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Is the Darling in Danger - Void For Vagueness - The Constitutionality of the RICO Pattern Requirement

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IS THE “DARLING” IN DANGER?
“VOID FOR VAGUENESS”—THE
CONSTITUTIONALITY OF THE RICO
PATTERN REQUIREMENT

I. INTRODUCTION

In the twenty years following its birth as the “new darling of the prosecutor’s nursery,” the Racketeer Influenced and Corrupt Organizations Act (RICO) has matured into the most versatile and potent weapon ever devised to deal with enterprise criminality. Now, on its twenty-first birthday, droves of attorneys representing defendants and business associations throughout the nation are relentlessly seeking to have RICO struck down in its prime.

1. Tarlow, RICO: The New Darling of the Prosecutor’s Nursery, 49 FORDHAM L. REV. 165, 165 (1980). The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1988 & Supp. II 1990) (Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922), was dubbed the “new darling of the prosecutor’s nursery” in reference to the advantages that it affords prosecutors in comparison to other available criminal statutes. See Tarlow, supra, at 167-70. RICO has usurped the place formerly held by the body of conspiracy laws which Judge Learned Hand had years before referred to as “that darling of the modern prosecutor’s nursery” because of the ease with which prosecutors could join numerous defendants in one trial and obtain convictions supported by weak circumstantial evidence. See id. at 167-68 (quoting Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925)).


4. In addition to the American Bar Association, other organizations that have petitioned Congress to amend RICO include: the National Association of Manufacturers, the American Civil Liberties Union, the United States Chamber of Commerce, the AFL-CIO, the American Institute of Certified Public Accountants, the Securities Industry Association, the American Bankers Association, the Independent Bankers Association of America, the Future Industries Association, the American Council of Life Insurance, the Credit Union National Association, the Grocery Manufacturers of America, the National Automobile Dealers Association, the State Farm Insurance Companies, the Alliance of American Insurers and the American Financial Services Association. Hughes, RICO Reform: How Much Is Needed?, 43 VAND. L. REV. 639, 640 (1990). In contrast, organizations that oppose any drastic change to RICO, include: the Public Citizen-Congress Watch, the United States Public Interest Research Group, the National Association of Attorneys General, the National District Attorneys Association, the Na-
RICO proscribes engagement in "a pattern of racketeering activity" or the "collection of an unlawful debt." The statute has both civil and criminal applications with differing burdens of proof.


(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce . . .

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

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

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

6. Private citizens can bring civil RICO actions to recover treble damages and the cost of the suit, including reasonable attorneys' fees, for injuries to their business or property resulting from violations of the statute. Id. § 1964(c). The government can also bring civil RICO actions seeking equitable relief such as restraining orders or injunctions. Id. § 1964(b). Other civil penalties that may be ordered by the court are divestiture by the RICO violator of any interest in the criminal enterprise and dissolution or reorganization of the enterprise. Id. § 1964(a).

The government can bring criminal RICO actions seeking forfeiture of any interest acquired or maintained in violation of the statute, fines, and imprisonment for up to 20 years (or for life, if the maximum penalty for an underlying predicate offense so provides). Id. § 1963(a).

7. The standard of proof for all criminal prosecutions, including those under RICO, is constitutionally mandated as "beyond a reasonable doubt." In re Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). Thus, a successful criminal prosecution under RICO requires both that underlying predicate acts and the existence of a pattern of racketeering activity be proved be-
defines "racketeering activity" to encompass enumerated "predicate yond a reasonable doubt. Id. The ABA Ad Hoc Civil RICO Task Force has urged that the required predicate offenses in civil RICO actions also be proved beyond a reasonable doubt. REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 384 (1985) [hereinafter ABA CIVIL RICO REPORT]. Those lower courts that initially addressed the standard of proof issue in civil RICO actions, however, adopted a "preponderance of the evidence" standard. See, e.g., United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974) (preponderance standard applied in government suit to obtain preliminary injunction to stop illegal gambling), cert. denied, 420 U.S. 925 (1975); Kimmel v. Peterson, 565 F. Supp. 476, 490 (E.D. Pa. 1983) (preponderance standard applied in private suit alleging fraudulent securities transactions); Eaby v. Richmond, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983) (preponderance standard applied in private suit alleging mail fraud in sale of mineral rights); State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp. 673, 676-77 (N.D. Ind. 1982) (preponderance standard applied in private suit to recoup damages for fraudulent insurance claim involving arson); Heinold Commodities, Inc. v. McGarty, 513 F. Supp. 311, 319-14 (N.D. Ill. 1979) (preponderance standard applied in private suit for losses in commodities trading); Farmers Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978) (preponderance standard applied in private suit alleging violations of securities laws); United States v. Ladmer, 429 F. Supp. 1231, 1243 (E.D.N.Y. 1977) (preponderance standard applied in government suit alleging embezzlement of union funds by union officers); United States v. Winstead, 421 F. Supp. 295, 296 (N.D. Ill. 1976) (preponderance standard applied in government suit to obtain temporary restraining order to stop illegal gambling). The preponderance standard requires "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

In a 1985 decision, the Supreme Court discussed, but did not rule on, the appropriate standard of proof in civil RICO actions. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985). In Sedima, the Court stated that it was "not at all convinced that the predicate acts must be established beyond a reasonable doubt" in civil RICO actions. Id. The Court noted that under a number of statutes other than RICO, "conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard." Id. Consequently, those lower courts that have addressed the issue after Sedima have continued to adhere to the preponderance standard in civil RICO suits. See, e.g., Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1303 (7th Cir. 1987) (preponderance standard applied in suit alleging conversion and breach of fiduciary duties), cert. denied, 492 U.S. 917 (1989); Wilcox v. First Interstate Bank, N.A., 815 F.2d 522, 531-32 (9th Cir. 1987) (preponderance standard applied in antitrust suit brought by borrowers against lender for imposition of fraudulent interest rates); Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir.) (preponderance standard applied in suit alleging that local government employers engaged in improper coercion of political contributions from employees and job applicants under threat of adverse employment actions), cert. denied, 483 U.S. 1021 (1987); United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985) (preponderance standard applied in government civil suit alleging murder and extortion by union officers), cert. denied, 476 U.S. 1140 (1986); Ford Motor Co. v. B & H Supply, Inc., 646 F. Supp. 975, 1001 (D. Minn. 1986) (preponderance standard applied in suit alleging fraudulent sale of counterfeit auto parts); Bosteve, Ltd. v. Marauszowski, 642 F. Supp. 197, 202 n.7 (E.D.N.Y. 1986) (preponderance standard applied in suit alleging failure to pay state sales tax).

A bill that would alter the burden of proof in civil RICO cases is presently
acts” ranging from murder to mail fraud. The statute’s definition of “pattern,” however, is less precise. This lack of precision in defining RICO’s “pattern requirement” has led to the present challenge to RICO’s constitutionality.

In 

In H.J. Inc. v. Northwestern Bell Telephone Co., Justice Scalia invited defendants to challenge RICO’s constitutionality on the ground that the statute’s pattern requirement is unconstitutionally vague. In his concurring opinion, Justice Scalia professed frustration with attempts to ascertain the meaning of the pattern requirement, stating: “That the highest Court in the land has been unable to derive from this statute anything more than today’s meager guidance bodes ill for the day when pending in the House of Representatives. See H.R. 1717, 102d Cong., 1st Sess. § 6 (1991). House Bill 1717 would require “clear and convincing” evidence of civil RICO violations. Id. The Supreme Court has noted that the clear and convincing standard of evidence “require[s] a plaintiff to prove his case to a higher probability than is required by the preponderance-of-the-evidence standard.” See California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater, 454 U.S. 90, 93 n.6 (1981). The Court has also noted that there is no single “precise verbal formulation” of this standard. Id.

Commentators are doubtful that House Bill No. 1717 will ever be enacted into law. See, e.g., DAILY REP. FOR EXECUTIVES, Jan. 17, 1992, at S14 (“RICO reform bills have had a tough time getting through the House and Senate. It does not appear that it will get any easier [for Bill 1717] in 1992 . . . .”). For a more extensive discussion of House Bill No. 1717, see infra notes 280-90 and accompanying text.

8. 18 U.S.C. § 1961(1) (Supp II 1990). Section 1961 provides that “‘racketeering activity’ means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.” Id. Additionally, “racketeering activity” is defined to incorporate conduct prohibited in over 50 different sections of Title 18 of the United States Code, as well as conduct prohibited in several sections of Title 29 and Title 11. Id. § 1961(1)(B)-(D). The offenses that underlie RICO actions are commonly referred to as “predicates” or “predicate acts.” See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989) (Congress did envision some circumstances where two “predicates” would suffice to establish pattern).

9. 18 U.S.C. § 1961(5) (1988). RICO does not expressly define the term “pattern.” Instead, the statute provides, in pertinent part, that a “pattern of racketeering activity” requires at least two acts of racketeering activity.” Id. (emphasis added). Those Supreme Court Justices who have participated in decisions involving RICO are in unanimous agreement that this statutory provision merely sets forth “a minimum necessary condition for the existence of . . . a pattern” under RICO. Northwestern Bell, 492 U.S. at 237 (majority opinion authored by Justice Brennan and joined by Justices White, Marshall, Blackmun and Stevens); id. at 255 (Scalia, J., concurring, joined by Chief Justice Rehnquist and Justices O’Connor and Kennedy) (RICO “describe[es] what is needful but not sufficient” for pattern). Justice Souter, who replaced Justice Brennan on the Court in 1990, and Justice Thomas, who replaced Justice Marshall in 1991, have yet to participate in a reported decision involving RICO’s pattern requirement.


11. Id. at 256 (Scalia, J., concurring) (Chief Justice Rehnquist and Justices O’Connor and Kennedy joined in Justice Scalia’s concurring opinion).
Inevitably, in the two and one-half years since Northwestern Bell was decided, numerous defendants have accepted Justice Scalia’s invitation to challenge RICO’s constitutionality. RICO’s detractors, bolstered by Justice Scalia’s remarks, have resurrected the argument that RICO’s pattern requirement is unconstitutional because the term “pattern” is not adequately defined in the statute and, therefore, its meaning is impermissibly vague. Because the vast majority of RICO actions are predicated on a pattern of racketeering, a successful challenge to the constitutionality of the pattern requirement would effectively emasculate RICO.

12. Id. (Scalia, J., concurring). Justice Scalia chastised the Court for failing to provide meaningful guidance as to the proper interpretation of the pattern requirement. Id. at 251 (Scalia, J., concurring). The concurring Justices accused the Court of simply repromulgating “hints” about the meaning of the pattern requirement and of giving instructions to the lower courts on how to interpret the pattern requirement that were “about as helpful to the conduct of their affairs as ‘life is a fountain.’” Id. at 252 (Scalia, J., concurring).

13. Understandably, members of the defense bar were quick to interpose constitutional challenges to RICO’s pattern requirement in pending cases. In a number of cases the constitutionality of the pattern requirement was raised for the first time at the appellate level. See, e.g., Busby v. Crown Supply, Inc., 896 F.2d 833, 836 (4th Cir. 1990) (court declined to address constitutionality of pattern requirement where issue not raised in district court); Newmyer v. Philatelic Leasing, Ltd., 888 F.2d 385, 397-98 (6th Cir. 1989) (court declined to address constitutional issue not raised in lower court because “the question of RICO’s constitutionality is not beyond any doubt, and no injustice would result from allowing the issue to be addressed in the first instance by the district court”), cert. denied, 110 S. Ct. 2169 (1990). In other cases, the defendant attempted to raise the constitutional issue for the first time near the end of the lawsuit. See, e.g., Minpeco, S.A. v. Hunt, 724 F. Supp. 259, 260 (S.D.N.Y. 1989) (court rejected defendants’ attempt to challenge constitutionality of pattern requirement eight years after origin of lawsuit and after post-trial motions had been decided). For other cases challenging the constitutionality of RICO’s pattern requirement after the Court’s decision in Northwestern Bell, see infra notes 158-279 and accompanying text.

14. Previous challenges to the constitutionality of RICO’s pattern requirement were unsuccessful and the argument had been largely abandoned in recent years. For a discussion of cases decided prior to Northwestern Bell in which the constitutionality of RICO’s pattern requirement was challenged, see infra notes 39-40 and accompanying text.

Constitutional attacks on the pattern requirement are based on the “void-for-vagueness” doctrine, which requires that statutes provide sufficient guidance to citizens, those in law enforcement and the judiciary. For a discussion of the void-for-vagueness doctrine, see infra notes 85-107 and accompanying text.

the statute. Furthermore, a decision that the pattern requirement was unconstitutionally vague would have serious consequences if applied retroactively. As of this writing, the United States Supreme Court has not yet addressed a constitutional challenge to RICO's pattern requirement.

This Comment examines the constitutionality of RICO's pattern requirement. To lay the groundwork for the examination, this Comment traces the legislative origins of the pattern requirement and the Supreme Court's discussions of the pattern requirement in RICO cases where the constitutionality of the pattern requirement was not expressly challenged. This Comment then surveys those civil and criminal cases decided after Northwestern Bell in which the United States Courts of Appeals and United States District Courts have expressly considered the argument that RICO's pattern requirement is unconstitutionally vague. Next, this Comment reviews the present legislative proposals.

16. Presumably, even if RICO's pattern requirement were found to be impermissibly vague, the remainder of the statute would not be invalidated. The United States Supreme Court has implicitly recognized that an entire statute is not invalidated just because one part of that statute is struck down as unconstitutionally vague. See A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 242 (1925) (upholding validity and application of one section of federal statute after declaring another section of same statute unconstitutionally vague); see also New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) (where severable part of federal statute is struck down as unconstitutionally overbroad, remainder of statute should not be invalidated (citing United States v. Thirty-seven Photographs, 402 U.S. 363 (1971))); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 580-81 (1973) (where severable part of federal statute struck down as unconstitutionally overbroad, remainder of statute not invalidated). Even if the part of RICO not related to the pattern requirement could be severed, however, the statute would have greatly decreased value to prosecutors and private plaintiffs because the remaining portion of the statute would encompass only those relatively few cases involving loansharking. For a discussion of the scarcity of RICO cases involving unlawful debt collection, see supra note 15.

17. See Note, “RICO’s ‘Pattern’ Requirement: Void For Vagueness?”, 90 COLUM. L. REV. 489, 525 (1990) [hereinafter Note, Void For Vagueness] (“If RICO were held void for vagueness . . . . application of the rule on collateral review could have the effect of ‘opening the jail doors.’ A court should therefore hesitate before declaring RICO unconstitutionally vague.”); see also Note, Mother of Mercy—Is This the End of RICO?, 65 NOTRE DAME L. REV. 1106, 1149-50 (1990) [hereinafter Note, Is This the End of RICO] (arguing that RICO’s pattern requirement should not be found unconstitutionally vague; but, if found vague, holding should not be applied retroactively).

18. For a discussion of the legislative origins of RICO’s pattern requirement, see infra notes 34-38 and accompanying text.

19. For a discussion of cases where the Supreme Court has discussed the pattern requirement, see infra notes 46-84 and accompanying text.

20. This Comment focuses on federal rather than state judicial interpretations of RICO. The Supreme Court has confirmed the concurrent jurisdiction of state courts in civil RICO actions. Taftin v. Levitt, 493 U.S. 455, 458 (1990). The Court declared, however, that despite this concurrent jurisdiction, federal courts “retain full authority and responsibility for the application of federal criminal laws.” Id. at 464 (citing 18 U.S.C. § 3231 (1988) (granting federal dis-
to clarify the pattern requirement. This Comment then predicts that the Supreme Court will ultimately face and reject the argument that RICO’s pattern requirement is unconstitutionally vague as applied in a criminal context. Furthermore, although the argument that the pattern requirement is unconstitutionally vague may be more persuasive in a civil context, this Comment concludes that the Supreme Court will ultimately reject that argument as well.

II. BACKGROUND

Commentators have long debated the proper scope of RICO’s coverage. Most commentators, and the Supreme Court, agree that the statute was enacted primarily to combat the infiltration of organized crime into legitimate businesses by “the archetypal, intimidating mobster.” In addition to this primary purpose, however, Supreme Court decisions have removed any doubt that the RICO statute also covers
“legitimate” enterprises that engage in a pattern of criminal conduct. Because of the statute’s broad scope, RICO defendants range from career criminals accused of classic organized crime activities, to persons accused of bribing politicians, to accountants and law firms involved in the administration of estates. Furthermore, in addition to the statute’s breadth, Congress has pronounced that RICO should be “liberally construed to effectuate its remedial purposes.”

26. Northwestern Bell, 492 U.S. at 246 (Congress deliberately “adopted commodious language capable of extending beyond organized crime”). RICO’s commodious language has arguably led to some abuse in its civil applications. Chief Justice Rehnquist has stated that

[v]irtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime. They are the garden-variety civil fraud cases of the type traditionally litigated in state courts.

... 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, or have some other reason for being in Federal Court.


Even Professor Blakey, one of the drafters of RICO, acknowledges that the statute has been abused in certain civil applications. See Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 18-23, McMonagle v. Northeast Women’s Center, 889 F.2d 466 (3d Cir.) (No. 88-1644) (Professor Blakey was lead counsel on petition arguing that RICO’s use against pro-life protestors was abuse of civil RICO), cert. denied, 493 U.S. 901 (1989).

In recent years civil litigants have “stretched” the statute to encompass such alleged RICO violations as the operation of “speed traps” by police and the publication of Roseanne Barr’s love letters. The Law That Ate All Common Sense; Motorist Uses RICO Statue Against Traffic Cops For Operating a Speed Trap!, L.A. Times, Aug. 24, 1990, at B6, col. 3; Lichtblau, Barr Sues 2 Tabloids For Printing Her Love Letters, L.A. Times, Oct. 5, 1990, at B3, col. 5.


30. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. The mandate for liberal construction was not codified. Some commentators argue that a liberal construction of RICO is only mandated in
In the first years after its passage in 1970, RICO was used sparsely in criminal prosecutions and virtually never in civil actions. In the early 1980s, however, the annual number of civil and criminal RICO cases rose markedly.

Civil cases, because criminal RICO actions are not "remedial." See D. Smith & T. Reed, Civil RICO ¶ 1.02, at 1-10 to 1-11 (1991) (arguing against liberal construction of statute in criminal RICO actions). But see Russello v. United States, 464 U.S. 16, 27 (1983) (citing liberal construction clause as support for liberal interpretation in case involving RICO's criminal forfeiture provision); see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985) (Supreme Court recognized that RICO's "remedial purposes" are nowhere more evident than in civil suits, thus implying remedial purposes mandating liberal construction exist to some extent in criminal actions). For an excellent discussion of the purpose and proper use of the liberal construction clause, see Note, RICO and the Liberal Construction Clause, 66 CORNELL L. REV. 167 (1980) (authored by Craig W. Palm).

31. See Dennis, Current RICO Policies of the Department of Justice, 43 VAND. L. REV. 651, 652 (1990) (noting that 30 or fewer criminal RICO suits were filed annually prior to 1981). RICO's slow start may be attributable, at least in part, to uncertainty concerning the reach of the statute. See id. at 653. One major uncertainty was clarified in 1981 when the Supreme Court held that RICO could be used not only against organized criminals infiltrating legitimate businesses, but also against organized criminals engaging in wholly illegitimate businesses such as illegal gambling. See United States v. Turkette, 452 U.S. 576, 590 (1981). A second major uncertainty about the scope of RICO was clarified in 1983 when the Court held that proceeds and profits derived from racketeering activity were "interests" subject to forfeiture under § 1963(a)(1) of the statute. See Russello v. United States, 464 U.S. 16, 22 (1983).

Shortly after Russello was decided, a number of high-profile RICO prosecutions against major Mafia figures attracted "enormous media coverage." Dennis, supra, at 653. Dennis asserts that "this coverage spurred FBI offices and federal prosecutors throughout the country to increase significantly the number of RICO investigations and to accelerate the completion of RICO cases already initiated." Id. For examples of high-profile prosecutions, see id. at 655 & nn.9 & 11-17.

32. See Dennis, supra note 31, at 562-53. In 1985, the Supreme Court noted that "[o]f 270 District Court [civil] RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984."

Sedima, 473 U.S. at 481 n.1 (citing ABA CIVIL RICO REPORT, supra note 7, at 55). One reason that fewer civil RICO suits were filed prior to 1985 may be that uncertainty existed as to whether a criminal conviction for the underlying offenses was required before a civil RICO suit could be brought. See id. at 485-86 & n.6. In 1985, the Supreme Court expressly rejected the "prior-conviction requirement" argument. Id. at 493. Another possible reason for the increase in civil RICO actions in the 1980s was the Department of Justice's contemporaneous success in criminal RICO prosecutions. See Reed, The Defense Case for RICO Reform, 43 VAND. L. REV. 691, 707 (1990) (Department of Justice's success, coupled with availability of attorneys' fees and treble damages, caused increased utilization of civil RICO).

33. Sedima, 473 U.S. at 481 n.1. Just how dramatically the number of civil RICO suits has increased in recent years is a hotly contested issue. Professor Blakey contends that between 1,000 and 10,000 civil RICO cases are filed each year. See Blakey & Perry, supra note 4, at 869-73. Some RICO critics, however, claim that as many as 40,000 RICO claims are filed annually. Id. at 879 (acknowledging contention of Rep. Rick Boucher).
A. Legislative History of the Pattern Requirement

As originally drafted, RICO provided: "The term 'pattern of racketeering activity' includes at least one act occurring after the effective date of this chapter." 34 Prior to RICO's passage, however, the Department of Justice proposed that the original language be amended to read: "The term 'pattern of racketeering' means at least two acts, one of which occurred after the effective date of this chapter." 35 Ultimately, the term "pattern of racketeering" was not precisely defined in the RICO statute. Instead, Congress chose simply to provide that "[t]he term 'pattern of racketeering' requires at least two acts, one of which occurred after the effective date of this chapter." 36 At the same time, however, RICO's congressional sponsors indicated that something more than the two predicate acts was necessary before a pattern existed. 37 Thus, with a minimum requirement, but no comprehensive definition, courts began the formidable task of interpreting RICO's pattern requirement. 38

The number of criminal RICO suits has also increased dramatically. See Kennedy, supra note 15, at 485 (statistics showing 62 criminal RICO cases filed in 1982, increasing to 102 cases filed in 1983, 122 cases filed in 1984 and 92 cases filed in 1985); see also Hughes, supra note 4, at 643 (as of 1989, average of 100 to 125 criminal RICO cases filed each year). Nevertheless, criminal RICO suits presently account for only a small percentage of the total number of RICO suits filed each year. 34. S. REP. No. 617, supra note 25, at 122 (emphasis added).

35. Id. (emphasis added).

36. 18 U.S.C. § 1961(5) (1988). A "required" element may only be a small part of what an entire concept "means." As a verb, "mean" denotes: "To have in mind as a purpose or intention." 9 Oxford English Dictionary 520 (2d ed. 1989). In contrast, the verb "require" denotes: "To demand as necessary or essential on general principles, or in order to comply with or satisfy some regulation." 13 Oxford English Dictionary 682 (2d ed. 1989). It can be argued that when a statute specifies what a term "means," nothing other than what is specified is needed. When a statute provides that something is "required," however, it can be argued that elements are needed in addition to those specified. See McClellan, The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 144 (1970) ("[C]ommission of two or more acts of racketeering activity is made a necessary, but not a sufficient, element of a pattern under Title IX.").

37. Senator McClellan, one of RICO's sponsors, noted during debate prior to the passage of the statute that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18,940 (1970). Responding to criticism of RICO after its passage, Senator McClellan again flatly rejected the argument that two isolated acts of criminal activity, without more, could constitute a RICO violation. See McClellan, supra note 36, at 144; see also ABA Civil RICO Report, supra note 7, at 193-94 (likely that Congress intentionally drafted pattern provision to provide minimum requirement rather than meaning of "pattern").

38. For a discussion of how some states have simplified the interpretation of the pattern definitions in their state anti-racketeering statutes, see infra notes 292-305 and accompanying text.
B. Early Judicial Interpretations of the Pattern Requirement

Defendants in several early RICO cases argued that the statute's pattern requirement was unconstitutionally vague. These vagueness arguments, similar to the one invited by Justice Scalia in his concurring opinion in *Northwestern Bell*, were uniformly rejected at the district court level. Consequently, while the number of RICO cases filed annually increased, the void-for-vagueness attacks on RICO's pattern requirement were largely abandoned.

Although defendants in early RICO cases discontinued their constitutional challenges to the statute's pattern requirement, they continued to argue that their acts did not constitute a pattern of racketeering under RICO. Courts invariably rejected the defendants' arguments and found that a pattern existed, although the courts reached that conclusion using a number of different analyses. Many decisions were based on the rationale that any two predicate acts, even if occurring within a single brief episode, sufficed to constitute a pattern. In other decisions, courts


40. See, e.g., Boffa, 513 F. Supp. at 462-63 (rejecting argument that RICO unconstitutionally vague due to failure adequately to define "pattern of racketeering"); White, 386 F. Supp. at 883-84 (same).

41. Other provisions of RICO have likewise withstood challenges of unconstitutional vagueness. See United States v. Tripp, 782 F.2d 38, 42 (6th Cir.) (rejecting argument that RICO provision incorporating state racketeering laws made statute unconstitutionally vague), cert. denied, 447 U.S. 928 (1986); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (rejecting argument that RICO conspiracy provision unconstitutionally vague), cert. denied, 441 U.S. 933 (1979); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (rejecting argument that RICO "enterprise" requirement unconstitutionally vague); United States v. Stofsky, 409 F. Supp. 609, 612-13 (S.D.N.Y. 1973) (rejecting argument that failure to define phrase "conduct or participate" in § 1962(c) made RICO unconstitutionally vague).

42. See, e.g., United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988) (two telephone calls on same day sufficient to establish pattern); United States v. Watchmaker, 761 F.2d 1459, 1475 (11th Cir. 1985) (three separate acts of attempted murder in single criminal episode constituted RICO violation), cert. denied, 474 U.S. 1100 (1986); United States v. Bascaro, 742 F.2d 1335, 1360-61 (11th Cir. 1984) (acts of importation, possession and intent to distribute marijuana constituted pattern where each act was separate crime), cert. denied, 472 U.S. 1017 (1985); United States v. Phillips, 664 F.2d 971, 1039 (5th Cir. Unit B Dec. 1981) (aiding and abetting drug importation and travel in aid of same crime sufficed to constitute pattern), cert. denied, 457 U.S. 1136 (1982); United States v. Starnes, 644 F.2d 673, 677-78 (7th Cir.) (arson, traveling in interstate commerce with intent to commit arson and mail fraud to collect insurance proceeds from arson constituted pattern), cert. denied, 454 U.S. 826 (1981); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980) (payment of bribe in three installments constituted pattern), cert. denied, 449 U.S. 1017 (1981).
held that two acts related to the same enterprise were sufficient to establish a pattern. Other courts took a more restrictive view, holding that a pattern existed only if the underlying predicate acts were related to each other. Finally, a few district courts even suggested that continuity of the predicate acts might be necessary before a pattern could be found.

C. Supreme Court Guidance in Interpreting the Pattern Requirement


In 1985, the United States Supreme Court, aware that lower federal courts had rendered conflicting interpretations of various RICO provisions, granted certiorari in *Sedima, S.P.R.L. v. Imrex Co.* In *Sedima,*

43. See, e.g., United States v. Sinito, 723 F.2d 1250, 1261 (6th Cir. 1983) (two predicate crimes “unrelated to one another” but related to enterprise sufficient to establish pattern), *cert. denied,* 469 U.S. 817 (1984); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982) (government need only prove two or more predicate acts related to enterprise to establish pattern), *cert. denied,* 464 U.S. 828 (1983); United States v. Bright, 830 F.2d 804, 890 & n.47 (5th Cir. 1980) (two acts of bribery associated with enterprise would be sufficient to establish pattern); United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir.) (any two acts of racketeering related to enterprise sufficient to establish pattern), *cert. denied,* 449 U.S. 871 (1980); United States v. Elliott, 571 F.2d 880, 899 n.23 (5th Cir.) (two or more predicate crimes related to enterprise sufficient to establish pattern; “interrelatedness” of acts unnecessary), *cert. denied,* 439 U.S. 953 (1978). For the text of RICO’s definition of “enterprise,” see supra note 3.


45. See, e.g., Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6, 12-13 (W.D. Pa. 1981) (RICO enacted “to prevent incidents constituting, or likely to constitute[,] a continuous course of unlawful conduct”); United States v. Moeller, 402 F. Supp. 49, 57-58 (D. Conn. 1975) (if not constrained by decision of appellate court, district court would hold that pattern required acts occurring in “different criminal episodes” or acts “somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity”).

46. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 485-86 (1985) (acknowledging that certiorari was granted because of “variety of approaches taken by the lower courts” interpreting RICO).

47. 469 U.S. 1157 (1984). Sedima, a Belgian corporation, entered into a joint venture with Imrex. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 483 (1985). The parties agreed that Sedima would solicit orders for electronic components from purchasers in Europe and that Imrex would obtain those components in the United States and ship them to Europe. *Id.* at 483-84. Sedima and Imrex were to split the net proceeds. *Id.* at 484. Sedima, however, became convinced that Imrex was billing it for nonexistent expenses. *Id.* As a result, Sedima brought suit alleging that Imrex had engaged in a pattern of mail and wire fraud to overcharge at least $175,000 in fictitious expenses. *Id.*
the Supreme Court chided both Congress and the lower courts for failing "to develop a meaningful concept of 'pattern.'" Then, although the meaning of "pattern" was not at issue in *Sedima*, in *Sedima* footnote 14, the Court pronounced that "continuity plus relationship" of predicate acts was necessary to form a pattern under RICO. Two isolated

48. *Sedima*, 473 U.S. at 500. The Court noted that most civil RICO actions were brought against legitimate businesses rather than against the "archetypal intimidating mobster" and acknowledged that it had "doubts" about RICO's "increasing divergence" from what was originally intended by the bill's drafters. *Id.* at 499-500. The Court attributed this divergence both to the "breadth of the predicate offenses, in particular . . . wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of 'pattern.'" *Id.* at 500.

49. The issues in *Sedima* were: 1) whether prior criminal convictions for the underlying predicate offenses were necessary before a RICO action could be brought; and 2) whether a RICO plaintiff was required to allege a "racketeering injury" of the type RICO was designed to deter. *Id.* at 484-85. The Supreme Court rejected the holding of the United States Court of Appeals for the Second Circuit that civil RICO claims were properly limited to instances where the defendant had already been criminally convicted for the underlying offenses. *Id.* at 493. The Court also rejected as "amorphous" and "unhelpfully tautological" the Second Circuit's finding that a civil RICO plaintiff must establish a "racketeering injury" that was "caused by an activity which RICO was designed to deter," rather than simply an injury from the predicate acts. *Id.* at 493-95 (quoting *Sedima*, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984)).

50. *Id.* at 496 n.14.

51. *Id.* The Court drew the "continuity plus relationship" language from the legislative history of the statute. See *id.* (quoting S. Rep. No. 617, *supra* note 25, at 158). The full text of footnote 14 is as follows:

As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35198 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665. Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar pur-
acts of racketeering would not suffice. The Court also suggested that further guidance as to the meaning of RICO’s pattern requirement might be found in the broad definition of “pattern” contained in one of RICO’s sister statutes. The consequence of the Court’s dicta in footnote 14 was accurately described by Justice Scalia in a later case: “Thus enlightened, the district and circuit courts set out ‘to develop a meaningful concept of “pattern”’ and promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory.”

In response to the Supreme Court’s directive in Sedima, the various United States Courts of Appeals adopted “tests” for the pattern requirement. Because the tests differed from circuit to circuit, however, facts poses, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. Iannelli v. United States, 420 U.S. 770, 789 (1975).

Id. In footnote 14, the Court advocated an approach that was contrary to the approaches taken by a number of the courts of appeals and district courts prior to Sedima. For a discussion of the approaches taken by the lower courts prior to Sedima, see supra notes 42-45 and accompanying text. For a discussion of the appropriateness of the Supreme Court’s reliance on the “continuity plus relationship” phrase in RICO’s legislative history, see infra note 65.


Interestingly, even before the Sedima decision, some lower courts had looked to the definition of pattern in Title X “to cast light on the [meaning of the] word ‘pattern.’” See, e.g., United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (RICO’s pattern requirement should be construed with reference to Title X’s pattern requirement). A number of other courts, however, had rejected arguments that they should seek guidance from Title X’s pattern requirement in interpreting the RICO pattern requirement. See, e.g., United States v. Weisman, 624 F.2d 1118, 1122-23 (2d Cir. 1980) (fact that RICO and Title X “were enacted simultaneously yet embody different definitions of ‘pattern’ would seem to indicate that Congress intentionally chose to use the term differently in different contexts”); United States v. DePalma, 461 F. Supp. 778, 784 (S.D.N.Y. 1978) (if Congress intended Title X’s pattern requirement to shed light on meaning of RICO’s pattern requirement, it should have made that intention clear).


54. Absent further explanation, the Court's pronouncement that a pattern required “continuity plus relationship” generally proved to be of little assistance to the courts of appeals in their attempts to develop a meaningful concept of pattern. The United States Court of Appeals for the Eighth Circuit adopted the most restrictive test for pattern, requiring that two distinct criminal schemes be proven. See Superior Oil Co. v. Fulmer, 785 F.2d 252, 254-57 (8th Cir. 1986).
that sufficed to establish a pattern in one circuit might fail to establish a pattern in another circuit. Three years later, largely as a result of the split in the circuits that followed Sedima, the Supreme Court accepted certiorari in another case that would allow it to revisit the meaning of RICO's pattern requirement.55


In H.J. Inc. v. Northwestern Bell Telephone Co.,56 the Supreme Court began its opinion by briefly reviewing the different, and sometimes conflicting, tests utilized by the various courts of appeals to determine the presence of a pattern.57 The Court did not blame the judiciary for the confusion among the circuits. Instead, the Court placed the blame squarely on Congress for failing to clarify adequately the pattern requirement.58 The Court then proceeded to interpret RICO's pattern requirement.

In interpreting the pattern requirement, the Northwestern Bell Court looked to the text and legislative history of RICO for guidance.59 The (several related acts in furtherance of "one continuing scheme" to convert property not sufficient to establish pattern). The United States Courts of Appeals for the Second and Fifth Circuits retained the most lenient test for pattern, requiring only two related predicate acts. See United States v. Ianniello, 808 F.2d 184, 189-93 (2d Cir. 1986) (labeling Sedima footnote 14 as non-controlling and holding that two acts for purpose of furthering enterprise suffice to establish pattern), cert. denied, 483 U.S. 1006 (1987); R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350, 1355 (5th Cir. 1985) (two related acts suffice to establish pattern).


55. H.J. Inc. v. Northwestern Bell Tel. Co., 485 U.S. 958 (1988). The plaintiffs in Northwestern Bell sought review of the holding of the Court of Appeals for the Eighth Circuit that multiple acts of bribery in furtherance of a single scheme to influence commissioners responsible for approving rate increases for utilities were not sufficient to constitute a pattern. Northwestern Bell, 492 U.S. at 234-35. Therefore, unlike Sedima, where the Court was not required to reach the pattern requirement, the meaning of "pattern" was squarely before the Northwestern Bell Court. Id. The Court acknowledged that its "task" in Northwestern Bell was to "develop[,] a meaningful concept of 'pattern' within the existing statutory framework." Id. at 236. The Court noted that "[m]ost Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes, and we granted certiorari to resolve this conflict." Id. at 235 (footnote omitted).


57. Id. at 235 n.2.

58. Id. at 236. Justice Brennan stated: "Congress has done nothing . . . further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since Sedima demonstrates, . . . developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task." Id.

59. Id. at 237-39.
Court first consulted RICO’s definition of “pattern of racketeering activity.” On the basis of that definition, the Court determined that Congress had envisioned not only circumstances in which two predicate acts would suffice to constitute a pattern, but also circumstances in which two predicate acts would not suffice to constitute a pattern. Accordingly, the Court turned to the issue of what, in addition to two predicate acts, was necessary before a pattern existed.

The Court stated that, in ordinary usage, the term “pattern” required an “arrangement or order of things or activity” rather than simply a “multiplicity of racketeering predicates.” Therefore, the Court discerned, the elements in a pattern must bear some relationship “to each other or to some external organizing principle.” The Court then inferred that Congress’ failure to limit expressly the sorts of patterns that would satisfy the pattern requirement indicated that Congress “had a fairly flexible concept of a pattern in mind.”

The Court next turned to RICO’s legislative history and concluded that it “reveal[ed] Congress’ intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.” The Court stated that “[i]t is this factor of

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61. Northwestern Bell, 492 U.S. at 237. The Court noted that § 1961(5) of RICO does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern.

Section 1961(5) does indicate that Congress envisioned circumstances in which no more than two predicates would be necessary to establish a pattern of racketeering—otherwise it would have drawn a narrower boundary to RICO liability, requiring proof of a greater number of predicates. But, at the same time, the statement that a pattern “requires at least” two predicates implies “that while two acts are necessary, they may not be sufficient.”

62. Id. at 238 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).

The Court looked at the ordinary usage of the term “pattern” because of its “assumption that the legislative purpose is expressed by the ordinary meaning of the words used.” Id. (quoting Richards v. United States, 369 U.S. 1, 9 (1962)).

63. Id. The Court stated that “it is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them ‘ordered’ or ‘arranged.’ ”

64. Id. The Court noted that “[t]he text of RICO conspicuously fails anywhere to identify . . . forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act.”

65. Id. at 239. The Court relied heavily on a statement by one of RICO’s sponsors that a person could not “be subjected to the sanctions of [RICO] simply for committing two widely separated and isolated criminal offenses.” Id. (quoting 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)).
continuity plus relationship which combines to produce a pattern."\(^{66}\)

Up to this point, the Court's espousal of a continuity plus relationship test in *Northwestern Bell* essentially restated the Court's discussion of pattern in *Sedima* three years earlier.\(^{67}\) Noting, however, the "plethora of different views expressed by the Courts of Appeals since *Sedima,*" the Court recognized the need for a more extensive explanation of the pattern requirement.\(^{68}\) Consequently, the Court expounded upon the meanings of continuity and relationship as requisites for a pattern.\(^{69}\)

First, the Court held that the requirement of relationship would be satisfied by "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."\(^{70}\) Having elaborated on the requirement of relationship, the Court then shifted its focus to the requirement of continuity.

The Court noted that it was difficult to formulate a general test for


\(^{68}\) Northwestern Bell, 492 U.S. at 236. For a discussion of the failure of the lower courts to develop a meaningful definition of "pattern" after *Sedima*, see *supra* notes 54-58 and accompanying text.

\(^{69}\) Northwestern Bell, 492 U.S. at 239-43.

\(^{70}\) *Id.* at 240 (quoting 18 U.S.C. § 3575(e) (1982) (repealed 1987)). The Court relied on the definition of "pattern" in RICO's sister title, the Dangerous Special Offender Sentencing Act, for guidance on the meaning of relationship. *Id.* at 239-40 (citing Title X of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3561-3580 (1982) (repealed 1987)). Four years earlier, in the "*Sedima footnote,*" the Court had suggested that the lower courts look to that same definition for guidance. *Sedima*, 473 U.S. at 496 n.14. Because the Sentencing Act (Title X) abutted RICO (Title IX) in the Organized Crime Control Act, the Court had "no reason to suppose that Congress had in mind for RICO's pattern of racketeering component any more constrained a notion of the relationships between predicates that would suffice." *Northwestern Bell*, 492 U.S. at 240.
continuity, but explained that continuity referred "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." The Court further explained that continuity could be established "by proving a series of related predicates extending over a substantial period of time." Recognizing, however, that "[o]ften a RICO action will be brought before continuity can be established in this way," the Court stated that the continuity requirement could also be satisfied by proof of the "threat" of continued racketeering activity. The Court then noted that whether such a threat existed depended on the facts of each case, and offered some examples of how a threat could be proved. Additionally, the Court flatly rejected the argument that RICO's pattern requirement should be interpreted narrowly to restrict its application to persons and associations possessing the traditional characteristics of "organized crime."

71. Northwestern Bell, 492 U.S. at 241. The Court noted that continuity could be established "in a variety of ways, thus making it difficult to formulate in the abstract any general test." Id.

72. Id. (citing Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d 36, 39 (3d Cir. 1987)).

73. Id. at 242. The Court cautioned that “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.” Id.

74. Id. (citing S. REP. No. 617, supra note 25, at 158).

75. Id. "Without making any claim to cover the field of possibilities," the Court offered the following examples of how the "threat" of continuity could be demonstrated:

A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id. at 242-43.

76. Id. at 249. Various organizations, including the AFL-CIO, the American Institute of Certified Public Accountants, the National Association of Manu-
In his concurrence, Justice Scalia characterized the majority opinion as "about as helpful" to lower courts attempting to interpret RICO's pattern requirement as the phrase "life is a fountain." Justice Scalia also contended that the majority erred in relying for guidance on the definition of "pattern" in one of RICO's sister statutes. According to Justice Scalia, the very fact that pattern was defined in the sister statute, but not in RICO, indicated "that whatever 'pattern' might mean in RICO, it assuredly does not mean [the same thing as it means in the sister statute]."

Furthermore, regardless of the propriety of using the definition of "pattern" from a sister statute, Justice Scalia flatly rejected the majority's explanation of the relationship and continuity requirements. He found the majority's concept of relationship to be so broad as to be meaningless and the majority's concept of continuity to be "murky" and confusing. Justice Scalia contended that neither he nor the majority was capable of providing the guidance necessary to aid the lower courts in developing a meaningful concept of pattern.

facturers and the Washington Legal Foundation, filed briefs as amici curiae urging the adoption of such a narrow interpretation of RICO's pattern requirement. Id. at 244 n.5. The Court stated that such an interpretation "would be counterproductive and a mismeasure of congressional intent." Id. at 249.

Id. at 252 (Scalia, J., concurring). Justice Scalia rejected the majority's analysis, arguing that the majority opinion "added nothing to improve [the Court's] prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a 'threat of continuity.' It seems to me this increases rather than removes the vagueness." Id. at 255 (Scalia, J., concurring).

80. Id at 252-54 (Scalia, J., concurring).

81. Id. at 252 (Scalia, J., concurring). Justice Scalia opined: "It hardly closes in on the target to know that 'relatedness' refers to acts that are related by 'purposes, results, participants, victims, . . . methods of commission, or [just in case that is not vague enough] otherwise.'" Id. (Scalia, J., concurring) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

82. Id. at 253-54 (Scalia, J., concurring). Justice Scalia contended that, by defining the continuity requirement to exclude from RICO's coverage criminal acts that extended over a "few weeks and months" but did not threaten "future criminal conduct," the majority created a "safe harbor" for short term criminal conduct and actually contravened the legislative intent behind RICO. Id.

83. Id. at 254-55 (Scalia, J., concurring). Justice Scalia remarked:

It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application. It is clear to me . . . that the word "pattern" . . . was meant to import some requirement
then concluded his concurring opinion with an "invitation" to defendants to challenge the constitutionality of RICO's pattern requirement.84

D. The Void-for-Vagueness Doctrine

1. Rationale Underlying the Void-for-Vagueness Doctrine

Justice Scalia invited a constitutional challenge to RICO based on the void-for-vagueness doctrine. The void-for-vagueness doctrine emanates from the fifth and fourteenth amendments of the Constitution which require that persons receive due process of law.85 Due process, the Supreme Court has declared, requires that federal and state statutes provide sufficient "guidance" not only to those who must obey the laws, but also to those who must enforce and interpret the laws.86

Supreme Court decisions applying the void-for-vagueness doctrine focus on three infirmities found in vague statutes. First, vague statutes fail to give fair guidance to the public as to the nature of the conduct prohibited.87 Second, vague statutes fail to provide sufficient guidance beyond the mere existence of multiple predicate acts. . . . But what that something more is, is beyond me. As I have suggested, it is also beyond the Court.

Id. (Scalia, J., concurring).

84. Id. at 255-56 (Scalia, J., concurring). Many, if not most, defendants in RICO actions accepted Justice Scalia's invitation to challenge the constitutionality of RICO's pattern requirement. For a discussion of Justice Scalia's "invitation," see supra notes 10-12 and accompanying text. For examples of cases challenging the constitutionality of RICO's pattern requirement, see infra notes 138-279 and accompanying text.

85. U.S. Const. amends. V, XIV. The fifth amendment, which applies to federal statutes, provides that "[n]o person shall be... deprived of life, liberty, or property, without due process of law." U.S. CONSt. amend. V. The fourteenth amendment, which applies to state statutes, similarly provides that "[n]o State shall... deprive any person of life, liberty, or property, without due process of law." U.S. CONSt. amend. XIV. For a more extensive discussion of the circumstances under which the Court will declare a statute unconstitutionally vague, see Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. Rev. 67 (1960) (authored by Anthony G. Amsterdam) (this highly regarded authoritative work was authored while Professor Amsterdam was a student).

The void-for-vagueness doctrine is often confused with another constitutional doctrine—overbreadth. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1033-35 (1988). The two doctrines, however, are separate and distinct. Id. The void-for-vagueness doctrine invalidates statutes which fail to provide guidance. Id. The doctrine of overbreadth invalidates statutes which impermissibly encroach on constitutionally protected conduct. Id. A statute may be: (1) both vague and overbroad; (2) vague, but not overbroad; or (3) overbroad, but not vague. Thus, although the same statute may violate both doctrines, the underlying doctrines are quite different.


87. Id. at 357 (void-for-vagueness doctrine requires penal statute to define offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited”); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (because persons are “free to steer between lawful and unlawful conduct,” law must give “reasonable opportunity to know what is prohibited”); Lanzetta v.
to prosecutors and others who are charged with enforcing statutes. 88

Third, vague statutes fail to provide sufficient guidance to judges who are charged with interpreting statutes. 89

One might expect that the most important function of the void-for-vagueness doctrine would be to ensure that citizens know what types of conduct are prohibited so that they can avoid violating the law. Contrary to that expectation, however, the Supreme Court has indicated that the doctrine's most important function is to ensure that law enforcement officials and judges know what types of conduct are prohibited. 90 This emphasis on guidance to law enforcement officials stems from a concern that vague statutes "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " 91

Although the void-for-vagueness doctrine values clarity, proper application of the doctrine does not mean that only the most precisely-drawn statutes will pass constitutional muster. 92 The Supreme Court has stated that "[t]he fact that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in

New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). Thus, if a statute "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," it will be held unconstitutional. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (statute requiring contractors to pay workmen "current rate of per diem wages in the locality where the work is performed" found unconstitutionally vague).

88. Kolender, 461 U.S. at 357-58. Some commentators have argued that, because RICO has civil as well as criminal applications, the void-for-vagueness doctrine must be concerned not only with guidance to those in law enforcement, but also to private RICO plaintiffs. See Freeman & McSlarrow, RICO and the Due Process "Void for Vagueness" Test, 45 Bus. Law. 1003, 1008 (1990) ("private persons are authorized to function as 'private attorneys general' in bringing civil RICO claims").

89. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1979) (vague law impermissibly delegated basic policy matters to judges for resolution on ad hoc and subjective basis). Where a statute is too vague to provide sufficient guidance, the judiciary is arguably placed in the position of usurping the proper function of the legislature by "making the law" rather than interpreting it. Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 202-05 & n.40 (1985) (discussing vagueness arguments based on separation of powers between legislature and judiciary).

90. Kolender, 461 U.S. at 358.

91. Id. (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

92. See Note, Is This The End of RICO, supra note 17, at 1118-20 ("[S]ince 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 regulations of first amendment rights. Two other statutes . . . abridged a mother's fundamental privacy right to an abortion. Three other statutes . . . regulated the crimes of vagrancy and communist activity," (citations omitted)).
fact drafted is unconstitutionally vague.” Furthermore, the Supreme Court has recognized that the legislature may “advisedly adopt[] a phrase which . . . does not ‘admit of precise definition but the meaning and application of which must be arrived at by . . . “the gradual process of judicial inclusion and exclusion.” ’” Finally, although the rationale underlying the void-for-vagueness doctrine is laudable, some commentators contend that the Supreme Court has not applied the doctrine consistently.

2. Application of the Void-for-Vagueness Doctrine

A defendant seeking to challenge a statute as unconstitutionally vague generally must establish that the statute is impermissibly vague as applied to her particular factual circumstances. Only when the challenged statute implicates first amendment rights may a defendant argue

93. United States v. Powell, 423 U.S. 87, 94 (1975) (quoting United States v. Petrillo, 332 U.S. 1, 7 (1947)). The Court in Powell also held that a statute is not necessarily unconstitutional even though “doubts as to the applicability of the [statute] in marginal fact situations may be conceived.” Id. Similarly, the void-for-vagueness doctrine is not “designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, the Court has upheld a number of statutes containing terms no more precise than pattern. See, e.g., United States v. Petrillo, 332 U.S. 1, 8 (1947) (rejecting constitutional challenge to statute prohibiting use of coercion to compel hiring of “persons in excess of the number of employees needed”); Kay v. United States, 303 U.S. 1, 9 (1938) (rejecting constitutional challenge to statute prohibiting charges in excess of “ordinary fees”); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 84 (1932) (rejecting constitutional challenge to statute prohibiting mislabeling of product, subject to “reasonable variations”); United States v. Alford, 274 U.S. 264, 267 (1927) (rejecting constitutional challenge to statute prohibiting fires “near” any forest, timber or inflammable material). But cf. Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (striking down as unconstitutionally vague statute making it unlawful for certain persons to be members of “gang”).


95. One commentator likened the Court’s application of the doctrine to “a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up.” Note, supra note 85, at 67. Another commentator remarked: “To understand and rationalize the applications of the doctrine would require a philosopher’s stone, for which one may search in vain in the reported decisions.” Collings, Unconstitutional Uncertainty—An Appraisal, 40 CORNELL L.Q. 195, 196 (1955).

96. New York v. Ferber, 458 U.S. 747, 767 (1982) (“The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.”); United States v. Mazurie, 419 U.S. 544, 550 (1975) (“It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.”).
that the statute should be invalidated because, although the statute clearly proscribes her conduct, it would be vague if applied to the conduct of certain "hypothetical" persons not before the court. 97

The void-for-vagueness doctrine applies to both civil and criminal statutes. 98 The Supreme Court recognizes, however, that the importance of the guidance required by the doctrine depends, in part, on the civil or criminal nature of the statute. 99 Accordingly, the Court scrutinizes civil statutes less severely than criminal statutes because the lesser penalties for violating civil statutes make the "consequences of imprecision . . . qualitatively less severe." 100 Although RICO has civil applica-

97. Where the statute alleged to be unconstitutionally vague encroaches upon first amendment rights, the defendant need not establish that the statute is impermissibly vague as applied to the facts in the case at bar. NAACP v. Button, 371 U.S. 415, 432 (1963) ("[S]tandards of permissible statutory vagueness are strict in the area of free expression."). Instead, the Court will strike down the statute as unconstitutionally vague if the statute prohibits conduct protected by the first amendment, whether or not the petitioner has engaged in the privileged conduct. Id. The Court relaxes the requirement in first amendment cases in order to invalidate statutes that would have a chilling effect by discouraging persons from engaging in conduct that is protected by the first amendment. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (vague statutes cause citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked" (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)))).

First amendment challenges to various RICO provisions have been argued in a number of recent cases. See United States v. Pryba, 900 F.2d 748, 753-56 (4th Cir.) (defendant unsuccessfully argued that RICO forfeiture provisions constituted prior restraint of free expression in violation of first amendment rights in case involving obscenity violations), cert. denied, 111 S. Ct. 305 (1990); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1348-49 (3d Cir.) (defendants unsuccessfully argued that RICO unconstitutionally imposed on first amendment rights to dissent and publication of political views), cert. denied, 493 U.S. 901 (1989); United States v. Yarbrough, 852 F.2d 1522, 1540-41 (9th Cir.) (defendant unsuccessfully argued that RICO conspiracy provision violated first amendment rights to political advocacy and association), cert. denied, 488 U.S. 866 (1988); United States v. Busacca, 739 F. Supp. 370, 378 (N.D. Ohio 1990) (defendant unsuccessfully argued that RICO's pattern requirement improperly imposed on right to associate with fellow trustees); Van Schaik v. Church of Scientology, Inc., 535 F. Supp. 1125, 1138-39 (D. Mass. 1982) (court dismissed RICO counts on other grounds, but recognized that first amendment right to freedom of religion may be implicated in civil RICO action by former church member against institution).


99. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) ("The Court has . . . expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."). The void for vagueness doctrine also permits more uncertainty when the law regulates economic behavior, when the law regulates relatively narrow subject matter or when the law applies only to those who intentionally or knowingly violate it. Id.

100. Id. (citing Barenblatt v. United States, 360 U.S. 109, 137 (1959)}
tions, it cannot be treated under the less-demanding civil standard because it also has criminal applications. The Supreme Court has indicated that statutes with both civil and criminal applications must be construed similarly in both settings and, therefore, statutes with dual applications will always be held to the more exacting standard applied to criminal statutes.

A defendant seeking to have a federal statute, such as RICO, declared unconstitutionally vague faces an uphill battle in certain respects. First, federal courts afford federal statutes a strong presumption of validity. Second, in addition to the plain language of the statute, federal courts will also utilize a number of other sources to clarify an otherwise vague federal statute. These sources include: prior judicial construction, external standards and related statutes. Third, where necessary, federal courts will narrow a federal statute, albeit

(Black, J., dissenting); Winters v. New York, 333 U.S. 507, 515 (1948)); see Kolender 461 U.S. 358 n.8 (requirement for certainty greater where statute imposes criminal penalties).

101. 18 U.S.C. §§ 1963-1964 (1988 & Supp. II 1990). For a discussion of the civil and criminal applications of RICO, see supra notes 5-7 and accompanying text. For civil RICO cases in which the constitutionality of the pattern requirement was challenged, see infra notes 239-79 and accompanying text. For criminal RICO cases in which the constitutionality of the pattern requirement was challenged, see infra notes 151-238 and accompanying text.

102. FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954) (FCC regulation with both civil and criminal penalties must be construed in accord with "well established principle that penal statutes are to be construed strictly"). In his concurring opinion in Northwestern Bell, Justice Scalia relied on American Broadcasting for the proposition that a statute which has both criminal and civil applications "must, even in its civil applications, possess the degree of certainty required for criminal laws." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (citing FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954)).

103. United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (strong presumptive validity attaches to acts of Congress). The Court has "consistently sought an interpretation which supports the constitutionality of legislation." Id.; see also Note, Void For Vagueness, supra note 17, at 510 ("very few federal statutes have been overturned on vagueness grounds").

104. See, e.g., Hamling v. United States, 418 U.S. 87, 116 (1974) (rejecting vagueness challenge to federal statute in light of prior judicial construction of phrase "obscene, lewd, lascivious, indecent, filthy or vile"); Jordan v. DeGeorge, 341 U.S. 223, 232 (1951) (rejecting vagueness challenge to federal statute in light of prior federal and state court interpretations of phrase "crime involving moral turpitude"); cf. Wainwright v. Stone, 414 U.S. 21, 22 (1973) ("For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' " (quoting Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270, 273 (1940))).

105. See, e.g., United States v. Vuitch, 402 U.S. 62, 71, (1971) (relying on dictionary definition of "health" in concluding that abortion law was not unconstitutionally vague); see also Rose v. Locke, 425 U.S. 48, 49 (1975) ("Even trained lawyers may find it necessary to consult legal dictionaries . . . before they may say with any certainty what some statutes may compel or forbid.").

under the guise of interpretation, rather than invalidate it as violative of
the Constitution.107

III. THE VOID-FOR-VAGUENESS DOCTRINE APPLIED

A. Supreme Court Cases

1. Cases Involving the RICO Pattern Requirement

The Supreme Court has not yet explicitly applied the void-for-vagueness doctrine to RICO’s pattern requirement. In fact, the Court has so far declined the opportunity to hear cases in which the void-for-vagueness challenge to the pattern requirement was raised.108 Nevertheless, in the RICO cases that it has heard, the Supreme Court has applied many of the same clarifying techniques that it would apply if confronted with an explicit vagueness challenge. For example, in Northwestern Bell, the Court resorted to legislative history,109 prior judicial construction,110 external standards111 and other statutes112 to interpret RICO’s pattern requirement. The culmination of the Court’s efforts is the continuity plus relationship formula.113

2. Cases Involving Analogous State Statutes

Although the Supreme Court has not yet faced a constitutional challenge to RICO’s pattern requirement, the Court has considered vagueness challenges to state statutes in two somewhat analogous cases.114

As explained in the sections that follow, however, both cases are distinguishable.

vagueness challenge to statute after noting that Court had “found that other statutes using similar language were not vague”).

107. See Screws v. United States, 325 U.S. 91, 98 (1945) (Court prefers narrower interpretation of legislation that favors statute’s constitutionality); Note, supra note 85, at 86 (“Where a contention of vagueness is advanced with regard to federal legislation, of course, the Court may narrowly interpret the act . . . rather than void it, and there has been a significant tendency to adopt this narrowing, rather than annihilating course.” (footnotes omitted)).


110. See id. at 237 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

111. See id. at 238 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)).

112. See id. at 240 (quoting definition of pattern from RICO’s sister statute).

113. For a discussion of the continuity plus relationship formula, see supra notes 65-76 and accompanying text.

a. Lanzetta v. New Jersey

In *Lanzetta v. New Jersey,* a case cited by commentators who contend that RICO's pattern requirement is unconstitutional, the Court held that the term “gang” as used in a New Jersey statute was unconstitutionally vague. A number of similarities exist between the vagueness challenge in *Lanzetta* and a potential constitutional challenge to RICO. As with RICO, a primary purpose of the New Jersey statute was to combat “the pursuit of criminal enterprises.” As with RICO, the New Jersey statute was predicated on the defendant's commission of prior criminal acts. Finally, as with RICO, the challenged provision in the New Jersey statute was not exhaustively defined. Instead, as with RICO, the New Jersey statute contained minimum requirements for meeting the challenged provision. These similarities have prompted some commentators to argue that the Supreme Court ultimately will hold that the term “pattern” in RICO is unconstitutionally vague just as the Court held that the term “gang” in the New Jersey statute was unconstitutionally vague.

Despite these apparent similarities, however, a number of crucial differences exist that preclude reliance on *Lanzetta* as controlling precedent in a constitutional challenge to RICO's pattern requirement. First, unlike the New Jersey statute involved in *Lanzetta,* RICO does not impact


116. *Id.* at 458 (word “gang” is “so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment”). At least one commentator has pointed out the numerous similarities between *Lanzetta* and any potential constitutional challenge to RICO's pattern requirement. See Rakoff, *The Unconstitutionality of RICO,* N.Y.L.J., Jan. 11, 1990, at 3 & nn.13-20, col. 2 (arguing RICO's pattern requirement unconstitutionally vague).

117. See *Lanzetta,* 306 U.S. at 455. Compare *id.* (“The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression.”) *with* 18 U.S.C. § 1962(c) (1988) (“It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.”).

118. See *Lanzetta,* 306 U.S. at 452. Compare *id.* (“Any person . . . who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or another state is declared to be a gangster . . . .”) *with* 18 U.S.C. § 1961(5) (1988) (“Pattern of racketeering activity’ requires at least two acts of racketeering activity . . . .”)

119. See *Lanzetta,* 306 U.S. at 453-55. Compare *id.* at 453 (“The phrase ‘consisting of two or more persons’ is all that purports to define ‘gang.’”) *with* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238 (1989) (“Section 1961(5) concerns only the minimum number of predicates necessary to establish pattern; and it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved.”).

120. See *Lanzetta,* 306 U.S. at 433-35.

necessarily on first amendment rights to freedom of association.\textsuperscript{122} For this reason, the Court may be less likely to find RICO's pattern requirement unconstitutional. Second, unlike the state statute involved in \textit{Lanzetta}, RICO is a federal statute. Accordingly, in recognition of the strong presumption of validity afforded to federal statutes, the federal courts would be more disposed to "narrow" RICO, albeit under the guise of interpretation, than to invalidate it.\textsuperscript{123} Third, unlike the New Jersey statute, RICO is subject to a "check" on prosecutorial discretion in its criminal applications and in any civil applications brought by the government. This check on RICO is provided by the Department of Justice's self-imposed requirement that each proposed civil or criminal RICO prosecution be submitted to the Organized Crime and Racketeering Section for review and approval.\textsuperscript{124} The internal guidelines governing whether a RICO charge will be approved are fairly stringent.\textsuperscript{125}

\textsuperscript{122} The prohibited conduct in \textit{Lanzetta} was membership in a "gang." \textit{Lanzetta}, 306 U.S. at 452. Consequently, the first amendment rights of individuals to associate with each other were necessarily implicated in each and every violation. In contrast, the prohibited conduct in RICO is engaging in a pattern of racketeering activity. 18 U.S.C. § 1962 (1988). Accordingly, violations of RICO may, but do not necessarily, implicate first amendment rights. For examples of cases where RICO violations were alleged to implicate first amendment rights, see \textit{supra} note 97.

\textsuperscript{123} The Supreme Court is reluctant to strike down federal statutes as unconstitutionally vague. This reluctance is evidenced in the strong presumption of validity which it affords to acts of Congress. See United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963) (rejecting vagueness challenge to federal law prohibiting sales "at unreasonably low prices for the purpose of destroying competition" as applied to sales made below cost, without legitimate objective and with intent to destroy competition). For a discussion of the Supreme Court's preference for narrowing federal statutes rather than finding them invalid, see \textit{supra} notes 104-07 and accompanying text.

\textsuperscript{124} \textit{Criminal Div., U.S. Dep't of Justice, United States Attorney's Manual} § 9-110.320 (1989) [hereinafter \textit{U.S. Attorney's Manual}] ("No criminal or civil prosecution ... shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division."). reprinted in \textit{The Department of Justice Manual} 9-2134 to 35 (P-H 1991); \textit{see also id.} § 9-110.101 ("No RICO criminal indictment or civil complaint shall be filed ... without the prior approval of the Criminal Division."). reprinted in \textit{The Department of Justice Manual} 9-2131 (P-H 1991).

\textsuperscript{125} \textit{See RICO Manual, supra} note 15, at 53-69, \textit{reprinted in The Department of Justice Manual} 9-2176.85 to .101 (P-H 1991). For example, the Department of Justice professes to "take[] a strict[er] approach to the single-episode rule ... than the requirements set forth in [Northwestern Bell]." \textit{Id.} at 61. Thus, "a proposed RICO count will not be approved that contains more than one predicate act arising from a single criminal episode." \textit{Id.} at 63. Additionally, "[i]n a mail fraud case, the pattern generally will not be approved if multiple mailings in furtherance of a single scheme to defraud are charged as separate racketeering acts, unless the scheme resulted in multiple harms." \textit{Id.}

Similarly, the preface to the \textit{United States Attorney's Manual} section setting forth the review procedure explains that not every case in which technically the elements of a RICO violation exist, will result in the approval of a charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under
The existence and rigorous application of the review procedure lessen the possibility that federal prosecutors will pursue "frivolous" RICO actions. At the same time, the lesser chance of an abuse of discretion increases the likelihood that the courts will find RICO constitutional. Fourth, unlike the term "gang" that was challenged in Lanzetta, for which there was no statutory definition, the term "pattern" is used and defined in one of RICO's sister statutes. Finally, unlike the term "gang" in the New Jersey statute, the Supreme Court has already provided guidance as to the proper interpretation of the term "pattern" in RICO. Consequently, although the facts in Lanzetta may, at first blush, appear remarkably similar to a constitutional challenge to RICO's pattern requirement, a closer examination reveals that Lanzetta is easily distinguishable and, therefore, of little or no precedential value in predicting the Court's ultimate decision.

b. Fort Wayne Books, Inc. v. Indiana

In Fort Wayne Books, Inc. v. Indiana, the Supreme Court rejected a vagueness challenge to the pattern requirement in Indiana's state antiracketeering law. The state law at issue in Fort Wayne, however, contained a different, and arguably more precise, definition of "pattern"

RICO which are far afield from the congressional purpose of the RICO statute. . . .

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is [not sought] . . . to attack the activity which Congress most directly addressed—the infiltration of organized crime into the nation's economy.


126. The success of the review procedure is also evidenced by the fact that less than two percent of the first 800 cases approved by the Department of Justice purportedly contained legal defects. Dennis, supra note 31, 654 & n.29. The statute in Lanzetta apparently contained no such check on prosecutorial discretion. See Lanzetta, 306 U.S. at 451.

127. Lanzetta, 306 U.S. at 455 (term "gang" not defined in statute in question, nor is there "any other statute attempting to make it criminal to be a member of a 'gang' ").


131. Id. at 58.
than does RICO. For that reason, it does not necessarily follow that the Justices who rejected the vagueness challenge to the state statute in *Fort Wayne* would also reject a vagueness challenge to the federal RICO statute.

Conversely, for several reasons, it does not necessarily follow that the dissenting Justices in *Fort Wayne* ultimately will vote to find RICO's pattern requirement unconstitutionally vague. First, Justice Brennan, one of the dissenters in *Fort Wayne*, later authored the majority opinion in *Northwestern Bell*, in which the Court professed to establish a "meaningful concept of pattern." Although Justice Brennan has since retired, the very fact that he authored the majority opinion in *Northwestern Bell* after dissenting in *Fort Wayne* discredits any argument that those Justices who dissented in *Fort Wayne* will ultimately vote that RICO's pattern requirement is unconstitutionally vague. Second, Justice Stevens, who authored the *Fort Wayne* dissenting opinion, has a well-known history of dissenting in virtually all cases, such as *Fort Wayne*, where the majority upholds a statute regulating "obscenity." Consequently, it is likely that Justice Stevens would have dissented in *Fort

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132. See IND. CODE ANN. § 35-45-6-1 (West 1986). The Indiana statute provides:

'Pattern of racketeering activity' means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or are otherwise interrelated by distinguishing characteristics [sic] that are not isolated incidents. However, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last incident occurred within five (5) years after a prior incident of racketeering activity.

Id. (emphasis added).

In contrast, the federal RICO statute does not expressly define what its pattern requirement "means." Instead, the statute provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1988) (emphasis added). As interpreted by the Court, federal RICO's pattern requirement "means" at least two acts of racketeering activity which are both related (by having the same or similar purposes, results, participants, victims, or methods of commission, or by otherwise being interrelated by distinguishing characteristics and by not being isolated events) and continuous (by being repeated within a closed period or by being conduct that by its nature projects into the future with the threat of repetition).

For a discussion of the method used by many states to simplify the interpretation of the pattern requirements in their state anti-racketeering statutes, see supra notes 291-305 and accompanying text.

133. *Fort Wayne*, 489 U.S. at 70 (Stevens, J. dissenting, joined by Justice Brennan).

134. See *Northwestern Bell*, 492 U.S. at 232.

135. See *Fort Wayne*, 489 U.S. at 76 n.15 (Stevens, J., dissenting) ("'It long has been my conviction that government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults.' ").
Wayne regardless of any vagueness challenge. Third, a careful reading of the dissenting opinion in Fort Wayne reveals that it was not premised on any "vagueness" in the definition of pattern. On the contrary, the dissenters implicitly recognized that the pattern requirement was clearly defined, but appeared to object to the breadth of the statute. Therefore, Fort Wayne, like Lanzetta, is of little value in predicting how the Court will ultimately decide a constitutional challenge to RICO's pattern requirement.

B. Lower Federal Court Cases

In the two and one-half years since the Supreme Court's decision in Northwestern Bell, defendants in newly filed and pending RICO cases have eagerly accepted Justice Scalia's invitation to challenge the constitutionality of RICO's pattern requirement. Lower federal courts have addressed the challenge in a variety of criminal and civil cases. In all but one of those cases, the courts have rejected the vagueness challenge. In reaching this common result, however, some courts have explained their analyses in greater detail than other courts.

1. Approaches Taken by Post-Northwestern Bell Courts

Most courts that have considered the constitutional challenge to RICO's pattern requirement after Northwestern Bell have followed one of three basic approaches. The major difference among these approaches is the extent of analysis that appears in the court's opinion. Courts following the first approach have, with little or no discussion, simply rejected the argument that RICO's pattern requirement is unconstitutionally vague. These courts generally take the position

136. Id. at 73 (Stevens, J. dissenting) ("A person who commits two [sales of obscene magazines] . . . engages in a 'pattern of racketeering activity' as defined in the State's RICO statute.").

137. Id. at 83-84 (Stevens, J., dissenting) ("[T]he Indiana Legislature's intent in making obscenity a RICO predicate offense is to expand beyond traditional prosecution of legally obscene materials into restriction of materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene. Fulfillment of that intent surely would overflow the boundaries imposed by the Constitution." (footnote omitted)). Overbreadth, a separate constitutional infirmity, is distinguished from vagueness in that it invalidates laws that regulate behavior that is constitutionally protected. Vagueness, on the other hand, invalidates statutes that lack the requisite clarity to provide guidance. Consequently, a law may be overbroad without failing to provide guidance, and a law may be vague without impacting on constitutionally protected conduct. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). For a discussion of the differences between the void-for-vagueness and overbreadth doctrines, see supra note 85.


139. See, e.g., Norstar Bank v. Pepitone, 742 F. Supp. 1209, 1213 (E.D.N.Y. 1990) (court would be presumptuous to hold RICO statute unconstitutional in
that the constitutionality of the pattern requirement was definitively settled when early constitutional challenges to the pattern requirement were rejected in cases decided prior to *Northwestern Bell*.140 A number of these courts also note that the Supreme Court’s decisions in *Sedima* and *Northwestern Bell* have made RICO’s pattern requirement clearer than when the earlier vagueness challenges were rejected.141

Courts following the second approach begin their analyses by considering whether any first amendment rights are involved in the case.142 Invariably, no first amendment rights are involved and, therefore, the defendant cannot challenge the facial validity of the pattern requirement.143 These courts then note that the question to be answered is: “Would a person of ordinary intelligence in the defendant’s position have notice that the acts charged would constitute a pattern of racketeering activity?” light of available legislative history, regardless of Justice Scalia’s concurrence); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 741 F. Supp. 906, 910 n.5 (S.D. Ga. 1990) (summarily concluding in footnote that RICO’s pattern requirement is not unconstitutional), aff’d *in part and rev’d in part*, 953 F.2d 587 (11th Cir. 1992); *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 342 (D. Conn. 1990) (declining to hold RICO’s pattern requirement unconstitutional after review of other court decisions upholding statute as constitutional); *In re Par Pharmaceutical, Inc.*, Sec. Litig., 733 F. Supp. 668, 682 n.15 (S.D.N.Y. 1990) (declining to hold RICO’s pattern requirement unconstitutional in light of numerous decisions by other courts upholding statute as constitutional); *United States v. Keller*, 730 F. Supp. 151, 156 (N.D. Ill. 1990) (without discussion, decling to hold RICO’s pattern requirement unconstitutionally vague); *Wellington Int’l Commerce Corp. v. Retelny*, 727 F. Supp. 843, 846 (S.D.N.Y. 1989) (same); *United States v. Regan*, 726 F. Supp. 447, 452 (S.D.N.Y. 1989) (court need not “linger” on claim that RICO’s pattern requirement unconstitutionally vague); *United States v. Butler*, 704 F. Supp. 1338, 1345 (E.D. Va. 1989) (rejecting argument that RICO unconstitutionally vague after noting that RICO has withstood numerous constitutional challenges), aff’d, 905 F.2d 1532 (4th Cir.) (table), cert. denied, 111 S. Ct. 257 (1990).


143. Defendants often argue that first amendment rights are implicated so that they can challenge the facial validity of the statute, rather than simply its application to the facts of their case. *See, e.g.*, *United States v. Busacca*, 739 F. Supp. 370, 378 (N.D. Ohio 1990) (rejecting defendant’s argument that first amendment rights were implicated in case and then rejecting constitutional challenge after concluding that defendant failed to establish that RICO was unconstitutional as applied to him), aff’d, 936 F.2d 232 (6th Cir.), cert. denied, 112 S. Ct. 595 (1991). For a discussion of how first amendment concerns permit a defendant to challenge the facial validity of a statute, see *supra* notes 96-97 and accompanying text.
Courts following the second approach then conclude, with little or no express consideration of relationship or continuity, that a person of ordinary intelligence in the defendant's position would have known that his acts constituted a pattern and were, therefore, proscribed by RICO. Many of the cases in which courts follow this second approach involve "traditional" organized criminal activity.

Courts following the third approach begin their analyses in the same manner as courts following the second approach. After posing the question of whether a person in the defendant's position would know that his acts constitute a pattern, however, courts following the third approach expressly apply the continuity plus relationship test espoused by the Supreme Court in *Northwestern Bell*. If the court finds that the defendant engaged in predicate acts which were both continuous and related, the court then concludes that the defendant had ample notice that his conduct constituted a pattern and was proscribed by RICO. This third approach displays the most extensive analysis and is the approach most overtly consistent with the Supreme Court's discussion of pattern in *Northwestern Bell*.

2. Decisions Rendered by Post-Northwestern Bell Courts

Although post-*Northwestern Bell* courts appear to have employed different approaches in their analyses, they have been virtually uniform in rejecting constitutional challenges to RICO's pattern requirement in a wide variety of cases. The decisions of these courts can be segregated into three categories based on the nature of the case: (1) criminal prosecutions involving traditional organized crime; (2) all other criminal prosecutions; and (3) civil actions. The following sections briefly review

144. See, e.g., *Pungitore*, 910 F.2d at 1104 ("inquiry must focus on whether persons of ordinary intelligence would know that the repeated commission of murder, extortion, illegal gambling, and usury offenses in furtherance of an organized crime enterprise constitute a pattern of racketeering under RICO"); *Quintanilla*, 760 F. Supp. at 693 (rejecting vagueness challenge because defendant failed to establish that "an ordinary person in [defendant's] position" would not "know that continuous and related acts of mail fraud, wire fraud and embezzlement amount to a 'pattern of racketeering activity'").


146. See, e.g., Masters, 924 F.2d 1362; Angiulo, 897 F.2d 1169. But see *Pungitore*, 910 F.2d at 1104 (applying relationship and continuity factors in case involving traditional organized crime).


148. It may be argued that courts following the second approach also apply the continuity plus relationship test, but do so "silently." Thus, the third approach may be implicit in the second approach, at least in the decisions of some courts.

149. This Comment confines its analysis primarily to post-*Northwestern Bell*
the cases in which federal courts have addressed the constitutional challenge to RICO's pattern requirement. While no strong correlation appears between the approach employed by the court and the nature of the case involved, one pattern has clearly emerged—courts consistently reject the vagueness challenge.\textsuperscript{150}

a. Criminal Cases Involving Traditional Organized Crime

In the criminal context, a number of United States Courts of Appeals have considered and rejected constitutional challenges to RICO's pattern requirement in cases in which the defendant raising the challenge was charged with multiple predicate acts on behalf of traditional organized crime. These courts have evidenced little difficulty in reasoning that the defendants had fair notice that their conduct constituted a pattern of racketeering activity and was prohibited by RICO.\textsuperscript{151}

\textit{United States v. Angiulo}\textsuperscript{152} was the first post-\textit{Northwestern Bell} case in which a federal court of appeals addressed a constitutional challenge to RICO's pattern requirement. In \textit{Angiulo}, the defendants were members of an organized crime family operating in Massachusetts.\textsuperscript{153} The predicate acts underlying the RICO charges included illegal gambling, extortionate credit transactions and murder conspiracies.\textsuperscript{154} The \textit{Angiulo} defendants argued that Justice Scalia's concurring opinion in \textit{Northwestern Bell} required a finding that RICO's pattern requirement was void for vagueness.\textsuperscript{155}

The United States Court of Appeals for the First Circuit began by noting that no first amendment considerations were involved in the cases in which federal courts have addressed constitutional challenges to the pattern requirement. Other commentators have analyzed this same topic by reviewing the approaches followed by each of the circuit courts of appeals in applying the pattern requirement. See Kelley, supra note 65, at 349-70 (discussing inconsistent interpretations of pattern by the courts of appeals); Note, \textit{Has the Constituency of Continuity Plus Relationship Put an End to RICO'S Pattern of Confusion?}, 18 AM. J. CRIM. L. 201, 213-40 (1991) (reviewing interpretations of pattern by the courts of appeals).

\textsuperscript{150} But see Firestone v. Galbreath, 747 F. Supp. 1556 (S.D. Ohio 1990) (finding RICO unconstitutionally vague as applied and on its face).

\textsuperscript{151} In some of these cases, the court simply summarily rejected the argument that the pattern requirement was unconstitutional. See, e.g., United States v. Van Dorn, 925 F.2d 131, 134 n.2 (11th Cir. 1991) (summarily rejecting argument that RICO's pattern requirement was unconstitutionally vague in prosecution where defendants charged with crimes on behalf of organized crime family).

\textsuperscript{152} 897 F.2d 1169, 1180 (1st Cir.) (holding RICO constitutional in traditional organized crime setting because person of ordinary intelligence would know organized crime activity fell within pattern requirement), cert. denied, 111 S. Ct. 130 (1990).

\textsuperscript{153} Id. at 1176.
\textsuperscript{154} Id. at 1176-77.
\textsuperscript{155} Id. at 1179.
The court then unequivocally rejected the defendants' vagueness challenge, stating that "if anything is clear about RICO, it is that 'a pattern of racketeering activity' is intended to encompass the activities of organized crime families." The court acknowledged, however, "that potential uncertainty exists regarding the precise reach of RICO's 'pattern of racketeering' element." Consequently, the court noted that it was not expressing any opinion as to whether RICO's pattern requirement might be unconstitutionally vague in a non-organized crime context.

In United States v. Coiro, the United States Court of Appeals for the Second Circuit considered and rejected a constitutional challenge to RICO's pattern requirement that was raised by an attorney charged with bribery and money laundering on behalf of members of an organized crime family. The Second Circuit found that, notwithstanding Justice Scalia's concurring opinion in Northwestern Bell, "RICO was plainly intended to encompass the illegal activities of organized crime." The court was "confident that the statute provided [the defendant] with fair notice that his contemplated conduct . . . fell within RICO's strictures, and thus the statute [was] not unconstitutionally vague as applied to him." Because Coiro did not involve any first amendment considerations, the Second Circuit confined its constitutional inquiry to the facts in the case before it and did not resolve whether RICO would be unconstitutional as applied in other circumstances.

Similarly, in United States v. Pungitore, the United States Court of Appeals for the Third Circuit rejected the void-for-vagueness challenge raised by "Mafia" defendants in a criminal RICO prosecution. The pattern in Pungitore consisted of criminal acts including murder, extortion, gambling and loansharking. The court noted that, because the challenge was not based on first amendment issues, the defendants were required to establish that the statute was unconstitutionally vague as applied to their particular factual circumstances. Thus, the court next considered whether persons of ordinary intelligence would know that the crimes committed by the defendants constituted a pattern of racke-

156. Id.
157. Id.
158. Id.
159. Id. at 1180.
161. Id. at 1010.
162. Id. at 1017.
163. Id.
164. Id.
166. Id. at 1103.
167. Id. at 1104.
168. Id. For a discussion of the void-for-vagueness doctrine in the first amendment context, see supra notes 96-97 and accompanying text.
To determine whether a pattern of racketeering existed, the Third Circuit applied the continuity plus relationship test set forth by the Supreme Court in Sedima and elaborated upon in Northwestern Bell. The court held that the requirement of continuity was satisfied because the "criminal conduct . . . was not isolated but extended over a substantial time." The court next found that the requirement of relationship was also met because the criminal acts were "committed pursuant to the orders of key members of the enterprise" and were carried out "in furtherance of [the enterprise's] affairs." The court concluded that the "appellants' argument that they lacked notice that their conduct constituted a 'pattern' under RICO [was] utterly devoid of merit, as they had engaged in a classic pattern of racketeering under RICO."

In rejecting the defendants' reliance on Justice Scalia's concurrence in Northwestern Bell, the Third Circuit held that the potential vagueness problems envisioned by Justice Scalia simply did not exist in Pungitore. Instead, the court likened Pungitore to Angiulo, where the First Circuit had rejected a similar constitutional challenge. The Third Circuit stressed that neither Pungitore nor Angiulo involved corruption in "legitimate businesses." Instead, in both cases, RICO was applied to a pattern comporting with the traditional conception of organized crime. The court found that, "however vague the statute..."
may be as applied to legitimate businesses, its application to the criminal activities of organized crime families is so clear as to be beyond peradventure.178 Finally, although the Third Circuit "doubt[ed] that a successful vagueness challenge to RICO ever could be raised by defendants in an organized crime case,"179 the court declined to rule out the possibility that a constitutional challenge to RICO in a civil case (or possibly a criminal case not involving organized crime) might be successful.180

United States v. Andrews181 involved a different level of organized crime than did Angiulo, Coiro or Pungitore. In Andrews, a federal district court rejected a constitutional challenge to RICO's pattern requirement that was advanced by six members of a street gang involved in narcotics distribution.182 In support of their drug dealing activities, members of the street gang committed twenty murders and were involved in twelve attempted murders.183 The district court summarily rejected the defendants' challenge to the facial validity of the RICO pattern requirement because no first amendment considerations were involved.184 The court then considered whether the statute was unconstitutionally vague as applied to the defendants' particular circumstances.185 The court found that persons of ordinary intelligence would know that the requirement of relationship was satisfied because the predicate acts were "heavily intertwined" with the affairs of a gang that was "a wholly criminal organization."186 The court found that persons of ordinary intelligence would know that the continuity requirement was satisfied because the defendants had each been associated for a number of years with a street gang that had been in existence for over twenty years.187 Therefore, the Andrews court rejected the defendants' constitutional challenge.188

United States v. Masters189 involved neither a traditional organized

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178. Pungitore, 910 F.2d at 1104.
179. Id. at 1105.
180. Id. In fact, the Pungitore court cited with apparent approval an article that suggested the "vagueness problem" referenced by Justice Scalia may be more pronounced in civil RICO cases. Id. (citing Freeman & McSlarrow, supra note 88, at 1009 (arguing that RICO's pattern requirement is unconstitutionally vague)).
182. Id. at 1520, 1524.
183. Id. at 1521.
184. Id. at 1522-23.
185. Id. at 1523-24.
186. Id. at 1524.
187. Id.
188. Id. The same district court that decided Andrews later reached the same result in a very similar case involving another street gang. See United States v. Infelise, No. 90 CR 87, 1991 WL 159126 at *1 (N.D. Ill. July 25, 1991) (rejecting vagueness challenge to RICO's pattern requirement in light of the decisions of various courts of appeal rejecting vagueness challenge in cases involving traditional organized crime families).
crime context nor a street gang, but the case did involve a wholly illegal
criminal enterprise.\textsuperscript{190} The members of the enterprise in \textit{Masters} were
an attorney and two police officers.\textsuperscript{191} Over several years, the police
officers referred criminals to the attorney in return for bribes.\textsuperscript{192} The
attorney also acted as a conduit to funnel money from illegal bookmakers
to the two police officers.\textsuperscript{193} The alleged predicate acts included
bribery, criminal solicitation and, ultimately, the murder of the attorney's estranged wife.\textsuperscript{194} The Seventh Circuit gave alternative bases for
rejecting the defendants' argument that RICO's pattern of racketeering
requirement was unconstitutionally vague.\textsuperscript{195} First, the court relied on
the Supreme Court's decision in \textit{Fort Wayne} in holding that the pattern
of racketeering requirement would never be unconstitutionally vague
unless the statutes that criminalized the underlying predicate acts were
vague.\textsuperscript{196} Alternatively, the court found that the pattern of racketeering
requirement would not be unconstitutionally vague when applied to enter-
prises engaged in wholly illegal conduct.\textsuperscript{197} The \textit{Master's} court did not expressly apply the continuity plus relationship test.

As the aforementioned cases illustrate, courts have had little diffi-
culty rejecting constitutional challenges to RICO's pattern requirement
in cases involving a traditional organized crime context or a wholly ille-
gal enterprise. The \textit{Coiro}, \textit{Angiulo} and \textit{Masters} courts reached this result
without expressly applying the continuity plus relationship test set forth
by the Supreme Court in \textit{Northwestern Bell}.\textsuperscript{198} The First, Second and
Seventh Circuits simply found it inconceivable that a defendant in an
organized crime context would not have fair notice that his conduct was
proscribed by RICO. The Third Circuit, in \textit{Pungitore}, also found it highly
unlikely that RICO's pattern requirement would ever be found vague in
a traditional organized crime context, but the court did so after finding
that the defendants' acts were both continuous and related.\textsuperscript{199} The
district court in \textit{Andrews} also applied the continuity plus relationship

\begin{footnotesize}
\begin{enumerate}
\item The \textit{Masters} court referred to the enterprise involved in the case as a
"miniature suburban mafia." \textit{Id.} at 1367.
\item \textit{Id.} at 1365.
\item \textit{Id.}
\item \textit{Id.} at 1365-66.
\item \textit{Id.} at 1367.
\item \textit{Id.} (citing \textit{Fort Wayne Books, Inc. v. Indiana}, 489 U.S. 46 (1989)). As
discussed earlier in this Comment, reliance on the Supreme Courts' \textit{Fort Wayne}
decision in addressing a challenge to RICO's pattern requirement is misplaced.

\textit{See supra} notes 130-37 and accompanying text.
\item \textit{Masters}, 924 F.2d at 1367.
\item \textit{See United States v. Coiro}, 922 F.2d 1008, 1016-17 (2d Cir.), cert. de-
\textit{nied}, 111 S. Ct. 2826 (1991); \textit{United States v. Angiulo}, 897 F.2d 1169, 1180 (1st
\item \textit{See United States v. Pungitore}, 910 F.2d 1084, 1104 (3rd Cir. 1990),
\end{enumerate}
\end{footnotesize}
Although the courts' analyses differed somewhat, there are similarities among the five cases. In each case, the defendant tried to challenge the facial validity of the statute. Each court responded by finding the case involved no first amendment considerations and, therefore, the court only permitted the defendant to challenge the statute's constitutionality as applied to the defendant's particular factual circumstances. Then, after rejecting the defendant's constitutional challenge, each court expressly noted that it was not ruling out the possibility that RICO's pattern requirement might be unconstitutionally vague in certain applications.

b. Criminal Cases Not Involving Traditional Organized Crime

The preceding section illustrated that courts have unanimously rejected the constitutional challenge to RICO's pattern requirement in cases involving traditional organized crime and wholly illegal enterprises. As this section reveals, no federal court to date has found RICO's pattern requirement unconstitutionally vague in any other criminal case, even where the case involved legitimate businesses engaged in criminal conduct.

i. Political Corruption

In United States v. Woods, the Third Circuit faced a constitutional challenge to RICO's pattern requirement in a political corruption case. One defendant in Woods was a politician. The other two defendants, a corporation and the president of the corporation, bribed the politician to receive contracts from the City of Pittsburgh. The court found that the acts of bribery over four years were related, "given the... methods, goals, results and identity of the parties." The court then found that the acts were continuous "given the substantial period

200. Andrews, 749 F. Sup. at 1522 ("'continuity plus relationship'... establishes 'pattern'"). The Andrews court is within the United States Court of Appeals for the Seventh Circuit. In a subsequent decision, however, the United States Court of Appeals for the Seventh Circuit rejected a vagueness challenge to RICO's pattern requirement without focusing on either relationship or continuity. See United States v. Masters, 924 F.2d 1362 (7th Cir.), cert. denied, 111 S. Ct. 2019 (1991). In Masters, the Seventh Circuit took an approach similar to the First and Second Circuits. Namely, the court found that RICO was simply not vague when applied to enterprises engaged in wholly illegal activities. Id. at 1367. For a discussion of Masters, see supra notes 189-97 and accompanying text.

202. Id. at 854.
203. Id. at 856.
204. Id. at 856-61.
205. Id. at 863-64.
of time over which the acts were committed." The Third Circuit concluded: "The application of RICO to the activities of these defendants should not come as a surprise to them. Whatever might be true in other cases, [RICO] is not unconstitutional when applied in this ongoing, hardcore political corruption case."

In another political corruption case, United States v. Lobue, two politicians were charged with bribery and extortion in connection with the awarding of municipal contracts for garbage disposal and the operation of a city landfill. The district court easily rejected the defendants' vagueness challenge after applying the continuity plus relationship test articulated in Northwestern Bell. The court found that the acts of bribery and extortion were related because they were part of the defendants' scheme to profit from their positions as public officials. The court found that the acts were continuous because they spanned six years. The court then concluded that the acts constituted "the classic pattern of racketeering activity" and that the statute was not unconstitutionally vague as applied to the defendants.

ii. Judicial Bribery

In United States v. Glacier, a judicial bribery case, the United States Court of Appeals for the Seventh Circuit, in a footnote, summarily rejected the contention that RICO's pattern requirement was unconstitutionally vague. The court did not premise its rejection of the vagueness challenge on the facts of the case before it or on the requirements of relationship and continuity. Instead, the court rejected the defendant's constitutional challenge after noting that pre-Northwestern Bell decisions by various courts of appeals upholding the constitutionality of the pattern requirement had "settled that issue to [the court's] satisfaction."

iii. Securities Fraud

In United States v. Dempsey, the district court considered the vagueness challenge to RICO's pattern requirement in a suit against five commodities traders who were charged with defrauding customers and

206. Id. at 864.
207. Id.
209. Id. at 750-51.
210. Id. at 754.
211. Id.
212. Id.
213. Id.
215. Id. at 497 n.1.
216. Id.
illegally avoiding liability for trading errors.\textsuperscript{218} The court found that the predicate acts were related because they had the same purpose, victims, results and methods of commission.\textsuperscript{219} The court found that the acts were continuous because they extended for over two and one-half years.\textsuperscript{220} The court concluded that "[a] person of ordinary intelligence would be on notice that more than 200 related predicate acts committed over a two-and-one-half-year period fall into a 'pattern.'"\textsuperscript{221}

In \textit{United States v. Eisenberg},\textsuperscript{222} the district court confronted the vagueness challenge in a prosecution against three defendants for securities fraud.\textsuperscript{223} The district court had "no doubt" that the sixty acts of wire and mail fraud committed by the defendants over a period of six years "amounted to a continuous stream of acts of racketeering."\textsuperscript{224} Thus, the court held that the pattern requirement was not vague as applied to the defendants.\textsuperscript{225}

iv. Insurance Fraud

In \textit{United States v. Eisen},\textsuperscript{226} the defendants were charged with bribing a public servant regarding twenty-three personal injury lawsuits.\textsuperscript{227} The defendants were employed by a particular law firm.\textsuperscript{228} The \textit{Eisen} court agreed with Justice Scalia's concurrence in \textit{Northwestern Bell} that "the outer reaches of [RICO's pattern requirement] could do with further clarification."\textsuperscript{229} The court found, however, that the case before it dealt with the "core" meaning of the statute.\textsuperscript{230} For that reason, and "given the defendants' occupations," the court rejected the vagueness challenge.\textsuperscript{231}

v. Embezzlement

In \textit{United States v. Quintanilla},\textsuperscript{232} the defendant challenging the constitutionality of the pattern requirement was charged with conspiring with two other persons to defraud a corporation of over $700,000.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 1260.
\item \textsuperscript{219} \textit{Id.} at 1262-63.
\item \textsuperscript{220} \textit{Id.} at 1263.
\item \textsuperscript{221} \textit{Id.}
\item \textsuperscript{222} 773 F. Supp. 662 (D.N.J. 1991).
\item \textsuperscript{223} \textit{Id.} at 731.
\item \textsuperscript{224} \textit{Id.}
\item \textsuperscript{225} \textit{Id.}
\item \textsuperscript{227} \textit{Id.} at *1.
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{Id.} at *19.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.}
\item \textsuperscript{232} 760 F. Supp. 687 (N.D. Ill. 1991).
\item \textsuperscript{233} \textit{Id.} at 689-90.
\end{itemize}
The defendant was the executive director of a nonprofit organization that requested and received funds from the corporation to support community activities. Rather than using the monies for community activities, however, the defendant kept a portion of the money and gave the rest to his co-conspirators. Because no first amendment issue was involved, the court considered only whether the statute was vague as applied to the defendant. The court held that the relationship requirement was satisfied because the embezzlement was carried out through acts of mail fraud and wire fraud that had similar participants, victims, methods of commission and results. The court found that the continuity requirement was satisfied because the acts "occurred over a substantial period of time." Therefore, the court rejected the defendant's challenge.

The preceding sections demonstrate the willingness of federal courts uniformly to reject the vagueness challenge to RICO's pattern requirement in criminal prosecutions. In a number of these cases, however, the courts expressly declined to hold that the pattern requirement would be constitutional as applied in a civil action. The section that follows reveals that, with one anomalous exception, federal courts have also uniformly rejected the vagueness challenge in civil cases.

c. Civil Cases

i. Civil Cases Rejecting the Vagueness Challenge

Thus far, only one federal appellate court has expressly considered the constitutionality of RICO's pattern requirement in a civil case. In *Abell v. Potomac Insurance Co.*, the United States Court of Appeals for the Fifth Circuit considered the vagueness challenge in a case in which the defendant was charged with repeatedly using the mails to defraud over 500 investors of over twelve million dollars. The case was on remand from the Supreme Court for consideration in light of the Court's decision in *Northwestern Bell*. The *Abell* court dismissed the defendant's constitutional challenge as "superficial" after noting that he had engaged in "[a] myriad of fraudulent acts spanning more than six years and involving more than five

234. *Id.* at 690.
235. *Id.*
236. *Id.* at 693.
237. *Id.*
238. *Id.*
240. 946 F.2d 1160 (5th Cir. 1991).
241. *Id.* at 1163, 1168.
242. *Id.* at 1164.
hundred victims." The court found that the defendant utterly failed to meet the burden of proving that a person of ordinary intelligence in the defendant's position would not have known that his acts constituted a pattern.

In Kauffmann v. Yoskowitz, the defendant was alleged to have repeatedly sold securities to the plaintiff over a three-year period in violation of federal securities laws. The district court acknowledged that RICO was "one of the most troublesome federal laws" and that its application was "difficult and sometimes confusing." Nevertheless, the court felt "bound by the implicit, as well as the explicit, conclusions reached by the majority in [Northwestern Bell] to the effect that, while flawed, RICO is a valid and utilitarian part of our civil law." Thus, the court rejected the constitutional challenge.

In another case involving allegations of securities fraud, Beck v. Jones, an investor brought suit against a stock brokerage firm and an individual broker for RICO violations involving the sale of securities. The alleged pattern consisted of only three sales of the securities in question. The first sale was made to the plaintiff by the defendant broker. The second and third sales were made to two other customers of the brokerage firm over one year later, after the defendant broker was no longer associated with the firm. The defendants argued that they could not have known that three sales by two different brokers over a year apart would constitute a pattern under RICO.

The Beck court first addressed the issue of whether RICO was unconstitutionally vague on its face. The court stated:

243. Id. at 1167.
244. Id. The court's next step was somewhat illogical. After having concluded that the defendant should have known that his acts would constitute a pattern, the court next considered whether the defendant's acts constituted a pattern. Id. Logically, it would seem that this second question was subsumed in the first.
248. Id. at *2. In an earlier decision, the same court found that the allegations in the plaintiff's complaint were sufficient to meet the requirements for a RICO pattern. Id.; Kauffmann v. Yoskowitz, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,532, at 93,404-05 (S.D.N.Y. July 13, 1989).
251. Id. at 907.
252. Id.
253. Id.
254. Id.
255. Id. It appears that the Beck court erred in considering the facial validity of the pattern requirement because no first amendment issues appear to have been involved in the case. Id. The Supreme Court has noted that a defendant does not have standing to challenge a statute as unconstitutionally vague on its
The mere fact that an issue has been frequently litigated does not prove its unconstitutional vagueness, nor does disagreement among the various circuits. Even further, the fact that RICO gives rise to legal and factual complications cannot make the statute unconstitutional unless the Court is willing to declare that the antitrust laws, the conspiracy laws, and other laws which give rise to similar complications are unconstitutional.256

After reviewing a number of pre-Northwestern Bell decisions in which challenges to RICO on vagueness grounds had been rejected, the court then rejected the argument that RICO was vague on its face.257 Next, the Beck court rejected the defendants' argument that they could not have been expected to know that their activities would constitute a pattern.258 Accordingly, the court held that RICO was not vague as applied in this case.259

In Uniroyal Goodrich Tire Co. v. Munnis,260 the plaintiff tire manufacturer brought a civil RICO action against "three of its affiliated dealers, a number of the dealers' individual employees, and two of its own employees [for] submitting thousands of false warranty claims to [the plaintiff] over a period of twelve to fifteen years."261 The defendants argued that RICO's pattern requirement was unconstitutionally vague.262 In ruling on defendants' motions to dismiss, the court noted that no first amendment considerations were involved and, therefore, the court limited its inquiry to whether the pattern requirement was vague as applied to the defendants in the particular case.263 The court then pointed out that the plaintiff had alleged "thousands of illegal acts, continuing over many years" and concluded that the plaintiff had met its burden of pleading "whatever degree of 'continuity' or 'relationship'" was required.264

ii. Firestone v. Galbreath

Firestone v. Galbreath265 has the distinction of being the only case in which a federal court has held RICO's pattern requirement unconstitu-

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257. Id.
258. Id. at 906-07.
259. Id. at 907.
261. Id. at *1.
262. Id. at *7.
263. Id.
264. Id. at *8.
tionally vague. The *Firestone* plaintiffs were beneficiaries of a trust that was a residuary beneficiary of their grandmother's estate. The plaintiffs "[sought] to recover assets from the defendants which [the plaintiffs] claim[ed] should have been included in the estate." The defendants challenged RICO's constitutionality in their motions to dismiss.

In *Firestone*, Judge Graham began his analysis of the constitutionality of RICO's pattern requirement by noting that "a dispute between family members concerning whether certain property should have remained in a relative's estate" was "in all likelihood far removed from the typical situations which Congress envisioned as being within RICO's scope of coverage." Judge Graham then commented that, if RICO's pattern requirement were narrowly interpreted, the allegations in the complaint might be insufficient to establish a pattern. Next, Judge Graham characterized the defendants' acts as "isolated and sporadic." Having found that the defendants' acts were isolated and sporadic, Judge Graham did not need to address the constitutional issue in order to decide the case. The Supreme Court expressly provided in both *Sedima* and *Northwestern Bell* that isolated and sporadic activity would never form a pattern. Nevertheless, Judge Graham proceeded to opine that "persons of ordinary intelligence in defendant's [sic] situation would not have had adequate notice that [their activities] constituted a 'pattern of racketeering activity' under RICO." Then, rather than avoiding the constitutional issue, Judge Graham held that RICO was unconstitutionally vague as applied to the defendants. Furthermore, instead of ceasing his analysis at that point, Judge Graham inexplicably proceeded to state: "This court is also persuaded to agree with Justice Scalia's suggestion that the 'pattern' requirement is unconstitu-

266. *Id.* at 1581.
267. *Id.* at 1561-62.
268. *Id.* at 1563.
269. *Id.* at 1562.
270. *Id.* at 1581.
271. *Id.*
272. *Id.*


275. *Id.*
tionally vague as written.”

Well-established Supreme Court jurisprudence dictates that courts should never decide a constitutional issue unless its resolution is necessary to decide the case. Similarly, it is also well established that, unless first amendment considerations are involved, a defendant may only challenge the constitutionality of a statute “as applied” to his particular circumstances. Judge Graham disregarded both of these principles. Judge Graham unnecessarily considered the constitutionality of RICO’s pattern requirement even though he could easily have disposed of the RICO claims on non-constitutional grounds. Furthermore, Judge Graham improperly considered the facial validity of RICO’s pattern requirement in a case in which no first amendment considerations were involved.

At present, Judge Graham’s decision in *Firestone* stands alone. Other courts that have considered the constitutionality of the pattern requirement after *Firestone* have expressly declined to follow Judge Graham’s lead.

IV. Legislative Proposals To Clarify the Pattern Requirement

In *Northwestern Bell*, the Supreme Court noted that further development of the pattern requirement would have to “await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act’s intended scope.” In the years that have followed, some members

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276. *Id.*

277. Under what is known as the Ashwander Doctrine, the Court avoids deciding constitutional questions whenever it can decide a case on non-constitutional grounds. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Federal courts “do not review issues, especially constitutional issues, until they have to.”); *see, e.g.*, VSA v. Von Weise Gear Co., 769 F. Supp. 1080, 1085 n.13 (E.D. Mo. 1991) (“Because, we hold that plaintiffs failed to state a claim under RICO we need not reach the constitutional issue.”); Princeton Economics Group, Inc. v. American Tel. & Tel. Co., 768 F. Supp. 1101, 1108 n.4 (D.N.J. 1991) (“Because the [defendant’s] motion is granted on an alternative basis, it is not necessary to address the issue as to whether RICO is unconstitutionally vague as applied to the facts of this case.”).

278. *New York v. Ferber*, 458 U.S. 747, 767 (1982) (“The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.”); *United States v. Mazurie*, 419 U.S. 544, 550 (1975) (“It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand.”).


281. *Id.* at 243 (emphasis added).
of Congress have attempted to provide that "clearer guidance." 282 Nevertheless, no legislative amendment to RICO's pattern requirement has been enacted to date. Furthermore, the bill currently pending in the House of Representatives would do nothing to clarify the pattern requirement and would inject uncertainty where none presently exists.

House Bill No. 1717 (Bill 1717)283 was purportedly introduced, in part, to "tighten up" RICO's pattern requirement. 284 Despite its stated goal, however, Bill 1717's two proposed amendments to the pattern requirement would not clarify the meaning of "pattern of racketeering." First, Bill 1717 would codify the Supreme Court's existing continuity and relationship requirements for a RICO pattern. 285 Because continuity and relationship are already required, however, this amendment would do nothing to clarify the pattern requirement.

Second, Bill 1717 would provide that a pattern requires acts from at least two separate "episodes." 286 This multiple episode requirement is intended to codify an existing self-imposed guideline of the Department of Justice for RICO prosecutions. 287 While the bill does not define "episode," the Department of Justice's RICO Manual uses the term "episode" interchangeably with the term "scheme." 288 The Supreme Court has already noted that a multiple-scheme approach that does not contain a clear definition of the term "scheme" does not clarify the pattern requirement, and may actually make the pattern requirement more vague. 289 Finally, not only would Bill 1717 fail to add clarity to the pattern requirement, it would also create vagueness where none now exists.

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286. H.R. 1717, supra note 283, § 2.
288. See, e.g., RICO MANUAL, supra note 15, at 56-59 (noting that the United States Court of Appeals for the Eighth Circuit had declined to find pattern without multiple schemes or episodes, but decision was overruled by Supreme Court).
289. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 241 n.3 (1989) ("Nor does the multiple scheme approach to identifying continuing criminal conduct have the advantage of lessening the uncertainty inherent in RICO's pattern component, for "scheme" is hardly a self-defining term. . . . [W]e prefer to confront these problems directly, not by introducing a new and perhaps more amorphous concept into the analysis' that has no basis in text or legislative history.") (quoting Barticheck v. Fidelity Union Bank/First Nat'l State, 832 F.2d

http://digitalcommons.law.villanova.edu/vlr/vol36/iss6/8
by injecting amorphous and undefined concepts into other sections of the RICO statute.\textsuperscript{290}

V. STATE ANTI-RACKETEERING LAWS

The federal RICO statute, as interpreted by the Supreme Court, defines pattern as two or more acts occurring within a specified time frame that are both related and continuous.\textsuperscript{291} The vast majority of states that have enacted anti-racketeering laws have modeled their state statutes after the federal RICO statute. Thus, most state anti-racketeering statutes also contain pattern requirements.\textsuperscript{292}

Most states that have enacted anti-racketeering statutes containing pattern requirements have simplified the task of interpreting their pattern requirements by adopting language that provides what pattern "means" rather than what pattern "requires."\textsuperscript{293} In the majority of

\begin{verbatim}
36, 39 (3rd. Cir. 1987)); see also Kelley, supra note 65, at 348-49 (arguing that "episode" is an inherently unclear term).

290. H.R. 1717, supra note 283, § 3. In an attempt to prevent the abuse of RICO by civil plaintiffs, Bill 1717 proposes the following new requirement be added to the civil remedy provision:

This subsection is an extraordinary civil remedy and may only be used against a defendant who was a major participant, either directly or as an aider and abettor . . . , in egregious criminal conduct responsible for a significant injury to the plaintiff.

Id. (emphasis added). Bill 1717 would not explain what is meant by the terms "major," or "significant." Bill 1717 would define "egregious" as follows:

For the purposes of this subsection, the term "egregious conduct" means a pattern of criminal conduct which was an integral part of ongoing racketeering activities and which was characterized by a combination of aggravating circumstances that renders [sic] the defendant's conduct more reprehensible than the minimum conduct necessary to sustain a violation of section 1962 of this title.

Id. (emphasis added). This collection of undefined and nebulous terms cannot help but inject vagueness.

291. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239 (1989) ("Congress[] inten[ded] that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat to continued criminal activity."). For a discussion of the requirements of relatedness and continuity for a pattern under federal RICO, see supra notes 62-84 and accompanying text.

292. But see ARIZ. REV. STAT. ANN. §§ 13-2301 to -2317 (1989 & Supp. 1991) (no pattern requirement); HAW. REV. STAT. §§ 842-1 to -12 (1985 & Supp. 1991) (same); KY. REV. STAT. ANN. § 506.120 (Michie/Bobbs-Merrill 1990) (same); R.I. GEN. LAWS §§ 7-15-1 to -11 (1985) (same); TEX. PENAL CODE ANN. §§ 71.01-71.05 (Vernon 1989 & Supp. 1992) (same); see also NEV. REV. STAT. ANN. § 207.390 (Michie 1986) ("[r]acketeering activity" means engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering; "pattern" not defined, however).

293. A few states, however, have chosen to adopt statutes similar to federal
these statutes, the pattern requirements define a pattern as two or more related predicate acts that occur within a specified time frame. See 18 U.S.C. § 1961(5) (1988) ("pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity); N.J. STAT. ANN. § 2C:41-1(d) (West 1982) ("Pattern of racketeering activity" requires (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years (excluding any period of imprisonment) after a prior incident of racketeering activity; and (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents."); N.J. STAT. ANN. § 5:12-125(d) (West 1988) ("Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this act and the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."); CASINO CONTROL ACT); N.D. CENT. CODE § 12.1-06.1-01(2) (d) (Supp. 1991) ("Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after July 8, 1987 and the last of which occurred within ten years, excluding any period of imprisonment, after the commission of a prior act of racketeering activity.").

294. See COLO. REV. STAT. § 18-17-103(5) ("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) ("Pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same 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."); FLA. STAT. ANN. § 895.02(4) (West Supp. 1992) ("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 five years after a prior incident of racketeering conduct."); GA. CODE ANN. § 16-14-3(8) (Supp. 1991) ("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, provided at least one of such incidents occurred after the effective date of the act and the last of such incidents occurred within four years, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity."); IDAHO CODE § 18-7803(d) (1987) ("Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct 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, provided at least one (1) of such incidents occurred after the effective date of this act and that the last of such incidents occurred within five (5) years after a prior incident of racke-
state's pattern requirement also specifies that the related predicate acts must be connected with "organized crime." Four state statutes em-

teering conduct.")) \text{IND. CODE ANN. § 35-45-6-1 (West 1986)} ("'Pattern of racketeering activity' means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics [sic] that are not isolated incidents. However, the incidents are a pattern of racketeering only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity."); \text{LA. REV. STAT. ANN. § 15:1352(C) (West Supp. 1992)} ("'Pattern of drug racketeering activity' means engaging in at least two incidents of drug racketeering activity that have the same or similar intent, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurs after the effective date of this Act and that the last of such incidents occurs within five years after a prior incident of drug racketeering activity."); \text{MISS. CODE ANN. § 97-43-3(d) (Supp. 1989)} ("'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 otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date of this chapter and that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct."); \text{N.C. GEN. STAT. § 75D-3(b) (1990)} ("'Pattern of racketeering activity' means engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity."); \text{OR. REV. STAT. § 166.715(4) (1990)} ("'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, including a nexus to the same enterprise, and are not isolated incidents, provided at least one of such incidents occurred after November 1, 1981, and that the last of such incidents occurred within five years after a prior incident of racketeering activity."); \text{TENN. CODE ANN. § 39-12-203(6) (1991)} ("'Pattern of racketeering activity' means engaging in at least two (2) incidents of racketeering conduct 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; provided, that at least one (1) of such incidents occurred after July 1, 1986, and that the last of such incidents occurred within two (2) years after a prior incident of racketeering conduct."); see also \text{WASH. REV. CODE ANN. § 9A.82.010(15) (1988)} ("'Pattern of criminal profiteering activity' means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act 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." (emphasis added)).

295. See \text{CAL. PENAL CODE § 186.2(b) (West 1988)} ("'Pattern of criminal profiteering activity' means engaging in at least two incidents of criminal profi-
ploy pattern requirements which provide that if two or more predicate acts are too closely related, they will be treated as a single act.²⁹⁶ Two other state pattern requirements provide that, if the acts are not related to a common scheme, plan or purpose, a pattern may still exist if the participants have the mental capacity required for the predicate acts and are associated with the criminal enterprise.²⁹⁷

teering, as defined by this act, which meet the following requirements: (1) Have the same or similar purpose, result, principals, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics; (2) Are not isolated events; and (3) Were committed as criminal activity of organized crime.

²⁹⁶. See DEL. CODE ANN. tit. 11. § 1502(5) (1987) ("Pattern of racketeering activity' shall mean 2 or more incidents of conduct: a. That: 1. Constitute racketeering activity; 2. Are related to the affairs of the enterprise; 3. Are not so closely related to each other and connected in point of time and place that they constitute a single event; and b. Where: 1. At least 1 of the incidents of conduct occurred after July 9, 1986; 2. The last incident of conduct occurred within 10 years after a prior occasion of conduct . . . . '); OHIO REV. CODE ANN. § 2923.31(E) (Anderson Supp. 1991) ("Pattern of corrupt 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. At least one of the incidents forming the pattern shall occur on or after January 1, 1986. Unless any incident was an aggravated murder or murder, the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern, excluding any period of imprisonment served by any person engaging in the corrupt activity."); OKLA. STAT. ANN. tit. 22, § 1402(5) (West Supp. 1992) ("Pattern of racketeering activity' means two or more occasions of conduct: a. That include each of the following: (1) constitute racketeering activity, (2) are related to the affairs of the enterprise, (3) are not isolated, (4) are not so closely related to each other and connected in point of time and place that they constitute a single event, and b. Where each of the following is present: (1) at least one of the occasions of conduct occurred after November 1, 1988, (2) the last of the occasions of conduct occurred within three (3) years, excluding any period of imprisonment served by the person engaging in the conduct, of a prior occasion of conduct . . . . '); see also WIS. STAT. ANN. § 946.82(3) (West Supp. 1991) ("Pattern of racketeering activity' means engaging in at least 3 incidents of racketeering activity that that the same or similar intents, results, accomplices, victims or methods of commission or otherwise are interrelated by distinguishing characteristics, provided at least one of the incidents occurred after April 27, 1982 and that the last of the incidents occurred within 7 years after the first incident of racketeering activity. Acts occurring at the same time and place which may form the basis for crimes punishable under more than one statutory provision may count for only one incident of racketeering activity." (emphasis added)).

²⁹⁷. See MINN. STAT. ANN. § 609.902(6) (West Supp. 1992) ("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 shared criminal purpose or (ii) committed, solicited, requested, importuned, or intentionally aided by persons acting with the mental culpability required for the commission of the criminal acts and associated with
The above statutes require that the predicate acts be related. A few state statutes, however, employ pattern requirements that do not require a relationship among the predicate acts. One state's pattern requirement omits any reference to a relationship and simply provides that pattern "refers to" two or more specified acts within a specified time frame.298 Another state statute omits any reference to a relationship and defines pattern as two or more specified acts that are committed "with the intent of accomplishing [specified] prohibited activities."299 Finally, one state's pattern requirement defines pattern as three related "episodes" that demonstrate "continuing unlawful conduct."300

As the preceding discussion reveals, most pattern definitions in state anti-racketeering statutes require that the predicate acts be related and that the acts occur within a specified time frame, but only one state statute expressly mentions continuity.301 In many instances, however,

or in an enterprise involved in these activities." (emphasis added)); N.Y. PENAL LAW § 460.10(4) (McKinney 1989) (" 'Pattern of criminal activity' means conduct engaged in by persons charged in an enterprise corruption count constituting three or more criminal acts that: (a) were committed within ten years of the commencement of the criminal action; (b) are neither isolated incidents, nor so closely related and connected in point in time or circumstance of commission as to constitute a criminal offense or criminal transaction . . . ; and (c) are either: (i) related to one another through a common scheme or plan or (ii) were committed, solicited, requested, importuned or intentionally aided by persons acting with the mental culpability required for the commission thereof and associated with or in the criminal enterprise." (emphasis added)).

298. See 18 PA. CONS. STAT. ANN. § 911(h) (4) (Purdon 1983) (" 'Pattern of racketeering activity' refers to a course of conduct requiring two or more acts of racketeering activity one of which occurred after the effective date of this section." (emphasis added)); see also ILL. ANN. STAT. ch. 56 1/2, para. 1653(b) (Smith-Hurd 1985) (" 'Pattern of narcotics activity' means 2 or more acts of narcotics activity of which at least 2 such acts were committed within 5 years of each other. At least one of those acts of narcotics activity must have been committed after the effective date of this Act and at least one of such acts shall be or shall have been punishable as a . . . felony." (emphasis added)).

299. See N.M. STAT. ANN. § 39-42-3(D) (1989) (" 'Pattern of racketeering activity' means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities . . . ; provided at least one of such incidents occurred after the effective date of [this act] and the last of which occurred within five years after the commission of a prior incident of racketeering.")

300. See UTAH CODE. UNANN. § 76-10-1602(2) (Michie 1990) (" '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, these episodes shall demonstrate continuing unlawful conduct and be related to each other or to the enterprise. At least one of the episodes compromising a pattern of unlawful activity shall have occurred after July 31, 1981. The most recent act constituting part of a pattern of unlawful activity as defined by this part shall have occurred within five years of the commission of the next preceding act alleged as part of the pattern.").

301. See id.
the state pattern definition specifies that the predicate acts may not be “isolated.”\textsuperscript{302} Lack of isolation is arguably the functional equivalent of continuity.\textsuperscript{303} Accordingly, a persuasive argument may be made that many state pattern definitions require both continuity and relationship and, therefore, are essentially identical to the federal pattern requirement in terms of clarity.

Because of the similarity between many state pattern requirements and the pattern requirement in the federal RICO statute, it is instructive to consider the experiences of those states in enforcing their anti-racketeering statutes. Few void-for-vagueness challenges have been made to the pattern requirements in state anti-racketeering laws patterned after the federal RICO statute.\textsuperscript{304} In each of those cases, the challenge has been rejected and the statute has been found constitutional.\textsuperscript{305}

\textsuperscript{302} See statutes cited supra notes 294-99.

\textsuperscript{303} Some commentators contend that continuity and lack of isolation are equivalent concepts. See Goldsmith, \textit{RICO and “Pattern:” The Search for “Continuity Plus Relationship,”} 73 CORNELL L. REV. 971, 1000 n.183 (1987); Note, \textit{Is This the End of RICO}, supra note 17, at 1147 & n.254. The Supreme Court, however, has apparently rejected such an interpretation of the word “isolated.” In \textit{Northwestern Bell}, the Supreme Court discussed a pattern definition that required that the predicate acts “not [be] isolated events.” 492 U.S. 240 (quoting 18 U.S.C. 3575(e) (1982) (repealed (1987)). Despite the inclusion of the requirement that the acts not be isolated, the Court stated that the definition “defined [the] pattern requirement solely in terms of the relationship of the defendant’s criminal acts to one another.” \textit{Id.} Thus, the Court did not even mention that pattern definition when discussing the requirement of continuity. \textit{Id.} at 240-43. Contrary to the Court’s discussion in \textit{Northwestern Bell}, however, some lower federal courts have recently treated lack of isolation and continuity as equivalent concepts. See Dolsky \textit{v. Johnson}, Civ. A. No. 90-1937, 1991 WL 3540, at *5 (E.D. Pa. Jan. 9, 1991) (mem.) (finding that defendant’s acts were not continuous after noting that they were “isolated business transactions”); Valley Forge Ins Co. \textit{v. Colello}, No. 89 C 9016, 1990 WL 141461, at *1-2 (N.D. Ill. Sept. 20, 1990) (mem.) (“The Supreme Court has found that . . . before a ‘pattern of racketeering’ exists . . . the predicate acts of racketeering must be continuous, i.e. not sporadic or isolated . . . .”).


\textsuperscript{305} See cases cited supra note 304.
VI. ANALYSIS

The Supreme Court will likely confront a constitutional challenge to RICO's pattern requirement in the next few years. Commentators disagree on what the Court will or should decide when ultimately faced with that challenge. The remainder of this Comment draws on the material already discussed to predict the outcome of such a challenge.

Any prediction of the Supreme Court's ruling on a constitutional challenge to RICO's pattern requirement must begin with the recognition of two factors that may strongly influence the Court. First, RICO is a federal statute. The Court affords federal statutes a strong presumption of validity and, to the extent possible, will interpret federal statutes to avoid any constitutional infirmity. Second, the number of conservative Justices on the Supreme Court is greater than at any time in recent history. The more conservative the Court, the less likely that it will strike down statutes, such as RICO, that are targeted at criminals.

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306. Professor Blakey, a drafter of RICO, acknowledges that it is "likely that one or more district courts will hold RICO unconstitutionally vague" and that "a panel of a court of appeal will thoughtlessly follow suit." Blakey, Is "Pattern" Void for Vagueness?, Civil RICO Rep. (BNA), Dec. 12, 1989, at 7, col. 2. Indeed, one district court has already held RICO's pattern requirement "unconstitutionally vague as written" in a case where the court was not even required to address the issue. See Firestone v. Galbreath, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990). For a discussion of Firestone, see supra notes 265-79 and accompanying text.

307. See, e.g., Blakey, supra note 306, at 7, col. 2 (arguing that RICO's pattern requirement is not unconstitutionally vague); Freeman & McSlarrow, supra note 88, at 1010 (arguing that RICO's pattern requirement is unconstitutionally vague); Rakoff, supra note 116, at 3, col. 1 (arguing that RICO's pattern requirement is unconstitutionally vague); Note, Void For Vagueness, supra note 17 at 527 (arguing that RICO's pattern requirement is not unconstitutionally vague).

308. For a discussion of the strong presumption of validity afforded to federal statutes, see supra note 103 and accompanying text.

309. For a discussion of the Supreme Court's preference for narrowing, rather than invalidating federal statutes, see supra notes 104-07 and accompanying text.

310. See Lewis, A Rehearsed Thomas Is Set for Hearings, N.Y. Times, Sept. 9, 1991, at A.12 col. 4 ("[T]he Court has become more and more conservative, generally showing greater deference to government and less tolerance of criminal defendants while being more supportive of law-enforcement agencies and increasingly skeptical of an expansive interpretation of the Constitution."); Price, Marshall's Retirement Brings Cheers and Tears, Wash. Post, June 28, 1991, at A10, col. 1 ("With one more conservative vote on the Supreme Court, the criminals' lobby will be on the run." (statement of Richard Viguerie, Chairman of United Conservatives of America)); Nightline: Supreme Court Justice Thurgood Marshall Resigns (ABC television broadcast, June 27, 1991) ("Today's Supreme Court is far more conservative, far less likely to strike down criminal laws and public policies of legislatures or the Congress." (statement of reporter Jeff Greenfield)), available in LEXIS, Nexis Library, ABCNEW File; see also Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change, 45 U. MIAMI L. REV. 757, 814 (1991) ("We... are in a period of increased threat to civil liberties, as more and more Americans seem willing to trade away certain constitutional protections to enhance law enforcement efforts..."
These two factors combine to provide RICO with an exceedingly strong foundation from which to combat the present constitutional challenge. When read in conjunction with the judicial gloss applied by the Supreme Court in *Northwestern Bell* and *Sedima*, RICO's pattern requirement provides the guidance required by the void-for-vagueness doctrine to: (1) citizens who must follow the statute; (2) police who must enforce the statute; and (3) judges who must interpret the statute. First, RICO's pattern requirement provides sufficient guidance that a concerned citizen generally could determine whether or not her conduct would constitute a pattern of racketeering. It is perhaps instructive to consider this desire for guidance from the viewpoint of the hypothetical concerned citizen of ordinary intelligence. As a starting point, this citizen likely would be a criminal and necessarily would be contemplating the commission of one or more crimes. The citizen would be concerned with whether the crime that she was contemplating, when taken in conjunction with her other crime(s), would constitute a pattern of racketeering under RICO.

The Court has stated that crimes constitute a pattern of racketeering if they are both continuous and related. The Court has also explained what continuity and relationship mean in the context of RICO. If the concerned citizen read the Court's discussion in *Northwestern Bell*, or contacted her attorney, she could, in all likelihood, accurately predict whether her contemplated conduct would constitute a pattern in the war on crime and drugs. And this threat is a serious one, given an increasingly conservative Supreme Court.” (footnote omitted)).

311. For a discussion of the functions served by the void-for-vagueness doctrine, see supra notes 87-91 and accompanying text.

312. Thus, the question could also be phrased: “Would a criminal of ordinary intelligence in the defendant's position know that if she commits another crime she would have engaged in a pattern of racketeering?” Phrasing the question in this way highlights one reason that courts may not be overly sympathetic to a defendant challenging RICO's pattern requirement—the challenger is arguably a criminal.

Such a defendant is only arguably a criminal for two reasons. First, a defendant can be found to have violated RICO without having been criminally convicted of the underlying predicate acts. See *Sedima*, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985) (“[A] prior-conviction requirement would be inconsistent with Congress' underlying policy concerns.”). Second, the burden of proof in civil RICO actions has been interpreted uniformly by the circuit courts of appeals as “a preponderance of the evidence.” See supra note 7 and accompanying text; see also *Sedima*, 473 U.S. at 491 (stating that Court is “not at all convinced that the predicate acts must be established beyond a reasonable doubt” in civil RICO actions).

313. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (“RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.”).

314. For a discussion of the Supreme Court's espousal of the continuity plus relationship test, see supra notes 51, 62-84 and accompanying text.
pattern of racketeering under RICO. As a practical matter, however, citizens generally do not consult the text of statutes before they act, nor do they study judicial opinions. Moreover, in terms of importance, the Court has stated that guidance to citizens is the least important of the three functions served by the void-for-vagueness doctrine.\textsuperscript{315}

A second, and more important, function of the void-for-vagueness doctrine is to ensure that police receive necessary guidance so that they properly enforce the statute.\textsuperscript{316} With regard to RICO, this function of the doctrine necessarily centers on criminal applications of the statute by the Department of Justice.\textsuperscript{317} The Department of Justice has published stringent guidelines concerning the meaning of the pattern requirement\textsuperscript{318} and has established a mandatory review procedure to ensure that these guidelines are applied properly and uniformly.\textsuperscript{319} The Department of Justice would not have been able to draft meaningful guidelines unless it had received sufficient guidance as to the meaning of the pattern requirement. Furthermore, the rigorous application of these guidelines ensures that RICO is not subject to the prosecutorial abuse that the void-for-vagueness doctrine seeks to prevent.\textsuperscript{320}

The third and final function of the void-for-vagueness doctrine is to ensure that the statute provides sufficient guidance to the judiciary who must interpret it.\textsuperscript{321} RICO’s detractors focus on this function most fre-
quently in arguing that the statute's pattern requirement is unconstitutionally vague. The almost uniform rejection of void-for-vagueness challenges to RICO's pattern requirement by federal courts provides one of the most forceful arguments that RICO does provide sufficient guidance to the judiciary. Similarly, the very fact that the Court was able to explain the meaning of "pattern" demonstrates that the statute provided the Court with guidance as to the proper interpretation of the pattern requirement. Furthermore, the explanation of pattern by the majority in Northwestern Bell serves as additional guidance to the lower courts.

Additional support for the position that the Supreme Court ultimately will hold RICO's pattern requirement constitutional may be found in a myriad of sources. First, over a decade before the Court's decisions in Sedima and Northwestern Bell, lower federal courts already had rejected constitutional challenges to RICO's pattern requirement. Those lower courts recognized that, while the pattern requirement was flexible, it was not unconstitutionally vague. Only after Justice Scalia invited a constitutional challenge to RICO's pattern requirement in his Northwestern Bell concurrence did RICO's detractors resurrect the already discredited argument that the statute's definition of pattern was unconstitutionally vague. Despite Justice Scalia's protestations to the contrary, however, the Court's decisions in Sedima and Northwestern Bell have made RICO's pattern requirement more, rather than less, clear. Thus, the pattern requirement that exists today is clearer than it was when the early challenges to its constitutionality were uniformly rejected.

Support for the constitutionality of the pattern requirement may also be found in the experience of state courts with statutes that are modeled after RICO. As a result of the continuity and relationship requirements expressed by the Court in Sedima and Northwestern Bell, RICO's pattern requirement now is virtually identical to those in many state anti-racketeering statutes. The constitutionality of the pattern

the judiciary charged with its interpretation, see supra note 89 and accompanying text.

322. See, e.g., Kelley, supra note 65, at 345-70, 402 (arguing that RICO is unconstitutionally vague due to differing interpretations of pattern requirement by circuit courts of appeals).

323. For cases rejecting the argument that RICO's pattern requirement is unconstitutionally vague, see supra notes 151-264 and accompanying text.

324. For a discussion of pre-Northwestern Bell cases in which federal courts rejected constitutional challenges to RICO's pattern requirement, see supra notes 39-40 and accompanying text.

325. See Northwestern Bell, 492 U.S. at 255 ("It seems to me [the majority's explanation of pattern] increases rather than removes the vagueness.").


327. For a discussion of the similarity between RICO's pattern requirement
requirements in those state statutes has rarely, if ever, been challenged.\textsuperscript{328} The state courts that have addressed such challenges, much like their federal counterparts, uniformly have rejected those challenges.\textsuperscript{329} The fact that state pattern requirements similar to that contained in RICO rarely have been challenged and the fact that those state courts that have considered constitutional challenges to pattern requirements similar to RICO have uniformly rejected such challenges bolster the argument that RICO's pattern requirement is constitutional.

Those who argue that RICO's pattern requirement is vague premise their arguments largely on Justice Scalia's concurrence in \textit{Northwestern Bell}.\textsuperscript{330} As several courts have noted, however, Justice Scalia's comments were merely dicta.\textsuperscript{331} RICO's detractors also attempt to make predictions based upon analogies between a constitutional challenge to RICO's pattern requirement and cases in which the Supreme Court has addressed vagueness challenges to other statutes.\textsuperscript{332} As discussed earlier, to the extent that such predictions rely on \textit{Lanzetta} or \textit{Fort Wayne}, the predictions are vulnerable to criticism.\textsuperscript{333} To the extent that such predictions rely on \textit{Northwestern Bell}, they are inconclusive.\textsuperscript{334} Furthermore, and the pattern requirements in a number of state anti-racketeering statutes, see \textit{supra} notes 292-305.

\textsuperscript{328} For cases where the constitutionality of state pattern requirements was challenged, see \textit{supra} note 304.


\textsuperscript{330} \textit{Northwestern Bell}, 492 U.S. at 251 (Scalia, J., concurring).

\textsuperscript{331} See, e.g., \textit{Kauffmann} v. \textit{Yoskowitz}, 85 Civ. 8414 (PKL), 1990 WL 300795, at *3 (S.D.N.Y. Apr. 6, 1990) ("[T]he court will not, based on the dicta of a concurring Supreme Court Justice, and in the face of all existing case law, find the civil RICO statute unconstitutional either on its face or as applied in the instant action.").

\textsuperscript{332} See, e.g., \textit{Rakoff}, \textit{supra} note 116, at 3, col. 2 (prediction based on decisions of current Justices on past vagueness challenge to state racketeering statute and on analogy to prior Supreme Court decision that word "gang" used in state statute was unconstitutionally vague).

\textsuperscript{333} For a discussion of why the Supreme Court's decision in \textit{Fort Wayne} is not helpful in predicting the Court's decision if faced with a constitutional challenge to RICO's pattern requirement, see \textit{supra} notes 150-37 and accompanying text. For a discussion of why the Supreme Court's decision in \textit{Lanzetta} is not helpful in predicting the Court's decision if faced with a constitutional challenge to RICO's pattern requirement, see \textit{supra} notes 115-29 and accompanying text.

\textsuperscript{334} The majority's decision in \textit{Northwestern Bell} arguably indicates that Justices White, Blackmun and Stevens view RICO's pattern requirement as workable. \textit{Northwestern Bell}, 492 U.S. at 232-43 (expounding on meaning of RICO's pattern requirement; joined by Justices Marshall and Brennan who have since retired and would not participate in any future decision on the constitutionality of pattern requirement). On the other hand, Chief Justice Rehnquist and Justices O'Connor and Kennedy joined a concurring opinion wherein Justice Scalia professed that it is "beyond the Court" to ascertain the meaning of RICO's pattern requirement. \textit{Id.} at 255 (Scalia, J., concurring). The remaining members of the Court, Justices Souter and Thomas have not yet sat on a case where RICO's
predictions that RICO's pattern requirement will be found unconstitutional ignore the fact that the Court repeatedly has rejected vagueness challenges to statutes containing terms that undoubtedly are no clearer than RICO's pattern requirement.335 Surely "pattern" is no less precise a term than "ordinary" "reasonable" or "near."336

RICO's detractors also argue that, even after Northwestern Bell, the United States Courts of Appeals are not applying a uniform test for pattern.337 Due to this lack of a uniform test, the Court ultimately may be called upon to resolve a split among the circuits as to the meaning of pattern. It does not follow, however, that RICO's pattern requirement is unconstitutionally vague simply because all circuits are not interpreting that term identically. Resolving splits among the circuits is one of the rudimentary functions served by the Supreme Court.338 This author suggests that the Court will resolve yet another split if ultimately faced with conflicting interpretations of the pattern requirement among the courts of appeals.

Finally, at least one commentator has suggested that RICO might be unconstitutionally vague in its civil, but not in its criminal applications.339 Supporters of this position note that, in its civil applications, RICO: (1) is more likely used in ways never intended by Congress;340 (2) is not generally subject to the check on discretion provided by the Department of Justice's mandatory review procedure;341 (3) is more

335. For examples of cases where the Supreme Court rejected vagueness challenges to statutes that were no more clear than RICO, see infra note 338.

336. See cases cited supra note 93.

337. See, e.g., Kelley, supra note 65, at 401-02.

338. See, e.g., Cheek v. United States, 111 S. Ct. 604 (1991) (resolving conflict among circuits over meaning of the word "willfully" as used in federal income tax laws); United States v. Giordano, 416 U.S. 505 (1974) (resolving conflict among circuits as to whether phrase "Attorney General, or any Assistant Attorney General specially designated by the Attorney General" in federal wiretap statute could be read to encompass Executive Assistant to Attorney General); see also Rainwater v. United States, 356 U.S. 590 (1958) (resolving conflict among circuits as to whether phrase "Government of the United States" as used in federal False Claims Act encompassed government corporations).

339. See Rakoff, supra note 116, at 6 col. 5 ("To be sure, a reasonable argument can be made that, despite the unity of the statutory language, RICO is unconstitutionally vague only on the civil side . . . ."); see also Note, Is This the End of RICO, supra note 17, at 1149-50 (discussing possibility that Court would treat civil and criminal cases differently if statute were ultimately held unconstitutionally vague).


341. For a discussion of the Department of Justice review procedure, see supra notes 15, 124-26 and accompanying text.
likely to involve first amendment concerns; \(^{342}\) and (4) is not subject to the "beyond a reasonable doubt" standard of proof required for criminal prosecutions. \(^{343}\) Nevertheless, because RICO must be construed similarly in both its civil and criminal applications, the Court may not find RICO unconstitutionally vague in its civil applications without also finding the statute unconstitutionally vague in its criminal applications. \(^{344}\)

RICO's pattern requirement provides the guidance required by the void-for-vagueness doctrine. In *Northwestern Bell* and *Sedima*, the Court espoused a workable definition of "pattern" using accepted methods of statutory interpretation. The continuity plus relationship test provides RICO's pattern requirement with a judicial gloss sufficient to provide guidance not only to those seeking to avoid violating the statute, but also to officials charged with RICO's enforcement and to judges charged with RICO's interpretation. Consequently, it is unlikely that the increasingly conservative Supreme Court ultimately will hold that RICO's pattern requirement is unconstitutionally vague in either its criminal or civil applications.

**VII. CONCLUSION**

RICO's pattern requirement is not unconstitutionally vague. Any vagueness that may have existed as to the meaning of the term "pattern" was brought within acceptable constitutional levels as a result of the Supreme Court's decisions in *Sedima* and *Northwestern Bell*. These decisions clarified the meaning of "pattern" and implicitly acknowledged that the statute is not unconstitutionally vague. If and when the Court ultimately faces a constitutional challenge to the pattern requirement in either a civil or criminal action, that challenge will be rejected.

*Christopher J. Moran*

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\(^{342}\) For RICO cases involving first amendment concerns, see *supra* note 97.

\(^{343}\) For a discussion of the standards of proof in civil and criminal RICO actions, see *supra* note 7.

\(^{344}\) For a discussion of the requirement that statutes with both civil and criminal applications be construed similarly in both settings, see *supra* note 102.