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INJUNCTIVE RELIEF AND CIVIL RICO: AFTER *SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN, INC.*, RICO'S SCOPE AND REMEDIES REQUIRE REEVALUATION

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In its analysis of the availability of injunctive relief under the civil provision of the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO),[1] the Seventh Circuit Court of Appeals explained:

> [T]wo separate episodes from the history of civil RICO's legislative passage convince us that . . . [the arguments that the court could grant the injunctive relief] do not reflect Congress' intent in section 1964. *First,* the House rejected an amendment, described as "an additional civil remedy," which would expressly permit private parties to sue for injunctive relief under section 1964(a). *Second,* in the very next year after RICO's enactment, Congress refused to enact a bill to amend section 1964 and give private plaintiffs injunctive relief . . . . The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.[2]

Congress enacted the RICO as part of the Organized Crime Control Act of 1970 (OCCA),[3] in response to public outcry and several government studies revealing pervasive infiltration of the legitimate business community by the mafia and other organized crime syndicates.[4] RICO proscribes broad patterns of racketeering activities historically associated with organized crime and empowers federal prosecutors to

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1. 18 U.S.C. §§ 1961-1968 (2000).
2. Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1085-86 (9th Cir. 1986).
3. Pub. L. No. 91-452, 84 Stat. 922 (1970).
4. Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 247-50 (1984). OCCA described the pervasive danger of an economic effect of organized crime, defining the purpose of the Act to be "the eradication of organized crime in the United States by strengthening the legal tools in [the] evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with unlawful activities of those engaged in organized crime." 84 Stat. at 922-23.

enforce the provision with powerful criminal penalties and civil equitable remedies.[5] Additionally, the Act creates a private civil RICO cause of action, permitting individuals to seek damages for injuries to business or property resulting from racketeering.[6] OCCA's scheme mandates that courts interpret the RICO statute "liberally . . . to effectuate its remedial purposes."[7] The private civil remedy coupled with a broad definition of racketeering and liberal construction resulted in an explosion of civil RICO lawsuits in the mid-1980s.[8] Since then, private plaintiffs increasingly have brought actions under RICO in areas not typically associated with organized crime.[9] Today, private racketeering suits are

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5. 18 U.S.C. § 1961. The four main acts prohibited under RICO are generally: investment of income derived from racketeering activity; acquisition of any interest in an enterprise engaged in racketeering; participation in any enterprise engaged in racketeering activity; and conspiracy to violate the previous provisions. *Id.* § 1962. Section 1961 defined racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act) . . . chargeable under State law and punishable by imprisonment for more than one year" or any act indictable under a long list of federal titles. *Id.* § 1961(1)(A), (B). All of the predicate acts that could lead to a charge of "racketeering" were existing federal crimes or state common law crimes. *Id.* § 1961(1)(B). RICO provisions allow federal prosecutors to seek fines, imprisonment, criminal forfeiture of assets, and restraining orders or injunctions. *Id.* § 1963. The provision also granted extensive civil penalties that prosecutors could pursue. *Id.* § 1964(a).

6. *Id.* § 1964(c). The statute states:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Id. The threefold damages provision is called a treble damages clause, and was adopted by the House of Representatives in a late amendment to mirror the private civil action of federal antitrust law under the Clayton Act. GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE § 2 (2d ed. 2000).

7. § 904(a), 84 Stat. at 947.

8. William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 9 (1989). The Chief Justice noted that from 1983 through 1988, civil RICO suits have increased more than eightfold. *Id.*; *see also* Elizabeth Anne Fuerstman, *Trying (Quasi) Criminal Cases in Civil Courts: The Need for Constitutional Safeguards in Civil RICO Litigation*, 24 COLUM. J.L. & SOC. PROBS. 169, 169-70 (1991). Since 1985, plaintiffs have filed approximately 1,000 private civil RICO actions a year in federal courts. *Id.* at 170 n.5; *see also* JOSEPH, *supra* note 6, § 1.

9. Rehnquist, *supra* note 8, at 9. The Chief Justice suggested that most civil RICO actions being filed have no relation to organized crime. *Id.* ("Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress

more prevalent than criminal racketeering prosecutions.[10] The escalation of private lawsuits has evoked substantial debate, and several Supreme Court decisions have surfaced regarding the scope and availability of remedies under civil RICO.[11]

Because federal courts have afforded significant deference to liberal interpretations, plaintiffs not only have applied RICO in creative ways, but also have sought new remedies.[12] One particular remedy sought by plaintiffs is injunctive relief.[13] Injunctions attract civil RICO plaintiffs who claim that their businesses or properties cannot receive full compensation from monetary rewards.[14] However, injunctions also

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never intended when it enacted the statute in 1970."). Racketeering has the potential to link legitimate businesses with organized crime. *See id.*; *see also* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 526 (1985) (Powell, J., dissenting); John L. Koenig, Comment, *What Have They Done to Civil RICO: The Supreme Court Takes the Racketeering Requirement Out of Racketeering*, 35 AM. U. L. REV. 821, 829 n.34 (1986).

10. Fuerstman, *supra* note 8, at 170-71; *see also* Rehnquist, *supra* note 8, at 9 (explaining that most civil RICO actions "are garden-variety fraud" that should be handled by state courts).

11. *See, e.g.*, Reves v. Ernst & Young, 507 U.S. 170, 183-85 (1993) (suggesting that the boundaries of congressional purpose limit the liberal construction clause); *Sedima*, 473 U.S. at 481 (indicating that to establish a RICO cause of action a plaintiff merely must satisfy the predicate act requirement and elements of the offense); JOSEPH, *supra* note 6, § 1 (explaining that a great amount of law exists debating various RICO issues of "standing, injury and damages, equitable relief, causation, and a variety of pleading and practice issues"). *But see* Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 397 (2003) (limiting the predicate racketeering act of extortion).

12. *See* Nat'l Org. for Women, Inc. v. Scheidler (NOW), 267 F.3d 687, 695 (7th Cir. 2001) (explaining that liberal construction allows for federal courts to exercise injunctive power in private civil actions, authority explicitly granted for federal prosecutions), *overruled by* 537 U.S. 393 (2003); *see also* G. Robert Blakely & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology v. Wollersheim*: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 556-57 (1987) (arguing that liberal interpretation requires RICO to be read to allow private injunctive relief).

13. *See, e.g.*, *NOW*, 267 F.3d at 693 (seeking injunctive relief to stop a coalition of abortion protesters from closing clinics); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1077 (9th Cir. 1986) (seeking injunctive relief to prevent dissemination of religious material); Dixie Carriers, Inc. v. Channel Fueling Service, Inc. (*In re* Fredeman Litig.), 843 F.2d 821, 822 (5th Cir. 1988) (seeking injunctive relief to freeze assets of an allegedly fraudulent company); see also JOSEPH, *supra* note 6, § 20(A).

14. *See* Blakely & Cessar, *supra* note 12 (arguing that rejecting injunctive relief limits the use of civil RICO to white collar crime); Glenn Israel, Comment, *Taming the Green Marketing Monster: National Standards for Environmental Marketing Claims*, 20 B.C. ENVTL. AFF. L. REV. 303, 314-17 (1993) (stating that civil RICO, with the availability of injunctive relief, may be a potential weapon against deceptive environmental marketing); Geri J. Yonover, *Fighting Fire with Fire: Civil RICO and Anti-abortion Activists*, 12 WOMEN'S RTS. L. REP. 153, 155 (1990) (proposing civil RICO as a solution to anti-abortion protesters shutting down clinics).

reveal the greatest potential dangers of RICO.[15] RICO plaintiffs have used this remedy to force large settlements, drive legitimate competitors out of business, and prevent political organizations from carrying out group activities.[16]

The Supreme Court encountered one such plaintiff in *Scheidler v. National Organization of Women, Inc.* (*Scheidler II*), its most recent opinion regarding civil RICO's scope.[17] In both trips to the Supreme Court, *Scheidler* revealed the potential for civil RICO to infringe on constitutionally guaranteed rights when applied to an organization

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15. *See, e.g.*, Rehnquist, *supra* note 8, at 10 (suggesting that the recent application of civil RICO reveals the inherent problems with private enforcement of RICO because plaintiffs' interests lack prosecutorial discretion); Koenig, *supra* note 9, at 823-24. Many injunctive relief opponents such as businesses, First Amendment watchdogs, and federalists express significant concerns about the deviance that the availability of injunctions under RICO may cause. *See, e.g.*, *Sedima*, 473 U.S. at 500 (Marshall, J., dissenting); Brief of Amicus Curiae Center for Individual Rights in Support of the Petitioners, *Scheidler II* (Nos. 01-1118, 01-1119); Brief for the States of Alabama, Nebraska, North Dakota, and South Dakota, and the Commonwealth of the Northern Mariana Islands, as Amici Curiae in Support of Petitioners at 2, *Scheidler II* (Nos. 01-1118, 01-1119) (suggesting that RICO throws off the balance of federalism because the broad statute usurps state judicial authority in areas of law traditionally reserved for states); Craig M. Bradley, NOW v. Scheidler*: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 134-35 [hereinafter *First Amendment*] (suggesting that RICO application to political activists implicates First Amendment issues); Craig M. Bradley, *When Is Political Protest a RICO Violation?*, 39 TRIAL 72 (2003) [hereinafter *Political Protest*] (insisting that RICO's elements still lack clear understanding); Charles Levendosky, *Protecting Anti-abortion Protests, Protects All*, CASPER STAR-TRIB. (Wyoming), Mar. 2, 2003, *reprinted in* COMMENTARY ON FIRST AMENDMENT ISSUES, FIRST AMENDMENT CYBER-TRIB., at http://fact.trib.com/1st.lev.protestnoextort.html (last visited July 14, 2004) (suggesting that civil RICO, as broadly applied, threatens to violate First Amendment freedoms); MAYER, BROWN, ROWE & MAW, LLP, SUPREME COURT DOCKET REPORT, at http://www.appellate.net/docketreports/sc20558099.asp (last visited Sept. 21, 2004) [hereinafter DOCKET REPORT] (suggesting that the question of injunctive relief is of particular interest to many businesses because the remedy provides a dangerous weapon to plaintiffs to force settlements).

16. *See, e.g.*, *NOW*, 267 F.3d at 693 (upholding the district court's injunctive order against national anti-abortion action network); Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1345, 1357 (3d Cir. 1989) (upholding injunction against anti-abortion protesters); DOCKET REPORT, *supra* note 15 (noting that injunction is a dangerous weapon for civil litigants to challenge business competitors); *see also* H.R. REP. NO. 1549, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4076, 4083-84 (dissenting Representatives Abner Mikva, William F. Ryan, and John Conyers, Jr. opposed the bill with the House amendment to add the civil provision to RICO). The dissenters suggested that the new civil RICO provision invited angry competitors to harass innocent businessmen with protracted federal litigation and negative publicity, in order to destroy the competitor's business. *Id.* at 4083.

17. *Scheidler II*, 537 U.S at 394-400. *Scheidler* came before the Supreme Court twice. The first will be referred to as *Scheidler I*. 510 U.S. 249 (1994). The second, the most recent trip to the Supreme Court, is the case to which this note primarily refers, and will be described as *Scheidler II*.

voicing a political opinion.[18] Ultimately, *Scheidler II* failed to address the constitutional issues raised by RICO's broad application and left unresolved the applicability of injunctive relief.[19] While the Court dismissed the National Organization of Women's (NOW) claim against anti-abortion protesters,[20] some experts suggested that the expansion of civil RICO to protest groups continued.[21] As a result, civil RICO still contains perpetual interpretation problems and constitutional questions that likely will return to the Supreme Court.[22]

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18. *See* Daniel Lucero et al., *Racketeer Influenced and Corrupt Organizations*, 38 AM. CRIM. L. REV 1211, 1262-63, 1270 (discussing how injunctive relief raises debate regarding violations of the First Amendment); *Political Protest*, *supra* note 15, at 72 (suggesting that RICO has the potential for infringing on First Amendment freedoms); Levendosky, *supra* note 15 (suggesting that private civil RICO actions against protesters may chill freedom of speech and association).

19. *See* Petition for Writ of Certiorari, 27-32 *Scheidler II* (No. 01-1118) (stating the one issue as whether the district court complied with the First Amendment standards mandated by *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). The Supreme Court granted certiorari, but not on the First Amendment issue, addressing: first, whether petitioners committed extortion under the Hobbs Act; and second, whether federal courts can grant private litigants injunctive relief under the private civil RICO provision. *Scheidler II*, 537 U.S. at 397.

20. *Id.* at 410-11.

21. *See Political Protest*, *supra* note 15, at 74 (suggesting that other avenues of litigating against abortion protesters are available, such as through states with less strict definitions of extortion or through other provisions of the Hobbs Act, including violent coercion); Levendosky, *supra* note 15 (suggesting that the Patriot Act of 2001, a predicate act under the RICO scheme, will be a future issue for the Court to address). The recent strengthening of federal criminal laws against terrorism may raise concerns over potential civil liberties violations under RICO. *Id.* RICO incorporates provisions of the Patriot Act of 2001, 18 U.S.C. §§ 1961(1), 2332b(g)(5)(B) (2001), enacted to provide government with appropriate tools to prevent terrorism. Pub. L. 107-56, 115 Stat. 272, 272 (2002). The Act provides that "'[r]acketeering activity' means . . . any act that is indictable under any provision listed in section 2332b(g)(5)(B)." 18 U.S.C. § 1961. The U.S. Code defines "[t]he 'Federal crime of terrorism' . . . as an offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and is a violation of several specified criminal acts. *Id.* § 2332b(g)(5)(B). The Patriot Act scheme defines domestic terrorism as:

> [A]cts dangerous to human life that are a violation of the criminal laws of the United States . . . intended . . . to intimidate or coerce a civilian population; . . . to influence the policy of a government by intimidation or coercion; or . . . to affect the conduct of a government by mass destruction, assassination, or kidnapping and . . . occur primarily within the . . . United States.

18 U.S.C. § 2331(5) (Supp. 2001). Under the current Court's broad definition of RICO, isolated actions of national groups protesting government activity, or of individuals involved in the protest, may fall under the predicate acts of "terrorism" by "intimidating local business" or "coercing" government officials into action, and may be subject to civil injunction at the hands of a private RICO action. *See* Levendosky, *supra* note 15.

22. *See* H.J. Inc. v. Northwestern Bell, 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (suggesting that the statute may be unconstitutionally vague); *Political Protest*, *supra* note 15, at 74; Levendosky, *supra* note 15.

This Comment examines the competing interpretations of civil RICO's elements and remedies after *Scheidler*. First, this Comment discusses the statutory scheme and elements of civil RICO. Next, this Comment reviews the Supreme Court's broad interpretation of racketeering, which contributed to RICO's expansive application. Then, this Comment highlights the circuit split over the availability of civil injunctive relief to private litigants. Next, this Comment details the Supreme Court's most recent analysis of civil RICO in *Scheidler II*, its shortcomings that result in constitutional and practical enforcement issues, and the current state of civil RICO. Finally, this Comment argues that the Supreme Court should construe civil RICO to bar private injunctive relief for both statutory and policy reasons. Ultimately this Comment concludes that Congress must amend RICO's private civil provision to serve RICO's initial purpose and to cure constitutional flaws.

I. THE RICO STATUTE AND THE CONUNDRUM OF PRIVATE INJUNCTIVE RELIEF: COURTS ANALYZE THE TENSION BETWEEN CONGRESSIONAL INTENT AND LIBERAL CONSTRUCTION

A. The Scheme of Civil RICO and the Liberal Interpretation Clause

The Racketeer Influenced and Corrupt Organizations Act (RICO) of 1970,[23] enacted as Title IX of the Organized Crime Control Act of 1970, created the federal crime of racketeering.[24] Its purpose was to eradicate organized crime from the legitimate business community.[25] Due to concern over its constitutional soundness and practical function, Congress did not direct the Act's prohibitions specifically at the mafia, but instead targeted racketeering patterns.[26] To this end, Congress defined "racketeering activity" by incorporating into its definition

23. 18 U.S.C. §§ 1961-1968 (2001).

24. Pub. L. No. 91-452, 84 Stat. 922 (1970).

25. 84 Stat. at 922-23. The Act responded to public outcry that originated with media reports on the mafia in national publications. Bradley, *supra* note 4, at 247-54. As a result, the President and Congress ordered federally appointed commissions to conduct research; the commissions subsequently issued a series of reports. *Id.*

26. *See* Koenig, *supra* note 9, at 830-31 (explaining that when drafting RICO, Congress did not seek to define organized crime or attach a specific connection to it, but to create a "functional legal concept"). To maintain RICO's constitutionality, Congress refrained from barring membership in the mafia, which could have violated freedom of association under the First Amendment. Curtis Roggow, Note, *Of Rum, Rights, and RICO: Are Plaintiffs Intoxicated with the Power of Civil RICO? What Is Falling Victim to the Statute?*, 40 DRAKE L. REV. 577, 581-82 (1991). The legislative history of the bill reveals that Senate debate concerning the overbreadth of the Act actually may have led to a broader definition of RICO. Paul A. Batista & Mark S. Rhodes, CIVIL RICO PRACTICE MANUAL § 2.13 (Supp. No. 2 1996).

numerous predicate offenses chargeable under state and federal law that had long been associated with organized crime syndicates.[27]

RICO § 1962 classifies racketeering activities in four ways: first, using or investing income derived from a pattern of racketeering activity to acquire an interest in an enterprise affecting interstate commerce;[28] second, acquiring or maintaining an interest or control of an enterprise through a pattern of racketeering activity affecting interstate commerce;[29] third, operating, conducting, or participating in an enterprise affecting interstate commerce through a pattern of racketeering activity;[30] and, finally, conspiring to participate in any of these activities.[31]

From these four offenses, two elements in addition to the predicate acts themselves are essential to establish a RICO violation: a "pattern of racketeering" and an "enterprise."[32] Section 1961 defines a pattern as "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 . . . after the commission of a prior act of racketeering activity."[33] Congress defined an enterprise as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[34] The Supreme Court subsequently expanded this definition to include

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27. 18 U.S.C. § 1961(a). The definition states:

> "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.

Id. The definition also includes any act that is indictable under an extensive list of federal provisions, most under Titles 18 and 29. *Id.* Originally mail, wire, and securities fraud were among the predicate acts. *See id.* §§ 1961, 1962(a). In 1995, Congress amended § 1964(c) to limit plaintiffs from basing RICO actions solely on securities fraud, unless the defendant's fraudulent conduct had previously resulted in a criminal conviction. Pub. L. No. 104-67, sec. 107, § 1964(c), 109 Stat. 737 (1995). Congress included this amendment with reforms to securities fraud litigation, set forth in the Private Securities Litigation Reform Act of 1995. *Id.* Congress inserted the USA Patriot Act of 2001 as a RICO predicate offense. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382 (2001).

28. 18 U.S.C. § 1962(a).

29. *Id.* § 1962(b).

30. *Id.* § 1962(c).

31. *Id.* § 1962(d).

32. *Id.* § 1962.

33. *Id.* § 1961(5). The ten-year tolling excludes any period of imprisonment. *Id.*

34. *Id.* § 1961(4).

legitimate businesses as well as associations that lack clear economic motives, such as protesters.[35]

Once the prosecutor establishes the elements of a RICO offense, there are a broad range of criminal and civil penalties available to enforce the RICO scheme.[36] For example, § 1963 allows for imprisonment up to twenty years, fines, criminal forfeiture of assets, and restraining orders.[37] Congress also provided federal prosecutors the option to seek civil injunctions and other equitable remedies to "prevent and restrain violations of § 1962."[38]

In addition to its sweeping criminal provisions and civil enforcement remedies, RICO also includes a provision encouraging private citizens to assist the government in the eradication of organized crime.[39] This "private attorneys general" provision allows a civil litigant to bring a RICO cause of action against a defendant in federal court for an injury to business or property.[40] To satisfy the elements of a civil action, RICO plaintiffs must establish an injury to business or property, caused by the defendant's violation of one of the four racketeering causes of action in § 1962.[41] The civil clause specifically provides for the remedies of treble damages suffered, reasonable attorney fees, and court costs.[42] The private civil provision, however, fails to stipulate whether individual plaintiffs, like federal prosecutors, may seek injunctive relief.[43]

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35. Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 256-62 (1994). There is no requirement that a racketeering enterprise or the racketeering predicate acts be motivated by economic interests. *Id.* The term "enterprise" in RICO is not limited to illegitimate enterprises. United States v. Turkette, 452 U.S. 576, 578, 585-87, 593 (1981).

36. *See* § 1963. The scheme allowed the Department of Justice to significantly expand its enforcement regime against organized crime. *See* Bradley, *supra* note 4, at 263-64.

37. § 1963(a)-(d).

38. *Id.* § 1964(a).

39. *Id.* § 1964(c); *see also supra* note 6. Congress intended the civil provision to promote the Act's purpose of eradicating organized crime by filling "gaps" in enforcement. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 514 (1985) (Marshall, J., dissenting).

40. § 1964(c). The civil provision stipulates that the plaintiff's injury must be to "business or property." *Id.*

41. *Id.*

42. *Id.*

43. *Id.* Section 1964(a) provides various injunctive remedial powers to federal courts including ordering divestment or dissolution of an organization. *Id.* § 1964(a). However, the private civil provision was a later amendment that included a clause-specific remedy of treble damages and attorneys' fees. *Id.* § 1964(c); H. REP. NO. 91-1549, at 4034 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034; *see also* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1082-89 (9th Cir. 1986) (explaining that the private civil provision was added later and should be read as a separate cause of action with its own defined remedy).

The original Senate bill did not include the civil action,[44] but the House made an "eleventh-hour addition" to include this cause of action.[45] The House fashioned the private civil cause of action and treble damages remedy after the Clayton Act.[46] House proponents of the RICO civil action expected that the lower burden of proof in civil actions and the possibility of large damage awards would encourage parties to assist in the fight against organized crime.[47] The enticement proved effective, as the numbers of RICO private actions increased dramatically in the mid-1980s, as predicate offenses under RICO were broadened to include wire, mail, and securities fraud.[48]

However, due to OCCA's liberal construction clause[49] and functional approach to tackling organized crime,[50] the statute provides plaintiffs with an avenue to bring actions in the federal courts against defendants who are not associated with organized crime.[51] Furthermore, most RICO actions assert violations traditionally within the jurisdiction of state courts.[52] The treble damages remedy in the civil provision draws many of

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44. H. REP. NO. 91-1549, at 4034, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4034.

45. JOSEPH, *supra* note 6, § 2.

46. Clayton Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27); *see also* § 15(a); JOSEPH, *supra* note 6, § 2. Because RICO's private civil provision was modeled after the Clayton Act, many courts look to the antitrust predecessor and its case history for direction when interpreting civil RICO. *See, e.g.*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 240-41 (1987). One commentator noted that "[t]he antitrust laws provided the precedent for using civil remedies to fulfill RICO's economic goals in the fight against racketeering." *See* JOSEPH, *supra* note 6, § 2; Koenig, *supra* note 9, at 832. However, some courts reject strict reliance on the Clayton Act to aid in RICO interpretation. *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler (NOW), 267 F.3d 687, 698-700 (7th Cir. 2001), *overruled by* 537 U.S. 393 (2003).

47. Koenig, *supra* note 9, at 832. *But see* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting).

48. *See Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP., BANKING AND BUS. L. REP. 55-56; Rehnquist, *supra* note 8, at 9 (noting that civil RICO filings increased 800% from 1983 to 1988, totaling nearly 1,000 cases during 1988); Fuerstman, *supra* note 8, at 169-70; *see also supra* note 27 (noting RICO amendments limiting the predicate act of securities fraud).

49. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) (stating that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes").

50. *See, e.g.*, *Sedima*, 473 U.S. at 526 (Powell, J., dissenting).

51. Koenig, *supra* note 9, at 821-23.

52. *See, e.g.*, Rehnquist, *supra* note 8, at 9. Many experts and judges also argue that RICO contributed to a growing and disturbing trend towards the expansion of federal criminal law. *See, e.g.*, *Sedima*, 473 U.S. at 501-22 (1985) (Marshall, J., dissenting) (arguing that Congress never intended to create such a dramatic shift in federal power); Brief of Amicus Curiae Center for Individual Rights at 2-22, Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119); Bradley, *supra* note 4, at 265-66. Criminal law was traditionally a matter reserved for the states; however, the body

these plaintiffs, who would otherwise file state claims, in growing numbers to the federal courts.[53] Plaintiffs have alleged racketeering claims for a wide range of "racketeering activities," often predicated on criminal mail or wire fraud, state extortion laws, or securities fraud.[54] This growth is evidenced by the fact that in the past fifteen years, plaintiffs brought far more RICO lawsuits against legitimate businesses and organizations than against traditional criminal organizations.[55]

Many courts have struggled to comply with Congress' mandate to liberally construe the Act in light of its recent applications far outside its stated purpose.[56] The Supreme Court has given much deference to liberal interpretations of the Act and consequently, its opinions reviewing the RICO statute are overtly cautious so as not to overstep the boundaries of judicial review.[57] As a result, the application of RICO continues to extend to broad areas of traditional state law and criminal law, without clear court direction or congressional clarification.[58]

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of federal criminal law has expanded to tackle specialized problems of federal concern. Bradley, *supra* note 4, at 214-16. Because the traditional purpose of federal criminal law is "to supplement the criminal law of the state by protecting federal interests," when congressional lawmaking begins to supplant state police power, it threatens to violate the constitutional balance of federalism. Brief of Amicus Curiae Center for Individual Rights at 2-6, *Scheidler II* (Nos. 01-1118, 01-1119).

53. *See* Rehnquist, *supra* note 8, at 9.

54. *See, e.g.*, *Sedima*, 473 U.S. at 500 (explaining that widespread application to businesses was a result of including mail and wire fraud under the predicate acts for RICO); United States v. Turkette, 452 U.S. 576, 586-87 (1981) (extending RICO provisions to legitimate enterprises); David Manogue, *Liability for General Business Fraud: Putting a Contract Out on RICO Treble Damages*, 45 U. PITT. L. REV. 481, 482 (1984) (arguing that the novel federal cause of action with treble damages for those injured in "garden variety business fraud" misses the intended targets of the act); Rehnquist, *supra* note 8, at 9; *see also supra* note 27 (noting the amendments to the securities fraud predicate act under the civil provision).

55. *See* discussion *supra* notes 9, 10.

56. Reves v. Ernst & Young, 507 U.S. 170, 183-84 (1993) (explaining that the boundaries of congressional purpose limit the liberal construction clause); *see also* JOSEPH, *supra* note 6, § 3 ("There is always a tension between a liberal construction of a statute and a tendency to overextend it to accomplish ends that the statute was never designed to achieve."); Fuerstman, *supra* note 8, at 169-70.

57. *See* Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 252 (1994) (rejecting limitations that are at odds with the statutory language).

58. *See* Koenig, *supra* note 9, at 833-38, 867-68.

B. The Court Rejects Limits to Civil RICO, Allowing for Expanded Application

1. Sedima *and* Northwestern Bell*: The Courts Eliminate Limitations on the Broad Racketeering Requirement*

Sedima, S.P.R.L. v. Imrex, Co.[59] significantly expanded the scope of civil RICO.[60] Prior to *Sedima*, several district courts attempted to curb the expansion of civil RICO and the significant growth of federal claims by reading special standing and injury requirements into the statute.[61] In *Sedima*, the Court of Appeals for the Second Circuit upheld the dismissal of an action by a Belgian corporation against a New York exporter under RICO for the predicate acts of mail and wire fraud.[62] The court held that RICO required both a racketeering injury and a prior conviction under the criminal statute.[63]

The Supreme Court granted certiorari, and Justice White, writing for the majority, rejected both the prior criminal conviction and the racketeering injury restrictions imposed by the circuit court.[64] The Court determined that standing under civil RICO required only a satisfaction

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59. 473 U.S. 479 (1985). *Sedima* was a controversial five-to-four decision that spanned traditional lines of Court separation. *Compare id.* at 490-500 (holding that the text of civil RICO and the liberal interpretation clause cannot be limited by legislative history or Court interpretation; a pattern of racketeering is merely the commission of two predicate acts), *with id.* at 500-23 (Marshall, J., dissenting) (determining that Congress intended for plaintiffs to first establish a pattern of racketeering, not simply two acts alone).

60. *See id.* at 500-01 (Marshall, J., dissenting); *see also* Koenig, *supra* note 9, at 821 (discussing how *Sedima* rejected court-imposed limitations on civil RICO and gave full credit to the liberal interpretation clause); David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J. L. & SOC. PROBS. 41, 71-72 (1996) (explaining that *Sedima* emphasized that liberal interpretation is more important in the civil context than in the criminal context).

61. John J. Lulejian, Comment, *Making Sense of the Kaleidoscope of Patterns: A Practitioner's Guide to Understanding the Third Circuit's Interpretation of Civil RICO's "Pattern of Racketeering Activity,"* 69 TEMP. L. REV. 413, 425 (1996). Federal courts have imposed three types of limitations on the standing requirement for RICO. Some have required the civil RICO plaintiff to establish a defendant's connection with organized crime. *See, e.g.*, Noonan v. Granville-Smith, Jr., 537 F. Supp. 23, 29 (S.D.N.Y. 1981); Waterman Steamship Corp. v. Avondale Shipyards, Inc., 527 F. Supp 256, 260 (E.D. La. 1981). Other courts have required a particular "racketeering injury" beyond injury to property from the predicate acts. *See* Bankers Trust Co. v. Rhoades, 741 F.2d 511, 516 (2d Cir. 1984), *vacated*, 473 U.S. 922 (1985). Finally, others have required the defendant to have a prior criminal conviction under RICO. *See* Sedima, S.P.R.L., Inc. v. Imrex Co., 741 F.2d 482, 492, 502-03 (2d Cir. 1984) (requiring "racketeering injury" and a prior conviction to establish a civil RICO cause of action), *rev'd*, 473 U.S. 479 (1985).

62. *Sedima*, 741 F.2d at 484, 494.

63. *Id.* at 494.

64. *Id.* at 488-96.

of the predicate elements.[65] The majority also endorsed a broad reading of RICO, supported by the liberal interpretation clause, and warned against future judicial efforts to limit the statute upon evidence of practicality or congressional intent.[66] The Court, however, expressed concern over the "extraordinary" application of RICO.[67] The Court suggested that a plausible judicial restriction would constitute higher scrutiny of the pattern of racketeering activity element, and suggested a "continuity plus relationship test" requiring more than simply two acts.[68]

Justice Marshall's dissent gave a narrower reading of the statute.[69] Like Justice White, he was concerned with the growing application of RICO, although his main criticism was that its current use marked the federalization of broad areas of state common law.[70] Justice Marshall rejected Justice White's broad interpretation of the predicate acts of § 1962.[71] Instead, he asserted that the civil provision was not intended to prohibit predicate racketeering acts alone, but also patterns of

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65. *Id.* at 496.

66. *Id.* at 497-500. The Court stated that, "It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypical, intimidating mobster. Yet this defect . . . is inherent in the statute as written, and its correction must lie with Congress." *Id.* at 499. Justice White was concerned over judicial activism overstepping the threshold of judicial review to change the statute as written by Congress. *See id.*

67. *Id.* at 500.

68. *Id.* at 496 & n.14.

69. *Id.* at 501 (Marshall, J., dissenting).

70. *Id.* (Marshall, J., dissenting). Justice Marshall suggested that the legislative history shows that Congress never intended for civil RICO to drastically change the landscape of federal jurisdiction and litigation. *Id.* at 507 (Marshall, J., dissenting). Justice Marshall suggested that a broad reading would upset the federal balance of power between the inherent police power of the states and the constitutionally enumerated powers of Congress, though this issue was not before the Court in *Sedima*. *Id.* at 504 (Marshall, J., dissenting). *See generally* United States v. Morrison, 529 U.S. 598 (2000) (outlining the Court's current interpretation of basic principles of federalism that limit Congress' power to proscribe in areas historically reserved to the states when no clear connection exists to an enumerated power in the Constitution); *accord* United States v. Lopez, 514 U.S. 549 (1995). When Congress legislates, it must do so pursuant to an enumerated grant; if the action is too overreaching, it may infringe on the reserved authority of states. *See* U.S. CONST. amend. X; *Morrison*, 529 U.S. at 608-10 (rejecting congressional legislation because of a tenuous connection to the grant to regulate interstate commerce clause); *accord Lopez*, 514 U.S. at 561-64. Justice Marshall suggested a narrower interpretation of civil RICO that ensured RICO would stay within these constitutional constraints. *See Sedima*, 473 U.S. at 507 (Marshall, J., dissenting) ("Congress simply does not act in this way when it intends to effect fundamental changes in the structure of federal law."). Justice Scalia reiterated Marshall's criticism in *Northwestern Bell*, suggesting that the extensive federal criminal and civil penalties require more certainty to withstand a constitutional challenge. H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring).

71. *Sedima*, 473 U.S. at 510-11 (Marshall, J., dissenting).

racketeering that have economic effects on other businesses.[72] Thus, to establish a violation of § 1962—as required in the civil provision—Justice Marshall asserted that plaintiffs must show a pattern of racketeering activity and demonstrate one of the four predicate acts.[73] The slim victory of the broader reading afforded by Justice White led to a continued expansive application of civil RICO.[74]

In *H.J. Inc. v. Northwestern Bell Tel. Co.*,[75] the Supreme Court attempted to resolve the question Justice White raised in *Sedima* regarding the required relationship between the predicate acts and a pattern of racketeering elements.[76] The question arose when the Eighth Circuit determined that a defendant telephone company's fraudulent ongoing price-fixing was a single "scheme" and therefore was insufficient to establish the required pattern under civil RICO.[77] Upon a grant of certiorari, the Supreme Court rejected barriers to civil RICO imposed by the court of appeals, much like it had done in *Sedima*.[78]

Writing for the majority, Justice Brennan relied on RICO's statutory language and liberal interpretation clause to conclude that Congress intended a flexible understanding of a pattern of racketeering.[79] Justice Brennan expanded the "continuity plus relationship" test by requiring that a plaintiff establish a connection between the defendant's two predicate racketeering acts, which likely would result in a continuation of the racketeering activity.[80] The Court noted that multiple illegal schemes may prove helpful for factual analysis in determining the required nexus, but that two acts alone could establish a RICO violation.[81]

Justice Scalia's concurring opinion agreed that the Eighth Circuit incorrectly inserted a new requirement, and that the courts should not abuse judicial power by reading in statutory requirements not supported

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72. *Id.* at 508-09.

73. *Id.* Like Justice White's interpretation, Justice Marshall's reading suggested that judicial review required the Court to read the statute as Congress intended. *Id.* at 508 (Marshall, J., dissenting). To avoid rewriting the statute from the bench, Justice Marshall suggested that the broad language must be read to require a pattern of racketeering and not simply the acts themselves in order to maintain RICO's constitutionality and prevent pervasive changes in the governmental structure. *Id.* at 508-09.

74. *See* Koenig, *supra* note 9, at 855-64.

75. 492 U.S. 229 (1989).

76. *Id.* at 232.

77. *Id.* at 236-37. The Court of Appeals for the Eighth Circuit determined that a pattern of racketeering requires multiple racketeering "schemes." *Id.* at 234-35.

78. *Id.* at 236.

79. *Id.* at 239.

80. *Id.* at 240-42.

81. *Id.* at 242-50.

by the text.[82] However, Justice Scalia suggested that the majority did little to clarify the meaning of the ambiguous statute.[83] He expressed disdain over the statutory scheme, reiterating Justice Marshall's concerns about federalization of state common law and the revolution of litigation.[84] Justice Scalia concluded that the vagueness of the statute, which contained broad criminal and civil applications, may make it susceptible to future constitutional challenges.[85] Ultimately, while the majority required some connection between predicate acts in order to constitute a pattern of racketeering, its failure to establish a clear test resulted in competing interpretations among the federal circuits regarding the requirement.[86]

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82. *Id.* at 256 (Scalia, J., concurring).

83. *Id.* (Scalia, J., concurring).

84. *Id.* at 255 (Scalia, J., concurring).

85. *Id.* at 255-56 (Scalia, J., concurring). Justice Scalia stated:

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

Id. (Scalia, J., concurring). Justice Scalia suggests that the vagueness of the private civil provision raises federalism issues with regard to the extent of a federal court's power to hear RICO claims and Congress' ability to implicate such diverse offenses. *See id.* at 251-52 (Scalia, J., concurring) (suggesting that the broad federal criminal statute may be unconstitutionally vague); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 501 (1985) (Marshall, J., dissenting) (condemning the majority's broad reading of RICO language as broadly extending its application to areas reserved to states). Because RICO includes such severe criminal penalties and civil rewards, and because its application is so broad and uncertain, the statutory scheme may violate constitutional federalism principles. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring); Bradley, *supra* note 4, at 265-66. Two Supreme Court developments may strengthen future challenges to RICO. First, the extension of civil RICO in *Scheidler I* to non-economic enterprises without a direct link to interstate commerce may lend support to this challenge. Stephen E. Oestreicher, Jr., Scheidler *Meets* Morrison *(At the Entrance to a Health Clinic)*, 35 CREIGHTON L. REV. 693, 707 (2002). Second, the Supreme Court's "New Federalism" signaled a trend toward narrower interpretation of the commerce clause against broad federal criminal legislation, and may lend itself to narrower scrutiny of the RICO scheme. *See id.* at 695-96. The result may be closer scrutiny of federal statutes, particularly when extended to areas indirectly related to interstate commerce. *See id.* at 696. With RICO no longer tied to economic motivation and a Court more willing to scrutinize congressional statutes, Congress may not be able to establish a connection between civil RICO's broad scope and its justifiable purpose. *See id.* at 724.

86. JOSEPH, *supra* note 6, § 11(D)(2) (stating that "[a] concrete definition for precisely what activity will constitute a 'pattern' for the purposes of the RICO statute has eluded the federal courts") (citing U.S. Textiles, Inc. v. Anheuser-Busch Cos., 911 F.2d 1261 (7th Cir. 1990)).

2. The Courts Give the Enterprise Requirement a Broad Reading: RICO Expands to Non-economically Motivated Enterprises

The Court also has allowed for great expansion of civil RICO claims in the enterprise element.[87] The first three prohibited acts under RICO § 1962 include the term "enterprise."[88] The first two subsections proscribe investing in or acquiring an interest in an enterprise, while the third and fourth subsections prohibit those engaged in an enterprise from conducting it in a manner that constitutes a pattern of racketeering or conspiracy to violate RICO's provisions.[89] Congress' use of the term "includes" to preface the definition of enterprise affords federal courts broad discretion in defining the term.[90] Strengthened by the liberally constructed provision, courts have rejected limitations to suits against alleged enterprises, regardless of the nature of their association with criminals, economic motivations, or national interests.[91]

In *United States v. Turkette*,[92] the Supreme Court granted certiorari to review the dismissal of a RICO action by the First Circuit.[93] The First Circuit had dismissed a RICO action and held that in order to establish a claim under § 1962(c) and (d), the defendant must engage in an illegal or illegitimate enterprise.[94] Justice White wrote for the majority and reversed the decision, holding that the term "enterprise" applies to both legitimate and illegitimate organizations.[95] The opinion reiterated the distinction between an enterprise and a pattern of racketeering, stating that an enterprise was "an entity separate and distinct from the pattern of activity in which it engages."[96] The majority established a test for

87. *See* Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 252 (1994) (rejecting court limitations preventing non-economically motivated enterprises from qualifying under RICO); United States v. Turkette, 452 U.S. 576, 593 (1981) (rejecting court limitations preventing legitimate enterprises to qualify under civil RICO).

88. 18 U.S.C. § 1962(a)-(c) (2000).

89. *Id.* § 1962(c)-(d).

90. *Scheidler I*, 510 U.S. at 256-61.

91. *See id.* at 252-53; *Turkette*, 452 U.S. at 579-80.

92. 452 U.S. 576 (1981).

93. *Id.* at 578.

94. *Id.* at 578-80. The Court Appeals for the First Circuit held that because the action was against a legitimate enterprise, the government failed to meet the elements of a RICO claim against the defendant. *Id.* at 579-80. The RICO claim was predicated upon § 1962(d), and the district court determined that the defendants conspired to commit multiple predicate acts under § 1961 through an enterprise. *Id.* at 578-79. The defendant introduced evidence that they were engaged in a legitimate business, were not infiltrated by an illegitimate enterprise, and therefore, could not be convicted under RICO. *Id.* at 579-80. The First Circuit agreed with the defendant's argument and reversed, dismissing the claim. *Id.*

95. *Id.* at 579-80.

96. *Id.* at 583.

courts to measure an enterprise, requiring an ongoing structure and evidence of functioning as a unit.[97] While straightforward on its face, many federal courts have struggled to determine the extent of structure that an "association in fact" must have to constitute an enterprise.[98] By allowing legitimate organizations to satisfy RICO's enterprise requirement, *Turkette* opened the door to increased civil litigation.[99]

Years later, the Supreme Court granted certiorari in *Scheidler I* again to interpret the enterprise requirement.[100] To resolve a split among federal courts of appeals, the Court addressed whether an enterprise required economic motivation.[101] In *Scheidler I*, NOW and several other women's health centers sued a coalition of anti-abortion groups under civil RICO.[102] These groups included the Pro-Life Action Network (PLAN) and various associated individuals.[103] The plaintiffs alleged that the defendants participated in a racketeering enterprise aimed at shutting down abortion clinics through a pattern of racketeering activity under § 1962(c) and were involved in a conspiracy to commit these acts under § 1962(d).[104] The complaint averred that the defendants operated an enterprise that conspired to commit, and did commit, multiple acts of the predicate offense of criminal extortion.[105]

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97. *Id.*

98. JOSEPH, *supra* note 6, § 11(B)(1). An "associat[ion] in fact" is included on the list of terms that encompass an enterprise in the RICO definitions section. 18 U.S.C. § 1961(4) (2000).

99. *See* Rehnquist, *supra* note 8, at 9 (discussing the increase of civil RICO actions flooding the federal courts with no connection to organized crime).

100. Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 252 (1994).

101. *Id.* at 255. Before *Scheidler I*, the Second and Eighth Circuits required some financial or economic motivation to establish an enterprise under RICO. *See, e.g.*, United States v. Flynn, 852 F.2d 1045, 1052 (8th Cir. 1988); United States v. Bagaric, 706 F.2d 42, 53 (2d Cir. 1983); United States v. Ivic, 700 F.2d 51, 65 (2d Cir. 1983). Conversely, the Court of Appeals for the Third Circuit did not require economic motivation to satisfy the enterprise requirement. Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989).

102. *Scheidler I*, 510 U.S. at 252.

103. *Id.* The complaint cited the Pro-Life Action Network (PLAN) organization as well as several of its members and organizers, including Joseph Scheidler, Andrew Scholberg, and Timothy Murphy. *Id.* at 252 n.1.

104. *Id.* at 252-54.

105. *Id.* The amended complaint alleged that defendants "conspired to use threatened or actual force, violence, or fear to induce the clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Id.* at 253. To satisfy the predicate act requirement, the plaintiffs alleged extortion under the federal Hobbs Act, Illinois state extortion law, and the Sherman Antitrust Act. *Id.* at 252-53. The federal district court dismissed the Sherman Antitrust claim because of the political, non-economic nature of its contentions. *Id.* at 254.

The district court dismissed the complaint, holding that the statute required some profit-generating purpose to constitute a RICO claim.[106] The Court of Appeals for the Seventh Circuit upheld the dismissal by adopting the Second Circuit's analysis of an economic enterprise analysis in *United States v. Ivic*.[107] In doing so, the court rejected the analysis of the Third Circuit's holding in *Northeast Women's Center v. McMonagle*,[108] which did not require an economic motive.[109] The Supreme Court granted certiorari to resolve the circuit split at the early pleading stage of the case.[110]

The Court, in a unanimous decision, overruled the Seventh Circuit and held that the broad language of the statute did not require an economic motive to establish an enterprise under the predicate acts of RICO.[111] In the Court's opinion, Justice Rehnquist explained that a plain reading of the statute revealed it was not limited to an economic motive.[112] The Court reasoned that an enterprise could affect interstate commerce without necessarily seeking profit.[113] The Court also suggested that

106. Nat'l. Org. for Women, Inc. v. Scheidler, 765 F. Supp. 937, 941 (N.D. Ill. 1991), *aff'd*, 968 F.2d 612 (1992), *rev'd*, 510 U.S. 249 (1994). The court determined that PLAN was a not-for-profit entity operating with voluntary member contributions and failed to meet the economic or profit-generating requirement of an enterprise under the statute. *Id.*

107. 700 F.2d 51 (2d Cir. 1983).

108. 868 F.2d 1342 (3d Cir. 1989).

109. Nat'l Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 627-30 (7th Cir. 1992). The Court of Appeals for the Seventh Circuit determined the economic motive issue as a case of first impression for the Circuit. *Id.* at 626. The court analyzed the circuit split among the Eighth Circuit in *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988), the Second Circuit in *Ivic*, 700 F.2d at 59-65, and the Third Circuit's interpretation in *Northeast Women's Center*, 868 F.2d at 1349-50. *Id.* Ultimately, the court adopted the reasoning of *Ivic* because of its reliance on the legislative history and careful analysis of RICO's use of enterprise in the first two offenses (§ 1962(a), (b)) and in the third offense (§ 1962(c)). *Id.* at 627-29. The *Ivic* court had followed the Eighth Circuit's interpretation of RICO to require an economic motive for an enterprise under all of RICO's offenses in § 1962(c). *Ivic*, 700 F.2d at 65. The Second Circuit had reasoned that RICO's legislative history targeted "corruption [in] commerce and trade," and, therefore, the term enterprise in RICO offenses limited to commercial organizations. *Id.* at 63. Consequently, because RICO § 1962(c) likely would not adopt a different meaning of enterprise and was qualified by "affecting interstate or foreign commerce," it also should be bound by an economic requirement. *Id.* at 60, 65.

110. *Scheidler I*, 510 U.S. at 255.

111. *Id.* at 252, 260. Professor Craig Bradley suggests that because removing the economic barrier to RICO allows application to protest groups, it "may . . . have been the most controversial unanimous decision by the Supreme Court since *Brown v. Board of Education*." *First Amendment*, *supra* note 15, at 130.

112. *Scheidler I*, 510 U.S. at 256-57.

113. *Id.* at 257-58.

courts should place less emphasis on RICO's legislative history and more on the text.[114]

To voice his concern and quell fears of potential First Amendment violations, Justice Souter authored a concurring opinion.[115] Justice Souter supported the outcome, but assured RICO defendants that the opinion did not prevent the raising of First Amendment defenses.[116] He explained that RICO was limited by the Court's First Amendment interpretation in *NAACP v. Claiborne Hardware*.[117] He reassured those concerned about application of RICO to protesters that under the Hobbs Act or RICO's "somewhat elastic . . . predicate acts," defendants still are afforded the full protection of the First Amendment.[118] Even with this

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114. *Id.* at 260-61 (suggesting the legislative history is often a "thin reed" for interpreting the language of a federal statute).

115. *Id.* at 263 (Souter, J., concurring); *First Amendment*, *supra* note 15, at 135.

116. *Scheidler I*, 510 U.S. at 264 (Souter, J., concurring).

117. *Id.* (noting that "a state common-law prohibition on malicious interference with business could not . . . be constitutionally applied to a civil rights boycott of white merchants"); *see also* NAACP v. Claiborne Hardware, 458 U.S. 886 (1982). In *Claiborne Hardware*, the Supreme Court overruled an injunction and damages against civil rights organizations that boycotted white businesses in Mississippi. *Id.* at 889-92, 915, 934. White merchants brought an action against the organization for malicious interference with business, illegal boycotts, and antitrust violations, which were sustained by the Mississippi Supreme Court. *Id.* at 889-92. Writing for the Court, Justice Stevens reversed the Mississippi Supreme Court decision, holding that the impassioned speeches by organizers of the boycott activity were not violent, and, therefore, constitutionally protected by the First Amendment. *Id.* at 913-15. Even if the merchants could prove interference with business, it was questionable whether they could collect or enforce an injunction against activity protected by the First Amendment. *See id.* at 928-29.

118. *Scheidler I*, 510 U.S. at 264 (Souter, J., concurring). Justice Souter's concurrence suggested that application of RICO to non-economically motivated groups would not provide a sufficient First Amendment check of advocacy groups. *Id.* at 263-64. After *Scheidler I*, many commentators feared that civil RICO would be used to chill political activism and would cause a decline in issue advocacy. *See, e.g.*, Peter Burke, Note, *Application of RICO to Political Protest Activity: An Analogy to the Antitrust Laws*, 12 J.L. & POL. 573, 602-03 (1996); Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 739-59 (1999); Alexander M. Parker, *Stretching RICO to the Limit and Beyond*, 45 DUKE L.J. 819, 819 (1996); Jaime I. Roth, Comment, *Reptiles in the Weeds: Civil RICO vs. the First Amendment in the Animal Rights Debate*, 56 U. MIAMI L. REV. 467, 468 (2002). Even after Justice Souter's assurance in *Scheidler I*, the Supreme Court chose not to address the nationwide injunction or implication of political activists in *Scheidler II*. Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 397 (2003). The injunction, which the Seventh Circuit upheld, forbade the anti-abortion coalition's political activities on private property. *See* Nat'l Org. for Women, Inc. v. Scheidler (NOW), 267 F.3d 687, 701-06 (7th Cir. 2001), *overruled by* 537 U.S. 393 (2003). Although these activities are not absolutely protected speech, the threat of potential treble damages and injunctions against activist groups who employ civil disobedience may chill protected speech and expression that falls within the scope of the First Amendment. John P. Barry, Note, *When Protesters Become "Racketeers," RICO Runs Afoul of the First Amendment*,

assurance, the Court's broad interpretation of RICO's enterprise requirement, taken to its logical extreme, may encompass several types of protest activities.[119]

C. *The Private Injunctive Relief Interpretation Conundrum: 18 U.S.C. § 1964(c) and the Construction of an Ambiguous Provision*

In accord with the Supreme Court's extension of RICO beyond traditional patterns of racketeering and into the realm of non-economic enterprises, private plaintiffs also have sought to extend RICO's remedy provisions.[120] Rather than challenging the court-imposed limits on the Act, such plaintiffs have sought to add a remedy that Congress expressly omitted, namely injunctive relief.[121] Generally, federal courts permit injunctive relief under pendant state claims brought with RICO claims that expressly provide for specific injunctive remedies.[122] However, circuits differ over the availability of injunctive relief under the federal scheme.[123] In *Religious Technology Center v. Wollersheim*, the Court of Appeals for the Ninth Circuit gave the first federal appellate ruling on the issue of injunctive relief and rejected its availability to private plaintiffs.[124]

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64 ST. JOHN'S L. REV. 899, 909-16 (1990). RICO has been criticized in several ways for chilling free speech. First, the threat of prosecution may prevent groups from organizing peaceful protests for threat that petty offenses will be RICO violations. *See id.* at 915-16 (suggesting this may be prior restraint on speech). Second, because RICO is prosecuted by private parties who stand to benefit from the civil suit and lack prosecutorial discretion, plaintiffs may single out certain viewpoints and direct the statute's provision at particular expressive content. *See id.* at 909-11.

119. *See First Amendment*, *supra* note 15, at 130; *see* discussion *supra* note 118.

120. *See, e.g.*, *NOW*, 267 F.3d at 693; Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1077 (9th Cir. 1986).

121. *See Wollersheim*, 796 F.2d at 1084-85 (noting that the Senate limited injunctive remedies to §§ 1964(a), (b), and (d)). The Senate developed the statute and the House adopted the private remedy. *Id.* at 1084. Representative Steiger, proposed an amendment to add injunctive relief; however, the provision was not included in the final bill. *Id.*

122. *See, e.g.*, Duct-O-Wire Co. v. U.S. Crane, Inc. 31 F.3d 506 (7th Cir. 1994) (upholding a preliminary injunction under the state tortious interference claim); Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1356 (3d Cir. 1989) (awarding injunctive relief under pendant state law claim); *see also* JOSEPH, *supra* note 6, § 20.

123. *Compare Wollersheim*, 796 F.2d at 1076 (barring injunctive relief to private plaintiffs), *and* Dixie Carriers, Inc. v. Channel Fueling Serv. (*In re* Fredeman Litig.), 843 F.2d 821 (5th Cir. 1988) (concluding the court had no power to issue injunctive relief), *with NOW*, 267 F.3d at 693 (upholding the district court's injunctive order against national anti-abortion action network).

124. 796 F.2d 1076, 1076 (barring injunctive relief to private plaintiffs under civil RICO); *Dixie Carriers*, 843 F.2d at 828, 830 (concluding that injunctive relief was unavailable to private plaintiffs under RICO).

In *Wollersheim*, the Church of Scientology brought an action against a church splinter group under RICO, seeking damages and an injunction.[125] The church alleged that the defendants stole and illegally disseminated valuable spiritual materials to organize a rival church.[126] The district court granted a preliminary injunction, ordering the splinter church to cease dissemination of the information.[127] The plaintiffs claimed Congress granted equitable power to federal courts under RICO § 1964(a) in federal civil prosecutions that could also extend to private actions.[128] The Ninth Circuit rejected the argument and reversed, holding that the exclusive remedy for private civil actions was treble damages.[129]

The court reasoned that federal courts do not have inherent injunctive powers without congressional authority.[130] It determined that the inclusion of the specific remedy of treble damages, while silent on the issue of injunctive relief, "logically carrie[d] the negative implication that no other remedy was intended to be conferred on private plaintiffs."[131] Analyzing civil RICO's legislative history, the court focused on the fact that a proposed amendment to include injunctive damages was withdrawn to "carefully explore the potential consequences that [the] . . . new remedy might have."[132] The court also noted that the Supreme Court had rejected private injunctive relief under the Clayton Act's private enforcement provision.[133] Because Congress modeled the RICO treble damages clause on the Clayton Act's private damages clause, courts should not grant private plaintiffs injunctive relief.[134] Furthermore, the court reasoned that the Supreme Court's doctrine "sharply limits" implied remedies and causes of action not expressly provided for by statute.[135]

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125. *Wollersheim*, 796 F.2d at 1077-79.

126. *Id.* at 1078.

127. *Id.* at 1079.

128. *Id.* at 1083.

129. *Id.* at 1088-89.

130. *Id.* at 1088; *see also* 31A AM. JUR. 2D *Extortion* § 180 (2002).

131. *Wollersheim*, 796 F.2d at 1083.

132. *Id.* at 1086.

133. *Id.* at 1087 (noting that injunctive relief is available to private plaintiffs under § 16 of the Clayton Act, but that RICO had no similar separate provision); *see also* Paine Lumber Co. v. Neal, 244 U.S. 459, 471 (1917) (barring injunctive relief under the parallel § 4 of the Clayton Act); *accord* Minnesota v. N. Sec. Co., 194 U.S. 48, 70-71 (1904).

134. *Wollersheim*, 796 F.2d at 1087.

135. *Id.* at 1087-88; *see also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) ("[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); Touche Ross & Co. v. Redington, 442 U.S. 560, 568-78 (1979) (holding that a particular violation of the Securities Exchange Act regulations did not create a private cause of action). The *Wollersheim* court also reasoned that where Congress gives

Although other circuits have discussed the issue in dicta or generally paid deference to the opinion, no circuit definitively embraced injunctive relief as a RICO remedy until *National Organization for Women, Inc. v. Scheidler*.[136] The Seventh Circuit was the first to extend injunctive relief to private plaintiffs under RICO claims.[137] On remand from *Scheidler I*, a jury held that the anti-abortion coalition operated an enterprise that committed multiple acts of extortion under the Hobbs Act and Illinois state law, sufficient to create a pattern of racketeering under RICO.[138] Accompanying the jury-imposed damage award, the district court issued a nationwide injunction barring the coalition, and those acting in concert, from all named activities.[139]

The Seventh Circuit upheld the district court's ruling, finding that injunctive relief was available to private plaintiffs under RICO.[140] The court reasoned that the grant of injunctive power for government actions in § 1964(a) provided courts with the power to issue injunctions for private plaintiffs.[141] Judge Wood explained that the liberally construed statute empowered federal courts to use remedial powers conferred in § 1964(a) for government actions to remedy private plaintiffs.[142] The court also suggested that *Wollersheim* relied too heavily on legislative history, which the Supreme Court had interpreted as "a particularly thin reed"

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explicit enforcement authority to both government and private litigants, "'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens.'" 796 F.2d at 1088 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc., 453 U.S. 1, 14 (1981)). Without a strong indication of congressional intent, the Court was not inclined to recognize new remedies not expressly provided. *Id.* The Fifth Circuit in *Dixie Carriers* did not create new remedies. 843 F.2d 821, 821 (5th Cir. 1988). The Eighth Circuit also has given deference to the Ninth Circuit, but allowed for injunctive relief under pendant state claims. Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1223 n.5 (8th Cir. 1987). However, "the Seventh Circuit recognized the Second, Fourth, Fifth, and Sixth Circuits have all expressed serious doubts about the availability of injunctions in this setting." Petition for Writ of Certiorari at 8, Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393 (2003) (No. 01-1118).

136. 267 F.3d 687, 693 (7th Cir. 2001) *overruled by* 537 U.S. 393 (2003) (upholding the district court's injunctive order against national anti-abortion action network). On remand from the preliminary issue of enterprise decided by the Supreme Court (in *Scheidler I*), the case advanced to trial and a jury found the defendants guilty of extortion under the Hobbs Act and state law extortion and awarded treble damages. *Id.* The district court issued a nationwide injunction against the protest groups, which the Seventh Circuit sustained. *Id.* at 693.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 697-98.

142. *Id.* at 698.

for statutory interpretation.[143] Finally, Judge Wood undercut *Wollersheim*'s reliance on RICO and the Clayton Act.[144] The Seventh Circuit *Scheidler* ruling resulted in a clear circuit split over whether injunctive relief was available to private plaintiffs under RICO.[145]

D. The Ultimate Scheidler *Holding*

The Supreme Court granted certiorari in *Scheidler II* to resolve the circuit split over injunctive relief and to resolve RICO's implications for protesters.[146] The Court considered only two of the questions presented by the petitioners.[147] The first was whether the activist group's

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143. *Id.* at 699. Judge Wood quoted Chief Justice Rehnquist's opinion in *Scheidler I*, which warned against judicial activism in interpreting RICO. *Id.* However, Chief Justice Rehnquist was referring to courts inserting limitations into RICO that were not expressly stated in the statute. *See* Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 262 n.6 (1994). Judge Wood conversely was adding a remedy not expressly stated in the statute. *See NOW*, 267 F.3d at 699.

144. *NOW*, 267 F.3d at 700. First, the court undercut the reliance on the Clayton Act by suggesting that the parallels between the treble damages clause were where similarities ended. *Id.* Second, the court explained that the Supreme Court now allows for private injunctive relief under the Clayton scheme. *Id.*

145. *See supra* note 123. The Seventh Circuit *Scheidler* opinion also touched on two highly contested issues: whether the First Amendment protected the actions and prevented broad injunction of the anti-abortion coalition and whether the activities of the coalition constituted "extortion" under the Hobbs Act. *NOW*, 267 F.3d at 700-03, 709. The court noted that although political speech is fully protected by the First Amendment, the government could regulate violent criminal conduct, even if the conduct involved expressive elements. *Id.* at 702. Judge Wood cited a series of First Amendment cases that refused to protect violent conduct from governmental regulation. *Id.* at 701-02. Judge Wood opined that the protection of the plaintiffs' rights to provide medical care free of violence and harassment were "important governmental interest[s]." *Id.* at 702. In light of the evidence of threats, trespass, and destruction of property, the court determined that the coalition's actions were outside the gambit of free speech protection. *Id.* The court also rejected the defendant's argument that the acts were isolated incidents by certain individuals, finding that the plaintiffs presented enough evidence to show that the entire organization intended the illegal goals. *Id.* at 702-03. The defendants cited *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which required plaintiffs to establish that the organization intended the actions. *Id.* at 703. Judge Wood admitted that this test was implicated, but rejected the argument, finding that the plaintiffs had met their burden to show that the entire organization was involved in the actions, citing that the leaders were those most involved in the violent activities. *Id.* Subsequently, Judge Wood rejected the argument that the injunction was vague and overbroad, concluding that in some instances the enjoined speech may be protected, but that the injunction was narrowly tailored to the criminal violations of trespass, violence, or threats. *Id.* at 706. Finally, the court dismissed argument that the Hobbs Act applied, claiming judicial precedent allowed for its application as long as there is a loss to, or interference with, the rights of the victim. *Id.* at 709.

146. Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 397 (2003).

147. *Id.* The Supreme Court rejected the petitioners' First Amendment appeal. *Id. Compare id., with* Petition for Writ of Certiorari at 1, *Scheidler II* (No. 01-1118)

interference with the abortion clinics qualified as a predicate act to satisfy the racketeering element of RICO under the Hobbs Act's definition of extortion.[148] The second question was whether the Seventh Circuit had the authority to grant a nationwide injunction under the civil RICO provision.[149]

The Supreme Court's ruling in *Scheidler II* sought to limit civil RICO by outlining a more rigid definition of extortion under the Hobbs Act.[150] The Court, per Chief Justice Rehnquist, determined that the meaning of "extortion" under the Hobbs Act was based on the crime's common law tradition, the New York Penal Code, and Field Code history.[151] The Court defined "extortion" as obtaining the property of another, which required that the defendant both deprive and acquire some property of value.[152] The Court proposed that the protesters deprived the clinic of property, but did not actually acquire its property.[153] Therefore, the petitioners' conduct did not meet the requisite definition of extortion under the Hobbs Act.[154] The Court thus held that the respondents failed to meet the predicate act requirements to establish a RICO claim.[155] As a result, it reversed the Seventh Circuit and dismissed NOW's RICO

(petitioning the Court to hear the issue of whether the nationwide injunction against PLAN complied with the First Amendment).

148. *Scheidler II*, 537 U.S. at 397.

149. *Id.* Notably, the United States filed an amicus curiae brief supporting the respondent's contention that the petitioners violated the Hobbs Act, but also supporting the petitioners' contention that RICO did not allow a private plaintiff to seek an injunction. Brief for the United States of America as Amicus Curiae at 3-4, *Scheidler II* (Nos. 01-1118, 01-1119). In its brief, the United States argued that allowing injunctive relief was both contrary to the language of the statute and a dangerous policy. *Id.* at 6-7, 14. It maintained that allowing competing businesses the remedy under RICO was contrary to the commerce-promoting nature of the Act because it had the potential to cause "corporate death." *Id.* at 14.

150. *Scheidler II*, 537 U.S. at 402-10. The Court ruled eight-to-one with Justice Stevens writing a lone dissent. *Id.*

151. *Id.* at 402-04.

152. *Id.* at 404.

153. *Id.* at 405. The Court defined the behavior of the coalition as coercion, which is not included in the Hobbs Act provision. *Id.* at 405-06. It noted that because coercion was not specifically included as a predicate act for a RICO violation, the petitioners did not meet the act requirement to constitute a RICO violation. *Id.* at 409. Craig M. Bradley suggests an option that NOW could have pled that is closer to coercion: under the Hobbs Act another RICO predicate offense is "interference with commerce" or criminal coercion defined as "commit[ting] or threaten[ing] physical violence to person or property." *Political Protest*, *supra* note 15, at 74.

154. *Scheidler II*, 537 U.S. at 409. Furthermore, the Court found that the conduct did not meet the requirements of extortion under Illinois state law. *Id.* Nor did the conduct meet the requirements of extortion under the Travel Act. *Id.* at 410.

155. *Id.* at 411.

claim.[156] Because the Court determined that no underlying RICO violation occurred, it declined to address the issue of injunctive relief.[157] Today, the issue remains unsettled by the Supreme Court.[158]

II. THE CURRENT STATE OF PRIVATE CIVIL RICO: DOES *SCHEIDLER II* RESOLVE PROBLEMATIC ISSUES OF CIVIL RICO?

A. Scheidler *Fails to Clarify the Expansive Definition of Racketeering*

Unlike the line of cases leading up to *Scheidler*, all of which gave strong deference to the liberal construction clause,[159] the *Scheidler II* opinion gave rise to the Court's attempt to limit civil RICO.[160] In light of the great division over the Act's complex and nuanced nature, the Court's eight-to-one decision to dismiss the case was surprisingly non-controversial.[161] Although the Supreme Court clearly was concerned with the private application to an organization involved in political protest,[162] the Court did not discuss the construction or interpretation of

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156. *Id.* Justice Ginsburg's concurrence voiced concern over the application of RICO to protesters and its general expansion, but reassured the pro-choice movement that Congress had enacted the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994), to deal with the issue. *Id.* at 411-12 (Ginsburg, J., concurring). Justice Stevens filed a lone dissent, arguing that extortion requires the acquisition of property but that the acquired property need not be tangible. *Id.* at 412-17 (Stevens, J., dissenting). Justice Steven's primary concern was the limitation of the Act's effectiveness against organized crime where threats were made not to acquire property, but to drive another out of business. *Id.* at 412 (Stevens, J., dissenting). He feared the holding would reverse *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969), in which members of an organized crime syndicate used verbal threats to corner the trash-hauling business, and to significantly weaken criminal proceedings under RICO against the mob under the Hobbs Act. *See Scheidler II*, 537 U.S. at 413; *Political Protest*, *supra* note 15, at 74.

157. *Scheidler II*, 537 U.S. at 411.

158. *See supra* note 123 and accompanying text.

159. *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 260-61 (1994); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489-90 (1985); United States v. Turkette, 452 U.S. 576, 580-81 (1981).

160. *See Scheidler II*, 537 U.S. at 412 (Ginsburg, J., concurring).

161. *Compare id.* at 397-411, *and id.* at 411-12 (Ginsburg, J., concurring), *with id.* at 412-17 (Stevens, J., dissenting) (criticizing the decision for weakening RICO's strength to combat organized crime with a narrower reading of extortion). The line of Supreme Court Justices struggling with the broad language of the RICO statute and the liberal interpretation clause exemplifies the conflicting approaches in defining the elements of RICO and racketeering. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 251-52 (1989) (Scalia, J., concurring) (suggesting that the RICO statute is somewhat ambiguous in its definition of racketeering); *accord Sedima*, 473 U.S. at 500-07 (Marshall, J., dissenting).

162. *See* Oral Arguments at 25, *Scheidler II* (Nos. 01-1118, 01-1119) (raising the question of whether RICO would have applied to civil rights protesters). Under both NOW and the government's interpretation of civil RICO, the statute would have implicated civil rights sit-ins in the 1960s. *Cf. Scheidler I*, 510 U.S. at 263-64 (Souter, J., concurring) (setting the limits of RICO at the First Amendment).

the elements of the RICO statute. Instead, the decision was limited in its analysis to the predicate crime of extortion.[163] This begs the question of whether *Scheidler II* actually clarified the meaning of racketeering or if it merely dispensed with the case before it.[164]

Although the holding of *Scheidler II* limits RICO's application under the predicate act of extortion defined by Illinois state law and the Hobbs Act, it does nothing to reduce those suits under other predicate act provisions.[165] Accordingly, experts suggest that the decision will not significantly impede future racketeering actions against other protest groups.[166] Plaintiffs still may use three potential predicate acts to establish a RICO violation against protesters. First, plaintiffs may sue under particular state statutes that define extortion without the requirement of property acquisition.[167] Second, plaintiffs may utilize a separate provision under the Hobbs Act for criminal interference with commerce, which also does not require obtaining property, but simply an interference with it.[168] Finally, the USA Patriot Act of 2001 also may

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163. *Scheidler II*, 537 U.S. at 402-10.

164. *See infra* notes 165-177 and accompanying text.

165. *See First Amendment*, *supra* note 15, at 135; *Political Protest*, *supra* note 15, at 73-74 (arguing that plaintiffs can use criminal coercion under the Hobbs Act or state definitions of extortion, in the six states that do not require acquisition of property, to bring civil RICO suits against protest groups); Levendosky, *supra* note 15 (suggesting that the Patriot Act can serve as a predicate act allowing for civil RICO actions against anti-government protesters).

166. *See First Amendment*, *supra* note 15, at 135; *Political Protest*, *supra* note 15, at 74; Levendosky, *supra* note 15.

167. *Political Protest*, *supra* note 15, at 73-74. Six states define extortion as using threats to deprive another of property, without the requirement of its acquisition. *Id.* at 73. In *Scheidler II*, Justice Rehnquist used this definition to distinguish extortion from coercion. 537 U.S. at 405-09. The Court characterized the anti-abortion protesters' activity as merely depriving the clinics of the use of their property, and because the protesters did not acquire any benefit, they simply were engaging in coercive behavior. *Id.* at 405. Because one of RICO's predicate acts is extortion, as defined by state statutes, if future plaintiffs bring suit in one of the six states that define extortion in this manner, Justice Rehnquist's *Scheidler II* rationale will not apply and a plaintiff can establish a prima facie racketeering activity. *See Political Protest*, *supra* note 15, at 74. Craig Bradley, a criminal and constitutional law expert, argued that NOW poorly litigated its RICO claim by failing to utilize the predicate act of criminal coercion and by bringing the suit in a state where the statute defines extortion less stringently. *Id.* Justice Ginsburg's point that relief to the clinics may be available under the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, also reveals the weakness of NOW's case. *See Scheidler II*, 537 U.S. at 411 (Ginsburg, J., concurring). Bradley suggested that NOW's error allowed the Supreme Court to make a straightforward, non-controversial decision on extortion, and noted that subsequent plaintiffs "would do well to avoid NOW's mistakes." *Political Protest*, *supra* note 15, at 73-74.

168. *First Amendment*, *supra* note 15, at 142-43; *Political Protest*, *supra* note 15, at 74. The Hobbs Act proscribes purposeful interference with commerce through commission or threat of violence. Hobbs Act of 1948, 18 U.S.C. § 1951 (2000). Section 1951(a) states:

implicate protesters through its broad definition of terrorism, which includes a prohibition of threatening or violent activities meant to coerce the government to act.[169]

Those satisfied by the Supreme Court's outcome may argue that its tone and willingness to limit the predicate act of extortion could prevent future cases or encourage the federal courts to interpret RICO's predicate acts more restrictively.[170] Another argument suggests that the Court's willingness to limit this predicate act may communicate to Congress the need to amend RICO.[171] However, the fact that *Scheidler II* did not comment on the scope of RICO and only analyzed the predicate act of extortion weakens these arguments.[172] Justice Rehnquist framed the opinion as an extortion case and discussed RICO simply to provide background and to suggest that the state crime of coercion was omitted from the statute.[173] The message from the Supreme Court suggests that the elements of extortion were not properly met under these circumstances, and that the Court will analyze each predicate act on a case-by-case basis when the outcome appears unsatisfactory to the Court.[174] Because *Scheidler II* only reviewed the narrow issue of extortion and failed to address the structure of RICO or other predicate acts that may implicate protesters, the decision ultimately failed to prevent future civil RICO litigation involving political protest groups.[175] Furthermore, in light of federalism and constitutional concerns over RICO's reach, the decision will not correct inherent flaws in the statute.[176] By failing to elucidate these issues or to direct congressional

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> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce . . . 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 shall be fined under this title or imprisoned not more than twenty years, or both.

Id. Professor Craig Bradley argues that criminal coercion is a separate crime from criminal extortion under the Hobbs Act, which was originally intended to protect the war effort from industry or railroad saboteurs during World War II. *First Amendment*, *supra* note 15, at 142-43.

169. *See* Levendosky, *supra* note 15.

170. *See Scheidler II*, 537 U.S. at 412-13, 417 (Stevens, J., dissenting) (suggesting that the Court's opinion limiting the definition of property may limit RICO enforcement in useful areas).

171. Oestreicher, *supra* note 85, at 717-19.

172. *See Scheidler II*, 537 U.S. at 397-411.

173. *Id.* at 397, 405-07. *Contra Political Protest*, *supra* note 15, at 73-74 (arguing that interference with commerce actually was included in the statute as a form of coercion).

174. *See Scheidler II*, 537 U.S. at 402-05 (providing a detailed analysis of the history and correct meaning of extortion).

175. *See supra* notes 166-69 and accompanying text.

176. *See* Oestreicher, *supra* note 85, at 723-26.

attention to the inherent problems with the statute, the Court left the door open for plaintiffs who will continue to test RICO's boundaries.[177]

B. Scheidler *Fails to Address Private Injunctive Relief and the Resulting Constitutional and Application Issues*

Scheidler not only failed to clarify the racketeering requirement, but it also failed to resolve the availability of injunctive relief.[178] Upon determining that no underlying RICO claim existed, the Court dismissed the action, stating that it "need not address" the issue of injunctive relief.[179] Since the Ninth Circuit decided *Wollersheim* in 1986, federal courts have generally followed its prohibition of injunctive relief to private civil RICO claimants, with the exception of pendant state claims, which do provide for injunctive relief.[180] Due to its contradictory reading of the statute and rejection of *Wollersheim*, the Seventh Circuit *Scheidler* opinion created a need for Supreme Court review.[181] With such uncertainty regarding the elements of the RICO private action,[182] determining the scope of available remedies to private litigants virtually ensures forum shopping, uncertain pleading, and issues of constitutional vagueness.[183]

On a practical level, injunctive relief serves as an important weapon for plaintiffs in many types of RICO actions.[184] RICO plaintiffs often use injunctions to induce large settlements, well beyond alleged damages, and to eliminate competitors.[185] *Scheidler* illustrates that injunctions also prove useful in halting alleged racketeering activities of non-economically motivated enterprises.[186] However, the Court's

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177. *See Political Protest*, *supra* note 15, at 74 (positing that protesters can still be charged as racketeers under other RICO predicate acts).

178. *See Scheidler II*, 537 U.S. at 411.

179. *Id.*

180. *See, e.g.*, Petition for Writ of Certiorari at 8, *Scheidler II* (No. 01-1118).

181. *Compare* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1077 (9th Cir. 1986) (barring injunctive relief to private plaintiffs), *and* Dixie Carriers, Inc. v. Channel Fueling Serv. (*In re* Fredeman Litig.), 843 F.2d 821, 828 (5th Cir. 1988), *with* Nat'l Org. for Women, Inc. v. Scheidler (NOW), 267 F.3d 687, 693 (7th Cir. 2001) (upholding the district court's injunctive order against national anti-abortion action network), *overruled by* 537 U.S. 393 (2003).

182. *See supra* Parts I.A–B.

183. *See supra* notes 14-16 and accompanying text.

184. *See* Blakely & Cessar, *supra* note 12, at 533 (suggesting injunctive relief can be used to fill gaps against terrorism, white-collar crime, political corruption, and hate-group prosecution).

185. *See* DOCKET REPORT, *supra* note 15 (explaining that the question of RICO injunctive relief is of particular interest to many businesses because it can be used to harass business competitors).

186. *See NOW*, 267 F.3d at 695.

unrestrained interpretations, which extend injunctive relief to private plaintiffs, may implicate constitutional concerns, especially when applied to organizations with political motives.[187] The district court's nationwide injunction against anti-abortion protesters in *Scheidler* exemplifies the danger of this remedy.[188] In this context, several commentators and judges raised concerns regarding RICO's injunctive remedies' infringement on First Amendment freedoms.[189] While private injunctive relief may compensate some plaintiffs when monetary damages fail to fully remedy,[190] injunctive power under RICO clearly has the potential to cause substantial mischief.[191]

The specific omission of private injunctive relief sharply differs from the other uncertainties of the RICO statute regarding enterprise or patterns of racketeering.[192] Congress provided private plaintiffs only with the express statutory remedy of treble damages and attorneys' fees.[193] The *Wollersheim* court reasoned that a federal court could only allow the express remedies because Congress considered and omitted injunctive relief.[194] The Seventh Circuit *Scheidler* opinion gave an opposite reading, ruling that the grant of injunctive relief to federal courts for federal prosecutorial hearings extended a parallel grant to civil litigants.[195] Without resolution of this circuit split in *Scheidler II*, application of civil RICO remains uncertain.[196] The Supreme Court has provided no clear

187. *See* Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 263 (1994) (Souter, J., concurring) (discussing whether some "racketeering" activities may be fully protected by the First Amendment); Levendosky, *supra* note 15 (suggesting that anti-government protesters may be enjoined by participating in supposed racketeering activity); *see also supra* note 118.

188. *See* Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 411 (2003) (Ginsburg, J., concurring); *Scheidler I*, 510 U.S. at 267 (Souter, J., concurring).

189. *See, e.g.*, *Political Protest*, *supra* note 15, at 74; Barry, *supra* note 118, at 909-16 (suggesting the broad statute and availability of broad relief implicate symbolic speech and prior restraint); Levendosky, *supra* note 15; *First Amendment*, *supra* note 15, at 135; *supra* note 118.

190. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1089 (9th Cir. 1986); Blakely & Cessar, *supra* note 12, at 533.

191. *See* Petition for Writ of Certiorari at 13, *Scheidler II* (No. 01-1118); *supra* notes 15, 118.

192. 18 U.S.C. § 1964(c) (2000); *see also Wollersheim*, 796 F.2d at 1084-85 (citing *Sedima*, which stated the Senate intended to limit injunctive remedies to §§ 1964(a), (b), and (d)); *supra* note 135.

193. 18 U.S.C. § 1964(c).

194. 796 F.2d at 1081-89.

195. 267 F.3d 687, 697-98 (7th Cir. 2001), *overruled by* 537 U.S. 393 (2003). Judge Wood also rejected *Wollersheim*'s reliance on legislative history. *Id.* at 697.

196. *See Political Protest*, *supra* note 15, at 73-74 (suggesting that there remain issues of RICO for the court to address). Because district court judges must follow different precedents, this will encourage RICO plaintiffs to shop for forums where the law favors

decision on the issue of injunctive relief, nor has the Court extended the suggestion to Congress that civil RICO requires more definition.[197] As a result, plaintiffs will continue to turn to RICO and the federal courts for new and creative racketeering claims and remedies.[198]

III. BOTH THE COURTS AND CONGRESS MUST REEXAMINE CIVIL RICO

Due to the uncertainty regarding the application of private civil RICO, the issues that *Scheidler II* left unresolved will likely return to the Supreme Court.[199] In the future, two suggestions will aid judges and practitioners in better understanding the RICO scheme: (1) barring the availability of injunctive relief to private litigants; and (2) amending the statute to remove the civil provision.[200]

A. The Court Should Resolve the Circuit Split and Bar Injunctive Relief to Private RICO Litigants

1. Courts Have Authority to Address the Issue of Injunction

The role of the courts in limiting RICO raises separation of powers problems because courts lack the authority to change acts of Congress.[201] In the line of RICO Supreme Court cases, Justices repeatedly noted that Article III of the U.S. Constitution limited judicial review of RICO.[202]

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injunction. *Id.* As a result of different laws in different federal courts, enforcement issues arise over injunctive relief. *See* Amicus Brief of Life Legal Defense Foundation in Support of Petitioners at 12, *Scheidler II* (Nos. 01-1118, 01-1119). Furthermore, because many circuits and districts fail to recognize its availability, the Seventh Circuit would have had difficulties enforcing a nationwide injunction in the Ninth Circuit if the injunction was upheld. *Id.*

197. *See, e.g.*, *Scheidler II*, 537 U.S. at 400-11 (failing to address the issue of injunctive relief or the issue of RICO construction).

198. *See* Roggow, *supra* note 26, at 600-02 (arguing that the broad interpretation of civil RICO will encourage plaintiffs to find creative ways to achieve the fruits of federalized crimes).

199. *See Scheidler II*, 537 U.S. at 411; *see also First Amendment*, *supra* note 15, at 135; *Political Protest*, *supra* note 15, at 74.

200. *See infra* Parts III.A–B.

201. *Compare* U.S. CONST. art. III, § 2 (stating that the judicial power shall extend to cases and controversies), *with id.* art. I, § 1 (stating that all legislative powers are vested in Congress). The Supreme Court has hesitated to legislate by reading into a statute limitations that Congress did not intend. *See, e.g.*, Nat'l Org. for Women, Inc. v. Scheidler (Scheidler I), 510 U.S. 249, 261 (1994); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 245 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497-500 (1985).

202. *See, e.g.*, *Scheidler I*, 510 U.S. at 261 (suggesting that courts should be wary to read limitations into RICO that do not comport with its language); *Northwestern Bell*, 492 U.S. at 245 (rejecting Court imposed non-textual limits to RICO because it is not the Court's duty to rewrite the statute); *Sedima*, 473 U.S. at 499 (suggesting that the defects of RICO are "inherent in the statute as written, and its correction must lie with Congress").

Many aspects of RICO lie outside the scope of judicial authority to impose limitations, and properly should be left for Congress to address.[203]

The issue of injunctive relief, however, falls within the powers of the federal judiciary to say "what the law is."[204] Two concerns support this premise: first, injunction differs from the other structural elements of RICO that federal courts have addressed; and second, injunction falls within the discretion of a court interpreting RICO.[205] Injunction differs from other elements of RICO because Congress clearly omitted the remedy when it added the civil provision.[206] Therefore, rather than abridge substantive elements of the racketeering crime by inserting limitations in order to grant an injunction, as *Sedima*, *Northwestern Bell*, *Turkette* and *Scheidler I* all rejected, a judge must extend the provision beyond its express language.[207] Additionally, the remedy of injunction in essence lies within the discretionary power of federal courts under the RICO scheme.[208] Even if the Seventh Circuit was correct in finding a parallel grant of injunctive relief, other federal circuits could still limit the authority of the district courts to issue injunctions.[209] The federal courts have exercised this discretion previously in relation to the Clayton Act.[210] Thus, the judiciary has the inherent authority to clarify the issue

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Indeed, the struggle of federal court judicial review of legislation is no more evident than in the Court's handling of RICO and the liberal interpretation clause. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that "[i]t is emphatically the province and duty of the judicial department to say what the law is"), *with Scheidler I*, 510 U.S. at 261; *Northwestern Bell*, 492 U.S. at 245; *and Sedima*, 473 U.S. at 497-500. The *Marbury* Court also said that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." 5 U.S (1 Cranch) at 177.

203. *See supra* notes 57, 200-01 and accompanying text.

204. *Compare Scheidler I*, 510 U.S. at 261, *Northwestern Bell*, 492 U.S. at 245, *and Sedima*, 473 U.S. at 497-500 (suggesting that the powers of judicial review are limited with respect to statutory elements) *with Wollersheim*, 796 F.2d at 1080-84 (referring to the legislative history to decide injunctive relief) *and* Blakely & Cessar, *supra* note 12, at 557-61 (suggesting that courts should use the canons of statutory construction to hold that injunctive relief is available).

205. *See Wollersheim*, 796 F.2d at 1080-84.

206. *Id.* at 1080-85.

207. *See supra* notes 121, 135 and accompanying text.

208. *See* 18 U.S.C. § 1964(a) (2000) (providing district courts the power to use equitable remedies, including injunction, in government enforcement actions when "appropriate").

209. *See, e.g., id.* This would imply that the courts have authority to determine whether relief was available in civil contexts. *See id.* However, the strongest means of settling the issue would be for Congress to amend the statute to provide a clearer understanding. *See infra* Part III.B.

210. *See* Klehr v. A.O. Smith Corp., 521 U.S. 170, 188-89 (1997) (interpreting the injunctive relief element of the Clayton Act); *see also* Nat'l Org. for Women, Inc. v. Scheidler (NOW), 267 F.3d 687, 700 (7th Cir. 2001) (referring to the fact that the Supreme Court decided the injunctive relief issue under the Clayton Act), *overruled by* 537 U.S. 393

of injunction without overstepping the boundaries of separation of powers.[211]

2. The Statutory Language Bars Injunctive Relief and Serves Both Political and Practical Functions

The Supreme Court could have barred injunctive relief to civil litigants in *Scheidler II*.[212] However, the Supreme Court determined that the outcome depended on the extortion issue, and therefore a ruling on injunction would have been dicta.[213] Once the Court ruled on the least controversial theory to dismiss the case, the issue of injunction became moot.[214]

When the issue returns, the Court should bar injunctive relief to private plaintiffs under civil RICO.[215] The Constitution and rules of interpretation limit the authority of federal courts to provide remedies under a statute, especially for an injunction.[216] The availability of injunctive relief in federal actions does not necessitate the parallel inclusion of it in civil actions as the Seventh Circuit suggested.[217] Congress provided specific and powerful civil remedies through treble

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(2003); California v. Am. Stores Co., 495 U.S. 271, 287-96 (1990); discussion *supra* note 135.

211. *See* discussion *supra* Part III.A.1.

212. *See* Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 397 (2003).

213. *See id.* (deciding that the injunction issue is moot because there is no underlying RICO violation); *Political Protest*, *supra* note 15, at 74 (suggesting that the Court will likely see other cases like *Scheidler*).

214. *Scheidler II*, 537 U.S. at 411.

215. *See infra* notes 216-241 and accompanying text.

216. *See, e.g.*, Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979) (suggesting that courts must be wary of reading new judicial remedies into federal statutes).

217. Brief for the United States as Amicus Curiae at 8-14, *Scheidler II* (Nos. 01-1118, 01-1119). The government's brief stated:

> The court of appeals' interpretation is also undermined by its recognition . . . that Section 1964(b) grants only the government the right to seek *preliminary* injunctive relief. Under the court of appeals' reading of the statute, private parties may seek permanent injunctive relief but not temporary relief pending final resolution of their claims. There is no reason, however, why Congress would have intended that highly anomalous result. Rather, the logical interpretation of the statute is that Congress created a symmetrical statutory scheme under which the Attorney General may seek temporary and final injunctive relief, and private parties may seek treble damages.

Id. at 8. The *Wollersheim* court similarly rejected the parallel grant theory because the civil provision in § 1964(c) was added later with its own specific remedy after consideration of inserting injunction into the civil clause. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1082-86 (9th Cir. 1986).

damages and attorneys' fees.[218] Without any specific language in the statute suggesting private injunctive relief, the *Wollersheim* court's consideration of the legislative history, rather than the extension of the remedy under the liberal construction clause, was an appropriate means of determining congressional intent.[219] Both the House and Senate rejected proposals to insert a private injunctive remedy into the civil provision.[220] This provides a strong indication that Congress did not intend to make equitable relief available to private plaintiffs.[221] Finally, as the United States argued in *Scheidler II*, the basic purpose of RICO remains consistent with the preclusion of injunctive relief in all actions except for those that the Attorney General prosecutes.[222]

Aside from the statutory limitation, three practical and political reasons support barring injunctive relief under civil RICO.[223] First, RICO plaintiffs will not suffer great hardship without injunction because they have alternative means to protect against injury to property or business.[224] All of the predicate acts under RICO are state crimes, federal crimes, or common law causes of action that can aid in righting any wrongs caused by a racketeering injury.[225] Congress did not intend for the statute to serve as a catch-all provision, but rather to prevent racketeering crimes from infiltrating the economy.[226] If an individual suffers injury to business or property through a RICO violation, that individual has the opportunity to collect treble damages and attorneys' fees, which is a generous reward.[227] If insufficient, the individual retains the full array of common law and state statutory remedies.[228] Ultimately,

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218. *See* 18 U.S.C. § 1964(c) (2000).

219. *See Wollersheim*, 796 F.2d at 1082-84 (holding that the grant of a specific remedy coupled with silence regarding another precludes the availability of the unstated remedy).

220. *Id.* at 1084-86.

221. *See id.*

222. Brief for the United States as Amicus Curiae at 14, *Scheidler II* (Nos. 01-1118, 01-1119). The United States' brief suggests that providing injunctive relief to private citizens may encourage "corporate death" at the hands of private litigants, a result the statutory scheme did not intend. *Id.* Furthermore, the United States cited the Freedom of Access to Clinic Entrances Act of 1994, which provides private injunctive relief, to suggest that Congress will expressly provide for the specific remedy in the statute when intended. *Id.* at 14-15.

223. *See infra* notes 224-39 and accompanying text.

224. *See, e.g.*, 18 U.S.C. § 1964(c) (2000) (providing treble damages and attorneys' fees to parties injured in their business or property by racketeers).

225. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500-01 (1985) (Marshall, J., dissenting) (suggesting that civil RICO federalizes areas of criminal law traditionally associated with states).

226. *See supra* notes 25-26 and accompanying text.

227. *See* 18 U.S.C. § 1964(c).

228. *See id.* § 1961(a).

even if every plaintiff does not obtain a remedy, this is an unfortunate consequence of a statutory scheme that does not support a private civil injunctive remedy.[229]

Second, although barring injunctive relief will not resolve all the uncertainties of civil RICO suits,[230] it will add some clarity.[231] It would discourage actions against non-economically motivated groups prosecuted under even the most liberal interpretation of racketeering.[232] It also will ease the potentially chilling effects on free speech that arise from the extension of RICO to political protest groups,[233] and will prevent problems arising from federalism challenges to the statute.[234] Furthermore, because judicial review precludes courts from inserting limits, barring injunctive relief effectively clarifies the statute without overstepping the boundaries of judicial interpretation.[235]

Finally, barring injunctive relief will promote Congress' political and practical intent.[236] Federal prosecutors, as opposed to private parties, are more likely to utilize discretion when enforcing RICO because they do

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229. *See* Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076, 1088-89 (9th Cir. 1986).

230. *See supra* notes 11, 15 (explaining that issues of application, including a clear definition of racketeering, remain unresolved).

231. *See* JOSEPH, *supra* note 6, § 20(a) (discussing the various federal court interpretations of injunctive relief).

232. *See* Amicus Brief of Life Legal Defense Fund Foundation In Support of Petitioners at 6-9, Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393 (2003) (Nos. 01-1118, 01-1119).

233. *See* Brief for the States of Alabama, Nebraska, North Dakota, and South Dakota, and Commonwealth of the Northern Marianas Islands, as Amici Curiae in Support of Petitioners at 7, *Scheidler II* (Nos. 01-1118, 01-1119). The States argued:

> [T]he addition of private injunctive remedies to the already powerful treble damages available to private persons is neither desirable "as a policy matter" nor in furtherance of "Congress' goal." The application of civil RICO to political or social protest activities has a substantial chilling effect on protected First Amendment activity. Adding injunctive remedies . . . would only lower the temperature further.

Id.; *see also supra* note 118.

234. *See* Oestreicher, *supra* note 85, at 711-13 (suggesting that the most problematic RICO claims for federalism charges are the non-economically motivated intra-state petty offenses).

235. *See* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring) (explaining that the Court was limited in its ability to construe the statute by its proper role as the judiciary and by the question presented); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499-500 (1985) (rejecting the lower court's "discovery" of limitations when the RICO statute implicates legitimate businesses); *see also supra* Part III.A.1; *cf.* Reves v. Ernst & Young, 507 U.S. 170, 183-84 (1993) (explaining that the Court must determine boundaries of congressional purpose and limit the liberal construction clause).

236. *See* Brief for the United States as Amicus Curiae at 14-15, *Scheidler II* (Nos. 01-1118, 01-1119) (arguing that restricting the availability of injunctive relief and equitable remedies to government actions promotes public policy and congressional intent).

not stand to receive a personal benefit.[237] Injunctive relief in the hands of private litigants risks harm to the American economy if courts allow businesses to enjoin their competitors or force them into exorbitant settlements.[238] In seeking to prevent infiltration of legitimate businesses by corrupt organizations, Congress did not intend for RICO to restrict business, which is an unfortunate economic consequence of injunction.[239] Barring this remedy will promote business and competition—long hampered by improper application of RICO—and will promote properly prosecuted RICO actions by the government.[240] Although some critics suggest RICO as a blanket remedy for many societal problems, limiting the availability of RICO remedies to its statutory mandate will encourage Congress to address these problems with more detailed legislation.[241]

B. Congress Should Amend RICO to Remove the Civil Provision

Although barring injunctive relief will provide for a clearer understanding of RICO's remedies, Congress, rather than the judiciary, is best suited and ultimately responsible for clarifying RICO.[242] Congress should amend RICO to strike, or significantly narrow, the civil provision for two reasons. First, practical application reveals that the civil provision no longer serves its purpose.[243] Second, the provision is marred by two constitutional flaws.[244]

Even after *Scheidler*, the civil RICO provision remains too broad to serve its initial purpose.[245] As courts continue in their struggle to

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237. *See id.* at 14.

238. *See supra* notes 16, 149 and accompanying text.

239. *Compare supra* notes 16, 149 (suggesting that injunctions sought by businesses against competitors harm economic growth by enjoining profitable activities and forcing settlements), *with* 18 U.S.C. § 1964(c) (2000) (stating the goals of civil RICO to prevent economic detriment to business or property from infiltration of the legitimate business community by organized crime).

240. *See supra* notes 16, 149 and accompanying text.

241. *Compare supra* note 14 (suggesting RICO's extension to provide remedies for various problems), *with supra* notes 52, 70, and 85 (suggesting that broad federalization of crime in vague terms may create a constitutional problem).

242. *See supra* Part III.A.

243. *Compare supra* note 4 and accompanying text (explaining the purpose of RICO), *with* notes 9, 57 and accompanying text (explaining that the current use of RICO extends beyond the traditional notions of organized crime).

244. *See infra* notes 252-59 and accompanying text.

245. *Compare supra* note 9 (noting the broad application of civil RICO to areas not typically associated with organized crime), *with supra* note 56 (noting the difficulties the courts have in interpreting RICO's broad language), *and supra* note 70 (explaining that RICO was never intended to be interpreted so broadly, particularly in light of the limiting principles of federalism). Several Justices and commentators suggest that the reason for

interpret the provision, plaintiffs continue to seek new applications.[246] Plaintiffs bring numerous RICO private actions, most often against legitimate businesses or organizations, scarring the businesses with a negative reputation as racketeers.[247] As a result, the overcrowded federal courts must bear the burden of an enormous RICO caseload that hinders the flow of commerce.[248] It is clear that the practical application of civil RICO has not been to weaken criminal organizations, but rather to create mountains of federal litigation and novel approaches to establish a "racketeering" suit.[249] In the narrow avenue of combating organized crime, RICO may actually serve a useful purpose.[250] The civil gap-filling provision, however, has clearly failed.[251]

Furthermore, the expansion of RICO also creates constitutional issues.[252] The statute extends federal criminal law beyond any federal statute before it.[253] The vague, quasi-criminal, quasi-civil provision revolutionizes federal litigation and creates jurisdictional problems that usurp state authority.[254] The shift towards more judicial scrutiny in commerce-clause jurisprudence, as well as the extension of civil RICO to non-economically motivated enterprises, signals a call for Congress to roll back RICO's extensive regulations.[255]

Another constitutional issue arises because RICO application to political groups threatens to infringe on First Amendment freedoms.[256] Although RICO prohibits only criminal actions outside the scope of the First Amendment, its loose association-in-fact requirement, vague and

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RICO's failure to serve its purpose is that the statute is too vague and overreaching. *See supra* note 85 and accompanying text.

246. *See supra* note 9 and accompanying text.

247. *See supra* notes 8, 9 and accompanying text.

248. *See* Rehnquist, *supra* note 8, at 8-10 (suggesting that civil RICO congests the federal courts with state justiciable claims); *see also supra* notes 16, 238-40 and accompanying text.

249. *See supra* notes 8, 9, and 198 and accompanying text.

250. Kurzweil, *supra* note 60, at 56 n.85. RICO has become a popular and effective prosecutorial tool. *Id.*; *see also* Scheidler v. Nat'l Org. for Women, Inc. (Scheidler II), 537 U.S. 393, 416-17 (2003) (Stevens, J., dissenting) (suggesting that limiting predicate acts may limit the usefulness of the criminal provision).

251. *See* Oestreicher, *supra* note 85, at 718 (stating that Congress knows the civil provision is dysfunctional); *see also* supra notes 9, 10, 15, 52, 56, 85.

252. *See supra* notes 70, 85 and accompanying text.

253. *See* Bradley, *supra* note 4, at 247-54.

254. *See supra* notes 52, 70, 85.

255. Oestreicher, *supra* note 85, at 717-20; *see also supra* notes 52, 70, 85.

256. *See supra* notes 117-18 and accompanying text; *see also* Roth, *supra* note 118, at 488 ("This showdown between RICO and the First Amendment may be avoided if Congress heeds the common cry to safeguard groups whose primary purpose is exchange in the marketplace of ideas from RICO liability.").

extremely broad definition of racketeering, and strong but undefined remedies, all serve to chill constitutionally protected freedoms.[257] Allowing broad application to parties with particular interests threatens to harm the participation and association of political organizations.[258] It also precludes groups from engaging in forms of protest that involve civil disobedience, a core American value.[259]

If Congress' intent in drafting RICO was to prevent the infiltration of the legitimate business community by organized crime, then it should have tailored a statute to effectively serve that end.[260] Civil RICO's unrestrained application contradicts its original intent, and it contains dangerous constitutional deficiencies.[261] It is time for Congress to clarify RICO by removing the civil provision.

IV. CONCLUSION

Due to civil RICO's ambiguous construction, mandate for liberal interpretation, and attractive remedies, plaintiffs have flooded the federal courts with suits against businesses and organizations not associated with organized crime. As illustrated by *Scheidler I*, the failure of the courts and Congress to clearly define RICO raises dangerous constitutional and practical application problems.[262] Unfortunately, the Supreme Court's resolution of *Scheidler II* fails to clarify RICO's application or its remedies. In future cases, the Court should bar injunctive relief under the civil provision to prevent these many recurring issues. This would provide the correct statutory interpretation, fall within the scope of judicial review, and find support in practical and policy rationales. Although Court efforts to limit RICO through injunctive relief would mark a sufficient starting point, Congress ultimately bears the responsibility to amend and cure RICO.[263] Congress should use this authority to remove RICO's civil provision.

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257. *See* Parker, *supra* note 118, at 830-48 (arguing that Congress must amend RICO because its broad definition of racketeering and extension of its requirements sets up future problems of infringing on political speech).

258. *See supra* notes 15, 118 and accompanying text.

259. *See* Martin Luther King, Jr., *Love, Law, and Civil Disobedience*, *in* CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 217 (David R. Weber ed., 1978) ("Our nation in a sense came into being through a massive act of civil disobedience, for the Boston Tea Party was nothing but a massive act of civil disobedience.").

260. *See* Bradley, *supra* note 4, at 253-54; *see also* Parker, *supra* note 118, at 847-48.

261. *See supra* notes 234-50 and accompanying text.

262. *See supra* Parts II—III.

263. *See supra* Part III.B.