



4-1-2013

The Resurrection of the Single Scheme Exclusion to Rico's Pattern Requirement

Kevin J. Murphy

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

Kevin J. Murphy, *The Resurrection of the Single Scheme Exclusion to Rico's Pattern Requirement*, 88 Notre Dame L. Rev. 1991 (2013).
Available at: <http://scholarship.law.nd.edu/ndlr/vol88/iss4/5>

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE RESURRECTION OF THE “SINGLE SCHEME”
EXCLUSION TO RICO’S PATTERN
REQUIREMENT

*Kevin J. Murphy**

INTRODUCTION

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act (“RICO”) as Title IX of the Organized Crime Control Act.¹ RICO was designed primarily to “eliminat[e] . . . the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.”² But, the language of RICO was written broadly enough to reach “both legitimate and illegitimate enterprises.”³ Congress believed that RICO would effectively “strengthen[] the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies”⁴ to combat “enterprise criminality.”⁵ Congress provided for both criminal⁶ and civil⁷ liability under RICO

* Candidate for Juris Doctor, University of Notre Dame Law School, 2014; B.S. in Accounting and Finance, Indiana University, Kelley School of Business, 2011. I would like to thank Professor G. Robert Blakey for his inspiration of this Note’s topic and invaluable guidance throughout the process, my family and friends for their constant love and support, and the members of the *Notre Dame Law Review* for being great editors and even better company.

1 Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961–1968 (2006)).

2 S. REP. NO. 91-617, at 76 (1969). For a comprehensive discussion and analysis of the legislative history of RICO, see G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249–80 (1982).

3 *United States v. Turkette*, 452 U.S. 576, 578 (1981); *cf. H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 248 (1989) (“The occasion for Congress’ action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.”).

4 84 Stat. 923 (1970).

5 *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (citation omitted).

6 *See* 18 U.S.C. § 1963 (2006). The criminal provisions authorize penalties in the form of imprisonment, fines, and criminal forfeiture. *Id.*

for violations of 18 U.S.C. § 1962, which, stated simply,⁸ makes it unlawful for a person to:

(a) use or invest income derived from a *pattern of racketeering activity* to acquire, establish, or operate an enterprise;⁹

(b) acquire or maintain any interest in an enterprise through a *pattern of racketeering activity*;¹⁰

(c) conduct or participate in the conduct of an enterprise's affairs through a *pattern of racketeering activity*;¹¹

7 See 18 U.S.C. § 1964. The "far-reaching civil enforcement scheme" of § 1964 includes a provision for private suits and remedies in the form of injunctions, treble damages, and counsel's fees. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 483 (1985).

8 These simplified provisions omit that RICO may be violated through a "collection of an unlawful debt." 18 U.S.C. § 1962(a)-(c). The collection of an unlawful debt cannot be an "isolated transaction," but it need not be a part of a pattern. See *Wright v. Shephard*, 919 F.2d 665, 673 (11th Cir. 1990). Additionally, the simplified statement omits the requirement of an effect on "interstate or foreign commerce." Even a slight impact on interstate commerce suffices. See *United States v. Bagnariol*, 665 F.2d 877, 892 (9th Cir. 1981) ("The effect on commerce is an essential element of a RICO violation, but the required nexus need not be great. A minimal effect on interstate commerce satisfies this jurisdictional element.").

9 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 in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, 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. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a).

10 "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." 18 U.S.C. § 1962(b).

11 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

(d) conspire to violate any of these provisions.¹²

Crucial to proving a violation of RICO is a showing that the defendant engaged in a “pattern of racketeering activity.” The phrase is used in all four sections of § 1962, and applies on both the criminal and civil sides of the statute. But the meaning of “pattern of racketeering activity” has proven particularly elusive, as its bounds are especially difficult to delineate. In the text of RICO, Congress merely placed a floor on what acts could constitute a “pattern of racketeering activity,” requiring *at least* two acts of racketeering activity within ten years of one another.¹³

The question of whether two acts within ten years could be *necessary* but not *sufficient* to form a pattern of racketeering activity laid largely dormant¹⁴ until the Court took up *Sedima, S.P.R.L. v. Imrex*

such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

12 “It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” 18 U.S.C. § 1962(d).

13 “[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). The Supreme Court described the statute as placing “an outer limit on the concept of a pattern of racketeering activity that is broad indeed.” *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 237 (1989).

14 *See* *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 255 (8th Cir. 1986) (“The majority of pre-*Sedima* decisions . . . concluded that a ‘pattern’ of racketeering activity could be proved simply by showing the commission of two acts of ‘racketeering activity’ within the last ten years” (citing *Alexander Grant v. Tiffany*, 742 F.2d 408, 410 (8th Cir. 1984), *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), and *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974))). *But see* *Exeter Towers Assocs. v. Bowditch*, 604 F. Supp. 1547, 1554 (D. Mass. 1985) (finding that two or more acts of mail fraud are insufficient for a pattern and noting that a holding to the contrary would give RICO “a sweep so broad as to be inconsistent with manifested congressional objectives”); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6, 13 (W.D. Pa. 1981) (holding that alleged acceptance of several bribes during one political fundraiser is not sufficient to form a pattern).

Several other courts prior to *Sedima* suggested that more than two acts in ten years might be required for a RICO pattern. *See, e.g.*, *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975) (noting in dicta that the “common sense interpretation of the word ‘pattern’ implies . . . *episodes* that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity” (emphasis added)); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (construing the word “pattern” to “include[e] a requirement that the racketeering acts must have been connected with each other by some common *scheme*, plan or motive so as to constitute a pattern and not simply a series of disconnected acts”

Co.¹⁵ in 1984. In footnote 14, in dicta, the Court famously recognized that two racketeering acts within ten years of one another may be insufficient to form a RICO pattern and that it is the “continuity plus relationship” of acts of racketeering that forms a pattern.¹⁶ The Court stated that “[t]he legislative history [of RICO] supports the view that two isolated acts of racketeering activity do not constitute a pattern.”¹⁷ Finally, the Court quoted the definition of “pattern” from a section of the 1970 Act *in pari materia*: “criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”¹⁸

Relying on the legal material set out in this footnote, the circuit courts quickly developed widely varying and inconsistent views of the “pattern” requirement.¹⁹ Several of the circuits held that the presence of “multiple schemes” assisted in proving the “continuity” prong.²⁰ The Eighth Circuit held that a single scheme could *never* be sufficient to satisfy the continuity element.²¹ As the circuits’ approaches grew further in tension with one another, the Supreme Court took up a case from the Eighth Circuit, *H.J. Inc. v. Northwestern Bell Telephone Co.*²² *H.J. Inc.* set out to clarify the disarray on the “pattern” requirement and bring consistency to the circuits. The Court explicitly rejected the Eighth Circuit’s requirement of “multiple

(emphasis added)). These two concepts, “episode” and “scheme,” represent themes in tension in early RICO pattern decisions.

15 473 U.S. 479 (1985).

16 *Id.* at 496 n.14 (quoting S. REP. NO. 91-617, at 158 (1969)). The Court in *Sedima* addressed two limitations to RICO’s civil liability provisions that the Second Circuit had imposed. First, the Court held that the statute required no distinct “racketeering injury” separate from the injury occurring as a result of the predicate acts. *Id.* at 494. Second, it dispensed with the rule that civil RICO actions could only proceed after a criminal conviction. *Id.* at 488. For an explanation of why the criminal conviction requirement is inconsistent with RICO’s legislative history and analogous civil actions, see Leigh Ann MacKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 569 (1985).

17 *Sedima*, 473 U.S. at 496 n.14.

18 *Id.* (citing Organized Crime Control Act, title X, § 1001(a), 84 Stat. 922, 948 (repealed 1987)).

19 *See infra* Part I.

20 *See infra* notes 31–40.

21 *See H.J. Inc. v. Nw. Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987) (“A single fraudulent effort or scheme is insufficient.”), *rev’d*, 492 U.S. 229 (1989); *see also* Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 (8th Cir. 1986) (finding one isolated scheme insufficient to form a pattern under RICO).

22 492 U.S. 229 (1989). *See infra* Part II.

schemes”²³ for a pattern to be present and provided a framework for analyzing whether a pattern was present.²⁴ It is the last word on RICO’s “pattern” from the Court.

This Note will argue that the “single scheme” exclusion (also referred to throughout this Note as the “multiple scheme requirement”) to RICO explicitly rejected by the Court in *H.J. Inc.* has improperly been resurrected. Part I of the Note will discuss the varying approaches used by the circuits prior to the Court’s ruling in *H.J. Inc.*, describing the degree of emphasis that different circuits placed on the presence of multiple schemes. Part II will describe the Court’s rejection of the Eighth Circuit’s “single scheme” exclusion and describe the framework for analysis of RICO’s pattern element the Court set out in *H.J. Inc.* Finally, Part III will discuss the re-imposition of the “single scheme” exclusion by many lower courts after *H.J. Inc.* and argue that several cases contravene the letter and spirit of *H.J. Inc.*, are inconsistent with a commonsense understanding of the word “pattern,” yield impractical results, and add more unnecessary confusion to an already murky pattern analysis. Part III will then recommend the jettison of the “single scheme” exclusion and suggest alternative measures that could ameliorate persistent differences over the meaning of RICO’s “pattern of racketeering activity.”

I. “A KALEIDOSCOPE OF CIRCUIT POSITIONS”

In *Sedima*, the Court expressed discontent about the “‘extraordinary’ uses to which civil RICO had been put,” attributing it to “the failure of Congress and the courts to develop a meaningful concept of ‘pattern.’”²⁵ With this invitation to develop a principled limitation to an arguably errant statute, the lower courts set out to rectify the problem.

Unfortunately, the gentle guidance that the Court gave as to the meaning of a “pattern of racketeering activity” in *Sedima* led to several divergent approaches in the courts of appeals,²⁶ provoking Justice

23 *Id.* at 240–41. This will be referred to throughout the Note as either the “multiple schemes requirement” or the “single scheme” exclusion.

24 *Id.* at 241–43.

25 *Sedima*, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985).

26 *See generally* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 535 n.37 (1987) (discussing the interpretation of “pattern” post-*Sedima* and rejecting all exclusions based on “single schemes”); Michael Goldsmith, *RICO and “Pattern:” The Search for “Continuity Plus Relationship,”* 73 CORNELL L. REV. 971 (1988) (discussing and analyzing the circuit courts’ interpretation of RICO’s pattern requirement after *Sedima*);

Scalia later to describe the phenomenon as “a kaleidoscope of Circuit positions.”²⁷ At the least restrictive end of the spectrum, several courts found that the “pattern” element was satisfied when the explicit statutory language was met, treating two acts of racketeering as sufficient.²⁸ Nearly as permissive was the test employed by the Fifth²⁹ and Eleventh Circuits,³⁰ which required only that the two or more racketeering activities be related. These circuits did not discuss whether the activities in question needed to be continuous in nature.

Lisa A. Huestis, Commentary, *RICO: The Meaning of “Pattern” Since Sedima*, 54 BROOK. L. REV. 621, 631–44 (1988) (discussing RICO “pattern” cases after *Sedima*); Lisa Barsoomian, Comment, *RICO “Pattern” Before and After H.J. Inc.: A Proposed Definition*, 40 AM. U. L. REV. 919, 925–30 (1991); Kim Cafaro Murphy, Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83, 88–93 (1986); Ethan M. Posner, Note, *Clarifying a “Pattern” of Confusion: A Multi-Factor Approach to Civil RICO’s Pattern Requirement*, 86 MICH. L. REV. 1745, 1754–60 (1988).

27 *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring in judgment). Justice Scalia also described the chaos after *Sedima* as “the widest and most persistent Circuit split on an issue of federal law in recent memory.” *Id.* at 251. The pervasiveness of disagreement in the circuit courts was not lost on the *H.J. Inc.* majority, who noted that the “plethora of different views expressed . . . demonstrates . . . [that] developing a meaningful concept of ‘pattern’ within the existing statutory framework has proved to be no easy task.” *Id.* at 236 (majority opinion).

28 See, e.g., *United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988) (“[I]f two distinct statutory violations are found, the predicate acts requirement is fulfilled”); *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986) (treating the Supreme Court’s discussion of the pattern element in *Sedima* as purely dicta and finding that two acts did form a pattern). The Second Circuit in *Ianniello* and *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), found that any necessary relationship and continuity requirements were inherent to RICO’s “enterprise” element, not “pattern.” See Huestis, *supra* note 26, at 636–44 (discussing this analysis and its resistance in the district courts).

29 See, e.g., *R.A.G.S Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (holding that two related acts of mail fraud were sufficient and noting that *Sedima* only implied that two isolated events did not constitute a pattern); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425–26 (5th Cir. 1987) (adhering to *R.A.G.S.’s* test of whether the acts are related, but urging the Circuit to review the case en banc); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280–81 & n.7 (5th Cir. 1986) (finding numerous acts of mail fraud to be sufficient under the Circuit’s current standard but recognizing that the Court in *Sedima* “appeared to challenge the lower courts to develop a more rigorous interpretation of ‘pattern’”).

30 See, e.g., *United States v. Fernandez*, 797 F.2d 943, 951–52 (11th Cir. 1986) (holding that kidnapping and murdering the same victim constituted a pattern because the crimes were related and not isolated); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (rejecting a requirement of “multiple schemes” for a pattern and holding that the activities must be related and not isolated).

At the opposite end of the spectrum lay the Eighth Circuit's comparably restrictive analysis, which held that "[a] single fraudulent effort or scheme is insufficient" to establish a pattern.³¹ In support of its single scheme exclusion, the Eighth Circuit argued that "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.'"³² Though several courts of appeals considered the existence of "multiple schemes" as a factor in searching for a pattern, most rejected it as a requirement.³³

The remainder of the circuit courts attempted to "steer[] a middle course between these two extremes,"³⁴ though even this attempt yielded discordant results. When courts did distinctly consider the relationship and continuity prongs, they generally had much more difficulty analyzing the continuity element.³⁵ However, many courts had trouble conceptually separating the relatedness and continuity

31 *H.J. Inc. v. Nw. Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1988).

32 *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986) (quoting *N. Trust Bank/O'Hare, N.A. v. Inryco, Inc.*, 615 F. Supp. 828, 831 (N.D. Ill. 1985)). *Northern Trust Bank* was the architect of the requirement of multiple schemes for a pattern to be present. The judge strove to put into action what he saw as the "message" of *Sedima*: "[I]ower courts concerned about RICO's expansive potential would best be advised to focus on the hitherto largely ignored 'pattern' concept." 615 F. Supp. at 832. The opinion is difficult analytically to understand, as it simultaneously introduces the concepts of a "single fraudulent effort," "single criminal episode," "single criminal transaction," and "single scheme" into the pattern analysis. *Id.* at 831–33. Ironically, the opinion itself foreshadowed the inherently contradictory nature of requiring multiple schemes for a pattern to be present, recognizing that several courts of appeals have determined that a pattern requires that the acts be "connected with each other by some *common scheme, plan or motive . . .*" *Id.* at 831 (quoting *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973)) (emphasis added); see *infra* note 129 and accompanying text (explaining how the single scheme exclusion effectively excludes *all* cases from RICO, as a single scheme of racketeering activity fails on the continuity prong and multiple schemes fail on the relatedness prong).

33 See *H.J. Inc.*, 492 U.S. at 235 n.2 (listing cases which explicitly rejected the "multiple scheme" requirement in the First, Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits). *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), articulated the most common indictment of the "multiple scheme" requirement: "[D]efendants who commit a large and ongoing scheme, albeit a single scheme, would automatically escape RICO liability for their actions, an untenable result."

34 *Morgan*, 804 F.2d at 975.

35 See, e.g., *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 928–29 (10th Cir. 1987) (quickly dispensing with the "relationship" element then finding that a single scheme absent a threat of continuity is insufficient).

components³⁶ and examined the elements together in multi-factor tests. For example, the Third Circuit looked to “a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity.”³⁷

The Seventh Circuit performed a similar multi-factored analysis, but also considered whether the acts were part of “separate schemes” and whether “distinct injuries” were present.³⁸ The Seventh Circuit imposed the additional requirement that the acts formed “separate transactions.”³⁹ Other Seventh Circuit cases considered whether the alleged acts formed multiple criminal “episodes.”⁴⁰

Between analysis of patterns, acts, schemes, transactions, and episodes, the lower courts seemed content to trade out one vague term for another.⁴¹ Amidst this confusion, the Court granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Co.*⁴² and sought to put the differences to rest.

II. H.J. INC.

In *H.J. Inc.*, a class of customers of Northwestern Bell Telephone Co. filed a civil RICO claim against Northwestern Bell, its officers and employees, and various members of the Minnesota Public Utilities

36 This is not so much a problem as it is an inescapable feature of the “relationship plus continuity” analysis. The Court in *H.J. Inc.* recognized this, stating that though “these two constituents of RICO’s pattern requirement must be stated separately . . . in practice their proof will often overlap.” 492 U.S. at 239.

37 *Barticheck v. Fidelity Union Bank/First Nat’l State*, 832 F.2d 36, 39 (3d Cir. 1987); *see also* *Town of Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1267 (3d Cir. 1987) (looking to whether the acts had “the same or similar results, participants, victims, methods of commission, or other interrelationships”).

38 *See Morgan*, 804 F.2d at 975 (“Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.”); *see also* *Med. Emergency Serv. Assocs. v. Foulke*, 844 F.2d 391, 395 (7th Cir. 1988) (applying the test set forth in *Morgan*).

39 *Morgan*, 804 F.2d at 975.

40 *See, e.g.,* *Medallian TV Enters., Inc. v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1296 (C.D. Cal. 1986) (requiring “different criminal episodes in order to show continuity of racketeering activity”); *Fleet Mgmt. Sys., Inc. v. Archer-Daniels-Midland Co.*, 627 F. Supp. 550, 559 (C.D. Ill. 1986) (requiring “at least two criminal episodes”).

41 *See* *Lipin Enters. Inc. v. Lee*, 803 F.3d 322, 324 (7th Cir. 1986) (“An episode is apparently something more than an act of racketeering activity but something less than a scheme.”).

42 492 U.S. 229 (1989).

Commission (MPUC).⁴³ The complaint alleged that from 1980 to 1986, Northwestern Bell sought to influence members of the MPUC in the performance of their duties through cash payments to commissioners, negotiations of future employment, and payments for meals, parties, and sporting events tickets. The complaint alleged that these bribes led the MPUC to approve excessive rates for the company, to the detriment of its customers.⁴⁴

The District Court for the District of Minnesota granted Northwestern Bell's motion to dismiss the RICO claim, finding that under *Superior Oil* the fraudulent acts alleged were part of a "single scheme to influence MPUC commissioners."⁴⁵ The Eighth Circuit affirmed, finding that "[a] single fraudulent effort or scheme is insufficient" to establish a pattern of racketeering activity.⁴⁶

The Supreme Court started by acknowledging that since *Sedima*, Congress "ha[d] done nothing . . . to illuminate RICO's key requirement of a pattern of racketeering" and recognizing that "developing a meaningful concept of 'pattern' within the existing statutory framework has proved to be no easy task" for the lower courts.⁴⁷

The Court's interpretation of the "pattern" element began by explicitly rejecting the Eighth Circuit's rule that only multiple illegal schemes can constitute a pattern.⁴⁸ The Court noted that "although

43 *Id.* at 233.

44 *Id.*

45 *Id.* at 234 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 648 F. Supp. 419, 425 (D. Minn. 1986)). The District Court held that dismissal was mandated by *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (1986), which the District Court recognized to have created an "extremely restrictive" test for the pattern of racketeering activity element. 648 F. Supp. at 425.

46 *H.J. Inc. v. Nw. Bell Tel. Co.*, 829 F.2d 648, 650 (8th Cir. 1987), *rev'd*, 492 U.S. 229 (1989).

47 *H.J. Inc.*, 492 U.S. at 236.

48 *Id.* The Court also rejected the notion that the "pattern" element has inherent in it a requirement that the predicate acts are related to organized crime. *Id.* at 236–37. The Court further elaborated on its rejection of the organized crime limitation by saying that it "finds no support in the Act's text, and is at odds with the tenor of its legislative history." *Id.* at 244.

Since RICO's rise in popularity in civil suits, it has withstood several similar efforts at judicially-imposed limitations not rooted in the text of the statute. *See, e.g.*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008) ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (holding that a RICO violation does not require an "economic motive"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493–94 (1985) (rejecting the requirement that civil RICO can only proceed against a defendant who already has a criminal conviction and rejecting the requirement of a "racketeering injury," relying heavily on the plain language of RICO's text in both

proof that a RICO defendant has been involved in multiple criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, it is implausible to suppose that Congress thought continuity might be shown *only* by proof of multiple schemes."⁴⁹ The Court believed that "Congress had a more natural and commonsense approach to RICO's pattern element in mind" when it drafted RICO.⁵⁰

In developing its commonsense approach, the Court began with RICO's text. It first reaffirmed that the statutory requirement for a pattern, which states that a pattern "requires *at least* two acts of racketeering activity," merely places a floor on what might be required for a pattern.⁵¹ The Court interpreted this provision to imply that "while

instances); *United States v. Turkette*, 452 U.S. 576, 580–81 (1981) (rejecting a construction of RICO which would limit its application to only "legitimate enterprises" and noting that this construction "clearly departed from . . . the statutory language [of § 1964(4)]"); *see also* *Blakey & Cessar*, *supra* note 26, at 533–34 (describing the "extreme hostility" from the district courts that greeted civil RICO's rise in popularity and analyzing their attempts to "redraft the statute in a concerted effort to dismiss civil suits in all possible ways").

49 *H.J. Inc.*, 492 U.S. at 240.

50 *Id.* at 237.

51 *Id.* (quoting 18 U.S.C. § 1961(5) (2006)) (emphasis added). Though the legislative history does unambiguously support this reading, it does not inexorably flow from the text of § 1961(5). Arguably, the most natural reading is that the phrase "requires at least two acts of racketeering" means "requires two or more acts of racketeering activity." Take, for example, this sentence as a semantic fact: "A Smorgasbord *requires at least* six types of food." It would be strange, indeed, for a man to arrive at a Smorgasbord, see that it has *only* six types of food, and proclaim in disgust, "This is no Smorgasbord! I see only six types of food. This is but a spread!"

Another analogy can be drawn from 33 U.S.C. § 2327, which lays out the definition of "rehabilitation" for inland waterway projects. The statute declares that the term "rehabilitation" requires, *inter alia*, "[a] major project feature restoration . . . which is initially funded before October 1, 1994, and will *require at least* \$5,000,000 in capital outlays . . ." 33 U.S.C. § 2327 (2006) (emphasis added). To say that a major project feature restoration that met all of the statute's other requirements, was initially funded in 1990, and would require \$5,000,000 in capital outlays is not a "rehabilitation" for the purpose of the statute would seriously strain the English language. If RICO's definition of a "pattern" was interpreted similarly, establishing merely two acts of racketeering activity would be sufficient for a pattern.

The Court's interpretation of § 1961(5) would be the most natural reading if the language of the provision were slightly altered to read, "pattern of racketeering activity *at least requires* two acts of racketeering activity." If this were the language, room would be left for the notion that two acts may not be entirely sufficient. To continue with the prior analogy, take as factual the sentence: "A Smorgasbord *at least requires* six types of food." In this instance, it would be decidedly less strange for someone to declare a layout of six foods not a Smorgasbord. However, looking at RICO from anything other than a purely textualist perspective would lead to the conclusion that

two acts are necessary, they may not be sufficient.”⁵² After exploring the ordinary meaning of “pattern” in the English language, the Court concluded that Congress intended to take a “flexible approach” in defining pattern.⁵³

In turning its attention to RICO’s legislative history, the Court found that a pattern is not formed by “sporadic activity” and that “two widely separated and isolated criminal offenses” do not establish a RICO violation.⁵⁴ Enshrining *Sedima*’s basic framework into precedential law, the Court held that it is “*continuity plus relationship* which combine[] to produce a pattern.”⁵⁵ Clarifying this further, the Court established two separate requirements for a showing of “pattern”: (1) relatedness—that “the racketeering predicates are related;” and (2) continuity—that these predicates “amount to or pose a threat of continued criminal activity.”⁵⁶

Though the Court acknowledged that the evidence of these prongs would inevitably overlap to some extent, it emphasized that they are “distinct requirements.”⁵⁷ Explaining the relatedness prong first, the Court stated that the predicate acts must “have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and [not be] isolated events.”⁵⁸

two acts alone are not sufficient, as Senator McClellan’s comments in the Congressional Record indicate. See 116 CONG. REC. 18,940 (1970) (stating that a person cannot be subjected to RICO liability “simply for committing two widely separated and isolated criminal offenses”).

Furthermore, as Justice Scalia observed in his concurring opinion, if two acts were sufficient for RICO liability to attach, the word “pattern” would not have been necessary, as “multiple acts” of racketeering activity would have sufficed. *H.J. Inc.*, 492 U.S. at 255 (Scalia, J., concurring in judgment). So “pattern” does connote something beyond two acts of racketeering activity, even if the definitional provisions in § 1961(5) do not entirely address what that something is.

52 *H.J. Inc.*, 492 U.S. at 237 (quoting *Sedima*, 473 U.S. at 496 n.14).

53 *Id.* at 238.

54 *Id.* at 239 (quoting S. REP. NO. 91-617, at 158 (1969); 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)).

55 *Id.* (quoting 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan)).

56 *Id.*

57 *Id.* at 242.

58 *Id.* at 240 (quoting Organized Crime Control Act, title X, § 1001(a), 84 Stat. 922, 948 (repealed 1987)). Justice Scalia (along with Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy, concurring in judgment) took serious issue with the Court’s use of a separate provision of the same bill in determining meaning:

[The Court’s] definition has the feel of being solidly rooted in law, since it is a direct quotation of 18 U.S.C. § 3575(e). Unfortunately, if normal (and sensible) rules of statutory construction were followed, the existence of

Providing a functional definition of “continuity” was not as simple an exercise. Further elaborating on its rejection of the Eighth Circuit’s requirement of multiple schemes, the Court found that the term “scheme” “appear[ed] nowhere in the language or legislative history of the Act.”⁵⁹ It further critiqued the multiple scheme approach by noting that it did not have the advantage of ameliorating the confusion surrounding RICO’s pattern requirement, as “‘scheme’ is hardly a self-defining term.”⁶⁰ The Court’s criticism of the concept of a “scheme” did not stop there, as it explained:

A “scheme” is in the eye of the beholder, since whether a scheme exists depends on the level of generality at which criminal activity is viewed. . . . There is no obviously “correct” level of generality for courts to use in describing the criminal activity alleged in RICO litigation. Because of this problem of generalizability, the Eighth Circuit’s “scheme” concept is highly elastic. Though the definitional problems that arise in interpreting RICO’s pattern requirement inevitably lead to uncertainty regarding the statute’s scope—whatever approach is adopted—we prefer to confront these problems directly, not by introducing a new and perhaps more amorphous concept into the analysis⁶¹

The Court instead looked for a meaning “derive[d] from a commonsense, everyday understanding of RICO’s language and Congress’

§ 3575(e)—which is the definition contained in another title of the Act that was explicitly *not* rendered applicable to RICO—suggests that *whatever* “pattern” might mean in RICO, it assuredly *does not* mean that. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”

Id. at 252 (Scalia, J., concurring in judgment) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). Though Justice Scalia rejected the doctrine of *in pari materia* in interpreting RICO, the Court has recently embraced this type of analysis. See *Carlsbad Tech., Inc., v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1865–66 (2009); see also *C&T Assoc., Inc. v. Govt. of New Castle Cnty.*, 408 A.2d 27, 29 (Del. Ch. 1979) (“In construing statutory language courts should relate words in question to associated words and phrases in the statutory context. . . . The import of any word or phrase is to be gleaned from the context and statutes in *Pari materia*, and statutes upon cognate subjects”).

59 *H.J. Inc.*, 492 U.S. at 241 (majority opinion).

60 *Id.* at 241 n.3 (citing *Barticheck v. Fidelity Union Bank/First Nat’l State*, 832 F.2d 36, 39 (3d Cir. 1987)).

61 *Id.* (quoting *Barticheck*, 832 F.3d at 39) (internal quotation marks omitted). Justice Scalia interpreted the Court’s discussion of multiple schemes as a rejection of the concept “not merely as the *exclusive* touchstone of RICO liability, but in all its applications” *Id.* at 253 (Scalia, J., concurring) (citations omitted). The lower courts disagreed on whether that was the case. See *infra* note 91.

gloss on it.”⁶² The Court outlined two *separate* ways of establishing continuity: (1) closed-ended continuity—“a closed period of repeated conduct;” and (2) open-ended continuity—“past conduct that by its nature projects into the future with a threat of repetition.”⁶³ Continuity could be established by proving that *either* closed-ended continuity *or* open-ended continuity was present. Continuity, in both cases, the Court stated, was “centrally a temporal concept.”⁶⁴

Closed-ended continuity may be proven by demonstrating “a series of related predicates extending over a substantial period of time.”⁶⁵ The Court declared that “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement,” because Congress’s concern in RICO was long-term criminal conduct.⁶⁶

Open-ended continuity, on the other hand, could be present before closed-ended continuity could be established. Whether open-ended continuity exists “depends on the specific facts of each case,”⁶⁷ the Court explained. “Without making any claim to cover the field of possibilities,” the Court presented three examples of how this “open-ended continuity” could be proven: (1) “if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit;”⁶⁸ (2) if the predicate acts are part of the

62 *Id.* at 241.

63 *Id.* (citing *Barticheck v. Fid. Union Bank/First Nat’l State*, 832 F.2d 36, 39 (3d Cir. 1987)).

64 *Id.* at 230.

65 *Id.* Justice Scalia was sharply critical of this “substantial period of time” requirement for closed-ended continuity:

I think [the majority opinion] must be saying that at least a few months of racketeering activity (and who knows how much more?) is generally for free, as far as RICO is concerned. The “closed period” concept is sort of a safe harbor for racketeering activity that does not last *too* long, no matter how many different schemes are involved, so long as it does not otherwise “establish a threat of continued racketeering activity.”

Id. at 254 (Scalia, J., concurring) (citation omitted).

66 *Id.* at 242 (majority opinion).

67 *Id.*

68 *Id.* The Court presented a concrete example:

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.

Id.

“regular way of doing business” of a “long-term association that exists for criminal purposes;”⁶⁹ or (3) if the predicates are “a regular way of conducting the defendant’s ongoing legitimate business” or RICO enterprise.⁷⁰

The Court, foreseeing the difficulties that applying its holding might create, admitted that the relatedness and continuity prongs “cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a ‘pattern of racketeering activity’ exists.”⁷¹ It acknowledged that “[t]he development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act’s intended scope.”⁷²

Applying the newly-created standard to the facts of *H.J. Inc.*, the Court found that dismissal was improperly granted. The numerous bribes across a six-year period to five members of the MPUC were sufficiently “related” because they were in pursuit of a common purpose—to influence the commissioners to allow the defendants to charge excessive rates.⁷³ Because the petitioners contended that the events occurred with some frequency across six years, the Court found that closed-ended continuity was sufficiently alleged. The Court also noted that had the bribes been shown to be a regular way of conducting Northwestern Bell’s business, or a regular way of conducting the MPUC as a RICO enterprise, then open-ended continuity would have been properly alleged as well.⁷⁴ The case was reversed and remanded.

Justice Scalia found the Court’s direction to look to continuity plus relationship to be as unclear of guidance as “life is a fountain.”⁷⁵ After criticizing the Court’s use of legislative history⁷⁶ and its “murky discussion” in attempting to define continuity,⁷⁷ Justice Scalia (joined by Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy)⁷⁸ in his concurring opinion admitted that his critiques might be unfair,

69 *Id.* at 242–43.

70 *Id.* at 243.

71 *Id.*

72 *Id.*

73 *Id.* at 250.

74 *Id.*

75 *Id.* at 252 (Scalia, J., concurring in judgment).

76 *See supra* note 58.

77 *See supra* note 65.

78 Speculation is abroad that Justice Scalia was originally assigned to write the majority opinion, but was unable to garner or keep his four other votes. G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: “Mother of God—Is This the End of RICO?”*, 43 VAND. L. REV. 851, 962 n.344 (1990) (citing Linda Greenhouse, *Broad Use of RICO Is Upheld*,

because he found it impossible to provide an interpretation to RICO that gave any further guidance as to its application.⁷⁹ He found this particularly disturbing because civil RICO suits had “‘quite simply revolutionize[d] private litigation’ and ‘validate[d] the federalization of broad areas of state common law of frauds.’”⁸⁰ He noted that RICO’s criminal dimensions, to which § 1962’s “pattern” requirement also applied, call for the same degree of certainty expected in criminal law. Finally, he cautioned that the Court’s inability to derive “anything more than today’s meager guidance” on RICO “bodes ill for the day when [a constitutional] challenge is presented.”⁸¹

Nevertheless, Justice Scalia, along with Justices Rehnquist, O’Connor, and Kennedy, did agree that the Eighth Circuit’s “single scheme” exclusion from RICO was improper. “[T]he Court is correct in saying that nothing in [RICO] supports the proposition that predicate acts constituting part of a single scheme (or single episode) can never support a cause of action under RICO.”⁸² Thus, all nine of the Justices of the Court agreed that single schemes of racketeering activ-

N.Y. TIMES, June 27, 1989, *available at* <http://www.nytimes.com/1989/06/27/business/broad-use-of-rico-is-upheld.html>).

79 *H.J. Inc.*, 492 U.S. at 254–55 (Scalia, J., concurring in judgment).

80 *Id.* at 255 (quoting *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985)).

81 *Id.* at 256. Justice Scalia’s invitation for a constitutional challenge to RICO’s pattern requirement spurred a wave of commentary. *See, e.g.*, G. Robert Blakey, *Is “Pattern” Void for Vagueness?*, CIV. RICO REP. 6, Dec. 12, 1989; Blakey & Perry, *supra* note 78, at 962 n.344 (“It is not possible to violate RICO without first violating one of its predicate offenses, not once, but at least twice. The line between guilt and innocence, which is at the heart of the void-for-vagueness doctrine, is drawn under RICO at the point of the predicate offense.”); Joseph E. Bauerschmidt, Note, “*Mother of Mercy—Is This the End of RICO?*”—Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO “Pattern”, 65 NOTRE DAME L. REV. 1106, 1164 (1990) (“Attempts to label RICO pattern void-for-vagueness should be rejected.”); David W. Garstenstein & Joseph F. Warganz, Note, *RICO’s “Pattern” Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 489 (1990) (arguing that RICO’s requirement is not void for vagueness and that judicial interpretation of ‘pattern’ is “consistent and sufficiently predictable to render the statute constitutional despite its extraordinary breadth”); Christopher J. Moran, Comment, *Is the “Darling” in Danger? “Void for Vagueness”—The Constitutionality of the RICO Pattern Requirement*, 36 VILL. L. REV. 1697, 1703 (1991) (predicting that the Court will eventually take up the issue and conclude that RICO’s pattern requirement is not void for vagueness in the criminal or civil context).

Ironically, earlier in the same term as *H.J. Inc.*, the Court addressed whether Indiana’s RICO analog statute was void for vagueness as applied to obscenity predicate offenses in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). The Court concluded that it was not, finding that because the RICO statute “totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either.” *Id.* at 58.

82 *H.J. Inc.*, 492 U.S. at 256 (Scalia, J., concurring in judgment).

ity could establish a RICO violation, and that the Eight Circuit's multiple scheme requirement was invalid.

III. THE REVIVAL OF THE "SINGLE SCHEME" EXCLUSION

Since *H.J. Inc.*, the courts have had relatively little difficulty in applying the "relationship" prong of the pattern analysis. The large majority of courts look directly to the guidance of *H.J. Inc.* and determine whether the predicate acts "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."⁸³

However, the same cannot be said for the continuity prong of *H.J. Inc.*, where the lower courts' approaches remain in disarray. Most of the differences can be attributed to the "flexible approach"⁸⁴ that the Court adopted in *H.J. Inc.* For example, courts are still in conflict about what factors are relevant to establishing closed-ended continuity⁸⁵ and what period of time is "substantial" enough to satisfy the

83 See Colman D. McCarthy, Note, *Criminal Relationships: Vertical and Horizontal Relatedness in Criminal RICO*, 86 WASH. U. L. REV. 1493, 1507–08 & n.103 (2009) (noting that the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits perform this analysis and citing cases); see also *United States v. Knight*, 659 F.3d 1285, 1289 (10th Cir. 2011) (noting that "unsurprisingly, most jurisdictions adopt the *H.J. Inc.* language" on relatedness and citing cases from the First, Fifth, and Ninth Circuits). The Second Circuit requires both "horizontal relatedness" (relation of the acts to one another) and "vertical relatedness" (relation of the acts to the enterprise), which in practice regularly overlap. See *United States v. Daidone*, 471 F.3d 371, 375 (2d Cir. 2006) ("[T]he requirements of horizontal relatedness can be established by linking each predicate to the enterprise, although the same or similar prong may also establish vertical relatedness."); see also *United States v. Basciano*, 599 F.3d 184, 202 (2d Cir. 2010) ("[P]redicate acts must be related, both to each other (horizontal relatedness) and to the enterprise (vertical relatedness) . . ."). The Third and Sixth Circuits also allow the relationship between predicate acts to be proven through a showing of relation to the enterprise. See *United States v. Irizarry*, 341 F.3d 273, 292 n.7 (3d Cir. 2003); *United States v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993); see also *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 795 (6th Cir. 2012) ("A particular defendant's predicate acts are not required to be interrelated with each other; instead, the predicate acts must be connected to the affairs of the criminal enterprise." (citing *United States v. Fowler*, 535 F.3d 408, 421 (6th Cir. 2008))).

84 *H.J. Inc.*, 492 U.S. at 238.

85 A majority of the circuits employ the explicit language of the Court in *H.J. Inc.*, simply looking for the presence of "a series of related predicates extending over a substantial period of time." See, e.g., *United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011); *U.S. Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 318 (4th Cir. 2010); *United States v. Burden*, 600 F.3d 204, 216–17 (2d Cir. 2010); *Brown v. Cassens Transp. Co.*, 546 F.3d 347, 354 (6th Cir. 2008); *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1028 (8th Cir. 2008); *United States v. Browne*, 505 F.3d

closed-ended standard.⁸⁶ Given the general nature of the Court's guidance, it is understandable that these differences persist. The Court

1229, 1259 (11th Cir. 2007); *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007); *Giuliano v. Fulton*, 399 F.3d 381, 387 (1st Cir. 2005); *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004).

The Tenth Circuit applies the Court's test but focuses primarily on the duration and extensiveness of racketeering activity. See *Tal v. Hogan*, 453 F.3d 1244, 1268 (10th Cir. 2006) ("To determine continuity we examine both the duration of the related predicate acts and the extensiveness of the RICO enterprise's scheme."); see also *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1543–44 (10th Cir. 1993) ("Under the rubric of 'extensiveness,' we consider a number of factors: the number of victims, the number of racketeering acts, the variety of racketeering acts, whether the injuries were distinct, the complexity and size of the scheme, and the nature of the enterprise or unlawful activity." (citations omitted)).

The Seventh Circuit continues to apply its multi-factor test from pre-*H.J. Inc.* when assessing continuity. See *Jennings v. Auto Meter Prods., Inc.*, 495 F.3d 466, 473 (7th Cir. 2007) ("[I]n determining whether there is continuity, '[r]elevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.'" (quoting *Morgan v. Bank of Waukegan*, 804 F.2d 970, 976 (7th Cir. 1986))). Additionally, they impose upon the closed-ended continuity analysis the requirement that criminal activity "carries with it an implicit threat of continued criminal activity," conflating the two prongs created by the Court in *H.J. Inc. Id.* at 473 (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1022–23 (7th Cir. 1992)).

In its most recent full discussion of the continuity prong, the D.C. Circuit applied a multi-factor test and gave great weight to the absence of multiple schemes. See *W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 633–37 (D.C. Cir. 2001) (affirming dismissal of an eight-year-long scheme of racketeering activity because the plaintiff only alleged "a single scheme, a single injury, and few victims" (citing *Edmonson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1265 (D.C. Cir. 1995))). See *infra* notes 96–119 for a greater analysis of the "single scheme" exclusion in the D.C. Circuit.

86 Contradictory findings for schemes of similar lengths of time have littered the RICO environment since *H.J. Inc. Compare Richmark Corp. v. Timber Falling Consultants, Inc.*, 730 F. Supp. 1525, 1533 (D. Or. 1990) (holding that the closed-ended continuity requirement was satisfied by seven months of racketeering activity), with *Newport Ltd. v. Sears, Roebuck & Co.*, 739 F. Supp. 1078, 1081 (E.D. La. 1990) (finding that ten months of mail and wire frauds did not satisfy the closed-ended continuity analysis), and *Airlines Reporting Corp. v. Aero Voyagers, Inc.*, 721 F. Supp. 579, 584–85 (S.D.N.Y. 1989) (finding that some fifty acts of mail fraud occurring across thirteen months were insufficient to prove closed-ended continuity).

Some circuits have adopted bright-line rules requiring a minimum duration of the racketeering activity for closed-ended continuity. See, e.g., *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1266 (11th Cir. 2004) ("[T]he *substantial* period of time requirement for establishing closed-ended continuity cannot be met with allegations of schemes lasting less than a year."); *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 181 (2d Cir. 2004) ("[T]his Court has never found a closed-ended pattern where the predicate acts spanned fewer than two years."); *Hughes v. Consol-*

sought to create a flexible framework, and even recognized that “the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance.”⁸⁷

However, one of the issues that persists in the lower courts is not a fruit of the Court’s lack of specific guidance in *H.J. Inc.* This problem is instead rooted in some courts’ failure to properly apply the *unambiguous* language of the Court in *H.J. Inc.* regarding what satisfies “closed-ended continuity.” Under the guise of applying *H.J. Inc.*’s framework, but against its express direction, courts have effectively reinstated the condemned single scheme exclusion to RICO’s pattern requirement.

The Court in *H.J. Inc.* explicitly rejected the Eighth Circuit’s rule that multiple schemes were the *sine qua non* of continuity.⁸⁸ But, notably absent from the Court’s opinion was any condemnation of the approach that treated the presence of multiple schemes as a factor in assessing continuity.⁸⁹ In fact, the Court’s statement that the presence of multiple schemes would “certainly be highly relevant” to the continuity analysis endorses such an approach.⁹⁰ Many courts read this language as the Court’s acceptance of a test which considers the number of schemes in determining whether a pattern exists.⁹¹ Conse-

Pennsylvania Coal Co., 945 F.2d 594, 611 (3d Cir. 1991) (“We hold that twelve months is not a substantial period of time.”).

87 *H.J. Inc.*, 492 U.S. at 243.

88 *Id.* at 236 (“We find no support in [the text and legislative history] for the proposition . . . that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes.”).

89 *See supra* notes 48–49 and accompanying text. *But see supra* note 61 (explaining how Justice Scalia interpreted the Court’s declaration that “scheme” had no basis in the text or legislative history to be a rejection of the concept of schemes “in all its applications”).

90 *H.J. Inc.*, 492 U.S. at 240.

91 *See, e.g.*, *W. Assocs. Ltd. P’ship v. Mkt. Square Assocs.*, 235 F.3d 629, 634 (D.C. Cir. 2001) (“[T]he number of schemes alleged remains a useful consideration.” (citing *H.J. Inc.*, 492 U.S. at 240)); *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 18 (1st Cir. 2000) (“[T]he fact that a defendant has been involved in only one scheme with a singular objective and a closed group of targeted victims . . . strikes us as ‘highly relevant.’” (citing *H.J. Inc.*, 492 U.S. at 240)); *U.S. Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1269 (7th Cir. 1990) (“[The Supreme Court’s decision in *H.J. Inc.*] does not mean that the fact that there is only one scheme involved is of no consequence to the ‘pattern’ determination.”); *Sutherland v. O’Malley*, 882 F.2d 1196, 1204 (7th Cir. 1989) (“While a RICO pattern can be established, in some circumstances, by proof of a single scheme, it is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.”). *But see Fleet Credit Corp. v. Sion*, 893 F.2d 441, 446 (1st Cir. 1990) (“[T]he Court [in *H.J. Inc.*] did not allude to the other *Morgan* factors, such as the number of victims or the variety of the acts. *H.J.*’s approach leads to the conclusion that a plaintiff who alleges a high number of

quently, these courts still consider whether the racketeering activity formed merely a single scheme or multiple schemes in analyzing the continuity prong.

Though consideration of the presence of multiple schemes as one of multiple factors is not *per se* improper,⁹² in some instances doing so contravenes the express guidance of *H.J. Inc.* Several lower courts fixate on the “highly relevant” language to exclude from RICO’s reach certain cases that meet the explicit *H.J. Inc.* standard for closed-ended continuity. *H.J. Inc.* held that continuity over a closed period of time may be demonstrated by showing “a series of related predicates extending over a substantial period of time.”⁹³ This includes “predicates within a single scheme that were related and that amounted to . . . continued criminal activity.”⁹⁴ Despite this *explicit* language, several courts, especially within the D.C. Circuit, have dismissed cases that have sufficient duration to meet the closed-ended standard⁹⁵ by relying heavily on the absence of “multiple schemes.”⁹⁶

related predicate acts committed over a substantial period of time establishes that those acts amount to continued criminal activity, irrespective of the other *Roeder/Morgan* factors.” (citation omitted); *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 883 F.2d 48, 51 (7th Cir. 1989) (“[W]e believe that the factors identified in *Morgan*—with the exception of our focus on the presence of separate schemes—are still useful in analyzing the pattern element.”).

92 *But see infra* notes 120–123 (explaining the argument that consideration of the presence or absence of multiple schemes was always improper, both before and after *H.J. Inc.*, based on the text and legislative history of RICO).

93 *H.J. Inc.*, 492 U.S. at 242.

94 *Id.* at 237.

95 This Note does not argue a bright-line period of time exists that satisfies *H.J. Inc.*’s standard of “substantial period of time.” Any true bright-line rule would interfere with the flexibility the Court desired to achieve. But, it does argue that (a) the time periods over which several of these “single scheme” exclusion cases extended are substantial; and (b) regardless of this, the courts engaging in this analysis are placing far too much weight on the absence of multiple schemes, such that the effective result is a single scheme exclusion.

96 *See, e.g.*, *W. Assocs. Ltd. P’ship v. Mkt. Square Assocs.*, 235 F.3d 629, 635 (D.C. Cir. 2001) (holding that a single scheme of racketeering activity across eight years was insufficient to prove continuity); *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 549–51 (4th Cir. 2001) (finding several acts of fraud across eighteen months designed to inflate company value before selling it to be insufficient for continuity and stating that “[w]here the fraudulent conduct is part of the sale of a single enterprise, the fraud has a built-in ending point, and the case does not present the necessary threat of long-term, continued criminal activity”); *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 17–21 (1st Cir. 2000) (finding that a single scheme of seventeen acts of racketeering across 21 months is insufficient for continuity and arguing that the Court’s emphasis on temporal factors “did not mean that other considerations were to be entirely ignored”); *Edmonson & Gallagher v. Alban Towers Tenants Ass’n*, 48

In performing their analysis of the closed-ended continuity, these courts regularly pay lip service to *H.J. Inc.*'s determination that a series of related acts over a substantial period of time is sufficient for closed-ended continuity.⁹⁷ But, instead of discussing whether the facts show a series of predicate acts occurring over a substantial period of time, these courts instead consider a range of factors, often giving inordinate weight to the absence of multiple schemes.

Some of these cases are objectionable merely because of the amount of weight they place on the absence of multiple schemes. For example, in *Anheuser Busch*, it is not entirely clear that seventeen months of racketeering activity would have met the Court's standard of "a series of related predicates extending over a substantial period of time."⁹⁸ However, the court did not explore this possibility, and in fact, did not even refer to this language.⁹⁹ Other cases are more troublesome, as they both employ a test that ignores the standard cre-

F.3d 1260, 1265 (D.C. Cir. 1995) (holding that fifteen predicate acts across three years had insufficient continuity and claiming that "the combination of these factors (single scheme, single injury, and few victims) makes it virtually impossible for plaintiffs to state a RICO claim"); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133–35 (6th Cir. 1994) (finding several acts of fraud, extortion, and obstruction of justice across seventeen months insufficient because it involved only "a single victim and a single scheme for a single purpose"); *U.S. Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266–69 (7th Cir. 1990) (finding seventeen months of mail and wire fraud offenses insufficient for a "pattern" because of the character of the offenses and the absence of multiple schemes); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 683–85 (4th Cir. 1989) (finding that several acts of commercial fraud across a year were insufficient to meet the continuity bar because the actions "were narrowly directed towards a single fraudulent goal" and "involved a limited purpose"); *Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 74–75 (D.D.C. 2009) (finding that a series of related acts across three years had insufficient continuity because they formed a "single scheme" and had only one victim); *Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104, 115 (D.D.C. 2009) (finding that even if the defendant's alleged scheme was construed to have lasted twenty four months, this "one scheme, spanning about two years, with only four identified victims" did not have the requisite continuity); *Zandford v. Nat'l Ass'n of Sec. Dealers, Inc.*, 19 F. Supp. 2d 4, 11 (D.D.C. 1998) (finding a single scheme of racketeering with one victim that continued for two years to have insufficient continuity).

97 See, e.g., *GE Inv.*, 247 F.3d at 549; *Efron*, 223 F.3d at 15–16; *Vemco*, 23 F.3d at 134. But see *Western Assocs.*, 235 F.3d at 636 (only mentioning the "substantial period of time" standard briefly when disposing of the plaintiff's argument and immediately redirecting attention to the *Edmonson* factors); *Edmonson*, 48 F.3d at 1264–65 (making no mention of *H.J. Inc.*'s standard for closed-ended continuity, but instead stating that "[t]he Court in *H.J.* offered few clues about what characteristics of a closed period would establish the requisite pattern").

98 See *supra* note 86 (discussing the uncertainty in analysis of a "substantial" period of time).

99 *Anheuser-Busch*, 911 F.2d at 1266–69.

ated by *H.J. Inc.* and reach a result that a proper application of *H.J. Inc.*'s test would contradict.

The most frequently cited case in this line of cases is *Edmonson & Gallagher v. Alban Towers Tenants Ass'n*.¹⁰⁰ *Edmonson* is the defibrillator that revived the "single scheme" exclusion, as almost every case that insulates single schemes from the reach of RICO cites it.¹⁰¹ In *Edmonson*, the plaintiff's plan to purchase an apartment complex was thwarted by a tenants' association through alleged tortious interference with contract, abuse of process, and malicious prosecution over a span of three years.¹⁰² At issue was whether the conduct formed a pattern for purposes of RICO. The court began its analysis by citing *H.J. Inc.* for the proposition that Congress intended for courts to take a "natural and commonsense approach to RICO's pattern element."¹⁰³ The court then purported to apply a multi-factor test, but noted that cases can arise in which "some factors will weigh so strongly in one direction as to be dispositive."¹⁰⁴ The court went on to dismiss the RICO claim, finding that "the combination of these factors (single scheme, single injury, and few victims) makes it virtually impossible for plaintiffs to state a RICO claim."¹⁰⁵ Conspicuously absent from the court's reasoning was any analysis of whether the plaintiff had alleged a series of acts continuing over a substantial period of time. Thus, the *Edmonson* court breathed life back into the single scheme exclusion to RICO's pattern requirement.

If *Edmonson* revived the single scheme exclusion, *Western Associates* rehabilitated it to its former strength.¹⁰⁶ In *Western Associates*, the plaintiff created a partnership to develop, own, manage, and ultimately dispose of a mixed-use property in downtown Washington,

100 48 F.3d 1260 (D.C. Cir. 1995).

101 See, e.g., *Western Assocs.*, 235 F.3d at 633; *Efron*, 223 F.3d at 19; *Lopez*, 657 F. Supp. 2d at 111.

102 *Edmonson*, 48 F.3d at 1262–64.

103 *Id.* at 1264. This broad, capacious language from the Court's decision in *H.J. Inc.* regularly serves as the leaping-off point for analysis in cases that appear to reimpose the single scheme exclusion. See, e.g., *Western Assocs.*, 235 F.3d at 633 (quoting *H.J. Inc.*, 492 U.S. at 237).

104 *Edmonson*, 48 F.3d at 1265. Ironically, the six-factor test that *Edmonson* cited, and purported to apply, made no mention whatsoever of the relevance of single or multiple schemes. *Id.* (noting that the Third Circuit's test considers "the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity" (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411–13 (3d Cir. 1991))).

105 *Id.*

106 *Western Assocs.*, 235 F.3d 629 (D.C. Cir. 2001).

D.C. The plaintiff filed suit against Market Associates (“Market”), his business partner in the venture, alleging that Market “repeatedly violated partnership agreements, transmitted fraudulent accounting statements, and stole the value of [plaintiff’s] partnership interest.”¹⁰⁷ The core of the allegations was that Market fraudulently misrepresented costs, profits, and economic viability, costing the plaintiff \$89 million in damages.¹⁰⁸ The plaintiff filed a RICO suit alleging racketeering activity that spanned across a period of *eight years*,¹⁰⁹ notably even longer than the six-year single scheme of racketeering activity found to satisfy closed-ended continuity in *H.J. Inc.*¹¹⁰

The court, citing *Edmonson*, found that the claim must fail because the plaintiff only alleged a single scheme, a single injury, and few victims.¹¹¹ Though it recognized the Supreme Court declared continuity to be “centrally a temporal concept,”¹¹² the court nonetheless found the eight-year time period not dispositive. The court then cautioned against “finding continuity too easily”¹¹³ in the context of wire and mail fraud cases because “[it is] the unusual fraud that does not enlist the mails and wires in its service at least twice.”¹¹⁴ Finally, the court closed by pronouncing, despite appearance to the contrary, that it was not creating a bright-line rule against single schemes.¹¹⁵

Though not all D.C. Circuit cases follow *Edmonson* and *Western Associates*,¹¹⁶ several district court cases in D.C. have followed suit on

107 *Id.* at 631.

108 *Id.*

109 *Id.*

110 *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 250 (1989).

111 *Western Assocs.*, 235 F.3d at 636.

112 *H.J. Inc.*, 492 U.S. at 242.

113 *Western Assocs.*, 235 F.3d at 636–37 (quoting *Efron v. Embassy Suites (P.R.)*, Inc., 223 F.3d 12, 20 (1st Cir. 2000)).

114 *Id.* at 637 (quoting *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000)).

115 *Id.* at 637 (“Neither the instant case nor *Edmonson* establishes a *per se* rule for RICO pattern analysis.”).

116 *See, e.g.*, *United States v. Wilson*, 605 F.3d 985, 1020–21 (D.C. Cir. 2010) (finding that a drug distribution ring of dealing spanning for sixteen months lasted a “substantial period of time” and therefore satisfied the closed-ended continuity standard); *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1117 (D.C. Cir. 2009) (performing only a cursory analysis of *H.J. Inc.*’s standard for a pattern and not citing *Western Associates* or *Edmonson* in its analysis). However, neither of these cases explicitly or implicitly rejected the *Edmonson* analysis, and subsequent cases continue to cite *Edmonson* and *Western Associates* when performing in-depth analyses of the pattern element. *See, e.g.*, *Feld Entm’t, Inc. v. Am. Soc’y for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288 (D.D.C. 2012) (applying the *Edmonson* test and finding that the 1000 alleged predicate acts across eight years and multiple victims and injuries distinguish the case from *Edmonson* and *Western Associates*).

the recreation of an exclusion of single schemes from the reach of RICO.¹¹⁷ These courts, applying the six-factor test set forth in *Edmonson*, tend not to cite the more explicit language of *H.J. Inc.* (that a series of related acts over a substantial period of time is sufficient to form a pattern)¹¹⁸ and give disproportionate at least, and dispositive at most, weight to the absence of multiple schemes. These courts justify their restrictive analysis of the pattern element in a familiar way: by voicing a preference against interpreting mail and wire fraud to be patterns.¹¹⁹

Several concerns arise from the practice of excluding cases from RICO because they lack “multiple schemes.” First, the plain text of RICO makes no reference to the relevance of multiple schemes.¹²⁰ The plain meaning of the term “pattern” does not connote a requirement of separate and distinct schemes.¹²¹ In other contexts, the

117 See, e.g., *Harpole Architects, P.C. v. Barlow*, 668 F. Supp. 2d 68, 74–75 (D.D.C. 2009) (finding that “a single series of acts over three years” was insufficient to satisfy the pattern requirement as set forth *Edmonson*); *Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104, 115 (D.D.C. 2009) (finding “one scheme, spanning about two years, with only four identified victims” to lack the requisite continuity under D.C. Circuit precedent); *Zandford v. Nat’l Ass’n of Sec. Dealers, Inc.*, 19 F. Supp. 2d 4, 11 (D.D.C. 1998) (finding that six predicate acts across two years in furtherance of a single scheme of using the regulatory and disciplinary authority of the National Association of Securities Dealers to harm the plaintiff’s business and reputation lacked the requisite continuity required by *Edmonson*).

118 Neither *Harpole*, *Lopez*, nor *Zandford* makes any reference whatsoever to the Supreme Court’s language that “a series of related predicates extending over a substantial period of time” demonstrates closed-ended continuity.

119 See, e.g., *Lopez*, 657 F. Supp. 2d at 114 (“RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it.” (citing *Western Assocs.*, 235 F.3d at 637)).

120 See *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (noting that the concept of a scheme “appears nowhere in the language or legislative history of the Act”); see also *United States v. Ianniello*, 808 F.2d 184, 192 n.16 (2d Cir. 1986) (“[T]he multiple scheme requirement is not grounded in the statutory language of RICO.”).

121 A “pattern” is defined as “a regular and intelligible form or sequence discernible in the way in which something happens or is done.” OXFORD DICTIONARIES, oxforddictionaries.com/definition/english/pattern (last visited Mar. 18, 2013). Absent from this definition is any indication, explicit or implicit, that multiple “schemes” could be relevant in any way. If anything, multiple schemes would detract from the presence of a pattern, as the “regular and intelligible form or sequence” would become less and less discernible as the number of schemes grew. See *infra* note 129. Several attempts by the judiciary have been made to articulate exactly what the plain meaning of a pattern is. See, e.g., *Apparel Art Int’l, Inc. v. Jacobson*, 967 F.2d 720, 722 (1st Cir. 1992) (Breyer, C.J.) (“[T]here are many words best defined by, say, pointing to examples (consider the color ‘red’) or simply by using them in different relevant contexts. And, it sometimes helps more to say what lies beyond a word’s

Court has consistently rejected attempts by the lower courts to read into RICO limitations that do not derive from its language.¹²² Further, no basis for the multiple schemes requirement can be found in the legislative history of RICO.¹²³

Given the complete absence of “scheme” in the text and legislative history of RICO, the argument could be made that consideration of the presence of multiple schemes is *per se* improper, both before and after *H.J. Inc.* However, given the Court’s declaration that the presence of multiple schemes could be “highly relevant”¹²⁴ to the continuity inquiry, this is a difficult argument. This language, paired with *H.J. Inc.*’s failure to reject multi-factor approaches that considered the presence of multiple schemes, can reasonably be interpreted as an implicit endorsement of the *general* practice of considering the presence of multiple schemes in assessing continuity.

However, the problem is that cases that meet the Court’s explicit standard for closed-ended continuity are being dismissed based on *H.J. Inc.*’s less-specific, arguably vacuous language. To whatever extent multiple schemes are “highly relevant” to the continuity inquiry, the absence of multiple schemes ought not result in dismissing a case presenting “a series of related predicates extending over a substantial period of time.”¹²⁵ The Court’s intention to create

conceptual scope than to provide an alternative verbal formulation of what lies within.”); *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989) (“The temptation thus is to yield to a criterion that is based on ‘I-know-it-when-I-see-it,’ but that can hardly be useful in measuring the adequacy of a complaint. In a common sense understanding, one recognizes a pattern on wallpaper, for example, which is being unrolled, when he has seen enough to discern repetition and to anticipate similar images on the paper were it to be unrolled further. . . . Pattern in th[is] example[] is thus a relationship of multiple images or points from which one can discern a larger order of repetition or predict that which is yet undefined.”). Professor Robert Blakey, the architect of RICO, explained vividly the intuitive nature of the word pattern: “[A]ny aficionado of football who watched Joe Montana and John Elway pass knew, without having to have it explained to him or her, that Montana passed in a ‘pattern,’ while Elway improvised most of the time.” G. Robert Blakey, *Time Bars: RICO—Criminal and Civil—Federal and State*, 88 NOTRE DAME L. REV. (forthcoming 2013).

122 See *supra* note 48.

123 See Goldsmith, *supra* note 26, at 986 (“The multiple scheme requirement also finds no support in [RICO’s] legislative history.”); Sally P. Everett Williamson, *RICO’s Pattern of Racketeering Activity and Sedima, S.P.R.L. v. IMREX Co., Inc.: Relationship and Continuity in the Circuit Courts*, 8 ANN. REV. BANKING L. 609, 629 (1989) (“The difficulty to the plaintiff in having to allege and prove multiple schemes of activity would defeat Congress’ intent in enacting RICO.”).

124 *H.J. Inc.*, 492 U.S. at 240.

125 *Id.* at 230.

a “natural and commonsense”¹²⁶ framework for the pattern element was not intended to give the lower courts carte blanche to devise their own analyses for the pattern element. Even if the Court’s test merely directed that “life is a fountain,” as Justice Scalia suggested,¹²⁷ this would presumably still preclude the lower courts from concluding that “life is a highway.”

Though the Court assuredly did intend a flexible approach, it intended it to be flexible *within the bounds of the framework it created*. Applying a framework other than that of the Court is itself questionable behavior for lower courts to engage in,¹²⁸ but certainly applying its own framework in a way that defies the plain guidance of the Court is inappropriate.

Moreover, from a practical perspective, the “multiple schemes” requirement, *and even the consideration of multiple schemes*, is illogical. In the context of the framework the Court created, requiring multiple schemes for a pattern would have the enigmatic effect of excluding all cases. If there were similar purposes, results, participants, victims, etc., the requirement of multiple schemes under the continuity prong would exclude the case. But, if there were separate victims, participants, purposes, etc., then the facts would no longer satisfy the relationship prong.¹²⁹ The existence of this anomaly does not cease to

126 *Id.* at 237.

127 *Id.* at 252 (Scalia, J., concurring).

128 The Seventh and D.C. Circuits continue to apply multi-factor tests from prior to *H.J. Inc.* in analyzing closed-ended continuity. *See supra* note 85. These frameworks differ from the Court’s analysis in *H.J. Inc.* both in their overvaluation of factors which the court in *H.J. Inc.* did not include in its explicit framework (such as separate schemes, number of victims, distinctness of injuries) and their undervaluation of factors that the Court did explicitly include (that a series of related acts over a substantial period of time is sufficient). Given that the Supreme Court intended a “flexible,” “natural and commonsense” approach to RICO’s pattern element, infusing other factors into the analysis—even those to which the Court did not specifically refer—does not seem improper. *H.J. Inc.*, 492 U.S. at 237, 238. But, the Court’s statement that a series of related acts over a substantial period of time is sufficient for closed-ended continuity would seem to qualify as part of its “holding.” *See, e.g.*, BLACK’S LAW DICTIONARY 800 (9th ed. 2009) (defining “holding” as a “court’s determination of a matter of law pivotal to its decision”); *Tate v. Showboat Marina Casino P’ship*, 431 F.3d 580, 582 (7th Cir. 2005) (Posner, J.) (“[T]he holding of a case includes, besides the facts and the outcome, the reasoning essential to that outcome.”). Consequently, courts that have failed to consider this component in their analysis, *see supra* note 118 and accompanying text, are violating the principle of *stare decisis*.

129 *See Lewis v. Sporck*, 646 F. Supp. 574, 581 n.7 (N.D. Cal. 1986) (“[The] defendants’ theory [that multiple fraudulent efforts are required] would force plaintiff to steer between the Scylla of pleading multiple ‘fraudulent efforts’ and the Charybdis of pleading ‘related, non-isolated’ criminal acts.”); Goldsmith, *supra* note 26, at 987

exist because the *Edmonson* and *Western Associates* courts insist that they are not applying a bright-line rule.¹³⁰ This claim rings hollow against the backdrop of cases involving over eight years of racketeering activity.

Finally, as the Court recognized in *H.J. Inc.*, introducing the concept of a scheme into an already confusing analysis has the added effect of further muddying the water with more ambiguous terminology.¹³¹ The concept of a scheme is exceedingly vague, and very susceptible to judicial stretching or contracting to fit a gut instinct about if the case should or should not be a RICO one.¹³² Moreover, the practical consequence of the D.C. Circuit's emphasis on multiple schemes has been to force plaintiffs to attempt to plead multiple schemes, not a pattern.¹³³ Forcing plaintiffs to jump through hoops to specifically plead something that the Court unmistakably found unnecessary to the presence of a pattern could not be what the Court in *H.J. Inc.* intended.

("Continuity and relationship, however, are potentially mutually exclusive concepts under a multiple scheme test. To the extent that a complaint alleges multiple schemes, it becomes more difficult to allege the requisite 'relationship' factor; however, when a close relationship between predicates is alleged, the events are more prone to be characterized as merely a single scheme."); Huestis, *supra* note 26, at 646 (arguing that the approach requiring multiple schemes "strains the balance created by the concepts of relationship and continuity and, in fact, often places them in direct tension").

130 See *Edmonson & Gallagher v. Alban Towers Tenants Assoc.*, 48 F.3d 1260, 1265 (D.C. Cir. 1995); *W. Assocs. Ltd. P'ship v. Mkt. Square Assocs.*, 235 F.3d 629, 637 (D.C. Cir. 2001).

131 See *H.J. Inc.*, 492 U.S. at 241 n.3 (noting that scheme is "hardly a self-defining term" and expressing the desire to avoid "introducing a new and perhaps more amorphous concept into the analysis" (citing *Barticheck v. Fid. Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987))).

132 See Goldsmith, *supra* note 26, at 984 ("[Under the multiple scheme requirement] the application of RICO then turns on how a court chooses to characterize the crime or crimes at issue. Presumably, 'good' RICO cases would be viewed as multiple schemes, and 'bad' RICO cases would be rejected as 'mere' single schemes. A standard so prone to result-oriented decisions is no standard at all.").

133 See, e.g., *Western Assocs.*, 235 F.3d at 631–32 (explaining how after the plaintiff's original pleading was amended, they simply replead the same facts but structured them in four separate schemes); *Feld Entm't, Inc. v. Am. Soc. for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 311–12 (D.D.C. 2012) (describing how plaintiffs argued that the amended complaint alleged three separate schemes while the defendants argued the activities amounted to one overarching scheme); see also Goldsmith, *supra* note 26, at 988 ("RICO defendants are motivated to generalize the allegations against them, and plaintiffs artificially attempt to splinter each claim into a multiplicity of schemes.").

The justification most commonly given for the single scheme exclusion is that it effectuates a preference “against finding continuity too easily in the context of a single dishonest undertaking involving mail or wire fraud”¹³⁴ Courts have expressed concern that “[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are ‘related’ by purpose and spread over a period of at least several months.”¹³⁵ Though the Supreme Court was undoubtedly aware of concerns about RICO’s extraordinary breadth at the time of *H.J. Inc.*,¹³⁶ no part of its test for closed-ended continuity accounts for this factor. Had the Court intended to set a loftier bar for RICO suits predicated on mail and wire fraud cases, the framework set forth in *H.J. Inc.* certainly would have mentioned it. Judicial attempts to circumscribe RICO’s application in typical business disputes and fraud cases have been addressed by the Supreme Court several times, and the Court has resoundingly rejected each of them.¹³⁷

To reiterate, the consideration of multiple schemes is not *per se* wrong, and many courts that consider this factor in their analysis do so faithfully to *H.J. Inc.*¹³⁸ What is problematic is the effective re-imposi-

134 *Efron v. Embassy Suites (P.R.), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000); *see also* *GE Inv. Private Placement Partners v. Parker*, 247 F.3d 543, 549 (4th Cir. 2001) (“We are ‘cautious about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice.’” (quoting *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000))); *U.S. Textiles, Inc. v. Anheuser-Busch Cos., Inc.*, 911 F.2d 1261, 1268 (7th Cir. 1990) (“Mail fraud and wire fraud are perhaps unique among the various sorts of ‘racketeering activity’ possible under RICO in that the existence of a multiplicity of predicate acts . . . may be *no* indication of the requisite continuity of the underlying fraudulent activity.” (emphasis added) (quoting *Sutherland v. O’Malley*, 882 F.2d 1196, 1205 n.8 (7th Cir. 1989))); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 685 (4th Cir. 1989) (“If the pattern requirement has any force whatsoever, it is to prevent this type of ordinary commercial fraud from being transformed into a federal RICO claim.”).

135 *U.S. Textiles*, 911 F.2d at 1268 (citation omitted).

136 *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985) (“We . . . recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. . . . The ‘extraordinary’ uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud . . .”).

137 *See supra* note 48 (listing cases rejecting unprincipled limitations to RICO not inhering in its text).

138 *See, e.g., Companhia Brasileira Carbureto de Calcio-CBCC v. Applied Indus. Materials Corp.*, Nos. 01-646, 01-2678, 2012 WL 3553750, at *12 (D.D.C. 2012) (finding that a single scheme of price-fixing and elimination of competition that featured fifty-seven predicate offenses across ten years was sufficient to plead the pattern requirement); *Feld Entm’t Inc. v. Am. Soc. for the Prevention of Cruelty to Animals*, 873 F. Supp. 2d 288, 313 (D.D.C. 2012) (applying the *Edmonson* test and finding that

tion of the multiple schemes requirement, especially when it excludes from RICO's reach cases that satisfy the express language of *H.J. Inc.* That this multiple schemes requirement comes cloaked in the broader language of *H.J. Inc.* does not make it any more acceptable.

Accordingly, courts that continue to impose the multiple schemes requirement on RICO's pattern requirement should alter their approach to comply with the letter and spirit of the Court's opinion in *H.J. Inc.* The Court set forth a framework to bring consistency to RICO's pattern analysis. That framework established that predicate acts extending over a substantial period of time are sufficient to show closed-ended continuity. Though this standard may make courts that are concerned with RICO's applicability to run-of-the-mill fraud cases uncomfortable, it is not their province to circumvent the Court's explicit direction to achieve their desired end. *H.J. Inc.* set forth a flexible, malleable framework for analysis that left ample wiggle room for courts to include or remove cases from RICO's reach. Inconsistencies and reasonable disagreement among the lower courts will inevitably persist as to some components of the pattern analysis,¹³⁹ purely as a function of this type of standard-based, rather than rule-based, framework. However, failing to consider the Court's standard and giving near dispositive weight to a factor the Court rejected fall beyond reasonable disagreement.

An alternative solution, given the continuity of "continuity" confusion in the lower courts,¹⁴⁰ would be for the Court to grant certiorari on another RICO pattern case and adjust or replace its previous guidance from *H.J. Inc.* Clarifying a previous discussion of an element of RICO is not something the Roberts Court is averse to doing, as in 2006 it took up *Anza v. Ideal Steel Supply Corp.*¹⁴¹ to adjust the proximate cause requirement for RICO that it had previously delineated,¹⁴² and in 2009 it took up *Boyle v. United States*¹⁴³ to refine its analysis of the "enterprise" element.¹⁴⁴ Reexamining the pattern requirement of RICO would give the Court an opportunity to construct a more easily

the 1000 alleged predicate acts across eight years and multiple victims and injuries distinguish the case from *Edmonson* and *Western Associates*).

139 See *supra* notes 83–86 and accompanying text (discussing disagreement in the lower courts regarding what factors to consider for the continuity prong and what period of time is "substantial" enough to satisfy closed-ended continuity).

140 See *supra* notes 84–96 and accompanying text (discussing problems in the lower courts in analyzing the continuity prong of the "pattern" analysis).

141 547 U.S. 451 (2006).

142 *Id.* at 461.

143 556 U.S. 938 (2009).

144 *Id.* at 947–49 (expanding upon *United States v. Turkette*, 452 U.S. 576 (1981), and holding that, while an enterprise must have some ascertainable "structure," there

applicable standard, or to clarify the existing standards, with the added benefit of twenty-three years of hindsight since *H.J. Inc.* That said, it could also disrupt whatever development of the “continuity plus relationship” standard has transpired since *H.J. Inc.* Furthermore, given the intuitive and abstract meaning of a “pattern,”¹⁴⁵ judicial attempts to formulate a more precise definition may simply be a fool’s errand.

Specifying what exactly a “pattern” is, and rejecting any exclusion based on a single scheme, remains a task better suited for Congress than the courts.¹⁴⁶ The Court in *H.J. Inc.* invited this type of intercession,¹⁴⁷ but ensuing attempts to refine or reform RICO floundered.¹⁴⁸ Should Congress wish to clarify what a “pattern” requires in a meaningful way, consulting the “little RICO” statutes of states¹⁴⁹ could be of assistance. While the majority of “little RICO” statutes do not define “pattern” in a way that could solve the inconsistencies in federal RICO jurisprudence,¹⁵⁰ several states’ definitions codify a more precise defi-

need not be any structural attributes beyond those inherent in the language of RICO).

145 See *supra* note 121.

146 Advising a more appropriate statutory definition for a “pattern of racketeering activity” is beyond the scope of this Note.

147 492 U.S. 229, 243 (1989) (“The development of these concepts must await future cases, *absent a decision by Congress to revisit RICO* to provide clearer guidance as to the Act’s intended scope.” (emphasis added)).

148 See Barsoomian, *supra* note 26, at 941–45 (discussing the provisions of the RICO Reform Act of 1989 and RICO Amendments Act of 1990).

149 Thirty-five United States jurisdictions now have “little RICO” statutes. See Blakey, *supra* note 121 (listing the states that have adopted RICO analog statutes).

150 The bulk of “little RICO” statutes utilize the concept of a “pattern.” These statutes often include in their definitional section that a “pattern” requires some relationship between the acts, and that the acts must have occurred within a certain time period of one another, but rarely address what degree of continuity the predicate acts must have. See, e.g., CAL. PENAL CODE § 186.2(b)(1)(A) (West 1999 & Supp. 2012) (requiring two incidents that are not isolated events that have “the same or a similar purpose, result, principals, victims, or methods of commission”); COLO. REV. STAT. ANN. §§ 18-17-103(3) (West 2004 & Supp. 2011) (requiring two acts of racketeering activity related to the conduct of the enterprise within ten years of one another); CONN. GEN. STAT. ANN. § 53-394(e) (West 2007 & Supp. 2012) (requiring at least two incidents that are related and not isolated occurring within five years of one another); FLA. STAT. ANN. § 895.02(4) (West 2000 & Supp. 2012) (requiring at least two incidents that are related and occurring within five years of one another); IDAHO CODE ANN. § 18-7803(d) (2004) (requiring at least two related incidents that are not isolated events within five years of one another). Congressional adoption of a definition similar to these would provide little assistance to courts in assessing what degree of continuity a “pattern” requires.

dition in a way that comports with federal RICO's "relationship plus continuity" aim.¹⁵¹

CONCLUSION

The meaning of RICO's "pattern of racketeering activity" requirement has been notoriously difficult to establish. *Sedima's* reference to "continuity plus relationship" spawned deep disagreement in the lower courts as to what constituted a "pattern of racketeering activity." Though *H.J. Inc.'s* guidance did solve some of the inconsistencies in the lower courts, other differences persist because of the flexible nature of the direction the Court provided. But, if there was one thing that the Court in *H.J. Inc.* was clear about, it was the rejection of the multiple schemes requirement. All nine members of the Court rejected the requirement of multiple schemes for a pattern to be present. Though the Court noted that the presence of multiple schemes was not irrelevant to the pattern inquiry, it set forth a framework that

Several "little RICO" statutes have omitted the term "pattern," instead just discussing whether "racketeering" or "racketeering activity" was present. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-2312(B) (2010 & Supp. 2011) ("A person commits illegally conducting an enterprise if such person is employed by or associated with any enterprise and conducts such enterprise's affairs through racketeering or participates directly or indirectly in the conduct of any enterprise that the person knows is being conducted through racketeering."); HAW. REV. STAT. ANN. § 842-2 (LexisNexis 2007 & Supp. 2011) (omitting the term pattern, using simply "racketeering activity"); NEV. REV. STAT. ANN. § 207.400 (LexisNexis 2006 & Supp. 2011) (same). Congressional removal of the term "pattern" would seem to be jumping out of the frying pan and into the fire, as finding what frequency and duration of predicate acts constitute "racketeering activity" would likely be even more difficult.

151 *See, e.g.,* DEL. CODE ANN. tit. 11, § 1502(5) (2007) (requiring two or more incidents of racketeering activity within ten years that are related to the affairs of the enterprise but "not so closely related to each other and connected in point of time and place that they constitute a single event"); MINN. STAT. ANN. § 609.902 (West 2009 & Supp. 2012) (defining "pattern" as three or more criminal acts within ten years that "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"); N.Y. PENAL LAW § 460.10(4) (McKinney 2008 & Supp. 2012) (defining pattern as three or more criminal acts within ten years that are "neither isolated incidents, nor so closely related and connected in point of time or circumstance of commission as to constitute a criminal offense or criminal transaction"); OHIO REV. CODE ANN. § 2923.31(E) (LexisNexis 2010) (defining "[p]attern of corrupt activity" to mean two or more incidents of corrupt activity, related to the same enterprise, that are not isolated and are "not so closely related to each other and connected in time and place that they constitute a single event"). These definitions of a "pattern" align better with the intuitive meaning of a pattern, as they recognize that a single event featuring multiple crimes could not form a pattern, but do not exclude the possibility that a single criminal scheme could. *See supra* note 121.

gave more explicit guidelines as to what did constitute a pattern. In particular, the Court held that the continuity prong of the pattern analysis may be proven by a showing of a series of predicates extending over a substantial period of time.

Fixating their analysis on the more nebulous components of the Court's opinion, lower courts are circumventing the explicit language of the Court and have effectively recreated a single scheme exclusion to RICO's pattern requirement. The effect has been to exclude from RICO's grasp cases that satisfy its text, explicated by the Court in *H.J. Inc.* These attempts are primarily motivated by a desire to exclude business fraud cases from RICO. However, the Court has uniformly rejected similar limitations on RICO's applicability not derived from its text. Moreover, the multiple schemes requirement is without basis in RICO's text, legislative history, or the intuitive meaning of a "pattern." In sum, lower courts that are giving excessive weight to the absence of multiple schemes should jettison this practice to give a more faithful application to the Court's word in *H.J. Inc.*

