. v. Indiana*,\(^ {151}\) and its sister case *Sappenfield v. Indiana*, Justice 
White and his colleagues Chief Justice Rehnquist, and Justices Kennedy, 
Scalia and Blackmun addressed whether the Indiana RICO statute was 
unconstitutionally vague as applied to obscenity predicate offenses. The 
logic and conceptual framework employed is particularly useful because 
the decision is so recent. Prosecutors in Howard County, Indiana 
charged Sappenfield with six counts of distribution of obscene matter, a 
state misdemeanor.\(^ {152}\) In addition, prosecutors used these alleged predi-
cate acts of obscenity as "patterns of racketeering activity" in two RICO 
charges. The trial court dismissed the two RICO counts on the grounds 
that the Indiana RICO statute was unconstitutionally vague as applied to 
obscenity predicate offenses.\(^ {153}\) The Indiana Court of Appeals reversed. 
The Indiana Supreme Court declined to review the lower court's hold-
ing.\(^ {154}\) The United States Supreme Court granted certiorari because of 
the important first amendment challenge to the facial validity of the Indi-
ania RICO statute.\(^ {155}\)

Sappenfield contended that the United States Constitution forbids 
the use of obscenity violations as predicate acts for a RICO violation be-
cause the predicate act—distribution of obscene materials—is inherently 
vague. White's opinion rejected this contention by constructing a very 
strong syllogism. First, the RICO statute at issue wholly incorporates the 
state obscenity law as a predicate act within "pattern of racketeering ac-
tivity." Second, Indiana obscenity standards are not "inherently vague" 
but closely conform to the Court's *Miller*\(^ {156}\) standards. Ergo, the RICO 
law itself cannot be vague as determined by the trial court, because there 
is no defect in the underlying obscenity law. Indeed, the Court's lan-
guage was particularly forceful:

> We find no merit in Petitioner's claim that the Indiana RICO law is 
unconstitutionally vague as applied to obscenity predicate offenses. 
Given that the RICO statute totally encompasses the obscenity law, if 
the latter is not unconstitutionally vague, the former cannot be vague 
either.\(^ {157}\)

Moreover, the Court postulated that pattern is necessarily less vague 
than the underlying predicate acts when it noted:

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\(^{150}\) *Little Caesar*, supra note 1, at 132.

\(^{151}\) 109 S. Ct. 916 (1989).


\(^{153}\) 109 S. Ct. at 922.

\(^{154}\) *Id.*

\(^{155}\) *Id.*


\(^{157}\) 109 S. Ct. at 924-25.
Indeed, because the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently less vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.158

Importantly, *Fort Wayne Books* was argued as a facial challenge to the constitutionality of using obscenity predicate acts to form a "pattern of racketeering activity." *Fort Wayne Books* was not a more narrow attack on the nature of obscenity alone. As such, the Court seems necessarily constrained by the analysis and construct of *Fort Wayne Books*. Pattern is no more than the sum of its "parts"—in each case the "parts" must fall before the "whole" can be deemed unconstitutional as applied. This analytical construct is particularly powerful. Moreover, it is buttressed by RICO's legislative history.159

Ostensibly, Justice O'Connor shares the views on pattern that the majority expressed in *Fort Wayne Books*. Although Justice O'Connor dissented from the grant of jurisdiction to hear *Sappenfield* before a final judgment, the analytic approach she took in *Fort Wayne* seems to support the majority position in both cases. She wrote, "I concur in the Court's disposition of *Fort Wayne Books, Inc. v. Indiana,* . . . which presents, among others, the same question as presented in *Sappenfield* . . . There is no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute."160

Conversely, Justice Stevens, with whom Justices Marshall and Brennan joined in dissent, argued that the Indiana RICO law was unconstitutionally vague as applied to obscenity predicate offenses. Justice Stevens added that obscenity predicates, absent some connection to minors or obtrusive display, are, in and of themselves, unconstitutionally vague. The resultant pattern of two such offenses "only compounds the intractable vagueness of the obscenity concept itself."161 Read literally, the dissent indicates only that Justice Stevens views obscenity statutes as unconstitutionally vague, and provides no indication that pattern involving any other predicate offense, nor circumstance, would be void-for-vagueness.162

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158 Id. at 925 n.7.
159 See supra notes 148-49 and accompanying text.
161 109 S. Ct. at 934.
162 However, in an offhand manner, Justice Stevens noted:
Ironically, the legal test for determining the existence of a pattern of racketeering activity has been likened to "Justice Stewart's famous test for obscenity—'I know it when I see it'—set forth in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)." *Morgan v. Bank of Waukegan*, 804 F.2d 970, 977 (7th Cir. 1986) [sic] (citing *Papai v. Cremosnick*, 635 F. Supp. 1402, 1410 (N.D. Ill. 1986)).

Id. at 934 n.14 This witty anecdote only serves to muddle Justice Steven's analysis; moreover, it is inappropriate. The original quote by Judge Moran in the Northern District of Illinois said, "because the scheme and the episode concept can easily slip into an 'I know it when I see it style' of discourse, we are reluctant to follow either concept." *Papai v. Cremosnick*, 635 F. Supp. at 1410. It was this multiple scheme or episode analysis that Judge Moran criticized, not the concept of pattern as a whole.
In sum, the Court properly demonstrated that both prongs of the void-for-vagueness doctrine have been satisfied. First, like Sappenfield suggested, fair warning cannot reasonably be implicated when the predicate offenses have always been state crimes—only the penalty applied is in dispute,\(^{163}\) not the offender’s culpability. Second, courts and prosecutors have circuit precedent within which the prospect of arbitrary or capricious enforcement is largely circumscribed.\(^{164}\)

The legislative history of RICO wisely considered that RICO pattern comprised of independent state predicate acts would pose “no due process constitutional” barrier. Six members of the Supreme Court in *Fort Wayne Books* added that if the predicate act is not vague, the pattern cannot be vague either. Moreover, a pattern of such acts is “inherently less vague.” The structure for any vagueness challenge to RICO pattern is firmly imbedded in *Fort Wayne Books*. The Court has “dished out” its medicine in the context of RICO “pattern,” it must now learn to live with the analysis.


This conceptual framework is not a unique Supreme Court doctrine. In a series of decisions dating from the 1970s, the lower federal courts have similarly analyzed RICO pattern, and rejected all assertions that pattern is void-for-vagueness.\(^{166}\) The most basic challenge in these cases presented to RICO pattern has been a facial challenge. Pattern could be found facially unconstitutional only if protected speech, or a similar fun-

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163 A related constitutional challenge has been the forfeiture provisions of RICO, and particularly their application to attorney fees. See Blakey, *Forfeiture of Legal Fees: Who Stands to Lose?*, 36 EMORY L.J. 781 (1987). Traditionally limited to drug cases in South Florida, the prospect that attorney fees in routine criminal RICO prosecutions might be subject to forfeiture is alarming. See Nat. L.J., Nov. 6, 1989, at 2, col. 2. (“New Jersey’s U.S. Attorney’s office has told lawyers for Eddie Antar, founder of bankrupt Crazy Eddie Inc., that their fees will be subject to forfeiture if he is convicted of racketeering. It would be the first time attorney’s fees are seized in a white-collar case, observers say.”) The reform movement can not be considered independent of prosecutorial discretion; to the extent prosecutors ask for forfeiture of attorney fees in complex securities fraud cases, the prospect for congressional reform would be greatly magnified.

164 Indeed, the reform movement in Congress is largely a jurisdictional movement. Rep. Boucher’s bill attacks the very culpability of certain predicate acts—commodities fraud, accounting fraud, corporate fraud, securities fraud—not the manner nor degree of arbitrariness in the enforcement. As such, the vagueness charges become merely illusory, a cloak covering the true motivation of anti-RICO forces. See infra notes 300-08 and accompanying text.

165 *Little Caesar*, supra note 1, at 116.

166 But see Mollard, *Firestone Lawsuit Cost $7 Million in Legal Fees*, Bus. First—Columbus, July 16, 1990, at 2, col. 1. United States District Judge James L. Graham dismissed a $1.3 billion lawsuit filed by the Firestone’s alleging that the Galbreath family had transferred assets out a family trust. “It [the decision] declared the RICO statute unconstitutional as written and applied to the Galbreath and Bricker defendants because the concept of showing a ‘pattern of racketeering activity’ is constitutionally vague, the judge said.” *Id*. Such an unwarranted finding will almost certainly be overturned by the Sixth Circuit on appeal. Judge Graham’s ruling RICO pattern unconstitutional “as written and applied” reveals his fundamental misunderstanding of the void-for-vagueness doctrine. Only a facial challenge to RICO pattern could justify finding pattern unconstitutional “as written.” But since the Firestone-Galbreath dispute was conspicuously devoid of first amendment issues, a facial challenge could not be sustained. Furthermore, RICO pattern “as applied” could only be found unconstitutional if (1) the predicate acts—mail and wire fraud—were found unconstitutionally vague or (2) the “continuity plus relationship” test itself was found unconstitutionally vague. Judge Graham’s decision supported neither finding, and is therefore deficient.
damental right, were implicated by RICO. Since most detractors of the statute have focussed on the civil applications of RICO—principally mail and wire fraud—a facial challenge to the statute’s definiteness is misguided. Rather, pattern may be challenged on vagueness grounds only “as applied” to the facts of the particular case. As *Fort Wayne Books* makes clear, constitutional challenges to RICO pattern “as applied” must allege that the predicate acts themselves are void-for-vagueness. Another possible challenge “as applied” to a particular case, is that the “continuity plus relationship” test of *H.J. Inc.* is unconstitutionally vague. Although Justice Scalia deridingly termed the test about as “helpful to the conduct of their affairs as ‘life is a fountain,’” the test is logically consistent and perfunctory in application. Thus, pattern may be challenged as vague because either the predicate acts, or the “continuity plus relationship” test either: (1) fails to give prospective notice and fair warning to defendants, or (2) places arbitrary or discriminatory discretion in the hands of prosecutors, judges or the jury.

1. *H.J. Inc.*’s “Continuity Plus Relationship” Test Vague?

Following Justice Scalia’s invitation, many challengers will assert that the pattern test set forth in *H.J. Inc.* is vague. But, if we graphically trace the logic of the Court’s “continuity plus relationship” test, we conclude that six questions must be asked and answered in order to establish whether a “pattern” is present: (1) is the series of acts (at least two) related to one another, for example, are they part of a single scheme? (2) if not, are they related to an external organizing principle, for example, to the affairs of the enterprise? If the answer to both questions is “no,” there is no relationship between the acts and there cannot be a pattern. If the answer to either question is “yes,” there is a relationship between the acts, and we must ask three further questions to search for continuity: (3) is the series of acts open-ended, that is, do the acts have no termination point? (4) if not, did the close-ended series of acts go on for a substantial period of time, that is, more than a few weeks or months? If the answer to either question is “yes,” continuity is present, there is a “pattern” of racketeering activity. If the answer to both questions is “no,” up to two additional questions must be asked: (5) may a threat of continuity be inferred from the character of the illegal enterprise? (6) if not, may a threat of continuity be inferred because the acts represent the regular way of doing business of a lawful enterprise? If the answer to either question is “yes,” a threat of continuity is present, both the relationship and continuity prongs of the test have been met, and a “pattern of racketeering activity” has been alleged.

The initial circuit court to squarely face the constitutionality of RICO pattern following *H.J., Inc.* was the First Circuit in *United States v.*


168 See Myths, supra note 38, at 961-62 n.343.
Angiulo. Angiulo, leader of the Boston arm of La Cosa Nostra (known as the ‘Patriarca Family’), contended that the exact scope of the “continuity plus relationship” test proffered in *H.J. Inc.* could not be fixed with sufficient clarity. The court answered, however, that even if the “continuity plus relationship” test was vague in some marginal circumstances, this did not exonerate Angiulo’s actions. Facial challenges to statutes, which assert vagueness in marginal cases, may only be brought to protect first amendment activity. Angiulo had properly to bring a challenge to RICO pattern “as applied” to his activity. The court concluded:

Thus, although RICO’s “pattern” element may be vague in some contexts, a matter on which we express no opinion, it is not vague in the context before us. A person of ordinary intelligence could not help but realize that illegal activities of an organized crime family [gambling, loansharking, and conspiracy] fall within the ambit of RICO’s pattern of racketeering activity.

The constitutionality of RICO pattern outside of the organized crime context was thus properly reserved for later judgment.

The Third Circuit similarly found RICO pattern not unconstitutionally vague in *United States v. Pungitore.* Sixty members of the Philadelphia branch of La Cosa Nostra (known as the “Scarfo Family”) were convicted in the Eastern District of Pennsylvania of a pattern of racketeering activity that included murder, attempted murder, illegal gambling, and extortion. Relying on Justice Scalia’s concurrence in *H.J. Inc.*, the appellants contended that RICO pattern was unconstitutionally vague because it “failed to place them on notice as to what conduct falls within its parameters.” The court properly noted, however, that facial challenges are permitted only when defendant’s are protecting first amendment activity. The court ruled that “persons of ordinary intelligence would know that the repeated commission of murder, extortion, illegal gambling, and usury offenses” could constitute a RICO pattern, and that the challenge was “utterly devoid of merit.”

Citing affirmatively to *Angiulo*, the court concluded:

We think that it is clear that the potential due process problems noted by Justice Scalia in *H.J. Inc.* are not present in organized crime cases. Unlike *H.J. Inc.* which involved allegations of corruption within the ranks of a legitimate business, the application of RICO to the activities of the Scarfo crime family could not have come as a surprise to the members of the family. In fact, we have doubts that a successful

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169 897 F.2d 1169 (1st Cir. 1990).
170 Id. at 1179.
171 Id. at 1180.
173 The court noted in a footnote that the governments contention that the analysis of *Fort Wayne Books* controlled was erroneous. *Fort Wayne Books* urged that unless the predicate acts themselves were unconstitutionally vague, a pattern of such acts could not be. Rather, the analysis of *H.J. Inc.* controlled because appellants contended that the “continuity plus relationship” test of *H.J. Inc.* was unconstitutionally vague.
vagueness challenge to RICO ever could be raised by defendants in an organized crime case.

*Pungitore* is troubling for two reasons, however. First, although the court said the “continuity plus relationship” test itself, and not the predicate acts, must pass constitutional muster, the court applied the notice test—“persons of ordinary intelligence”—to the predicate acts of murder extortion, illegal gambling and usury. Perhaps the court found that the analysis of *Fort Wayne Books* is very broad indeed. Second, the court implied in dicta that an organized crime limitation may still have some vitality.174 This is troubling because the “continuity plus relationship” test

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174 The Third Circuit is not alone in its attempt to read an organized crime limitation into RICO through the void-for-vagueness doctrine. The following discourse in oral argument between Justice Scalia and Mark Reinhart, counsel for H.J. Inc., revealed Justice Scalia's true motivation to challenge RICO pattern—inserting an organized crime limitation into the text. Mr. Reinhart properly thwarted Justice Scalia's attempt to "end-run" the facts of the case by pointedly noting that an "organized crime" limitation was not argued in the Eighth Circuit, but was wholly a creation of Justice Scalia:

QUESTION: Couldn't one say that what you need in addition is activity that can reasonably be characterized as racketeering activity; that is to say, the kind of activity that would normally be conducted by organized crime?

MR. REINHART: Well, Your Honor, in a way that is what Congress said. They defined racketeering activity in (I), and they did not add, though, when committed by organized crime. They said these acts. It is defined here. There's no further definitional requirement needed.

The person likewise is defined, and throughout this statute you will see no limitation to organized crime. This—and in fact, the person—this argument, trying to limit the person defendant has been rejected, and now the amici are trying to work it in through the word “pattern,” through the action word in the statute, not though the subject word.

But Footnote 14 in Sedima has already recognized that Congress, and indeed this Court, finds two elements in pattern: relationship, relatedness and continuity. There was no discussion of and being a member of organized crime or earning your money through organized crime.

Indeed, Justice Scalia, the Congress did know well the principle of including substantial income from crime or expert criminality because they did it in Title X, the next title of this act, where they said if you have a pattern and you have substantial income and you are an expert criminal, then you get enhanced punishment. Clearly those were not included within pattern, at least as they saw pattern.

Congress well knew that the purview of RICO was beyond organized crime. The Sedima decision is replete with examples from the congressional debate, and it's well laid out there. The New York City Bar strenuously objected to the statute. The two sponsors, Congressman Poff and Senator McClellan, both explicitly stated that it extends beyond organized crime.

The predicate acts, as pointed out in Sedima, give the breadth to the statute because they include acts that are not normally committed by organized crime. The organized crime connection requirement has been virtually uniformly rejected by lower courts. Respondent did not argue this to the Eighth Circuit—one of the first circuits in the country to reject the organized crime connection in the case of Bennett v. Berg.

I submit that Respondent and amici miss the point when they argue that legitimate businesses are being pulled within the purview of RICO. Only those who commit not one but a pattern of racketeering activity are within RICO. Such businesses forfeit the right to call themselves legitimate.

The Eighth Circuit's attempt to restrict the statute should be reversed, this case should be remanded, and amici's attempt to rewrite RICO to include an organized crime connection requirement should be rejected.

As this Court said in Sedima, legitimate business enjoys no immunity from the consequences of criminal activity.
should be no more clear in the organized crime context than in the legitimate business context. *H.J. Inc.* expressly provided for the application of the "continuity plus relationship" test to legitimate business, not only through its explicit rejection of an organized crime limitation, but also by noting that "a regular way of conducting defendant's ongoing legitimate business" establishes a continuous pattern. In the future, courts would be wise to ask the six questions *H.J. Inc.* analytically set forth and reject bald assertions of vagueness that really focus on the constitutionality of the predicate acts—at least in this sense the *Pungitore* court was successful.

2. Pre-*H.J. Inc.* Courts Focus On Notice

a. Notice From a Pattern Of Racketeering Activity?

One of the first federal district courts to address the applicability of the void-for-vagueness doctrine to RICO pattern was *United States v. Stofsky.* Counsel in *Stofsky* used an innovative challenge. They suggested that while "pattern of racketeering activity" may be adequately defined in isolation, the phrase "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . ." as applied in section 1962(c) was vague. Without such a definition "the prospective defendant cannot predict with any certainty conduct sought to be made unlawful." The court answered the allegation with some of the most precise language used by any court to date:

[T]he statute is clear enough. The elements of the predicate offenses are well-defined and established. It would be futile for a person to argue that he had no warning or knowledge that his commission of such acts would violate the law. Thus the only serious question is whether Section 1962(c) gives him adequate warning that the commission of more than one such criminal act under certain circumstances constitutes an additional, separate crime for which there is a separate penalty. With respect to this aspect, the statutory scheme of Section 1962(c) is not unlike that of 21 U.S.C. Section 848 which proscribes "a continuing criminal enterprise" in drug trafficking. That statute also creates a separate offense based on the commission of predicate crimes under certain defined circumstances. Neither statute contains a requirement of scienter independent or in addition to that necessary to prove the predicate crimes. It was characterized as a business regulatory statute and upheld against a vagueness attack in *United States v. Manfredi,* 488 F.2d 588 (2d Cir. 1973), with the Court of Appeals relying in part on *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), where the Court said, "[I]n the field of regulatory statutes governing business activities, where the acts limited are in a narrow category, greater leeway is allowed." If this language is applicable to 21 U.S.C. 848, where the purpose of Congress is to eradicate totally illicit enterprises, it would seem all the more applicable to 18 U.S.C. Section 1962 where the congressional purpose is to eradicate criminal means of acquiring, maintaining and conducting any enterprise affecting commerce. Given the leeway of a regulatory statute (and even without

176 Id. at 612.
177 Id.
such leeway), Section 1962(c) sufficiently places men of reasonable intelligence on notice...

Counsel further argued that only acts that further the illegitimate business objectives should be illegal under RICO. The court rejected this legitimate/illegitimate distinction by stating, "[T]his may be broad, but it is not vague." Finally, counsel argued that accidental or unrelated behavior is not subject to section 1962(c). The court agreed and introduced 18 U.S.C. section 3575 as an analogy. "Statutes enacted together within the Organized Crime Control Act of 1970 have been construed in pari materia... [T]t would seem that it [section 3575] may be used to cast light on the word pattern as used in section 1961." Stofsky thus stands for several propositions: (1) to the extent the predicate offenses are well-defined, defendants have been fairly apprised of the illegality of their acts, (2) legitimate businesses are subject to penalties of RICO, (3) section 3575 may be used in pari materia to construe pattern within RICO.

Following closely on the heels of the Stofsky decision was the Second Circuit's decision in United States v. Parness. Parness was alleged to have acquired an interest in a St. Maarten hotel-casino through a pattern of racketeering involving the conversion and interstate transportation of gambling marker proceeds. Parness asserted in his defense that the statute failed to provide a sufficient warning that his behavior was proscribed because he was uncertain whether he would be indicted for the predicate offenses. "Pattern of racketeering activity" was thus, in Parness' view, unconstitutionally vague as applied to his behavior. The court responded that predicate offenses must only be "indictable" not actually "indicted." Moreover, the Court explained:

The Constitutional validity of a statute does not depend on whether there are marginal cases in which its clarity may be in doubt. Rather the test is whether the statute conveys an adequate warning as applied in a specific situation. Here, the interstate transportation of the two cashiers checks clearly were indictable acts under § 2314. They pro-
vide unambiguous predicates for the § 1962(b) "pattern." We reject Parness' claim that § 1962(b) is unconstitutionally vague...186

Parness embraced two analytical concepts that are critical to the understanding of vagueness. First, marginal cases are irrelevant to a defendant's assault on vagueness grounds (absent first amendment claims). Second, fair warning is satisfied by the proscription of predicate offenses, not by the actual indictment of the offense.

Another district court faced a direct challenge to the constitutionality of RICO pattern in United States v. White.187 Specifically, White challenged, "the definition of the element of 'pattern of racketeering' is vague and uncertain and fails to give a defendant definite and proper notice as to what activity is proscribed."188 The court dismissed the defendant's assertion noting instead what pattern is: "In common usage, the term 'pattern' is applied to a combination of qualities or acts forming a consistent or characteristic arrangement."189 After further noting that the defendant's acts were of a "continuing criminal activity" sufficient to meet this requirement, the court said "I am persuaded by the reasoning of the district court in United States v. Stofsky."190 Once again, to the extent that the predicate acts were well-defined, there was sufficient fair warning to satisfy the requirements of due process.

In United States v. Swiderski,191 a similar assault was mounted on the constitutionality of RICO pattern. The challenge simply stated that any provisions of RICO employing the language "pattern of racketeering activity" were "too vague to put persons on notice that their activities are illegal."192 The court answered this charge by looking to the rationale of United States v. Campanale, and United States v. Stofsky for constitutional validations of the language.193 They stressed, first, that no party was subject to the conspiracy unless he committed two predicate acts of racketeering activity. Second, RICO presented no more of a "notice" problem than more conventional conspiracy statutes—both rendered defendants liable for inchoate offenses. So too, in United States v. Thevis,194 a frontal assault on the constitutionality of most of the provisions of section 1962(c) was rejected by the court. In particular they found the phrase "through a pattern of racketeering activity" "is not constitutional under the vagueness doctrine." In addition, defendants framed a vagueness as applied argument. The court responded that this claim "has even less merit," because the racketeering activity all furthered the purpose of their pornography business.195 Thus, "there can be no real argument that this conduct was in an area of such attenuated and ambiguous criminal liability under 18 U.S.C. Section 1962(c) that the conduct

186 Id. (citations omitted).
188 Id. at 883.
189 Id.
190 Id. at 884 (citation omitted).
191 593 F.2d 1246 (D.C. Cir. 1978).
192 Id. at 1246.
193 Id.
195 Id. at 140.
of the defendants should be protected by the shield of the vagueness doctrine." 196

b. Notice to Legitimate/Illegitimate Businesses?

Another argument that challengers have made is that RICO is vague because the defendant had no notice that legitimate businesses (or illegitimate businesses in the case of the mafia) were subject to the sanctions of RICO. United States v. Scalzitti 197 involved a vagueness challenge that contended that "insofar as no distinction is made between the illegal but incidental or peripheral functions of an otherwise legitimate concern and an enterprise whose sole raison d'être is to serve as a front for racketeering, the statute must fail as being too indefinite." 198 The court answered the challenge by citing Stofsky verbatim. The challenge was noteworthy in that it followed closely on the heels of Stofsky and illustrated willingness of the other federal district courts to adopt the compelling reasoning of the Stofsky court. 199 In United States v. Field, 200 a district court similarly held section 1962(c) not unconstitutionally vague. Like Stofsky, the defendant alleged that RICO requires proof that the enterprise itself was corrupt, and that the defendant's activities advanced the purposes of the enterprise. The court, of course, rejected this allegation, "Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs... or proof that the union itself is corrupt, or proof that the union authorized the defendant to do [the] acts." 201 Citing at length from Stofsky, the court similarly stressed that the state acts alleged are well-defined, and that criminal responsibility is attendant with a pattern of such violations, whether the enterprise was legitimate or illegitimate. Surprisingly, the notion that illegitimate businesses could claim they had no notice that mafia families could be RICO enterprises was litigated repeatedly throughout the country. In a 1974 case, United States v. Castel- lano, 202 nine New York "mafia" loan sharks 203 were convicted on section

196 Id.
198 Id. at 1015.
199 Another constitutional challenge to § 1962(c) was summarily dismissed in United States v. Chovanec, 467 F. Supp. 41 (S.D.N.Y. 1979), by merely referring to Stofsky.
201 Id. at 58.
203 The principal defendant in the case, Big Paul Castellano, was the leader of the Gambino "Family" at the time of his indictment. His ironic and newsworthy assassination was described by Shana Alexander in the book THE PIZZA CONNECTION at 88-89 (1988) ("[5:15 P.M. Midtown, New York] [Castellano] and Billoti [were] anxious to get to their next appointment, a dinner reservation at Sparks steakhouse, across town on East 46th between Second and Third Avenues... Billoti edged into East 46th street and pulled up beside the red canopy with the legend SPARKS stenciled on its side. As Paul Castellano stepped out of the Lincoln, he failed to notice the yellow taxicab pull across the junction of the street and block off the flow of traffic. Thomas Billoti had just closed the door of the car when he caught a glimpse of two men in tan Burberry raincoats and caps advancing toward Castellano. Both raised their hands at the same instant, and Billoti was hit in the head with a bullet from a 9 mm Browning automatic pistol. Castellano stood staring at the hit men, frozen, as they shot him twice in the head and once in the chest. He collapsed at the side of the Lincoln as the two gunmen ran to a waiting car at the corner of 46th and second... (ellipses in original)... At New York University Law School, the room set aside for Professor Blakey's cocktail reception [preceding a RICO seminar] was comfortably crowded. The gathering was predominantly male, white, mid-
1962(c) and (d) counts. They argued that RICO Section 1962(c) was unconstitutionally vague as applied to them, because it failed to give adequate and fair warning that illegitimate business as well as legitimate were within RICO's ambit.\textsuperscript{204} They quoted extensively from RICO's legislative history which focused on the "mafia's" infiltration of "legitimate" business.\textsuperscript{205} The court noted the legitimate/illegitimate distinction was rejected by the Second Circuit in \textit{United States v. Darney}. Furthermore, the court noted that the question of fair warning was not warning in the abstract, but whether there was sufficient clarity of warning in this particular case. The court concluded "[i]t is clear to us that the statute's language is not vague in including not only legitimate business but also illegitimate business."\textsuperscript{206} In \textit{United States v. Clemente},\textsuperscript{207} Professor Alan M. Dershowitz of Harvard Law School argued for the defendant, Clemente, that the RICO conspiracy count against him was unconstitutionally vague. Since Clemente was the New York waterfront mafia ringleader, Professor Dershowitz was put in the unusual position of having to argue that RICO only applied to legitimate businesses. The court responded that, "[w]e decline in this case to construe the RICO statute so as to allow the appellants a defense that they made sure not to engage in any legal activity."\textsuperscript{208}

c. \textit{Notice To Persons of Their Own Enterprise}?

A slight variation of this argument asserted that defendants had no notice that liability could attach to racketeering acts of their own enterprise. In \textit{United States v. Martino}, a major arson ring in South Florida involving twenty-three defendants,\textsuperscript{209} 200 witnesses, sixty-nine alleged

\textsuperscript{204} 416 F. Supp. at 128.
\textsuperscript{205} Id. at 127.
\textsuperscript{206} Id. at 128.
\textsuperscript{207} 640 F.2d 1069 (2nd Cir. 1981). Some of the more interesting tape recordings introduced as evidence at the trial included co-defendant Thomas Buzzanca's [President of two New York International Longshoreman's Associations] following statement: "Tino's [Fiumara] good point is that everybody fears and respects him. That's a good thing... I absolutely think, if this guy tempers himself, he'll be, ten years from now, he'll be awesome... He'll have the best of two worlds. Good sense, good judgment. Plus, which we all live under fear. Ya need to have that balance... We'll make money. We'll steal it if we have to." \textit{Id.} at 1075. Mr. Fiumara, the New Jersey waterfront "boss" received a 25-year sentence for his good judgment. He currently resides in Leavenworth Kansas federal prison and it seems certain he will serve the entirety of his term. \textit{Ste Fiumara v. O'Brien}, 889 F.2d 254 (10th Cir. 1989) (no abuse of discretion in finding Tino Fiumara responsible, although unconvicted, of four murders for purposes of parole denial).
\textsuperscript{208} Id. at 545-46 (citing United States v. Provensano, 620 F.2d 985, 993 (3d Cir. 1980)).
overt acts and fifty-six alleged predicate acts, presented such a challenge. The court summarily dismissed the vagueness challenge as follows:

Appellants' third contention, that RICO is unconstitutionally vague, was rejected in United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976); in which we held that a person of average intelligence, upon reading the statute with the aid of relevant definitional provisions, "could not help but realize that they would be criminally liable for participating in 'any enterprise,' including their own," through a pattern of racketeering activity.\(^{210}\)

In the leading Fifth Circuit case on pattern definiteness, United States v. Hawes,\(^{211}\) eight defendants who were charged with distributing coin-operated electronic gambling machines\(^{212}\) argued that they had no notice or fair warning because a person could not expect to be included in his own "enterprise," thus RICO was vague as applied. The court did not entertain the person/enterprise distinction for long:

We cannot agree with this line of reasoning. In its classic formulation of the standard for establishing unconstitutional vagueness, the Supreme Court held that a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." If "men of common intelligence" must guess at the meaning of a statute, the statute violates due process of law. By this standard, quoting from § 1962(c), we hold that "any person" of average intelligence, on a clear reading of that statute, together with relevant definitional provisions, could not help but realize that they would be criminally liable . . .\(^{213}\)

The Fifth Circuit thus firmly stated that the vagueness standards were easily met; RICO pattern provided sufficient notice and fair warning to apprise the defendant that his actions were unlawful.

d. Notice From Wire Fraud Predicate Acts?

A Sixth Circuit case, United States v. Morelli,\(^{214}\) decided that wire fraud predicate acts provide sufficient notice to potential defendants to maintain RICO's constitutional definiteness. Morelli contended that RICO was unconstitutionally vague as applied to his conduct: Morelli allegedly allowed his name to be used (in the context of his being the Detroit Giacolone Family's "main man") in order to coerce and extort illegal loan sharking payments. Allegedly, he never participated in the conduct of the enterprise. Nevertheless, "Morelli was found guilty of two predicate counts of wire fraud that were part of a pattern of rackets-
teering activity."

Morelli, too, failed to mount a constitutional attack on the predicate acts within his RICO conviction. This is especially significant given the fact that many RICO opponents argue that mail and wire frauds fail to give adequate notice to potential defendants. These vagueness challenges should properly fail.

e. Notice From State Law Predicate Acts?

One of the most recent circuits to hold RICO constitutional has been the Sixth in United States v. Tripp. In a sweeping decision, the court rejected a challenge that by incorporating state laws into "racketeering activity," RICO violated due process notions of fair warning. The court noted that many other circuits "squarely rejected the argument that the federal racketeering statute is unconstitutionally vague," including the Sixth Circuit, Seventh Circuit, Second Circuit, District of Columbia Circuit, Fifth Circuit, and Ninth Circuit. "Nor is there any constitutional objection to a criminal statute that incorporates state law for purposes of defining illegal conduct." Most importantly, the court stated, "Tripp does not allege that the state offenses involved herein themselves are void-for-vagueness." The court thus explicitly adopted the rationale the Supreme Court later adopted in Fort Wayne Books—RICO's pattern may only be challenged constitutionally by subjecting the predicate acts themselves to constitutional scrutiny. Further, the court rejected Justice Scalia's contention in H.J. Inc. that by incorporating state law predicates into RICO, and seemingly upsetting the balance of federalism between the states and the federal government, this could somehow sway the void-for-vagueness argument.

3. Arbitrary Or Discriminatory Enforcement

Given the overwhelming weight of authority that has found that RICO pattern provides fair warning to potential defendants, it is not surprising that new challengers are suggesting that civil RICO places unfettered discretion in the hands of prosecutors, judges and juries. It is true that there is a paucity of case law analyzing this second prong of the void-for-vagueness doctrine in the RICO context. But challengers would be wise to note that the requirements for mounting a proper and just challenge under this second prong of the vagueness doctrine have been clearly set out by the Supreme Court.

One author has phrased this fear of discriminatory enforcement as "a risk of harassment" that "is greater in the civil than criminal context because, in part, there can be no effective political oversight over the private plaintiff." The argument continues that "whether the enforcing party is a federal official or private citizen, the constitutional violation exists because the statute provides inadequate prosecutorial gui-

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215 Id. at 412.
216 782 F.2d 38 (6th Cir. 1986).
217 Id. at 42.
218 Id.
219 Id. (emphasis added).
220 Freeman & McSlarrow, supra note 38, at 1008.
dance." 221 Such contentions, however, are directly refuted by the governing Supreme Court jurisprudence. In United States v. Batchelder, 222 the Court held that the prosecutor’s discretion to subject a defendant to two different statutes, each with substantially different maximum penalties, was not unconstitutionally vague. The statutes did not lodge arbitrary or discriminatory discretion in the hands of prosecutors but “plainly demarcate[d] the range of penalties that prosecutors and judges may seek and impose.” 223

Civil RICO defendants essentially wish to argue that mail and wire frauds, “garden variety frauds,” are only prosecuted arbitrarily or discriminatorily as civil RICO claims. 224 But as Batchelder established, such discretion is not unfettered. The frauds maybe pursued at the state level under theories of common law fraud, or they may be pursued as civil RICO “patterns of racketeering activity.” As in Batchelder, there are really only two prosecutory “alternatives” and two potential “sentences” available. The real core of the alleged infirmities in RICO is that state common law fraud is difficult to prove, and offers only single damages. Conversely, RICO offers the lure of treble damages. But this difference is illusory; in many states punitive damages are available to address egregious fraud, and in some states these punitive damages may actually result in more, not less, damages. Nevertheless, it is the severity of the “sentence” or damages, and not arbitrary or discriminatory discretion, that the civil RICO defendants deplore. The Court concluded in Batchelder: “The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.” 225 In a similar vein, the Court noted in Fort Wayne Books, “It is true . . . that the punishments available in a RICO prosecution are different from those for obscenity violations. But we fail to see how this difference renders the RICO statute void for vagueness.” 226


The unanimity with which RICO pattern has been held constitutionally definite is overwhelming. The First, Second, Third, Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits have all found RICO pattern constitutionally sound. RICO pattern provides adequate notice to potential defendants, and does not result in arbitrary or discriminatory

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221 Id.
223 Id. at 126.
224 Discriminatory enforcement becomes rather meaningless in the context of white-collar defendants. Defendants must argue that the prosecution discriminated against a “class of defendants.” “The Equal Protection Clause prohibits selective enforcement ‘based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’ ” Id. at 125 n.9 (citation omitted). Surely, white-collar defendants do not comprise such a protected class.
225 Id. at 124.
227 Additionally the Third Circuit found § 1962(c) not vague. United States v. Herman, 589 F.2d 1191 (3d Cir. 1979). The Second Circuit found § 1962 not vague. United States v. Huber, 603 F.2d 387 (2d Cir. 1979).
enforcement at the hands of prosecutors, judges or juries. The only difference between the controlling circuit court precedents and the present challengers is their more genteel clientele—substantially the challenges are identical. As these new challengers to the constitutionality of RICO pattern properly fail, we will again say “Three cheers for Rico.”

D. Little RICO’s: “You see, . . . ’tain’t no use bein’ scared of any of those big guys. The bigger they come the harder they fall.”

Regardless of the meaning of pattern in federal RICO, the state RICO statutes stand on completely independent grounds. Although some commentators have referred to these statutes as “Little RICOs”—perhaps implying they are dependent on “Big RICO” for their sustenance—the state RICOs have their own legislative histories, their own structure and limitations, and most importantly, their own defining language. It is thus unwarranted categorically to read into the state RICO statutes the limitations and interpretations imposed by federal courts. This is particularly true of pattern within the state RICO statutes, which have geneses and operational definitions quite distinct from the federal precursor. Federal RICO is thus only the precursor and not the progenitor of state RICO statutes.

228 Little Caesar, supra note 1, at 134.


1. State RICO "Patterns": "This ain't no picnic." 232

It has been repeatedly asserted that the term pattern is only limited by, but not defined in section 1961(5). Among the states, however, several have chosen not to use the pattern concept at all. 233 Others proscribe a "pattern of corrupt activity," 234 a "pattern of criminal activity," 235 a "pattern of unlawful activity," 236 or a "pattern of criminal profiteering activity." 237 Two states further limit the ambit of their statutes by prohibiting a "pattern of drug racketeering activity" and a "pattern of narcotics activity." 238 Nonetheless, the overwhelming majority of the states—twenty-six of twenty-nine—utilize the pattern concept to form the heart of their state RICO statute. Indeed most state legislatures—eighteen of twenty-nine—prohibit a "pattern of racketeering activity," debunking the myth that only a federal Congress applied such language.

232 Little Caesar, supra note 1, at 172.
234 Ohio Rev. Code Ann. § 2993.31(E) (Anderson 1987 & Supp. 1988) ("'Pattern of Corruption Activity' means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event.").
235 Minn. Stat. § 609.902 Subd. 6 (Supp. 1989) ("'Pattern of criminal activity' means conduct constituting three or more criminal acts that: (1) were committed within ten years of the commencement of the criminal proceeding; (2) are neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a single criminal offense; and (3) were either: (i) related to one another through a common scheme or plan or a shared criminal purpose or (ii) committed, solicited, requested, imported, or intentionally aided by persons acting with the mental culpability required for the commission of the criminal acts and associated with or in an enterprise involved in those activities.").
236 Utah Code Ann. § 76-10-1602(3) (Supp. 1989) ("'Pattern of unlawful activity' means engaging in conduct which constitutes the commission of at least three episodes of unlawful activity, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise ... ").
237 Cal. Penal Code § 186.2(b) (West 1988) ("'Pattern of criminal profiteering activity' means engaging in at least two incidents of criminal profiteering, as defined by this act, which meet the following requirements: (1) Have the same or a similar purpose, result, principals, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics; (2) Are not isolated events; (3) Were committed as a criminal activity of organized crime."); Wash. Rev. Code Ann. § 9A.82.010(15) (1988 & Supp. 1989) ("'Pattern of criminal profiteering activity' means engaging in at least three acts of criminal profiteering ... In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events ... ").
239 Colo. Rev. Stat. § 18-17-108(3) (1986 & Supp. 1988) ("'Pattern of racketeering activity' means engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise, if at least one of such acts occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years (excluding any period of imprisonment) after a prior act of racketeering activity."); Conn. Gen. Stat. Ann. § 53-394(e) (West 1985 & Supp. 1989) ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same
Furthermore, many of the state RICO statutes are not susceptible to challenges that pattern limitations are inherently vague; many of the

or similar purposes, results, participants, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, including a nexus to the same enterprise, and are not isolated incidents, provided the latter or last of such incidents occurred after October 1, 1982, and within five years after a prior incident of racketeering activity.

"Pattern of racketeering activity' means engaging in at least two incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurred after the effective date of this act and that the last of such incidents occurred within 5 years after a prior incident of racketeering conduct.

"Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents.

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states explicitly define pattern. Thus, when Florida’s RICO statute says pattern “means . . .”\textsuperscript{240} it has exactly defined the term pattern. Pattern is similarly unassailable on grounds of vagueness in twenty-three of the twenty-nine states.\textsuperscript{241} Two states say pattern “requires”\textsuperscript{242} following the federal RICO limitation, while Pennsylvania says “refers.”\textsuperscript{243} Furthermore, eight states have included a liberal construction clause to guide the state’s judiciary.\textsuperscript{244} Pattern limitations are a uniquely federal creature; overwhelmingly the states have adopted exact definitions of “pattern,” rendering the vagueness debate moot for state purposes.

2. State RICO & “Continuity”: “Bad business to quit on me . . . One guy tried that on me once.”\textsuperscript{245}

Within federal RICO, “acts” are used as the unit for counting predicate offenses.\textsuperscript{246} The states conversely have chosen a wider array of terms for quantifying the continuity prong of “pattern.” Sixteen states expressly count “incidents”\textsuperscript{247} while others count “crimes,”\textsuperscript{248} “occasions”\textsuperscript{249} and “episodes.”\textsuperscript{250} Ten states utilize “acts”\textsuperscript{251} as the standard for establishing “continuity.” Such a prevalence of the terms “acts” and “incidents” can only be explained by the requirement that they “not be isolated incidents” or “events” (twenty-three states).\textsuperscript{252} This focus on separate acts or incidents is more clearly demonstrated by five of the newest statutes which require that the acts “are not so closely related to each other and connected in time and place that they constitute a single event.”\textsuperscript{253} To the extent that Federal RICO’s legislative history has wrongly been interpreted to limit Title X’s application to the relatedness prong, the textual choices of the states in opting for “incidents,” “episodes” and “crimes” as “not to be isolated,” should preclude the wrongful application of such analysis to the states.\textsuperscript{254}

\begin{footnotesize}

\begin{enumerate}
\item[241] See generally supra note 229.
\item[244] See, e.g., R.I. Gen. Laws § 7-15-10 (1985) (“The provisions of this chapter shall be liberally construed to effectuate its purpose.”).
\item[245] Little Caesar, supra note 1, at 176 n.6.
\item[247] See, e.g., Cal. Penal Code § 186.2(b) (West 1988), supra note 227.
\item[254] The H.J. Inc. majority’s confusion about the meaning of the phrase “and are not isolated acts” has not resulted in merely harmless error. Several state courts relied on this interpretation of the phrase in H.J. Inc. to shape their own state’s “little” RICO jurisprudence. Oregon, for instance, in Computer Concepts v. Brandt overlooked the phrase “and are not isolated incidents” and based on H.J. Inc.’s erroneous dicta concluded:
\[\text{[T]he legislature chose to include the element of “relationship” and exclude “continuity.”}\]
\[\text{We cannot ignore the plain meaning of unambiguous words in a statute. We hold that the “pattern of racketeering” element in an ORICO claim is satisfied by two incidents of}\]
\end{enumerate}
\end{footnotesize}
Federal RICO, as recognized by the Court in Sedima and H.J. Inc., has incorporated the "relationship prong" of pattern through its legislative history. The states, more often than not, explicitly define this prong within its provisions. Indeed, twenty-four of the states explicitly mention the word "related" or "interrelated" when defining "pattern." The typical state requires that a pattern is demonstrated by acts which "have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are "interrelated by distinguishing characteristics." Moreover, several states have additionally required the acts to have a "nexus to the same enterprise." Therefore, when Justice Scalia and his minority faction suggest that Title X is irrelevant for the interpretation of pattern within Title IX, this analysis has no bearing on the state RICO statutes which directly incorporate the "relationship" prong into the elements of state RICO. Moreover, the Court would be wise to recognize the intelligence of the states, of which more than eighty per cent have found Title X's language of "relationship" compelling and adopted it in twenty-four separate state legislatures.

Temporal "relationship" is also governed independently by the states. For instance, while federal RICO requires "at least two acts" be committed "within ten years" of one another, Pennsylvania has no time limitation at all. Other states (New York, Washington, and Wisconsin) require "three acts." Tennessee requires that the acts be committed within two years of one another, Connecticut, Florida, Idaho, Georgia and North Carolina, four years, Illinois, Indiana, Louisiana, Mississippi, Nevada, New Mexico, Oregon, Utah and Washington, five years, Ohio, six years, and Wisconsin, seven years. The rest follow the federal statute.

"racketeering activity," interrelated. The "continuity" element in the RICO statute is not an element under ORICO. Computer Concepts v. Brandt, 98 Or. App. 618, 780 P.2d 249, 256 (1989). This oversight may be remedied by other states grasping the plain meaning of the phrase "are not isolated acts": acts that are not isolated are, or were, continuous. See also Continuity Plus Relationship, supra note 119, at 183 n.183 ("since section 3575(e) also requires that the crimes be not 'isolated,' continuity is addressed as well").

255 LITTLE CAESAR, supra note 1, at 180 n.48.
259 See supra note 229.
263 See generally supra note 229.
E. Prospective Application: "Who stands here? Yeah, the back door...? Kinda forgot that, didn’t you?"  

One particularly clever argument would find pattern vague only prospectively. The pragmatics of such an approach are obvious; no judge relishes the thought of turning Carmine Persico, Anthony Salerno, nor members of the white supremacist “Order” loose on society. Assuming, arguendo, that pattern could be found void-for-vagueness, is such a prospective application constitutionally circumspect? One Supreme Court case, Wainwright v. Stone, would seem to answer affirmatively. 

In Wainwright, a Florida statute proscribing “abominable and detestable crime against nature, either with mankind or beast” had previously been held constitutionally definite by the Florida Supreme Court. After the conviction of the defendant Stone, the Florida Supreme Court held prospectively that oral and anal sexual activity did not appear on the face of the statute, and that the statute was void-for-vagueness and uncertainty. The defendant sought federal habeas corpus relief on the grounds that this prospective application of the vagueness doctrine was unconstitutional. The Supreme Court thus faced the issue of whether prior judicial “gloss” by the Florida Supreme Court had made Stone’s conviction under the statute sufficiently definite, so that Florida’s new “gloss” on the statute need be applied only prospectively. The Court held that when the defendants committed their acts, they were on clear notice that their conduct was criminal under the statute as then construed (its “gloss”). Thus, the Florida Supreme Court’s judgment to not apply the void-for-vagueness holding retroactively, but only prospectively, did not deprive Stone of fair warning or notice.

What then does the application of Wainwright hold for RICO? Seemingly, as long as the judicial “gloss” of RICO was firmly established at the time of conviction, there is no rationale to apply vagueness holdings retroactively. The defendants were all on notice that their activity was definitely proscribed by the statute—the predicate acts under RICO were all sufficiently defined as well. Thus, in order for a court to justify retroactive application of vagueness, that court would have to find (1) that the judicial “gloss” of RICO pattern was indefinite at the time of conviction, and (2) that the predicate offense and its accompanying “gloss” were independently uncertain. Therein lies the rub; such a dual finding by a court is certainly problematic. In all likelihood, RICO’s darkest and most heinous criminals will remain behind bars, regardless of “pattern’s” vagueness (or definiteness).

Another twist to this prospective application argument is to apply RICO prospectively only for criminal penalties under section 1963, and hold RICO unconstitutional retroactively for civil redress under section

265 Little Caesar, supra note 1, at 75.
267 Id. at 22.
268 Id.
269 Id. at 23-24.
One immediate disadvantage of such an action is that it would eliminate the possibility of treble damages for the nearly 5000 pending cases with billions of dollars in potential judgments. This is, of course, clearly untenable. Nevertheless, proponents of such a distinction may point to Justice Cardozo’s famous Sunburst decision in support. Sunburst held that for civil statutes, at least, a state may constitutionally apply its findings retroactively or prospectively. Besides Wainwright there is little to support such a holding in the realm of criminal statutes. Such an asymmetric approach is counter-intuitive; moreover, it breaks with precedent. The federal courts have held that RICO’s criminal and civil provisions must be construed in pari materia. Moreover, Sunburst does not hold that part of the identical statute may be applied prospectively, and the remainder retroactively. Rather, RICO pattern must be applied consistently in both its criminal and civil applications. It is doubtful, therefore, that the Court will leave the “back door” unattended; efforts to apply vagueness to RICO pattern retroactively should properly be thwarted by the judiciary.

IV. Policy Choices Implicit in Vagueness Challenge

Implicit within Justice Scalia’s argument are at least two underlying rationales, or motivations for finding pattern void-for-vagueness. First, a lingering resentment that RICO has not been limited to members of “organized crime”—the “mafia.” Second, fear that by supplanting state common law remedies, RICO violates notions of federalism or state autonomy.

A. Organized Crime Requirement: “Do you expect me to fraternize with crooks?”

The organized crime requirement was addressed repeatedly in the amicus briefs of H.J. Inc. Justice Scalia was not a member of the Court.
in Sedima, however, he similarly noted that “the prologue of the statute . . . describes a relatively narrow focus upon 'organized crime.’” 277 Chief Justice Rehnquist, too, in a speech to the Brookings Institution made in April 1989 said “I think the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime.” 278 At best then these comments are veiled invective, linguistic palliative designed to soothe their sense of rejection—at worst, unprincipled attempts to overrule Sedima with an end run. If organized crime’s nexus is read as the implicit motivation of the four votes in favor of Justice Scalia’s concurrence, Justice Brennan’s majority opinion becomes much more powerful indeed. Section III of the opinion is devoted entirely to the rejection of an organized crime nexus. Before examining the specifics, Justice Brennan noted “the argument for reading an organized crime limitation into RICO’s pattern concept . . . is at odds with the tenor of legislative history.”279 Moreover, in the eight succeeding paragraphs the Justice discussed at least seven reasons why the majority decision refused to “invent a rule . . . that requires . . . an organized crime nexus.”280 Suffice it to say, following on the heels of Turkette 281 and Sedima,282 and the majority in H.J. Inc., Justice Scalia’s views suggesting an organized crime nexus can only be viewed as “sour grapes” rationalizing. Surely, a more principled analysis would require all those who engage in a pattern of racketeering acts to “fraternize with crooks” while serving their sentences: both members of the “mafia” and “conventional” white-collar criminals alike.

B. RICO Floodgates: “Sure, Boss, pretty soon you’ll be running the whole town.”283

Justice Scalia's second rationale lamented that “RICO has ‘quite simply revolutionize[d] private litigation’ and ‘validate[d] the federalization of broad areas of state common law of frauds.’”284 The Chief Jus-

279 109 S. Ct. at 2903.
280 Id. at 2902-05 ((1) RICO may apply to an individual alone (2) no such restrictions are explicitly stated (3) Title X’s language indicates liability beyond organized crime (4) Senator’s in floor debate recognized RICO’s wide application (5) Courts should not frame legislation (6) Organized crime was the focus of, but not the chief limitation of RICO (7) Congress felt organized crime was impossible to define).
281 United States v. Turkette, 452 U.S. 576, 586-87 (“As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would ‘move[e] large substantive areas formerly totally within the police power of the State into the Federal realm.’ In the face of these objections Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alterations would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case the courts are without authority to restrict the application of the statute.”).
283 LITTLE CAESAR, supra note 1, at 179 n.46.
tice similarly bemoaned in his Brookings Institution speech, "I do think that the imposition of some limitations on civil RICO actions is required so that federal courts are not required to duplicate the efforts of the state courts. No one doubts that the victim of a fraudulent scheme should be able to obtain redress in a court. The question is under what circumstances should that take place in a federal court?"285 The federalism attack does seem to voice two differing concerns. "Duplicat[ing] the efforts of the state courts" is really just another way of couching fears that RICO claims are burgeoning and threaten to overwhelm federal dockets.286

Since civil RICO claims have levelled off at approximately 100 cases a month, and constitute less than 0.5% of the federal docket,287 this argument is a "red herring." Indeed, the "burgeoning court dockets" argument is an old ploy used by the "strict constructionists" to justify federal retrenchment on a variety of fronts: "antitrust" threatened to overwhelm the federal judiciary in the early 80s, asbestos litigation in the mid-80s, racial discrimination suits in the late 80s.289 Civil RICO litigation is a minute part of the federal docket and will remain so. Those who suggest otherwise have "cried wolf" repeatedly throughout the 1980s. Their cries have no veracity as we enter the 1990s; they only smack of active judicial retrenchment. No, RICO will not be "running the whole town" but will continue to represent a small fraction of a percent of the federal judicial caseload.

C. Federalism: "I'm takin' over this territory . . . from now on its all mine."290

The second concern, couched in this asserted violation of federalism,291 is that RICO supplants state common law and turns "garden-vari-
contract disputes into federal racketeering violations. This second concern touches at the heart of vertical federalism, and contains much that is true. Certainly some "garden-variety" contract disputes are turned into federal racketeering violations—ostensibly, those contract disputes that evidence a pattern of racketeering activity and violate sections 1962(a), (b), (c), or (d). Nevertheless, just because the behavior of the defendant has been "elevated" to a federal "pattern," is it necessarily true that state common law has been supplanted? Senator McClellan and the congressional framers answered just such claims in the negative when they expressly incorporated into the legislative history of the Organized Crime Control Act of 1969: "Nothing in [RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for." RICO, like many other federal criminal statutes, supplements, not supplants state common law. This statutory scheme was adopted by Congress for several reasons.

First, the sophisticated nature of modern criminal transactions was viewed to be largely beyond the competent enforcement powers of the states. Securities markets, commodities markets, international accounting practices, and international banking are only some of the electronic transactions largely beyond the police powers of the states. Second, to the extent civil RICO supplements, and not supplants, state common law—principally fraud remedies—state redress is completely operative. The state scheme does not preclude anyone from being indicted, tried, or convicted if the federal RICO charges are transferred or dismissed. In this manner, federalism principles are not exclusively abridged as in violations of the Federal Tax Code or Sherman Anti-Trust Act. Third, there is ample precedent in the federal criminal scheme for this supplemental approach. A notable example of this supplemental, or dual, approach is the Employee Retirement Income Security Act of 1974. Fourth, philosophically the vertical scheme is a repugnant and antiquated approach. To the extent that state boundaries become mean-
ingless in the pursuit of crime, that electronic and computerized information cross international boundaries in seconds, the notion that state governments can govern this flow of money and information is an antiquated fallacy. Because technological growth and the flow of information develops exponentially, while our state enforcement mechanisms barely grow geometrically (indeed shrink in real terms), this approach becomes repugnant. It only serves to insulate interstate and international enterprises from an effective policing, regulatory and prosecutorial mechanism. Indeed, this realization prompted Congress to adopt new means including the enforcement of remedial measures—the private attorney general provisions of RICO were an integral component of this new statutory scheme.296

Federalism is the cloak of the recent “pre-New Deal” judicial activists. Like their predecessor of 50 years ago, they claim allegiance to strict constructionist doctrines. Of course, in choosing not to change, they have chosen. Insulation of the status quo always involves a choice: in this case, not to react to the turbulent forces at work in our age.297 Perhaps Roscoe Pound best perceived the pendulum-like swing of judicial activism: from change to unchange, from status alterare to status quo, from wealth transfer to wealth entrenchment.298 The pendulum swings with choice. Even when the pendulum has slowed to an apparent stasis, it is at once both swinging towards a future change, and swinging from a recent past.

E. Congressional Reform: “They thought they hit the target, Boss, but bullets just bounce off you.”299

Spurred on by the AFL-CIO, the ACLU, the Securities Industries Association, the American Bankers Association, and the American Institute of Certified Public Accountants, bills have been introduced in both houses of Congress to “defang” RICO. Rather than a measured and principled approach to reform, however, the bills have reflected the “grab bag” nature of the special interests that drafted them.300 And the results have been little more successful than the level of organization.301

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298 See generally R. POUND III, CRIMINAL JUSTICE IN AMERICA (1930).

299 LITTLE CAESAR, supra note 1, at 179 n.38.


Now, just 11 months later, the RICO reform juggernaut is running out of steam . . . making it unlikely that Congress will pass any RICO legislation this year. The near reversal of the RICO revision lobby's fortunes is a case study of how a high-powered, well-funded lobby-
Analytically the failure of this reform movement—or triumph of RICO—can be traced to three factors. First, the “grab bag” approach to reform necessarily included a great deal of excess baggage. One such indulgence was retroactivity. Second, the Savings & Loan scandals, as well as the ruckus on Wall Street and LaSalle Street, have underscored the need for strong and effective remedies against institutional fraud. Indeed, Rep. John Conyers Jr. (D-Mich.), has declared, “I'll be damned if I let big fat cats rip off American people.” This perception of our financial capitals as hotbeds of corruption, will preclude our political capitol from enacting RICO reform in the near future.

Of course the previous two arguments may be overstating the case. Shortly after the decision in *H.J. Inc.* was announced, odds could be taken in any political conference that RICO would be prudently trimmed before Christmas time. Shortly afterwards, however, the political supporters of RICO reform were linked to the financial abuses Representative Conyers had warned about. Senator DeConcini was linked to Lincoln Savings and Loan’s president, Mr. Keating, and RICO reform affectionately was termed the “Keating bail-out bill.” The political tide was stemmed.

In 1990, Rep. William J. Hughes (D-N.J.), Chair of the House Subcommittee on Crime, proposed a middle ground termed the “gate keeper” provision. Fueled by a genuine attempt to refine the reach of RICO, the movement can be derailed. Three factors hurt the movement. First, seemingly unconnected scandals, mainly in the savings-and-loan industry, have made Congress uneasy about appearing to go easy on white-collar crime. Second, the RICO issue brought out advocates with unusually direct financial interests in the bill, making lawmakers even more wary of being accused of bailing out special interests. Finally, RICO revision advocates insisted that narrowing of the civil RICO law be made retroactive, a point their opponents seized upon as too greedy.

Early this year, Senator Dennis DeConcini, a member of the judiciary panel, became the chief sponsor of the RICO revision bill. Then the savings-and-loan crisis mired Sen. DeConcini in questions about his intervention with regulators on behalf of Charles Keating’s Lincoln Savings and Loan Association, whose collapse is expected to cost taxpayers about $2 billion. Sen. DeConcini had received $55,000 in campaign contributions from Mr. Keating or his associates, while top campaign aides got $50 million in real-estate loans from Lincoln. With three civil RICO suits pending against Mr. Keating... foes of RICO revision quickly tagged the legislation “the Keating bail-out bill.”

Apparently, this author was not the only one to view retroactivity as an “indulgence.” Benjamin J. Stein, when considering the prospect of RICO reform, had written in *BARRON’s*, July 3, 1989, at 14: “The Congress like a Dark Ages pope, will grant retroactive indulgences, plenary and eternal, in fraud, bribes, looting, inside trading, cheating the government and stock manipulators—with no counterveiling gain at all except to the treasuries of individual legislators.”

Similarly, the Legal Times concluded, “So while RICO may prod congressional action, there is uncertain political mileage for either party in lambasting the act.” *Id.* at 17.

Not coincidentally, two of DeConcini’s aides received more than $50 million in real estate loans from Keating’s Lincoln Savings and Loan. Chicago Trib., Oct. 16, 1989, at A14, col. 1.

See *Pitt & Johnson, RICO Decision Fans the Fire That Won’t Go Out*, Manhattan Law., July 18, 1989, at 13 (“Several RICO revision bills, similar to compromise legislation that nearly gained approval in the last session of Congress, have been introduced in the House and Senate. The *H.J. Inc.* majority and concurring opinions called for legislative reform. Unfortunately, this reform will not galvanize Capitol Hill in the same manner, as say, flag burning. Prosecutors have been diligent in protecting RICO as an effective weapon; consumer groups want this tool against corporate defendants.”).

and use of civil RICO, rather than eviscerate civil RICO like the Boucher bill, the "gate keeper" provision seeks to thwart the application of RICO to routine corporate fraud. At the same time egregious criminal activity for which there are previous criminal convictions are automatically let through the "gates." The "gate keeper" provision shall operate through a formal hearing where egregious fraudulent activity for which no criminal convictions have been obtained are nonetheless let through the "gates" if: (1) the remedy is appropriate because of the significance of the loss to plaintiff; (2) the defendant's conduct was central to the harm; and (3) the remedy is needed to deter criminal conduct. This middle-ground approach has even been endorsed by the drafter of the original RICO bill.

V. Catastrophic Consequences: "Rico is dead . . . where is the guardian angel?"

A. S&L Crisis

If the Court were to sound the death-knell of RICO by finding pattern unconstitutionally vague, the reverberations would be heard far wider than America's corporate boardrooms. American consumers would ultimately pick up the tab for the widespread fraud denied RICO redress. As even Chief Justice Rehnquist has previously noted, white-collar crime in America is widespread and pervasive. The Justice Department has affixed a price tag of $200 billion to the crime. This number perhaps drastically underestimates the share consumers will ultimately pay in aiding our failing Savings & Loan industry. President Bush's plan may, in sum, cost consumers upwards of $157 billion.

307 The RICO Amendments Act of 1990, H.R. 5111, 101st Cong., 2d Sess. (1990). H.R. 5111 also codifies the Supreme Court's H.J. Inc. "continuity plus relationship" test for pattern; explicitly makes the first amendment applicable to RICO; explicitly makes Fed. R. Civ. Pro. Rule 11 applicable to frivolous—factually or legally unsupportable claims—RICO suits; explicitly extends Fed. R. Civ. Pro. Rule 9(b) (pleading fraud with particularity) to all elements of RICO; changes the burden of proof in civil litigation under RICO from preponderance of the evidence to clear and convincing evidence; restricts jurisdiction over civil RICO litigation to exclusively the federal courts; and applies retroactively to conduct that occurs before its effective date. It is this last provision, retroactive application, that is the most troublesome. Representative John Conyers, Jr. (D-Mich) commented that:

Thousands of meritorious cases will retroactively lose a substantial portion of their present value. Philip A. Lacovara, who represents the American Institute of Certified Public Accountants, conceded, "We're talking very big numbers. There are probably billions of dollars in claim where you treble the damages." Nat'l L.J., Sept. 6, 1986, at 2114. Lacovara did not ask the next question: Who should pay the tab—the accountants, who profited from the fraud, or the American taxpayer or other victims.


308 Myths, supra note 38, at 1049-1101 (proposed legislation incorporating the "gate keeper" concept).

309 LITTLE CAESAR, supra note 1, at 175.

310 LITTLE CAESAR, supra note 1, at 79.

311 See supra note 11.


314 N.Y. Times, Feb. 23, 1989, at 11, col. 1 (Treasury Secretary Nicholas F. Brady says Bush Administration's proposed $90 billion rescue plan of savings industry will cost additional $24 billion;
The cost of this S&L "bail-out" plan escalates by more than $1 billion monthly. At least four independent studies link a large percentage of this cost to fraud and insider abuse, two prevalent forms of criminal misconduct in the S&Ls. For instance, the Office of the Comptroller of the Currency studied over 200 failed and healthy S&Ls and reported that fraud and insider abuse was a significant cause of forty-six percent of the failures. The General Accounting Office (GAO) reviewed 184 Federal Deposit Insurance Corporation (FDIC) insured banks that closed in 1987 and concluded sixty-four percent of the failed banks revealed insider abuse, and thirty-eight percent insider fraud. The GAO considered significant insider abuse or fraud as the distinguishing characteristic of failed S&Ls. A congressional study of 105 failed and failing banks concluded fifty percent of the failures "are caused, in large part, by the criminal misconduct of officers, directors, and insiders." Finally the FDIC itself said that for the failures between 1980-83, forty-five percent of the failures revealed criminal misconduct as the "major contributing factor." The cost of fraud in America is staggering, and probably greatly underestimated. Absent RICO, "neither the banking nor the criminal justice systems impose effective sanctions or punishment to deter white-collar bank fraud." John L. Douglas, general counsel to the FDIC, testified that "the RICO statute can be an important instrument to deter . . . improper behavior [in banks and S&Ls] and to facilitate lost recovery of funds."

B. Commodities Fraud

National headlines similarly may underscore, but seriously underestimate, the extent of fraud in the commodities industry. While former Assistant U.S. Attorney Anton Valukas said the Chicago probe unearthed fraud in hundreds of thousands of trades, national commentators have suggested that in the aggregate, commodities fraud may cost Americans

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315 N.Y. Times, Jan. 29, 1989, § IV, at 23, col. 2 (William Proxmire says savings and loans losses grow by at least one billion dollars a month every month).
318 Id. at 29.
320 Id. at 30.
nearly $200 million. Yet, without RICO, commodities traders joked for years that the tri-partite regulatory scheme was nothing more than a "paper-tiger" regulator. As the Chicago Probe aptly demonstrated, however, RICO and the Commodity Exchange Act can be used to complement one another by providing remedies for different wrongs. This statutory combination can, perhaps, best insure that America's futures market retains investor confidence, and continues as the preeminent commodities hedging market in the world.

C. Insurance Fraud

The Medicare and private insurance industries are also besieged by fraud. For instance, the reimbursement of Medicare expenses by private insurance groups is engaged in "what may become the biggest financial scandal in the history of Medicare: the misspending of as much as $10 billion in Medicare funds over the past six years." The Department of Justice is currently completing a probe of the apparent scam. More pervasively, the American Insurance Industry Association estimates that 15 to 20% of all claims are fraudulent and that such claims cost policy holders $13.75 billion in premiums. Aetna, AllState, Lloyd's of London, and State Farm, among others, have all used RICO to protect themselves against insurance-policy fraud, and in so doing, saved American consumers millions of dollars in insurance premiums. "RICO reform would have a 'chilling effect' on anti-fraud activities of insurance regulators and would 'dash the expected returns to victims in present RICO actions.'"

Insurance companies, like S&Ls, also threaten insolvency on a national scale. Gerald Morlitz, a director of Arthur Anderson & Co., prophesied, "I think its the savings and loans five years deferred without any bailout." Although the studies are not as complete as those done on the S&Ls, preliminary "autopsies" reveal the causes to include significant levels of fraud. Since there presently is no federal "bail-out" for consumers left with no insurance coverage, we should be particularly sus-

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323 S. REP. No. 495, 97th Cong., 2d Sess. V (1982). See RICO Reform: Hearings on H.R. 3240 Before the House Comm. on the Judiciary, 101st Cong., 1st Sess. 238 (1989) (Testimony of Phillip A. Feigin, commissioner of the Colorado Division of Securities, "I think the average national losses of $200 million is very conservative... Cass Willard estimated, that it was a billion dollars."). This number is uniformly low as the volume of futures trading has increased much faster than the budgets of the CFTC. Perhaps the most egregious abuse of the commodities markets has been the attempt by the Hunt brothers to corner the silver market during 1979 and 1980. Nelson Bunker Hunt, William Herbert Hunt, Lamar Hunt and others were convicted of violation of the Commodity Exchange Act, RICO, and anti-trust laws, and the plaintiff, Minpeco S.A. a Peruvian minerals firm, was awarded $132 million in damages. Minpeco S.A. v. Hunt, (S.D.N.Y. No. 81 Civ. 7619 [MEL]); see 1988 Civ. RICO Rep. (Andrews) 3477 (March).

324 Newkirk, supra note 9, at 3, col. 1.
325 Note, supra note 10, at 123, 124.
330 See Wall St. J., Feb. 17, 1988, at A1, col. 6 ("Autopsies of several failed insurers across the country have turned up evidence of frauds and inadequate regulations.").
pect of efforts to short circuit RICO redress: "[RICO] is probably the single most effective deterrent which presently exists against national and international conspiracies to evade oversight by insurance regulators and to defraud consumers of insurance products."\(^{331}\)

D. Securities Fraud

The merger activity that fueled much of the bull run of the 1980s has also been afflicted with its share of fraud. *The Wall Street Journal* observed prophetically (before the 1989 indictments of Milken and Drexel): "[T]he abuse of inside information in the take over game is endemic and has grown systematically over the past half-decade."\(^{332}\) Some commentators have linked this abuse of insider information\(^{333}\) to the crash of Black Monday, October 19, 1987.\(^{334}\) Much of the takeover game was so complex, that the RICO litigation is only now filtering through the courts, four and five years later.\(^{335}\) Although not curative in the absolute, RICO has been perceived as an effective adjunct to the SEC and Justice Department in their regulation of the takeover "game."\(^{336}\)

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333 Even lawyers were indicted for their role in insider trading scams. Alfred Elliot, a former partner at Schiff Hardin & Waite, was sentenced to five years in prison for insider trading arising from nine purchases of stock in companies that were clients of Schiff Hardin or that were acquisition targets of Schiff Hardin clients. United States v. Elliot, 88 Cr. D. N.Ill, 8/30/89. As noted at 21 Sec. Reg. & L. Rep. (BNA) 1597 September 15, 1989:

Thereafter, in July 1988, Elliot was charged in a 70-count indictment with wire fraud, securities fraud, and income tax evasion. He was the first person indicted on insider trading charges to be accused of violating the Racketeer Influenced and Corrupt Organizations Act, the U.S. Attorney’s office said at the time. Apparently in his glee at having copped a plea, and avoiding a "guilty" adjudication (although he received five years plus $332,000 in fines plus disgorgement of $350,000 in illegal profits), Mr. Elliot forgot about the commencement of his prison term and failed to show prompting a nationwide FBI man-hunt. *See* Nat. L.J., Nov. 13, 1989, at 2.

334 Avner Arbet, Professor of Finance at Cornell University, has argued that "the crash is but a symptom of dangerous inefficiency in the stock market... behind the inefficient and volatile pricing: insider trading." *Forbes*, Jul. 10, 1989, at 60-61. "Arbel recommends more effective policing of institutional activity and more timely public disclosure of merger negotiations. In short, Arbel wants to see more federal policing." *Id.* at 61. Although certainly not causal in his analysis, Professor Arbel is not alone in his analysis, nor his plea for more federal policing.

335 *See, e.g.,* In Re Phillips Petroleum Securities Litigation, (3rd Cir. Aug. 9, 1989) (Nos. 88-3719 & 88-3755) which chronicles Boone Pickens' attempt to take control over Phillips Petroleum Co. in 1984, and the allegedly fraudulent scheme which violated RICO. Professor Johnson anticipated such redress not only against the Wall Street sharks, but also by the spurned predator against the evasive prey in her piece *Predator's Rights: Multiple Remedies for Wall Street Sharks Under the Securities Laws and RICO*, 10 J. Corp. L. 3 (1984). Shareholders too are seeking remedies against sharks. In Rubin v. Posner, 701 F. Supp. 1041 (D. Del. 1988), shareholders of PEC brought suit against PEC president Victor Posner alleging that he entered into a secret agreement with Ivan Boesky to "park" stock illegally. When PEC announced their tender offer for Fishbach Corp. stock, Boesky sold the stock to PEC at an inflated price, and then sold it to an entity controlled by Posner for less than one-half the market price. The shareholders alleged losses of over $15 million. The 10(b)-5 securities fraud claim was upheld against summary judgment, and also deemed sufficient to form the predicate acts necessary for 1962(c) and 1962(d) RICO charges (Drexel was dismissed from the action).

336 Some publications like Barron's noted the similarity between Drexel's fraudulent junk bond schemes and Charles "Ponzi's" schemes of 1920. *See* B. Stein, *The Biggest Scam Ever? Drexel/Milken Was a Giant Ponzi Scheme*, BARRON'S, Feb. 19, 1990, at 9 ("Wasn't this just like a classic Ponzi scheme?") ("Drexel/Milken was largely a vast scam based upon myths about bond-valuing skills
A previously overlooked source of fraud in the securities markets involves the sale of penny stocks (speculative issues that commonly sell for less than $1 share) to unknowing consumers. Fraud and manipulation in the penny stock market, much of it centered in Denver, Colorado, is now estimated to cost consumers $2 billion annually. The North American Securities Administrators Association (NASAA) Report on Fraud and Abuse in the Penny Stock Industry concluded:

Penny stock swindles are now the No. 1 threat of fraud and abuse facing small investors in the United States... The penny stock industry increasingly is dominated by utterly worthless or highly dubious securities offerings that are systematically manipulated by repeat offenders of state and federal securities laws and other felons, some of whom have

and bond value, kept going by a vast Ponzi controlling markets, prices, reputation and data about defaults, offering the kind of profits that a decade-long scam involving tens of billions of dollars of phony bonds would offer.”) Id. at 32; B. Stein, Memo to Judge Wood: Why Milken Deserves a Stiff Sentence, BARRON’S, Sept. 24, 1990, at 17 (“Michael Milken was the maestro of a Ponzi scheme of staggering proportions.”); Myths, supra note 38, at 895-96 n.119 (“[T]he resemblances between the rise and fall of Michael Milken’s junk bond empire and Charles Ponzi’s postal arbitrage scheme are haunting.”). The parallels to the original Charles Ponzi scam are uncanny. Ponzi was an Italian immigrant who, from 1919 to 1920, masterminded a $20 million dollar scam. He sold coupons to investors promising 50% return on investment in 90 days. This outrageous return encouraged the investors to return with their friends, and the operation snowballed. More money continued to be invested in the scam than the amount due to be paid back, so nearly 40,000 investors flocked to the Ponzi’s Financial Exchange Co. on School Street in Boston. Ponzi spent the investors’ money lavishly, buying a mansion, suits, diamonds and even gambling away $3 million in a single night. When the Boston Globe exposed his criminal record, Ponzi’s pyramid tumbled. Investors demanded their money and Ponzi was $5 million short. See J. NASH, BLOODLETTERS & BADMEN 448-451 (1973). Ponzi pleaded guilty to federal mail fraud and received a 5-year prison term. He then was convicted of four counts of larceny in state courts and received seven to nine years in state prison. Commonwealth v. Ponzi, 256 Mass. 159, 152 N.E. 207 (1925). He was later deported. Ponzi v. Fesenden 258 U.S. 254 (1922) (mail fraud and larceny constitute two separate crimes for purposes of deportation). So too, Drexel’s failure can be traced to a financing method that only worked with more customers coming in than going out. Apart from the massive fraud Drexel plead guilty to, Drexel also “borrowed from Peter to pay Paul.” N.Y. Times, Feb. 26, 1990, at C6. col 1.

The way Drexel financed its operations was particularly perilous, they said, and is atypical of the rest of the street. “Drexel’s capital structure was far different from other brokerage firms,” said Jeffrey Bowman, an analyst at Standard & Poor’s... Drexel relied heavily on a technique called ‘double leverage’ to finance its broker-dealer operations. Double leverage means a firm borrows at the holding company level and lends those funds to a subsidiary, which in turn can use the money as collateral with which to raise more money. Essentially the same funds can be put to work twice... Drexel was twice as double leveraged as its competitors... What Drexel appears to have done was to borrow at the holding company level in the short term commercial paper market and use that money to finance its subsidiary’s portfolio of high-yield, high-risk “junk bond.” These bonds became illiquid and did not produce the required cash flow... “It was a very imprudent capital structure,” said a financial executive at a large Wall Street firm, “My guess is that it’s not practiced by anyone who intends to live for a long time.”

Drexel didn’t. “Sadly, Drexel’s departure from among the quick and Milken’s effective incapacitation came too late... to help scores of companies, thousands of investors, and millions of taxpayers.” A. Abelson, BARRON’S, Feb. 19, 1990, at 37.


Meyer Blinder, the Denver penny stock king, and four of his associates were indicted by a federal grand jury in Las Vegas on 11 criminal counts of securities and wire fraud racketeering and money laundering. The criminal indictment raises the pitch of the federal government’s 12-year battle to topple the penny-stock empire fashioned by Mr. Blinder. The SEC has pursued Mr. Blinder for 12 years and at least 29 states have brought 35 different regulatory actions against the firm.

been identified as having ties to organized crime. Since unmanipulated penny stock investors are believed to lose all or some of their investment 70 percent of the time... the presence of fraud pushes up that figure to 90 percent.338

The litigation redressing these consumer frauds has only started. Nonetheless, RICO promises to be one of the principal forces in recovering some of the fraudulent money from this “No. 1 threat” to the small investor.339

E. Pension Fund Fraud

Other types of fraud are less patent, and ultimately more disturbing. Thirty-nine million American workers plan to retire in whole or in part upon the proceeds of the Pension Benefit Guarantee Corporation (PBGC). In 1987, $1.6 trillion were held in the Corporation for the benefit of these workers.340 Yet the PBGC itself reported a deficit of $4 billion in 1987 to pay its immediate distributions.341 Moreover, the Labor Department has stated that the public accountant reporting on these pension plans within the PBGC is “inadequate.”342 Fraud plays a causal role in the pilfering of these American pension plans.343 Silently, nearly forty million futures are being mortgaged: “Unless steps are taken now, today’s S&L bail-out may become tomorrow’s ERISA nightmare.”344 RICO is ideally suited to promise the best long-run protection for these Americans because RICO has long been applied to stop the “mafia” pilfering of union pension funds.345 One recent analysis concluded: “Oftentimes, the most potent criminal cause of action against fiduciaries and nonfiduciaries [of pension funds] will be the state and federal RICO laws. These causes of action are an indispensable weapon in the fight against pension scam artists.”346

341 Pension Benefit Guarantee Corporation, Annual Report to the Congress Fiscal Year 1987 at 3.
345 Recently too, RICO has had success in redressing the victims of pension fraud. See, e.g., Crawford v. La Boucherie Bernard Ltd., No. 83-0780 (D.D.C. 1989) (participants can sue fiduciaries on behalf of plan under RICO for fraudulent conversion of plan assets), aff'd, 815 F.2d 117 (D.C. Cir. 1987), cert. denied, 484 U.S. 943 (1987).
346 Note, supra note 340, at 365.
F. Department of Justice (DOJ) “Probes”

New probes by the Justice Department threaten to uncover millions of dollars of fraud in the entertainment industry. Organized crime figures appear to have been laundering money to front the million dollar budgets that motion pictures now command.\textsuperscript{347} Organized crime similarly evades hundreds of millions of dollars in gasoline and cigarette taxes alone.\textsuperscript{348} Our own federal government is not immune to these allegations. Defense procurement contracts have led to allegations that billions of dollars have been unjustly billed to the American taxpayers.\textsuperscript{349} A major scandal in HUD accounted for hundreds of millions of dollars of fraud.\textsuperscript{350} Doubtless, major sectors of the American economy will come under increasing scrutiny in the following months. The power of RICO to effectuate these Justice Department probes and the magnitude of the yet unredressed fraud poignantly illustrate the necessity of maintaining RICO’s vitality.

G. La Cosa Nostra

Beyond fraud, however, lies the application of RICO to organized crime, political corruption, and violent “hate” groups. Organized crime has obviously been the central target, if not limitation, of RICO. RICO indictments and convictions have increased the effectiveness of our nation’s battle against the “mafia” by an order of magnitude.\textsuperscript{351} The stunning success of RICO in convicting the “Bosses” of the “Five Families” in New York City prompted former U.S. Attorney Rudolph Giuliani to say “the mafia is a dying organization and will cease to be a major threat within ten years.”\textsuperscript{352} To constitutionally cripple pattern construction

\textsuperscript{347} See Wall St. J., Nov. 14, 1989, at B1, col. 3 (Eugene Giaquinto, a close associate of many La Cosa Nostra members and allegedly a nephew of Edward Scirdra, a Buffalo “Family” member, admitted in affidavit that at least four movies were all laundered mob money.) (Salvatore Pisello, a suspected member of the Gambino “Family”, received hundreds of thousands of dollars in cash and records from MCA’s record unit even though he had no previous experience in the industry.).

\textsuperscript{348} See H.R. No. 1629, 95th Cong., 2nd Sess. 4 (1978) (34 states losing $400 million each year from cigarette tax evasion); N.Y. Times, Feb. 6, 1989, at 1, col. 2 (“By 1984, the estimated illicit take [from gasoline tax evasion] was $300 million a year in the New York area alone.”).

\textsuperscript{349} 191 CONG. REC. 11,885 (Sept. 20, 1985) (testimony of Senator Biden) (“That the figure [for defense fraud] must be enormous is indicated by a variety of factors . . . A general estimate of fraud in [non-defense] programs was put at 1 to 10 percent by the U.S. Department of Justice . . . [If] that estimate were to be applied to the defense budget, it would mean that between $2.85 billion and $28.5 billion of fraud is worked on our national government each year.”). Hundreds of cases of military fraud are yet to be disposed of. N.Y. Times, July 3, 1989, at 1, col. 6. Some individual claims are staggering. Wall St. J., January 8, 1990, at A14, col. 1 (Unisys expected to enter guilty plea soon for $130 million).


\textsuperscript{351} See Effectiveness of the Government’s Attack on La Cosa Nostra, at 14 (General Accounting Office, April 14, 1988): “Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair . . . With the passage of RICO, the entire picture of the organization’s criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.”

\textsuperscript{352} N.Y. Times, Mar. 3, 1987, at B3, col. 2 (“Mr. Giuliani attributed what he said was the demise of the mafia to two factors: the vigorous prosecution under strengthened racketeering laws [RICO], and the shifting demographics that have made it difficult for Mafia leaders to recruit new members . . . ”). To graphically illustrate the basis of such rationale, we need only examine the New York Times, Mar. 11, 1987, at 1, col. 1, where the “Bosses” of the “Five Families” and their heirs to the
within RICO would be tantamount to disarming the Justice Department in their battle against a well-armed, internationally organized, “La Cosa Nostra” of the 1990s.

H. Political Corruption & Racist Hate Groups

Political corruption has been particularly difficult to prosecute in our majoritarian government. Nonetheless, RICO has been used effectively against judges, politicians, and lawyers. The Chicago Greylord scandal in which thirteen judges and forty-seven lawyers were convicted of racketeering activity illuminated the widespread corruption of segments of our judiciary, and perhaps best demonstrated how RICO can disinfect our legal apparatus. Similarly, violent “hate” groups, traditionally hard to prosecute under state law conspiracy statutes, have been forcefully eradicated under the guidance of RICO.

VI. Conclusion

It is ironic that the most libertarian Justice on the Court should most fear RICO—particularly at a time when the individual citizen is threatened with scandals in the S&L and insurance industry, fraudulent investment schemes in the commodities and securities markets, and violence from drug cartel members and racist hate groups. It is almost inconceivable, that in an age when white collar crime poses the most serious threat to America, one of the most effective and promising deterrents—RICO—is being hamstrung with allegations of “vagueness.”

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353 See, e.g., United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. Unit A Jul. 1981) (Florida’s Third Judicial Circuit); United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985) (state judge prosecuted in Greylord scandal in Chicago).


356 See, e.g., United States v. Yonan, 800 F.2d 164 (7th Cir. 1986).


358 See, e.g., 1989 Civ. RICO Lit. Rep. (Andrews) 4700 (May) (“Phillip A Feigin, securities commissioner of the Colorado Division of Securities ... said that ‘white collar crime has grown from a major problem to a national catastrophe.’ Scandals caused by insider trading and other types of fraud ‘have significantly eroded the public’s faith in our markets, industries, and financial institutions and raised fundamental questions about our ethics as a nation ... Yet in the context of this crisis in faith and ethics the members of the financial community have called upon Congress to emasculate private civil RICO.”).
But the void-for-vagueness doctrine as applied by the Supreme Court is principled and well developed. At the circuit court level, RICO pattern was unanimously held sufficiently definite and constitutional. Moreover, the civil RICO provisions which garner the most criticism rely on the very same pattern that the criminal provisions do. Even if the Court conspicuously failed to construe the civil and criminal provisions in pari materia, there is only one precedent for finding a civil statute unconstitutionally vague in over one-hundred years of Supreme Court jurisprudence.

Rather, the Scalia concurrence in *H.J. Inc.* should properly be viewed as invective, designed to focus the RICO debate on the policy choices of federalism and organized crime—views clearly rejected by a majority of the Court. More importantly however, these policy views are dwarfed by the catastrophic consequences hamstringing our federal prosecutors would have on the American public. Attempts to label RICO pattern void-for-vagueness should be rejected. Lower courts and litigants alike should properly apply the circuit court precedents and the well defined principles of the void-for-vagueness doctrine to find RICO pattern sufficiently definite for Constitutional application, and remove the vagueness “albatross” from ensuing RICO litigation.

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