# NOTE

# UNLEASHING RICO

MATTHEW C. BLICKENSDERFER*

## I. INTRODUCTION

In 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations (RICO) provisions of the Organized Crime Control Act[1] as a salvo against the pervasive influence of organized crime. Racketeers and their predatory business ventures threatened the integrity of the American economy and worried the public.[2] RICO was a significant but narrow measure designed to provide new techniques to battle organized crime. RICO, however, was not intended to be a catch-all criminal statute that swept a variety of state and federal offenses under its aegis; nor was it designed as an instrument to be used against social protesters. Yet in *National Organization for Women, Inc. v. Scheidler*,[3] the Supreme Court may have transformed RICO into just such a law. In *Scheidler*, the Supreme Court considered whether RICO requires that defendants act with an economic motivation.[4] Finding no such requirement in the statute, the Court unleashed RICO on the anti-abortion protesters named as defendants in *Scheidler*.[5] In so doing, the Court rendered almost every individual and group a potential RICO "enterprise" and may have turned RICO into a potent weapon for ideological harassment.

The *Scheidler* Court reached its decision in a period of heightened national concern over violence at abortion clinics. In early 1993, the Supreme Court in *Bray v. Alexandria Women's Health*

* B.A., 1992, Northwestern University; J.D. Candidate, 1995, Harvard Law School.

1. 18 U.S.C. §§ 1961-1968 (1988 & Supp. IV 1992). Section 1961 defines the statute's crucial terms, including "racketeering activity," "pattern of racketeering activity," and "enterprise." Section 1962 contains four separate prohibitions on conduct involving the RICO enterprise. Section 1963 establishes criminal penalties for violation of § 1962, while § 1964 provides civil remedies for violations of § 1962. Sections 1965-1968 cover various procedural issues, including venue, expedition of actions, and civil investigative techniques.

2. *See* S. REP. No. 617, 91st Cong., 1st Sess., 76-79 (1969).

3. 114 S. Ct. 798 (1994).

4. Simply put, the economic motive requirement limits the application of RICO to individuals or groups acting for financial or commercial purposes. This limitation is grounded in RICO's "enterprise" requirement. *See infra* note 20.

5. The Court remanded the case to the district court for a determination of whether the defendants committed the predicate acts of extortion alleged by the plaintiffs. *Scheidler*, 114 S. Ct. 798 at 806.

*Clinic*[6] ruled that abortion rights advocates could not invoke the Civil Rights Act of 1871[7] against anti-abortion protesters. Shortly thereafter, the shooting of Dr. David Gunn outside his Florida abortion clinic by protester Michael Griffin provoked nationwide horror and outrage.[8] These events stirred Congress to action, as Senator Edward Kennedy soon introduced the Freedom of Access to Clinic Entrances Act.[9]

## II. THE *SCHEIDLER* DECISION

The *Scheidler* case began when abortion rights advocates[10] sued numerous anti-abortion protesters[11] in the United States District Court for the Northern District of Illinois, alleging antitrust and RICO violations.[12] The plaintiffs invoked § 1964,[13] RICO's civil remedies provision, which provides a private right of action against defendants who commit any of the prohibited activities contained in § 1962.[14] The gravamen of the plaintiffs' complaint

6. 113 S. Ct. 753 (1993).

7. 42 U.S.C. § 1985(3)(1988). The statute, known as the Ku Klux Klan Act, prohibits, *inter alia*, conspiring to deprive "any person or class of persons of the equal protection of the laws. . . ." *Id.*

8. *See* Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, March 11, 1993, at A1. Griffin was convicted of first-degree murder and sentenced to life in prison. *See Activist Gets Life for Killing Abortion Doctor*, L.A. TIMES, March 6, 1994, at A1. The Gunn murder was the most dramatic of over one thousand violent attacks on abortion clinics in the last decade. Michael Wines, *House Approves Measure on Anti-Abortion Attacks*, N.Y. TIMES, Nov. 19, 1993, at A5.

9. The Act, P.L. 103-259, was signed by President Clinton on May 26, 1994 and became effective on June 7, 1994.

10. The plaintiffs were the National Organization for Women, Inc. (N.O.W.) and two women's health clinics: Delaware Women's Health Organization, Inc. and Summit Women's Health Organization, Inc. National Organization for Women, Inc. v. Scheidler, 968 F.2d 612, 614 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994).

11. The defendants included anti-abortion groups and individuals. The group defendants were the Pro-Life Action League (PLAL), Pro-Life Direct Action League (PDAL), Project Life, and Operation Rescue. Among the individuals named as defendants were Operation Rescue leader Randall Terry and Joseph Scheidler, a prominent anti-abortion activist. Vital-Med Laboratories, which provided testing and disposal services to the plaintiff clinics, was also named as a defendant. *Id.* at 615-616.

12. National Organization for Women, Inc. v. Scheidler, 765 F. Supp. 937, 938 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (7th Cir. 1992), *rev'd*, 114 S. Ct. 798 (1994). The plaintiffs' antitrust claim alleged that the defendant conspired to drive women's health clinics out of business through a pattern of unlawful, concerted activity. *Id.* The plaintiffs' complaint also stated several pendent state causes of action. *Id.*

13. 18 U.S.C. § 1964(c).

14. Section 1962 provides as follows:

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

was threefold. First, the plaintiffs alleged that the anti-abortion protesters violated § 1962(a) by using money derived from their racketeering activities to further those activities through an enterprise.[15] Second, they alleged that the defendants violated § 1962(c) by conducting an enterprise through a pattern of racketeering activity.[16] Third, they also alleged that the defendants conspired to violate these provisions in violation of § 1962(d).[17] To support their allegations, the plaintiffs contended that the defendants conspired to shut down abortion clinics through a pattern of racketeering activity,[18] namely, extortion.[19] The plaintiffs argued that the Pro-Life Action Network (PLAN), a coalition of anti-abortion groups, was the "enterprise" that gave rise to RICO liability.[20] The district court granted the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.[21] The court dismissed the plaintiffs' primary RICO

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

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

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

15. *Scheidler*, 765 F. Supp. at 941.

16. *Id.*

17. *Id.* at 944.

18. Under § 1961(1), "racketeering activity" means conduct chargeable under a variety of state laws or indictable under certain federal statutes. Section 1961(5) provides as follows: " '[P]attern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."

19. *Scheidler*, 968 F.2d at 614. Plaintiffs alleged that defendants had engaged in extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1988), one of the predicate acts listed in § 1961(1). Defendants allegedly used methods typical of the anti-abortion protest movement, including "blitzes" (organized demonstrations at clinics), "lock and block" (protesters pour glue into clinic locks and chain themselves to clinic doors), "sidewalk counseling" (attempts to persuade clinic patrons to forego abortions, often through abusive and harassing speech or threats), trespass and "invasion" of clinics, theft of aborted fetuses, threats to clinic landlords, and destruction of clinic supplies and property. *Scheidler*, 968 F.2d at 623. Defendant Scheidler even offers his own "how-to" manual. JOSEPH M. SCHEIDLER, CLOSED: 99 WAYS TO STOP ABORTION (1985).

20. *Scheidler*, 968 F.2d at 625. RICO liability is premised on the existence of an identifiable "enterprise." Section 1961(4) provides as follows: " '[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."

21. *Scheidler*, 765 F. Supp. at 938. In dismissing the plaintiff's antitrust claims, the court held that the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988 & Supp. 1992), does not apply to political activity like that undertaken by the defendants. *Id.* at 940-941.

claim under § 1962(c) because it believed that RICO did not apply to the defendants, who were motivated not by financial considerations but by ideological concerns.[22] The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of all counts.[23]

The Supreme Court granted certiorari[24] to resolve a split among the courts of appeals over whether RICO includes an economic motive requirement.[25] Writing for a unanimous Court, Chief Justice William H. Rehnquist held that RICO requires no economic motivation.[26] The Chief Justice adopted a literalist, plain language view of the RICO provisions. He noted that § 1962(c) makes it illegal "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."[27] "Pattern of racketeering activity," as defined in § 1961(5), requires the commission of at least two acts of racketeering activity, and under § 1961(1), "racketeering activity" includes conduct that is "chargeable" under a variety of state laws or "indictable" under Titles 11, 18, and 29 of the United States Code. Furthermore, Chief Justice Rehnquist noted, § 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[28] Nowhere in this statutory scheme, the Chief Justice concluded, "is there any indication that an economic motive is required."[29]

The *Scheidler* Court dismissed all of the protesters' arguments for an economic motive requirement. Although § 1962(c) requires that a RICO enterprise engage in or affect interstate com-

22. *Id.* at 942-944. The court also dismissed the § 1962(a) claim because donations to the group defendants were derived not from the extortion predicates but rather from their ideological affinities with contributors. *Id.* at 941. Finally, because the court held that the defendants could not violate either § 1962(a) or § 1962(c), the claim alleging a conspiracy to violate these sections was dismissed. *Id.* at 944.

23. *Scheidler*, 968 F.2d 612 (7th Cir. 1992).

24. *Scheidler*, 113 S. Ct. at 2958 (1993).

25. *Compare* United States v. Flynn, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988) (RICO requires economic motivation) *and* United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) (same) *with* Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989) (no economic motive requirement).

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

27. *Id.* at 803.

28. *Id.* at 803-804.

29. *Id.* at 804.

merce, Chief Justice Rehnquist explained that an enterprise may affect interstate commerce "without having its own profit-seeking motives."[30] The respondents also argued that "enterprise" as used in subsections (a) and (b) of § 1962 required some economic motivation, and therefore subsection (c), which relies on the same description of "enterprise," also requires economic motivation. In response, Chief Justice Rehnquist argued that, even if the respondents' assertions about subsection (a) and (b) were correct, the enterprise plays a different role in subsection (c) than it does in the other subsections.[31] The Court also rejected an argument that the congressional statement of findings and purpose[32] in the Organized Crime Control Act limits the otherwise expansive scope of "enterprise." This statement, Chief Justice Rehnquist claimed, "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."[33] Finally, the Chief Justice eschewed consideration of both the legislative history of RICO and the rule of lenity. Those interpretive tools, he argued, are irrelevant when faced with unambiguous statutory language.[34]

Justice David H. Souter, joined by Justice Anthony M. Kennedy, wrote a concurring opinion to highlight the First Amendment implications of the Court's opinion. Justice Souter emphasized that the Court's decision did not bar First Amendment challenges to RICO as applied in specific cases.[35] He noted that the Court has often interpreted statutes to avoid constitutional problems, but only where the meaning of a statue is unclear.[36] Furthermore, the putative economic motive requirement would "correspond only poorly to free speech concerns."[37] Such a requirement, Justice Souter argued, would be overprotective, by insulating ideological actors who commit violent acts, and underprotective, by subjecting to RICO liability those who engage

30. *Id.*

31. *Id.*

32. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 922-923 (1970). The statement is characterized by an overwhelming emphasis on organized crime. *See infra* note 73.

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

34. *Id.* at 806.

35. *Id.*

36. Justice Souter agreed with the Chief Justice's assessment that the relevant language was unambiguous. *Id.* at 806-807.

37. *Id.* at 807.

in protected expression but who fail the economic motive test.[38] Finally, Justice Souter implicitly invited a First Amendment challenge to RICO. Free speech concerns could be raised and adjudicated in individual RICO cases as they arose. Justice Souter cautioned lower courts to be aware that First Amendment issues may require attention in future RICO cases.[39]

## III. Removal of RICO's Economic Motive Requirement

Despite the unanimity among the justices, the Court's decision was unfortunate. The Court's cursory effort at statutory interpretation violated venerable principles and canons of statutory construction, and its result is at odds with the obvious purpose of Congress in enacting RICO. Moreover, the consequences of the Court's decision are likely to be unpalatable. For example, *Scheidler* sanctioned the further federalization of state criminal law and permitted the extension of RICO to a variety of new "enterprises" that were not intended to be and should not be covered by RICO. Finally, the *Scheidler* Court's expansion of RICO will have the unfortunate effect of trampling on or chilling First Amendment liberties.

### A. *Statutory Construction*

The Court's attempt at construing RICO provisions was strikingly superficial.[40] Chief Justice Rehnquist quickly asserted the lack of ambiguity in the term "enterprise,"[41] prematurely ending the interpretive debate and foreclosing consideration of other traditional tools of statutory interpretation. Although Chief Justice Rehnquist has previously acknowledged the shortcomings of relying solely on literalism,[42] in *Scheidler* he used that approach to

38. *Id.*

39. *Id.*

40. Although the Court has generally refused to limit RICO's broad language, *see* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) (RICO not limited to organized crime); Sedima, S.P.R.L., v. Imrex Co., Inc., 473 U.S. 479 (1985) (civil RICO does not require prior criminal convictions; civil RICO plaintiffs need not allege a distinct "racketeering injury"); United States v. Turkette, 452 U.S. 576 (1981) (RICO covers both legitimate and illegitimate enterprises), the Court has not left RICO completely unrestrained—at least until *Scheidler*. *See* Reves v. Ernst & Young, 113 S. Ct. 1163 (1993) (Section 1962(c) requires that defendant participate in the operation or management of enterprise); *H.J., Inc.*, 492 U.S. at 239 (a pattern of racketeering activity requires that the predicate acts be related and that they constitute a continuing threat of criminal activity); *Turkette*, 452 U.S. at 583 (RICO enterprise requires organization and continuity).

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

42. *See, e.g.*, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (" 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the

foreclose debate. Even as a plain language interpretation, however, the *Scheidler* Court's plain meaning is merely one possible construction of the term "enterprise."[43] Moreover, it is the weaker construction, for the text and structure of RICO and venerable canons of construction indicate a more plausible construction of "enterprise" that includes an economic motive requirement. This preferable interpretation follows from the Court's methodology in *H.J., Inc. v. Northwestern Bell Telephone Co.*[44]

In *H.J., Inc.*, the Court considered whether a pattern of racketeering activity requires anything more than proof of two predicate acts. Writing for the Court, Justice Brennan held that § 1961(5), which describes the pattern requirement, stated a necessary but not sufficient condition for the existence of such a pattern.[45] This was so, Brennan argued, because "[u]nlike other provisions in § 1961 that tell us what various concepts used in the Act '*mean*', 18 U.S.C. § 1961(5) says of the phrase 'pattern of racketeering activity' only that it '*requires* at least two acts of racketeering activity . . . .' "[46] Thus, according to the Court, the verb *means* signifies all necessary and sufficient conditions, while the verb *requires* signifies only a necessary condition. Justice Brennan went on to hold that a pattern of racketeering activity requires that the predicate acts be related and that they amount to or pose a threat of continuing criminal activity.[47]

The meaning of "enterprise" can be ascertained in an analogous fashion. Section 1961(4) states that " '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." It describes "enterprise" not as *meaning* certain enumerated items, but rather as *including*

provisions of the whole law, and to its object and policy.' ") (Rehnquist, J.), quoting United States v. Heirs of Boisdoré, 49 U.S. 113, 122 (1849).

43. On its face, the language of RICO seems sweeping. But the Supreme Court has acknowledged that the plain language approach is not infallible. In its first interpretation of RICO, the Court noted that "there is no errorless test for identifying 'plain' or 'unambiguous' language." United States v. Turkette, 452 U.S. 576, 580 (1981). In an early case interpreting the enterprise requirement, the Eight Circuit criticized the attempt to ascertain the "plain meaning" of enterprise. United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) ("[O]nly by ignoring the context of the term ['enterprise'] can it be considered unambiguous.").

44. 492 U.S. 229 (1989).

45. *Id.* at 237.

46. *Id.* (emphasis added).

47. *Id.* at 239.

them.[48] To *include* something is not to *mean* it. Indeed, to describe the term as *including* other things is not an attempt to define the term at all; rather, it is an attempt to provide examples. Therefore, § 1961(4) must be interpreted in the in the light of the common, ordinary meaning of the term "enterprise,"[49] which is quite close to "business organization."[50]

"Enterprise" must be given its ordinary meaning. If, as the ordinary meaning suggests, "enterprise" implies economic motive, then "individual" refers to something like a sole proprietorship[51] and a "group of individuals associated in fact although not a legal entity" describes organized crime. These meanings comport with other terms in § 1961(4), such as "partnership," "corporation," and "union," all of which have an explicit commercial connection.

Chief Justice Rehnquist's construction is less satisfactory because it yields nonsensical results. For example, suppose an individual committed two of the predicate acts listed in § 1961(1). The literalist approach of *Scheidler* permits this individual, acting alone, to be deemed a RICO enterprise. Because all the predicate acts are crimes in themselves, however, the hypothetical individual could be punished twice—once under the statute criminalizing the predicate act, and again under RICO—for the same conduct without proof of any additional elements. This result raises patent double jeopardy concerns.[52] Moreover, Chief

48. *See* § 1961(4), *supra* note 20. *See also* Chaim T. Kifell, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100, 104 (1981); Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 761, 771 n. 3 (1990).

49. *See* Burns v. Alcala, 420 U.S. 575, 580-581 (1975) ("words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary"); *see also* NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.28 (5th ed. 1992 rev.).

50. *See* THE RANDOM HOUSE DICTIONARY 476 (1971) ("a company organized for commercial purposes; business firm"); BLACK'S LAW DICTIONARY 531 (6th ed. 1990) ("a business venture or undertaking"); *see also* United States v. Altese, 542 F.2d 104, 108 (2d Cir. 1976) (Van Graafeiland, J., dissenting) ("enterprise" was intended by Congress "to be synonymous with commercial business"), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

51. *Cf.* United States v. Benny, 786 F.2d 1410, 1415-1416 (9th Cir.) (sole proprietorship was RICO enterprise), *cert. denied*, 479 U.S. 1017 (1986); McCullough v. Suter, 757 F.2d 142, 143 (7th Cir. 1985) (sole proprietorship can be a RICO enterprise).

52. *See* U.S. CONST. amend. V ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"); *see also* Blockburger v. United States, 284 U.S. 299, 304 (1932) (double jeopardy is not violated if "each provision requires proof of an additional fact which the other does not"). Where the pattern requirement imposes a meaningful limitation on RICO liability, the *Blockburger* test might be satisfied despite *Scheidler*'s emasculation of the enterprise requirement. If the pattern requirement does

Justice Rehnquist's construction may effectively write the enterprise requirement out of RICO in certain situations. If an individual acting alone may be a RICO enterprise, then that individual may be convicted merely by proving a pattern of racketeering activity. Likewise, any two or more individuals who together to commit two predicate acts may constitute an association-in-fact (which counts as a RICO enterprise) and may thus be convicted merely by proving a pattern of racketeering activity. Congress certainly did not intend that the enterprise requirement be written out of the statute; the requirement was intended to ensure that RICO would be directed toward organized criminal activity.[53] Other judges have correctly recognized that an enterprise requires something more than the pure literalism of Chief Justice Rehnquist would suggest.[54]

Application of the rule of *ejusdem generis* also signifies that the term "enterprise" as used in § 1961(4) requires an economic motive. Because the meaning of the term "enterprise" is susceptible to more than one plausible construction, the use of *ejusdem generis* is appropriate and helpful.[55] This sturdy principle of statutory construction counsels that, in a list of statutory terms, broad and general terms are to be construed in the light of and restricted by narrow, specific terms.[56] Thus, the broad terms of § 1961(4)—individual, group of individuals associated in fact—are to be construed in the light of the commercial nature of the

---

not impose such a limitation, however, the *Scheidler* approach is likely to violate the Double Jeopardy Clause. This is so because a RICO violation, *Scheidler*-style, may require no additional proof beyond the proof of the underlying predicate acts.

53. *See* Kiffel, *supra* note 48, at 102; Michael A. Gardiner, *The Enterprise Requirement: Getting to the Heart of Civil RICO*, 1988 WISC. L. REV. 663, 675, 697-698.

54. *See* United States v. Turkette, 452 U.S. 576, 583 (1981) (RICO enterprise "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit"); *see also* United States v. Sanders, 928 F.2d 940, 943 (10th Cir.) (citing *Turkette*), *cert. denied*, 112 S. Ct. 1142 (1991); United States v. Perholtz, 842 F.2d 343, 354 (D.C. Cir.) (enterprise requires common purpose among participants, organization, and continuity), *cert. denied*, 488 U.S. 821 (1988). Like the economic motive requirement, these recognized characteristics of a RICO enterprise would not pass muster under the excessively literal interpretation offered by the *Scheidler* Court.

55. *Ejusdem generis* is only an aid to statutory construction should not be utilized where language is perfectly clear. *Turkette*, 452 U.S. at 581; *see also* SINGER, *supra* note 49, at § 47.22. However, "enterprise" as used in § 1961(4) is indeed susceptible to more than one plausible construction. *See* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) (rule is applicable in construing "enterprise").

56. *See generally* SINGER, *supra* note 49, at §§ 47.17-47.18; *see also* United States v. Grzywacz, 603 F.2d 682, 691 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980); United States v. Altese, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

provision's narrow terms—partnership, corporation, union.[57] The *ejusdem generis* rule indicates that even the broad terms of § 1961(4) are constrained by the economic motive requirement.

The structure of § 1962 also reveals that RICO includes an economic motive requirement. The RICO enterprise plays a crucial role in subsections (a), (b), and (c) of § 1962. Because all three subsections rely on the same description of "enterprise" found in § 1961(4), it follows that "enterprise" must mean the same thing in each of these provisions. "We should not lightly infer," the Court cautioned in construing the term "violation" in RICO, "that Congress intended the term to have wholly different meanings in neighboring subsections."[58]

As used in subsections (a) and (b) and § 1962, "enterprise" clearly refers to commercial or economically-motivated entities. For example, § 1962(a) prohibits the use or investment of income derived from a pattern of racketeering income to acquire an interest in or establish a RICO enterprise. One cannot invest in or acquire an interest in a non-commercial entity.[59] Operation Rescue, for instance, is not selling shares on the New York Stock Exchange. Likewise, § 1962(b) prohibits acquiring or maintaining any interest in or control of a RICO enterprise through a pattern of racketeering activity. One cannot acquire an interest in an ideological association—such groups are not like partnerships or corporations, in which interests can be purchased. Hence, the term "enterprise" in subsections (a) and (b) "quite clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired. . . ."[60] The same meaning must apply to § 1962(c) as well.[61] It would be absurd to contend that "enterprise" as used in subsection (c) is materially different than "enterprise" as used in subsections (a) and (b),

57. *See generally* Kiffel, *supra* note 48, at 108-109.

58. Sedima, S.P.R.L.. v. Imrex Co., Inc., 473 U.S. 479, 489 (1985). *See also* Sorenson v. Secretary of the Treasury of the United States, 475 U.S. 851, 860 (1986) (identical words are intended to have the same meaning throughout an act); United States v. Ivic, 700 F.2d 51, 60 (2d Cir. 1983) (same).

59. Commercial entities include not-for-profit businesses, which would therefore fail the economic motive test.

60. *Ivic*, 700 F.2d at 60.

61. Congress "employed the identical term in all three subsections, and defined the term in section 1961 without differentiation according to the provision in which it appeared. Uniform definition thus appears more consistent with legislative intent." United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also Altese*, 542 F.2d at 110 n. 5 (Van Graafeiland, J., dissenting) (uniform definition required); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 201-202 (1975) (same).

particularly when a single description of "enterprise" in § 1961(4) applies throughout RICO. "Enterprise" as used in subsection (c) must therefore refer to entities of a commercial nature.[62]

Traditional canons of construction are appropriate and instructive in a case such as *Scheidler*, where alternative readings of a statute are possible. One such canon, the rule of lenity, strongly indicates that RICO requires an economic motive.[63] As a fundamental precept of due process, the rule of lenity demands that any ambiguity in criminal statutes "should be resolved in favor of lenity"[64]—in other words, the category of criminalized behavior should be interpreted narrowly. The rule of lenity helps avoid due process objections based on vagueness of statutory provisions and also gives potential criminal defendants fair warning that their conduct may be punished.[65] That the *Scheidler* defendants were sued in a civil RICO suit does not deny them the protection of the rule of lenity. Both criminal and civil penalties under

62. Chief Justice Rehnquist rejected this argument in *Scheidler*. *See Scheidler*, 114 S. Ct. at 804-805. The Chief Justice argued that "enterprise" plays a different role in subsections (a) and (b) than in subsection (c). *Id.* at 804. He argued that, because the enterprise in subsection (c) is not being acquired, it need not have any property interests capable of acquisition and need not act for commercial or financial purposes. *Id.* While it is true that an enterprise in subsection (c) is not being acquired, an enterprise *must* be characterized by the same qualities in all subsections of § 1962, for they all depend on the single description found in § 1961(4). Thus, if subsections (a) and (b) contemplate an economically-motivated enterprise, then so does subsection (c). If this were otherwise, then some "enterprises" (namely, those without an economic motivation) under subsection (c) could not constitute enterprises under subsections (a) and (b)—surely an odd result.

63. The rule of lenity, like all other interpretive devices, must be used to solve an ambiguity, not create one. *See, e.g.*, Bifulco v. United States, 447 U.S. 381, 387 (1980); Callanan v. United States, 364 U.S. 587, 596 (1961). Ambiguity is present here, however, and the rule may appropriately be invoked.

64. Rewis v. United States, 401 U.S. 808, 812 (1971). *See also* Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").

65. One might argue that an expansive interpretation provides fair warning as well as a restrictive interpretation. *See infra* note 125. There are at least two problems with this suggestion. First, no fair warning of the Court's expansive interpretation was provided to the *Scheidler* defendants or to any other potential RICO defendants who acted before the *Scheidler* decision. Second, even after *Scheidler*, the reach of RICO remains uncertain. For example, it is unclear whether the predicate act of extortion may be applied to ideological protesters, or whether the Court will accept Justice Souter's invitation to limit RICO on First Amendment grounds. The Court has turned "pattern of racketeering activity" and "enterprise" into nebulous concepts, and it has been unwilling or unable to make them concrete. Even after *Scheidler*, individuals are left to guess whether their conduct violates RICO. Indeed, someone "reading the statute would have real doubt in determining how closely he must be associated with an enterprise before he would run afoul of RICO." Jeff Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-1968: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 4 (1978). The economic motive requirement would have the salutary effect of assuring individuals that at least one type of activity—ideological protest—would not be proscribed by RICO.

§§ 1963 and 1964, respectively, flow from § 1962, RICO's basic list of prohibited activities. Since § 1962 forms the basis for criminal penalties, that section must be interpreted in accordance with the rule of lenity.[66] The rule of lenity requires that the application of RICO be limited to persons or groups acting for financial or commercial purposes. The economic motive requirement would restrict the category of punishable conduct and the class of persons regulated, thus clarifying the scope of a RICO enterprise and providing fair warning both to those whose conduct can be proscribed by RICO and to those whose activities cannot be so regulated.

RICO's putative liberal construction provision[67] does not support dispensing with the economic motive requirement. The constitutional due process requirements that give rise to the rule of lenity trump this mere legislative provision.[68] Congress cannot emasculate due process simply by enacting a liberal construction provision. Moreover, the provision is irrelevant to the economic motive debate. It is meaningless to declare that RICO is to be liberally construed to effectuate its remedial purposes without knowing what those remedial purposes are; this very question constitutes the essence of the economic motive debate.[69] In *United States v. Ivic,* Judge Friendly wrote that "construing RICO

66. Justice White suggested a bifurcated approach to § 1962 in which that section might be interpreted somewhat differently depending on whether it was being used in a criminal or civil proceeding. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 491 n. 10 (1985). Such an approach is simply inapposite. Both criminal and civil proceedings rely on the identical language of § 1962 and the corresponding definitions in § 1961. *Cf.* Gardiner, *supra* note 53, at 676-677. It is entirely unclear why these same words should mean one thing in one proceeding and something different in another proceeding, especially when the type of proceeding that does occur may depend on the fortuity of whether the government prosecutor or the aggrieved private party first brings suit. *See* SINGER, *supra* note 49, at § 60.04 (statutes which are both penal and remedial should be applied alike in criminal and civil cases); United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2110 n. 10 (1992) (rule of lenity applies if a statute has criminal applications); *cf.* Note, *Civil RICO is a Misnomer: The Need for Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964,* 100 HARV. L. REV. 1288 (1987) (arguing that civil RICO is punitive in purpose and effect and is thus criminal in nature).

67. RICO is to "be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

68. *See* United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 450 U.S. 912 (1981); United States v. Altese, 542 F.2d 104, 107 n. 1 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

69. In a recent RICO case, the Court emphasized this point. Writing for the Court, Justice Blackmun declared that the liberal construction provision "is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help us to determine what purposes Congress had in mind. Those must be gleaned from the statute through the normal means of interpretation." Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993).

to cover terrorist activities of the sort before us here would in no way 'effectuate its remedial purposes.' "[70] Likewise, applying RICO to anti-abortion protesters is no part of RICO's purpose.[71]

### B. *Legislative Intent*

Whenever a court embarks upon its interpretive mission, it should construe statutory language in the light of legislative purpose.[72] Congress's statement of findings and purpose in RICO is illuminating.[73] The statement is marked by its overwhelming em-

---

70. 700 F.2d 51, 65 n. 8 (2d Cir. 1983).

71. *See infra* notes 73-88 and accompanying text (arguing that Congress did not intend to apply RICO to anti-abortion protesters and other ideological groups).

72. In Philbrook v. Glodgett, 421 U.S. 707 (1975), Justice Rehnquist wrote that the Court must "look to the provisions of the whole law, and to its object and policy." *Id.* at 713, quoting United States v. Heirs of Boisdoré, 49 U.S. 113 (1849). "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will." *Id.* at 713. *See also* National Labor Relations Board v. United Food and Commercial Workers Union, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect . . ."); Griffiths v. Helvering, 308 U.S. 355, 358 (1939) (Frankfurter, J.) ("Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed. . . ."); SINGER, *supra* note 49, at § 45.05 (courts should look to legislative intent).

Moreover, the Court's fundamental obligation of faithfulness to the intent of the legislature is prefaced on separation of powers concerns. It is the duty of the Court to give effect to the Congressional purpose. "Expanding the scope of RICO beyond congressional intent is violative of the separation of powers doctrine established in the United States Constitution." United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 527 (1985) (Powell, J., dissenting) ("It is the duty of this Court to implement the unequivocal intention of Congress.").

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

> 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,

phasis on organized crime, its sources of income, and its despoilation of the American economy. The statement contains no indication whatsoever that RICO would or should be utilized against those groups or individuals without an economic motivation. On the contrary, the statement strongly suggests that the economic motive requirement is a central part of RICO. In *United States v. Ivic*,[74] in which the United States Court of Appeals for the Second Circuit refused to apply RICO to a group of politically-motivated terrorists, Judge Friendly relied on this congressional statement, arguing that "[n]o one reading these words at the time of enactment would have thought them intended to apply to Croatian terrorists. . . ."[75] Likewise, no one would have thought them intended to apply to anti-abortion protesters or any other ideological group not motivated by financial or commercial considerations.

Despite Chief Justice Rehnquist's characterization of the statement of findings and purpose as a "rather thin reed upon which to base a requirement of economic motive,"[76] this congressional statement is a persuasive indicator of congressional intent.[77] The statement, as part of the statute, was voted on and passed by both Houses of Congress. It is therefore not susceptible to many of the criticisms directed at the use of legislative history, another traditional indicator of congressional purpose. Indeed, Justice Scalia, the Court's greatest critic of legislative history, has explicitly relied on the "relatively narrow focus upon 'organized crime' " found in the statement.[78] Chief Justice Rehnquist's casual dismissal of such manifest evidence of congressional intent violates the Court's constitutional duty to effectuate that intent.

Legislative history also demonstrates that RICO includes an economic motive requirement.[79] The Court has explicitly sanc-

---

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, 922-923 (1970).

74. 700 F.2d 51 (2d Cir. 1983).

75. *Id.* at 61-62.

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

77. Courts may use such a congressional policy statement to clarify ambiguous sections of statutes. SINGER, *supra* note 49, at § 20.12 (5th ed. 1993 rev.).

78. *See* H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment).

79. For an excellent review of the legislative history of RICO, see Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 807-814 (1990).

tioned the use of legislative history in RICO cases.[80] Indeed, even where the text of the statute seems unambiguous, the Court has cautioned that the legislative history should be consulted because it might demonstrate a legislative intent contrary to the text.[81] In this case, the statutory language's susceptibility to alternative constructions strengthens the need to consult legislative history.

The Senate and House Reports for the Organized Crime Control Act evince an overwhelming and singular emphasis on organized crime and its economic power. The Senate Report declared that RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."[82] The report also remarked that the Act was needed to provide "new approaches that will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the economic well-being of the Nation. In short, *an attack must be made on their source of economic power itself. . . .*"[83] The House Report simply noted that "Section 1962 establishes a threefold prohibition aimed at *stopping the infiltration of racketeers* into legitimate organizations."[84] The reports demonstrate that the paramount concern of Congress was to stop organized crime and cut off its economic base. Ideological and other groups without financial or commercial motivations were simply not part of the equation.

The floor statements of RICO's primary sponsors make this point even more unmistakable. Several legislators clarified that RICO's broad language was used because Congress believed that there were constitutional and definitional problems in limiting

80. In interpreting RICO's pattern of activity requirement, the Court wrote, "[o]ur guides in the endeavor must be the text of the statute and its legislative history." *H.J., Inc.*, 492 U.S. at 236. In Sedima, S.P.R.L. v. Imrex Co., Inc. 473 U.S. 479, 486-487 (1985), where Justice White *began* the Court's opinion by considering RICO's legislative history.

81. "If the statutory language is unambiguous, *in the absence of a 'clearly expressed legislative intent to the contrary,* that language must ordinarily be regarded as conclusive.' " United States v. Turkette, 452 U.S. 576, 580 (1981), quoting Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)(emphasis added).

82. S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969). *See also id.* at 80-81 ("What is ultimately at stake is . . . the viability of our free enterprise system itself.").

83. *Id.* at 79 (emphasis added).

84. H. REP. No. 1549, 91st Cong., 2d Sess. 57 (1970)(emphasis added). Section 1961(4) "defines 'enterprise' to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of *holding a property interest* can be reached." *Id.* at 4032 (emphasis added); *see also* ATKINSON, *supra* note 65, at 10.

RICO to members of organized crime.[85] RICO's primary sponsor, Senator McClellan, clearly stated that any effect RICO had beyond organized crime was intended to be merely incidental:[86] "Unless an individual not only commits such a crime [the predicate acts in § 1961(1)] but engages in a pattern of such violations, and uses that pattern *to obtain or operate an interest in an interstate business*, he is not made subject" to RICO.[87] Member after member of Congress repeatedly emphasized that RICO's purpose was to attack organized crime and its economic power.[88]

Chief Justice Rehnquist himself has argued that judges have allowed civil RICO to expand beyond its intended limits. In a 1989 speech, the Chief Justice commented as follows:

> 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.[89]

---

85. *See, e.g.*, 116 CONG. REC. 35343-35344 (remarks of Rep. Celler) (noting imprecision and uncertainty of statutory terms based on membership); *id.* at 35344 (remarks of Rep. Poff) (suggesting constitutional problems with status-based prohibitions); *see also* Senator John L. McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 N.D. L. REV. 55, 62 (1970) ("there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases"); *id.* at 143 ("It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."); Gardiner, *supra* note 53, at 667-668.

86. 116 CONG. REC. 18914 ("each title in [the Organized Crime Control Act of 1970] which is justified primarily in organized crime prosecutions has been confined to such cases *to the maximum degree possible*") (emphasis added). *See also* McClellan, *supra* note 85, at 144 (arguing that the danger of prosecution of individuals unrelated to organized crime under RICO is minimal because the expansive list of predicate acts supplies only one element of a RICO violation).

87. 116 CONG. REC. 18940 (emphasis added).

88. *See, e.g.*, 116 CONG. REC. 819 ("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 35295 (RICO "provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped") (remarks of Rep. Poff); *id.* at 36296 (RICO is designed to "curtail—and eventually to eradicate—the expansion of organized crime's economic power") (remarks of Sen. Dole).

89. William H. Rehnquist, *Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9-10 (1989).

Rehnquist's recognition of but refusal to implement the legislative intent is disconcerting. Moreover, he is not the only justice to have highlighted the problem. Dissenting in *Sedima*, Justice Marshall remarked that "[t]he central purpose that Congress sought to promote through civil RICO is now a mere footnote."[90] Limiting the application of RICO to those who act with financial or commercial motives corresponds precisely to the intent of Congress. By refusing to follow Congress's intent, the *Scheidler* Court neglected its constitutional duty to effectuate the legislative will.

### C. *Policy Considerations*

Statutory interpretation and implementing congressional purpose were not, however, the only scores on which the *Scheidler* Court fared poorly, for the decision was wrong-headed on policy grounds as well. The Court's decision will produce a number of undesirable consequences, including federalization of state criminal law and a ridiculously expansive application of RICO, that the economic motive requirement would have sensibly avoided.

By holding that RICO requires no economic motive, the *Scheidler* Court sanctioned a potentially massive expansion of federal criminal jurisdiction under RICO.[91] For example, any two garden-variety robberies, arsons, or murders may constitute a pattern of racketeering activity. Before *Scheidler*, these acts were typically not indictable under RICO because no identifiable enterprise existed. These crimes, which traditionally have been the exclusive concerns of the states, may now constitute federal RICO violations. In addition, all aggressive ideological groups, once subject to prosecution under state law for such crimes as trespass, interference with contract, and assault, will now be subject to RICO penalties.[92]

90. Sedima, S.P.R.L. v. Imrex Co., Inc. 473 U.S. 479, 506 (1985) (Marshall, J., dissenting). In *Sedima*, Justice White, while broadly construing RICO, acknowledged for the majority, "We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Id.* at 500. Justice Powell countered, "I do not believe that the statute *must* be construed in what in effect is an irrational manner." *Id.* at 524 n. 1. (Powell, J., dissenting).

91. *See* United States v. Altese, 542 F.2d 104, 108 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (warning that broad interpretation of RICO will cause the "transformation of relatively minor state offenses into federal felonies by mere geographic happenstance"), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

92. "An expansive definition of the enterprise element of the offense grossly distorts the balance between federal and state law enforcement efforts, and brings within the ambit of the statute offenses which Congress did not consider sufficiently threatening to our economy to warrant federal intervention." United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). *See also Sedima*, 473 U.S. at 530 (Powell, J.,

The Court has traditionally required a clear statement when Congress intends to disrupt the allocation of power between state governments and the federal government:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relationship between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue the critical matters involved in the judicial decision.[93]

Congress did not clearly state any intention to disrupt the federal-state balance in such a dramatic fashion as that sanctioned by *Scheidler*.[94] Although Congress did intend, in enacting RICO, to shift the federal-state balance somewhat in order to attack organized crime with new law enforcement weapons,[95] no one has suggested that Congress intended to reach ideological protesters or to usurp large portions of state criminal law.[96] Justice Marshall remarked in his *Sedima* dissent that "nothing in the language of [RICO] or its legislative history suggests that Congress intended . . . the federalization of state common law. . . ."[97] Unless Congress has stated clearly its intention to federalize state criminal law, the judiciary should not "lead the charge."[98]

---

dissenting) (expansive interpretation will cause resort to RICO in traditional state fraud and contract cases).

93. United States v. Bass, 404 U.S. 336, 349 (1971). *See also* Gregory v. Ashcroft, 111 S. Ct. 2395, 2400-2401 (1991) (Court assumes that Congress "does not exercise lightly" its power to upset the federal-state balance); *Sedima*, 473 U.S. at 507 (Marshall, J. dissenting) (the Court does not lightly impute a congressional intention to upset the federal-state balance in the provision of civil remedies); *Anderson*, 626 F.2d at 1370 (quoting *Bass*); Rewis v. United States, 401 U.S. 808 (1971).

94. *See supra* notes 73-88 and accompanying text.

95. *Cf.* United States v. Turkette, 452 U.S. 576, 585 (1981) (Congress altered the federal balance somewhat in order to address the "large and seeming neglected" problem of organized crime).

96. The Court itself is acutely aware of this problem. *See, e.g.*, Rehnquist, *supra* note 89, at 9. ("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"). Unfortunately, the Chief Justice's opinion in *Scheidler* will carry RICO even further from the realm in which Congress intended RICO to operate.

97. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 507 (1985) (Marshall, J., dissenting).

98. United States v. Altese, 542 F.2d 104, 109 (2d Cir. 1978) (Van Graafeiland, J., dissenting), *cert. denied sub nom.* Napoli v. United States, 429 U.S. 1039 (1977).

The *Scheidler* decision also embraces the application of RICO to a whole new set of "enterprises" that are not enterprises at all. Consider, for example, a Native American religion that advocates the use of peyote. Members of this religious group who use that drug have probably committed a pattern of racketeering activity, because dealing in narcotic or other dangerous drugs constitutes a racketeering activity.[99] If the sect is itself instrumental in acquiring or distributing peyote to its members, the sect has become a *Scheidler*-style RICO enterprise. Suppose a member of Congress uses the franking privilege to send two pieces of mail that contain statements made with reckless disregard for the truth. This hypothetical legislator may have committed two acts of mail fraud, probably enough to create a pattern of racketeering activity.[100] And because the legislator used the franking privilege, Congress has become a RICO enterprise and the legislator has become a racketeer. Now suppose that White House aides use their positions to impede an investigation of the president. If they do so on at least two separate occasions, they have engaged in a pattern of racketeering activity.[101] Thus, even the White House can be a RICO enterprise. Next, suppose an errant priest, using the persuasive authority he derives from his position in the church hierarchy, sexually molests and take obscene photographs of a young parishioner. The priest's acts might give rise to charges of kidnapping and dealing in obscene matter; if so, a pattern of racketeering activity is present.[102] If the priest was able to carry out these heinous acts because of his authority as a church leader, then the priesthood itself might become a RICO enterprise. Finally, suppose members of the National Association for the Advancement of Colored People (N.A.A.C.P.) infringe business owners' right to do business by conducting a boycott of segregated businesses. These civil rights protesters may have violated the Hobbs Act[103] and thus committed a pattern of racke-

99. *See* 18 U.S.C. § 1961(1).

100. A violation of 18 U.S.C. § 1341 (relating to mail fraud) counts as a RICO predicate act. 18 U.S.C. § 1961(1).

101. Obstruction of justice constitutes a racketeering activity. *Id.*

102. Kidnapping and dealing in obscene matter are both RICO predicates. *Id.*

103. The Hobbs Act, 18 U.S.C. § 1951, prohibits, *inter alia*, obstructing, delaying, or affecting commerce by obtaining tangible or intangible property from another, with that person's consent, induced by wrongful use of force, violence, or fear. The Hobbs Act is a RICO predicate act under 18 U.S.C. § 1961(1).

teering activity.[104] The N.A.A.C.P. would then be considered a RICO enterprise.[105] Indeed, any number of politically-motivated or social protest groups could easily constitute RICO enterprises under the *Scheidler* interpretation.[106]

Application of RICO to these "enterprises" is absurd, and not merely because it offends one's sensibilities. First, Congress had absolutely no intention of extending the coverage of RICO in such an outlandish manner.[107] Second, the predicate acts in the above hypotheticals, like all of RICO's predicate acts, are crimes in their own right. Congress did not intend to subject all criminal defendants to new and harsher penalties under RICO; rather, it intended RICO to be a new remedy against organized crime, whose members had proven to be frustratingly adept at avoiding prosecution.[108] Finally, the absence of any meaningful restraint on the use of civil RICO will no doubt lead to RICO's use in all sorts of previously unimaginable situations. Civil RICO is not restrained by prosecutorial discretion.[109] The availability of treble damages and attorney's fees in civil RICO actions[110] will cause plaintiffs and their attorneys to stretch RICO to its limits. Justice Marshall warned of this problem in *Sedima*:

> Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the con-

104. Had RICO and its *Scheidler* spin been conceived in the 1960s, it is possible that RICO could have been used against the civil rights movement. The notion of Rosa Parks and Martin Luther King, Jr. as racketeers is, at best, distasteful.

105. A prosecution of N.A.A.C.P. members based on this hypothetical would seemingly run afoul of the Court's decision in N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886 (1982). In *Claiborne Hardware*, the Court that the N.A.A.C.P.'s boycott activity which was not violent was constitutionally protected. *Id.* at 917. The *Scheidler* Court refused to address these and similar First Amendment issues, however. Until the Court addresses these constitutional concerns, that refusal means that constitutionally-protected activity will be chilled and might even be punished. *See infra* notes 119-136 and accompanying text (discussing constitutional issues).

106. In fact, any social protest group that somehow interferes with someone's intangible property interest in doing business or in engaging in contractual relations runs the risk of violating the Hobbs Act. *See infra* note 113-114 and accompanying text. Many, if not most, active social protest groups do disrupt business relations—often, such disruption is the very object of the protest. Therefore, aggressive protest groups such as Greenpeace (environmental protection), anti-nuclear organizations, animal rights activists, ACT UP (gay and lesbian advocacy), and many others are clearly prone to RICO liability after *Scheidler*.

107. *See supra* notes 73-88 and accompanying text (regarding Congress's purpose).

108. S. REP. No. 617, 91st Cong., 1st Sess. 42, 78-79 (1969).

109. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 529-530 (1985) (Powell, J. dissenting) (civil RICO is subject to the "unfettered discretion of private litigants"); *id.* at 504 (Marshall, J., dissenting) ("In the context of civil RICO, however, the restraining influence of prosecutors is completely absent.").

110. *See* 18 U.S.C. § 1964(c).

> trary, such litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of [RICO predicate acts].[111]

Despite such warnings, the nation's highest court placed its imprimatur on the extension of RICO into heretofore unforeseen and unthinkable territory.

### D. *Constitutional Implications*

Perhaps the most damning indictment of *Scheidler*, however, is that constitutionally protected expression may prove to be RICO's newest victim. Free speech and association protected by the First Amendment may now fall within RICO's prohibited zone, and the *Scheidler* Court's failure adequately to address these concerns will exacerbate the constitutional problems.[112] The economic motive requirement would have effectively redressed these constitutional concerns by providing the necessary protection for expressive activity.

Social protest groups and other politically-motivated organizations will often fall within the ambit of RICO after *Scheidler*. Consider, for example, a RICO suit based on predicate Hobbs Act violations.[113] The Hobbs Act prohibits, *inter alia*, affecting or con-

---

111. *Sedima*, 473 U.S. at 504 (Marshall, J. dissenting). *See also* Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 637 (1990) (arguing that the availability of treble damages and attorney's fees "encourages plaintiffs to stretch the predicate acts as wide as possible").

112. Chief Justice Rehnquist noted potential problems, but refused to consider them on the ground that the grant of certiorari was limited to the issue of economic motive. The excuse is a weak one, however, for the Court has the power to consider issues other than those on which certiorari was granted. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 246 n. 12 (1981) ("An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case."); Redrup v. New York, 386 U.S. 767, 769-770 (1967) (Court decided case on First and Fourteenth Amendment grounds even though those issues were not included in the limited grant of review); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 5.10 (7th ed. 1993). Surely our constitutional liberties cannot be defeated by catty crafting of a petition for certiorari. In his concurrence, Justice Souter at least made the effort to confront the constitutional concerns stemming from the Court's decision. His "solution," however, is inadequate. *See* argument *infra* notes 124-132 and accompanying text (regarding chilling effects).

113. The Act provides, in relevant part, as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [is guilty of a crime].

18 U.S.C. § 1951(a) (1988).

spiring to affect interstate commerce by extortion, and it is well-settled that intangible, as well as tangible, property rights can be extorted.[114] Ideological protest activity often infringes intangible property rights. In *Northeast Women's Center, Inc. v. McMonagle*,[115] for instance, the plaintiffs' RICO claim alleged that anti-abortion protesters extorted the clinic's right to do business, its employees' right to employment, and its patients' right to contract with the clinic. Consider also a RICO conspiracy allegation. Because an individual who agrees with but does not commit the predicate acts herself may be convicted of a RICO conspiracy,[116] other individuals associated with the protest group can easily be named in a RICO suit. In *Town of West Hartford v. Operation Rescue*,[117] for example, the plaintiff's complaint named the entire leadership of Operation Rescue, including some who had never protested in West Hartford.[118] Without an economic motive requirement, RICO will be regularly invoked against politically-motivated groups.

The constitutional infirmities of the *Scheidler* interpretation arise because ideological protest often involves both protected expression and unprotected conduct.[119] Anti-abortion protests, for example, typically involve both conduct that is constitutionally protected—picketing, offensive or even coercive speech—and conduct that is unprotected—violence, trespass, and assault. Only that conduct which is unprotected by the First Amendment can be punished.[120] Protected activity cannot be punished

114. *See, e.g.*, United States v. Santoni, 585 F.2d 667 (3d Cir.), *cert. denied*, 440 U.S. 910 (1978); United States v. Tropiano, 418 F.2d 1069 (1st Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

115. Northeast Women's Center, Inc. v. McMonagle, 689 F. Supp. 465, 472 (E.D. Pa. 1988), *aff'd*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

116. *See* United States v. Quintanilla, 2 F.3d 1469, 1484 (7th Cir. 1993); United States v. Kragness, 830 F.2d 842, 860 (8th Cir. 1987).

117. Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990).

118. *See* Califa, *supra* note 79, at 831.

119. *Cf.* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (N.A.A.C.P. boycott contained both protected expression and unprotected conduct); United States v. O'Brien, 391 U.S. 367, 376 (1968) (defendant's burning of his draft card combined both "speech" and "nonspeech" elements). One commentator calls this the problem of "mixed conduct." Califa, *supra* note 79, at 823-824.

120. *See Claiborne Hardware*, 458 U.S. at 918 (only unlawful conduct, not protected expression, may not give rise to punishment or liability); *cf.* United States v. O'Brien, 391 U.S. 367, 376 (1968) (incidental limitation on "speech" element of conduct permitted when occasioned by a substantial government interest in regulating "nonspeech" element of conduct). Such regulation or punishment must be narrowly tailored, *Button*, 371 U.S. at 433, and must incidentally restrict First Amendment freedoms no greater than necessary. *O'Brien*, 391 U.S. at 377. It might be argued that civil RICO does not fall within these

merely because that person or his fellow protesters engage in unprotected conduct contemporaneously.[121] Therefore, in the "mixed conduct" situation, the First Amendment demands precision of regulation.[122] "Because First Amendment freedoms need breathing space to survive," the Court declared in *N.A.A.C.P. v. Button*, "the government may regulate in the area only with narrow specificity."[123] Yet the *Scheidler* Court failed to provide any guidance whatsoever, let alone the requisite precision of regulation.

The unfortunate result of this failure is that *Scheidler* will chill constitutionally protected expression.[124] Ideological protesters, left uncertain as to the boundary between protected and unprotected conduct, will refrain from engaging in protected expression in order to avoid the uncertain line of demarcation.[125] In addition, potential protesters, also left uncertain, may decline to

---

First Amendment strictures because its use constitutes private, not state, action. However, there is no basis for drawing a distinction between §§ 1961-1962 as applied in the criminal context and as applied in the civil context. Thus, both criminal and civil RICO must comport with the dictates of the First Amendment. *See supra* note 66.

121. "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *Claiborne Hardware*, 458 U.S. at 908. *See also* Scales v. United States, 367 U.S. 203, 229 (a "blanket prohibition of association with a group having both legal and illegal aims" would present a "real danger that legitimate political expression or association would be impaired").

122. N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963).

123. *Button*, 371 U.S. at 433; *see also id.* ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."); *Claiborne Hardware*, 458 U.S. at 920 (government may not broadly stifle protected expression when the end can be more narrowly achieved).

124. The Rutherford Institute, a religious liberties organization, petitioned the Court for a rehearing on the grounds that *Scheidler*, without further clarification, would have a "disastrously chilling effect on otherwise legal, nonviolent political expression . . . ." *Rehearing Sought on RICO Abortion-Protests Ruling*, DALLAS MORNING NEWS, Feb. 19, 1994, at 38A. Despite the patent validity of this concern, the Court denied a rehearing. 114 S. Ct. 1340 (1994).

125. *See* RASMUSSEN, *supra* note 111, at 630. Sadly enough, the chilling effect of *Scheidler* seems to have quickly taken hold. Less than two weeks after the *Scheidler* decision, an attorney for Operation Rescue reported, "We've been getting calls: 'I pray the rosary in front of such-and-such clinic once a week' or, 'I leaflet at the clinic. Can I get sued under RICO?' " Marcia Coyle, *Clinics Win One; Justices Accept RICO Use Against Protesters; Free Speech Challenge Lies Ahead*, NAT'L L.J., Feb. 7, 1994, at 1. The very uncertainty of RICO's reach after *Scheidler* might give rise to a void for vagueness challenge to RICO. Indeed, even before the *Scheidler* decision, Justice Scalia, in a less than subtle opinion, invited a vagueness challenge to RICO. H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 256 (1989) (Scalia, J., concurring in the judgment) ("That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when [a vagueness] challenge is presented."). It might be suggested that RICO is no longer vague after *Scheidler*—rather, anything and everything counts as an enterprise. In a very real sense, this is true: the *Scheidler* Court never met an enterprise it did not like. However, RICO is still nebulous, and *Scheidler* left the ultimate scope of RICO uncertain. *See supra* note 65.

join ideological groups out of fear of RICO liability.[126] *Scheidler* may have a powerful and unacceptable *in terrorem* effect.[127]

RICO's status as a potent and stigmatizing statute exacerbates *Scheidler's* chilling effect. Because RICO offers treble damages and attorney's fees to a victorious civil plaintiff, ideological groups face tremendous risks when slapped with a RICO suit. Indeed, merely bringing—or even threatening—a RICO action may be enough to deter an ideological group from engaging in protected activity.[128] Ideological protesters may be cowed into settlements (which might restrict or prohibit expressive activity) of even arguably frivolous RICO suits.[129] RICO may also allow prosecutors or civil plaintiffs to sweep into the dragnet persons who engaged exclusively in protected expression.[130] Finally, selective enforcement—by either prosecutors or private plaintiffs—may allow RICO to become an instrument of oppression to be used against ideological opponents.[131] RICO clearly contains the necessary ingredients for a powerful chilling effect. Justice Souter's proposal to resolve RICO's constitutional problems through a case-by-case approach provides little solace. By the time Justice Souter would hear a First Amendment challenge, protected expression would have already been chilled. This result is simply intolerable in a society where debate on matters of public con-

126. In N.A.A.C.P. v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-463 (1958), the Court held that compelled disclosure of the N.A.A.C.P.'s membership might "induce members to withdraw from the Association and dissuade others from joining it. . . ." This is the same type of chilling effect that will result from *Scheidler. See also* Speiser v. Randall, 357 U.S. 513, 526 (1958) ("the probability of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized"); Califa, *supra* note 79, at 834.

127. "[R]egulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." N.A.A.C.P. v. Button, 371 U.S. 415, 439 (1963). That, however, is precisely what RICO will be used to do after *Scheidler. See also* N.A.A.C.P. Alabama *ex rel.* Patterson, 357 U.S. at 461 ("state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

128. *See Button*, 371 U.S. at 433 ("The threat of sanctions may deter [the exercise of First Amendment freedoms] almost as potently as the actual application of sanctions."); Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 506 (1985) (Marshall, J. dissenting); Califa, *supra* note 79, at 834-35.

129. *Id.* at 835.

130. While liability cannot be imposed merely because of association, it is easy for prosecutors or plaintiffs to name many defendants in a RICO action, even though some defendants may later be dismissed because they engaged only in protected conduct. *See id.* at 834-835.

131. "[A] statute broadly curtailing group activity . . . may easily become a weapon of oppression, however evenhanded its terms appear." *Button*, 371 U.S. at 435-436.

cern is intended to be "uninhibited, robust, and wide-open . . . ."[132]

Justice Souter's suggestion[133] that the economic motive requirement would correspond only poorly to free speech concerns is also misguided, for it ignores the well-established distinction in First Amendment jurisprudence between political and commercial expression. Commercial speech and association have historically received less protection against government regulation than political speech and association.[134] The economic motive requirement corresponds *precisely* to this venerable constitutional distinction. Less-protected commercial expression would meet the economic motive requirement and thus could be punished under RICO. On the other hand, highly-protected political expression, such as anti-abortion protest activity, would fail the economic motive requirement and would not be punishable under RICO.

*Scheidler* is all the more puzzling because the Court has often interpreted statutes to avoid constitutional problems.[135] A sensible interpretation of RICO's enterprise element, which recognizes the economic motive requirement, would have avoided the worrisome First Amendment problems that the Court has created. The economic motive requirement would provide the necessary precision of regulation by subjecting to RICO only those individuals or groups that act with commercial or financial purposes. The economic motive requirement would also eliminate the chilling effect of the *Scheidler* interpretation by excluding ideological groups from the reach of RICO.[136] Finally, the economic motive requirement is narrowly tailored to meet First Amend-

132. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

133. *Scheidler*, 114 S. Ct. 798 at 807.

134. *See* New York State Club Association, Inc. v. City of New York, 487 U.S. 1 (1988) (commercial association); Roberts v. U.S. Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring in part and concurring in the judgment) ("there is only minimal constitutional protection of the freedom of commercial association"); Central Hudson Gas v. Public Service Com'n of New York, 447 U.S. 557, 566 (1980) (applying intermediate scrutiny, rather than strict scrutiny, to regulation of commercial speech).

135. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) (refusing to adopt construction of the Sherman Act that "would raise important constitutional questions"; Court would not "lightly impute to Congress an intent to invade" First Amendment freedoms); National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (interpreting the National Labor Relations Act to avoid problems under the Free Exercise and Establishment Clauses); *see also* SINGER, *supra* note 49, at § 56.04 ("Constitutional policy can provide a valuable aid in determining the legitimate boundaries of statutory meaning.").

136. Of course, ideological groups *would* be subject to RICO when they do act with an economic motive. *See, e.g.*, United States v. Bagaric, 706 F.2d 42 (2d Cir.) (Croatian ter-

ment concerns, for its tracks the constitutional distinction between political and commercial speech. Recognizing this requirement of RICO is a highly satisfying way to avoid these constitutional issues in a manner entirely consistent with the statutory text.

## IV. Conclusion

*Scheidler* is indeed an unfortunate decision, for RICO's economic motive requirement is central to the statute. The economic motive requirement is, at worst, consistent with the statutory text, and it is probably essential to a correct interpretation of the text. The requirement precludes undesirable policy consequences by protecting federalism and limiting RICO to true enterprises, properly conceived. Furthermore, and perhaps most important, the requirement ameliorates and effectively redresses constitutional concerns arising from the application of RICO to ideological groups and protesters. In short, a decision giving effect to RICO's economic motive requirement would have made for sound statutory interpretation and a highly sensible result.

Moreover, requiring an economic motive under RICO is not inconsistent with the Court's existing RICO jurisprudence. After hinting at RICO limitations in *Sedima* and actually limiting RICO in *H.J., Inc.*[137] and *Reves v. Ernst & Young*,[138] the *Scheidler* Court was not bound by precedent to take such a boundless and inappropriate view of RICO's language.[139] Indeed, the Court should

---

rorists subject to RICO when they acted with a financial purpose), *cert. denied*, 464 U.S. 840 (1983).

137. 492 U.S. 229 (1989).

138. In *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n. 14 (1985), Justice White offered the suggestion, adopted by Justice Brennan in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-239 (1989), that two predicate acts were necessary, but not sufficient, to create a pattern of racketeering activity. In *H.J., Inc.*, Justice Brennan held that a "pattern" required continuity and relationship between or among the predicate acts. *Id.* at 239. In *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1170 (1993), the Court interpreted § 1962(c) to require that the defendant have participated in the operation or management of the enterprise. Thus, those whose contact with the enterprise was incidental would not be held liable.

139. Indeed, Justice White's suggestion in *Sedima*, Justice Brennan's opinion for the Court in *H.J., Inc.*, and Justice Blackmun's opinion for the Court in *Reves* might have signaled a new approach to RICO with which the economic motive requirement dovetails perfectly. The Court in these cases was perhaps searching for ways to limit RICO that were based on the statutory text and yet corresponded with the intent of Congress. The chosen approach was based upon close scrutiny of the text; it analyzed §§ 1961-1962, the definitional provisions and basic list of prohibited activities. *See, e.g., H.J., Inc.* at 237 (§ 1961(5) tells only what a pattern of racketeering activity "requires," not what it "means"). The

not have done so, for the economic motive requirement is an appropriate and even compelled limitation on the sweep of RICO.

In all probability, however, the *Scheidler* interpretation is unlikely to remain long intact. By allowing "enterprise" to become all-encompassing, the Court permitted RICO to run amok. *Scheidler* may well produce unpalatable results, and new restrictions on RICO are likely to be imposed legislatively or judicially. *Scheidler* seems destined either to force the Court, urged on by Justice Souter's concurrence, to limit the application of RICO in particular cases,[140] or to spur Congress to clean up the mess *Scheidler* has created. Until that time, however, the *Scheidler* Court has permitted an assault on the First Amendment and has unleashed RICO on society at large.

economic motive requirement limits RICO in precisely the same fashion. Thus, *Scheidler* would have been consistent with the Court's precedents had it come out the other way.

140. The Court's October 1993 Term included a First Amendment challenge to restrictions on anti-abortion protest activity. Operation Rescue v. Women's Health Center Inc., 626 So.2d 664 (Fla. 1993), *cert. granted sub nom.* Madsen v. Women's Health Center Inc., 114 S. Ct. 907 (1994) (No. 93-880), *and cert. denied*, 114 S. Ct. 923 (1994). *Madsen* involved issues of content-neutrality and the reasonableness of time, place, and manner restrictions on protest activity, *see* 62 U.S.L. WK. 3478 (Jan. 18, 1994), and thus does not directly reach the First Amendment issues raised by *Scheidler*.