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RICO—Economic Motive Unnecessary for the Proof of an Enterprise. *National Organization of Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994).

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INTRODUCTION

*National Organization for Women, Inc. v. Scheidler*¹ pitted familiar foes against one another when the National Organization for Women (NOW), a pro-choice women's rights organization, and two health clinics joined forces to combat antiabortion protesters. The controversy between the two factions, however, did not take place on a sidewalk outside a health clinic or on some broadcast debate. The "pro-choicers" took the "pro-lifers" all the way to the Supreme Court in a battle which did not directly address women's freedom of privacy or a baby's right to live. The debate addressed whether antiabortion protesters can be prosecuted under a federal organized crime statute when they stray from the lawful path down the path of civil disobedience.²

In *Scheidler*, NOW claimed the antiabortion protesters violated a federal organized crime statute, the Racketeer Influenced and Corrupt Organization (RICO)³ Chapter of the Organized Crime Control Act of 1970 (OCCA).⁴ However, protesters generally do not

1. 114 S. Ct. 798 (1994).

2. See Charles R. DiSalvo, *Abortion and Consensus: The Futility of Speech, The Power of Disobedience*, 48 WASH. & LEE L. REV. 219 (1991), for a comprehensive philosophical discussion of the proper exercise of civil disobedience. DiSalvo examines the actions and results of successful civil rights activists as support for his theories regarding how to effectively utilize civil disobedience to inspire change. *Id.* at 220-22. He also points out the defects in the tactics of one radical pro-life group, Operation Rescue. *Id.* at 222-34.

3. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993). In *Parnes v. Heindol Commodities, Inc.*, 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982), Judge Shadur offered a possible explanation for the creation of the "awkward title" of the Racketeer Influenced and Corrupt Organizations Act, more commonly known as RICO. The judge, in a footnote, suggested the one who coined the title was a "movie buff with a sense of humor" because Hollywood's first cinema attraction about gangsters was "Little Caesar," a 1930's movie with a lead character named "Rico." G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 237 n.3 (1982) (citing *Parnes*, 548 F. Supp. at 21 n.1.).

It is worth noting that Professor Blakey played a role in the drafting of the original RICO statute. He served as "the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970." *Id.* at 237 n.1.

4. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 801 (1994). The opening language closely resembles opening salvos from other RICO cases

possess a financial motive, which many courts have held to be a RICO requirement. Thus, the Supreme Court answered the question whether conviction under RICO can be achieved absent an economic motive.⁵ The Court, after employing a strict plain language assessment of the statute, held that no requirement of an economic motive existed within RICO's language.⁶

This Note will first attempt to simplify the complexity of RICO by generally discussing Section 1962 to give the reader a foundation upon which to examine the import of the *Scheidler* decision. Second, the Note will summarize the facts giving rise to the case and discuss its progress through the federal courts. Then, the Note will describe the origin of RICO and its subsequent judicial treatment—noting especially the courts' treatment of RICO's enterprise element—to demonstrate how the law of RICO has evolved in its interpretation and application. Finally, after a thorough explanation of the reasoning of the Court's central holding,⁷ the Note will discuss the significance of this case in the Eighth Circuit specifically;⁸ the Note

decided by the Court, as Chief Justice Rehnquist wrote that the Court was addressing RICO's interpretation "once again." See, e.g., *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1166 (1993); *Russello v. United States*, 464 U.S. 16, 17 (1983). Perhaps that recurring language suggests a Court that is tired of sounding the bell for the broad interpretation of a very broad law. However, consider *infra* notes 160-71 (discussing the *Reves* Court's narrowing RICO's application) and notes 150-55 (explaining how this breadth could lead to the death knell of RICO) and accompanying text.

5. *Scheidler*, 114 S. Ct. at 801. Only the 18 U.S.C. § 1962(c) count of the complaint was dismissed by the lower courts on the basis that the respondents lacked an economic motive. *Id.* However, the Supreme Court addressed the entire RICO statute in its decision that no profit-seeking motive is required. *Id.* at 802.

6. *Scheidler*, 114 S. Ct. at 806.

7. *Id.* "We hold only that RICO contains no economic motive requirement." *Id.*

8. The United States Court of Appeals for the Eighth Circuit (Eighth Circuit) approaches RICO's expansiveness reticently. It has repeatedly found, within RICO's language, elements that the Supreme Court has held to be improper. See *infra* notes 88-91 and accompanying text for Eighth Circuit cases narrowly construing RICO. *But see* *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993) (affirming the Eighth Circuit's operation or management test). This will be discussed more fully *infra* at notes 107, 160-71 and in the accompanying text.

The case which provided the initial remark that RICO required an economic motive in its enterprise element was *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). Although this remark was essentially dicta because the case involved financially motivated defendants, the *Anderson* definition of RICO was adopted by subsequent decisions of other circuits. See, e.g., *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), *cert. denied*, 479 U.S. 940 (1986); *United States v. Ivic*, 700 F.2d 51, 60-61 (2d Cir. 1983). See also *infra* note 88 for the *Anderson* definition of enterprise. In fact, this definition became the basis of the United States Court of Appeals for the Seventh Circuit's (Seventh Circuit) decision to uphold the dismissal of the RICO counts in *Scheidler*.

will also address the possible affects of *Scheidler* on the treatment of RICO generally in all the federal courts, as well as the possible constitutional challenges which may develop following this and other recent RICO Supreme Court decisions.

I. AN INTRODUCTION TO RICO

Congress created RICO to respond to the ever-increasing problem of organized crime, or racketeering, occurring in the marketplace of the American economy.⁹ Prior to RICO's creation, law enforcement had few weapons in its arsenal to stop the growth of organized crime.¹⁰ Congress therefore created RICO with extreme breadth to enable law enforcement agencies to reach and impact evasive and powerful racketeers.¹¹

RICO provides both criminal and civil remedies and allows the federal government to instigate both kinds of proceedings.¹² Private plaintiffs may also initiate civil proceedings against racketeers to recover treble damages and costs incurred.¹³ Although this discussion emphasizes the civil RICO process, the process involved in *Scheidler*,¹⁴ it should be recognized that the decision impacts both civil and criminal applications of RICO because the enterprise element is the same for both.

Private use of this powerful statutory weapon has grown tremendously since its inception due to the lure of treble damages and expenses.¹⁵ A plaintiff¹⁶ need only demonstrate, by a preponderance

National Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 626-27 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). For this reason, it is possible that the *Anderson* definition has been called into question by the *Scheidler* decision. See *infra* notes 157-58 (citing a district court case holding that *Scheidler* did call *Anderson's* enterprise definition into question).

For these reasons this casenote will emphasize possibilities for the Eighth Circuit's future interpretation of RICO law.

9. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). See *infra* note 79 for the complete text of the preface to the Organized Crime Control Act of which RICO is one part.

10. See *infra* note 79.

11. See *infra* note 79.

12. 18 U.S.C. §§ 1963(b), 1964(b) (1988).

13. 18 U.S.C. § 1964(c) (1988).

14. See 18 U.S.C. §§ 1962-1963 (1988 & Supp. V 1993).

15. Marguerite C. Gualtieri, Note, 35 VILL. L. REV. 705, 707 (1990). It has been posited that the "attraction of treble damages and attorney's fees has transformed civil RICO into 'the darling of the prosecutor's nursery.'" *Id.* (quoting Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1011 (1980) (quoting

of the evidence,¹⁷ that the defendant injured the plaintiff's business or property in one of the following four ways: (1) investing income received through racketeering activity in the establishment or operation of an enterprise;¹⁸ (2) acquiring or maintaining interest or control of an enterprise through a pattern of racketeering activity;¹⁹ (3) conducting the affairs of an enterprise through a pattern of racketeering activity;²⁰ or, (4) conspiring to do any of the first three.²¹

Two elements are common to all four offenses. A plaintiff must show: (1) the existence of an enterprise; and, (2) a pattern of racketeering activity. The statute intentionally imparts breadth to these terms.²² The statute purports to define the terms, but leaves the definitions open-ended. For example, an enterprise can even include an entity associated only in fact.²³ Likewise, the statute defines a "pattern of racketeering activity" as requiring, at a minimum, two predicate acts committed within ten years of each other.²⁴ In addition, these terms are subject to RICO's liberal construction clause.²⁵ Neither definition provides a concise meaning of either

Judge Learned Hand's comment with regard to the crime of conspiracy in *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925)).

16. RICO plaintiffs have included "individuals, American and foreign corporations, partnerships, governmental units and agencies, labor unions, churches, universities, estates, and foreign governments." DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* § 1.3.1 (1991). The class of potential plaintiffs is extremely broad, as "person" is defined by RICO as "includ[ing] any individual or entity capable of holding a legal or beneficial interest in property." *Id.* (quoting 18 U.S.C. § 1961(3) (1988)).

17. Of course, a criminal RICO conviction requires proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970).

18. 18 U.S.C. § 1962(a) (1988).

19. 18 U.S.C. § 1962(b) (1988).

20. 18 U.S.C. § 1962(c) (1988).

21. 18 U.S.C. § 1962(d) (1988).

22. *See infra* note 79 (containing the "Statement of Findings and Purpose" of OCCA).

23. "'[E]nterprise' includes 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) (1988).

24. "'[P]attern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1988).

As with any action, one must also consider the statute of limitations. The applicable statute of limitations requires a plaintiff to bring an action within five years of the last predicate act committed. 18 U.S.C. § 3282 (1988).

25. RICO is to "be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 947 (1970).

term; rather the statutory definitions give a framework within which the terms exist.²⁶ As a result, federal courts have debated the meanings of these terms for years. Courts have interposed various requirements in an effort to determine what constitutes an enterprise or a pattern and what must be proven to demonstrate these two elements.

Generally, the Supreme Court has stated that a RICO enterprise must have a common purpose, continuity of structure, continuity of personnel, and be distinct from the pattern of racketeering activity alleged.²⁷ The Supreme Court, prior to *Scheidler*, gave no further guidance regarding the definition of enterprise itself. Common purpose and continuity generally exist in legal entities and are basically meant to be self-defined concepts.²⁸ However, "association-in-fact enterprises" present potential difficulties in proving the existence of an enterprise because the formalities of these structures are more elusive.²⁹ *Scheidler* addresses specifically the nature of the enterprise element in Section 1962(c) and, more narrowly, the common purpose requirement of an enterprise.³⁰

The second concept lacking a true definition, a pattern of racketeering,³¹ cannot be understood without understanding what constitutes racketeering activity. Section 1961(1) defines "racketeering

26. See Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1590 (1994) (reviewing LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993)) [hereinafter Cunningham] (discussing specifically the enterprise element's definition).

27. U.S. v. Turkette, 452 U.S. 576, 583 (1981). *But see* ABRAMS, *supra* note 16, § 4.3.2, at 197-202 (discussing why *Turkette* did not specifically require a distinction between the enterprise and the pattern of racketeering activity requirements).

28. "The enterprise is an entity . . . a group of persons associated together for a common purpose of engaging in a course of conduct . . . [and] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583.

29. ABRAMS, *supra* note 16, § 4.3.2. Association-in-fact enterprises do not need to be legal entities. 18 U.S.C. § 1961(4) (1988). A great deal of litigation and confusion surround the application of RICO to these enterprises because they can be any group of persons as defined in the RICO statute. See 18 U.S.C. § 1961(3) (1988). Any two people, as broadly defined by RICO, associated with a purpose that would violate § 1962, are a RICO enterprise.

30. Section 1962(c) states:

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.

18 U.S.C. § 1962(c) (1988).

31. Professor Solan termed both "enterprise" and "pattern" as "concepts with fuzzy boundaries." Cunningham, *supra* note 26, at 1585.

activity'' by listing a number of specific federal and state crimes which, if broken, are the predicate acts necessary to show racketeering and a pattern of racketeering.³²

The Supreme Court gave some boundaries to the pattern of racketeering activity requirement in 1988.³³ The Court held the pattern requirement could be proven by demonstrating two additional concepts: relatedness and continuity of activity.³⁴ There must be some order or similar purpose behind the goals of the predicate acts to demonstrate a relationship, or relatedness.³⁵ Continuity requires demonstrating either continuous illegal acts within a closed time period or the threat of continuing illegal conduct into the future.³⁶

Although RICO appears simply stated, it is very complex. Imposing liability under RICO basically requires a showing of an enterprise, conduct constituting a pattern of racketeering activity, and an impact on interstate commerce. However, understanding those terms can escape the most accomplished of commentators, as is evidenced by the number of cases diametrically decided.³⁷

II. FACTS

National Organization for Women, Inc. v. Scheidler was argued before the Court on December 8, 1993, and the Court gave its opinion on January 24, 1994.³⁸ The Court, with Chief Justice Rehnquist writing, held unanimously that the Racketeer Influenced Corrupt Organizations Act³⁹ did not require the proof or pleading that the defendant possessed an economic motive.⁴⁰ Justice Souter wrote a concurring opinion which Justice Kennedy joined.⁴¹

32. 18 U.S.C. § 1961(1) (1988 & Supp. V 1993). The specific laws range from mail fraud and bribery to drug running and murder. *Id.*; see also *infra* notes 54-55 (discussing § 1961(1)).

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

34. *Id.* at 239.

35. *Id.* at 240.

36. *Id.* at 241-42. Justice Scalia opened the door to void-for-vagueness challenges to this definition in his concurrence which is discussed further *infra* notes 151-52, 155 and accompanying text. *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring).

37. An example of Supreme Court Justices interpreting RICO entirely differently, but citing the clarity of their respective positions, can be found in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Lawrence Solan commented on this 5-4 decision in his book, *The Language of Judges*. See Cunningham, *supra* note 26, at 1582-85.

38. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994).

39. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993).

40. *Scheidler*, 114 S. Ct. at 801.

41. *Id.* at 806 (Souter, J., concurring). Justices Souter and Kennedy addressed specifically the arguments of the respondents and amici who were concerned about

The petitioners in this case were the National Organization for Women, Inc.,⁴² Delaware Women's Health Organization (DWHO), and Summit Women's Health Organization (SWHO).⁴³ The respondents were a combination of pro-life activists including Joseph Scheidler.⁴⁴

NOW, DWHO, and SWHO filed the original complaint in the United States District Court for the Northern District of Illinois.⁴⁵ The trial court, with Judge Holderman presiding,⁴⁶ granted the respondents' 12(b)(6) motion to dismiss the complaint.⁴⁷ On appeal to the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), Chief Judge Bauer wrote a decision that affirmed, with reservations, the district court's dismissal.⁴⁸

The second amended complaint⁴⁹ alleged violations of both the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(a), (c), and (d),⁵⁰ and the Sherman Antitrust Act,⁵¹ as well

the ramifications of a RICO interpreted without an economic motive requirement in light of First Amendment freedoms. *Id.* For more discussion of their concurrence, see *infra* notes 137-45 and accompanying text.

42. *Scheidler*, 114 S. Ct. at 801. "NOW is a national nonprofit organization" that champions women's rights such as the "availability of abortion." *Id.*

43. *Id.* Both DWHO and SWHO are health centers that provide health services including abortions. *Id.*

44. *Id.* The coalition of antiabortion groups called themselves the Pro-Life Action Network (PLAN). *Id.* Other respondents included in the complaint were: John Patrick Ryan, Randall A. Terry, Andrew Scholberg, Conrad Wojnar, Timothy Murphy, Monica Migliorino, Vital-Med Laboratories, Inc., Pro-Life Action League, Inc. (PLAL), Pro-Life Direct Action League, Inc. (PDAL), Operation Rescue, and Project Life. *Id.* n.1. Vital-Med was a medical laboratory that had furnished the two petitioner health organizations with its services. *Id.* This relationship ended when one or more of Vital-Med's employees helped certain of the other defendants obtain approximately 4,000 aborted fetuses from the laboratory to use in the groups' protests of abortion, and to hold burial services for the fetuses. *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 616 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994); see also *infra* note 57 (presenting one of the respondent's purported purpose for committing the illegal actions).

45. *National Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

46. *Id.* at 938.

47. *Id.* at 945.

48. *Scheidler*, 968 F.2d at 614.

49. The original complaint was twice amended in response to motions by the defendants. *Scheidler*, 765 F. Supp. at 938-39. The second amended complaint was the subject reviewed by all three levels of the federal courts. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 800 (1994); *Scheidler*, 968 F.2d at 614; *Scheidler*, 765 F. Supp. at 945.

50. The relevant portion of 18 U.S.C. § 1962(a) states:

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

as many supplemental state claims.⁵² The petitioners specifically alleged that the respondents were guilty of repeated violent demonstrations which involved trespass, destruction of property, and the theft of medical supplies.⁵³ In addition to these allegations, the petitioners contended the antiabortion activists committed Hobbs Act extortion.⁵⁴ The Hobbs Act violations constituted the predicate acts necessary to satisfy the pattern of racketeering requirement of RICO.⁵⁵

The defendants argued they were not chargeable under RICO because their alleged enterprise had no financial motive.⁵⁶ They

to use or invest, directly or indirectly, any part of such income, or [its] proceeds . . . in acquisition of any interest in, or [to] affect . . . commerce.

18 U.S.C. § 1962(a) (1988). The count charging the respondents with this offense was dismissed because the petitioners did not plead what the trial court considered to be "income" as required by the statute. *Scheidler*, 765 F. Supp. at 941. Petitioners stated that the pro-life networks took donations to support their alleged racketeering activities. *Id.* These donations, the petitioners further asserted, were invested to perpetuate the protestors' unlawful acts. *Id.* The Supreme Court only reviewed the holding that RICO requires an economic motive. *Scheidler*, 114 S. Ct. at 800.

For the complete text of § 1962(c), see *supra* note 30.

The count alleging a violation of § 1962(d), or conspiracy to act as a racketeer, was dismissed because all other RICO counts had been dismissed. *Scheidler*, 765 F. Supp. at 944-45 (quoting 18 U.S.C. § 1962(d)).

51. 15 U.S.C. § 1 (1988).

52. *Scheidler*, 968 F.2d at 614.

53. *Id.* at 615.

54. *Scheidler*, 114 S. Ct. at 800. The Hobbs Act violations alleged were essential to the petitioners' RICO claims. The Hobbs Act is one of the specific federal laws enumerated as a predicate act to a RICO violation in § 1961(1)'s definition of "racketeering activity." 18 U.S.C. § 1961(1) (1988). The Hobbs Act can be found at 18 U.S.C. § 1951(b)(2) (1988).

The petitioners' brief stated that the defendants were attempting to "drive all clinics performing abortions out of business 'by any and all means available.'" Brief for Petitioners at 4, *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) available in WESTLAW, 1993 WL 459617 [hereinafter Petitioners' Brief]. The means allegedly included "extortion through direct threats of personal harm to clinic personnel and patients; arson and fire-bombing; burglary and criminal damage to clinic property . . ." *Id.* The alleged extortion constituted the claim of Hobbs Act violations.

55. 18 U.S.C. § 1961(1) (1988). Section 1961(1) gives a lengthy, but not exclusive, list of the possible predicate acts required to find a "pattern of racketeering activity." *Id.* The definition includes any act or threat "chargeable" under a variety of state laws such as murder, gambling, and arson, or any act "indictable" under certain federal laws such as the Hobbs Act. *Id.*

NOW claimed the respondents used Hobbs Act extortion to injure the property rights of the clinics and their patients. Petitioners' Brief, *supra* note 54, at 10.

56. Some other defenses the pro-life defendants proffered specifically answered many of the petitioners' charges: that the defendants were not involved in violent protesting, that their expression was non-violent in nature, and that their actions were protected by the First Amendment. Brief for Respondents Joseph M. Scheidler et al. at 1-7, *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994), available in WESTLAW, 1993 WL 459767 [hereinafter Respondents' Brief].

claimed they were simply protesting abortion as the killing of human life.⁵⁷ Thus, the defendants moved for dismissal for failure to state a claim⁵⁸ and further asserted that their actions were constitutionally protected speech.⁵⁹

The district court found the absence of an economic motive decisive in its dismissal of the RICO counts.⁶⁰ The circuit court concurred reluctantly,⁶¹ finding that the lack of a profit-minded

57. The brief for Monica Migliorino depicted the alleged theft of the aborted fetuses as follows:

[T]he funeral masses and ceremonies were performed as an act of religious worship and faith: "Insofar as . . . Migliorino . . . participated in the handling, funeral rites, [and] burial of the unborn victims of abortion, she did so motivated by her religious belief . . . believing that such [acts] were an act of charity and a work of mercy, affording such unborn victims a measure of recognition of individual worth and human dignity."

Brief for Respondent Monica Migliorino at 5-6, National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994), available in WESTLAW, 1993 WL 459805. Such a faith in the life and liberty of unborn fetuses shows passionate expression, which if not violent, arguably should be protected regardless of what one believes about the positive good of the freedom of choice. See *infra* notes 172-75 and accompanying text for a comparison of the antiabortion movement with such movements as the sixties' civil rights movement.

58. The respondents successfully moved according to Rule 12(b)(6) of the Federal Rules of Civil Procedure at the trial court level. Thus, the court dismissed all federal counts. National Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 945 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). The counts under state law were subsequently dismissed because the court no longer had pendent jurisdiction. *Id.*

59. See *supra* notes 56-57. The Supreme Court has frequently found that certain kinds of conduct can be protected by the First Amendment. See, e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (holding a St. Paul ordinance that prohibited bias-motivated disorderly conduct unconstitutional under the First Amendment); Texas v. Johnson, 491 U.S. 397 (1989) (reversing a conviction under a Texas statute making it unlawful to desecrate the United States flag because the statute violated the First Amendment); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (overturning a Mississippi state court decision against the NAACP and certain of its members for injuries to all-white businesses caused by a NAACP sponsored economic boycott because the judgment punished individuals for their membership in the NAACP); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (reversing a conviction under an ordinance forbidding parades and public demonstrations without first obtaining a permit).

60. *Scheidler*, 765 F. Supp. at 943. The court based its opinion on the Seventh Circuit's decision in *United States v. Neapolitan*, which adopted the Eighth Circuit's definition of a RICO enterprise. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986), *cert. denied*, 479 U.S. 940 (1986) (adopting the definition of enterprise as outlined by *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)). The *Anderson* Court found the term enterprise, by definition, implied a profit-seeking motive, especially in light of the use of the term in subsections (a) and (b) of § 1962. *Anderson*, 626 F.2d at 1366. See *infra* notes 157-58 and accompanying text discussing the possibility that *Scheidler* has called this definition into question.

61. The court stated that its reluctance stemmed from the "reprehensible" nature

motive compelled affirmation of the district court's ruling.⁶² In its opinion, the Seventh Circuit surveyed the precedents established by the Eighth Circuit,⁶³ as well as the United States Courts of Appeals for the Second Circuit (Second Circuit)⁶⁴ and the Third Circuit (Third Circuit).⁶⁵ The appellate court noted that it previously had adopted the Eighth Circuit's definition of enterprise in one of its earlier RICO decisions.⁶⁶ However, neither circuit's cases had ever directly addressed the issue of economic motive; therefore, the court focused on the opinions of the Second⁶⁷ and Third⁶⁸ Circuits that did directly confront the issue of a RICO profit-making motive requirement.⁶⁹

of the respondents' acts. *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 630 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). It is true that the alleged acts would be reprehensible if committed; however, it is interesting that the circuit court conceded that its reluctance to affirm was based upon acts which had yet to be proven. *Id.*

62. *Id.* at 614.

63. *United States v. Flynn*, 852 F.2d 1045 (8th Cir. 1988) (affirming a RICO count against a labor union local manager noting that the defendant obviously had economic motivation), *cert. denied*, 488 U.S. 974 (1988); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980) (reversing a RICO conviction against two Arkansas county judges because the alleged enterprise could not be said to have a structure or goal distinct from the charged pattern of racketeering activity), *cert. denied*, 450 U.S. 912 (1981).

64. *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985) (affirming trial court's RICO conviction because defendants had "some" profit-seeking purpose), *cert. denied*, 474 U.S. 1032 (1985); *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983) (distinguishing the *Ivic* holding by finding that "some financial purpose" is what RICO requires), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) (overturning a RICO conviction against a Croatian Nationalist terrorist because he lacked financial motivation).

65. *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (upholding a RICO judgment against antiabortion activists because RICO did not require a profit-seeking motive), *cert. denied*, 493 U.S. 901 (1989).

66. *Scheidler*, 765 F. Supp. at 943; *see supra* note 60.

67. *United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983). The Seventh Circuit also mentioned *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985), which National Organization for Women argued was invalid authority because the Supreme Court had overruled the *Ferguson* holding regarding prior conviction and separate "racketeering injury" requirements. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Because the Supreme Court did not address the economic motive requirement in *Sedima* when it overruled the other parts of *Ferguson's* holding, the appellate court still found the precedent of *Ferguson* persuasive. *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 627-29 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

68. *McMonagle*, 868 F.2d at 1342.

69. *Id.* at 1348-49 (finding that the court was not free to read additional limitations into RICO's express provisions). The Third Circuit cited *Sedima*, 473 U.S. at 499-500, which stated: "[T]his defect—if defect it is—is inherent in the statute as written and its correction must lie with Congress." In *Sedima*, that language followed the Court's acknowledgment that civil RICO was capable of applications "far beyond those originally intended." *Sedima*, 473 U.S. at 499-500.

After a lengthy discourse on the persuasiveness of the two applicable Second Circuit cases,⁷⁰ the court held that RICO's terms, its legislative history, and the pertinent administrative directives supported the implication of an economic motive requirement for RICO enterprises.⁷¹ In dismissing the holding of the Third Circuit,⁷² the court found the economic motive requirement would not excessively limit RICO actions, nor would it clearly contradict the directive of the statutory terms.⁷³

As a result of the discrepancy in appellate holdings, the Supreme Court granted certiorari.⁷⁴

III. THE DEVELOPMENT OF RICO

The Ninety-first Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970.⁷⁵ The bill progressed from the Senate with criminal and civil remedies; however, the original Senate bill⁷⁶ only provided injunctive relief for civil RICO plaintiffs. The House added significant bite to the bill by attaching a treble-damages remedy.⁷⁷ The Senate concurred in this addition, and the bill became law.⁷⁸

70. *Bagaric*, 706 F.2d at 42; *Ivic*, 700 F.2d at 51. The district court followed the *Bagaric* finding that there must be "some financial motive" behind the enterprise's motivation. *Scheidler*, 765 F. Supp. at 942 (citing *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985); *Bagaric*, 706 F.2d at 55; *Ivic*, 700 F.2d at 65). The court also noted that the economic motive need not be the overriding motive. *Id.*

71. *Scheidler*, 968 F.2d at 627-28.

72. *Northeast Women's Center v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989), *cert. denied*, 493 U.S. 901 (1989).

73. *Scheidler*, 968 F.2d at 629-30.

74. *National Org. for Women, Inc. v. Scheidler*, 113 S. Ct. 2958 (1993). The grant of certiorari was a grant in part to decide whether an economic motive was required for the pleading and proof of a RICO enterprise. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 800 (1994).

75. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). This law had no common law origin and was created to battle the modern phenomenon of sophisticated organized crime. The only law that could be considered a predecessor would be the antitrust legislation because Congress patterned its structure in formulating RICO's treble-damages provision. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489-90 n.8 (1985).

76. S. 30, 91st Cong., 2d Sess. (1970). Senator John McClellan of Arkansas introduced the first racketeering bill into the Senate. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

77. This addition came at the final stages of the law's enactment and was passed very quickly. It has been suggested that this last minute addition to the relief available is the reason civil RICO has produced so much litigation and has

The purpose of RICO is generally summarized in the preface to OCCA.⁷⁹ The lawmakers determined that organized crime was not effectively remedied by the traditional criminal justice tools available to law enforcement entities.⁸⁰ Thus, they hoped to forge a more sophisticated sword for those agencies to wield against organized crime.⁸¹ Congress observed that organized crime was sapping the economy of the United States by absorbing billions of dollars into the criminal world.⁸² OCCA, including RICO, was the resulting weapon created to combat organized crime.

reached defendants not contemplated by the legislators who passed the bill into law. GREGORY P. JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE* 3 (1992).

78. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). RICO was Title IX of OCCA. 18 U.S.C. §§ 1961-1968 (1988); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970).

79. The preface to OCCA, entitled "Statement of Findings and Purpose," provides:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

80. "[O]rganized crime continues to grow because of defects in the . . . [legal] process [and the] . . . remedies available" Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

81. "It is the purpose of [OCCA, and therefore, RICO] . . . to . . . eradicat[e] . . . organized crime in the United States by strengthening the legal tools" Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

82. "The Congress finds that . . . organized crime . . . drains billions of

Prior to 1980, civil RICO prosecutions occurred infrequently. At that time, corresponding with the decade some have referred to as the "decade of greed,"⁸³ the amount of civil RICO claims mushroomed.⁸⁴ As the claims became more and more profuse, the federal trial and appellate courts judicially narrowed RICO's seemingly broad scope. Courts feared RICO's application against defendants whom the general public would not consider mobsters.⁸⁵ Still, more legitimate businesses⁸⁶ and even protest groups⁸⁷ were being charged with RICO counts.

RICO's offenses and elements of the offenses can confuse the most proficient lawyer. The Section 1962(c) offense has been the subject of many interpretational debates before the judiciary.

The Eighth Circuit Court of Appeals frequently restricted RICO's scope in claims made against atypical racketeers. One of the earliest hints of the Eighth Circuit's narrow view of RICO arose in 1980 in *United States v. Anderson*.⁸⁸ The *Anderson* court found that a RICO enterprise must have some discernable structure with its operations focused on an economic goal.⁸⁹ This was the first case suggesting that a RICO enterprise must have an economic goal.

In 1987, the Eighth Circuit held that for a plaintiff to prove the existence of the pattern of racketeering activity element, the plaintiff must show the existence of more than one illegal scheme.⁹⁰

dollars" Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922 (1970).

83. See Thomas Sowell, *Was Adam Smith a Closet Socialist (Both Conservatives and Liberals Hold Humanitarian Values)*, FORBES, Dec. 20, 1993, at 220.

84. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 n.1 (1985); Gualtieri, *supra* note 15, at 707.

85. See *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d at 482, 492 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985).

86. See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987) (affirming district court's dismissal of RICO claims against Northwestern Bell because the court found that the pattern of racketeering activity element required the pleading and proof of "multiple schemes"), *rev'd*, 492 U.S. 229 (1988).

87. See, e.g., *Northeast Women's Health Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (holding antiabortion protesters guilty under RICO), *cert. denied*, 493 U.S. 901 (1989).

88. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The *Anderson* case did not directly address the economic motive requirement because the defendant possessed a financial motive. *Id.* at 1361-62. *Anderson* is significant, though, because in defining "enterprise," the court held that the phrase "a group of individuals associated in fact . . . encompass[ed] only an association having an ascertainable structure, . . . an economic goal, . . . [and] an existence apart from the . . . pattern of racketeering activity." *Id.* at 1372.

89. *Id.* at 1372.

90. *H.J. Inc.*, 829 F.2d at 648. The Eighth Circuit held that a plaintiff must

Then, in 1991, the court found that a Section 1962(c) conviction could only be attained against a defendant who participated in the operation or management of the enterprise alleged in the statute, as opposed to simply being a part of the enterprise.⁹¹

All of these holdings represented limitations on the breadth of RICO's applications. However, in most every case except *Reves*, the Supreme Court reversed the decisions of the lower courts, including the Eighth Circuit.⁹² The Supreme Court has read RICO broadly,⁹³ its terms unambiguously,⁹⁴ and has followed the statute's liberal construction clause emphatically in nearly every case addressing RICO's interpretation.⁹⁵

prove the existence of multiple schemes to prove the existence of a pattern of racketeering activity. *Id.* at 650. A scheme can be understood as the purpose behind the predicate acts; therefore, under the multiple schemes test, a plaintiff must prove the existence of more than one fraudulent purpose or effort. *Id.*

91. *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), *aff'd sub. nom. Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993).

92. The Supreme Court has consistently spurned additional RICO requirements which lower courts have found in legislative history or implicit within the language of RICO. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1984) (overturning the two requirements the Second Circuit imposed: prior conviction of predicate acts and a separate "racketeering injury"); *United States v. Turkette*, 452 U.S. 576 (1981) (overturning First Circuit's holding that a RICO enterprise encompassed only legitimate enterprises, not illegitimate enterprises). *But see Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993) (affirming the Eighth Circuit's requirement that the defendant be a part of the operation of management of the enterprise). *See also infra* notes 160-71 for comment on this decision which appears inconsistent with all other Supreme Court decisions regarding RICO's interpretation.

93. *Sedima*, 473 U.S. at 497. "RICO is to be read broadly." *Id.*

94. *Id.* at 499. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984)).

95. *Id.* at 498. "RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)).

Arguably, the *Sedima* holding may have been dispositive in many of the subsequent cases addressing RICO limitations, including *Scheidler*. The Court wrote in *Sedima*:

A violation of § 1962(c), the section on which *Sedima* relies, requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must, of course, allege each of these elements to state a claim. . . . In addition, the plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation. . . . But the statute requires no more than this. . . . This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly.

Id. at 496-97 (footnotes omitted).

IV. REASONING OF THE SUPREME COURT

The Supreme Court granted certiorari in *Scheidler* and limited its review to the narrow issue of whether RICO contains an economic motive implicit in its enterprise requirement.⁹⁶ Chief Justice Rehnquist wrote for the unanimous Court which held that there is no economic motive requirement in the proof of either the racketeering enterprise or in the predicate acts of racketeering.⁹⁷

The Court essentially effected three feats in its decision. First, the Court's main objective was to resolve the conflict between the circuits concerning the issue of an economic motive requirement.⁹⁸ In addition, the Court summarily dismissed two issues of law raised by the respondents by reiterating previous decisions and applying them to the facts at hand.⁹⁹ Finally, the Court expressly refused to address three issues, two¹⁰⁰ of which the Court remanded for consideration by the trial court.¹⁰¹

96. *National Org. for Women, Inc. v. Scheidler*, 113 S. Ct. 2958 (1993). The Court granted a review of this particular issue solely to resolve the conflict between three circuits. See *supra* notes 63-73 and accompanying text for the circuit courts in conflict over this issue.

97. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 801 (1994).

98. *Id.* at 802.

99. The Court first addressed the issue of standing raised by the respondents. *Id.* The opinion reiterated that only general allegations are required at the pleading stage. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992)).

The second issue the Court summarily dismissed concerned the rule of lenity. This rule allows a court to adopt the most lenient possible meaning of a statute when the act is so unclear that reasonable minds might differ in their interpretation of the statute. *BLACK'S LAW DICTIONARY* 926 (6th ed. 1991). The Court stated that because the language of the statute was clear and unambiguous the rule of lenity did not apply. *Scheidler*, 114 S. Ct. at 806 (quoting *United States v. Turkette*, 452 U.S. 576, 587-88 (1981)).

100. The Court refused to address two issues which it remanded to the district court for consideration: (1) the alleged Hobbs Act violations, *Scheidler*, 114 S. Ct. at 802; and (2) the First Amendment challenges, *Scheidler*, 114 S. Ct. at 806.

101. The Court also questioned the applicability of administrative guidelines to the process of statutory interpretation, but did not give a direct response to the issue because the guidelines to which the respondents and the lower courts cited had been amended. *Id.* at 805. However, Justice Rehnquist did intimate the correct answer by citing to Justice Scalia's concurrence in *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring). *Scheidler*, 114 S. Ct. at 805. This reference, however, could produce a problematic analysis of either the *Scheidler* opinion or Justice Scalia's concurrence in *Crandon*. On the page in *Crandon* immediately following Justice Rehnquist's pinpoint cite to that case, Justice Scalia specifically addressed advice given by the Department of Justice. *Crandon*, 494 U.S. at 178. Justice Scalia noted that the Justice Department tends to take a broad view of all criminal statutes, because to take a narrow view would likely never result in judicial correction. *Id.* However, if the Department reads a statute broadly, perhaps the Justice Department will achieve its goal of easier prosecutions. *Id.* At

Chief Justice Rehnquist concluded the Court's opinion by stating that the Court only held that no financial motive requirement is embodied in the RICO statute.¹⁰² In reaching this conclusion, the Court followed the plain language¹⁰³ of the statute,¹⁰⁴ dismissed one interpretational argument the Seventh Circuit presented,¹⁰⁵ and decided, with detailed explanation, that any arguments made in reliance upon nonstatutory materials, such as legislative history, were not persuasive.¹⁰⁶

worst, a federal court will compel the department to narrow an overly broad view. *Id.* Justice Scalia then concluded that reliance on the Justice Department's guidelines would result in a rule of severity, not of lenity. *Id.* The problem with Justice Rehnquist's citation of this concurrence is that, in the case of the Justice Department's guidelines regarding RICO, the advice was too narrow, not too broad.

102. *Scheidler*, 114 S. Ct. at 806.

103. The Court began this strict plain language assessment of RICO by selecting the 1969 edition of Webster's Third New International Dictionary as its chosen lexicon. *Scheidler*, 114 S. Ct. at 804.

A. Raymond Randolph, Judge for the United States Court of Appeals for the District of Columbia Circuit, asserted that "citing to dictionaries creates a[n] . . . optical illusion," which imparts a guise of clarity, certainty, or "plainness." A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 72 (1994). This, he said, is fruitless because lexicographers simply define words with more and more words—an infinite circle of "meaning." *Id.* He specifically addressed *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993), the last RICO case the Supreme Court decided before *Scheidler*. Randolph, *supra*, at 72. The *Reves* Court used a dictionary to define "conduct," which is part of the language of § 1962(c) (see *supra* note 30 for the complete language of § 1962(c)). Randolph, *supra*, at 72 (citing *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976))). In *Reves*, the Court found the word "conduct" implied an element of direction because the definition given in Webster's was to "lead, run, manage, or direct." Randolph, *supra*, at 72. Based on this definition, the Court rejected the plaintiff's argument that the word means to "carry on." Randolph, *supra*, at 72. Judge Randolph noted that the word "run," contained within the definition of conduct, is defined in the same dictionary as to "carry on." Randolph, *supra*, at 72. He cited this as an example of how using the dictionary to aid in the interpretation of statutes is simply pushing back the obstacle of genuine statutory interpretation. Randolph, *supra*, at 72.

104. *Scheidler*, 114 S. Ct. at 803-04. Judge Randolph also questioned whether the Court truly followed a plain meaning interpretation of the statute in *Reves*. Randolph, *supra* note 103, at 76-77. The Court, in both *Reves* and *Scheidler*, even after deciding that the language was unambiguous and needed no further interpretation, continued its opinion and tested its determination by using a cursory analysis of the legislative history. The court declared the additional materials supported its plain meaning assessment. Randolph, *supra* note 103, at 76-77. Compare *Reves*, 113 S. Ct. at 1170-72 with *Scheidler*, 114 S. Ct. at 805-06 (noting particularly the Court's analysis of the legislative history in spite of the fact that the language was found to be unambiguous).

105. *Scheidler*, 114 S. Ct. at 804.

106. *Id.* at 805-06. Judge Randolph commented that the Supreme Court appears

The Court commenced its plain language interpretation of the statute by utilizing a dictionary's definition¹⁰⁷ of the term "affect."¹⁰⁸ After finding that the term was defined in earlier cases as having a negative impact upon commerce,¹⁰⁹ the Court reasoned that it would be simple to hypothesize a situation¹¹⁰ in which a RICO enterprise might easily have a negative impact upon interstate or foreign commerce without any personal financial motive.¹¹¹

The Court next noted that the enterprise required by subsections (a) and (b) constitute different entities than the enterprise found in Section 1962(c).¹¹² The 1962(c) enterprise acts as a pawn in the hands of racketeers through which an unlawful pattern of racketeering is performed; in contrast, the enterprise elements found in 1962(a) and (b) are the prizes procured or invested in by illegal means.¹¹³ Because the enterprises in the neighboring subsections perform different roles,¹¹⁴ the Court dismissed the circuit court's finding that the enterprise of 1962(c) should be interpreted in the same fashion as the enterprises of 1962(a) and (b).¹¹⁵ The Court further determined that even if the enterprises in all three subsections were similar, still none of them requires a pecuniary motive.¹¹⁶

to be returning to the "two-step plain meaning rule" of interpretation, or textualism. Randolph, *supra* note 103, at 75-76 (citing the Court's "resurrect[ion]" of *Caminetti v. United States*, 242 U.S. 470 (1917), in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)). The Court basically followed the "two-step" method in *Scheidler*. The two-step method of statutory interpretation requires looking to the statute's language; if the language is clear, then a court must look no further. Randolph, *supra* note 103, at 71 n.1. If the language is ambiguous, then a court may examine superstatutory materials to attempt to glean Congress's intent. Randolph, *supra* note 103, at 71 n.1.

107. It has become fairly common for courts to quote to some dictionary. Randolph, *supra* note 103, at 72. Judge Randolph, however, eschews this practice because it only sidesteps many difficult questions about textual analysis. Randolph, *supra* note 103, at 72.

108. The definition provided was "to have a detrimental influence on—used especially in the phrase affecting commerce." *Scheidler*, 114 S. Ct. at 804 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 35 (1969)).

109. *Id.* at 804.

110. *Id.* The Court did not provide any specific examples. It did, however, state that "[a]n enterprise surely can have a detrimental influence on interstate or foreign commerce without having its own profit-seeking motives." *Id.*

111. *Id.*

112. *Id.* For the complete text of § 1962(c) and a summary of § 1962(a), see *supra* notes 30 and 50, respectively.

113. *Scheidler*, 114 S. Ct. at 804. The Court cited to Blakey, *supra* note 3, at 307-25, in its decision. Professor Blakey employed the terms "prize," "instrument," "victim," and "perpetrator" to demonstrate that § 1962 enterprises play four distinct roles in the four different subsections. *Scheidler*, 114 S. Ct. at 804 n.5.

114. Blakey, *supra* note 3, at 307-25.

115. *Scheidler*, 114 S. Ct. at 804-05.

116. *Id.* Although the district and circuit courts dismissed the counts concerning

After the Court interpreted the statute's plain language, it began to address the specific arguments raised by all the parties, especially those which the lower courts found persuasive.¹¹⁷ The Court refuted every superstatutory interpretive finding by reiterating that the statutory language of RICO is unambiguous¹¹⁸ and by stating that even if the plain meaning were in doubt the superstatutory materials could not support the findings of the lower courts.¹¹⁹

The Court found further support for its decision in the preface of OCCA,¹²⁰ contrary to the findings of the lower courts.¹²¹ The Court reasoned that even a group such as the respondents in *Scheidler*, who had no economic motive and were allegedly acting unlawfully by committing Hobbs Act extortion,¹²² might still harm the economy by destroying profitable businesses.¹²³ Finally, the Court restated its plain language interpretative theories by asserting that a preface to a bill is a small soapbox upon which to stand to preach an economic motive requirement not found or implied in the actual language of the bill.¹²⁴

The Court also compared *Turkette*¹²⁵ with the case under consideration in order to further support its reasoning.¹²⁶ As Justice White¹²⁷ noted in *Turkette* that it would have been simple for Congress to restrict the application of RICO to legitimate enterprises by the addition of the single term "legitimate,"¹²⁸ so could the legislature have confined the scope of RICO to profit-minded enterprises by the addition of similar language to that effect.¹²⁹

The Court dismissed any possibility of hope for an implicit economic motive requirement by noting that reliance on the De-

1962(a) and (b) on the basis that the "income" alleged was not "income" under the statute, and although only subsection (c) was dismissed on the basis that the defendants were found to possess no economic motive, the Supreme Court ruled that the entire RICO statute contains no tacit requirement of a profit-seeking motive. *Id.*

117. *Id.* at 804-06.

118. *Id.* at 806.

119. The Court found every nontextual argument unpersuasive. *Id.* at 805.

120. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

121. *Scheidler*, 114 S. Ct. at 805; see *supra* notes 60-71 and accompanying text (discussing the decisions of the lower courts).

122. 18 U.S.C. § 1951(b) (1988).

123. *Scheidler*, 114 S. Ct. at 805.

124. *Id.*

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

126. *Scheidler*, 114 S. Ct. at 805.

127. *Turkette*, 452 U.S. at 577.

128. *Scheidler*, 114 S. Ct. at 805 (citing *Turkette*, 452 U.S. at 581).

129. *Id.*

partment of Justice's 1981 guidelines for prosecution of RICO cases¹³⁰ was unfounded, if for no other reason than because the guidelines were amended in 1984.¹³¹ In concluding its resolution of the issue, the Court again declared that because the written statute is unambiguous, any reliance on legislative history was in error unless it could be found that the legislative history contained obvious expressions of a congressional intent to include a profit-seeking motive within the ambit of the RICO statute.¹³² Having found no intent to that effect, the Court dismissed the parties' arguments addressing the legislative history.¹³³

Finally, after summarily dismissing the issue of the applicability of the rule of lenity,¹³⁴ and expressly choosing not to address the amici's arguments of a "chilling effect,"¹³⁵ the Court restated its sole holding and found that the petitioners could succeed in their action on remand by proving that the respondents committed a pattern of racketeering activity via a RICO enterprise.¹³⁶

Justice Souter added a concurring opinion in which Justice Kennedy joined.¹³⁷ Justice Souter briefly discussed the reasons for not reading an economic motive requirement into the statute, even in light of First Amendment liberties.¹³⁸ In addition, Justice Souter used his concurrence to emphasize that the Court's holding would not hinder parties to RICO cases from raising First Amendment challenges.¹³⁹

130. The 1981 guidelines directed that a prosecutor should not "charge an association as an enterprise, unless the association exists 'for the purpose of maintaining operations directed toward an economic goal . . .'" *Id.* at 805.

131. *Id.* at 805. The 1984 guidelines simply added, "or some other identifiable goal." *Id.* (quoting the UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-110.360 (Mar. 9, 1984)).

132. *Id.* at 806 (citing *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993)). The Court emphasized how concrete this rule had become by showing that *Reves* cited to *Turkette*, which quoted *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

133. *Scheidler*, 114 S. Ct. at 806.

134. *Id.*

135. *Id.* The chilling effect doctrine "[i]n constitutional law [addresses] any law or practice which has the effect of seriously discouraging the exercise of a constitutional right." BLACK'S LAW DICTIONARY 240 (6th ed. 1990) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969)); see also *infra* notes 153-55 and accompanying text (discussing footnote 6 of the *Scheidler* opinion).

136. *Scheidler*, 114 S. Ct. at 806. The opinion stated that the First Amendment issue was not before the Court. *Id.* at 806 n.6.

137. *Id.* at 806-07 (Souter, J., concurring).

138. *Id.*

139. *Id.* at 806.

The finding that the RICO language is unambiguous explained the Court's refusal to infer an economic motive requirement to avert First Amendment difficulties, according to Justice Souter.¹⁴⁰ However, Justice Souter remarked that, even if the language were ambiguous, the financial motive requirement, if added, would be both an overinclusive and underinclusive means of controlling First Amendment concerns.¹⁴¹ Justice Souter asserted that such a requirement would constrain RICO from reaching dogmatic groups that used violence in expressing their beliefs, even though the law ought not fear chilling violent expressions.¹⁴² Also, even with a financial motive requirement, RICO could still reach some expressive protesters who were acting within the scope of the First Amendment, yet sought profits to maintain the organization.¹⁴³

Justice Souter concluded by advising lawyers that a First Amendment challenge can always be raised as a defense, and by encouraging the courts that try RICO cases to remember the First Amendment liberties that might be chilled by an adverse RICO judgment.¹⁴⁴ He expressly refused to provide examples of assertions that would prevail as First Amendment defenses, except to enumerate a few cases involving successful First Amendment claims.¹⁴⁵

V. SIGNIFICANCE

The decision in *National Organization For Women, Inc. v. Scheidler* achieved the narrow goal the Court set out to accomplish: to settle the discord between the circuits regarding whether a RICO enterprise requires a pecuniary motive.¹⁴⁶ However, in so doing,

140. *Id.* at 806-07.

141. *Id.* at 807.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* Justice Souter cited specifically *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 917 (1982) (holding a state law against "malicious interference with business" unconstitutional as "applied to a civil-rights boycott" of all-white businesses); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (dismissing, because of First Amendment liberties protecting association, a court order requiring the NAACP to produce its membership rolls under a law addressing out-of-state corporations); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991) (placing a more difficult pleading standard on a complaint based on conduct possibly protected by the First Amendment).

146. *National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798, 802 (1994).

Scheidler might raise questions regarding RICO's constitutionality, particularly in its civil applications. Also, RICO's breadth, which the Court has declared for years,¹⁴⁷ could result in legislative modifications aimed at narrowing the blunderbuss, scattershot focus RICO presently has.¹⁴⁸ It is probable, however, that Congress fully intended such breadth for RICO and appreciates its applications as a powerful weapon against any form of organized crime.¹⁴⁹

Scheidler possibly further opens the door for defendants to advance a successful constitutional challenge to either limit RICO's application as applied to their particular facts¹⁵⁰ or to find the law unconstitutional on its face.¹⁵¹ Justice Scalia frankly addressed that possibility in his concurrence in *H.J. Inc. v. Northwestern Bell Telephone Co.*¹⁵²

In a footnote appended to the *Scheidler* opinion itself, the unanimous Court indicated that, although the economic motive should not be included as a protection against a restraint of First Amendment liberties, constitutional arguments could be made with regard to the

147. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985); see also *supra* notes 92-95 (discussing *Sedima*).

148. The Court has previously indicated that such measures would be required to limit the broadly written law because the function of the judicial branch is to interpret, not to write, law. See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989); *Sedima*, 473 U.S. at 499.

149. See *H.J. Inc.*, 492 U.S. at 246-49 (discussing RICO's legislative history to demonstrate that Congress did intend for RICO to be broad to increase RICO's effectiveness as a legal tool).

RICO's value depends on the eye of the beholder. Some see RICO as a valuable tool, particularly for the government. Others see RICO as an abusive and overly broad weapon. In fact, RICO has been coined "the most controversial law of the last quarter century." ABRAMS, *supra* note 16, at 7 (citing Flaherty, *A RICO Crisis*, NAT'L L.J., Aug. 13, 1984, at 1, col. 3).

150. A defendant could challenge a RICO claim by raising any constitutional challenge unique to that defendant's case. Justice Souter discussed the possibility of this type of claim in his concurring opinion in *Scheidler. Scheidler*, 114 S. Ct. at 806-07 (Souter, J., concurring); see also *supra* text accompanying notes 137-45.

151. Justice Scalia suggested the possibility of a void-for-vagueness challenge to the pattern element in his concurrence in *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring). However, most scholars and courts have uniformly rejected the possibility. For a colorful and creative article discussing why one commentator believes that RICO is not unconstitutionally vague, see Joseph E. Bauerschmidt, "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 (1990).

152. *H.J. Inc.*, 492 U.S. at 251 (Scalia, J., concurring). For another opinion on the vagueness of the pattern requirement in RICO, consider the following words uttered by Robert Bork: "Certain aspects of law should be declared unconstitutionally vague. What does the phrase 'pattern of racketeering' mean? Nobody knows. Congress should repeal the damn thing and start over again." Ann R. Dowd, *The U.S. Legal System is Breaking Down*, FORTUNE, Mar. 26, 1990, at 146.

structure of RICO.¹⁵³ The Court declined to discuss the constitutional challenges of the respondents and amici because they only raised constitutional challenges concerning the specific actions of the respondents, rather than questioning the construction of the law itself.¹⁵⁴ This commentary by the Court should lead to a new array of constitutional assaults on RICO by creative civil and criminal defense attorneys.¹⁵⁵

This should be especially true in the Eighth Circuit, where the appellate court has consistently been hesitant to expand the purview of RICO except at the express direction of the Supreme Court. Because *Scheidler* feasibly calls the very definition of enterprise found in *United States v. Anderson*¹⁵⁶ into question,¹⁵⁷ the resulting void provides little direction to the courts for understanding the meaning of "enterprise." Moreover, if the *Anderson* concept of the RICO enterprise has been overruled by the *Scheidler* opinion, then perhaps the requirement that an enterprise must have a distinct structure

153. *Scheidler*, 114 S. Ct. at 806 n.6. Many commentators have theorized that the entire statute is not unconstitutional; a few have attempted to dichotomize the two RICO applications (civil and criminal) by positing that only civil RICO is unconstitutionally vague. See Christopher J. Moran, Comment, *Is the "Darling" in Danger? "Void for Vagueness"—The Constitutionality of the RICO Pattern Requirement*, 36 VILL. L. REV. 1697, 1754-55 & nn.339-42 (1991). Mr. Moran observed that civil RICO arguably extends Congress's intent further and more frequently than does criminal RICO, civil RICO may involve First Amendment concerns (particularly post-*Scheidler*), and civil RICO requires only a preponderance of the evidence burden of proof. *Id.*

154. *Scheidler*, 114 S. Ct. at 806 n.6.

155. What the Court meant by footnote 6 is difficult to determine. Perhaps the note refers to Justice Scalia's concurrence regarding the vagueness of RICO. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1988) (Scalia, J., concurring). Because the statute could foreseeably prohibit actions protected under the First Amendment as a result of the *Scheidler* decision, the principles underlying Justice Scalia's concurrence may be strengthened. Courts more often apply the void-for-vagueness doctrine to statutes that infringe on constitutional liberties. Bauerschmidt, *supra* note 151, at 1116-17. Also, if a statute infringes on First Amendment liberties, then the overbreadth doctrine may apply. See JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.8 (3d ed. 1986). The overbreadth doctrine applies to legislation written so broadly that, in addition to proscribing unprotected activities, it proscribes constitutionally protected activities. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 16.8 (3d ed. 1986).

156. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); see *supra* note 88 (containing the *Anderson* definition of "enterprise").

157. One court decided that the *Scheidler* decision overrules the *Anderson* definition of "enterprise." *United States v. King*, 850 F. Supp. 750, 751-53 (C.D. Ill. 1994). Following this reasoning the court then held that there is no need to show an enterprise distinct from the pattern of racketeering activity in a criminal RICO case. *Id.* at 752.

apart from the pattern of racketeering activity has been dismissed as well.¹⁵⁸

An interesting comparison can be made of the *Scheidler* opinion and the opinion in *Reves v. Ernst & Young*.¹⁵⁹ The opinions employ virtually identical analyses, yet appear to result in two contrary holdings. The *Reves* majority approved an Eighth Circuit decision mandating the operation or management¹⁶⁰ requirement many have considered not plainly found in RICO's text.¹⁶¹ *Scheidler*, on the other hand, dismissed the economic motive requirement,¹⁶² which was not expressly in RICO's language.

In *Reves*, the majority of seven¹⁶³ held that one must participate in the operation or management of the enterprise in order to be held liable under RICO.¹⁶⁴ The Court, with Justice Blackmun writing,¹⁶⁵ reached this holding by looking to the language of the statute,¹⁶⁶ consulting virtually the same dictionary¹⁶⁷ used in *Scheidler*,¹⁶⁸ finding further support from the legislative history, and citing to the same law review article¹⁶⁹ to which Justice Rehnquist cited in *Scheidler*.¹⁷⁰ The only significant difference in the reasoning was the outcome of the Court's plain language determination.¹⁷¹

158. *King*, 850 F. Supp. at 752.

159. 113 S. Ct. 1163 (1993).

160. The operation or management requirement applies to the conducting element of 18 U.S.C. § 1962(c). *Reves*, 113 S. Ct. at 1166. The *Reves* Court found that conduct includes an element of control, as in conducting an orchestra, and therefore, to violate § 1962(c), one must be in the operation or management of the racketeering enterprise. *Id.* at 1173.

161. *Reves*, 113 S. Ct. at 1172.

162. *Scheidler*, 114 S. Ct. at 798.

163. *Reves*, 113 S. Ct. at 1166. Two justices, Justice Souter joined by Justice White, dissented. *Id.* at 1174 (Souter, J., dissenting). The dissent argued that the Court misapplied its own textual analysis and the operation or management test which the majority had approved. *Id.* at 1174-75. Justice Souter pointed out that even if the "contextual" analysis was a close call, the liberal construction requirement would break the tie against the more restrictive interpretation the majority utilized. *Id.* at 1175.

164. *Reves*, 113 S. Ct. at 1170.

165. *Id.* at 1166.

166. *Id.* at 1169.

167. *Id.* at 1169 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 474 (1976)). In *Scheidler*, the Court employed the 1969 edition rather than the 1976 edition.

168. *Scheidler*, 114 S. Ct. at 804.

169. *Reves*, 113 S. Ct. at 1171 (citing Blakey, *supra* note 3, which is discussed more fully *supra* notes 113-14).

170. *Scheidler*, 114 S. Ct. at 804 n.5.

171. Compare *Reves*, 113 S. Ct. at 1169-74 (accepting the operation or management requirement) with *Scheidler*, 114 S. Ct. at 803-06 (rejecting the commercial motive requirement).

Considering the two cases together seemingly lessens the real impact of this case for civil RICO plaintiffs. The Court might find any supportive lexicon by which to interpret the plain language of the statute and could easily identify reinforcing legislative history to support or refute any limiting element a lower court could apply to the language of RICO.

The intriguing question whether this holding will affect many protest groups such as the pro-life groups charged under RICO engages the legal mind.¹⁷² If nonviolent protesters can be held accountable under RICO, then possibly so could have the civil rights activists and Vietnam War protesters of the sixties, the prohibitionists of the early 1900s, and the abolitionists of the pre-Civil War era. This result is worthy only of despair. Hopefully, and properly, the statute will be found only applicable to violent protests.¹⁷³ The Court has never found violence to be a protected liberty under the First Amendment.¹⁷⁴ However, the application of RICO to nonviolent protests, even protests which possibly harm the health care business,

172. One new development unique to the area of antiabortion protesting is the passage of the Freedom of Access to Clinic Entrances Act (FACE). Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (to be codified at 18 U.S.C. § 248). Perhaps the holding in *Scheidler* will be of little impact if FACE is found constitutional, because that statute's application will give abortion clinics and women's rights groups ammunition against protesters.

The stated purpose of FACE follows:

[I]t is the purpose of this Act to protect and promote the public safety and health and activities affecting interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services.

Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694, 694 (1994) (to be codified at 18 U.S.C. § 248).

The constitutionality of FACE will most likely be challenged by antiabortion groups, but the Court will likely weigh the First Amendment freedoms of the protesters against the rights of the patients to receive available health care. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516 (1994) (affirming a buffer zone injunction against antiabortion protesters around an abortion-providing health center). Such a balancing of liberties should result in the finding that FACE is constitutionally valid. *See Madsen*, 114 S. Ct. at 2516. The *Madsen* court upheld certain limitations on the pro-life protesters, but overturned others which impinge further than necessary on First Amendment freedoms. *Madsen*, 114 S. Ct. at 2530. The Court only upheld those limitations that it felt properly protect a legitimate state interest in prohibiting unlawful conduct. *Id.*

173. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-15 (1982). The Court stated that even speech which advocates violence is protected so long as the speech does not give rise to imminent violence. *Id.* at 927. The opinion also held, though, that violence is never protected by the First Amendment. *Id.* at 916.

174. *Claiborne Hardware Co.*, 458 U.S. at 916.

should not be tolerated. To employ any law against peaceful expressive activity should be deemed unconstitutional.¹⁷⁵

VI. CONCLUSION

The *Scheidler* Court principally held that no economic motive requirement exists in RICO. The Court addressed that narrow issue and no more. *Scheidler* gave little direction to lower courts and provided no further definition regarding any of RICO's elements.

The questions lie in this silence. Regardless of the possibilities that can be posited, however, the Court did expressly state that the only thing the opinion accomplished was to find that RICO does not require an economic motive. Because RICO provides law enforcement with a good weapon against organized crime, courts should uphold the statute, but they also need to make stronger efforts to more concretely define RICO's terms. Finally, any nonviolent protests should be held free from prosecution under the RICO statute.

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175. Even advocacy of violence is protected so long as the advocacy is not directed to "inciting . . . imminent lawless action" and will not "likely . . . produce such [imminent lawless] action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

