

DEFINING EXTORTION: RICO, HOBBS, AND  
STATUTORY INTERPRETATION IN *SCHEIDLER  
V. NATIONAL ORGANIZATION FOR WOMEN, INC.*,  
123 S. CT. 1057 (2003).

DANIEL B. KELLY\*

I. FACTS & PROCEDURAL HISTORY.....	955
A. NOW v. Scheidler: <i>Round One</i> .....	956
B. NOW v. Scheidler: <i>Round Two</i> .....	957
II. THE SUPREME COURT DECISION .....	958
III. COMMENT.....	963
A. <i>Defining Extortion:</i>	
<i>What Constitutes “Obtaining”?</i> .....	964
B. <i>What is RICO’s Purpose Anyway?</i> .....	966
C. <i>Catching the Court in a Contradiction?</i> .....	969
IV. CONCLUSION.....	971

The Racketeer Influenced and Corrupt Organizations Act (RICO)<sup>1</sup> has recently become the preferred legal weapon for establishing criminal and civil liability in a panoply of situations involving allegedly extortionate conduct.<sup>2</sup> Prosecutions for extortion under RICO originally targeted so-called “organized crime enterprises” that intimidate legitimate business owners for money.<sup>3</sup> Increasingly, RICO

---

\* B.A., 2002, University of Notre Dame; J.D. Candidate, 2005, Harvard Law School. Thanks to Jonathan Skrmetti, David Remus, Mark Barrera, and Lee Strang for their helpful comments and suggestions.

1. 18 U.S.C. §§ 1961-68 (2000).

2. According to Gerald E. Lynch:

One of the most controversial statutes in the federal criminal code is that entitled ‘Racketeer-Influenced and Corrupt Organizations,’ known familiarly by its acronym, RICO. Passed in 1970 as title IX of the Organized Crime Control Act of 1970, RICO has attracted much attention because of its draconian penalties, including innovative forfeiture provisions; its broad draftsmanship, which has left it open to a wide range of applications, not all of which were foreseen or intended by the Congress that enacted it; and the sometimes draconian prosecutions that have been brought in its name.

Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 661 (1987) (footnotes omitted).

3. See *United States v. Corrado*, 304 F.3d 593 (6th Cir. 2002) (upholding convictions of Detroit Mafia for conspiracy and extortion under Hobbs Act and RICO); *United States v.*

has been applied more expansively, most notably as a tool for alleging extortion against pro-life protesters who block access to abortion clinics.<sup>4</sup> As a result, many organizations, representing perspectives from the entire political spectrum, have become alarmed that the threat of civil RICO litigation might inhibit their ability to engage in political and social protest.<sup>5</sup> Some jurists have even worried that it would seem to follow logically from this expansive interpretation of extortion under RICO that the protesting of invidious racial discrimination and segregated restaurants using “sit-down” demonstrations during the Civil Rights Movement would have constituted extortion. Addressing this ambiguity regarding the

---

DiDomenico, 78 F.3d 294 (7th Cir. 1996) (upholding convictions of Chicago Mafia for extortion, bribery, and murder under RICO); *United States v. Eufrasio*, 935 F.2d 553 (3d Cir. 1991) (upholding convictions of organized crime enterprise for racketeering, RICO conspiracy, and attempted extortion).

4. See *Feminist Women’s Health Ctr. v. Codispoti*, 63 F.3d 863 (9th Cir. 1995) (reversing judgment for abortion clinic that filed civil action for extortion under RICO against abortion protesters); *Northeast Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (affirming judgment for abortion clinic that brought action for extortion under RICO against antiabortion activists); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991) (granting pro-life advocates’ motion to dismiss town’s action for alleged racketeering and extortion under RICO).

5. A diverse range of groups and individuals including the American Civil Liberties Union, actor Martin Sheen, People for the Ethical Treatment of Animals, and even some organizations that support abortion rights have advocated lifting the threat of harsh penalties for pro-life demonstrators because a ruling against the protesters threatened their causes with harsh penalties for demonstrating. See Frank J. Murray, *High Court Rules Pro-Life Protests a Lawful Right*, WASHINGTON TIMES, February 27, 2003, at A1. The diversity of organizations concerned about the potential reach of extortion under RICO is also evident from the various *Amicus Curiae* briefs filed in support of the pro-life protesters in *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003). See Brief for People for the Ethical Treatment of Animals (PETA) as *Amicus Curiae* in Support of Petitioners at 2, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S.Ct. 1057 (2003) (No. 1593747) (“This loose application of federal anti-racketeering laws to political advocacy groups threatens PETA’s aggressive advocacy for the benefit of animals and constitutes a dagger at the throat of all other movements where minor violence may accompany peaceful political action.”); Brief for the Seamless Garment Network, et al. as *Amici Curiae* in Support of Petitioners at 1, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S.Ct. 1057 (No. 1594370) (“The general interest of the *amici* in this case is that, if uncorrected by this Court, the unwarranted expansion of the federal racketeering law by the court of appeals will repress the function of popular protest in the American constitutional order.”); Brief for The Concerned Women for America as *Amicus Curiae* Supporting Petitioners at 1-2, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S.Ct. 1057 (No. 1592875) (“The Seventh Circuit’s decision demonstrates that civil RICO, combined with a dangerously expansive definition of Hobbs Act extortion, permits—indeed, requires—courts to mete out Draconian punishment for minor offenses occurring within the context of political protest, thereby chilling protected speech.”).

6. During oral argument of *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003), the Government was asked: “[D]o you agree that your interpretation would have been applicable to the civil rights sit-ins?” The Solicitor General responded: “Under some circumstances, it could have if illegal force or threats were used to prevent a business from operating.” Theodore Olson, Oral Argument on Behalf of the United States as *Amicus Curiae*, 2002 U.S. Trans. LEXIS 70, \*22, *Scheidler v. Nat’l Org. for Women, Inc.*, 123

definition of extortion, the Supreme Court, in *Scheidler v. National Organization for Women, Inc.*,<sup>7</sup> held that petitioners, Joseph Scheidler and a coalition of pro-life activists, did not commit extortion because they did not obtain property from respondents as required by the Hobbs Act.<sup>8</sup> That is, an extortionate act cannot occur unless the offending party actually acquires the victim's property.<sup>9</sup> In clarifying the definition of extortion, the Supreme Court ensured that the legal system will be able to draw a reasonable distinction between organized criminals who acquire money by force and civil rights leaders, pro-life activists, and future protesters whose objectives are not profit but the promulgation of their political messages.

#### I. FACTS & PROCEDURAL HISTORY

The Supreme Court's decision in *Scheidler* is the final battle of a tumultuous seventeen-year litigation war waged between the National Organization for Women (NOW) and pro-life activists. The case, initiated in 1986 in the United States District Court for the Northern District of Illinois, first reached the Supreme Court in 1994. The case was remanded to the trial court, which awarded treble damages of over \$257,000<sup>10</sup> and granted a nationwide injunction against the protesters.<sup>11</sup> The Seventh Circuit Court of Appeals affirmed the trial court's decision in favor of NOW, and the case was again appealed to the United States Supreme Court in 2002.

---

U.S. 1057 (2003). See also Matthew C. Blickensderfer, Note, Unleashing RICO, 17 HARV. J.L. & PUB. POL'Y 867, 886 n.104 (1994) ("Had RICO . . . been conceived in the 1960s, it is possible that RICO could have been used against the civil rights movement."). For a sample of cases during the Civil Rights Movement in which "sit-in" protesters were eventually exonerated but might have been convicted for extortion under RICO, see e.g., *Bell v. Maryland*, 378 U.S. 226 (1964) (vacating judgment against students arrested for criminal trespass after "sit-in" demonstration at privately-owned restaurant that refused to serve members of their race); *Lombard v. Louisiana*, 373 U.S. 267 (1963) (reversing criminal convictions of students who refused to leave having been denied service at refreshment counter); *Garner v. Louisiana*, 368 U.S. 157 (1961) (reversing defendants' convictions for engaging in "sit-in" and refusing to leave lunch counters that were reserved for people of another race). Cf. *NAACP v. Claiborne*, 458 U.S. 886 (1982) (holding that state common-law prohibition on malicious interference with business could not be constitutionally applied to civil-rights boycott of white merchants).

7. 123 S. Ct. 1057 (2003).

8. *Id.* at 1061. The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (1988).

9. *Scheidler*, 123 S. Ct. at 1066.

10. *Nat'l Org. for Women v. Scheidler*, No. 86-C7888, 1999 U.S. Dist. LEXIS 11980, at \*44 n.10 (N.D. Ill. July 16, 1999).

11. *Id.* at \*58-64.

A. NOW v. Scheidler: *Round One*

The plaintiffs—NOW and two abortion clinics—brought class actions<sup>12</sup> alleging that the defendants—individual anti-abortion activists including Joseph Scheidler and several antiabortion organizations—engaged in a conspiracy to close all abortion clinics through a pattern of illegal activity.<sup>13</sup> The plaintiffs alleged that the defendants violated the Sherman Antitrust Act and RICO, as well as several pendent state-law claims.<sup>14</sup> NOW later amended its complaint,<sup>15</sup> claiming that the defendants were “members of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity,”<sup>16</sup> including Hobbs Act extortion,<sup>17</sup> a predicate offense under RICO.<sup>18</sup> The defendants filed a motion to dismiss.

The United States District Court for the Northern District of Illinois, dismissing NOW’s claims, held that liability under RICO could not be imposed against abortion protesters when neither the alleged enterprise nor the racketeering acts were economically motivated.<sup>19</sup> The Seventh Circuit, affirming the dismissal, agreed that there is an economic motive requirement implicit in RICO’s “enterprise” element.<sup>20</sup> NOW and the abortion clinics appealed, and

12. The first class consisted of “all women’s health centers in the United States at which abortions are performed” and the second class consisted of “women who are not NOW members and whose rights to the services of women’s health centers in the United States at which abortions are performed have been or will be interfered with by defendants’ unlawful activities.” These classes were not certified until after the Supreme Court overturned the initial dismissal. *Nat’l Org. for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 363 (N.D. Ill. 1997).

13. *Nat’l Org. for Women, Inc. v. Scheidler*, 765 F. Supp. 937, 938 (N.D. Ill. 1991).

14. *Id.*

15. The amended complaint alleged that defendants:

Threatened and intimidated clinic personnel and patients, trespassed on clinic property, invaded clinics and damaged clinic equipment, blocked ingress and egress to clinics, destroyed clinic advertising, coordinated telephone campaigns to tie up clinic lines, set up appointments under false pretenses to keep legitimate patients from making appointments, and established competing pregnancy testing and counseling facilities in the vicinities of the clinics.

*Id.* at 938-39.

16. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 253 (1994).

17. 18 U.S.C. § 1951 (2000).

18. *Northeast Women’s Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (an act which is indictable under Hobbs Act is predicate offense under RICO).

19. *Scheidler*, 765 F. Supp. at 943-45. Section 1962(c) makes it 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 . . . 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).

20. *Nat’l Org. for Women, Inc. v. Scheidler*, 968 F.2d 612, 614 (7th Cir. 1992). Under

the Supreme Court unanimously reversed.<sup>21</sup> The Court held that RICO requires no economic motive.<sup>22</sup> The Court remanded the case to the district court for trial of the RICO claims.

### B. NOW v. Scheidler: *Round Two*

During a seven-week trial in 1998, NOW introduced evidence of various acts, which it contended constituted predicate acts under RICO.<sup>23</sup> These alleged predicate acts included violations of federal extortion law (the Hobbs Act), state extortion law, the federal Travel Act, and conspiracy to violate these laws.<sup>24</sup> The jury found for the plaintiffs and awarded treble damages of over \$257,000; additionally, the district court issued a permanent, nationwide injunction against the protesters.<sup>25</sup>

The Seventh Circuit Court of Appeals affirmed. Scheidler and the defendants contended that the Hobbs Act did not apply to their conduct because the things that plaintiffs claimed were “obtained”—the women’s rights to seek reproductive services, the clinic doctors’ rights to perform their jobs, and the clinics’ rights to provide

---

RICO, an “‘enterprise’ 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) (2000).

21. Nat’l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994).

22. The Justice Department filed an *amicus curiae* brief supporting the position of NOW and the abortion clinics that RICO requires no economic motive. Interestingly, Assistant Solicitor General Miguel A. Estrada filed the brief; the Court agreed with Mr. Estrada’s position that the language of the statute was unambiguous and to read a requirement for economic motive into the statute would “warrant a different construction.” *Id.* at 261. Some commentators, however, have suggested that the United States filed an *amicus* brief less for its impact against the abortion protesters, and more for its effect on the government’s prosecution of terrorists because the federal government had recently been precluded from filing RICO charges against the 1993 World Trade Center Bombers due to the binding Second Circuit ruling in *United States v. Ivic*, 700 F.2d 51, 59 (2d Cir. 1983) (holding that RICO implied an economic-motive requirement). See Hao-Nhien Q. Vu, Note, *A Response to Soule and Weinstein: Nat’l Org. for Women v. Scheidler is Just Hard Facts Making Bad Law*, 4 UCLA WOMEN’S L.J. 399, 411 (1994) (“with the spread of ideologically and religiously driven terrorism, the federal government would be particularly interested in using RICO to enhance its prosecutorial power”); Gregory A. Sebastian, Note, *NOW v. Scheidler: The Beginning or End of Civil RICO Applicability to Abortion Protesters?*, 45 MERCER L. REV. 1109, 1120 (1994) (“United States government submitted a brief in support of petitioners’ position and Assistant Solicitor General Estrada argued that the broader scope of RICO would aid in the government’s prosecution of terrorists.”).

23. Nat’l Org. for Women, Inc. v. Scheidler, 267 F.3d 687, 694 (7th Cir. 2001).

24. *Id.*

25. The injunction prohibited “the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threat of violence against the clinics . . . .” *Id.* at 695.

reproductive services—could not be considered “property” as required by the Hobbs Act.<sup>26</sup> Rejecting this argument, the Circuit concluded that “intangible property such as the right to conduct a business can be considered ‘property’ under the Hobbs Act.”<sup>27</sup> Likewise, the Seventh Circuit rejected the defendants’ assertion that even if property were involved, the defendants did not obtain that property because they merely forced the plaintiffs to part with it.<sup>28</sup> The Court stated that “an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.”<sup>29</sup> Joseph Scheidler and the defendants petitioned the Supreme Court, which granted certiorari;<sup>30</sup> for the second time in ten years, the case was headed to the highest court in the land.

## II. THE SUPREME COURT DECISION

In an eight-to-one decision written by Chief Justice Rehnquist, the Supreme Court reversed.<sup>31</sup> The Court held that, because the petitioners did not obtain or attempt to obtain property from NOW and the clinics, there was no basis to find that they committed extortion under the Hobbs Act, the statutory language of which requires “the *obtaining* of property from another.”<sup>32</sup>

Before the Court, Scheidler and his fellow petitioners contended that upholding the verdict would represent an unacceptable expansion of extortion under the Hobbs Act.<sup>33</sup> They claimed that the Seventh Circuit had “rea[d] the requirement of ‘obtaining’ completely out of the statute.”<sup>34</sup> On the other hand, NOW and the respondents shifted the thrust of their earlier theory<sup>35</sup> and asserted that petitioners violated

26. *Id.* at 709.

27. *Id.* (citation omitted).

28. *Id.*

29. *Id.* (quoting *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

30. *Scheidler v. Nat’l Org. for Women, Inc.*, 535 U.S. 1016 (2002), *cert. granted*, 70 U.S.L.W. 3497 (U.S. Apr. 22, 2002) (No. 01-1118).

31. *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003).

32. *Id.* at 1069 (quoting 18 U.S.C. § 1951(b)(2) (1988) (emphasis added)).

33. *Id.* at 1063.

34. *Id.* (quoting Brief for the Petitioners at 11-13, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003) (No. 01-1118), 2002 WL 1595130, at \*11-\*13 (July 12, 2002)).

35. At trial, NOW asserted that petitioners committed extortion under the Hobbs Act by using or threatening to use force to cause respondents “to give up” property rights. These property rights included “a woman’s right to seek medical services from a clinic, the right of doctors, nurses or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion and fear.” *Id.*

the Hobbs Act by “seeking to get control of the use and disposition of respondents’ property.”<sup>36</sup> They argued that, because the right to control the use of an asset is property, the protesters, who interfered with the ability of the clinics to function, “obtained or attempted to obtain respondents’ property.”<sup>37</sup>

The statutory language of the Hobbs Act requires that property must be “obtained” in order for extortion to occur: “The term ‘extortion’ means the *obtaining* of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”<sup>38</sup> The principal objective of the Supreme Court was to determine what constitutes “obtaining” property. In *Scheidler*, the Court asserted that under both the Field Code<sup>39</sup> and the Penal Code of New York<sup>40</sup> (from which Congress formulated the Hobbs Act),<sup>41</sup> extortion required that

---

(quoting Jury Instruction No. 24, App. 136.). The jury instruction regarding extortion under the Hobbs Act further provided that:

Plaintiffs have alleged that the defendant and others associated with PLAN [Pro-Life Action Network] committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence or fear to cause women, clinic doctors, nurses or other staff, or the clinics themselves to give up a ‘property right.’

*Id.*

36. *Id.* (quoting Brief for the Respondents, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003) (No. 01-1118), 2002 WL 31154781 at \*24 (September 17, 2002).

37. *Id.* at 1064. The United States offered a view similar to that of the respondents, asserting that “where the property at issue is a business’s *intangible* right to exercise exclusive control over the use of its assets, [a] defendant obtains that property by obtaining control over the use of those assets.” *Id.* (quoting Brief for the United States as *Amicus Curiae* at 22, *Scheidler* (No. 01-118) (supporting respondents)).

38. 18 U.S.C. § 1951(b)(2) (1988) (emphasis added).

39. See Penal Code of the State of New York § 613 (1865) (reprint 1998) (Field Code).

40. N.Y. PENAL LAW § 552 (1881) (Penal Code of New York had utilized Field’s Penal Code as prototype). “Under New York law—the source of the language of the Hobbs Act—‘obtaining’ means ‘gaining,’ not just ‘denying.’ . . . Under New York law, it is well-settled that the crime of extortion requires an unlawful taking.” Jay Alan Sekulow & Walter M. Weber, *NOW v. Scheidler: An Inside Look*, 21 OHIO N.U. L. REV. 959, 983-84 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (under New York statute, “extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive”; accused must be “actuated by the purpose of obtaining a financial benefit” such as “receiv[ing] a payoff”) (quoting and citing New York cases)).

41. See *Evans v. United States*, 504 U.S. 255, 262 n.9 (1992) (“One of the models for the statute was the New York Statute . . . . The other model was the Field Code.”). A statutory term is usually presumed to maintain its common law meaning, and Supreme Court jurisprudence reflects this traditional rule. See *id.* at 260 (interpreting Hobbs Act extortion: “It is a familiar ‘maxim that a statutory term is generally presumed to have its common-law meaning.’” (quoting *Taylor v. United States*, 495 U.S. 575, 592 (1990))). English common law writers largely agreed that the definition of “extortion” included the term “taking,” a synonym for “obtaining.” See, e.g., 3 A SYSTEMATIC ARRANGEMENT OF LORD COKE’S FIRST INSTITUTE 586 (J.H. Thomas ed., Philadelphia, Robert H. Small

property must be “obtained” in the sense that one party is *deprived* of the property and another party *acquires* the property.<sup>42</sup> Chief Justice Rehnquist also pointed out that in an earlier case the Supreme Court itself recognized that the “obtaining” requirement of extortion under New York law “entailed both a deprivation and acquisition of property.”<sup>43</sup> Indeed, the Court has construed the relevant extortion provision of the Hobbs Act “to require not only the deprivation but also the acquisition of property.”<sup>44</sup> Thus, the Court concluded that extortion requires obtaining property, and to “obtain” property one must “acquire” property from another party.<sup>45</sup>

Applying this definition of extortion, the Court concluded in *Scheidler* that even when the protesters’ acts of interference and disruption achieved their ultimate goal of “shutting down” a clinic that performed abortions, these acts did not constitute extortion because the protesters did not obtain the respondents’ property.<sup>46</sup> While they may have deprived (or attempted to deprive) the clinics of their alleged property right of exclusive control of their business assets, the protesters themselves “did not acquire any such property.”<sup>47</sup> Chief Justice Rehnquist pointed out that to conclude that

---

1826) (Extortion “in [its] proper sense, [is] a great misprison, by wresting or unlawfully taking by an officer, by colour of his office, any money or valuable thing . . . either that is not due, or more than is due, or before it be due.”); 4 WILLIAM BLACKSTONE, COMMENTARIES \*141 (“Extortion is an abuse of public justice which consists in an officer’s unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.”).

42. According to the Court, both the Penal Code of New York and the Field Code defined extortion as “the obtaining of property from another with his consent, induced by a wrongful use of force or fear or under color of official right.” N.Y. PENAL LAW § 850 (1909); 4 Report of the Commissioners of the Code, Proposed Penal Code of the State of New York § 613 (1865) (reprint 1998) (Field Code). The Field Code explained that extortion was one of four property crimes that included “the criminal acquisition of . . . property.” *Id.* § 584. Furthermore, New York case law demonstrated that this “obtaining of property” requirement included both a deprivation and acquisition of property. *See* *People v. Ryan*, 133 N.E. 572, 573 (N.Y. 1921) (explaining that intent “to extort” requires accompanying intent to “gain money or property”); *People v. Weinseimer*, 102 N.Y.S. 579, 588 (App. Div. 1907) (noting that in extortion prosecution the issue that must be decided is whether the accused “receive[d] [money] from the complainant”). *See also* *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057, 1065 (2003).

43. *Scheidler*, 123 S. Ct. at 1065; *see also* *Enmons*, 410 U.S. at 406 n.16 (noting that “[j]udicial construction of the New York statute” demonstrated that “extortion requires an intent ‘to obtain that which in justice and equity the party is not entitled to receive’”) (quoting *People v. Cuddihy*, 271 N.Y.S. 450, 456 (N.Y. Ct. Gen. Sess. 1934), *aff’d*, 277 N.Y.S. 960 (N.Y. App. Div. 1935)).

44. *Scheidler*, 123 S. Ct. at 1065 (citing *Enmons*, 410 U.S. at 400) (noting that extortion under the Hobbs Act requires a “‘wrongful’ taking of . . . property”) (emphasis added).

45. *See* *Scheidler*, 123 S. Ct. at 1065.

46. *See id.* at 1065-66.

47. *Id.* at 1066.

the protesters' actions constituted extortion "would effectively discard the statutory requirement that property must be *obtained* from another, replacing it instead with the notion that merely *interfering* with or *depriving* someone of property is sufficient to constitute extortion."<sup>48</sup>

The Court supported its conclusion that *obtaining* requires *acquiring* by pointing out that removing this requirement would eliminate the distinction between extortion and coercion.<sup>49</sup> While extortion involves using force to acquire property from another, coercion, which more accurately describes the protesters' actions,<sup>50</sup> involves using force "to restrict another's freedom of action."<sup>51</sup> Thus, while coercion and extortion overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property, coercion is a necessary but not sufficient condition for extortion, which requires the additional element of acquiring property.<sup>52</sup> The

---

48. *Id.* (emphasis added).

49. *Id.* Courts have unequivocally recognized the distinction between "extortion" and "coercion." See *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1131-32 (E.D.N.Y. 1992) (finding erroneous the government's contention that the difference between coercion and extortion is "irrelevant." "[E]xtortion requires the taking of property from a person whereas coercion simply requires the forcing of a person to do something against his will. The distinction is not trivial."); *Center Cadillac, Inc. v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 232 (S.D.N.Y. 1992) ("[C]oercion [in contrast to extortion] . . . is not among the . . . laws . . . providing a basis for RICO liability.").

50. The stated purpose of the protesters was "to put clinics out of business." *Nat'l Org. for Women v. Scheidler*, No. 86-C-7888, 1999 WL 571010, at \* 3 (N.D. Ill. July 16, 1999). The protesters did not seek to "acquire" the business of the abortion clinics for themselves or for a third party; rather, they sought only to "deprive" the clinics of the business. Thus, their protesting is more accurately characterized as coercion rather than extortion because the protesters did not "acquire" anything of which the plaintiffs were "deprived."

51. *Scheidler*, 123 S. Ct. at 1065. The Supreme Court pointed out that the New York Penal Code had clearly defined coercion as a separate and lesser offense than extortion at the time Congress turned to the New York statute in drafting the Hobbs Act. The Court also noted that New York had applied the coercion statute in cases where, like the pro-life protesters, individuals used force and threats of force to restrict the actions and decisions of businesses. See *People v. Scotti*, 195 N.E. 162 (N.Y. 1934) (affirming conviction for coercion where defendants used threatened and actual force to compel manufacturer to enter into agreement with labor union of which defendants were members) (per curiam); see also *People v. Kaplan*, 269 N.Y.S. 161 (N.Y. App. Div. 1934) (affirming convictions for coercion where defendants, who were members of labor union, used threatened and actual physical violence to compel other members of union to drop lawsuits challenging manner in which defendants were handling union's finances); *People v. Ginsberg*, 188 N.E. 62 (N.Y. 1933) (affirming convictions for coercion where defendant used threatened and actual property damage to compel owner of drug store to become member of local trade association and to remove price advertisements for specific merchandise from store's windows) (per curiam).

52. See, e.g., MODEL PENAL CODE §§ 212.5, 223.4 (1980). Under the Model Penal Code § 223.4, cmt. 1, extortion requires that one "obtains [the] property of another" using threat as "the method employed to deprive the victim of his property." This "obtaining" is

Court concluded that “if the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law’s coverage must come from Congress, and not from the courts.”<sup>53</sup>

The Court further held that, because the protesters did not commit or attempt to commit extortion, the state extortion claims and the Travel Act violations, which require extortionate conduct, were also fatally flawed.<sup>54</sup> Consequently, because all the predicate acts supporting a RICO violation were reversed, the judgment that petitioners violated RICO was also reversed.<sup>55</sup> Without an underlying RICO violation, the Court vacated the injunction.<sup>56</sup>

Justice Ginsburg (along with Justice Breyer) concurred.<sup>57</sup> Agreeing that the Seventh Circuit’s decision accorded undue breadth to RICO, Ginsburg worried what effect a decision against the protestors here would have on other cases pursued under RICO.<sup>58</sup> She concluded that “the Court is rightly reluctant, as I see it, to extend RICO’s domain further by endorsing the expansive definition of ‘extortion’ adopted by the Seventh Circuit”<sup>59</sup> because RICO “has already ‘evol[ed] into something quite different from the original conception of its enactors,’ warranting ‘concern[s] over the consequences of an unbridled reading of the statute.’”<sup>60</sup>

---

further explained as “bring[ing] about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another.” *Id.* § 223.3, cmt. 2. Coercion, on the other hand, is defined as making “specified categories of threats . . . with the purpose of unlawfully restricting another’s freedom of action to his detriment.” *Id.* § 212.5, cmt. 2.

53. *Scheidler*, 123 S. Ct. at 1068.

54. *See id.* at 1069.

55. *See id.*

56. *See id.* Because the injunction was vacated, the Court refused to address the second question presented—whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

57. *Id.* (Ginsburg, J., concurring).

58. *Id.* Justice Ginsburg cites the question from oral argument in which the Government was asked: “[D]o you agree that your interpretation would have been applicable to the civil rights sit-ins?” The Solicitor General responded: “Under some circumstances, it could have if illegal force or threats were used to prevent a business from operating.” *Id.* at 1069. Justice Ginsburg’s footnote created a brief controversy—the earliest released version of her concurring opinion contained a printing error in which her note consisted of precisely the same text as Justice Scalia’s note from the previous day’s completely unrelated habeas corpus case of *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1046 (2003) (Scalia, J., concurring).

59. *Id.* at 1069.

60. *Id.* (quoting *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 481, 500 (1985)). In contrast to Justice Ginsburg’s concern that a misapplication of RICO could infringe on the civil liberties of protesters, many pro-abortion activists responded with alarm at the Court’s decision. Kate Michelman, head of NARAL Pro-Choice America, stated: “This is a huge blow to women trying to exercise their constitutional right to choose . . . I’m also deeply concerned that the court’s decision will encourage the anti-choice movement to continue the assault on these clinics to shut them down.” Warren Richey & Linda

Justice Stevens dissented.<sup>61</sup> While agreeing that the term “extortion” as defined in the Hobbs Act refers to “the obtaining of property from another,” Stevens argued that “for decades federal judges have uniformly given the term ‘property’ an expansive construction that encompasses the intangible right to exercise exclusive control over the lawful use of business assets.”<sup>62</sup> Having interpreted “property” to include intangible rights, Stevens then asserted that “the use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible right is an appropriation of control embraced by the term ‘obtaining.’”<sup>63</sup> Justice Stevens concluded that, under a “commonsense reading of the statute,” one may “obtain” property without acquiring anything.<sup>64</sup>

### III. COMMENT

The decisive factor in *Scheidler v. NOW* was the statutory interpretation of “extortion” under the Hobbs Act.<sup>65</sup> Both NOW and the protesters agreed that the Hobbs Act explicitly defines “extortion” in 18 U.S.C. § 1951(b)(2) and that “extortion” requires “the obtaining of property from another.”<sup>66</sup> However, in analyzing extortion as a predicate act under RICO,<sup>67</sup> three statutory interpretation puzzles arose: (1) What does it mean to “obtain” someone else’s property? (2) Why did the Court fail to mention the purpose of RICO in its opinion? (3) Why did the Court’s previous instruction to interpret the Hobbs Act expansively not contradict the principle of strictly

---

Feldmann, *Abortion Protesters Grab a Victory in Court*, CHRISTIAN SCIENCE MONITOR, February 27, 2003, at 3. Kim Gandy, president of NOW, which had pursued the racketeering case for 17 years, called the ruling shocking: “A woman’s right to seek medical services from a clinic, and the clinic’s right to provide those services, is now under great threat because this court decided to protect only property that can be sold or traded.” Lyle Denniston, *Court Ends a Curb on Abortion Protesters*, BOSTON GLOBE, February 27, 2003, at A1. However, Nancy Northup, president of the Center for Reproductive Rights, interpreted the ruling less drastically than NOW: “When this case was filed 17 years ago, there was no other remedy. There is now a statute on the books that says explicitly you cannot interfere with clinic operations. This decision will not allow widespread blockades.” *Id.*

61. *Scheidler*, 123 S. Ct. at 1069 (Stevens, J., dissenting).

62. *Id.* at 1070.

63. *Id.* Justice Stevens pointed to *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), where the Second Circuit held that threats of physical violence to persuade owners of competing trash removal company to refrain from soliciting customers in certain areas violated the Hobbs Act.

64. *Scheidler*, 123 S. Ct. at 1070 (Stevens, J., dissenting).

65. *Id.* at 1061.

66. 18 U.S.C. § 1951(b)(2) (1988).

67. *Id.* § 1961(1).

construing criminal statutes?

*A. Defining Extortion: What Constitutes "Obtaining"?*

At oral argument, Fay Clayton, lead counsel for NOW, described *obtaining* as *A*'s preventing *B* from exercising control over *B*'s property.<sup>68</sup> Solicitor General Theodore Olson, arguing in support of NOW's expansive definition of "obtain," asserted that "where unlawful force is used to arrest sufficient control of a business to stop the performance of its services, the Hobbs Act has been violated because control of the business, a property right, has been acquired."<sup>69</sup> Justice Stevens ultimately adopted this meaning of "obtaining" in his dissenting opinion and stated that "the use of violence or threats of violence to persuade the owner of a business to surrender control of such an intangible right is an appropriation of control embraced by the term 'obtaining.'"<sup>70</sup>

Stevens utilized two sources in deriving his conclusion that *surrendering control* is equivalent to *obtaining*. First, Stevens cited *United States v. Tropiano*,<sup>71</sup> an early circuit court case, which held that threats of violence aimed at hindering the solicitation of customers violated the Hobbs Act because an intangible right (such as the ability to solicit customers) constituted property.<sup>72</sup> Stevens asserted that courts applying the Hobbs Act to abortion clinic protesters had adhered to *Tropiano*.<sup>73</sup> Second, Stevens quoted *United States v. Arena*,<sup>74</sup> which the Seventh Circuit utilized in ruling for NOW in the present case:

A perpetrator plainly may 'obtain' property without receiving anything, for obtaining includes 'attaining . . . disposal of,'

---

68. Fay Clayton, Oral Argument on Behalf of Respondents, 2002 U.S. Trans. LEXIS 70, \*43-\*44, *Scheidler v. Nat'l Org. for Women, Inc.*, 123 S.Ct. 1057 (2003). Clayton stated:

When one uses a demand to make one cede their control over property—this is my pen. This is my property. It has ink and plastic. But I also have a right to use it for writing. And if someone puts a gun to my head and says, if you use that pen, I'll shoot you, they have taken my property. They've taken my control.

*Id.*

69. Theodore Olson, Oral Argument on Behalf of the United States as *Amicus Curiae*, 2002 U.S. Trans. LEXIS 70, \*27-\*28, *Scheidler v. Nat'l Org. for Women, Inc.*, 123 S.Ct. 1057 (2003).

70. *Scheidler*, 123 S. Ct. at 1070 (Stevens, J., dissenting).

71. 418 F.2d 1069 (2d Cir. 1969).

72. *Id.*

73. *Id.* See also *Libertad v. Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989); *United States v. Anderson*, 716 F.2d 446, 447-50 (7th Cir. 1983).

74. 180 F.3d 380 (2d Cir. 1999).

*Webster's Third New International Dictionary* 1559 (1976); and 'disposal' includes 'the regulation of the fate . . . of something,' *id.* at 655. Thus, even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless 'obtained' that property if she has used violence to force her victim to abandon it." *Id.* at 394.<sup>75</sup>

Using *Tropiano* and *Arena*, Stevens determined that *A* has *obtained* property if *A* causes *B* to *surrender control* of *B*'s property.

Eight members of the Court disagreed with this expansive definition of *obtain*. They stated that "the dissent is mistaken to suggest that our decision reaches, much less rejects" *Tropiano*.<sup>76</sup> While the Court did not exclude the possibility "that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets,"<sup>77</sup> the Court concluded that whatever property is at stake, whether tangible or intangible, *A* has *obtained* property only if *A* actually *acquires B's* property. The majority opinion also countered Justice Stevens' endorsement of the expansive definition of "obtain" utilized in *Arena*. Chief Justice Rehnquist explained:

The Court of Appeals quoted part of a dictionary definition of the word 'obtain' in *Webster's Third New International Dictionary*, 180 F.3d, at 394. The full text of the definition reads 'to gain or attain possession or disposal of.' That court then resorted to the dictionary definition of 'disposal,' which includes 'the regulation of the fate . . . of something.' Surely, if the rule of lenity, which we have held applicable to the Hobbs Act, means anything, it means that the familiar meaning of the word 'obtain'—to gain possession of—should be preferred to the vague and obscure 'to attain regulation of the fate of.'<sup>78</sup>

Rejecting the Seventh Circuit and Justice Stevens' overly narrow and selective interpretation of the dictionary's definition of "obtain," the Court concluded that the ordinary meaning of "obtain" is "to gain possession of," i.e., "to acquire."<sup>79</sup> Thus, the Supreme Court clarified that *A's interfering* with *B's* rights is not tantamount to *A's obtaining*

75. *Scheidler*, 123 S. Ct. at 1071 (Stevens, J., dissenting).

76. *Id.* at 1064 n.6.

77. *Id.* at 1064.

78. *Id.* at 1065 n.8. Moreover, "[t]he *Oxford English Dictionary* traces the development of the uses of 'obtain' through the history of the English language. Its principal sense is 'to come into the possession or enjoyment of (something) . . . to acquire or get.' 'Obtaining . . . from' is not synonymous with 'part with,' which means 'to let go, give up or surrender.'" Sekulow & Weber, *supra* note 40, at 983 (quoting 10 OXFORD ENGLISH DICTIONARY 669-70 (2d ed. 1989); 11 *id.* at 262).

79. *Scheidler*, 123 S. Ct. at 1065 n.8.

*B*'s rights; rather, only *A*'s acquiring something of *B*'s constitutes obtaining for purposes of extortion.<sup>80</sup>

### B. What is RICO's Purpose Anyway?

RICO was specifically designed to provide an innovative technique for combating organized crime.<sup>81</sup> Congress's statement of findings and purpose in RICO overwhelmingly emphasized organized crime.<sup>82</sup>

80. The Supreme Court stated:

We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act . . . . Whatever the outer boundaries may be, the effort to characterize petitioners' actions here as an 'obtaining of property from' respondents is well beyond them. Such a result would be an unwarranted expansion of the meaning of that phrase."

*Id.* at 1064. For a complete account of the transformation of legal doctrine resulting in the misinterpretation of the "obtaining" requirement of extortion, see generally Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999):

[T]he courts have radically changed that requirement by reading out the 'getting' element of 'obtaining' and requiring only that a victim show a 'deprivation.' . . . The mantra that 'one need receive no personal benefit to be guilty of extortion because the gravamen of the offense is loss to the victim' was repeated so frequently that eventually courts took it literally. Courts began to find extortion, without any analysis, in cases where no one—neither the extortionist nor a third party—'got' the property of which the extortionist 'deprived' the victim.

*Id.* at 715-21

81. For examples of Supreme Court cases identifying RICO's primary goal as combating organized crime, see *Alexander v. United States*, 509 U.S. 544 (1993); *Moskal v. United States*, 498 U.S. 103 (1990); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *United States v. Turkette*, 452 U.S. 576 (1981). See also Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 662 (1987).

Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates. As such, RICO has hardly been a dramatic success. Few notable RICO prosecutions have dealt directly with this sort of criminal activity. Instead, prosecutors have seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments."

*Id.*; See also Murray, *supra* note 80, at 696-702 (discussing RICO and its legislative history); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1101 (1982) (discussing legislative intent and purpose of RICO); SKADDEN, ARPS, SLATE, MEAGHER & FLOM, *GUIDE TO RICO: A PRACTICAL GUIDE FOR THE CORPORATE COUNSELOR* 3 (John C. Fricano ed., 1986) (discussing origins and purposes of RICO).

82. The following statement of findings and purpose preceded the Organized Crime Control Act of 1970, of which RICO is a part:

The Congress finds that (1) *organized crime* in the United States . . . annually drains billions of dollars from America's economy by unlawful conduct . . . ; (2) *organized crime* derives a major portion of its power through money obtained from such illegal endeavors . . . ; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business . . . ; (4) *organized crime* activities in the United States weaken the stability of the Nation's economic system . . . 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 those engaged in *organized crime* . . . . *It is the purpose of this Act to seek the*

Members of Congress repeatedly asserted that RICO's purpose was to attack organized crime.<sup>83</sup> Furthermore, members of Congress had explicitly stated that the application of RICO to political protesters did *not* fall within its legislative intent.<sup>84</sup> The statutory author of RICO himself, after initially urging courts to interpret RICO liberally (i.e., beyond its original application to organized crime),<sup>85</sup> later argued that there was a "clearly expressed legislative intent" contrary to the Seventh Circuit's decision against Scheidler and the pro-life

---

*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. 91-452, § 1, 84 Stat. 922, 922-23 (1970) (emphasis added).

83. See, e.g., 116 CONG. REC. 819 (1970) ("purpose is to eradicate organized crime") (remarks of Sen. Scott); *id.* at 591 ("title IX RICO is aimed at removing organized crime from our legitimate organizations") (remarks of Sen. McClellan); *id.* at 602 (RICO "offers an extraordinary potential for striking a mortal blow against the property interests of organized crime") (remarks of Sen. Hruska); *id.* (RICO "strikes at the economic roots of organized crime") (remarks of Sen. Yarborough); *id.* at 845 ("title IX . . . may provide us with new tools to prevent organized crime from taking over legitimate business and activities") (remarks of Sen. Kennedy); *id.* at 603 (RICO "is designed to root out the influence of organized crime in legitimate business, into which billions of dollars of illegally obtained money is channeled") (remarks of Sen. Yarborough); *id.* at 35,295 (RICO "provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped") (remarks of Rep. Poff); *id.* at 36,296 (RICO is designed to "curtail—and eventually to eradicate—the expansion of organized crime's economic power") (remarks of Sen. Dole).

84. See, e.g., 116 CONG. REC. 854, at 35,344 (1970) (where Representative Richard H. Poff, who sponsored bill in House of Representatives, stated that RICO "does not violate the civil liberties of those who are not engaged in organized crime, but who nonetheless are within the incidental reach of provisions primarily intended to affect organized crime"). In response to an earlier version of the statute, several people voiced objections, claiming that the language could be used against political protesters. See S. REP. NO. 91-617, at 215 (1969) ("[T]he reach of this bill goes beyond organized criminal activity.") (individual views of Sen. Hart and Sen. Kennedy); Measures Relating to Organized Crime: Hearings on S.30 and Related Measures Before the Subcomm. on Crim. Laws and Proc. of the Senate Comm. on the Judiciary, 91st Cong. 475 (1969) ("[O]ffenses . . . from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill.") (statement of Lawrence Speiser, director of the Washington office of the ACLU); S. REP. NO. 91-617, at 121-22 (1969) (Definition of "racketeering activity [was] . . . too broad and would result in a large number of unintended applications.") (statement of Deputy Attorney General Richard Kleindeinst).

85. G. Robert Blakey, *RICO Isn't Just for Racketeers Anymore: RICO is Working*, 14 THE BRIEF NO. 4, at 18 (1985); see also G. Robert Blakey et al., *What's Next?: The Future of RICO*, 65 NOTRE DAME L. REV. 1073, 1081 (1990) ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms, and likely to attract a broad array of perpetrators operating in different ways."); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1035 n.117 (1980) ("While RICO had as one of its purposes preventing the takeover of legitimate business by organized crime, it is myopic to read RICO as if that were its only purpose.").

protesters.<sup>86</sup> Even Chief Justice Rehnquist previously had argued that judges have allowed civil RICO to expand beyond its intended limits.<sup>87</sup> Because applying RICO to silence the protesters would have directly violated Congress's unambiguous legislative intent, it would have been *prima facie* reasonable for the Supreme Court to have ruled that RICO was inapplicable to the protesters<sup>88</sup>—a group which Congress had intentionally attempted to exclude from the breadth of the statute.<sup>89</sup>

In the Supreme Court's eight-to-one opinion, however, not only did Chief Justice Rehnquist not base the decision on this rationale of legislative intent, he did not even mention the legislature's intent regarding RICO. One possible explanation for this omission is that Rehnquist adheres to the principle that it is the positive, written *law* that governs, not the unwritten *intent* of the lawgiver.<sup>90</sup> Interpreting a

86. G. Robert Blakey, *The RICO Racket*, NAT'L REV., May 16, 1994, at 76.

87. William H. Rehnquist, *Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5 (1989):

Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970 . . . . The legislative history of RICO strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.

*Id.* at 9-10.

88. The principle that the judge's objective in interpreting a statute is to give effect to "the intent of the legislature" has been advocated by jurists at least as far back as Blackstone. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES \*59-62, 91. *See also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 57-58 (Boston: Little, Brown, & Co. 1882) ("[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; or, exactly, the meaning which the subject is authorized to understand the legislature intended.").

89. *See supra* note 84.

90. Rehnquist has frequently criticized the approach to statutory interpretation that embraces the use of legislative intent and legislative history even when the statute's textual meaning appears clear. In fact, when this case first appeared before the Supreme Court, Rehnquist rejected Scheidler's legislative intent argument that relied on a congressional statement of findings and purpose. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 US 249, 260 (1994) (Rehnquist, C.J.) ("[Q]uoted statement of congressional findings is a rather thin reed upon which to base a requirement of economic motive neither expressed nor, we think, fairly implied in the operative sections of the Act."). *See also* *Darby v. Cisneros*, 509 U.S. 137, 138 n.\* (1993) (Rehnquist, C.J., concurring in part) (joining majority opinion, except the part concluding that legislative history supported meaning that the majority had earlier found plain in statutory text); *Regan v. Wald*, 468 U.S. 222, 237 (1984) (Rehnquist, J.) (asserting that legislative floor statements "can seldom be expected to be as precise as the enacted language itself"); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (Rehnquist, J.) ("[W]here [Congress's] will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102 (1980)). *But see* *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (Rehnquist, J.) (The Court must "look to the provisions of the whole law, and to its object and policy."); *id.* at 713 ("Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will.").

statute so as to give effect to its supposed legislative intent, while simultaneously ignoring a statute's text, violates two of the few generally accepted concrete rules of statutory construction: namely, (1) begin with the text of the statute,<sup>91</sup> and (2) words are to be given their ordinary meaning.<sup>92</sup> In *Scheidler*, although he knew that Congress had not intended for RICO to be applied to political protesters, Chief Justice Rehnquist did not use a legislative intent rationale to exonerate the pro-life activists. Instead, he chose to carefully examine the text of the statute, which was relatively clear.<sup>93</sup> In fact, both the plaintiffs and defendants agreed that the statute required a party to obtain property in order to be liable for extortion. Utilizing the principle of statutory interpretation that words are to be given their ordinary meaning, Rehnquist and seven other justices agreed that "obtain" should be given its ordinary meaning of "to take possession of."<sup>94</sup> Consequently, Congress's intent, although clearly not aimed at encompassing protesters, was irrelevant for Rehnquist's ultimate rationale in determining that the pro-lifers had not committed extortion.

### C. Catching the Court in a Contradiction?

*Scheidler v. NOW* also presented the Supreme Court with a conundrum because it appeared that in previous cases the Court had established two contradictory principles of statutory interpretation

91. *United States v. Turkette*, 452 U.S. 576, 580 (1981) (White, J.) ("In determining the scope of a statute, we look first to its language.")

92. *Russello v. United States*, 464 U.S. 16, 21 (1983) (Blackmun, J.) ("[S]tart with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.") (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962) (Warren, C.J.) ("[W]e must, of course, start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."). See also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter."). For an early statement from the Supreme Court denouncing the use of legislative intent and stressing the importance of the language used, see *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845) (Taney, C.J.):

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

*Id.*

93. See 18 U.S.C. § 1951(b)(2) (1988).

94. *Scheidler v. Nat'l Org. for Women, Inc.*, 123 S. Ct. 1057, 1061 (2003).

regarding the Hobbs Act. On the one hand, the Court had stated in *United States v. Culbert* that the words of the Hobbs Act “do not lend themselves to restrictive interpretation” because they “manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence.”<sup>95</sup> On the other hand, the Court had stated in *United States v. Enmons* that, in construing the Hobbs Act, “[e]ven if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded . . . for . . . this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.”<sup>96</sup> While the former quote from *Culbert* advised against an overly restrictive interpretation, the latter quote from *Enmons* cautioned against an excessively expansive interpretation. The Court seemed to be caught in a contradiction that had the potential to impede its ability to decide *Scheidler*.

The Court determined, however, that these two seemingly antithetical statements could be reconciled. *Culbert* recognized that Congress had exercised the full extent of its commerce power in prohibiting extortion that “affects commerce or the movement of any article or commodity in commerce.”<sup>97</sup> But, in this case, *Scheidler* and the protesters had not contended that their acts did not affect interstate commerce.<sup>98</sup> Rather, the protesters’ argument was that (notwithstanding whether their actions may or may not have affected interstate commerce in some tangential way) they had not committed extortion because they had not obtained any property. Thus, the Supreme Court was able to apply the rule of lenity in determining this specific issue (i.e., whether the protesters had committed extortion) while still being consistent with its prior statement in *Culbert*. As the Court stated, “[the protesters’] argument is that their acts did not amount to the crime of extortion as set forth in the [Hobbs] Act, so

---

95. *United States v. Culbert*, 435 U.S. 371, 373 (1978) (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

96. *United States v. Enmons*, 410 U.S. 396, 411 (1973). The rule of lenity holds “that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.” BLACK’S LAW DICTIONARY 1332-33 (7th ed. 1999). Although the defendants were sued in a civil RICO suit, the rule of lenity still applies because the criminal and civil penalties flow from RICO’s basic list of prohibited activities. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 519 n.10 (1992) (stating that rule of lenity applies if statute includes criminal applications).

97. *Scheidler*, 123 S. Ct. at 1068.

98. *Id.*

the rule of lenity referred to in *Enmons* may apply to their case quite consistently with the statement in *Culbert*.”<sup>99</sup> In applying the rule of lenity, the Court asserted that “[w]hen 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.”<sup>100</sup> Because Congress had not explicitly abandoned the distinction between extortion and coercion,<sup>101</sup> the Court was unwilling to expand the definition of extortion when Scheidler and the pro-life activists had not acquired any property by protesting.

#### IV. CONCLUSION

While the litigation between NOW and Scheidler at times seemed interminable, the Supreme Court, holding that pro-life protesters could not be liable for extortion under RICO because they did not “obtain” or attempt to “obtain” property from NOW and the clinics as required by the Hobbs Act, brought a definitive conclusion to the conflict with its eight-to-one decision. In clarifying that *obtaining* property entails actually *acquiring* property and not merely causing another to surrender control of property, the Court maintained the long-standing distinction between extortion and coercion. As a result, the Court’s decision in *Scheidler* has ensured that the legal system will be able to draw a reasonable distinction between an organized criminal enterprise, which acquires money by force, and any future protester, whose objective is not profit but the promulgation of a political message.

---

99. *Id.*

100. *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)).

101. *Id.* at 1057. Indeed, during oral argument, Roy Englert, Jr., lawyer for Scheidler et al., stated: “Coercion is a different crime from extortion, and interfering with someone’s rights is the crime of coercion under the Model Penal Code, under New York law, under various other bodies of law, but it’s not the crime of extortion.” Roy Englert, Jr., Oral Argument on Behalf of Petitioners, 2002 U.S. Trans. LEXIS 70, \*8, *Scheidler v. Nat’l Org. for Women, Inc.*, 123 S. Ct. 1057 (2003).

