Loyola University Chicago Law Journal

Volume 31
Issue 4 *Summer 2000*

Article 4

2000

RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking

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I. INTRODUCTION

In interpreting the Racketeer Influenced and Corrupt Organizations Act (RICO), the United States Supreme Court has not utilized a coherent jurisprudence that would produce consistent results when faced with unclear[1] criminal statutes. The failure of the Supreme Court to engage in a consistent jurisprudence, or to recognize the undefined nature of RICO's statutory language,[2] has resulted in the almost unlimited reach of RICO. The Court's inconsistent jurisprudence could further encourage Congress to promulgate unclear criminal statutes and thereby delegate power to the judiciary to define rules of criminal law.[3] This Article will discuss the criminal aspects of RICO as part of a broader analysis of how courts should respond when Congress enacts unclear criminal statutes.

This Article presents three possible approaches to the problem of unclear criminal statutes. The first, a common law approach, directs

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1. I use the term "unclear" as a synonym for "indeterminate" in referring to statutes that are vague and/or ambiguous. *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 512 (1994) (commenting that the term "indeterminacy" includes the three distinct terms, "ambiguity," "contestability," and "vagueness").

2. *See infra* Part III (discussing the Supreme Court's incoherent approach to interpreting RICO).

3. *See* Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, 61-WTR L. & CONTEMP. PROBS. 47, 47 (1998) ("Once content to leave the bulk of criminal lawmaking to the states, Congress now reacts convulsively to every species of wrongdoing that captures public attention, whether it be carjacking, child molestation, or celebrity stalking."). Moreover, many states enact criminal statutes that model similar federal statutes. *See* Jason D. Reichelt, Note, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 225 (1995) (noting that 29 states have enacted their own RICO statutes, with only minor changes from federal RICO, since Congress passed RICO in 1970).

courts to recognize and affirm Congress' express delegation of lawmaking authority in federal criminal law.[4] The second, an administrative law approach, directs the executive branch of the federal government to be responsible for defining the operative rules of federal criminal law.[5] The third, a legislative supremacy approach, requires the courts to apply the judicial doctrines of unconstitutional vagueness and the rule of lenity, thus placing the onus on Congress to enact statutes that are clear.[6]

This Article argues for the third approach. The legislative supremacy approach promotes democracy by forcing the most politically accountable branch of government, Congress, to resolve the difficult and controversial issues of criminal lawmaking instead of delegating those issues to a less politically accountable branch. This approach also comports with the traditional American view of criminal lawmaking and with the Supreme Court's preference for employing traditional methods of statutory interpretation, as well as its reluctance to assume criminal law rulemaking power.

As part of the legislative supremacy approach, two separate doctrines, both aspects of due process,[7] would be used more vigorously as nondelegation doctrines to force Congress to shoulder the burden of criminal lawmaking. First, the rule of lenity[8] would guide interpretation of criminal statutes by directing courts to construe criminal statutes narrowly and would mandate that a court elect the narrower of two possible interpretations of the statute if that interpretation is plausible. Second, the void-for-vagueness doctrine[9] would be used when the statutory standards are so unclear that courts cannot apply a criminal statute without engaging in common law rulemaking.[10]

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4. *See infra* notes 51-59 and accompanying text (discussing the common law approach to interpreting unclear criminal statutes).

5. *See infra* notes 60-71 and accompanying text (discussing the administrative law approach to interpreting unclear criminal statutes).

6. *See infra* notes 72-80 and accompanying text (discussing the legislative supremacy approach to interpreting unclear criminal statutes).

7. *See* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471 (1989). Sunstein notes that "[t]he due process clause provides a constitutional basis for the rule of law ideal. The most celebrated aspect of this general idea is the rule of lenity, which leads courts to resolve ambiguities favorably to the criminal defendant." *Id.*

8. *See infra* notes 122-47 and accompanying text (discussing the rule of lenity).

9. *See infra* notes 211-47 and accompanying text (discussing the void-for-vagueness doctrine).

10. The Supreme Court has recently indicated its approval of these related doctrines. In *United States v. Lanier*, 520 U.S. 259 (1997), the Court described the "three related manifestations of the fair warning requirement" of due process. *Id.* at 266. The Court said that the first of these manifestations is the vagueness doctrine; the second, described as a "junior version of the vagueness doctrine," is the rule of lenity; and the third is that "due process bars courts from ap-

This Article contends that, despite Congress' delegation of lawmaking authority to it, the Supreme Court has not engaged in a coherent interpretive jurisprudence when confronted with the task of making sense out of the confusion of RICO's statutory language. It is time for the Court to recognize that Congress has enacted an unclear criminal statute and explicitly choose an interpretive approach to effectively deal with the problem.

II. THREE APPROACHES TO UNCLEAR CRIMINAL STATUTES

A. RICO as an Unclear Statute

RICO was enacted as Title IX of the Organized Crime Control Act of 1970.[11] As defined in § 1962, RICO punishes three types of conduct: (1) acquisition of an "enterprise" with money derived from a "pattern of racketeering activity;"[12] (2) acquisition of an "enterprise" through a "pattern of racketeering;"[13] and (3) operation of an enterprise through

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plying a novel construction of a criminal statute to conduct that neither the statute nor any other judicial decision has fairly disclosed to be within its scope." *Id.* (quoting H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 95 (1968)). As discussed in Part III, however, the Court does not apply these principles consistently.

11. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1999).

12. Section 1962(a) reads:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or though 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 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) (1994).

13. Section 1962(b) reads "[i]t 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." *Id.* § 1962(b).

a "pattern of racketeering."[14] As defined in § 1961(5),[15] a "pattern of racketeering activity" is established when the accused commits at least two acts of racketeering activity within ten years of one another. The definition of "racketeering activity" in § 1961(1) includes a number of federal offenses and state crimes.[16] An "enterprise" is an amorphous,

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14. Section 1962(c) reads:

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

Id. § 1962(c).

Section 1962(c) is by far the most often used of the substantive RICO offenses. The Eleventh Circuit, in *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), defined the substantive elements required to prove a RICO violation as follows:

> (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendant was employed by or associated with the enterprise; (4) that he participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that he participated through a pattern of racketeering activity . . . .

Id. at 1323.

15. Section 1961(5) provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1994).

16. Section 1961(1) provides that:

> [R]acketeering activity means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions) . . . section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement) . . . section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses) . . . sections 2314 and 2315 (relating to interstate transportation of stolen property) . . . sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 . . . fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled or listed chemical (as defined in section 102 of the Controlled Substances Act) punish-

all inclusive concept that is defined in § 1961(4).[17]

RICO is an example of a statute that provides for compound liability.[18] Unlike most criminal statutes, RICO's crimes have no delineated physical form.[19] In contrast to traditional crimes like burglary and murder, RICO does not define and prohibit particularly described types of conduct.[20] Instead, RICO "is defined in terms of abstract relationships: the 'enterprise' is a structure of relationships among individuals or entities, and the 'pattern of racketeering' is a form of relationship among crimes."[21] Because RICO, as drafted, is such a broad and abstract statute, it is capable of extending to a number of different types of conduct in a wide range of circumstances.

From its inception, RICO has ignited controversy.[22] Most

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able under any law of the United States . . . .

18 U.S.C.A. § 1961(1) (West 1984 & Supp. 1999).

17. "Enterprise" is defined in § 1961(4), as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1994).

18. Other examples of federal, compound criminal statutes include the Continuing Criminal Enterprise statute (CCE), 21 U.S.C.A. § 848 (West 1999), the Gambling Business statute, 18 U.S.C. § 1955 (1994), and the Continuing Financial Crimes Enterprise statute, 18 U.S.C. § 225 (1994). For a discussion of the growing prominence of compound liability in federal criminal law and its affect on traditional precepts of criminal law, see Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239 (1993); *see also* Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 YALE L.J. 2277, 2278 (1995) (arguing that "the recent advent of the compound-complex criminal statute, with its novel definitions of crime and its elements, has strained the limits of criminal procedure and effectively taken the right to a unanimous verdict away from a large and growing class of federal criminal defendants").

19. *See* Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 777 (1990).

20. *See id.*

21. *Id.*

22. *See, e.g.*, Christopher J. Moran, Comment, *Is the "Darling" in Danger? "Void for Vagueness"—The Constitutionality of the RICO Pattern Requirement*, 36 VILL. L. REV. 1697, 1697 n.4 (1991) (stating that the National Association of Manufacturers, the American Civil Liberties Union, the United States Chamber of Commerce, the AFL-CIO, the American Institute of Certified Public Accountants, the Securities Industry Association, the American Bankers Association, the Independent Bankers Association of America, the Future Industries Association, the American Council of Life Insurance, the Credit Union Nation Association, the Grocery Manufacturers of America, the National Automobile Dealers Association, the State Farm Insurance Companies, the Alliance of American Insurers, and the American Financial Services Association have all called for reform of RICO); *Can RICO be Reformed?*, RICHMOND TIMES-DISPATCH, Nov. 6, 1989, at A16 (proposing that RICO be repealed); *Giuliani's Legacy*, WALL ST. J., Oct. 25 1989, at A18 (stating that "only the complete repeal of RICO can guarantee an end to injustices in its name"); *It's Time to Rescind RICO*, L.A. TIMES, Aug. 16, 1989, at B6 (arguing that "RICO's widening application in an astonishing array of cases makes it imperative that Congress erase this law from the books").

commentators believe that RICO's statutory terms are unclear.[23] Recognizing the statute's vagueness, courts have occasionally indicated sensitivity to possible governmental abuse of the RICO statute.[24] In an early RICO case, *United States v. Anderson*,[25] the court warned that "[b]road interpretation and simplistic resolution of the complicated statutory language pose the danger of enhancing [RICO's] popularity beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."[26]

Some scholars have called for the repeal or substantial reform of RICO because it has been used in a much broader fashion than Congress originally intended and the gap between the legislative goals of RICO and its practical impact is significant.[27] It has been argued that the main reason for the broad use of RICO is "the elasticity of RICO's limiting principles of 'predicate' acts, a 'pattern' of racketeering conduct, and an involved 'enterprise.'"[28] One commentator argues that:

> While these terms were meant to distinguish between the common criminal and the organized criminal, they were not equal to the task. Accordingly, RICO's perceived and actual overbreadth can be traced

23. *See, e.g.*, Tabas v. Tabas, 47 F.3d 1280, 1290 (3d Cir. 1995) (commenting that "[i]f we examine the language of the statute itself, in an attempt to discern the scope of civil RICO, we find ourselves lost in a land with few signposts"); *In re* Dow Co. "Sarabond" Products Liability Litigation, 666 F. Supp. 1466, 1471 (D. Colo. 1987) (commenting that "RICO is just . . . a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud"); Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 815 (1990) (noting that while the legislative history of RICO demonstrates that Congress wanted to limit its application by using terms like "enterprise," "pattern," and "racketeering activity," courts have interpreted these terms broadly such that their limiting effect is minimal); Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (arguing that RICO's definitions are tautological and "accomplish little more than to grant authority to prosecutors and judges to shape the contours of the law"); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 294 (1983) (arguing that "the scope of the RICO statute has been expanded far beyond what was intended by Congress"); Peter Skomorowsky, Comment, *Is This the End of Big RICO? Comment on Justice Scalia's Concurring Opinion in H.J. Inc. v. Northwestern Bell Telephone Co.*, 35 N.Y.L. SCH. L. REV. 733, 754-55 (1990) (asserting that Congress defined RICO's proscribed conduct in "vague terms solely with the hope of circumventing a constitutional challenge that status, without more, cannot be criminalized").

24. *See, e.g.*, United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979) (stating that RICO's potentially broad reach posed danger for abuse if used by a prosecutor in situations for which Congress did not originally intend).

25. United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980).

26. *Id.* at 1364 n.8.

27. *See, e.g.*, Terrance G. Reed, *The Defense Case for RICO Reform*, 43 VAND. L. REV. 691, 692-93 (1990) (stating that "the gap between the legislative goals of RICO and its practical impact is dramatic," and calling for reconsideration of RICO's purpose and effects).

28. *Id.* at 695 (referring to 18 U.S.C. §§ 1961(1), (4), (5) (1994)).

> directly to the failure of these statutory terms to place meaningful limits on RICO's reach in either criminal or civil prosecutions.[29]

Further exacerbating the problems caused by the seemingly unlimited reach of RICO's statutory terms, Congress also inserted a liberal construction clause into the RICO statutory scheme. Section 904(a) provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."[30] In general, however, courts have not relied on this clause in broadly construing RICO. Instead, they have relied on plain meaning theories of statutory interpretation. For example, in *Reves v. Ernst & Young*,[31] the Supreme Court said that the clause does not help in determining what the purposes of the statute are and that the purposes must be gleaned from the statute through the normal means of interpretation.[32] The clause "only serves as an aid for resolving an ambiguity; it is not to be used to beget one."[33]

It has been argued that broad interpretations of RICO have produced many invidious effects. Among those effects are: (1) the prejudicial effect of the use of the term "racketeering" on judges and juries,[34] (2) the expansion of federal jurisdiction over local crimes traditionally prosecuted by states,[35] (3) the ability to reprosecute defendants for transactions that previously have been fully litigated,[36] (4) the imposition of disproportionately severe punishment and novel

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29. *Id.*

30. 18 U.S.C. § 904(a) (1994) (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

31. Reves v. Ernst & Young, 507 U.S. 170 (1993).

32. *See id.* at 184.

33. *Id.* (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492 n.10 (1985), quoting Callanan v. United States, 364 U.S. 587, 596 (1961)). Although courts do not rely on the liberal construction clause when construing RICO in criminal cases, they have relied on it in civil cases. For example, in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Court said that "RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, (citation omitted) but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-98 (1985); *see also infra* note 209 (discussing further the liberal construction clause).

34. *See* Tarlow, *supra* note 23, at 293-94. "One difficulty that continues to plague RICO prosecutions is the prejudicial impact that results from labeling the conduct of a defendant, who may be a businessman, politician, or alleged gangster, as racketeering." *Id.*

35. RICO has been used to prosecute crimes such as rigged card games in an individual's hotel suite. *See* United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976). The Supreme Court has consistently given RICO a broad interpretation, allowing it to invade traditional state domains of criminal prosecution even as some members of the Court have expressed concern over the increasing federalization of criminal law. *See* William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 6-7 (1993).

36. *See* Tarlow, *supra* note 23, at 401-08 (noting problems that arise, for example, when the predicate crime has been fully litigated prior to the RICO litigation or the government alleges multiple § 1962(d) offenses out of the same transaction).

sanctions,[37] (5) courts' employment of orders barring a defendant from using available assets to post bail and obtain legal representation or prepare a defense,[38] (6) joining defendants whose conduct is unrelated, orchestrating mass trials, and admitting prejudicial evidence that would be barred in any conspiracy prosecution,[39] and (7) chilling the exercise of First Amendment rights.[40]

Part of the controversy over RICO stems from those who view RICO's legislative history as indicating a more limited purpose for RICO than has occurred. It has been suggested that "[w]hen Congress considered RICO in 1969 and 1970, [RICO's] objective was as clear as [the name of the Act of which it was a part]: The Organized Crime Control Act of 1970."[41] Senator John L. McClellan, Chairman of the Criminal Law and Procedures Subcommittee of the Senate Judiciary Committee, introduced the Senate bill that became the Organized Crime

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37. Judge Posner, in affirming a judge's upward departure in the sentencing of the notorious "Chicago Outfit," said that "[h]ad the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions." United States v. Rainone, 32 F.3d 1203, 1209 (7th Cir. 1994).

The provisional remedies of RICO, 18 U.S.C.A. § 1963(e) (West 1984 & Supp. 1999), *amended by*, Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Title II, § 302, 98 Stat. 2040, permit a court to enter a restraining order before trial, freezing the defendant's potentially forfeitable assets to assure their availability for forfeiture if the defendant is convicted. "RICO forfeitures are not keyed exclusively to the size of the crime" because RICO allows for forfeiture "of the defendant's entire 'interest in' the enterprise," which can be devastating in the case of ordinary business people who become involved in fraudulent activities. Lynch, *supra* note 19, at 781-82.

38. *See* Glenn Beard et al., Comment, *Racketeer Influenced and Corrupt Organizations*, 33 AM. CRIM. L. REV. 929, 951-54 (1996) (discussing RICO asset forfeiture provisions).

39. *See* Lynch, *supra* note 19, at 787 (explaining that evidence of a defendant's other crimes, even those that are different in their nature or that occurred in the distant past, becomes relevant because those crimes become part of the "pattern of racketeering," and evidence that a defendant associates with criminal colleagues is necessary to prove the existence of the enterprise).

40. *See The Supreme Court 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 358 (1994) (arguing that the Supreme Court's decision in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 246 (1994), will chill some protest activities because of fear of RICO suits).

> Given the expansive and growing list of predicate RICO offenses, the lack of prosecutorial discretion in civil RICO cases, the intense hatred many groups on opposite sides of ideological divides feel for one another, and the indeterminate nature of exactly what constitutes a pattern of racketeering activity, protest organizations have reason to face with trepidation the repercussions of RICO.

Id.

41. Reed, *supra* note 27, at 693. Reed also claims that Congress chose indirect means to fight organized crime because it was concerned that drafting statutory language proscribing membership in organized crime would raise constitutional questions about status offenses and vagueness. *See id.*

Control Act of 1970 (OCCA) on January 15, 1969.[42] When he introduced RICO, Senator McClellan said that "[T]itle IX is aimed at removing organized crime from our legitimate organizations."[43] Other sponsors, such as Senator Roman Hruska, agreed that the purpose of RICO was to combat the influence of organized crime in legitimate business.[44]

Although the subject of much criticism, substantial congressional reform of RICO appears remote because even if the critics' analysis of RICO is accurate, Congress has endorsed the judiciary's broad interpretations of RICO and shows no signs of dissatisfaction.[45] Congress added new predicate offenses, which trigger a RICO violation, in 1984, 1986, 1988, 1989, 1990, 1994, and 1996.[46] In 1984, RICO was significantly amended.[47] Congress, however, has never modified the criminal aspects of the statute in an attempt to narrow its scope.[48] It

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42. *See* S. Res. 30, 91st Cong., 115 CONG. REC. 827 (1969). At the time of introduction, the bill did not contain a private right to action. *See id.* Thus, the government was the only party that could pursue civil remedies. *See id.*

43. 116 CONG. REC. 591 (1970).

44. *See id.* at 602. "Title IX of this act is designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." *Id.* Senator Edward Kennedy said that "[T]itle IX . . . may provide us with new tools to prevent organized crime from taking over legitimate businesses and activities." *Id.* at 845.

45. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II,* 87 COLUM. L. REV. 661, 712-13 (1987). Lynch comments that:

> While it may be dangerous to draw authoritative conclusions about the legislators' attitudes toward the body of RICO law developed by the courts over a decade and a half from such haphazardly drafted legislation, it would appear obvious that Congress is reasonably satisfied with what prosecutors and courts have made of RICO . . . . If RICO has evolved into something different from what Congress intended at its creation, it is difficult to escape the conclusion that Congress has looked at what has evolved, and pronounced it good.

Id.

46. *See* 18 U.S.C § 1961(1) (1996). Some of the added predicate offenses include financial institution fraud, 18 U.S.C. § 1344, and criminal infringement of copyright, 18 U.S.C. § 2319.

47. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, ch. III, sec. 302, § 1963 (to be codified at 18 U.S.C. § 1963), ch. IX, sec. 901, § 1961(1) (to be codified at 18 U.S.C. § 1961(1)), ch. X, sec. 1020, § 1961(1) (to be codified at 18 U.S.C. § 1961(1)), ch. XXIII, sec. 2301, § 1963 (to be codified at 18 U.S.C. § 1963). The 1984 amendments occurred in three stages. First, Congress amended the forfeiture provisions of § 1963 to clarify proceeds forfeiture and other matters and amended § 1961 to add crimes dealing in obscene matter (under state law and §§ 1461-65) and currency violations under Title 31 to the list of predicate acts. Second, Congress added as predicate offenses three automobile theft violations (Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, sec. 205, § 1961(1) (to be codified at 18 U.S.C. § 1961(1))). Third, Congress deleted some expedition-of-action language from the civil provisions of §§ 1964(b) and 1966.

48. Congress, however, has narrowed the civil aspects of the statute. In 1995, as part of an overhaul of private federal securities litigation, Congress enacted § 107 of the PSLRA, providing

appears that Congress is comfortable with its delegation of power to the judiciary to define criminal conduct pursuant to RICO and approves of courts' interpretation and application of RICO.[49]

B. Approaches to Unclear Criminal Statutes

A person's philosophy towards the interpretation of unclear criminal statutes depends on his or her view of the proper role of the courts, Congress, and the Executive Branch. Although the proper roles of the judiciary and Congress in the area of statutory interpretation and rulemaking in the area of criminal law are necessarily matters of degree, clear differences in philosophies concerning those roles make possible a fairly accurate categorization of approaches. Professor Dan Kahan describes these competing approaches to federal criminal lawmaking.[50]

1. The Common Law Approach

The common law approach, which is the current de facto regime,[51] directs the courts to recognize and affirm Congress' implicit delegation of lawmaking authority in federal criminal law.[52] This approach requires the courts to craft legal rules to fill in the interstices of broad criminal statutes.[53] In Professor Kahan's view, the common law approach conceives of the operative rules of federal criminal law as judicially-derived, analogous to the way that the operative rules of federal antitrust and labor law are judicially derived.[54] The common law approach would give the courts normative discretion to engage in ad hoc balancing of the benefits of broad and narrow readings of criminal statutes.[55] Professor Kahan argues that the common law approach's many inherent virtues include improvement of the quality of

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"no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO]." Private Securities Litigation Reform Act of 1995, Pub. L. No 104-67, sec. 107, § 1964(c) (to be codified at 18 U.S.C. § 1964(c)).

49. *See* Lynch, *supra* note 45, at 712-13 (inferring through Congress' inaction that it approves of the courts' interpretation of RICO).

50. *See* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5 (1997) (discussing three competing conceptions of federal criminal-lawmaking: the legislative supremacy position, the common law position, and the administrative law position).

51. *See id.* at 5 (arguing that the common law conception "offers the best description of federal criminal-lawmaking as it currently exists").

52. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 352.

53. *See* Kahan, *supra* note 50, at 11.

54. *See id.* at 6.

55. *See* Kahan, *supra* note 52, at 378.

federal criminal law,[56] more efficient updating of legal norms,[57] greater power to avoid loopholes in statutes,[58] and less expense because of the generative character of open-textured statutory terms.[59]

2. The Administrative Law Approach

The second approach to unclear criminal statutes, which Kahan believes is normatively superior to the other two conceptions, is the administrative law approach of federal criminal lawmaking.[60] The administrative law approach would delegate the responsibility for defining the operative rules of federal criminal law to the Executive Branch.[61] The Executive Branch, through the Justice Department,

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56. *See id.* at 352. Professor Kahan argues that delegated common lawmaking would improve the quality of federal criminal law, because Congress necessarily makes its rules in anticipation of future cases and thus lacks full information about how these rules would actually operate in the real world. *See id.* Courts, on the other hand, see how statutes interact with real-world circumstances, and with each other, and are better situated to fashion rules of law that fully implement legislative goals and that avoid unforeseen conflicts with other values and policies. *See id.* at 353.

57. *See id.* at 352. Professor Kahan argues that time spent on specifying the details of the criminal statute is spent at the expense of time spent on matters of broad public policy on which Congress prefers to focus its energies. *See id.* It is also easier to generate political consensus for a delegation standard than for specific rules of law because the rules produced under a delegation standard would be general and would not attempt resolution of the most controversial issues. *See id.* The efficiency gained from the common law conception of rulemaking is especially important in the context of federal criminal lawmaking. Although the public is very concerned with "law and order," criminal lawmaking has historically comprised a very small part of Congress' docket because there is no real constituency for the rule of law in criminal law. *See id.* at 370. Therefore, Congress can satisfy the public's demand for criminal statutes by enacting highly general, often symbolic, criminal statutes and focus its attention on matters of concern to highly organized interest groups, which are "more likely than the public generally to reward legislators for benefits conferred and to punish for disabilities imposed." *Id.*

58. *See* Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law,* 110 HARV. L. REV 469, 482-83 (1996) (arguing that under-specified norms in criminal statutes avoid the problems of loopholes because the norms "can be extended beyond their core applications to all analogous but unforeseen forms of wrongdoing").

59. *See id.* at 481-82 (arguing that it is cheaper for courts to fill out incompletely specified criminal statutes than it would be for Congress to enact a fully specified criminal code, and that the higher cost of a nondelegation doctrine would lower Congress' output, a significant social cost).

60. At this time, Professor Kahan has written four articles on delegation of rulemaking power in federal criminal law. In his first article, *Lenity and Federal Common Law Crimes*, Professor Kahan argues for the abolition of the rule of lenity (the legislative supremacy approach) and an increased role for the common law conception. *See* Kahan, *supra* note 52. In his second article, *Is Chevron Relevant to Federal Criminal Law*, Kahan, while still arguing that the common law approach is superior to the legislative supremacy approach, advocates that the administrative law approach is superior to both of the other approaches. *See* Kahan, *supra* note 58. In his third and fourth articles, Kahan continues to refine and advocate his administrative law approach to interpreting federal criminal law. *See* Kahan, *supra* notes 3 & 50.

61. *See* Kahan, *supra* note 50, at 5-6.

would carry out this task "by promulgating legally binding rules akin to the Federal Sentencing Guidelines, or by announcing statutory interpretations to which courts would be bound to defer in criminal prosecutions."[62]

Kahan recommends that the courts convert the existing regime of federal criminal lawmaking from a common law approach to an administrative law approach by employing two established canons of statutory construction: "the *Chevron* rule,[63] which courts should use to uphold statutory constructions formally defended by the Department of Justice in advance of prosecution; and the rule of lenity, which courts should use to compel narrow interpretations in all other cases."[64] The *Chevron* rule would require courts to defer to the Justice Department's reasonable resolution of a statutory ambiguity on the ground that its "expertise and democratic accountability make it the preferred delegated lawmaker."[65] The rule of lenity would be invoked only when a "broad reading . . . advanced by the prosecution ha[d] not been formally articulated and justified in advance by the Justice Department."[66]

Kahan argues that the "administrative-law approach would conserve essentially all of the efficiency benefits associated with implied delegation."[67] Moreover, "because the Justice Department has more experience with criminal law enforcement than does any court, and because it is more unified than the judiciary," Kahan argues that "an administrative regime would likely enhance both the quality and consistency of federal criminal-lawmaking relative to the existing common lawmaking" method.[68] Moreover, the administrative law approach would avoid the tensions between common lawmaking and the values of democracy and fair notice because the Justice Department

62. *Id.*

63. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In *Chevron*, the Supreme Court formulated a two-step test to determine the deference a court should accord an agency interpretation of a statute that it administers. *See id.* at 842-44. The first step requires the court to inquire whether "Congress has directly spoken to the precise question at issue" before the agency. *Id.* at 842. If so, the court must "give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, the court decides that "the statute is silent or ambiguous with respect to the specific issue," it proceeds to the second step, which requires the court to defer to any "reasonable interpretation" made by the agency. *Id.* at 843-44.

64. Kahan, *supra* note 50, at 21.

65. *Id.*

66. *Id.* at 22.

67. *Id.* at 18.

68. *Id.* This is a valid criticism of the common law conception of federal criminal lawmaking. As underscored by the history of the RICO statute, if the courts were to engage in criminal common lawmaking, the sheer number of district and appellate court judges who participate in the process would pose immense obstacles to its consistent and rational exercise.

is accountable to the President and, therefore, more politically accountable than judges.[69] Kahan argues that an administrative lawmaking regime would moderate the partisanship of criminal-lawmaking by placing responsibility in the hands of "distant and largely invisible bureaucrats" within the Justice Department.[70] This proposed regime differs from the present situation where the Executive Branch influences the formation of federal common law crimes almost entirely through the uncoordinated actions of individual U.S. Attorneys.[71]

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69. *See id.* at 19.

70. *Id.* at 18-19.

71. Although possessing arguable merit, the administrative law approach has weighty problems that preclude it from being an acceptable solution to the problem of vague criminal statutes. One problem with the administrative law approach is that it would involve institutional self-dealing. *See* Kahan, *supra* note 50, at 18. The administrative law approach would grant authority over the interpretation of the federal criminal laws to the organization that is to enforce those laws. The Justice Department has claimed that it exercises self-restraint in its interpretation of RICO, but it is clear that the Justice Department is partly responsible for bringing prosecutions that have resulted in the extremely wide scope given to RICO. The Justice Department has its own set of guidelines and "blue sheets" that bind all federal prosecutors, and the Criminal Division's Organized Crime and Racketeering Section reviews and approves all RICO prosecutions. *See* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions,* 65 NOTRE DAME L. REV. 1035, 1036, 1043 (1990). Despite these constraints, RICO has been prosecuted in a very broad manner. *See, e.g.,* United States v. Viola, 35 F.3d 37 (2d Cir. 1994) (reviewing the prosecution of a criminal organization's janitor and handyman who was unaware of the criminal enterprise); United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (finding that the defendant engaged in a "pattern of racketeering activity" based solely on the defendant's participation in a restaurant assassination); United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) (reviewing prosecution of members of a terrorist organization seeking Croatian independence); United States v. Morris, 532 F.2d 436 (5th Cir. 1976) (reviewing the prosecution of an individual rigging card games in his hotel suite as a pattern of racketeering activity). Another problem with the administrative law conception is the lack of political accountability of its decision-makers. While an administrative agency is perhaps more politically accountable than the judiciary, government bureaucrats are not as politically accountable to Congress. Kahan calls Justice Department officials "[d]istant and largely invisible bureaucrats." Kahan, *supra* note 3, at 54. "Distant and largely invisible bureaucrats," however, do not possess the democratic accountability that those who make criminal law should possess. *But see id.* (arguing that the Department of Justice is accountable to the public through the President).

Although the *Chevron* rule may be an appropriate use of agency expertise in the civil context, criminal statutes should be treated differently. One judge who has considered the issue and agreed is Judge Kenneth W. Starr. In *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987), Judge Starr wrote for the court of appeals that criminal defendants are "far outside *Chevron* territory," and refused to defer to the interpretation by the Justice Department of the Foreign Agents Registration Act of 1938. *Id.* at 1077. The need for political accountability is most important in the criminal context. All other things being equal, in situations involving the moral condemnation of the community and the loss of liberty, the most politically accountable branch of government should make the rules. *See* Lisa K. Sachs, *Strict Construction of the Rule of Lenity in the Interpretation of Environmental Crimes*, 5 N.Y.U. ENVTL. L.J. 600, 632 (1996) (arguing that "determining which types of conduct should be punishable by criminal sanctions—the highest measure of condemnation—involves 'a special kind of value judgment' traditionally within the province of the legislature"). Professor Lawrence Solan also takes issue with Kahan's proposi-

3. The Legislative Supremacy Approach

The third approach to unclear federal criminal statutes is the legislative supremacy approach of federal criminal lawmaking. The legislative supremacy approach considers federal crimes as essentially legislative in origin. Congress defines the crime in a statute and courts carry out Congress' intent through conventional statutory interpretation.[72] The legislative supremacy conception requires that courts place the onus on Congress to enact clear statutes using historically rooted judicial devices such as the doctrines of unconstitutional vagueness and the rule of lenity. The legislative supremacy approach would help promote the principles of judicial restraint, political accountability, and consistent statutory interpretation.

The legislative supremacy approach limits the likelihood that courts will engage in creating common law crimes based on inferences that go beyond the language actually contained in the statute.[73] It is important to recognize, however, that the legislative supremacy conception does not mandate criminal statutes that are narrow in scope. Congress can enact criminal statutes with a broad scope, but it must clarify the intended breadth of these statutes. Courts that interpret such a statute would be bound to implement its broad coverage. Of course, Congress can refuse to shoulder the burden of criminal lawmaking and enact an unclear statute. Under the legislative supremacy approach, however, courts would recognize the absence of a clear statutory definition and would, accordingly, construe the statute narrowly.

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tions. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 130-34 (1998). Solan argues, among other things, that (1) contrary to Kahan's assertions, "there is little reason to believe that the Justice Department is that much more expert at interpreting criminal statutes than are the courts," (2) Kahan's proposal would mean the "elimination of stare decisis in criminal law" because of the differing philosophies of Presidents, and (3) there should not be an abandonment of "thoughtful judicial decision making in favor of a regime in which the prosecutor wins whenever the executive branch beats the courts to the punch." *Id.*

72. *See* Kahan, *supra* note 50, at 5.

73. This was a concern of the Court in *United States v. Sheldon*, 15 U.S. (2 Wheat) 119 (1817). In *Sheldon*, the Court refused to extend a statute that made illegal to transport munitions or provisions from the United States to Canada "in any waggon [sic], cart, sleigh, boat or otherwise," to include oxen driven over the Canadian border. *Id.* at 120. The Court construed "otherwise" as limited to the kinds of vehicles enumerated in the statute. *See id.* at 121. The Court admitted that "the mischief is the same, whether the enemy be supplied with provisions in the one way or the other," but refused to interpret the statute as addressing this evil without clear language from Congress supporting such a move. *Id.* The principle exhibited in *Sheldon* (limiting the reach of a criminal statute even though interpreting the statute broadly to include analogous behavior would be congruent with the purpose of the statute) has been referred to as "the linguistic wall." *See* Solan, *supra* note 71, at 84.

One argument against the legislative supremacy approach, coming from a public choice perspective, is that courts should update criminal statutes because updating is a particularly difficult task for the legislature.[74] Because organized interest will oppose specific legislation that explicitly resolves difficult and controversial issues, a legislature may draft an ambiguous bill and delegate rulemaking responsibility to agency or judicial discretion allowing all sides to claim victory.[75] Moreover, general criminal statutes are likely to satisfy the general public's demand for criminal law while still being able to be expeditiously enacted by Congress.[76]

The legislative supremacy approach, however, can accommodate the realities of the modern legislative process in which Congress faces both time and political constraints. Although the legislative supremacy approach will make it harder for Congress to make criminal law by raising the practical and institutional cost of such legislation, the costs of this should not be overstated. For example, when a court does interpret a criminal statute narrowly, the Department of Justice has a superior record for obtaining overrides.[77]

Ambiguity and uncertainty are inevitable by-products of the legislative process. Certainly Congress is faced both with time constraints, which limit its ability to give sufficient thought to all of the alternatives and possibilities, and with political constraints, which encourage loose drafting methods designed to avoid provoking intense controversy among powerful interest groups who may threaten to block

74. *See* Kahan, *supra* note 52, at 353.

75. *See* Kahan, *supra* note 3, at 50.

76. *See* Kahan, *supra* note 50, at 10. Kahan's theory mirrors public choice theory. A prominent aspect of public choice theory is the belief that the legislative process is "a microeconomic system in which actual political choices are determined by the efforts of individuals and groups to further their own interests." WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 52 (2d ed. 1995) (quotation omitted). Because most criminal statutes concentrate their benefits among a highly dispersed group of people (the general public) but concentrate their costs on a small organized group of people (criminals and interest groups), public choice theorists postulate that the best legislative solution for self-interested representatives would be to draft an ambiguous bill and delegate rulemaking authority. *See id.* at 56. Of course, it should be noted that public choice theory, even if accurate, merely describes what it views as the current description of the political process rather than making a normative argument about how Congress and the judiciary *should* handle criminal statutes. *See generally id.* at 57-61 (discussing the application of public choice theory as well as alternative approaches to the political process).

77. *See* William Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 (1991). Professor Eskridge's article casts doubt on the proposition that the forces against criminal expansion have greater power than the forces in favor of criminal expansion. Professor Eskridge notes that "criminal defendants and suspects . . . have had virtually no success in obtaining overrides." *Id.* at 352.

legislation.[78] These concerns, however, argue *against* delegation of lawmaking authority to the courts, not in favor of delegation. Congress should absorb the full political costs of the criminal legislation that it enacts. The courts should not allow Congress to avoid political costs by delegating the responsibility of criminal law rulemaking to the judiciary.

Under the legislative supremacy model, courts would take a more aggressive stance in interpreting federal criminal statutes in order to force Congress, in the text of a statute, to make the tough political choices concerning the scope of a statute.[79] The legislative supremacy approach avers that judicial attempts to force Congress to shoulder the burden of criminal lawmaking are possible and laudatory. It recognizes that a criminal code under the legislative supremacy model is more costly and less efficient than the common law or administrative law models but asserts that the principle of political accountability outweighs the higher costs and reduced efficiency.[80]

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78. *See supra* notes 74-76 and accompanying text (illustrating that Congress often drafts an ambiguous bill in order to meet political demands and to avoid pressures).

79. *See* Kahan, *supra* note 52, at 351. Kahan argues that greater use of the void-for-vagueness doctrine and the rule of lenity is a dubious strategy because Congress' default of its lawmaking obligations is the "product of powerful and long-standing institutional dynamics" and "judicial attempts to force Congress to shoulder the entire burden of federal criminal lawmaking are likely to prove futile." Kahan, *supra* note 3, at 52-53. As support for his argument, Kahan cites *McNally v. United States*, 483 U.S. 350 (1987), where after the Court invoked lenity to invalidate the judicially constructed "intangible rights" theory of mail fraud, Congress enacted § 1346, which simply engrafted the "intangible right to honest services" standard, another empty standard that depends on judge-made implementing doctrines, onto the preexisting mail fraud statute. *Id.* at 53 n.31. Kahan's argument, at least to some degree, proves the opposite of his claims. *McNally* illustrates how federal criminal law is supposed to work: the courts narrowly construe the criminal statute and, if Congress believes that the statute should extend further, it is free to enact legislation explicitly providing for that result. The problem of Congress responding to a narrow interpretation of a statute by enacting a broad and undefined standard can be remedied through a more consistent and aggressive judicial response to undefined statutes. Congress resists the judiciary's efforts to force it to shoulder the burden of criminal lawmaking because those efforts are sporadic and inconsistent. A more consistent and aggressive judicial response would preclude Congress from delegating lawmaking authority as it did in *McNally* and in its aftermath. For example, after Congress enacted the vague "intangible right to honest services" provision, the judiciary could have interpreted the language narrowly or struck it down on void-for-vagueness grounds. *See infra* Parts IV-V (discussing the rule of lenity and void-for-vagueness doctrines).

80. Enormous institutional constraints weigh against the idea of either the common law or the administrative law conception of federal criminal lawmaking. Three doctrines which have redounded to the advantage of the legislative supremacy conception of federal criminal law have constrained the relationship between the courts and common law rulemaking in the twentieth century. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985). First, "[t]he principle of legality, or *nulla poena sine lege*, condemns judicial crime creation." *Id.* Second, the "constitutional doctrine of void-for-vagueness forbids wholesale legislative delegation of lawmaking authority to the courts." *Id.* Third, the "rule of strict construction directs that judicial resolution of residual uncertainty in the

III. THE SUPREME COURT'S INCOHERENT APPROACH TO INTERPRETING RICO

Professor Kahan claims that RICO is an example of the Supreme Court adhering to the common law approach to statutory interpretation.[81] Kahan argues, however, that the contribution the Supreme Court has made in defining RICO is not the product of a "lawless usurpation of congressional prerogative."[82] Rather, he asserts, the Court's interstitial rulemaking in RICO is a consequence of the incompleteness of the RICO statute that Congress enacted.[83] Kahan argues that the implied delegation of lawmaking authority from Congress to the courts is a politically legitimate "strategy for maximizing Congress' policymaking influence in the face of constraints on its power to make law."[84]

Kahan argues that Congress delegated rulemaking authority to the judiciary by leaving RICO's key terms undefined.[85] Despite this delegation of responsibility, however, it is clear that when interpreting RICO, the Supreme Court has engaged in both the common law conception of federal criminal lawmaking and the legislative supremacy conception while claiming to adhere strictly to the legislative supremacy approach to statutory interpretation.[86] Even if Congress may delegate, and courts may legitimately exercise, criminal lawmaking authority, the Supreme Court has been reluctant to countenance this delegation in the RICO context.[87] Even if the Court, using common law methods, has

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meaning of penal statutes be biased in favor of the accused." *Id.*

81. *See* Kahan, *supra* note 50, at 8.

82. *Id.* at 9.

83. *See id.*

84. *Id.* Kahan, though, as described above, prefers the administrative law conception to the common law conception. He recognizes that a full common law conception of criminal-lawmaking is "not a particularly realistic or sensible strategy." Kahan, *supra* note 3, at 53. Because, however, the administrative law conception is not likely to be implemented because of its substantial departure from the current system, it is believed that the real battle is between the common law and legislative supremacy positions. *See infra* note 102 (arguing that the Supreme Court will likely continue to employ a narrow reading of the statute). More accurately, the batter is between the current incoherent mix of common law and legislative supremacy methods and a pure legislative supremacy conception.

85. *See* Kahan, *supra* note 50, at 8.

86. *See* National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985); United States v. Turkette, 452 U.S. 576 (1981); *infra* notes 97-118 and accompanying text (discussing the Supreme Court's utilization of the common law conception and its version of the legislative supremacy approach to federal criminal lawmaking).

87. *See infra* notes 103-18 and accompanying text (demonstrating that the Court has continually declined a common law rulemaking approach).

fashioned a body of RICO law similar to the body of law shaped in the fields of antitrust, civil rights, and labor law,[88] these common law efforts in the RICO context have not been performed with any kind of purposeful self-awareness.[89]

Instead, the Court, in attempting to divine the scope of RICO, has applied textualist methods and has claimed to follow a legislative supremacy approach, seemingly unaware that the judiciary has been delegated legislative lawmaking authority over the interpretation of RICO. The Court's ostensible adherence to textualist methodology and legislative supremacy has not produced consistent results, however, because even when the Court has declined to engage in common law rulemaking, it has not engaged in a coherent interpretative methodology that would help it cope with the unclearness of RICO.[90]

The Supreme Court's willingness to engage in common law rulemaking in its decisions has come mostly in cases where the text of the RICO statute has been unhelpful in resolving an issue that must be resolved for RICO to function at all. An example of this common law rulemaking occurred in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[91] where the Supreme Court had to interpret RICO's definition of "pattern of racketeering activity."[92] The Court recognized that § 1961(5) did not define "pattern of racketeering," but merely stated a minimum necessary condition for the existence of such a pattern.[93] The Court stated that the text of RICO was unhelpful in defining "pattern of racketeering activity" because "[t]he text of RICO conspicuously fails anywhere to identify . . . forms of relationship or external principles to be used in determining whether racketeering activity falls into a pattern for purposes of the Act."[94]

The Court was left in a quandary. The Court could either declare that the statute was unconstitutionally vague or engage in common law

88. *See* Kahan, *supra* note 52, at 353.

89. *See infra* notes 119-31 and accompanying text (arguing that the Court has provided inadequate justifications for its interpretation and has thus yielded an incoherent approach).

90. *See infra* notes 119-21 and accompanying text (advocating the legislative supremacy approach).

91. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989).

92. 18 U.S.C. § 1961(5) (1994). To convict a defendant of a RICO violation, other than for an "unlawful debt," under § 1962 (a), (b), or (c), the government must prove that the defendant engaged in "pattern of racketeering activity" as defined by § 1961(5). 18 U.S.C. § 1962(a)-(c) (1994).

93. *See H.J. Inc.*, 492 U.S. at 237.

94. *Id.* at 238. The Court inferred from this absence of direction in the text of § 1961(5) that Congress intended a flexible approach to the interpretation of a "pattern." *See id.* at 239.

rulemaking.[95] The Court resolved its dilemma by engaging in common law rulemaking in order to give definition to "pattern of racketeering activity."[96] The Court's common law methods consisted of using legislative history, other statutes, and cases decided by other courts.[97] Through its process of common law rulemaking, the Court developed a two-prong test, requiring "relatedness"[98] and "continuity,"[99] neither of

95. Other courts have agreed that RICO's "pattern of racketeering activity" was left undefined. In *People v. Chaussee II*, 880 P.2d 749 (Colo. 1994), the Supreme Court of Colorado compared its state RICO statute with the federal RICO statute. *See id.* at 753. The court held that the Colorado statute's definition of "pattern of racketeering activity" was complete and self-contained because it began with the word "means." *Id.* at 757. The court noted that, in contrast, the federal statute's use of the word "'requires' among a group of definitions otherwise employing the words 'means' or 'includes' was very suggestive that section 1961(5) was not intended to be a self-contained definition for purposes of RICO." *Id.*; *see also* Bart A. Karwath, Note, *Has the Constituency of Continuity Plus Relationship Put an End to RICO's Pattern of Confusion*, 18 AM. J. CRIM. L. 201, 212 (1991) (noting that, after *H.J. Inc.*, problems in interpreting the Court's opinion caused lower courts to apply varying RICO pattern standards).

96. *See H.J. Inc.*, 492 U.S. at 236. The Court noted:

> Congress has done nothing in the interim further to illuminate RICO's key requirement of a pattern of racketeering; and as the plethora of different views expressed by the Courts of Appeals since *Sedima* demonstrates developing a meaningful concept of "pattern" within the existing framework has proved to be no easy task.
>
> It is, nevertheless, a task we must undertake in order to decide this case.

Id. (citation omitted).

97. *See id.* at 239-41.

98. *See id.* at 240. The Court looked to a provision elsewhere in the Organized Crime Control Act of 1970 for guidance in determining the definition of the "relatedness" element. *See id.* at 239-40. The Court adopted the Dangerous Special Offender Sentencing Act's pattern requirement in § 3575(e) verbatim: "[c]riminal 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." *Id.* at 240.

99. *See id.* The Court recognized that § 3575 was of no assistance in defining the "continuity" prong, but, nevertheless, determined that the Eighth Circuit's "multiple scheme" test "brings a rigidity to the available methods of proving a pattern that simply is not present in the idea of 'continuity' itself." *Id.* at 240-41. The Court decided that "continuity" "is both a closed-and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. Closed-ended continuity could be shown by a "series of related predicates extending over a substantial period of time," while open-ended continuity can be proved by showing that "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future" or that "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Id.* at 242. The Court's support for its test was, understandably, weak. The Court adopted what it termed "a commonsense, everyday understanding of RICO's language and Congress' gloss on it." *Id.* at 241. As support for its "continuity" definition, the Court cited *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (3d Cir. 1987). *See H.J. Inc.*, 492 U.S. at 241. However, although the *Barticheck* court rejected the view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended, the court "decline[d] to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.'" *Barticheck*, 832 F.2d at 40.

which are found in the text of RICO, in order to find a "pattern of racketeering."

Paradoxically, although the Court engaged in common law rulemaking in order to provide definition to "pattern of racketeering," the Court criticized the Eighth Circuit's concept of a scheme that it said "appears nowhere in the language or legislative history of the Act."[100] The Court seemed to recognize, however, that it had started down a road of common law rulemaking in defining the "pattern of racketeering" requirement, saying:

> [T]he limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, 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. 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.[101]

In other contexts, where RICO's statutory language provides more definition, the Supreme Court has been consistently hostile to lower court efforts to create extra-textual limitations on RICO. The Court has avoided common law policy analysis in deciding not to create extra-textual limitations, relying instead on plain meaning principles, and has rejected any notions that it should engage in common law rulemaking.[102] The Court has often relied on negative inference in

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100. *H.J. Inc.*, 492 U.S. at 241. Unsurprisingly, earlier courts had interpreted RICO's "pattern of racketeering activity" requirement differently than the Court's "commonsense, everyday understanding." *Compare* United States v. Jennings, 842 F.2d 159, 163 (6th Cir. 1988), *and* United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir. 1980) (concluding that predicate acts need not be related to each other to constitute a pattern), *with* H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648, 650 (8th Cir. 1987) (holding that "[a] single fraudulent effort or scheme is insufficient" to establish a pattern of racketeering activity, even if more than two predicate acts were committed in furtherance of the scheme), *rev'd*, 492 U.S. 229 (1989).

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

102. The Supreme Court's predilection for using a textualist approach in interpreting RICO and claiming to adhere to the legislative supremacy approach indicates its unlikeliness of ever adopting an explicit common law approach, or, for that matter, Kahan's administrative law conception. It should not be too surprising that the Supreme Court relied on a textualist approach in interpreting RICO. The statutory interpretation approach of textualism has been prominently used by the Court in recent years and has captured the interest of a wide variety of judges and legal scholars. *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527 (1998); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Stephen A. Plass, *The Illusion and Allure of Textualism*, 40 VILL. L. REV. 93 (1995); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995);

rejecting efforts to fill in the interstices of RICO through perceived extra-textual constraints on the scope of the statute. For example, in *Sedima, S.P.R.L. v. Imrex Co.*,[103] the Court refused to interpret "pattern of racketeering" to require evidence of a "racketeering injury." The Court said:

> [Given] that 'racketeering activity' consists of no more and no less than commission of a predicate act, § 1961(1), we are initially doubtful about a requirement of a racketeering injury separate from the harm from the predicate acts. A reading of the statute belies any such requirement. . . . There is no room in the statutory language for an additional, amorphous racketeering injury requirement.[104]

David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235; Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995); George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259 (1995).

It has been documented that since Justice Scalia's appointment to the Supreme Court in 1986, the Court's statutory opinions have more often found a plain meaning, have less often examined legislative history to confirm the existence of a plain meaning, and, in only a handful of instances, have relied on legislative history to interpret a statute against what the Court felt was its plain meaning. *See* ESKRIDGE & FRICKEY, *supra* note 76, at 624. Four types of justifications for textualism are usually offered. The first is that all that is "law" is the text actually adopted by the legislature and presented to the chief executive. *See id.* The second is that other methodologies are inconsistent with constitutional norms. *See id.* Any effort by members or committees of Congress to influence the interpretation of statutes by signaling their "intent" or "purpose" is in tension with Article I, section 7 of the United States Constitution's requirement that Congress cannot legislate without bicameral consensus and presentment of the fruits of that consensus to the President. *See id.* Moreover, efforts by courts to interpret statutes by reference to extra-textual sources is in tension with the separation of powers that is part of Articles I-III of the Constitution. *See id.* The third is that textualism upholds the "liberal" principles embodied in the Constitution. *See id.* By construing statutes narrowly, textualism upholds the Framers' intent that there be a presumption that people's arrangements would prevail unless expressly displaced by legal doctrine. *See id.* The fourth justification for textualism, more normative than the rest, is "courts should respect legislative supremacy because society will be better off it they do." Edward O. Correia, *A Legislative Conception of Legislative Supremacy*, 42 CASE W. RES. L. REV. 1129, 1132 (1992). The normative argument is based on accountability and majoritarianism. *See id.* at 1135. Elected representatives are politically accountable, while judges with life tenure are not directly accountable in either their appointments or removal. *But see* Sunstein, *supra* note 7, at 418-19 (discussing limitations in textualist approach in distinguishing between original meanings for the enacting legislature and contemporary meanings of statutory language). Regardless of its arguable limitations in other areas, textualism is a necessary component of the legislative supremacy model because it allows the courts to give a criminal statute its fair import without extending its meaning beyond what is clearly expressed in the text of the statute.

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

104. *Id.* at 495. The Court also seemed to accept a common law conception of rulemaking, saying that "[t]he 'extraordinary' uses to which RICO has been put" are the result of "the failure of Congress and the courts to develop a meaningful concept of pattern." *Id.* at 500.

Similarly, in *United States v. Turkette*,[105] the Supreme Court declined to engage in common law rulemaking. The Court relied on the plain meaning of the statute and declined to require that the "enterprise" requirement, defined in § 1961(4),[106] be limited to legitimate enterprises, saying that:

> [o]n its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'[107]

In *National Organization for Women v. Scheidler*,[108] the Court again declined to engage in common law rulemaking and relied instead on the plain meaning of the statute. In holding that the RICO statute did not require that the racketeering enterprise harbor, or that the predicate acts of racketeering spring from an economic motive, the Court said that nowhere in either § 1962(c)[109] or the RICO definitions in § 1961 is there a requirement of such a motive.[110] The Court said that "Congress could easily have narrowed the sweep of the term 'enterprise' by inserting a single word, 'legitimate.'"[111]

As the aforementioned cases illustrate, the Court's incoherent jurisprudence in construing RICO has resulted from its refusal to recognize consistently that Congress delegated lawmaking authority to construe RICO by leaving key terms undefined.[112] The Court has, except on rare occasions,[113] engaged in a jurisprudence that is not a common law jurisprudence, but rather a jurisprudence that has been erroneously identified as a legislative supremacy jurisprudence. Instead of explicitly recognizing that the statute was left incomplete, the Court has engaged in a jurisprudence that has construed RICO's terms as though Congress had enacted complete definitions.[114]

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105. United States v. Turkette, 452 U.S. 576 (1981).

106. *See supra* note 17 and accompanying text (discussing RICO's definition of "enterprise").

107. *Turkette*, 452 U.S. at 580-81.

108. National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).

109. 18 U.S.C. § 1962(c) (1994).

110. *See Scheidler*, 510 U.S. at 249-50.

111. *Id.* at 260 (quoting *Turkette*, 452 U.S. at 581).

112. *See* Kahan, *supra* note 58, at 480. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), is one of the few instances where the Court recognized that Congress left some RICO terms undefined. *See id.* at 237 (citing Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985)).

113. *See supra* notes 91-101 (discussing *H.J. Inc.* as an instance where the Court seemed to recognize that it was engaging in common law rule making).

114. *See Scheidler*, 510 U.S. at 252 (holding that a violation of RICO can occur without an

Because the Court has not recognized that Congress left RICO undefined, it has also refused to construe RICO as possessing limiting principles on the ground that recognizing limiting principles would be equivalent to engaging in de facto lawmaking.[115] The Court's jurisprudence has resulted in an unpersuasively broad interpretation of RICO,[116] unpersuasive not just because of its broad interpretations,[117] but because of its inadequate justifications for those broad interpretations.[118]

Recognizing that the Court's current position is incoherent suggests that another approach is more appropriate. This Article contends that the viable choices are the common law and legislative supremacy methods,[119] and that the legislative supremacy method is far superior. By approaching the interpretation of RICO using principles of legislative supremacy that recognize the incompleteness of RICO and restrict its scope through the rule of lenity[120] and the void-for-vagueness doctrine,[121] the courts could foster a more consistent interpretation of RICO that would place the onus on Congress to shoulder the responsibility of criminal-lawmaking.

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economic motive, despite little statutory guidance); United States v. Turkette, 452 U.S. 576, 580-81 (1981) (holding that the term "enterprise" included both legitimate and illegitimate enterprises within its scope).

115. *See* Kahan, *supra* note 50, at 15 (citing *H.J. Inc.*, 492 U.S. at 249) ("[I]f the omission of an organized crime nexus in RICO is a defect . . . it is one 'inherent in the statute as written,' and hence beyond our power to correct"); *see also Scheidler*, 510 U.S. at 257 ("Nowhere in either § 1962(c) or the RICO definitions in § 1961 is there any indication that an economic motive is required.").

116. *See* Alexander M. Parker, Note, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 838 (1996) (stating that the judiciary has interpreted RICO "in its absolute broadest manner").

117. This Article does not argue that RICO's scope should be narrow or that Congress would want RICO to have a narrow scope. Rather, this Article contends that if RICO's reach is to be broad, Congress, not the judiciary, should make that determination.

118. As discussed above, in refusing to interpret RICO narrowly, the Court has pointed to RICO's text and declared that explicit statutory indications of Congress' intent to have RICO interpreted in the suggested narrow manner are absent. This method of looking for limiting principles to be explicitly stated in the statutory text is often illogical considering that Congress left RICO's terms undefined, see *supra* notes 112-14, and delegated the authority to define the terms to the courts.

119. This Article also acknowledges the existence of a third conception, the administrative law approach, which Kahan calls "a realizable ideal." *See* Kahan, *supra* note 50, at 17. Because, however, the administrative law approach is unlikely to be implemented, it cannot be considered a viable option. *See supra* note 71 and accompanying text (discussing the unlikelihood that the administrative law method will be enacted).

120. *See infra* Part IV (discussing the role the rule of lenity could play to narrow the scope of RICO).

121. *See infra* Part V (analyzing the role of the void-for-vagueness doctrine in narrowing the scope of ambiguous statutes).

IV. THE RULE OF LENITY

A. Justification for the Rule of Lenity as a Nondelegation Doctrine

The rule of lenity is an important component of the legislative supremacy approach.[122] The rule of lenity, one of the oldest canons of statutory interpretation,[123] dictates that criminal laws must be construed strictly. If the criminal statute does not clearly outlaw private conduct, the actor cannot be penalized.[124] The rule of lenity is usually viewed as a default rule of interpretation, coming into play only when the statute is ambiguous.[125] The rule requires that the legislature define a crime, and that the definition be clear before courts may impose punishment.[126] If the legislature drafts the statutory language so that the language clearly shows the legislative intent for the criminal statute to cover a wide range of criminal behavior, the statute, consistent with the rule of lenity, will be read that way.

The doctrine is usually justified as protecting principles of fair warning and protecting individuals from arbitrary or discriminatory enforcement of criminal statutes.[127] Some, however, object that these traditional justifications are not sufficient to warrant application of the

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122. *See* Bryan v. United States, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction consistent application: by fostering uniformity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime.

Id. (Scalia, J., dissenting) (citing Bousley v. United States, 523 U.S. 614 (1998)).

123. One of the first expressions of the strict construction philosophy was expressed by Chief Justice Marshall:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.

United States v. Wiltberger, 18 U.S. 76, 95 (1820). Although the rule of lenity is indisputably an old and established doctrine, critics have been skeptical about whether strict construction and the rule of lenity are even seriously used. One scholar has said that "[t]oday, strict construction survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation. Citation to the rule is usually pro forma." Jeffries, *supra* note 80, at 198-99; *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation,* 137 U. PA. L. REV. 1007, 1083 (1989).

124. *See* Sachs, *supra* note 71, at 600.

125. *See infra* notes 184-210 and accompanying text (discussing when the rule of lenity will be applied).

126. *See* Sachs, *supra* note 71, at 600.

127. *See id.*

rule of lenity.[128] One objection, which questions the fair warning rationale, is that a court should not strictly construe a criminal statute prohibiting an act that is clearly antithetical to conventional values, such as one that creates an offense that is *malum in se*.[129] Invoking the rule of lenity even for *malum prohibitum* criminal statutes is not uncontroversial. Critics doubt whether criminals actually consult criminal statues before acting.[130] Indeed, critics of the rule of lenity ask why a serious wrongdoer should get the benefit of the strict-construction maxim.[131]

Although still retaining some persuasive force, notice concerns are not the main reason why courts should invoke the rule of lenity in contexts such as RICO. The rule of lenity also serves as a "nondelegation doctrine."[132] While still concerned with due process, fair notice, and a "generic bias in favor of liberty," lenity is also

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128. *See* Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61, 61-62 (1994) (objecting to the rule of lenity in the RICO context); Shapiro, *supra* note 102, at 935 (noting that the critics of canons of construction recognize the value of the rule of lenity in providing fair warning of prohibited conduct, but questioning its value in cases involving conduct that is *malum in se*); Solan, *supra* note 71, at 140 (arguing that traditional rationales for the rule of lenity do not apply in the RICO context).

129. Justice Holmes made the traditional argument that although notice might be a fiction, it is important nonetheless:

> [A]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

McBoyle v. United States, 282 U.S. 25, 27 (1931).

130. *See, e.g.*, Jeffries, *supra* note 80, at 219-20 (arguing that, generally, "there is no plausible suggestion that the actor either knew or cared what the law was").

131. These objections are especially weighty when considering RICO because RICO does not make previously legal acts criminal, but, instead, creates a new federal criminal statute covering acts that other criminal statutes have made crimes. Invoking the rule of lenity because of notice concerns might therefore seem unpersuasive in the RICO context. Because RICO created a new federal criminal statute covering acts made criminal by other statutes, it seems implausible to think that courts' broad interpretations of RICO could have subjected anyone who honestly attempted to conform his or her behavior to what he or she believed the criminal law required to criminal penalties. However, although there are weighty arguments against notice as a rationale for the rule of lenity in the RICO context, those concerns still have persuasive force. Requiring a high degree of clarity from the legislature will ensure that potential defendants have notice as to the scope of a statute and the degree of penalty imposed and will also ensure that the legislature recognizes the full extent of the consequences it imposes on individuals. While invoking the rule of lenity may not be completely persuasive in the RICO context to provide notice of prohibited conduct, it is persuasive when used to put the defendant on notice as to the level of punishment that is accorded a specific act. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952) (indicating the Court's approval of the rule of lenity when determining the appropriate severity of punishment).

132. *See* Kahan, *supra* note 52, at 347; *see also* Eskridge, *supra* note 123, at 1029 (noting that the rule of lenity provides separation-of-powers value in addition to a due process value).

essential to the enforcement of legislative supremacy in federal criminal law.[133] The Court has asserted that federal criminal law-making power cannot be delegated, saying that "[b]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."[134] When viewed as a nondelegation principle, the rule of lenity becomes much more persuasive.[135] By

133. *See* Kahan, *supra* note 52, at 349-50.

134. United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring) (quoting United States v. Bass, 404 U.S. 336, 348 (1971)). In rejecting the Court's authorization of the use of legislative history in *Moskal v. United States*, 498 U.S. 103 (1990), Justice Scalia endorsed the rule of lenity as upholding legislative supremacy, saying that "*Moskal's* mode of analysis also disserves the rule of lenity's other purpose: assuring that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring); *see also* United States v. Kozminski, 487 U.S. 931, 951 (1988) (distinguishing between a degree of uncertainty involved in applying standards and toleration of arbitrariness and unfairness of standards developed by the judiciary); Dowling v. United States, 473 U.S. 207, 213 (1985); Liparota v. United States, 471 U.S. 419, 427 (1985) (holding that the rule of lenity strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability).

135. *See* Solan, *supra* note 71, at 140-41. Professor Solan argues that neither notice nor legislative supremacy "rationales should lead to strict construction of RICO" because RICO has a liberal construction clause and RICO is a compound criminal statute that criminalizes activities that are otherwise crimes in any event. *Id.* First, it is debatable whether the liberal construction clause applies to the criminal provisions of RICO and, if it does, whether it is constitutionally congruent with due process principles. *See infra* note 209 and accompanying text. Moreover, Solan himself argues that, as a result of ingrained judicial philosophy, courts ignore liberal construction clauses because of the rule of lenity. *See* Solan, *supra* note 71, at 122-28. Second, the fact that RICO is a compound criminal statute does not make lenity inappropriate. Professor Solan shortchanges the nondelegation principle of the rule of lenity. As Chief Justice Marshall wrote in *United States v. Wiltberger*, 18 U.S. 76 (1820), "[i]t is the legislature, not the Court, which is to define a crime and ordain its punishment." *Id.* at 95. In drafting RICO, Congress left its terms undefined. *See* Kahan, *supra* note 58, at 480. To say that the judiciary should not invoke the rule of lenity in this situation is to make a normative argument that the judiciary should make policy in the criminal-law area. *See infra* note 136 (discussing the implications on democracy of judicial lawmaking in the criminal context). Solan also ignores the benefits of the rule of lenity in fostering uniformity in the interpretation of criminal statutes. In situations such as RICO where statutory terms are left undefined, the rule of lenity provides an a priori principle of interpretation that would foster greater consistency in statutory interpretation. *See infra* note 153 (discussing the importance of consistency in statutory interpretation). Also, notice *is* still important in the RICO context. *See* Sachs, *supra* note 71, at 601 (addressing the rule of lenity as a safeguard of the procedural due process right to notice of the type of conduct that can result in criminal punishment). RICO's possible penalties are often harsher than the penalties for the underlying predicate acts. *See* United States v. Rainone, 32 F.3d 1203, 1208 (7th Cir. 1994) (affirming a two-level upward departure from the RICO sentencing guidelines). Therefore, the notice rationale is relevant because it puts the defendant on notice as to the level of punishment that is accorded a specific act. Invoking the rule of lenity in federal criminal law will also help promote federalism. When there is an issue of the scope of a federal criminal statute that potentially covers activities historically regulated by the states, the courts promote federalism by requiring Congress to be explicit in its desire to regulate areas traditionally under the exclusive control of the states. *See Bass*, 404 U.S. at 349 (commenting that "[i]n traditionally sensitive areas, such as

invoking the rule of lenity, courts promote democracy.[136] Justice Frankfurter equated broad statutory writing and the acceptance of it by the courts as the equivalent to an undemocratic shift of lawmaking responsibility to the judiciary:

> In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language.[137]

Invoking the rule of lenity will discipline Congress to move away from the public choice theory of legislative enactment[138] toward a more responsible form of legislative enactment that will force Congress to tackle the difficult and controversial issues itself.

The use of the rule of lenity in RICO is not to ensure that Congress is protected from the courts, but rather to ensure that the courts are

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legislation affecting the federal balance," requiring Congress to draft clear statutes assures that the legislature has addressed the issue).

136. Kahan argues that there is no "tension between delegated common lawmaking and democracy." Kahan, *supra* note 58, at 484. He argues that "the suggestion that democracy requires confining criminal law-making authority to Congress rests on a false premise . . . that Congress is perfectly able to satisfy the electorate's demand for criminal law." *Id.* The position, however, that democracy requires confining criminal law-making authority to Congress does not rest on the premise that Congress can satisfy the electorate's demand for criminal law. Rather, it rests on the premise, stated by Justice Scalia and Justice Frankfurter, that in a democracy "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community . . . legislatures and not courts should define criminal activity." *Id.* at 471. Kahan, as he recognizes, assumes that efficiency as a result of delegation "in criminal law-making is good." *Id.* at 482 n.81. This, as he also recognizes, is a controversial position. *See id.* (citing INS v. Chadha, 462 U.S. 919, 959 (1983)). Professor Eskridge has a different take on the democratic virtues of the rule of lenity than Professor Kahan. *See* Eskridge, *supra* note 77, at 413 (commenting that the rule serves the values of protecting people accused of crimes, a relatively powerless group, and the goal of "injecting due process" into the political process, both of which are values easily ignored in the legislative process). Kahan also argues that "the suggestion that it is undemocratic for courts to participate in defining the elements of criminal statutes overlooks the role of federal prosecutors" because "[t]hrough the power of initiative, individual prosecutors have a vital say in determining the content of incompletely specified statutes." Kahan, *supra* note 58, at 485. Of course, although prosecutors obviously initiate criminal proceedings, they have no more say in the determination of the reach of a statute than do any other advocates. *See* Solan, *supra* note 71, at 130. Moreover, under a legislative supremacy approach, prosecutors would have the burden of proof in arguing for a broad interpretation of a criminal statute. *See infra* notes 177-83 (discussing the burden of proof in relation to the rule of lenity).

137. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 545-47 (1947); *see also* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 108 (1983) (noting that administrators are better equipped to devise policy than are courts).

138. *See supra* notes 74-76 and accompanying text (discussing public choice theory).

protected from Congress.[139] Congress faces few institutional incentives to produce clear criminal statutes because it is highly risk-averse in defining crime.[140] Because Congress is interested in broad statutory coverage to ensure that statutes do not overlook criminal behavior, it attempts to push the limit of statutory ambiguity allowed by the courts.[141] As part of the legislative supremacy approach, the rule of lenity is invoked to ensure that Congress, and not the courts, is the branch faced with the responsibility of making difficult political choices and drafting clear criminal statutes.

Professor Kahan, though, argues that "[i]f a court takes seriously the notion that only Congress can define the elements of crimes, it ought to view itself as powerless to construct any doctrine that *narrows* the scope of such broadly worded statutes."[142] Kahan is partially correct. Broad, but clear, criminal statutes should not be narrowed by the judiciary. However, broad, but unclear, statutes are problematic. It is a fallacy that all broadly worded statutes are intended by Congress to be broadly construed.[143] The legislative supremacy model acknowledges Congress' legislative mandate, but insists on clear directives. Congress is free to enact statutes that cover a broad range of criminal activity, as long as the scope of the statute is made explicit in the text of the statute.

The rule of lenity, thus, is only invoked in the absence of clear legislation. In the case of a statute whose scope is unclear, the court has two options: construe the statute narrowly or construe it broadly.[144]

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139. *See* Standen, *supra* note 23, at 286-87 (arguing that RICO's broad definitions allow judges and prosecutors to define the law).

140. *See id.*

141. *See id.* at 287-88.

142. Kahan, *supra* note 58, at 480-81. Unfortunately, the Supreme Court has, at times, mistakenly agreed with those who have taken the position that construing federal statutes as possessing limiting principles would amount to de facto lawmaking. For example, in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the Court said that "[i]f plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect . . . it is one 'inherent in the statute as written,' and hence beyond our power to correct." *Id.* at 249; *see also* Carole Golinski, *In Protest of NOW v. Scheidler*, 46 ALA. L. REV. 163, 171 (1994) (noting that the Court's application of "classic separation of power arguments" to "justify a liberal interpretation of the RICO statute" indicates "reluctance to usurp legislative functions"). *But see* Dowling v. United States, 473 U.S. 207, 213-14 (1985) (applying a narrow interpretation where statutory language is unclear); Bifulco v. United States, 447 U.S. 381, 400-01 (1980) (stating that courts must resolve doubt in accord with the rule of lenity and that if the Court's construction of Congress' intent clashes with present legislative expectations, then Congress, not the Courts, must provide the remedy by amending the statute).

143. *See infra* notes 165-67 and accompanying text (discussing Justice Scalia's dissent in *Holloway v. United States*, 526 U.S. 1 (1999)).

144. *See supra* notes 91-101 and accompanying text (discussing *H.J. Inc. v. Northwestern Bell Telephone Co.*).

Principles of judicial restraint and the historical reluctance of courts to construe criminal statutes broadly argue for a strict interpretation.[145] Lenity ensures that the expressed intent of the legislature is enforced by insisting on clear language as a prerequisite to imposing punishment on defendants. Invoking the rule of lenity avoids judicial embellishment.[146] "When the legislature fails to speak clearly," the legislative supremacy model "avoids the dilemma of how to derive a legitimate interpretation without 'legislating' by choosing a priori the stance the court" must take—the court must construe the statute narrowly.[147]

B. The Rule of Lenity as a Background Principle of Strict Construction

Determining that the rule of lenity will be used in the interpretive process does not end the lenity controversy because the manner in which the rule is considered in the interpretive process determines its efficacy.[148] In general, the Supreme Court usually only invokes lenity at the end of the interpretive process.[149] As a result, the Court has held that the RICO statute is broad but unambiguous and, thus, it does not require application of the rule of lenity. In rejecting the use of the rule of lenity in *United States v. Turkette*[150] and *National Organization for Women, Inc. v. Scheidler,* the Court said that "the rule of lenity applies

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145. *See supra* notes 122-26 and accompanying text (discussing the application of the rule of lenity).

146. Similar to the de facto lawmaking claim, another criticism of the rule of lenity approach to federal criminal statutory interpretation may be that it gives one side of the criminal law debate an unfair advantage in the legislative process. Because those interests in favor of a narrow conception of federal criminal law would know that the courts will interpret criminal statutes with a presumption of invoking the rule of lenity, they will have an advantage in the legislative process. Contrary to those claims, however, the legislative supremacy conception as a refusal of courts to interpret criminal statutes broadly should not be viewed as giving one side an unfair advantage. Rather, it is a principle of judicial restraint, mandating that the legislature define crime. *See* Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 207 (1994). By using lenity as an interpretive principle that is applied consistently, Congress would be on notice that it must enact clear statutes if it intends that courts interpret them broadly.

147. *Id.* at 206.

148. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 66 (1993).

149. *See* Newland, *supra* note 146, at 204.

150. In *United States v. Turkette*, 452 U.S. 576 (1981), the Court added that:

> There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play. The canon in favor of strict construction of criminal statutes is not an inexorable command to override common sense and evident statutory purpose . . . . Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

Id. at 587 n.10 (citations omitted).

only when an ambiguity is present; 'it is not used to beget one . . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'"[151]

Instead of waiting until the end of the interpretive process to invoke the rule of lenity, however, courts should use the rule of lenity as both part of the textualist interpretive process and as a general principle of strict construction of criminal statutes.[152] This alternative application of the rule of lenity would promote consistent, restrained judicial interpretation that, in turn, would drive legislative drafting in the direction of plain, unmistakable language.[153] The rule of lenity would foster coherence in legal interpretation by providing a consistent interpretive framework. Consistent use of the rule of lenity would put Congress on notice of how to draft its statutes to reach a desired result.[154] The rule of lenity's principle of strict construction would guide interpretation of all criminal statutes and would apply the rule of lenity when the statutory text is ambiguous.[155]

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151. National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) (quoting *Turkette*, 452 U.S. at 587-88). The Court added that "[w]e simply do not think there is an ambiguity here which would suffice to invoke the rule of lenity. The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* The Supreme Court's refusal to consider applying the rule of lenity until the end of the interpretive process in RICO cases is consistent with the Court's treatment of lenity in other contexts. *See* Muscarello v. United States, 524 U.S. 125, 139 (1998) (holding that to invoke the rule there must be a "grievous ambiguity or uncertainty in the statute") (citations omitted); United States v. Wells, 519 U.S. 482, 499 (1997) (indicating that the rule of lenity only applies if the court can make "no more than a guess as to what Congress intended") (citations omitted); Reno v. Koray, 515 U.S. 50, 51 (1995) (stating that the rule of lenity applies only if the court can make "no more than a guess as to what Congress intended") (citations omitted); United States v. Shabani, 513 U.S. 10, 17 (1994) (noting that the rule of lenity applies only when traditional canons of statutory construction fail to resolve the statutory ambiguity); Smith v. United States, 508 U.S. 223, 239 (1993) (holding that the mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable) (citations omitted).

152. *See* Newland, *supra* note 146, at 204.

153. *See id*; *see also* Sachs, *supra* note 71, at 622 (commenting on the importance of precise textual meanings). The Court, at times, has indicated the value of the rule of lenity in promoting consistency in interpretation. *See* United States v. Kozminski, 487 U.S. 931, 951 (1988) (stating, before the Court applied the rule of lenity, that "it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis").

154. *See* Frankfurter, *supra* note 137, at 545.

155. *See* Newland, *supra* note 146, at 206.

C. The Rule of Lenity Should Trump Use of Legislative History and Congressional Purpose

Before invoking the rule of lenity, the Court must find that the statutory language is ambiguous. Obviously, the sources consulted by the Court to determine whether the statutory language is ambiguous are critical.[156] Unfortunately, the Court has referred to the legislative history and "motivating policies" of statutes as part of its interpretive policy. This is unfortunate because legislative history is unreliable and, even if it is reliable, courts are institutionally incapable of interpreting legislative history accurately.[157] Instead, courts should allow the rule of lenity to trump reference to legislative history and congressional purpose.

A recent case illustrates the Court's willingness to give a broad and plain reading of criminal statutes in accord with the Court's treatment of the RICO statute. In *Holloway v. United States*,[158] the Court considered

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156. Professor Solan describes three approaches to the rule of lenity. The first approach developed in England as a device to thwart the will of a legislature bent on enacting draconian laws. *See* Solan, *supra* note 71, at 87. The second approach, called "The American Tradition of Strict Construction," was articulated primarily by Chief Justice Marshall. *Id.* at 89. This approach consisted of the following principles:

> (1) criminal statutes are to be strictly construed; (2) vagueness is not to be resolved by imposing the narrowest reading; rather, the ordinary meaning of the word is to be gleaned from its context in the statute; and (3) if an activity is not within the plain meaning of the statute it is not a crime.

Id. at 94. The third approach, the "Narrow Rule of Lenity," was articulated by Justice Frankfurter. *Id.* at 102. This approach, which applied to criminal statutes "the meaning that their language most obviously invites," added legislative history and other extra textual materials to the types of information that courts were willing to examine in construing a criminal statute. *Id.* at 105-07. Professor Solan believes that the Rehnquist Court continues to apply the third, narrow approach to lenity. *See id.* at 109.

157. *See* Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1862 (1998). Professor Vermeule offers a persuasive, and relatively unmentioned, criticism of judicial use of legislative history. Professor Vermeule argues that even if the "[i]ntentionalist claim (1) that judicial resort to legislative history is constitutional; (2) that ascertaining legislative intent is the ultimate object of interpretation; and (3) that legislative history generally provides reliable evidence of intent," they have not shown "that courts that consult legislative history will produce *more* accurate determinations of legislative intent than courts that restrict themselves to statutory text and other standard sources of interpretation." *Id.* Professor Vermeule's conclusion is that:

> [T]he extreme volume and heterogeneity of legislative history interact with structural constraints of the adjudicative process in ways that make courts systematically prone to mishandle legislative history and that accordingly create distinctive risks of adjudicative error. Even on intentionalist premises, then, courts should consider curtailing their use of a source that predictably decreases the accuracy of judicial determinations of legislative intent over the run of cases.

Id. at 1896.

158. Holloway v. United States, 526 U.S. 1 (1999).

whether a federal statute making it a crime to carjack "with the intent to cause death or serious bodily harm"[159] could be satisfied if the defendant possessed "conditional intent" (*i.e.*, intent to cause death or serious bodily harm only if a condition is met, such as the victim not cooperating).[160]

The Court seemingly began a textualist approach by citing *Turkette* for the proposition that "the language of the statutes that Congress enacts provides 'the most reliable evidence of its intent,'" but instead attempted to divine the purpose of the statute.[161] The Court determined that the purpose of "the statute as a whole reflects an intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern."[162] Further, the Court reasoned that because the purpose of the statute is better served by a broad reading, "the entire statute is consistent with a normal interpretation of the specific language that Congress chose."[163] The Court rejected the application of the rule of lenity, saying that "[w]e have repeatedly stated that '[t]he rule of lenity applies only if, after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended'" and that the result of its previous analysis required it to make no such guess.[164]

Besides disagreeing with the Court's textual analysis, Justice Scalia disagreed with the Court's interpretation of and reliance on the statute's purpose.[165] He opposed the Court's view that serving the purpose of the

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159. As amended by the Violent Crime Control and Law Enforcement Act of 1994, § 60003(a)(14), 108 Stat. 1970, and by the Carjacking Correction Act of 1996, § 2, 110 Stat. 3020, the statute provides:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury . . . results be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119 (1994 & Supp. III 1999).

160. *See Holloway*, 526 U.S. at 3. The accomplice testified at the trial that the intent was to "steal the cars without harming the victims, but that he would have used his gun if any of the drivers had given him a 'hard time.'" *Id.* at 4.

161. *Id.* at 6.

162. *Id.* at 9.

163. *Id.*

164. *Id.* at 12 n.14 (citations omitted).

165. *See id.* at 13 (Scalia, J., dissenting). Justice Scalia dissented on the basis that "intent" in the statute could not possibly be broad enough to include "conditional intent" because:

statute required a broad reading of the statute. He said that "[l]imitations upon the means employed to achieve the policy goal are no less a 'purpose' of the statute than the policy goal itself."[166] But "[u]nder the Court's analysis, any interpretation of the statute that would broaden its reach would further the purpose the Court has found. Such reasoning is limitless and illogical."[167]

The goal of the legislative supremacy conception would be to avoid the reasoning exhibited in *Holloway* and in other decisions that broadly construe RICO. Too often the Court has construed indefinite statutes broadly on the basis of legislative history and in a misguided belief that the purpose of the criminal statute could only be served by a broad interpretation.[168]

> [I]n customary English usage the unqualified word 'intent' does not usually connote a purpose that is subject to any conditions precedent except those so remote in the speaker's estimation as to be effectively nonexistent—and it *never* connotes a purpose that is subject to a condition which the speaker hopes will not occur.

Id. (Scalia, J., dissenting). According to Justice Scalia, intent is "[a] state of mind in which a person seeks to accomplish a given result through a course of action" that cannot be present when the actor hopes the result required for liability will not ensue. *Id.* (Scalia, J., dissenting) (citing BLACK'S LAW DICTIONARY).

166. *Id.* at 18 (Scalia, J., dissenting).

167. *Id.* (Scalia, J., dissenting). Justice Scalia said that if he "*were* to speculate as to the *real* reason the 'intent' requirement was added by those who drafted it, [he] would select neither the Court's attribution of purpose nor [the intent that he] hypothesized." *Id.* at 19 n.2 (Scalia, J., dissenting). Justice Scalia concluded that he thought that "the 'intent' requirement was inadvertently expanded beyond the new subsection 2119(3), which imposed the death penalty—where it was thought necessary to ensure the constitutionality of that provision." *Id.* (Scalia, J., dissenting). But, according to Justice Scalia, "the actual intent of the draftsmen is irrelevant," only the enacted text controls. *Id.* (Scalia, J., dissenting). Although Justice Scalia found the statute "entirely unambiguous," he noted that "[e]ven if ambiguity existed, [sic] the rule of lenity would require it to be resolved in the defendant's favor." *Id.* at 20 (Scalia, J., dissenting). Justice Scalia criticized the Court, saying:

> [I]f [lenity] is no longer the presupposition of our law, the Court should say so, and reduce the rule of lenity to an historical curiosity. But if it remains the presupposition, the rule has undeniable application in the present case. If the statute is not, as I think, clear in the defendant's favor, it is at the very least ambiguous and the defendant must be given the benefit of the doubt.

Id. at 21 (Scalia, J., dissenting). Justice Scalia also quoted Justice Frankfurter's opinion in *Bell v. United States*, 349 U.S. 81 (1955), where Frankfurter said:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Holloway, 526 U.S. at 21 (Scalia, J., dissenting) (quoting *Bell*, 349 U.S. at 81).

168. In addition to his concerns about the reliability and appropriateness of judicial resort to legislative history, Justice Scalia also believes that considering legislative history when inter-

D. How Much Ambiguity Must a Criminal Statute Possess to Be Considered Ambiguous?

Even if courts accept the rule of lenity as a background principle of statutory construction and do not consult legislative history before invoking the rule, a critical determination in the legislative supremacy approach the degree of ambiguity a statute must possess in order to mandate the application of the rule of lenity.[169] The issue should perhaps be framed as how persuasive the government's broad interpretation of the statute must be to be accepted as the authoritative interpretation.[170] In *Moskal v. United States*,[171] the Court said that

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preting criminal statutes fails to comport with the fair warning principle of the rule of lenity. In *United States v. R.L.C.*, 503 U.S. 291 (1992), a non-RICO case, the Supreme Court discussed the rule of lenity. Although the Court affirmed that it would use "the venerable rule of lenity" when a criminal statute was ambiguous, it reserved application "for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the 'language and structure, legislative history, and motivating policies' of the statute." *Id.* at 305 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)); *see also* Liparota v. United States, 471 U.S. 419, 427 (1985). In a concurrence, Justice Scalia wrote that it is "not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history." *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring). Justice Scalia argued that referring to legislative history would fail to "provide fair warning concerning conduct rendered illegal." *Id.* at 309 (Scalia, J., concurring) (quoting *Liparota*, 471 U.S. at 427); *see also* Sachs, *supra* note 71, at 619 (arguing that because "defendants cannot be presumed to be on notice of information present only in legislative history . . . courts should resort to lenity instead [of legislative history]"). Justice Scalia has persuasively echoed this point in other cases. *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

169. The Supreme Court says that it will apply the rule of lenity when a statute is ambiguous, but the Court is not clear as to how persuasive the narrowing definition must be before it becomes acceptable. *See* Caron v. United States, 524 U.S. 308, 316 (1998) (holding that "the rule of lenity is not invoked by a grammatical possibility"); Muscarello v. United States, 524 U.S. 125, 138 (1998) (holding that "[t]he simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree") (citations omitted); Salinas v. United States, 522 U.S. 52, 66 (1997) (holding that "[t]he rule does not apply . . . when invoked to engraft an illogical requirement to its text"); Reno v. Koray, 515 U.S. 50, 64-65 (1995) (noting that "division of judicial authority over its proper construction" does not warrant application of lenity) (citations omitted); United States v. Shabani, 513 U.S. 10, 17 (1994) (stating that lenity does not require that Congress explicitly reject petitioner's reading) (citations omitted); Smith v. United States, 508 U.S. 223, 240 (1993) (commenting that "[t]he rule of lenity 'cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term'") (citations omitted); Moskal v. United States, 498 U.S. 103, 107 (1990) (saying that the argument that lenity should be invoked because it is possible to narrowly construe a statute misconstrues the doctrine); *see also* Kahan, *supra* note 52, at 385 (arguing that "[s]tatutory language is 'ambiguous' when [the interpretive] conventions conflict or point in different directions"); Newland, *supra* note 146, at 228 (suggesting that "courts can frame the issue in terms of the plausibility of competing interpretations and the ability of a particular interpretation to provide future consistency").

170. *See infra* notes 178-83 and accompanying text (advocating that the burden of persuasion should be on the government).

171. Moskal v. United States, 498 U.S. 103 (1990).

although the touchstone of the rule of lenity is statutory ambiguity, "[s]tated at this level of abstraction, of course, the rule 'provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of *how much* ambiguousness constitutes . . . ambiguity.'"[172] The *Moskal* Court declared that it would "[reserve] lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute."[173]

The *Moskal* Court indicated that an alternative interpretation must raise a "reasonable doubt" about the broader interpretation.[174] This standard has been subsequently cited by the Supreme Court.[175] The Supreme Court's conception of what constitutes a "reasonable doubt" in the lenity context, however, is extremely narrow, requiring that the alternative interpretation convince the Court that it can make "no more than a guess" or that there be a "'grievous ambiguity or uncertainty' in the statute."[176]

The Court's definition of "reasonable doubt" in the rule of lenity context is inconsistent with the Court's definition of "reasonable doubt" in other contexts. Previously, the Court has said that "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."[177] Instead, the Court should decide that a statute is ambiguous when the government has failed to show that there is no "reasonable possibility"[178] that the

172. *Id.* at 108 (quoting United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985)) (emphasis added).

173. *Id.* (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

174. *See id.*

175. *See* United States v. Granderson, 511 U.S. 39, 70 (1994) (Rehnquist, J., dissenting) (arguing that the rule of lenity requires an absurd or glaringly unjust result that raises a reasonable doubt about Congress' intent) (citation omitted); United States v. R.L.C., 503 U.S. 291, 305-06 (1992) (commenting that the Court has "always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort 'to the language and structure, legislative history, and motivating policies of the statute'") (citation omitted); Chapman v. United States, 500 U.S. 453, 463-64 (1991) (requiring a "reasonable doubt" before invoking the rule of lenity).

176. Muscarello v. United States, 524 U.S. 125, 138-39 (1998).

177. Cage v. Louisiana, 498 U.S. 39, 40 (1990) (per curium) (rejecting a Louisiana jury instruction that defined reasonable doubt as "such doubt as would give rise to a grave uncertainty" and one that "is an actual substantial doubt").

178. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (defining harmless-beyond-a-reasonable-doubt standard as no "'reasonable possibility' that trial error contributed to the verdict") (citation omitted).

proffered narrower interpretation is congruent with the language and structure of the text.[179] A "reasonable possibility" exists when the narrow interpretation is "rational"[180] or "plausible."[181] Applying the rule of lenity when a narrow interpretation is "rational" or "plausible" is congruent with the historical use of the rule of lenity[182] and would further the legislative supremacy conception of criminal lawmaking while setting a standard that would not "automatically permit[] a defendant to win."[183]

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179. Although the Court usually does not discuss burdens of proof, the Court has suggested that the burden of persuasion should be on the government. *See Granderson*, 511 U.S. at 54. Placing the burden of proof on the government would comport well with principles of due process and judicial restraint.

180. *See* McNally v. United States, 483 U.S. 350, 359 (1987) (stating that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language").

181. Justice Thomas has suggested that if the narrower interpretation is plausible, the rule of lenity should be invoked. *See* Caron v. United States, 524 U.S. 308, 319 (1998) (Thomas, J., dissenting). Thomas argued that "[a]t the very least, this interpretation is a plausible one . . . [and] must therefore apply. . . . But the alleged ambiguity does not result from a mere grammatical possibility; it exists because of an interpretation that . . . both accords with a natural reading of the statutory language and is consistent with the statutory purpose." *Id.* (Thomas, J., dissenting). Justice Kennedy has suggested essentially the same standard. *See* Evans v. United States, 504 U.S. 255, 273 (1992) (Kennedy, J., concurring) (arguing that when the court is left with two quite plausible interpretations, "the rule of lenity requires that [the Court] avoid the harsher one"). Justice Ginsburg has suggested that the rule should be applied when the government's position is not decisively clear. *See Muscarello*, 524 U.S. at 148 (Ginsburg, J., dissenting) (noting that "Section 924(c) (1) . . . is not decisively clear").

182. In *United States v. Wiltberger*, 18 U.S. 76 (1820), Chief Justice Marshall wrote:

> [T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.

18 U.S. 76, 95-96 (1820). Applying the narrowest plausible interpretation is consistent with this statement. The Court is correct that courts should not apply the narrowest *possible* interpretation. Rather, courts should apply the narrowest *plausible* interpretation. In *Wiltberger*, Chief Justice Marshall wrote that the Court realized that the narrower interpretation of the statute was probably not the interpretation that Congress intended. *See id.* at 105. Nonetheless, he stated,

> But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act, should not be punished. But Congress has not made them punishable, and this Court cannot enlarge the statute.

Id.

183. *Muscarello*, 524 U.S. at 139. The Court has warned that it will not adopt a rule of lenity that would effectively allow a criminal defendant to always prevail. *See id.*

E. Application of the Rule of Lenity to RICO

If the Court had invoked the rule of lenity in the RICO context, the results would have been different, and preferable. For example, in *National Organization of Women, Inc. v. Scheidler*,[184] with an analysis guided by the rule of lenity,[185] the Court would have limited the definition of "enterprise," as defined in § 1961(4),[186] to include only enterprises with an economic motive.[187]

The definition of "enterprise" contained in § 1961(4)[188] is the key to whether RICO enterprises must have an economic motive.[189] Similar to

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184. National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994). As with many of the other Supreme Court opinions construing RICO, *Scheidler* also resulted in many law review articles debating its merits. *Compare* Jennifer G. Randolph, *RICO—The Rejection of an Economic Motive Requirement*, 85 J. CRIM. L. & CRIMINOLOGY 1189, 1189 (1995) (agreeing with Court's decision but not its reasoning), *and* Michael Vitiello, *Has the Supreme Court Really Turned RICO Upside Down?: An Examination of NOW v. Scheidler*, 85 J. CRIM. L. & CRIMINOLOGY 1223 (1995) (agreeing with the Court's decision), *and* Jennifer Bullock, Note, *National Organization for Women v. Scheidler: RICO and the Economic Motive Requirement*, 26 CONN. L. REV. 1533, 1535 (1994) (same), *with* Golinski, *supra* note 142, at 164 (contending that the Court's decision was an assault on free speech), *and* Matthew C. Blickensderfer, Note, *Unleashing RICO*, 17 HARV. J.L. & PUB. POL'Y 867, 867 (1994) (disagreeing with the *Scheidler* Court's decision).

185. As discussed earlier, the rule of lenity militates against any attempt to divine a criminal statute's motivating policies from legislative history in order to support a broad interpretation of the statute. *See supra* Part IV.C. Instead, the rule requires that the meaning of the statute be derived from its text, and because it is a criminal statute, that the text be strictly construed. *See* Solan, *supra* note 71, at 83-86.

186. *See* 18 U.S.C. § 1961(4) (1994). Each of RICO's prohibited activities in § 1962 requires that the pattern of racketeering activity have some connection to an "enterprise." Because of the undefined nature of § 1961(4), courts have been forced into the common law conception to define the "enterprise" requirement. The Eight Circuit, for example, has construed the "enterprise" requirement to require three elements: "(1) a common purpose; (2) a formal or informal organization of the participants in which they function as a unit ('some continuity of both structure and personality'); and (3) 'an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.'" United States v. Darden, 70 F.3d 1507, 1520 (8th Cir. 1995).

187. The Seventh Circuit Court of Appeals held that "RICO requires either an economically motivated enterprise or economically motivated predicate acts." National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992), *rev'd*, 510 U.S. 249 (1994). In addition to the Seventh Circuit, other circuits adopted the view that RICO enterprises must have economic motivation. *See* United States v. Ivic, 700 F.2d 51, 60 (2d Cir. 1983) (noting that "enterprise," though more broad than "business," "is an organized profit-seeking venture"). In *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983), however, "the court later held that "the Government may meet its obligation to show 'financial purpose' through either the enterprise or the predicate acts of racketeering." *Id.* at 56; *see also* United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980) (holding that the term enterprise requires "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal"). *But see* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349-50 (3d Cir. 1989) (holding that because the predicate offense did not require an economic motive, RICO required no additional economic motive).

188. *See* 18 U.S.C. § 1961(4).

189. In its analysis of whether an enterprise must possess an economic motive, the Supreme Court analyzed the definition of enterprise in § 1961(4) in a very cursory manner, merely analo-

the definition of "pattern of racketeering," the definition provided in § 1961(4) is explicitly incomplete and provides only hints to its meaning rather than a complete definition.[190] The definition merely describes the forms that "enterprises" may take without ascribing any defining characteristics to those forms.[191] Because Congress never attempted to provide a complete definition of "enterprise" in § 1961(4), resort to other textualist devises is necessary in order to construe a plausible definition.

An examination of various dictionaries, however, reveals that the term "enterprise" has multiple definitions.[192] The term typically

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gizing to *Turkette* and, instead, focused more on the operative language of § 1962 in its attempt to define "enterprise." *See Scheidler*, 510 U.S. at 260-61. This is likely because RICO's definition of enterprise is relatively unhelpful in trying to decide whether construing RICO's "enterprise" concept as containing limiting principles is appropriate. *See infra* note 195 (discussing possible meanings of "enterprise" through an examination of RICO's legislative history). Nevertheless, conducting a close analysis of § 1961(4) would have been appropriate.

190. The word "includes" in § 1961(4) is similar to the "requires at least" language in § 1961(5). In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the Supreme Court noted that the "requires at least" language in § 1961(5) is different than "other provisions in § 1961 that tell us what various concepts used in the Act 'mean.'" *Id.* at 237.

191. *See* Kahan, *supra* note 52, at 379. Kahan states,

> In truth, the statutory 'definition' of 'enterprise' is no definition at all, but only a directive to courts not to limit 'enterprise' to the formally structured entities that it commonly denotes—such as corporations, partnerships, or associations. But beyond conveying that 'enterprise' is *not merely* one of these entities, the statute affords no clue as to *what else* an enterprise is (and, more importantly, is not). That task necessarily falls upon the courts.

Id.

192. *See* Sunstein, *supra* note 7, at 418-19 (noting that instructing courts to rely on the plain meanings of a statute's words "is unhelpful when statutory words have more than one dictionary definition, or when the context produces interpretive doubt"); *see also* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998) (criticizing the Supreme Court's use of dictionaries in its opinions). Professor Aprill argues that dictionaries may be unreliable, in part, because the legal sense of ordinary words may be absent from general dictionaries and because dictionaries offer a range of meanings for most words. *See id.* at 298. Professor Aprill also argues that "[j]udges need to resist basing statutory interpretation on the precise words a particular dictionary uses for one meaning of a word." *Id.* at 299. Professor Aprill, however, does see a role for dictionaries in defining statutory language; she envisions a more limited role where the "dictionary definition becomes a resource in developing the judicial conception of a statute's interpretation." *Id.* at 331. The Court's use of a dictionary has sometimes been called a "denotative approach to plain meaning: Apply the dictionary definition and see if it fits." ESKRIDGE & FRICKEY, *supra* note 76, at 588. According to Eskridge & Frickey, professional linguists do not approach meaning this way. *See id.* In fact, many reject the insistence that a statute has a "plain meaning." *See id.* Because words reflect categories that are "fuzzy at the margins," linguists are willing to expand and contract the meaning of a word beyond its dictionary definitions. *Id.* Although the proper weight to give to dictionary definitions is a matter of dispute, when Congress fails to completely define an important word in a statute, consulting a dictionary is indispensable. Moreover, the Supreme Court does not stop at the dictionary definition of a word, but also analyzes its use in the context of the statute. *See infra* note 206

includes a business or commercial reference, but also can refer to a "goal-oriented" entity.[193] The list of examples in § 1961(4) that constitute enterprises do not mandate that the definition of "enterprise" be interpreted broadly to include "goal oriented" entities without an economic motivation. Because the list includes entities that obviously imply a commercial orientation, such as "partnership" and "corporation" and because the rest are not inconsistent with a commercial orientation, adopting the business or commercial motivation dictionary definition of "enterprise" is consistent with the language of § 1961(4).[194] Because the definition of "enterprise" as an entity with an economic motivation is both commonly accepted, as well as plausible and congruent with RICO's incomplete definition in § 1961(4), applying the rule of lenity's principle of strict construction would dictate that the narrower definition of "enterprise" prevail, unless contextual evidence shows that defining "enterprise" to include only entities with an economic entity would conflict with the purpose of the statute and hence be implausible. No other evidence, however, indicates that it would be implausible to define "enterprise" as an entity with an economic motivation.[195]

& accompanying text (illustrating how the Court looks for the meaning of a statutory term in the context of the statute).

193. *See* Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1618-19 (1994) (reviewing LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES (1993)). The authors provide nine dictionary definitions for "enterprise." Six of the definitions include references to economic activity. *The American Heritage Illustrated Encyclopedic Dictionary* defines enterprise as a "[c]ommercial economic activity; business: *private enterprise*" and also "[a] business or company." *Id.* at 1618. *Funk & Wagnalls New "Standard" Dictionary of the English Language* defines enterprise as "[t]he act of engaging, or the disposition to engage, in difficult undertakings; boldness, energy, and invention exhibited in practical affairs, especially in business." *Id. The Oxford Encyclopedic English Dictionary* defines enterprise as a "business firm." *See id. The Random House Dictionary of English Language* defines enterprise as "a company organized for commercial purposes; business firm." *Id.* at 1618-19. *The World Book Dictionary* defines enterprise as "[t]he carrying on of enterprises; a taking part in enterprises." *Id.* at 1619. *Websters Third New International Dictionary of the English Language* defines enterprise as " a unit of economic organization or activity (as a factory, a farm, a mine); *esp*: a business organization: FIRM, COMPANY." *Id.*; *see also* BLACK'S LAW DICTIONARY 531 (6th ed. 1990) (defining enterprise as "[a] business venture or undertaking").

194. See Blickensderfer, *supra* note 184, at 874 (stating that "individual" could refer to a sole proprietorship, and union or "groups of individuals associated in fact although not a legal entity" could refer to organized crime).

195. As discussed above, legislative history is unreliable and its unreliability is evident when utilized to illuminate the definition of "enterprise." *See supra* notes 156-68 and accompanying text. As is usual when construing RICO, there is considerable disagreement about Congress' objectives in defining "enterprise." *Compare* Blickensderfer, *supra* note 184, at 879-83 (arguing that RICO's legislative history overwhelmingly supports an economic requirement), *and* Neil Feldman, *Spiraling Out of Control: Ramifications of Reading RICO Broadly*, 65 DEF. COUNS. J. 116, 118 (1998) (contending that "there was never an indication that RICO was to extend even

The operative criminal provisions in §§ 1962(a),[196] (b),[197] and (c)[198] in which the term "enterprise" is used do not mandate a broader definition. The term "enterprise" plays an important role in subsections (a), (b), and (c) of § 1962.[199] The dominant theme of § 1962(a), which prohibits the use or investment of income received from racketeering activity "in acquisition of any interest in, or the establishment or operation of, any enterprise" and which contains language referring to the purchase of securities, is a prohibition against investment in commercial entities.[200] Similarly, § 1962(b), which prohibits acquiring or maintaining any interest in or control of a RICO enterprise through a pattern of racketeering activity, also has as its dominant theme the prohibition of racketeers involvement in commercial entities. Although the context of § 1962(c), unlike subsections (a) and (b), by itself may not support the conclusion that the enterprise be a "profit-seeking"

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minimally beyond the scope of economically induced crimes"), *with* Randolph, *supra* note 184, at 1216-19 (positing that RICO's legislative history does not support an economic requirement). To the extent that legislative history is relevant in determining whether an economic requirement is a reasonable interpretation of the RICO statute, RICO's legislative history confirms that an economic requirement is a reasonable interpretation. The statements of findings and purpose preceding the Organized Crime Control Act of 1970 are devoted exclusively to organized crime and focus on its tendency to "derive[] a major portion of its power through money." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 922-923 (1970). Likewise, the House and Senate Reports focused on the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. *See* S. REP. NO. 91-617, at 76 (1969); H. REP. NO. 91-1549, at 57 (1970). Although the legislative history does not clearly show that RICO requires an economic motive, it certainly does not clearly show the opposite. One common and misleading objection is that, "if Congress had desired an economic motive restriction on the term 'enterprise' it could easily have included one" and that while "[i]n the Senate proceedings prior to the enactment of RICO . . . the Senators used the term 'business enterprise,' or 'business,'" the text merely uses the word "enterprise." Randolph, *supra* note 184, at 1217. The point that if Congress desired an economic motivation it would have explicitly stated so (also mentioned in *Scheidler*) is misleading when one considers that Congress did not give a definition for "enterprise." *See supra* notes 188-91 and accompanying text. Contrary to the Supreme Court's assertions, incomplete statutory language should not automatically be construed as breadth. Also, the fact that the Senate used the terms "business enterprise" and "business" supports an economic requirement. Likely, the Senate dropped these terms because it did not want RICO "enterprises" to be limited to traditional businesses, not because it did not intend for there to be an economic motivation requirement.

196. *See* 18 U.S.C. § 1962(a) (1994).

197. *See id.* § 1962(b).

198. *See id.* § 1962(c). *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), involved an action under § 1962(a), (c), and (d). *See id.* at 252.

199. The Supreme Court has said that it starts with the language of the statute but "consider[s] not only the bare meaning of the word but also its placement and purpose in the statutory scheme." Bailey v. United States, 516 U.S. 137, 145 (1995).

200. Blickensderfer, *supra* note 184, at 876 (arguing that it is impossible to acquire an interest in a non-commercial entity).

entity, it certainly does not mandate a broader conception of "enterprise."[201]

In *Scheidler*, the Supreme Court said that:

> [t]he phrase "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" comes the closest of any language in subsection (c) to suggesting a need for an economic motive. Arguably an enterprise engaged in interstate or foreign commerce would have a profit-seeking motive, but the language in § 1962(c) does not stop there; it includes enterprises whose activities "affect" interstate or foreign commerce .... An enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives.[202]

The Supreme Court's assertion that the word "affect" in § 1962(c) was intended to broaden "engaged in interstate or foreign commerce" is hardly as self-evident as the Court suggests. More likely, the phrase "or the activities of which affect" was intended to satisfy the Commerce Clause while still covering intrastate economic activity.[203] The phrase "affect interstate commerce" is the standard that courts use in determining whether intrastate activity falls within the Commerce Clause.[204] Moreover, other criminal provisions that clearly only relate to enterprises having a profit motive use the language.[205]

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201. Section 1961(4) provided a single definition of "enterprise," a definition that applies to all of RICO's subsections. *See id.* at 875-76. If one were to define "enterprise" as requiring an economic motive in § 1962(a), it would be illogical, without explicit direction from Congress, to construe the "enterprise" as not requiring an economic motivation in § 1962(b) or (c). *See id.* at 876-77.

202. *Scheidler*, 510 U.S. at 257-58.

203. This conclusion is supported by the fact that the same phrase "engaged in, or the activities of which affect, interstate or foreign commerce" is included in all three subsections of § 1962, the first of which clearly refers exclusively to commercial based organizations.

204. *See, e.g.*, United States v. American Bldg. Maint. Indus., 422 U.S. 271, 283 (1975) (holding that "the phrase 'engaged in commerce' as used in § 7 of the Clayton Act ... means engaged in the flow of interstate commerce and was not intended to reach all corporations engaged in activities subject to the federal commerce power"); Navegar, Inc. v. United States, 192 F.3d 1050, 1054 (D.C. Cir. 1999) (recognizing "three broad categories of activity that Congress may regulate under its Court-defined Commerce Clause authority") (citation omitted); United States v. Hornbeck, 489 F.2d 1325, 1326 (7th Cir. 1973) (holding that "Congress may impose criminal sanctions for the purpose of regulating purely intrastate activities which substantially affect interstate commerce").

205. For example, § 1956(c)(4), which prohibits money laundering, provides:

> the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce, in any way or degree.

Analysis of § 1961(4)'s "enterprise" requirement suggests that the definition is, at worst, ambiguous. Interpreting "enterprise" as including an economic motivation is a plausible definition and, therefore, the rule of lenity dictates that the Court should adopt the narrower interpretation.[206]

Contrary to the fears of some members of the Supreme Court, the application of the rule of lenity would not mean that the defendant always wins under the legislative supremacy approach.[207] For example, the rule of lenity would not change the Court's holding that a RICO "enterprise" does not have to be a legitimate organization.[208] Although taking interpretive precedence over recourse to any nontextual sources, such as legislative history, that purport to prove congressional purpose,

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18 U.S.C. § 1956(c)(4) (1994).

206. Interpreting "enterprise" to include an economic motive should not be considered judicial engrafting of a requirement not found in the statutory language. Rather, the process is merely an attempt to find the ordinary meaning of the statutory language in its textual context. *See* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting). Justice Scalia stated:

> I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.

Id. (Scalia, J., dissenting); *see also* National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 629 (7th Cir. 1992) (stating "[i]n this case we do not believe we are adding elements to the offense, but merely fleshing out the definitions of those elements"), *rev'd*, 510 U.S. 249 (1994). Of course, there is a fine line between "fleshing out" the definitions of elements and engaging in common law rulemaking. *See* United States v. Aguilar, 515 U.S. 593, 612 (1995) (Scalia, J., dissenting) ("But 'exercising restraint in *assessing the reach* of a federal criminal statute' (which is what the rule of lenity requires), is quite different from importing extratextual requirements *in order to limit the reach* of a federal criminal statute, which is what the Court has done here.") (citation omitted).

207. *See* Muscarello v. United States, 524 U.S. 125, 139 (1998).

208. *See* United States v. Turkette, 452 U.S. 576, 593 (1981). Professor Solan believes that the Court in *Turkette* could have held that "enterprise" is limited only to legitimate organizations. *See* SOLAN, *supra* note 148, at 79 (arguing that "enterprise" is understood to include only legitimate businesses). Solan does not, however, explain in any detail how the term "enterprise" can be reasonably limited to legitimate enterprises. In *Turkette*, the First Circuit rested much of its argument on its view that "[e]ach specific enterprise enumerated in § 1961(4) is a legitimate one." United States v. Turkette, 632 F.2d 896, 899 (1980), *rev'd*, 452 U.S. 576 (1981). As the Supreme Court in *Turkette* noted, however:

> The mere fact that a given enterprise is favored with a legal existence does not prevent that enterprise from proceeding along a wholly illegal course of conduct. Therefore, since legitimacy of purpose is not a universal characteristic of the specifically listed enterprises, it would be improper to engraft this characteristic upon the second category of enterprises.

Turkette, 452 U.S. at 582 n.4. Further, it is not reasonable, as the Court noted, that §§ 1962(a)-(b) "were not also aimed at preventing racketeers from investing or reinvesting in wholly illegal enterprises and from acquiring through a pattern of racketeering activity wholly illegitimate enterprises such as an illegal gambling business or a loan-sharking operation." *Id.* at 584-85.

the rule would only be applied when a narrower interpretation of the statute is plausible.[209] Interpreting RICO in this manner would improve the consistency of federal law and would force Congress to write better statutes.[210]

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209. One objection to the legislative supremacy conception in the RICO context is that RICO contains a liberal construction clause in § 904(a). Critics of applying RICO's liberal construction clause in criminal contexts, however, argue that "[t]he fundamental principle of statutory construction is the due process requirement that criminal statutes be construed in favor of lenity .... If the liberal construction clause is applicable to determine the scope of criminal liability under [RICO], the provision is therefore unconstitutional." Tarlow, *supra* note 23, at 309; *see also* Jeremy M. Miller, *RICO and Conspiracy Construction: The Mischief of the Economic Model*, 104 COM. L.J. 26, 51 (1999) (arguing that the liberal construction clause violates due process and the separation of powers). At least one court has agreed that the liberal construction clause is not applicable in criminal contexts. *See* United States v. McClendon, 712 F. Supp. 723, 729 (E.D. Ark. 1988). The court wrote that "Congress' call for a liberal interpretation in order to effectuate the Act's remedial purposes does not outweigh the Court's duty under the rule of lenity to construe criminal statutes strictly." *Id.* The Supreme Court may agree that the liberal construction clause does not apply to the criminal provisions of RICO. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the Supreme Court said that:

> The strict- and liberal-construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c) [a civil RICO provision]. Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is § 1964(c), where RICO's remedial purposes are most evident.

Id. at 492 n.10 (citation omitted). Although the Court suggested that RICO's liberal construction clause might not be applicable to criminal applications of RICO, the Court's language was enigmatic and cannot be considered conclusive. *See* SOLAN, *supra* note 148, at 80 (noting that the Court's narrow interpretation of § 1962 and its broad interpretation of § 1964 "is a mystery that the Court does not address, much less solve"). Also complicating matters is that § 904(a) states that RICO should be interpreted "liberally to effect its remedial purposes," which implies that the statute should be allowed a broad construction only when doing so would further the remedial purposes of the statute, a proposition that is subject to dispute considering that the "remedial purposes" of RICO are subject to much debate. 18 U.S.C. § 904(a) (1994); *see, e.g.*, United States v. Anderson, 626 F.2d 1358, 1370 (8th Cir. 1980) (holding that "enterprise" required an economic motivation and stating that "[f]urthermore, an expansive definition of the term 'enterprise' will not necessarily effectuate the remedial purpose of RICO to eliminate the infiltration of racketeers into our business economy").

210. Although reaching the correct result in *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Court's reasoning would have been far more persuasive, and could have improved the consistency of federal law, if it had invoked the rule of lenity. In *Reves*, the Court was faced with the task of defining § 1962(c)'s requirement that the defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." *Id.* at 177. The Court noted that the word "conduct" was used twice in § 1962(c) and said that it was reasonable to give each use a similar construction. *See id.* The Court used *Webster's Third New International Dictionary* to define "conduct," as a verb, to mean "to lead, run, manage or direct." *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 476 (1976)). The Court argued that conduct must require an element of direction because, otherwise, the second use of the word becomes superfluous. *See id.* at 178. The Court concluded that "[i]n order to 'participate, directly or indirectly, in the conduct of such enterprise's affairs,' one must have some part in directing those affairs." *Id.* at 179. The Court averred that the language of the statute is clear from its language and legislative history and that its interpretation of "participate" is the commonly understood definition. *See id.* As the dissent pointed out, the Supreme Court engaged in dictionary shopping and "[w]hat strikes the Court

V. THE VOID-FOR-VAGUENESS DOCTRINE AND THE LEGISLATIVE SUPREMACY APPROACH

Although the rule of lenity is a major component of the legislative supremacy conception, there are instances where federal criminal statutes may be so lacking in minimal guidelines that the judiciary should not attempt to provide definition, but, instead, should strike the statute down under the void-for-vagueness doctrine. Under the legislative supremacy approach of federal criminal law, an indispensable requirement of the unconstitutionally vague doctrine is that criminal statutes provide sufficient "guidance" not only to those who must obey the laws but also to those who must interpret the laws. When a statute is too vague to provide sufficient guidance, the judiciary is placed in the position of usurping the proper function of the legislature by "making the law" rather than interpreting it.[211]

Traditionally, vagueness[212] may invalidate a criminal law for either of what the Supreme Court has termed two "independent" reasons.[213] First, the statute "may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits."[214] Second,

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as clear, however, looks at the very least hazy to me." *Id.* at 187-88 (Souter, J., dissenting). For criticism of the Court's decision, see Camp, *supra* note 128, at 77-80; Ira H. Raphaelson & Michelle D. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669, 690-95 (1994). The *Reves* majority decided that "[b]ecause the meaning [of] the statute is clear," they did not need "to consider the application of the rule of lenity," but that the court would favor the narrower "operation or management" test that the Court adopted. *Reves*, 507 U.S. at 184 n.8. The majority would have been better off honestly conceding that its interpretation of § 1962(c) was only a plausible interpretation, and not the only reasonable interpretation, and invoking the rule of lenity to mandate the narrower interpretation.

211. *See* Jeffries, *supra* note 80, at 202-05 & n.40 (discussing how separation of powers justifies various methods of statutory interpretation).

212. The void-for-vagueness doctrine is a component of the Fifth Amendment, which provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Commentators have noted that courts applying the unconstitutionally vague doctrine often do not articulate clearly the underlying rationale and, similar to the rule of lenity, do not apply the doctrine consistently. *See* Robert D. Luskin, *Behold, the Day of Judgment: Is the RICO Pattern Requirement Void for Vagueness*, 64 ST. JOHN'S L. REV. 779, 782-83 (1990); Jeffrey I. Tilden, Note, *Big Mama Rag: An Inquiry Into Vagueness*, 67 VA. L. REV. 1543, 1551-52 (1981) (noting that vagueness jurisprudence is characterized by inconsistency and lack of semantic analysis). Professor Batey has argued that courts calculate the importance of a statute and allow more ambiguity if they believe that the criminal statute is sufficiently important. *See* Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 12 (1997). Consequently, important criminal statutes such as RICO may be allowed more vagueness than other less important criminal statutes. *See id.*

213. *See* City of Chicago v. Morales, 119 S. Ct. 1849, 1859 (1999).

214. *Id.* The Supreme Court has said that the fair notice principle bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common

the statute "may authorize and even encourage arbitrary and discriminatory enforcement."[215] Like the rule of lenity,[216] the void-for-vagueness doctrine is viewed, in part, as a nondelegation doctrine. The Supreme Court has said that "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[217] In explaining why vague statutes that do not establish minimal guidelines "offend several important values," the Court has warned that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[218]

The minimal guidelines concern has been viewed as an independently sufficient basis for striking down a law on vagueness grounds. In *City of Chicago v. Morales*,[219] the Supreme Court struck down Chicago's gang loitering ordinance on the grounds that the ordinance failed to establish minimal guidelines to govern law enforcement, even though the Court, arguably, found that the ordinance provided adequate notice to offenders.[220] Although Justice Stevens' plurality opinion found the statute invalid because it failed to provide adequate notice,[221] he commented that "[v]agueness may invalidate a criminal law for *either* of two independent reasons."[222]

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intelligence must necessarily guess at its meaning and differ as to its application." United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

215. *Morales*, 119 S. Ct. at 1859 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

216. *See supra* Part IV.A (discussing the rule of lenity as a nondelegation doctrine).

217. *Kolender*, 461 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

218. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1973); *see also Goguen*, 415 U.S. at 575 (noting that legislatures abdicate their responsibilities for setting the standards of the criminal law when they allow standardless sweeps).

219. City of Chicago v. Morales, 119 S. Ct. 1849 (1999).

220. *See id.* at 1861-63.

221. *See id.* at 1861.

222. *Id.* at 1859 (emphasis added). Both Justice Souter and Justice Ginsburg joined Justice Stevens in the plurality. Moreover, Justice O'Connor and Justice Breyer explicitly stated in concurrences that their concurrences were based on the theory that the ordinance was unconstitutionally vague because it lacked minimal guidelines. Justice O'Connor stated that the minimal guidelines concept "alone provides a sufficient ground" for invalidating a statute. *Id.* at 1864 (O'Connor, J., concurring). Justice Breyer stated, "I believe this ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide 'sufficient minimal standards to guide law enforcement officers.'" *Id.* at 1866 (Breyer, J., concurring); *see also* Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289 (1999) (agreeing that the Court held that the minimal guidelines concept was held to be an independent basis for invalidation). Professor Hill believes that the Supreme Court's opinions in

The Court, at times, has extended to the judiciary the philosophy of the void-for-vagueness as a nondelegation, minimal guidelines doctrine. Although the Court has often emphasized notice and arbitrary enforcement, it has also mentioned, though not nearly as often, the importance of clear criminal statutes in guiding and constraining the judiciary.[223] Nevertheless, concerns that vague laws delegate excessive power to the Judicial Branch are as important as concerns that vague criminal laws delegate excessive enforcement discretion to the Executive Branch.[224]

In order for the void-for-vagueness doctrine to serve a nondelegation purpose in the legislative supremacy approach, an important principle is that vague criminal statutes, even ones that do not infringe on constitutionally protected rights, be subject to facial challenges.[225]

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), and *Kolender v. Lawson*, 461 U.S. 352 (1983), support the *Morales* Court's holding that the minimal guidelines concept is an independently sufficient grounds for invalidation. *See* Hill, *supra*, at 1309-10. *But see The Supreme Court-Leading Cases*, 113 HARV. L. REV. 200, 280 n.52 (1999) (commenting that the holdings of the six Justices "are consistent with the proposition that notice and discretion moved as one in vagueness doctrine").

223. *See Kolender*, 461 U.S. at 358. The Court noted that:

> Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese*, 92 U.S. 214, 221 (1875): "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative branch of government."

Id. at 358 n.7; *see also* United States v. Lanier, 520 U.S. 259, 265 n.5 (1997) (stating "the fair warning requirement also reflects the deference due to the legislature"); Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984) (holding that the vagueness doctrine permits meaningful judicial review); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966) (stating that "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"); United States v. Evans, 333 U.S. 483, 495 (1948) (holding that guessing at Congress' intent is a task outside the bounds of judicial interpretation); Musser v. Utah, 333 U.S. 95, 97 (1948) (stating that "[l]egislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused").

224. *See* Luskin, *supra* note 212, at 781 (suggesting that vague criminal statutes that delegate excessive power "implicate Article III's separation of powers concerns").

225. Allowing facial challenges to federal criminal statutes is important under a legislative supremacy approach because under an "as-applied" vagueness challenge, if a court finds a law partially vague, the statute cannot be applied to that particular defendant, but it remains intact. *See* Michael S. Kelley, *"Something Beyond": The Unconstitutional Vagueness of RICO's Pattern Requirement*, 40 CATH. U. L. REV. 331, 371 (1991). Some may object to allowing facial challenges because the Supreme Court has said that it must construe congressional enactments so as to avoid a danger of unconstitutionality. *See* United States v. Harriss, 347 U.S. 612, 623 (1954). The Court, however, has indicated that the principle of construing federal statutes so as to avoid a

Unfortunately, the Supreme Court has not been inclined to strike down vague federal criminal statutes, especially on facial challenges.[226] Generally, vagueness challenges that do not involve First Amendment freedoms are examined in light of the facts of the case at hand and are not deemed to warrant facial challenges.[227] The Court has said that the

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danger of unconstitutionality is not unlimited. *See id.*; *see also* United States v. Powell, 423 U.S. 87, 94 (1975); United States v. Evans, 333 U.S. 483, 486 (1948); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994) (criticizing the Supreme Court's distinction between as-applied and facial challenges). Dorf notes that as-applied challenges violate the principle that "a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." Dorf, *supra*, at 242 (quoting Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3).

226. The Court has said that it expresses less tolerance for vagueness in criminal rather than civil statutes because the consequences of imprecision in criminal statutes are qualitatively more severe. *See Kolender*, 461 U.S. at 358-59 n.8 (stating that "where a statute imposes criminal penalties, the standard of certainty is higher"); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982). The Court, however, has said that a strong presumption of validity attaches to acts of Congress. *See* United States v. National Dairy Prods. Corp., 372 U.S. 29, 32 (1963). The Court is far more apt to strike down state, rather than federal, statutes because once a state statute has been construed by that state's highest court, there is little the United States Supreme Court can do to save it. Federal statutes, however, can be construed by the Court in such a way as to make them constitutional. *See* A.G.A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 83 n.80 (1960). There are several other areas where the Court has relaxed its vagueness standard. The Court has relaxed vagueness standards where the statutory terms at issue have a well-established common law meaning. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). The Court has asserted that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow and because businesses . . . can be expected to consult relevant legislation in advance of action." *Hoffman Estates*, 455 U.S. at 498. The Court has also said that "the constitutionality of a vague statutory standard is closely related to whether [the] standard incorporates a requirement of *mens rea*." Colautti v. Franklin, 439 U.S. 379, 394 (1979); *see also Morales*, 119 S. Ct. at 1858 (holding that the ordinance was subject to a facial challenge because it did not contain a *mens rea* requirement) (plurality opinion). In RICO, Congress did not explicitly include a *mens rea* requirement and some have concluded that RICO has no *mens rea* requirement beyond that necessary for the predicate acts. *See* United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995); Miller, *supra* note 209, at 26, 27 n.6 (noting that, arguably, all but the non-conspiracy clause of RICO may be subject to strict liability).

227. *See* Maynard v. Cartwright, 486 U.S. 356, 361 (1988) (concluding that "[v]agueness challenges to statutes not threatening First Amendment interests [are judged] on an as applied basis") (citations omitted); New York v. Ferber, 458 U.S. 747, 767 (1982) (stating that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court") (citations omitted); United States v. Mazurie, 419 U.S. 544, 550 (1975) (holding that "vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand") (citations omitted). This approach by the Supreme Court is contrary to the traditional mode of vagueness adjudication. *See* Hill, *supra* note 222, at 1292-96. Professor Hill argues that "[u]nder traditional vagueness practice, a statute would be invalidated for vagueness although not vague in all possible applications." *Id.* at 1290. Professor Hill claims that *Parket v. Levy*, 417 U.S. 733 (1974), was the first case to hold that "one who has received fair notice can never attack a statute for vagueness." *Id.* at 1297. The Court, however, did so on the basis of a misinterpretation of an earlier case, *United States v. National Dairy Products Corp.*,

rationale for not allowing a defendant to facially challenge a statute when that defendant's conduct is clearly prohibited under the statute is evident: "to sustain a challenge, the complainant must prove that the ordinance 'is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'"[228] Congruent with this standard, however, the Court, in *United States v. Powell*,[229] said that even a federal criminal statute[230] that does not implicate First Amendment rights can be dealt with generally if the statute proscribes "no comprehensible course of conduct at all."[231] Such a statute "may not constitutionally be applied to any set of facts."[232]

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372 U.S. 29 (1963). *See* Hill, *supra* note 222, at 1297 (arguing that "the Court worked a major revolution in the disposition of vagueness challenges" when deciding *National Dairy Products Corp.*). In *Morales*, the Court debated whether the ordinance at issue was susceptible to a facial challenge. Justice Stevens' plurality opinion allowed a facial challenge and said that "even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Morales*, 119 S. Ct. at 1857 (citing *Kolender*, 461 U.S. at 352). Justice Breyer, in a concurring opinion, believed that a facial challenge was appropriate because "[t]he ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case." *Id.* at 1866 (Breyer, J., concurring). Justice Scalia, in a dissent, took strong exception to the Court's view that a facial challenge was appropriate, saying that "[w]hen a facial challenge is successful, the law in question is declared to be unenforceable in all its applications, and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration." *Id.* at 1867-68 (Scalia, J., dissenting).

228. *Hoffman Estates*, 455 U.S. at 495 n.7 (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

229. United States v. Powell, 423 U.S. 87, 92 (1975). The *Powell* Court also stated the general rule of the vagueness doctrine, which is that Congress could have chosen precise and unambiguous language in drafting a statute but did not, does not necessarily mean that a statute is unconstitutionally vague. *See id.* at 94.

230. Significantly, *Powell* involved a facial challenge to a federal criminal statute, 18 U.S.C. § 1715 (making it illegal to mail a pistol, revolver, or other firearm). *See Powell*, 423 U.S. at 89.

231. *Id.* at 92. This principle has been cited by other courts. In *Kolender*, the Court said that concerns about certainty in criminal statutes have, at times led the Court "to invalidate a criminal statute on its face even when it could conceivably have had some valid application." *Kolender*, 461 U.S. at 358 n.8 (citing *Colautti*, 439 U.S. at 394-401); Lanzetta v. New Jersey, 306 U.S. 451 (1939)); *see also* Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 965 n.13 (1984); Smith v. Goguen, 415 U.S. 566, 582 (1974) (upholding a vagueness challenge to criminal statute); *Coates*, 402 U.S. 611 (holding that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face); Giaccio v. Pennsylvania, 382 U.S. 399, 404 (1966) (holding constitutionally invalid an 1860 Act which allowed juries to assess court costs to an acquitted defendant).

232. *Powell*, 423 U.S. at 92. The Court said that:

> An example of such a vague statute is found in United States v. Cohen Grocery Co., 255 U.S. 81, 89. The statue there prohibited any person from "willfully . . . mak(ing)

For example, in *Lanzetta v. New Jersey*,[233] the Supreme Court struck down a statute very similar to RICO that was designed to combat "the pursuit of criminal enterprises" because the statute contained no comprehensible course of conduct.[234] The statute provided that:

> [a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.[235]

Similar to RICO, the statute in *Lanzetta* was predicated on the defendant's commission of prior criminal acts and, like RICO, the statute was not completely defined.[236] The Court recognized that the phrase "consisting of two or more persons" is all that purported to define "gang'" and found that "the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."[237]

As *Lanzetta* shows, striking down RICO's "pattern" requirement as unconstitutionally vague would not be as extreme as some might

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> any unjust or unreasonable rate or charge in . . . dealing in or with any necessaries . . . ." So worded it "forbids no specific or definite act" and "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

Id.

233. Lanzetta v. New Jersey, 306 U.S. 451 (1939).

234. *Id.* at 455 (making it illegal to be a "gangster"). Some have offered "crucial differences" as to why *Lanzetta* is not analogous to RICO. One writer has distinguished RICO on the basis that (1) "RICO does not impact necessarily on First Amendment rights to freedom of association;" (2) it is a federal statute; (3) the Department of Justice applies "a 'check' on prosecutorial discretion in its criminal applications" of RICO; (4) the "term 'pattern' is used and defined in one of RICO's sister statutes;" and (5) the "Supreme Court has already provided guidance as to the proper interpretation of the term 'pattern' in RICO." Moran, *supra* note 22, at 1722-24. These attempts to distinguish, however, do not necessarily lessen the analogousness of *Lanzetta* to RICO. First, in *Lanzetta*, the Court never mentioned the statute's possible impingement of First Amendment rights or whether it involved a status crime. The Court struck down the statute solely because the statutory terms provided were too vague and indefinite to be congruent with the Due Process Clause. Second, as Justice Scalia pointed out in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the fact that "pattern" was defined elsewhere in the Act is hardly persuasive proof that Congress intended that definition to be controlling in RICO. *See id.* at 252 (Scalia, J., concurring). Just as likely, the opposite it true. Third, the Department of Justice's "check" on prosecutorial discretion in RICO is hardly a cause to lessen the standard for vagueness review. *See supra* note 71 (noting that the Department of Justice aggressively prosecutes RICO). Moreover, checks on prosecutorial discretion cannot satisfy the notice requirement of the void-for-vagueness doctrine.

235. *Lanzetta*, 306 U.S. at 451.

236. *See supra* Part III (discussing the absence of complete definitions within RICO).

237. *Lanzetta*, 306 U.S. at 458.

claim.[238] Like the definition of "gangster" in *Lanzetta*, Congress' definition of "pattern" in RICO is simply too vague and undefined to prevent the courts from applying the statute without engaging in common law rulemaking. Although the Supreme Court has not directly addressed the vagueness of RICO,[239] commentators have voiced

238. At this point, striking down RICO's "pattern" requirement would be significant because every circuit that has addressed the void-for-vagueness issue following the Supreme Court's decision in *H.J. Inc.* has held that the RICO statute's definition of "pattern of racketeering" is not unconstitutionally vague. *See, e.g.*, United States v. Keltner, 147 F.3d 662, 667 (8th Cir. 1998); Columbia Natural Resources, Inc. v. Tatum, 58 F.3d 1101, 1106 (6th Cir. 1995); United States v. Krout, 66 F.3d 1420, 1432 (5th Cir. 1995); Cox v. Administrator U.S. Steel & Carnegie, 17 F.3d 1386, 1398 (11th Cir. 1994); United States v. Bennett, 984 F.2d 597, 605-07 (4th Cir. 1993); United States v. Ashman, 979 F.2d 469, 487 (7th Cir. 1992); United States v. Dischner, 974 F.2d 1502, 1508-11 (9th Cir. 1992); United States v. Pungitore, 910 F.2d 1084, 1102-05 (3d Cir. 1990); United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir. 1990). Courts have generally claimed that while RICO may have vagueness problems with respect to a hypothetical defendant, if RICO clearly applies to the particular defendant before the court, the vagueness challenge fails. In *United States v. Angiulo*, the court said that to succeed on a vagueness challenge, a defendant must demonstrate that "persons of ordinary intelligence in the defendants' situation [would not have had] fair notice that the gambling, loansharking and conspiracy offenses with which they were charged constituted an unlawful 'pattern of racketeering activity.'" *Angiulo*, 897 F.2d at 1178-79. Some have been critical of the decisions upholding RICO's constitutionality. *See* Luskin, *supra* note 212, at 780. Luskin argues that:

> [T]he cases rejecting constitutional challenges to RICO all derive from a handful of early cases construing terms other than "pattern of racketeering," or measuring the intelligibility of the pattern requirement against definitions that have long since been discarded as overly simplistic. The first trickle of cases spawned by Justice Scalia's concurrence promises little more. Displaying either commendable restraint or utter cowardice, depending on one's perspective, the courts seem content to duck the issue squarely raised by *Northwestern Bell* through a number of avoidance devices. These devices include reliance on "precedent," the need to review the statute "as applied," or focusing the due process inquiry on the predicate offenses rather than the terms of the RICO statute itself.

Id. (citations omitted). One district court has struck down RICO as being unconstitutionally vague. In *Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990), a civil case, the court stuck down RICO on an "as-applied" basis. *See id.* at 1581. The court said that the circumstances of the case, "which involve[d] a dispute between family members concerning whether certain property should have remained in a relative's estate, [were] in all likelihood far removed from the typical situations which Congress envisioned as being within RICO's scope of coverage." *Id.* The court held that the "pattern" requirement was unconstitutionally vague as applied to the defendant, saying that, "assuming the allegations in the complaint were proved, it could not be said that the pattern requirement had clearly been satisfied regardless of the narrowness of the interpretation placed upon the term 'pattern.'" *Id.* The court held the "pattern" requirements as facially invalid, saying that "[t]his court is also persuaded to agree with Justice Scalia's suggestion that the "pattern" requirement is unconstitutionally vague as written." *Id.*

239. Although the Supreme Court, in *H.J. Inc.*, did not address the vagueness of RICO, Justice Scalia, in his concurring opinion, voiced his opinion that a challenge to the constitutionality of RICO's "pattern" requirement might be appropriate. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring). Justice Scalia claimed that the Court's efforts in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), four years earlier to give lower courts guidance to the "enigmatic term" "pattern of racketeering activity" produced the "widest and

concerns about the vagueness of RICO's statutory language.[240] Applying the legislative supremacy approach, RICO would be vulnerable to a facial challenge on the grounds that its "pattern of racketeering activity" requirement does not set forth a comprehensible course of conduct.[241] The Court's concerns that facial challenges rest

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most persistent Circuit split on an issue of federal law in recent memory" and that the majority opinion in *H.J. Inc.* did little more than repromulgate the direction given in *Sedima* with the added caveat that Congress intended the Court's direction to be applied using a "flexible approach." *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring). Justice Scalia said that the Court's elevation "to the level of statutory text a phrase taken from the legislative history, ['continuity plus relationship' is] . . . about as helpful [to lower courts] to the conduct of their affairs as 'life is a fountain.'" *Id.* at 252 (Scalia, J., concurring).

Justice Scalia noted that the Court's interpretation of the "relatedness" prong was a direct quotation from 18 U.S.C. § 3575(e), a definition for "pattern" contained in another title of the Organized Crime Control Act of 1970, that "was explicitly *not* rendered applicable to RICO." *Id.* at 252 (Scalia, J., concurring). Justice Scalia said that "if normal (and sensible) rules of statutory construction were followed," the definition of "pattern" in RICO could not possibly mean the same thing as a provision that Congress deemed to not apply to RICO at all. *Id.* (Scalia, J., concurring). Justice Scalia cited *Russello v. United States*, 464 U.S. 16 (1983), for the proposition that "where 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." *H.J. Inc.*, 492 U.S. at 252 (Scalia, J., concurring) (citing *Russello*, 464 U.S. at 23). Justice Scalia admitted, however, that while he was critical of the Court's efforts, he "would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application." *Id.* at 254-55 (Scalia, J., concurring). He concluded that:

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

Id. at 255-56 (Scalia, J., concurring).

240. *Compare* Califa, *supra* note 23, at 843 (concluding that RICO is unconstitutionally vague), *and* Kelley, *supra* note 225, at 380 (noting that a number of circumstances indicate that the term "pattern" should be held void-for-vagueness), *and* Jed S. Rakoff, *The Unconstitutionality of RICO*, N.Y.L.J., Jan. 11, 1990, at 3 (asserting that RICO is unconstitutionally vague), *and* Reed, *supra* note 27, at 721-22 (noting that "the 'continuity' element of *H.J. Inc.* pattern requirement is ripe for a vagueness challenge"), *and* Skomorowsky, *supra* note 23, at 756 (concluding that RICO is unconstitutionally vague), *with* Moran, *supra* note 22, at 1755 (asserting that the "pattern" requirement is not unconstitutionally vague), *and* 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, 1149-50 (1990) (arguing that RICO's pattern requirement should not be held unconstitutionally vague).

241. Traditionally the Supreme Court has imposed a high burden of vagueness before invoking the unconstitutionally vague doctrine. *See* Moran, *supra* note 22, at 1717 (noting that the Supreme Court's cases have come to the conclusion that "[a]lthough the void-for-vagueness doctrine values clarity, proper application of the doctrine does not mean that only the most precisely-drawn statutes will pass constitutional muster"). The legislative supremacy approach, however, is consistent with the Court's position regarding the void-for-vagueness doctrine. Under the legislative supremacy conception, imprecisely drawn statutes are dealt with through the rule of lenity analysis, while statutes that do not set forth a "comprehensible course of conduct" are dealt with under the void-for-vagueness doctrine.

upon hypothetical cases[242] do not apply to situations like RICO where Congress left key terms so undefined that the standards set are not comprehensible and, therefore, cannot sufficiently guide judicial interpretation.[243]

Under a legislative supremacy approach, the constitutional doctrine of void-for-vagueness should be used whenever a statute does not define a comprehensible course of conduct.[244] Although a key

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242. *See, e.g.*, United States v. Raines, 362 U.S. 17, 22 (1960) (stating that the declaration of an act of Congress as unconstitutional should "not to be exercised with reference to hypothetical cases").

243. The Court in *United States v. Evans*, 333 U.S. 483 (1948), said that where a great degree of uncertainty existed as to Congress' intended penalty for a violation of the Immigration Act of 1917, the Court should refrain from choosing among the possible interpretations of the statute. *See id.* at 495. In deciding that its task exceeded the bounds of judicial interpretation, the Court described when a court should refuse to choose from among competing interpretations of criminal statutes:

> If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply.

Id.

244. Congress' choice to draft RICO in a very broad manner and courts' inability to deal effectively with that choice has worked to the disadvantage of the administration of RICO. Because of the lack of any coherent definition of "pattern of racketeering activity" in § 1961(5), the Supreme Court was forced to create its own definition of "pattern" in *H.J. Inc.* *See supra* notes 91-101 and accompanying text. The incoherence of the Supreme Court's definition led to confusion and inadequate guidance for lower courts. This led to a weak pattern requirement in decisions, such as *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), where multiple predicate acts committed within seconds of each other in a single criminal transaction were held to have met the "pattern" requirement. *See id.* at 1371. The Second Circuit held that Indelicato's participation in three murders as part of a single criminal transaction, the only predicate acts alleged against Indelicato, could constitute a "pattern of racketeering activity" by reasoning that "[w]here the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity" sufficient to meet the "pattern" requirement. *Id.* at 1383-84. In addition to cases like *Indelicato*, courts have held that certain crimes, by their very nature, satisfy the "continuity" requirement. In *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), the defendant "used his duties and responsibilities as a legislative aide to move two special interest bills through the California legislature in exchange for payments." *Id.* at 595. The court held that by their nature, crimes such as bribery suggest the threat of long-term activity. *See id.* at 596.

The Court's inadequate guidance has led to incoherent attempts by lower courts to further define the "pattern requirement." *See* United States v. Polanco, 145 F.3d 536, 541 (2d Cir. 1998). In attempting to provide a more precise definition of "relatedness," the *Polanco* court said that "[p]redicate acts "must be related to each other ('horizontal' relatedness), and they must be related to the enterprise ('vertical' relatedness)." *Id.* (quoting United States v. Minicone, 960 F.2d 1099, 1106 (2d Cir. 1992)). The court explained that to satisfy the "vertical relatedness" re-

component of the legislative supremacy approach, the void-for-vagueness doctrine should not be thought of as a sufficient device for the Court to use in insuring that Congress enacts sufficiently clear criminal statutes.[245] Instead, it should be used in tandem with the rule of lenity, a "junior version of the vagueness doctrine,"[246] to ensure legislative supremacy.[247]

VI. CONCLUSION

The legislative supremacy conception is the best approach to federal criminal statutory interpretation because it ultimately promotes judicial restraint, political accountability and consistent statutory interpretation. Moreover, it is the approach with which the judiciary is most comfortable. The two doctrines used to enforce legislative supremacy, the unconstitutionally vague doctrine and the rule of lenity,[248] are

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quirement, "[a] predicate act is 'related' to an enterprise if it is 'related to the activities of that enterprise.'" *Id.* (quoting *Minicone*, 960 F.2d at 1106). In describing the "horizontal relatedness" requirement, the court said that "[a] predicate act is related to a different predicate act if each predicate act is related to the enterprise." *Id.* (citing *Minicone*, 960 F.2d at 1106). Unfortunately, the *Polanco* court's additional gloss not only failed to provide much helpful guidance, but conflated its vertical and horizontal relatedness requirements by defining the "horizontal relatedness" requirement as requiring nothing more than the required showing for the "vertical relatedness" requirement. By requiring only that the predicate acts be related to the activities of the enterprise to satisfy the "horizontal relatedness" requirement, the court did not further elucidate or narrow *H.J. Inc.'s* all inclusive definition.

245. The Court has frequently maintained that absolute clarity may never be achievable. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) (noting that "we can never expect mathematical certainty from our language"); Colten v. Kentucky, 407 U.S. 104, 110 (1972) (rejecting efforts to "convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited").

246. *Supra* notes 211-42 and accompanying text (discussing the vagueness doctrine).

247. It is difficult to clearly distinguish between the void-for-vagueness and rule of lenity doctrines because the void-for-vagueness doctrine comprises both vagueness and ambiguity. *See* Waldron, *supra* note 1, at 513. Waldron comments that "'vagueness' is supposed to refer to any form of indeterminacy that encourages unwarranted discretion or leaves the citizen without reasonable notice of what is required of her." *Id.* at 514. The difference between the two doctrines in some cases is probably a matter of degree. While RICO's enterprise concept is perhaps unconstitutionally vague overall, in the specific instance of the *Scheidler* case, it was appropriate to deal with the issue of whether RICO's enterprise concept requires an economic motive through the use of the rule of lenity. In other cases, such as *H.J. Inc.*, the void-for-vagueness doctrine would be appropriate because a court would have to engage in common law rulemaking in order to give definition to the "pattern of racketeering activity" requirement. *See* SOLAN, *supra* note 148, at 105.

248. The rule of lenity is simply too ingrained in the judicial culture to jettison it at this point. Solan notes that although "the legislatures of many states replaced the rule of strict construction with the principle that courts should follow the legislative will," even judges in those states "that have rejected lenity use it anyway when the court has no other basis for deciding what to do." Solan, *supra* note 71, at 122.

historically rooted doctrines that comport well with courts' preferences for employing traditional methods of statutory interpretation as well as their reluctance to assume criminal law rulemaking power. If the legislative supremacy approach had been used by the Court in interpreting RICO, the result would have been a narrower, clearer statute that better preserved congressional responsibility to define crime.