

THE YALE LAW JOURNAL

CALEB NELSON

The Constitutionality of Civil Forfeiture

ABSTRACT. Many state and federal statutes provide that when property is used in certain prohibited ways, ownership of the property passes to the government. Often, the statutes allow these forfeitures to be declared in civil proceedings against the property itself, without the normal safeguards of the criminal process. Indeed, if no one claims the property after proper notice, the government's assertion of ownership can become incontestable without any judicial proceedings at all. Statutes authorizing such civil or administrative forfeiture might seem like egregious violations of both property rights and criminal-procedure rights guaranteed by the federal Constitution. But while forfeiture statutes may be unfair and unwise, this Feature cautions originalists not to assume that they are unconstitutional. The Feature concludes that the original meaning of the Constitution (as liquidated by historical practice) does not foreclose the three key features of forfeiture statutes considered here: the fact that noncriminal forfeiture typically proceeds in rem rather than in personam, the fact that people often must file timely claims in order to trigger judicial proceedings, and the fact that claimants are not afforded the procedural protections that the Constitution requires for criminal defendants.

AUTHOR. Emerson G. Spies Distinguished Professor of Law and Elizabeth D. and Richard A. Merrill Professor, University of Virginia School of Law. For helpful comments at various stages, I thank Barry Cushman, Rachel Harmon, John Harrison, and Ann Woolhandler. They are not to blame for my errors.



FEATURE CONTENTS

INTRODUCTION	2448
I. IN REM VERSUS IN PERSONAM	2456
A. A Brief History of In Rem Forfeiture	2457
B. Might History Support In Rem Forfeiture Proceedings Only Where In Personam Proceedings Would Have Been Difficult?	2468
C. In Rem Forfeiture of the Proceeds of Illegal Transactions	2475
D. The Modern Convergence of In Rem and In Personam Procedures	2482
II. CIVIL VERSUS CRIMINAL	2487
A. The Path to Current Doctrine	2488
B. The Perils of Equating “Punitive” with “Criminal”	2492
C. Historical Support for the Category of Civil Punishment	2496
III. ADMINISTRATIVE VERSUS JUDICIAL	2507
CONCLUSION	2516

INTRODUCTION

Everyone knows that the law denies people property rights in illegal drugs and other contraband.¹ But nonlawyers sometimes are startled to learn that the law also strips people of property rights in everyday items that simply have been used in a prohibited way. For instance, when someone transports illegal drugs in a car, the federal Controlled Substances Act provides that ownership of the car thereby passes to the federal government.² Many other categories of property, including houses and land as well as personal property, are similarly “subject to forfeiture to the United States” if they are used in connection with drug trafficking or if they are the proceeds of such trafficking.³ In the words of the Controlled Substances Act, “no property right shall exist in [these things]”⁴ and “[a]ll right, title, and interest in [them] . . . shall vest in the United States upon commission of the act giving rise to forfeiture.”⁵

To enforce these forfeitures, the government can use a special set of procedures that may startle even lawyers. When the government alleges that personal property has been forfeited under the Controlled Substances Act, the government often can perfect its title without going to court (aside, perhaps, from the *ex parte* process of getting a warrant to seize the property in the first place).⁶ The government does have to provide public notice of the seizure and its intention to declare the property’s forfeiture, and the government must also send written notice “to each party who appears to have an interest in the seized article.”⁷ Any interested person who wants to contest the government’s position can trigger judicial proceedings by filing a claim to the property.⁸ But that is not always advisable; the relevant judicial proceedings might take the form of a criminal prosecution against the claimant,⁹ and in any event they

1. See, e.g., 21 U.S.C. § 881(a)(1) (2012); see also DEE R. EDGEWORTH, *ASSET FORFEITURE: PRACTICE AND PROCEDURE IN STATE AND FEDERAL COURTS* 11 (3d ed. 2014) (discussing “contraband *per se*”).

2. See 21 U.S.C. § 881(a)(4), (h).

3. *Id.* § 881(a).

4. *Id.*

5. *Id.* § 881(h).

6. See 18 U.S.C. § 981(b)(2) (2012) (establishing a warrant requirement but recognizing some exceptions).

7. 19 U.S.C. § 1607(a) (2012) (addressing seizures for violation of the customs laws); see also 21 U.S.C. § 881(d) (making the customs provisions applicable to seizures for violation of federal drug laws).

8. See 19 U.S.C. § 1608 (2012); 18 U.S.C. § 983(a)(2)–(3) (2012).

9. See 18 U.S.C. § 983(a)(3)(C); see also 21 U.S.C. § 853(a) (2012) (listing categories of property that people convicted of felony drug offenses “shall forfeit to the United States”); *cf.* 28

might cost the claimant more than the property is worth.¹⁰ Whether for those reasons or because the government is usually correct, most forfeitures under the federal drug laws are uncontested.¹¹ And if no one files a claim within a fairly short deadline, the process need go no further: an administrative official can issue a binding declaration of forfeiture, clearing the way for the government to sell the property at auction or retain it for the government's own use.¹²

Under current federal law, this method of “administrative forfeiture” is available only for personal property (including cash),¹³ and only when no one files a claim. But even when the government needs to get the courts involved, the government does not have to proceed in personam against the former owner. Instead, the government often can seek judicial confirmation of its ownership through proceedings in rem against the property itself.¹⁴ While claimants have a right to participate in these “civil-forfeiture” proceedings,¹⁵ they usually have no right to appointed counsel,¹⁶ and they also lack some of the other procedural advantages that would attend a criminal prosecution. For instance, instead of having to prove each element of a criminal offense beyond

U.S.C. § 2461(c) (2012) (allowing the government to seek forfeiture through the criminal process, rather than launching a separate civil-forfeiture proceeding, whenever a defendant “is charged in a criminal case with a violation of an Act of Congress for which the civil . . . forfeiture of property is authorized”).

10. See Michael van den Berg, Comment, *Proposing a Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 870 (2015).
11. STEFAN D. CASSELLA, ASSET FORFEITURE LAW IN THE UNITED STATES § 1-4(a), at 10 & n.22 (2d ed. 2013). Explanations of this fact vary. Compare *id.* § 4-2, at 153 (arguing that “in the overwhelming number of cases,” no claim is filed because “the property was, in fact, derived from or used to commit a criminal offense, and there is no meritorious defense to its forfeiture”), with David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 NEV. L.J. 1, 31 (2012) (arguing that “the high rate of uncontested forfeitures may be evidence of a serious problem in protecting the rights of property owners”).
12. See 19 U.S.C. § 1609 (2012); 21 U.S.C. § 881(e)(1); see also EDGEWORTH, *supra* note 1, at 67-69, 239-40 (describing the relevant procedures).
13. See 19 U.S.C. § 1607(a) (2012) (listing categories of property that are subject to administrative forfeiture); see also 18 U.S.C. § 985(a) (2012) (requiring judicial proceedings for the forfeiture of real property).
14. See 19 U.S.C. §§ 1608, 1610 (2012).
15. See FED. R. CIV. P. G(4)(b)(i), G(5)(a)(i) (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) (requiring the government to “send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government,” and adding that any interested person “may contest the forfeiture by filing a claim in the court where the action is pending”).
16. See 18 U.S.C. § 983(b) (2012) (identifying a few situations in which the government will pay for the claimant to have legal representation).

a reasonable doubt, the government need only prove that the property is subject to forfeiture by a preponderance of the evidence.¹⁷

Over the past few decades, these practices have gone through a cycle of expansion and reform. Starting in the 1970s and accelerating in the 1980s, Congress and state legislatures made civil and administrative forfeiture an increasingly prominent tool of law enforcement, first in the war on drugs and then in other areas.¹⁸ In the 1990s, critics across the political spectrum¹⁹ raised concerns about the plight of innocent owners who were not themselves responsible for the misuse of their property,²⁰ the dangers of letting police departments and other enforcement agencies fund themselves through forfeiture,²¹ and the need for more procedural safeguards to guard against erroneous or abusive confiscations of property.²² Congress responded to some of these criticisms by enacting the Civil Asset Forfeiture Reform Act of 2000,²³ which made targeted changes to federal forfeiture laws.²⁴ More recently, the

-
17. See *id.* § 983(c). This provision is actually a liberalization of prior law; some federal forfeiture statutes continue to put the burden of proof on the claimant rather than the government. See, e.g., 19 U.S.C. § 1615 (2012); see also *infra* notes 186–189 and accompanying text.
 18. See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 1.01 (2015) (providing an overview of the history); see also EDGEWORTH, *supra* note 1, at 24 (“In 1998, the U.S. Department of Justice estimated that there were more than 140 federal civil forfeiture statutes.”); NAT’L CRIMINAL JUSTICE ASS’N, ASSETS SEIZURE & FORFEITURE: DEVELOPING & MAINTAINING A STATE CAPABILITY app. A (rev. ed. 1994) (citing state forfeiture statutes).
 19. See Pimentel, *supra* note 11, at 13.
 20. See, e.g., LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 161–66 (1996).
 21. See generally Eric Blumenson & Eva Nilssen, *Policing for Profit: The Drug War’s Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56–100 (1998) (discussing the incentives created by forfeiture laws and the risk that self-funding agencies will be less accountable to legislatures).
 22. See JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 12 (1994) (“Asset forfeiture laws are turning some federal agents into the modern-day equivalent of horse thieves. . . . Confiscation based on mere suspicion is the essence of contemporary asset forfeiture.”); LEVY, *supra* note 20, at 1 (“Law enforcement agencies—federal, state, and local—perpetrate astonishing outrages on owners of private property through forfeitures.”).
 23. Pub. L. No. 106-185, 114 Stat. 202.
 24. See, e.g., *id.* at 205 (enacting 18 U.S.C. § 983(c), which applies in judicial proceedings under most federal civil-forfeiture statutes and which requires the government “to establish, by a preponderance of the evidence, that the property is subject to forfeiture” rather than requiring claimants to prove that the property is *not* subject to forfeiture); *id.* at 206 (enacting 18 U.S.C. § 983(d), which creates an “innocent owner defense” for claimants who show that they “did not know of the conduct giving rise to forfeiture” or “did all that reasonably could be expected under the circumstances to terminate such use of the

Department of Justice has been reviewing its asset-forfeiture program, and the Department has announced new restrictions on how it will use a few of the powers that federal law gives it.²⁵ Some state legislatures have gone much farther; nine states require most forfeitures to be predicated on criminal convictions,²⁶ and one of those states no longer authorizes civil forfeiture at all.²⁷ Still, at the federal level and in most states, a great deal of forfeiture continues to occur outside the criminal process.²⁸

property”); *id.* at 213 (amending 18 U.S.C. § 981(b) to recognize more situations in which federal agents must obtain warrants before seizing property); *id.* at 214-15 (enacting 18 U.S.C. § 985, which imposes special procedural restrictions on the forfeiture of real property); *cf. id.* at 221 (under the heading “Encouraging Use of Criminal Forfeiture as an Alternative to Civil Forfeiture,” amending 28 U.S.C. § 2461 to give prosecutors the option of seeking forfeiture through the criminal process when someone is being prosecuted criminally for violating a federal statute that also authorizes civil forfeiture). For an overview of these reforms, see Pimentel, *supra* note 11, at 15-21.

25. See Memorandum from Eric Holder, Attorney Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Attorneys 1-3 (Mar. 31, 2015), <http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/31/ag-memo-structuring-policy-directive.pdf> [<http://perma.cc/62RX-Z9D8>] (announcing new restrictions on when the Department will seek forfeiture in connection with enforcing federal laws against structuring currency transactions so as to avoid reporting requirements); Office of the Attorney Gen., *Prohibition on Certain Federal Adoptions of Seizures by State and Local Law Enforcement Agencies*, U.S. DEP’T JUST. 1 (Jan. 16, 2015), <http://www.justice.gov/file/318146/download> [<http://perma.cc/94QP-V6PK>] (curtailing one aspect of the federal Equitable Sharing Program by ordering all components of the Department to refrain from “adopt[ing]” most seizures made by state or local law enforcement under state law); *cf.* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 935-36 (2015) (noting the limits of this change to the Equitable Sharing Program).
26. See DICK M. CARPENTER II ET AL., *POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE* 17 (2d ed. 2015) (identifying these states as California, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, Oregon, and Vermont). The details of the laws in these states vary. *Compare id.* at 17 (noting that in California, civil forfeiture can be based on the conviction of someone other than the property’s owner), *with* MONT. CODE ANN. § 44-12-207 (2015) (normally requiring the conviction of the owner).
27. See Act of Apr. 10, 2015, ch. 152, § 4, 2015 N.M. Laws 1684, 1688 (amending N.M. STAT. ANN. § 31-27-4); *see also id.* § 2, 2015 N.M. Laws at 1685 (expressing the purpose of “ensur[ing] that only criminal forfeiture is allowed in this state”); *see also* CARPENTER ET AL., *supra* note 26, at 112 (noting that North Carolina law authorizes civil forfeiture only in racketeering cases).
28. See, e.g., EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR 2014, at 64 (2015), <http://www.justice.gov/sites/default/files/usao/pages/attachments/2015/03/23/14statrpt.pdf> [<http://perma.cc/LTA4-FBAA>] (reporting that in fiscal year 2014, the Department of Justice alone took in almost \$4 billion through civil forfeiture—a figure that does not include administrative forfeiture); *see also* CARPENTER ET AL., *supra* note 26, at 46-147 (canvassing and criticizing state forfeiture laws). *But cf.* EXEC. OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ ANNUAL STATISTICAL REPORT: FISCAL YEAR

Groups ranging from the American Civil Liberties Union²⁹ and the National Association of Criminal Defense Lawyers³⁰ to the Heritage Foundation³¹ and the Institute for Justice³² are pushing for further legislative reform. Ever since the 1990s, however, some lawyers and scholars have been asking a more basic question: are civil and administrative forfeiture even constitutional?³³

This Feature examines evidence bearing on how originalists, in particular, might analyze that question. More precisely, this Feature evaluates the constitutionality of civil and administrative forfeiture from the perspective of the version of originalism that I accept, in which historical research can serve at least two different functions.³⁴ To the extent that particular constitutional provisions have a determinate “original meaning,” historical research may help modern readers identify that meaning.³⁵ But to the extent that the original meaning of the Constitution is indeterminate, historical research can also help establish how those indeterminacies were resolved or “liquidated” over time. As I have discussed elsewhere,³⁶ the concept of “liquidation” was prominent during the Founding era, when the verb “to liquidate” could mean “to render

2015, at 64 (2016), <http://www.justice.gov/usao/file/831856/download> [<http://perma.cc/J6TS-5TST>] (reporting that in fiscal year 2015, the Department of Justice took in less than \$500 million through civil forfeiture, and showing a sharp increase in criminal-forfeiture amounts).

29. See *Asset Forfeiture Abuse*, ACLU, <http://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse> [<http://perma.cc/R5LW-HMFR>].
30. See *Forfeiture Reform*, NAT'L ASS'N CRIM. DEF. L., <http://www.nacdl.org/forfeiture> [<http://perma.cc/ZWB2-F7VK>].
31. See *Arresting Your Property? How Civil Asset Forfeiture Turns Police into Profiteers*, HERITAGE FOUND., <http://www.heritage.org/ForfeitureReform> [<http://perma.cc/UH29-YS9F>].
32. See *Initiative To End Policing for Profit, End Civil Forfeiture*, INST. JUST., <http://endforfeiture.com> [<http://perma.cc/9SN3-UNJ5>].
33. See, e.g., Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 U. ILL. L. REV. 691, 730-33 (arguing that much forfeiture constitutes punishment of a sort that should trigger the criminal-procedure guarantees of the federal Constitution); Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910, 1923-26 (1998) (reaching a similar conclusion).
34. For a much more refined taxonomy of the ways in which both pre- and post-Founding history can matter to originalists and nonoriginalists alike, see Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 NOTRE DAME L. REV. 1753, 1759-97 (2015).
35. Of course, the concept of “meaning” has its own complexities. For a thoughtful discussion of those complexities, see Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015).
36. See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-29 (2003).

unambiguous.”³⁷ Just as a “liquidated damages” clause in a contract might pick a single number from a range of possibilities,³⁸ so too leading members of the Founding generation anticipated that post-Founding practices or precedents would settle on one of the permissible interpretations of provisions that lent themselves to multiple readings.³⁹ In the absence of “extraordinary and peculiar circumstances,”⁴⁰ moreover, those liquidations were expected to be permanent; they would fix the Constitution’s meaning on points that could otherwise have been disputed.⁴¹

For anyone who accepts the concept of liquidation,⁴² it seems likely to play a prominent role in debates about civil forfeiture. The constitutional provisions

37. 8 OXFORD ENGLISH DICTIONARY 1012 (2d ed. 1989).

38. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 13 (2001) (using this analogy).

39. See, e.g., THE FEDERALIST No. 82, at 491 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (acknowledging that the Constitution would inevitably generate “questions of intricacy and nicety” and asserting that only time “can liquidate the meaning of all the parts”); Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Philadelphia, J.B. Lippincott & Co. 1865) (“It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter; . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.”).

40. Letter from James Madison to Charles J. Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 39, at 183, 185.

41. See Nelson, *supra* note 36, at 527-39.

42. Cf. *id.* at 549-53 (acknowledging the potential for modern-day originalists to have a diversity of views about liquidation). The concept of liquidation operates in some of the same terrain as what Keith Whittington calls “construction” of the Constitution. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 5-14 (1999) (distinguishing “interpretation,” which “represents a search for meaning already in the text,” from “construction,” which can include selecting “a single governing meaning” from the possibilities identified through interpretation); see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96, 108 (2010) (defining “interpretation” and “construction” somewhat differently than Whittington, but referring to “the construction zone” of the Constitution as “the zone of underdeterminacy in which construction (that goes beyond direct translation of semantic content into legal content) is required for application”); cf. Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 645-55, 658-66 (2013) (noting that the various versions of “new originalism” all recognize a distinction between “interpretation as ascertainment of meaning” and “construction,” and proceeding to discuss the different roles that history plays in these two activities). But while liquidation and construction are both premised on underdeterminacy, Whittington’s account of construction differs from Founding-era accounts of liquidation. For Whittington, “[c]onstructions are, by their nature, temporary”; they “are meant to settle indeterminacies to the satisfaction of immediate political interests,” and future actors remain free to revisit them. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST.

that may be most directly relevant—the prohibitions on depriving people of property “without due process of law”⁴³—are widely thought to be at least somewhat indeterminate.⁴⁴ As modern courts and commentators well know, moreover, civil forfeiture has an impressive historical pedigree: the practice dates back to colonial America, continued unabated after the Founding, and has not been rejected even today.⁴⁵

Of course, the facts that myriad early statutes included forfeiture provisions and that courts willingly enforced those provisions through civil proceedings in rem do not automatically prove that civil forfeiture comports with the original meaning of the Constitution. Precisely because civil forfeiture predated the Founding, early legislators and judges may simply have followed familiar practices without appreciating the legal import of the Due Process Clause or other relevant aspects of the Constitution. But to the extent that practice can liquidate the meaning of the Constitution on uncertain points, history tends to validate the constitutionality of civil forfeiture *unless* the history is more limited than it seems or the meaning of the Constitution is not uncertain.

Part I of this Feature considers possible limits on the history. Several modern authors have argued that most early statutes authorizing in rem forfeiture proceedings did so in contexts where the statutes’ requirements could not reliably be enforced in personam, and these authors suggest that history does not validate the use of in rem forfeiture in other contexts.⁴⁶ There is something to that argument—but, in my view, not enough. Both at the federal level and in the states, various early statutes authorized forfeitures to be enforced in rem even in the absence of any obvious barrier to proceedings in personam. As far as I know, moreover, no early judges or lawyers interpreted the Due Process Clause or related constitutional provisions to draw the distinction that modern authors have suggested.

COMMENT. 119, 121–22 (2010); *see also* WHITTINGTON, *supra*, at 11 (suggesting that courts should hold the actions of the political branches unconstitutional only on the basis of “interpretation” of the Constitution and “should . . . avoid enforcing even venerable constructions”); *cf.* Balkin, *supra*, at 646, 651 (agreeing that constructions are impermanent, but observing that “[a]ll three branches of government engage in constitutional construction”).

43. U.S. CONST. amends. V, XIV.

44. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 556 (1994) (“[T]here is a range of genuine textual ambiguity about the original meaning of such phrases as ‘due process of law’ . . .”).

45. *See infra* Section I.A.

46. *See, e.g.*, Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 618–21 (1996); Herpel, *supra* note 33, at 1918.

Part I goes on to consider a separate possible limitation. Historically, statutes authorizing *in rem* forfeiture reached only items that were themselves involved in illegal conduct, not items that simply were purchased with the proceeds of such conduct. The use of *in rem* process against the latter items is a modern development. Given other well-accepted legal principles, though, Part I concludes that this historical distinction does not make a constitutional difference.

Part II considers a more fundamental objection to civil forfeiture: under most of the relevant statutes, the forfeiture of property can be regarded as a punishment for illegal behavior, and perhaps the Constitution should be understood to prevent the imposition of punishment through civil process. As Part II notes, the idea that punishment requires criminal process can be traced back to nineteenth-century debates over punitive damages. But those debates were resolved in favor of the constitutionality of using civil process to impose some forms of punishment. Dating back to the beginning of the Republic, moreover, state and federal statutes routinely backed up their requirements with the threat of monetary penalties for violations, and such penalties routinely were collected through civil actions. The forfeiture of specific items of property does not seem any different—and, historically, it too has been enforced through civil process.

To be sure, *some* forms of punishment can be imposed only through criminal process. Cases in which the government asks a court to punish someone with death or imprisonment surely trigger the special procedural protections that the Constitution requires for criminal prosecutions. But centuries of practice support the idea that civil process can be used to declare the loss of property, even when that loss is punitive.

Part III considers one further argument: even if statutes can validly authorize *civil* forfeiture, perhaps Congress cannot validly authorize *administrative* forfeiture. Read broadly, a recent dissent by Chief Justice Roberts might seem to suggest that executive officials can never declare, authoritatively, that property has been forfeited to the United States; perhaps a binding declaration of forfeiture requires “judicial” power even if no one claims the property after proper notice.⁴⁷ Again, though, Part III rejects this idea. While federal statutes authorizing administrative forfeiture date back only to 1844 and not to the Founding,⁴⁸ other well-accepted practices are analytically

47. *Cf. Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954-60 (2015) (Roberts, C.J., dissenting) (arguing that Congress cannot validly authorize bankruptcy courts or other non-Article III actors to render dispositive judgments in certain kinds of cases, even if the parties consent).

48. See *infra* notes 298-302 and accompanying text.

indistinguishable. If Congress can establish other statutory deadlines for challenging executive action, then Congress can also establish deadlines for contesting the government's ownership of property that the executive branch has seized.

These conclusions give me no pleasure. I am skeptical that current forfeiture laws are good policy. But laws can be unwise and even unfair without being unconstitutional. In my view, the basic characteristics of civil and administrative forfeiture considered in this Feature are consistent with the original meaning of the Constitution as liquidated over time. Reform efforts should continue to focus on the political branches, not the courts.

I. IN REM VERSUS IN PERSONAM

Forfeiture laws address the ownership of property. Although the details vary, the typical forfeiture statute provides that when an item is possessed or used in violation of specified legal restrictions, private ownership of the item ceases and title vests in the government by operation of law.⁴⁹ Subject to some procedural restrictions, moreover, the statute often makes it possible for law-enforcement officials to take immediate possession of the item, through seizure, before the (former) owner has had a chance to contest the government's position in court.⁵⁰

Of course, statutes cannot automatically give conclusive effect to an executive officer's determination that property previously vested in a private individual or entity has been used in such a way that the property now belongs to the government. Under doctrines that became prominent in the mid-nineteenth century but that have roots in earlier understandings of both the federal Constitution and its state counterparts, "[t]he legislative power . . . cannot directly reach the property or vested rights of the citizen, by providing for their forfeiture or transfer to another, without trial and judgment in the courts."⁵¹ At the very least, the law could not authorize nonjudicial officials to

49. See, e.g., 21 U.S.C. § 881(a), (h) (2012).

50. See, e.g., 18 U.S.C. § 981(b) (2012). *But cf. id.* § 985 (setting out special limitations on the seizure of real property in connection with civil forfeiture); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52-62 (1993) (holding that at least where civil forfeiture is concerned, the Due Process Clause requires more pre-seizure process for real property than for movable personal property).

51. *Newland v. Marsh*, 19 Ill. 376, 383 (1857); see also, e.g., THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 362 (Boston, Little, Brown & Co. 1868) ("Forfeitures of . . . property cannot be adjudged by legislative act, and confiscations without a judicial hearing and judgment after due notice would be void as not due process of law."); *cf.*

make an authoritative declaration of forfeiture unless the former owners had an *opportunity* to contest the government's position in court.⁵²

The requisite judicial proceedings, however, did not necessarily have to be conducted in personam. As Section I.A briefly describes, in rem forfeiture proceedings have an exceedingly long history in Anglo-American law. Section I.B considers some efforts by modern scholars to cabin the relevant history, but concludes that those efforts fail. Indeed, Section I.C argues that even the modern expansion of in rem forfeiture to the *proceeds* of illegal conduct probably does not offend the Due Process Clauses as originally understood. In any event, given the modern convergence of in rem and in personam proceedings, Section I.D suggests that the in rem nature of civil forfeiture is not a promising target for constitutional attack.

A. A Brief History of In Rem Forfeiture

Long before the American Revolution, both the English Parliament and legislatures in the American colonies were using the threat of forfeiture to encourage compliance with statutes. Forfeitures of this sort, moreover, often were enforced through civil proceedings in rem. Modern courts and commentators already know the outlines of the relevant history,⁵³ but this Section provides a brief recap.

From the colonists' perspective, some of the most prominent forfeiture provisions in English law appeared in the Navigation Acts, many of which regulated colonial trade in the service of England's mercantilist system.⁵⁴ For instance, the Navigation Act of 1660 required that English ships be used to

Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681-1726 (2012) (tracing the historical roots of the linkage between separation-of-powers themes and the concept of due process of law).

52. See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 569 (2007) ("Whether this principle flowed simply from the limited nature of the powers vested in the political branches or from provisions like the Due Process Clause of the Fifth Amendment and its state counterparts, American constitutions were widely understood to require an opportunity for 'judicial' proceedings when the government proposed to act upon core private rights." (footnote omitted)); see also *Windsor v. McVeigh*, 93 U.S. 274, 277-81 (1876) (indicating that even if a forfeiture is declared in court through proceedings in rem, those proceedings are not "judicial" in the relevant sense unless "the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed").

53. See, e.g., *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-53 (1943); James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 774-85 (1977).

54. See Maxeiner, *supra* note 53, at 774-78. For the seminal work on these statutes, see LAWRENCE A. HARPER, *THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING* (1939).

carry imports to and exports from the American colonies, “under the penalty of the Forfeiture and Losse of all the Goods and Commodities which shall be Imported into, or Exported out of, any the aforesaid places in any other Ship or Vessell, as alsoe of the Ship or Vessell with all its Guns Furniture Tackle Ammunition and Apparell.”⁵⁵ The same Act added that certain important products (including sugars, tobacco, cotton, and wool) could not be exported from the American colonies to any place not dependent on the English Crown, again upon pain of forfeiting both the goods and the ship that carried them.⁵⁶ A few years later, Parliament imposed similar restrictions in the other direction: most goods produced or manufactured in Europe could enter the colonies only by way of England or Wales, and goods illegally imported from elsewhere were forfeited along with the ship in which they were imported.⁵⁷

Judicial proceedings to enforce these forfeitures could take various forms. For instance, the Navigation Act of 1660 explicitly authorized one of its provisions to be enforced through prize cases in admiralty.⁵⁸ The term “prize case” refers to a special type of proceeding in rem.⁵⁹ The laws of war allowed vessels acting under the authority of one of the warring nations to try to capture vessels and cargos belonging to citizens or subjects of the enemy.⁶⁰ Upon a capture, the captors would take their prize to port and initiate in rem

-
55. An Act for the Encourageing and Increasing of Shipping and Navigation 1660, 12 Car. 2 c. 18, § 1 (Eng.) [hereinafter Navigation Act of 1660]; see also HARPER, *supra* note 54, at 395 (“English shipping alone was permitted to trade with the colonies by the Act of 1660, and only a few relaxations of this rule were subsequently permitted.”). The Navigation Act of 1651 had contained a precursor of this provision. See An Act for Increase of Shipping, and Encouragement of the Navigation of this Nation, 1651, in A COLLECTION OF SEVERAL ACTS OF PARLIAMENT, PUBLISHED IN THE YEARS 1648, 1649, 1650, AND 1651, at 165, 165-66 (Henry Scobell ed., London 1651); see also HARPER, *supra* note 54, at 34 (“The Act of 1651 . . . provided the basic formula which, as modified by the Restoration Parliament in 1660, was destined to govern English navigation for two centuries.”).
 56. Navigation Act of 1660, *supra* note 55, § 18; see also HARPER, *supra* note 54, at 396-97 (noting that subsequent statutes imposed export restrictions on additional products).
 57. See An Act for the Encouragement of Trade 1663, 15 Car. 2 c. 7, §§ 4, 6 (Eng.); see also HARPER, *supra* note 54, at 402-03 (observing that in the eighteenth century, Parliament extended these import restrictions to cover not only European-made goods, but also certain products of the American colonies of other countries).
 58. See Navigation Act of 1660, *supra* note 55, § 1.
 59. See The Flad Oyen (1799) 165 Eng. Rep. 124, 127 (Admlty) (“Proceedings upon prize are proceedings in rem . . .”); see also William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 123 (1993) (noting the prominence of prize cases during the wars of the eighteenth century).
 60. See RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM 394 (Chicago, Callaghan & Co. 1882) (“The general rule is that belligerents have a right to make prize of each other’s property found upon the high seas; and to this rule there are but few exceptions.”).

proceedings in a court of admiralty.⁶¹ Owners who denied that the property was lawful prize could appear in those proceedings to contest the captors' position,⁶² but if the court agreed with the captors, the court would enter a decree condemning the property, and the proceeds would be distributed according to the law of the capturing nation.⁶³

In a sense, the typical wartime prize case was a type of forfeiture proceeding, because the previous owners were losing their property. But the cause of the forfeiture was not that the property had been involved in some legal infraction.⁶⁴ Instead of being a tool of law enforcement, prize cases usually were a tool of war. Indeed, the law of prize was simply one manifestation of a broader principle: as far as the laws of war were concerned, a nation could seize and condemn *all* property owned or possessed by the enemy's adherents, on the theory that all such property adds to the enemy's strength.⁶⁵ The prize cases authorized by the Navigation Act of 1660 were different, because they covered only property linked to violations of the Act. Specifically, the section of the Act that prohibited the use of foreign vessels for carrying goods to or from the colonies included the following enforcement provision:

[A]ll Admiralls and other Commanders at Sea of any the Ships of War or other Ship haveing Comission from His Majesty . . . are hereby authorized and strictly required to seize and bring in as prize all such

61. See Additional Note on the Principles & Practice in Prize Causes, 15 U.S. (2 Wheat.) app. at 1, 9-10, 17 (1817) (Joseph Story).

62. See *id.* at 21.

63. See *id.* at 71 ("It is an elementary principle of prize law, that all rights of prize belong originally to the government; . . . and the beneficial interests derived to others can proceed only from the grant of the government; and therefore all captures wherever made enure to the use of the government, unless they have been granted away.").

64. See *WAPLES*, *supra* note 60, at 363. For this reason, *Waples* posited a sharp distinction between the forfeiture of property on the ground that it is "hostile" (that is, owned or controlled by an enemy's adherents) and the forfeiture of property on the ground that it is "guilty" (that is, involved in some violation of the law). See *id.* at 2.

65. See *id.* at 361-62; see also *Miller v. United States*, 78 U.S. 268, 304-05 (1871) (upholding the Confiscation Acts, adopted by Congress during the Civil War, as an exercise of "the war powers of the government"); cf. USA PATRIOT Act, Pub. L. No. 107-56, § 806, 115 Stat. 272, 378 (2001) (current version at 18 U.S.C. § 981(a)(1)(G) (2012)) (providing for the forfeiture of "[a]ll assets, foreign or domestic," of anyone engaged in planning or perpetrating acts of terrorism against the United States, its citizens, or its residents).

Ships or Vessells as shall have offended contrary hereunto and deliver them to the Court of Admiralty there to be proceeded against⁶⁶

Apart from this provision authorizing certain naval seizures to be treated as prizes, many sections of the Navigation Act of 1660 indicated that their forfeitures could be enforced *qui tam*, through actions brought “in any Court of Record” by any appropriate process (“Bill Information Plaintiff or other Action”).⁶⁷ Despite this apparent breadth of options, scholars agree that in England, as opposed to the colonies, the main forum for enforcement proceedings was the Court of Exchequer—“the historic court of the King’s revenue.”⁶⁸ There, forfeiture proceedings “were commenced by civil information, . . . either in personam or in rem.”⁶⁹ (The “information in rem” in the Court of Exchequer was a traditional means for the king or a *qui tam* informer to obtain a judicial decree recognizing the Crown’s ownership of specific items of property.⁷⁰ Although modern readers may think of

66. Navigation Act of 1660, *supra* note 55, § 1 (adding that “in case of condemnation,” the proceeds would be split between the captors and the Crown).

67. *Id.* §§ 1, 3, 4, 6; *see also id.* § 18 (contemplating suit “by Bil Plaintiff or Information”).

68. HARPER, *supra* note 54, at 109-10 (calling the Court of Exchequer “the generally preferred court” in England for proceedings to condemn property seized under the Navigation Acts, though noting that some such proceedings were brought instead in England’s vice-admiralty courts).

69. Maxeiner, *supra* note 53, at 775; *see also id.* at 776 (“Circumstances of the seventeenth and eighteenth centuries favored greater use of the in rem action in the Exchequer at the expense of in personam proceedings.”).

70. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *262. In a manuscript that probably was written in the early eighteenth century, Sir Jeffrey Gilbert asserted that the Crown had originally used this process to confirm its title to things without any other apparent owner—such as stray livestock, the estate of “a Man [who] died without Heir,” or certain kinds of wrecks that arrived on shore. *See* JEFFREY GILBERT, A TREATISE ON THE COURT OF EXCHEQUER 180-81 (London, Henry Lintot 1758); *see also* Matthew Hale, De Jure Maris et Brachiorum Ejusdem, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, FROM MANUSCRIPTS 5, 37-41 (Francis Hargrave ed., London, T. Wright 1787) (discussing the king’s “prerogative and franchise of wreck”). According to Gilbert, when Parliament later enacted statutes with forfeiture provisions, “the Forfeiture was appointed *in rem*, and likewise a Penalty was laid upon the Person transgressing the Law”—with the result that goods seized pursuant to these laws “were often *Derelict*, because the Owners would not come in to claim them, lest they should be subject to a Personal Information.” GILBERT, *supra*, at 181-82. Blackstone, whose treatment follows Gilbert’s, portrayed the extension of informations in rem to cases about statutory forfeitures as a means of “secur[ing] . . . forfeited goods for the public use, though the offender himself has escaped the reach of justice.” 3 WILLIAM BLACKSTONE, COMMENTARIES *262; *see also* Maxeiner, *supra* note 53, at 775 n.46 (citing Blackstone’s and Gilbert’s accounts). But readers of Blackstone should not infer that informations proceeded in rem only when they were unopposed. Even when owners appeared and filed claims contesting the alleged forfeiture, the action could continue

“informations” as being exclusively criminal, that was not the nature of informations in the Court of Exchequer: even when brought to enforce statutory forfeitures, an action upon an information in rem was a civil proceeding about the ownership of property.⁷¹ Indeed, the Court of Exchequer was said to have no criminal jurisdiction at all.⁷²)

In addition to the restrictions on commerce found in the Navigation Act of 1660, England’s acts of trade and navigation imposed customs duties on various goods.⁷³ Parliament backed up such duties with the threat of forfeiture, and the forfeiture provisions sometimes covered not only goods that were smuggled into England without payment but also the ships that were used to carry them, the boats that were used to unload them, and the horses and carriages that were used to take them away.⁷⁴ Again, the Court of Exchequer was the traditional forum in England for actions to enforce forfeitures under both customs and excise statutes,⁷⁵ and again informations in rem were used for this purpose.⁷⁶ (In the early eighteenth century, Parliament authorized many forfeitures under these statutes to be handled instead by local justices of the peace or commissioners of the excise,⁷⁷ but these matters too proceeded in rem.⁷⁸)

in rem. *See generally* JAMES MANNING, *THE PRACTICE OF THE COURT OF EXCHEQUER* 142-96 (London, A. Strahan 2d ed. 1827) (summarizing practice on informations in rem, with a focus on forfeiture cases).

71. *See, e.g.*, JOSEPH CHITTY, JR., *A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN* 332 (London, Joseph Butterworth & Son 1820) (noting that the process of information in the Exchequer “is wholly different from the criminal proceeding by information in the King’s Bench” and “is in the nature of a civil action at the suit of the Crown”); *see also* *The Sarah*, 21 U.S. 391, 397 n.a (1823) (reporter’s note) (“These informations are not to be confounded with criminal informations at common law They are civil proceedings *in rem* . . .”).
72. *See* *Attorney General v. Bowman* (1791) 126 Eng. Rep. 1423, 1423-24 (Exch.) (argument of counsel); *see also, e.g.*, *United States v. Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.) (taking it to be admitted that “the court of exchequer has no criminal jurisdiction”); 2 JOHN BAKER, *COLLECTED PAPERS ON ENGLISH LEGAL HISTORY* 1032 (2013) (“The Court of King’s Bench was the only one of the three superior common-law courts in Westminster Hall to possess a criminal jurisdiction . . .”).
73. *See* HARPER, *supra* note 54, at 404-10 (summarizing various duties on goods imported from Europe, including extra “alien duties” on goods imported into England on foreign ships).
74. *See, e.g.*, *An Act . . . for Enforcing the Laws Against the Clandestine Importation of Soap, Candles, and Starch, into this Kingdom 1750*, 23 Geo. 2 c. 21, § 31 (Eng.).
75. ELIZABETH EVELYNOLA HOON, *THE ORGANIZATION OF THE ENGLISH CUSTOMS SYSTEM, 1696-1786*, at 276 (1968); DANIEL HOWARD, *A TREATISE ON SUMMARY PROCEEDINGS UNDER THE LAWS OF EXCISE AND CUSTOMS* 7 (London, A. Strahan 1812).
76. *See, e.g.*, 3 WILLIAM BLACKSTONE, *COMMENTARIES* *262.
77. *See* HOON, *supra* note 75, at 277; HOWARD, *supra* note 75, at 7; *see also* 2 RICHARD BURN, *THE JUSTICE OF THE PEACE, AND PARISH OFFICER* 3-165 (London, W. Strahan & M. Woodfall 12th

In the American colonies too, forfeitures for violations of the acts of trade and navigation were frequently enforced through civil proceedings *in rem*. Because the colonies lacked specialized courts of exchequer, many early enforcement proceedings were brought in the colonies' existing courts of common law, which are said to have "closely followed the procedure in Exchequer" (complete with trial by jury even in proceedings *in rem*).⁷⁹ By the end of the seventeenth century, though, "the obstinate resistance of American juries" had led the Crown to seek another mechanism for enforcing the Navigation Acts.⁸⁰ In 1696, Parliament gave concurrent jurisdiction over enforcement proceedings in the colonies to a set of vice-admiralty courts (which sat without juries),⁸¹ and those courts eventually became the primary forum for cases in the colonies about alleged violations of the Navigation Acts.⁸² Again, forfeiture proceedings in the colonial vice-admiralty courts could be—and were—brought *in rem*.⁸³

ed. 1772) (digesting English laws regarding customs and excise duties as relevant to justices of the peace).

78. See *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 138 (1943).

79. See *id.* at 139-40 & n.4.

80. *Id.* at 141.

81. See Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part I)*, 26 J. MAR. L. & COM. 581, 592-94 (1995); see also Charles M. Andrews, *Introduction to RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND, 1716-1752*, at 1, 5-14, 66-67 (Dorothy S. Towle ed., 1936) (discussing early uncertainties about the meaning of the 1696 statute and the Crown's creation of new vice-admiralty courts to exercise the jurisdiction that the statute conferred).

82. See, e.g., CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* 21 n.23 (1960); Maxeiner, *supra* note 53, at 777.

83. See Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 323 (1996). Some confusion on this point has crept into the academic literature. In a leading article based on records from the Massachusetts vice-admiralty court for the years 1726 to 1733, Professor L. Kinvin Wroth made a few generalizations about practice and procedure in that court. In a passage that did not focus specifically on forfeiture proceedings, Wroth reported that "[i]n the majority of cases [covered by the records] the process seems to have been *in personam* in the first instance," and "[t]he action *in rem* seems to have been relied upon primarily in cases in which no respondent to an *in personam* suit could be found within the jurisdiction." L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction* (pt. 1), 6 AM. J. LEGAL HIST. 250, 266 (1962). A few subsequent authors have erroneously taken this passage to describe how forfeiture proceedings worked (and also to describe practice in all colonial vice-admiralty courts, not just one period in Massachusetts). See Boudreaux & Pritchard, *supra* note 46, at 608; Maxeiner, *supra* note 53, at 777. In a revised version of his article, though, Professor Wroth himself indicated that his generalization did *not* apply to statutory forfeiture proceedings. See L. Kinvin Wroth, *The Massachusetts Vice-Admiralty Court*, in *LAW AND AUTHORITY IN COLONIAL AMERICA* 32, 44 (George Athan Billias ed., 1965) ("Suits under the Acts of Trade and other regulatory legislation . . . were usually brought by information *in rem* in the name

England's approach to colonial trade took a new direction in the 1760s, when Parliament sought to address war debt by extracting more revenue from the colonies.⁸⁴ For instance, the Revenue Act of 1764 (portions of which were short-lived) increased customs duties on various goods imported into or exported from the colonies.⁸⁵ Like other customs laws, the Act not only threatened smugglers with personal penalties but also provided for the forfeiture of property used in connection with smuggling.⁸⁶ The Act also explicitly allowed prosecutors and informers to bypass juries by using the vice-admiralty courts to recover any forfeiture or penalty incurred in the colonies under "any . . . act or acts of parliament relating to the trade and revenues of the said . . . colonies" – even when analogous enforcement proceedings in England would not trigger admiralty jurisdiction.⁸⁷

of the customs officer who had seized the offending vessel or goods."); *cf.* Vice Admiralty Records of Massachusetts, in *EXTRACTS FROM GODOLPHI, SEA LAWS, JENKINS, MALINE, ZOUCH AND EXTON* 129, 129-32 (Boston, Howe & Norton 1826) (listing captions of cases filed in the vice-admiralty court in Massachusetts from 1740 to 1747, and indicating that while actions for seamen's wages were often brought against named people, forfeiture proceedings under the Navigation Acts were brought against property).

84. See DAVID R. OWEN & MICHAEL C. TOLLEY, *COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634-1776*, at 108-09 (1995); see also UBBELOHDE, *supra* note 82, at 207 ("Before 1763, the acts of trade and navigation had been designed as regulatory laws, to direct the commerce of the empire. After 1763, the trade laws were intended as revenue statutes."). According to Professor Oliver M. Dickerson, the new policies helped precipitate the American Revolution. See OLIVER M. DICKERSON, *THE NAVIGATION ACTS AND THE AMERICAN REVOLUTION* 161 (1951) ("Whoever seeks to explain the American Revolution must start with the proved loyalty of all the colonies in 1763 and their general satisfaction with the commercial system which bound the Empire together. Americans themselves dated the beginning of oppressive policies with 1764.").
85. See Revenue Act 1764, 4 Geo. 3 c. 15, §§ 1-3 (Eng.); UBBELOHDE, *supra* note 82, at 50; Harrington, *supra* note 83, at 333 & n.139.
86. See Revenue Act § 37 (providing that "if any goods or merchandizes whatsoever, liable to the payment of duties in any *British* colony or plantation in *America* by this or any other act of parliament, shall be loaded on board any ship or vessel outward bound, or shall be unshipped or landed from any ship or vessel inward bound, before the respective duties due thereon are paid, agreeable to law," then not only would every person involved face monetary penalties, but also "all the boats, horses, cattle, and other carriages whatsoever, made use of in the loading, landing, removing, carriage, or conveyance, of any of the aforesaid goods, shall . . . be forfeited and lost, and shall and may be seized and prosecuted, by any officer of his Majesty's customs").
87. See *id.* §§ 40-41 (allocating jurisdiction differently depending on whether penalties and forfeitures were incurred in Great Britain or in the American colonies); see also Stamp Act 1765, 5 Geo. 3 c. 12, § 52 (Eng.) (similarly authorizing colonial vice-admiralty courts to entertain suits for forfeitures and penalties under revenue acts). The British argued that this allocation of jurisdiction was nothing new because the colonial vice-admiralty courts had long entertained proceedings to enforce the acts of trade and navigation. The colonists responded that the new laws were different both because they were aimed at raising revenue

Colonists bitterly complained both about taxation without representation and about the use of the vice-admiralty courts for revenue matters that, in England, would have been tried to a jury in the Court of Exchequer.⁸⁸ But while the vice-admiralty courts were highly unpopular, the colonists did not reject the general concept that statutes might use forfeiture as a tool of law enforcement, or that forfeiture proceedings might be brought in rem rather than in personam. To the contrary, when the United States gained independence, the new states continued to use the threat of forfeiture to back up their own customs and antismuggling laws, and many statutes explicitly authorized in rem proceedings to enforce such forfeitures.⁸⁹

Once the Constitution created a federal Congress with authority to levy taxes and to regulate interstate and foreign commerce, the same was true at the federal level. When Congress convened in 1789, it promptly imposed customs

and because some of the transactions being taxed had nothing to do with maritime commerce. See UBBELOHDE, *supra* note 82, at 207-10 (summarizing this debate).

88. See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 165-67 (2001); see also UBBELOHDE, *supra* note 82, at 209 (concluding that “the heart of the dispute over the vice-admiralty courts in the decade before the Revolution” concerned “the charge that they denied the colonists their right of trial by jury”).
89. See, e.g., An Act for Levying and Collecting a Duty on Certain Articles of Goods, Wares and Merchandize Imported into this State, by Land or Water, in ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 271, 273-74 (Hartford, Hudson & Goodwin 1784) (providing that “every Ship, Vessel or Boat” in which any goods were illegally imported into the state “shall with its Tackle, Apparel, Furniture and Cargo, whether on board or unladen, be forfeited as lawful prize,” and describing an in rem procedure by which such property could be “seized, libelled and condemned”); *id.* at 276-77 (similarly providing for forfeiture of goods, horses, oxen, carts, wagons, and carriages involved in illegally importing goods into the state by land, and authorizing such property to “be seized, libelled and proceeded against” in the same manner as boats); An Act Imposing Duties on Goods and Merchandize, Imported into this State, ch. 81 (1787), in 2 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1785, 1786, 1787 AND 1788, INCLUSIVE 509, 514-19 (Albany, Weed Parsons & Co. 1886) (using the forfeiture of goods and vessels to back up many provisions, and specifying that “all ships and vessels, goods and merchandize which shall become forfeited by virtue of this act, shall be prosecuted by the collector, or officer or other person who shall seize the same, by information in the court of admiralty, or in the court of exchequer, or in any mayors court or court of common pleas in this State, in order to condemnation thereof”); An Act to Amend and Reduce the Several Acts of Assembly for Ascertaining Certain Taxes and Duties, and for Establishing a Permanent Revenue, into One Act, ch. 8, §§ 10, 21 (1782), in 11 HENING’S STATUTES AT LARGE 112, 123, 128 (William Waller Hening ed., Richmond, George Cochran 1823) (providing that in Virginia, “all spirits, wine, sugar, coffee, or other merchandize, landed, put on shore, or delivered, contrary to the true intent and meaning of this act, or the value thereof, shall be forfeited and lost,” and authorizing proceedings “upon information in any court of record”); An Act for Better Securing the Revenue Arising from Customs, ch. 14, §§ 2, 6 (1785), in 12 HENING’S STATUTES AT LARGE, *supra*, at 46-47 (authorizing seizure of noncompliant vessels and cargos, “to be prosecuted [by libel] and condemned before the court of admiralty”).

duties on imported goods⁹⁰ and tonnage duties on ships,⁹¹ and the Collection Act that Congress passed to enforce those duties is replete with forfeiture provisions.⁹² Different types of infractions triggered forfeitures of different breadth. For instance, removing dutiable goods from a wharf before they were weighed or gauged made only the goods themselves forfeit.⁹³ But if goods worth at least \$400 were unloaded and delivered from a vessel at nighttime, or without a permit from the collector of customs, the forfeiture extended to the vessel as well as the goods.⁹⁴ With respect to these and other forfeitures, the statute contemplated in rem proceedings against the forfeited goods and vessels, initiated by “seizure and libel” and culminating in “condemnation.”⁹⁵

Although the federal Constitution did not have a Due Process Clause when Congress enacted these provisions and the similar provisions in the Collection Act of 1790,⁹⁶ ratification of the Bill of Rights did not change Congress’s practices with regard to forfeiture. Thus, when Congress revised the Collection Act in 1799, the new statute included equally extensive forfeiture provisions,⁹⁷ to be enforced through the same in rem proceedings.⁹⁸ Early Congresses also used the threat of forfeiture (again enforced in rem) to back up many other statutory restrictions on shipping, including limitations on the slave trade,⁹⁹

90. Act of July 4, 1789, ch. 2, 1 Stat. 24.

91. Act of July 20, 1789, ch. 3, 1 Stat. 27.

92. See Collection Act of 1789, ch. 5, §§ 12, 15, 22-24, 34, 40, 1 Stat. 29, 39, 41-43, 46, 48-49.

93. *Id.* § 15, 1 Stat. at 41.

94. *Id.* § 12, 1 Stat. at 39; *cf. id.* § 40, 1 Stat. at 49 (“[A]ll goods, wares and merchandise brought into the United States by land, contrary to this act, shall be forfeited, together with the carriages, horses, and oxen, that shall be employed in conveying the same.”).

95. *Id.* §§ 36-37, 1 Stat. at 47-48.

96. See Collection Act of 1790, ch. 35, §§ 13-14, 22, 27-28, 46-48, 60, 70, 1 Stat. 145, 157-58, 161, 163-64, 169-70, 174, 177 (declaring forfeitures); *id.* §§ 67-68, 1 Stat. at 176-77 (authorizing in rem proceedings against all forfeited goods and vessels).

97. See Collection Act of 1799, ch. 22, §§ 24, 27-28, 35, 37-38, 43, 45-46, 50-51, 66-68, 84, 103, 1 Stat. 627, 646, 648, 655, 658, 660-62, 665, 677-78, 694, 701.

98. *Id.* §§ 89-90, 1 Stat. at 695-97.

99. See Act of Mar. 2, 1807, ch. 22, §§ 2, 4, 7, 9, 2 Stat. 426, 426-29; Act of Feb. 28, 1803, ch. 10, § 2, 2 Stat. 205, 205; Act of Mar. 22, 1794, ch. 11, § 1, 1 Stat. 347, 349.

prohibitions on exporting certain goods,¹⁰⁰ and embargoes on trading with certain nations.¹⁰¹

Notwithstanding the old complaints about colonial vice-admiralty courts, the Supreme Court soon held that when vessels or cargos were seized on navigable waters under these or other statutes, the ensuing forfeiture proceedings were properly brought in admiralty.¹⁰² By contrast, when property was seized on land, forfeiture cases usually proceeded at law.¹⁰³ Whether brought in admiralty or at law, though, forfeiture proceedings were commonly conducted in rem. (At law, the normal process was an information in rem of the sort used in England's Court of Exchequer.¹⁰⁴ In admiralty, the process was sometimes called an information and sometimes called a libel, but again it was in rem.¹⁰⁵)

The norm of enforcing forfeitures in rem was strong enough to affect the interpretation of statutes that declared forfeitures but were not specific about enforcement procedures. In 1809, for instance, Congress supplemented the then-existing Embargo Act with further penal provisions—some declaring forfeitures of vessels and cargos, others imposing civil or criminal penalties on individuals.¹⁰⁶ The 1809 statute addressed enforcement as follows: “[A]ll penalties and forfeitures incurred by force of this act . . . may be

100. See, e.g., Act of May 22, 1794, ch. 33, §§ 2-3, 1 Stat. 369, 369-70 (providing for the forfeiture of arms and ammunition intended for illegal export and of vessels used to export them); *id.* § 4, 1 Stat. at 370 (borrowing the procedures described in the Collection Act of 1790 to enforce these forfeitures); see also *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796) (addressing a forfeiture proceeding under this statute, and observing that the process is “of the nature of a libel *in rem*”).

101. See, e.g., Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 614; Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565, 565.

102. *La Vengeance*, 3 U.S. (3 Dall.) at 301; accord, e.g., *United States v. Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 446 (1808); *United States v. Schooner Sally*, 6 U.S. (2 Cranch) 406, 406 (1805).

103. See *The Sarah*, 21 U.S. (8 Wheat.) 391, 394 (1823). *But cf.* *Clark v. United States*, 5 F. Cas. 930, 931 (C.C.D. Pa. 1811) (No. 2,837) (“[I]f the cause of forfeiture arise at sea, the bringing of the thing forfeited to land, will not oust the admiralty of its jurisdiction.”).

104. See *The Sarah*, 21 U.S. (8 Wheat.) at 397 n.a (reporter’s note) (observing that “revenue seizures made on land have been uniformly left to their natural forum, and to their appropriate proceeding, which is an exchequer information *in rem*,” and adding that “[t]hey are civil proceedings *in rem*”).

105. Compare *United States v. The Vermont*, 28 F. Cas. 373, 373 (D. Conn. n.d.) (No. 16,618A) (using the term “libel” or “libel of information”), with *Clark*, 5 F. Cas. at 931 (“[I]nformations in rem, on the admiralty side of the district court, for forfeitures incurred under laws of impost, navigation, and trade, of the United States, have been common in the practice of our courts as an admiralty proceeding, as much so as the proceeding by libel.”).

106. See Act of Jan. 9, 1809, ch. 5, 2 Stat. 506.

prosecuted, sued for, and recovered by action of debt, or by indictment or information . . . ”¹⁰⁷ In an opinion prepared on circuit, Justice Story concluded that the word “information” should be understood to encompass “proceedings in rem, for forfeitures.”¹⁰⁸ He went on to indicate that such proceedings were the standard way to recover forfeitures—so that even if the statute had said nothing at all about the mode of enforcement, “I should have had no doubt that an information [in rem] would have lain upon common law principles.”¹⁰⁹

That was true even when forfeitures were incurred for violations of a statute that also authorized personal penalties against violators themselves: proceedings in rem to enforce a forfeiture did not have to be predicated upon proceedings in personam against any violator (unless the relevant statute provided otherwise). The standard citation for that proposition is *The Palmyra*,¹¹⁰ a forfeiture proceeding brought in rem under a federal statute that not only authorized the prosecution of “any person or persons [who] shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and . . . shall afterwards be brought into or found in the United States,” but also authorized condemnation proceedings against “any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure shall have been . . . attempted or made.”¹¹¹ According to Justice Story’s opinion for the Supreme Court, the longstanding practice under statutes that authorized “both a forfeiture in rem and a personal penalty” was that “the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*.”¹¹² Justice Story confirmed this understanding of the law: “[N]o personal conviction of the offender is necessary to enforce a forfeiture *in rem* in cases of this nature.”¹¹³

^{107.} *Id.* § 12, 2 Stat. at 510.

^{108.} *The Bolina*, 3 F. Cas. 811, 812 (C.C.D. Mass. 1812) (No. 1,608); *see also, e.g., Clark*, 5 F. Cas. at 931-32 (reaching the same conclusion about similar language in the Non-Intercourse Act of 1809, ch. 24, § 18, 2 Stat. 528, 532-33).

^{109.} *The Bolina*, 3 F. Cas. at 812. The parties settled this case before Justice Story delivered his opinion, so “no decree was actually pronounced.” *Id.* at 815 (reporter’s note).

^{110.} 25 U.S. (12 Wheat.) 1 (1827).

^{111.} Act of March 3, 1819, ch. 77, §§ 4-5, 3 Stat. 510, 513-14.

^{112.} *The Palmyra*, 25 U.S. (12 Wheat.) at 14-15.

^{113.} *Id.* at 15.

B. Might History Support In Rem Forfeiture Proceedings Only Where In Personam Proceedings Would Have Been Difficult?

At least for originalists, the historical pedigree of civil forfeiture as a tool of law enforcement—dating back to colonial America, continuing at the state level after independence, and carried forward at the federal level from the First Congress on—might seem to support the constitutionality of civil forfeiture as a tool of law enforcement today. According to some modern commentators, however, the history is more limited than it initially appears. Early federal forfeiture provisions were concentrated in customs statutes and other laws about shipping,¹¹⁴ which aimed partly to affect the behavior of people outside the United States. Under traditional understandings of personal jurisdiction, American courts could not have exercised in personam jurisdiction over “at least some . . . and perhaps most” of those people.¹¹⁵ If Congress had not been able to authorize in rem forfeiture proceedings against property that entered the United States in violation of statutory requirements, then foreign shippers and shipowners might have had little reason to pay customs duties or otherwise to comply with federal shipping laws. Under these circumstances, in rem forfeiture proceedings were a practical necessity if American shipping laws were to be effective.¹¹⁶ Some modern lawyers suggest that history does not support the use of in rem forfeiture proceedings in other circumstances.¹¹⁷ If one sees in rem forfeiture proceedings as compromising constitutional principles, moreover, one might think that the Constitution prohibits expanding those proceedings beyond their historical functions. In one of the most powerful statements of this position, Stefan Herpel concludes that the Due Process Clauses of the Fifth and Fourteenth Amendments prevent the government from using civil in rem forfeiture to enforce laws that could readily be enforced through proceedings in personam.¹¹⁸

114. See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79, 99 (1996) (referring to “customs and admiralty” as the “traditional domain” of in rem forfeiture).

115. Herpel, *supra* note 33, at 1918; see also *Pennoyer v. Neff*, 95 U.S. 714, 722-27 (1878) (describing traditional principles about limits on personal jurisdiction, and concluding that “[p]rocess from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them”).

116. See Herpel, *supra* note 33, at 1918-19; Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 194-95 (1996).

117. See, e.g., Boudreaux & Pritchard, *supra* note 46, at 618-21; Herpel, *supra* note 33, at 1618-20; Brief for Inst. for Justice as Amicus Curiae Supporting Petitioner at 9-10, *Bennis v. Michigan*, 516 U.S. 442 (1996) (No. 94-8729).

118. See Herpel, *supra* note 33, at 1925-26 (“If a modern application of civil forfeiture outside its traditional domains depended on the same rationale that justified the traditional uses—the

The initial premise of this argument has deep historical roots. Indeed, Rufus Waples—the lawyer who, in 1882, published the first systematic study of actions in rem in the United States—observed that “in a great proportion of causes *in rem*, there would be no means of making a personal citation upon the owner of the *res*.”¹¹⁹ Sometimes that was because of territorial limits on jurisdiction in personam, and sometimes it was simply because of the practical difficulty of identifying the owner. (To illustrate the latter possibility, Waples noted the realities of smuggling: when customs inspectors came across a cache of smuggled goods, the inspectors could readily tell that the goods were being imported in violation of law, but “it is almost always impossible to know who is the owner.”)¹²⁰ For one reason or another, though, many of the areas in which American legislatures traditionally authorized in rem forfeiture proceedings were areas in which in personam enforcement could have been difficult.

Still, neither Waples nor earlier lawyers and judges understood the Constitution to limit actions in rem to cases of this sort.¹²¹ Nor did early legislatures act upon such a theory. While legislatures did authorize in rem proceedings in situations where in personam proceedings would often have been impractical, they also authorized in rem proceedings in other situations.

Federal tax statutes provide some examples. Admittedly, until the Civil War, the main (and often the only) federal taxes were customs duties on imported goods.¹²² The fact that federal customs statutes included forfeiture

inability to obtain *in personam* jurisdiction over the wrongdoer—perhaps it could pass muster under the Due Process Clause. But absent that, the contemporary extensions of civil forfeiture should be condemned as a violation of due process.”). Herpel coupled his argument with the suggestion (considered in Part II *infra*) that when the government uses forfeiture as a penalty for violations of the law, the necessary proceedings in personam should be criminal prosecutions rather than civil actions. *See id.* at 1923-26.

119. WAPLES, *supra* note 60, at 22; *see also* ERASTUS C. BENEDICT, *THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE WITH PRACTICAL FORMS AND DIRECTIONS* 170 (New York, Banks, Gould & Co. 1850) (observing that “the United States, like all other commercial nations, find it necessary to impose penalties and forfeitures on goods afloat and on vessels, in relation to which the laws of trade, navigation and revenue, have been violated,” and adding that “[i]n a great variety of such cases, the vessels and the goods are the only things within the reach of the courts and their process”).

120. WAPLES, *supra* note 60, at 22; *cf. supra* note 70 (noting the English Crown’s traditional use of informations in rem against property without a known owner).

121. *Cf.* William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1111 (1994) (“There has never been any attempt to restrict in rem proceedings to cases in which no owner was available for in personam prosecution.”).

122. *See* Herpel, *supra* note 33, at 1921-22; *see also* W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 13-30 (2d ed. 2004) (discussing federal taxation from 1789 until

provisions is consistent with Herpel's thesis because a sizable fraction of customs violations would have involved property owned by foreigners.¹²³ But federal customs statutes did not limit the availability of *in rem* procedures to this fraction of cases; by the terms of the statutes, forfeiture proceedings were to be conducted *in rem* even if the owner of the subject property could readily have been reached *in personam*.¹²⁴ As Herpel acknowledges, moreover, there were periods in both the 1790s and the 1810s when Congress supplemented customs duties with domestic excise taxes (that is, taxes on the production or sale of certain goods within the United States).¹²⁵ These "internal revenue" taxes had no international flavor, yet Congress enforced them with the same sort of forfeitures that Congress used to enforce customs duties.¹²⁶

Take the Act of March 3, 1791, by which the First Congress imposed an excise tax on "spirits . . . distilled within the United States."¹²⁷ In aid of

the Civil War, and noting that "the leaders of the new republic . . . discovered that import taxes met most of their needs for tax revenues while minimizing political discord").

123. See Herpel, *supra* note 33, at 1918.

124. Many statutory provisions declared forfeitures of particular goods or vessels (to be enforced through proceedings *in rem*) without giving the government the option of proceeding *in personam* instead. See, e.g., Collection Act of 1799, ch. 22, § 51, 1 Stat. 627, 665; cf. The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827) ("Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*."). Some other provisions gave the government the choice of seeking *either* specific items of forfeited property (through proceedings *in rem*) *or* "the value thereof" (through proceedings *in personam* against a designated person). See, e.g., Collection Act of 1799, § 66, 1 Stat. at 677; Registry Act, ch. 1, § 12, 1 Stat. 287, 293 (1792); Collection Act of 1789, ch. 5, § 22, 1 Stat. 29, 42; see also *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 341-42, 346 (1806) (arguments of counsel) (confirming that suits for "the value thereof" would proceed *in personam*). In discussing provisions that gave the government this option, the Supreme Court spoke as if the government could make either choice; the Court did not suggest that proceedings *in rem* were proper only when a proceeding *in personam* would not have been practicable. See *Grundy*, 7 U.S. (3 Cranch) at 351-52.

125. See Herpel, *supra* note 33, at 1922 n.46.

126. In addition to the example discussed in the next paragraph, see Act of Jan. 18, 1815, ch. 22, §§ 1, 6-7, 3 Stat. 180, 180-84 (laying excise duties on many goods manufactured for sale in the United States, and backing up the statutory requirements with forfeitures as well as monetary penalties); Act of Dec. 21, 1814, ch. 15, §§ 1, 6-7, 3 Stat. 152, 152-55 (similarly declaring forfeitures in aid of collecting excise duties on spirits distilled in the United States); Act of July 24, 1813, ch. 21, §§ 1-2, 5-6, 3 Stat. 35, 35-36 (same for excise duties on sugar refined in the United States); Act of June 5, 1794, ch. 51, §§ 1-2, 4-5, 9-10, 1 Stat. 384, 384-87 (same for excise duties both on refined sugar and on snuff manufactured for sale in the United States).

127. Act of Mar. 3, 1791, ch. 15, §§ 14-15, 1 Stat. 199, 202-03; see also THE UNITED STATES INTERNAL REVENUE TAX SYSTEM 20 (Charles Wesley Eldridge ed., Boston, Houghton, Mifflin & Co. 1895) (identifying this statute as "the first internal revenue measure" enacted

collecting this tax, the statute not only imposed some monetary penalties on violators, but also declared a broad variety of forfeitures. For instance, if spirits were removed from a distillery without having been marked as the law required, “the [spirits], together with the cask or casks containing [them], and the horses or cattle, with the carriages, their harness and tackling, and the vessel or boat with its tackle and apparel employed in removing them, shall be forfeited, and may be seized by any officer of inspection.”¹²⁸ Likewise, spirits were not to be removed from a distillery except during daylight hours, again “on pain of forfeiture of such spirits” and “the casks, vessels and cases containing the same.”¹²⁹ The statute contemplated that these forfeitures could be enforced “by information,” just like the forfeitures that the same statute established in aid of the customs duties on imported spirits.¹³⁰ In the context of excise forfeitures as well as customs forfeitures, moreover, the word “information” seems to have been understood to encompass informations in rem.¹³¹ This understanding resonates with the traditional practice in England, where in rem process had been used to enforce forfeitures incurred under excise as well as customs statutes.¹³²

One cannot always extrapolate from the procedures for enforcing taxes to the procedures that would have been considered adequate in other contexts.¹³³

under the Constitution). Discontent over this tax led to the Whiskey Rebellion. See THE UNITED STATES INTERNAL REVENUE TAX SYSTEM, *supra*, at 21-22.

128. Act of Mar. 3, 1791, § 19, 1 Stat. at 204.

129. *Id.* §§ 20, 34, 1 Stat. at 204, 207.

130. See *id.* § 44, 1 Stat. at 209.

131. See, e.g., *Buchanan v. Biggs*, 2 Yeates 232, 233 (Pa. 1797) (referring to proceedings in a federal district court in Virginia “on an information against six casks of whiskey” that allegedly had been removed from the distillery in violation of this statute); see also *supra* note 108 and accompanying text. The excise tax statutes of the 1810s similarly provided that fines, penalties, and forfeitures incurred thereunder “may be sued for . . . by bill, plaint, or information.” Act of Jan. 18, 1815, ch. 22, § 21, 3 Stat. 180, 185-186; Act of Dec. 21, 1814, ch. 15, § 21, 3 Stat. 152, 157; Act of July 24, 1813, ch. 21, § 14, 3 Stat. 35, 38. In 1815, Congress enacted more specific provisions about the procedure in these forfeiture cases, and those provisions described a proceeding in rem. See Act of Mar. 3, 1815, ch. 100, § 14, 3 Stat. 239, 242-43. The same was true when Congress reintroduced domestic excise taxes in the Civil War. See Act of Mar. 7, 1864, ch. 20, § 2, 13 Stat. 14, 14 (declaring the forfeiture of property connected with tax evasion, and specifying that “the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem*”); see also Act of July 1, 1862, ch. 119, § 54, 12 Stat. 432, 452 (doing the same with respect to forfeitures incurred for evading excise duties on liquor).

132. See *supra* notes 75-78 and accompanying text.

133. See Herpel, *supra* note 33, at 1922 n.48; see also *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 282 (1856) (“[P]robably there are few governments which do or can permit their claims for public taxes . . . to become subjects of

But early American lawmakers also included forfeiture provisions in a variety of other statutes about purely domestic topics unrelated to taxation. Pursuant to those statutes, items that were otherwise legitimate subjects of property could be forfeited if used in violation of the law, and the forfeitures could be declared through proceedings *in rem*.¹³⁴ For example, early American legislatures provided for the forfeiture of horses used in races that violated gambling laws,¹³⁵ shingles sold in bundles that violated commercial regulations,¹³⁶ and gunpowder stored above the quantities permitted by fire safety laws.¹³⁷

Of course, because of limits on Congress's enumerated powers, these laws were found primarily at the state and local level, and so they do not bear directly on the original understanding of the Due Process Clause of the Fifth

judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others . . .").

134. *Cf.* Act of Feb. 22, 1794, ch. 43, §§ 1-3, *in* 2 THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, FROM NOVEMBER 28, 1780 . . . TO FEBRUARY 28, 1807, at 612, 612-14 (Boston, J.T. Buckingham 1807) [hereinafter LAWS OF MASSACHUSETTS] (describing an *in rem* process for use "whenever any personal property shall be liable to forfeiture for any offence").
135. *See, e.g.*, Act of Feb. 17, 1820, ch. 20, § 2, 1819 Pa. Acts 20, 21 (providing that "each horse . . . used . . . by the owner thereof or with his consent, in any race on which any bet or wager shall have been laid, or any purse or stakes shall have been made, shall be liable to be forfeited to the proper county," and instructing the officer who seized any such horse to "make information thereof to the next court of common pleas," which "shall proceed to hear and decide upon such seizure[] and . . . shall order a sale" if the horse was "adjudged to be forfeited"); An Act To Prevent Horse-Racing, 1777 R.I. Acts & Resolves 7 (Sept. Adjourned Session) (similarly declaring forfeitures and authorizing proceedings by information).
136. *See* An Act for the Admeasurement of Boards, and Regulating the Tale of Shingles, Clapboards, Hoops and Staves, and for Other Purposes Therein Mentioned, § 3 (1783), *in* 1 LAWS OF MASSACHUSETTS, *supra* note 134, at 103, 104 (regulating the dimensions of shingles offered for sale in any town, and declaring that "in case there shall be more than five shingles in any one bundle that are under the [required] length, breadth or thickness, or five short in the tale of any one bundle of two hundred and fifty, the bundle . . . shall be forfeited" and the merchantable shingles in the bundle "shall be . . . sold . . . for the benefit of the poor of such town where the shingles are condemned"); An Act for the Admeasurement of Boards, and for Regulating the Tale of Shingles, Clap-boards, Hoops and Staves; and for Other Purposes Therein Mentioned, § 3, 1785 N.H. Laws 348, 348-50 (saying much the same); *see also id.* §§ 2, 6, 9, 1785 N.H. Laws at 348, 351-52 (declaring other forfeitures); 1784 R.I. Acts & Resolves 4 (Aug. Adjourned Session) ("[E]very Bunch or Rope of Onions, which shall be made and offered or exposed for Sale in this State, weighing less than Four Pounds, shall be forfeited, or the Value thereof," and "said Forfeitures [shall] be recovered by Bill or Information, before any one or more Justices of the Peace, in the County where the said Onions shall be offered for Sale . . .").
137. *See, e.g.*, Act of Feb. 18, 1814, ch. 139, § 3, 1814 Mass. Laws 389, 390. For similar colonial legislation, *see* Act of July 5, 1771, ch. 9, § 1, *in* 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 167, 168 (Boston, Wright & Potter Printing Co. 1886).

Amendment. But many state constitutions had similar clauses of their own,¹³⁸ and these provisions apparently were not understood to prevent lawmakers from authorizing in rem forfeiture proceedings against property used in violation of the law.¹³⁹ At any rate, early state and local laws of this sort do not seem to have generated many constitutional challenges.

The earliest significant set of counterexamples may be the Maine Liquor Law of 1851 and copycat statutes in other states, which prohibited most sales of liquor and also authorized the seizure and forfeiture of liquor intended for unlawful sale.¹⁴⁰ Those statutes did generate constitutional challenges, and at first the challenges succeeded: several courts concluded that the statutes' enforcement provisions violated the state constitution.¹⁴¹ As initially enacted, though, the Maine laws had a number of idiosyncratic features that help explain the courts' chilly reception. For instance, the first generation of Maine laws contemplated a strange judicial process that appeared to start in rem but

138. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 438 nn.121-22 (2010) (quoting the “law of the land” clauses from six of the original states’ constitutions); cf. *id.* n.120 (quoting two more “law of the land” clauses that applied only to deprivations of liberty, not property).

According to Williams, neither the “law of the land” formulation in early state constitutions nor the Due Process Clause of the Fifth Amendment was initially understood to impose many restrictions on legislative power. See *id.* at 454-59. Starting in the late 1830s, though, the idea that these provisions protected “vested rights” against legislative impairment became prominent. See *id.* at 462-67. Williams raises the intriguing possibility that by 1868 (when the Fourteenth Amendment was ratified) the language of the Due Process Clause might have acquired a different meaning than it had in 1791 (when the Fifth Amendment was ratified). See *id.* at 416.

In response, Professors Chapman and McConnell have argued that even in 1791, “due process was widely understood to apply to legislative acts” and to impose restrictions associated with the separation of powers. Chapman & McConnell, *supra* note 51, at 1677; see also *id.* at 1726-27 (arguing that the relevant concepts did not change their essential character between 1791 and 1868). For purposes of this Feature, I need not choose sides: even after the 1830s, neither the doctrine of “vested rights” nor other prevalent glosses on the Due Process Clause were thought to preclude civil forfeiture. See *infra* notes 146-148 and accompanying text.

139. Cf. *Our House No. 2 v. State*, 4 Greene 172, 174-75 (Iowa 1853) (“Under our federal, as well as under state constitutions, it is not uncommon to pass laws declaring articles to be forfeited, when they are used for illegal or criminal purposes. . . . That proceedings *in rem*, against property used for unlawful purposes, may be sanctioned by laws, without doing violence to the constitution, is conclusively settled by the highest judicial tribunal in our country.”).

140. See Act of June 2, 1851, ch. 211, 1851 Me. Laws 210; see also JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* 63 (2014) (noting that from 1851 to 1856, “about a dozen states” enacted such laws).

141. See COMPTON, *supra* note 140, at 64, 74-77 (noting both the challengers’ early success and their later losses).

that nonetheless put the owner or keeper of the liquor at risk of personal penalties: if the court believed that the liquor was covered by the statute and had been intended for unlawful sale, then not only would the liquor “be declared forfeited . . . and be destroyed,” but the court would fine the owner or keeper of the liquor twenty dollars or jail him for thirty days in default of payment.¹⁴² Partly because of this feature, a federal circuit court in Rhode Island characterized the forfeiture proceeding as a criminal prosecution rather than a civil case¹⁴³—a view that the Supreme Judicial Court of Massachusetts echoed and that contributed to the conclusion that the statute was unconstitutional because it did not conform to the requirements for criminal procedure.¹⁴⁴ Once legislatures revised the statutes to keep the in rem forfeiture proceedings more distinct from any proceedings for personal penalties (and to supply appropriate process for the latter),¹⁴⁵ courts tended to uphold the forfeiture provisions.¹⁴⁶

142. Act of June 2, 1851, § 11, 1851 Me. Laws at 215. For parallel provisions in the early “Maine laws” of Massachusetts and Rhode Island, see Act of May 22, 1852, ch. 322, § 14, 1852 Mass. Laws 257, 265, and An Act for the Suppression of Drinking Houses and Tippling Shops, § 11, 1852 R.I. Acts & Resolves 3, 8 (May Regular Session).

143. See *Greene v. Briggs*, 10 F. Cas. 1135, 1141 (C.C.D.R.I. 1852) (No. 5,764) (“These proceedings are clearly criminal in their nature. Their object is to inflict upon the person fine or imprisonment, and at the same time to adjudicate a forfeiture of the liquors. The process, and the judicial action under it, are directed both against the offender and his property.”).

Admittedly, Justice Benjamin Curtis’s opinion in *Greene* went on to say that “[i]f this were simply a proceeding to forfeit property, it would nevertheless[] be a criminal prosecution within the meaning of [a clause in the state constitution].” *Id.* at 1142. In context, though, Justice Curtis was not necessarily saying that he would have characterized the forfeiture proceeding as a “criminal prosecution” even if the statute had not authorized personal penalties to be imposed in that proceeding. Instead, he may simply have been saying that under the existing version of the statute, the enforcement proceeding would amount to a criminal prosecution even if the government chose not to seek a fine in a particular case.

144. See *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 25 (1854) (noting that under § 14 of the Massachusetts statute, “the first time any mention is made of the owner or keeper, is upon the seizure of the liquors,” after which “he is to be summoned, and if he fail to appear, or unless he can make certain proofs, the liquors are to be destroyed, and he is to be punished”); *id.* at 26–27 (indicating that both the in rem and the in personam aspects of the statute “are proceedings designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration”). Chief Justice Shaw’s opinion in *Fisher* made other arguments, too. See *id.* at 28–43 (raising myriad constitutional concerns).

145. See, e.g., Act of Jan. 22, 1855, ch. 45, §§ 9–11, 1854 Iowa Acts 58, 63–67; Act of Mar. 25, 1858, ch. 33, §§ 14–16, 1858 Me. Laws 31, 35–36.

146. See, e.g., *Santo v. State*, 2 Iowa 165, 217–18 (1855) (concluding that *Fisher*’s objections to the Massachusetts statute were not applicable to the liquor law that the Iowa legislature had enacted in 1855); *State v. Miller*, 48 Me. 576, 581 (1859) (“Without . . . expressing any

The terms in which the Maine laws were debated, moreover, suggest a broad consensus in favor of the constitutionality of the typical forfeiture statute. Courts that upheld the Maine laws sought to group them with other forfeiture provisions. Thus, Connecticut's highest court emphasized that "[f]orfeitures have frequently been imposed by laws of congress as well as by other laws of this state, none of which have ever been adjudged unconstitutional."¹⁴⁷ By contrast, courts that saw problems with the Maine laws sought to distinguish them from other forfeiture provisions.¹⁴⁸ Neither set of courts suggested that there is anything categorically unconstitutional about using in rem forfeiture as a tool of domestic law enforcement.

In sum, early forfeiture provisions cannot be explained entirely as a response to limits on in personam jurisdiction. Even in the absence of apparent obstacles to proceedings in personam, antebellum American legislatures sometimes authorized proceedings in rem, and courts seemed to accept this practice.

C. In Rem Forfeiture of the Proceeds of Illegal Transactions

There is at least one respect in which modern civil-forfeiture statutes do go far beyond their forebears. Many of the modern statutes reach not only property that is used to commit or facilitate an illegal transaction, but also the proceeds of such transactions and property that is traceable to those proceeds.¹⁴⁹ For instance, the concept of "proceeds forfeiture" explains why police sometimes seize a great deal of property belonging to alleged drug dealers—not on the theory that lawnmowers and television sets were used to facilitate crimes, but on the theory that they were purchased with the proceeds of those crimes.¹⁵⁰

opinion in regard to former statutes in this State, . . . we believe the provisions of the existing statute . . . are not in conflict with the constitution of this State.”).

147. *State v. Brennan's Liquors*, 25 Conn. 278, 287 (1856).

148. *See, e.g., Wynhamer v. People*, 13 N.Y. 378, 403-04 (1856) (opinion of Comstock, J.) (distinguishing New York's liquor law, “which enacts in substance that property of a particular species shall no longer exist,” from an ordinary forfeiture law declaring “that the species of property to which it relates is *forfeited by a violation of its provisions*”).

149. *See, e.g.,* 21 U.S.C. § 881(a)(6), (11) (2012) (providing for forfeiture of the proceeds of drug trafficking); 18 U.S.C. § 981(a) (2012) (providing for forfeiture of the proceeds of many other federal crimes).

150. *See, e.g.,* Christopher Ingraham, *Why Armed Drug Cops Took “Every Belonging” from a Michigan Soccer Mom*, WASH. POST: WONKBLOG (June 3, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/06/03/why-armed-drug-cops-took-every-belonging-from-a-michigan-soccer-mom> [<http://perma.cc/9WQD-HR52>] (discussing two cases involving

As Justice Stevens has suggested, the use of in rem process against property that was purchased with tainted funds appears to be a modern invention.¹⁵¹ The first federal statute to authorize in rem forfeiture proceedings against the proceeds of illegal transactions may date back only to 1978.¹⁵² Although Congress enacted more such statutes in the 1980s,¹⁵³ the use of in rem process against property that was itself involved in illegal conduct has a far stronger historical pedigree than the use of in rem process against property that was merely acquired as a result of such conduct.

If the latter sort of forfeiture is an innovation, originalists might wonder whether it comports with the Constitution. Of course, if a legislature has the power to prohibit certain transactions, the legislature probably also has the power to make the prohibited transactions less profitable by providing for forfeiture of the proceeds. But might the Due Process Clause require such forfeitures to be enforced in personam rather than in rem?

At first glance, Rufus Waples's 1882 treatise might seem to support such a restriction. Waples acknowledged that the law could authorize proceedings in rem against property that was itself "guilty" in the eyes of the law.¹⁵⁴ According to Waples, however, "*Things Guilty* must have been *used* in contravention of law, or held in contravention of law, to justify procedure against them."¹⁵⁵ Waples explicitly cast this point in constitutional terms: "Congress cannot constitutionally provide that property shall be condemned as guilty by proceedings *in rem* where there is no offense to be imputed" to the property.¹⁵⁶

state forfeiture laws); see also EDGEWORTH, *supra* note 1, at 12 (calling proceeds forfeiture "one of the most powerful tools in the prosecutor's arsenal").

151. See *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 121-22, 125 (1993) (plurality opinion).
152. See Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 301(a)(1), 92 Stat. 3768, 3777 (enacting a version of the provision codified at 21 U.S.C. § 881(a)(6) (2012)); see also CASSELLA, *supra* note 11, at 33 ("The idea of forfeiting the proceeds of crime was entirely new . . .").
153. See, e.g., Child Protection Act of 1984, Pub. L. No. 98-292, § 6, 98 Stat. 204, 206 (making proceeds of child pornography subject to civil forfeiture); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1366(a), 100 Stat. 3207, 3207-35 (enacting 18 U.S.C. § 981).
154. See WAPLES, *supra* note 60, at 2 (recognizing three different categories of property against which suits may proceed in rem: "[t]hings guilty," "[t]hings hostile," and "[t]hings indebted").
155. *Id.* at 4; see also *id.* at 2 ("Things are *guilty*, by fiction of law, when some act is done in, with, or by them, in contravention of some law having the forfeiture of such misused things as its sanction."); *id.* at 252 (claiming a consensus for the view that "things *guilty* can only be condemned for wrong done in, with, or by them"). In this respect, Waples distinguished "things guilty" from "things hostile." See *supra* note 64 and accompanying text.
156. WAPLES, *supra* note 60, at 236. Waples qualified this conclusion by adding that Congress "can provide for such condemnations for offenses resting upon apparently unimportant facts." *Id.*

Thus, Waples thought that the Due Process Clause would prevent Congress from “provid[ing] for the forfeiture of a ship engaged in legitimate commerce, by proceedings directly against that ship, for the offense of illicit trade carried on by another ship belonging to the same owner.”¹⁵⁷ Likewise, if an illicit distillery was located on a large farm, “only such acreage as is used for distilling purposes, and for ingress and egress, . . . can be rightfully condemned, whatever the text [of the forfeiture statute] may say.”¹⁵⁸ To enforce a broader forfeiture, Waples suggested, the government would have to proceed against the owner in personam rather than against the property in rem.¹⁵⁹

Yet even if one accepts Waples’s understanding of the constitutional limits on in rem process,¹⁶⁰ modern proceeds-forfeiture statutes do not necessarily violate that understanding. To be sure, some of the proceeds of illegal transactions might not themselves have been used in contravention of the law. But the logic that traditionally was used to explain civil forfeiture nonetheless allows the law to reach those proceeds in rem.

To see why, one must start by recognizing that even when civil-forfeiture statutes are designed to affect behavior, they take the form of property regulations. Specifically, they identify circumstances in which the ownership of property passes from one person to another by operation of law. For more than two centuries, moreover, the Supreme Court has allowed Congress to provide that when a particular item of property is used or transported in a manner that

157. *Id.* at 37-38.

158. *Id.* at 231; *see also id.* at 226 (“Had Congress distinctly said that every farm or plantation on which such distillery should be situate, shall be forfeited, it would have exceeded its powers. Congress cannot make that guilty which is innocent”); *id.* at 252 (“If only one acre of a tract of land containing a hundred acres, is used in contravention of law, only that acre can be rightfully condemned.”); *cf.* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 82 & n.2 (1993) (Thomas, J., concurring in part and dissenting in part) (suggesting a similar view, though attributing it more to the Excessive Fines Clause than the Due Process Clause).

159. *See WAPLES, supra* note 60, at 37-38. Indeed, Waples went farther: he suggested that such proceedings would be criminal in nature and therefore would trigger the special procedures required for criminal prosecutions. *See id.* For my discussion of that issue, *see infra* Part II.

160. Putting Waples’s view into practice would obviously require difficult line-drawing decisions. *See, e.g.,* Act of Mar. 2, 1857, ch. 113, 11 Stat. 168, 168-69 (prohibiting the importation of obscene material into the United States, and providing for forfeiture not only of such material but also of everything else listed on the same invoice or contained in the same package); WAPLES, *supra* note 60, at 321-22 (discussing this statute without questioning its constitutionality); *cf. Bennis v. Michigan*, 516 U.S. 442, 455 (1996) (Thomas, J., concurring) (“The limits on *what* property can be forfeited as a result of what wrongdoing—for example, what it means to ‘use’ property in crime for purposes of forfeiture law—are not clear to me.”).

the law validly prohibits, forfeiture occurs at that very moment.¹⁶¹ Under forfeiture provisions of this sort, ownership of the item passes to the government as soon as the item is misused, and the item's subsequent seizure and condemnation through proceedings *in rem* simply confirm that a transfer of ownership has already occurred.¹⁶² Waples fully accepted this doctrine.¹⁶³ According to Waples, the fact that the government has a preexisting interest in the property is precisely why the government can proceed *in rem*.¹⁶⁴

Modern civil-forfeiture statutes address this topic explicitly. Ever since 1984, the relevant section in the federal Controlled Substances Act has specified that “[a]ll right, title, and interest in property described in [the provision identifying property that is subject to forfeiture] shall vest in the United States upon commission of the act giving rise to forfeiture under this section.”¹⁶⁵ Since 1986, the basic civil-forfeiture provision in Title 18 of the United States Code has included essentially identical language.¹⁶⁶

Admittedly, these provisions may have hidden complexities. In a concurring opinion from 1993, Justice Scalia interpreted the Controlled Substances Act to embody what he called “the common-law relation-back doctrine”: instead of literally acquiring title as soon as property becomes subject to forfeiture, the government acquires title “only upon entry of the

161. See *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 404-05 (1814) (adopting this interpretation of a forfeiture provision in the Non-Intercourse Act, ch. 24, § 5, 2 Stat. 528, 529 (1809)); see also *id.* at 408 (Story, J., dissenting) (agreeing that Congress *could* provide for forfeitures to take effect at the moment of the violation, but disagreeing with the majority's interpretation of the particular forfeiture provision in question).

162. See, e.g., *United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (“By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.”).

163. See WAPLES, *supra* note 60, at 29 (observing that “[t]he court simply declares the forfeiture” that has already occurred); *id.* at 162 (“From the date of forfeiture, . . . the property ceases to belong to the proprietor who previously owned it, and its title is vested at once in the government to which it is forfeited.”).

164. See *id.* at 37 (asserting that “[t]he action against a thing must always be based upon a pre-existing right *in* or *to* that thing,” and adding that the Due Process Clause “would be clearly violated, were property taken from its owner by the *actio in rem*, in a case where there was no *jus in re* or *ad rem*”).

165. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 306(f), 98 Stat. 1837, 2051 (codified at 21 U.S.C. § 881(h)).

166. See 18 U.S.C. § 981(f) (2012).

judicial order of forfeiture,” but that order relates back to the date of the wrongful act.¹⁶⁷ While this interpretation solves some practical problems, it does not readily fit the statutory language,¹⁶⁸ and it has less historical support than Justice Scalia suggested.¹⁶⁹ Even on Justice Scalia’s view, though,

-
167. *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 131-34 (1993) (Scalia, J., concurring in the judgment). Whether a majority of the Court agreed is not entirely clear. *Compare id.* at 127-29 (plurality opinion) (saying at one point that 21 U.S.C. § 881(h) “merely codified the common-law rule,” but leaving room for doubt about the meaning of this statement), *with id.* at 132 (Scalia, J., concurring in the judgment) (reading the plurality opinion to mean something different than Justice Scalia). Still, many lower federal courts have followed Justice Scalia’s view. *See, e.g.*, *United States v. Bailey*, 419 F.3d 1208, 1213 (11th Cir. 2005); *United States v. Spahi*, 177 F.3d 748, 754 (9th Cir. 1999); *United States v. One Parcel of Land*, 33 F.3d 11, 13 (5th Cir. 1994).
168. *See 92 Buena Vista Ave.*, 507 U.S. at 134 (Scalia, J., concurring in the judgment) (acknowledging that “there is some textual difficulty with the interpretation I propose,” but arguing that the alternative interpretations have problems of their own).
169. Early on, the Marshall Court held that “[w]here a forfeiture is given by statute, the rules of the common law may be dispensed with, and the thing forfeited may . . . vest immediately” *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 351 (1806). As a matter of statutory interpretation, the Court indicated that forfeiture provisions would not have this effect if they gave the government the option of *either* seeking particular items of property in rem *or* demanding “the value thereof” from a responsible individual in personam. *See id.* at 351-54. But most forfeiture provisions did not give the government this option; instead, they simply declared that certain items “shall be forfeited” when misused. *See, e.g.*, Non-Intercourse Act, ch. 24, § 5, 2 Stat. 528, 529 (1809). Over Justice Story’s dissent, the Marshall Court interpreted this language to mean that “the commission of the offence marks the point of time on which the statutory transfer of right takes place.” *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398, 405 (1814); *see also id.* (adding that the statutory language did not “admit of doubt” and that “the doctrine of forfeiture at common law” was therefore irrelevant). This interpretation of the typical forfeiture provision became canonical. *See, e.g.*, 1 SMITH, *supra* note 18, ¶ 3.05[2] (“[U]nder a peculiar rule of statutory construction adopted early in the nineteenth century and followed consistently by the Supreme Court thereafter, it is *presumed* that the legislature intends to ‘vest’ title in the government at the moment the property is illegally used unless the legislature indicates otherwise (which it almost never does).”).

It is true that the Supreme Court often described this canon as implicating the “relat[ion] back” of judicial decrees. *See* 1 SMITH, *supra* note 18, ¶ 3.05[2]; *see also, e.g.*, *Henderson’s Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56 (1872) (“Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree.”). But the very same opinions also used other formulations. *See Henderson’s Distilled Spirits*, 81 U.S. (14 Wall.) at 57 (“[T]he reported decisions of this court . . . establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent”); *see also*

forfeiture statutes give the government *some* sort of interest in property as soon as the property is misused.¹⁷⁰ What is more, case law strongly suggests that Congress can go farther than Justice Scalia read the Controlled Substances Act to go: it is within Congress's power to provide "that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States."¹⁷¹

If Congress can indeed make forfeitures effective at the moment that property is misused, then it follows almost inexorably that most "proceeds forfeiture" is constitutional: Congress can subject the proceeds of illegal transactions to the same sort of in rem process as property that was directly involved in those transactions. In fact, some proceeds of illegal transactions *were* directly involved in those transactions. For instance, if I illegally sell drugs for money, the money that I receive in the exchange is as much a part of the illegal transaction as the drugs themselves. If the law can declare the forfeiture of other items that are used for unlawful purposes, the law can also reach the money used in the exchange.

That rationale for forfeiture might not seem to extend to "derivative" proceeds of the illegal transaction, such as items that I buy with the money that I received in exchange for drugs.¹⁷² But if the law can make forfeitures effective as of the moment of the unlawful use, the law can specify that the money belonged to the government as soon as I received it in exchange for drugs. To

United States v. 221 Dana Ave., 261 F.3d 65, 71 (1st Cir. 2001) ("[P]rior to the Supreme Court's decision in *United States v. 92 Buena Vista Avenue*, . . . it was generally believed that title to forfeited property vested in the United States at the time of the illegal act.").

170. See, e.g., *Thacher's Distilled Spirits*, 103 U.S. 679, 682 (1881) ("[I]t can hardly be necessary at this day to reconsider the doctrine that when the act has been done which the law declares to work a forfeiture of the property, the right of the government to seize the property, and assert the forfeiture, attaches at once . . ."); see also *United States v. 2659 Roundhill Drive*, 283 F.3d 1146, 1155 (9th Cir. 2001) (Kozinski, J., dissenting) (taking *92 Buena Vista Avenue* to acknowledge that "the government does get an executory interest in the property as soon as its owners commit their illegal act"); 1 SMITH, *supra* note 18, ¶ 3.05[3] (observing that "[t]he government's claim of forfeiture against a vessel is quite properly considered to be a species of maritime lien," and adding that "[n]o judicial action is required to create a maritime lien"); cf. *Luis v. United States*, No. 14-419, 2016 WL 1228690, at *6-*9 (U.S. Mar. 30, 2016) (plurality opinion) (discussing the relation-back doctrine that governs *criminal* forfeitures under 21 U.S.C. § 853 (2012), and concluding that the government acquires a substantial interest in the covered property at the moment of the crime).

171. *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) at 57; see also *92 Buena Vista Ave.*, 507 U.S. at 127 (plurality opinion) ("Congress had the opportunity to dispense with the common-law doctrine when it enacted § 881(h) . . ."); *Grundy*, 7 U.S. (3 Cranch) at 351 (observing that "the will of the legislature" controls when title vests).

172. For the distinction between "direct" and "derivative" proceeds, see U.S. GEN. ACCOUNTING OFFICE, GGD-81-51, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 2-3 (1981).

the extent that I then use the government's money to buy other items, moreover, the law presumably can provide that those items belong to the government rather than me;¹⁷³ just as equity might impose a "constructive trust" on such items,¹⁷⁴ the law can provide that the government owns whatever I buy with money that already has been forfeited to the government. Even on Waples's view that the government can bring an action in rem only against property in which the government has a preexisting interest, it follows that the law can authorize the government to bring an action in rem against such proceeds.¹⁷⁵

Because this argument is analytical rather than historical, readers might wonder about its originalist bona fides. For originalists, though, the fact that modern legislation lacks exact historical analogues does not automatically make it unconstitutional. The point of researching history in connection with evaluating the constitutionality of civil-forfeiture statutes is not to ensure that modern civil-forfeiture statutes reach only the categories of property that the early colonial, state, and federal statutes declared to be forfeit, but rather to shed light on the constitutional principles that might restrain such statutes. I take history to suggest that the original meaning of the Constitution (as liquidated by historical practice) tolerates statutes declaring that when property is used in certain prohibited ways, ownership of the property passes to the government by operation of law, and the government can confirm its title through proceedings in rem against the property itself. If that is so, and if there is no sound basis for distinguishing statutes that authorize in rem proceedings

173. See Boudreaux & Pritchard, *supra* note 114, at 124 (advancing this sort of argument in defense of the constitutionality of proceeds forfeiture).

174. See 1 DAN B. DOBBS, *LAW OF REMEDIES* § 4.3(2) (2d ed. 1993) (discussing circumstances in which a defendant who holds legal title to an item might be regarded as holding the item in trust for the plaintiff, and might be required to transfer title on the theory that "in equity and good conscience, [the item] belongs to the plaintiff"); 2 *id.* § 6.1(2) ("Owners who can prove by clear and convincing evidence that their funds were used to acquire other property[] can usually get a constructive trust on that other property, which is regarded as merely a new form of the funds taken from them." (footnote omitted)); see also *Counihan v. Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir. 1999) (upholding the imposition of a constructive trust in favor of the United States on insurance benefits with respect to a house that was damaged by arson after becoming forfeit); cf. Boudreaux & Pritchard, *supra* note 114, at 123 ("Profiting from an illegal transaction falls squarely within the common-law understanding of unjust enrichment; forfeiture of profits simply imposes a constructive trust on that unjust enrichment.").

175. Cf. WAPLES, *supra* note 60, at 36-37 (observing that if a legislature so desired, it could authorize all liens arising from constructive trusts to be enforced through proceedings in rem).

against items obtained in trade for such property, the natural inference is that the Constitution tolerates the latter statutes too.¹⁷⁶

D. The Modern Convergence of In Rem and In Personam Procedures

Even if the previous two Sections were not persuasive, there is a further reason to question the idea that modern forfeiture statutes cannot validly authorize proceedings in rem against the proceeds of illegal conduct, or that proceedings in rem are permissible only when responsible individuals cannot be pursued in personam. Arguments that the Due Process Clause requires certain types of forfeiture cases to proceed in personam rather than in rem assume that those two types of proceedings are quite different. That was true in the eighteenth and nineteenth centuries, but it is no longer so true today.

Consider three important respects in which actions in rem used to differ dramatically from actions in personam.

- *Notice and preclusive effects.* Traditionally, a court's decree about the ownership of property in an action in rem was said to bind the entire world, including people who had not been given any personalized notice of the proceedings.¹⁷⁷ Although the initial seizure of the property might supply notice to the person who had been in possession of the property at the time of the seizure, and although notice of the proceedings also had to be posted or published in a local newspaper, actions in rem did not require personal service of process on any particular individual.¹⁷⁸ In the mid-twentieth century, however, the Supreme Court held that whether a proceeding is characterized as in personam or in rem, the Due Process Clause demands "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

176. Perhaps this inference could be overcome by historical evidence establishing that the Constitution was originally understood to tolerate only old-style forfeiture statutes and not "proceeds forfeiture" statutes. After all, even though this distinction seems analytically unsound, the Constitution might draw some illogical distinctions. Still, I am not aware of historical evidence that refutes the inference discussed in the text.

Even apart from the argument in the text, moreover, the legislature can control the distinction between property that is involved in illegal transactions and property that is derived from such transactions. Statutes presumably could prohibit buying things with property that is subject to forfeiture. If such statutes were in place, even the "derivative" proceeds of illegal transactions would themselves have been involved in an illegal transaction.

177. See *Mankin v. Chandler*, 16 F. Cas. 625, 626 (C.C.E.D. Va. 1823) (No. 9,030); *WAPLES*, *supra* note 60, at 151-61.

178. See *WAPLES*, *supra* note 60, at 88-91.

and afford them an opportunity to present their objections.”¹⁷⁹ Thus, even in actions in rem, current doctrine requires “efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in *in personam* actions.”¹⁸⁰ In keeping with this principle, modern rules prescribing the procedure for in rem forfeiture actions require the government to send personalized notice to people with known interests in the property.¹⁸¹

- *Jurisdiction.* Traditionally, the Due Process Clause of the Fourteenth Amendment was thought to prevent a state from exercising in personam jurisdiction over an unconsenting defendant who did not owe allegiance to the state unless the defendant (or an agent authorized to receive summonses on his behalf) was served with a summons inside the state’s

179. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

180. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 n.3 (1983).

181. See, e.g., FED. R. CIV. P. G(4)(b)(i) (Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) (providing that in any forfeiture action in rem arising from a federal statute, “[t]he government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government”). Similar provisions apply to most administrative forfeiture—that is, forfeiture that is not confirmed in court because no one contests the government’s claim to the property. See 19 U.S.C. § 1607(a) (2012) (addressing seizures by customs officers of the sort that might lead to administrative forfeiture, and specifying that “[w]ritten notice of seizure . . . shall be sent to each party who appears to have an interest in the seized article”); see also 18 U.S.C. § 981(d) (2012) (piggybacking upon the provisions of the customs laws); 21 U.S.C. § 881(d) (2012) (same); 28 C.F.R. § 8.9(b) (2015) (addressing many forfeitures administered by the Department of Justice, and specifying that “[a]fter seizing property subject to administrative forfeiture, the seizing agency, in addition to publishing notice, shall send personal written notice of the seizure to each interested party in a manner reasonably calculated to reach such parties”); cf. *Dusenbery v. United States*, 534 U.S. 161 (2002) (discussing constitutional requirements for notice in the context of administrative forfeiture). But see 26 U.S.C. § 7325 (2012) (purporting to allow administrative forfeitures of personal property under the Internal Revenue Code to proceed on the basis of mere notice by publication); cf. INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL § 9.7-13.7.4, http://www.irs.gov/irm/part9/irm_09-007-013.html [<http://perma.cc/TDM8-6FEX>] (calling for personalized notice to be “mailed by certified or registered mail to all known potential claimants” notwithstanding the lesser requirements of 26 U.S.C. § 7325).

Under current laws about both judicial and administrative forfeiture, it remains possible that an interested person will not be sent timely notice because the government was unaware of her interest, and that the ensuing judgment or declaration might nonetheless bind her because the government satisfied the constitutional requirements for providing notice. But this possibility also exists in some proceedings in personam. See, e.g., 42 U.S.C. § 2000e-2(n)(1)(B)(ii) (2012) (limiting later litigants’ ability to challenge employment practices that implement certain kinds of consent decrees or judgments); FED. R. CIV. P. 23(c)(2) (discussing notice in class actions).

borders.¹⁸² By contrast, courts could exercise in rem jurisdiction over property that was located in the state no matter where any claimants might be found. Again, however, modern doctrine has narrowed this distinction. In the mid-twentieth century, the Supreme Court allowed in personam jurisdiction to expand; states can now send summonses beyond their borders to reach defendants who are not physically present in the state but who satisfy the “minimum contacts” test.¹⁸³ Conversely, the Court has cut back on the permissible reach of in rem jurisdiction, or at least quasi in rem jurisdiction.¹⁸⁴ Because of these twin developments, the outer limits of in rem jurisdiction now resemble—and may be identical to—the outer limits of in personam jurisdiction.

- *Burden of proof.* In the typical in personam action, the plaintiff bears the burden of proving each of the elements of his or her cause of action against the defendant. Historically, the allocation of burdens of proof in actions in rem has been less clear.¹⁸⁵ Rather than leave the topic in the courts’ hands, early federal customs statutes that included forfeiture provisions explicitly put the burden of proof on claimants who contested seizures or denied that property had been forfeited.¹⁸⁶ This allocation of the burden of proof came to be seen as a basic feature of the customs

182. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878).

183. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

184. See *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977) (holding that state laws authorizing quasi in rem jurisdiction are subject to the same “minimum contacts” test as state laws authorizing in personam jurisdiction, and leaving room for a similar conclusion about pure in rem jurisdiction).

185. See *WAPLES*, *supra* note 60, at 144.

186. See, e.g., Collection Act of 1789, ch. 5, § 27, 1 Stat. 29, 43-44 (“[I]n all actions, suits or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the onus probandi shall be upon such claimant . . .”); see also Collection Act of 1799, ch. 22, § 71, 1 Stat. 627, 678 (putting the burden of proof on the claimant once the government made a showing of “probable cause”); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (applying this provision). Provisions allocating the burden of proof to claimants date back at least to the Navigation Acts. See An Act for Preventing Frauds and Regulating Abuses in His Majesties Customes, 1662, 14 Car. 2, c. 11, § 27 (Eng.). They can also be found in colonial and early state statutes. See, e.g., An Act for Laying a Duty on the Exportation of Lumber to the Neighbouring Governments (1747), in THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1744, TO NOVEMBER, 1750, INCLUSIVE 286, 287 (Charles J. Hoadly ed., Hartford, Case, Lockwood & Brainard Co. 1876); An Act Imposing Duties on Goods and Merchandize, Imported into this State, ch. 81, 1787 N.Y. Laws 509, 518-19.

system,¹⁸⁷ and Congress extended it to other areas too.¹⁸⁸ In 2000, however, Congress rolled back those extensions. While claimants still have the burden of proof with respect to forfeitures under customs statutes, the Civil Asset Forfeiture Reform Act of 2000 established the following rule for most other federal statutes: “In a suit or action brought under any [federal] civil forfeiture statute for the civil forfeiture of any property[,] . . . the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture”¹⁸⁹ At least at the federal level, then, the burden of

-
187. See *In re Cliquot’s Champagne*, 70 U.S. (3 Wall.) 114, 143 (1866) (holding that “th[e] rule of *onus probandi*” stated in § 71 of the Collection Act of 1799 applies to later revenue statutes that are silent on this topic); see also REV. STAT. § 909 (1874) (explicitly applying this rule to seizures under “any act providing for or regulating the collection of duties on imports or tonnage”); Tariff Act of 1930, ch. 497, § 615, 46 Stat. 590, 757 (codified as amended at 19 U.S.C. § 1615 (2012)) (similar).
188. See, e.g., Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 511(d), 84 Stat. 1236, 1277 (using customs statutes as the template for forfeitures under the Controlled Substances Act); Sherman Act, ch. 647, § 6, 26 Stat. 209, 210 (1890) (same for forfeiture proceedings under federal antitrust law); see also 18 U.S.C. § 981(d) (1994) (same for many other civil forfeitures); Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 826 (“The practice of shifting the burden . . . eventually became an integral part of the jurisprudence of in rem forfeiture law.”).
189. Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 2, 114 Stat. 202, 205 (enacting 18 U.S.C. § 983(c)). There is a technical glitch in the mechanism that Congress used to exempt federal customs statutes from this rule. CAFRA tried to accomplish that result by specifying that the term “civil forfeiture statute,” as used in 18 U.S.C. § 983, “does not include . . . the Tariff Act of 1930 or any other provision of law codified in title 19.” § 2, 114 Stat. at 210 (enacting 18 U.S.C. § 983(i)(2)(A)). It is fine for this definition to refer to the Tariff Act of 1930, but the reference to “any other provision . . . codified in title 19” is troublesome. Title 19 is not one of the titles of the United States Code that Congress has enacted as such. See CALEB NELSON, STATUTORY INTERPRETATION 49 & n.9 (2011). When Congress enacts a statute, then, Congress does not itself specify that any of the statute’s provisions must be assigned to title 19. Instead, the entity that decides where to assign which provisions is the Office of the Law Revision Counsel in the U.S. House of Representatives. The Office makes those decisions after Congress has acted, and even then the decisions are not set in stone; the Office can move provisions from one title to another. See Office of the Law Revision Counsel, *Editorial Reclassification*, U.S. HOUSE OF REPRESENTATIVES, <http://uscode.house.gov/editorialreclassification/reclassification.html> [<http://perma.cc/KG8E-GYQX>]. If CAFRA’s reference to “any other provision . . . codified in title 19” is interpreted to include whatever provisions the Office of the Law Revision Counsel chooses to assign to title 19 in the future, and to exclude whatever provisions the Office removes from title 19 and puts elsewhere, then this aspect of CAFRA is unconstitutional: it would amount to giving the Office of the Law Revision Counsel ongoing authority to determine which forfeiture provisions are subject to CAFRA, and Congress cannot delegate this sort of power to a subunit of Congress that acts outside the process of bicameralism and presentment. See *INS v. Chadha*, 462 U.S. 919 (1983). For

proof in most in rem forfeiture actions now resembles the burden of proof that would apply in civil actions in personam.

To be sure, the traditional differences between actions in rem and actions in personam have not vanished completely. For instance, the typical action in rem still begins with the seizure of property, while the typical action in personam does not. In some other contexts, moreover, the Supreme Court has understood the Due Process Clause to require notice and an opportunity to be heard *before* the government removes property from someone's possession.¹⁹⁰ But even as the Court was establishing this doctrine, it recognized an exception for forfeiture proceedings.¹⁹¹ Although the Court has since narrowed this exception so that an adversary hearing is normally required before the seizure of *real* property,¹⁹² the government's ability to seize *personal* property without prior notice continues to distinguish in rem forfeiture proceedings from many other civil actions. Even this aspect of current doctrine, however, is not really about the difference between actions in rem and actions in personam. In allowing the government to seize movable personal property without advance notice for purposes of civil forfeiture, the Supreme Court reasoned that forfeiture proceedings implicate the same considerations that had justified dispensing with preseizure notice in other contexts.¹⁹³ Those considerations can be relevant whether an action is proceeding in rem or in personam.

To the extent that the procedures used for actions in rem have converged with the procedures used for actions in personam, it is hard to argue that the Due Process Clause requires certain types of civil-forfeiture actions to proceed in personam rather than in rem. After all, if the procedures currently used for civil actions in personam would be adequate to satisfy the Due Process Clause, and if the procedures currently used for civil actions in rem supply essentially

CAFRA's reference to "title 19" to be valid, courts would have to interpret it to refer only to title 19 as it stood in April 2000, when CAFRA was enacted.

190. See *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); cf. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 615-18 (1974) (distinguishing *Fuentes*).

191. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 677-80 (1974) (agreeing with government officials that "seizure for purposes of forfeiture is one of those 'extraordinary situations that justify postponing notice and opportunity for a hearing'" (quoting *Fuentes*, 407 U.S. at 90) (some internal quotation marks omitted)).

192. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52-61 (1993) (noting that *Calero-Toledo* involved movable personal property that a miscreant could have hidden or removed from the jurisdiction if given advance notice of seizure, and distinguishing real property). More recently, CAFRA has imposed additional restrictions on civil-forfeiture actions against real property. See 18 U.S.C. § 985 (2012).

193. See *Calero-Toledo*, 416 U.S. at 679.

the same safeguards, then the mere fact that an action is denominated in rem rather than in personam should not matter.

II. CIVIL VERSUS CRIMINAL

Where forfeiture is concerned, though, perhaps the procedures currently used for civil actions in personam are *not* adequate to satisfy the Due Process Clause. The most fundamental argument that has been advanced against the constitutionality of civil-forfeiture statutes is that many of them purport to use civil process to achieve “criminal law objectives”¹⁹⁴: they authorize the government to punish people for violations of the law, but without the special safeguards that the Constitution requires for criminal prosecutions. According to many commentators, courts should not permit this end run around criminal procedure.¹⁹⁵ While the details of the commentators’ arguments vary, the basic idea is simple: legislatures should not be able to avoid the constitutional safeguards for criminal prosecutions simply by authorizing the government to impose punishments through nominally “civil” proceedings.

The modern Supreme Court has struggled with arguments of this sort. In the words of one thoughtful scholar, the distinction between “civil” and “criminal” proceedings is one of “the least well-considered and principled in American legal theory,” and the Supreme Court’s decisions on this topic are “as incoherent as any in the Court’s jurisprudence.”¹⁹⁶

At least where forfeiture is concerned, though, Part II.A suggests that the incoherence in the Court’s doctrine did not really emerge until the last two decades of the nineteenth century. Even today, Part II.B agrees with the late J. Morris Clark that most of the Court’s seemingly disparate results can be

194. Herpel, *supra* note 33, at 1924.

195. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 229-30 & n.b (2014) (arguing on historical grounds that “neither administrative nor civil forms can disguise the reality of criminal proceedings” and suggesting that civil-forfeiture statutes violate this principle); Fellmeth, *supra* note 33, at 733 (arguing that “[f]orfeitures imposed for deterrent . . . purposes are always punitive” in a sense that should trigger the Constitution’s criminal-procedure guarantees); Herpel, *supra* note 33, at 1923-26 (arguing that at least “outside the maritime, revenue, and war power fields,” where civil forfeiture has the strongest historical tradition, the Due Process Clauses should normally be understood to require criminal process “[i]f government wishes to use forfeiture as a sanction for enforcing the criminal law”); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 J. CRIM. L. & CRIMINOLOGY 274, 337 (1992) (concluding that nominally “civil” forfeitures under 21 U.S.C. § 881 “constitute criminal punishment” and that the Constitution therefore requires proof of the underlying offense beyond a reasonable doubt).

196. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3, 9 (2005).

rationalized; there is an interpretation of the Constitution that largely fits the data points supplied by modern doctrine, and this interpretation does not foreclose the use of civil procedure to declare the forfeiture of property, even when the forfeiture serves the purpose of punishing or deterring forbidden behavior. Part II.C identifies strong historical support for Professor Clark's key insight.

A. *The Path to Current Doctrine*

Early on, the Supreme Court took a clear position about how to characterize the typical forfeiture proceeding. The Court first discussed the issue in 1796, in a proceeding that the United States had initiated by information against a vessel that allegedly had been used to export arms in violation of federal law.¹⁹⁷ The district court had decreed a forfeiture, but a circuit court had reversed the decree on appeal.¹⁹⁸ Arguing that the matter "is a criminal cause" as to which "the judgment of the District Court is final," the United States asked the Supreme Court to hold that the circuit court had lacked jurisdiction.¹⁹⁹ But the Supreme Court declared itself "unanimously of opinion, that [this] is a civil cause: It is a process of the nature of a libel in rem; and does not, in any degree, touch the person of the offender."²⁰⁰

The Marshall Court repeatedly took the same position,²⁰¹ as did many other courts.²⁰² In 1882, Rufus Waples thus observed that even though actions in rem for forfeiture could be "based upon criminal offenses committed in, with, or by the things proceeded against," such actions "are well settled to be civil, and not, in any sense, criminal actions."²⁰³

Yet if this principle was "well settled" in 1882, the Supreme Court unsettled it just four years later. "We are . . . clearly of opinion," the Court announced in *Boyd v. United States*, "that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him,

197. *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297 (1796).

198. *See id.* at 297-98.

199. *Id.* at 299 (argument of counsel).

200. *Id.* at 301; *see also* Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1102-03 (2011) (providing more details about *La Vengeance*).

201. *See* Martinez, *supra* note 200, at 1103-05.

202. *See* WAPLES, *supra* note 60, at 30 & n.4 (collecting many authorities).

203. *Id.* at 29-30; *see also* L. MADISON DAY, *THE CONSTITUTIONALITY AND LEGALITY OF CONFISCATIONS IN FEE 52* (New Orleans 1870) ("[I]t is well settled by an unbroken current of authority that proceedings *in rem* for a forfeiture or an action for a penalty are not criminal but *civil* proceedings.").

though they may be civil in form, are in their nature criminal.”²⁰⁴ Although the scope of the Court’s ruling was uncertain, the Court held that at least some forfeiture proceedings that are “civil in form” are nonetheless “quasi-criminal,” and should be treated like criminal proceedings “for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.”²⁰⁵

A decade later, though, the Court reached a different conclusion about the Sixth Amendment, which lists various rights that “the accused” shall enjoy “[i]n all criminal prosecutions.”²⁰⁶ In *United States v. Zucker*, the Court held that this language reaches only proceedings that are “technically criminal in [their] nature” and “has no reference to any proceeding . . . which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed.”²⁰⁷ Specifically, *Zucker* concluded that the Confrontation Clause did not reach a proceeding that the government had brought through civil process under the descendant of the same customs statute that had been at issue in *Boyd*.²⁰⁸

The tension between *Boyd* and *Zucker* has carried forward into more recent cases. Relying on *Boyd*, the Warren Court held that just as the fruits of unreasonable searches and seizures are often inadmissible as evidence in criminal trials, so too they are inadmissible in the typical forfeiture proceeding; the “object” of both types of proceedings “is to penalize for the commission of an offense against the law,” and “the technical character of a forfeiture as an in

204. 116 U.S. 616, 633-34 (1886); see also *infra* notes 269-271 and accompanying text (identifying earlier opinions that also described actions for penalties or forfeitures as being “in the nature” of criminal proceedings).

205. *Boyd*, 116 U.S. at 634. Consistent with Waples’s understanding of the doctrine before *Boyd*, lower federal courts had not anticipated this conclusion. See John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 902-03 (1999) (observing that in earlier cases involving the same discovery provision as *Boyd*, “the lower federal courts uniformly upheld the statute on the grounds that in rem forfeiture proceedings were not ‘criminal case[s]’ within the meaning of the Fifth Amendment”).

206. U.S. CONST. amend. VI.

207. 161 U.S. 475, 481 (1896).

208. See Act of June 10, 1890, ch. 407, § 9, 26 Stat. 131, 135-36 (providing that if false documents were used to deprive the United States of customs duties on imported merchandise, “such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited”). In *Zucker* itself, instead of bringing an action in rem against the merchandise, the government had brought an action in personam to recover its value from the importers. See *Zucker*, 161 U.S. at 476. Judging from the Court’s opinion, however, the Sixth Amendment would not have reached an in rem action either.

rem proceeding against the goods” does not matter.²⁰⁹ For much the same reason, the Court continued to classify some civil-forfeiture proceedings as “criminal case[s]” for purposes of the Self-Incrimination Clause of the Fifth Amendment.²¹⁰ In keeping with *Zucker*, though, such proceedings still do not qualify as “criminal prosecutions” for purposes of the Sixth Amendment.²¹¹ Nor do they trigger the special burden of proof that the Supreme Court has read the Due Process Clause to require for criminal cases: while the government must prove each element of an offense “beyond a reasonable doubt” in order to obtain a criminal conviction,²¹² this requirement “does not apply to civil forfeiture proceedings.”²¹³

Under current doctrine, most civil-forfeiture proceedings also do not trigger the Double Jeopardy Clause. For instance, suppose that federal law makes certain conduct a crime punishable by imprisonment and, separately, provides for forfeiture of property used in such conduct (with the forfeiture to be declared through an action in rem against the property itself). If the government prosecutes someone criminally, but he is acquitted, can the government then bring a forfeiture action against his property based on the same alleged conduct? Although the Double Jeopardy Clause historically was not understood to bar this course of proceedings,²¹⁴ divergent views started to

209. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 701 n.11 (1965); *see also Garcia-Mendoza v. 2003 Chevy Tahoe*, 852 N.W.2d 659, 667 (Minn. 2014) (noting that although the exclusionary rule has changed since 1965, “the Supreme Court has not expressly overruled, modified, or clarified *Plymouth Sedan*”); *cf. Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (observing that “we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials,” but not referring to *Plymouth Sedan* or revisiting how to characterize civil-forfeiture proceedings for this purpose).

210. *See United States v. U.S. Coin & Currency*, 401 U.S. 715, 718 (1971) (“From the relevant constitutional standpoint there is no difference between a man who ‘forfeits’ \$8,674 because he has used the money in illegal gambling activities and a man who pays a ‘criminal fine’ of \$8,674 as a result of the same course of conduct.”).

211. *See, e.g., United States v. 777 Greene Ave.*, 609 F.3d 94, 95 (2d Cir. 2010) (“[C]laimants in civil forfeiture proceedings lack a Sixth Amendment right to counsel”); *United States v. \$40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009) (following *Zucker* and holding that the Confrontation Clause does not apply to civil-forfeiture proceedings).

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

213. *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993).

214. *See WAPLES*, *supra* note 60, at 24; *Klein*, *supra* note 116, at 185-86; *see also Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) (stating categorically that the Double Jeopardy Clause does not prevent the government from seeking forfeiture through in rem proceedings after a criminal prosecution of the owner in personam); *United States v. Three Copper Stills*, 47 F. 495, 499 (D. Ky. 1890) (“There is no case known to me which decides that this constitutional provision includes a proceeding *in rem*, which is a civil

emerge around the time of *Boyd*.²¹⁵ In the twentieth century, the Supreme Court came to think that the answer depended on whether the forfeiture in question was “punitive” or “remedial.”²¹⁶ Perhaps out of a desire to reach the result that history supported, though, the Court went to great lengths to characterize particular forfeiture statutes as “remedial” for this purpose.²¹⁷ Eventually, the Court announced a not-quite-categorical rule: in *United States v. Ursery*, a case involving the extensive forfeiture provisions in modern drug and money-laundering statutes, the Court held that “[t]hese civil forfeitures (and civil forfeitures generally) . . . do not constitute ‘punishment’ for purposes of the Double Jeopardy Clause.”²¹⁸

Just three years earlier, however, the Court’s opinion in *Austin v. United States* had held that forfeiture under one of the very same statutes “constitutes

action, within its inhibition.”); *cf.* *The Palmyra*, 25 U.S. (12 Wheat.) 1, 15 (1827) (addressing a different argument, but observing that “the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*”).

215. *See* *United States v. One Distillery*, 43 F. 846, 853 (S.D. Cal. 1890); *cf.* *Coffey v. United States*, 116 U.S. 436, 442-45 (1886) (holding that the acquittal of a property owner in a criminal prosecution defeated a subsequent proceeding to declare a forfeiture of his property based on the same alleged conduct, though casting this conclusion as a matter of issue preclusion rather than the Double Jeopardy Clause).

216. *See* *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (“Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable The question, then, is whether a § 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial.”); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (“It appears that the § 1497 forfeiture is civil and remedial, and, as a result, its imposition is not barred by [the owner’s acquittal on criminal charges].”). The seeds of this analysis trace back at least to *Helvering v. Mitchell*, 303 U.S. 391, 398-406 (1938).

217. *See* *United States v. Ursery*, 518 U.S. 267, 290 (1996) (noting that 21 U.S.C. § 881(a)(7) “provides for the forfeiture of ‘all real property . . . which is used or intended to be used, in any manner or part, to commit, or to facilitate the commission of’ a federal drug felony,” and asserting that this provision serves the “nonpunitive” purpose of “encourag[ing] property owners to take care in managing their property and ensur[ing] that they will not permit that property to be used for illegal purposes”); *Emerald Cut Stones*, 409 U.S. at 237 (addressing a customs law that both declared the forfeiture of any smuggled article and imposed an additional monetary penalty in the amount of the article’s value, and characterizing these provisions as “remedial” because the forfeiture “prevents forbidden merchandise from circulating in the United States” and the monetary penalty “provides a reasonable form of liquidated damages for violation of the inspection provisions and serves to reimburse the Government for investigation and enforcement expenses”); *cf.* Klein, *supra* note 116, at 240-41 (criticizing “the Court’s inclusion of ‘deterrence’ as a remedial purpose”).

218. *Ursery*, 518 U.S. at 270-71; *cf. id.* at 289 n.3 (leaving room for a narrow exception “where the ‘clearest proof’ indicates that an *in rem* civil forfeiture is ‘so punitive either in purpose or effect’ as to be equivalent to a criminal proceeding” (quoting *89 Firearms*, 465 U.S. at 365)).

‘payment to a sovereign as punishment for some offense,’ . . . and, as such, is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.”²¹⁹ The majority opinion in *Ursery* offered no explanation of why the Double Jeopardy Clause was different, but the Court nonetheless insisted on the distinction: “The holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence.”²²⁰

B. The Perils of Equating “Punitive” with “Criminal”

In 1976, just a few years before his untimely death, J. Morris Clark explained how to make sense of these cases as a doctrinal matter.²²¹ To do so, “one must temporarily disregard the Court’s language” and look for a pattern in the Court’s results.²²² Although the modern Court has sometimes spoken as if laws are either “criminal and punitive” or “civil and remedial,”²²³ the Court’s outcomes can be rationalized better if one separates the criminal/civil distinction from the punitive/remedial distinction. Of course, those distinctions overlap to some extent: some paradigmatic types of punishment (such as death sentences and prison terms) are inherently criminal.²²⁴ But if the legislature so directs, certain other types of punishment (including punitive deprivations of property) can be declared in “civil” proceedings.²²⁵

This clarification matters, because some provisions in the Bill of Rights refer specifically to criminal cases and do not appear to reach any civil

219. 509 U.S. 602, 622 (1993) (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

220. *Ursery*, 518 U.S. at 287.

221. J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

222. *Id.* at 392.

223. See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984); cf. Clark, *supra* note 221, at 391 (noting “the Court’s shifting and uncertain use of the distinctions between civil and criminal laws and between remedial and punitive laws”).

224. See Clark, *supra* note 221, at 401-03.

225. See *id.* at 403; see also Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-97, 1871 (1992) (noting that although courts and commentators sometimes speak of a binary opposition between criminal punishment and civil remedies, “there has always been a middleground in which legislatures and courts sought punitive ends through nominally civil proceedings”).

proceedings (even those involving punishment).²²⁶ By its terms, for instance, the Sixth Amendment covers only “criminal prosecutions.”²²⁷ Similar limitations appear in several provisions of the Fifth Amendment—the Grand Jury Clause (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”²²⁸), the Double Jeopardy Clause (“ . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb”²²⁹), and the

226. See Clark, *supra* note 221, at 383 (positing that the Court’s cases reflect the fact that “the Constitution makes certain provisions applicable only to criminal prosecutions”); see also Austin v. United States, 509 U.S. 602, 608 n.4 (1993) (subsequently offering the same explanation for the Court’s outcomes).

227. U.S. CONST. amend. VI.

228. U.S. CONST. amend. V.

229. *Id.* Although the Double Jeopardy Clause speaks of putting someone “in jeopardy of life or limb” for an offense, there was a brief period in which the modern Supreme Court read it to limit civil penalties too. See United States v. Halper, 490 U.S. 435, 446-51 (1989); cf. Dep’t. of Revenue v. Kurth Ranch, 511 U.S. 767, 776-84 (1994) (following *Halper* in de-emphasizing the civil/criminal distinction, and holding that a state’s purported tax on the illegal possession of drugs implicated the Double Jeopardy Clause because the tax “is fairly characterized as punishment”). But the Court has since retreated from those opinions. See Hudson v. United States, 522 U.S. 93, 101 (1997) (faulting *Halper* for “deviat[ing] from longstanding double jeopardy principles” and “bypass[ing] the threshold question: whether the successive punishment at issue is a ‘criminal’ punishment”); see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1812 n.34 (1997) (“[N]ot until the late 1980s did the Supreme Court ever embrace the novel notion that the Double Jeopardy Clause could be stretched to cover some civil suits about money.”). Under current doctrine, the Double Jeopardy Clause restricts only successive *criminal* prosecutions and *criminal* punishments. See Hudson, 522 U.S. at 95-96, 99; cf. *id.* at 99-100 (endorsing a multifactor test for identifying whether a particular punishment is “criminal”).

As a historical matter, indeed, it is possible that the phrase “jeopardy of life or limb” was originally understood to refer to only a subset of criminal prosecutions. In the nineteenth century, some state courts interpreted similar language in state constitutions to cover only prosecutions for felonies. See *People v. Goodwin*, 18 Johns. 187, 201 (N.Y. Sup. Ct. 1820); see also *id.* at 197 (argument of counsel) (explaining that the phrase “life or limb” was “derived from the ancient punishment of felonies, and has acquired a technical meaning which has been preserved since the abolition of the punishment [of loss of limb]”); 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 656 (Boston, Little, Brown & Co. 1856) (agreeing that, strictly speaking, the Double Jeopardy Clause “extends to all felonies, but not to misdemeanors”); OFFICE OF LEGAL POLICY, DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS 6 (1987), reprinted in 22 U. MICH. J. L. REFORM 831, 842 (1989) (calling this view of the Clause’s original meaning “highly probable”); cf. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 54 (1999) (supporting the even narrower view that “to be in ‘jeopardy of life or limb’ meant to be in jeopardy of capital punishment”). Ever since 1874, however, the U.S. Supreme Court has extended the protections of the Double Jeopardy Clause to misdemeanors as well. See *Ex parte Lange*, 85 U.S. 163, 168-73 (1874).

Self-Incrimination Clause (“ . . . nor shall [any person] be compelled in any criminal case to be a witness against himself”²³⁰). With the exception of the Self-Incrimination Clause (which *Boyd* arguably misinterpreted), the Supreme Court has generally held that these provisions do not apply to civil-forfeiture proceedings.²³¹ As Professor Clark noted, the most logical explanation of that conclusion is not that civil-forfeiture proceedings are “remedial” rather than “punitive,” but simply that they are not “criminal” in the necessary sense.²³²

By contrast, some other constitutional provisions are worded in such a way as to restrict all types of punishment, whether enforced through criminal or civil proceedings. For these provisions, the criminal/civil distinction does not matter; instead, the punitive/remedial distinction takes over. That explains why civil forfeiture is subject to the Excessive Fines Clause. At least on its face, the Excessive Fines Clause is not limited to *criminal* punishment,²³³ and the Supreme Court has understood it to restrict fines and forfeitures imposed through civil process too.²³⁴

As Professor Clark suggested, the Ex Post Facto Clauses may be similar.²³⁵ Although some modern federal judges take the Supreme Court to have held

230. U.S. CONST. amend. V.

231. See Clark, *supra* note 221, at 394-96; see also *id.* at 414 (criticizing *Boyd*'s reasoning).

232. See *id.* at 395-96.

233. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

234. See *Austin v. United States*, 509 U.S. 602, 610 (1993) (concluding that for purposes of triggering review under the Excessive Fines Clause, “the question is not . . . whether forfeiture under [21 U.S.C.] §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment”); see also Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1234 (1987) (arguing that the Clause reaches civil as well as criminal cases); cf. *Hanscomb v. Russell*, 77 Mass. 373, 374-75 (1858) (acknowledging that “one of the technical meanings of the word [‘fine’]” covers “only those pecuniary punishments of offences, which are inflicted by sentence of a court in the exercise of criminal jurisdiction,” but observing that the word can also be used in a broader sense to encompass “forfeitures and penalties recoverable in civil actions,” and reading a state statute to use the word in the broader sense). *But cf.* *United States v. Mann*, 26 F. Cas. 1153, 1154-55 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.) (suggesting that unlike the words “penalty” and “forfeiture,” the word “fine” is “almost invariably applied to the act of the court in pronouncing a criminal sentence”); *id.* at 1156 (noting that such fines differ from civil penalties in that “where a fine is imposed, imprisonment in case of non-payment[] is a part of the judgment”); *Ex parte Marquand*, 16 F. Cas. 776, 776 (C.C.D. Mass. 1815) (No. 9,100) (similarly indicating that “in [its] technical sense,” the word “fines” refers exclusively to penalties recovered through criminal process).

235. See U.S. CONST. art. I, §§ 9-10 (forbidding Congress and the states to pass any “ex post facto Law”); Clark, *supra* note 221, at 425 (“[T]he ex post facto clause has been applied to a variety of laws which, though punitive, need not be called criminal.”); see also Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 360 (1993)

definitively that the Ex Post Facto Clauses “appl[y] only to criminal cases,”²³⁶ that gloss on the Court’s opinions may not be quite right. In the seminal case of *Calder v. Bull*,²³⁷ the Court did treat the phrase “ex post facto law” as a term of art that connotes the retroactive authorization of punishment. But the Justices’ seriatim opinions did not clearly specify whether the phrase is limited to *criminal* punishment,²³⁸ and subsequent courts used formulations that encompass penalties and forfeitures more broadly.²³⁹ In the 1860s, federal courts gave teeth to the broader idea: in several cases, they applied the Ex Post Facto Clauses to laws that did not operate through the criminal process, but that the courts saw as imposing “punishment” for pre-enactment conduct.²⁴⁰

(taking current doctrine to draw a “sharp distinction between the constitutional tests applied to criminal laws and punitive civil statutes,” but arguing that this distinction “lacks any legitimate historical or jurisprudential basis”).

236. *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 540 (5th Cir. 1987).

237. 3 U.S. (3 Dall.) 386 (1798).

238. That refinement was not at issue in *Calder*, and neither Justice Chase nor Justice Iredell focused on it. *See id.* at 390 (opinion of Chase, J.) (first saying that the Ex Post Facto Clauses prevent legislatures from passing laws that “punish” people for acts done before enactment, but then focusing on laws about “crime”); *id.* at 399-400 (opinion of Iredell, J.) (stating in one place that the Clauses are limited to “criminal” cases and in another place that the Clauses forbid legislatures to “inflict a punishment for any act, which was innocent at the time it was committed”).

239. *See, e.g.*, *Locke v. New Orleans*, 71 U.S. (4 Wall.) 172, 173 (1867) (“*Ex post facto* laws embrace only such as impose or affect penalties or forfeitures”); *see also* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 382 (New York, O. Halsted 1826) (taking Chief Justice Marshall’s opinion in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810), to define an ex post facto law as “one which rendered an act punishable in a manner in which it was not punishable when it was committed,” and noting that this definition “extends equally to laws inflicting personal or pecuniary penalties, and to laws . . . affecting a person by way of punishment, either in his person or estate”). Along the same lines, Justices Story and Washington both glossed the Ex Post Facto Clauses as operating not only in criminal prosecutions but in “penal” proceedings more broadly. *See infra* notes 247-265 and accompanying text (explaining that the word “penal” encompassed penalties that could be enforced without criminal process); *see also* *Watson v. Mercer*, 33 U.S. (8 Pet.) 88, 110 (1834) (Story, J.) (“[E]x post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings”); *United States v. Hall*, 26 F. Cas. 84, 86 (C.C.D. Pa. 1809) (No. 15,285) (jury charge of Washington, J.) (“An ex post facto law is one which in its operation makes that criminal or penal, which was not so at the time the action was performed; or which increases the punishment”). *But cf.* *Carpenter v. Pennsylvania*, 58 U.S. (17 How.) 456, 463 (1855) (saying that the Ex Post Facto Clauses “relat[e] to criminal cases only,” though not specifically discussing other “penal” proceedings).

240. *See* *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 327-28 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377-78 (1867); *Ex parte Law*, 15 F. Cas. 3, 12-13 (S.D. Ga. 1866) (No. 8,126).

Unfortunately, the Supreme Court later glossed these cases as establishing that “the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal,”²⁴¹ and the modern Court has continued to muddy the waters by conflating the punitive/nonpunitive distinction with the criminal/civil distinction.²⁴² That has led several lower federal courts to suggest that unless a civil-forfeiture statute is so “overwhelmingly punitive” that it “must be considered criminal,” the Ex Post Facto Clauses do not prevent it from operating retroactively²⁴³—with the result, apparently, that a statute enacted in 2016 could declare that property has been forfeited to the government because of how the property was used in 2015. Professor Clark’s analysis shows the route away from this conclusion: the distinction that matters to the Ex Post Facto Clauses, as interpreted by the Supreme Court over the years, is not the criminal/civil distinction but the punitive/nonpunitive distinction.²⁴⁴

C. Historical Support for the Category of Civil Punishment

Professor Clark cast his analysis mostly as a way to make sense of current judicial doctrine.²⁴⁵ But there is considerable historical support for his key insight: not all punishment is *criminal* punishment.

In the eighteenth and nineteenth centuries, many statutes backed up their requirements by subjecting violators to monetary penalties.²⁴⁶ Lawyers of the day classified such statutes as “penal.”²⁴⁷ But they did not mean that the mulcts

241. *Burgess v. Salmon*, 97 U.S. 381, 385 (1878).

242. *See, e.g., Smith v. Doe*, 538 U.S. 84, 92-106 (2003).

243. *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 544 (5th Cir. 1987); *accord, e.g., Universal Ins. Co. v. Dep’t of Justice*, 866 F. Supp. 2d 49, 63-67 (D.P.R. 2012); *United States v. All Assets Held at Bank Julius Baer & Co.*, 571 F. Supp. 2d 1, 7-9 (D.D.C. 2008).

244. *See Clark, supra* note 221, at 425. For a suggestion that the Supreme Court should have understood the Ex Post Facto Clauses to forbid retroactive legislation of any sort, and that *neither* the civil/criminal distinction *nor* the punitive/nonpunitive distinction is true to the Clauses’ original meaning, see Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WIS. L. REV. 727.

245. *See Clark, supra* note 221, at 383-84.

246. *See, e.g.,* Collection Act of 1789, ch. 5, §§ 11, 12, 16, 29, 1 Stat. 29, 39, 41, 45; *see also* Table of Fines, Forfeitures, Penalties and Amercements, in 2 A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA OF A PUBLIC AND PERMANENT NATURE AS HAVE PASSED SINCE THE SESSION OF 1801, app. at 213-34 (Richmond, Samuel Pleasants, Jr. 1808) (taking more than twenty pages to index statutes of this sort in just one state).

247. *See generally* WILLIAM ADDINGTON, AN ABRIDGMENT OF PENAL STATUTES (London, 3d ed. 1786) (listing thousands of infractions for which English statutes authorized penalties and punishments, and referring to all these statutes as “penal” whether the penalty was death or

authorized by these statutes could be recovered only through criminal prosecutions.²⁴⁸ According to Justice Story, indeed, unless the statute “specially allowed” the use of criminal process, “an indictment [will not] lie for such a penalty.”²⁴⁹ Instead, the default process for collecting monetary penalties of this sort was “an action or information of debt” brought by the government against the person who had violated the statute (and who therefore was indebted to the government in the amount of the penalty).²⁵⁰

An “action of debt,” even to collect a statutory penalty, was a civil proceeding.²⁵¹ So was an “information of debt,” which again should not be

a small pecuniary mulct); *see also* ISAAC 'ESPINASSE, A TREATISE ON THE LAW OF ACTIONS ON PENAL STATUTES 5 (Exeter, George Lamson, 1st Am. ed. 1822) (similarly describing statutes that authorized monetary penalties as “penal”).

248. *Cf.* Martinez, *supra* note 200, at 1110 (observing that in the nineteenth century, “the words ‘criminal’ and ‘penal’ were not . . . equivalent”).
249. *Matthews v. Offley*, 16 F. Cas. 1128, 1130 (C.C.D. Mass. 1837) (No. 9,290); *accord Ex parte Marquand*, 16 F. Cas. 776, 777 (C.C.D. Mass. 1815) (No. 9,100). Justice Story based this conclusion on his understanding of English practice. *See id.* (citing *Rex v. Malland* (1728) 93 Eng. Rep. 877 (K.B.); *see also* *United States v. Mann*, 26 F. Cas. 1153, 1154 (C.C.D.N.H. 1812) (No. 15,718) (Story, J.) (“It is laid down as law in *Rex v. Malland* . . . that where a pecuniary penalty is annexed to an offence, and no mode of prosecution is prescribed, an indictment does not lie thereon; but only an information of debt in the exchequer.”). *But see* *United States v. Chapel*, 25 F. Cas. 395, 397-98 (W.D. Mich. 1863) (No. 14,781) (arguing that the government can collect such penalties *either* through civil actions *or* by indictment, and asserting that *Rex v. Malland* “stand[s] . . . opposed to many other cases in the English courts”).
250. *Matthews*, 16 F. Cas. at 1130; *United States v. Lyman*, 26 F. Cas. 1024, 1030 (C.C.D. Mass. 1818) (No. 15,647) (jury charge of Story, J.); *see also, e.g.,* *Jacob v. United States*, 13 F. Cas. 267, 268 (C.C.E.D. Va. 1821) (No. 7,157) (Marshall, J.) (“[T]he books say, expressly, that where a penalty is given by a statute, and no remedy for its recovery is expressly given, debt lies.”); *cf.* *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 543 (1871) (“[I]t has frequently been ruled that debt will lie, at the suit of the United States, to recover the penalties and [monetary] forfeitures imposed by statutes.”); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Marshall, C.J.) (“Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information . . .”).
251. *See Mann*, 26 F. Cas. at 1154; *United States v. Mundell*, 27 F. Cas. 23, 26 (C.C.D. Va. 1795) (No. 15,834); *see also Jacob*, 13 F. Cas. at 269 (dictum of Marshall, C.J.) (“An action for debt for a penalty[] appears to me to be a ‘civil cause’ under the 9th section of the judicial act, which defines the jurisdiction of the district courts.”); *Dow v. Norris*, 4 N.H. 16, 20 (1827) (“[I]t seems to be well settled that an action of debt, or an information brought to recover a penalty is a civil proceeding.”); *City of Cincinnati v. Gwynne*, 10 Ohio 192, 196 (1840) (in bank) (“[A]lthough debt is a civil action, it is not unfrequently brought to recover penalties for the violation of statutes.”). Actions of debt to collect statutory penalties were also classified as “civil” when initiated by relators under *qui tam* statutes. *See Atcheson v. Everitt* (1775) 98 Eng. Rep. 1142, 1147 (K.B.) (Lord Mansfield) (“Penal actions were never yet put under the head of criminal law, or crimes. . . . [This action of debt] is as much a civil action, as an action for money had and received.”); *see also Hitchcock v. Munger*, 15 N.H. 97,

confused with a *criminal* information.²⁵² Like the information in rem, the information of debt was a familiar process in England's Court of Exchequer: just as the Crown might file an information in rem against specific items of property that allegedly had been forfeited, so too the Crown might file an information of debt against a person who allegedly owed the Crown a monetary penalty for having violated a statute.²⁵³ Authorities agreed that this process "is in the nature of a civil action at the suit of the Crown" and amounted to "the King's action of debt."²⁵⁴

When Justice Story wrote that "an action or information of debt" was the default mechanism for the government to recover a monetary penalty imposed by statute,²⁵⁵ he plainly was referring to civil proceedings. Indeed, even judges who believed that the government *could* use criminal process to collect such penalties agreed that the government rarely did so: "the usual and almost universal practice, in the courts of the United States, has been to enforce the payment of pecuniary penalties, given by statute, by civil and not criminal proceedings."²⁵⁶

By the mid-nineteenth century, both legislatures and courts were using the term "civil penalties" as shorthand for such mulcts.²⁵⁷ Likewise, courts emphasized that proceedings to recover these penalties were "penal" but not "criminal."²⁵⁸ Admittedly, there were certain respects in which courts treated penal statutes like criminal statutes. For instance, interpreters often said that penal as well as criminal statutes should be "construed strictly,"²⁵⁹ and the

104 (1844) ("The decisions that have been made in relation to *qui tam* actions are consistent with the judgment of the court in the important and much considered case of *Atcheson v. Everett . . .*").

252. See *supra* note 71 and accompanying text.

253. CHITTY, *supra* note 71, at 332.

254. *Id.* at 332, 335; see also, e.g., *Mann*, 26 F. Cas. at 1154 ("I take it to be clear, that an information of debt in the exchequer for a penalty, is as much a civil proceeding, as an action of debt."); *Huntley v. Luscombe* (1801) 126 Eng. Rep. 1422, 1423 (C.P.) (argument of counsel) ("All suits in the Exchequer for penalties of this nature, though in the name of the King, are considered as civil suits; for the Court of Exchequer is not a criminal court.").

255. *Matthews*, 16 F. Cas. at 1130.

256. *United States v. Chapel*, 25 F. Cas. 395, 397 (W.D. Mich. 1863) (No. 14,781).

257. See, e.g., Act of Apr. 16, 1850, No. 322, § 49, 1850 Pa. Acts 477, 494; *State v. Thomas*, 12 Rob. 48, 50 (La. 1845); *Behan v. People*, 17 N.Y. 516, 517 (1858).

258. E.g., *Thomas*, 12 Rob. at 50 ("The statute itself does not seem to contemplate a *criminal*, but rather a *penal* proceeding."); see also *Mann*, 26 F. Cas. at 1154 ("[A]ll infractions of public laws are offences; and it is the mode of prosecution, and not the nature of the prohibitions, which ordinarily distinguishes penal statutes from criminal statutes.").

259. *United States v. Eighty-four Boxes of Sugar*, 32 U.S. (7 Pet.) 453, 462-63 (1833); see also *The Enterprise*, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4,499) (explaining the principle of

courts of one sovereign did not feel obliged to entertain proceedings to enforce either the penal or the criminal laws of another sovereign.²⁶⁰ On matters of practice and procedure, though, the penal actions that courts did entertain generally followed civil rather than criminal rules.²⁶¹

Throughout American history, courts have taken a similar approach to statutes that threatened violators not with monetary penalties, but with the forfeiture of specific items of property. Early courts regularly referred to such

strict construction as meaning that penal statutes “shall not, by what may be thought their spirit or equity, be extended to offences other than those which are specially and clearly described and provided for”); Martinez, *supra* note 200, at 1110 (noting the application of this principle to civil-forfeiture statutes). *But see* Taylor v. United States, 44 U.S. (3 How.) 197, 210 (1845) (agreeing with the court below that “[l]aws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good” can sometimes be classified as remedial, and hence need not always “be construed with great strictness in favour of the defendant,” even if they back up their requirements with penalties).

260. *See* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 290 (1888) (“The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties.”); State v. M’Bride, 24 S.C.L. (Rice) 400, 413 (1839) (“It is . . . a settled principle of jurisprudence, sanctioned by the practice of all countries, especially of England and of these States, that the courts of one country will not enforce the penal laws of another, much less will they undertake to prosecute and punish crimes and public offences against another.”); *see also* Martinez, *supra* note 200, at 1108, 1111 (noting that “the classic statement of this conflict-of-laws rule actually comes from a slave-trade forfeiture case, *The Antelope*, [23 U.S. (10 Wheat.) 66, 123 (1825)],” which was a “civil proceeding”).
261. *See* 5 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 243 (Boston, Cummings, Hilliard & Co. 1824) (“*Penal actions*, or actions for penalties, given by statute, are *civil* actions”); *see also, e.g.*, Pettis v. Dixon, 1 Kirby 179, 180 (Conn. 1786) (applying normal civil doctrines about setting aside a jury’s verdict for the defendant); Barnacoat v. Six Quarter Casks of Gunpowder, 42 Mass. (1 Met.) 225, 230 (1840) (observing that “a libel, sued as a process *in rem* for a forfeiture, is in the nature of a civil action,” and that the libellants therefore could file a bill of exceptions). *But see* Buckwalter v. United States, 11 Serg. & Rawle 193, 197 (Pa. 1824) (holding that “[a]n action for a penalty inflicted for an offence[] is not a civil action” within the meaning of Pennsylvania’s arbitration statute, with the result that “[a]n offender cannot say to the United States, or to the state, I will arbitrate this matter with you” (emphasis omitted)); *cf.* An Act Regulating Arbitrations, ch. 102, § 1, 1809 Pa. Acts 145, 145 (1810) (giving “either party . . . in all civil suits or actions . . . in any court of this Commonwealth” a unilateral right to force the case into arbitration). Although courts did recognize some exceptions, *see infra* notes 266-271 and accompanying text, the pattern of using civil procedure for penal actions persisted. *See, e.g.*, Alfred Pizey, *Penalties and Penal Actions*, in 16 THE ENCYCLOPAEDIA OF PLEADING AND PRACTICE 229, 235 (Northport, Edward Thompson Co. 1899) (“The general principles applicable to matters of pleading and procedure in penal actions are, as a rule, those which govern the particular civil action brought, and not those which obtain in criminal prosecutions.”).

provisions as “penal”²⁶² and as inflicting a species of “punish[ment]” on the property’s owner.²⁶³ Statutes themselves sometimes used similar language, as when they said that their requirements applied “on pain of forfeiture” of the property involved in a violation.²⁶⁴ Again, though, penal did not mean criminal. Like informations of debt, the libels or informations in rem that were used to enforce such forfeitures were “civil proceedings.”²⁶⁵

Despite the general rule that nineteenth-century courts applied doctrines of civil procedure in actions of debt for penalties and proceedings in rem for forfeitures, there were some exceptions. *Locke v. United States*²⁶⁶ may be an early example. There, the government had filed an eleven-count libel seeking to declare the forfeiture of a cargo for violations of the Collection Act and some other federal statutes, and the district court had rendered judgment in the government’s favor.²⁶⁷ When the case reached the Supreme Court, Chief Justice Marshall affirmed the judgment on the strength of one of the counts in the libel, which allegedly warranted the forfeiture irrespective of the claimant’s objections to the other counts.²⁶⁸ At least according to the Taney Court, Marshall’s conclusion that the judgment could be affirmed on the basis of just one of the counts reflected the view that the case was “in the nature of a criminal proceeding.”²⁶⁹ The analogy between penal actions and criminal

262. See, e.g., *Eighty-four Boxes of Sugar*, 32 U.S. (7 Pet.) at 462; *The Enterprise*, 8 F. Cas. at 734; see also *The Emily*, 22 U.S. (9 Wheat.) 381, 389 (1824) (referring to “the penalty of forfeiture” under certain federal statutes).

263. E.g., *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (Marshall, C.J.); see also *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 61 (1804) (“The forfeiture of the thing [under a federal statute laying duties on refined sugar] is not the recovery and receipt of a duty, but a punishment for the non-payment of it . . .”).

264. See, e.g., Collection Act of 1799, ch. 22, § 103, 1 Stat. 627, 701; Act of Mar. 3, 1791, ch. 15, §§ 11, 20, 1 Stat. 199, 202, 204.

265. Anonymous, 1 F. Cas. 996, 997 (C.C.D. Mass. 1812) (No. 444) (Story, J.).

266. 11 U.S. (7 Cranch) 339 (1813).

267. *Id.* at 339-41.

268. See *id.* at 344 (“The Court . . . is of opinion, that the 4th count is good, and this renders it unnecessary to decide on the others.”).

269. *Clifton v. United States*, 45 U.S. (4 How.) 242, 250 (1846). Although the report of Marshall’s opinion in *Locke* does not itself offer this explanation, the Taney Court’s inference is plausible. See, e.g., *Whitfield v. Hunt* (1784) 99 Eng. Rep. 464, 466 (K.B.) (Lord Mansfield) (indicating that civil cases were different from criminal cases in this respect, though lamenting that fact and criticizing the civil practice). Still, the fact that *Locke* reached the Supreme Court by writ of error shows that Chief Justice Marshall and his colleagues did not deem the case to be criminal in the technical sense. See *United States v. Emholt*, 105 U.S. 414, 416 (1881); *Ex parte Gordon*, 66 U.S. (1 Black) 503, 504-05 (1862); see also *Snyder v. United States*, 112 U.S. 216, 216-17 (1884) (acknowledging that “[i]nformations under the revenue laws for the forfeiture of goods, seeking no judgment of

prosecutions may also have led judges to require more specificity in pleadings than standard civil practice would have demanded,²⁷⁰ and perhaps to apply a higher standard of proof at trial.²⁷¹ With rare exceptions, though, even judges who took this view of penal actions did not cast their position in constitutional terms.²⁷² As a result, people seem to have thought that statutes could validly instruct courts to treat penal actions like ordinary civil suits.²⁷³

fine or imprisonment against any person, . . . are civil actions,” but citing *Clifton* for the proposition that “they are so far in the nature of criminal proceedings, as to come within the rule that a general verdict, upon several counts seeking in different forms one object, must be upheld if one count is good”).

270. See, e.g., *United States v. Huckabee*, 83 U.S. (16 Wall.) 414, 431 (1872) (“[T]he rule is that inasmuch as the information is in the nature of a criminal proceeding, the allegations must conform strictly to the statute upon which it is founded”); *The Schooner Hoppet*, 11 U.S. (7 Cranch) 389, 393–94 (1813) (Marshall, C.J.) (concluding that in admiralty as at law, informations to enforce forfeitures in rem must include “a substantial statement of the offence upon which the prosecution is founded”); *United States v. Three Parcels of Embroidery*, 28 F. Cas. 141, 143 (D. Mass. 1856) (No. 16,512) (“It was long ago held by the supreme court, that an information to recover a penalty under the collection act of 1799, is in the nature of a criminal proceeding. The description of the offence for which the penalty is demanded, must have the same kind and degree of certainty that is ordinarily required in other criminal proceedings.” (citations omitted)).
271. Compare *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 690 (1835) (“The object of the prosecution against the Burdett is to enforce a forfeiture of the vessel, and all that pertains to it, for a violation of a revenue law. This prosecution then is a highly penal one, and the penalty should not be inflicted, unless the infractions of the law shall be established beyond reasonable doubt.”), *Tompkins v. Butterfield*, 25 F. 556, 558 (C.C.D. Mass. 1885) (jury charge) (“[A]nother consequence flowing from this being . . . in the nature of a criminal proceeding, is this: that the offense must be proved by evidence that leaves upon the minds of the jury no reasonable doubt that the penalty has been incurred.”), and *Brooks v. Clayes*, 10 Vt. 37, 50 (1838) (holding that in a *qui tam* action for a penalty, “the case must be established beyond a reasonable doubt”), with *Three Thousand Eight Hundred and Eighty Boxes of Opium v. United States*, 23 F. 367, 392–96 (C.C.D. Cal. 1883) (noting sharp divisions of authority on this question, but reading *Lilienthal’s Tobacco v. United States*, 97 U.S. 237 (1878), to support requiring only a preponderance of the evidence), *United States v. Brown*, 24 F. Cas. 1248, 1249 (D. Or. 1869) (No. 14,662) (jury charge) (observing, in an action brought by the government to recover a monetary penalty, that “this is a civil action” and “[i]t is . . . not necessary for the government to establish the charge beyond a reasonable doubt”), and *Hitchcock v. Munger*, 15 N.H. 97, 98, 104–05 (1844) (agreeing with the trial judge that normal civil standards of proof applied in a *qui tam* action to collect a monetary penalty for violation of a statute). Analysis of this issue is complicated by a split of authority on a related question: according to some nineteenth-century courts, allegations of behavior that would amount to a crime needed to be proved beyond a reasonable doubt even in ordinary civil lawsuits seeking purely compensatory damages. See, e.g., JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 335 (San Francisco, Sumner Whitney & Co. 1877) (citing cases on both sides).
272. Before *Boyd*, the principal exceptions to this statement were opinions about the Maine liquor laws. See, e.g., *Hibbard v. People*, 4 Mich. 125, 129–30 (1856); see also cases cited *supra* notes 143–144. As noted above, those laws had idiosyncratic features, and courts tended to

In the first edition of his treatise on criminal law, published in 1856, Joel Prentiss Bishop did try to identify some constitutional limitations on the use of civil procedure to enforce statutory forfeitures. While conceding that “the adjudications on the subject are not numerous,” Bishop asserted that

a legislative forfeiture may be so far in the nature of a punishment for crime, in distinction from a regulation concerning the use of the property, as to require the proceedings, for its enforcement, to be regulated with a reference to the guaranties of rights for the protection of persons charged with crime.²⁷⁴

By 1865, Bishop had developed a more precise formulation of the distinction that he had in mind. His basic idea, as expressed in the heading of the relevant chapter in the third edition, was that forfeiture could proceed outside of the criminal process “where the thing, as distinguished from its owner, is in the wrong.”²⁷⁵ Thus, “[w]henver the law . . . creates a forfeiture of property by reason of its circumstances, or of its peculiar nature as being dangerous to the community, — by reason of any form or position which it assumes, — this forfeiture is not to be deemed a punishment inflicted on its owner.”²⁷⁶ By contrast,

distinguish them from other forfeiture statutes. *See supra* notes 140-148 and accompanying text; *see also* *United States v. Three Tons of Coal*, 28 F. Cas. 149, 154, 156 (E.D. Wis. 1875) (No. 16,515) (holding that an ordinary forfeiture proceeding in rem was not a “criminal case” within the meaning of the Fifth Amendment, and distinguishing opinions about the Maine laws).

273. *See, e.g.*, Act of Mar. 9, 1854, ch. 696, tit. I, § 8, 1853 Ky. Acts 92, 93 (“The proceedings in penal actions are regulated by the code of practice in civil actions.”); *Commonwealth v. Sherman*, 4 S.W. 790, 792 (Ky. 1887) (“Undoubtedly, the legislature may authorize a civil action to be maintained for a forfeiture.”); *see also Locke*, 11 U.S. (7 Cranch) at 348 (applying the provision in the Collection Act of 1799 that put the burden of proof on the claimant rather than the government); *supra* note 186 (citing the Collection Act and some of its antecedents). After *Boyd*, courts expressed more doubts on this topic. *See, e.g.*, *United States v. A Lot of Jewelry*, 59 F. 684, 690-91 (E.D.N.Y. 1894) (noting uncertainty about how to interpret *Boyd*); *cf. United States v. Shapleigh*, 54 F. 126, 129-30 (8th Cir. 1893) (“[I]f the government enacts a statute which provides that a case in its nature criminal, whose purpose is punishment, whose prosecutor is the state, and whose successful prosecution disgraces the defendant, and forfeits his property to the state as a punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that ought to be applied to it? . . . Is a wolf in sheep’s clothing a wolf or a sheep?”).

274. 1 BISHOP, *supra* note 229, § 702.

275. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW ch. XLIV (Boston, Little, Brown & Co. 3d ed. 1865).

276. *Id.* § 709. In the fourth edition, Bishop added a crucial qualification at the end of this sentence. Instead of flatly declaring that such forfeiture “is not to be deemed a punishment inflicted on [the property’s] owner,” he clarified that it “is not to be deemed a punishment

if the law provides, that a person shall forfeit property A for what property B does, or for what the owner does in a matter not connected with the property, or for a bare intent which does not enter into the situation and conduct of the property, the forfeiture is a punishment, which can be inflicted only on conviction of the owner, for the act or intent, viewed as a crime.²⁷⁷

Unfortunately, this analysis risks conflating two separate questions. One question, addressed in Part I of this Feature, concerns the circumstances in which actions must proceed in personam against an offender rather than in rem against property that the offender happens to own. By and large, Bishop's position on this question was consistent with traditional practices. Bishop did not deny that the law can declare the forfeiture of property that is used in violation of legal restrictions, or that the law can enforce such forfeitures through proceedings in rem.²⁷⁸ His basic point was simply that the law cannot extend this treatment to other pieces of property that are not at all germane to the violations.²⁷⁹ That point does not necessarily undermine the

inflicted on [the property's] owner *in the criminal-law sense, and within constitutional guaranties protecting persons who are accused of crime.*" 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 709 (Boston, Little, Brown & Co. 4th ed. 1868) (emphasis added).

277. 1 BISHOP, *supra* note 275, § 709. Rufus Waples expressed similar views in the 1880s. See WAPLES, *supra* note 60, at 37-38.
278. See 1 BISHOP, *supra* note 275, § 698 (referring to some such forfeiture statutes and raising no doubts about their constitutionality).
279. In addition to making this point, Bishop also suggested that Congress cannot authorize proceedings in rem to enforce forfeitures that depend on an offender's mental state. Bishop derived that limitation from the fact that property does not think, and so "a mere intent in a man's mind cannot be deemed an act of his property." *Id.* § 700. For Bishop, it followed that if a statute makes forfeiture depend centrally on "an intent in the mind of [the property's] owner," so that the owner's intent is "the gist" of the legal trigger for forfeiture, "then the question is one of the criminal law, and the forfeiture is a penalty imposed for crime." *Id.* § 708; *cf. id.* (conceding that if the law gave intent only a "secondary" role, "the fact of its being introduced into the consideration of the case will not alone make the forfeiture a penalty for crime").

This aspect of Bishop's argument was idiosyncratic, and defending it required Bishop to engage in some contortions. As Bishop knew, federal law had long permitted owners to seek remission of certain forfeitures on the ground that neither the owners nor their agents had intended to do anything wrong. See *id.* § 701; see also, e.g., Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122-23 (empowering the Secretary of the Treasury to remit many fines, penalties, or forfeitures "if in his opinion [they were] incurred without wilful negligence or any intention of fraud"). In an apparent effort to fit his theory to the historical data, Bishop argued that this feature did not transform otherwise valid forfeitures into criminal punishments of the sort that required criminal procedure. See 1 BISHOP, *supra* note 275, § 709 ("[I]f the law, in its clemency, permits the owner still to retain his property and avoid

constitutionality of modern forfeiture statutes, which continue to focus on property connected with a violation of the law.²⁸⁰

To the extent that some forfeiture actions must proceed in personam rather than in rem, though, a second question arises: under what circumstances must the proceeding take the form of a criminal prosecution rather than a civil suit? Without focusing specifically on this question, Bishop arguably assumed that criminal procedure is necessary when the law is imposing “a punishment” on an individual.²⁸¹ But the long history of civil penalties cuts against any such assumption: from the beginning of the Republic on, many statutes have punished infractions with monetary penalties that the government could collect in actions of debt or other civil proceedings.²⁸² Bishop did not attack the constitutionality of those statutes. Nor did he suggest that the Constitution prevented legislatures from enacting civil-forfeiture statutes for punitive purposes. To the contrary, he acknowledged that the motivation behind some such statutes was “the same which pervades our criminal law,” and he did not assert that this motivation made the statutes unconstitutional.²⁸³

Whatever the details of Bishop’s own views, some nineteenth-century lawyers did reject the idea that civil process could be used for punitive purposes. This topic received particular attention in the context of punitive damages.²⁸⁴ Dating back to the eighteenth century, both English and American courts had explicitly allowed juries to award “exemplary” or “vindictive”

the forfeiture on showing himself innocent of any wrong in the matter, there is no more a punishment involved in the case than there was before.”). But whether the owner’s intent comes up as part of the government’s case, the owner’s defense, or a later request for remission, it still is not attributable to the property. If civil-forfeiture laws can validly make innocent intent a basis for avoiding forfeiture, they presumably can make guilty intent a ground for forfeiture.

280. Cf. *supra* notes 161-175 and accompanying text (discussing whether statutes authorizing actions in rem against the proceeds of illegal activity are a counterexample).

281. See *supra* text accompanying note 277. But see *supra* note 276 (suggesting that by 1868, Bishop recognized the possibility of noncriminal punishment).

282. See *supra* notes 246-261 and accompanying text.

283. See 1 BISHOP, *supra* note 275, § 702. Admittedly, Bishop’s discussion of this point may simply have reflected his view that “[t]he court should never impute evil motives to the legislative body.” JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 38 (Boston, Little, Brown & Co. 1873); see also Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1812 (2008) (“Under the doctrine that was dominant until the 1870s, if a statute did not itself acknowledge its purposes, and if some hypothetical set of facts would justify its enactment, courts were supposed to assume that the legislature had been pursuing permissible purposes . . .”).

284. See Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 614-29 (2003) (canvassing nineteenth-century views of punitive damages).

damages in certain kinds of tort cases involving outrageous conduct,²⁸⁵ and American judges of the early nineteenth century had described such damages as a form of punishment.²⁸⁶ In 1830, however, Theron Metcalf wrote an article arguing that this common way of talking was “not true” and “there is nothing punitive in civil actions.”²⁸⁷ According to Metcalf, what courts had called “vindictive” damages amounted to compensation “for insult, contumely, and abuse” – misconduct that inflicted genuine harms on plaintiffs even though those harms did not give rise to an independent cause of action.²⁸⁸ In the 1840s, Simon Greenleaf agreed with Metcalf. Dismissing contrary comments in judicial opinions as “*obiter dicta*,” Greenleaf insisted that no express holding had definitively allowed civil juries to impose damages for the sake of punishment.²⁸⁹

As Theodore Sedgwick soon pointed out, though, this reading of the cases was strained: courts *had* upheld the award of genuinely punitive damages in civil actions.²⁹⁰ In 1852, indeed, the federal Supreme Court asserted that “if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.”²⁹¹ In

285. See Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1287-91 (1993) (citing the classic cases).

286. See, e.g., *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818) (Story, J.); *Tillotson v. Cheetham*, 3 Johns. 56, 58 (N.Y. Sup. Ct. 1808) (describing jury charge of Kent, C.J.); see also *id.* at 66 (Spencer, J., dissenting) (“In vindictive actions, such as for libels, defamation, assault and battery, false imprisonment, and a variety of others, it is always given in charge to the jury, that they are to inflict damages for example’s sake, and by way of punishing the defendant.”).

287. Theron Metcalf, *A Reading on Damages in Actions Ex Delicto*, 3 AM. JURIST & L. MAG. 287, 305 (1830); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 81-82 (1977) (discussing Metcalf’s article).

288. Metcalf, *supra* note 287, at 305-06.

289. Simon Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 9 L. REP. 529, 535 (1847); see also 2 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* 219 n.3 (1846) (crediting Metcalf).

290. See Theodore Sedgwick, *The Rule of Damages in Actions Ex Delicto*, 10 L. REP. 49 (1847); see also *McBride v. McLaughlin*, 5 Watts 375, 376 (Pa. 1836) (“Whatever be the speculative notions of fanciful writers, the authorities teach that damages may be given, in peculiar cases, not only to compensate, but to punish.”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 113 (1992) (“[Sedgwick] demonstrated overwhelmingly the long-standing authority behind punitive damages.”). *But cf.* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 459-61 (2006) (concluding that Greenleaf’s reading of some of the old English opinions was better than Sedgwick’s).

291. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852).

Justice Grier's words, "[b]y the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."²⁹²

Even if Sedgwick was correct about the case law, some judges thought that Metcalf and Greenleaf were "right in principle."²⁹³ In 1873, the Supreme Court of New Hampshire boldly held that "the idea of punishment is wholly confined to the criminal law" and that the state constitution forbade the award of punitive damages in civil cases.²⁹⁴ Some other state courts reached similar conclusions in the ensuing decades.²⁹⁵ But the majority of state courts refused to go along. While tending to acknowledge that punitive damages were a form of punishment, most state courts nonetheless allowed them to be imposed through civil process.²⁹⁶

If one accepts the constitutionality of genuinely punitive damages, and if one also accepts the constitutionality of statutes that threaten violators with "civil penalties" payable to the government (which have even more solid historical roots than punitive damages), it is hard to maintain that no form of punishment can ever be imposed through civil proceedings.²⁹⁷ If legislatures can establish civil penalties measured in money, moreover, it is not clear what would categorically prevent legislatures from establishing civil penalties that entail the loss of some other type of property. Of course, such exactions are limited by the Excessive Fines Clause and other constitutional provisions that

292. *Id.*; see also *Peshine v. Shepperson*, 58 Va. (17 Gratt.) 472, 488 (1867) ("The views of Mr. Sedgwick are sustained by the Supreme court of the United States and by the courts of most of the states.").

293. *Bass v. Chi. & Nw. Ry. Co.*, 42 Wis. 654, 672 (1877) (Ryan, C.J., concurring) (acknowledging that *stare decisis* foreclosed Greenleaf's position in Wisconsin); accord, e.g., *Duckett v. Pool*, 13 S.E. 542, 547 (S.C. 1891).

294. *Fay v. Parker*, 53 N.H. 342, 381-82 (1873); see also Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 182-89 (2003) (discussing the debate between Sedgwick and Greenleaf as well as the opinion in *Fay*).

295. See, e.g., *Murphy v. Hobbs*, 5 P. 119, 120-21 (Colo. 1884) (complaining that the award of punitive damages in civil cases ignored "the distinctions between civil and criminal procedure" and violated the spirit of the state constitution's Double Jeopardy Clause); *Spokane Truck & Dray Co. v. Hoefler*, 25 P. 1072, 1074 (Wash. 1891) (reaching the same bottom line on nonconstitutional grounds); see also HORWITZ, *supra* note 290, at 113-15 (chronicling opposition to punitive damages in the 1870s and 1880s); cf. *Taber v. Hutson*, 5 Ind. 322, 325-26 (1854) (adopting the more limited position that punitive damages should not be available for conduct that is also a crime).

296. See 17 C.J. *Damages* § 268 (1919).

297. Cf. *Maxeiner*, *supra* note 53, at 769 n.14 ("Civil suits often impose punishment, such as civil penalties and punitive damages in tort suits.").

have been understood to operate in civil as well as criminal cases. But the mere fact that a particular law uses forfeiture as a penalty does not automatically make actions to enforce the forfeiture “criminal” in the constitutional sense.

III. ADMINISTRATIVE VERSUS JUDICIAL

So far, this Feature has discussed two basic characteristics of civil forfeiture—the fact that it proceeds in rem and the fact that it does not afford the procedural protections that the Constitution requires for criminal cases. In light of historical practice, I have suggested that neither characteristic makes civil forfeiture unconstitutional. This Part considers a third aspect of forfeiture law that has less direct historical support and might seem even more objectionable: both at the federal level and in many states, property is often declared forfeit without any judicial proceedings at all.

Before 1844, the federal customs statutes required the government to launch proceedings in court whenever it had seized property that it wanted to be adjudged forfeit.²⁹⁸ But in 1844, Congress established a special procedure

in all cases of seizure of any goods, wares, or merchandise, which shall, in the opinion of the collector or other principal officer of the revenue making such seizure, be of the appraised value of one hundred dollars or less, and which shall have been so seized for having been illegally imported into the United States.²⁹⁹

If two appraisers agreed that the goods were worth \$100 or less, the responsible customs officials would publish a notice for three weeks in a local newspaper, describing the goods and the circumstances of their seizure and instructing any would-be claimants to appear within ninety days.³⁰⁰ If anyone filed a claim with the collector and posted a bond within that period, the collector would hand the matter off to the United States attorney for the relevant district, “who shall proceed thereon in the ordinary manner prescribed by law”—that is, by launching an action in rem in court.³⁰¹ But if no one

²⁹⁸. See, e.g., Collection Act of 1799, ch. 22, § 89, 1 Stat. 627, 695-96; Collection Act of 1789, ch. 5, § 36, 1 Stat. 29, 47-48; see also 1 SMITH, *supra* note 18, ¶ 6.01 n.2 (“Prior to 1844, the only way the government could effect a forfeiture was to institute suit in the district court.”).

²⁹⁹. Act of Apr. 2, 1844, ch. 8, § 1, 5 Stat. 653, 653.

³⁰⁰. *Id.*

³⁰¹. *Id.*

submitted a timely claim and posted the required bond, the collector would simply sell the goods at a public auction.³⁰²

For more than a century, Congress continued to restrict this administrative procedure to low-value property. As late as 1978, federal customs statutes authorized administrative forfeiture only for property worth \$2,500 or less.³⁰³ By 1990, however, Congress had raised the ceiling to \$500,000, and some types of property (including cash) had been exempted from the ceiling altogether.³⁰⁴

Despite increasing the value of the property subject to administrative forfeiture, Congress has not given people any more time to file claims and post bonds. In 1866, indeed, Congress shortened the deadline from ninety days to twenty days,³⁰⁵ and the federal customs statutes have retained that deadline ever since.³⁰⁶ The modern customs statutes do require the government to take more steps to notify interested parties that the clock is ticking: in addition to requiring notice by publication, current law provides that “[w]ritten notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.”³⁰⁷ But interested parties still have only “twenty days from the date of the first publication of the notice of seizure” to file a claim and post a bond (thereby prompting the government to launch either civil or criminal forfeiture proceedings in court).³⁰⁸ If no one claims the property within the twenty-day

302. *Id.* For the next year, an interested party who had been “absent out of the United States, or in such circumstances as prevented him from knowing of [the] seizure,” could apply to the Secretary of the Treasury for remission of the forfeiture and restoration of the proceeds of sale. *See id.* § 2, 5 Stat. at 653-54 (giving the Secretary discretion to grant this relief if the applicant established “that the said forfeiture was incurred without wilful negligence or any intention of fraud on the part of the owner or owners of such goods”). But if no such applications were made within a year after the sale, the Secretary would distribute the proceeds in the same manner as in the case of goods that were “condemned and sold pursuant to the decree of a competent court.” *Id.* § 3, 5 Stat. at 654.

303. *See* 19 U.S.C. § 1607 (1976).

304. *See* 19 U.S.C. § 1607 (1994); *cf.* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1566(a), 100 Stat. 2085, 2763 (amending I.R.C. § 7325, which addresses administrative forfeiture under the Internal Revenue Code, so as to raise the ceiling from \$2,500 to \$100,000).

305. Act of July 18, 1866, ch. 201, § 12, 14 Stat. 178, 181; *see also id.* § 11, 14 Stat. at 181 (raising the dollar limit to \$500). The same statute also shortened the deadline for asking the Secretary of the Treasury to remit a forfeiture after the government had sold the property. *See id.* § 13, 14 Stat. at 181 (requiring such applications to be made within three months of the sale); *cf. supra* note 302.

306. *See* 19 U.S.C. § 1609(a) (2012).

307. *Id.* § 1607(a).

308. *Id.* § 1608; *see also id.* § 1609.

deadline, “the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction . . . or otherwise dispose of the same according to law.”³⁰⁹ Ever since 1988, Congress has explicitly provided that “[a] declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States.”³¹⁰

In the 1970s and 1980s, this method of declaring forfeiture radiated from federal customs statutes into many other areas, because Congress piggybacked upon the customs procedures when enacting other forfeiture statutes.³¹¹ With respect to those other areas, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) has now made it somewhat easier for people to file claims (and thereby trigger judicial proceedings).³¹² Each federal agency that conducts administrative forfeitures under statutes covered by CAFRA must “make claim forms generally available on request,” and those forms must be “written in easily understandable language.”³¹³ CAFRA also gave people more time to file claims; instead of having only twenty days from the first publication of notice of seizure, each interested party to whom written notice must be sent³¹⁴ now has at least thirty-five days from the date that the notice is mailed to him personally.³¹⁵ Likewise, CAFRA eliminated the requirement that claimants post

309. *Id.* § 1609(a).

310. *Id.* § 1609(b).

311. *See, e.g.*, 18 U.S.C. § 981(d) (2012); 21 U.S.C. § 881(d) (2012).

312. *Cf. supra* note 189 (observing that CAFRA tried to exclude the federal customs statutes from most of its reforms, but pointing out a technical problem with part of the provision that purports to do so).

313. 18 U.S.C. § 983(a)(2)(D) (2012).

314. *Cf. supra* text accompanying note 307 (quoting the notice requirement established by 19 U.S.C. § 1607(a) (2012), which is relevant to all forfeiture statutes that piggyback upon the customs procedures).

315. *See* 18 U.S.C. § 983(a)(2)(B) (providing for the deadline to be “set forth in a personal notice letter,” but specifying that the deadline “may not be earlier than 35 days after the date the letter is mailed”); *see also id.* (adding that “if the letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure”); *id.* § 983(e) (providing that for five years after the date of final publication of the notice of seizure, a person who was “entitled to written notice” but “[did] not receive such notice” may file a motion in court to set aside a declaration of forfeiture, and requiring the court to grant this motion if “the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim” and “the Government knew, or reasonably should have known, of the moving party’s interest and failed to take reasonable steps to provide such party with notice”).

a bond.³¹⁶ But even after CAFRA, one expert suggests that as many as eighty percent of federal forfeiture proceedings are uncontested and are therefore handled administratively.³¹⁷

Critics might question the constitutionality of ever allowing officials in the executive branch to issue a conclusive “declaration of forfeiture,” even when the forfeiture is not contested.³¹⁸ By the very terms of current law, such declarations operate like judicial judgments.³¹⁹ From one perspective, then, federal statutes purporting to let customs officers and other administrative officials declare authoritatively that property has been forfeited might be regarded as an unconstitutional attempt to vest “judicial” power in executive officials.

Chief Justice Roberts arguably lent some credence to this idea in a recent dissenting opinion about the powers of federal bankruptcy judges. Because those judges lack life tenure and the other structural protections required by Article III, past cases have recognized limits on the kinds of claims that Congress can authorize federal district courts to refer to bankruptcy judges for resolution.³²⁰ In *Wellness International Network, Ltd. v. Sharif*, the majority held that if the parties consent, bankruptcy judges can be authorized to adjudicate some claims of the sort that normally require Article III adjudication.³²¹ But Chief Justice Roberts disagreed. He suggested that within the federal government, “the power to ‘render dispositive judgments’” is “the constitutional birthright of Article III judges”;³²² with only “narrow exceptions,” Congress normally cannot authorize federal tribunals that lack the structural safeguards of Article III to render dispositive judgments adverse to

316. *Id.* § 983(a)(2)(E); *cf.* 19 U.S.C. § 1608 (2012) (continuing to require claimants to post a bond in connection with customs forfeitures).

317. *See* CASSELLA, *supra* note 11, at 10 n.22 (citing statistics from the Drug Enforcement Administration and saying that “[o]ther seizing agencies report similar figures”); *see also* CARPENTER ET AL., *supra* note 26, at 12-13 (concluding that between 1997 and 2013, eighty-seven percent of all forfeitures handled by the Department of Justice proceeded outside the criminal process, and eighty-eight percent of the noncriminal forfeitures were administrative rather than judicial).

318. *Cf.* HAMBURGER, *supra* note 195, at 230 n.b (describing administrative forfeitures as “criminal penalties imposed in extralegal proceedings” — a view that leads to the conclusion that “they are unconstitutional on many grounds”).

319. *See supra* note 310 and accompanying text.

320. *See Stern v. Marshall*, 131 S. Ct. 2594, 2601 (2011).

321. 135 S. Ct. 1932, 1939 (2015).

322. *Id.* at 1951, 1958 (Roberts, C.J., dissenting) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995)).

private rights.³²³ According to Chief Justice Roberts, moreover, even the parties' explicit consent cannot cure this problem and justify "the entry of final judgment by a non-Article III actor."³²⁴

At first glance, one might think that current statutory provisions about administrative forfeiture raise a similar issue. Even if no interested parties object, perhaps Congress cannot authorize executive officials to issue "declaration[s] of forfeiture" that have the same legal effect as judicial judgments.

Of course, Chief Justice Roberts was writing in dissent, and his analysis might be incorrect even in the context of bankruptcy cases. In my view, both text and history do support reading Article III to restrict the types of entities that can exercise "judicial" power on behalf of the United States.³²⁵ But when parties consent to let a bankruptcy judge resolve their dispute, they need not be thought of as purporting to authorize "an exercise of judicial power outside Article III."³²⁶ Instead of trying to confer "judicial power" on an actor who cannot receive it, the parties might be thought of as simply waiving their right to insist on an exercise of such power. Just as potential litigants waive their right to "judicial" adjudication when they opt not to file a complaint in the first place, or when they settle their claims out of court, or when they agree to binding arbitration, so too litigants may be able to consent to abide by the decision of a bankruptcy judge.³²⁷ In other words, perhaps the power that is uniquely "judicial" – the power that only true courts can exercise – is the power to adjudicate and authoritatively resolve disputes about certain kinds of private rights even *without* the consent of the purported right-holder.

Whatever the proper analysis of the question presented in *Wellness*, though, Chief Justice Roberts's argument cannot readily be deployed against the federal laws that currently authorize administrative forfeiture. The essence of those laws is that when an executive official takes possession of property on the theory that it really belongs to the government, and when the official properly causes notice of the seizure to be directed to interested parties, people have only a limited period of time to dispute the official's action. If someone files a timely claim, the laws do not purport to subject that claim to

323. *Id.* at 1951-52.

324. *See id.* at 1956-58.

325. *See Nelson, supra* note 52, at 574-82.

326. *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J., dissenting).

327. In *Wellness*, Justice Thomas criticized Chief Justice Roberts's analysis on exactly this ground. *See id.* at 1963 (Thomas, J., dissenting) (framing a key question as "whether consent . . . eliminates the need for an exercise of the judicial power," and concluding that it might).

administrative adjudication; the dispute between the government and the claimant will instead be adjudicated in court. But if no claimants appear within the prescribed period, then the laws conclude that there is no dispute for anyone to adjudicate. Rather than casting executive officials in the role of judges, administrative-forfeiture laws simply establish a deadline for contesting the government's assertion of ownership.

To be sure, such laws may sometimes allow the government to obtain clear title to property even though the responsible executive officials were wrong about the facts and the property had not really been used in a manner that triggers forfeiture. If adequate notice is directed to all interested parties, but no one claims the property within the prescribed period, then title vests in the government even if the former owner would have had a good basis for contesting the government's position. This feature of administrative-forfeiture laws, however, does not distinguish them from various other statutes that establish deadlines for asserting legal rights against the government.³²⁸

Throughout American history, legislatures have enacted statutes that extinguish property rights belonging to owners who fail to take certain affirmative actions.³²⁹ Recording acts have that feature, yet have long been regarded as unexceptionable.³³⁰ The same is true of statutes of repose, which routinely extinguish interests belonging to people who fail to assert claims within the deadline prescribed by law. The law has long imposed deadlines for asserting property rights not only in connection with certain kinds of court proceedings (including probate cases,³³¹ bankruptcy cases,³³² prize cases,³³³ and

328. See, e.g., 28 U.S.C. § 2401(b) (2012) ("A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."); 28 U.S.C. § 2344 (2012) (addressing judicial review of final orders entered by certain federal agencies, and giving parties who are aggrieved by such orders sixty days to file a petition for review in the appropriate federal circuit court).

329. See, e.g., *Texaco, Inc. v. Short*, 454 U.S. 516, 526-29 (1982) (discussing cases in which, "as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse").

330. See *id.* at 528; *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280, 290 (1830) ("It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time . . .").

331. See *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 480 (1988) (noting that most states require claims against an estate to be asserted within "a relatively short time period, generally two to six months, that begins to run after the commencement of probate proceedings"); *cf. id.* (noting that even in the absence of any probate case, most states also bar claims that are not asserted within a specified number of years of the decedent's death).

other proceedings in rem³³⁴), but also in connection with events in the real world. For instance, title to land can be lost through the failure to contest someone's adverse possession³³⁵ and rights in personal property can be lost through failure to claim property that the government believes to have been abandoned.³³⁶

Administrative-forfeiture laws do differ from some other statutes of repose in that their clocks are started by government action. Under modern case law, that feature imposes a burden on the government to try to identify potential claimants and to send them personalized notice of the need to act if they want to defend their alleged interests.³³⁷ At least at the federal level, though, the notification procedures required by current administrative-forfeiture laws and regulations appear to satisfy this requirement.³³⁸

332. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004) (“If a creditor chooses not to submit a proof of claim, once the debts are discharged, the creditor will be unable to collect on his unsecured loans.”).

333. See Additional Note on the Principles & Practice in Prize Causes, *supra* note 61, at 21 (“[I]f no claim be interposed within [a year and a day after public notice], the property is condemned of course, and the question of former ownership is precluded for ever, the owner being deemed in law to have abandoned it.”).

334. See *WAPLES*, *supra* note 60, at 133-34.

335. See *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831) (“[N]o class of laws is more universally sanctioned by the practice of nations, and the consent of mankind, than laws which give peace and confidence to the actual possessor and tiller of the soil.”).

336. See, e.g., 40 U.S.C. § 552 (2012) (empowering the Administrator of General Services to “take possession of abandoned or unclaimed property on premises owned or leased by the Federal Government and determine when title to the property vests in the Government,” but providing for payment “[i]f a former owner files a proper claim within three years from the date that title to the property vests in the Government”).

337. See *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 486-91 (1988) (concluding that a statute requiring creditors to file claims against a decedent's estate within two months after published notice of the start of probate proceedings “is not a self-executing statute of limitations” and cannot validly extinguish the interests of “known or reasonably ascertainable creditors” who were not sent personalized notice); cf. *Taylor v. Yee*, 136 S. Ct. 929, 929 (2016) (Alito, J., concurring in the denial of certiorari) (discussing state laws that provide for bank accounts and other assets to escheat to the state after a specified period of inactivity, and observing that the Due Process Clause obliges states to make adequate efforts “to notify owners of a pending escheat”).

338. A recent student note calls this conclusion into question. See Rebecca Hausner, Note, *Adequacy of Notice Under CAFRA: Resolving Constitutional Due Process Challenges to Administrative Forfeitures*, 36 *CARDOZO L. REV.* 1917 (2015). As the author suggests, one of the provisions added by CAFRA could conceivably be read as purporting to preclude relief for people who received notice that their property was seized, but who were not told that a forfeiture proceeding was under way and who therefore did not submit a timely claim. See *id.* at 1936-37 (discussing 18 U.S.C. § 983(e) (2012) and arguing that it is unconstitutional). Under current law, though, the notice that people receive is unlikely to be so limited. To the

Of course, even when personalized notice is directed to all interested parties, Congress presumably must give those parties a reasonable time to file claims. A statute purporting to make the executive branch's determinations conclusive if no one challenges them within an hour after receiving notice might not differ meaningfully from a statute purporting to make the executive branch's determinations conclusive without permitting any challenges at all. According to longstanding case law, though, "[a] limitations period is only too short if 'the time allowed [to file a claim] is manifestly so insufficient that the statute becomes a denial of justice.'"³³⁹ While originalist research may not permit us to say exactly how short is too short, familiar aspects of current practice suggest that would-be claimants do not have to be given more than a month to respond to a personalized notice that the government has seized property and is planning to declare forfeiture. In judicial proceedings, at least, the Federal Rules of Civil Procedure currently give defendants only twenty-one days after service of process to serve an answer to the plaintiff's complaint, upon pain of default.³⁴⁰ If that is presumptively long enough for a defendant to hire a lawyer, form a position about each of the plaintiff's allegations, and identify all relevant affirmative defenses, then a similar period might be long enough for interested parties to decide whether to claim property that the government has seized.

Admittedly, statutes that let law-enforcement officials seize property on the theory that it now belongs to the government, and that excuse the government from having to prove the underlying facts unless the former owner protests, might well be bad ideas. The more valuable the property, moreover, the more one might think that further procedural safeguards would be worth their cost. If one were conducting a cost-benefit analysis in the style of *Mathews*

extent that federal forfeiture statutes piggyback on the customs procedures, each party with an apparent interest will be sent not only "[w]ritten notice of seizure" but also "information on the applicable procedures." 19 U.S.C. § 1607(a) (2012); see also *Lobzun v. United States*, 422 F.3d 503, 506 (7th Cir. 2005) (indicating that both 18 U.S.C. § 981(d) and 21 U.S.C. § 881(b) continue to pick up this requirement). Regulations applicable to most seizures administered by the Department of Justice explicitly require the personalized notice to include "the deadline for filing a claim" and "the identity of the appropriate official of the seizing agency and the address where the claim must be filed." 28 C.F.R. § 8.9(b)(2) (2015); see also *Lobzun*, 422 F.3d at 505 (quoting the notification form used by the Drug Enforcement Administration, which says that "procedures to administratively forfeit this property are underway" and specifies the date by which a claim must be filed if the recipient wants to contest the forfeiture).

339. *N.Y. Republican State Comm. v. Sec. & Exch. Comm'n*, 799 F.3d 1126, 1135 (D.C. Cir. 2015) (quoting *Wilson v. Iseminger*, 185 U.S. 55, 63 (1902)).

340. See FED. R. CIV. P. 12(a)(1)(A)(i).

v. Eldridge,³⁴¹ one might conclude that the current system of administrative forfeiture raises substantial risks of erroneous deprivations; even when no claims are filed, requiring some review of the government's position might improve accuracy enough to justify the added expense and delay. But even under modern procedural-due-process doctrine, the *Mathews* balancing test does not necessarily govern the constitutionality of the threshold requirement that someone must file a claim in order to trigger further procedures.³⁴² And if *Mathews* does require the government to conduct some additional review even in the absence of a claim, the added review process would not necessarily have to occur in court. Whatever additional administrative safeguards the Due Process Clause might be understood to require, a system that establishes a deadline for contesting the government's assertions of ownership, and that enforces the deadline by giving the government clear title to property that goes unclaimed despite adequate notice, cannot readily be said to vest "judicial" power in executive officials.

341. 424 U.S. 319 (1976). In *Mathews*, the Supreme Court considered whether the Due Process Clause required the government to afford someone an opportunity for an evidentiary hearing before terminating his Social Security disability benefits on the ground that his disability had ceased. According to the Court, evaluating the constitutionality of the existing administrative procedures (which did not include a pre-deprivation hearing) "requires analysis of the governmental and private interests that are affected." *Id.* at 334. In particular,

our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35; *see also* *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-59 (1993) (holding that under this analysis, the Due Process Clause requires the government to provide an opportunity for an adversary hearing before seizing real property in connection with civil forfeiture).

342. *See Mathews*, 424 U.S. at 323 ("The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an *opportunity* for an evidentiary hearing." (emphasis added)); *cf.* *Booker v. City of St. Paul*, 762 F.3d 730, 734-37 (8th Cir. 2014) (using the *Mathews* factors to conclude that the Due Process Clause does not require the state to provide an "automatic" hearing in connection with administrative forfeiture, but adding that *Mathews* might not even apply because "process was made available to Booker, and he failed to take advantage of that opportunity").

CONCLUSION

This Feature does not assert, in gross, that all aspects and all applications of modern forfeiture statutes are constitutional. But the three central characteristics of modern forfeiture statutes that I have considered—the fact that civil forfeiture proceeds in rem rather than in personam, the fact that claimants are not afforded the procedural protections that they would receive if they were criminal defendants, and the fact that the government’s assertion of ownership can become incontestable unless an interested party files a claim within the deadline for doing so—do not violate the original meaning of the Constitution as liquidated over time.

Still, the conclusion that these characteristics are constitutional does not mean that they are good.³⁴³ Media accounts are rife with horrifying stories about how forfeiture laws work in practice, especially at the local level.³⁴⁴

We might not muster much sympathy for people who plainly have committed crimes and who lose some of their property as a result. When criminals forfeit their ill-gotten gains, or even some of their pre-existing property, forfeiture laws are serving the useful purpose of “tak[ing] the profit out of the crime.”³⁴⁵ In many ways, moreover, forfeiture is a less costly form of punishment than incarceration. From the government’s standpoint, indeed, asset forfeiture is a source of revenue that can help the government fund needed programs without having to raise taxes.

But that very fact raises dangers, especially when the law permits enforcement agencies to retain some or all of the money that they raise through forfeiture.³⁴⁶ As critics have noted, letting enforcement agencies augment their own resources through forfeiture seems likely to affect both enforcement priorities and enforcement methods. A famous example dates back to the early 1990s: “Florida drug agents working the I-95 cocaine corridor reportedly try to stop suspected drug buyers on their way south, while they still have forfeitable

343. *Cf.* *Bennis v. Michigan*, 516 U.S. 442, 454 (1996) (Thomas, J., concurring) (“This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable.”).

344. *See, e.g.*, Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12 & 19, 2013, at 49-61.

345. CASSELLA, *supra* note 11, at 2.

346. *Cf.* CARPENTER ET AL., *supra* note 26, at 14 (summarizing state and federal laws about “the percentage of forfeiture proceeds allowed to flow to law enforcement,” and concluding that “civil forfeiture laws present law enforcement with significant incentives to seize property for financial gain”).

cash,” rather than when they are returning north with drugs that have no value to law-enforcement agencies.³⁴⁷

The ease of forfeiture, moreover, must tempt police departments to use it even when they cannot be sure that a crime has been committed. For instance, suppose that a police officer stops a car and finds large amounts of cash. These facts hardly suffice to prove that the driver is engaged in the drug trade, but they do raise suspicions. The department’s policymakers, moreover, may encourage officers to act on those suspicions by seizing the cash and launching the forfeiture process. Departments may reason that drivers who are indeed involved in the drug trade will walk away from their cash rather than invite further investigation, while drivers who are innocent can ultimately get their property back. In this way, departments may be able to persuade themselves that the forfeiture process will sort the guilty from the innocent and ensure that justice is done.³⁴⁸

Seizure on mere suspicion, though, imposes obvious costs on people who are carrying cash for legitimate reasons. Those people, moreover, are likely to be disproportionately poor and powerless—people who make important purchases with cash because they do not have checking accounts, and who cannot readily hire lawyers to contest the government’s confiscation of their money.³⁴⁹ Every time such people walk away from their property because getting it back would cost too much, or because they fear that the government will erroneously charge them with crimes if they fight the forfeiture, the system is wronging people whom it should be protecting.

Those systemic wrongs would occur even if all police officers and departmental policymakers were completely honest. But no large-scale program will be administered perfectly, and there are special dangers in a large-scale program that asks a disparate set of officers to seize cash and other hard-to-trace items. To the extent that asset-forfeiture programs invite corrupt decisions either by individual officers or by departmental policymakers, the programs’ costs grow. Norms of honest policing are important, and the temptations created by repeated seizures of cash have some potential to undermine those norms.

347. David A. Kaplan, *Where the Innocent Lose*, NEWSWEEK, Jan. 4, 1993, at 43; see also, e.g., Blumenson & Nilsen, *supra* note 21, at 68; Harmon, *supra* note 25, at 933.

348. Cf. Richard Minitzer, *Ill-Gotten Gains*, REASON, Aug./Sept. 1993, at 35 (quoting a critic who accuses government officials of “[s]eiz[ing] it all and let[ting] the innocent sue to get it back”).

349. See Stillman, *supra* note 344, at 57, 59 (noting that “only a small portion of state and local forfeiture cases target powerful entities,” and concluding that “forfeiture actions tend to affect people who cannot easily fight back”).

I do not know how to assess the magnitude of any of these costs, or how to tell whether forfeiture laws have enough offsetting benefits to justify them. But even after the reforms of the last two decades, it is certainly possible that forfeiture laws do more harm than good.

Nonetheless, the judiciary is not the place for policy debates of this sort. If legislatures choose to authorize in rem forfeiture proceedings as a means of enforcing valid statutory restrictions, originalists should not assume that the Constitution stands in the way.