

## ARTICLES

### THE FOUNDERS' FORFEITURE

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*Civil forfeiture is controversial. Critics allege that law enforcement authorities use forfeiture to take property from often-innocent victims free of the constraints of criminal process. Yet despite recent statutory reforms, a significant obstacle to meaningful change remains: Under longstanding Supreme Court precedent, the Constitution imposes few limits on civil forfeiture. Relying on a perceived tradition of largely unfettered government power to seize private property, the Court has consistently denied constitutional protection to forfeiture's victims. In response, forfeiture's critics have argued that the power was historically limited, but such arguments have fallen on deaf ears.*

*As this Article explains, forfeiture's critics are right, but for the wrong reasons. Based on original research into more than 500 unpublished federal forfeiture cases from 1789 to 1807, this Article shows—for the first time—that forfeiture at the Founding was significantly constrained. But not by judges. Instead, concern over forfeiture's abusive potential spurred Alexander Hamilton and the First Congress to establish executive-branch authority to return seized property to violators who lacked fraudulent intent. What is more, Hamilton and subsequent Treasury Secretaries understood themselves to be obligated to exercise that authority to its fullest extent. The result was an early forfeiture regime that was expansive in theory, but in practice was constrained by a deep belief in the impropriety of taking property from those who inadvertently broke the law.*

*This is an opportune moment to reexamine civil forfeiture's historical bona fides. In addition to the growing public outcry, there are hints that members of the current Supreme Court may be willing to*

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*reconsider forfeiture’s constitutionality. The existence of meaningful constraints on forfeiture in the Founding Era calls into question key historical propositions underlying the Court’s permissive modern jurisprudence and suggests that history may offer an affirmative basis for greater constitutional protections today.*

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## INTRODUCTION

There is a growing consensus that civil forfeiture is a problem. Critics from across the ideological spectrum—including, it seems, on the current Supreme Court<sup>1</sup>—argue that the government’s tremendous

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1. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (“Ours is a world filled with more and more civil laws bearing more and more extravagant punishments . . . [including] forfeiture provisions that allow homes to be taken . . . .”); *Leonard v. Texas*, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (“This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses.”); Transcript of Oral Argument at 46, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 6200334 (Sotomayor, J.) (“[I]f we

authority to seize and condemn private property in response to alleged lawbreaking violates fundamental principles of American justice.<sup>2</sup> Yet thanks to history, constitutional doctrine has proven largely intractable. In rejecting claims that the Constitution meaningfully constrains civil forfeiture, the Court has long relied on a perceived historical tradition of unfettered government ability to forfeit property without criminal process.<sup>3</sup> Though the Court has acknowledged the apparent injustice of core aspects of the modern forfeiture regime,<sup>4</sup> it has consistently asserted that civil forfeiture's historical pedigree makes it too late to turn back now.<sup>5</sup>

This Article demonstrates that the Court's understanding of civil forfeiture's early history is mistaken. Forfeiture at the Founding *was* highly circumscribed, but in ways courts and commentators have wholly failed to recognize. To be sure, early forfeiture was, on the surface, as harsh and unforgiving as modern Supreme Court opinions describe.<sup>6</sup> The government regularly seized high-value property in response to minor and technical violations. It frequently used the forfeiture power to punish lawbreaking in situations where personal penalties against individuals would have been available. In fact, the early government seemingly used forfeiture precisely in the ways that modern critics find so

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look at these forfeitures that are occurring today . . . many of them seem grossly disproportionate to the crimes being charged.”).

2. See Asset Forfeiture Abuse, ACLU, <http://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/asset-forfeiture-abuse> [<https://perma.cc/A4PA-VPUU>] (last visited July 27, 2019); Inst. for Justice, End Civil Forfeiture, End Forfeiture, <http://endforfeiture.com> [<https://perma.cc/HW99-KKAE>] (last visited July 27, 2019); Forfeiture Reform, Nat'l Ass'n of Criminal Def. Lawyers, <http://www.nacdl.org/forfeiture> [<https://perma.cc/R2NX-J363>] (last visited July 27, 2019); Jason Snead, Stopping America's Runaway Civil Forfeitures, Heritage Found. (Feb. 26, 2016), <https://www.heritage.org/crime-and-justice/commentary/stopping-americas-runaway-civil-forfeitures> [<https://perma.cc/QR65-FVL9>].

3. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 331 (1998) (“Traditional *in rem* forfeitures were . . . not considered punishment against the individual for an offense.”); *United States v. Ursery*, 518 U.S. 267, 287 (1996) (reaffirming the Court's “traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause”); *Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (concluding that cases authorizing forfeitures of property belonging to “innocent” owners were “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced” (internal quotation marks omitted) (quoting *J.W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921))).

4. See *Bennis*, 516 U.S. at 453 (recognizing the “considerable appeal” of the argument that it is “unfair” to penalize innocent owners for the acts of others); *id.* at 454 (Thomas, J., concurring) (“One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process.”).

5. See *id.* at 453 (“We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are ‘too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.’” (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511)).

6. See *infra* Part I.

objectionable: as a means of imposing punishment free of the restraints that ordinary criminal process would impose.<sup>7</sup>

At the same time, however, this Article shows that, in practice, early forfeiture was far more constrained than previously recognized. Based on original research into more than 500 unpublished cases filed in federal district court from 1789 to 1807, this Article reveals a Founding Era consensus that forfeiture's punitive potential necessitated meaningful limits on its use. The mechanism was administrative "remission" of penalties, a critical aspect of early federal law enforcement practice that has gone unnoticed by legal scholars and historians.<sup>8</sup> Proposed and put into motion by Alexander Hamilton, the remission power gave the Treasury Secretary broad—and effectively unreviewable—authority to return seized property to those who unintentionally violated the law.<sup>9</sup> What is more, the early court records demonstrate that Hamilton and his successors understood themselves to be *obligated* to exercise that authority to its fullest extent, granting relief in over ninety percent of cases presented to them, despite concerns among contemporaries over the negative consequences of permissive remission practice.<sup>10</sup> The result was an early forfeiture regime constrained by a deep belief in the impropriety of taking property from those who lacked real culpability.

Understanding early forfeiture's true nature has significant implications for debate about its proper limits today. As the Supreme Court has acknowledged, civil forfeiture's historical bona fides are critical to its constitutional legitimacy.<sup>11</sup> This Article's revelation of the constraints that remission imposed on early forfeiture calls into question key historical propositions underlying Court decisions insulating civil forfeiture from

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7. See *infra* Part II.

8. Accounts of the early forfeiture power have overlooked the remission practices described in this Article almost entirely. While a few scholars have noted in passing that the Treasury Secretary had the statutory authority to return forfeited property, no one has considered remission's impact on the early federal government's forfeiture practices. See, e.g., Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 *Yale L.J.* 2446, 2503 n.279 (2016) [hereinafter Nelson, *Constitutionality of Civil Forfeiture*] ("[F]ederal 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."). This inattention is understandable, as remission does not feature prominently in the historical sources most scholars look to in assessing the scope of the early forfeiture power. Congress established it in a short statute, which was subject to only brief debate. See *infra* section III.A. Only a handful of early court cases discussed the scope of the power. See, e.g., *United States v. Morris*, 23 U.S. (10 *Wheat.*) 246, 291 (1825) (concluding that the remission power allows the Secretary to return the portion of forfeiture proceeds to which the seizing offer would otherwise be entitled). And contemporary treatises did not address it. See Rufus Waples, *A Treatise on Proceedings In Rem* 548 (Callaghan & Co. ed., 1882) (discussing the remission power very briefly and only in reference to its impact on the officers' share of a forfeiture). Accordingly, remission's key role in shaping the government's use of forfeiture only becomes apparent in the unpublished records of the early federal courts studied here.

9. See *infra* section III.A.

10. See *infra* Part III.

11. See *infra* Part I.

constitutional challenge. First, in rejecting claims that the Due Process Clause requires a defense to forfeiture for “innocent owners”—those who did not participate in the criminal conduct in which their property was involved—the Court has consistently taken the view that forfeiture was historically permissible even in response to unintentional violations of the law.<sup>12</sup> Second, the Court’s belief that in rem civil forfeitures—actions against property, not people—were traditionally not understood to be “punishment” has left uncertain whether civil forfeitures are subject to the Eighth Amendment’s Excessive Fines Clause and its requirement that a penalty be proportional to the offense.<sup>13</sup>

Yet as this Article shows, innocence and proportionality were core concerns in the Founding Era, raising significant doubts about the historical justifications for the Court’s pro-government jurisprudence.<sup>14</sup> What is more, it appears that the limits the early Congress and the Executive imposed on forfeiture were the product of broad agreement that such constraints were a necessary corollary to government exercise of the forfeiture power, and perhaps even a constitutional one.<sup>15</sup> Accordingly, this Article’s account of early forfeiture suggests that history may offer an affirmative basis for greater constitutional limits on forfeiture’s exercise today. At minimum, the evidence of a Founding Era consensus that core principles of justice demanded meaningful limits on forfeiture’s exercise suggests that renewed scrutiny of the Court’s modern doctrinal conclusions is warranted.

This is the right time to engage in such a reexamination, given the growing skepticism about civil forfeiture’s propriety among the Court’s current members.<sup>16</sup> Though the Court recently declined to address directly whether civil forfeiture is subject to the limitations in the Excessive Fines Clause,<sup>17</sup> that question is likely to reoccur.<sup>18</sup> And even if a

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12. See *infra* notes 44–62 and accompanying text.

13. See *infra* notes 64–75 and accompanying text.

14. See *infra* section IV.A.

15. See *infra* section IV.B.

16. See *Leonard v. Texas*, 137 S. Ct. 847, 850 (2017) (Thomas, J., respecting the denial of certiorari) (“Whether this Court’s treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail.”); *supra* note 1.

17. In *Timbs v. Indiana*, the Court held that the Excessive Fines Clause is incorporated against the states via the Fourteenth Amendment. 139 S. Ct. 682, 687 (2019). In its briefing, Indiana argued that even if the Clause is incorporated, it does not apply to in rem civil forfeitures like the one at issue in the case. Brief for Respondent at 1, *Timbs*, 139 S. Ct. 682 (No. 17-1091), 2018 WL 4908395. Indiana further argued that, if the Court believed that it had already held in *Austin v. United States*, 509 U.S. 602 (1993), that civil forfeitures are fines under the Clause, it should overrule that decision. Brief for Respondent, *supra*, at 43–57. The Court, however, declined to consider overruling *Austin*, because the question of the Clause’s applicability to civil forfeitures had not been raised or addressed in the courts below. *Timbs*, 139 S. Ct. at 690; see also *infra* notes 66–68 and accompanying text (discussing *Austin*).

18. At oral argument in *Timbs*, several Justices suggested the Court should limit itself to resolving the incorporation issue and leave questions about the Clause’s applicability to

wholesale reconsideration of civil forfeiture's constitutionality may not be imminent,<sup>19</sup> the Court's apparent receptiveness to questions about forfeiture's historical justifications makes a critical reassessment of the past all the more important now.

This Article proceeds as follows: Part I outlines civil forfeiture's current constitutional status, paying special attention to the historical justifications the Supreme Court has advanced for refusing to apply to civil forfeiture several constitutional protections that apply in criminal proceedings.

Part II describes an early forfeiture regime that was, in theory and in practice, substantively broad and procedurally favorable to the government. This history poses a challenge for forfeiture's modern critics, and they have sought to counter its relevance by arguing that early forfeiture served limited purposes. As the Part demonstrates, those efforts fail. Rather than using forfeiture simply to remove dangerous items from commercial circulation or reach lawbreakers who were otherwise beyond the courts' jurisdiction, early federal officials exercised their power as a means of imposing severe penalties outside the criminal process.

As Part III demonstrates, however, there *were* meaningful limits on early forfeiture, but they came from a different source than current debate imagines. Prompted by concerns that the government's broad power to take private property might work significant injustices, Congress gave the Treasury Secretary the ability to remit forfeitures incurred by those who unintentionally broke the law. Turning to actual practice, this Part shows that the early Secretaries remitted lawfully incurred forfeitures when presented with any credible explanation for why the violation was not motivated by fraudulent intent. As the Part further explains, this generosity pushed the boundaries of the congressional scheme, transforming a discretionary authority to provide relief in deserving cases into a mandate to mitigate the harsh results that flowed from the government's maximal use of the forfeiture power as a tool of law enforcement.

Part IV considers what the history of the federal government's forfeiture and remission practices might tell us about constitutional limits on the forfeiture power today. The early government's remission

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civil forfeitures for another day. See Transcript of Oral Argument, *supra* note 1, at 52 (Roberts, C.J.) (“[Y]our argument is . . . [the forfeiture at issue] isn’t a fine at all. Well, we can deal with that later, right?”); *id.* at 36 (Gorsuch, J.) (“[T]he Indiana Supreme Court didn’t address . . . any of this forfeiture . . . . It just said that the Excessive Fines Clause is not incorporated, period. . . . Do you really want us to answer the merits questions too?”); *cf.* *Timbs*, 139 S. Ct. at 691 (“[R]egardless of whether application of the Excessive Fines Clause to civil *in rem* forfeitures is itself fundamental or deeply rooted, our conclusion that the Clause is incorporated remains unchanged.”).

19. See *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014) (holding, over a three-person dissent, that criminal defendants are not constitutionally entitled to a pretrial hearing to challenge a grand jury’s probable cause determination permitting the government to restrain their assets).

practices raise significant doubts about the historical underpinnings of the Supreme Court's forfeiture jurisprudence regarding the "innocent owner" defense and the proportionality requirement. And although the evidence is circumstantial, there is reason to think that the early regime's permissiveness was driven by a belief in the constitutional necessity of protecting forfeiture's victims from unjust results. The Part closes by discussing whether a revised understanding of forfeiture's history necessitates the recognition of judicially enforceable limits on that power today.

## I. THE PROBLEM OF FORFEITURE

Civil forfeiture is controversial, to say the least. Though many of the most contentious debates around forfeiture took place in the 1990s,<sup>20</sup> there has been a resurgence of criticism in recent years.<sup>21</sup> Despite legislative reforms in the past two decades that have placed some limits on state and federal civil forfeiture,<sup>22</sup> federal law enforcement alone continues to seize billions of dollars' worth of property each year.<sup>23</sup> And there is little

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20. See David Pimentel, *Forfeitures Revisited: Bringing Principle to Practice in Federal Court*, 13 Nev. L.J. 1, 13 (2012) [hereinafter Pimentel, *Forfeitures Revisited*] ("By the mid-1990s, the dramatic increase in forfeiture filings had attracted attention, generating criticism of the concept both from conservatives, who lamented the assault on private-property rights and from liberals, who questioned overreaching by law enforcement officials.").

21. See, e.g., Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & Jennifer McDonald, *Inst. for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 2* (2d ed. 2015), <https://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<https://perma.cc/Q63B-EFV5>]; Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems It Creates*, 7 Wake Forest J.L. & Pol'y 315, 315–16 (2017); Shaila Dewan, *Police Use Department Wish List When Deciding Which Assets to Seize*, N.Y. Times (Nov. 9, 2014), <https://www.nytimes.com/2014/11/10/us/police-use-department-wish-list-when-deciding-which-assets-to-seize.html> [<https://perma.cc/L8CJ-RW5T>]; Michael Sallah, Robert O'Harrow Jr., Steven Rich & Gabe Silverman, *Stop and Seize*, Wash. Post (Sept. 6, 2014), <https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/> [<https://perma.cc/4QYZ-29BF>]; Sarah Stillman, *Taken*, New Yorker (Aug. 5, 2013), <https://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/GF48-J5WV>].

22. See, e.g., *Civil Asset Forfeiture Reform Act of 2000 (CAFRA)*, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered titles of the U.S.C.); Carpenter et al., *supra* note 21, at 17 (identifying nine states that require a criminal conviction for most forfeitures).

23. See 10-Yr Summary of Financial Report Data, DOJ 1, [https://www.justice.gov/afp/file/10-yr\\_summary\\_of\\_reporting.pdf/download](https://www.justice.gov/afp/file/10-yr_summary_of_reporting.pdf/download) [<https://perma.cc/7H2Z-EC2A>] (last visited Aug. 12, 2019) (reporting \$2.2 billion in average annual deposits into the U.S. Department of Justice's Assets Forfeiture Fund from 2009 to 2018).

There are essentially three types of forfeiture: civil, criminal, and administrative. Civil forfeiture proceeds in rem, as a government suit against property itself, separate from any criminal case arising from the same transaction. See Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 Harv. L. Rev. 2387, 2389 (2018). Criminal forfeiture involves an in personam action against an individual and requires a conviction of the person to enable forfeiture of property at sentencing. See *id.* Under administrative forfeiture, the

reason to think that the trend will reverse anytime soon. While the federal government under President Obama took steps to reduce its use of civil forfeiture,<sup>24</sup> the Trump Administration has indicated its firm belief that forfeiture is a valuable and legitimate law enforcement tool going forward.<sup>25</sup>

While advocates argue that government power to seize and condemn private property outside the criminal process is a necessary tool of law enforcement,<sup>26</sup> critics contend that modern civil forfeiture is out of control. Noting the astounding sums of money governments recoup through civil forfeiture, critics charge that law enforcement authorities use this power to seize valuable assets from vulnerable victims who are often never convicted of a crime (or even arrested).<sup>27</sup> And because law enforcement often keeps the proceeds of forfeited property, civil forfeiture is rife with abuse.<sup>28</sup>

What most outrages many of civil forfeiture's critics is the lack of legal protections for the owners of property seized by the government.<sup>29</sup> Though recent state and federal legislative reforms have granted property owners increased protections from forfeiture, many critics contend that they do not do enough to level the playing field.<sup>30</sup> The deeper problem is constitutional: According to longstanding Supreme Court doctrine, most of the rights that criminal defendants enjoy under the Fifth, Sixth, and Eighth Amendments do not apply in civil forfeiture

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government can forfeit certain property without filing suit, as long as it provides adequate notice of the seizure and no one files a claim to the property. See Nelson, *Constitutionality of Civil Forfeiture*, supra note 8, at 2448–49, 2507–10.

24. See Nelson, *Constitutionality of Civil Forfeiture*, supra note 8, at 2451 n.25 (describing changes to policies regarding currency-structuring forfeitures and asset sharing with state and local governments).

25. See Christopher Ingraham, *Jeff Sessions Wants Police to Take More Cash from American Citizens*, Wash. Post (July 17, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/07/17/jeff-sessions-wants-police-to-take-more-cash-from-american-citizens/> [<https://perma.cc/8QYH-QDNT>].

26. See, e.g., Jefferson B. Sessions III, Office of the Attorney Gen., DOJ, Ord. No. 3946-2017, *Federal Forfeiture of Property Seized by State and Local Law Enforcement Agencies* (July 19, 2017), <https://www.justice.gov/opa/press-release/file/982611/download> [<https://perma.cc/P3GE-KUSB>] (“Asset forfeiture is one of law enforcement’s most effective tools to reduce crime . . .”).

27. See ACLU, supra note 2.

28. Andrew Wimer, *Civil Forfeiture May Be Over in Philly, but Abuses Abound Across America*, Forbes (Oct. 1, 2018), <https://www.forbes.com/sites/instituteforjustice/2018/10/01/civil-forfeiture-may-be-over-in-philly-but-abuses-abound-across-america> [<https://perma.cc/2LWE-JCKW>].

29. See, e.g., Snead, supra note 2 (suggesting legal reforms to “rebalance a skewed system”).

30. See David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol’y Rev. 541, 542–43 (2017) [hereinafter Pimentel, *Forfeitures and the Eighth Amendment*].

proceedings.<sup>31</sup> As a result, critics charge that the government often uses civil forfeiture as a means of imposing penalties for alleged lawbreaking free of the constraints of the criminal process.<sup>32</sup> Given the potentially enormous costs forfeiture can impose on its victims, critics argue that heightened protections are not simply warranted as a policy matter but also as a constitutional one.<sup>33</sup>

Arguments in favor of stronger constitutional protections against civil forfeiture have largely fallen on deaf ears at the Court. While the Fourth Amendment's prohibition against unreasonable searches and seizures applies in the civil forfeiture context,<sup>34</sup> the Sixth Amendment's Confrontation Clause does not.<sup>35</sup> Nor does the claimant to the property the government seeks to forfeit have a right to counsel.<sup>36</sup> The government's high burden of proof in criminal cases does not apply in civil

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31. See *infra* notes 34–49, 74 and accompanying text.

32. See, e.g., Philip Hamburger, *Is Administrative Law Unlawful?* 229–30 & n.b. (2014) (“[N]either administrative nor civil forms can disguise the reality of criminal proceedings.”); Leonard W. Levy, *A License to Steal: The Forfeiture of Property* 192–94 (1996) (arguing that civil forfeiture claimants are denied due process protections); David P. Atkins & Adele V. Patterson, *Punishment or Compensation? New Constitutional Restrictions on Civil Forfeiture*, 11 *U. Bridgeport L. Rev.* 371, 373–74 (1991) (discussing constitutional protections afforded criminal forfeiture defendants and not civil forfeiture claimants); Aaron Xavier Fellmeth, *Challenges and Implications of a Systemic Social Effect Theory*, 2006 *U. Ill. L. Rev.* 691, 730–33 (arguing that forfeiture often constitutes punishment of a sort that should trigger the criminal procedure guarantees of the Federal Constitution); Marc B. Stahl, *Asset Forfeiture, Burdens of Proof and the War on Drugs*, 83 *J. Crim. L. & Criminology* 274, 294–301, 337 (1992) (arguing that “civil” forfeitures that effectively “constitute criminal punishment” should be subject to the requirement of proof beyond a reasonable doubt of the underlying offense); Stefan B. Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 *Mich. L. Rev.* 1910, 1926 (1998) (book review) (“[T]he contemporary extensions of civil forfeiture should be condemned as a violation of due process.”).

33. See, e.g., Note, *supra* note 23, at 2403–07.

34. See *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697–98 (1965) (“[S]uits for penalties and forfeitures incurred by the commission of offences against the law . . . are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution.” (quoting *Boyd v. United States*, 116 U.S. 616, 633–34 (1886))).

35. See *United States v. Zucker*, 161 U.S. 475, 480–82 (1896) (“[I]t does not follow that the defendants can demand of right, in this civil action, not directly involving their personal security, that they shall be confronted at the trial with the witnesses who testify in behalf of the government.”); *United States v. \$40,955.00 in U.S. Currency*, 554 F.3d 752, 758 (9th Cir. 2009) (“Although some constitutional protections apply to civil forfeiture proceedings, the Supreme Court long ago established . . . that the Confrontation Clause does not . . .”).

36. *United States v. 777 Greene Ave.*, 609 F.3d 94, 95 (2d Cir. 2010). But see 18 U.S.C. § 983(b) (2012) (stating that the government will pay for legal representation for the claimant in certain limited situations). The Court recently held that the pretrial restraint of assets a criminal defendant needs to pay for an attorney may, in certain circumstances, impermissibly interfere with the right to counsel. *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016) (plurality opinion); *id.* at 1096 (Thomas, J., concurring in the judgment).

forfeiture proceedings,<sup>37</sup> and critics argue that the statutory “preponderance of the evidence” standard that applies in most civil forfeiture cases<sup>38</sup> unfairly offers prosecutors a means of bypassing the more stringent requirements of criminal prosecutions.<sup>39</sup> Critics also point to the high rate of uncontested forfeitures in the present day as evidence that modern statutory and constitutional notice requirements—which call for “efforts to provide actual notice to all interested parties”<sup>40</sup>—are insufficiently protective of potential claimants’ interests in seized property.<sup>41</sup> Critics similarly rue that jury trials are not required for most civil forfeiture,<sup>42</sup> and decry the fact that, in many cases, the government can forfeit property without going to court at all.<sup>43</sup>

In two particular areas, the Supreme Court’s refusal to extend constitutional protections to civil forfeiture proceedings has been based in significant part on the Court’s reading of forfeiture’s history. First, the Court has declined to recognize an “innocent owner” exception to forfeiture under the Due Process Clause, much to critics’ consternation.<sup>44</sup>

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37. *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (citing *Lilienthal’s Tobacco v. United States*, 97 U.S. 237, 271–72 (1878)).

38. 18 U.S.C. § 983(c)(1). Note that prior to passage of the Civil Asset Forfeiture Reform Act (CAFRA) in 2000, the burden of proof for most civil forfeitures lay with the claimant, as it had historically. See *United States v. One “Piper” Aztec “F” De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057*, 321 F.3d 355, 360 (3d Cir. 2003).

39. See, e.g., Stahl, *supra* note 32, at 294–301; Barclay Thomas Johnson, Note, Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System, 35 *Ind. L. Rev.* 1045, 1075–76 (2002); Eric Moores, Note, Reforming the Civil Asset Forfeiture Reform Act, 51 *Ariz. L. Rev.* 777, 797–98 (2009).

40. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796–97 & n.3 (1983); see also *Fed. R. Civ. P. G(4)(b)(i)* (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”); Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2482–83.

41. See Pimentel, *Forfeitures Revisited*, *supra* note 20, at 27–30 (“To the extent that constructive notice by publication is considered legally adequate, the end result may be a forfeiture that is never heard on its merits, and never justified . . .” (footnotes omitted)).

42. See Levy, *supra* note 32, at 200–01 (criticizing the government’s resort to admiralty jurisdiction to avoid the Seventh Amendment’s guarantee of a jury trial in civil cases); Michael Schechter, Note, Fear and Loathing and the Forfeiture Laws, 75 *Cornell L. Rev.* 1151, 1167–68 (1990) (“The denial of a jury trial in admiralty suits borders on injustice when we consider that the government need not be consistent in its decisions to commence actions in admiralty or at common law.”).

43. See Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2448–49, 2507–15 (describing administrative forfeiture); Rebecca Hausner, Note, Adequacy of Notice Under CAFRA: Resolving Constitutional Due Process Challenges to Administrative Forfeitures, 36 *Cardozo L. Rev.* 1917, 1928–33 (2015) (critiquing the lack of adequate notice in administrative forfeiture proceedings).

44. See, e.g., Donald J. Boudreaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan* and the Forfeiture Tradition, 61 *Mo. L. Rev.* 593, 594–99 (1996) (exploring the

Even when a property owner did not participate in—or even know about—lawbreaking conduct, the Court has consistently held that property involved in the offense is nonetheless subject to civil forfeiture.<sup>45</sup> Whether it is a boat used to transport a small amount of marijuana,<sup>46</sup> or a car used in solicitation of prostitution<sup>47</sup> or to carry moonshine,<sup>48</sup> such property is forfeit to the government “even though the owner did not know that it was to be put to such use.”<sup>49</sup>

The Court has recognized the harshness of this rule. The assertion that it is simply unfair for the government to take property from people with no involvement in or knowledge of the underlying unlawful conduct “has considerable appeal,” the Court admits.<sup>50</sup> It would be “unduly oppressive” and “[il]legitimate” to allow forfeiture in cases where not only was the owner unaware of and uninvolved in the violation, but where they had not been negligent in entrusting their property to the wrongdoer.<sup>51</sup> Indeed, the Court has acknowledged that forfeiting property belonging to persons uninvolved in the underlying offense “seems to violate that justice which should be the foundation of the due process of law required by the Constitution.”<sup>52</sup>

Yet despite these reservations, the Court has consistently rejected assertions of an “innocent owner” defense, on the strength of a perceived historical tradition of ignoring claims to innocence in civil forfeiture. Citing “a long and unbroken line of cases” allowing forfeiture of property belonging to those with no involvement in the offense, in 1996 the Court declared that it was too late to reverse course.<sup>53</sup> Such cases were “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”<sup>54</sup>

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Supreme Court’s history in declining to establish an innocent owner exception); Herpel, *supra* note 32, at 1933–45 (advocating for such an exception on due process grounds).

45. See *Bennis v. Michigan*, 516 U.S. 442, 446 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688–90 (1974); *Van Oster v. Kansas*, 272 U.S. 465, 467–68 (1926); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510–11 (1921).

46. *Calero-Toledo*, 416 U.S. at 665–68.

47. *Bennis*, 516 U.S. at 443–44.

48. *Goldsmith-Grant Co.*, 254 U.S. at 508.

49. *Bennis*, 516 U.S. at 446.

50. *Id.* at 453.

51. *Calero-Toledo*, 416 U.S. at 689–90.

52. *Goldsmith-Grant Co.*, 254 U.S. at 510; see also *Calero-Toledo*, 416 U.S. at 688–89 (acknowledging that the “broad sweep” of modern forfeiture statutes could “give rise to serious constitutional questions”).

53. *Bennis*, 516 U.S. at 446, 453; see also *id.* at 454 (Thomas, J., concurring) (“[F]orfeiture of property without proof of the owner’s wrongdoing, merely because it was ‘used’ in or was an ‘instrumentality’ of crime has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.”).

54. *Id.* at 448 (majority opinion) (internal quotation marks omitted) (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511).

This perceived historical tradition is not simply window dressing: It is crucial to the Court's jurisprudence.<sup>55</sup> As the Court explained a century ago, were a case raising an innocent-owner defense "the first of its kind," the Court would be compelled to take that argument very seriously.<sup>56</sup> But the "historical background of forfeiture statutes in this country" and prior decisions "sustaining their constitutionality" necessarily lead the Court to conclude that the Due Process Clause offers no protection to innocent owners.<sup>57</sup> The question, as the Court put it, has "long been settled."<sup>58</sup> Critics counter that the Court has overlooked historical precedents supporting more robust constitutional protection for innocent owners in the context of *in personam*<sup>59</sup> and criminal<sup>60</sup> forfeitures, and that the Court has ignored important subtleties in the precedents upon which it relies.<sup>61</sup> Yet even the critics have been obliged to concede that, as a general historical proposition, "the innocence of owners is formally irrelevant to *in rem* forfeiture."<sup>62</sup>

Second is a question—less settled but no less consequential—that reappeared on the Court's docket just last term: whether civil forfeiture is "punishment" for purposes of the Eighth Amendment's Excessive Fines Clause.<sup>63</sup> Under the Court's jurisprudence, the Clause applies to penalties imposed by the government "as punishment for some offense."<sup>64</sup> If a government-imposed penalty is punishment, then it must satisfy the Clause's requirement that the penalty be "proportional" to the

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55. See *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari) ("In the absence of this historical practice, the Constitution presumably would require the Court to align its distinct doctrine governing civil forfeiture with its doctrines governing other forms of punitive state action and property deprivation.").

56. *Goldsmith-Grant Co.*, 254 U.S. at 510; see also *Bennis*, 516 U.S. at 454 (Thomas, J., concurring) ("One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process.").

57. *Calero-Toledo*, 416 U.S. at 680.

58. *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926).

59. See *Boudreaux & Pritchard*, supra note 44, at 609 ("Anglo-American law has for centuries struggled to protect the property interests of innocent owners from *in personam* forfeiture.").

60. See *id.* at 613 ("Americans early on adopted a hostile attitude toward criminal forfeitures.").

61. See, e.g., *Bennis*, 516 U.S. at 466 (Stevens, J., dissenting) ("Even assuming that strict liability applies to 'innocent' owners, we have consistently recognized an exception for truly blameless individuals.").

62. *Boudreaux & Pritchard*, supra note 44, at 609.

63. Brief in Opposition to Petition for a Writ of Certiorari at i, *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 2129785.

64. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989); see also *Austin v. United States*, 509 U.S. 602, 609–10 (1993) ("The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" (alteration in original) (quoting *Browning-Ferris*, 492 U.S. at 265)).

underlying offense—as the Court has held with respect to *criminal* forfeitures.<sup>65</sup> But if a penalty (like civil forfeiture) is *not* punishment, then the Clause's limitations are irrelevant, and the Constitution cannot curtail the massive forfeitures that modern critics decry.

Here, too, the Court's understanding of history has profoundly influenced its jurisprudence, though with uncertain results. In *Austin v. United States*, the Court's view seemed clear enough: Statutory forfeiture of property via *in rem* proceedings was "historically" understood as punishment, and therefore modern analogues are subject to the Clause's proportionality requirement.<sup>66</sup> The Court based this conclusion on its reading of English and early American history—particularly on statutes passed by the First Congress—as well as on its own precedents.<sup>67</sup> In particular, the *Austin* Court noted that it was permissible for the government to use forfeiture to penalize those who negligently entrusted their property to wrongdoers—a theory that only makes sense if forfeiture is understood to be "punishment" for such negligence.<sup>68</sup>

Yet only five years later, in *United States v. Bajakajian*, the Court appeared to reverse course. It declared that because "[t]raditional *in rem* forfeitures" were historically *not* considered punishment, they "occupy a place outside the domain of the Excessive Fines Clause."<sup>69</sup> Relying on many of the same cases cited in *Austin*, the *Bajakajian* Court focused on the "guilty property" fiction running through its precedents—the idea

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65. See, e.g., *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (finding that the Clause applies to criminal forfeiture of currency for failure to report); *Alexander v. United States*, 509 U.S. 544, 549, 558–59 (1993) (finding that the Clause applies to criminal forfeiture of business assets for tax and obscenity offenses). But see *Browning-Ferris*, 492 U.S. at 271 (finding that the Clause does not apply to punitive damages awards).

The Court adopted the "gross proportionality" standard from its cases under the Cruel and Unusual Punishments Clause. See *Bajakajian*, 524 U.S. at 336; see also *Rummel v. Estelle*, 445 U.S. 263, 271 (1980). The Court has not attempted to set forth a precise test for determining whether a particular penalty is "grossly disproportional." See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) (recognizing that "the relevant constitutional line is 'inherently imprecise'" (internal quotation marks omitted) (quoting *Bajakajian*, 524 U.S. at 336)). See generally Pimentel, *Forfeitures and the Eighth Amendment*, *supra* note 30 (proposing a guide to proportionality analysis drawn from the Court's due process jurisprudence).

This Article does not address whether the Court's adoption of the "gross proportionality" standard for the Excessive Fines Clause is historically supported. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 *Calif. L. Rev.* 277, 321–22 (2014) ("[T]he historical record suggests that the ratifying generation would have held a much broader understanding of the concept of excessiveness than that captured in the Supreme Court's treatment of the term."). That said, the early Treasury Secretaries' apparent concern for finely calibrating penalties via remission suggests that a more stringent conception of proportionality is, at minimum, consistent with early practice.

66. 509 U.S. at 618.

67. *Id.* at 611–14.

68. *Id.* at 614–19.

69. 524 U.S. at 331.

that in rem forfeiture is punishment directed against the property itself.<sup>70</sup> The Court reasoned that such forfeitures were traditionally not considered to be punishment “against [an] *individual* for an offense,” and are therefore outside the Clause’s ambit.<sup>71</sup>

It is difficult to square these decisions,<sup>72</sup> and because the forfeiture actually at issue in *Bajakajian* was a *criminal* forfeiture, there is reason to doubt whether the *Bajakajian* Court’s description of civil forfeiture’s historically nonpunitive nature is controlling as to the applicability of the Excessive Fines Clause.<sup>73</sup> That said, in between *Austin* and *Bajakajian*, the

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70. See, e.g., *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581 (1931) (“It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.”); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (“The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing . . .”).

71. *Bajakajian*, 524 U.S. at 331 (emphasis added).

72. The *Bajakajian* Court halfheartedly acknowledged the tension with *Austin*, citing the latter case for the proposition that some “modern civil *in rem* forfeitures” are punitive. *Id.* at 331 n.6. But *Bajakajian* did not explain why the in rem forfeiture of a mobile home and auto body shop used to facilitate drug crimes in *Austin* was punitive, yet the historical in rem forfeitures discussed in *Bajakajian* were not. See *id.* at 355 (Kennedy, J., dissenting) (noting that the Court’s conclusion that most in rem forfeitures are not fines was “inconsistent or at least in tension with” *Austin*); Colgan, *supra* note 65, at 311 n.178 (describing *Austin* and *Bajakajian* as “directly contradictory”).

73. Because *Austin* involved an in rem forfeiture separate from a criminal proceeding, its statements respecting civil forfeiture’s punitive purposes could reasonably be seen as more authoritative. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (“It is to the holdings of our cases, rather than their dicta, that we must attend . . .”); Pimentel, *Forfeitures and the Eight Amendment*, *supra* note 30, at 560 (“[B]ecause the issue [of whether civil forfeiture is punishment] was not part of the specific holding in *Bajakajian*, the *Austin* holding should still be good law.”). That said, the *Bajakajian* Court’s views on civil forfeiture were arguably necessary to its decision, giving them precedential value. See *Kastigar v. United States*, 406 U.S. 441, 454–55 (1972) (arguing that statements that are “unnecessary to the Court’s decision . . . cannot be considered binding authority”). The Court discussed civil forfeiture’s “nonpunitive” nature in order to refute the government’s argument that the criminal forfeiture at issue was analogous to traditional in rem forfeitures (and therefore not subject to the Clause). See *Bajakajian*, 524 U.S. at 329–32, 340–44 (“The forfeiture in this case does not bear any of the hallmarks of traditional civil *in rem* forfeitures. The Government has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally.”).

What is more, a number of lower courts appear to have followed *Bajakajian* in concluding that civil in rem forfeitures generally are nonpunitive and therefore not subject to proportionality analysis under the Excessive Fines Clause. See, e.g., *United States v. 1948 S. Martin Luther King Drive*, 270 F.3d 1102, 1115 (7th Cir. 2001) (concluding that forfeitures of real property and vehicles involved in drug offenses are “not punitive and therefore not subject to the gross disproportionality test under the Eighth Amendment”); *United States v. Land, Winston Cty.*, 221 F.3d 1194, 1199 (11th Cir. 2000) (“A civil forfeiture is not a fine, whether excessive or not.”); *United States v. Ahmad*, 213 F.3d 805, 814 (4th Cir. 2000) (stating that, following *Bajakajian*, if property subject to civil forfeiture is an “instrumentality” of the offense, the forfeiture “does not trigger the [Clause’s] excessiveness inquiry”). But see *United States v. 45 Claremont St.*, 395 F.3d 1, 6 (1st Cir. 2004) (“[T]he punitive nature of civil *in rem* forfeitures under [21 U.S.C.]

Court deemed civil forfeiture not to be punishment for purposes of the Double Jeopardy Clause. In *United States v. Ursery*, the Court held that the Double Jeopardy Clause generally did not bar parallel criminal and civil forfeiture proceedings, given the “traditional understanding” held “[s]ince the earliest years of this Nation” that “civil forfeiture does not constitute punishment.”<sup>74</sup> Though the *Ursery* Court sought to distinguish *Austin* by disclaiming any necessary “parallel” between the Excessive Fines and Double Jeopardy Clauses,<sup>75</sup> *Ursery*’s conclusion that civil forfeiture was historically considered nonpunitive—subsequently reaffirmed in *Bajakajian*—seems to be the Court’s considered view of the question.

Irrespective of any confusion on the Court regarding civil forfeiture’s punitive nature, what *is* certain is that a definitive answer to the question whether the Eighth Amendment applies to civil forfeiture will likely turn on the Court’s understanding of forfeiture’s history. That much is evident from *Timbs v. Indiana*, a recently decided case in which the Court concluded that the Excessive Fines Clause is incorporated against the states under the Fourteenth Amendment.<sup>76</sup> Recognizing that it was almost certain to lose on this question, the State of Indiana focused on persuading the Court to rule that, irrespective of incorporation, civil forfeitures are not subject to the Clause.<sup>77</sup> The state’s argument for exempting civil forfeiture from constitutional scrutiny was almost entirely historical; in particular, the state asserted that forfeitures have always been considered nonpunitive.<sup>78</sup>

The *Timbs* Court did not take the state’s bait. Because the courts below had not addressed the question of whether the Clause applies to civil forfeitures, the Court limited itself to answering the incorporation

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§ 881(a)(7) [providing for forfeiture of real property involved in drug offenses] warrants application of the ‘grossly disproportional’ standard to determine whether a forfeiture violates the Excessive Fines Clause.”). Accordingly, there is reason to think that the *Bajakajian* Court’s belief that civil forfeiture has historically been considered nonpunitive has served to limit applicability of the Excessive Fines Clause’s proportionality requirement to such forfeitures in the present day.

74. 518 U.S. 267, 274, 287, 292 (1996); see also *id.* at 274–78 (describing cases in which the Court concluded that the Double Jeopardy Clause does not apply to civil forfeitures).

75. *Id.* at 286; see also Susan R. Klein, Civil In Rem Forfeiture and Double Jeopardy, 82 Iowa L. Rev. 183, 189 (1996) (critiquing the *Ursery* Court’s conclusion that the Double Jeopardy Clause is inapplicable to civil in rem forfeiture actions); Andrew L. Subin, The Double Jeopardy Implications of In Rem Forfeiture of Crime-Related Property: The Gradual Realization of a Constitutional Violation, 19 Seattle U. L. Rev. 253, 254–55 (1996) (discussing the Supreme Court’s conclusions in other cases that “the civil forfeiture of crime-related property is punitive and such forfeitures can often violate the Double Jeopardy Clause”).

76. 139 S. Ct. 682, 686–87 (2019).

77. See Brief for Respondent, *supra* note 17, at 58–59 (dedicating only two of sixty pages to arguing that the Excessive Fines Clause should not be incorporated against the states).

78. See *id.* at 17–57.

question.<sup>79</sup> But it is doubtful that the question of the Clause's applicability to civil forfeiture will escape review for long. There is confusion among the lower courts on this issue,<sup>80</sup> and the current Justices' apparent willingness to entertain questions regarding civil forfeiture's constitutionality ensures that aggrieved litigants will not be shy about seeking the Court's review going forward.<sup>81</sup>

## II. FORFEITURE AT THE FOUNDING

Given the centrality of history in Supreme Court decisions assessing forfeiture's constitutionality, a nuanced understanding of how the early federal government used civil forfeiture as a tool of law enforcement is crucial. To develop such an understanding, this Part reviews both the statutory regime governing civil forfeiture in the post-Founding Era and the government's enforcement practices, to see how early forfeiture actually worked. The findings present a challenge for forfeiture's modern critics. As section II.A describes, the enforcement scheme Congress devised enabled the government to impose substantial penalties for even

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79. *Timbs*, 139 S. Ct. at 690. Because the Court declined Indiana's invitation to address whether the Excessive Fines Clause applies to in rem civil forfeitures, it also did not address whether *Austin* had already answered that question in the affirmative, and therefore did not consider whether to "overrule" *Austin* (as the state suggested it should). *Id.* Accordingly, the Court refused to reconsider its "unanimous judgment in *Austin* that civil in rem forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive." *Id.*

While this suggests that the current Court understands *Austin* to be controlling as to the Clause's applicability to civil forfeiture, one should be cautious about reading too much into the statement. The only thing the Court decided in *Timbs* is that the Clause is incorporated against the states. *Id.* at 686–87. The Court did not discuss the questions raised by *Bajakajian* or *Ursery* about *Austin*'s general applicability. See *id.* at 690. Accordingly, one can expect future government litigants to follow Indiana's lead and challenge *Austin* on historical grounds. Moreover, even if lower courts assume that the Clause applies to civil forfeiture, government attorneys will likely point to the historical absence of proportionality review in judicial proceedings as reason to conclude that the forfeiture of property directly involved in criminal offenses is necessarily "proportional" under the Clause. See Opening Brief of Appellant at 12–28, *Indiana v. Timbs*, No. 27SO4-1702-MI-00070 (Ind. filed May 24, 2019) (making this argument); see also *Austin v. United States*, 509 U.S. 602, 627–28 (1993) (Scalia, J., concurring in part and concurring in the judgment) (suggesting that a civil forfeiture violates the Eighth Amendment's "traditional limits" only when the property in question "cannot properly be regarded as an instrumentality of the offense").

80. See *supra* note 73.

81. See *supra* note 1; see also Supplemental Brief to Pending Petition for a Writ of Certiorari at 2–4, *Ashland Specialty Co. v. Steager*, 139 S. Ct. 2714 (2019) (No. 18-1053), 2019 WL 1240048 (asking the Court to decide, in light of *Timbs*, whether a particular civil penalty violated the Excessive Fines Clause); RJ Vogt, Justices' Answer on Excessive Fines Invites New Questions, *Law360* (Feb. 24, 2019), <https://www.law360.com/articles/1131638/justices-answer-on-excessive-fines-invites-new-questions> [<https://perma.cc/67ZM-YLUL>] (quoting a law professor predicting "an avalanche of litigation" post-*Timbs* to decide whether and how the Clause applies to civil forfeiture).

trivial and unintentional violations of the law, with little process required to effectuate a seizure and forfeiture. And because federal officers received a share of the proceeds from every forfeiture in which they were involved, they had a strong financial incentive to exercise this power to its fullest extent.<sup>82</sup> Viewed in isolation, the expansiveness of the early regime suggests that the Court is correct in concluding constitutional protections for forfeiture's victims are historically unjustified.

Faced with a challenging historical record, modern-day advocates for more stringent limits on civil forfeiture have sought to confine this history's relevance. They argue that forfeiture, while potentially expansive in scope, was traditionally limited in its purposes and should be similarly confined today.<sup>83</sup> As section II.B explains, however, Founding Era practices undermine this argument. While it is true that forfeiture served the limited purposes the critics identify, this Article's investigation into early court records and government correspondence reveals that the federal officers also used the power more broadly. Indeed, the historical record suggests that the government used forfeiture precisely in the ways in which modern critics find so objectionable: as an easier path to imposing penalties for lawbreaking than ordinary criminal process would allow.

#### A. *Forfeiture Unfettered*

From the federal government's earliest days, forfeiture was critical to law enforcement. In the period studied here, Congress authorized the federal government to seize property connected with—among other things—arms exportation,<sup>84</sup> slave trading,<sup>85</sup> violating U.S. neutrality,<sup>86</sup> alcohol distilling,<sup>87</sup> sugar and snuff refining,<sup>88</sup> and trading with native peoples.<sup>89</sup> In almost every area the federal government regulated, forfeiture was one of the primary tools of law enforcement. In some cases, the government could forfeit commercial goods, like illegally traded arms<sup>90</sup> or cargo involved in unlawful native trading.<sup>91</sup> In other cases, the government could seize ships that facilitated a legal violation, as for slave trade<sup>92</sup> or neutrality violations.<sup>93</sup> And it could often take both.<sup>94</sup>

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82. See *infra* notes 117–122 and accompanying text.

83. See *infra* note 144 and accompanying text.

84. Act of May 22, 1794, ch. 33, § 2, 1 Stat. 369, 369.

85. Slave Trade Act of 1794, ch. 11, § 1, 1 Stat. 347, 349.

86. Neutrality Act of 1794, ch. 50, § 3, 1 Stat. 381, 383.

87. Whiskey Tax Act of 1791, ch. 15, § 10, 1 Stat. 199, 201–02.

88. Act of June 5, 1794, ch. 51, § 4, 1 Stat. 384, 385.

89. Indian Trade and Intercourse Act of 1790, ch. 33, § 3, 1 Stat. 137, 137–38.

90. Act of May 22, 1794, ch. 33, § 2, 1 Stat. 369, 369.

91. Indian Trade and Intercourse Act of 1790 § 3, 1 Stat. at 137–38.

92. Slave Trade Act of 1800, ch. 51, § 1, 2 Stat. 70, 70.

93. Neutrality Act of 1794, ch. 50, § 3, 1 Stat. 381, 383.

94. See Collection Act of 1790, ch. 35, §§ 27, 60, 1 Stat. 145, 163, 174 (repealed 1799).

First and foremost, forfeiture was a tool for enforcing the legislative scheme governing revenue collection—in particular, the customs duties imposed on goods imported into the United States.<sup>95</sup> These duties were the national government's lifeblood. During the period studied here—and well into the nineteenth century—receipts from import duties constituted the lion's share of the federal government's total revenue.<sup>96</sup>

Given the importance of revenue, one of Congress's primary items of business in 1789 was to organize customs collection. The first Collection Act established collection districts along the eastern seaboard, each with a collector responsible for supervising the payment of duties.<sup>97</sup> When a ship sailed into port, its master made entry at the collector's office, providing a manifest indicating the cargo on board.<sup>98</sup> Based on the manifest and inspection of the cargo, the collector (or his subordinates) would determine the amount of duties owed.<sup>99</sup> An accurate assessment of duties depended on a full and complete accounting of the type and quantity of goods being brought into the country. Goods that escaped notice—either accidentally or by subterfuge—compromised the government's ability to collect the revenue it was due.<sup>100</sup>

To prevent evasions, customs inspectors regularly boarded ships arriving into port to examine documents and supervise the unloading of cargo.<sup>101</sup> Once on board, if the officer had any "reason to suspect" that dutiable goods were being concealed, he could conduct a full search, with no warrant needed.<sup>102</sup> Similarly, when officers learned of goods

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95. See Whiskey Tax Act of 1791, ch. 15, §§ 10–11, 19–20, 25, 27–28, 31–33, 55, 1 Stat. 199, 201–02, 203–07, 212; Collection Act of 1790 §§ 13–14, 22, 27–28, 46–49, 60, 70, 1 Stat. at 157–58, 161, 163–64, 169–70, 174, 177; Act of Sept. 1, 1789, ch. 11, §§ 24, 35, 1 Stat. 55, 61, 65; Collection Act of 1789, ch. 5, §§ 12, 15, 22–25, 34, 39, 1 Stat. 29, 39–43, 46, 48 (repealed 1790).

96. In every year from 1791 to 1809, customs collections accounted for more than seventy-five percent of nonloan revenue, and for the entire period it constituted ninety percent of total nonloan revenue. Receipts and Public Debt (Apr. 16, 1810), in 2 American State Papers: Finance 423, 423–24 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832). See generally Gautham Rao, National Duties: Custom Houses and the Making of the American State 6–8 (2016) ("Americans in the early republic recognized the importance of the custom house because of what happened there: [I]t was an indisputable fact that customs revenue almost singlehandedly funded the federal government.")

97. Collection Act of 1789 § 1, 1 Stat. at 29–35.

98. *Id.* § 10, 1 Stat. at 38.

99. See Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 224–26 (2013) (describing the role of customs officers in collecting duties prior to congressional reform in the nineteenth century).

100. See *id.*

101. See Collection Act of 1789 § 10, 1 Stat. at 38.

102. *Id.* § 24, 1 Stat. at 43; see also, e.g., Marks ex rel. United States v. Amiable Adele (E.D. Pa. 1799), microformed on Information Case Files, 1789–1843, and Related Records, 1792–1918, of the U.S. District Court for the Eastern District of Pennsylvania, Microfilm M992, reel 1, at 5, 8 (Nat'l Archives Microfilm Publ'ns) [hereinafter EDPA]

already landed on shore, they could obtain a search warrant for goods concealed “in any particular dwelling-house, store, building, or other place.”<sup>103</sup>

To aid officers in their efforts to collect duties owed, the early forfeiture prohibitions Congress established were aimed at discouraging customs evasion.<sup>104</sup> Some attacked the problem directly: For example, goods unloaded from a ship without an officer’s consent were subject to forfeiture.<sup>105</sup> Goods omitted from the ship’s manifest, or inaccurately described, were also forfeited,<sup>106</sup> as were goods invoiced at a lower value than their price at the place of export.<sup>107</sup> Other regulations aimed at curtailing smuggling indirectly by making it more difficult to pull off. Goods imported in ships under a certain size were forfeited,<sup>108</sup> as were beer and spirituous liquors imported in undersized containers.<sup>109</sup> These proscriptions—even the most arbitrary seeming—were designed to make it more

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Information Files] (holding that loose coffee beans scattered on deck gave the customs inspector reason to believe that goods had been illegally landed).

103. Collection Act of 1789 § 24, 1 Stat. at 43; Parrillo, *supra* note 99, at 235–36. The statutory standard for land-based searches was “cause to suspect,” rather than “reason to suspect,” but it does not appear that these terms indicated different thresholds of suspicion. Cf. Fabio Arcila, Jr., *The Framers’ Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. Rev. 363, 398, 422–23 (2009) (noting that “reasonable suspicion” and “probable cause” were “substantively identical” in early civil search statutes (internal quotation marks omitted)). For discussions of federal officers’ search powers at the Founding, see generally William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602–1791*, at 739–72 (2009) (discussing the historical process of determining whether searches and seizures are reasonable); Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*, at 17–44 (2006) (describing the connection of search and seizure disputes to political violence in England); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 765–77 (1994) (discussing historical warrant requirements in searches and seizures); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 551 (1999) (discussing the original meaning of search and seizure); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 218–28 (1993) (discussing Framers’ concerns with warrantless searches).

104. See Alexander Hamilton, *Report on Defects in the Existing Laws of Revenue* (Apr. 22, 1790), in 6 *The Papers of Alexander Hamilton* 373, 380 (Harold C. Syrett ed., digital ed. 2011) (“[A]ll the precautions comprehended in the existing system . . . proceed on a supposition . . . that there are persons concerned in trade, in every country, who will, if they can, evade the public dues, for their private benefit.”).

105. Collection Act of 1790, ch. 35, §§ 27, 28, 1 Stat. 145, 163–64 (repealed 1799).

106. *Id.* § 10, 1 Stat. at 156.

107. *Id.* § 46, 1 Stat. at 169. The invoicing requirement was meant to ensure accuracy in *ad valorem* duties—that is, duties imposed in relation to the value of the goods, rather than a fixed rate according to type and quantity. Parrillo, *supra* note 99, at 225–26.

108. Collection Act of 1790 § 70, 1 Stat. at 177.

109. Act of May 2, 1792, ch. 27, § 12, 1 Stat. 259, 262 (amended 1800); Whiskey Tax Act of 1791, ch. 15, § 33, 1 Stat. 199, 207.

difficult for merchants to avoid paying duties owed on the goods they shipped.<sup>110</sup>

Importantly, forfeiture also extended to the ships that transported illegally imported goods. If a ship landed cargo worth more than \$400 without a permit, both the goods and the vessel were subject to forfeiture.<sup>111</sup> The penalty for *receiving* such goods was a heavy fine (triple the goods' value) and forfeiture of the receiving vessel.<sup>112</sup> Ships could also be seized for fraudulently pretending to be American owned (which allowed them to benefit from lower import duties)<sup>113</sup> or for unlicensed engagement in interstate trade (open only to Americans).<sup>114</sup> Similar penalties were available for even minor infractions; for instance, importation of bottled beer in packages of fewer than six dozen bottles subjected both the beer *and* the vessel to forfeiture.<sup>115</sup> In short, potentially severe penalties attached to a range of customs violations.

In addition to authorizing stiff punishments, the initial legislative scheme governing customs collection was harsh in another sense: It was largely a strict liability regime. With a few exceptions, those who violated the law were subject to penalties irrespective of whether they intended to evade paying the duties they owed. For example, of the dozens of prohibitions in the first Collection Act, only two depended on the offender's state of mind.<sup>116</sup> For all other transgressions, a penalty attached to even unintentional offenses. Working in combination, the forfeiture and liability provisions Congress enacted enabled the government to seize highly valuable property for unknowing violations of a host of technical requirements related to maritime commerce.

The statutory scheme governing customs collection also gave officials strong incentive to pursue such forfeitures. By law, half of the

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110. See Letter from Alexander Hamilton to John Lowell (Mar. 19, 1794), *in* 16 The Papers of Alexander Hamilton 184, 184 (Harold C. Syrett ed., digital ed. 2011) (stating that a rule prescribing forfeiture of wine imported in casks of less than ninety-gallon size was tailored to prevent "clandestine landing of them"); Alexander Hamilton, Treasury Department Circular to the Captains of the Revenue Cutters (June 4, 1791), *in* 7 The Papers of Alexander Hamilton 426, 430 (Harold C. Syrett ed., digital ed. 2011) (writing that a statutory provision requiring a permit before landing was intended to prevent "clandestine[]" unloading).

111. Collection Act of 1790 § 27, 1 Stat. at 163.

112. *Id.* § 14, 1 Stat. at 158.

113. Act of Dec. 31, 1792, ch. 1, § 4, 1 Stat. 287, 289–90.

114. See *id.* §§ 2, 27, 1 Stat. at 288, 298.

115. See Act of May 8, 1792, ch. 32, § 12, 1 Stat. 267, 270 (repealed 1802) (forfeiting goods and vessel for importing foreign-made spirits in casks bearing American marks); Act of May 2, 1792, ch. 27, § 12, 1 Stat. 259, 262 (amended 1800) (forfeiting the goods and vessel for importing spirits below a specified quantity from foreign ports).

116. See Collection Act of 1789, ch. 5, § 16, 1 Stat. 29, 41 (providing a \$200 fine for discrepancies between the manifest and goods actually delivered, unless it was due to "unavoidable necessity or accident, and not with intention to defraud the revenue"); *id.* § 23, 1 Stat. at 43 (allowing forfeiture of packaged goods if the contents differed from the entry made at the customhouse due to "intention to defraud the revenue").

proceeds from a forfeiture went to the United States, and the other half was divided equally among the three principal customs officers for the district in which the seizure took place.<sup>117</sup> Informants also received a cut of the proceeds,<sup>118</sup> and certain nonrevenue statutes allowed informants to seek forfeiture directly via a *qui tam* action in their own name.<sup>119</sup> If successful, the informant and the government shared the proceeds equally.<sup>120</sup>

Sharing in forfeitures was a potentially strong inducement for customs officers.<sup>121</sup> During this period the government repeatedly sought high-value forfeitures, some worth thousands of dollars. Given the modest income most officers received, even a partial share of such seizures represented a substantial financial boon.<sup>122</sup> As a result, customs officers not only had significant authority to seize and condemn property in response to lawbreaking; they also had good reason to use that power.

Authority and incentives were not the only factors that encouraged expansive use of forfeiture, as the process for forfeiting seized ships and goods was relatively simple. The customs collector brought suit in federal district court,<sup>123</sup> though the suit was actually initiated by the federal district attorney at the collector's behest.<sup>124</sup> The district attorney filed a

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117. *Id.* § 38, 1 Stat. at 48.

118. *Id.*

119. See, e.g., *Humphrey ex rel. United States v. Brig Express* (E.D. Pa. 1799), microformed on EDPA Information Files, *supra* note 102, at reel 1, 14–15 (finding a violation of the embargo against trade with French territories).

120. See Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565, 565 (providing that one half of the forfeited cargo would be awarded to the person who “inform[s] and prosecute[s]”); Neutrality Act of 1794, ch. 50, § 3, 1 Stat. 381, 383 (awarding half of the fine to “any person who shall give information of the offence”); Slave Trade Act of 1794, ch. 11, §§ 2, 4, 1 Stat. 347, 349 (providing that one half of the fine be awarded to the individual who “sue[s] for and prosecute[s]” the offense); Whiskey Tax Act of 1791, ch. 15, § 44, 1 Stat. 199, 209 (awarding half of the forfeiture to the person who “first discover[s] the matter”).

121. This inducement was not unique to revenue collection. See generally Parrillo, *supra* note 99, at 24–48 (describing the use—and eventual abandonment—of “bounties” as a tool of governance in the nineteenth century).

122. In 1792, the compensation earned by various customs collectors ranged from \$4,609.04 for the New York collector to \$6.25 for his counterpart in South Hero, Vermont. List of Civil Officers of the United States, Except Judges, with Their Emoluments, for the Year Ending October 1, 1792 (Feb. 27, 1793), *in* 1 *American State Papers: Miscellaneous* 57, 61 (Walter Lowrie & Walter S. Franklin eds., Washington, D.C., Gales & Seaton 1834).

123. The Judiciary Act of 1789 gave the district courts exclusive jurisdiction over “all seizures under laws of impost, navigation or trade of the United States” and “all suits for penalties and forfeitures incurred, under the laws of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

124. See Alexander Hamilton, Treasury Department Circular to the Collectors of the Customs (June 8, 1792), *in* 11 *The Papers of Alexander Hamilton* 495, 496 (Harold C. Syrett ed., digital ed. 2011) (explaining that the statutory scheme “contemplate[d] the Collector, as the person, who is to direct, in the first instance, prosecutions for fines, penalties and forfeitures”). At the time, the attorneys employed by the federal government to represent its interests in federal court were colloquially known as the “district attorneys,” as they were appointed to represent the government in a particular federal judicial district. See Judiciary Act of 1789 § 35, 1 Stat. at 92 (“[T]here shall be appointed

complaint in the name of the United States, called a “libel” or an “information” in rem—that is, the suit was against the vessels or goods themselves.<sup>125</sup> The libel did not need to include any details; a basic statement setting forth the articles to be forfeited and the alleged statutory violation was sufficient.<sup>126</sup>

The notice requirement was similarly minimal.<sup>127</sup> The court had to provide fourteen days’ notice of the proceedings, but this only required the marshal of the court to post notice of the suit in a local newspaper and in a public place.<sup>128</sup> Neither the government nor the court had to make any effort to identify and directly notify interested parties, and even the limited publication requirement was not always enforced.<sup>129</sup> If no one filed a claim in opposition—which was often the case<sup>130</sup>—after a few weeks the court would enter default judgment in favor of the government.<sup>131</sup>

The government also enjoyed significant advantages in the few cases that went to trial. Though as a general matter both sides presented evidence, often including live and written testimony from various witnesses, under the original legislative scheme it was the defending claimant who

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in each district a meet person learned in the law to act as attorney for the United States in such district . . . .”); Letter from Jeremiah Olney to Alexander Hamilton (June 21, 1791), in 8 *The Papers of Alexander Hamilton* 495, 495–96 (Harold C. Syrett, ed., digital ed. 2011) (discussing a customs-related suit initiated by “the District Attorney”).

125. There is some confusion, both in the practices of federal government attorneys and in the case law, regarding whether an “information” or a “libel” was the proper means of suing for forfeiture. See *The Samuel*, 14 U.S. (1 Wheat.) 9, 14 (1816) (“A libel on a seizure, in its terms and in its essence, is an information.”). But for present purposes the two are the same—the suit was against the offending article itself. See Nelson, *Constitutionality of Civil Forfeiture*, supra note 8, at 2466 (“Whether brought in admiralty or at law, though, forfeiture proceedings were commonly conducted in rem. . . . In admiralty, the process was sometimes called an information and sometimes called a libel, but again it was in rem.” (footnote omitted)).

126. See, e.g., *United States v. Ship Lydia* (S.D.N.Y. 1801), microformed on Admiralty Case Files of the U.S. District Court for the Southern District of New York, 1790–1842, Microfilm M919, reel 2 (Nat’l Archives Microfilm Publ’ns) [hereinafter SDNY Admiralty] (alleging that importation violated the Whiskey Tax Act of 1791 ch. 15, § 44, 1 Stat. 199).

127. See *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983) (explaining that “constructive notice” of the kind used in customs forfeiture cases was historically “understood to satisfy” due process).

128. *Collection Act of 1789*, ch. 5, § 36, 1 Stat. 29, 47.

129. See *Court Order* (S.D.N.Y. 1801), microformed on Minutes and Rolls of Attorneys of the U.S. District Court for the Southern District of New York, 1789–1841, Microfilm M886, reel 2, vol. 1, at 178 (Nat’l Archives Microfilm Publ’ns) [hereinafter SDNY Minutes] (noting that the practice of publishing notices in a local paper had “been discontinued for some time past,” and ordering that the marshal recommence doing so, so as to avoid “irreparable injury” to claimants located at “distant ports”).

130. As discussed later, approximately half the cases in the sample resulted in a default judgment. See *infra* note 226 and accompanying text.

131. See, e.g., *United States v. Three Boxes of Ironmongering Lines* (S.D.N.Y. 1790), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 16.

bore the burden of proof—that is, they had to *disprove* that a violation had occurred.<sup>132</sup> Congress adjusted this burden in 1795 so that it applied if only the government first showed that there was “probable cause” for the prosecution.<sup>133</sup> But that itself was a fairly low bar for the government to surmount,<sup>134</sup> and one it likely met in any case it bothered to bring.<sup>135</sup>

Perhaps most importantly, customs forfeitures were tried before a judge, not a jury. This makes intuitive sense: Juries in the colonial period had long favored claimants and defendants against the government in trade and revenue cases, and their stubbornness was one of the principal reasons the British government gave jurisdiction over revenue cases to the vice-admiralty courts in the colonies (which sat without a jury).<sup>136</sup> Indeed, in the early years of the federal courts, juries continued to render defendant-friendly verdicts in cases where the government sought monetary fines in personam.<sup>137</sup>

Yet if the jury’s absence in early forfeiture cases is understandable, it is nonetheless noteworthy. One of the prime sources of colonial outrage in the run-up to the American Revolution was precisely the fact that trade and revenue cases were tried to a jury in England (generally in the Court of Exchequer), but in the colonies they were tried to a judge in the

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132. See Collection Act of 1790, ch. 35, § 51, 1 Stat. 145, 170 (stating that in every case brought under the Act, “the onus probandi shall be upon [the] claimant”); Collection Act of 1789 § 27, 1 Stat. at 43–44 (same).

133. Act of Feb. 26, 1795, ch. 31, § 2, 1 Stat. 420, 420–21 (repealed 1799).

134. See *Locke v. United States*, 11 U.S. (1 Cranch) 339, 348 (1813) (stating that “probable cause” merely means a seizure “made under circumstances which warrant suspicion”); Arcila, *supra* note 103, at 422–23 (concluding that “reasonable cause” and “probable cause” meant the same thing to the Framers).

135. Federal officers had good reason to file suit only when they were confident that the court would agree that they had “reasonable cause” to suspect that a violation had been committed: By statute, a judicial finding of “reasonable cause” for a seizure immunized officers from liability for damages if the seizure was ultimately deemed wrongful. See Collection Act of 1789, § 36, 1 Stat. at 47. On the potentially significant tort liability federal government officers faced for unlawful seizures, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 *Yale L.J.* 1256, 1319–31 (2006); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 *N.Y.U. L. Rev.* 1862, 1877–88 (2010).

136. See *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 141 (1943) (describing the “obstinate resistance of American Juries” to British maritime regulation through the common law courts); Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part I)*, 26 *J. Mar. L. & Com.* 581, 594–95 (1995) (explaining that British officials urged the creation of vice-admiralty courts because common law juries “proved continually reluctant to bring in verdicts against their neighbors”).

137. See Douglas Lamar Jones, “The Caprice of Juries”: The Enforcement of the Jeffersonian Embargo in Massachusetts, 24 *Am. J. Legal Hist.* 307, 324–29 (1980) (describing the high acquittal rate in juried cases under the Jeffersonian embargo laws involving fines against natural persons, as compared to forfeiture cases tried before a judge).

British vice-admiralty courts.<sup>138</sup> Despite this background, and the use of juries in early state admiralty courts,<sup>139</sup> the early federal courts appear to have adopted a practice of trying revenue-related forfeiture actions without a jury. This change did not happen overnight; the records examined for this project reveal a small handful of suits against goods or vessels that were tried to a jury.<sup>140</sup> But those cases appear to be outliers. By the close of the period studied here, the Supreme Court had definitively ruled that all seizures under the nation's impost, trade, and navigation laws made on navigable waters were "admiralty causes" and therefore tried to a judge.<sup>141</sup>

Full consideration of why the early federal courts embraced a feature of British governance that Americans viewed as anathema only two decades earlier is beyond the scope of this Article.<sup>142</sup> But the simplest explanation is that, when faced with the task of constructing a viable revenue system, the Founders—like Parliament and crown officials in an earlier period—did not want obstructionist juries to undermine the government's ability to collect much-needed revenue.<sup>143</sup> They instead

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138. See Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts* (Part II), 27 J. Mar. L. & Com. 323, 332 (1996) [hereinafter Harrington, *Legacy* (Part II)] ("In England, trade cases were usually tried in the exchequer courts with juries. The fact that the vice-admiralty courts were given jurisdiction over trade cases was a constant source of irritation to the American colonists."). But cf. *C.J. Hendry Co.*, 318 U.S. at 139–48 (describing significant in rem forfeiture practice in common-law courts during the colonial period).

139. See Harrington, *Legacy* (Part II), supra note 138, at 341.

140. See, e.g., *United States v. Sloop Penelope* (E.D. Pa. 1806), microformed on EDPA Information Files, supra note 102, at reel 2, 2, 10–11; *United States v. The Brig Friends* (E.D. Pa. 1803), microformed on EDPA Information Files, supra note 102, at reel 2, 15; *United States v. Ship Huron* (S.D.N.Y. 1803), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 48; *United States v. Brig Lydia* (E.D. Pa. 1792), microformed on EDPA Information Files, supra note 102, at reel 1.

141. Though in 1796 the Court held that a forfeiture for illegal arms exportation was an admiralty cause because "exportation is entirely a water transaction," *United States v. La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796), and subsequently cited that decision in ruling that slave trade forfeitures were also admiralty causes, *United States v. Schooner Sally*, 6 U.S. (2 Cranch) 406, 406 (1805), the Court only settled the broader issue in 1808. See *United States v. Schooner Betsey & Charlotte*, 8 U.S. (4 Cranch) 443, 446 (1808).

142. See Harrington, *Legacy* (Part II), supra note 138, at 349 ("Once free from British control, American legislators seemed to have forgotten most of the rhetoric about the evils of trying trade cases in admiralty.").

143. See *Schooner Betsey & Charlotte*, 8 U.S. at 446 n.\* (Chase, J.) ("The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries."); Kevin Arlyck, *Forged by War: The Federal Courts and Foreign Affairs in the Age of Revolution* 43–67 (Sept. 2014) (unpublished Ph.D. dissertation, New York University) (on file with the *Columbia Law Review*) (explaining that the Founders' grant of exclusive admiralty jurisdiction to the federal courts was motivated in significant part by the difficulties that stemmed from jury adjudication of prize cases in state courts during the Confederation period).

wanted to ensure that the government would be able to use forfeiture to its fullest extent.

B. *The Search for Limits*

The picture of early forfeiture that emerges from the records is a harsh—and perhaps familiar—one. The forfeiture power was highly punitive in both theory and practice, imposing significant penalties for minor transgressions, through procedures that both gave the government significant advantages and provided significant personal rewards to the enforcers. In short, at first blush the early practice appears to confirm the portrait of unfettered government power the modern Supreme Court has drawn.

Faced with this reality, forfeiture's critics argue that this early history has limited relevance because forfeiture was traditionally used for narrow purposes: to remediate harm, impose penalties on those outside the courts' jurisdiction, and support revenue collection.<sup>144</sup> Therefore, critics contend, there is no historical basis for denying constitutional protections in connection with modern forfeitures that go beyond those limited objectives.

The difficulty with these arguments is that historical practice was not restricted in the ways modern critics suggest. To be sure, the early government used forfeiture for the “limited” purposes critics identify. But it also used forfeiture more broadly, raising doubts about whether the constraints for which modern critics advocate are historically justified.

1. *Remediating Harm.* — Critics contend that early forfeiture had limited “remedial” purposes.<sup>145</sup> One such alleged purpose was to replace

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144. See Boudreaux & Pritchard, *supra* note 44, at 629 (“[T]he Court allowed *in rem* forfeiture to evolve from its origins in admiralty and customs enforcement to become a general tool for government to suppress criminal activity through civil procedures.”); Klein, *supra* note 75, at 272 (“Civil *in rem* forfeiture originally was designed as a measure to collect otherwise uncollectible revenues, remove dangerous instrumentalities from commerce, eliminate contraband, and compensate victims . . .”); Herpel, *supra* note 32, at 1915 (“Civil forfeiture was used almost exclusively to redress violations of revenue and maritime offenses and to provide a legal mechanism for seizing enemy property in wartime.”); James R. Maxeiner, Note, Bane of American Forfeiture Law—Banished at Last?, 62 Cornell L. Rev. 768, 774–85 (1977); see also *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari) (“[H]istorical forfeiture laws were narrower in most respects than modern ones.”).

145. As commentators have noted, the distinction between “punitive” and “remedial” sanctions is slippery. See, e.g., J. Morris Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379, 391 (1976) (describing the Supreme Court's distinction between remedial and punitive laws as “shifting and uncertain”); Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 Geo. L.J. 1, 10 (2005) (“[T]he Court has often found statutes to be ‘remedial’ even though the primary intent and effect of the statute are deterrence and punishment.”). For present purposes, I use the term “remedial” to refer to purposes other than imposing a penalty on an individual (whether for retribution or deterrence), such as compensating for harm done or preventing future harm by limiting the wrongdoer's

the lost revenue that resulted from a customs evasion: Forfeiture of property involved in illegal importation could repair the harm to the public treasury that resulted from nonpayment of duties owed.<sup>146</sup> A second remedial purpose was to remove from circulation two categories of dangerous items: “instrumentalities” that facilitated the commission of the offense (and could do so again if left in the hands of customs evaders) and “contraband”—that is, inherently illegal or harmful property.<sup>147</sup> According to the critics, while forfeiture in such contexts could be justified as a remedial measure aimed at protecting government revenue or preventing further lawbreaking, modern forfeitures that go beyond such limited purposes—such as those reaching property purchased with the proceeds of illegal activity—are “punitive” and should therefore be subject to constitutional limits (particularly under the Excessive Fines and Double Jeopardy Clauses).<sup>148</sup>

The difficulty with this argument is that the government’s early forfeiture practices were not limited solely to “remedial” purposes. In both theory and practice, civil forfeiture did far more than replace lost revenue or remove dangerous items from circulation. By imposing severe financial penalties on the owners of forfeited property, it served as a means of punishing lawbreaking.

Consider the value of most forfeitures as compared to the revenue lost from customs evasion. While the rates of customs duties on particular goods varied, from 1790 to 1807 the average annual tariff on dutiable goods was generally around twenty percent, and only exceeded twenty-five percent twice.<sup>149</sup> As a result, forfeiture of goods subject to *ad valorem*

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capacity to inflict it. See *id.* at 18 (defining remediation as “coercing the redistribution of resources . . . from one person to an injured person in an amount approximately equivalent to the injury sustained”); see also *United States v. Ursery*, 518 U.S. 267, 311 (1996) (Stevens, J., concurring in part and dissenting in part) (“It is perfectly conceivable that certain kinds of instruments used in the commission of crimes could be forfeited for remedial purposes.”).

146. See Klein, *supra* note 75, at 193–94; see also *United States v. Bajakajian*, 524 U.S. 321, 342 (1998) (indicating that “monetary forfeitures” requiring payment of a cash penalty proportioned to the property’s value serve the “remedial purpose” of reimbursing the government for customs duties lost via evasion); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 n.26 (1974) (“Seizure and forfeiture statutes . . . help compensate the Government for its enforcement efforts . . .”).

147. Klein, *supra* note 75, at 193–95; see also *Calero-Toledo*, 416 U.S. at 686–87 (“Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws . . . prevent[s] further illicit use of the conveyance . . .”); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965) (describing “contraband” as “objects the possession of which, without more, constitutes a crime”).

148. Klein, *supra* note 75, at 190–91; see also Pimentel, *Forfeitures and the Eighth Amendment*, *supra* note 30, at 545 (arguing that leveraging the Excessive Fines Clause to provide a constitutional check on forfeiture is “long overdue”).

149. Douglas A. Irwin, *New Estimates of the Average Tariff of the United States, 1790–1820*, 63 *J. Econ. Hist.* 506, 508 (2003). In contrast, from 1813 to 1836, the tariff dipped below thirty percent only four times and was generally around forty percent. *Id.* at 509; see

duties—that is, duties imposed in relation to the value of the goods—was likely to be four or five times more valuable than the duty owed. Rather than simply replacing lost revenue, forfeiture multiplied it.<sup>150</sup> And that is true even before considering forfeiture actions brought against illegally imported goods *and* the vessels that carried them. Because ships were often worth thousands of dollars, the penalty imposed through forfeiture in such cases grew by orders of magnitude.<sup>151</sup>

This is not merely a hypothetical problem. Research reveals that, in the early period, the government routinely used forfeiture to impose penalties that were wholly disproportional to the potential revenue loss stemming from a violation. For example, when Thomas Shaw brought two casks of rum on board his ship to sell to passengers en route from Londonderry to New York, he unwittingly ran afoul of a law prohibiting the importation of spirits in casks bearing American marks.<sup>152</sup> In response, the government sought to forfeit both the rum (worth \$405.75) *and* his ship (worth \$12,000), a penalty more than 100 times greater than the duties owed.<sup>153</sup> And this was not an outlier case; a number of statutes provided for forfeiture of both goods and vessels,<sup>154</sup> and federal officers were not shy about using them.<sup>155</sup>

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also Parrillo, *supra* note 99, at 234–35 (noting that heightened tax rates leading up to the Civil War gave merchants increased reasons to evade duties).

150. The same is true for goods taxed by fixed rate according to type and quantity. Compare *United States v. Richard Conklin* (S.D.N.Y. 1797), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 2, 191–92 (finding forfeited salt worth \$2.00 per bushel), with Letter from Oliver Wolcott to William Smith (Jan. 19, 1797), in 1 *American State Papers: Finance* 493, 493–94 (Walter Lowrie & Matthew St. Claire Clarke eds., Washington D.C., Gales & Seaton 1832) (noting the duty on salt is \$0.12 per bushel).

151. See, e.g., *United States v. Ship Lydia* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 368 (petitioning for remission in a case involving \$387.50 worth of improperly packaged goods brought in a vessel worth \$11,240).

152. *United States v. Ship Mary* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, at 304 (describing Thomas Shaw as “an ignorant man” unaware of the prohibition on importation); see also Act of May 8, 1792, ch. 32, § 12, 1 Stat. 267, 270 (repealed 1802).

153. *Ship Mary* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129. The duty rate on imported rum in 1795 is unknown, but given that the average tariff in this period was around twenty percent, see Irwin, *supra* note 149, at 508, it seems doubtful that the duties on Shaw’s rum exceeded \$100.

154. See, e.g., Act of May 2, 1792, ch. 27, § 12, 1 Stat. 259, 259 (amended 1800) (importing beer, ale, or porter in casks smaller than forty gallons or in packages of fewer than six dozen bottles); Act of May 8, 1792, ch. 32, § 12, 1 Stat. 267, 270 (repealed 1802) (importing spirits in casks bearing U.S. marks); Act of June 5, 1794, ch. 51, § 13, 1 Stat. 384, 387 (importing sugar in ships under 120 tons); Collection Act of 1790, ch. 35, § 14, 1 Stat. 145, 158 (repealed 1799) (receiving goods unloaded without permission); *id.* § 60, 1 Stat. at 167–68 (landing goods intended for re-export).

155. See, e.g., *United States v. Ship Alfred* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 310 (ruling on a forfeiture action for the importation in casks of less than a forty gallon capacity against \$240 worth of porter and a vessel worth \$6000); *Petition of Elijah Pell* (S.D.N.Y. 1793), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 180 (describing a forfeiture action for

Conversely, federal officers also showed little hesitation in pursuing relatively insignificant penalties, even when it made little economic sense. They regularly filed suit to forfeit low-value goods, though their eventual condemnation and sale resulted in little profit to the government or the interested officers. For example, in both New York and Pennsylvania, default judgments were common against goods that sold for under \$50 (about \$1,000 in present-day dollars).<sup>156</sup> Once the court taxed costs for the marshal, clerk, and district attorney, the remainder to be shared between the government and customs officers was often negligible, sometimes less than \$10 total.<sup>157</sup>

In a number of cases, in fact, the sale proceeds did not cover the court costs, meaning that even the minimal effort required to obtain a default judgment was not a break-even proposition for the government.<sup>158</sup> Nor was this approach limited to default judgments. At times (though not often), the government actually litigated cases even when they promised minimal returns at best.<sup>159</sup> In other words, though forfeiture could theoretically serve the remedial purpose of compensating the government for lost revenue, federal officers often used the power in

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importation in undersized casks, with porter worth \$87.50, and a ship worth \$11,550); *Petition of William Provost* (S.D.N.Y. 1792), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 118 (describing a forfeiture action for importation in undersized casks, with gin worth \$14.84, and a ship worth \$2,000).

156. See, e.g., *United States v. Two Bags of Oranges* (E.D. Pa. 1807), microformed on EDPA Information Files, supra note 102, at reel 2 (selling two bags of oranges and two boxes of cigars for \$24.00); *United States v. Five Barrels of Salt* (S.D.N.Y. 1807), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 423 (selling for \$26.20); *United States v. One Piece of Blue Cloth* (S.D.N.Y. 1805), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 321 (selling for \$33.97); *United States v. One Hamper of Cheese* (S.D.N.Y. 1804), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 212 (selling for \$10.94); *United States v. Six Casks of Porter* (S.D.N.Y. 1803), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 42 (selling for \$38.25); *United States v. Two Boxes of Wine* (E.D. Pa. 1802), microformed on EDPA Information Files, supra note 102, at reel 2 (selling for \$8.00); *United States v. Three Boxes of Oil* (S.D.N.Y. 1790), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 29 (selling for \$23.61).

157. See, e.g., *United States v. Four Cheeses* (S.D.N.Y. 1790), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 28 (selling goods for \$43.73 and distributing \$11.42 to the United States and officers after costs).

158. See, e.g., *United States v. One Keg of Brandy* (E.D. Pa. 1807), microformed on EDPA Information Files, supra note 102, at reel 2, 9 (selling for \$17.24 with no proceeds remaining after paying court costs); *United States v. Shallop Indus.* (E.D. Pa. 1806), microformed on EDPA Information Files, supra note 102, at reel 2, 620 (selling for \$51 while facing court costs of \$58.93); *United States v. Sloop Republican* (E.D. Pa. 1805), microformed on EDPA Information Files, supra note 102, at reel 2, 5 (selling for \$220 while facing court costs of \$284.93); *United States v. Six Casks of Porter* (S.D.N.Y. 1803), microformed on SDNY Minutes, supra note 129, at reel 2, vol. 2, 42 (selling for \$38.25 while facing court costs of \$45.27).

159. See, e.g., *United States v. Sundry Goods* (E.D. Pa. 1802), microformed on EDPA Information Files, supra note 102, at reel 2, 13 (litigating a case seeking forfeiture of goods worth \$71.14).

situations where its primary impact was to impose a financial penalty on the violator.

There is an analogous difficulty with the other version of the “remedial” argument advanced by critics—that forfeiture was limited to “instrumentalities” of lawbreaking or “contraband.” By statute, the government could do far more than simply seize inherently illegal goods and the ships that transported them (though it could do that too<sup>160</sup>). It could also seize perfectly legal goods that were brought into the country by illegal means—whether it was unloading them without permission from a customs officer,<sup>161</sup> invoicing them at lower than actual value,<sup>162</sup> or simply transporting them in the wrong kind of container.<sup>163</sup> Moreover, the government did not hesitate to use this power; the federal court records are replete with cases involving the forfeiture of ordinary commercial goods that simply happened to be imported contrary to law.<sup>164</sup> In early practice, the government used forfeiture for more than just “remediation.”

2. *Reaching Lawbreakers.* — The second historical limitation advanced by modern critics fares no better: They contend that the breadth of the government’s early forfeiture power was merely an expedient, as it enabled the government to impose penalties on guilty parties that would otherwise be beyond its reach. This argument’s premise is the belief that many of the people involved in customs violations were located outside the United States, or could easily put themselves outside U.S. territory (on a ship, for instance), and were therefore often beyond the jurisdiction of American courts.<sup>165</sup> If the property involved in customs violations was not subject to forfeiture, then federal officers would often have no recourse against lawbreaking merchants, ship owners, and mariners who could easily absent themselves from the United States.<sup>166</sup> According to a

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160. See, e.g., Act of June 13, 1798, ch. 53, § 1, 1 Stat. 565, 565 (authorizing the seizure of goods from any vessel returning to the United States directly or indirectly from a port within the territory of the French Republic and the vessels carrying them).

161. Collection Act of 1789, ch. 5, § 12, 1 Stat. 29, 39.

162. *Id.* § 22, 1 Stat. at 42.

163. Whiskey Tax Act of 1791, ch. 15, § 33, 1 Stat. 199, 207.

164. See, e.g., Petition of John Vandenhevel (S.D.N.Y. 1802), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 2, 11 (single undersized cask holding sixty rather than ninety gallons of spirits); Petition of Elijah Pell (S.D.N.Y. 1793), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 180 (casks of porter measuring over forty gallons by “wine measure” but under forty gallons by “beer measure”); Petition of Asa Benton (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 96 (rum imported in forty-gallon casks rather than fifty).

165. Herpel, *supra* note 32, at 1918 (“Criminal and civil fines for customs violations generally have no extraterritorial application and, in any event, a foreign seller who violates such laws will frequently be outside an American court’s jurisdiction.”); see also *Pennoyer v. Neff*, 95 U.S. 714, 727 (1878) (“Process 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.”).

166. See Klein, *supra* note 75, at 194–95; Herpel, *supra* note 32, at 1918–19.

number of critics, modern forfeiture should be similarly limited to cases in which it is difficult to penalize lawbreaking conduct through an in personam action against the wrongdoer.<sup>167</sup>

In theory, this argument has some merit. One longstanding justification for the forfeiture power was the difficulty of being able to enforce the revenue laws against those over whom the American courts could not assert jurisdiction.<sup>168</sup> And it is true that during the early period federal officers sought forfeiture against goods and vessels owned by foreigners, people against whom in personam penalties—that is, monetary fines—would likely have been difficult to secure.<sup>169</sup> Nor was this simply a jurisdictional issue; in smuggling cases it was often difficult for federal officers to identify the lawbreakers in the first place, leaving forfeiture of the smuggled goods as the only means by which the officers could penalize violators.<sup>170</sup>

The problem with this theory is that the early forfeiture power extended well beyond cases in which it was practically or jurisdictionally difficult to impose a fine against the actual lawbreaker. As Caleb Nelson points out, forfeiture was used in contexts other than maritime regulation; it was used in a variety of domains under state law and was also used as a tool for enforcing federal excise taxes on distilled spirits.<sup>171</sup> Even if it is unclear how widespread state practice was,<sup>172</sup> and even if there was some debate in the nineteenth century about forfeiture's constitutional-

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167. See, e.g., Boudreaux & Pritchard, *supra* note 44, at 618–21; Herpel, *supra* note 32, at 1925–26.

168. See *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 87 (1992) (“The fictions of in rem forfeiture were developed primarily to expand the reach of the courts . . . .”); *Harmony v. United States*, 43 U.S. (2 How.) 210, 233 (1844) (explaining that the forfeiture of a vessel is often “the only adequate means of suppressing the offence”); Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2469 (explaining that the idea that civil in rem forfeiture was intended to reach wrongdoers that would otherwise be beyond the courts' reach “has deep historical roots”).

169. See, e.g., *United States v. Twenty-Six Half Pipes of Brandy* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 236–37 (seeking forfeiture of brandy illegally imported by foreign merchants); *United States v. Ten Casks of Brandy* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 234 (same).

170. See, e.g., *United States v. Twenty-Six Boxes of Segars* (E.D. Pa. 1801), microformed on EDPA Information Files, *supra* note 102, at reel 1 (seeking forfeiture of goods landed without a permit from “unknown” vessels); *United States v. Sundry Goods* (E.D. Pa. 1797), microformed on EDPA Information Files, *supra* note 102, at reel 1 (same).

171. Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2470–75; see also Brief for Respondent, *supra* note 17, at 19 n.1 (citing several nineteenth-century cases discussing contemporary state forfeiture provisions); Colgan, *supra* note 65, at 303 n.141 (noting several colonial and state forfeiture provisions).

172. See Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2472 & nn.135–137 (citing only four state law examples).

ity when applied outside the maritime context,<sup>173</sup> these examples suggest that civil forfeiture's legitimacy did not depend on it being used only to reach those who might otherwise evade punishment.

There is also a more powerful objection to the jurisdictional theory: The early federal government regularly instituted forfeiture suits in maritime cases where personal penalties against the violators were almost certainly available. For example, in an early smuggling case from Massachusetts, the Boston collector of customs wrote to Alexander Hamilton detailing his continuing efforts to locate "a few bags of cotton" that had been illegally landed on an island off Cape Cod, despite having already instituted in personam actions seeking stiff fines against the captain and mate of the ship in which the cotton had been imported.<sup>174</sup> Indeed, the court records reveal numerous forfeiture actions in instances where levying fines against natural persons presumably would have been feasible.<sup>175</sup>

The government's preference for forfeiture was not because fines were statutorily unavailable.<sup>176</sup> Congress imposed monetary penalties for numerous violations related to the regulation of maritime commerce: failure to make timely entry at the customhouse,<sup>177</sup> discrepancies between the ship's manifest and the actual goods landed,<sup>178</sup> leaving port

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173. See *id.* at 2473–74 (discussing a midcentury debate over the constitutionality of Maine laws authorizing forfeiture for certain liquor-related activities).

174. See Letter from Benjamin Lincoln to Alexander Hamilton (July 29, 1791), *in* 8 *The Papers of Alexander Hamilton*, *supra* note 124, at 583, 583–84; see also Letter from William Ellery to Alexander Hamilton (May 9, 1791), *in* 8 *The Papers of Alexander Hamilton*, *supra* note 124, at 332, 333 (noting that while Ellery had already secured forfeiture of "Goods" involved in a customs violation, "Actions for the penalties" had been continued to the following term).

175. See, e.g., Petition of William Britton (E.D. Pa. 1804), microformed on Records of the U.S. District Court for the Eastern District of Pennsylvania Containing Statements of Fact in Forfeiture Cases, 1792–1918, Microfilm T819, at 322–24 (Nat'l Archives Microfilm Publ'ns) [hereinafter EDPA Petition Files] (providing partial remittance of forfeiture even though the American vessel had previously been unlawfully registered); Petition of Robert Hare (E.D. Pa. 1802), microformed on EDPA Petition Files, *supra*, at 279 (accepting petitioner's plea of good character and ignorance of the law as a defense to failure to declare gifts received abroad, which had been seized by customs officers at port); Petition of William Priestman (E.D. Pa. 1798), microformed on EDPA Petition Files, *supra*, at 200 (describing a forfeiture petition for silver watches transported between ports without the required permit and defending the merchant from an accusation of willful negligence or fraud); *United States v. Cargo of the Sloop Merimack* (E.D. Pa. 1792), microformed on EDPA Petition Files, *supra*, at 13 (discussing cargo of American goods transported from Massachusetts to Philadelphia and the culpable acts of the ship's master for failing to produce required documents for customs officials).

176. See, e.g., Collection Act of 1790, ch. 35, §§ 4, 12, 15, 16, 20, 31, 34, 43, 1 Stat. 145, 153, 157–60, 164–66, 168–69 (repealed 1799). See generally Colgan, *supra* note 65, at 302–19 (providing a detailed analysis of the myriad monetary penalties imposed by early colonial and state governments in response to legal violations).

177. Collection Act of 1789, ch. 5, § 11, 1 Stat. 29, 38–39.

178. *Id.* § 16, 1 Stat. at 41.

without permission,<sup>179</sup> not painting the name and port on an American vessel,<sup>180</sup> not reporting a change in command,<sup>181</sup> or failing to return an expired registry<sup>182</sup>—just to name a few. And the fines themselves could be significant, often \$500 or more<sup>183</sup> (roughly equivalent to \$13,000 today<sup>184</sup>). In short, if there had been an early consensus that monetary fines were the preferred tool of federal law enforcement, the government had the means to act accordingly.

The government's enthusiasm for in rem forfeiture of course makes perfect sense, but not in a way that gives comfort to modern critics. In many cases, a forfeiture produced more significant returns than a fine for both the government and the officers involved, particularly if the offense allowed for seizure of a vessel in addition to goods.<sup>185</sup> And given the many advantages of in rem process—including a lower burden of proof and trial before a judge rather than a jury<sup>186</sup>—it was certainly easier to secure a forfeiture than a fine. In fact, in the smuggling episode in which Hamilton endorsed customs officers' efforts to seek both forfeiture of a few bags of cotton and fines against the smugglers personally,<sup>187</sup> the government failed to secure the latter, apparently because the jurors thought "the penalty . . . was too high."<sup>188</sup> The government's routine use of in rem forfeiture, in addition to or in lieu of in personam fines, casts serious doubt on the proposition that early forfeiture was purely a tool for reaching wrongdoers who lay beyond the courts' jurisdiction.

3. *Protecting the Fisc.* — Finally, some critics have suggested that because early forfeiture was oriented toward ensuring that the government was able to enforce customs collection, modern forfeiture that serves purposes unrelated to revenue should be subject to stricter constitutional scrutiny.<sup>189</sup> This, too, fails as a limiting principle.

179. Act of Sept. 1, 1789, ch. 11, § 24, 1 Stat. 55, 61.

180. Act of Dec. 31, 1792, ch. 1, § 3, 1 Stat. 287, 288–89.

181. *Id.* § 15, 1 Stat. at 295.

182. *Id.* §§ 13–14, 1 Stat. at 294–95.

183. See, e.g., Act of Sept. 1, 1789 § 36, 1 Stat. at 65; Collection Act of 1789 § 11, 1 Stat. at 38–39.

184. See Samuel H. Williamson, Seven Ways to Compute the Relative Value of a U.S. Dollar Amount—1790 to Present, MeasuringWorth, <https://www.measuringworth.com/uscompare/> [<https://perma.cc/Y6UF-3CNH>] (last visited July 25, 2019).

185. See, e.g., Collection Act of 1789 § 12, 1 Stat. at 39 (imposing a \$400 fine and forfeiture of goods for unloading without a permit).

186. See *supra* notes 132–141 and accompanying text.

187. See Letter from Alexander Hamilton to Benjamin Lincoln (Aug. 20, 1791), *in* 9 The Papers of Alexander Hamilton 83, 84 (Harold C. Syrett ed., digital ed. 2011) [hereinafter August 1791 Letter to Lincoln]; see also *supra* note 174 and accompanying text.

188. Letter from Benjamin Lincoln to Alexander Hamilton (Sept. 9, 1791), *in* 9 The Papers of Alexander Hamilton, *supra* note 187, at 194, 194–95.

189. See Herpel, *supra* note 32, at 1922 n.48 (raising the possibility that revenue-related forfeitures might be legitimate because "the collection of the tax revenues is

Even if most early forfeiture actions were in response to customs violations, not all were; for example, there were suits for involvement in arms dealing, the slave trade, and violations of U.S. neutrality.<sup>190</sup> Although such prosecutions were relatively rare, the fact that they took place at all casts significant doubt on the proposition that forfeiture was constitutionally legitimate only in relation to revenue collection. And immediately after the period studied here the government made significant use of forfeiture to enforce regulations on maritime commerce that were largely unrelated to revenue collection—namely, for violations of the Jeffersonian Embargo from 1808 to 1811,<sup>191</sup> and for trading with the enemy in the War of 1812.<sup>192</sup> As a result, the suggestion that forfeiture should be subject to stricter constitutional limitations when used outside the revenue context seems to project backward a constraint that was not apparent at the Founding.<sup>193</sup>

There is a better explanation for early forfeiture's narrow orientation than the (unspoken) existence of a special constitutional carve out for powers protective of the public fisc: The federal government used forfeiture primarily in support of revenue collection and maritime regulation because those are the things the early government did. Though recent historical scholarship has demonstrated that the federal government had a greater presence in early American life (especially economic life) than has traditionally been understood,<sup>194</sup> its chief functions (at least prior to the War of 1812) were collecting taxes and regulating maritime commerce.<sup>195</sup> In other words, the limiting principle of "revenue collection" that critics identify was not particular to

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essential to the functioning of government"); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 60 (1993) (suggesting that nineteenth-century precedents allowing the *ex parte* seizure of real property were justified because "[t]he prompt payment of taxes . . . may be vital to the existence of a government" (citation omitted) (internal quotation marks omitted) (quoting *Springer v. United States*, 102 U.S. 586, 594 (1881))); *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977) (stating that the rationale underlying precedents upholding tax collection by summary administrative proceedings is that "the very existence of government depends upon the prompt collection of the revenues").

190. See *supra* notes 84–94 and accompanying text.

191. See, e.g., *The Paulina*, 11 U.S. (7 Cranch) 52, 53, 56 (1812).

192. See, e.g., *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103, 104 (1819).

193. See Klein, *supra* note 75, at 196 ("[M]any new forfeiture statutes differ so fundamentally from their historical antecedents that their continued legitimacy should be questioned.").

194. See, e.g., Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* 137 (2009); Max M. Edling, *A Hercules in the Cradle: War, Money, and the American State, 1783–1867*, at 17–21 (2014); Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 229–30 (2012); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 85 (1996); Rao, *supra* note 96, at 6.

195. See Rao, *supra* note 96, at 10–12 (describing the centrality of commerce to early American state building).

forfeiture; it was inherent in the nature of early federal authority itself. Accordingly, if history is to offer a basis for constraining modern forfeiture's scope, it is not because it was used for limited purposes in the Founding Era.

### III. FORGOING FORFEITURE

As it turns out, forfeiture at the Founding *was* meaningfully circumscribed, but in ways that courts and commentators have failed to recognize. While the federal government's early law enforcement practices indicate an expansive conception of the forfeiture power, the government's exercise of its remission authority tells a very different story—one in which the solution to the problem of forfeiture's potentially "ruinous" effects was robust discretion to return forfeitable property, lodged centrally in the executive branch.

Shortly after Congress established the statutory regime governing forfeiture, it recognized the need for a means by which the government could mitigate forfeiture's harshest effects. As section III.A explains, there was universal agreement on this point. At Hamilton's urging, Congress gave the Treasury Secretary authority to return property seized for unintentional violations of the law. Moreover, as section III.B shows, in exercising their remission authority the early Treasury Secretaries demonstrated a profound commitment to granting as much relief as was permissible under the statutory scheme Congress established. They granted relief in the overwhelming majority of cases presented to them and accepted almost any plausible explanation for why the underlying violation was unintentional, even when harboring significant doubts about the petitioner's claims. As section III.C reveals, in exercising remission so expansively, the Secretaries did not simply sand down forfeiture's roughest edges. Rather, they transformed forfeiture entirely, turning the harsh strict liability regime outlined by statute—and relied on by the Supreme Court in its modern forfeiture cases—into a moderate exercise of state power.

#### A. *Establishing Remission*

The necessity of tempering forfeiture's consequences was apparent as soon as the First Congress created the customs regime that undergirded the new nation's finances. Only a few months after the 1789 Collection Act went into effect, Hamilton explained the problem to Congress: The government's extensive authority to seize private property raised the prospect of "heavy and ruinous forfeitures" being imposed for infractions resulting from "inadvertence and want of information," rather than any intent to defraud the revenue.<sup>196</sup> To avoid injustice,

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196. Alexander Hamilton, Report on the Petition of Christopher Saddler (Jan. 19, 1790), *in* 6 *The Papers of Alexander Hamilton*, *supra* note 104, at 191, 191–92

Hamilton argued that a “discretionary power of granting relief”<sup>197</sup> was “indispensable.”<sup>198</sup> He urged Congress to follow “the usual policy of Commercial Nations” and vest such power “somewhere.”<sup>199</sup>

Hamilton’s basic premise attracted broad agreement in Congress. As leading Federalist Fisher Ames argued, it was “necessary” to provide some mode of redress for forfeitures that “bear hard upon individuals.”<sup>200</sup> His colleagues concurred: It was a universal principle that “no person ought to be liable who is not guilty of a violation of the laws intentionally or willfully.”<sup>201</sup> Yet under the existing statutory regime, those who violated the revenue laws, “whether intentionally or through ignorance,” were “precluded from all relief.”<sup>202</sup> Given the “duty of [customs] officers to prosecute in all cases,” a power to return seized property to those who committed minor or unintentional infractions was “necessary” to avoid injustice.<sup>203</sup> Indeed, it would be “impossible to get along” without it.<sup>204</sup>

Members of Congress recognized that creating such power was risky. It was a truism that “safe and effectual” revenue collection required that the penalties set out for violations be made “nearly inevitable.”<sup>205</sup> Accord-

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[hereinafter Hamilton, Saddler Report]; see also Alexander Hamilton, Enclosure: [An Act Repealing Duties Laid Upon Distilled Spirits Imported] (Jan. 9, 1790), in 6 *The Papers of Alexander Hamilton*, supra note 104, at 138, 161 n.\* [hereinafter Hamilton, Act Repealing Duties] (stating that the remission power is essential because “[h]eavy penalties are frequently incurred through inadvertence, misconstruction or want of information”).

197. Hamilton, Saddler Report, supra note 196, at 191.

198. Hamilton, Act Repealing Duties, supra note 196, at 161 n.\*.

199. *Id.* Hamilton did not specify what foreign precedents he was thinking of, but British commissioners of customs had broad authority to restore forfeited goods in light of “[e]vidence given to their [s]atisfaction that the [f]orfeiture arose without any [d]esign or [i]ntention of [f]raud.” An Act for the More Effectual Prevention of Smuggling in this Kingdom 1787, 27 Geo. 3 c. 32, § 15 (UK); see also An Act to Extend the Powers Vested in the Commissioners of Customs 1811, 51 Geo. 3 c. 96, § 1 (UK) (“[T]he Powers and Authorities so vested in the Commissioners of the Customs in *England* and *Scotland* should extend . . . to order any Goods or Commodities whatever, or any Ships, Vessels, Boats, Horses, Cattle or Carriages, which shall have been seized as forfeited . . .”). See generally *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 293–95 (1825) (discussing the British remission regime); 1 Francis Ludlow Holt, *A System of the Shipping and Navigation Laws of Great Britain* 330–36 (London, J. Butterworth & Son 2d ed. 1824) (same).

200. 6 *Annals of Cong.* 2286 (1797) (statement of Sen. Ames); see also *id.* at 2288 (statement of Sen. Ames) (stating that because the revenue laws “were made strictly,” the remission power “must somewhere exist”). For a more extensive discussion of Hamilton’s relationship and work with Fisher Ames on matters related to public funding, see Winfred E. A. Bernhard, *Fisher Ames, Federalist and Statesman 1758–1808*, at 122–39 (1965).

201. 1 *Annals of Cong.* 1128 (1790) (Joseph Gales ed., 1834) (statement of Sen. Sturgis).

202. *Id.* (statement of Sen. Lawrence).

203. 6 *Annals of Cong.* 2291 (1797) (statement of Sen. Coit).

204. *Id.* at 2287 (statement of Sen. Coit).

205. 2 *Annals of Cong.* 1475 (1790) (statement of Sen. Lawrence); see also 1 *Annals of Cong.* 1127 (1790) (Joseph Gales ed., 1834) (statement of Sen. Ames) (“With respect to

ingly, some members worried that creating a “discretionary power” to remit fines and forfeitures had the potential to seriously impair the public fisc.<sup>206</sup> Too generous an application of the remission power risked encouraging “careless and incautious violations of the law.”<sup>207</sup> Such a “delicate power”<sup>208</sup> therefore needed to be “managed with a great deal of circumspection.”<sup>209</sup> The goal, Ames explained, was to allow for relief in certain deserving cases while creating “the least risk of injuring the revenue.”<sup>210</sup>

The solution Congress arrived at was to put the remission power in the Treasury Secretary’s hands. Under the 1790 Remission Act, any party interested in a seizure made under the laws regulating customs collection and the coasting trade could petition the Secretary to have the forfeiture remitted.<sup>211</sup> The petitioner first submitted the petition to the district court, which heard evidence and transmitted a judicial statement of facts to the Treasury Secretary.<sup>212</sup> If the Secretary determined that the viola-

the revenue . . . a certain rule ought to be maintained in all possible cases . . .”). Such comments echoed the views of Cesare Beccaria, a leading eighteenth-century theorist of criminal punishment whose views were hugely influential in the early United States. See Cesare Beccaria, *On Crimes and Punishments and Other Writings* 63 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) (1764) (“The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all.”); John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 *Nw. J.L. & Soc. Pol’y* 195, 206–15 (2009) (discussing Beccaria’s early influence).

206. 1 *Annals of Cong.* 1128–29 (1790) (Joseph Gales ed., 1834) (statement of Sen. Stone).

207. 2 *Annals of Cong.* 1475 (1790) (statement of Sen. Lawrence).

208. 6 *Annals of Cong.* 2286 (1797) (statement of Sen. Ames).

209. 2 *Annals of Cong.* 1475 (1790) (statement of Sen. Lawrence).

210. 1 *Annals of Cong.* 1127 (1790) (Joseph Gales ed., 1834) (statement of Sen. Ames).

211. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23 (repealed 1797).

212. *Id.* § 1, 1 Stat. at 122 (“[T]he said judge shall inquire . . . into the circumstances of the case . . . and shall cause the facts which shall appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the Secretary of the Treasury . . .”). Somewhat surprisingly, the district court judges’ role in the remission scheme prompted no apparent controversy, even though only two years later a now-famous dispute arose over whether Congress could assign the Justices of the Supreme Court (sitting as circuit court judges) the extrajudicial responsibility of determining whether Revolutionary War veterans were statutorily eligible for federal pensions. The Justices generally took the position that, because their pension decisions were subject to review (and possible overruling) by the Secretary of War and Congress, the assignment of such duties violated separation of powers. See Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 *Wis. L. Rev.* 527, 529–34 (noting concerns of Supreme Court Justices sitting on Circuit panels in New York, Pennsylvania, and North Carolina as to the constitutionality of the 1792 Invalid Pensions Act).

It seems likely that the district judges’ role in remission provoked no controversy because even though they performed judicial functions in the remission procedure—in particular, they weighed evidence and found facts—they did not actually decide whether remission should be granted (or even make a recommendation). Accordingly, the

tion was not the result of “wilful negligence or any intention of fraud,” he could remit the penalty in whole or in part, “upon such terms or conditions as he may deem reasonable and just.”<sup>213</sup> This included the shares due to customs officers or informants—a provision members of Congress thought essential to ensuring that the remission scheme be able to provide complete relief.<sup>214</sup> The Secretary’s decision was effectively final, as the statute did not provide for any administrative or judicial review.<sup>215</sup>

Through the remission procedure, Congress essentially created an alternative mechanism for contesting government seizures. Though technically remission was only available for a penalty that had been “incurred,” nothing in the statute required a claimant to wait until judgment in court against them to file a petition.<sup>216</sup> And in practice, petitions seeking to undo a judgment post hoc were rare. Instead, in most cases a claimant filed a petition immediately after the government filed suit; the court proceedings were stayed pending Treasury’s disposition of the petition (though generally without entry of a formal stay).<sup>217</sup>

Procedurally, remission also had many of the trappings of litigation in court. Before the judge could inquire into the facts of the case, the district attorney and the collector—the government officials responsible for pursuing forfeitures—each had to have notice of the petition and “an

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Treasury Secretary’s ultimate decision on remission was not a constitutionally improper “review” of a judicial ruling.

213. Act of May 26, 1790 §1, 1 Stat. at 123.

214. See 1 Annals of Cong. 1127 (1790) (Joseph Gales ed., 1834) (statement of Rep. Sedgwick) (advocating for modification of proposed statutory language that would have precluded remission of officers’ share); *id.* at 1128 (statement of Rep. Smith) (objecting to the same language on the ground that it prevented the remission scheme from providing meaningful relief).

215. Act of May 26, 1790 §1, 1 Stat. at 122–23. On occasion parties interested in a forfeiture argued that a Secretary’s remission decision was unauthorized by statute. See, e.g., *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291 (1825) (rejecting the argument that the Secretary was statutorily without authority to remit a customs officer’s portion of forfeiture proceeds); *The Margareta*, 16 F. Cas. 719, 722 (C.C.D. Mass. 1815) (No. 9,072) (Story, J.) (concluding that remission granted in the absence of the judicial statement of facts required by statute was “a nullity”). But there is no indication that parties ever challenged in court a Secretary’s decision on the merits. Cf. *id.* (asserting that the Secretary’s determination that the facts stated by the district court are sufficient to justify remission “is conclusive, and cannot be overhauled in any collateral inquiry”).

216. See Act of May 26, 1790 § 1, 1 Stat. at 122–23; see also *Morris*, 23 U.S. (10 Wheat.) at 291 (noting that the Remission Act as reenacted in 1797 “presupposes[] that the offence has been committed, and the forfeiture attached according to the letter of the law”).

217. See, e.g., *United States v. Ten Casks of Brandy* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 233 (noting that after the parties presented their libel and answer, the claimant “preferred” a petition to the Treasury Secretary).

opportunity of showing cause against the mitigation or remission.”<sup>218</sup> In preparing the statement of facts, the district judge heard witnesses and considered written testimony and documentary evidence. The judge’s responsibility was not simply ministerial; in determining the “facts” of the incident, he had to make the same kind of credibility determinations he would in trying a case.<sup>219</sup> This was especially true because the petitioner’s eligibility for remission turned entirely on their state of mind—that is, whether the Treasury Secretary believed that the petitioner violated the relevant statutory provision unintentionally.<sup>220</sup>

Yet if the remission procedure functioned as a parallel adjudicative procedure for contesting forfeitures, it differed from litigation in a crucial respect: The Treasury Secretary had far greater latitude than district judges in deciding whether a forfeiture was warranted and, if so, how severe the penalty should be. This is for two reasons. First, while violations of the statutory regulations the courts administered were almost entirely strict liability offenses, the Treasury Secretary had authority to remit penalties whenever he was persuaded that no fraud had been intended.<sup>221</sup> As a result, judicial rulings in litigated cases paid no heed to questions of *mens rea*, while remission outcomes largely depended on the Secretary’s judgment about the offender’s state of mind. Second, the statutory regulations prescribed specific penalties for each offense, offering judges no latitude as to the degree of penalty to be imposed.<sup>222</sup> The Secretary, on the other hand, had broad authority to remit as much or as little of a penalty as he deemed appropriate.<sup>223</sup> In other words, the remission power introduced significant discretion into a law enforcement regime that otherwise allowed for none.

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218. Act of May 26, 1790 § 1, 1 Stat. at 122. If notice was not given, the courts declined to proceed. See, e.g., *Petition of William Seger* (S.D.N.Y. 1802), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 1, 373 (refusing to inquire into facts because the district attorney had not been given notice).

219. See, e.g., *United States v. Brig Adelaide* (E.D. Pa. 1792), microformed on EDPA Petition Files, *supra* note 175, at 1–2 (expressing confidence in the witness’s assertion that French merchants were ignorant of U.S. legal requirements regarding the size of brandy casks).

220. Act of May 26, 1790 § 1, 1 Stat. at 122–23. As the Pennsylvania district court explained, the difficulty of obtaining direct evidence of the petitioner’s state of mind is that it required reliance on inferences from “exterior circumstances.” *Petition of Robert Hare* (E.D. Pa. 1802), microformed on EDPA Petition Files, *supra* note 175, at 279.

221. Act of May 26, 1790 § 1, 1 Stat. at 122–23.

222. See, e.g., Collection Act of 1789, ch. 5, § 12, 1 Stat. 29, 39 (specifying that unloading or delivering goods at certain times of day or without a permit triggers the forfeiture of goods and a \$400 fine, among other penalties).

223. See Act of May 26, 1790 § 1, 1 Stat. at 122 (“[T]he Secretary of the Treasury . . . shall . . . have power to mitigate or remit such fine, penalty or forfeiture, or any part thereof . . . upon such terms or conditions as he may deem reasonable and just.”).

### B. *Excusing Violations*

As a formal matter, remission merely gave the Treasury Secretary the *power* to mitigate forfeiture's potentially harsh effects but no *obligation* to do so. In practice, however, the three Secretaries who held office during the period studied here were exceedingly liberal in their use of the remission power, granting relief in the overwhelming majority of cases presented to them. The result of this generosity was nothing less than a fundamental reconfiguration of the forfeiture power itself.

The numbers are stark: From 1790 to 1807,<sup>224</sup> the government instituted a total of 578 forfeiture actions in the New York and Pennsylvania district courts.<sup>225</sup> As a procedural matter, exactly half the suits were

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224. This study covers this period for two reasons. First, it encompasses three presidential administrations (Washington, Adams, and Jefferson), providing a broad view of early forfeiture and remission and reducing the possibility that the revealed practices were idiosyncratic and unrepresentative. Second, by ending with 1807, the study avoids the skewing effects of the Jeffersonian Embargo (beginning in 1808) and the War of 1812, two events during which Congress tightly restricted foreign trade. These periods saw a massive—but temporary—spike in forfeiture activity, as federal officers struggled to prevent American merchants from trading abroad. By 1820, however, forfeiture had returned to pre-embargo levels, where it would stay for some time. Compare, e.g., U.S. Treasury Dep't, Statement of Duties Arising on Merchandise and Tonnage, *in* An Account of the Receipts and Expenditures of the United States for the Year 1807 (1808) (listing fines, penalties, and forfeitures totaling \$4,231.35), with U.S. Treasury Dep't, Statement of Duties Arising on Merchandise and Tonnage, *in* An Account of the Receipts and Expenditures of the United States for the Year 1815 (1816) (listing fines, penalties, and forfeitures totaling \$190,386.70), and U.S. Treasury Dep't, Statement Showing the Amount of Duties on Imports and Tonnage, &c, *in* An Account of the Receipts and Expenditures of the United States for the Year 1821 (1822) (listing fines, penalties, and forfeitures totaling \$15,191.30).

225. In compiling data on forfeiture activity, I examined the records of the federal district courts for New York and Pennsylvania. I selected these courts for two reasons: First, their jurisdictions included two of the nation's busiest ports during the period studied here (New York City and Philadelphia), so the forfeiture activity in those places is likely to be fairly representative of the government's practice more broadly. See Tonnage for the Year Ending September 30, 1792 (Feb. 18, 1794), *in* 1 American State Papers: Commerce and Navigation 895, 897 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832) (recording that New York and Pennsylvania were second and fourth in foreign tonnage of arriving vessels for 1792); Tonnage from 1789 to 1810 (Feb. 4, 1812), *in* 1 American State Papers: Commerce and Navigation, *supra* at 254–63 (recording that New York and Pennsylvania consistently ranked in the top four states in terms of total tonnage of vessels registered to engage in foreign trade during this period). Second, the extant court records for those two jurisdictions are relatively complete, allowing for a high degree of confidence in the completeness of the forfeiture dataset I compiled from them.

I examined three principal sets of court records: the minutes of the New York district court, the "Information" case files of the Pennsylvania district court, and the Pennsylvania remission petitions. The New York minutes were a day-to-day accounting of the court's business, providing a brief summary of every major event in each case before the court, including its disposition. Because the minutes generally do not include any information about the substantive nature of a suit, I identified forfeiture cases by the plaintiff (the United States) and the defendant (ships and goods). I also included *qui tam* actions

resolved in court, and half were resolved by the Treasury Secretary under his remission authority.<sup>226</sup>

The difference in outcomes between the two modes of disposition is striking. In cases adjudicated in court—that is, cases in which no remission petition was filed—the government prevailed eighty-nine percent of the time, thanks to the huge number of default judgments (accounting for more than three-quarters of all cases adjudicated in court). The opposite is true in cases resolved via remission; the Secretaries granted ninety-one percent of remission petitions, with seventy-one percent of those grants being full remissions in which the petitioner only had to pay court costs. And most partial remissions required the petitioner to pay a relatively small sum to recover his property.<sup>227</sup> In the vast majority of cases, therefore, judicial decisions respecting forfeiture favored the government, whereas submission of a remission petition provided property owners nearly full relief from forfeiture.<sup>228</sup>

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brought by private parties. The minutes also recorded the filing of remission petitions and the Treasury Secretary's decision. As a result, a complete review of the minutes for 1790 to 1807 provides an accurate count of the total number of forfeiture actions in New York.

To tally the tried and default judgment cases in Pennsylvania, I reviewed every file in the "Information" records—that is, suits in which proceedings were initiated by the filing of an information or libel, usually by the United States. Because the files almost always included the libel or information itself, I was able to identify all forfeiture actions (including some *qui tam* suits). I also reviewed all the remission petitions filed in that court, which I collected separately. Taken together, these two sets of records similarly allow for a reasonably accurate count of the total number of Pennsylvania forfeiture actions.

This dataset excludes any consideration of appeals. While the district court records note appeals taken in a few cases, they generally do not record the outcome. Given the low incidence of appeal, different outcomes in the handful of appealed cases would not change the total figures significantly.

226. More precisely, 289 of the 578 total cases were adjudicated in court, including 222 default judgments and 67 contested cases, though that figure includes many cases in which one party or the other withdrew before final adjudication. See, e.g., *United States v. Schooner Prince* (S.D.N.Y. 1794), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 207 (noting that the government libel was dismissed after the claimant filed an answer). The other 289 cases were resolved through the remission procedure. I coded the few cases in which a claimant sought remission *after* court entry of judgment as being disposed of via remission, since that was the "final" determination with respect to forfeiture of the property.

227. See, e.g., *In re Petition of Joshua Waddington* (S.D.N.Y. 1802), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 1, 390–92, 414 (requiring petitioner to pay \$81.50 to remit forfeiture valued at \$1,062.38); *United States v. Ship Lydia* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 368, 373 (requiring petitioner to pay \$15 to remit forfeiture worth over \$11,500). Even less generous remission resulted in a fine much less punitive than the attendant forfeiture. See, e.g., *United States v. Thirty-Seven Hogsheads* (S.D.N.Y. 1797), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 2, 20, 77 (requiring \$300 payment to remit forfeiture worth over \$6,000).

228. Albert Gallatin's 1813 report to Congress confirmed the remission figures I derived. He reported granting remission in ninety-three percent of cases from 1801 to 1812, sixty-eight percent being full remissions and twenty-four percent partial. See 25

Looking behind the numbers, closer examination of the petitions themselves reveals just how lenient the remission regime was. The Secretaries accepted a broad range of excuses as justification for lawbreaking conduct. For example, petitioners did not need to assert that extraordinary circumstances prevented them from following the law. Instead, an asserted difficulty with—or just the inconvenience of—complying with customs regulations consistently offered a path to forgiveness.<sup>229</sup> The Secretaries remitted forfeitures incurred due to ship captains' hurry to get a cargo to port,<sup>230</sup> changes in foreign markets,<sup>231</sup> and trading restrictions imposed by other nations.<sup>232</sup> Even a petitioner's admitted carelessness in following the law was not fatal,<sup>233</sup> despite the fact that the Remission Act expressly disallowed relief in cases of "wilful negligence."<sup>234</sup>

In addition, plausibility was not a high bar. The Secretaries remitted forfeitures despite misgivings about the veracity of petitioners' assertions,<sup>235</sup> a

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Annals of Cong. app. at 1287 (1813) [hereinafter Gallatin Report] (statement of Treasury Secretary Gallatin).

229. See, e.g., *United States v. One Hundred Casks of Raisins* (1794), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 213–15 (explaining that a manifest was incomplete because the customs house was closed when the petitioner wanted to depart); *United States v. Brig Adelaide* (E.D. Pa. 1792), microformed on EDPA Petition Files, supra note 175, at 2–3 (arguing that it was difficult to find proper-sized casks for transporting wine).

230. See, e.g., *Petition of Oliver Champlin* (S.D.N.Y. 1793), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 151 (finding a violation occurred due to the ship leaving "in a great hurry on account of the tide"); *Petition of George Chesroe* (S.D.N.Y. 1792), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 123–24 (finding a violation occurred due to a haste to reach New York before other vessels with a competing cargo of raisins).

231. See, e.g., *United States v. Schooner Sally* (S.D.N.Y. 1795), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 264 (finding a ship's return to the United States with improperly marked casks was due to a downturn in the Caribbean rum market); *United States v. Sloop Argus* (S.D.N.Y. 1795), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 261–62 (same).

232. See, e.g., *Petition of William M. Seton* (S.D.N.Y. 1799), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 3, 71 (finding that a ship violated the U.S. embargo against France because it was prevented from leaving France before the embargo went into effect); *Petition of Isaac Gouverneur* (S.D.N.Y. 1799), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 3, 69 (same).

233. See *Petition of Nicholas Cruger* (S.D.N.Y. 1797), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 2, 119, 157–58 (providing remission for an owner who neglected to make a citizenship oath needed for a ship registration due to "forgetfulness occasioned by the multiplicity of business"); *United States v. Schooner Pilgrim* (E.D. Pa. 1795), microformed on EDPA Petition Files, supra note 175, at 131 (providing remission for a ship captain who was not aware of incorrect marks on brandy casks).

234. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23 (repealed 1797) (providing for remission of forfeitures).

235. See *Petition of John Osborn* (S.D.N.Y. 1791), microformed on SDNY Minutes, supra note 129, at reel 1, vol. 1, 87–88, 97–98 (remitting forfeiture for a ship that did not meet tonnage requirements); Letter from Alexander Hamilton to James Duane (Aug. 4,

lack of evidence supporting them,<sup>236</sup> indications of other questionable conduct,<sup>237</sup> and “circumstances of suspicion.”<sup>238</sup> Nor did the Secretaries require much persuading; in Hamilton’s view, if there simply “appear[ed] to be reasonable ground for a presumption” that the violation was unintentional, forbearance was called for.<sup>239</sup> It was not even always necessary for the petitioner to justify his error—the mere assertion that it was unintentional could trigger a remission.<sup>240</sup>

The Secretaries also went to great lengths to ensure that claimants were able to make their cases. As a statutory matter, petitioners were responsible for establishing that a violation was unintentional, which included presenting evidence to the district court.<sup>241</sup> In practice, however, the Secretaries investigated cases themselves, asking federal officers on the ground for additional information, so as to fully consider the merits of the petitioners’ claims.<sup>242</sup> And the Secretaries did so knowing full well the extra burden these requests imposed on federal officials.<sup>243</sup>

For Hamilton, this willingness to bend over backward in favor of petitioners was motivated by an appreciation of forfeiture’s potentially

1791), *in* 9 The Papers of Alexander Hamilton, *supra* note 187, at 11, 11 (Harold C. Syrett ed., digital ed. 2011) (doubting whether John Osborn’s claim about ship’s tonnage was accurate).

236. See *Ship Three Friends* (E.D. Pa. 1796), microformed on EDPA Petition Files, *supra* note 175, at 167–69 (remitting forfeiture even though no evidence supported petitioner’s explanation for having an undersized cask on board).

237. See *Ship Harmony* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 87–89 (remitting forfeiture despite credible evidence that petitioner intentionally mislabeled imported brandy casks to evade export regulations in the country of origin).

238. *Petition of Lemuel Toby* (S.D.N.Y. 1793), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 224.

239. Letter from Alexander Hamilton to Jeremiah Olney (Sept. 24, 1791), *in* 9 The Papers of Alexander Hamilton, *supra* note 187, at 236, 236 (Harold C. Syrett ed., digital ed. 2011).

240. See *United States v. Ten Casks of Brandy* (S.D.N.Y. 1795), microformed on SDNY Admiralty, *supra* note 126, at reel 2 (remitting forfeiture because “it was not intended to commit any fraud”); *Petition of Louis Simond* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 268 (remitting forfeiture even though “nothing sufficiently is shown to justify ignorance of the law”); see also *Petition of Samuel Bard* (S.D.N.Y. 1793), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 144 (remitting full forfeiture even though no explanation was given for ignorance); *Petition of James Bunyan* (S.D.N.Y. 1793), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 141–42 (same).

241. See Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122 (repealed 1797) (requiring the petitioner to “truly and particularly set[] forth the circumstances of his case”).

242. See, e.g., Letter from Alexander Hamilton to James Duane, *supra* note 235 (giving the New York district judge detailed instructions on what additional evidence to adduce).

243. See Letter from Alexander Hamilton to Nathaniel Pendleton (Aug. 15, 1792), *in* 12 The Papers of Alexander Hamilton 206, 206 (Harold C. Syrett ed., digital ed. 2011) (acknowledging the “additional trouble” he gave Nathaniel Pendleton by seeking more information); Letter from Alexander Hamilton to Otho H. Williams (June 4, 1791), *in* 8 The Papers of Alexander Hamilton, *supra* note 124, at 437, 437 (asking the Baltimore collector to undertake “the trouble of a further investigation” in a doubtful case).

severe consequences. As he explained to the federal officers charged with enforcing the customs regime, Hamilton was “unwilling . . . to precipitate a forfeiture as long as there is a *chance* of new light to evince innocence.”<sup>244</sup> This was true even in “extremely questionable” cases.<sup>245</sup> In fact, Hamilton regularly expressed his doubts about “the innocence of the transaction[s]” he was presented with, but he declined to reject unpersuasive petitions outright.<sup>246</sup> Instead, he repeatedly gave petitioners further opportunity to “explain[] and put[] matters in a more satisfactory light, if they can.”<sup>247</sup>

### C. *Transforming Forfeiture*

The generous approach Hamilton and his successors adopted did more than provide meaningful relief to a substantial number of claimants. In granting relief to petitioners with any plausible claim to an unintentional violation of the law, and by calibrating penalties in accordance with the claimants’ level of culpability, the Secretaries substantially reshaped core principles of the forfeiture regime Congress established. The picture of early forfeiture that emerges from the remission records is therefore quite different from the image one finds in modern Supreme Court decisions.

1. *Incorporating Intent*. — The first transformation wrought by the Secretaries’ remission practices lay in shifting what was formally a strict liability regime into a system that effectively required lawbreaking intent to permit a forfeiture. As discussed above, only a small handful of the numerous offenses set forth in the 1789 Collection Act turned on the offender’s state of mind; for the vast majority, whether the violator acted

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244. Letter from Alexander Hamilton to Otho H. Williams, *supra* note 243, at 437 (emphasis added); see also Letter from Alexander Hamilton to David Sewall (Nov. 13, 1790), *in* 7 *The Papers of Alexander Hamilton*, *supra* note 110, at 150, 151 (Harold C. Syrett ed., digital ed. 2011) (asking for additional information despite the collector’s view that fraud was intended, because Hamilton was “unwilling to precipitate the execution of a sentence of so serious a nature” without giving a petitioner full opportunity to defend his conduct).

245. Letter from Alexander Hamilton to Otho H. Williams, *supra* note 243, at 437.

246. Letter from Alexander Hamilton to James Duane (Apr. 5, 1793), *in* 14 *The Papers of Alexander Hamilton* 284, 284 (Harold C. Syrett ed., digital ed. 2011); see also Letter from Alexander Hamilton to Benjamin Lincoln (Oct. 18, 1792), *in* 12 *The Papers of Alexander Hamilton*, *supra* note 243, at 591, 591 (Harold C. Syrett ed., digital ed. 2011) (asking for additional information, even though the facts “furnishe[d] a presumption that there may have been something more than mere unintentional neglect”); Letter from Alexander Hamilton to Nathaniel Pendleton, *supra* note 243, at 206 (declining to reject a petition even though the case “[stood] ill in [his] mind” and his “first impression was to decide against remission of mitigation”).

247. Letter from Alexander Hamilton to Nathaniel Pendleton, *supra* note 243, at 206; see also Petition of John Osborn (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 97–98 (remitting full forfeiture imposed in that case); Letter from Alexander Hamilton to James Duane, *supra* note 235, at 11 (doubting petitioner’s explanation for violating a vessel tonnage requirement, but soliciting further evidence).

intentionally, negligently, or innocently was irrelevant to liability.<sup>248</sup> The Remission Act gave the Treasury Secretary the power to remit penalties incurred without “wilful negligence or any intention of fraud,” but it did not *require* that he do so.<sup>249</sup> The legislative scheme thus established strict liability as the baseline, with a discretionary power vested in the Secretary to grant relief to occasional deserving petitioners.<sup>250</sup>

In practice, however, the Secretaries *always* granted remission in response to a plausible claim of lack of fraudulent intent. Petitioners who could credibly pin the blame on others—whether they were ship captains,<sup>251</sup> crew members,<sup>252</sup> business partners,<sup>253</sup> prior owners,<sup>254</sup> or even customs officers<sup>255</sup>—were successful in securing relief. In contrast, the

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248. See *supra* note 116 and accompanying text.

249. Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506; Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123 (repealed 1797); see also *The Margareta*, 16 F. Cas. 719, 721 (C.C.D. Mass. 1815) (No. 9,072) (Story, J.) (contrasting the discretion in the customs remission scheme with mandatory remission in an 1813 statute).

250. When Congress revised the customs statute in August 1790—several months after enacting the Remission Act—the legislature modified a number of substantive provisions to remove liability when there was no fraudulent intent. See, e.g., Collection Act of 1790, ch. 35, § 10, 1 Stat. 145, 156 (repealed 1799) (imposing liability for forfeiture of goods omitted from a manifest, but with exceptions including “mistake,” if the manifests were “defaced by accident,” or lost without “fraud or collusion”); *id.* § 34, 1 Stat. at 166 (imposing a \$500 fine if packages reported on a manifest are subsequently “not found on board,” unless no part of the cargo “has been unshipped since it was taken on board,” or by mistake or accident); *id.* § 47, 1 Stat. at 169–70 (permitting the inspection of goods after entry “on suspicion of fraud” and allowing seizure of such goods, unless by “accident or mistake” or if “not from an intention to defraud”).

251. See, e.g., *United States v. Schooner Endeavor* (E.D. Pa. 1793), microformed on EDPA Petition Files, *supra* note 175, at 33–35 (remitting a ship forfeited because the captain mistakenly imported gin in undersized casks); *Petition of Joseph George* (S.D.N.Y. 1804), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 2, 183 (providing partial remission for the owner of a ship whose captain landed goods illegally); *Petition of Marshal Jenkins* (S.D.N.Y. 1792), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 119–20 (remitting a ship forfeited due to a captain’s mistaken entry of undersized casks of spirits).

252. See, e.g., *United States v. Twelve Bags of Coffee* (E.D. Pa. 1793), microformed on EDPA Petition Files, *supra* note 175, at 24, 26 (remitting a penalty imposed due to seamen secretly bringing coffee on board); *Petition of Thomas Reid* (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 89 (remitting forfeiture due to servants putting items on board the boat without informing the owners).

253. See, e.g., *United States v. Brig Mary* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 104, 107 (providing partial remission for an importer who asked a foreign seller to ship brandy in properly sized casks).

254. See, e.g., *Petition of Joseph Willson* (E.D. Pa. 1806), microformed on EDPA Petition Files, *supra* note 175, at 363–64 (providing partial remission due to the previous owners’ failure to renew their coasting license); *Petition of Welsh* (E.D. Pa. 1798), microformed on EDPA Petition Files, *supra* note 175, at frame 193–195 (remitting forfeiture incurred due to the previous owner’s failure to surrender their coasting license prior to sale to a foreigner).

255. See, e.g., *Petition of Thomas Elder* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 76–78 (providing partial remission of forfeiture against

rare cases in which the Secretaries denied remission usually involved facts suggesting complicity or at least a failure to properly supervise on the owner's part.<sup>256</sup>

The most common basis for remission was simple ignorance of the law. Whether because the petitioner had been misinformed by others,<sup>257</sup> had left the country for a while,<sup>258</sup> or had been simply "poor and . . . ignorant,"<sup>259</sup> time and again the Secretaries granted forbearance solely in response to a claim of a lack of legal knowledge. In fact, ignorance of the law was not only a potential excuse—it was *always* an excuse. The records reveal not a single instance of the Treasury denying remission because the Secretary deemed a mistake of law defense to be insufficient. What is more, the Secretaries regularly granted remission in response to dubious claims of ignorance—for example, when the statutory provision in question had long been in effect,<sup>260</sup> or the petitioner was someone who could well be expected to know the law governing their business.<sup>261</sup> In

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the defendant's ship and spirits when a customs officer told the owner that he could land the illegal cask and petition for relief afterward).

256. See, e.g., *United States v. Schooner Neptune* (E.D. Pa. 1796), microformed on EDPA Information Files, *supra* note 102, at reel 1, 15 (describing the testimony of a ship's mate suggesting the ship owner had knowledge of the ship's use for smuggling); *United States v. Two Hogsheads of Rum* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 80 (denying remission to a distillery owner for forfeiture incurred due to the foreman's ignorance); *Petition of Charles White* (E.D. Pa. 1796), microformed on EDPA Petition Files, *supra* note 175, at 163–64 (denying remission to a ship owner for forfeiture incurred due to captain's smuggling).

257. See, e.g., *United States v. Three Boxes of Iron Mongering Lines* (S.D.N.Y. 1790), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 17–18 (describing a case in which petitioner relied on a collector's indication that household items were not subject to a duty); *Petition of James Barnes* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 109–10 (describing a case in which petitioner relied on a U.S. consul's knowledge of customs regulations).

258. See, e.g., *Petition of Asa Benton* (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 95–96 ("[T]he petitioner has been absent from the United States and in the West Indies since the month of October last . . . [;] there is no room to suspect the petitioner was guilty of any fraudulent intention.").

259. *United States v. Ship Mary* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 304; see also *Petition of Joseph Fay* (S.D.N.Y. 1802), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 1, 292 (noting the customs officers' belief that the unlawful importation "was the effect of Ignorance and not design").

260. See, e.g., *United States v. Twenty Six Half Pipes of Brandy* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 235–37, 269 (providing full remit of forfeiture for the violation of a law that had been in place for several years); *Petition of James Barnes* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 109, 110 (same); *Letter from Alexander Hamilton to John Lowell*, *supra* note 110, at 184 (same).

261. See, e.g., *Petition of Louis Simond* (S.D.N.Y. 1805), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 2, 325 (remitting forfeiture against an experienced merchant who failed to take an oath of American ownership for registering a ship); *Petition of Thomas Mackie* (E.D. Pa. 1803), microformed on EDPA Petition Files, *supra* note 175, at 306 (remitting forfeiture of undersized rum casks despite petitioner having previously received relief for the same violation); *Petition of George Chesroe* (S.D.N.Y.

short, a mistake of law did not have to be reasonable; it just had to be believable.

It is worth pausing to consider the significance of the Secretaries' treatment of ignorance of the law as a complete defense to forfeiture. At the time, the principle that ignorance of the law was not an excuse for lawbreaking was firmly established, and had been for centuries.<sup>262</sup> Though contemporaries recognized that the doctrine risked subjecting persons innocent of real wrongdoing to harsh penalties, the severity was a necessary evil.<sup>263</sup> Otherwise, it would be too easy to evade the law, either by pretending to be unaware of it, or by neglecting to learn it; those who knowingly ran afoul of the law could simply assert that they were unaware of its requirements.<sup>264</sup> Indeed, permitting mistake of law as a defense removed any incentive that merchants had to learn the new regulations Congress had enacted and to abide by them.<sup>265</sup>

This was not an abstract concern. As discussed earlier, there was deep anxiety in Congress that the remission power risked undermining enforcement of the revenue laws.<sup>266</sup> And while Hamilton thought forfeitures incurred because of "misconstruction" or "want of information" were candidates for relief, he also believed—at least at first—that remission was only a *temporary* expedient, to "allow sufficient time for persons to become acquainted with the law."<sup>267</sup> Yet contrary to Hamilton's initial assumption, in practice the Secretaries (him included) not only treated every colorable claim of ignorance as a basis for remission, they repeatedly did so in circumstances suggesting that they could have taken a dimmer view of the petitioners' claim for relief.<sup>268</sup> And they continued

1792), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 123, 133 (remitting forfeiture despite the district court's note that the petitioner—a ship captain—"does not appear to be well acquainted with the duties of his station"); see also 2 Walter Barrett, *The Old Merchants of New York City* 100 (N.Y., Carlton 1885) (discussing the merchant Simond's extensive business in foreign commerce based out of New York City).

262. See *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833) (describing the principle as "a common maxim, familiar to all minds").

263. See *The Ann*, 1 F. Cas. 926, 928 (C.C.D. Mass. 1812) (No. 397) (Story, J.) ("I am aware of great difficulties in sustaining the reason of these principles . . .").

264. See Letter from Thomas Jefferson to Andre Limozin (Dec. 22, 1787), *in* 12 *The Papers of Thomas Jefferson* 450, 451 (Julian P. Boyd ed., digital ed. 2019) ("[I]gnorance of the law is no excuse in any country. If it were, the laws would lose their effect, because it can always be pretended.").

265. See 1 John Austin, *Lectures on Jurisprudence, or, the Philosophy of Positive Law* 481 (Robert Campbell ed., 5th ed. 1885) ("[I]gnorance or error with regard to the state of the law, is never inevitable. For the law is definite and knowable, or might or ought to be so.").

266. See *supra* section III.A.

267. Hamilton, *Act Repealing Duties*, *supra* note 196, at 161 n.\*.

268. See *supra* notes 235–240, 246 and accompanying text.

to do so long after the rules Congress created for revenue collection had been firmly established.

The Secretaries' fulsome exercise of the remission power worked a profound change in the legal regime governing forfeiture. As a formal matter, the statutory scheme regulating maritime commerce largely ignored questions of intent in prescribing penalties for violations. But under the Secretaries' approach, a claimed lack of fraudulent intent was a complete defense to forfeiture, effectively rendering such intent an element of every customs offense.

2. *Tailoring Penalties.* — The second transformation resulting from the Secretaries' remission practices was their introduction of strong proportionality considerations into the forfeiture regime. Here the change was more subtle, but important nonetheless.

As a formal matter, the statutory scheme evinced concern for maintaining proportionality between offenses and forfeitures, but only roughly so. Some violations triggered fines (of varying amounts), some resulted in forfeitures, and some both.<sup>269</sup> But as to forfeitures, the statutes rarely provided any gradation—the penalty was the value of the goods, irrespective of whether that amount was low or high.<sup>270</sup> To be sure, forfeitures in response to violations that threatened to deprive the government of customs duties on imports were often proportional in a general sense: Because the duties owed for many types of goods were calculated as a percentage of their value, forfeiture of the goods in full bore a direct relationship to the harm to the public fisc that arose from nonpayment. But in many instances, forfeiture could result in widely disparate penalties imposed for identical offenses.<sup>271</sup>

In exercising their remission authority, the Secretaries evinced a deeper concern for meting out penalties commensurate to the level of misconduct than did the statutes. First, every statement of facts produced by a district court judge noted the value of the articles subject to forfeiture. This information was irrelevant to the question of *eligibility* for remission—by statute, a forfeiture could be remitted as long as it was incurred “without wilful negligence or any intention of fraud.”<sup>272</sup> But evidence about the value of the forfeiture *was* necessary to enable the Secretaries to exercise their statutory authority to tailor relief “upon such terms or conditions as he may deem reasonable and just.”<sup>273</sup> The fact that

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269. See, e.g., Collection Act of 1789, ch. 5, §§ 11, 12, 15, 1 Stat. 29, 38–41.

270. The exception was in cases where the statute provided for forfeiture of a vessel, in addition to illegally imported goods, when the value of the goods was above a certain threshold. See, e.g., *id.* § 12, 1 Stat. at 39.

271. For example, trading foreign goods without a license resulted in forfeiture of the goods and the vessel, irrespective of their value. Coasting Act of 1793, ch. 8, § 6, 1 Stat. 305, 307–08. The same was true for importing sugar in packages of less than 600 pounds. Act of June 5, 1794, ch. 51, § 13, 1 Stat. 384, 387.

272. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23.

273. *Id.*

every petition included information about forfeiture value suggests that the Secretaries understood themselves to have not only the *power* to tailor remission but also an *obligation* to ensure congruence between the level of misconduct and the severity of the penalty.

More evidence of the Secretaries' concern for proportionality lies in the decisions themselves. As noted earlier, a percentage of remissions granted significant but not complete relief.<sup>274</sup> Partial remissions were generally granted in cases involving some degree of responsibility for the violation on the petitioner's part but no actual fraud. Negligence was the most common reason for not granting full remission; the Secretaries imposed small penalties on petitioners who offered no good excuse for their claimed ignorance of the law,<sup>275</sup> as well as those who were simply careless<sup>276</sup> or forgetful.<sup>277</sup> At times the Secretaries also imposed penalties on petitioners who failed to properly supervise others.<sup>278</sup> In most such cases the penalty was relatively minor—twenty or fifty dollars—representing a small fraction of the potential forfeiture's total value.<sup>279</sup> And even

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274. See *supra* notes 227–228.

275. See, e.g., *United States v. Ship Lydia* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 368 (valuing the ship at \$11,240 and noting a seizure because porter was not in casks or packages of bottles as required by statute); *Petition of William Seton* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 373 (ordering a \$15 penalty on forfeiture of *Ship Lydia* above worth \$11,240 because “there is no cause stated to excuse fully the Master from an attention to a law”).

276. See, e.g., *United States v. Forty Bags of Peppers* (E.D. Pa. 1792), microformed on EDPA Petition Files, *supra* note 175, at 10–11 (imposing a \$20 penalty for omitting peppers from the manifest due to hurry); *Petition of John Vorhees* (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 57 (imposing a penalty of one-quarter of the forfeiture value for “some degree of carelessness and inattention to the Law”).

277. See, e.g., *Petition of Samuel Wiswall* (S.D.N.Y. 1804), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 2, 256–57 (requiring petitioner who left his American register in St. Croix to pay higher foreign tonnage duties).

278. See, e.g., *United States v. A Cask of Rum Imported in the Schooner Sally* (E.D. Pa. 1793), microformed on EDPA Petition Files, *supra* note 175, at 28–29 (imposing forfeiture of a single cask of rum loaded on board by an inattentive seaman); *Petition of Joseph George* (S.D.N.Y. 1804), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 5, 183 (imposing a \$20 penalty against a part-owner of a ship whose captain landed goods illegally); *Petition of Benjamin Bailey* (E.D. Pa. 1795), microformed on EDPA Petition Files, *supra* note 175, at 135–38 (imposing a \$20 penalty for barrels of coffee mistakenly left off a manifest by a ship's mate).

279. See, e.g., *Ship Lydia* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 368 (valuing the ship at \$11,240); *Petition of William Seton* (S.D.N.Y. 1796), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 373 (imposing a \$15 penalty on *Ship Lydia*'s forfeiture). In certain cases, the Secretaries applied the proportionality principle quite literally—for example, in upholding the forfeiture of a small amount of illegally imported goods, but remitting the forfeiture of the vessel in which they arrived. See *United States v. Ship Leeds* (S.D.N.Y. 1794), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 217–18 (forfeiting one cask of ale but overturning the forfeiture of the vessel); *United States v. Twelve Bags of Coffee* (E.D. Pa.

larger penalties generally paled in comparison to what the petitioner stood to lose by forfeiture.<sup>280</sup> In short, when the offense was minor, so was the penalty the Secretaries imposed.<sup>281</sup>

The Secretaries were explicit about their belief in the importance of carefully tailoring the penalties they imposed. As Hamilton explained to Congress, penalties causing “material suffering or loss” should be limited to cases involving a significant “degree of negligence.”<sup>282</sup> Albert Gallatin echoed this view two decades later; in cases where he thought it “improper” to grant complete remission, his practice was to “graduat[e] the amount of penalty” according to the nature of the case.<sup>283</sup> In determining what penalty was appropriate, he took account of the “degree of negligence manifested by the party” as well as “the importance, for the safety of the revenue, of the particular provision which had been infringed.”<sup>284</sup>

This is the proportionality principle in action. Petitioners who had admittedly broken the law, but who made a plausible case that they did so without fraudulent intent, were not subject to forfeiture’s harshest consequences. At the same time, those who bore *some* responsibility for the violation were not excused entirely; negligent merchants paid a price for their dereliction of responsibility, albeit a small one. Hamilton agreed with this too: When compliance with the law “was practicable,” it was

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1793), microformed on EDPA Petition Files, *supra* note 175, at 24–26 (forfeiting one bag of coffee illegally imported without the captain’s knowledge, but sparing the vessel); Petition of William Rhodes (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 252 (imposing a penalty of \$17 as recompense for the illegal importation of a cask of ale worth \$17.50, while renouncing forfeiture of the vessel worth \$9,000).

280. See, e.g., *United States v. Eleven Half Cases of Gin* (S.D.N.Y. 1795), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 240–42, 245–46 (imposing a penalty of \$100 in partial remission of forfeiture worth \$2,483).

281. Even full remissions can be seen as imposing a proportional penalty, because Treasury decisions always charged the petitioner with paying court costs—fees owed to the marshal, clerk, and other court personnel for services rendered. See, e.g., Petition of John Osborn (S.D.N.Y. 1791), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 98 (charging costs totaling \$13.13); Petition of William Wilcocks (S.D.N.Y. 1790), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 64 (charging costs totaling about \$18). These fees were generally not significant, but they were nevertheless a cost, and served as a minor penalty imposed on claimants who had failed to prevent a violation from occurring. See Gallatin Report, *supra* note 228, at 1286 (stating that Gallatin’s practice was always to impose costs, except in “a few cases of great hardship”); Letter from Jeremiah Olney to Alexander Hamilton (Mar. 18, 1793), *in* 14 *The Papers of Alexander Hamilton*, *supra* note 246, at 214, 214 n.1 (reporting the combined court and counsel charges for a merchant complaint, even after securing remission, meant that “the remedy [was] equal to the disease”).

282. Alexander Hamilton, Report on the Petition of Thomas Jenkins and Sons (Jan. 27, 1794), *in* 15 *The Papers of Alexander Hamilton* 665, 665 (Harold C. Syrett ed., digital ed. 2011) [hereinafter Hamilton, Report on Jenkins and Sons].

283. Gallatin Report, *supra* note 228, at 1286.

284. *Id.*

appropriate that the violator suffer “[s]ome degree of inconvenience.”<sup>285</sup> By carefully aligning the penalties imposed on property owners with their degree of culpability, the Treasury Secretaries sought to ensure that the government used its statutorily broad power to forfeit property as moderately as possible. Rather than the unconstrained power the Supreme Court has imagined, forfeiture at the Founding was kept within limits.

#### IV. FORFEITURE AND THE CONSTITUTION

In light of the Supreme Court’s reliance on history to justify its denial of constitutional protections against civil forfeiture, this Part considers what the Founding Era practice revealed in Part III might tell us about constitutional limits on civil forfeiture today. As section IV.A explains, the government’s generous exercise of the remission power raises significant doubts about two key propositions underlying the Supreme Court’s modern jurisprudence: that “innocence” was traditionally irrelevant to civil forfeiture’s propriety, and that civil forfeiture was not considered a “punishment” to be constrained by the proportionality principles that apply to other government-imposed penalties. At minimum, this Article’s contrary findings offer good reason for the Court to reconsider the historical underpinnings of its doctrinal conclusions in these two critical domains.

The history discussed here may also do more than simply challenge a faulty judicial narrative about forfeiture’s past. It offers historical evidence—though admittedly speculative—to support the imposition of stronger constitutional constraints on forfeiture’s exercise today. In particular, section IV.B assesses evidence that early remission was shaped by a Founding Era understanding that robust protections for forfeiture’s victims were a necessary—and possibly constitutional—corollary to the government’s exercise of its power. Yet as section IV.C explains, it is uncertain whether the revised understanding of forfeiture’s history advanced here necessitates the recognition of judicially enforceable limits on that power today.

##### A. *Forfeiture’s History*

The federal government’s early remission practices raise deep doubts about the historical beliefs that underlie two key areas of the Supreme Court’s forfeiture jurisprudence. Recall that the Court’s rejection of an “innocent owner” defense to forfeiture under the Due Process Clause rests on a belief that considerations of innocence have never been relevant to forfeiture’s propriety.<sup>286</sup> Similarly, the Court seems to have concluded—though not clearly—that civil forfeiture was traditionally not

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285. Hamilton, Report on Jenkins and Sons, *supra* note 282, at 665.

286. See *supra* notes 44–62 and accompanying text.

understood to be “punishment,” and therefore not subject to the proportionality requirement embedded in the Excessive Fines Clause.<sup>287</sup>

As detailed below, those conclusions are dubious. Solicitude for innocent owners and proportionality in punishment were both core concerns of the early forfeiture regime, a finding that has implications for the Court’s jurisprudence going forward. At minimum, the revelation that the government’s early use of civil forfeiture was subject to significant constraints offers reason for the Supreme Court to revisit its contrary historical understanding and the doctrinal conclusions that flow from it.

1. *Innocence*. — First, consider innocence. The Court has consistently held that a property owner’s lack of involvement in a legal violation has no bearing on the propriety of civil forfeiture under the Due Process Clause.<sup>288</sup> This is true even though the Court recognizes that it is potentially “unfair” to penalize innocent owners for the acts of others.<sup>289</sup> The *reason* that such manifest unfairness does not require constitutional protections for innocent owners is history. Citing the “historical background of forfeiture statutes in this country”—including the customs regulations discussed in section II.A—and prior decisions “sustaining their constitutionality,” the Court has concluded that the Due Process Clause offers no protection to innocent owners.<sup>290</sup>

The Court’s understanding of forfeiture’s history is incomplete at best. Contrary to the conclusion the Court has drawn from a handful of its prior opinions, concerns over the injustice of forfeiting the property of innocent owners have deep historical roots. As Part III demonstrates, the principle that morally nonculpable property owners should be shielded from forfeiture’s harsh effects was an essential element of the federal government’s practice from its very beginnings.<sup>291</sup>

Indeed, the Treasury Secretaries’ early remission activities point to a conception of “innocence” far more capacious and forgiving than even the modest version rejected by the Supreme Court. Take historical claims to “innocence” that mirror modern conceptions—that is, when the claimant asserts that they had no direct involvement in, or even knowledge of, the offense underlying a forfeiture.<sup>292</sup> Supreme Court doctrine adopts a hard-line approach; for example, the Court has rejected the

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287. See *supra* notes 64–81 and accompanying text.

288. See *supra* notes 44–49 and accompanying text.

289. *Bennis v. Michigan*, 516 U.S. 442, 453 (1996).

290. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–86 (1974).

291. See *supra* section III.C.1.

292. See 18 U.S.C. § 983(d)(2)(A) (2012) (limiting CAFRA’s innocent-owner defense to those who either “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 property”); *Bennis*, 516 U.S. at 444–46 (rejecting claimant’s argument that forfeiture of her car was unconstitutional because she “did not know” that it would be used in connection with illegal activity).

“innocent owner” arguments of a woman who jointly owned a car used by her husband when soliciting a prostitute<sup>293</sup> and a boat-leasing company whose yacht was used to transport a small amount of marijuana,<sup>294</sup> though in neither case was there any suggestion that the owners had any knowledge of the crime, let alone involvement in it.<sup>295</sup> By contrast, early property owners who asserted such defenses were broadly successful in securing remission. In fact, they prevailed in circumstances far less suggestive of “innocence” than those present in recent Court decisions.<sup>296</sup>

Perhaps more importantly, the early conception of “innocence” evident in the Secretaries’ remission practices extended beyond those who could plausibly argue a lack of involvement in wrongdoing. The Secretaries did not grant relief only to persons who were *personally* innocent of wrongdoing; they also remitted forfeitures incurred by persons whom we might consider to be *morally* innocent—that is, those whose violations were the result of extenuating circumstances,<sup>297</sup> or (more commonly) who were simply ignorant of the law.<sup>298</sup> In other words, in the early period a successful claim of “innocence” did not necessitate establishing lack of actual *involvement* or *knowledge*; all that was required was to plausibly assert absence of *intent* to break the law (and sometimes barely so).<sup>299</sup>

The capaciousness of this early conception of “innocence” is most evident in Alexander Hamilton’s evolving views of remission’s relationship to claims of ignorance of the law. As noted earlier, Hamilton initially believed that a federal remission power would only be necessary to “allow sufficient time for persons to become acquainted with the law.”<sup>300</sup> But that is not what happened. Not only did remission soon become a permanent feature of the regulatory regime governing maritime commerce, but in practice Hamilton and his successors forgave forfeitures in response to claims of legal ignorance long after the requirements and prohibitions of that regime had been clearly established.<sup>301</sup>

In short, if Hamilton originally understood remission to be a necessary expedient in managing the transition to a new regulatory

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293. *Bennis*, 516 U.S. at 451–53.

294. *Calero-Toledo*, 416 U.S. at 665, 690.

295. *Bennis*, 516 U.S. at 443 (“A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband’s activity.”); *Calero-Toledo*, 416 U.S. at 668 (“[Appellee] had no knowledge that its property was being used in connection with or in violation of [Puerto Rican Law].” (second alteration in original) (internal quotations marks omitted) (quoting Appellee’s Brief at 2, *Calero-Toledo*, 416 U.S. 663 (No. 73-157), 1973 WL 172407)).

296. See *supra* notes 235–240 and accompanying text.

297. See *supra* notes 229–234 and accompanying text.

298. See *supra* section III.C.1.

299. See *supra* notes 230–241.

300. Hamilton, Act Repealing Duties, *supra* note 196, at 161 n.\*.

301. See *supra* sections III.B–C.

regime, over time he and his successors used it in a way that indicates a deeper principle at work: Even if many violators could reasonably be expected to know that they were violating the law, imposing forfeiture was only appropriate in cases involving specific lawbreaking *intent*. Rather than severing forfeiture's legitimacy from questions of moral culpability, as modern doctrine does, in the early period the Secretaries were guided by a conception of "innocence" that viewed forfeiture as necessarily limited by such considerations.

This Article's revelation that innocence was in fact a paramount concern in the early forfeiture regime should encourage the Court to reconsider its rejection of an innocent-owner defense under the Due Process Clause. Contrary to the Court's understanding, from the first days the federal government used civil forfeiture as a tool of law enforcement, claimants were able to recover property seized by the government whenever they could plausibly assert that they lacked law-breaking intent. Shorn of its historical rationale, the Court's refusal to consider claims to innocence must be justified on other grounds.<sup>302</sup> Perhaps it can be—such questions are beyond the scope of this Article.<sup>303</sup> But, at minimum, these are questions the Court should be asking itself.

2. *Proportionality and Punishment.* — Second, consider proportionality and punishment. As explained above, history has also shaped Supreme Court doctrine regarding the Eighth Amendment's applicability to civil forfeiture. Under the Court's approach, the key question in assessing whether a particular penalty is a "fine" for purposes of the Excessive Fines Clause—and is therefore subject to the Clause's "gross proportionality" requirement—is whether that penalty constitutes "punishment."<sup>304</sup>

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302. See *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari) ("In the absence of . . . historical practice, the Constitution presumably would require the Court to align . . . civil forfeiture with . . . other forms of punitive state action and property deprivation. . . . I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . .").

303. See *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (noting that forfeiture of property owned by those uninvolved in lawbreaking conduct encourages owners to take care in entrusting the use of that property to others). One additional question I do not address here is whether a persuasive counternarrative of early limits on the forfeiture power necessitates a change in modern Supreme Court doctrine. Even if the Court has relied on a mistaken understanding of historical tradition as the basis for much of its forfeiture jurisprudence, *stare decisis* concerns weigh heavily in favor of preserving existing rules. See Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *Notre Dame L. Rev.* 1753, 1788–89 (2015) ("[M]ost judges, Justices, and commentators agree that the doctrine of *stare decisis* sometimes, but not always, authorizes or requires courts to act contrary to what otherwise would be the best interpretation of constitutional language."). But see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 *Va. L. Rev.* 1, 84 (2001) (questioning the general scholarly and judicial agreement that rule of law concerns necessitate a presumption of adherence to even "demonstrably erroneous precedents").

304. See *supra* notes 64–81 and accompanying text.

In answering that question, the Court has again looked to history. While in *Austin* the Court suggested that, historically, civil forfeiture has been considered punishment,<sup>305</sup> in *Bajakajian* the Court cast doubt on that proposition, asserting that because “[t]raditional in rem forfeitures” were historically *not* considered punishment, they “occupy a place outside the domain of the Excessive Fines Clause.”<sup>306</sup> The Court echoed that view in holding that civil forfeiture is not “punishment” for purposes of the Double Jeopardy Clause, on the strength of early practice and “a long line of cases” so holding.<sup>307</sup>

Here again, the Court’s historical conclusions are doubtful. To be sure, early forfeiture served, in part, what we might understand to be “nonpunitive” purposes. Statutory provisions providing for the seizure of vessels and their equipment not only penalized individuals for their misconduct; they also served the “remedial” purpose of removing from circulation the “instrumentalities” of lawbreaking conduct—such as ships used in the slave trade—and thereby potentially reducing the incidence of future violations.<sup>308</sup> The sums raised from forfeitures also served as compensation for customs officers and court personnel,<sup>309</sup> and—theoretically—replaced revenue lost to customs evasion.<sup>310</sup>

In the main, however, early forfeiture was a punishment for wrongdoing, a means of deterring such conduct in the future—something contemporaries acknowledged.<sup>311</sup> The government routinely

305. *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (“The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’” (emphasis added by the Court) (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989))).

306. *United States v. Bajakajian*, 524 U.S. 321, 331 (1998).

307. *United States v. Ursery*, 518 U.S. 267, 274 (1996).

308. See, e.g., Slave Trade Act of 1800, ch. 51, § 4, 2 Stat. 70, 71 (permitting forfeiture of a vessel involved in the slave trade and “her tackle, apparel and guns”); see also *Austin*, 509 U.S. at 621 (“[W]e have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society.”).

309. See Act of Mar. 3, 1791, ch. 22, § 1, 1 Stat. 216, 216–17 (appropriating monies “arising from the fines and forfeitures to the United States” for judicial salaries and juror and witness fees).

310. See *supra* notes 149–159 and accompanying text.

311. See Letter from William Ellery to Alexander Hamilton (Aug. 23, 1791), *in* 9 The Papers of Alexander Hamilton, *supra* note 187, at 93, 96 (Harold C. Syrett ed., digital ed. 2011) (“[Forfeiture] trials in my opinion, and in the opinion of others, will have a beneficial effect. The masters of vessels, and their owners will I think learn from them to pay a strict regard to the Revenue Laws . . . .”); August 1791 Letter to Lincoln, *supra* note 187, at 84 (advising a Boston customs collector that a “rigorous prosecution” of those who receive smuggled goods “may produce a desirable effect”); Letter from Benjamin Lincoln to Alexander Hamilton (Apr. 15, 1790), *in* 6 The Papers of Alexander Hamilton, *supra* note 104, at 365, 366 (arguing that “heavy forfeiture” is necessary to prevent customs evasions); Letter from Jeremiah Olney to Alexander Hamilton (Nov. 29, 1790), *in* 7 The Papers of Alexander Hamilton, *supra* note 110, at 168, 168 [hereinafter November 1790 Letter from Olney] (“It appears to me of great Consequence that every breach of the Revenue Laws should be prosecuted, and if *wilful*, punished with rigour . . . .”); cf. Colgan,

pursued forfeitures that served no apparent purpose other than penalizing people who violated the law.<sup>312</sup> And the longstanding justification for in rem forfeiture—that it allows a sovereign to reach wrongdoers who are otherwise beyond its jurisdiction—makes no sense unless the forfeiture punishes lawbreaking conduct.<sup>313</sup> In addition, despite the fiction of the “guilty property,” members of the Founding generation fully understood that an in rem forfeiture imposed punishment on individuals, not on the property itself.<sup>314</sup> Indeed, the entire point of creating the remission power was to provide relief from forfeitures that “might bear hard upon *individuals*.”<sup>315</sup>

The historical evidence also demonstrates an early concern over the Eighth Amendment’s central principle: proportionality in punishment. As discussed earlier, remission provided relief to those who were subject to penalties that were disproportional to their degree of moral culpability for the offense.<sup>316</sup> And by granting almost all of the remission petitions presented to them, the Treasury Secretaries made clear that forfeiture of valuable property was an inappropriate punishment for unintentional violations of the law. So much so, in fact, that it was better to err in favor of generosity in dubious cases.<sup>317</sup> Rather than sanctioning outsized forfeitures irrespective of the offense, the government’s early practice ensured that the punishments imposed via forfeiture fit the crime.

To the extent the Court has concluded that civil forfeitures were historically not considered to be punishment and therefore are not restrained by the Clause’s proportionality principles, that conclusion seems wrong. At the Founding, civil forfeiture was clearly understood to serve in significant part as a punishment for lawbreaking and was also constrained by a deep concern for ensuring that such punishments were commensurate with the offender’s culpability. To be sure, confirming the

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supra note 65, at 313 (arguing that monetary sanctions “that served remedial purposes were, in fact, punishment, which indicate[s] that the ratifying generation would not have looked for a division between remedial and punitive purposes”).

312. See supra notes 156–159 (recounting instances where federal officers regularly filed suit to forfeit low value goods).

313. See supra section II.B.2. (arguing that early uses of the forfeiture power in lieu of or in addition to in personam fines, even where fines were jurisdictionally or practically available, weakens this justification).

314. See supra section III.A; see also *The Little Charles*, 26 F. Cas. 979, 982 (C.C.D. Va. 1818) (No. 15,162) (Marshall, J.) (“It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law.”).

315. 6 Annals of Cong. 2286 (statement of Rep. Ames) (emphasis added).

316. See section III.C.2; see also Gallatin Report, supra note 228, at 1286 (reporting that one of the key principles guiding Gallatin’s remission decisions was reducing penalties to an amount “sufficient for the purpose of preventing infractions”); Hamilton, Saddle Report, supra note 196, at 191 (proposing the remission power out of concern over “considerable forfeitures” being imposed for infractions resulting from mere “inadvertence”).

317. See supra notes 224–228 and accompanying text.

Clause's applicability to civil forfeiture might not precipitate significant changes in the government's forfeiture practice.<sup>318</sup> But at the very least, the evidence discussed here gives the Court good reason to reject assertions—like those made by the State of Indiana this past term in *Timbs*<sup>319</sup>—that there is no historical basis for subjecting civil forfeiture to the Clause's proportionality requirement.

B. *Forfeiture's Constitutionality*

Forfeiture's early history might do more than simply encourage the Supreme Court to reconsider its historical justifications for denying constitutional protections to those subject to government seizures. The limited use of forfeiture at the Founding might also serve as the basis for an affirmative argument in favor of stronger constitutional protections in the present day. As discussed below, there is reason to attribute the early restrained approach to a Founding Era understanding that the Constitution did in fact apply to civil forfeiture.

Before unpacking the evidence of remission's constitutional underpinnings, it is worth noting that precisely *how* this history might factor into a new constitutional jurisprudence of civil forfeiture depends on one's views about the role of history in constitutional interpretation and adjudication. While even a partial overview of the possibilities is beyond the scope of this Article,<sup>320</sup> we can stipulate that historical evidence shedding light on Founding Era constitutional understandings is potentially relevant to almost any constitutional interpreter.<sup>321</sup> And we can further stipulate that evidence from the period immediately following Ratification is of high salience.<sup>322</sup> This is true even for proponents of "original public meaning" originalism, who accept that immediate post-

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318. As discussed earlier, under Supreme Court precedent the Clause only requires "gross" proportionality between penalty and offense, see *supra* note 65, allowing the government ample room to argue that, even if the Clause applies to civil forfeitures, financially significant seizures are nonetheless constitutionally permissible. See Opening Brief of Appellant, *supra* note 79, at 28–35 (arguing that, even if the Clause applies, the forfeiture in that case was not grossly disproportional); Louis S. Rulli, *Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?*, 19 U. Pa. J. Const. L. 1111, 1150 (2017) (asserting that, under the "gross proportionality" test, "the prosecutor almost always wins").

319. See Brief for Respondent, *supra* note 17, at 43–57.

320. For comprehensive taxonomies of the ways in which history influences constitutional interpretation, see generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *Fordham L. Rev.* 641 (2013); Fallon, *supra* note 303.

321. See Balkin, *supra* note 320, at 660 ("[F]or each modality of constitutional argument—text, structure, purpose, consequences, and so on—there is a different way to use history.").

322. See Fallon, *supra* note 303, at 1754 ("[N]early all of those who characterize themselves as nonoriginalists readily acknowledge the importance to constitutional adjudication of evidence bearing on the original meaning of constitutional language.").

Ratification evidence is highly probative of what contemporaries understood the Constitution to mean in 1788.<sup>323</sup> Post-Ratification evidence is also important when the original meaning of constitutional language is indeterminate; such evidence can aid in the process of “constructing” constitutional meaning when textual interpretation fails to provide an answer,<sup>324</sup> or in discerning the meaning of constitutional text that is originally susceptible to contested interpretations but, over time, becomes settled or “liquidated.”<sup>325</sup> Given the acknowledged indeterminacy of phrases like “due process” and “excessive fines,”<sup>326</sup> evidence regarding the federal government’s post-Ratification practices may have significant value for determining the constitutional meaning of such terms as they relate to civil forfeiture.

There is a problem, of course: The Constitution itself does not visibly appear in the forfeiture and remission story told here. Research in both published and unpublished cases during this period reveals no instance of a party arguing in court that the Constitution limited the government’s exercise of the forfeiture power. And the constitutional silence extended beyond the courts. With one important exception discussed below, I have found no indication that anyone in Congress or the executive branch contended that the Constitution itself circumscribed the forfeiture power. One might reasonably object to ascribing

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323. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008) (describing post-Ratification history as “a critical tool of constitutional interpretation”); Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 *Sup. Ct. Econ. Rev.* 115, 116–17 (2004) (considering both pre- and post-Ratification evidence to demonstrate that the Founders contemplated judicial nullification of legislation); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *Geo. L.J.* 1113, 1182 (2003) (“Post-Founding evidence is probative of original linguistic meaning and should be consulted even when the Founding Era evidence is seemingly unambiguous.”).

324. See Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *Const. Comment.* 95, 96, 108 (2010) (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”).

325. See William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1, 13–21 (2019); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519, 525–29 (2003) [hereinafter Nelson, *Originalism and Interpretive Conventions*].

326. See 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’ . . . .”); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1705 n.154 (2004) (noting the “indeterminacy of the Eighth Amendment’s prohibition against ‘excessive fines’”); Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2454 (“[P]rohibitions on depriving people of property ‘without due process of law’ . . . are widely thought to be at least somewhat indeterminate.”).

constitutional significance to historical practices that were not obviously constitutionally motivated.<sup>327</sup>

That said, there is good reason to think that the Treasury Secretaries' generous remission practices were motivated by widespread Founding Era agreement that it was fundamentally unjust to seize private property in response to unintentional violations of the law. As a result, remission in such circumstances was not discretionary; it was required—possibly by the Constitution itself.<sup>328</sup>

Evidence of remission's obligatory nature can be seen from its earliest days. As discussed above,<sup>329</sup> the remission power came into being because Hamilton and Congress agreed that the threat of “heavy and ruinous forfeitures” under the revenue laws rendered it a “necessity” that the government create—and continuously exercise—“some power capable of affording relief.”<sup>330</sup> Indeed, as a House committee explained in 1798, as a general matter Congress was “extremely loath to afford relief

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327. See Colgan, *supra* note 65, at 344 (suggesting that although evidence lacking a “constitutional pedigree” can be “useful in interpreting the [Excessive Fines] Clause, the lack of an explicit connection to the Constitution reduces the weight it should carry in assessing the Clause’s meaning today”); Nelson, *Originalism and Interpretive Conventions*, *supra* note 325, at 527–28 (reporting James Madison’s view that “[s]tatutes should not be taken to settle constitutional questions that members of the enacting Congresses had examined only ‘slightly, if at all’”).

328. The possibility that Hamilton and his successors took the lead in interpreting and applying the Constitution as it related to civil forfeiture should not come as a surprise. In the period studied here (and presumably going forward for some time), the Treasury Secretaries decided far more forfeiture cases than the courts. Such cases were rarely litigated to judgment. See *supra* note 226. In contrast, between 1790 and 1807 the Treasury Secretaries ruled on nearly 300 remission petitions. See *supra* note 226. In other words, while the courts in this period rarely opined on the permissibility of a given seizure, the executive branch repeatedly contemplated—and enforced—limits on the government’s forfeiture power. This situation was not unusual; as Sophia Lee has recently argued, “administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States,” especially in the nineteenth century. Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 168 U. Pa. L. Rev. (forthcoming 2019) (manuscript at 8), <https://ssrn.com/abstract=3400382> (on file with the *Columbia Law Review*). Furthermore, although scholarly accounts differ as to precisely when the Supreme Court became the *exclusive* arbiter of constitutional meaning, there is broad agreement that, in the early period studied here, the Court enjoyed no such monopoly. See, e.g., Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 353 (1998) (“Commentators generally fix the point of judicial supremacy, i.e., when the broad precedential effect of Supreme Court pronouncements began to carry weight, at some time late in the nineteenth century.”); John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 Mich. L. Rev. 1436, 1458 (2000) (book review) (“It was not until *Cooper v. Aaron* in 1958 that the Court first clearly declared that its interpretations of the Constitution bound all other government officials.”).

329. See *supra* section III.A.

330. Hamilton, *Saddler Report*, *supra* note 196, at 191–92.

in cases of non-compliance with the . . . revenue [laws].”<sup>331</sup> But it was “essential to justice” that petitions seeking remission for unintentional violations “be favorably heard.”<sup>332</sup>

Moreover, the way in which the early Treasury Secretaries used the power Congress created indicates that what the Founding generation deemed to be “necessary” was not simply the *existence* of remission but its maximal *exercise*. Most obviously, the fact that the Secretaries granted complete or near-complete relief in the overwhelming majority of cases presented to them suggests that they considered it their *duty* to grant remission whenever a claim plausibly alleged a lack of fraudulent intent.<sup>333</sup> The Secretaries’ willingness to grant remission even in cases with dubious claims of innocence only strengthens the inference that they understood themselves to be compelled to grant relief as broadly as their statutory authority would allow. Gallatin said as much in an 1813 report to Congress describing how he exercised the remission power: He did not “consider himself authorized” to deny remission (at least in part) if he believed there was no fraudulent intent.<sup>334</sup> In other words, despite the lack of mandatory language in the remission statute itself—which simply gave the Treasury Secretary the “power” to remit forfeitures<sup>335</sup>—Gallatin was of the view that remission was *obligatory* in cases of violations committed without fraudulent intent.

Similar markers of remission’s “necessity” can be seen in the ways that the Secretaries interpreted particular statutory provisions. For example, Hamilton routinely granted relief from forfeitures related to the domestic production of spirits,<sup>336</sup> despite the fact that, by statute, remission was available only for forfeitures under the laws “for collecting duties of impost and tonnage, and for regulating the coasting trade”—that is, *not* for laws related to making spirits.<sup>337</sup> And Hamilton stuck to his expansive—and atextual—interpretation of the remission power despite the fact that two federal judges expressed serious doubts about his statutory authority to exercise it in that way.<sup>338</sup> Along similar lines, Gallatin

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331. Petition of Pierre Aupoix (Jan. 2, 1798), *in* 1 American State Papers: Finance, *supra* note 150, at 505, 505.

332. *Id.*

333. See *supra* section III.B.

334. Gallatin Report, *supra* note 228, at 1285.

335. Act of Mar. 3, 1797, ch. 13, § 2, 1 Stat. 506, 506.

336. See, e.g., Petition of John Murray (S.D.N.Y. 1792), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 1, 117–18, 127–28.

337. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122.

338. Letter from Alexander Hamilton to John Lowell, *supra* note 110, at 184 (acknowledging “doubts entertained whether the case [involving spirits] would come within the provision of the act for remitting . . . forfeitures,” but settling on an expansive statutory construction); see also Letter from Alexander Hamilton to William Paca (Mar. 5, 1794), *in* 16 The Papers of Alexander Hamilton, *supra* note 110 118, 118 (Harold C. Syrett ed., digital ed. 2011) (acknowledging the Maryland district judge’s doubts about Hamilton’s position).

conceded that, in “common parlance,” the term “wilful negligence” in the Remission Act could readily be understood to mean *any* negligent act, “however unimportant.”<sup>339</sup> But under such an interpretation, remission would be unavailable for most violations. So Gallatin instead read “wilful negligence” narrowly, to mean the same thing as “intention of fraud,” even though such a reading effectively rendered redundant those two phrases in the statutory text (and also reduced the benefits forfeiture provided to the government fisc, as Gallatin forthrightly admitted).<sup>340</sup>

Notably, the Treasury Secretaries’ willingness to push their statutory authority to its outer limits (and arguably beyond) provoked no apparent opposition in Congress. To the contrary: According to a House committee established in 1813 to investigate the Treasury Secretaries’ remission practices, the Secretaries—far from contravening legislative intent—exercised their authority “in a manner liberal and just.”<sup>341</sup> Accordingly, Congress repeatedly reauthorized the remission statute in the 1790s, expanded the Secretaries’ power in 1797,<sup>342</sup> and made remission a permanent feature of the customs collections regime in 1800.<sup>343</sup> And Congress included parallel remission provisions in numerous specific statutes in future years.<sup>344</sup>

Of course, the existence of a legislative and executive consensus regarding the “necessity” of remitting forfeitures incurred unintentionally does not mean that contemporaries understood the compulsion to be *constitutional*. They might have believed that generous remission was simply good policy. As noted earlier, the federal government was deeply dependent on customs revenue.<sup>345</sup> And while many, like Hamilton, believed that “the security of the revenue” depended on rigorous

339. Gallatin Report, *supra* note 228, at 1286–87.

340. *Id.* at 1284, 1286–87 (explaining that “wilful negligence . . . meant only . . . flagrant and voluntary infraction[s] of the laws . . . tantamount to fraud”).

341. *Id.* at 1282.

342. In addition to fines and forfeitures, the 1797 Act gave the Secretary the additional capacity to remit “disabilities”—for instance, if a ship was denied an American registry (entitling it to lower tonnage duties) for an alleged violation of the rules governing registration, the Secretary could order that it be provided one. See Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506; Petition of Harry Caldwell (S.D.N.Y. 1803), microformed on SDNY Minutes, *supra* note 129, at reel 2, vol. 2, 142 (removing disability on petitioner taking an oath of American ownership of a vessel).

343. Act of Feb. 11, 1800, ch. 6, 2 Stat. 7, 7 (extending remission power “without limitation of time”); Act of Mar. 3, 1797, ch. 13, § 4, 1 Stat. 506, 507 (continuing remission power through the end of the next session of Congress); Act of Mar. 2, 1795, ch. 37, 1 Stat. 425, 425 (continuing remission power through the end of the next session of Congress); Act of May 8, 1792, ch. 35, § 1, 1 Stat. 275, 275 (continuing remission power for three years from the passing of the act); Act of Mar. 3, 1791, ch. 24, § 1, 1 Stat. 218, 218 (continuing remission power through the end of the next session of Congress) .

344. See, e.g., Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (authorizing remission of “all fines, penalties, and forfeitures” incurred under the Jeffersonian embargo laws).

345. See *supra* notes 95–96 and accompanying text.

enforcement of the customs laws,<sup>346</sup> they also recognized that “heavy and ruinous” forfeitures of goods and vessels could harm merchants and slow the flow of customs revenues into federal coffers.<sup>347</sup> As the aforementioned House committee put it in 1798, granting remission for unintentional violations of the law was “essential” both to “justice” and to “the interest of commerce.”<sup>348</sup>

It is not clear, however, that the Secretaries’ generous remission practice *was* good policy. In the short term, the government had strong incentive to keep much of what it seized. Though receipts from forfeiture were never a major source of early government revenue, in the period discussed here they were so low that they did not even cover the expenses the government incurred for pursuing forfeitures in court (let alone the cost of detecting and interdicting violations), obliging Treasury to repeatedly request special appropriations to cover the deficit.<sup>349</sup> At minimum, a less generous remission policy might have allowed forfeiture to pay for itself.

Remission also had a negative impact on customs officers’ wallets. Recall that the customs statutes “encourage[d] vigilance” among officers by granting them a significant share of every forfeiture.<sup>350</sup> But the

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346. Alexander Hamilton, First Report on the Further Provision Necessary for Establishing Public Credit (Dec. 13, 1790), *in* 7 *The Papers of Alexander Hamilton*, *supra* note 110, 225, 228–29.

347. Hamilton, Saddle Report, *supra* note 196, at 191–92; see also *United States v. The Anthony Mangin*, 24 F. Cas. 833, 838 (D. Pa. 1802) (No. 14,461) (“It is more the interest and policy of government to increase its wealth and strength by the employment of ships in trade and commerce, than to augment its revenue by forfeitures.”); Rao, *supra* note 96, at 10–12 (describing the centrality of commerce to early American state-building).

348. Petition of Pierre Aupoix, *supra* note 331, at 505.

349. Alexander Hamilton, Enclosure B: An Additional Estimate, for Making Good Deficiencies for the Support of the Civil List Establishment, for Aiding the Fund Appropriated for the Payment of Certain Officers of the Courts, Jurors and Witnesses, for the Support of Light-Houses, and for Other Purposes (Dec. 20, 1793), *in* 15 *The Papers of Alexander Hamilton*, *supra* note 282, at 561, 563 (requesting \$12,000); Alexander Hamilton, Report on Additional Appropriations (Apr. 17, 1792), *in* 11 *The Papers of Alexander Hamilton*, *supra* note 124, at 275, 277–78 (Harold C. Syrett ed., digital ed. 2011) (requesting \$10,000 to cover an anticipated shortfall); Alexander Hamilton, Report on the Estimate of Expenditures for 1792 (Nov. 4, 1791), *in* 9 *The Papers of Alexander Hamilton*, *supra* note 187, at 456, 466 (showing a deficit of \$2,488.14 from “monies arising from ‘fines, forfeitures and penalties’” and asking that \$5,000 to be appropriated). In 1813, Gallatin confirmed that the total fine and forfeiture revenue the government received from 1794 to 1811 was considerably less than the cost “expended in prosecuting for the offences.” Gallatin Report, *supra* note 228, at 1289.

350. Letter from Richard Harison to Alexander Hamilton (May 24, 1791), *in* 8 *The Papers of Alexander Hamilton*, *supra* note 124, at 352, 353; see also *Jones v. Shore’s Ex’r*, 14 U.S. (1 Wheat.) 462, 471 (1816) (“It is unquestionably with a view to stimulate [the officer’s] vigilance, and reward his exertions, that the law has given him a share of the forfeitures recovered by his enterprise and activity.”); *supra* note 117 and accompanying text.

Secretaries' remission practices substantially reduced customs officers' income, even as collectors besieged Treasury with complaints about the inadequacy of their pay.<sup>351</sup> A less generous remission policy could have helped remedy this problem, too, as the shares officers stood to gain from a single high-value forfeiture were often equal to their entire annual compensation.<sup>352</sup>

It is also questionable whether the Secretaries' generous approach to remission was good policy at a broader level. As already mentioned, one key article of faith among government officials was that customs collection depended on consistent application of the penalties prescribed for evading it.<sup>353</sup> Members of Congress repeatedly made this point in establishing

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351. See, e.g., Letter from Alexander Hamilton to John Davidson (Apr. 13, 1793), *in* 14 *The Papers of Alexander Hamilton*, *supra* note 110, at 315, 315 (accepting the resignation of an Annapolis collector and admitting no "probability of any material increase of [his] present official emoluments"); Letter from William Heth to Alexander Hamilton (Jan. 25, 1791), *in* 7 *The Papers of Alexander Hamilton*, *supra* note 110, at 452, 452 (stating that fees and commissions "are little more than equal to the trouble, & risque, in receiving & paying money" (emphasis omitted)); Letter from Jeremiah Olney to Alexander Hamilton (Jan. 6, 1791), *in* 7 *The Papers of Alexander Hamilton*, *supra* note 110, at 415, 415 (referring to the "extreme inadequacy" of his pay in relation "to the services performed"); Letter from Joseph Whipple to Alexander Hamilton (June 9, 1791), *in* 8 *The Papers of Alexander Hamilton*, *supra* note 124, at 457, 457 (describing his income as "a Sum not equal to one third the real value of the Services incumbent on the Office"). Even the collectors at major ports were dissatisfied. See Letter from Sharp Delany to Alexander Hamilton (Apr. 1790), *in* 6 *The Papers of Alexander Hamilton*, *supra* note 104, at 400, 400 ("[M]y Emoluments . . . are greatly inadequate to my services."); Letter from Benjamin Lincoln to Alexander Hamilton (Feb. 5, 1790), *in* 6 *The Papers of Alexander Hamilton*, *supra* note 104, at 246, 247 (complaining about the inadequacy of compensation in light of the work required); Letter from Otho H. Williams to Alexander Hamilton (May 23, 1791), *in* 8 *The Papers of Alexander Hamilton*, *supra* note 124, at 350, 350–51 ("The compensation of the Collector, you will observe, is small; and, when compared to the multifarious duties required of him, disproportioned to his services.").

352. For example, in 1799 the New York collector, David Gelston, earned \$6,542.72 in fees and commissions. See *Roll of the Officers, Civil, Military, and Naval of the United States* (Feb. 17, 1802), *in* 1 *American State Papers: Miscellaneous*, *supra* note 122, at 260, 270. That same year, Oliver Wolcott remitted the forfeitures of at least thirteen vessels, which—if left standing—would likely have earned Gelston several thousand dollars more. See, e.g., *Petition of James Prince*, (S.D.N.Y. 1799), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 3, 192–93 (remitting forfeiture of a vessel and cargo); *Petition of Isaac Gouverneur* (S.D.N.Y. 1799), microformed on SDNY Minutes, *supra* note 129, at reel 1, vol. 3, 84–85 (same). And Gelston was one of the highest-earning collectors; remitted forfeitures were even more financially meaningful for officers at smaller ports. See *Roll of the Officers, Civil, Military, and Naval of the United States*, *supra*, at 270 (reporting that a Hudson, New York collector earned only \$250.65 in 1799).

353. See *supra* notes 205–210 and accompanying text. These views were consistent with Founding Era attitudes on criminal punishment more generally, which were profoundly influenced by the writings of Italian jurist Cesare Beccaria. Beccaria argued that, for deterrence purposes, the certainty of punishment was far more important than its severity. See Cesare Beccaria-Bonesana, *An Essay on Crimes and Punishments* 93 (Edward D. Ingraham trans., 2d Am. ed., Academic Reprints 1953) (1819) ("Crimes are more effectually prevented by the certainty than the severity of punishment."); 4 William Blackstone, *Commentaries On the Laws of England* 17 (1769) (agreeing with Beccaria—

the remission power, which was meant to provide an avenue for relief for those who suffered undeservedly from a necessarily inflexible enforcement of the revenue laws.<sup>354</sup> Executive branch officials and judges agreed; as Hamilton's immediate successor Oliver Wolcott put it, customs officers were to "execute the Law, without reference to any circumstances of fraud or innocence, . . . because nothing but the strictest method can prevent the Revenue system, from being deranged."<sup>355</sup>

Most notably, front-line officers also worried that relaxed enforcement sent the wrong message to merchants. According to some officers, it was "of great Consequence that *every* breach of the Revenue Laws should be prosecuted."<sup>356</sup> If the government failed to pursue violations incurred due to alleged ignorance, "others might expect to avoid the law by making a like plea."<sup>357</sup> Overgenerous remission created precisely these problems. According to one federal district attorney, Hamilton's habit of remitting virtually every forfeiture meant that those who "trespass[ed] upon the regulations of Congress" feared little from forfeiture proceedings in court.<sup>358</sup> Instead, government lawsuits were "a mere Subject of ridicule."<sup>359</sup> In short, even if generous remission brought

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"an ingenious writer"—that "crimes are more effectually prevented by the certainty, than by the severity, of punishment"). On Beccaria's influence in the early United States, see generally Kathryn Preyer, Cesare Beccaria and the Founding Fathers, *in* Blackstone in America: Selected Essays of Kathryn Preyer 239, 239–51 (Mary Sarah Bilder, Maeva Marcus & R. Kent Newmyer eds., 2009); Bessler, *supra* note 205, at 206–15.

354. See *supra* notes 205–210 and accompanying text.

355. Frederick Arthur Baldwin Dalzell, Taxation with Representation: Federal Revenue in the Early Republic 168 (1993) (unpublished Ph.D. dissertation, Harvard University) (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Letter from Wolcott, Sec'y of the Treasury, Dep't of the Treasury, to Purviance, Collector, Dep't of the Treasury (May 6, 1797)); see also *United States v. A Certain Boat* (E.D. Pa. 1801), microformed on EDPA Information Files, *supra* note 102, at reel 1, 8 (noting enforcement of the revenue laws had to be "essentially strict," for if "indulgences . . . were permitted," fraud was the likely result); Dalzell, *supra*, at 170 ("Any 'absolute violation of the Law' . . . should be prosecuted . . . ." (quoting Letter from Wolcott, Sec'y of the Treasury, Dep't of the Treasury, to Heth, Collector, Dep't of the Treasury (June 16, 1795))).

356. November 1790 Letter from Olney, *supra* note 311, at 168; see also Letter from Benjamin Lincoln to Alexander Hamilton (July 26, 1792), *in* 12 The Papers of Alexander Hamilton, *supra* note 243, at 111, 111–12 (describing gin importation in undersized casks as "such an open violation of the Law . . . that I could not persuade my self [sic] that I should be justified if I let the matter pass with impunity").

357. Letter from William Ellery to Alexander Hamilton (Feb. 3, 1794), *in* 16 The Papers of Alexander Hamilton, *supra* note 110, at 2, 2 (commenting on the case of Samuel Pearsall).

358. Letter from Alexander Campbell to William Heth (Nov. 1, 1792) (enclosed in Letter from William Heth to Alexander Hamilton (Nov. 19, 1792)), *in* 13 The Papers of Alexander Hamilton 163, 164 (Harold C. Syrett ed., digital ed. 2011).

359. *Id.*; cf. Dalzell, *supra* note 355, at 159 (warning that remission might "throw a damp upon the zeal" with which juries would apply the revenue laws (quoting Letter from Alexander Hamilton to Benjamin Lincoln (Oct. 18, 1792), *in* 7 The Papers of Alexander Hamilton, *supra* note 110, at 591, 591)).

the government potential benefits, it also risked imposing substantial costs.<sup>360</sup>

If the Treasury Secretaries' forgiving attitude toward forfeiture was not compelled by statutory text or policy considerations, what drove them to grant remission so freely? One possible answer is the Constitution. In 1792, Hamilton reported to Congress on objections that had been raised against a 1791 act imposing a tax on distilled spirits—the much-maligned “Whiskey Tax.”<sup>361</sup> One of the complaints, according to Hamilton, was that the penalties in the act—which included the kinds of fines and forfeitures found in customs regulations—were “unusual or excessive.”<sup>362</sup> Hamilton rejected the objection. Such penalties could not be considered “either unusual or excessive,” as they were similar to “those which are common in revenue laws.”<sup>363</sup>

Though Hamilton did not expressly mention the Constitution or the Eighth Amendment, it seems unlikely that his word choice was accidental. After all, “excessive” and “unusual” are two of the three adjectives the Amendment uses to describe impermissible penalties.<sup>364</sup> This suggests that the Eighth Amendment's limitations on government power—and those in the Excessive Fines Clause in particular—*were* potentially applicable to civil forfeitures. At minimum, some members of the public apparently believed this to be the case, and Hamilton thought the argument sufficiently meritorious to warrant a response.

More importantly, while Hamilton rejected the contention that the Spirits Act's forfeiture provisions were “excessive,” he added a crucial caveat: The penalties the act provided for were neither unusual nor excessive when exacted as punishment for “wilful and fraudulent breach-

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360. It is also possible that the Secretaries were simply following Congress's lead. As noted above, after Congress enacted the first Remission Act, it began incorporating mens rea elements into a number of substantive provisions in the customs statutes, generally in the form of exceptions to liability in cases of mistake or lack of fraudulent intent. See *supra* note 250. Accordingly, it is possible that the Secretaries granted remission at high rates because they believed that Congress had already made a legislative judgment that liability was not warranted in such instances. But there is no evidence in either the remission decisions or the government correspondence examined here to suggest that this was the case. Moreover, even if the Secretaries *were* following Congress's lead, that simply begs the larger question explored in this section: Why was there broad agreement among members of the Founding generation that violators of the customs statutes should enjoy robust protections against the government's exercise of the forfeiture power?

361. Alexander Hamilton, Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits (Mar. 5, 1792), in 11 *The Papers of Alexander Hamilton*, *supra* note 124, at 77, 78 [hereinafter *Hamilton, Report on Difficulties*].

362. *Id.* at 82–83 (noting the penalties in the 1791 Spirits Act included “fines from fifty to five hundred dollars, and forfeiture of the article in respect to which there has been a failure to comply with the law,” as well as “forfeiture of the ship or vessel . . . or other instrument of conveyance”).

363. *Id.*

364. U.S. Const. amend. VIII.

es of an important law.”<sup>365</sup> What this suggests is that such forfeitures *would* be considered “unusual and excessive”—that is, unconstitutional—*if* they were imposed for unintentional violations. Of course, sparing from punishment those who did not intend to violate the law is *exactly* what the remission power was intended to do. It is undoubtedly no coincidence that the criteria Hamilton used to identify constitutionally permissible penalties—those imposed for “wilful and fraudulent” violations—are the same Congress used in the 1790 Remission Act to demarcate violations for which remission was unavailable.<sup>366</sup> The implication is unmistakable: The remission power is what saved civil forfeiture from constitutional objection.

Indeed, Hamilton’s report offers further reason to think that, in his view, remission was necessary to preserve forfeiture’s constitutionality. Later in the report, Hamilton enumerated the features of the Spirits Act that prevented it from “operating severely or oppressively,” as its critics charged.<sup>367</sup> First among them—unsurprisingly—was the act’s remission provision, which gave the Treasury Secretary exactly the same authority to mitigate penalties as the general remission acts gave him with respect to customs and maritime violations—that is, in cases where the penalty was “incurred without wilful negligence, or any design or intention of fraud.”<sup>368</sup> In other words, what rendered civil forfeiture constitutionally unobjectionable was the fact that remission protected those who, in Hamilton’s words, committed “undesigned transgressions of the law.”<sup>369</sup>

Admittedly, a few sentences in a report to Congress is a slender reed on which to base conclusions about Hamilton’s views on forfeiture’s constitutional limits, let alone to attribute those views to his contemporaries. But this evidence should not be dismissed lightly, because it may explain why, for two decades after Ratification, Hamilton and his successors in office exercised the remission power more generously and comprehensively than either the statutory language required or sound policy recommended, and why Congress repeatedly endorsed their approach. In exercising the remission power to its fullest extent—ensuring relief for anyone who could plausibly claim a lack of fraudulent intent—the Secretaries ensured that civil forfeiture did not transgress the constitutional limits that Hamilton seemed to recognize.

The insights to be gleaned from Hamilton’s report might also help solve a puzzle regarding civil forfeiture’s constitutionality: Why is the early history apparently devoid of any constitutional challenges to particular forfeitures in court? One might reasonably argue—as scholars and litigants recently have—that the absence of judicial discussion of

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365. Hamilton, Report on Difficulties, *supra* note 361, at 83.

366. Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123.

367. Hamilton, Report on Difficulties, *supra* note 361, at 84.

368. Whiskey Tax Act of 1791, ch. 15, § 43, 1 Stat. 199, 209.

369. Hamilton, Report on Difficulties, *supra* note 361, at 84.

constitutional limits on the forfeiture power serves as powerful evidence that, at least until the twentieth century, no one imagined that the Constitution had anything to say about forfeiture's limits.<sup>370</sup>

The early Treasury Secretaries' maximal exercise of the remission power points to a different answer: Innocent claimants seeking return of their property did not make constitutional arguments in court because they did not have to go to court at all. Given the very high rate of success for remission petitions, claimants who could make colorable assertions of lack of fraudulent intent likely preferred remission's near-guaranteed path to relief than the expense and uncertainty of trial. This possibility is borne out by the numbers; of the nearly 600 forfeiture actions instituted in New York and Pennsylvania federal court from 1789 to 1807, half were resolved through the remission process, and another thirty-eight percent were default judgments in favor of the government. Only the remaining twelve percent were "contested" in court, and this includes many cases that were voluntarily dismissed by one of the parties after proceedings had begun. In other words, owners of seized property who had no viable basis for challenging a forfeiture simply did not bother to do so. And those who *did* have viable claims to relief took them to the Treasury Secretary, not to the courts.

In this sense, we can see the remission power as a constitutional safety valve: statutory authority granted to the executive branch to ensure that the government's use of forfeiture did not transgress constitutional limits.<sup>371</sup> Remission moderated—yet preserved—the government's power to forfeit property in response to lawbreaking. In other words, the Secretaries' expansive use of remission may have precisely been what made the government's otherwise unfettered power to forfeit private property constitutionally acceptable.

### C. *Forfeiture's Future*

Even if we accept that remission's early history points to a Founding Era understanding that forfeiture was subject to constitutional limita-

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370. See Brief for Respondent, *supra* note 17, at 45 ("The obvious explanation for the historical silence surrounding Excessive Fines Clause limitations on *in rem* forfeitures is that America's lawyers and judges have not understood the federal Excessive Fines Clause—or its state analogues—to apply to these forfeitures."); Nelson, *Constitutionality of Civil Forfeiture*, *supra* note 8, at 2454 (rejecting the argument that the Constitution prohibits the use of civil forfeiture when penalties can be imposed in personam, in part because "no early judges or lawyers interpreted the Due Process Clause or related constitutional provisions to draw the distinction").

371. See *State v. Button*, 622 N.W.2d 480, 485 (Iowa 2001) (referring to a legitimate purpose requirement in anti-harassment statutes as a "constitutional safety valve" against First Amendment challenges); Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. Envtl. Aff. L. Rev. 307, 344–60 (1995) (describing land-use variances as a "safety valve" against Takings Clause challenges).

tions, a question remains: Must any limits we can discern from the historical record be judicially enforced today?

Perhaps not. If nothing else, Congress's early establishment of the remission power, combined with the Treasury Secretaries' robust exercise of that power, suggests a Founding Era commitment to enforcing limits on the forfeiture power via the executive branch, not the courts.<sup>372</sup> In other words, if forfeiture's early history supports the argument that forfeiture must be substantively bounded by principles of innocence and proportionality, that history offers less support for the notion that, as a procedural matter, such principles must be vindicated by judges.

Instead, what this history might suggest is just what Hamilton implied in his report to Congress: Providing an avenue for meaningful administrative relief satisfies any constitutional obligation to spare those guilty of only minor or unintentional transgressions from forfeiture's most severe consequences. The Supreme Court, in fact, has suggested as much. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Court affirmed its view that due process did not mandate a rule protecting innocent owners from forfeiture.<sup>373</sup> Yet the Court acknowledged that "the 'broad sweep' of forfeiture statutes . . . could . . . give rise to serious constitutional questions."<sup>374</sup> In particular, a forfeiture incurred by an owner who had "done all that reasonably could be expected" to prevent the violation might very well be "unduly oppressive."<sup>375</sup>

In addressing this possibility, the *Calero-Toledo* Court pointed to the existence of the very remission procedures discussed here, beginning with the 1790 Remission Act.<sup>376</sup> It discussed at length how historical and modern-day remission statutes have consistently offered relief to those who forfeited their property through no fault of their own.<sup>377</sup> Though the Court did not expressly say that such remission procedures provide

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372. See *United States v. The Louisa Barbara*, 26 F. Cas. 1000, 1002 (E.D. Pa. 1833) (No. 15,632) (declaring the court to be without "power" to take equitable considerations into account in a forfeiture case and stating that was instead "a proper question to be entertained" by the executive branch); Legislature of Pennsylvania, *The National Gazette* (Feb. 14, 1833) (on file with the *Columbia Law Review*) (reporting that the vessel was restored to its owners by the federal executive only a few weeks after condemnation).

373. 416 U.S. 663, 686–87 (1974) ("Plainly, the Puerto Rican forfeiture statutes further the punitive and deterrent purposes that have been found sufficient to uphold, against constitutional challenge, the application of other forfeiture statutes to the property of innocents.").

374. *Id.* at 688–89 (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 720 (1971)).

375. *Id.* at 689–90.

376. *Id.* at 689 n.27.

377. *Id.* (citing Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506 (current version at 19 U.S.C. § 1618 (2012))); Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23 (amended by Rev. Stat. § 5292 (2d ed. 1878)).

the protections for innocent owners that the Constitution could be understood to demand, that was the import of the Court's discussion.<sup>378</sup>

Perhaps more importantly, such avenues arguably *do* exist today. The Civil Asset Forfeiture Reform Act (CAFRA) enacted in 2000 provides an “innocent owner” defense to forfeiture<sup>379</sup> and requires proportionality review analogous to that under the Excessive Fines Clause.<sup>380</sup> In addition, the original Remission Act passed in 1790 survives to the present day largely intact: The Treasury Secretary can remit a forfeiture incurred under the customs laws if they find “that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law.”<sup>381</sup> Department of Justice regulations also allow for remission and mitigation of any administrative, civil, and criminal forfeitures secured by its member agencies,<sup>382</sup> as do regulations governing seizures by the IRS.<sup>383</sup> Accordingly, even if the early history recounted here suggests a constitutional requirement that the forfeiture power be used moderately, the federal government may already be doing so.

That said, there are reasons to doubt whether modern forfeiture is as constrained as Founding Era practice. CAFRA does not apply to many federal government forfeitures—most notably, it does not apply to seizures under customs regulations or the Internal Revenue Code.<sup>384</sup> (It also does not apply to state forfeitures.<sup>385</sup>) And while a complete review of the federal government's modern-day remission practices is beyond the scope of this article (and perhaps any<sup>386</sup>), the regulations governing

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378. The *Bennis* Court made a similar suggestion. *Bennis v. Michigan*, 516 U.S. 442 (1996). Though it acknowledged the “considerable appeal” of the argument that the forfeiture at issue was “unfair” because the relevant statute offered no protection for innocent owners, the Court found that this argument's force was “reduced” because the trial court had discretion to mitigate the penalty imposed. *Id.* at 453; see also *U.S. Coin & Currency*, 401 U.S. at 721–22 (“[T]he Secretary is authorized to return the seized property ‘upon such terms and conditions as he deems reasonable and just.’ It is not to be presumed that the Secretary will not conscientiously fulfill this trust . . . .” (quoting 19 U.S.C. § 1618)).

379. 18 U.S.C. § 983(d)(2)(A) (2012).

380. *Id.* § 983(g).

381. 19 U.S.C. § 1618.

382. See 28 C.F.R. § 9.1 (2019).

383. See *Treas. Reg.* §§ 403.35–403.45 (2018).

384. 18 U.S.C. § 983(i)(2).

385. See *id.* (restricting the term “civil forfeiture statute” to “any provision of Federal law”).

386. At present neither the IRS nor the Bureau of Customs and Border Protection (CBP) forfeiture databases are publicly accessible, significantly limiting any researcher's ability to determine the rates at which those agencies grant remissions. In 2016, the Institute for Justice (IJ) sued both agencies under the Freedom of Information Act to compel them to release their data. See Press Release, *Inst. For Justice, Lawsuits Challenge Federal Agencies' Refusal to Disclose Forfeiture Records* (Dec. 8, 2016), <http://ij.org/press-release/lawsuits-challenge-federal-agencies-refusal-disclose-forfeiture-records/> [<https://>

remission today impose stricter requirements than those informally adopted by Hamilton and his successors. For instance, DOJ regulations only permit remission in cases where the owner either “did not know of the conduct giving rise to forfeiture” or, if she did know, that she “did all that reasonably could be expected under the circumstances to terminate such use of the property.”<sup>387</sup> The regulations governing customs remissions impose similar requirements.<sup>388</sup> Notably, nowhere do the regulations allow for remission in cases where the owner knew of the conduct—and perhaps were themselves the violator—but seeks relief on other grounds, such as extenuating circumstances or simple ignorance of the law. The regulations also do not mandate any consideration of proportionality in penalty.<sup>389</sup>

It is also not clear how widely the government exercises this power. While anecdotal evidence suggests that the government grants remission in the customs context at rates in line with the historical practice recounted here, such estimates are decades old,<sup>390</sup> and more current figures suggest that the DOJ restores only a small percentage of the

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perma.cc/YBE7-28GB]. In 2018, the district court granted summary judgment to the IRS on almost all issues, and the IJ has appealed that decision. See *Inst. for Justice v. IRS*, 340 F. Supp. 3d 34, 45–46 (D.D.C. 2018); Plaintiff’s Notice of Appeal, *Inst. for Justice v. IRS*, No. 18-5316 (D.C. Cir. filed Oct. 31, 2018). It appears that the IJ and CBP have reached a settlement in their case; CBP has provided the IJ some forfeiture data, see Joint Status Report at 1–2, *Inst. for Justice v. U.S. Customs and Border Prot.*, No. 1:16-cv-02408 (D.D.C. filed July 19, 2019), and the parties recently stipulated to dismissal. Joint Stipulation of Dismissal, *Inst. for Justice v. U.S. Customs and Border Prot.*, No. 1:16-cv-02408 (D.D.C. filed Aug. 5, 2019). However, it is unclear at this point what the CBP data might reveal about the agency’s remission practices.

387. 18 U.S.C. § 983(d)(2)(A); see also 28 C.F.R. § 9.5(a)(1) (stipulating that remission shall not be granted unless the petitioner establishes that she is an innocent owner within the meaning of 18 U.S.C. § 983(d)(2)(A)); 28 C.F.R. § 9.5(a)(2) (stating that “the knowledge and responsibilities of a petitioner’s representative, agent, or employee are imputed to the petitioner”).

388. See 19 C.F.R. § 171.52(c)(1)(iii) (2018) (“The petitioner did not know or consent to the illegal use of the property or, in the event that the petitioner knew or should have known of the illegal use, the petitioner did what reasonably could be expected to prevent the violation.”).

389. But cf. 28 C.F.R. § 9.5(b)(2) (including among factors justifying DOJ mitigation “the fact that the violation was minimal and was not part of a larger criminal scheme” and “the fact that complete forfeiture of an asset is not necessary to achieve the legitimate purposes of forfeiture”).

390. See *United States v. Eight Thousand Eight Hundred & Fifty Dollars* (\$8,850) in U.S. Currency, 461 U.S. 555, 558 (1983) (“The Secretary . . . grants at least partial relief for an estimated 75% of [remission] petitions.” (citing Brief for Petitioner at 7, *Eight Thousand Eight Hundred & Fifty Dollars in U.S. Currency*, 461 U.S. 555 (No. 81–1062), 1982 U.S. Ct. Briefs LEXIS 530 at \*16)); Peter M. Gerhart, *Judicial Review of Customs Service Actions*, 9 *Law & Pol’y Int’l Bus.* 1101, 1133–34 (1977) (“Because the assessed penalty is almost always disproportionate to the culpability of the respondent or the loss of revenue resulting from the violation, Customs virtually always offers to mitigate the penalty.”).

property it seizes.<sup>391</sup> Though significant further research is necessary to determine whether the government's current remission scheme provides relief on a scale comparable to Founding Era practices, there is reason to believe that forfeiture in the modern day—while theoretically consistent with historical tradition—acts more harshly in fact. If that is the case, then the administrative relief the federal government provides to those subject to civil forfeiture may fall short of the historical standards established at the Founding.

#### CONCLUSION

Forfeiture at the Founding was expansive, but it was not without limits. Federal officers enforcing the regulatory scheme governing maritime commerce had broad statutory authority to take goods and vessels associated with lawbreaking and enjoyed significant advantages when they sought to forfeit seized property in court. But in practice the forfeiture power was meaningfully constrained—not by judges enforcing legal rules in litigation over disputed property but by administrative officials charged by Congress with protecting those innocent of significant wrongdoing from forfeiture's harshest effects.

This Article's new account of the Founding Era forfeiture regime offers a fresh perspective on debates about forfeiture's constitutionality that have been percolating for decades, and are recently resurgent, both in the public arena and before the Supreme Court. The expansive authority that federal officials both enjoyed and used in the early period calls into question the historical claims made by modern proponents of constitutional protections against forfeiture, who argue that the forfeiture power was historically quite narrow.

At the same time, early forfeiture was much more forgiving than the Supreme Court or its critics have recognized, thanks to the robust remission scheme implemented by the Treasury Secretaries. A more accurate understanding of forfeiture's history undercuts the reasoning of modern Supreme Court decisions that refuse to recognize constitutional limits on the government's power to seize private property in response to alleged wrongdoing. Instead, the history of forfeiture in the Founding Era supports the opposite conclusion—that the Constitution imposes some constraints on civil forfeiture's exercise in the present.

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391. A report from the 2018 fiscal year indicates that "Return[ed] Asset[s]" constitute less than three percent of the annual total value of DOJ seized assets (most of which is cash), though it is unclear whether such assets are returned via the remission process authorized by 28 C.F.R. § 9, or whether remission under that regulation might constitute a separate (but unreported) method of restoring forfeited property to its owners. See, e.g., Assets Forfeiture Fund and Seized Asset Deposit Fund Method of Disposition of Forfeited Property, DOJ, <https://www.justice.gov/afp/page/file/1126591/download> [<https://perma.cc/FK2U-7BU7>] (last visited Aug. 14, 2019).