1996

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This Article uses economic analysis to show how civil forfeiture creates perverse incentives for law enforcement officials and encourages abuses. The Article then surveys the history of civil forfeiture and the Supreme Court's forfeiture jurisprudence. Finding the Court's jurisprudence incoherent, the Article proposes a constitutional framework for civil forfeiture grounded in historical practice. Adopting that framework would go far toward reining in civil forfeiture's abuses.

Congress and federal law enforcement officials have increasingly employed civil forfeiture to combat the illegal drug trade. The Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "Drug Act") provides for the forfeiture of illegal narcotics and property used in manufacturing and distributing drugs.[1] Since 1970, Congress has added two noteworthy items to the Drug Act's list of forfeitable property: (1) monies used in and proceeds from drug trafficking;[2] and

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The authors thank Karol Ceplo, Miguel Estrada, Randy Holcombe, Joan Larsen, William Shughart, and Amy Wax for provocative discussion and comments on earlier drafts.

1. 21 U.S.C. § 881(a)(4) (1994).
2. 21 U.S.C. § 881(a)(6) (1994).

(2) real property.[3] These additions have made civil forfeiture especially lucrative for law enforcement authorities because the law enforcement agency keeps the forfeiture proceeds.[4] Moreover, civil forfeiture carries an important procedural advantage over the criminal law. Rather than holding the government to the higher criminal standard of proof, "beyond a reasonable doubt," Congress has provided that the government need only prove that "probable cause" supports the forfeiture.[5] The combination of huge returns and a minimal burden of proof has led law enforcement authorities to escalate their use of civil forfeiture to an unprecedented level.

Civil forfeiture, despite its long historical pedigree in enforcing revenue laws, sits uneasily between civil and criminal law, between taxation and prohibition. In this Article, we model civil forfeiture as a "sin tax" to analyze its sometimes conflicting goals: prohibition and revenue raising. We examine the economic incentives provided by civil forfeiture as a window into the question of why legislators and law enforcement officials have expended such enormous resources waging the war on drugs. Our analysis shows that discouraging drug use may be only a secondary goal of the war on drugs, and that revenue considerations determine the vigor with which law enforcement authorities attack the drug trade. We conclude that the judiciary should be skeptical of civil forfeiture and its importance to the war on drugs. We propose a constitutional framework, grounded both in economics and history, to limit forfeiture abuses.

In Part I, we develop an economic model of civil forfeiture's role in the war on drugs. We rely on an economic approach to political behavior to analyze the incentives that shape the legal regime Congress has adopted to enforce drug prohibitions. We focus in particular on civil forfeiture's uneasy status as a form of quasi-sin tax in the twilight zone

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3. The Act also provided an "innocent owner" defense for the first time. *See* Comprehensive Forfeiture Act of 1984, 21 U.S.C. § 881(a)(7) (1994). That provision, *in relevant part* states:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> (7) All real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

The Act also provided for criminal forfeiture in all felony drug cases. 21 U.S.C. § 853 (1994).

4. 28 U.S.C. § 524(c) (1994).

5. 19 U.S.C. § 1615 (1994).

between the ordinary taxation of legal goods and the outright prohibition of criminalized goods. We examine civil forfeiture to determine where its costs fall and benefits accrue. We first analyze politicians' choice between taxation and prohibition, and the incentives leading politicians to adopt a forfeiture regime. We then highlight forfeiture's incentives for law enforcement agents and prosecutors. We show how enforcement authorities maximizing rent-seeking opportunities in drug markets are likely to over-enforce drug laws. This over-enforcement of the drug laws necessarily impairs the enforcement of other criminal prohibitions, and indeed probably leads to more violence and property crimes. Civil forfeiture blends the ordinarily distinct sectors of civil and criminal law together with unfortunate consequences for criminal law enforcement.

In Part II, we briefly sketch the history of forfeiture in England. We then turn to Congress's expansion of the use of civil forfeiture in this country, and the Supreme Court's response. Traditionally, the Court has deferred to Congress's use of civil forfeiture. In particular, the Court has sanctioned Congress's abandonment of the common law requirement that the government first obtain a criminal conviction before obtaining real property through forfeiture. In turn, Congress has relied on the Court's deference by enacting civil forfeiture provisions going well beyond civil forfeiture's traditional domain. Specifically, Congress has exploited the freedom afforded by the Court's abandonment of common law requirements by adopting civil forfeiture as an additional sanction for criminal prohibitions. In several recent cases, however, the Court has backed away from its deferential posture, demonstrating increasing skepticism toward Congress's use of civil forfeiture.

In Part III, we evaluate the Court's response to the government's recent expansion of civil forfeiture. We find that response wanting. While the economic analysis presented in Part I supports constitutional checks on civil forfeiture, the Court's response fails to put coherent limits on civil forfeiture because it relies on a variety of ad hoc exercises to check particular abuses. We offer an alternative constitutional framework, grounded in the common law and the historical function of civil forfeiture, to safeguard against civil forfeiture's unique abuses. Our rule is simple: the government must obtain a criminal conviction to obtain real property through forfeiture. Where Congress has criminalized primary conduct and the criminal actor is subject to in personam jurisdiction, all forfeiture proceedings for real property should require a prior criminal conviction. Thus, property owners would be

guaranteed the procedural safeguards that the Constitution affords criminal defendants.

We conclude in Part IV with some observations about the Court's role in safeguarding constitutional traditions, and the risks of constitutional innovation. In our view, the history of civil forfeiture should give the Court pause when it is tempted to depart from long-established traditions. While the first departure may seem innocuous, government rent-seeking naturally flows into the precedential gaps created by those departures, paving the way for future abuses. The history of civil forfeiture shows that judges, like other government officials, cannot evade the law of unintended consequences.

I. THE ECONOMICS OF CIVIL FORFEITURE

A. Civil Forfeiture and the Legislature

Why do politicians criminalize goods demanded by many people? Economics answers that interest groups demand such statutes. If prohibition works (i.e., if commerce in the commodity is reduced or stopped altogether), politicians gain votes by eliminating goods intensely disliked by a sufficiently large block of voters. But even if prohibition is ineffective, voters may still be swayed by the posturing of politicians, who often stumble over each other in their efforts to "get tough on crime." Prohibition creates an instant crime problem as market participants attempt to evade the prohibition. Politicians milk votes and contributions by purporting to solve the problem by spending more on police and prisons.

Political benefits from prohibition, however, are never free. When prohibition works, politicians suffer a real cost: outlawed goods yield no tax revenues. Thus, legislators have fewer resources to (re)distribute in ways that enhance their re-election chances. Ineffective prohibition also imposes costs on politicians. Legislators find it both difficult and politically embarrassing to tax goods whose circulation has been made illegal. If the prohibited commodity continues to be distributed, and politicians collect tax revenues from that distribution, voters may question the politicians' resolve in enforcing the prohibition.[6] In short, legislators feel the pain of foregone tax revenues when they consider prohibiting certain substances, and as a result, generally avoid outright prohibition. Legislators will outlaw only those commodities intensely

6. Moreover, there are now constitutional bounds on the amount of such taxes. *See* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994).

disliked by large numbers of voters, for only those commodities will yield political benefits outweighing the foregone revenues.[7]

Civil forfeiture frees politicians from this political constraint on prohibition. Forfeiture surreptitiously taxes formally prohibited substances. It permits seizure of contraband, and more importantly, seizure of valuable items used as "instrumentalities" in distributing contraband. Many instrumentalities are perfectly legal goods, such as automobiles used to transport marijuana. The government retains the proceeds when it liquidates seized items. In this way, government extracts revenues from the black market while still purporting to vigorously enforce prohibition. By varying the intensity of enforcement, government controls the amount of revenues extracted through civil forfeiture. Self-interested politicians will choose the enforcement level yielding the highest net revenues. Thus, civil forfeiture reduces the political cost of voting for prohibition. Politicians receive kudos by voting for prohibition, without sacrificing tax revenues ordinarily extracted from legal markets.[8] Therefore, politicians face lower costs by voting to prohibit disfavored substances, which leads to more formal prohibitions.

Civil forfeiture poses additional problems as a tax. These problems stem from the methods used to collect these taxes and the political effects on the government agencies that receive them. Specifically:

- law enforcement agencies keep the proceeds from civil forfeitures;[9]
- civil forfeiture proceeds are collected from only a small and politically unorganized subgroup of the population;[10] and

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7. Congress repealed alcohol prohibition in 1933 during the fiscal crisis of the Great Depression. This repeal occurred—and occurred when it did—because the Depression substantially reduced incomes (and, hence, income tax revenues). Congress was desperate for taxes available from legally sold liquor. *See* Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1 (1994).

8. Consequently, government gains a stake in the formally prohibited industry---an industry which, in the case of drugs, supplies hundreds of millions of dollars annually in revenue to government. In 1992 alone, federal civil forfeitures were worth approximately $900 million. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, BUREAU OF JUSTICE STATISTICS tbl. 4.43 (1992).

9. *See* discussion *infra* part I.B.

10. *See infra* note 14 and accompanying text.

- constitutional protections against government abuses are too often ignored in the civil forfeiture context.[11]

Because law enforcement agencies retain the proceeds extracted through civil forfeiture, members of these agencies coalesce into an interest group favoring, and lobbying for, civil forfeiture statutes (as well as their attendant prohibitions). Law enforcement officials campaign to expand the reach of prohibition and fight to minimize constitutional and statutory restraints on the use of forfeiture.[12]

Legislators benefit from civil forfeiture in two ways: (1) civil forfeiture frees up funds that would otherwise have gone to law enforcement agencies; and (2) civil forfeiture increases the cost of prohibited substances, thus fostering more violence in the outlawed industry. Politicians exploit this violence to expand government power, notwithstanding their role in fostering the very criminal activity that they rail against. They pedal ever more draconian criminal sanctions to voters as solutions to the problem of increased crime.

Civil forfeiture also taxes in a random fashion. Civil forfeiture initially may appear to be a carefully targeted "user fee" that imposes a larger share of the fiscal burden on criminals. Appearances, however, deceive here. Civil forfeiture allows government to confiscate assets without abiding by constitutional restrictions designed to protect innocent citizens from over-vigorous prosecution of criminal laws. Civil forfeiture *would* impose a greater burden on criminals if the government were required to prove that property owners in fact had engaged in criminal conduct, but the procedures used afford no such assurance. For example, law enforcement agencies need only show probable cause for suspicion of illegal use to seize property; to retrieve the property, the owner must prove his or her innocence.[13] The government's burden of

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11. *See infra* part III.

12. *See* Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21 (1995). An agency's quest for forfeiture proceeds (in addition to concern for personal security) may help explain support by law enforcement agencies for gun control and, particularly, bans on assault weapons: heavily armed drug dealers can better protect their properties from government officials. But this speculation may be inaccurate. If gun control reduces the drug dealer's armories, the profitability of dealing drugs may decline because turf protection would be more costly. In turn, reduced drug-crime profitability might reduce the aggregate value of seizable assets. Alternatively, law enforcement agencies may support gun control because voters regard guns as substitutes for police protection services. By reducing the number of guns possessed by law-abiding citizens, the demand for police services increases, especially if gun control reduces gun possession by criminals proportionately less than gun possession by noncriminals.

13. United States v. 900 Rio Vista Blvd., 803 F.2d 625, 629 (11th Cir. 1986) ("Once the government demonstrates that probable cause exists, the burden of proof in a civil forfeiture proceeding shifts to the [owner] to establish by a preponderance of the

proof is slight relative to the burden in a criminal prosecution. In a criminal case, the accused enjoys a presumption of innocence and can be convicted and punished only if the government proves beyond a reasonable doubt—to the satisfaction of a jury—that he has committed a crime. Thus, the government can more readily confiscate properties under civil forfeiture than it can convict people of criminal offenses.

Minimal procedures inevitably lead to erroneous determinations. Civil forfeiture, by eliminating procedural safeguards, assures that too many innocent people will be burdened by taxes not shared by their fellow citizens. Criminal procedures exist not to make life easier for criminals, but to reduce government error in punishing *non*criminals to a tolerable level. Civil forfeiture causes too many innocent people to have their properties seized and converted to government revenues, while similarly situated (i.e., equally innocent) people escape this tax.

The random manner in which the government levies civil forfeiture taxes hides a part of the cost of the war on drugs from taxpayer scrutiny. A disproportionate share of these costs are foisted upon owners of property that law enforcement agencies suspect was used in drug trafficking. This group is politically unorganized and, hence, cannot adequately defend itself against more cohesively organized lobbies, such as law enforcement agencies, who clamor for liberalized civil forfeiture. Property owners at risk of forfeiture remain unorganized because they cannot identify themselves as members of the affected group before having their properties forfeited. The potential forfeiture of property is typically a one-time, low-probability occurrence for each property owner. Thus, they have little incentive to form or to join lobbying groups to press for the repeal or reform of civil forfeiture statutes.[14]

The proceeds from civil forfeiture thus partially relieve the general body of taxpayers from the burden of paying taxes for the public good of law enforcement.[15] Because taxpayers do not feel the full cost of

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evidence that the property is not subject to forfeiture.").

14. *See generally* A.C. Pritchard, Note, *Government Promises and Due Process: An Economic Analysis of the "New Property,"* 77 VA. L. REV. 1053, 1069-74 (1991).

15. As we discuss below, insofar as government is excused from the inconvenience of abiding by the Constitution, members of the subgroup bearing the burden of the civil forfeiture tax are not sufficiently likely to be criminals. In those cases, majoritarian outcomes are likely to trample the rights of politically weak groups, thus justifying constitutional restraints on government. The Bill of Rights protects accused criminals from government overreaching, discouraging baseless prosecutions of innocent

government, as they would if law enforcement was funded entirely by direct taxes, the result is excessively large government in general, and overly aggressive drug-law enforcement in particular.[16]

B. Civil Forfeiture and the Nonoptimality of Law Enforcement

We showed above how civil forfeiture allows the legislature to exploit a revenue source partially hidden from taxpayers. In this section, we explore civil forfeiture's consequences for executive branch decisions, and in particular, the consequences of allowing law enforcement agencies to keep seizure proceeds.

First, however, we must review some basic economics of law enforcement. Law enforcement, like other goods, is scarce.[17] Resources used to enforce criminal laws could be used to construct bridges and highways, educate children, or provide social services. Alternatively, taxes can be kept lower so that private citizens can allocate their resources through their own individual decisions. Thus, efforts to eliminate all criminal activity would not be socially worthwhile. After some point, the gains from using additional resources to police against crime—even heinous crimes such as murder and rape—become smaller than the gains available from using these same resources elsewhere.

As with all economic choices, the optimal amount of law enforcement occurs when the marginal benefit to society from an additional unit of enforcement equals the marginal cost of the resources used to produce

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people.

16. Much of the cost of civil forfeiture seizures ultimately falls on lessees. A landlord who knows civil forfeiture understands that he faces some positive chance of losing his property due to drug offenses committed by his tenants. This landlord will thus raise the rent. By transferring a portion of the cost of government to tenants, a form of "fiscal illusion" is created. Fiscal illusion is (rational) ignorance about the full costs of government. As the cost of government becomes more and more detached from explicit tax payments (e.g., by being hidden in higher rental rates), fiscal illusion increases. Larger than optimal government is the consequence. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 342 (1989). Mueller states:

> The fiscal illusion explanation for government size assumes that citizens measure the size of government by the size of their tax bill. To bring about an increase in government size, for which citizens are not willing to pay voluntarily, the legislative-executive entities must increase the citizens' tax burden in such a way that the citizens are unaware that they are paying more in taxes.

Id.

17. *See* Morgan O. Reynolds, *The Economics of Criminal Activity*, *in* THE ECONOMICS OF CRIME 24, 45 (Ralph Andreano & John J. Siegfried, eds., 1980) ("[I]f all crime could be prevented at zero cost, it would pay to stop all crime. But crime prevention, as we well know, consumes valuable resources, so that it only pays to expand the law enforcement industry to the point where the value of the additional harm prevented is equal in value to the resources consumed.").

that additional enforcement. And what is true for law enforcement in general also holds for choices among alternative areas of law enforcement. Each type of crime fighting entails costs. Devoting more crime-fighting resources to apprehending murderers means that fewer resources are available to police against vice offenses and other illegal activities, and vice versa.[18]

Figure 1 (following page) depicts the costs and benefits of enforcing drug prohibition. In the top panel, the horizontal axis measures the quantity of drug-law enforcement, while the vertical axis shows the dollar value of the costs and benefits of such enforcement. The marginal benefit curve (MB) shows the gains to society of each additional unit of drug-crime enforcement; the marginal cost curve (MC) shows the costs of those additional units of enforcement. Enforcement beyond E^* is excessive because the benefits from further drug crime reductions are worth less than the goods and services thereby sacrificed. Similarly, enforcement less than E^* is suboptimal because the gains from additional enforcement then exceed the costs. Therefore, any institutional arrangement affecting law enforcement should be assessed by how likely it is to encourage the optimal amount of enforcement. By giving law enforcement officials a disproportionate stake in drug-crime enforcement, civil forfeiture creates a powerful incentive for law enforcement agents to exceed the optimal, E^*, amount of drug-crime enforcement.

The lower panel of Figure 1 shows civil forfeiture revenues that law enforcement agents retain as funds for their agencies.[19] These revenues can be depicted using the familiar "Laffer curve," which shows the relationship between tax rates and tax receipts.[20] If the agency engages in no drug-crime enforcement, it will gain no revenues from drug-related civil forfeiture (point O). At the other extreme, if the agency enforces drug laws so vigorously as to eliminate illegal drug operations, civil

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18. *See* Benson et al., *supra* note 12 (showing that increased drug law enforcement reduces police efforts to thwart non-drug violent and property crimes, resulting in an *increase* in these latter crimes). *See also* Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593 (1994).

19. Empirical studies of civil forfeiture's effect upon the size of an enforcement agency's budget indicate that forfeitures "have a significant positive impact on non-capital expenditures by police agencies." Civil forfeiture increases the discretionary budgets of law enforcement bureaus. *See* Benson et al., *supra* note 12, at 22.

20. *See* James D. Gwartney, *Supply-Side Economics*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 165 (David R. Henderson, ed., 1993) (explaining the Laffer Curve).

Enforcement Level and Dollars Retained by Law-Enforcement Agencies from Civil Forfeiture

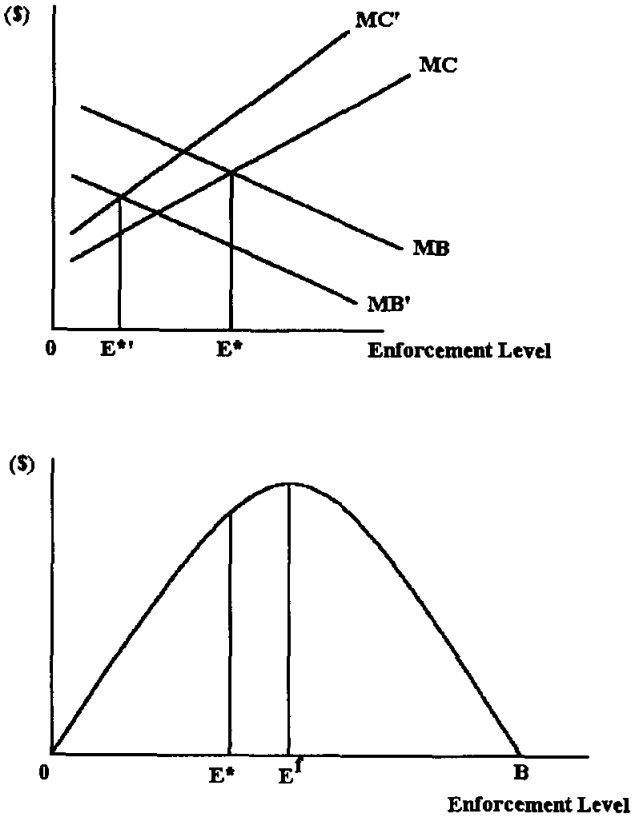

Figure 1

forfeiture revenues also will be zero. With no drug crime, there is no opportunity for drug-related civil forfeitures (point B). Between points O and B, however, civil forfeiture revenues are positive. Civil forfeiture revenues increase as drug-crime enforcement expands from no enforcement toward greater enforcement. After some point, however, greater enforcement reduces drug trafficking to such an extent that the dollar amounts available from seizures also will be reduced.

Revenues from seizures are maximized at E^F. E^F is the 'optimal' level of enforcement for law enforcement agencies allowed to keep proceeds from civil forfeiture seizures. Law enforcement agencies will determine the intensity of their drug enforcement efforts—and, by necessary implication, the intensity of their efforts to enforce laws against non-drug crimes—by how such efforts affect their civil forfeiture revenues. Thus, revenue effects of drug crime enforcement, rather than social welfare consequences, will determine the allocation of police efforts attacking various kinds of criminal behaviors.

No necessary correlation exists between E^F (agency-revenue maximizing) and E^* (social optimum). E^F could be to the right or to the left of E^*; only by chance will E^F fall at E^*. Allowing law enforcement agencies to retain proceeds from civil forfeitures affords agencies discretion over their budgets. As a consequence, agencies produce either sub- or supra-optimal drug enforcement, leaving society worse off.

The alternative to giving an agency discretion over its budget is to reserve that discretion exclusively for the legislature. When a legislature determines an entire budget for a law enforcement agency, that legislature, in effect, chooses a quantity of law enforcement. With its budget set by a legislature, the law enforcement agency then allocates its monies among the different categories of crime fighting. In this scenario, no one type of crime has a 'revenue advantage' over others in attracting law enforcement resources.[21] The heads of law enforcement agencies will thus make more rational enforcement decisions.

The legislature is the most appropriate branch of government to determine the law enforcement budget because it confronts many constituencies vying for public funds. Therefore, legislatures are better positioned than a specialized bureaucracy to determine if an additional dollar of public revenue should be used for law enforcement, schooling, or social welfare programs.[22] To be sure, Public Choice[23] economics

21. Although without forfeiture, drug-law enforcement would have no revenue advantage over other law enforcement activities, drug arrests and seizures may provide more visible evidence of bureaucratic output than, for example, a drop in the number of burglaries. But even if such a 'bureaucratic-output' bias exists, it is worse if enforcement agencies retain civil forfeiture proceeds.

22. *See* Reynolds, *supra* note 17, at 45 ("through [the] political process, the community is deciding how much and what kinds of crime to have").

23. "Public Choice" refers to the use of economic analysis to explain political institutions and outcomes.

indicates that legislatures are unlikely to tax, spend, and regulate in ways that maximize society's well being.[24] Even so, legislatures should still allocate civil forfeiture proceeds more efficiently than law enforcement bureaucrats.[25]

Furthermore, we believe that drug laws are inefficiently *over*-enforced. Over-enforcement results from the victimless nature of drug use.[26] The crime consists of a transaction between willing sellers and buyers. Americans, however, seem to prefer effective enforcement of laws

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24. *See* Gordon Tullock, *Problems of Majority Voting*, 67 J. POL. ECON. 571, 579 (1959) ("[T]he system of majority voting is not by any means an optimal method of allocating resources."). *See also* DWIGHT R. LEE & RICHARD B. MCKENZIE, REGULATING GOVERNMENT (1987); JAMES M. BUCHANAN & ROBERT D. TOLLISON, EDS., THE THEORY OF PUBLIC CHOICE-II (1984); ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT (1981).

25. *See* Roger D. Congleton & Robert D. Tollison, The Political Economy of Crime, 10 (Nov. 1993) (unpublished manuscript, on file with the authors) ("[I]t is unlikely that law enforcement agencies would be directly responsive to the wishes of voters. . . . [T]he allocation of enforcement activity which maximizes police budgets differs from that which minimizes the net cost of crime to voters."). *See also* James C. Miller III et al., *A Note on Centralized Regulatory Review*, 43 PUB. CHOICE 83 (1984) ("[I]f regulatory administration is decentralized, with rules issued piecemeal by a variety of independent agencies, then concentrated interests will typically be more successful in inducing regulators to fashion their decisions to benefit them. In contrast, a centralized review process makes this outcome less likely."). Centralization of policymaking reduces public decision-making bias because "centralization sums the individual welfare losses created by the regulatory bodies subject to its jurisdiction." *Id.* at 86. A legislature is a more centralized evaluator of law enforcement policy.

26. Characterizing drug use as a victimless crime can be challenged. Critics typically point to families and friends rendered distraught by drug abuse, lost productivity, and increased burdens on the health care system. While we do not deny that drug abuse causes genuine and often expensive tragedies, it remains, in our view, a victimless crime. Drug use is victimless in the sense that no one is physically coerced, defrauded, or blackmailed into acting against his or her will, or involuntarily stripped of property. *See* Barnett, *supra*, note 18, at 2621. This fact distinguishes drug use from crimes such as murder, rape, and burglary.

Barnett persuasively argues that criminalizing noncoercive, nonfraudulent, and nonthieving activities actually *increases* social costs because victimless crimes have no complaining victims. *Id.* at 2621-25. Consequently, police must rely upon highly invasive techniques to detect such crimes, to apprehend their perpetrators, and to gather incriminating evidence. Constitutional protections are thereby imperiled.

Criminalizing victimless behavior also dilutes valuable disapproving attitudes about criminal activity *with* victims. *See* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 106 (1993). Duke & Gross state:

> Criminalizing behavior that is commonly engaged in by a substantial segment of society inevitably debases the currency of criminal proscriptions. If a legal system declares that both drug use and robbery are reprehensible, it is not only making a moral statement about drug use, it is making a moral statement about robbery.

Id.

proscribing violence or fraud that harms nonconsenting parties, over a "war on drugs" where the transactions are consensual. In 1990, in the midst of drug war hysteria, the Drug Policy Foundation reported that more than one in three Americans (36%) supported drug legalization.[27] More recently, in January 1994, *NBC Nightly News* conducted a telephone call-in poll asking callers if drugs should be legalized. A majority (52.2%) favored legalization.[28] As popular support for a law decreases, the social benefit of enforcing that law decreases.

Enforcing such laws is also more expensive than policing violence and theft because victimless crimes lack victims willing to testify against lawbreakers. Thus, society gets more bang for its law enforcement buck when it shifts law enforcement efforts from pursuing perpetrators of victimless crimes to pursuing violators of personal and property rights.[29]

In Figure 1, the decreased social benefits of drug-crime enforcement are shown by a marginal benefit curve (MB') closer to the origin than MB; the higher marginal costs of victimless-crime enforcement are shown by a steeper marginal cost curve (MC'). The socially optimal level of enforcement falls as well (to E^*). Naturally, E^F is more likely to be to the right of E^* as E^* moves to the left. That is, the weaker the consensus for outlawing drug use, and the less willing victims are to testify against offenders, the more likely it is that enforcement agents will over-enforce legal prohibitions that yield personal benefits for the agents. If no widespread consensus exists for drug prohibition, then civil forfeiture leads to inefficient over-enforcement of drug laws.

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27. "The American People Talk About Drugs," poll conducted by the Drug Policy Foundation, Washington, D.C., April 1990.

28. *NBC Nightly News* Phone Poll (NBC television broadcast, Jan. 4, 1994). Of those responding, 42,812 callers supported legalization, while 39,254 opposed it. Moreover, drug prohibitions are condemned by a number of prominent people. This number includes former Secretary of State George Schulze, Baltimore Mayor Kurt Schmoke, Nobel laureate Milton Friedman, and columnist William Buckley. DRUG LEGALIZATION: FOR AND AGAINST (Rod L. Evans & Irwin M. Berant eds., 1992).

29. Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 3 (1974) ("The society . . . buys the amount of enforcement which it deems appropriate to the statute or rule: more will be bought if the statute serves a more valuable goal (protects us from murder rather than assault) and if a given increase in enforcement is less expensive.").

C. *Civil Forfeiture and Violence*

Economic analysis teaches that penalties should match the seriousness of the crime.[30] Holding the probability of apprehension and conviction constant, perpetrators of more serious crimes should be punished more severely than perpetrators of less serious crimes. If criminal penalties are not matched to the increased social costliness of particular crimes, criminals who commit less serious offenses are inadequately deterred from committing more serious collateral crimes. If armed robbery and murder carried the same penalty, an armed robber would have no incentive not to kill his victims; the marginal cost of murder would be zero. More murder would result than under a more carefully calibrated penalty scheme.[31]

Civil forfeiture, as a penalty for drug trafficking, is not related to the seriousness of the crime. Forfeiture liability turns on the property's use in the crime, rather than on the crime's seriousness. As a result, small crimes can lead to large forfeitures. Because a drug dealer faces an equal risk of forfeiture if he uses his automobile to transport marijuana or crack cocaine, the civil forfeiture regime encourages a shift by the dealer from marijuana distribution to the more lucrative crack distribution. As drug dealers shift their marketing efforts to harder drugs, users are exposed to more expensive drugs with higher addiction rates. Crime rates rise both because users find it more difficult to control their actions while under the influence of these harder drugs, and because addiction is often financed with property crime. Similarly, because drug dealers stand to forfeit much of their property as a result of even the most minor drug offenses, the marginal cost of defending themselves and their property with violence during the commission of any drug crime is lower than it would be if losses increased with the seriousness of the offense.[32] Thus, while civil forfeiture deters some drug crimes, it has the perverse effect of *encouraging* nondrug crimes by drug users and sellers.

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30. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 223-31 (4th ed. 1992).

31. *Id.* at 226 ("[O]ne cost of increasing the severity of punishment of a crime is to reduce the incentive to substitute that crime for a more serious one.").

32. Colombia's Attorney General, Gustavo de Greiff, calls for drug legalization, primarily because of the link between prohibition and violence: "Our present approach offers criminals, large and small, a profit margin that no honest business ordinarily yields. In the process, we may be contributing to the generation of all the problems and vices that accompany drugs, i.e., violence, corruption, and a generalized disregard for law." Gustavo de Greiff, *The Coke King Compromise: Colombia's Top Prosecutor on Rethinking the Drug War*, WASH. POST, Mar. 13, 1994, at C1, C4. *See also* DANIEL K. BENJAMIN & ROGER LEROY MILLER, UNDOING DRUGS 107-08 (1991).

In sum, economic analysis indicates that civil forfeiture leads to: (1) bigger government; (2) inefficient and overly aggressive enforcement of the drug laws; and (3) increased violence and theft. Therefore, economics suggests that courts should be skeptical of civil forfeiture's expansion.

II. A BRIEF HISTORY OF FORFEITURE

We turn now from economics to history. The history of civil forfeiture helps explain how law enforcement officials obtained such a dangerous weapon for fighting crime. After briefly reviewing pre-Revolutionary War English precedent, we turn to civil forfeiture's use—and expansion—in America.

A. English Practices

English law provided three methods of forfeiture: (1) deodand, (2) attainder forfeitures, and (3) statutory forfeitures.[33] Traditionally, conviction of the property owner was necessary for all forfeitures save deodand. Beginning in the seventeenth century, certain statutes—especially the Navigation Acts and revenue statutes—allowed for in rem forfeiture procedures without prior criminal conviction.[34] In rem procedures allowed the government to directly prosecute the offending property, naming the property itself as the defendant. The legal fiction was that the property itself, without human intervention, caused the harm or violated the law. Thus, no conviction of the property owner was required because legally the property owner was not being punished; only the property was found 'guilty.'

33. *See infra* notes 34-51.

34. *See* Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1154 (1990) ("The in rem proceeding . . . developed in the seventeenth century . . . .")

1. Deodand[35]

A deodand is an instrument causing a person's death, e.g., a pistol or a runaway carriage. Forfeiture to the Crown under the common law of a deodand is the oldest in rem method of forfeiture.[36] The deodand "may have served as an alternative to the blood feud of early justice—the instrument of death replacing the slayer's kin as the object of vengeance."[37] In theory, the Crown used the funds from the liquidated deodand to pay for the funeral Mass of the deceased. In time, however, the Crown actually profited from deodand.[38]

Some courts have been tempted to explain modern in rem forfeiture as evolving from deodand.[39] Like modern American forfeiture statutes under which the government can proceed directly against offending objects (e.g., a yacht used to transport marijuana) as if these objects were culpable for the offense, the Crown proceeded directly against the deodand as if it were guilty of a tort or crime. There is little evidence, however, that modern forfeiture law descended from deodand, which was carefully limited by the English courts.[40] First, and perhaps most obvious, property became deodand only if it caused a human's death. Second, "attempts to raise the analogy [of forfeiture to deodand] were specifically rejected" by English courts.[41] More recently, Grant Gilmore and Charles Black, in their treatise of admiralty, rejected Oliver Wendell Holmes's contention that deodand is the evolutionary ancestor

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35. The word "deodand" derives from the Latin *Deo dandum*, which means "to be given to God." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.16 (1974).

36. *See id.* at 681 (discussing the Biblical origins of deodand).

37. James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?* 62 CORNELL L. REV. 768, 771 (1977).

38. *Id.* ("[D]eodands were one of many prerogatives of the English kings, providing a small but steady source of income.").

39. *See, e.g., Calero-Toledo*, 416 U.S. at 681-90.

40. *See* Schecter, *supra* note 34, at 1154 ("Modern forfeiture law originated, independent of deodands, during England's seventeenth century maritime expansion."); *see also* Maxeiner, *supra* note 37, at 772 ("The only English authority cited as proof that deodand represents a general forfeiture principle is one sentence from St. Germain's *Doctor & Student* dialogues, published in 1530 . . . . But a careful reading . . . does not support that conclusion." (footnotes omitted)).

41. Maxeiner, *supra*, note 37, at 771. Maxeiner stated:

> In 1766, in a case before the Court of the Exchequer, the Crown argued that deodand represented a general principle of forfeiture law. Chief Baron Parker rejected the argument, citing Chief Justice Vaughn for the proposition that "goods as goods, cannot offend, forfeit, unlade, pay duties, or the like, but [only] men whose goods they are."

Id. at 771-72 (citing Mitchell *qui tam* v. Torup, Parker 227, 145 Eng. Rep. 764 (Ex. 1766)) (footnotes omitted).

of modern forfeiture law.[42] Finally, the superstition that inanimate objects can be culpable for harming humans has been discarded with the advance of science.[43]

2. *Attainder Forfeitures*

Attainder forfeiture was the largest class of forfeiture.[44] Generally, under the law of attainder, the convicted felon's personal property was forfeited to the Crown, while his real property was forfeited to his lord. A conviction for treason, however, rendered all of the felon's property, personal and real, forfeitable to the Crown. No property was forfeited unless the owner of the property was first duly convicted of a criminal offense.[45] The government proceeded against the property owner in personam.

3. *Statutory Forfeitures*

Although not the first English forfeiture statutes, the Navigation Acts of the mid-seventeenth century were the first to allow for in rem forfeiture. Prior to these Acts, "[i]f the owner was available, the forfeiture evidently was imposed only upon confession or adjudication of his guilt."[46] The Navigation Acts were intended to strengthen England's naval prowess. By requiring that most imports and exports from England be carried in English ships, the Navigation Acts protected

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42. GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 590 (2d ed. 1975).

43. *See generally* Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1916).

44. Stuart D. Kaplan, Note, *The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Courts to Realize RICO's Potential*, 33 AM. U. L. REV. 747, 751 (1984).

45. Blackstone justified forfeitures as an appropriate sanction for the property owner's violation of the social compact. WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 289 (1765). Blackstone stated:

> The true reason and only substantial ground of any forfeiture for crimes consists in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities.

Id.

46. Maxeiner, *supra* note 37, at 775.

the English maritime industry from competition.[47] "Violation of the Acts resulted in forfeiture of both the illegally carried goods and the ship that transported them. The English courts construed these statutes so that the act of an individual seaman, undertaken without the knowledge of master or owner, could cause a forfeiture of the entire ship."[48] Given the importance of the maritime industry to British commerce, courts enforced the Acts strictly. Therefore, the Navigation Acts exposed certain parties to forfeiture even absent guilt. According to Chief Baron Parker of Exchequer, the Acts were:

> negative, absolute, and prohibitory; . . . there is not a syllable that hints at the privity or consent of the master, mate or owners.
>
> The reason of penning this clause in these strong terms is to prevent as much as possible its being evaded, for if the privity or consent of the master, mate or owners, had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.[49]

Nevertheless, despite the "absolute" language of the Navigation Acts, the courts did not interpret them as imposing strict liability upon ship owners. If ship owners could not reasonably have known of the illegal uses, juries could acquit the vessel.[50] For example, if the amount of contraband was so small that the owner or master could not have found it on board after a reasonable search, the ship was not forfeitable.[51]

B. Early American History

The English law of forfeiture influenced American law while not strictly determining its course. The Constitution's framers did not outlaw forfeiture in response to its perceived abuses in England, but they did forbid bills of attainder,[52] and they limited the penalty for treason by providing that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[53] These reforms abolished the worst abuses of forfeiture. The first

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47. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 464-65 (R.H. Campbell & A.S. Skinner, eds., Liberty Classics 1981) (1776) ("As defence, however, is of much more importance than opulence, the act of navigation is, perhaps, the wisest of all the commercial regulations of England."). Smith, of course, opposed the protectionist functions of the Acts. *Id.*

48. Maxeiner, *supra* note 37, at 774 (footnotes omitted).

49. Mitchell *qui tam* v. Torup, Parker 227, 232-33, 145 Eng. Rep. 764 (Ex. 1766).

50. Maxeiner, *supra* note 37, at 775 ("Thus, under the Navigation Acts, forfeiture of a ship carrying contraband was required only if the owner or his carefully chosen master was implicated or negligent.").

51. *Id.* n.44.

52. U.S. CONST. art. I, § 9, cl. 3.

53. U.S. CONST. art. III, § 3, cl. 2.

Congress: (1) adopted civil forfeiture to aid in the collection of customs revenues;[54] and (2) abolished criminal forfeiture.[55]

In a series of early cases, the Supreme Court laid the legal foundation for current forfeiture practice. The Court adopted English in rem forfeiture procedures in rejecting challenges to the forfeiture laws. The early Court held that (1) forfeiture proceedings were civil rather than criminal, and that no jury was required because the proceedings arose under the admiralty jurisdiction;[56] (2) goods could be forfeited upon a showing of probable cause of illegal importation;[57] (3) the forfeiture "related back," vesting title in the government at the time of the offense;[58] (4) the claimant, rather than the government, bore the burden of proof;[59] (5) no criminal conviction was required for a forfeiture for acts of piracy;[60] and (6) the property owner's innocence was no defense.[61] Consistent with the in rem fiction that the "guilty" property was the defendant, the Court also held that actual seizure of the ship was required for a court to exercise jurisdiction, and that jurisdiction was lost if the vessel departed the court's territorial jurisdiction.[62]

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54. Act of Aug. 4, 1790, ch. 35, 1 Stat. 145 (repealed 1799).

55. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117, *repealed by* Pub. L. No. 98-473, Tit. II, § 212(a)(2), 98 Stat. 1987 (1984).

56. United States v. La Vengeance, 3 U.S. (3 Dall.) 297, 301 (1796). Chief Justice Marshall later distinguished forfeiture of goods seized on land, which were to be tried to a jury under the common-law jurisdiction of the court. *See* The Sarah, 21 U.S. (8 Wheat.) 391, 394 (1823).

57. Locke v. United States, 11 U.S. (7 Cranch) 339, 345 (1813).

58. United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 405 (1814).

59. The Langdon Cheves, 17 U.S. (4 Wheat.) 103, 104 (1819); *Locke*, 11 U.S. at 348.

60. The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

61. United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 231-32 (1844).

62. The Brig Ann, 13 U.S. (9 Cranch) 289, 290-91 (1815). The Court adopted English in rem practice for forfeitures under the admiralty jurisdiction over two substantial historical objections. Arguing that the Seventh Amendment required a jury, former Attorney General Lee pointed out that "[a]ll seizures [in England] for violation of the laws of revenue, trade, or navigation are tried by a jury in the court of exchequer according to the course of the common law." United States v. The Schooner Betsey and Charlotte, 8 U.S. (4 Cranch) 443, 447 (1808). Lee also urged that "[i]t was one of our serious grievances, and of which we complained against Great Britain in our remonstrances to the King, and in our addresses to the people of Great Britain, while we were colonies, that the jurisdiction of the courts of vice-admiralty was extended to cases of revenue." *Id.* at 448. Chief Justice Marshall rejected Lee's argument on the basis of *La Vengeance*, in which Lee had argued that a jury was required because the cause was criminal. *Id.* at 452 (citing *La Vengeance*, 3 U.S. at 299). Justice Chase suggested that Congress shared the Crown's motive in taking forfeiture from the jury: "The reason of

Most important of these rulings is Justice Story's opinion upholding a vessel's in rem forfeiture for piracy without a criminal conviction. He summarized common law forfeiture:

> It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement, that no right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction.[63]

Justice Story went on, however, to distinguish common-law forfeitures from in rem forfeitures created by statute and seizures in admiralty. In those proceedings, forfeiture did not turn on the guilt of the offender; rather, "[t]he thing is here primarily considered as the offender . . . ."[64] The forfeiture proceeding was independent of any criminal proceeding, and the challenged statute did not even provide for criminal punishment.[65] Thus, "no personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature."[66]

C. Civil Forfeiture and the Civil War

The next series of forfeiture cases to reach the Court arose out of the Confiscation Acts, which authorized the seizure of property owned by Confederates and those aiding the rebellion.[67] The Acts authorized in rem proceedings of both real and personal property, fashioned after the forfeiture proceedings for personal property such as vessels and

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the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprices of juries." *Id.* at 446 n.*. *See also* Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847) ("But there is no provision, as the constitution originally was, from which it can be inferred that civil causes in admiralty were to be tried by a jury, contrary to what the framers of the constitution knew was the mode of trial of issues of fact in the admiralty."). Justice Woodbury's dissent in *Waring* discusses at length the colonists' objections to the pre-Revolution expansion of admiralty by the Crown. *Id.* at 467. Justice Story's typically learned opinion on circuit in De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776), relates the history of the admiralty jurisdiction.

63. The Palmyra, 25 U.S. at 14.

64. *Id.*

65. *Id.* at 15.

66. *Id.*

67. Act of July 17, 1862, ch. 195, 12 Stat. 589; Act of August 6, 1861, ch. 60, 12 Stat. 319.

smuggled goods.[68] In *Armstrong's Foundry*, the Court recognized that the Acts "regarded the consent of the owner to the employment of his property in aid of the rebellion as an offence, and inflicted forfeiture as a penalty."[69] Despite the Acts' penal nature, the Court nevertheless upheld them as an exercise of the war power over the claimant's objections that the Acts violated the Fifth and Sixth Amendments,[70] citing the enactment of similar forfeiture provisions in the colonies/states during the Revolutionary War.[71] The Court also held that due process did not require a prior criminal conviction before forfeiture.[72]

D. The Post-Bellum Expansion of Civil Forfeiture

The survival of the Confiscation Acts encouraged Congress to expand in rem forfeiture beyond its traditional domain—customs and admiralty—to enforce revenue provisions unrelated to the maritime trade.[73] The landmark case upholding this break with tradition is *Dobbins's Distillery v. United States*.[74] In *Dobbins's Distillery*, the Court upheld

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68. Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 345 (1870); Union Ins. Co. v. United States, 73 U.S. (6 Wall.) 759, 764 (1867).

69. 73 U.S. (6 Wall.) 766, 769 (1867) (holding that a presidential amnesty relieved an ex-Confederate of a prior forfeiture). The Acts' legislative history reinforces its penal nature. *See* Maxeiner, *supra* note 37, at 786-87 (discussing Congress's intention to punish rebels). The Court construed the Acts narrowly to avoid offending the Corruption of Blood clause. *See* Bigelow v. Forrest, 76 U.S. (9 Wall.) 339, 352 (1870).

70. Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871). The Court stated:

> The Constitution confers upon Congress expressly power to declare war . . . and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war . . . includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor.

Id.

71. *Miller*, 78 U.S. at 312. *See, e.g.*, Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173 (1809) (upholding forfeiture of real property under a New Jersey treason statute). The *Miller* decision provoked a heated dissent from Justice Field. In his view,

> legislation founded upon the municipal power of the government and directed against criminals . . . is subject to all the limitations prescribed by the Constitution for the protection of the citizen against hasty and indiscriminate accusation, and which insure to him, when accused, a speedy and public trial by a jury of his peers.

78 U.S. at 315.

72. *See Tyler*, 78 U.S. at 337-38, 346.

73. *See* Act of July 20, 1868, ch. 186, 15 Stat. 125, 133.

74. 96 U.S. 395 (1877).

the forfeiture of a distillery, and the real property upon which it stood, for liquor-tax violations. The owner had leased the property, and his tenant had defrauded the government of excise taxes due on the liquor distilled there.[75] It was not necessary, the Court held, "that the owner of the property should have knowledge that the [tenant] was committing fraud on the public revenue, in order that the information of forfeiture should be maintained."[76] The Court reasoned that the proceeding was civil in nature, and that any "conviction of the wrong-doer must be obtained, if at all, in another and wholly independent proceeding."[77] The Court justified its holding by citing *The Palmyra*.[78] No precedent was cited, however, for the proposition that real property forfeiture, as opposed to the personal property traditionally forfeited in rem, could be accomplished without a prior criminal conviction. Nowhere in the decision does the Court indicate that it even considered whether real property was distinguishable from personal property. The Court simply affirmed the forfeiture despite the owner's lack of wrong-doing because "the offence . . . attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner."[79]

Dobbins's Distillery did not end challenges to civil forfeiture. Faced with those challenges, the Court shied away from the full implications of forfeiture's "civil" label. In *Coffey v. United States*, the Court held that a prior acquittal of criminal tax evasion barred a subsequent civil forfeiture based on the same conduct.[80] Later that same term, in *Boyd v. United States*, the Court held that the Fourth and Fifth Amendments barred the compulsory production of private documents in a forfeiture proceeding.[81] The Court declared the proceedings "quasi-criminal,"

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75. *Id.* at 396-97.
76. *Id.* at 399.
77. *Id.*
78. *Id.* at 399-400.
79. *Id.* at 401. The Court also affirmed the relation-back principle in the context of real property. United States v. Stowell, 133 U.S. 1, 17 (1890) ("[T]he forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith."). In a later case involving personal property forfeiture, the Court rejected the claimant's argument that the government could not seize property unless it proved its case beyond a reasonable doubt. Lilienthal's Tobacco v. United States, 97 U.S. 237, 266-68, 271-72 (1878). The Court had earlier reaffirmed that where a seizure giving rise to a forfeiture was made on land, the claimant was entitled to a jury trial. Garnharts v. United States, 83 U.S. (16 Wall.) 162, 165 (1872).
80. 116 U.S. 436, 442 (1886).
81. 116 U.S. 616 (1886).

because proceedings for "the forfeiture of a man's property by reasons of offences committed by him, though they may be civil in form, are in their nature criminal."[82]

These pronouncements spawned a series of constitutional challenges to civil forfeiture, but the Court narrowly cabined *Boyd's* "quasi-criminal" rationale. The Court reaffirmed the traditional rule requiring no prior criminal conviction to forfeit unlawfully imported goods,[83] and denied that Confrontation Clause rights attach in forfeiture proceedings.[84] The Court made no pretense of distinguishing *Boyd*; it simply announced that "[t]he principles announced in the *Boyd* case have no application whatever to the present case" because there was no claim of either unreasonable search and seizure or compelled self-incrimination.[85]

This disdain for *Boyd*'s reasoning did not bode well for future challenges to forfeiture. The Court later held that the trial judge could direct a verdict for the government in a forfeiture suit,[86] and that proof beyond a reasonable doubt was not required, even though the statute authorizing the penalty also made the same conduct a misdemeanor.[87] Finally, the Court breezily rejected the due process challenge of an innocent third-party claimant, holding a security interest in a car forfeited for transporting alcohol, who challenged in rem forfeiture:[88]

> Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. . . .
>
> But whether the reason for [civil forfeiture] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.[89]

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82. *Id.* at 633-34.
83. Origet v. United States, 125 U.S. 240 (1888).
84. United States v. Zucker, 161 U.S. 475 (1896).
85. *Id.* at 480.
86. Hepner v. United States, 213 U.S. 103, 112 (1909).
87. United States v. Regan, 232 U.S. 37 (1914). The Court distinguished *Boyd* on the ground that the Fifth Amendment had a "broader scope" than did the Sixth. *Id.* at 50.
88. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 506, 509 (1921).
89. *Id.* at 510-11. After Prohibition's repeal, the Court stepped back from the rather daunting monitoring duties it had imposed on creditors. *See* United States v. One 1936 Model Ford V-8 DeLuxe Coach, 307 U.S. 219, 236 (1939) ("The forfeiture acts . . . were intended for protection of the revenues, not to punish without fault.").

Apparently, civil forfeiture was too well embedded in tradition to be dislodged by mere appeals to fairness.

E. Modern Civil Forfeiture Cases

Constitutional challenges to forfeiture declined after Prohibition,[90] but the modern Court has revisited civil forfeiture's constitutional status. In *United States v. United States Coin & Currency*, the Court held that the right against compelled self-incrimination provided a defense to the civil forfeiture of money used in illegal gambling, rejecting the government's argument that it was prosecuting the money, not the gambler.[91] The Court reasoned:

> From the relevant constitutional standpoint there is no difference between a man who "forfeits" $8,674 because he has used the money in illegal gambling activities and a man who pays a "criminal fine" of $8,674 as a result of the same course of conduct. . . . When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.[92]

The Court, however, quickly dispelled any notion that it would apply criminal procedures to civil forfeiture across the board. Two terms later, the Court rejected a double jeopardy challenge to the forfeiture of smuggled goods.[93] The Court found the forfeiture remedial, because it "prevents forbidden merchandise from circulating in the United States, and . . . it provides a reasonable form of liquidated damages for

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90. The Court decided a number of forfeiture cases during Prohibition. The National Prohibition Act provided for forfeiture only after a criminal conviction, but Congress did not repeal the alcohol excise tax, or its broad forfeiture provisions. United States v. One Ford Coupe, 272 U.S. 321, 326-27, 332 (1926). The Court upheld the tax's forfeiture provisions, although there was "no way in which the tax could be . . . paid." *Id.* at 327. A tax which was actually a penalty could not be obtained after a criminal conviction. United States v. La Franca, 282 U.S. 568 (1931). *But see* Helvering v. Mitchell, 303 U.S. 391 (1938) (50% tax penalty is remedial and therefore no double jeopardy bar to civil collection proceeding following criminal acquittal). But forfeiture was not a penalty, because "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient." Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931). *See also Helvering*, 303 U.S. at 400 ("Forfeiture of goods . . . [has] been recognized as enforceable by civil proceedings since the original revenue law of 1789. In spite of [its] comparative severity, [forfeiture has] been upheld against the contention that [it is] essentially criminal and subject to the procedural rules governing criminal prosecutions." (citations omitted)).

91. 401 U.S. 715, 720 (1971).

92. *Id.* at 718, 721-22.

93. One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (per curiam).

violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses."[94]

The next term brought an even more emphatic rejection of challenges to civil forfeiture. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court upheld a yacht's forfeiture, resulting from the discovery of marijuana on board, over the lessor's objection that it was ignorant of the yacht's illegal use.[95] The lessor claimed that the forfeiture violated due process and was a taking without just compensation. The Court offered three reasons for rejecting the lessor's claim to preseizure notice and a hearing: (1) seizure permitted in rem jurisdiction, "thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions";[96] (2) preseizure notice might lead to the removal, concealment, or destruction of the property; and (3) the seizure was initiated by government officials rather than "self-interested private parties."[97] The Court also rejected the takings claim, invoking the long history of civil and criminal forfeiture provisions, as well as the need to help enforce the criminal law. Forfeiture ensured that the conveyance would not be used again for illegal activity, "and . . . impos[ed] an economic penalty, thereby rendering illegal behavior unprofitable."[98] The owner's innocence was irrelevant, because the forfeiture would "induc[e] them to exercise greater care in transferring possession of their property."[99] The Court did not explain how the owners might have done so.

F. Recent Cases

More recently, the Court has revealed a heightened skepticism of civil forfeiture's role in the war on drugs. The government recently has

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94. *Id.* at 237. *Coffey* and *Boyd* were limited to their facts. *Id.* at 235 n.5, 236 n.6. *Coffey* subsequently was overruled. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361 (1984) ("[N]either collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. To the extent that *Coffey v. United States* suggests otherwise, it is hereby disapproved."); *see also* United States v. Ward, 448 U.S. 242, 253 (1980) ("This Court has declined, however, to give full scope to the reasoning and dicta in *Boyd* . . . .").

95. 416 U.S. 663 (1974).

96. *Id.* at 679.

97. *Id.*

98. *Id.* at 687.

99. *Id.* at 688.

litigated four civil forfeiture cases arising under the Drug Act; it lost all four.[100] We focus on the last two cases.[101]

In *Austin v. United States*, the government sought civil forfeiture of Richard Austin's mobile home and auto body shop after he was convicted for distributing two ounces of cocaine from the shop, having brought the cocaine from his mobile home to consummate a prearranged sale.[102] The district court granted the government's summary judgment motion, rejecting Austin's argument that the forfeiture violated the Excessive Fines Clause, and the court of appeals "reluctantly" affirmed.[103] The Supreme Court granted Austin's certiorari petition.[104]

The government urged that "any claim that the government's conduct in a civil proceeding is limited by . . . the Excessive Fines Clause . . . must fail unless the challenged governmental action, despite its label, would have been recognized as a criminal punishment at the time the Eighth Amendment was adopted."[105] Arguing that civil forfeiture of real property was not criminal punishment, the government invoked the venerable traditions of deodand and the revenue laws which treated the

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100. United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993); Austin v. United States, 113 S. Ct. 2801 (1993); United States v. 92 Buena Vista Ave., 113 S. Ct. 1126 (1993) (plurality opinion); Republic Nat'l Bank of Miami v. United States, 113 S. Ct. 554 (1992). In a fifth case, the Court rejected a First Amendment challenge to a RICO criminal forfeiture, 18 U.S.C. § 1963(a), but remanded to the lower court for consideration of the defendant's Excessive Fines challenge. Alexander v. United States, 113 S. Ct. 2766, 2769 (1993). As this Article goes to print, two additional cases are pending before the Court. *See infra* notes 150, 153.

101. In *Republic Nat'l Bank*, the government argued that the court of appeals lost jurisdiction when the United States Marshal transferred the proceeds from the sale of the res to the Assets Forfeiture Fund. 113 S. Ct. at 557. The Court disagreed, limiting the rule of *The Brig Ann* requiring the seizure of the res, *see supra* note 62, to those cases in which the seizing party had abandoned its attachment prior to filing an action. 113 S. Ct. at 559. The Court explained the rationale allowing jurisdiction on the basis of seizure: "The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts and to furnish remedies for aggrieved parties," and explained the limits of that rule: to ensure "enforceability of judgments, and fairness of notice to parties." *Id.* (citations omitted).

In *92 Buena Vista Ave.*, the government argued that an allegedly innocent owner had no property right because title "related back" to vest in the government at the time of the purchase, which was made with drug trafficking proceeds. 113 S. Ct. at 1130. In the government's view, the proceeds had been forfeited prior to those transactions, and any subsequent transfer did not devest the government's title. *Id.* at 1134. The Court rejected this "absurdity" because "the Government's submission would effectively eliminate the innocent owner defense in almost every imaginable case." *Id.* at 1135 & n.18. The Court held that title did not vest in the government until judgment, and that claimants could therefore assert the statutory defenses. *Id.* at 1136.

102. 113 S. Ct. at 2803.

103. *Id.*

104. 113 S. Ct. 1036.

105. Brief for the United States at 16, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073).

property as the offender.[106] The government, however, failed to cite any case before *Dobbins's Distillery* in which a court—English or American—treated *real* property as the offender. The following exchange occurred at oral argument:

> [Justice Scalia]: Mr. Estrada, historically—do you know the answer to this? Historically at the time the Eighth Amendment was adopted, was there such a thing as in rem forfeiture of real property, or was it limited to ships and personal property?
>
> MR. ESTRADA: [T]here is no contemporary case that we've been able to find in which a specific issue was made of the fact. There is a case, *Dobbins's Distillery*, which is cited in our [brief], in which the claim was raised specifically that real property in that case could not be forfeited, and the Court dealt with real property in the case much as it had dealt with the claims of ships and the like without giving any indication whatsoever that the real estate, by virtue of being that type of property interest, couldn't be forfeited under the common law.[107]

"[A]t the time the Eighth Amendment was adopted," real property could only have been forfeited as a criminal punishment.[108]

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106. *Id.* at 18-24.

107. Official Transcript at 26-27, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073).

108. Justice Kennedy later distinguished the common law tradition relied on by the government:

> [Justice Kennedy]: But all that analysis, Mr. Estrada, proceeds from the line of cases that essentially began with forfeitures in the maritime area and forfeitures of certain kind of chattel. But isn't it true that at early common law, one of the benefits, at least to the nobles, of classifying certain crimes as felony was so that they could have forfeiture. Forfeiture was intricately bound up with the definition of crime at a very early English law, was it not?
>
> MR. ESTRADA: Well, I think—
>
> [Justice Kennedy]: And didn't the Framers recognize that?
>
> MR. ESTRADA: There were two types of forfeiture at early common law, Justice Kennedy. One of them was the so-called forfeiture of estate, which really was in personam and really only came into play when the Government proved with a judgment of conviction that the person had, in fact, been convicted of a crime.
>
> The other type of forfeiture really didn't have anything to do with the crimes that were hurting the king's bench. It was in a completely different court system, the Court of the Exchequer, and that type of forfeiture, which is, in essence, what is at issue here, didn't partake of the rationale that you just gave I think.
>
> [Justice Kennedy]: It seems to me that the Framers were concerned that the criminal laws not be used to impose excessive punishments, and certainly in the early history of England, that was true with reference to forfeitures for felonies.

Apart from these vexing questions regarding the historical tradition of real property forfeiture, the government also labored to distinguish *United States v. Halper*.[109] The Court in *Halper* held that double jeopardy barred a proceeding to seek a civil penalty, disproportionate to any remedial end, subsequent to a criminal conviction. The government argued in *Austin* that the forfeiture of Austin's property served a broad remedial purpose:

> The drain on the public fisc attributable to the vastly increased law enforcement expenses that have accompanied the drug epidemic, and to the care, treatment, and rehabilitation of drug addiction and related problems is practically incalculable—and easily dwarfs the value of assets acquired by the government as a result of asset forfeitures.[110]

The Court unanimously reversed.[111] After surveying English and American forfeiture history, the Court found that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment."[112] The Court rejected the government's argument that forfeiture under the Drug Act was remedial, focusing on: (1) the Act's provisions protecting innocent owners; (2) Congress's choice "to tie forfeiture directly to the commission of drug offenses"; and (3) "the dramatic variations in the value of conveyances and real property forfeitable."[113] The Court concluded that forfeiture was a "'payment to a sovereign as punishment for some offense' . . .

> MR. ESTRADA: Right, but it was not the same type of forfeiture that is at issue here, Justice Kennedy. *If this were a case in which the forfeiture could only be had upon the conviction of a crime, we don't—we would not be here because we would concede that the essence of that sort of action is on the person.*
>
> What we do have here is a statute that really doesn't need the criminal law other than to state a—other than to set a standard of conduct and, taking that as the standard of conduct, then says if your property has been used or is intended to be used for this purpose, then we will make sure that that harm doesn't come to pass by placing the property in the hands of someone who can give surety to society as a whole that these harms won't happen. And I think that's a very different type of forfeiture than the forfeiture that you have in mind, Justice Kennedy.

Id. at 39-41 (emphasis added). The authors are grateful to Miguel Estrada for identifying the justices posing the cited questions. Interview with Miguel A. Estrada, Assistant to the Solicitor General (Apr. 1, 1994).

109. 490 U.S. 435 (1989).

110. Brief for the United States at 30-31, Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073) (citations omitted).

111. *Austin*, 113 S. Ct. at 2812.

112. *Id.* at 2810.

113. *Id.* at 2810-12.

subject to the limitations of the Eighth Amendment's Excessive Fines Clause."[114]

The Supreme Court addressed civil forfeiture only once during the following term.[115] Four years after James Daniel Good had been convicted, sentenced, and fined in a Hawaii state court for growing marijuana, the United States filed an in rem action to forfeit his house and the appurtenant four acres.[116] Based on an affidavit stating the facts underlying the state conviction, the magistrate judge issued an *ex parte* warrant to seize the property.[117] After the seizure, Good filed a claim for the property's return.[118] The district court entered a judgment of forfeiture, but the court of appeals reversed, holding that the government violated due process when it seized Good's property without prior notice and hearing.[119]

The government argued that the Due Process Clause did not apply when seizing property for "law enforcement purposes," and that it only needed to comply with the Fourth Amendment.[120] The government reasoned that because the Fourth Amendment did not require an adversary hearing to establish probable cause to detain a criminal defendant pending trial, no adversary hearing was required to detain real property subject to forfeiture.[121] In the alternative, the government urged that due process did not require notice and a hearing before seizing property for forfeiture.[122] As in *Austin*, the government cited

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114. *Id.* at 2812 (quoting Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 265 (1989).

115. *See* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994) (expanding upon the *Halper* analysis in the context of taxation of illegal drugs).

116. United States v. James Daniel Good Real Property, 114 S. Ct. 492, 497 (1993). Although A. C. Pritchard was employed by the Office of the Solicitor General at the time *Good* was argued, the views expressed here are solely those of the authors and do not necessarily represent the views of the Department of Justice.

117. *Id.*

118. *Id.* at 498.

119. *Id.*

120. Brief for the United States at 13, United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (No. 92-1180).

121. *Id.* at 9 (citing Gerstein v. Pugh, 420 U.S. 103, 119-22 (1975)).

122. *Id.* at 10 (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 677 (1974)).

no case prior to *Dobbins's Distillery* in which real property was forfeited in rem.[123]

Justice Kennedy, writing for the Court, rejected the government's argument that the applicability of the Fourth Amendment to civil forfeitures excluded the application of the Due Process Clause.[124] He applied the balancing test of *Matthews v. Eldridge*[125] to the facts of the case. Justice Kennedy found that: (1) Good had a substantial interest in his home; (2) the *ex parte* determination of probable cause posed a considerable risk of error; and (3) the government's asserted interests in taking control of the property—obtaining jurisdiction and preventing the loss or destruction of the property—were slight in the case of real property.[126] He distinguished *Dobbins's Distillery* and later cases on the ground that "executive urgency" required "'[t]he prompt payment of taxes.'"[127] Because tax revenues were not implicated, due process required notice and hearing before seizing the house.[128]

Chief Justice Rehnquist, Justice O'Connor and Justice Thomas dissented. The Chief Justice characterized the distinction of *Dobbins's Distillery* as "novel," and pointed out that the majority's opinion called into question the government's long-established authority to collect taxes by summary procedures.[129] Justice O'Connor charged that "[t]he distinction the Court tries to draw between our precedents and this case—the only distinction it *can* draw—is that real property is somehow different than personal property for due process purposes. But that distinction has never been considered constitutionally relevant in our forfeiture cases."[130] Justice O'Connor cited *Dobbins's Distillery* for the proposition that the government can summarily seize and forfeit real property used in a crime.[131] Justice Thomas's dissent was more guarded in its tone, recognizing that

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123. *Id.* at 18. The ACLU, as amicus, focused on civil forfeiture's expansion beyond its original domain of contraband and direct instrumentalities. Brief *Amicus Curiae* of the American Civil Liberties Union and the ACLU of Hawaii in Support of Respondents at 3-10. The ACLU urged that "civil *in rem* forfeiture is no longer grounded in its original remedial justification," and that "the government can no longer rely on the 'guilty property' fiction to obscure the punitive impact of forfeiture on individuals like Good." *Id.* at 10. In the ACLU's view, property owners were entitled to all relevant constitutional criminal procedures. *Id.* at 19.

124. *Good*, 114 S. Ct. at 500.

125. 424 U.S. 319 (1976).

126. *Good*, 114 S. Ct. at 501.

127. *Id.* at 504 (quoting Springer v. United States, 102 U.S. 586, 594 (1880)).

128. *Id.* at 505.

129. *Id.* at 509 (Rehnquist, C.J, concurring in part and dissenting in part).

130. *Id.* at 511 (O'Connor, J., concurring in part and dissenting in part).

131. *Id.* at 512.

> [a] strong argument can be made . . . that § 881(a)(7) is so broad that it differs not only in degree, but in kind, from its historical antecedents. . . . Given that current practice under § 881(a)(7) appears to be far removed from the legal fiction upon which the civil forfeiture doctrine is based, it may be necessary—in an appropriate case—to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture.[132]

In Justice Thomas' view, however, *Good* did not provide an appropriate vehicle for reconsidering the Court's approach to civil forfeiture. Justice Thomas found the majority's distinction of *Dobbins's Distillery* "twice-puzzling," as it was "somewhat odd that the . . . Government's financial concerns might justifiably control the due process analysis" and "difficult to believe that the prompt collection of funds was more essential to the Government a century ago than it is today."[133]

III. CIVIL FORFEITURE, THE COURT, AND THE CONSTITUTION

The Constitution, with enforcement by Article III's independent judiciary, limits the agency costs that government actors can impose on the public.[134] Judicial independence protects judges from political pressures—such as those compelling legislators to enact ever more draconian laws against drug trafficking—and allows the judiciary to check the rent-seeking behavior endemic to the political branches.[135] As shown in Part I, agency costs are particularly acute in the context of the war on drugs, especially given civil forfeiture's collateral consequences in violence and property crime. In our view, civil forfeiture has more to do with rent-seeking by legislators and law enforcement officials than with eradicating drug use. In this Part, we discuss the judiciary's role in discouraging this rent-seeking.

Drug Act forfeiture singles out certain individuals to bear the costs of law enforcement against illegal drug use. Imposing costs on a particular

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132. *Id.* at 515 (Thomas, J., concurring in part and dissenting in part).
133. *Id.* at 516.
134. Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 123-29 (1993).
135. Donald J. Boudreaux & A.C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 CONST. POL. ECON. 1 (1994).

industry ordinarily does not run foul of takings law,[136] but civil forfeiture imposes costs on only a part of the industry. As a consequence of drug criminalization, civil forfeiture singles out those individuals who have been caught drug trafficking, and those unlucky or foolish enough to permit dealers to use their property. The Takings Clause ordinarily would require compensation in such cases, because it "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[137] The Court, however, has rejected takings challenges to forfeitures on the ground that forfeiture "further[s] the *punitive and deterrent* purposes that have been found sufficient to uphold, against constitutional challenge, the application of . . . forfeiture statutes to the property of innocents."[138]

This reasoning makes sense for criminal forfeiture, which explicitly punishes. The criminal law singles out individuals for punishment based on their behavior. Constitutional criminal procedure exists because legislatures are unlikely to supply optimal procedures for correctly singling out individuals who have committed crimes. Courts must step in to ensure adequate procedures.[139] The due process ideal that criminals should be precisely identified appeals to common notions of corrective justice, as well as efficiency concerns of optimal deterrence. Simply put, more precise criminal law enforcement yields greater deterrence of wrongdoers with fewer collateral costs imposed on innocents.

Takings law provides a useful analogy to help explain why the Constitution mandates criminal procedures in certain contexts. Just as the requirement of just compensation forces government to internalize the costs of highways by imposing that cost on taxpayers as a whole, channeling crime fighting through the criminal process, and funding that

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136. *See* Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1347 (1991) ("regulatory plans that burden entire industries (such as legislation mandating automobile safety equipment or banning the sale of alcohol) are not compensable takings").

137. Armstrong v. United States, 364 U.S. 40, 49 (1960).

138. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974) (emphasis added). The Court had earlier suggested that taking the property of "totally innocent people" would raise "serious constitutional questions" under the Takings Clause. United States v. United States Coin & Currency, 401 U.S. 715, 719-20 (1971). As this Article was going to print, however, the Court handed down its decision in Bennis v. Michigan, 116 S. Ct. 994 (March 4, 1996), rejecting a challenge brought by an innocent owner. We discuss that decision and the historical treatment of innocent owners in a forthcoming article. *See* Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost:* Bennis v. Michigan *and the Forfeiture Tradition*, MO. L. REV. (forthcoming 1996).

139. *See* Pritchard, *supra* note 14, at 1069-74.

process through the general revenues, forces taxpayers to internalize the full social cost of criminalization and increases government accountability. Criminal forfeiture, while not immune from rent-seeking abuses by government officials, reduces externality problems.[140] Criminal forfeiture, like a criminal fine, is unambiguously subject to both the Eighth Amendment's Excessive Fines Clause, and the Sixth Amendment's right of trial by jury.[141] In addition, requiring government to proceed criminally when it seeks forfeiture reduces prosecutors' bargaining power because they cannot trade criminal immunity for the turnover of assets. The revenue potential of forfeiture would be curtailed by the requirement of a criminal conviction, and politicians and law enforcement authorities would feel the full budgetary implications of a drug war. More importantly, criminal forfeiture affords defendants the accuracy-enhancing criminal process which protects against erroneous singling out of the innocent.

Criminal forfeiture has other advantages. Civil forfeiture ties agency revenues to criminal behavior, presenting a unique opportunity for law enforcement abuse, which is absent when civil forfeiture is used in a legal industry. For example, when the Food and Drug Administration seizes misbranded or defective drugs from a pharmaceutical company, the company is part of a lobby that can push Congress for changes in forfeiture enforcement if the FDA abuses its authority. Under the Drug Act, however, Congress has criminalized the behavior giving rise to the forfeiture, leaving no lobby to campaign for reform. Because few bear the burden of forfeiture, and Congress has effectively disenfranchised those individuals from the interest group lobbying that produces legislation, the heightened protection of criminal procedures is needed. Abuses left unchecked by the courts will go unchecked altogether.

Although the judiciary has an important role to play in cabining civil forfeiture, perceived abuse does not warrant judicial conjuring of novel constitutional doctrines. Justice Scalia noted such a trend in the Court's *Austin* decision.

> We have never held that the Constitution requires negligence, or any other degree of culpability, to support such forfeitures. . . . If the Court is correct that

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140. For a discussion of criminal forfeiture's revival, see Karla R. Spaulding, *"Hit Them Where it Hurts": RICO Criminal Forfeitures and White Collar Crime*, 80 J. CRIM. L. & CRIMINOLOGY 197, 198-211 (1989).

141. *See* Alexander v. United States, 113 S. Ct. 2766, 2769 (1993).

> culpability of the owner is essential, then there is no difference (except perhaps the burden of proof) between the traditional *in rem* forfeiture and the traditional *in personam* forfeiture. Well-established common-law distinctions should not be swept away by reliance on bits of dicta.[142]

We share Justice Scalia's desire to maintain "[w]ell-established common-law distinctions." Indeed, given the rent-seeking abuses identified in Part I, we believe that the Court should restore the "common-law distinctions" that served to protect liberty.

In this Part, we criticize the Court's approach to curbing civil forfeiture abuses. We then sketch an alternative constitutional framework for answering civil forfeiture questions. Our framework restores "common-law distinctions" and finds support in both economics and history. In our view, the Court went astray when it discarded the common-law distinction between personal property, which was subject to in rem forfeiture, and real property forfeiture, which required an in personam criminal conviction. That distinction is crucial to any coherent civil forfeiture doctrine. Furthermore, our rule would permit the government to proceed in rem—unconstrained by the Bill of Rights provisions traditionally applied only in criminal proceedings—only against personal property. In order to obtain real property through forfeiture, the government would first have to criminally convict the property owner in personam.

A. Defects of the Current Constitutional Regime

The government's expansion of civil forfeiture has left the Court in a doctrinal quagmire. Beginning with *Boyd*, the Court has confronted civil forfeiture abuses using a "selective incorporation" approach, extending some, but not all, criminal constitutional protections to civil forfeiture.[143] The Court, however, has done so in a grudging and haphazard fashion, without explaining why certain protections have been extended while others have not.[144] *Boyd* invoked Fourth and Fifth Amendment protections ordinarily limited to criminal proceedings based on the

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142. Austin v. United States, 113 S. Ct. 2801, 2814 (1993) (Scalia, J., concurring in part and concurring in the judgment).

143. *Compare* Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring) (advocating total incorporation of the Bill of Rights through the Fourteenth Amendment) *with id.* at 176 (Harlan, J., dissenting) (criticizing the majority's ad hoc "selective incorporation").

144. *See, e.g.*, Austin v. United States, 113 S. Ct. 2801, 2804-05 n.4 (1993); United States v. Ward, 448 U.S. 242, 248 (1980); Helvering v. Mitchell, 303 U.S. 391, 400 n.3 (1937); *see also* Schecter, *supra* note 34, at 1157-78 (criticizing selective application of criminal constitutional provisions to forfeitures and advocating criminal procedures for all proceedings under the Drug Act).

Court's conclusion that the forfeiture was "quasi-criminal." No guidance was offered, however, in determining what other constitutional provisions would be required by "quasi-criminal" forfeiture.[145] Unable to formulate a limiting principle for the "quasi-criminal" category, the Court simply ignored it when confronted with other constitutional claims.

Faced with the forfeiture abuses of the Drug Act, the contemporary Court has continued *Boyd*'s tradition of checking abuse by invoking constitutional provisions on an ad hoc basis. In *Austin*, the Court used an amorphous remedial/punitive standard for determining when the protections of the Eighth Amendment, ordinarily limited to criminal cases,[146] should be brought to bear in a civil proceeding.[147] Traditional constitutional standards, however, allow the government to punish only after a criminal conviction.[148] If the forfeiture "punished" Austin in a constitutional sense, *no* forfeiture of any amount should have been permitted absent a criminal conviction. Austin, of course, had already faced prosecution criminally, so double jeopardy would have barred a criminal forfeiture prosecution. *Austin* not only departed from traditional notions of punishment, but it also requires a case-by-case analysis with an involved factual accounting of a forfeited property's value relative to the harm suffered by the government. *Austin* followed *Halper*, in which the Court offhandedly dismissed the traditional dividing line between civil and criminal protections: "The notion of punishment, as we commonly understand it, cuts across the division between the civil and

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145. *Cf.* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 414 (1976) ("[*Boyd*'s] term 'quasi-criminal,'. . . has muddied legal waters ever since.").

146. *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 573-74 (1833) ("The eighth amendment is addressed to courts . . . exercising criminal jurisdiction . . . .").

147. *See supra* notes 102-14 and accompanying text.

148. *See* Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). The Court stated:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eight Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.

Id.

the criminal law."[149] The Court's reliance on *Halper* in *Austin* suggests that the Court will extend the remedial/punitive analysis when assessing double jeopardy challenges to civil forfeitures, further blurring the line between civil and criminal constitutional procedures.

The Court's decisions in this area have led to confusion in the lower courts. The Ninth Circuit has recently held that forfeiture under the Drug Act always constitutes punishment,[150] reading the Court's decision in *Austin*: "[to] resolve[] the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the *Halper* criteria, it constitutes 'punishment' for the purposes of *both* clauses."[151] Looking "to the requirements of the forfeiture *statute* as a whole," the Ninth Circuit concluded that Drug Act forfeitures operated "at least in part to punish and deter."[152] Accordingly, any civil forfeiture under the Drug Act subsequent to criminal conviction was barred by double jeopardy.[153]

We disagree with the courts that have read *Austin* to hold that double jeopardy should apply generally to civil forfeitures. To determine if the defendant is being punished twice, *Halper* requires ad hoc balancing of the government's damages relative to the forfeited property's value.[154] Sanctioning conduct both criminally and civilly, however, has long been held constitutional.[155] Double jeopardy provides the wrong constitutional framework for tackling the disproportionality problems raised by civil forfeiture. If a penalty genuinely punishes, its constitutionality should not turn on whether it is imposed before, after, or simultaneously

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149. United States v. Halper, 490 U.S. 435, 447-48 (1989).

150. *See* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1222 (9th Cir. 1994), *cert. granted*, United States v. Ursery, 116 S. Ct. 762 (1996), *argued* April 17, 1996. This decision has led to chaos in the district courts of the Ninth Circuit. *See generally* Joan L. Cobb, *Forfeiture Decision Generates Veritable Explosion of Relief*, 8 BNA CRIM. PRAC. MAN. 590 (1994).

151. *$405,089.23*, 33 F.3d at 1219.

152. *Id.* at 1220-21.

153. *Id.* at 1222; *accord* United States v. Ursery, 59 F.3d 568, 573 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996), *argued* April 17, 1996 ("any civil forfeiture under 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes").

154. United States v. Tilley, 18 F.3d 295, 298 (5th Cir. 1994) ("*Halper* . . . focuses on the relationship between the amount of the civil sanction and the amount required to serve the remedial purpose of reimbursing the costs incurred by the government and society as a result of the wrongful conduct.").

155. United States v. Dixon, 347 U.S. 381, 385 (1954) ("Clearly Congress may impose both a criminal and a civil sanction in respect to the same act; this is neither unusual nor constitutionally objectionable.").

with criminal punishment. It should be unconstitutional unless imposed in a criminal proceeding.[156] Due process accuracy requires no less.

In applying double jeopardy to civil forfeitures, the Court further confuses the question of when criminal constitutional procedures will apply in civil proceedings.[157] Prior criminal punishment should not bar the government from subsequently taking away the instrumentalities by which a criminal might commit future crimes. By the same token, when the government seizes instrumentalities used in the drug trade, a prior civil forfeiture should not bar subsequent prosecution if the government later uncovers evidence warranting such prosecution. To be sure, the government can avoid such complications by bringing its criminal case and civil forfeiture action simultaneously,[158] but it can do this only if it knows the scope of the defendant's wrongdoing (and the instrumentalities employed) at the time of the initial action.

Not satisfied with invoking criminal protections on an ad hoc basis, the Court has also invented novel civil protections. *Good* invoked the civil ad hoc balancing test of *Mathews v. Eldridge*[159] to limit government seizure of real property for forfeiture. This inquiry, however, requires the same case-by-case analysis that makes *Austin* so unwieldy. Further, *Good* provides no clues as to what further civil forfeiture procedures might spring from the *Mathews* balancing test.[160] Finally, it calls into question long available civil procedures, such as the

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156. *See* Lawrence A. Kasten, Note, *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 GEO. WASH. L. REV. 194, 237 (1991) ("On careful inspection, the distinction between double jeopardy and other safeguards, especially in the forfeiture context, becomes illusory.").

157. *See* Peter J. Henning, *Precedents in a Vacuum: The Supreme Court Continues to Tinker with Double Jeopardy*, 31 AM. CRIM. L. REV. 1, 67 (1993) ("The application of *Halper* to civil forfeiture actions could seriously impede the government's ability to pursue parallel civil and criminal proceedings."). *But see* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1369-1404 (1991) (certain constitutional criminal procedures should be applied in civil cases).

158. *Compare* United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) (no *Halper* problem where civil forfeiture suit and criminal case brought in "a single prosecution") *with* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1216 (9th Cir. 1994) ("A forfeiture case and a criminal prosecution would constitute the *same* proceeding only if they were brought in the same indictment and tried at the same time.").

159. 424 U.S. 319 (1976); *see also* Medina v. California, 505 U.S. 437, 442-46 (1992).

160. *See, e.g.*, United States v. Michelle's Lounge, 39 F.3d 684 (7th Cir. 1994) (applying *Matthews* to grant post-seizure hearing on probable cause to seize proceeds).

government's ability to collect taxes through summary procedures. In our view, such an unpredictable approach poorly checks civil forfeiture abuses.

The Court's recent decisions have produced a mish-mash of criminal and civil procedures. In rem civil forfeiture now sits uneasily between the realms of criminal and civil law. A more determinate, predictable, and rule-based approach to forfeiture is available if the Court is willing to reconsider prior holdings and return civil forfeiture to its historical function—and boundaries—under the common law. The next sections outline that approach.

B. Due Process: Civil or Criminal Procedures?

This Section addresses the application of criminal constitutional procedures to forfeiture. Although the "Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction,"[161] we think, at bottom, that question necessarily implicates the accuracy concerns of due process. The seminal case on due process accuracy is *Murray's Lessee v. Hoboken Land & Improvement Co.*[162] *Murray's Lessee* requires that judges:

> examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statue [sic] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[163]

Under this standard, a remedy available in a civil proceeding at common law carries the strong presumption validating its current use as a civil remedy. But the contrary proposition does not follow; the Court has not frozen common law requirements into the Constitution.

> [A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. . . . [T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and . . . render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.[164]

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161. United States v. Ward, 448 U.S. 242, 248 (1980) (citations omitted).
162. 59 U.S. (18 How.) 272 (1855).
163. *Id.* at 277.
164. Hurtado v. California, 110 U.S. 516, 528-29 (1884).

This is no license for legislative procedural innovation: "no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."[165] Thus, the choice between civil and criminal procedures cannot be resolved solely by reference to common law practice.[166]

To carry the analysis further, we must distinguish among the three strands of due process. Due process has both civil and criminal procedural elements, as well as a substantive element. The Court balances three factors in civil due process cases:

> [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[167]

In *Medina* v. *California*, the Court held this balancing test inapplicable to criminal proceedings; instead, the Court examined historical practice to determine whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[168] In the criminal context, due process has narrow application beyond the specific guarantees of the Bill of Rights.[169] The most conspicuous example of an independent procedure required by due process is proof beyond a reasonable doubt.[170] That

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165. Twining v. New Jersey, 211 U.S. 78, 101 (1908). *But see In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting) ("For me the only correct meaning of [due process] is that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions.")

166. *Cf.* Clark, *supra* note 145, at 409 ("[T]he Court might find it very difficult to determine which *offenses* are so serious that any punishment based on their intentional commission, even if labeled 'civil,' should trigger constitutional safeguards. The proliferation of statutory offenses would render any historical reference to common law impossible in many cases." (footnotes omitted)).

167. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

168. Medina v. California, 505 U.S. 437, 445 (1992) (internal quotations omitted).

169. Dowling v. United States, 493 U.S. 342, 352 (1990).

170. *In re* Winship, 397 U.S. 358, 364 (1970).

rule, however, is no ad hoc judicial innovation; it is well founded in historical practice.[171]

The Court's application of different *tests* in civil and criminal contexts does not necessarily reflect a different *standard*; each inquiry balances the costs and benefits of procedural schemes.[172] Each test has the same goal: Reasonable accuracy given the severity of the threatened sanction.[173] In the criminal context, that standard has been crystallized in historical tradition and the specific provisions of the Bill of Rights. Case-by-case judicial balancing is unlikely to improve upon that historical balance, proved valid by experience. In the civil context, by contrast, Congress has demonstrated an inventiveness in creating new offenses and procedures that has left common-law procedures far behind.[174] The judiciary has confronted that legislative innovation with flexibility of its own in construing the requirements of due process.

The question whether a given penalty must be enforced through civil or criminal proceedings raises similar accuracy concerns. Unless the judiciary grants Congress carte blanche to punish through civil procedures, courts must look beyond the label affixed by the legislature. The doctrinal hook is supplied by the third due process strand: substantive due process. Under substantive due process standards, the government cannot punish an individual without first establishing his guilt in a criminal trial.[175] However, "[n]ot every disability. . . amounts to punishment."[176] In determining whether a given sanction "punishes," thus requiring criminal procedures, the Court applies seven factors:

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171. "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* at 361-62 (quoting Duncan v. Louisiana, 391 U.S. 145, 155 (1968)).

172. *See* Cheh, supra note 157, at 1351 ("One can view the Bill of Rights itself as a balancing of interests between the costs of procedures and the benefits they confer. Any decision to extend procedural protections beyond those instances where they clearly apply requires a similar calculation.").

173. *See, e.g.*, *Winship*, 397 U.S. at 363 ("The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error. . . . The accused during a criminal prosecution has at stake interests of immense importance.").

174. *See* Cheh, *supra* note 157, at 1337 ("There is almost no limit to the creativity of Congress in thinking of ways to sanction participants in government regulated activities.").

175. United States v. Salerno, 481 U.S. 739, 748-49 (1987) ("general rule of substantive due process" precludes government from inflicting punishment prior to a criminal trial); Bell v. Wolfish, 441 U.S. 520, 536 n.17 (1979) (noting "general principle that punishment can only follow a determination of guilt after trial or plea"); Wong Wing v. United States, 163 U.S. 228, 237 (1896) (due process requires a "judicial trial to establish the guilt of the accused" before confiscating his or her property).

176. *Bell*, 441 U.S. at 537.

> [1] whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .[177]

Given the number of factors, it is no surprise that the Court's decisions applying them are unclear.[178] The application of these factors to forfeiture, however, is tolerably clear. In the next sections we apply these due process standards to personal and real property.

C. Due Process: Personal Property

Historically, in rem forfeiture allowed courts to hear actions against property owned by individuals who were beyond the courts' in personam jurisdiction.[179] Forfeiture of vessels employed in wrong-doing carries a sound functional justification with its long historical pedigree. In rem procedures were essential to enforce revenue and piracy laws, given that the vessels' owners were usually beyond the court's jurisdiction. The government often would be left remediless if required to obtain personal jurisdiction over the owner. The personification fiction solves this jurisdictional dilemma: "The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."[180] Justice Story justified the fiction as arising "from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party."[181]

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177. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

178. Clark, *supra* note 145, at 384 ("Notwithstanding general agreement about this core concept [of punishment], the Court's application of it to particular cases has proved to be highly unpredictable and confusing.").

179. *See supra* text accompanying note 62.

180. United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1844).

181. *Id. Cf.* O.W. HOLMES, JR., THE COMMON LAW 28 (Little, Brown, and Company 1881) ("The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.").

In rem procedures were not limited to admiralty; the customs laws also authorized the seizure on land of goods that had been illegally imported.[182] The admiralty jurisdiction did not extend to such seizures,[183] but permitting in rem procedures on land for customs violations comports with the logic of their use in admiralty for seizing vessels. The owner of the goods may well have been beyond the court's in personam jurisdiction, and forfeiture was the government's only means for collecting the tax. Moreover, the sanction imposed usually fell within the broad range of the government's expenses resulting from the smuggling.[184] Requiring a criminal conviction before forfeiting smuggled goods might leave the government without any sanction against the owner.[185] Finally, the government's entitlement to collect taxes by seizing the property could be defeated if the goods were removed from the jurisdiction before judgment: "revenue seizures . . . are always of personal and movable property."[186] Thus, summary

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182. *See, e.g.*, Clifton v. United States, 45 U.S. (4 How.) 242, 243 (1846).

183. United States v. Coombs, 37 U.S. (12 Pet.) 72, 76 (1838) ("[I]n cases purely dependent upon the locality of the act done, it is limited to the sea, and to tide waters, as far as the tide flows; and that it does not reach beyond high water mark."). Forfeiture proceedings for goods seized on land were authorized by Congress's "power to regulate commerce and navigation, and to levy and collect duties." *Id.* at 78.

184. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972). The Court stated:

> [The] forfeiture is intended to aid in the enforcement of tariff regulations. It prevents forbidden merchandise from circulating in the United States, and, by its monetary penalty, it provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses.

Id.

185. *See* Origet v. United States, 125 U.S. 240, 246 (1888) ("The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent."). This rule still provides the government with greater rights against the ship and its cargo than a private party would have. *See* United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210, 235 (1844) ("So far as the general maritime law applies to torts or injuries committed on the high seas and within the admiralty jurisdiction, the general rule is, not forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonably allowable, to be enforced by a proceeding therefor *in rem* or *in personam*.").

186. Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 348 (1870). In rem proceedings also prevented jurisdictional conflicts. *See* Miller v. United States, 78 U.S. (11 Wall.) 268, 294 (1870). The *Miller* Court stated:

> In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is in rem. In most such cases the *res* is movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual.

Id.

search and seizure of goods imported without payment of duties, accompanied by streamlined forfeiture procedures, protected the public revenues from massive fraud.[187]

The historical justification for in rem civil forfeiture supports the constitutionality of at least some personal property forfeitures under the Drug Act.[188] For example, the long tradition of civil forfeiture of contraband[189] affirms the constitutionality of forfeiting illegal drugs.[190] Accuracy concerns are minimal because adjudication addresses only the good's identity.[191] The government's power to proscribe possession of certain goods encompasses the power to destroy the offending object.[192] The owner has not been singled out as a lawbreaker, because his culpability is irrelevant.[193] The government can eliminate property rights in such goods. This rationale has its limits; the label "contraband" does not define a fixed set. Notwithstanding these limits, proceedings for the forfeiture of contraband may be more attenuated than those normally afforded in cases involving personal property; the Court has properly recognized that elaborate procedures are

187. *See generally In re* Platt, 19 F. Cas. 815, 816-17 (S.D.N.Y. 1874) (No. 11,212) (Blatchford, J.) (discussing history and policy of customs searches).

188. Not all assertions of in rem jurisdiction over personal property satisfy due process. *See* Shaffer v. Heitner, 433 U.S. 186 (1977) (striking down Delaware's "quasi in rem" jurisdiction over stock of Delaware corporations).

189. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) ("One of the oldest examples is the summary destruction of property without prior notice or hearing for the protection of public health. There is no constitutional reason why Congress in the interests of consumer protection may not extend that area of control.")

190. *See* 21 U.S.C. § 881(f) (1995) (authorizing forfeiture and destruction of controlled substances).

191. Miller v. United States, 78 U.S. (11 Wall.) 268, 322 (1870) (Field, J., dissenting) ("the thing, thus subject to seizure, itself furnishes the evidence for its own condemnation").

192. Hester v. United States, 265 U.S. 57, 58-59 (1924) (no property rights in liquor).

193. *See* Clark, *supra* note 145, at 479. Clark notes:

> It seems clear that forfeiture of contraband items can be justified as regulatory rather than punitive even apart from the formal 'property interest' idea. Forfeiture of such items does not depend on their use to commit an illegal act, so that the sanction of forfeiture does not apply uniquely to lawbreakers.

Id.

unnecessary.[194] A similar rule applies to stolen and smuggled goods.[195]

The government, through civil forfeiture, can also obtain conveyances used to transport drugs. Ships used in smuggling are within civil forfeiture's domain. Although a closer question, automobiles and airplanes are arguably analogous instrumentalities within that traditional domain.[196] The risk of disproportionality usually will be small because the value of the conveyance will not be great. Moreover, the contraband ordinarily will be found within the conveyance, making the forfeiture determination straightforward and minimizing accuracy concerns. The full panoply of criminal procedures should not come into play simply because forfeiture sanctions the possession of a criminalized good, rather than aiding revenue collection.[197] The owners of the automobiles, however, are likely to be within the court's in personam jurisdiction. In light of the historical justification for civil forfeiture, the Supreme Court

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194. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950) (Upholding the forfeiture of mislabeled goods: "It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."). *See also* Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 306 (1992) ("forfeiture statutes aimed at *per se* contraband should be subjected to limited scrutiny"). The Seventh Amendment, however, may require a jury for forfeiture of goods seized on land. *Compare* Four Hundred and Forty-Three Cans of Frozen Egg Product v. United States, 226 U.S. 172 (1912) (jury trial required to forfeit impure food) *with* Van Oster v. Kansas, 272 U.S. 465, 469 (1926) (no jury required in state forfeiture proceeding).

195. The *Boyd* Court stated:

> The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

Boyd v. United States, 116 U.S. 616, 623 (1886). *See also* North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (no prior hearing required to seize and destroy unwholesome food).

196. General Motors Acceptance Corp. v. United States, 286 U.S. 49, 56 (1932) ("Forfeiture of vehicles bearing smuggled goods is one of the time-honored methods adopted by the Government for the repression of the crime of smuggling.").

197. *See id.* at 62 ("Courts accepting the conclusion that the customs forfeitures are ended in respect of intoxicating liquors have been unable to extricate themselves from the conclusion that forfeitures under the navigation acts have fallen at the same time."). Some constitutional protections commonly applied in criminal contexts would apply to automobiles as well, even if not applied to seizures of contraband. *See, e.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 699 (1965) (applying Fourth Amendment to forfeiture of car, distinguishing contraband exception: "There is nothing even remotely criminal in possessing an automobile."). On some matters, the requirements of due process and a criminal constitutional provision may be the same. *See, e.g.*, United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555, 564 (1983) (due process employs balancing test used under the Sixth Amendment's guarantee of a speedy trial).

could properly adopt a rule requiring the government to show that the conveyance had crossed a jurisdictional boundary or that the owner was beyond the court's in personam jurisdiction before the conveyance could be forfeited civilly; otherwise, a criminal proceeding would be required.[198]

The forfeiture of drug trafficking proceeds[199] poses a more complicated question. Congress plainly adopted the provision to deter drug trafficking.[200] Forfeiture statutes have traditionally "applied to stolen goods, but they did not apply to proceeds from the sale of stolen goods."[201] The forfeiture of proceeds cannot be considered a form of restitution because consensual transactions do not create "victims." The forfeiture of *profits* from illegal drug trafficking seems nonproblematic, given the use of disgorgement for illegal profits in the antitrust and securities areas. The disgorgement of profits is nonpunitive because it simply restores the status quo ante.[202] Profiting from an illegal transaction falls squarely within the common-law understanding of unjust enrichment; forfeiture of profits simply imposes a constructive trust on that unjust enrichment.[203] The civil remedy of the constructive trust is well known to the common law.[204] Civil forfeiture of profits merely affords the government a civil alternative for securing its entitlement to these monies.

The forfeiture of *all* proceeds raises greater concerns. It is difficult to distinguish a forfeiture of proceeds from a 100% tax, which is arguably

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198. *But see* Bennis v. Michigan, 116 S. Ct. 994 (1996) (forfeiture of innocent owner's interest in car is neither a taking nor a due process violation).

199. 21 U.S.C. § 881(a)(6) (1995).

200. Senator Sam Nunn, § 881(a)(6)'s sponsor, sought "a meaningful deterrent. . . . [A]stronomical profit, is the base motivation of drug traffickers. The amendment . . . is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illicit drug trafficking." 124 CONG. REC. 23,055 (1978).

201. United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1134 (1993); *id.* at 1135 ("[W]e are not aware of any common-law precedent for treating proceeds traceable to an unlawful exchange as a fictional wrongdoer . . . .").

202. *See* S.E.C. v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994) (disgorgement of "ill-gotten gains" does not constitute punishment for double jeopardy purposes).

203. *See* Snepp v. United States, 444 U.S. 507 (1980) (per curiam) (imposing constructive trust on profits from book published by ex-CIA agent in violation of contractual commitment).

204. E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1351-69 (1985) (discussing historical development of disgorgement principle).

punitive.[205] Although in rem forfeiture of proceeds was unknown at common law, we believe there are common-law analogues. The government is arguably entitled to drug proceeds because of its superior property right in the drugs themselves prior to the defendant's conversion of the drugs into cash.[206] On this view, proceeds forfeiture is simply a form of tracing. In some cases, the government has seized proceeds or frozen accounts. When the claimant to those funds then comes into court seeking equity, a court can properly deny relief based on the claimant's "unclean hands." Civil forfeiture of proceeds simply reduces this venerable equitable doctrine to a rule of law, but the question is a close one.[207] The labelling of drugs as "contraband" is simply a device by which the government seeks to control crime;[208] the validity of the tracing rationale is dependent on the strength of the government's property right in the drugs.[209]

A less formalistic rationale for the forfeiture of drug proceeds can be found in civil forfeiture's historic function. Money today, like ships historically, can move easily across jurisdictional boundaries, via check, wire transfer, or suitcase. Consequently, the money's owner may be beyond the personal jurisdiction of United States courts. As with ships, therefore, imposing stringent monitoring duties on owners of currency may be "the necessity of the case, as the only adequate means of suppressing the offence or wrong."[210] The civil forfeiture of proceeds from drug trafficking fits within the historical justification for in rem forfeiture.

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205. *See* Department of Revenue of Mont. v. Kurth Ranch, 114 S. Ct. 1937 (1994); United States v. LaFranca, 282 U.S. 568 (1931).

206. *See* Henning, *supra* note 157, at 65-66 ("It is unlikely that a forfeiture action to reach the proceeds of drug transactions, as permitted under § 881(a)(6), would be found to be punitive because the money is a substitute for the narcotics, a byproduct of the violation.").

207. *Compare* United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1221 (9th Cir. 1994), *cert. granted*, United States v. Ursery 116 S. Ct. 762 (1995) (distinguishing proceeds from profits) *with* United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994) (forfeiture of proceeds not punishment, because "the forfeiture of drug proceeds will always be directly proportional to the amount of drugs sold").

208. Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967). The Court stated:

> [C]ontraband is indeed property in which the Government holds a superior interest, but only because the Government decides to vest such an interest in itself. And while there may be limits to what may be declared contraband, the concept is hardly more than a form through which the Government seeks to prevent and deter crime.

Id.

209. *See* United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 44 F.3d 1082, 1085-90 (2d Cir. 1995) (Heaney, J., dissenting) (discussing RICO disgorgement as a "quasi-criminal" sanction).

210. United States v. The Brig Malek Adhel, 43 U.S. (2 How.) 210, 233 (1894).

D. Due Process: Real Property

The forfeiture of real property poses an even tougher constitutional question. In *Austin*, the Court avoided the question of whether real property forfeiture was a criminal punishment by extending the Eighth Amendment to noncriminal proceedings.[211] In our view, the Court took a wrong turn in *Austin*. The Court has failed, until recently, to recognize the distinction between the forfeiture of personal property and the forfeiture of real property. *Good*[212] recognizes the distinction, but fails to acknowledge the Court's previous errors that arose from having ignored the distinction.

In our view, the incoherence of the Court's forfeiture doctrine stems from *Dobbins's Distillery's* abandonment of the common law requirement that the government criminally convict the owner to forfeit real property. Given the rather sparse use of real property forfeiture subsequent to *Dobbins's Distillery*, the Court's abandonment of that requirement originally did not pose great difficulties.[213] The Drug Act, however, has greatly altered the stakes for the government, encouraging real property forfeiture and enhancing opportunities for abuse.[214]

The Court approved Congress's extension of in rem forfeiture to real property under the Confiscation Acts without considering whether the in rem rationale extended to real property.[215] The Court held that

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211. Austin v. United States, 113 S. Ct. 2801, 2806 n.6. (1993).

212. United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993).

213. Real property forfeiture was rare before the Drug Act. David J. Fried, *Rationalizing Criminal Forfeiture*, 79 J. CRIM. L. & CRIMINOLOGY 328, 384 n.257 (1988). Fried states:

> [T]wo statutes . . . provide for the civil forfeiture of land: land upon which an illegal still is found, 26 U.S.C. § 5615(3) (1982); and land of a brewery from which taxable beer has been removed for consumption or sale "with intent to defraud the United States of the tax thereon." 26 U.S.C. § 5673 (1982). There is no reported case of in rem forfeiture of real property under either of these statutes more recent than United States v. About 151.682 Acres of Land, 99 F.2d 716 (7th Cir. 1938).

Id.

214. *Cf. id.* at 331 ("Civil forfeiture is a farrago of injustices sanctified by tradition. Its historical justifications, such as they are, have been left behind by its alarming extension in recent years, and its adoption as a criminal punishment, when its validity has always depended on its status as a civil penalty, is unprincipled.").

215. Union Fire Ins. Co. v. United States, 73 U.S. (6 Wall.) 759, 764 (1867). This holding contradicted the Court's rejection the previous term of the argument that in rem

Congress's war power permitted this abrogation of common-law procedures, but the seizure could have been upheld on a basis more consistent with the historic function of in rem jurisdiction. The Confiscation Acts fit neatly within the traditional jurisdictional rationale for in rem forfeiture. The owners of the property seized were ordinarily behind Confederate lines. To require criminal conviction before forfeiting their real property effectively would have eliminated the government's right to the property of culpable individuals beyond the courts' in personam jurisdiction. The Court's rejection of such a requirement thus squared with in rem jurisdiction's historic function.

Unfortunately, the Court extended in rem doctrine beyond its historical function in *Dobbins's Distillery*.[216] In *Dobbins's Distillery*, the jurisdictional rationale that forfeiture was necessary to collect taxes was unavailable because the taxpayer was subject to the court's in personam jurisdiction.[217] Moreover, the owner was also subject to in personam

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procedures were available at common law. The Court overturned a state court's assertion of in rem jurisdiction:

> The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world.

The Moses Taylor, 71 U.S. (4 Wall.) 411, 427 (1866). Moreover, the Court confirmed the unavailability of in rem proceedings in a common law proceeding the *following* term. *See* The Belfast, 74 U.S. (7 Wall.) 624, 644 (1868) ("[T]here is no form of action at common law which, when compared with the proceeding *in rem* in the admiralty, can be regarded as a concurrent remedy."). *But see* C.J. Hendry Co. v. Moore, 318 U.S. 133, 143 (1943) ("[T]here is ample support for the conclusion that in the seaboard states forfeiture proceedings *in rem*, extending to seizures on navigable waters of the state, were an established procedure of the common law courts before the Revolution.").

216. 96 U.S. 395 (1877).

217. Moreover, the government could levy, by summary procedure, on any property owned by the taxpayer to the extent of the tax. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 273, 276-80 (1855) (holding that summary seizure of real property for payment of taxes owing did not violate due process, because such procedures were followed in both England and the colonies before the Revolution); *see also* G.M. Leasing Corp. v. United States, 429 U.S. 338, 352 (1977) (no Fourth Amendment violation in summary seizure of automobiles to satisfy tax claims); Phillips v. Commissioner, 283 U.S. 589, 595 (1931) ("The right of the United States to collect its internal revenue by summary administrative proceedings has long been settled."); Springer v. United States, 102 U.S. 586 (1880) (no due process violation in distraint and sale of real and personal property for satisfaction of unpaid taxes). This rather draconian levy power is justified by the need to ensure "voluntary compliance" with the tax system. *G.M. Leasing Corp.*, 429 U.S. at 350. Private parties, by contrast, are not permitted such effective remedies. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (due process violated by creditor's ex parte replevin of goods). *Good* calls into question the government's power to summarily collect taxes. *See* United States v. James Daniel

jurisdiction, and therefore would have been subject to injunctive relief to assure compliance with the law. Nonetheless, the Court discarded the common law requirement of criminal conviction before real property forfeiture. The Court did not acknowledge the novelty of the proceeding, nor did it consider whether the functional justifications for in rem procedures extended to real property.

Notwithstanding *Dobbins's Distillery*'s novelty, the government has attempted to establish the constitutionality of in rem forfeiture of real property by sweeping it within the "guilty property" fiction.[218] The "guilty property" fiction, however, cannot be sustained beyond its original boundaries. The fiction can be traced to the ancient practice of deodand, but that practice was questioned early: "Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism."[219] Justice Story similarly condemned it: "*deodand* . . . seems a peculiar case growing out of the avarice of the church and the superstition of the layity in ancient times."[220] Whatever its status in England, "[d]eodands did not become part of the common-law tradition of this country."[221]

Quite apart from deodand's rejection in America, the "guilty property" fiction never extended to real property at English common law. The fiction reached only personal property, which is inherently mobile; deodand, like revenue forfeiture, never extended to real property.[222] Justice Harlan's view that "centuries of history support the Government's claim that forfeiture statutes . . . have an extraordinarily broad scope,"[223] must be limited to personal property. History does not support the real property forfeiture upheld in *Dobbins's Distillery*.

Good Real Property, 114 S. Ct. 492, 509 (1993) (Rehnquist, C.J., dissenting).

218. *See, e.g.*, Brief for the United States, United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (No. 92-1180).

219. United States v. United States Coin & Currency, 401 U.S. 715, 720-21 (1971) (Harlan, J.) (quoting 1 W. BLACKSTONE, COMMENTARIES, ch. 8, *300).

220. United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch.) 398, 413 (1814) (dissenting opinion).

221. Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 682 (1973). Despite its archaic nature, deodand survived in England until 1846. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 170-71 (1973).

222. *See supra* notes 105-108 and accompanying text.

223. *United States Coin & Currency*, 401 U.S. at 719.

Although history does not support the constitutionality of in rem forfeiture, the government has other arguments. Due process does not limit the government to common-law procedures. The government can devise new civil procedures, as long those procedures do not "punish" in the constitutional sense.[224] But in our view, the forfeiture of real property "punishes" in the constitutional sense.

Applying the *Mendoza-Martinez* factors,[225] we conclude that civil forfeiture: (1) permanently restrains an owner's property interest; (2) historically has been seen as punishment; (3) requires *scienter*, both because the owner's innocence is a defense, and also in the commission of the underlying drug offense; (4) deters persons from drug trafficking; and (5) only applies to previously criminalized behavior. Factors (6) and (7) are more difficult to apply. The government can easily postulate "an alternative purpose" for civil forfeiture. The government has urged that civil forfeiture alleviates "[t]he drain on the public fisc attributable to the vastly increased law enforcement expenses that have accompanied the drug epidemic, and [funds] the care, treatment, and rehabilitation of drug addiction and related problems."[226] However, by criminalizing narcotics, the government has brought the law enforcement expenses on itself. A small percentage of forfeiture proceeds goes to treat addicts; the lion's share goes to enforcement.[227] As to the seventh *Mendoza-Martinez* factor, real property forfeiture is also frequently "excessive in relation to the alternative purpose assigned," creating disproportionality problems of a magnitude rarely seen in personal property cases.[228] Real property forfeiture was an exclusively criminal remedy at common law; this civil use of a traditionally criminal sanction places a much heavier burden on the government to show that it does not intend to punish. Where

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224. *Cf.* Helvering v. Mitchell, 303 U.S. 391, 402 n.6 (1938) (Congress may not provide for enforcement of punitive sanctions in civil proceedings).

225. *See supra* note 177 and accompanying text.

226. Brief for the United States at 30-31, Austin v. United States, 113 S. Ct. 492 (1993) (No. 92-6073).

227. In 1994, approximately one dollar in six of total federal expenditures in this area went for treatment. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, BUREAU OF JUSTICE STATISTICS tbl. 1.15 (1995). Forfeiture proceeds are likely to be more heavily biased toward enforcement given typical sharing arrangements.

228. *See* United States v. Sixty Acres in Etowah County, 727 F. Supp. 1414, 1422 (N.D. Ala. 1990), *aff'd*, 930 F.2d 857 (11th Cir. 1991). The court stated:

> The United States argues that all of Texas would be forfeited under a literal reading of § 881(a)(7) if Texas were owned by one person, and if one acre of it was used in a drug deal with the owner's knowledge or consent. The larger the tract and the smaller the portions misused, the more questionable may become the constitutionality of a literal application of the § 881(a)(7) language. This court is happy not to have had to deal with this question.

Id.

government has abandoned the common law requirement of a criminal conviction, a presumption should arise that the government is punishing civilly.[229]

The government cannot overcome that presumption in the context of real property forfeiture. Law enforcement is hardly a novel task for government, and it has not shown a need for novel procedures. Even without the civil forfeiture of real property, the government can still criminally prosecute offenders, and enforce criminal forfeiture where the offenders are also owners. Requiring a criminal conviction to forfeit real property would not substantially impair the government's ability to proscribe the property's illegal use.[230] In personam criminal forfeiture would still permit the government to attach property subject to forfeiture pending the outcome of the criminal proceeding.[231] The government can also substitute property of the defendant if the defendant has hidden property,[232] and can set aside fraudulent transfers.[233] To be sure, criminal forfeiture would bind only the defendant, not others holding a property interest,[234] but this result would eliminate a substantial

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229. *See* Clark, *supra* note 145, at 385. Clark notes:

> [I]f the law places special burdens specifically on a group of persons who have violated some legal prohibition, then there should exist a presumption that the law is punitive, absent convincing evidence of some other purpose. The analysis of alternative purpose should focus on the overbreadth or underbreadth of the legislation and on the presence or absence of a less burdensome alternative.

Id.

230. *See* Gary M. Maveal, *The Unemployed Criminal Alternative in the Civil War of Drug Forfeitures*, 30 AM. CRIM. L. REV. 35, 45-46 (1992) (advocating advantages of criminal forfeiture).

231. *See* Rounds v. Cloverport Foundry & Mach. Co., 237 U.S. 303, 306 (1915) (in personam jurisdiction authorizes auxiliary attachment).

232. *See* 21 U.S.C. § 853(p) (1994).

233. "The government has always possessed the implicit authority to set aside sham or fraudulent transfers intended to avoid *in rem* forfeitures and enjoyed the same authority as to *in personam* forfeitures under 1970 RICO." Fried, *supra* note 213, at 354 n.120 (footnotes omitted).

234. *See Rounds*, 237 U.S. at 306 (in rem "decree binds all the world"; in personam jurisdiction merely severs the personal interest of the defendant); *see also* The Moses Taylor, 71 U.S. (4 Wall.) 411 (1866), where the Court stated:

> By the common law process, whether of mesne attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

number of "innocent owner" questions.[235] Under an in personam criminal regime, the government could forfeit only the defendant's interest.[236]

Even where the offender is not the owner, the government has not shown that common law remedies are insufficient to counter the social ill. If the government actually wishes to control an instrumentality of crime, it can proceed civilly against the owner in a nuisance action.[237] In a nuisance action, the government could seek an injunction against further illegal use, regardless of the owner's knowledge of prior illegal use. The injunctive relief could be enforced through the court's contempt power. If injunction and contempt proved ineffective, the government could force the owner to sell the property to a party who would ensure its lawful use.[238] It will be the rare case where the government cannot assert in personam jurisdiction over the real property's owner. In such a case, resort to civil forfeiture would then be appropriate because it would be within civil forfeiture's traditional domain.

Real property is not dangerous in and of itself; it becomes an instrumentality of the drug trade only in the hands of a criminal offender.[239] The government's neglect of these options suggests that

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Id. at 427. *See also* Maxeiner, *supra* note 37, at 773 ("common-law forfeiture normally took only the interest the attainted traitor or felon had in the property").

235. Leslie C. Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 WM. & MARY L. REV. 661, 711 (1978) ("A forfeiture law which requires a finding of guilty in the related criminal proceedings . . . appears desirable. The primary constitutional objection, the forfeiture of property without due process when innocent persons are involved, would thereby be removed, and only the offender's interest in the property would be subject to forfeiture.").

Commentators often fret about the forfeiture of innocent owners' property. *See, e.g.*, Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law*, 62 FORDHAM L. REV. 287, 288 (1993); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 218-19 (1992); Patricia M. Canavan, Note, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 486 (1990); Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1256-59. We address this topic from an historical perspective in a forthcoming article. Boudreaux & Pritchard, *supra* note 138.

236. Criminal forfeiture provides for notice and hearing to third party claimants. Windsor v. McVeigh, 93 U.S. 274, 277-78 (1876). The claimant, however, must establish his interest. 21 U.S.C. § 853(n) (1994).

237. 21 U.S.C. § 882 (1982).

238. *See* United States v. du Pont & Co., 366 U.S. 316, 333-35 (1961) (enforcing divestiture of stock holdings that violated Clayton Act).

239. Stahl, *supra* note 194, at 318 ("a particular building does not make it easier to sell or store drugs and a particular piece of land does not make it easier to grow or manufacture drugs").

it primarily intends to punish wrongdoers and collect revenues while evading the criminal process. Given that less restrictive and equally efficacious alternatives are available—in addition to the practice's lack of historical sanction—civil forfeiture of real property violates due process. The Court should overrule *Dobbins's Distillery* and require that the government proceed criminally when seeking to forfeit real property.[240]

Due process accuracy concerns counsel a return to the common law requirement that the government obtain a criminal conviction before forfeiting real property. Having freed the government from common law requirements, the Court has been unable to rely on that common law baseline in confronting the subsequent abuses that followed as the government expanded civil forfeiture. Absent a showing by the government that the common law framework cannot handle modern conditions, the Court should return to that framework. Requiring a criminal conviction would go far toward ensuring that the real property owner has been properly singled out for violating the drug laws because it would necessarily invoke the procedural protections that ordinarily accompany criminal prosecutions. The abuses engendered by the government's use of in rem forfeiture—like those seen in *Austin* and *Good*—would be minimized. In *Austin*, if forfeiture had been done criminally, the Excessive Fines Clause would plainly have limited the punishment imposed on Austin.[241] Given that criminal sanctions must be a multiple of the harm done to adequately deter, the forfeiture would

240. Public choice theory provides another rationale for distinguishing real property forfeitures from the traditional forfeiture of personal property to enforce the revenue laws. The conduct underlying the revenue laws—making income or importing goods—is not criminally proscribed, and those engaged in such activities constitute a viable lobby if enforcement agents abuse their powers or exact forfeitures without justification. The unavailability of political redress separates civil forfeiture under the Drug Act from civil forfeiture under the revenue laws. In passing the Drug Act, Congress was not collecting taxes that drug dealers might otherwise evade. Congress does not admit to collecting revenues from drug trafficking; rather, it expressly intends to punish and deter drug traffickers. "It was hoped that through the use of current criminal and civil forfeiture provisions, forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering." S. REP. NO. 225, 98th Cong., 1st Sess. 194 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3377. Civil forfeiture for revenue violations is part of an escalating scale of penalties, with criminal sanctions reserved for egregious cases. The drug laws, by contrast, begin with criminal sanctions. 21 U.S.C. §§ 841-58 (1994). Civil forfeiture was added to enhance the deterrent value of those criminal sanctions.

241. Alexander v. United States, 113 S. Ct. 2766, 2775 (1993).

have been well within constitutional boundaries. Only when the sanction is styled as a civil remedy do disproportionality concerns arise because the sanction must be remedial rather than deterrent. Similarly, the due process issue raised in *Good* would not arise under the criminal forfeiture provisions[242] because those procedures easily pass constitutional muster.[243] Of equal importance from society's perspective is the reduction of agency costs identified in Part I that occurs when a criminal conviction is required. Law enforcement officials would need to criminally prosecute an individual to obtain forfeiture revenues, thus decreasing their enthusiasm for forfeiture, while simultaneously diminishing the risk that prosecutors and officers will maximize revenue at the expense of deterrence.[244]

E. Excessive Fines Clause

Once civil forfeiture has been confined to its appropriate domain by the Due Process Clause, civil forfeitures will implicate only the Eighth Amendment's Excessive Fines Clause.[245] That clause is not limited by its terms to criminal punishments, and it lends itself to disproportionality concerns.[246] We agree with the holding in *Austin* that there are sound

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242. Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 SW. L.J. 1111, 1125 (1988). Winn comments on 21 U.S.C. §§ 853(e)(2)(f):

> Under the criminal forfeiture procedures the government, in order to seize property prior to a criminal conviction, must make three showings: (1) that probable cause exists to seize the property; (2) that preseizure notice would likely render the property unavailable for forfeiture (i.e., an extraordinary situation); and (3) that less restrictive means, such as a bond, restraining order, or lis pendens, would not suffice to protect the government's interest.

Id.

243. United States v. Monsanto, 491 U.S. 600, 615 (1989) (upholding 21 U.S.C. § 853(e)).

244. *Cf.* Stahl, *supra* note 194, at 335 (citing study showing "that parallel criminal charges are filed in only twenty percent of § 881 cases").

245. *See* Henning, *supra* note 157, at 69 ("The only basis on which to judge whether a sanction is proportional to the underlying violation is under the Excessive Fines Clause.").

246. *See* John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 149 (1986) ("[A] nominally civil fine may be every bit as 'excessive' as a criminal one and should be equally objectionable. This conclusion is reinforced by the significant textual differences between the eighth amendment and those Bill of Rights guarantees specifically limited to the criminal context."). There is a substantial historical argument that the drafters of the Bill of the Rights sought to proscribe only the use of imprisonment conditioned upon the payment of an unrealistic fine. *See* Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 267 (1989) (discussing events leading to the adoption of Section 10 the English Bill of Rights, which was adopted verbatim by Art. I, § 9 of the Virginia Declaration of Rights, which in turn provided the basis for the Eighth Amendment); Brief for the United States,

reasons to give broader scope to the Eighth Amendment's prohibition against excessive fines than to its prohibition against cruel and unusual punishment. Specifically, the government benefits from forfeiture, while imprisonment and related sanctions cost the government when it inflicts them.[247] From an historical perspective, the use of civil forfeiture recalls the English crown's abusive use of "amercements" before they were limited by the Magna Charta.[248] The government has every incentive to prefer fines over criminal actions; if left unchecked, it will not hesitate to exact the most draconian sanctions in civil proceedings.

We disagree, however, with *Austin*'s attempt to identify whether a particular forfeiture is remedial or punitive. A case-by-case review for excessiveness as applied can only lead to inconsistent treatment of similarly situated defendants. The label "punitive" should be reserved for sanctions that are traditionally criminal. Where the government intends to *punish*, it plainly can impose a much heavier sanction than it can in a civil proceeding: optimal deterrence requires a penalty that is a multiple of the harm incurred by society.[249] Instead of searching for an amorphous equilibrium between the harm caused and the government's recovery, we think that the test for excessiveness of a civil forfeiture should be grounded in the in rem tradition. Excessiveness

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Austin v. United States, 113 S. Ct. 2801 (1993) (No. 92-6073). This interpretation of the of the original purpose of the clause has been disputed. *See* Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 VAND. L. REV. 1233, 1240-69 (1987). In any event, the Court has held that *all* imprisonment conditioned on the payment of a fine violates the Equal Protection Clause where the defendant cannot realistically pay. *See* Tate v. Short, 401 U.S. 395, 399 (1971); Williams v. Illinois, 399 U.S. 235, 243 (1970). The Excessive Fines Clause has thus been stripped of its original function by free-ranging interpretation of other constitutional provisions.

247. *See* Harmelin v. Michigan, 111 S. Ct. 2680, 2693 n.9 (1991) (Scalia, J.), Justice Scalia commented:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Id.

248. *See Browning-Ferris Indus.*, 492 U.S. at 268-73 (discussing history of amercements); *id.* at 287-94 (O'Connor, J., concurring) (same).

249. *See* POSNER, *supra* note 30, at 222.

should turn on civil forfeiture's rationale—the "guilty property" fiction—measured by the fault of the offending property. We agree with Justice Scalia that, "[t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense."[250] If the object has an obvious connection to the illegal act, then, whatever the culpability of its owner, the sanction is not "excessive."[251] Contraband, guns used in a crime, and mislabeled or dangerous goods easily pass such scrutiny. Where the object lacks such an obvious connection because it has more than one use (e.g., a conveyance in which marijuana is found), the government must show that the property has a close nexus to the crime and to the historical function of in rem forfeiture. On this test, a vessel used to smuggle drugs into the country or goods imported without paying customs duties, are plainly forfeitable. Where the property has a less obvious connection to the historical function of forfeiture, such as an automobile, the relevant question should be whether the car was used to facilitate the crime. For example, a car which transported cocaine for sale would be forfeitable, regardless of the car's value, while a car in which one marijuana cigarette was found would not be forfeitable, again regardless of the car's value.[252] The appropriate inquiry focuses on the instrumentality's fault, not amorphous balancing of harm and remedy.

IV. CONCLUSION

In this Article, we have shown how civil forfeiture leads police and prosecutors to excessive enforcement of drug prohibition. The revenues available from civil forfeiture have made drug crime a top priority at the expense of fighting other crimes. These revenues have also made civil forfeiture the preferred crime-fighting weapon against drug crime. That weapon, however, is susceptible to abuse, and brings with it increased violence and property crime.

We have also shown how civil forfeiture's potential for abuse increased substantially when the Court cut it loose from its moorings in enforcing the customs laws. Civil forfeiture was introduced into a context where its functional justification—the unavailability of personal

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250. *See* Austin v. United States, 113 S. Ct. 2801, 2815 (1993) (Scalia, J., concurring). *See also* United States v. Chandler, 36 F.3d 358, 365-66 (4th Cir. 1994) (applying instrumentality test for excessiveness).

251. *See Austin*, 113 S. Ct. at 2815 (Scalia, J., concurring) ("Scales used to measure out unlawful drug sales, for example, are confiscable whether made of the purest gold or the basest metal."); United States v. Cullen, 979 F.2d. 992, 995 (4th Cir. 1992) ("[T]he Ferrari is at least as harmful an instrumentality as the Chevette.").

252. *See* Clark, *supra* note 145, at 479.

jurisdiction over the wrongdoer—largely did not apply. This departure from common law traditions led the Court into confusion when it later attempted to curb civil forfeiture's abuses. Unwilling to limit the government to traditional common law procedures, the Court has afforded itself flexibility in its due process analysis. That flexibility, however, has carried with it a substantial cost. Having abandoned tradition, the Court has found no alternative to confront the patent injustices that have accompanied the expansion of civil forfeiture. The result has been doctrinal confusion and a mish-mash of ad hoc balancing exercises.

In response to that confusion, we offer an alternative constitutional framework grounded in the historical function and practice of civil forfeiture. Under our rule, personal property ordinarily could be forfeited civilly, but real property forfeiture would require a criminal conviction. Our constitutional regime, while remaining true to common law tradition, would limit forfeiture's worst abuses by affording property owners criminal procedures in those cases which pose the greatest risks of disproportionality and erroneous determinations. Moreover, our regime would limit those abuses in a principled and predictable rule-based fashion, rather than relying on ad hoc balancing. As the Court plunges ahead in its efforts to rein in forfeiture, we suggest that traditional practice, tested by time, may provide the surest guide.