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In two distinct areas of the law, the United States Supreme Court has signalled fundamental shifts in constitutional doctrine over the last several years. These shifts portend new limitations on the Government's power to seize and obtain forfeiture of private property. First, in cases decided under the Eighth Amendment's Excessive Fines Clause[1] and the Fifth Amendment's Due Process Clause,[2] the United States Supreme Court has placed severe constraints on the scope of and the procedures for governmental forfeitures.[3] Second, in cases decided under the Fifth Amendment's Takings Clause,[4] the Court has modified and, in some

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With respect to the discussion of United States v. Regan, 699 F. Supp. 36, 37 (S.D.N.Y. 1988), *infra*, Part III, I was affiliated with a law firm that represented a defendant in that case. The views concerning that case expressed in this article are mine alone.

1. U.S. CONST. amend. VIII ("Excessive bail shall not be required nor excessive fines imposed . . . .").

2. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

3. *See* Austin v. United States, 113 S. Ct. 2801, 2802 (1993) (holding that the Excessive Fines Clause applies to in rem forfeitures); United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) (holding that the government must comply with the Due Process Clause in civil forfeiture of real property unless exigent circumstances exist).

4. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

cases, expanded individuals' rights to receive just compensation for governmental regulation of private property.[5]

In both areas, a majority of the Court has emphasized property rights, even where that emphasis has conflicted with the Government's ability to regulate property use in the public interest and to exercise its police powers in furtherance of law enforcement. The Court has yet to address the Takings Clause in the context of seizures and forfeitures. It is upon the potentially substantial impact of takings jurisprudence on the law of forfeitures that this Article focuses.

Recent developments in the law of just compensation have been startling. In 1994, the United States Supreme Court in *Dolan v. City of Tigard*[6] reinforced a potentially dramatic expansion of the Fifth Amendment's Takings Clause that had begun in 1987 with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[7] and *Nollan v. California Coastal Commission*.[8] The expansion continued in 1992 with *Lucas v. South Carolina Coastal Council*.[9] In *Dolan*, a five member majority led by Chief Justice Rehnquist held for the first time that, to avoid requiring payment of just compensation, governmental control over private property must be supported by "rough proportionality" between the asserted governmental interest and the restriction on the property's use.[10] Although decided in the context of required dedications of land use,[11] *Dolan* is the fourth in a line of recent Su-

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5. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2312 (1994) (holding that the Fifth Amendment requires the city to make an individual determination that there is a "rough proportionality" between a permit requirement and its impact on proposed development); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2892-95 (1992) (holding that state deprivation of landowner of all economically viable land usages requires compensation); Nollan v. California Coastal Comm'n, 483 U.S. 825, 839 (1987) (holding that the California Coastal Commission could not impose a condition on a building permit without compensation). *See generally* Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation*, 72 OR. L. REV. 603, 605 (1993) (describing the "increased judicial activism regarding the meaning and scope of the Takings Clause"). The Supreme Court has held that the Fifth Amendment's Takings Clause limits state action under the Fourteenth Amendment. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897).

6. *Dolan*, 114 S. Ct. at 2317-20.

7. 482 U.S. 304, 321 (1987) (holding that the Fifth Amendment entitled a landowner to compensation for a period of Government action that constituted a taking).

8. 483 U.S. 825, 841-42 (1987) (limiting municipal zoning exaction as a taking).

9. 112 S. Ct. 2886, 2889 (1992) (holding that state must compensate landowner if a regulation completely destroys its economically beneficial use unless the landowner did not hold title so as to use the land in the proscribed manner).

10. *Dolan*, 114 S. Ct. at 2319.

11. The City Planning Commission conditioned approval of Dolan's application to expand her store and pave her parking lot upon compliance with a requirement that

preme Court opinions requiring just compensation under circumstances where the Court might not have previously done so.

Current Supreme Court takings jurisprudence may have profound implications in areas beyond the land use regulation cases upon which that jurisprudence is now centered.[12] Whenever the Government assumes or seeks to assume control over property or its use, and the required nexus between the regulation and the governmental interest is open to question, the owner may have a claim for just compensation.[13]

Seemingly far from the land use context lies the practice of governmental seizures and forfeitures of property. Acting pursuant to federal statutes,[14] law enforcement authorities in recent years have significantly increased both assumption of temporary control over and permanent possession of property.[15]

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she dedicate a portion of her property for a public greenway and a pedestrian/bicycle pathway. *Id.* at 2313-14.

12. *See infra* notes 64-104 and accompanying text.

13. *See infra* notes 157-81 and accompanying text.

14. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1988) (prohibiting activities); *see also* 18 U.S.C. § 1956 (1988 & Supp. V 1993) (money laundering); 21 U.S.C. § 881 (1988 & Supp. V 1993) (narcotics). A number of states also enacted statutes that sometimes parallel the federal statutes. *See, e.g.* CAL. FIN. CODE § 5320 (West Supp. 1995) (subjecting property to forfeiture for violations of laws governing lending institutions); CAL. HEALTH & SAFETY CODE § 11470 (West 1994 & Supp. 1995) (allowing for forfeiture of property used or intended for use in violation of drug laws); D.C. CODE ANN. §§ 22-2723 (1994) (providing for forfeiture of property used in prostitution), 33-553 (1994) (placing the burden of proof of ownership or claim of exemption or exception from forfeiture on the party claiming it); N.Y. PENAL LAW § 480.05 (McKinney 1994) (allowing forfeiture for proceeds or instrumentalities of drug offenses). Although this Article focuses on federal forfeiture statutes, state forfeiture statutes also implicate the Federal Constitution's Takings Clause, along with any parallel state constitutional provisions. *See* Richard M. Frank, *Inverse Condemnation Litigation in the 1990s—The Uncertain Legacy of the Supreme Court's* Lucas *and* Yee *Decisions*, 43 WASH. U. J. URB. & CONTEMP. L. 85, 87 (1993) (stating that the "the 'Takings Clause' or 'Just Compensation Clause' of the Fifth Amendment applies to limit state and local, as well as federal, government action") (citing Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897)). *See generally* Jan G. Laitos, *The Takings Clause in America's Industrial States After* Lucas, 24 U. TOL. L. REV. 281 (1993) (discussing the effect of a modified takings test on subsequent state actions).

15. Forfeiture receipts for the Department of Justice evidence a rapid rate of increase:

Fiscal Year	Forfeiture Receipts (in Millions)
1985	$ 27.2
1986	$ 93.7

To the surprise of many Court-watchers,[16] the Supreme Court has recently begun to place severe restrictions on these seizures and forfeitures. Although long considered to be beyond the purview of constitutional rights relating to criminal proceedings,[17] the Court in *Austin v. United States*[18] held for the first time that civil forfeiture proceedings are subject to the Eighth Amendment's Excessive Fines Clause.[19] Furthermore, in *United States v. James Daniel Good Real Property*,[20] the Court held that the Due Process Clause requires notice and a hearing before the Government can seize real property pursuant to the federal forfeiture statutes.[21]

The Court's increased willingness to scrutinize seizures and forfeitures parallels its increased willingness to require just compensation in

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1987	$177.6
1988	$207.3
1989	$580.8
1990	$459.6
1991	$644.0

William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1324 (1992).

16. *See generally* Mary E. di Zerega, Austin v. United States*: An Analysis of the Application of the Eighth Amendment to Civil Forfeitures*, 2 GEO. MASON U. L. REV. 127, (1994) (agreeing with result in *Austin*, but questioning reasoning in application of Eighth Amendment to all forfeiture proceedings); Douglas S. Reinhart, Note, *Applying The Eighth Amendment to Civil Forfeiture After* Austin v. United States*: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235 (1994) (suggesting that the *Austin* decision will have slight effect on civil forfeiture proceedings); Robin M. Sackett, Comment, *The Impact of* Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495 (1994) (discussing the need for more constitutional protections in civil forfeiture proceedings).

17. *See, e.g.*, United States v. $84,740.00 Currency, 981 F.2d 1110, 1110-14 (9th Cir. 1992) ("[T]wo criminal law protections . . . apply in civil forfeitures: the Fourth Amendment exclusionary rule and the Fifth Amendment protection against self-incrimination."); Sequoia Books, Inc. v. Ingemunson, 901 F.2d 630, 639 (7th Cir.) (explaining that civil forfeiture actions are outside the scope of the constitutional protections extended to criminal defendants), *cert. denied*, 498 U.S. 959 (1990); United States v. 40 Moon Hill Rd., 884 F.2d 41, 44 (1st Cir. 1989) (explaining that civil forfeiture proceeding does not "constitute punishment for purposes of the Double Jeopardy Clause"); United States v. D.K.G. Appaloosas, Inc., 829 F.2d 532, 545 (5th Cir. 1987) (holding that the Ex Post Facto Clause of the Constitution does not bar civil drug forfeiture statutes), *cert. denied*, 485 U.S. 976 (1988). In the wake of *Austin*, courts have applied the Double Jeopard Clause to civil forfeitures. *See infra* note 182.

18. 113 S. Ct. 2801 (1993).

19. *Id.* at 2812.

20. 114 S. Ct. 492 (1993).

21. *Id.* at 505. The federal forfeiture statutes grant the government power to seize or restrain property in order to preserve it pending the conclusion of a formal forfeiture proceeding. *See infra* part II.

the land use context. In both areas, the Court's focus on individual property rights runs counter to the Government's stated policy goals. These two developments portend an inevitable collision between the Government's expansive use of forfeiture statutes and the law of takings.

Signs of this collision have been apparent for some time. In recent years, federal district and circuit courts have issued a number of rulings requiring just compensation in the forfeiture context, albeit in relatively narrow circumstances.[22] In light of *Dolan*, however, the Government may now bear a significant additional burden to justify temporary or permanent takings—proportionality not only under the Excessive Fines Clause, but also under the potentially more far-reaching Takings Clause.[23]

This Article addresses whether the Takings Clause may come to provide a serious impediment to the Government's expansive use of forfeitures. The Article first examines the development of takings law and the Supreme Court's recent takings cases.[24] Next, the Article analyzes the background of, procedures for, and constitutional restrictions on seizures and forfeitures, focusing on the recent *Austin* and *James Daniel Good* decisions.[25] Finally, the Article explores the potential intersection of these two doctrinal quagmires.[26]

I. OVERVIEW OF TAKINGS LAW

Under the Fifth Amendment of the United States Constitution, private property may not be "taken" by the Government without "just compensation."[27] The United States Supreme Court has hardly been clear or consistent in defining the term "taking;" consequently, takings law has long been considered to be among the most confused areas of federal constitutional doctrine.[28] Further, seizures and forfeitures often do not

22. *See, e.g.*, Shelden v. United States, 7 F.3d 1022, 1026 (Fed. Cir. 1993); *infra* part III.A.2.

23. *See* Dolan v. City of Tigard, 114 S. Ct. 2309, 2319-20 (1994).

24. *See infra* notes 27-104 and accompanying text.

25. *See infra* notes 105-82 and accompanying text.

26. *See infra* notes 183-285 and accompanying text.

27. U.S. CONST. amend. V.

28. Partly as a result of this confusion, takings jurisprudence has produced an enormous amount of critical analysis. *See generally, e.g.*, JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 3.05 (1995) (discussing takings law) [hereinafter KUSHNER, GROWTH MANAGEMENT]; Richard A. Epstein, *Property as a Fundamental*

fall neatly within either of the commonly-cited takings categories: "physical" takings, involving physical occupation of the owner's property, and "regulatory" takings, involving regulation of the property's use.[29]

In two recent decisions, *Lucas v. South Carolina Coastal Commission*[30] and *Dolan v. City of Tigard*,[31] the Court has attempted to articulate a comprehensive approach to takings law. In both of these cases, the Court continued its expansion of the circumstances in which just compensation is required. Because pre-*Lucas* and pre-*Dolan* law remains important, it is necessary to first review that law.

A. *The Early Takings Cases*

Courts and commentators generally view the Takings Clause as pro-

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Civil Right, 29 CAL. W. L. REV. 187 (1992) (discussing property as a fundamental right and the effects of modern regulation) [hereinafter Epstein, *Property as a Fundamental Civil Right*]; Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1 (1987) (advocating the use of the Takings Clause to protect property rights from modern regulation) [hereinafter Epstein, *Takings*]; Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627 (1988) (arguing that courts must protect property rights from unconstitutional regulations); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988) (stating that, although the Takings Clause "does not supply a remedy for every legislative redefinition of property," it "can hardly be seen as a constitutional failure when the document expressly delegates or reserves that authority"); James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 60-78 (1992) (considering the impact of *Nollan* on state exaction cases) [hereinafter Kushner, *Property and Mysticism*]; Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (stating that the "one incontestable case for compensation" occurs when the Government physically invades land and that judicial decisions in takings cases are "liberally salted with paradox") [hereinafter Michelman, *Property, Utility, and Fairness*]; Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988) ("The war between popular self-government and strongly constitutionalized property now comes to seem not containable but total.") [hereinafter Michelman, *Takings*]; Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) (maintaining that the Takings Clause is designed to discourage "arbitrary government action," but that takings jurisprudence is "a welter of confusing and apparently incompatible results").

29. *See, e.g.*, Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 473 (9th Cir. 1994) ("There are two classes of Fifth Amendment takings recognized by the Supreme Court: physical takings and regulatory takings."). *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (physical taking) *with* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1986) (regulatory taking). As discussed more fully in *infra*, Part II, seizures and forfeitures may involve complex combinations of physical occupation or possession of property and limitations on property's use.

30. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

31. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

viding an important limitation on the Government's exercise of its eminent domain and police powers.[32] Originally, takings claims primarily arose in eminent domain cases where the Government took full possession of the property in question.[33] In one important early case, *Mugler v. Kansas*,[34] the owner of a brewery sought compensation when the state forbade the manufacture or sale of alcohol.[35] The Court rejected the brewery owner's claim because the state regulation was solely designed to protect the public.[36] The *Mugler* decision and its progeny came to be known for the proposition that the government may regulate a "harmful" or "noxious" use of public property without paying just compensation.[37]

In 1922, however, the Supreme Court in *Pennsylvania Coal Co. v. Mahon*,[38] recognized that the exercise of the state's police powers may give rise to a compensable taking.[39] Writing for the majority, Justice Holmes stated, "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[40]

In the decades following *Pennsylvania Coal*, the Court continued to apply this vague test, which provided little predictability.[41] Not until its

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32. *See, e.g., Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring) ("The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the state to enact limitations on the use of their property."); Epstein, *Property as a Fundamental Civil Right*, *supra* note 28, at 187.

33. *See* Jeb Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1083 (1993).

34. 123 U.S. 623 (1887).

35. *Id.* at 653.

36. *Id.* at 655.

37. As discussed more fully *infra* notes 71-84 and accompanying text, *Lucas* apparently limits the applicability of the "noxious use" doctrine. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992).

38. 260 U.S. 393 (1922).

39. *Id.* at 413.

40. *Id.* at 415. The Pennsylvania Coal Company sold surface rights to land, while keeping the right to mine beneath the surface. *Id.* at 412. The buyers sued to prevent this mining based upon a law subsequently adopted by the State. *Id.* at 412-13. The trial court "found that if not restrained the defendant would cause [damages] . . . but denied an injunction, holding that the statute, if applied, would be unconstitutional." *Id.* at 412. On appeal, the Pennsylvania Supreme Court "held that the statute was a legitimate exercise of the police power and directed a decree for plaintiffs." *Id.* The United States Supreme Court reversed. *Id.* at 416.

41. *See* Ann T. Kadlecek, Note, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 418 (1993) ("Throughout the middle of the twentieth century, takings jurisprudence did not prog-

1978 decision in *Penn Central Transportation Co. v. City of New York*,[42] did the Court attempt to refine its general approach to takings cases.[43]

B. The Penn Central *Approach*

After decades of uncertainty, the Supreme Court in *Penn Central* endeavored to provide some clarity to takings law.[44] The Court conceded that its previous takings cases were based upon "essentially ad hoc, factual inquiries."[45] The Court went on, however, to establish three factors in the takings inquiry:

> [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by the government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[46]

The Court, in an opinion written by Justice Brennan, used this test to reject a claim for just compensation filed by the owners of the Grand Central Terminal.[47] The owners had sued for just compensation when the New York City Landmarks Commission refused to approve their plans for the construction of an office tower over the terminal.[48] Applying the above factors, the Court first noted that not all land use restrictions give rise to takings claims; zoning ordinances, for example, generally do not.[49] Second, the Court noted that the landmark regulations were broadly applicable, did not single out Penn Central, and did not restrict the then-current use of the terminal.[50] Finally, the Court concluded that "the preservation of landmarks benefits all New York citizens

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ress beyond, or clarify the vague 'too far' test of *Pennsylvania Coal* . . . [H]owever, the increasing number of restrictive regulations . . . triggered additional taking challenges, and highlighted the deficiencies in the 'too far' test." (footnotes omitted)).

42. 438 U.S. 104 (1978).

43. *See* Andrew R. Mylott, Note, *Is There a Doctrine in the House?: The Nuisance Exception to the Taking Clause Has Been Mortally Wounded by* Lucas, 1992 WIS. L. REV. 1299, 1308 (1992) ("With the *Penn Central* decision in 1978, the Court began to clarify its regulatory taking doctrine by formulating general tests to be applied to taking disputes.").

44. *Penn Central*, 438 U.S. at 123.

45. *Id.* at 124.

46. *Id.*; *accord* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

47. *Penn Central*, 438 U.S. at 130-31.

48. *Id.* at 116-19.

49. *Id.* at 131.

50. *Id.*

and all structures, both economically and by improving the quality of life in the city as a whole."[51]

Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, dissented, arguing that landmark restrictions are much more selective and onerous than zoning restrictions.[52] Focusing on the Constitution's guarantees of property rights, Justice Rehnquist wrote:

> The Court has frequently held that, even where a destruction of property rights would not *otherwise* constitute a taking, the inability of the owner to make a reasonable return on his property requires compensation under the Fifth Amendment . . . . A taking does not become a noncompensable exercise of police power simply because the government in its grace allows the owner to make some 'reasonable' use of his property.[53]

Given the changes in the Court's personnel since 1978, and the Court's recent takings cases, there is a good chance that the *Penn Central* outcome would be different were the case decided today. Nevertheless, the *Penn Central* approach continues to be influential, probably because it gives some structure to a previously chaotic area of the law.

Nine years after the *Penn Central* decision, the Supreme Court, in *Agins v. City of Tiburon*,[54] articulated a two-part takings test. The Court held that a governmental regulation can give rise to a takings claim if that regulation constitutes either an impermissible use of the Government's police power, or a denial of the owner's "economically viable use of the property."[55]

C. Temporary Takings

Traditionally, takings cases arose where the government took permanent physical control over property, or placed a permanent regulatory

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51. *Id.* at 134.

52. *Id.* at 138-41 (Rehnquist, J., dissenting).

53. *Id.* at 149 (Rehnquist, J., dissenting).

54. 447 U.S. 255 (1980).

55. *Id.* at 260. In response to the purchase of a five-acre plot of unimproved land by a developer, the city enacted zoning ordinances that limited construction on five acre lots to between one and five single family dwellings. *Id.* at 258. Without attempting to comply with the ordinances, appellants brought suit in state court alleging that the ordinances effected a taking of their property without just compensation in violation of the Fifth and Fourteenth Amendments. *Id.* at 259. The Court held that the ordinances did not facially operate as a taking. *Id.* The Court found that the government's interest in enacting the ordinances substantially advanced a legitimate state goal and that enacting the ordinances was a proper exercise of the City's police powers to protect its residents from the ill effects of urbanization. *Id.* at 262-63.

restriction on property.[56] By their nature, however, seizures of, and restraints on, property that is later returned to the owner may constitute temporary rather than permanent takings. As discussed more fully in Part III, there is a wide range of circumstances in forfeiture cases in which the Government assumes temporary control over property.[57] If the property is damaged or otherwise loses value during that time, the Fifth Amendment "taking," if any, is at most a temporary one.[58]

The Supreme Court addressed the temporary takings issue in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[59] In *First English*, the Government relied upon flood control regulations to deny a property owner's development application.[60] In an opinion by Chief Justice Rehnquist, the Court held that an excessive land use regulation, even though later abandoned by the government, may require the payment of just compensation for the period the regulation was in effect.[61] The Court held that compensation is due for the period of the regulation even if the Government later removes the regulatory burden.[62] The measure of compensation for a temporary taking by the Government is the value of the use of the property during the temporary taking, or the amount the owner lost as a result of the taking.[63]

D. The Expanded Takings Clause: Nollan, Lucas, *and* Dolan

Following *Penn Central*, the next major change in takings law occurred with the Supreme Court's decision in *Nollan v. California Coastal Commission*.[64] In *Nollan*, the plaintiffs had applied for a permit to con-

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56. *See supra* note 29 and accompanying text.

57. *See infra* notes 183-285 and accompanying text.

58. *See infra* notes 271-77 and accompanying text.

59. 482 U.S. 304 (1987). *See generally* Gregory M. Stein, *Regulatory Takings and Ripeness in Federal Courts*, 48 VAND. L. REV. 1, 5 (1995).

60. *First English*, 482 U.S. at 304-08.

61. *Id.* at 319. In *First English*, the plaintiff owned land, located in a flood control area, which it operated as a campground. *Id.* at 307. Following a flood that destroyed the campground buildings, the county adopted an interim ordinance prohibiting any construction or reconstruction of any building. *Id.* at 307-08. The plaintiff sued for damages in an inverse condemnation action for the loss of the use of its property. *Id.* at 308. The trial court granted the county's motion to strike the allegation from the complaint and the plaintiff appealed. *Id.* at 308-09. The California Court of Appeal affirmed, and California Supreme Court denied the petition for certiorari. *Id.* at 310. The United States Supreme Court held that, "While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings." *Id.* at 316.

62. *Id.* at 319.

63. *Id.*

64. 483 U.S. 825 (1987).

struct a new home on their beach-front property.[65] The California Coastal Commission agreed to issue the permit if the plaintiffs agreed to grant the state a public access easement across a portion of the property.[66] In an opinion by Justice Scalia, the Court appeared to modify the *Penn Central* approach by setting forth the threshold requirement that the state, in order to prevail, must prove that the regulation substantially advances a legitimate state interest.[67] The Court made it clear that the state's required showing is higher than the standard for upholding governmental action under substantive due process or equal protection theories in other contexts.[68] Applying this test to the facts before it, the Court held that the state's asserted interests were not sufficiently related to the burden placed on the property owners and that just compensation was therefore required.[69] Justices Marshall, Brennan, Blackmun, and Stevens dissented.[70]

Five years after *Nollan*, the Court continued to expand its view of the circumstances under which just compensation is required. In *Lucas v. South Carolina Coastal Council*,[71] state land-use legislation prohibited the construction of permanent habitable structures on the plaintiff's coastal residential property.[72] The South Carolina Supreme Court dismissed the owner's takings claim.[73] The state supreme court found that, under established United States Supreme Court precedent, a regulation designed "to prevent serious public harm does not give rise to a takings claim regardless of the effect on the property's value."[74] Because the regulations prevented harmful coastal development, no compensation was required.[75]

In a six-to-two decision written by Justice Scalia, the Court reversed the dismissal of the action.[76] Rejecting the lower court's reading of the

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65. *Id.* at 828.
66. *Id.*
67. *Id.* at 834 n.3. The commission argued legitimate state interests based upon "protecting the public's ability to see the beach, assisting the public in overcoming the 'psychological barrier' to using the beach created by a developed shorefront, and preventing congestion on the public beaches." *Id.* at 835.
68. *Id.*
69. *Id.* at 841-42.
70. *Id.* at 842 (Brennan, J., dissenting).
71. 112 S. Ct. 2886 (1992).
72. *Id.* at 2889.
73. *Id.* at 2890.
74. *Id.*
75. *Id.*
76. *Id.* at 2902. *Lucas* has produced a substantial amount of commentary. *See*

"harmful and noxious uses" doctrine, the Court adopted a rule requiring just compensation in two circumstances: (1) where the property owner has suffered "a physical invasion of [the] property," or (2) where the state "regulation 'does not substantially advance legitimate state interests'" or "denies all economically beneficial or productive use of land."[77] The Court found that Lucas fell within the latter category because the regulations denied him all economically beneficial use of his land.[78]

In his concurring opinion, Justice Kennedy focused on the relief to which Lucas was entitled.[79] The regulations at issue had been amended after the suit was filed to allow landowners such as Lucas to apply for construction permits.[80] Therefore, any taking of Lucas's property was potentially only a temporary taking.[81] Justice Kennedy noted that temporary takings, like permanent takings, require just compensation.[82]

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generally, e.g., Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that the infusion of common law principles into the takings analysis has expanded the harmful or noxious use doctrine and may make it easier for the government to defeat takings claims by landowners); Richard A. Epstein, *The Seven Deadly Sins of Takings Law*, Lucas v. South Carolina Coastal Council, 26 LOY. L.A. L. REV. 955 (1993) (stating that courts are "unable to break free of the implicit assumption that any coherent account of the Takings Clause has to allow the political process of land use planning, and, more generally, of economic planning to go forward more or less as it has"); William W. Fisher, III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393 (1993) ("The nuisance exception that the Court builds into its new test will contribute to the already infamous vagueness of the takings doctrine and may lead to inconsistency in the vulnerability of similar tracts of land to sever land-use regulation."); Richard Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411 (1993) ("*Lucas* likely signals the emergence of a takings analysis that is more receptive to environmental concerns."); Laura McKnight, *Regulatory Takings: Sorting Out Supreme Court Standards After* Lucas v. South Carolina Coastal Council, 41 KAN. L. REV. 615 (1993) (stating that the Supreme Court "has far to go before its regulatory takings doctrine will be developed well enough to accommodate the complexities of modern land use regulation, but *Lucas* is a step in the right direction); James W. Sanderson & Ann Mesmer, *A Review of Regulatory Takings After* Lucas, 70 DENV. U. L. REV. 497 (1993) ("Now that *Lucas* has been decided, the claims court has a mandate to continue issuing decisions that take less account of legitimate state interests in regulating and more account of a loss in an owner's property value resulting from that regulation.").

77. *Lucas*, 112 S. Ct. at 2893-94.

78. *Id.* at 2901.

79. *Id.* at 2902 (Kennedy, J., concurring).

80. *Id.* (Kennedy, J., concurring).

81. *Id.* (Kennedy, J., concurring).

82. *Id.* at 2902 (Kennedy, J., concurring) (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987)).

Where a property owner does not fall into *Lucas's per se* rule, the holding seems to indicate that the earlier, ad hoc balancing test remains in place.[83] Post-*Lucas*, courts continue to apply the *Penn Central* factors.[84]

In its 1994 decision in *Dolan v. City of Tigard*,[85] the Supreme Court further refined the *Lucas* approach. The Court, led by Chief Justice Rehnquist, again found an uncompensated taking of property in circumstances where the Court arguably would earlier have held that no compensation was required.

Pursuant to a state-wide land use management program enacted in Oregon in 1991, the City of Tigard adopted a Community Development Code (CDC) requiring property owners in the central business district to maintain fifteen percent of their property as open space.[86] The city also enacted a drainage plan designed to combat flood risks.[87] Florence Dolan owned a plumbing and electrical supply store within the central business district and within a floodplain.[88]

When Dolan applied for a permit to expand her store, the city responded by conditioning the permit upon dedication of a portion of the property for improvement of a storm drainage system and an additional portion as a pedestrian/bicycle pathway.[89] The city found that the required dedication was justified by the need to offset increased automobile traffic to the expanded store and the need to accommodate increased runoff that would result from the expansion.[90]

Dolan filed a series of administrative and judicial appeals from the city's decision, arguing that the required dedications were not justified by the proposed expansion of the store and therefore constituted a compen-

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83. *Id.* at 2895 n.8 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

84. It is not clear on the face of *Lucas* that the *Penn Central* test continues to apply. Courts, however, have continued to rely on the latter case. *See, e.g., In re* Chateaugay, 163 B.R. 955, 960-61 (Bankr. S.D.N.Y. 1993) (citing Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1986), and denying a claim that government-imposed restrictions on pension funds require just compensation), *aff'd*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

85. 114 S. Ct. 2309 (1994).

86. *Id.* at 2312.

87. *Id.*

88. *Id.*

89. *Id.* at 2314.

90. *Id.* at 2314-15.

sable taking under the Fifth Amendment.[91] Ultimately, the Oregon Supreme Court upheld the required dedication, finding that the city had shown that the dedication was "reasonably related" to the city's goals and that such a showing sufficed under *Nollan*.[92] The Oregon Supreme Court found that both the drainage and pathway dedications were reasonably related to the impact of the business' expansion.[93]

As it had in *Nollan* and *Lucas*, the Court again focused on the purpose of the Takings Clause: "to bar 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."[94] Once again, the attempt to force the property owner to allow public access to her property constituted a substantial infringement on property rights.[95]

At this point, the Court modified its previous approach. The Court acknowledged that the city had proven the "essential" nexus between the governmental goals and the restrictions on property use as required by *Nollan*.[96] The Court went on, however, to establish an additional test to be met by the Government: "The second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."[97]

Next, the Court analyzed tests used by other courts to determine whether the Government has met its burden.[98] The Court rejected approaches that either would grant extreme deference to the governmental findings or would require a "very exacting correspondence."[99] The Court found that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."[100] The Court went on to note that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[101] Under this test, the Court found that the city's findings were too generalized and imprecise to pass constitutional muster.[102]

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91. *Id.*
92. *Id.* at 2315 (citing Dolan v. City of Tigard, 854 P.2d 437, 442 (Or. 1993), *rev'd*, 114 S. Ct. 2309 (1994)).
93. *Id.*
94. *Id.* at 2316 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
95. *Id.*
96. *Id.* at 2318.
97. *Id.*
98. *Id.* at 2319.
99. *Id.*
100. *Id.*
101. *Id.* at 2319-20.
102. *Id.* at 2321-22; *see also* Kristen P. Sosnosky, Note, Dolan v. City of Tigard: *A*

As discussed more fully in Part III, *Dolan's* "rough proportionality" test may be implicated where the Government has assumed control of property under federal forfeiture statutes.[103] Before analyzing that question, Part II sets forth the modern bases for governmental seizures and forfeitures of private property.[104]

II. THE LAW OF SEIZURES AND FORFEITURES

Congress has adopted an array of civil and criminal forfeiture statutes designed to give law enforcement an additional tool.[105] These statutes provide for the pretrial seizure and ultimate forfeiture of the instrumentalities and proceeds of criminal activities. Forfeitures have been much-lauded as a means to deprive criminals of the fruits of their activities and as a deterrent to further crimes,[106] and also produce substantial revenues for the Department of Justice.[107] Nonetheless, in the wake of substantial critical commentary from Congress, defense counsel, and academics,[108] courts have begun to place severe constitutional restrictions

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Sequel to Nollan's *Essential Nexus Test for Regulatory Takings*, 73 N.C. L. REV. 1677 (1995) (analyzing the development of the rough proportionality standard as a logical extension of takings doctrine); Christopher J. St. Jeanos, Note, Dolan v. Tigard *and the Rough Proportionality Test: Roughly Speaking, Why Isn't a Nexus Enough?*, 63 FORDHAM L. REV. 1883 (1995) (analyzing the rough proportionality test as a constitutional necessity).

103. *See infra* notes 244-57 and accompanying text.

104. *See infra* notes 105-82 and accompanying text.

105. For an overview of the law relating to seizures and forfeitures, see generally DIANA PARKER & J. KELLY STRADER, CIVIL AND CRIMINAL FORFEITURES in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 6A (Otto G. Obermaier & Robert G. Morvillo, eds. 1995); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274 (1992) (stating that forfeitures under § 881 "constitute criminal punishment and should not be permitted" unless the Government can prove its case beyond a reasonable doubt); Michael F. Zeldin & Roger G. Weiner, *Innocent Third Parties and Their Rights in Forfeiture Proceedings*, 28 AM. CRIM. L. REV. 843 (1991) (discussing the threat of forfeiture to lenders); Jay A. Rosenberg, Note, *Constitutional Rights and Civil Forfeiture Actions*, 88 COLUM. L. REV. 390 (1988) (arguing for constitutional protections in some cases, such as a right to appointed counsel and use immunity, for those accused of criminal violations and whose property is subject to forfeiture); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990) (arguing that "forfeiture is criminal penalty and that claimants are entitled to criminal due process protections").

106. *Id.*

107. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 502 n.2 (1993) (noting the substantial role that revenues from forfeiture play in meeting the Department of Justice's annual budget).

108. *See, e.g.*, Stanley S. Arkin, *Prosecutorial Vindictiveness and Big-Bang Statutes*,

on the scope of and procedures for seizures and forfeitures.[109] After reviewing the history of and current statutory bases for seizures and forfeitures,[110] this section discusses current constitutional restrictions on those governmental actions.[111] It is in this context that claims under the Takings Clause will arise in the coming years.

A. Historical Background

1. Common Law

Forfeitures have a lengthy history.[112] Under both common law and modern statutes, the primary distinction is between criminal forfeiture, an in personam proceeding against a criminal defendant, and civil forfeiture, an in rem proceeding brought against the property itself.[113] Under English common law, defendants convicted of felonies or treason lost all their property through in personam forfeitures[114] as part of the criminal penalty.[115] The English common law also provided for in rem forfeitures.[116] For example, under the doctrine of "deodand," property that caused the accidental death of a King's subject was forfeited.[117] In rem

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N.Y.L.J., June 10, 1993, at 3; John C. Coffee, Jr., *Is Innocence Irrelevant? Under RICO, Trials Have Become Secondary*, LEGAL TIMES, Mar. 13, 1989, at 20; John Conyers, Jr., *Conyers on Asset-Forfeiture Abuses*, LEGAL TIMES, Apr. 25, 1994, at 43.

109. *See infra* part II.C.2.

110. *See infra* notes 112-57.

111. *See infra* notes 158-82 and accompanying text.

112. For instance, some argue that forfeiture is rooted in the Bible. *See* Rosenberg, *supra* note 105, at 390-91; Zeldin & Weiner, *supra* note 105, at 843. Both articles argue that *Exodus* 21:28, which states in particular that, "If an ox gores a man or a woman and they die, then the ox shall be stoned and his flesh not eaten; but the owner of the ox shall be quit," provides for forfeiture.

113. *See infra* notes 129-35 and accompanying text.

114. Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 171 n.33 (1990). Article III of the U.S. Constitution limits in personam forfeitures in connection with the crime of treason. U.S. CONST. art. III, § 3, cl. 2. Another type of in personam forfeiture in early English common law was attainder. *See* Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. PITT. L. REV. 1, 7 (1991) ("Attainder was a legal state into which a convicted defendant was thrust by operation of law upon his conviction of a capital offense like treason or felony. Attainder was no part of the common law sentence; rather, it was an automatic consequence of that sentence.").

115. Forfeiture of an estate after a treason conviction, however, was proscribed in the United States by Article III of the United States Constitution. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974).

116. *Id.* at 682.

117. *See id.* at 681 n.16. "Deodand", taken from the Latin *Deo dandum* (to be given to God), has its roots in practices in biblical and pre-biblical times. *Id.* at 681. Under deodand, the property itself was "guilty;" the owner's guilt or innocence was irrele-

forfeiture of goods and vessels used in violation of customs and revenue laws was also permitted in England[118] and has always existed in the United States,[119] pursuant to English and local laws.[120] After independence, such forfeitures were authorized by federal law.[121]

In all these in rem forfeiture proceedings, the establishment of the guilt or innocence of the property owner was not a prerequisite or defense.[122] The guilty object was the nominal defendant in the case, and

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vant. *See* 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, 181-83 (1973). The rationale was partly akin to restitution, with the money intended to be used for prayer for the victim's soul or for other charitable purpose. *Calero-Toledo*, 416 U.S. at 681. Deodand was also premised on the notion that the instrument was capable of future harm and should be destroyed. *See* Palm, *supra* note 114, at 8. For a discussion of in rem forfeitures in early American jurisprudence, see Jankowski, *supra* note 114, at 171-78.

118. There are sources that "trace the origin of forfeiture distinctions to an independently developed British admiralty law." Stahl, *supra* note 105, at 295. Oliver Wendell Holmes, Jr., "attributed admiralty forfeiture to the motion of the ships through water" and "concluded that the object's 'motion' creates the liability." Schecter, *supra* note 105, at 1153 (quoting OLIVER W. HOLMES, JR., THE COMMON LAW 25-30 (1923)).

119. The transplanting of forfeitures to the New World did not always proceed smoothly. *See* Schecter, *supra* note 105, at 1154.

> When the Crown was unable to extract desired tariff payments through criminal sanctions via jury trials, it threatened the colonies with the use of forfeitures and juryless admiralty proceedings. Although the Continental Congress complained about England's abuses of admiralty proceedings in the Declaration of Independence, the United States Congress had fewer qualms about its own use of the procedure.

Id. at 1154-55. Congress also adopted the practice of shifting the burden of proof to property owners in customs law in rem forfeitures. *See* Peter Petrou, Comment, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 825-26 (1984).

120. *Calero-Toledo*, 416 U.S. at 682 (citing 3 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 68-71 (3d ed. 1927); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 351 (2d ed. 1909)). Although each American colony had its own forfeiture law, the English Crown did demand that all colonies adhere to the British Navigation Acts, enacted in the mid-seventeenth century, which could be either in personam or in rem proceedings. *See* Palm, *supra* note 114, at 9.

121. *Calero-Toledo*, 416 U.S. at 683 (citing C.J. Hendry Co. v. Moore, 318 U.S. 133, 145-148 (1943)); Lalit K. Loomba, Comment, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 472 (1989) ("Although many of the present day characteristics of civil forfeiture law and procedure may be traced to origins in the early stages of English common law, the forfeiture of both real and personal property is based exclusively on statutory authority.").

122. *Calero-Toledo*, 416 U.S. at 684 (quoting The Palmyra, 25 U.S. (12 Wheat.) 1

its offense against the law was the critical factor. Thus, for example, "the statutory forfeiture of a vessel found to have been engaged in piratical conduct" was upheld as early as 1844,[123] even though the innocence of the owner was "fully established."[124]

2. Modern Proceedings and Trends

Modern forfeiture statutes have eclipsed the common law bases for forfeiture.[125] Forfeitures are now justified to prevent further illicit use of the property, to render illegal behavior unprofitable by imposing a harsh economic penalty,[126] and to induce innocent owners "to exercise greater care in transferring possession of their property."[127] As discussed more fully below, current statutes provide both for the forfeiture of property necessary to the commission of an offense and of property only marginally connected to a crime.[128]

B. Statutory Bases for Seizures, Restraints, and Forfeitures

Forfeitures arise in both the civil and criminal contexts.[129] Like com-

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(1827)).

123. *Id.* at 684. The United States formally adopted in rem forfeiture of vessels in 1789, with the Act of July 31, 1789, ch. 5, §§ 12, 36. *See* Elizabeth A. Skorcz, Comment, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. REV. 1199, 1204 (1990).

124. *Calero-Toledo*, 416 U.S. at 684 (citing United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 238 (1844)).

125. For instance, "[a]s many as seventy years ago, *in rem* forfeiture was seen as a 'worn out fiction' derived from the 'superstitious' belief that a physical object has a power or personality capable of guilt. Today, *in rem* forfeiture is used as a powerful method for attacking drug felony violations." Ron Champoux, Note, *Real Property Forfeiture Under Federal Drug Laws: Does the Punishment Outweigh the Crime?*, 20 HASTINGS CONST. L.Q. 247, 250 (1992).

126. "In particular, civil forfeiture schemes have been increasingly employed in the 'war on drugs.'" Stahl, *supra* note 105, at 274.

> Most civil forfeitures directed at drug activity occur under the aegis of the Comprehensive Drug Abuse Prevention and Control Act of 1970 [Section 881] . . . which permits the forfeiture of all profits from the drug trade . . . all assets purchased with such proceeds [and] . . . assets intended to be given in exchange for controlled substance, allowing for forfeiture of property never actually involved with illegal activities.

Id. at 275-76.

127. *Calero-Toledo*, 416 U.S. at 688.

128. While both state and federal governments insist that the expanding scope of forfeitures is unrelated to raising revenue, the explosive use of forfeiture statutes arouses the suspicion that there is a new motivation for the use of forfeitures. *See* United States v. James Daniel Good Real Property, 114 S. Ct. 492, 504 (1993).

129. "The forfeiture provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970, along with the analogous provision in [the Racketeer Influenced

mon law civil forfeitures, modern civil forfeiture statutes, such as those provided for in the federal narcotics,[130] currency transaction reporting,[131] and money laundering[132] statutes, are in rem proceedings directed at the property itself.[133] The alleged wrongdoer is not named as a party to the action and need not have been convicted or even indicted for the property to be forfeited.[134] Criminal forfeitures, on the other hand, are provided as part of the penalty imposed upon conviction.[135]

1. Civil Seizures and Forfeitures

Section 981 of the Federal Criminal Code[136] and § 881 of the Federal Food and Drugs Code[137] provide the basis for most civil forfeiture proceedings. Under § 981,[138] "[a]ny property, real or personal," that is involved in or traceable to crimes relating to currency transaction reporting and money laundering is forfeitable.[139] Furthermore, any property

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and Corrupt Organizations Act], was the first modern criminal forfeiture provision enacted by Congress." Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303, 314 (1988).

130. 21 U.S.C. § 881 (1988 & Supp. V 1993).

131. 18 U.S.C. § 981 (1988 & Supp. V 1993).

132. *Id.* § 1956 (1988 & Supp. V 1993).

133. "In the United States today, over 100 federal statutes provide for in rem forfeiture." Skorcz, *supra* note 123, at 1204.

134. *Id.* at 1204.

135. 18 U.S.C. § 982 (1988 & Supp. V 1993). "The legislative history of RICO indicates that Congress considered criminal forfeiture a novel form of punishment." Skorcz, *supra* note 123, at 1206 (*in personam* forfeiture "deprives the racketeer of property acquired through an illegal activity" and it separates "the violator from ill-gotten gains, . . . prevent[ing] the violator both from delegating criminal activities to a colleague while in prison and from resuming the activities once the violator has served his criminal sentence").

136. 18 U.S.C. § 981 (1988 & Supp. V 1993).

137. 21 U.S.C. § 881 (1988 & Supp. V 1993). Congress enacted § 881, part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, to help "strengthen existing law enforcement authority in the field of drug abuse . . . through providing more effective means for law enforcement aspects of drug abuse prevention and control." H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4566-67 (codified at 21 U.S.C. § 881 (1988)).

138. Money Laundering Prosecution Improvement Act of 1988, Pub. L. No. 100-690, § 6463, 102 Stat. 4374, 4734 (1988) (amending 18 U.S.C. § 981).

139. 18 U.S.C. § 981(a)(1)(A). The transaction must violate 18 U.S.C. §§ 1956 (1988 & Supp. V 1993) (money laundering), 1957 (1988 & Supp. V 1993) (same) or 31 U.S.C. §§ 5313(a) (1988) (requiring reporting of monetary transactions), 5324(a) (1988

that is derived from, or is traceable to proceeds of specified financial crimes is also forfeitable.[140] Section 881 renders all proceeds from and instrumentalities of controlled substance transactions, including both real and personal property, subject to seizure and forfeiture.[141]

These statutes also provide for the pretrial seizure of potentially forfeitable property.[142] The procedures for such seizures are extremely complex, but in general terms and subject to the limitations discussed below, the Government may seize property without a judicial determination, upon a showing of probable cause that the property is forfeitable.[143] At the forfeiture trial, once the Government has established

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& Supp. V 1993) (prohibiting structuring transactions to avoid reporting requirements), to cause a forfeiture. 18 U.S.C. § 981; *see infra* note 152 and accompanying text.

140. 18 U.S.C. § 981(a)(1)(C). The specified underlying statutes are 18 U.S.C. §§ 215 (1988 & Supp. V 1993), 218 (1988), 656 (1988 & Supp. V 1993), 657 (1988 & Supp. V 1993), 1005-07 (1988 & Supp. V 1993), 1014 (1988 & Supp. V 1993), 1032 (1988 & Supp. V 1993), 1344 (1988 & Supp. V 1992), and those affecting a financial institution, 18 U.S.C. §§ 1341 and 1343 (1988 & Supp. V 1993).

141. 21 U.S.C. § 881(a)(6) provides:

> (a) Subject property
>
> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the 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.

21 U.S.C. § 881(a)(6) (1988). Section 881(a)(7) provides for the forfeiture of:

> All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, 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.

Id. § 881(a)(7) (1988).

142. *See supra* note 141.

143. *See generally* PARKER & STRADER, *supra* note 105, at § 6A.02[2][A].

probable cause, the burden of proof shifts[144] to an intervening owner to prove "innocent" ownership.[145]

2. Criminal Restraints and Forfeitures

Criminal forfeiture statutes provide for in personam proceedings that are part of a criminal defendant's punishment.[146] Some of the primary federal criminal forfeiture statutes are § 982 of the Federal Criminal Code relating to financial crimes,[147] § 1963 of the RICO statute,[148] and

144. "The practice of shifting burden of proof onto property owners in an in rem forfeiture first appeared in seventeenth-century England when Parliament passed the Navigation Acts." Petrou, *supra* note 119, at 825. "Prior to the Navigation Acts, the Crown had to prove the guilt of the owner." *Id.* This practice received early acceptance in the United States Supreme Court in Locke v. United States, 11 U.S. (7 Cranch) 339 (1813), in which the Court "refused to interpret the government's burden to show probable cause in a forfeiture proceeding as requiring it to prove the elements of a prima facia case." *Id.* Chief Justice Marshall viewed it as a "legitimate exercise of the legislative power to mandate judicial procedure." *Id.*

145. Sections 881(a)(6) and (7) each provide that: "no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the *owner* to have been committed or omitted without the *knowledge or consent* of that owner." 21 U.S.C. § 881(a)(6)-(7) (1988) (emphasis added). The innocent owner defense of § 981 provides that: "[n]o property shall be forfeited under this section to the extent of the interest of an *owner or lienholder* by reason of any act or omission established by that owner or lienholder to have been committed *without the knowledge* of that owner or lienholder." 18 U.S.C. § 981(a)(2) (emphasis added).

146. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974) (providing an overview of the history of criminal forfeitures); Jankowski, *supra* note 114, at 171 n.33.

147. 18 U.S.C. § 982 (1988 & Supp. V 1993), provides, *inter alia*:

> (b) (1) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed—
>
> (A) in the case of a forfeiture under subsection (a)(1) of this section, by subsections (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853); and
>
> (B) in the case of a forfeiture under subsection (a)(2) of this section, by subsections (b), (c), (e), and (g) through (p) of section 413 of such Act.

18 U.S.C. § 982(b)(1) (1988 & Supp. V 1993).

148. 18 U.S.C. § 1963 provides, *inter alia*:

> (b) Property subject to criminal forfeiture under this section includes—
>
> (1) real property including things growing on, affixed to, and found in land; and
>
> (2) tangible and intangible personal property, including rights, privi-

§ 853 of the federal drug laws.[149]

Under § 982,[150] property involved in or traceable to an offense in violation of the currency transaction reporting and money laundering criminal statutes is forfeitable.[151] Property constituted of or derived from proceeds of specified financial crimes is also deemed forfeitable.[152] Section 982(a)(1) permits forfeiture of property "involved in" an offense, or merely traceable to such tainted property.[153] Under 21 U.S.C. § 1963 the defendant also forfeits broad categories of property if he is convicted under the RICO laws.[154] Finally, under § 853, upon conviction of a viola-

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leges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

18 U.S.C. § 1963 (b), (c) (1988).

149. 21 U.S.C. § 853 provides, *inter alia:*

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

* * *

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

21 U.S.C. § 853 (1988).

150. The property subject to forfeiture pursuant to § 982(a) is: "[A]ny property, real or personal, involved" in the proscribed offense, or "any property traceable to such property." 18 U.S.C. § 982(a)(4) (Supp. V 1993).

151. 31 U.S.C. §§ 5313(a) (1988), 5324 (Supp. V 1993); 18 U.S.C. §§ 1956, 1957 (1988 & Supp. V 1993).

152. 18 U.S.C. § 982(a)(2) (Supp. V 1993).

153. 18 U.S.C. 982(a)(1) (Supp. V 1993).

154. 18 U.S.C. § 1961-1968 (1988 & Supp. V 1993). Sections 1956 and 1957, dealing with money laundering, also are implicated. See 18 U.S.C. §§ 1956, 1957. The property subject to forfeiture under § 1963(a) is:

tion of the federal narcotics laws, broad categories of property are forfeitable.[155] As with civil forfeitures, the criminal forfeiture statutes allow

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(1) any interest the person has acquired or maintained in violation of Section 1962.
(2) any —
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962; and
(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of Section 1962.

18 U.S.C. § 1963(a) (1), (2) (1988).

Apart from the RICO enterprise, any property acquired, maintained, or derived through racketeering, may be forfeitable under § 1963(a)(1) or (3) upon a finding that the defendant would not have obtained the property "but for" the criminal offense. *See* United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989); United States v. Regan, 699 F. Supp. 36, 37 (S.D.N.Y. 1988). The "but for" test also appears to apply to forfeitures under § 1963(a)(3). *Cf.* United States v. Bucuvalas, 970 F.2d 937, 947 (1st Cir. 1992) (holding that forfeiture provisions are to be construed liberally), *cert. denied*, 113 S. Ct. 1382 (1993); United States v. Angiulo, 897 F.2d 1169, 1213 (1st Cir.) (same), *cert. denied*, 498 U.S. 845 (1990); United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987) (same); United States v. One 1980 BMW 320, 559 F. Supp. 382, 384 (E.D.N.Y. 1983) (same).

155. This section provides for forfeiture of property used to "facilitate" a drug offense. 21 U.S.C. § 853(a)(2) (1988). Section 853 was enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 301-323, 98 Stat. 1976, 2040-57 (1984). The statute was enacted "to enhance the use of forfeiture, and, in particular, the sanction of criminal forfeiture, as a law enforcement tool in combatting . . . racketeering and drug trafficking." S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374.

The property subject to forfeiture pursuant to 21 U.S.C. § 853(a) is far broader than that covered by its civil counterpart, 21 U.S.C. § 881(a):

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over the continuing criminal enterprise.

for pretrial restraint of the assets.[156]

In sum, the federal civil and criminal forfeiture statutes provide the Government with extraordinary powers over private property. Until recently, federal courts have been hesitant to limit those powers and have yielded to the Government's stated law enforcement goals. Since 1993, however, the United States Supreme Court has substantially altered the landscape of constitutional law in the forfeiture context.[157]

C. Constitutional Limitations on Seizures and Forfeitures

1. The Hands-Off Approach

For years, the United States Supreme Court and other federal courts declined to place substantial restrictions on the scope of forfeitures. The United States Supreme Court decision in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[158] was the foundation for this approach. In that case, the owner of a pleasure yacht leased the property to persons allegedly involved in narcotics activity.[159] After the Government obtained forfeiture of the yacht, the owner brought a claim for compensation.[160] The Court held that seizure of the property without notice or a hearing did not violate due process because notice might have made it possible to hide or destroy the property.[161] The Court also rejected the owners' just compensation claim.[162]

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156. Under § 853(e)(2), and § 1963(d)(2), a court may enter a pre-indictment temporary restraining order (TRO), without notice or a hearing, upon a showing of probable cause that, if there were a conviction, the property would be subject to forfeiture and that notice would jeopardize the availability of the property. 21 U.S.C. § 853 (1988); 18 U.S.C. § 1963(d)(2) (1988). The procedures under 21 U.S.C. § 853 also apply to forfeitures under 18 U.S.C. § 982. *See* 18 U.S.C. § 982(b)(1) (Supp V 1993). Under 21 U.S.C. §§ 853(e)(1)(B), 18 U.S.C. §§ 982(b)(1), 1963(d)(1)(B), a court may enter a TRO upon notice and a finding that there is a "substantial probability that the United States will prevail on the issue of forfeiture," and that the government's need outlays any hardship on the opposing party. 21 U.S.C. § 853(e)(1)(B) (1988); 18 U.S.C. §§ 982(b)(1), 1963(d)(1)(B) (1988). After indictment, all three authorize the court to enter a "restraining order or injunction," to require a bond, or to "take any other action to preserve [the property]." 21 U.S.C. § 853(e)(1)(B); 18 U.S.C. §§ 982(h)(1), 1963(d)(1)(B) (1988).

157. *See infra* notes 166-82 and accompanying text.

158. 416 U.S. 663 (1974).

159. *Id.* at 665.

160. *Id.* at 668.

161. *Id.* at 678-80. The Court held that, "in limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible." *Id.* at 678. The Court found that the instant situation was analogous to those "extraordinary" situations in which postponement of notice and a hearing until after the seizure does not offend due process. *Id.* at 680.

162. *Id.*

Relying primarily on *Calero-Toledo*, numerous courts rejected both due process[163] and Eighth Amendment challenges to civil[164] and criminal[165] forfeitures. In this context, the Supreme Court's recent willingness to invoke constitutional provisions to strike down forfeitures is all the more remarkable.

2. The New Vulnerability of Forfeiture Laws

The Supreme Court's newly-adopted constraints on forfeitures have arisen both under the Fifth Amendment's Due Process Clause and the Eighth Amendment's Excessive Fines Clause. On the procedural side, the Court in *James Daniel Good Real Property*,[166] for the first time, limited the Government's ability to seize property pursuant to forfeiture statutes without notice.[167] Because the property in that case was real property, the Court reasoned, there were no exigent circumstances such as those in *Calero-Toledo* that might justify a seizure without notice.[168] Although

163. The Supreme Court, in *United States v. Monsanto*, declined to decide whether a hearing is required before property can be restrained prior to trial. 491 U.S. 600, 615 n.10 (1989); *see* United States v. James Daniel Good Property, 971 F.2d 1376, 1383 (9th Cir. 1992), *rev'd*, 114 S. Ct. 492 (1993) (rejecting the due process challenge to forfeitures); United States v. 141st St. Corp. by Hersh, 911 F.2d 870, 876 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); United States v. One Clipper Bow Ketch Nisku, 548 F.2d 8, 11 n.4 (1st Cir. 1977); United States v. One 1978 Chrysler LeBaron Station Wagon, 648 F. Supp. 1048, 1050 (E.D.N.Y. 1986).

164. *See, e.g.*, United States v. 508 Depot St., 964 F.2d 814, 816 (8th Cir. 1992), *rev'd sub. nom.*, Austin v. United States, 113 S. Ct. 2801 (1993); United States v. All Tract 686.64 Acres of Property, 820 F. Supp. 1433, 1439 (M.D. Ga. 1993) (holding that the state has title upon showing probable cause and that defendant must subsequently prove innocence to avoid forfeiture).

165. *See, e.g.*, United States v. Whalers Cove Drive, 954 F.2d 29, 38 (2d Cir.) (holding that forfeiture of real property did not violate the Eighth Amendment), *cert. denied*, 113 S. Ct. 55 (1992).

166. 114 S. Ct. 492 (1993).

167. *Id.* at 505 (holding that the delayed notice and hearing were not justified by any important government needs).

168. *Id.* Concurring in part and dissenting in part, Justice O'Connor rejected the majority's holding that the government must give notice and a hearing before seizing any real property prior to forfeiture. *Id.* at 511 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor cited *Calero-Toledo* and its progeny as clearly indicating that due process does not require a hearing prior to seizing items that are subject to forfeiture. *Id.* (O'Connor, J., concurring in part and dissenting in part). "Those cases reflect the common sense notion that the property owner receives all the process that is due at the forfeiture proceeding itself." *Id.* (O'Connor, J., concurring in part and dissenting in part).

limited on its face to seizures of real property, this decision indicates the Court's new willingness to protect procedural rights in the forfeiture context.

Even more significantly, in *Alexander v. United States*,[169] and in *Austin v. United States*,[170] the Court held for the first time that criminal and civil forfeitures are subject to the Eighth Amendment's Excessive Fines Clause.[171] The *Austin* decision is particularly important because the vast majority of courts, with a few notable exceptions,[172] had previously indicated that "civil" forfeitures are beyond the purview of the protections that the Eighth Amendment affords individuals in criminal proceedings.[173]

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169. 113 S. Ct. 2766 (1993).

170. 113 S. Ct. 2801 (1993).

171. *See id.* at 2803; *Alexander*, 113 S. Ct. at 2775-76.

172. *See* United States v. On Leong Chinese Merchants Ass'n Bldg., 918 F.2d 1289, 1299 (7th Cir. 1990) (Cudahy, J., concurring) (noting that constitutional issues could arise when property is seized in civil forfeiture actions), *cert. denied*, 502 U.S. 809 (1991); United States v. 4492 South Livonia Rd., 889 F.2d 1258, 1270 (2d Cir. 1989) (dicta).

173. United States v. One 107.9 Acre Parcel of Land, 898 F.2d 396, 400 (3d Cir. 1990) (reasoning that Congress can legitimately seize property as a civil penalty); *On Leong*, 918 F.2d at 1296 (reiterating that the remedial nature of civil suits precludes Eighth Amendment implication); United States v. Tax Lot 1500, 861 F.2d 232, 235 (9th Cir. 1988) (maintaining the inapplicability of the Eighth Amendment in civil forfeiture actions), *cert. denied*, 493 U.S. 954 (1989); United States v. 250 Kreag Rd., 739 F. Supp. 120, 124 (W.D.N.Y. 1990) (noting that courts generally hold that civil enactments preclude findings of Eighth Amendment violations); United States v. 1213 34th St., No. 89-2401 (JHG), 1991 U.S. Dist. LEXIS 3226, *8 (D.D.C. 1991) ("Although some constitutional protections extend to civil forfeitures proceedings, they are few and the Eighth Amendment's proscriptions are not among them.").

Courts had declined to apply the Eighth Amendment to criminal forfeitures. *See* United States v. Monroe, 866 F.2d 1357, 1367 (11th Cir. 1989) (holding that the punishment was not sufficiently severe to invoke the Eighth Amendment); United States v. Grande, 620 F.2d 1026, 1039 (4th Cir.), *cert. denied*, 449 U.S. 830 (1980), *and cert. denied*, 449 U.S. 919 (1980); United States v. Huber, 603 F.2d 387, 397 (2d Cir. 1979) (holding that RICO forfeiture does not violate the Eighth Amendment because the statute correlates the amount of a forfeiture to the defendant's interest in the enterprise), *cert. denied*, 445 U.S. 927 (1980). *But see* United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (holding that trial court must insure that the size of the forfeiture and the gravity of the offense are proportionate); United States v. Littlefield, 821 F.2d 1365, 1368 (9th Cir. 1987) (asserting that the trial court is responsible for insuring that forfeiture is not excessive punishment); *Grande*, 620 F.2d at 1039 (remanding for evaluation under the Eighth Amendment because the amount of illegal proceeds was a fraction of the enterprise forfeited); United States v. Regan, 726 F. Supp. 447, 459 (S.D.N.Y. 1989) (overturning criminal forfeiture on Eighth Amendment grounds), *aff'd in part and vacated in part*, 937 F.2d 823 (2d Cir.), *amended*, 946 F.2d 188 (9th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992); United States v. Robinson, 721 F. Supp. 1541, 1543-45 (D.R.I. 1989) (same).

In *Austin*, the claimant had pleaded guilty to possession of two grams of cocaine with intent to distribute.[174] The Government had alleged that the defendant arranged the narcotics sale at his automobile body shop, went to his mobile home, and returned with the cocaine.[175] Police later discovered drug paraphernalia, small amounts of marijuana and cocaine, and $4,700 in cash in the home and the body shop.[176] The government then sought and obtained forfeiture of the property under 21 U.S.C. § 881(a)(4) and (a)(7).[177]

The Eighth Circuit rejected Austin's proportionality claim, holding that the Eighth Amendment does not apply where the government proceeds in rem against property.[178] The court stated that it was bound by the technical distinction between civil and criminal proceedings, and also by "clear court decisions that the Constitution does not require proportionality—at least, not in civil proceedings for the forfeiture of property."[179]

The unanimous Supreme Court decision reversing the Eighth Circuit is, therefore, startling. The Court reviewed the history of civil forfeitures and found that these proceedings have been designed, at least in part, to punish the wrongdoer.[180] The Court held that the Eighth Amendment is not limited to criminal proceedings but extends to civil fines where those fines are intended, at least in part, to punish.[181]

In its recent cases, the United States Supreme Court has sent clear signals that it is prepared to scrutinize carefully both civil and criminal forfeiture proceedings. After years of virtually unfettered use by the government, courts are likely, in coming years, to limit civil and criminal

174. *Austin*, 113 S. Ct. at 2803.
175. *Id.* at 2803.
176. *Id.*
177. *Id.*
178. *Id.*
179. United States v. 508 Depot St., 964 F.2d 814, 818 (1992), *rev'd*, Austin V. United States, 113 S. Ct. 2801 (1993).
180. *Austin*, 113 S. Ct. at 2806.
181. *Id.* As Justice Kennedy noted in his concurrence, this conclusion is highly suspect. *Id.* at 2815 (Kennedy, J., concurring). Justice Kennedy observed that neither the cases nor the commentary present a unified theory that forfeitures are always rationalized as a personal punishment against the owner: "Some impositions of in rem forfeiture may have been designed either to remove property that was itself causing injury, or to give the court jurisdiction over an asset that it could control in order to make injured parties whole. . . . *Id.* at 2812 (Kennedy, J., concurring) (citations omitted).

forfeitures as never before.[182] It is in this context that the takings issue should be evaluated.

III. SEIZURES, FORFEITURES, AND COMPENSABLE TAKINGS

A. *Takings Cases in the Forfeiture Context*

Although some commentators have suggested that the Takings Clause should provide a basis for claims in the forfeiture context,[183] there are relatively few such cases where courts have awarded just compensation. Yet, as the Government has become more aggressive in its forfeiture efforts, the courts have come to scrutinize forfeitures more carefully under the Takings Clause. Before turning to possible applications of the Takings Clause to seizures and forfeitures, this Section analyzes earlier forfeiture cases.

1. *Calero-Toledo's* Takings Analysis

For many years, courts relied upon the United States Supreme Court's decision in *Calero-Toledo* to reject takings claims in forfeiture cases.[184] In that case, the innocent lessors of a pleasure yacht used for narcotics trafficking sought just compensation for their property.[185] In rejecting the claim, the Supreme Court stated that the Government has the power

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182. It is already clear that the Supreme Court's new approach will affect lower courts' approaches in areas beyond those addressed in the Court's decisions. For example, three circuit courts, relying upon *Austin*, have found that the concurrent imposition of civil forfeiture and criminal punishment may violate the Double Jeopardy clause. *See* United States v. Perez, No. 94-60788 (5th Cir. Nov. 21, 1995); United States v. Ursery, 59 F.3d 568, 572 (6th Cir. 1995); United States v. $405,089.23 in United States Currency, 33 F.3d 1210, 1219 (9th Cir. 1994), *amended on denial of reh'g*, 56 F.3d 41 (9th Cir. 1995). *But see* United States v. Millan, 2 F.3d 17, 20 (2d Cir. 1993) ("Congress may impose multiple punishments for a single crime without violating the Constitution's double jeopardy restrictions."), *cert. denied*, 114 S. Ct. 922 (1994); United States v. 18755 North Bay Rd., 13 F.3d 1493, 1499 (11th Cir. 1994) (stating that civil forfeiture was not barred on double jeopardy grounds because the criminal and civil proceedings fall "within the contours of a single, coordinated prosecution").

183. *See, e.g.*, 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, 237-38 (1992) (suggesting that the Takings Clause may provide a means for compensating innocent owners); Jane Rohrer, Note, *What Price Investor Confidence? RICO Abuse as Compensable Takings*, 66 S. CAL. L. REV. 1675 (1993) (suggesting that forfeitures later overturned in the RICO context may require just compensation).

184. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-90 (1974).

185. *Id.* at 665-66.

to seize and obtain the forfeiture of property under its police powers.[186] Because the property at issue was properly forfeited pursuant to those powers, no taking occurred.[187] Further, the Court found that the owner's innocence did not require just compensation because the property itself was considered the wrongdoer.[188] The Court, however, also remarked that if an owner of an interest in real property proved "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property . . . it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive."[189]

In the years following *Calero-Toledo*, the vast majority of courts relied upon that case to reject takings claims in the forfeiture context.[190] So long as the statutory innocent owner provisions are followed, the requirements of *Calero-Toledo* are met and no taking has occurred.[191]

At least with respect to the takings issue, the *Calero-Toledo* holding has lost much of its force. First, in that case the Court adopted the common law assumption that forfeitures operate only against the property as wrongdoer and not against the owner.[192] As discussed above, the deci-

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186. *Id.* at 686.

187. *Id.*

188. *Id.* at 683-88.

189. *Id.* at 689-90.

190. *See, e.g.*, United States v. Monsanto, 491 U.S. 600, 614-16 (1989) (rejecting forfeiture challenge on due process grounds); United States v. James Daniel Good Real Property, 971 F.2d 1376, 1383 (9th Cir. 1992), *rev'd*, 114 S. Ct. 492 (1993); United States v. One Clipper Bow Ketch Nisku, 548 F.2d 8, 11 n.4 (1st Cir. 1977). *Calero-Toledo* is relied on in cases of civil forfeitures. *See, e.g.*, United States v. 508 Depot St., 964 F.2d 814, 817 (8th Cir. 1992), *rev'd*, Austin v. United States, 113 S. Ct. 2801 (1993); United States v. All Tract 686.64 Acres of Property, 820 F. Supp. 1433, 1438 (M.D. Ga. 1993). The case is similarly applied in criminal forfeiture cases. *See, e.g.*, United States v. 40 Moon Hill Rd., 884 F.2d 41, 45 (1st Cir. 1989).

Some courts, however, required just compensation or return of property when an owner was not only innocent, but also took the requisite precautions to ensure that the property was not misused. *See, e.g.*, United States v. One 1981 Datsun 280ZX, 644 F. Supp. 1280, 1288 (E.D. Pa. 1986); United States v. One 1976 Chevrolet Corvette, 477 F. Supp. 32, 35 (E.D. Pa. 1979); United States v. One 1976 Lincoln Mark IV, 462 F. Supp. 1383, 1392 (W.D. Pa. 1979).

191. *See* United States v. 1213 34th Street, No. 89-2401 (JHG), 1991 U.S. Dist. LEXIS 3226, at *18 (D.D.C. 1991) (holding that a mortgage holder had no claim under the takings clause because the "government is required by statute and regulations to compensate innocent mortgage holders").

192. *Calero-Toledo*, 416 U.S. at 683-688.

sions in *Austin* and *Alexander* make clear that the Court is no longer willing to accept that common law fiction.[193]

Second, lower court cases make clear that there are instances where the innocent owner provisions are simply not sufficient to protect a property owner from governmental overreaching.[194] For example, if property loses value or is destroyed, "return" of the property to an innocent owner does not make the owner whole.

Finally, in the years since *Calero-Toledo*, the Court has reaffirmed the *Pennsylvania Coal* holding that governmental exercises of its police powers may require just compensation.[195] A number of courts have relied upon *Calero-Toledo* and have stated that, because forfeitures are effected by an exercise of the police power, they cannot give rise to takings claims.[196] On its face, however, *Calero-Toledo* recognizes the possibility of takings claims in the forfeiture context.[197] In any event, the Supreme Court has recognized since *Pennsylvania Coal* that an exercise of the police power can give rise to takings claims.[198]

2. Valid Takings Claims in the Forfeiture Context

In light of the foregoing, courts have begun to award just compensation for seizures and forfeitures. Perhaps the first significant takings decision in the forfeiture context is the Fourth Circuit's 1987 opinion in *In re Metmor Financial, Inc.*[199] In that case, the court held that an innocent mortgagee of seized property is entitled to interest payments under the mortgage agreement while the Government holds the property.[200] In so holding, the *Metmor* court relied upon *Armstrong v. United*

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193. *See supra* notes 166-82 and accompanying text.

194. *See infra* notes 271-77 and accompanying text.

195. *See supra* notes 38-43 and accompanying text.

196. *See* Perry v. United States, 28 Fed. Cl. 82, 85 (1993) (stating that forfeitures further the purposes of the underlying criminal statutes); Eversleigh v. United States, 24 Cl. Ct. 357, 359 (1991) (stating that if property used in criminal activity is lawfully forfeited, then the exercise of governmental authority is permissible); State *ex rel.* Schrunk v. Metz, 867 P.2d 503, 508 (Or. Ct. App. 1993) (noting that properly exercised police power does not give rise to takings claim); Myers v. 1518 Holmes St., 411 S.E.2d 209, 211 (S.C. 1991) (finding that forfeiture statutes further "punitive and deterrent purposes" and are not unconstitutional).

197. *Calero-Toledo*, 416 U.S. at 669.

198. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) ("[B]asic understanding of the [Fifth] Amendment makes clear that it is designed . . . to secure compensation in the event of otherwise proper [police power] interference [with property] amounting to a taking.").

199. 819 F.2d 446 (4th Cir. 1987).

200. *Id.* at 451; *see also* United States v. Federal Nat'l Mortgage Ass'n, 946 F.2d 264, 266 (4th Cir. 1991) (holding that a mortgagee and a servicer of mortgages, as innocent lienholders, were "owners" whose interest in the property could not be forfeit-

States.[201] In *Armstrong*, the plaintiffs held liens enforceable only by attachment on property that was later transferred to the Government.[202] Because United States property is immune from attachment, the transfer affected the enforceability of the lien and not the lien itself.[203] The Supreme Court held that the plaintiffs were entitled to compensation because their property interest had become unenforceable.[204]

The Fourth Circuit found that the mortgagee in *Metmor* was in a similar position to the *Armstrong* plaintiff because the mortgagee continued to hold its mortgage rights.[205] Because the mortgagor was a fugitive who likely had no available assets, the mortgagee had no party other than the Government against which to assert those rights.[206] The holder of the mortgage in *Metmor*, like the lienholders in *Armstrong*, was therefore entitled to just compensation.[207]

Six years after *Metmor*, the Federal Circuit issued another significant ruling awarding just compensation in the forfeiture context. In its 1993 decision in *Shelden v. United States*,[208] that court reversed the claims court and held that the mortgagees of forfeited property were entitled to just compensation.[209] In *Shelden*, the property owner was convicted under RICO;[210] the Government filed a lis pendens, and in December 1983, the district court entered a forfeiture order.[211] The mortgagees attempted to foreclose on the property when the mortgagors subsequently went into arrears, but were unable to do so initially because the mortgagors

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ed); Monroe Sav. Bank, FSB v. Catalano, 733 F. Supp. 595, 598 (W.D.N.Y. 1990) (providing that "a mortgagee cannot be denied relief provided for under a mortgage [agreement] because of conditions or circumstances not attributable to the mortgagee").

201. 364 U.S. 40 (1960).

202. *Id.* at 41.

203. *Id.* at 42.

204. *Id.* at 46.

205. 819 F.2d at 450.

206. *Id.*

207. *Id.* at 451.

208. 7 F.3d 1022 (Fed. Cir. 1993).

209. *Id.* at 1031. *But see* Perry v. United States, 28 Fed. Cl. 82, 84 (1993) ("[T]he Court of Federal Claims has rejected the notion that the seizure and administrative forfeiture of money, pursuant to federal seizure and forfeiture statutes, is a compensable [F]ifth [A]mendment taking"); Eversleigh v. United States, 24 Cl. Ct. 357, 358 (1991) (finding no compensable Fifth Amendment taking in forfeiture case).

210. 18 U.S.C. §§ 1961-1968 (1988 & Supp. V 1993).

211. *Shelden*, 7 F.3d at 1024.

cured their default, and later because the mortgagors declared bankruptcy.[212]

Ultimately, following a reversal of the conviction and the entry of a plea agreement, the Government in October 1990, abandoned its forfeiture efforts, gave the Sheldens a deed to the property, and released the lis pendens.[213] In the interim, the property had suffered structural and cosmetic damage.[214] Plaintiffs sought compensation for the diminution of the property value from December 1983 to October 1990.[215]

The claims court held that there was no taking because the Sheldens failed to show any actual damage resulting from the placing of the lis pendens on the property.[216] The court reasoned that the Sheldens were prevented from foreclosing not by the Government's actions, but by the mortgagors' actions.[217]

In reversing the lower court's decision, the Federal Circuit analogized the case to *Armstrong*.[218] The court found that, although the mortgagors were allowed to retain record title while their appeal was pending, the forfeiture order made clear that title had actually passed to the United States.[219] Therefore, foreclosure against the mortgagors would have been futile.[220] The plaintiffs were thus entitled to the fair market value of the property as of the date of transfer to the Government, minus compensation received.[221] The court also stated that deterioration of the property was not a prerequisite to recovery.[222]

These cases show that courts will recognize takings claims in the forfeiture context. The next Section sets forth the potential applicability of the Takings Clause in the different situations that may arise under the forfeiture statutes.

B. Factual Contexts in Which Takings Claims May Arise

There are a number of scenarios in which takings claims may arise in the forfeiture context. Some of these include:

Scenario A

The Government seizes or obtains a restraining order on assets prior

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212. *Id.* at 1025.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 1025-26.
217. *Id.* at 1026.
218. *Id.* at 1026-28.
219. *Id.* at 1027.
220. *Id.* at 1028.
221. *Id.* at 1031.
222. *Id.*

to a civil or criminal trial but the trial court finds that the seizure or restraint was excessive, irrespective of whether forfeiture is ultimately ordered. Alternatively, the trial or appellate court reduces the amount forfeited because that amount is excessive. While the excess amount of property is in the Government's control, the owner suffers damages because the Government has assumed control of the property or because the property has lost value, or both.

Scenario B

The Government seizes or obtains a restraining order on assets prior to trial, but fails to obtain a final forfeiture order, because (a) it decides not to proceed with the civil forfeiture case, (b) in a criminal case, it disposes of the case or drops the forfeiture request, or (c) it loses at the civil forfeiture trial or substantive criminal trial. While the excess amount of property is in the Government's control, the owner suffers damages because the Government has assumed control of the property or because the property has lost value, or both.

Scenario C

The Government obtains forfeiture of the property, but the forfeiture is reversed either because (a) in a civil forfeiture case the trial court or the appellant court reverses the forfeiture decision, or (b) in the case of a criminal forfeiture the trial court voids the forfeiture, or the criminal conviction is reversed, or the forfeiture is overturned on appeal.

Scenario D

The Government seizes property, which is later returned to a third party uninvolved with the crime, such as a lienholder. The property declines in value, or the third party loses interest and incurs expenses in the interim, or both.

Each of these situations involves various permutations, and each permutation requires distinct analysis under the Takings Clause. Most significantly, the outcome may hinge on whether the claimant can establish innocent owner status.

1. Scenario A: Excessive Pretrial Seizure or Restraints

In light of the United States Supreme Court's decisions in *Austin* and *Alexander*, applying the Eighth Amendment to civil and criminal forfeitures, there is a substantial likelihood in a particular case that the initial amount frozen, or the amount ultimately forfeited, will later be found to be excessive. An excessive seizure of, restraint on, or forfeiture of property could give rise to a takings claim in a number of ways.

The notorious case of *United States v. Regan* [the "Princeton-Newport" case][223] provides a good example of how such a takings claim might arise. Pretrial, the Government in *Regan* obtained an order freezing the assets of Princeton-Newport Partners, a securities firm.[224] Arguably as a result of the restraining order, the business liquidated prior to the criminal trial.[225] In the interim, the court ordered a reduction in the amount initially frozen.[226]

As to the forfeiture itself, the defendants were convicted at their criminal trial and the jury awarded forfeiture.[227] The trial judge later set aside the forfeiture on the grounds that it violated the Eighth Amendment.[228] Ultimately, almost all of the substantive convictions in the case were reversed on appeal.[229]

Using the *Regan* case as an example of a takings claim where there is an excessive seizure or forfeiture, such claims could arise under alternative theories. The claimant could argue that, because excessive seizure or forfeiture, or both, destroyed the asset's value, the Government effected an unlawful permanent taking of all the assets.[230] The amount of the loss was the value lost by the owners of the frozen assets. Alternatively, the excess amount initially frozen and forfeited, as illustrated by *Regan*,[231] may constitute a temporary taking.[232] Under this theory, the

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223. 699 F. Supp. 36 (S.D.N.Y. 1988). *Regan* led to substantial commentary, and ultimately to congressional hearings, on the use of forfeiture statutes to restrain third parties' property. *See, e.g.*, Scott J. Paltrow, 6 *Plead Not Guilty to Racketeering*, L.A. TIMES, Aug. 12, 1988, at D12.

224. *Regan*, 699 F. Supp. at 37.

225. Stephen J. Adler, *Heated Argument: Are RICO Seizures a Violation of Rights, As Critics Contend?*, WALL ST. J., Feb. 15, 1989, at A1, A6; *Princeton/Newport Will Liquidate*, N.Y. TIMES, Dec. 8, 1988, at 38.

226. *Regan*, 699 F. Supp. at 37.

227. *Id.*

228. *Id.* at 39.

229. United States v. Regan, 858 F.2d 115, 121-22 (2d Cir. 1988) (dissolving the restraining order on the property of unindicted third parties); *see also* United States v. Regan, 937 F.2d 823, 829-30 (2d Cir.) (remanding the RICO count that was premised on reversed tax conviction), *amended by*, 946 F.2d 188 (2d Cir. 1991) (amending previous order and vacating conspiracy charges against four defendants), *cert. denied*, 504 U.S. 940 (1992).

230. Shelden v. United States, 7 F.3d 1022, 1027-28 (Fed. Cir. 1993); *cf.* Alde, S.A. v. United States, 28 Fed. Cl. 26, 34 (1993) (holding that the destruction of plaintiff's airplane by Hurricane Hugo while in possession of the United States Government did not amount to a compensable taking); B & F Trawlers, Inc. v. United States, 27 Fed. Cl. 299, 304-06 (1992) (holding that the sinking of a burning vessel under control of United States Coast Guard is not a compensable taking because it "constituted a danger to navigation" and was thus a valid exercise of the government's police powers).

231. The Government obtained a restraining order on all the defendants' assets and all of the firm's assets. United States v. Regan, 699 F. Supp. 36, 37 (1988). These

loss is the diminution in value from the time of the original freeze order to the time of either the later order decreasing the amount frozen or the later order overturning the jury's forfeiture award.[233]

2. Scenario B: The Failure to Obtain Final Forfeiture Award

An example of this scenario arose in *Shelden*, where the original forfeiture order was never finalized, and the Government and the defense entered into a plea agreement after the defendant's conviction was reversed on appeal.[234] The court found that the claimant was entitled to compensation as a result of the restraint on the property.[235]

3. Scenario C: Case Ends Upon Reversal

In *Regan*, the forfeiture in the final instance was not effected because the convictions were reversed and the Government declined to retry the charges.[236] Therefore, the seizure and forfeiture arguably constituted an unlawful temporary taking. Under this theory, the loss was the difference in the value of the assets on the date of the original freeze order and the value on the date of the reversal.

The facts in *State ex rel. Schrunk v. Metz*[237] provide another example of this scenario. In that case, the defendant was charged criminally with conducting illegal gambling activities in his restaurant.[238] The State initiated parallel civil forfeiture proceedings and seized the property.[239] Be-

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were valued at $1.3 billion, although the estimated criminal proceeds were approximately $446,653.00. *See* Rohrer, *supra* note 183, at 1685. The government requested forfeitures of more than $30 million, but the district court limited the forfeitures to $14 million to reflect the assets of the defendants. *See id.* at 1687; Roger Parloff & Rifka Rosenwein, *Princeton/Newport Fallout Predicted*, MANHATTAN LAW., Dec. 13-19, 1988, at 1.

232. *See, e.g.*, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

233. *See Regan*, 699 F. Supp. at 38; *see also Shelden*, 7 F.3d at 1024 (ordering damages as a result of the loss of value from the time the government assumed control of the property).

234. *Shelden*, 7 F.3d at 1025.

235. *Id.* at 1031.

236. *See* United States v. Regan, 699 F. Supp. 36, 37-38 (1988); L. Gordon Crovitz, *The RICO Monster Turns Against Its Master*, WALL ST. J., Jan. 15, 1992, at A15.

237. 867 P.2d 503 (Or. Ct. App. 1993).

238. *Id.* at 506.

239. *Id.*

cause the restaurants ceased to produce income, the owners went into default on their debts, and the assets were subsequently turned over to the creditors.[240]

After the defendant was acquitted of all criminal charges, he filed a counterclaim for just compensation in the civil forfeiture proceeding that the State had previously commenced against the property.[241] The Oregon Court of Appeals affirmed summary judgment for the State in the civil action on the grounds that the seizure was a valid exercise of the police power and that the owner-claimant, who had been the defendant in the criminal action, failed to prove innocent ownership under *Calero-Toledo*.[242]

4. Scenario D: Third Party Losses During Seizure

Lienholders and other third parties may lose interest and incur costs, including attorneys' fees, during seizure. Most courts hold such losses to be compensable.[243]

C. *Analysis Under* Nollan *and* Dolan

As discussed above, the Supreme Court in *Nollan* and *Dolan* articulated specific tests that the Government must meet to avoid payment of just compensation. Those cases arose in the context of conditions imposed upon property owners in exchange for building permits. Courts have applied the cases, however, in situations other than the permit condition context,[244] including situations involving seizures and forfeitures. Therefore, although *Nollan* and *Dolan* did not arise in the forfeiture context, it is possible that claimants could rely on those cases in this setting.

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240. *Id.*

241. *Id.* at 506-07.

242. *Id.* at 508. The exercise of police power ground, standing alone, should not defeat a just compensation claim. *See supra* notes 38-55, 193-98 and accompanying text.

243. *See, e.g., In re* Metmor Fin. Inc., 819 F.2d 446, 449-50 (4th Cir. 1987) (requiring payment of post-seizure interest to innocent property owners).

244. *See, e.g.*, Peterman v. State Dep't of Natural Resources, 521 N.W.2d 499, 511-12 (Mich. 1994) (applying the *Dolan* "rough proportionality" test in a takings claim arising out of the destruction of beachfront property caused by sand filtration); *see also* Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 473-76 (9th Cir. 1994) (citing the *Nollan* and *Dolan* tests in a takings challenge to rent control laws); McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 542 (1994) (using *Nollan* and *Lucas* to analyze a takings challenge to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 504(d), but finding that the *Penn Central* factors, as restated in Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 212 (1986), controlled).

Under the threshold question established by *Nollan*, the Government, in order to defend against a just compensation claim, must prove that the regulation substantially advanced a legitimate state interest.[245] Furthermore, under *Dolan*, a claimant could argue that the Government cannot meet its burden of proving "rough proportionality" between its legitimate interests and the amount frozen or restrained. These arguments will vary according to the scenario in which the claim arises.

Under Scenario A, where pretrial restraints or seizures are deemed excessive, the claimant could analogize to the facts in *Nollan* and argue that the restriction on use of the property was not sufficiently related to the legitimate governmental interest in preserving or obtaining forfeiture of the property. For example, as to pre-trial restraint, the posting of a bond in a reasonable amount would have sufficed.[246]

Likewise, under *Dolan*, excessive seizure or forfeiture would not be proportionate to the Government's interests. The facts of *Dolan* lend weight to this argument. In that case, the Government established goals the Court accepted as legitimate—reducing traffic flow and increasing storm drainage—and articulated findings that supported these goals.[247] The Court found an uncompensated taking, however, because the Government failed to establish the "rough proportionality" between the burden on property and the governmental interest.[248] The same analysis on its face may apply to excessive seizures or forfeitures of property.[249] Under this theory, an excessive seizure or forfeiture in its entirety effects

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245. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987).

246. *See* United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988) ("The government has conceded—as it must in light of the express provisions of Section 1963(d)(1)—that a bond in an amount equivalent to the value of the partnership interests at the time of the crimes would eliminate the need for the challenged order.").

247. Dolan v. City of Tigard, 114 S. Ct. 2309, 2317-18 (1994).

248. *Id.* at 2322.

249. A claimant could cite the revised Department of Justice prosecutorial guidelines, limiting pretrial restraints, in support of this argument. The purpose of the revision was "to reserve the use of TROs for cases in which no less intrusive device would serve the government's interest, to identify the impact a TRO could have on third parties, to establish a principle of proportionality between forfeiture and offense, and to head off public criticism of TROs." *Justice Department Limits Use Of RICO In White Collar Cases*, 58 U.S.L.W. 2273 (Nov. 7, 1989) (referring to the revised United States Attorneys' manual). The Government would likely argue that the forfeiture statutes do not require that it proceed by the least restrictive means and that in any event, the Department of Justice guidelines are merely internal policy statements and are not constitutionally compelled.

a compensable taking because the seizure or forfeiture by definition is not "roughly proportionate" to the governmental goals. Therefore, any loss attributable to the seizure or forfeiture should be compensable.

Alternatively, the claimant in such a situation could argue that compensation is due, not for losses resulting from the entire seizure or forfeiture, but only for the amount found to have been in excess of that needed to serve the Government's interest. Under this approach, the claimant would argue that freezing the excess amount, by definition, served no legitimate goal.

The second approach appears to provide a particularly strong case for just compensation. If excessive seizures or forfeitures were to go uncompensated, the Government could obtain an excessive freeze order or seek excessive forfeiture in order to coerce a defendant into pleading guilty or to drive a defendant out of business before trial. Such governmental overreaching falls within the category of actions that, as the Court held in *Nollan* and *Dolan*, require compensation.[250]

If the Government loses at trial or disposes of a case without obtaining forfeiture, as in Scenario B, the facts would seem analogous to the facts in *Shelden*, where the Government eventually turned title over to the mortgagee.[251] A legitimate governmental interest is served under *Nollan* because the Government is simply attempting, albeit unsuccessfully, to further the forfeiture statutes' stated goals. A claimant might argue that the result should be different under *Dolan*, where the Government was required to show "rough proportionality" between its interests and the burden on property rights. This is a burden that cannot be met where the purposes of the forfeiture statutes are not served.

In some cases, where property is frozen pending a successful appeal, as in Scenario C, substantial losses may occur. In *Regan*, for example, the restraining order on the partnership's assets was eventually invalidated, but only after the partnership was liquidated.[252] The Government announced that it would not retry the case.[253] A claimant whose property is forfeited pending an appeal that is ultimately successful could therefore argue under *Nollan* that the forfeiture served no legitimate governmental interest. The claimant could also argue under *Dolan* that the forfeiture was not proportionate to the governmental interest.

The Government's likely response would be that criminal seizures and forfeitures, like any criminal penalty, serve legitimate law enforcement interests even if the defense prevails on appeal. Also, the Government

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250. *See Dolan*, 114 S. Ct. at 2319; Nollan v. California Coastal Comm'n, 483 U.S. 825, 842 (1987).

251. Shelden v. United States, 7 F.3d 1022, 1029 (Fed. Cir. 1993).

252. Rohrer, *supra* note 183, at 1697-98.

253. *Id.* at 1689.

may assert that there is a significant distinction between truly innocent claimants, like the *Shelden* plaintiffs, and criminal defendants, such as those in *Regan*.[254] Presumably, this argument would not be available if the claimants were unindicted third parties.[255]

Under Scenario D, third parties completely uninvolved in any criminal wrongdoing have a simple argument under *Nollan* and *Dolan*: No governmental interests are served by taking their property without just compensation.[256] Many courts have found this argument persuasive.[257]

D. Analysis under the Lucas *Test*

Assuming either that a court were to find *Nollan* and *Dolan* inapplicable to the takings context or that the Government were able to pass the *Nollan* and *Dolan* tests, a claimant theoretically could still prevail under *Lucas* in certain circumstances. *Lucas* requires that the claimant prove (1) there was a physical invasion of the property or (2) the regulation denied all economically beneficial or productive use of the property.[258] The *Lucas* test would appear to apply equally to all the scenarios discussed above, subject to the particular governmental action in the case.

Again, *Regan* provides an interesting example. In that case, the Government obtained an excessive freeze order restricting business activities.[259] On these facts, a claimant could argue that the restrictions on business operations amounted to a physical invasion. Such an argument, however, may stretch the *Lucas* holding because the owners in *Regan* were still allowed substantial use of the property.[260]

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254. *See id.*

255. *See* United States v. Regan, 858 F.2d 115, 118-19 (2d Cir. 1988).

256. *See supra* notes 64-104 and accompanying text.

257. *See, e.g., In re* Metmor Fin., Inc., 819 F.2d 446, 448-49 (4th Cir. 1987).

258. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

259. United States v. Regan, 699 F. Supp. 36, 37 (S.D.N.Y. 1988)

260. *Id.*; *see* Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (holding that the rent control ordinance at issue did not amount to a physical taking because it did not compel the property owner to submit to a physical occupation of the property); FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987) (holding that economic regulations imposed on landlords are not takings). Note, however, that only a minimal physical invasion of the property is required in order for the plaintiff to recover. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that a state law requiring landlords to allow the installation of a one and one-half cubic foot cable television box constituted a taking); *see also* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179-83 (Fed. Cir. 1994) (holding that total destruction of economic value of property is not required for recovery under *Lucas*).

A claimant in circumstances such as *Regan* could also argue that the freeze order divested the investors of all economically beneficial use of the property. What *Lucas* would appear to cover, however, would be a situation where the Government obtained an order that investment funds could not be used for the intended purpose at all, rather than an order placing certain restrictions on the use of those funds.[261] The *Lucas* dissent noted that the owner of the coastal property was not denied *all* use of his land by the regulations; he simply could not build upon it.[262]

Therefore, *Lucas* hardly establishes a bright-line rule; the per se rule will apply even if the owner retains incidental benefits from the property. Nonetheless, pretrial restraints short of actual physical occupation appear not to implicate the *Lucas* holding. In the other scenarios set forth above and subject to the innocent/guilty owner restrictions discussed below,[263] governmental occupation of the premises would appear to require compensation under *Lucas*.[264]

E. The Penn Central *Test*

If a court found that a claimant could not succeed under *Lucas*, *Nollan*, or *Dolan*, it would appear that the *Penn Central* factors would come into play by default.[265] Again, those factors are: (1) the severity of the economic impact of the regulation on the claimant; (2) the "character of the governmental action"; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations."[266] In the forfeiture context, the first factor generally weighs in favor of the claimant and the third in favor of government. Therefore, a just compensation claim based upon a seizure or forfeiture will probably most often turn on application of the second factor.

1. Economic Impact

Under the first factor, the claimant would have to establish that the

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261. *See Lucas*, 112 S. Ct. at 2893-95.

262. *Id.* at 2919 (Stevens, J., dissenting).

263. *See infra* notes 278-85 and accompanying text.

264. *Lucas*, 112 S. Ct. at 2893.

265. *See* McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 542 (1994) (analyzing the takings claim under *Nollan* and *Lucas*, but finding that the *Penn Central* factors, as restated in Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 212 (1986), controlled).

266. *Connelly*, 475 U.S. at 225 (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)); *see also* Golden Pacific Bankcorp v. United States, 15 F.3d 1066, 1072 (Fed. Cir.), *cert. denied*, 115 S. Ct. 420 (1994); Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 974 (1st Cir. 1993). For a discussion of the *Penn Central* factors, see KUSHNER, *supra* note 28, at § 3.05[1] & [2].

governmental action resulted in an economic loss. Under Scenario A, assuming the claimant could prove causation, an excessive restraint or forfeiture could produce clear economic loss in some circumstances, as in the *Regan* case.[267] Under Scenarios B and C, where the Government fails to obtain criminal forfeiture or there is a reversal on appeal, an owner could endure losses, as in *Shelden*.[268] Under Scenario D, a truly innocent third party could likewise entail economic losses as discussed below.

2. Character of Governmental Action

The third factor seems to mirror the *Nollan* threshold test, which requires that the regulation have served a legitimate governmental interest. If the Government succeeds under *Nollan* by arguing law enforcement interests, and a court applies the *Penn Central* test, then the character of the governmental regulation simply becomes part of the balancing test.[269]

Again, the Government would likely argue that the civil and criminal forfeiture statutes give it broad discretion to seize or restrain property pretrial in order to deter crimes and deprive criminals of the fruits of their labors. Accordingly, pretrial restraints serve an important function, and a later acquittal, reversal, or invalidation of a forfeiture should not give rise to a takings claim. If it did, the Government would be deterred

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267. Courts have held that unless the Government action causes the loss there is no requirement of compensation. *See* Smith v. United States, 28 Fed. Cl. 430, 439 (1993) (holding that the landowner failed to establish that the Government's construction or operation of a dam was the direct and proximate cause of the erosion to his riverfront property), *aff'd*, 19 F.3d 39 (Fed. Cir. 1994); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1580 (Fed. Cir. 1993) (explaining that to recover under the Takings Clause, a claimant with a recognized property interest must show that his interest was "taken").

268. Shelden v. United States, 7 F.3d 1022, 1025 (Fed. Cir. 1993).

269. *See McMahan*, 858 F. Supp. at 529. In *McMahan*, the defendant was indicted and convicted of crimes related to his business relationship with a trade union. *Id.* at 533. Pursuant to 29 U.S.C. § 504(d), McMahan's union salary was placed in escrow during the litigation. *McMahan*, 858 F. Supp. at 533. His conviction was later overturned, and he sought his back salary. *Id.* at 533-34. The union argued that a return of the salary pursuant to the statute would violate the Takings Clause. *Id.* at 539. The court applied the *Penn Central* test, as restated in *Connolly*. *Id.* at 540. The court noted that the defendant was clearly engaged in the alleged scheme and that the conviction was reversed because the government charged the defendant under the wrong theory. *Id.* at 541. Therefore, the "character of the governmental action" weighed strongly in support of the statute on the facts of the case. *Id.*

from ever seeking forfeiture, and the forfeiture statutes' effectiveness would be undermined.

The thrust of recent Supreme Court takings cases, however, is that the Constitution requires just compensation. Claimants would thus argue that allowing a civil cause of action against the Government will not undermine its law enforcement efforts any more than allowing takings claims in the land use context undermines the Government's ability to regulate land use. Indeed, courts have indicated that takings claims would be allowed in the context of criminal forfeitures under the RICO statute.[270]

3. Interference with Investment-Backed Expectations

In a case where the Government interferes with use of a business or other property, the claimants could argue that the seizure deprived them of their investment. This argument would appear to apply under any of the above scenarios, regardless of whether the Government's action involves a temporary or permanent assumption of control over the property.

In a *Regan* situation, for example, where the Government restricts the operations of an ongoing business, the business owners could claim that the Government destroyed a substantial, ongoing, and highly profitable business. In *Shelden*, the Government's control over a home resulted in the property's deterioration.[271] Just as the property owners in *Nollan* and *Lucas* expected to be able to make economic use of their property, the property owners in *Regan* and *Shelden* also expected to be able both to maintain the value of their investments and to gain a profit on those investments.

If the Government's action forever lessens or destroys the property's value, then the government may have effected a permanent taking, entitling the owner to just compensation.[272] Under Scenario A, where there

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270. United States v. 1980 Lear Jet, 38 F.3d 398, 401 n.4 (9th Cir. 1994) ("[A]t least for purposes of constitutional taking analysis, a forfeiture under RICO was tantamount to a forfeiture under [the Comprehensive Drug Abuse Prevention and Control Act].").

271. *Shelden*, 7 F.3d at 1025.

272. *Cf.* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 975 (1st Cir. 1993).

> We find no logical analogy between the physical invasion of real property, as in *Kaiser* and *Loretto*, and the operation of the IOLTA Rule. The plaintiffs' takings claim involves intangible property rights not real property. To bolster their claim of physical invasion, the plaintiffs contend that their property rights are nearly identical to the claimants' property rights in *Webb*'s . . . in which the Court stated "The [government's] appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property."

is only an excess seizure or forfeiture, a claimant in a case like *Regan* may prevail under the theory that this was a temporary taking entitled to just compensation.[273] As noted above, the Supreme Court has held that temporary restrictions on the use of real property may give rise to takings claims.[274] As one prosecutor in the *Regan* case later wrote,

> It is well established that temporary deprivations of property, such as those resulting from the entry of a restraining order, are deprivations of 'property'[275] . . . . There can be no question that a pre-judgment restraining order even of the partial type used in Princeton-Newport, is a deprivation of property in a constitutional sense.[276]

In most circumstances, a seizure or forfeiture that is later found to be excessive or is later overturned will have interfered with clear "investment-backed expectations." Of course, if owners are aware of the property's misuse, then their expectations may not be found to be reasonable.[277] Depending upon how the innocent owner factor plays out, any of the factual scenarios set forth above could give rise to a successful just compensation claim under *Penn Central.*

F. The "Innocent Owner" Question

In *Calero-Toledo,* the Supreme Court implied that an owner who was neither involved in nor aware of the property's misuse, and who had taken reasonable precautions to prevent the misuse, would likely have a just compensation claim in the forfeiture context.[278] Some civil forfeiture statutes do provide for an innocent owner defense where the claimant can show lack of knowledge of or consent to the illegal

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Id. (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-64 (1980)).

273. For the proposition that claimants can recover attorneys' fees, see United States v. 41741 National Trails Way, 989 F.2d 1089, 1092 (9th Cir. 1993) (holding that lienholders could recover attorneys' fees if innocent or possessing a preexisting deed of trust); United States v. 2471 Venus Drive, 949 F.2d 374, 375 (10th Cir. 1991) (same).

274. *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322 (1987).

275. Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport,* 65 NOTRE DAME L. REV. 1009, 1011 (1990).

276. *Id.* at 1030; *see also* Rohrer, *supra* note 183, at 1686.

277. *See* California Hous. Sec., Inc. v. United States, 959 F.2d 955, 958 (Fed Cir.), *cert. denied,* 113 S.Ct. 324 (1992) (holding that the government's appropriation of property was not a Fifth Amendment taking).

278. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974).

activity,[279] while other forfeiture statutes provide no such defense.[280] Criminal forfeiture statutes, of course, provide no innocent owner defense because criminal forfeiture is predicated upon the owner's conviction.[281]

Under any of the takings tests outlined above, a property owner's claim to innocent owner status may have a decisive impact on a takings claim. Further, an innocent owner can be defined at least four ways:

(1) In a civil forfeiture case, an owner who meets the *Calero-Toledo* test of lack of knowledge, coupled with reasonable precautions.

(2) In a civil forfeiture case, an owner who meets the statutory definition of innocent owner but not the *Calero-Toledo* test.

(3) In a criminal case, a defendant-owner who has been acquitted or whose conviction has been reversed and who meets the *Calero-Toledo* test.

(4) In a criminal case, a defendant-owner who has been acquitted or whose conviction has been reversed, but who cannot meet the *Calero-Toledo* test.

It seems that in any case where the owner meets the *Calero-Toledo* test under definitions (1) and (3) above, and the seizure or forfeiture has effected economic harm on the owner, a takings claim would lie. The governmental interests in seizure and forfeiture—which are key under all the tests discussed above—appear to be minimal here. Specifically, the primary goal of the forfeiture statutes—to deter illegal use of property—cannot apply where the owner has taken all reasonable precautions.

In addition, there is a strong argument that anyone who meets a statutorily-defined innocent owner test in a civil forfeiture case, as in definition (2), should not be precluded from asserting innocent owner status

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279. *E.g.*, 21 U.S.C. § 881(a)(6) and (7) (1988 & Supp. V 1993) (providing innocent owner defense in drug related forfeiture). *See generally* PARKER & STRADER, *supra* note 105, at § 6A.02[4]. Some courts use the reasonable precautions test from *Calero-Toledo* to modify the "consent" prong of the innocent owner defense. *See id.* at § 6A.02[4][d]. Other courts, however, place a less onerous burden on claimants. Under the former approach, an owner must show not merely lack of consent, but also affirmative precautionary actions. *See id.*

280. *See, e.g.*, United States v. One 1957 Rockwell Aero Commander 680 Aircraft, 671 F.2d 414, 416 (10th Cir. 1982) (applying 49 U.S.C. §§ 1474, 1509 (1988)); United States v. $72,420 U.S. Currency, 1994 U.S. Dist. LEXIS 16860, at *9-11 (N.D. Ill. 1994) (applying 31 U.S.C. § 5317 (1988 & Supp. V 1993) which sets the standard for the export of monetary instruments).

281. Although the criminal forfeiture statutes do not provide for intervention by third-party claimants, courts have allowed such intervention. *See* United States v. Regan, 858 F.2d 115, 121 (2d Cir. 1988). *See generally* PARKER & STRADER, *supra* note 105, at § 6A.03[4].

and from prevailing on a just compensation claim. As noted above, *Calero-Toledo*'s underlying assumption that civil forfeiture is not punishment was rejected in *Austin*.[282] Likewise, *Calero-Toledo*'s extremely exacting innocent owner test is unfair to owners operating without knowledge of or consent to the wrongdoing. Affirmative precautions should not be required, especially given that Congress has not mandated such a stringent test.

Analysis under the fourth definition of innocent owner involving a criminal defendant who ultimately is not convicted is by far the most perplexing. In such a case, which could arise under scenarios B and C above, the ultimate forfeiture depended upon proof of crime beyond a reasonable doubt, as contrasted with the probable cause/preponderance of the evidence standard in civil forfeitures. If the Government has failed to prove the crime, then criminal forfeiture is not possible. In the absence of a subsequent civil forfeiture proceeding,[283] property loss due to a seizure or a failed forfeiture should require just compensation irrespective of whether the claimant can meet the *Calero-Toledo* test. Here, the Government's justification for forfeiture as part of the criminal punishment does not exist. If the Government cannot provide a justification for the property loss, then a takings claim is appropriate under *Nollan/Dolan*, under *Penn Central*, and even under *Lucas* if the two-prong *Lucas* test is met.

If the Government seeks to obtain forfeiture in a subsequent civil proceeding, then the nature of the defendant's action may be relevant to the "character of government action" prong of the *Penn Central* test. For example, if the defendant clearly engaged in wrongdoing, but escaped criminal liability for procedural reasons, then the Government arguably has a strong argument under *Penn Central*.[284] Conversely, conviction does not necessarily mean the defendant has no takings claim as, for example, where the property is unrelated to the crime.[285]

In a given case, then, the viability of a takings claim will depend upon a number of facts specific to that case. As outlined above, courts have

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282. *See* Austin v. United States, 113 S. Ct. 2801, 2809-12 (1993).

283. Such a scenario is possible under the statutes, but may violate the Double Jeopardy Clause. *See supra* note 182 and accompanying text.

284. *See* McMahan v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539-40 (D.S.C. 1994) (stating that defendant's wrongdoing—despite a reversal of his conviction based upon technical grounds—weighed in favor of the Government under the *Penn Central* test).

285. *See* Froudi v. United States, 22 Cl. Ct. 290, 297 & n.12 (1991) (dictum).

begun to recognize that just compensation may be required in the context of seizures and forfeitures.

IV. CONCLUSION

Seizures and forfeitures have clearly become one of the Government's principal crime-fighting weapons over the last decade. Designed to deprive criminals of the fruits of their crimes, while incidentally providing the Government with substantial revenues, these proceedings are now widely used across the country.

The success of the forfeiture weapon has, however, provoked new restrictions on the use of that weapon. When the current United States Supreme Court places itself on the side of individual rights in the law enforcement context, it is surely sending a signal that this newest anti-crime tool goes too far. The next logical step in the Court's scrutiny of forfeitures is to focus on remedies available to property owners.

Recent developments in both the law of takings and the law of forfeitures illustrate the Court's increased focus on individual property rights. Eighth Amendment excessive fines analysis, however, is not sufficient to protect property owners where the seizure or forfeiture does not result in a final forfeiture order and the property is returned to the owner. At this point in the history of takings law, then, it seems inevitable that the Court will place its imprimatur on the use of the Takings Clause as yet another constitutional restriction on the Government's forfeiture powers. Whether the Court has anticipated this use of its new takings cases is uncertain and points to the potentially revolutionary nature of those cases.