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THE CONSTITUTIONAL INFIRMITY OF RICO FORFEITURE

The English common law recognized the criminal penalty of mandatory estate forfeiture.[1] The penalty of estate forfeiture required an offender, upon conviction of a felony, to forfeit all his real and personal property to the state.[2] By enacting section 1963 of the Racketeer Influenced and

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1. 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 160 (7th ed. London 1795). At English common law, a felony constituted "an offence which occasions a total forfeiture of either lands or goods, or both, . . .; and to which capital or other punishment may be superadded according to the degree of guilt." *Id.*; *see generally* 2 HAWKINS 477-489 (explaining English common-law forfeiture); HALE'S PLEAS OF THE CROWN *354-*370 (explaining English common-law penalty of forfeiture of estate including loss of dower and corruption of blood). Despite modern misperceptions, in eighteenth century England a felony could exist independent of capital punishment, and capital punishment could exist independent of a felony. 1 HAWKINS, *supra*, at 160. For example, common-law heresy (not a felony) required punishment by burning, a capital punishment, but conviction of heresy did not require forfeiture of goods or property. *Id.* At English common law, the criminal penalty of forfeiture determined which crimes were felonies. *Id.*

2. 2 HAWKINS, *supra* note 1, at 478-479. The English common law required a convicted felon to forfeit all personal property to the king and all real property either to his lord or to the king. *Id.* In addition to forfeiting all real property to a lord or to the king, a felon at English common law forfeited to the king all rents and profits, including the profits of a life estate or any inheritance rights that the offender's wife possessed. *Id.* at 478. Forfeiture as a criminal penalty could only prejudice an offender and his heirs, not innocent third parties. *Id.* at 485. The common law "saved" to innocent parties all rights, title, uses, possession, entry, reversions, remainders, conditions, rents, leases, or other interests in the land. *Id.* at 483. Moreover, if a felony statute specified that "no corruption of blood" must occur or if the statute "saved to the heirs" the offender's land, the offender's wife did not lose her dower rights and the offender's heirs could inherit the convicted offender's land interests. *Id.* In all cases of forfeiture of real property, the forfeiture related back to the time of the offense. *Id.* at 486-487.

In addition to resulting in the mandatory forfeiture of the offender's real property, conviction of a felony also resulted in the mandatory forfeiture of the convicted offender's personal property. *Id.* at 480. The personal property subject to forfeiture included all personal property that the convicted offender actually possessed or to which the law entitled the offender. *Id.* The offender's personal property subject to forfeiture, however, did not include possessions that the offender held as an executor or as an administrator. *Id.* Upon indicting an individual for a felony, the state inventoried the accused person's personal property and required the accused person's family or neighbors to hold all of the property until disposition of the criminal case against the accused. *Id.* at 487. The government, however, could not seize any of the accused person's property until a court convicted the accused person. *Id.* at 488. Unlike forfeiture of real property, forfeiture of an offender's personal estate related back to the time of conviction as opposed to the time of the offense. *Id.* at 486-487.

In addition to causing mandatory forfeiture of an offender's real and personal estate, English common-law conviction for a felony often carried the condition of "corruption of blood." *Id.* at 493-495. Corruption of blood prohibited the convicted offender from inheriting land as an heir. *Id.* at 493. Also, corruption of blood prohibited any person from deriving any title to land from the convicted offender. *Id.* at 493-494. A pardon could not restore a convicted offender's ability to inherit land or to pass land to any person alive at the time of the offender's conviction. *Id.* at 495.

Corrupt Organizations Act (RICO) in 1970, the United States Congress revived the English common-law criminal penalty of forfeiture.[3] Congress enacted RICO to prevent organized crime from infiltrating legitimate business.[4] In particular, Congress attempted to prohibit convicted RICO offenders from retaining control of the enterprises that the offenders influenced through their illegal racketeering activities.[5] Consequently, in section 1963 of RICO, Congress implemented as a mandatory criminal penalty for a racketeering offense forfeiture to the United States Government of the convicted offender's interest in all corrupted enterprises.[6] A

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3. *See* 18 U.S.C. § 1963 (1982 and Supp. 1986) (imposing forfeiture as mandatory penalty for racketeering violations); S. REP. No. 617, 91st Cong., 1st Sess. 80 (1969). In the Senate Report of the legislative history of the Racketeer Influenced and Corrupt Organizations Act (RICO), the United States Senate Committee on the Judiciary states that Congress derived the RICO penalty of forfeiture directly from the English common-law criminal penalty of forfeiture of estate. *Id.* at 79. Moreover, the Senate report expressly states that Congress believed that by enacting § 1963 of RICO Congress was reviving the English common-law penalty of estate forfeiture. *Id.* at 80. The Senate report justified reviving the English common-law criminal penalty of estate forfeiture by relying on Blackstone's reasoning. *Id.* Blackstone reasoned that society is the foundation of all property, and when an individual violates the laws of society, the offender breaches his contract of association with society and forfeits his right to the lands that the offender initially derived from society. 16 W. BLACKSTONE, COMMENTARIES *299-*300; *see also* S. REP. No. 617, 91st Cong., 1st Sess. 80 (1969) (using Blackstone's reasoning to justify § 1963 forfeiture). Consequently, Blackstone reasoned that the government acted for society and resumed possession of the offender's lands. BLACKSTONE, *supra*, at *299-*300. Congress used Blackstone's "social compact" reasoning to justify § 1963's forfeiture penalty. S. REP. No. 617, 91st Cong., 1st Sess. 80 (1969).

4. *See* S. REP. No. 617, 91st Cong., 1st Sess. 76-78 (1969) (stating Congressional purpose behind RICO forfeiture penalty). In the Senate Report of the legislative history of RICO, the Senate Committee on the Judiciary noted that organized crime had invaded almost all types of commercial industries, production industries, and entertainment industries. *Id.* at 77. Congress believed that the RICO forfeiture penalty would prohibit convicted organized crime leaders from retaining their sources of economic power. *Id.* at 80. Consequently, Congress believed that new organized crime leaders would not be able to succeed the convicted organized crime leaders. *Id.* As a result, any conviction of an organized crime leader under RICO would remove the overall influence of organized crime in a given industry. *Id.*

5. *See id.* at 78 (explaining that government must deprive convicted felon of property to prevent retention of control by new members of organized crime syndicate). The legislative history of RICO in the report of the Senate Committee on the Judiciary asserted that the laws prior to RICO could not remove effectively criminal influences from legitimate enterprises. *Id.* The Senate report stated that attacking an offender's economic base proves necessary to eliminating an offender's influence over a given enterprise. *Id.* at 79.

6. *See* 18 U.S.C. § 1963(a), (b) (1982 & Supp. 1986) (imposing mandatory forfeiture penalty for racketeering offenders). Section 1963 of RICO requires an offender guilty of a RICO racketeering offense to forfeit any interest in, security of, claim against, or property or contractual right in any enterprise that the offender established or operated by engaging in illegal racketeering activity. 18 U.S.C. § 1963(a)(1)-(2). Moreover, §1963 requires a RICO offender to forfeit to the government all profits that the offender derived from the enterprise and all property that the offender acquired with those profits. 18 U.S.C. § 1963(a)(3). Property subject to forfeiture under RICO includes all real property and all tangible and

convicted offender's forfeitable interest includes all profits that the offender derived from racketeering activity and all real and personal property that the offender obtained with these profits.[7] In formulating section 1963, Congress directly derived the RICO section 1963 punishment from the English common-law criminal penalty of forfeiture.[8] Moreover, Congress recognized that it was creating new punishment unprecedented in American law.[9]

The Framers of the United States Constitution ("Framers") and the members of the First Federal Congress, however, expressly rejected the English common-law criminal penalty of forfeiture.[10] The treason clause of the United States Constitution, as well as the clauses of the Constitution that prohibit the federal and state governments from passing bills of attainder, expressly prohibit the English common-law criminal penalty of forfeiture.[11] Moreover, the First Federal Congress expressly prohibited the

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intangible personal property including rights, privileges, interests, claims and securities. 18 U.S.C. § 1963(b). RICO's definition of forfeitable property includes all real and personal property that the offender possessed prior to committing the racketeering offense. 18 U.S.C. § 1963(c). The penalty of forfeiture under § 1963, however, operates only upon conviction of a RICO defendant. 18 U.S.C. § 1963(c). Upon conviction of the RICO offender, the government may seize all property that RICO subjects to forfeiture. *Id.* RICO defines racketeering activity as any state law felony offense that involves an act or threat of murder, kidnapping, gambling, arson, robbery, bribery, extortion, or narcotics exchanges. 18 U.S.C. § 1961(1)(a). Racketeering activity also includes any federal offense relating to bribery, sports bribery, counterfeiting, or theft from interstate shipping. *Id.* Moreover, RICO racketeering includes embezzlement from pension or welfare funds, extortionate credit transactions, transmission of gambling information, mail fraud, wire fraud, or obstruction of justice. *Id.* In addition, RICO defines racketeering as any felony offense relating to criminal investigations or local law enforcement, interference with commerce, robbery, extortion, interstate transportation of wagering paraphernalia, or unlawful welfare fund payments. *Id.* Further, RICO racketeering includes illegal gambling businesses, interstate transportation of stolen property, contraband trafficking of cigarettes, white slave traffic, restrictions on payments and loans to unions, embezzlement from union funds, or any narcotics offense. 18 U.S.C. § 1961(b)-(c). RICO defines an enterprise as any legal entity or association in fact not a legal entity. 18 U.S.C. § 1961(4).

7. 18 U.S.C. § 1963(a)(3) (1984 & Supp. 1986); *see supra* note 6 and accompanying text (explaining meaning of forfeitable interest under § 1963).

8. 18 U.S.C. § 1963(a)(3) (1984 & Supp. 1986); *see* S. REP. No. 617, 91st Cong., 1st Sess. 79-80 (1969) (stating in legislative history of RICO that Congress directly derived § 1963 penalty from English common-law forfeiture); *supra* note 3 and accompanying text (explaining legislative history of RICO in Senate Report).

9. *See* S. REP. No. 617, 91st Cong., 1st Sess. 79-80 (1969) (stating in legislative history of RICO that Congress recognized § 1963 penalty was unprecedented in American law); *supra* note 3 and accompanying text (explaining legislative history of RICO in Senate report).

10. *See* U.S. CONST. art. III, § 3, cl. 2 (prohibiting use of forfeiture as criminal penalty for treason ("treason clause"); An Act for the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess., Act of April 30, 1790, § 24 (prohibiting use of forfeiture as criminal penalty for all federal crimes); *infra* notes 88-127 and accompanying text (explaining historical significance of treason clause and § 24 of Punishment of Crimes Bill of 1790).

11. *See* U.S. CONST. art. III, § 3, cl. 2 (stating that no conviction of treason shall

use of forfeiture as a criminal penalty in section 24 of the first Punishment of Crimes Bill in 1790.[12] Congress later codified this prohibition on criminal forfeiture in section 3563 of Title 18 of the United States Code.[13] Consequently, forfeiture as a criminal penalty was unknown to American law until Congress enacted RICO in 1970.[14] Congress' revival of forfeiture as a criminal penalty in section 1963 necessarily repealed the First Congress' one hundred eighty year old express prohibition on the use of forfeiture as a criminal penalty.[15] Furthermore, examination of the intent of the Framers of the Constitution and the members of the First Congress demonstrates that section 1963 unconstitutionally punishes criminal offenders.[16]

An examination of the English common-law forfeiture penalties is necessary to understand the historical significance of the intent of the Framers and the members of the First Congress.[17] Two distinct types of forfeiture existed at English common law.[18] The first and most prevalent use of forfeiture was the mandatory criminal penalty that attached upon a defendant's conviction of any felony offense.[19] The English common law, however, also recognized the penalty of seizure, a civil forfeiture that evolved from the theory of deodand.[20] The English common-law deodand theory required the forfeiture of any instrumentality or object (the "deo-

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result in corruption of blood or forfeiture of estate); U.S. CONST. art. I, § 9, cl. 3 (stating that Congress cannot pass bills of attainder); U.S. CONST. art. I, § 10, cl. 1 (stating that no state can pass bills of attainder); *infra* notes 37-43 and accompanying text (discussing treason clause and prohibition on bills of attainder).

12. *See* An Act for the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess., Act of April 30, 1790 § 24 (prohibiting use of forfeiture as criminal penalty for any crime); 1 ANNALS OF CONG. 2220 (J. Gales ed. 1789) (providing text of § 24 of Act of April 30, 1790).

13. *See* 18 U.S.C. § 3563 (1982) (originally enacted as § 24 of Act of April 30, 1790), *repealed by* Pub. L. No. 98-473, Title II, c.II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987 (stating that no conviction shall result in corruption of blood or forfeiture of estate).

14. *See* S. REP. No. 617, 91st Cong., 1st Sess. 80 (1969) (stating that prior to enactment of § 1963 criminal forfeiture was unprecedented in American history); *supra* note 3 (discussing legislative history of RICO in Senate Report).

15. *See* S. REP. No. 617, 91st Cong., 1st Sess. 80, 160 (1969) (stating that § 1963 impliedly repeals 18 U.S.C. § 3563). In the Senate Report of the legislative history of RICO, the Senate Committee on the Judiciary states that § 1963(a) repeals § 3563 by implication. *Id.* at 80. Moreover, the Senate Report expressly states that insofar as 18 U.S.C. § 3563 applies to forfeiture, § 3563 is no longer the law. *Id.* at 160.

16. *See infra* notes 88-127 and accompanying text (examining intent of Framers and members of First Congress).

17. *See infra* notes 18-28 and accompanying text (distinguishing English common-law seizure from English common use of forfeiture as criminal penalty).

18. *See infra* notes 18-28 and accompanying text (distinguishing English common-law seizure from use of forfeiture as criminal punishment).

19. *See supra* notes 1, 2 and accompanying text (explaining English common-law use of forfeiture as criminal punishment).

20. *See* Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510 (1922) (explaining that civil seizure evolved from concept of deodand).

dand") that caused the death of a person, regardless of whether the death was intentional or accidental, and regardless of the guilt or innocence of the owner of the property.[21] The deodand practice evolved from the rationale that forfeiting the instrumentality that caused death would expiate the soul of the deceased person.[22] Modern civil seizure adopted the deodand rationale's personification that an instrumentality that an offender used to commit an offense is "guilty."[23]

Modern civil forfeiture is a civil sanction that allows the state or federal government to seize the property that a criminal offender used to commit a crime.[24] For example, a yacht owner who leases a yacht subjects that yacht to government seizure if the lessee uses the yacht to commit an unlawful act.[25] If the lessee uses the yacht to smuggle narcotics into the United States, for example, the government may seize the yacht by commencing a civil seizure action against the yacht itself.[26] The guilt or innocence of the yacht owner is completely unrelated to the government's civil seizure proceeding against the yacht.[27] The illegal use of the property,

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21. *See* 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 161-163 (7th ed. London 1795) (explaining English common-law theory of deodand). Under English common law, when an animal or any inanimate object caused the death of a man, the instrument that caused the death was a "deodand" that society forfeited to the king. *Id.* at 161. Deodand included all weapons that individuals used in legal duels as well as unlawful murders. *Id.* Forfeiture of deodand did not depend on any finding of fault. *Id.* For example, if an individual accidentally fell from a cart, the cart was a deodand subject to forfeiture to the king. *Id.*

22. *Id.* The deodand rationale probably evolved from ancient Mosaical law and ancient Athenian law. *See* Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510-511 (1922) (explaining English theory of deodand). Ancient Mosaical law required that a community stone to death any ox that gored a person, and the ancient law prohibited the community from eating the flesh of the stoned ox. *Id.* Ancient Athenian law exterminated or banished any animal or instrumentality that caused a man's death. *Id.*

23. *See Goldsmith-Grant Co.*, 254 U.S. at 510 (explaining relationship of civil seizure to English common-law deodand).

24. *See id.* at 511-513 (explaining modern civil seizure); The Palmyra, 25 U.S. (12 Wheat.) 1, *14-*16 (1827) (distinguishing English common-law use of forfeiture as criminal punishment from civil seizure actions against tainted property); Maxeiner, *Bane of American Forfeiture Law—Banished At Last?*, 62 CORNELL L. REV. 768, 784-785 (1977) (explaining civil seizure in American law); Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 HARV. L. REV. 1929, 1932-1934 (1984) (explaining civil seizure in United States today).

25. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-686 (1974) (holding that government can seize through civil action owner's yacht that lessee used to smuggle narcotics).

26. *See id.* (explaining government seizure of yacht that lessee used to smuggle narcotics); *supra* notes 23-25 and accompanying text (explaining that civil seizure is government action against property that offender used illegally); *infra* notes 27-28 and accompanying text (same).

27. *See Calero-Toledo*, 46 U.S. at 680-686 (explaining government can seize yacht that lessee used to smuggle narcotics); *supra* note 28 and accompanying text (explaining that guilt or innocence of owner of property is wholly unrelated to civil seizure action).

not the guilt or innocence of the owner, triggers the civil seizure sanction.[28]

Both the common-law imposition of forfeiture as a criminal penalty and the civil seizure sanction carried over from England to the American colonies.[29] The American colonies embraced the civil seizure sanction.[30] In Virginia, Maryland, Massachusetts, New Jersey, Pennsylvania, New Hampshire, Connecticut, Maine and New York, colonial governments brought common-law actions against "guilty" property.[31] Most often the colonial governments maintained common-law actions against ships or cargo to enforce the provisions of the English Navigation Acts.[32] The colonists, however, did not embrace the English common-law use of forfeiture as a criminal penalty.[33] In New York, for example, where the English colonial government attempted to implement the mandatory criminal penalty of forfeiture, colonial New York juries consistently reported that the offender had no real or personal property, thus circumventing the operation of the forfeiture penalty.[34] In Massachusetts, the colonists abolished altogether

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28. *See Goldsmith-Grant Co.*, 254 U.S. at 513 (stating that criminal offender's illegal use of property is only consideration in civil seizure actions and that guilt or innocence of owner of property is fortuitous).

29. *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 153 (1943) (explaining that English common-law forfeiture and seizure existed in United States in colonies prior to adoption of Constitution); Maxeiner, *supra* note 24, at 774-778 (explaining that forfeiture law in American colonies included criminal penalty of forfeiture and civil seizure).

30. *See C.J. Hendry Co.*, 318 U.S. at 140-143 n.4 (explaining that colonies unanimously used civil seizure sanction).

31. *See id.* (detailing colonial use of common-law civil seizure actions against tainted property for customs and navigation violations).

32. *See id.* (explaining actions to enforce English Navigations Acts); Maxeiner, *supra* note 24, at 774 (explaining English Navigations Acts). The English Navigation Acts were the broadest of the English civil seizure statutes. Maxeiner, *supra* note 24, at 774. The English Navigation Acts provided that only English built and English manned ships could transport goods to the colonies. *Id.* If an individual crew member or a shipowner violated the Acts, the government could seize the ship and all goods the ship was carrying. *Id.* An individual seaman who violated the Acts without the knowledge of the shipowner or the master of the seaman's ship could cause the seizure of the entire ship. *Id.*

33. *See* 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 970 (6th ed. 1877) (stating that American law did not favor use of forfeiture as criminal penalty); 2 J. KENT, COMMENTARIES ON AMERICAN LAW *317 (stating that common-law forfeiture fell into disrepute in American colonies); *infra* notes 34-36 and accompanying text (explaining colonists' rejection of use of forfeiture as criminal penalty).

34. *See* J. GOEBEL AND T.R. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 710-717 (1970) (discussing English government's use of escheat and forfeiture in colonial New York). In the late seventeenth century case of the Leisler Rebellions, after convicting Leisler and others of treason, the colonial New York jury in the case refused to report that any of the convicted offenders possessed forfeitable lands, tenements or chattels. *Id.* at 713. After the Leisler Rebellion, the English courts did not attempt to enforce forfeiture as a criminal penalty until the treason cases of Hutchins and Bayard in the early eighteenth century. *Id.* at 714. In the *Hutchins* and *Bayard* cases, the colonists charged the English government with bringing the treason actions against Hutchins and Bayard solely to enforce forfeiture of the Hutchins' and Bayard's estates. *Id.* The colonists anticipated that the English colonial government planned to use the proceeds from the estates to balance the

the criminal penalty of forfeiture.[35] At the time of the adoption of the Constitution, therefore, the American common law had absorbed the civil seizure sanction, while the colonists had rejected the English common-law use of forfeiture as a criminal penalty.[36]

In drafting the Constitution and the first laws of the national government, the Framers and the members of the First Federal Congress followed the trend of the colonies and adopted civil seizure but rejected imposition of forfeiture as a criminal penalty.[37] In the text of the Constitution, the Framers expressly rejected the use of forfeiture as a criminal penalty.[38] Article III, section three, clause two of the Constitution (the treason clause) expressly prohibits the English common-law criminal penalty of forfeiture for treason.[39] In addition to prohibiting the penalty of forfeiture in the treason clause, the Framers also rejected the criminal penalty of forfeiture by prohibiting both the national government and the state governments from passing bills of attainder.[40] At English common law, bills of attainder were legislative bills that originated in Parliament and convicted specifically named individuals of criminal offenses.[41] Bills of

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local budget. *Id.* Subsequently, the colonial New York legislature restored the forfeited property to Bayard and Hutchins. *Id.* After the Hutchins and Bayard cases, juries in eighteenth century New York consistently refused to report that a convicted felon possessed any lands, tenements, or chattels that the felon could forfeit to the state. *Id.* at 715. Because a jury finding that a convicted offender possessed lands and chattels was necessary to any use of forfeiture as a criminal penalty, refusal to report any lands or chattels effectively circumvented the criminal penalty of forfeiture in colonial New York. *Id.* at 715. The only exception to the New York juries' failure to report a defendant's lands and chattels was the state's enforcement of deodand forfeiture of instrumentalities that caused death. *Id.* at 717; *see supra* notes 20-22 and accompanying text (discussing civil sanction of seizing instrumentalities of crime).

35. 4 J. KENT, COMMENTARIES *427.

36. *See C.J. Hendry Co. v. Moore*, 318 U.S. 133, 153 (1943) (concluding that American colonists had accepted civil seizure in United States at time of adopting United States Constitution); *supra* notes 33-35 and accompanying text (explaining.that American colonies rejected use of forfeiture as criminal penalty).

37. *See infra* notes 88-127 and accompanying text (explaining that Framers of Constitution and members of First Congress rejected use of forfeiture as criminal penalty).

38. *See* U.S. CONST. art. III, § 3, cl. 2 (prohibiting use of forfeiture as criminal punishment for treason).

39. *Id.*

40. *See* U.S. CONST. art. I, § 9, cl. 3 (prohibiting national government from passing bills of attainder); U.S. CONST. art. I, § 10, cl. 1 (prohibiting state government from passing bills of attainder); Maxeiner, *supra* note 24, at 779 (stating that constitutional prohibition on bills of attainder is in part reaction to colonists' distaste for use of forfeiture as criminal penalty); *infra* notes 41-43 and accompanying text (explaining that when Framers prohibited bills of attainder, Framers in effect prohibited criminal penalty of forfeiture).

41. *See* C.E. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY, 97-98 n.1 (2d ed. 1894) (explaining English procedure in passing bills of attainder); Note, *Beyond Process: A Substantive Rationale For The Bill of Attainder Clause*, 70 VA. L. REV. 475, 477 (1984) (explaining English common-law bills of attainder and stating that Framers prohibited English practice of bills of attainder in United States Constitution).

attainder, like common-law felony convictions, triggered the mandatory penalty of forfeiture.[42] In prohibiting bills of attainder, the Framers, therefore, expressed a further rejection of the use of forfeiture as a criminal penalty.[43]

The First Federal Congress implemented the civil sanction of seizure in the customs and navigation laws of 1789 and 1790.[44] Since 1789, civil seizure actions by the United States government against tainted property have continued to the present.[45] The First Federal Congress, however, expressly prohibited the use of forfeiture as a criminal penalty in section 24 of the first Punishment of Crimes Bill in 1790.[46] Congress later codified section 24 in section 3563 of Title 18 of the United States Code.[47] When Congress enacted RICO in 1970, Congress recognized that section 1963 of RICO impliedly repealed section 3563 of Title 18.[48] Later, when Congress amended RICO in 1984, Congress expressly abolished section 3563.[49] Section 3563, however, arguably expressed the necessary implications of

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42. *See* 2 HAWKINS, *supra* note 1, at 483 (explaining that criminal penalty of forfeiture applied to conviction by bills of attainder as well as felony convictions by jury trial).

43. *See* Maxeiner, *supra* note 24, at 779 (explaining that Framers prohibited bills of attainder as part of effort to follow colonial trend that abolished forfeiture as penalty in American law). The English common-law treatise writers all explained that bills of attainder triggered the mandatory penalty of forfeiture. *See* 2 HAWKINS, *supra* note 1, at 483 (assimilating English common-law treatise explaining forfeiture was mandatory penalty that attached upon legislative attainder). Because these English common-law treatises were the primary sources of legal scholars at the time of the framing and adoption of the Constitution, the Framers must have been aware of the forfeiture consequences of bills of attainder. *See* Payton v. New York, 445 U.S. 573, 594-595 at nn.36,38 (1980) (explaining that sources of Framers were English common-law treatise writers Coke, Hale, and Hawkins). Moreover, Chief Justice John Marshall has explained that the Framers of the Constitution believed that bills of attainder may affect the life of an individual or confiscate an individual's property, thus further illustrating that the Framers were aware that bills of attainder caused the penalty of forfeiture at English common law. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) *87 (1810) (explaining consequences of bills of attainder as death or confiscation of property).

44. *See* Act of July 31, 1789 §§ 12, 34, 36 (Customs Laws providing for seizure of property that persons used to smuggle goods into United States and for seizure of smuggled goods); Act of August 5, 1790 §§ 13, 22, 67 (providing for civil seizure of property that individuals used to violate Customs and Revenue Laws); 1 ANNALS OF CONG. 2146, 2156, 1168-1195 (J. Gales ed. 1789) (reprinting text of Customs and Revenue Laws).

45. *See* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (upholding congressional authority to authorize civil seizure of property that individual used illegally).

46. *See* An Act for the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess. § 24 (April 30, 1790) (prohibiting use of forfeiture as criminal penalty for all federal crimes); 1 ANNALS OF CONG. 2220 (J. Gales ed. 1789) (reprinting text of § 24 of Act of April 30, 1790).

47. *See* 18 U.S.C. § 3563 (1982) (stating that no felony conviction shall work corruption of blood or any forfeiture of estate).

48. *See* S. REP. No. 617, 91st Cong., 1st Sess. 80, 125, 160 (1969) (stating that by enacting § 1963 of RICO, Congress necessarily repealed by implication § 3563 of Title 18 of the United States Code); *supra* note 3 (detailing legislative history of § 1963 of RICO).

49. *See* Pub. L. No. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987 (repealing 18 U.S.C. § 3563 (1982)).

the treason clause of the Constitution.[50] Under this argument any criminal penalty that repeals section 3563, in effect, repeals a constitutional doctrine.[51] Section 1963, therefore, arguably constitutes an unconstitutional revival of the use of forfeiture.[52]

Despite Congress' express recognition that RICO's criminal penalty of forfeiture repeals section 3563, courts in the United States have rejected attacks on the constitutionality of RICO's forfeiture penalty.[53] In *United States v. Thevis*,[54] the United States District Court for the Northern District of Georgia considered whether section 1963's forfeiture penalty was constitutional.[55] Counts I and II of the indictment in *Thevis* charged the defendant with conducting the business of an enterprise through a pattern of racketeering activity in violation of section 1962(c) of RICO.[56] In *Thevis* the defendant, in moving to dismiss the RICO counts of the indictment, argued that the forfeiture penalty provisions of RICO were unconstitutional.[57] Specifically, the defendant in *Thevis* contended that the treason clause of the Constitution barred section 1963's forfeiture penalty.[58] The defendant in *Thevis* argued that the treason clause of the Constitution, in prohibiting forfeiture of a defendant's estate upon conviction of the defendant for treason, necessarily prohibits the penalty of forfeiture of estate for all crimes of a lesser degree.[59]

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50. *See infra* notes 95-118 and accompanying text (explaining that treason clause impliedly prohibits use of forfeiture as penalty for all other crimes and § 3563 is mere expression of this implication).

51. *See infra* notes 119-128 and accompanying text (explaining that because § 3563 states implications of treason clause, use of any penalty that repeals § 3563 offends U.S. Constitution).

52. *Id.*

53. *See infra* notes 54-83 and accompanying text (explaining that United States District Court for Northern District of Georgia and United States Court of Appeals for Fourth Circuit have rejected attacks on constitutionality of § 1963 of RICO).

54. 474 F. Supp. 134 (N.D. Ga. 1979).

55. *See* United States v. Thevis, 474 F. Supp. 134, 140-144 (N.D. Ga. 1979) (addressing defendant's arguments that § 1963's use of forfeiture as criminal penalty for violations of RICO violates fifth amendment's guarantee of due process, constitutes cruel and unusual punishment in violation of eighth amendment, and violates treason clause).

56. *See id.* at 136-137 (stating that count I of indictment charged defendant with substantive violation of § 1962(c) and count II of indictment charged defendant with conspiracy to violate § 1962(c)).

57. United States v. Thevis, 474 F. Supp. 134, 136 (N.D. Ga. 1979); *see infra* note 58 and accompanying text (explaining defendant's attack on constitutionality of § 1963's forfeiture penalty).

58. *Thevis*, 474 F. Supp. at 140. The defendant in *Thevis* claimed that § 1963 was unconstitutionally vague and that § 1963's forfeiture penalty constituted a cruel and unusual disproportionate penalty that violated the eighth amendment to the Constitution. *Id.* In addition to the defendant's fifth and eighth amendment arguments, the defendant alleged that § 1963's forfeiture penalty violated the treason clause. *Id.*; *see generally* Winters, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 HASTINGS CONST. L.Q. 451 (1987) (analyzing constitutionality of RICO forfeiture penalty under eighth amendment to Constitution).

59. *See Thevis*, 474 F. Supp. at 140 (stating defendant's argument that treason clause's

In addressing the defendant's arguments, the district court in *Thevis* first recognized that the Constitution prohibits the penalty of forfeiture of estate upon conviction of treason.[60] Moreover, the district court noted that the First Congress' prohibition of forfeiture of estate has barred forfeiture of a defendant's estate upon the defendant's conviction of a federal crime since 1790.[61] The district court further recognized that legislatures in the United States both before and after the ratification of the Constitution have enacted civil seizure statutes that permit government seizure of tainted property.[62] The district court in *Thevis* reasoned that, because statutes that permit the civil sanction of seizure result in forfeiture of tainted property, the First Congress' prohibition on forfeiture as a criminal penalty did not prohibit forfeiture of the instrumentalities of a crime.[63] Consequently, the district court in *Thevis* reasoned that because Congress limited section 1963's forfeiture penalty to a convicted offender's interest in a corrupted enterprise, section 1963 fell within the limits of the permissible seizure of tainted property.[64] The *Thevis* court, therefore, concluded that the treason clause of the Constitution and the First Punishment of Crimes Bill do not render the RICO criminal forfeiture penalty unconstitutional.[65]

Similarly, in *United States v. Grande*,[66] the United States Court of Appeals for the Fourth Circuit examined the legitimacy of section 1963's penalty of forfeiture in light of the defendant's constitutional attack.[67] In *Grande*, the United States District Court for the District of Maryland convicted five defendants of conducting racketeering activity in the city of Baltimore in violation of section 1962(c) of RICO.[68] After convicting

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prohibition on use of forfeiture as penalty for treason prohibits use of forfeiture as penalty for all felonious conduct).

60. *Id.*

61. *Id.*

62. *See id.* (acknowledging that legislative bodies in U.S. before and after adoption of United States Constitution consistently enacted seizure laws effecting property that offender used to commit a criminal offense).

63. *See id.* at 140-141 (reasoning that although § 3563 of Title 18 of United States Code barred imposition of forfeiture of estate as criminal penalty, no constitutional or statutory barrier prohibits limited forfeiture of property that offender used to violate criminal law).

64. *See id.* at 141 (reasoning that since § 1963 of RICO encompasses only property that offender used in committing substantive RICO offense, treason clause does not proscribe § 1963 forfeiture penalty).

65. *Id.*

66. 620 F.2d 1026 (4th Cir. 1980).

67. *See* United States v. Grande, 620 F.2d 1026, 1037-1039 (4th Cir. 1980) (addressing defendant's argument that treason clause of Constitution prohibits § 1963's imposition of estate forfeiture as criminal penalty).

68. United States v. Grande, 620 F.2d 1026, 1028-29 (4th Cir. 1980). In *Grande* several Baltimore city demolition contractors conspired with the Director of the Department of Housing and Community Development, Division of Construction and Building Maintenance, to ensure profits by underbidding other contractors. *Id.* Grande, the director, supplied

one defendant, Berg, of securing demolition contracts by violating RICO, the jury in *Grande* found that Berg had a fifty percent interest in a particular wrecking company.[69] Pursuant to section 1963 of RICO, the district court ordered Berg to forfeit his interest in the wrecking company.[70] Berg appealed the district court's order to the United States Court of Appeals for the Fourth Circuit.[71] The defendant in *Grande*, like the defendant in *Thevis*, contended that the treason clause of the Constitution rendered the RICO criminal forfeiture provision unconstitutional.[72]

In addressing the defendant's claims, the Fourth Circuit in *Grande* first noted that, if section 1963 of RICO revived forfeiture of estate, the section 1963 penalty would be repugnant to the treason clause of the Constitution which impliedly prohibits the use of forfeiture as a criminal penalty for all crimes.[73] Accordingly, the Fourth Circuit in *Grande* considered whether the RICO forfeiture penalty repealed the First Punishment of Crimes Bill, which codified the implication of the treason clause by prohibiting forfeiture of estate as a criminal penalty for all federal crimes.[74] In considering whether section 1963 repealed the First Punishment of Crimes Bill, the Fourth Circuit reviewed the English commom-law criminal penalty of forfeiture.[75] The Fourth Circuit recognized that the American

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information to the demolition contractors concerning the city's cost estimate for a given project. *Id.* The "ring" of demolition contractors used the information that Grande supplied them to submit low bids, each contractor taking a turn to submit the lowest bid. *Id.* The contractors paid Grande five percent of each contract. *Id.*

69. *See id.* at 1037 (stating that jury returned special verdict announcing that Berg had 50% interest in Buzz Berg Wrecking Co.).

70. *Id.* The jury in *Grande* rendered a special verdict, in which the jury found that one of the defendants, Berg, possessed a fifty percent interest in the Buzz Berg Wrecking Company, Inc. *Id.* Accordingly, the district court entered a restraining order that prevented Berg from transferring his interest in the company and ordering Berg to forfeit his interest to the state. *Id.* Berg appealed the district court's forfeiture order to the United States Court of Appeals for the Fourth Circuit. *Id.* On appeal, Berg challenged the constitutionality of § 1963's forfeiture provisions. *Id.*

71. *Id.*

72. *Id.* In *Grande* the defendant challenged § 1963 of RICO on two grounds. *Id.* First, the defendant contended that the treason clause of the Constitution prohibits the imposition of forfeiture as a criminal penalty for all felonies because prohibiting the imposition of forfeiture as a penalty for treason impliedly prohibits imposition of forfeiture as a penalty for all other crimes. *Id.* The defendant also challenged § 1963's forfeiture penalty by arguing that § 1963 of RICO violates the eighth amendment's prohibition against cruel and unusual punishment. *Id.* at 1039; *see generally* Winters, *supra* note 58, at 470-484 (analyzing constitutionality of RICO forfeiture penalty under eighth amendment cruel and unusual punishment standards).

73. *Grande*, 620 F.2d at 1038. The Fourth Circuit in *Grande* recognized that to hold that the use of forfeiture as a criminal penalty is not legitimate for treason but is legitimate for lesser felony offenses would be irrational. *Id.* Accordingly, the Fourth Circuit determined that if § 1963's forfeiture penalty revived English common-law forfeiture of estate, the RICO penalty would be unconstitutional. *Id.*

74. *See id.* at 1038-1039 (examining whether § 1963 of RICO repealed § 3563 of Title 18 of the United States Code).

75. *Id.* The Fourth Circuit in *Grande* noted that under English common law, the

colonies rejected the English use of forfeiture as a criminal penalty.[76] The *Grande* court further noted that consequently the Framers and members of the First Congress prohibited the use of English common-law forfeiture as a criminal penalty in the United States.[77] The Fourth Circuit emphasized that the First Punishment of Crimes Bill supplemented the treason clause's prohibition on the use of forfeiture as a criminal penalty by expressly prohibiting the use of forfeiture as a criminal penalty for all federal crimes.[78] From this historical background, the Fourth Circuit in *Grande* determined that the Framers and the First Congress intended that the treason clause of the Constitution and section 24 of the First Punishment of Crimes Bill would prohibit the forfeiture of a convicted offender's entire estate, as well as the total disinheritance of the offender's heirs.[79] The Fourth Circuit further reasoned that Congress limited section 1963's forfeiture penalty to an offender's interest in a corrupted enterprise.[80] The *Grande* court determined that the object of section 1963 was the forfeiture of the instrumentalities of a crime, and that no significant differences exist between section 1963's criminal penalty of forfeiture and civil seizure sanctions by the government against tainted property.[81] The Fourth Circuit reasoned that, because the Framers and the First Congress intended to prohibit only the forfeiture of an offender's entire estate and not an offender's limited interest in a corrupted enterprise, section 1963's forfeiture penalty did not unconstitutionally repeal section 24 of the First Punishment of Crimes Bill.[82] Consequently, the Fourth Circuit in *Grande* concluded that section 1963 did not unconstitutionally revive the use of forfeiture as a criminal penalty that the treason clause of the Constitution prohibits.[83]

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forfeiture penalty defined felony offenses. *Id.* The Fourth Circuit further noted that the English common-law forfeiture penalty forced a defendant to forfeit all the defendant's real and personal property as a consequence of the defendant's felony conviction. *Id.*

76. *See id.* at 1039 (acknowledging that forfeiture found little favor in American colonies).

77. *See id.* (noting that in 1787 Constitution banned imposition of forfeiture of estate for treason and that three years later First Congress abolished penalty of forfeiture for all convictions).

78. *See id.* at 1037-38 (recognizing that § 3563 of Title 18 of United States Code supplemented treason clause's prohibition on forfeiture penalty for treason).

79. *See id.* at 1039 (stating that treason clause and subsequent First Congress statute of 1790 contemplated only broad forfeiture that completely disinherited offender's heirs and resulted in total confiscation of offender's estate).

80. *See id.* (stating that § 1963 seeks to accomplish forfeiture of instrumentalities of crime).

81. *See id.* (stating that fact that § 1963 penalty of forfeiture operates upon adjudication of guilt of defendant whereas seizure is civil action against property is of little significance). The Fourth Circuit in *Grande* reasoned that because RICO's use of forfeiture as a criminal penalty is effectively the same as civil seizure of property that an offender used illegally, no significant difference exists between criminal forfeiture and civil seizure. *Id.*

82. *Id.*

83. *Id.*

The reasoning of both the United States District Court for the Northern District of Georgia in *Thevis* and the United States Court of Appeals for the Fourth Circuit in *Grande* is flawed.[84] Primarily, both courts underestimated the significance of the historical background behind the Framers' and the First Congress' prohibition on forfeiture as a criminal penalty in the formative years of American law.[85] Moreover, both courts misinterpreted the significant distinction between permissible civil seizure and the outlawed criminal penalty of forfeiture.[86] Last, both courts plainly misunderstood the scope of RICO forfeiture.[87]

First, both the *Thevis* and the *Grande* courts underestimated the significance of the constitutional prohibition on the use of forfeiture as a criminal penalty for treason and the First Congress' subsequent prohibition on the use of forfeiture as a penalty for federal criminal offenses.[88] The Framers of the Constitution expressly prohibited the national government from punishing treason by forcing a convicted traitor to forfeit his property to the state.[89] Very little debate occurred over the treason clause of the Constitution.[90] The debate that did occur reveals concerns over the definition of the crime of treason, not over the punishment for treason.[91]

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84. *See infra* notes 85-87 and accompanying text (explaining why reasoning of *Grande* court and *Thevis* court is unsound).

85. *See infra* notes 88-127 and accompanying text (examining historical significance of treason clause and First Punishment of Crimes Bill of April 30, 1790).

86. *See infra* notes 128-136 and accompanying text (examining significance of historical distinction between civil seizure and use of forfeiture as criminal penalty).

87. *See infra* notes 137-148 and accompanying text (examining broad scope of criminal forfeiture penalty in § 1963 of RICO).

88. *See supra* notes 10-14 and accompanying text (explaining that Framers and members of First Congress rejected imposition of forfeiture as criminal penalty); *infra* notes 89-127 (explaining significance of Framers' and First Congress members' rejection of imposition of forfeiture as criminal penalty).

89. *See* U.S. CONST. Art. III, § 3, cl. 2 (prohibiting use of forfeiture as punishment for crime of treason). The treason clause of the Constitution provides that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." *Id.*; *see supra* notes 38-39 and accompanying text (discussing treason clause of Constitution).

90. *See* J. MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 430-435 (recounting debates over treason clause in Constitutional Convention).

91. *See id.* (explaining debate over definition of treason during Constitutional Convention). The debates during the Constitutional Convention reflect the Framers' concern over adopting the narrow English treason definition of the Statute of 25 Edward III. *Id.*; *see generally* HALE'S PLEAS OF THE CROWN *86 (advocating return to definition of treason in Statute of 25 Edward III to avoid political use of treason penalties). The Statute of 25 Edward III defined treason in part as "the levying of war against the king" and "the adhering to the king's enemies within the land or without, and declaring the same by some overt-act." *Id.* at 91. The debate over the treason clause during the Constitutional Convention centered on the meaning of the phrase "giving them aid and comfort" and the overt-act requirements of the constitutional treason definition that the Framers proposed. MADISON, *supra* note 90, at 431-433. Specifically, the Framers were concerned whether the Convention's proposed definition of treason comported with the definition of the Statute of 25 Edward III that Hale advocated. *Id.*

James Madison, however, recognized the importance of limiting the punishment for treason in the Constitution to prevent the national government from using treason convictions to eliminate political opponents of the government.[92] Madison and all the other Framers that spoke on the issue believed that, unless the Constitution specifically defined the treason crime and significantly curtailed the punishment for the offense of treason, the government in power would use treason convictions to eliminate political opponents of the government by sentencing the opponents to death and forcing them to forfeit their estates to the government.[93] Consequently, the treason clause of the Constitution prohibited forfeiture as a penalty for treason.[94]

Courts and scholars agree that prohibiting the imposition of forfeiture as a penalty for treason necessarily prohibits the imposition of forfeiture as a penalty for all lesser offenses.[95] Moreover, courts and scholars

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92. *See* THE FEDERALIST No. 43, at 219 (J. Madison) (Bantam Classic ed. 1982) (stating that narrow definition of treason was necessary to prevent political holders of power from falsely using treason offense to convict innocent political opponents); *infra* note 93 and accompanying text (explaining Madison's opinion in FEDERALIST No. 43).

93. *See id.* (explaining reasons for Framers' narrow definition of treason in Constitution). The text of the debates during the Constitutional Convention refers directly to the importance of defining treason narrowly in the Constitution as Hale advocated in his discussion of the Statute of 25 Edward III. MADISON, *supra* note 90, at 430. In advocating a return to the Statute of 25 Edward III in England, Hale emphasized the necessity that any definition of the treason crime provide a fixed offense with definite limits and boundaries. HALE'S PLEAS OF THE CROWN *86. Hale recognized that departing from the narrow definition of the treason crime in the Statute of 25 Edward III could result in any crime becoming a treason. *Id.* Hale emphasized further that expanding the crime of treason beyond the letter of the law "admits of no limits or bounds, but runs as far as the wit and invention of accusers." *Id.* at 87. Madison's justification for defining treason in the Constitution reflects Hale's concerns. *See* FEDERALIST No. 43, at 219 (J. Madison) (Bantam Classic ed. 1982) (explaining that Framers defined treason in Constitution to avoid malicious prosecutions attempting to extinguish political opposition). In explaining why the Framers defined treason in the Constitution, Madison asserted that fabricated treason accusations have constituted the instruments by which volatile political factions historically have attacked each other's political power base. *Id.* Madison, therefore, shared Hale's concern that the political factions in power would define treason broadly to eliminate their political opponents through punishment by death and confiscation of property. *Id.* Accordingly, Madison and the other Framers not only defined treason in the text of the Constitution, but prohibited the use of forfeiture as a penalty for the crime to ensure further against possible political abuse of fabricated treason accusations. *Id.*

94. *See* U.S. CONST. art. III, § 3, cl. 2 (stating that no conviction of treason shall work corruption of blood or forfeiture).

95. *See* Hanauer v. Doane, 79 U.S. 342, 347 (1870) (stating that no crime is greater than treason); United States v. Grande, 620 F.2d 1026, 1038 (4th Cir. 1980) (determining that treason clause rationally prohibits use of forfeiture of estate for all other crimes); 1 BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 603 (6th ed. 1877) (explaining that three gradation of criminal offenses from highest to lowest are treason, felony, and misdemeanor); HALE'S PLEAS OF THE CROWN *86 (stating that treason is highest of all crimes and requires most severe penalties); MINOR, EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS 16 (1894) (explaining three gradations of offenses and stating that treason is greatest of crimes

generally perceive treason as the most egregious crime an individual can commit.[96] Consequently, the treason crime warrants the most severe sanctions that the law permits.[97] Thus, if the law does not permit a certain penalty for treason, the law cannot permit use of that penalty for any other crime.[98] Accordingly, courts and scholars have interpreted the treason clause as prohibiting the English common-law use of forfeiture for all crimes.[99]

Like courts and scholars today, the First Congress of the United States immediately recognized that forfeiture as a criminal penalty was not a legitimate criminal punishment.[100] As a result, in drafting the First Punishment of Crimes Bill in 1790, the First Congress expressly rejected the use of forfeiture as a criminal penalty.[101] The United States Senate first appointed a committee to prepare a Punishment of Crimes Bill on May 13, 1789.[102] The Senate committee presented and read the first Punishment of Crimes Bill (S-2) on July 28, 1789.[103] Originally, S-2 defined treason and provided for punishment of traitors by both death and forfeiture to

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warranting most severe of punishments); PERKINS AND BOYD, CRIMINAL LAW 13-15, 498-499 (3d ed. 1982) (explaining that treason is highest grade of offenses and that no crime is greater than treason).

96. *See supra* note 95 (citing significant authority that treason is highest degree of offense and greatest of all crimes).

97. *See* HALE'S PLEAS OF THE CROWN *86 (stating that treason is greatest crime against faith, duty, and human society and requires most severe penalties); MINOR, *supra* note 95, at 16 (stating that treason requires most severe of all punishments).

98. *See* United States v. Grande, 620 F.2d 1026, 1038 (4th Cir. 1980) (stating that punishing lesser crimes than treason with penalty that Constitution expressly prohibits for treason is plainly irrational). Because treason is the highest degree of offense warranting the most severe penalties that law can provide, prohibiting a certain punishment for treason necessarily prohibits implementing the punishment for all other crimes. *See supra* notes 95-96 and accompanying text (explaining that treason is greatest of all crimes and is highest degree of criminal offense); *supra* note 97 and accompanying text (explaining that treason warrants most severe punishment law can provide).

99. *See supra* notes 95-98 and accompanying text (explaining common perception of courts and scholars that government cannot punish any crime with penalty that Constitution prohibits for treason).

100. *See infra* notes 101-13 and accompanying text (explaining that First Congress absolutely rejected use of forfeiture as criminal penalty); *supra* notes 37-41 and accompanying text (explaining that First Congress' prohibition on use of forfeiture as criminal penalty followed established trend in colonial jurisprudence).

101. *See* An Act For the Punishment of Certain Crimes Against the United States, 1st Cong., 2nd Sess., Act of April 30, 1790 § 24 (prohibiting use of forfeiture as criminal penalty for all federal crimes); 1 ANNALS OF CONG. 2220 (J. Gales ed. 1789) (reproducing First Punishment of Crimes Bill of 1790).

102. 3 L. DEPAUW, DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 44, 51, 67 (Johns Hopkins University Press 1977). The Senate Committee to draft the first Punishment of Crimes Bill consisted of five members who were also Framers of the Constitution. *See id.* (listing members of Senate Committee to draft Punishment of Crimes Bill); MADISON, *supra* note 90, at lxxxiii-lxxxv (listing members of Constitutional Convention).

103. 3 DEPAUW, *supra* note 102, at 98.

the state of the traitor's real and personal estate.[104] In amending the treason section of S-2, the Senate eliminated the entire forfeiture penalty and left only the death penalty as punishment for treason.[105] In addition, the third section of S-2 punished wilful murder by putting the offender to death and forcing the offender to forfeit his real and personal estate.[106] The Senate, however, amended section three, as the Senate amended the treason section of S-2, to eliminate completely the forfeiture penalty and left only the death penalty for wilful murder.[107] Similarly, the Senate eliminated the forfeiture penalty from every other section of S-2, leaving only the death penalty or a fine as punishment for federal crimes.[108] Finally, section 26 of S-2 originally stated

> *Provided Always* (emphasis added), And Be It Enacted, That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, nor *shall any of the said offenses, murder and forgery excepted, occasion* (emphasis added) any forfeiture of estate, *longer than for the life of the person or persons attainted* (emphasis added).[109]

The Senate amended section 26 by deleting the words "shall any of the said offenses, murder and forgery excepted, occasion" and the words "longer than for the life of the person or persons attainted," which resulted in the absolute, express statutory prohibition of forfeiture as a

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104. 6 C. BICKFORD AND H. VEIT, DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1721 (Johns Hopkins University Press 1986).

105. *Id.* at 1721 n.5. Section 1 of the first Punishment of Crimes Bill, S-2, defined treason in exactly the same terms as the treason clause of the Constitution. *Id.* at 1720. The Senate Committee amended § 1's penalty for treason by striking the phrase "shall forfeit to the use of the United States all the estate real and personal, which he or they had at the time of committing the treason aforesaid." *Id.* at 1721 n.5.

106. *Id.* at 1721.

107. *Id.* at 1721 n.9. The Senate Committee amended the punishment provision for wilful murder in § 3 of S-2 by striking the phrase "and forfeit all the estate both real and personal, which he or they had at the time of committing the crime." *Id.*

108. *See id.* at 1722-25 (detailing original text of S-2 and Senate Committee amendments to the Bill). Section 8 of the first Punishment of Crimes Bill (S-2) imposed the penalty of forfeiture upon all defendants guilty of any treason, murder, robbery, or other felony on the high seas. *Id.* at 1722. The Senate Committee amended the penalty provision of § 8 by striking the phrase "and forfeit his estate to the use of the United States." *Id.* at 1723 n.20. Section 9 of S-2 originally prescribed the forfeiture penalty for piracy as well. *Id.* at 1723. The Senate Committee, however, amended § 9 by striking the phrase "and forfeit all his estate to the United States." *Id.* at 1723 n.22. In addition to § 8 and § 9, § 10 of S-2 originally imposed the penalty of forfeiture upon those aiding and abetting any treason, murder, robbery, or other felony on the high seas. *Id.* at 1723. The Senate Committee, however, amended the penalty provision of § 10 by striking the phrase "and the forfeiture of his estate in like manner as the principals in such piracies." *Id.* at 1723 n.25. Last, the Senate Committee amended the penalty provision for forgery and counterfeiting in § 14 of S-2 by striking the phrase "and forfeit to the use of the United States the whole of his real and personal estate." *Id.* at 1725 n.47.

109. *Id.* at 1729.

penalty for any crime.[110] S-2 became positive law in the form of S-6, an Act for the Punishment of Certain Crimes against the United States, on April 30, 1790.[111] Section 26 of S-2, as amended, became section 24 of S-6, which Congress later codified in the United States Code at section 3563 of Title 18.[112] As a result, the treason clause of the Constitution, together with section 3563, prohibited forfeiture as a criminal penalty in the United States until Congress implicitly repealed section 3563 in 1970.[113]

Significantly, section 3563 merely expressed the constitutional mandate of the treason clause.[114] Because treason is the most severe crime an individual can commit and because treason warrants the most severe sanctions the law can provide, to prohibit a penalty for treason impliedly prohibits use of the penalty for all other crimes.[115] The treason clause of the Constitution prohibits the use of forfeiture as a punishment for

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110. *Id.* at nn.79-80.

111. An Act for the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess. Act of April 30, 1790 (S-6). When the First Senate reconvened for the second session, the Senate appointed a new committee to draft a Punishment of Crimes Bill on January 26, 1790. 3 DEPAUW, *supra* note 102, at 227. The Senate Committee consisted of five members, and four of the members were also Framers of the Constitution. *See id.* (listing members of second committee to draft Punishment of Crimes Bill); MADISON, *supra* note 90, at lxxxiii-lxxxv (listing members of Constitutional Convention of 1787). On the same day that the Senate appointed the members of the Committee, the Committee presented the second Punishment of Crimes Bill (S-6), an amended version of S-2. *Compare* An Act For the Punishment of Certain Crimes Against the United States, 1st Cong., 1st Sess. Act of April 30, 1790, *reprinted in* 1 ANNALS OF CONG. 2215-2222 (J. Gales ed. 1789) (providing final text of S-6) *with* 6 BICKFORD AND VEIT, *supra* note 104, at 1720-1733 (providing text of S-2, first Punishment of Crimes Bill, Act of July 1, 1789). The only Senate debate surrounding S-6 concerned whether Congress should permit a surgeon to dissect for medical purposes the body of an executed, convicted murderer. DEPAUW, *supra* note 102, at 230-231; 1 ANNALS OF CONG. 1519-1522 (J. Gales ed. 1789). The House considered S-6 from April 5, 1790 to April 9, 1790. DEPAUW, *supra* note 102, at 357-62. By deleting the phrase "by being hanged" in all sections of S-6 that prescribed the death penalty, the House of Representatives adjusted the language of S-6 only slightly. *Id.* at 286-87. The House did not amend the language of the Act that expressly prohibited the use of forfeiture as a criminal penalty. *Id.* The Senate agreed to the House of Representatives' minor amendments to S-6, and President Washington signed the bill into law on April 30, 1790. *Id.* at 286-287, 295.

112. *See* 18 U.S.C. § 3563 (1982) (originally enacted as Act of April 30, 1790, § 24) (stating that no conviction or judgment shall result in corruption of blood or forfeiture of estate).

113. *See* United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) (recognizing that use of forfeiture as criminal penalty was unknown in federal criminal law until Congress enacted § 1963(a) of RICO in 1970); 1 BISHOP, *supra* note 95, at § 920 (stating that as result of treason clause and First Punishment of Crimes Bill, use of forfeiture as criminal penalty is unknown in United States); S. REP. No. 617, 91st Cong., 1st Sess. 79-80 (1969) (legislative history of RICO stating that use of forfeiture as criminal penalty is unprecedented in American law); *id.* at 80 (stating that § 1963 impliedly repeals § 3563).

114. *See supra* notes 95-99 and accompanying text (explaining constitutional mandate of treason clause); *supra* notes 100-113 (explaining how First Congress followed mandate of treason clause and prohibited forfeiture for all lesser crimes); *infra* notes 115-118 (same).

115. *See supra* notes 95-99 and accompanying text (explaining implied meaning of treason clause of Constitution).

convicted traitors.[116] Section 3563's express prohibition on the use of forfeiture as punishment for any federal crime, therefore, expressly stated the treason clause's implied doctrine that use of forfeiture as a criminal penalty is not constitutional.[117] Any repeal of section 3563, therefore, is necessarily repugnant to the implied meaning of the treason clause of the Constitution.[118]

The Fourth Circuit in *Grande* recognized that any repeal of section 3563 would be unconstitutional, but the Fourth Circuit nevertheless determined that RICO's criminal forfeiture penalty did not repeal section 3563's prohibition of forfeiture as a criminal penalty.[119] The Fourth Circuit's determination that section 1963 of RICO did not repeal section 3563 and revive English common-law forfeiture was erroneous.[120] The Senate Committee on the Judiciary, in its report on the legislative history of RICO, stated that Congress derived section 1963's forfeiture penalty directly from the same English common-law criminal penalty of forfeiture that section 3563 expressly prohibited.[121] In fact, the Senate Report indicated that Congress believed that section 1963 "revived" the English common-law criminal penalty of forfeiture.[122] Accordingly, when Congress enacted

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116. *See* U.S. CONST. art. III, § 3, cl. 2 (stating that no conviction shall work corruption of blood or forfeiture).

117. *See supra* notes 95-99 and accompanying text (explaining that treason clause of Constitution prohibits use of forfeiture as criminal penalty for all crimes less serious than treason); An Act For the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess. Act of April 30, 1790 § 24 (following implied mandate of treason clause by expressly prohibiting use of forfeiture as criminal penalty for all crimes); 18 U.S.C. § 3563 (1982) (codifying in United States Code § 24 of First Punishment of Crimes Bill).

118. *See supra* notes 95-99 and accompanying text (explaining that treason clause impliedly prohibits use of forfeiture as criminal penalty for all lesser crimes).

119. *See* United States v. Grande, 620 F.2d 1026, 1038-39 (4th Cir. 1980) (discussing effect of forfeiture penalty in § 1963 of RICO on § 3563 of Title 18 of United States Code); *supra* notes 66-83 and accompanying text (explaining reasoning of Fourth Circuit in *Grande*).

120. *See infra* notes 121-27 (explaining that § 1963 of RICO repeals § 3563 of Title 18).

121. *See* S. REP. No. 617, 91st Cong., 1st Sess. 79-80, 124-125, 160 (1969) (providing legislative history of § 1963 of RICO). In its report, the Senate Committee on the Judiciary stated that Congress' use of forfeiture as a criminal penalty in § 1963 was an innovative new penalty that Congress derived from the English common law. *Id.* at 79. The Senate Committee on the Judiciary recognized that the use of forfeiture as a criminal penalty was an English common-law concept that was unprecedented in American law until Congress drafted RICO. *Id.* at 80. Moreover, the United States Department of Justice recognized that § 1963's forfeiture penalty derived from English common-law practices that never existed in the United States. *See id.* at 121-126 (reproducing letter of Deputy Attorney General Richard G. Kleindienst to Senator McClellan of the Senate Committee on the Judiciary, August 11, 1969).

122. *See id.* (stating that Congress derived imposition of forfeiture as criminal penalty in § 1963 of RICO from English common law). The report of the Senate Committee on the Judiciary on § 1963 of RICO expressly stated that Congress believed that Congress was reviving the English common-law use of forfeiture as a criminal penalty by enacting § 1963. *Id.* at 80. The United States Department of Justice also realized that RICO § 1963 revived the English common-law imposition of forfeiture as a criminal penalty. *See id.* at 120-126

RICO, Congress recognized that the RICO criminal penalty of forfeiture impliedly repealed section 3563.[123] Indeed, the Senate Report stated that "18 U.S.C. § 3563, insofar as it is applicable to forfeiture is no longer the law."[124] The fact that Congress expressly repealed section 3563 when amending RICO in 1984 further evidences the *Grande* court's erroneous determination that RICO section 1963 does not repeal section 3563.[125] Moreover, both the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeals for the Second Circuit have recognized that section 1963 necessarily repealed section 3563's prohibition on the criminal penalty of forfeiture.[126] Unlike the *Grande* court, however, these courts and Congress failed to recognize that, because section 3563 merely expressed the necessary implications of the treason clause, any penalty that repeals section 3563 would be repugnant to the Constitution.[127]

In addition to underestimating the historical background of the Framers' and First Congress' prohibition on the use of forfeiture as a criminal penalty, the *Grande* court ignored the significant historical distinction between permissible civil seizure and the outlawed criminal penalty of forfeiture.[128] Both the district court in *Thevis* and the Fourth Circuit in *Grande* erroneously relied on the civil seizure sanction to justify section

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(reproducing August 11, 1969 letter of Deputy Attorney General Richard G. Kleindienst to Senator McClellan of the Senate Committee on the Judiciary).

123. *See id.* (stating that by implication § 1963 of RICO repealed § 3563 of Title 18). The Senate Committee's report on RICO recognized that § 3563 of Title 18 prohibited the English common-law use of forfeiture as a criminal penalty. *Id.* Furthermore, the report acknowledged that § 1963 of RICO revived forfeiture as a criminal penalty. *Id.* at 80. Accordingly, the Senate Committee on the Judiciary noted that section 1963(a) repealed 18 U.S.C. § 3563 by implication. *Id.* The Senate Committee on the Judiciary determined that "18 U.S.C. § 3563, insofar as it is applicable to forfeiture is no longer the law." *Id.* at 160. The United States Department of Justice reached the same conclusion as the Senate Committee on the Judiciary. *See id.* at 120-126 (reproducing letter of August 11, 1969 from Deputy Attorney General Richard G. Kleindienst to Senator McClellan of the Senate Committee on the Judiciary). Deputy Attorney General Richard G. Kleindienst determined that because § 3563 of Title 18 had prohibited the use of forfeiture as a criminal penalty in the United States from 1789 to 1969, the revival of the English common-law use of forfeiture as a criminal penalty in § 1963 of RICO repealed § 3563 by implication. *Id.* at 124-125.

124. S. REP. No. 617, 91st Cong., 1st Sess. 160 (1969).

125. *See* Pub. L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987 (expressly repealing § 3563 of Title 18).

126. *See* United States v. Huber, 603 F.2d 387, 396 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (stating that by implication § 1963 of RICO repealed § 3563 of Title 18); United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) (recognizing that use of forfeiture as criminal penalty is unprecedented in United States, and stating that 91st Congress recognized that it was repealing § 3563 by passing § 1963).

127. *See supra* note 118 and accompanying text (explaining that any repeal of § 3563 is repugnant to treason clause of Constitution).

128. *See infra* notes 129-136 and accompanying text (explaining significant historical distinction between civil seizure and use of forfeiture as criminal penalty).

1963's imposition of forfeiture as a penalty for violations of RICO.[129] Both courts drew analogies between the forfeiture provision in section 1963 and the civil "forfeiture" sanction of state seizure of tainted property.[130] Analogizing the criminal penalty of forfeiture to civil seizure, however, is inappropriate.[131] Civil actions by the United States government against guilty property have been a part of American law since the colonization of the United States.[132] Forfeiture under section 1963, in contrast, is a mandatory criminal penalty, unprecedented in American jurisprudence, that the government imposes upon a defendant upon convicting the defendant of a racketeering felony offense.[133] Section 1963 is not a civil sanction.[134] Both the Fourth Circuit in *Grande* and the district

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129. *See* United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980) (stating that no significant difference existed between use of forfeiture as criminal penalty and civil seizure); United States v. Thevis, 474 F. Supp. 134, 140 (N.D. Ga. 1979) (stating that imposition of forfeiture as criminal penalty in § 1963 of RICO resembles civil seizure of instrumentalities of crime); *supra* notes 80, 81 and accompanying text (explaining Fourth Circuit's attempt to analogize civil seizure to RICO forfeiture in *Grande*); *supra* notes 62-64 and accompanying text (explaining *Thevis* court's analogy of civil seizure to RICO forfeiture); *supra* notes 20-28 and accompanying text (explaining significant historical distinction between civil seizure and use of forfeiture as criminal penalty).

130. *See Grande*, 620 F.2d at 1039 (stating that forfeiture penalty in § 1963 of RICO is equivalent to civil seizure and that no significant difference exists between use of forfeiture as criminal penalty and civil seizure); *Thevis*, 474 F. Supp. at 140 (comparing use of forfeiture as criminal penalty in § 1963 of RICO to civil seizure); *supra* notes 80-81 and accompanying text (explaining Fourth Circuit analogy in *Grande*); *supra* notes 62-64 and accompanying text (explaining *Thevis* court's comparison).

131. *See infra* notes 132-136 (explaining that analogy of civil seizure to criminal use of forfeiture is unfounded).

132. *See* C.J. Hendry Co. v. Moore, 318 U.S. 133, 137-153 (1943) (explaining that American colonists practiced civil seizure and that civil seizure constituted part of common law in America at time of adoption of Constitution); J.W. Goldsmith-Grant Co. v. United States, 254 U.S. 505, 510-513 (1921) (explaining history and nature of civil seizure); The Palmyra, 25 U.S. 12 Wheat. 1, *14-*16 (1827) (distinguishing civil seizure from use of forfeiture as criminal penalty and explaining civil seizure sanction); Customs and Revenue Acts, 1st Cong., 1st Sess. Act of July 31, 1789 §§ 12, 36 (enacting civil seizure sanctions for violation of customs laws); Customs and Revenue Acts, 1st Cong., 2d Sess. Act of August 4, 1790 §§ 13, 22, 27-28, 67 (providing for civil seizure of articles that violated the customs and revenue laws); Maxeiner, *supra* note 24, at 779-780 (explaining early use of civil seizure in United States); Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CR. L. REV. 379, 380 (explaining that civil seizure was in use at time Congress enacted RICO); Winters, *supra* note 58, at 459-460 (explaining that use of civil seizure has existed throughout United States' legal history); *supra* notes 44-45 and accompanying text (explaining that civil seizure always has constituted part of American law).

133. *See* 18 U.S.C. § 1963(a) (1982) (requiring forfeiture as mandatory criminal penalty upon conviction under § 1962 of RICO of racketeering felony); *compare* 18 U.S.C. § 1963(a) (1982) (describing RICO forfeiture as criminal penalty that is mandatory upon conviction of racketeering offense) *with supra* notes 20-28 (explaining that civil seizure is civil action against tainted property completely independent of criminal proceeding).

134. *See* 18 U.S.C. § 1963(a) (1982) (requiring courts to impose mandatory criminal penalty of forfeiture upon finding that criminal defendant is guilty of RICO racketeering offense).

court in *Thevis*, therefore, incorrectly analogized RICO forfeiture to civil seizure.[135] Such an analogy cannot justify RICO forfeiture.[136]

Similarly, the Fourth Circuit in *Grande* and the United States District Court for the Northern District of Georgia in *Thevis* wrongly determined that the scope of RICO forfeiture, although criminal in nature, is as narrow as the scope of the civil forfeiture sanction of seizing the instrumentalities of a crime.[137] Civil forfeiture is a civil action by the government against only those specific articles that an individual used illegally, as in the example of a yacht used to smuggle narcotics into the United States.[138] The civil sanction is unrelated to any criminal proceeding, and seizure extends to only the specific articles that the law considers tainted by illegal use.[139] The illegal use of the property triggers the seizure.[140]

RICO forfeiture, in contrast, encompasses more than property that a criminal offender used illegally.[141] RICO forfeiture is a criminal penalty that extends to untainted property.[142] For example, a shopkeeper may conduct an honest business for forty years, but subject his entire business to RICO forfeiture by committing a single act of mail fraud.[143] Under

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135. *See supra* notes 20-28 and accompanying text (explaining that civil seizure is significantly distinct from criminal forfeiture and that civil seizure is completely unrelated to imposition of forfeiture as criminal penalty). Although the Fourth Circuit in *Grande* determined that the distinction between imposition of forfeiture as a criminal penalty and civil seizure of the instrumentalities of a crime is insignificant, the Framers of the Constitution and members of the First Congress made this very same distinction in determining permissible and impermissible uses of forfeiture by enacting civil seizure sanctions and prohibiting use of forfeiture as a criminal penalty. *See* U.S. CONST. art. III, § 3, cl. 2 (prohibiting use of forfeiture as criminal penalty for treason); Customs and Revenue Act, 1st Cong., 1st Sess. Act of July 31, 1789 §§ 12, 36 (providing civil seizure sanctions for violating customs laws); Customs and Revenue Act, 1st Cong., 2d Sess. Act of August 4, 1790 §§ 13, 22, 27-28, 67 (providing civil seizure sanctions for violating customs laws); An Act For the Punishment of Certain Crimes Against the United States, 1st Cong., 2d Sess. Act of April 30, 1790 § 24 (prohibiting use of forfeiture as criminal penalty for all federal crimes); *supra* notes 88-127 (explaining historical significance of treason clause and First Congress' Act of April 30, 1790).

136. *See supra* notes 128-135 and accompanying text (explaining that analogy of civil seizure to use of forfeiture as criminal penalty is unfounded).

137. *See* United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980) (determining that RICO forfeiture encompasses only forfeiture of instrumentalities of crime); United States v. Thevis, 474 F. Supp. 134, 141 (N.D. Ga. 1979) (determining that RICO forfeiture includes only property that offender used to commit crime); *infra* notes 138-48 (explaining that § 1963 of RICO extends beyond mere instrumentalities of crime).

138. *See supra* notes 25-27 and accompanying text (providing example of civil seizure).

139. *See supra* notes 20-28 and accompanying text (explaining nature of civil seizure sanction).

140. *Id.*

141. *See* 18 U.S.C. § 1963(a)(3) (1982 & Supp. 1986) (extending scope of RICO forfeiture penalty to profits and to property acquired legitimately with those profits).

142. *Id.*

143. *See* Taylor, *supra* note 132, at 389-90 (explaining shopkeeper example); Winters, *supra* note 58, at 473 (describing shopkeeper example); Note, *supra* note 24, at 1935 (using shopkeeper example).

section 1963, the convicted shopkeeper would forfeit all property that the shopkeeper obtained with profits that the shopkeeper derived from his business, now tainted by the shopkeeper's act of mail fraud.[144] Such property, however, might include personal property completely untainted by illegal use in the crime.[145] The shopkeeper's forfeitable interest could extend to legitimately acquired assets that constituted the shopkeeper's entire life's earnings.[146] The attempts of the *Thevis* court and the *Grande* court to justify RICO forfeiture by emphasizing that the RICO penalty extends only to the instrumentalities of a crime is plainly wrong.[147] RICO forfeiture is a criminal penalty that can cause a convicted offender to forfeit untainted assets that may constitute the offender's life's earnings.[148]

Although American jurisprudence since the early colonial period has embraced the English common-law theory that allows a government to seize the instrumentalities of a crime, the imposition of forfeiture as a criminal penalty was unknown to American law until Congress enacted section 1963 of RICO in 1970.[149] Section 1963 first impliedly then expressly repealed the First Congress' 180 year-old prohibition on the use of forfeiture as a criminal penalty.[150] Because the First Congress' prohibition on the use of forfeiture as a criminal penalty merely expressed the necessary implications of the treason clause, any repeal of this prohibition is nec-

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144. *See* 18 U.S.C. § 1963(a)(3) (1982 & Supp. 1986) (extending RICO forfeiture to all property that offender obtains directly or indirectly with proceeds from tainted enterprise). Although § 1963(a)(3) of RICO appears to apply only to fruits of a crime, in reality, the scope of § 1963(a)(3) extends beyond the fruits of a crime; for example, a shopkeeper who generates a minimal amount of business profits through committing mail fraud subjects all property that the shopkeeper obtains with profits from his business to RICO forfeiture, despite the fact that only a small percentage of those profits resulted from the RICO violation of mail fraud. *See* Note, *supra* note 24, at 1935 (explaining that in shopkeeper example, RICO forfeiture extends to shopkeeper's entire life's earnings).

145. *See* Note, *supra* note 24, at 1935 (explaining that RICO forfeiture extends to legitimately acquired assets).

146. *See id.* (explaining that shopkeeper who commits single instance of business fraud subjects entire life's earnings to RICO forfeiture).

147. *See supra* notes 138-146 and accompanying text (explaining that RICO forfeiture encompasses more than instrumentalities of crime by extending to untainted property as well).

148. *See supra* notes 141-147 (explaining broad scope of RICO forfeiture); *compare supra* notes 6-7 and accompanying text (explaining that RICO forfeiture is mandatory criminal penalty that can cause forfeiture of offender's life's earnings) *with supra* notes 1-2 and accompanying text (explaining that English common-law criminal forfeiture is mandatory criminal penalty that can cause forfeiture of offender's real and personal estate).

149. *See supra* notes 29-32 and accompanying text (explaining that American common law embraced civil seizure sanction); *supra* notes 10-14 and accompanying text (explaining that treason clause, together with § 24 of First Punishment of Crimes Bill resulted in prohibition of forfeiture as criminal penalty in United States until Congress enacted RICO in 1970).

150. *See* S. REP. No. 617, 91st Cong., 1st Sess. 80 (1969) (stating that § 1963 of RICO revives English common-law use of forfeiture as criminal penalty, thus impliedly repealing § 3563 of Title 18); Pub. L. 98-473, Title II, c. II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1987 (expressly repealing § 3563 of Title 18).

essarily repugnant to the treason clause.[151] Despite constitutional attacks on section 1963 of RICO, however, courts in the United States unfortunately have failed to realize the constitutional infirmity that RICO forfeiture presents.[152] Consequently, courts have helped legitimate an unconstitutional criminal penalty that is becoming entrenched in modern American law.[153]

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151. *See supra* notes 95-99 and accompanying text (explaining that treason clause of Constitution impliedly prohibits use of forfeiture as criminal penalty for all crimes less serious than treason); *supra* notes 100-118 and accompanying text (explaining that § 3563 of Title 18 of the United States Code expressly states implications of treason clause by prohibiting use of forfeiture for all federal crimes); *supra* note 118 and accompanying text (explaining that any criminal penalty that repeals § 3563 is necessarily repugnant to treason clause of Constitution).

152. *See supra* notes 119-28 and accompanying text (explaining failure of courts in United States to realize that § 1963 of RICO is repugnant to treason clause of Constitution).

153. *See supra* notes 66-83 and accompanying text (explaining how Fourth Circuit has upheld constitutionality of § 1963 of RICO despite arguments that treason clause prohibits use of forfeiture as criminal penalty).