Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian

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PURGING THE CRUEL AND UNUSUAL: THE AUTONOMOUS EXCESSIVE FINES CLAUSE AND DESERT-BASED CONSTITUTIONAL LIMITS ON FORFEITURE AFTER UNITED STATES v. BAJAKAJIAN

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Within the past twenty years, asset forfeiture has become an important tool in fighting crime. The Supreme Court recently clarified important constitutional issues regarding asset forfeiture in its 1998 opinion United States v. Bajakajian. In this piece, Professor Johnson explores the nuances and implications of the Supreme Court’s holdings within the framework of the Eighth Amendment.

More specifically, the author explores the case law treating the Excessive Fines Clause. In his extensive critique of the Bajakajian decision, Professor Johnson then clarifies the arguments put forth in both the majority and dissenting opinions. He asserts that the proportionality review the majority adopted in Bajakajian is implicitly a case-specific, desert-based limitation. Finally, the author argues that this standard is flawed because of its extreme deference to legislative decisionmaking and the blurring of the Excessive Fines Clause and the Cruel and Unusual Punishments Clause that it evidences. Thus the Court’s decision in Bajakajian has the potential to undermine meaningful judicial review of forfeitures under the Excessive Fines Clause.

“[I]t is completely foreign to this Court’s responsibility for constitutional adjudication to limit the scope of judicial review because of the expectation . . . that legislative bodies will exercise appropriate restraint.”1

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461
I. INTRODUCTION

In the last two decades, asset forfeiture has emerged as a major weapon in efforts to combat crime, especially drug-related crime. Although forfeiture is capable of facilitating important law enforcement goals, the recent expansion in its use has generated considerable controversy. Critics have complained that forfeitures often seem wildly disproportionate to the offenses committed and that the procedures used in civil forfeiture unfairly favor the prosecution. Commentators also have expressed concern that the strong financial interest many law enforcement agencies have in forfeited property skews enforcement incentives toward overly aggressive use of forfeiture provisions. These concerns, along with media reports of several high profile incidents of law enforcement abuse of forfeiture provisions, have raised serious questions about the lack of judicial supervision of the forfeiture process.


4. See infra notes 45–51 and accompanying text (describing major criticisms of the existing forfeiture regime).


7. One of the more notorious incidents involved the killing of Donald Scott in Ventura County, California, by Los Angeles County law enforcement agents during a raid on Scott's ranch. Investigations revealed that a major motivating purpose of the ill-fated raid was the Los Angeles County Sheriff's Department's desire to seize and forfeit the ranch. No drugs were found. See David Heilbroner, The Law Goes on a Treasure Hunt, N.Y. TIMES, Dec. 11, 1994, §6 (Magazine), at 70; see also infra note 51 (listing several high-profile examples of seemingly disproportionate forfeitures).

8. See, e.g., HYDE, supra note 5, at 3 (characterizing the role of the courts in policing forfeitures as one of “supine acquiescence”). This criticism, in turn, generated legislative efforts to reform the forfeiture laws. In 1993, the House of Representatives considered two major reform bills, the Civil Asset Forfeiture Reform Act, H.R.2417, 103d Cong., 1st Sess. (1993), and the Asset Forfeiture Justice Act, H.R.3347, 103d Cong., 1st Sess. (1993). These legislative reform efforts finally bore fruit when President Clinton signed into law on April 26, 2000, the Civil Asset Forfeiture Reform Act of 2000, H.R.1658, Pub. L. No. 106-185. That legislation shifts the burden of proof in federal forfeiture actions
The United States Supreme Court's 1993 decisions in *Austin v. United States*\(^9\) and *Alexander v. United States*\(^{10}\) generated hope that the Court would play a greater role in curbing the overly zealous pursuit of forfeitures. In *Austin*, the Court ruled for the first time that the Constitution placed substantive limits on punitive in rem forfeitures,\(^{11}\) holding that they are fines subject to the constraints of the Eighth Amendment's Excessive Fines Clause.\(^{12}\) In *Alexander*, the Court held that criminal forfeitures\(^{13}\) constitute fines within the meaning of the Excessive Fines Clause and emphasized that courts must analyze Excessive Fines Clause challenges separately from Cruel and Unusual Punishments Clause challenges.\(^{14}\) Although in each case the Supreme Court left to the lower courts the task of formulating a test for "excessiveness,"\(^{15}\) *Austin* and *Alexander* led some commentators to conclude that the Constitution would be interpreted to impose meaningful substantive limitations on asset forfeiture.\(^{16}\)

Unfortunately, in the ensuing five years, the promise of *Austin* and *Alexander* remained unfulfilled, largely because most of the courts implementing the cases' holdings fundamentally misconceived either the nature or the scope of the "excessiveness" inquiry. Some courts evaluated excessiveness exclusively by reference to the nature of the connection between the forfeited property and the offense, eschewing any proportionality-oriented comparison of the severity of the sanction with the seriousness of the offense.\(^{17}\) Others applied a proportionality analysis but emphasized that only the most egregiously disproportionate forfeitures run afoul of the Excessive Fines Clause.\(^{18}\) Neither approach showed...
much promise as a basis for seriously constraining the overly zealous pursuit of forfeitures.

In June 1998, the Supreme Court again addressed the application of the Excessive Fines Clause to forfeitures in *United States v. Bajakajian*, holding for the first time that a particular forfeiture constituted an excessive fine within the meaning of the Eighth Amendment. In so doing, the Court began to clarify its relatively new Excessive Fines Clause jurisprudence. Some aspects of the Court’s opinion appear to strengthen judicial review of forfeitures. For example, the Court held that the excessiveness determination requires application of proportionality principles, rejecting a narrower excessiveness analysis that would permit forfeiture of any property sufficiently connected to an underlying offense. On the other hand, the Court appears to have blunted the effectiveness of Excessive Fines Clause review by emphasizing the need for deference to legislative penal decisions and holding that only those forfeitures “grossly disproportional to the gravity of the defendant’s offense” are unconstitutionally excessive.

In this article, I examine the existing state of Excessive Fines Clause jurisprudence in the wake of *Bajakajian*. Part I provides background, including a basic introduction of asset forfeiture concepts. Part II explores the development of Excessive Fines Clause jurisprudence and the Court’s efforts to determine the impact of that provision on forfeiture law.

Part III involves an extensive critique of *Bajakajian*, highlighting and clarifying important jurisprudential developments embodied in that case. First, I attempt to clarify the Court’s analysis of the role of tradition in determining both the scope of the Excessive Fines Clause and the meaning of excessiveness. I explain that the Court has implicitly adopted a functional approach, rejecting the long-standing historical acceptance of certain types of forfeitures as the sole determinant of their constitutionality. This suggests that the Court’s proportionality-oriented analysis is broadly applicable to all types of punitive monetary penalties, whether civil or criminal in form.

Second, I address the nature of the Court’s proportionality analysis, pointing out that the majority implicitly embraces case-specific, desert-based limitations on the power of the government to inflict punishment on individual citizens. This analysis contrasts sharply with the dissent’s vision of proportionality review, which takes into account social interests.

20. *See id.* at 337.
21. *See id.* at 333–34. To the extent that *Bajakajian* can be read to embrace proportionality analysis and reject its principal alternative, the crabbed instrumentality test championed by Justice Scalia, *Bajakajian* represents a step toward heightened judicial scrutiny of forfeitures. *See infra* notes 106–24 and accompanying text (discussing the proportionality and instrumentality tests); *infra* notes 153–56, 205–07 (discussing *Bajakajian*’s rejection of the instrumentality test).
in crime control and legislative characterizations of the seriousness of classes of offenses (as opposed to the individual offender's conduct) in judging whether a particular punishment is excessive. I note that these contrasting visions of proportionality review have serious implications for the application of the Excessive Fines Clause in future cases and argue that the majority's view is consistent with the purpose and structure of the Eighth Amendment and with the Court's previous proportionality case law.

Finally, I argue that the extreme deference to legislative decision-making embodied in the Court's gross disproportionality standard is ill-founded because it reflects the Court's failure to adequately distinguish the Excessive Fines Clause from its more prominent Eighth Amendment counterpart, the Cruel and Unusual Punishments Clause. The Court appeared to borrow the exceedingly restrictive proportionality review embodied in pre-Austin Cruel and Unusual Punishments Clause case law, including an excessiveness test that requires courts to affirm any forfeiture that is not grossly disproportionate to the offense. This standard is inconsistent with the language, history, and purposes of the Excessive Fines Clause and may serve as a significant barrier to meaningful constitutional limitations on forfeiture.

II. FORFEITURE: AN INTRODUCTION

Forfeiture is "the divestiture without compensation of property used in a manner contrary to the laws of the sovereign." Contemporary forfeiture comes in two varieties, criminal (or in personam) and civil (or in rem). Criminal forfeiture is "the taking of property by the state as an incident to conviction for crime." It is expressly recognized as part of the sentence imposed upon the criminal offender, much like a fine or sentence of imprisonment. It thus requires no independent action on the part of the government but gives the offender the traditional panoply of constitutional protections available at criminal trial, including the application of the reasonable doubt standard.

Criminal forfeiture has its roots in the common law. For centuries, persons convicted of certain felonies—treaus, for example— forfeited to the Crown all their real and personal property. Such "forfeiture of estate" was tied closely to the concept of "corruption of blood" or "at-

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23. See id. at 335; see also text accompanying notes 158–60.
24. United States v. Eight Rhodesian Statues, 449 F. Supp. 193, 195 n.1 (C.D. Cal. 1978); see also BLACK'S LAW DICTIONARY (5th ed. 1979) (defining forfeiture as a "deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition" or, alternatively, as the "[l]oss of some right or property as a penalty for some illegal act").
taint,” which prohibited a felon’s estate from passing title to property, thus depriving the felon’s descendants of inheritance not only from the felon but also from more remote ancestors. These concepts were abolished from American law by Article III, Section 3 of the Constitution and by a federal statute passed by the first Congress.

Civil forfeiture, in contrast, is an action brought by the government against the property itself, a concept traceable to biblical text and carried into the Middle Ages in the form of the law of deodands. Civil forfeiture relied traditionally upon the hoary legal fiction that the property itself is guilty of some offense against the sovereign and thus is forfeitable to the sovereign because of the taint associated with that offense. Because civil forfeiture depends on whether the property is tainted by some offense, rather than whether its owner necessarily is guilty of criminal conduct, civil forfeiture does not depend on a criminal conviction. As a result, many of the traditional procedural safeguards associated with the criminal trial are inapplicable to civil forfeiture.

Civil forfeiture also has a long and venerable history in the common law. For example, English law provided for statutory forfeiture of objects used in violations of customs laws. Similar provisions were contained in early American statutes, permitting in rem forfeiture of ships and cargo involved in customs offenses and illegal slave trading.

Despite their respective impressive historical pedigrees, neither civil nor criminal forfeiture played a prominent role as an instrument of law enforcement in the United States until the early 1970s, when Congress

28. See Fried, supra note 25, at 329 n.1.
29. See U.S. Const. art. III, § 3, cl. 2 (abolishing corruption of blood and forfeiture of estate in connection with the crime of treason).
30. See Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1850) (codifying abolition of corruption of blood and forfeiture of estate in connection with treason and extending that abolition to other enumerated offenses).
31. See Exodus 21:28 (“When an ox gore a man or a woman to death, the ox must be stoned; its flesh may not be eaten.”).
32. See LEVY, supra note 16, at 7. “The term ‘deodand’ derives from the Latin phrase ‘deo dandum,’ and means ‘given to God.’ A deodand is a thing forfeited, presumably to God for the good of the community, but in reality to the English crown.” Id.
33. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680–81 (1974) (discussing the origins of civil forfeiture). This “guilty property” fiction has been criticized extensively by modern commentators. See, e.g., Cheh, supra note 16, at 6 (characterizing guilty property fiction as an “irrational and superstitious idea”).
34. See, e.g., LEVY, supra note 16, at 22 (noting that in civil forfeiture “the guilt or innocence of the property owner or user is simply an extraneous matter of no legal concern”).
35. See id. at 23 (explaining that the “constitutional protections surrounding a civil defendant are severely limited compared to those enjoyed by a criminal defendant”).
37. See id. at 682.
38. See id. at 683.
39. See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES at vii (1992) (describing forfeiture as “a curiosity which prosecutors and criminal defense attorneys were unlikely to encounter more than a few times in the course of a career, if at all”); Sandra Guerra, Family Values?: The Family as an Innocent Victim of Civil Drug Asset Forfeiture, 81 CORNELL L. REV. 343, 359 (1996)
provided for criminal forfeiture remedies in the Racketeer Influenced and Corrupt Organizations Act (RICO)\(^\text{40}\) and the Controlled Substances Act.\(^\text{41}\) Since then, Congress has continued to expand the availability of forfeiture, especially civil forfeiture.\(^\text{42}\) State legislatures have emulated Congress, increasingly resorting to forfeiture as a criminal justice tool.\(^\text{43}\) As a result, forfeiture has emerged in the last two decades as a major weapon in law enforcement’s arsenal.\(^\text{44}\)

As prosecutors increasingly resort to forfeiture, particularly civil forfeiture,\(^\text{45}\) its use has become more controversial. Critics have characterized existing civil forfeiture law as “a virtual smorgasbord of injustices”\(^\text{46}\) and a “draconian” regime “virtually bereft of constitutional protections.”\(^\text{47}\) They note, inter alia, that seizures under commonly applied federal civil forfeiture laws (1) are permissible in the absence of a conviction or even a criminal charge,\(^\text{48}\) (2) are made on the basis of a mere showing of probable cause, shifting to the property owner the burden of establishing that the property is not forfeitable;\(^\text{49}\) and (3) often involve legally acquired property with only a modest relationship to the prohibited activity.\(^\text{50}\) Further, critics argue that forfeiture laws appear to result


\(^{\text{42.}}\) See, e.g., Susan R. Klein, Civil In Rem Forfeiture and Double Jeopardy, 82 IOWA L. REV. 183, 195 & n.52 (1996) (noting that “[t]he number of federal statutes providing for civil in rem forfeiture has exploded over the years” and providing a list of examples ranging from a provision for forfeiture of any conveyance used to transport illegal aliens to forfeiture of sporting equipment used to violate public land restrictions on hunting and fishing).

\(^{\text{43.}}\) See Walter J. Van Eck, Note, The New Oregon Civil Forfeiture Law, 26 WILLAMETTE L. REV. 449, 457 (1990) (noting the proliferation of state forfeiture laws); see also Taifa, supra note 5, at 110–11 n.92 (cataloging state forfeiture statutes).

\(^{\text{44.}}\) See, e.g., I SMITH, supra note 39, at vii (explaining that forfeiture plays an “increasingly important role in federal law enforcement”); Guerra, supra note 39, at 360 (noting that Congress has dramatically increased the scope of civil forfeiture since the 1970s through a series of amendments to federal forfeiture provisions); David J. Stone, The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment, 73 B.U. L. REV. 427, 428–29 (1993) (“Thus, Congress elevated civil forfeiture from a rarely used penalty in the background of American law enforcement to the forefront of government prosecutorial strategy.”).

\(^{\text{45.}}\) A number of commentators have noted that prosecutors’ extensive use of civil forfeiture is due to the numerous tactical advantages it provides, including the lessered standard of proof required to successfully forfeit property in an in rem proceeding. See, e.g., Guerra, supra note 39, at 362 (explaining that “[p]rosecutors prefer to invoke the civil asset forfeiture law, rather than its criminal counterpart, because the civil process offers the government many important advantages,” including the lower standard of proof); Klein, supra note 42, at 217–18 (noting that prosecutors file civil forfeiture actions to gain tactical advantages over offending property owners).

\(^{\text{46.}}\) Cheh, supra note 16, at 7.


\(^{\text{49.}}\) See id. at 2 n.9.

\(^{\text{50.}}\) See Klein, supra note 42, at 200.
in forfeitures that are vastly disproportionate or unfair given the nature of the offense.\textsuperscript{51}

Many of these criticisms have been translated into various constitutional attacks on forfeitures. The Supreme Court has, in the past several years, addressed major challenges to various forfeiture provisions under the Due Process Clause,\textsuperscript{52} the Excessive Fines Clause,\textsuperscript{53} and the Double Jeopardy Clause.\textsuperscript{54} Of these, Excessive Fines Clause challenges present potentially the most significant opportunity to cabin the perceived excesses of forfeiture, particularly in light of the Supreme Court’s recent Excessive Fines Clause case law.\textsuperscript{55}

III. RESURRECTING THE EIGHTH AMENDMENT’S MORIBUND EXCESSIVE FINES CLAUSE: THE SUPREME COURT’S DECISIONS IN AUSTIN AND ALEXANDER

A. Pre-1993 Case Law

Prior to 1993, the Excessive Fines Clause was virtually a dead letter. One could search the Supreme Court’s fairly extensive forfeiture juris-

\textsuperscript{51} See, e.g., HYDE, supra note 5, at 7 (highlighting the lack of proportionality between offense and punishment under the existing civil forfeiture regime and citing examples that include the forfeiture of three fraternity houses at the University of Virginia resulting from students’ alleged sales of small quantities of drugs and the seizure of an oceanographic research vessel based on the discovery of a single marijuana joint in the ship’s crew quarters); LEVY, supra note 16, at 118–43 (recounting a litany of abusive or disproportionate forfeitures, including a case in which a Portland man forfeited a $40,000 automobile because he used it to pick up a prostitute—had he done so on foot, he might have been subject to no more than a $100 fine).

Courts have also expressed concern about disproportionate forfeiture. For example, the U.S. Court of Appeals for the Eighth Circuit observed:

We do not condone drug trafficking or any drug-related activities; nonetheless, we are troubled by the government’s view that any property, whether it be a hobo’s hovel or the Empire State Building, can be seized by the government because the owner, regardless of his or her past criminal record, engages in a single drug transaction . . . . In this case, it does appear that the government is exacting too high a penalty in relation to the offense committed . . . .


\textsuperscript{53} See United States v. Bajakajian, 524 U.S. 312, 344 (1998) (holding that criminal forfeiture of $357,144 in currency for failure to report the cash transfer constitutes an excessive fine in violation of the Eighth Amendment); Austin, 509 U.S. at 622 (holding that punitive civil forfeitures constitute fines for purposes of application of the Excessive Fines Clause); United States v. Alexander, 509 U.S. 544, 558–59 (1993) (holding that criminal forfeitures constitute fines for purposes of application of the Excessive Fines Clause).

\textsuperscript{54} See United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that in rem forfeiture is not “punishment” and, therefore, does not trigger double jeopardy protections).

\textsuperscript{55} The Court’s procedural due process protections are limited to requirements that the owner of the offending property be given adequate notice and the opportunity to be heard prior to forfeiture. See James Daniel Good Real Property, 510 U.S. at 62. Although these rights are important, they do not constrain forfeitures in any direct, substantive way. Double jeopardy challenges to most civil forfeitures are essentially barred in light of the Court’s holding in Ursery. See Ursery, 518 U.S. at 288–92.
prudence in vain for any reference to that provision.\(^56\) In fact, prior to 1993, the Court had addressed it in only one case, *Browning-Ferris Industries v. Kelco*,\(^57\) in which it held the Excessive Fines Clause inapplicable to the award of punitive damages to a private party in a civil action.\(^58\) The absence of discussion of the Excessive Fines Clause in the context of civil in rem forfeiture can be explained by the prevailing view that the Eighth Amendment did not apply to civil proceedings.\(^59\) The *Browning-Ferris* Court itself, without specifically deciding the issue, employed language suggesting that the reach of the Eighth Amendment, including the Excessive Fines Clause, was limited to criminal cases.\(^60\)

Lower courts, however, took a different approach to criminal forfeitures. Criminal forfeitures were held to be subject to Eighth Amendment restrictions, but courts tended to conceptualize the Eighth Amendment as a single, unified entity, rather than attempting to distinguish and apply the individual clauses.\(^61\) As a result, the criminal forfeiture analysis was heavily influenced by the familiar and extensive case law interpreting the Cruel and Unusual Punishments Clause.\(^62\) Under this view, the Eighth Amendment required criminal forfeitures to be at least somewhat proportionate to the seriousness of the offense, although those proportionality restrictions were extremely weak.\(^63\) *United States v. Buscher*,\(^64\) and

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58. See id. at 260.

59. With few exceptions, the federal appellate courts have held that the Eighth Amendment does not apply to civil forfeitures. Compare *United States v. 38 Whalers Cove Dr.*, 954 F.2d 29, 35 (2d Cir. 1991) (acknowledging that civil forfeiture potentially could run afield of the Eighth Amendment), with *United States v. 508 Depot St.*, 964 F.2d 814, 817 (8th Cir. 1992) (holding that Eighth Amendment proportionality review is inapplicable to civil forfeiture proceedings); *United States v. 107.9 Acre Parcel of Land*, 898 F.2d 396, 400 (3d Cir. 1990) (same); *United States v. 40 Moon Hill Rd.*, 884 F.2d 41, 43 (1st Cir. 1989) (same); *United States v. Tax Lot 1500*, 861 F.2d 232, 234–35 (9th Cir. 1988) (same); *United States v. Santoro*, 866 F.2d 1358, 1544 (4th Cir. 1989) (same).

60. The Court explained:

Given that the [Eighth] Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments... To decide the instant case, however, we need not go so far as to hold that the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.

*Browning-Ferris*, 492 U.S. at 262.


62. See *infra* notes 66–76 and accompanying text.

63. See, e.g., *United States v. Sarbello*, 985 F.2d 716, 723–24 (3d Cir. 1993) (applying a constitutionally based proportionality limitation to in personam criminal forfeiture under RICO); United
United States v. Sarbello65 were typical of this unified Eighth Amendment approach.

In Busher, the Ninth Circuit held that RICO's criminal forfeiture provisions66 were subject to Eighth Amendment proportionality review of the type set out in Solem v. Helm.67 After noting that the forfeiture provisions of section 1963(a) constituted "punishment" for Eighth Amendment purposes,68 the Busher court explained that the breadth and inflexibility of those forfeiture provisions created a risk of constitutionally excessive punishment.69 Busher outlined a two-tiered approach to reviewing the constitutionality of a RICO forfeiture. Once the government established that the property met the statutory requirements for forfeiture, the property owner then had the opportunity to make a prima facie showing that the forfeiture would be excessive.70 At that point, the district court would evaluate the forfeiture under the general framework of Solem.71 Consistent with the Solem framework, the Busher court emphasized that the constitutional role in controlling forfeiture was extremely limited, with the Eighth Amendment prohibiting only those forfeitures grossly disproportionate to the offense committed.72

United States v. Sarbello,73 another major pre-Alexander case, exhibited a similar disinclination toward aggressive application of Eighth

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65. United States v. Angiulo, 897 F.2d 1169, 1211-12 (1st Cir. 1990) (same); United States v. Porcelli, 865 F.2d 1352, 1365 (2d Cir. 1989) (same); United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987) (same). Even these limited proportionality restraints were not, however, universally recognized. Some courts declined to recognize the existence of any constitutional limitations on criminal forfeitures. See, e.g., United States v. Pryba, 900 F.2d 748, 756-57 (4th Cir. 1990) (stating that a sentence less severe than life imprisonment without parole does not trigger Eighth Amendment proportionality review); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988) (same).

66. 817 F.2d 1409 (9th Cir. 1987).

67. See supra note 40.

68. 463 U.S. 277 (1983). In Solem, the Court held that common-law proportionality limitations in criminal sentencing were embodied in the Eighth Amendment's prohibitions against cruel and unusual punishments and were applicable to sentences of imprisonment. See id. at 284-90. The Court emphasized that the Eighth Amendment proportionality analysis is guided by three objective criteria: (1) a comparison of the gravity of the offense with the harshness of the penalty; (2) a comparison of the sentence imposed with sentences imposed on other types of criminals in the same jurisdiction; and (3) a comparison of the sentence imposed with sentences imposed on similarly situated criminals in other jurisdictions. See id. at 290-92. For a more complete discussion of the Supreme Court's proportionality jurisprudence under the Eighth Amendment's Cruel and Unusual Punishments Clause, see infra notes 208-39 and accompanying text.

69. See Busher, 817 F.2d at 1413.

70. See id. at 1414 ("Since RICO's forfeiture provision is quite literally without limitation, it may well exceed constitutional bounds in any particular case.").

71. See id. at 1415.

72. See id.

73. See id. The court explained:

[The forfeiture is not rendered unconstitutional because it exceeds the harm to the victims or the benefit to the defendant. After all, RICO's forfeiture provisions are intended to be punitive. The Eighth Amendment prohibits only those forfeitures that, in light of all the relevant circumstances, are grossly disproportionate to the offense committed.

Id. 985 F.2d 716 (3d Cir. 1993).
Amendment proscriptions to RICO's criminal forfeiture provisions. Like Buscher, Sarbello identified the broad scope of RICO forfeiture as potentially troublesome from a constitutional standpoint. It, too, relied on Solem for the proposition that the Eighth Amendment imposed broad proportionality limits on noncapital sentencing. As the Sarbello Court explained:

We hold that some proportionality analysis is required upon the defendant's prima facie showing that the § 1963(a)(2) sentence is grossly disproportionate, or bears no close relation, to the seriousness of the crime. . . . The language of the [E]ighth [A]mendment demands that a constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime.

In short, under pre-1993 case law, Eighth Amendment constraints on forfeitures were extremely limited. Civil forfeitures were viewed as completely outside the scope of Eighth Amendment inquiry. Criminal forfeitures were subject to a highly restricted test of excessiveness derived largely from the Cruel and Unusual Punishments Clause, which was interpreted to prohibit only those forfeitures deemed extremely disproportionate. The Excessive Fines Clause was almost completely ignored as a potential constraint on government forfeiture authority.

B. Austin and Alexander

The constitutional landscape surrounding asset forfeiture changed dramatically with the Court's 1993 decisions in Austin v. United States and Alexander v. United States. Each, in its own way, significantly altered existing jurisprudence. Austin held, against the weight of prevailing circuit case law, that punitive civil forfeitures are governed by the Eighth Amendment's Excessive Fines Clause. Alexander highlighted that clause's application to criminal forfeitures, disaggregating the Excessive Fines and the Cruel and Unusual Punishments Clauses, releasing the former from its traditional moorings and the restrictions imposed by prior case law.

Austin involved an in rem civil forfeiture of the petitioner's mobile home and body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7), which provide for the forfeiture of real or personal property used to facilitate drug

74. See id. at 723.
75. See id. at 722.
76. Id. at 724.
79. See supra note 59 (noting that only one circuit found civil forfeiture to be within the purview of the Eighth Amendment).
80. See Austin, 509 U.S. at 604.
trafficking offenses. Austin, who was caught selling a small quantity of cocaine to a police informant, was sentenced to a seven-year prison term after pleading guilty in state court to one count of possessing cocaine with intent to distribute. The United States then filed a civil forfeiture action against Austin’s body shop and mobile home. The district court granted summary judgment for the United States, rejecting Austin’s argument that forfeiture of the property would violate the Eighth Amendment and concluding that any proportionality guarantees contained in the Eighth Amendment were inapplicable to in rem civil forfeiture. The Eighth Circuit affirmed.

The Supreme Court granted certiorari “to resolve an apparent conflict with the Court of Appeals for the Second Circuit over the applicability of the Eighth Amendment to in rem civil forfeiture.” It held that such forfeitures were subject to the limitations of the Excessive Fines Clause. The Court’s analysis proceeded in several steps. First, it expressly rejected the Government’s argument that the Excessive Fines Clause applies only in criminal cases, repudiating the dicta in Browning-Ferris that lent credence to the Government’s argument. The Court reasoned that the Eighth Amendment, unlike other Bill of Rights provisions (such as the Fifth Amendment’s Self-Incrimination Clause), contained no language expressly limiting its application to criminal cases. It noted further that the purposes of the Eighth Amendment were not consistent with such a limitation. The Court explained:

The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government’s power to punish. The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment. The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, “as punishment for some offense.” “The notion of punishment, as we com-

82. These provisions, respectively, authorize the forfeiture of “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of [controlled substances].” 21 U.S.C. § 881(a)(4) (1994), and “[a]ll real property . . . which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter,” id. § 881(a)(7).

83. See Austin, 509 U.S. at 604.

84. Both items had sufficient connection to the drug trafficking offense to warrant forfeiture under § 881. Austin met with the police informant in the body shop, agreeing there to sell him cocaine. See id. at 604–05. Austin then left the body shop and retrieved from his adjacent mobile home two grams of cocaine that he sold to the informant. See id. at 605.

85. See id.

86. See id. at 605–06.

87. Id. at 606. The Eighth Circuit’s decision created a conflict with the Second Circuit, which had concluded in United States v. 38 Whaler’s Cove Dr., 954 F.2d 29, 38–39 (2d Cir. 1991), that the Eighth Amendment applied to civil forfeitures.

88. See Austin, 509 U.S. at 604.

89. See id. at 607–10.

90. See supra note 60 (quoting language suggesting that the Excessive Fines Clause may not apply to civil cases).

91. See Austin, 509 U.S. at 607–08.
monly understand it, cuts across the division between the civil and
the criminal law."92

Under this approach, the relevant inquiry is not whether civil forfeiture under a particular statutory scheme should be characterized as criminal or civil but whether it should be characterized as punishment. If so, the restrictions of the Eighth Amendment, including the Excessive Fines Clause, are applicable.93

The Court supplemented its analysis of the text and history of the Eighth Amendment with an historical analysis of civil forfeiture in England and the United States. Based on this analysis, it concluded that civil forfeiture historically had been understood as punishment.94 The Court then concluded that the language and legislative history of §§ 881(a)(4) and (a)(7) established that those provisions were punitive in nature and thus governed by the limitations of the Excessive Fines Clause.95

In Alexander v. United States,96 the Court again addressed the applicability of the Excessive Fines Clause, this time in the context of criminal forfeiture. Alexander, the owner of a group of businesses dealing in sexually explicit entertainment, was convicted for RICO and obscenity violations.97 The district court sentenced Alexander to six years imprisonment, imposed a $100,000 fine, and ordered forfeiture of all of Alexander's adult entertainment businesses, as well as $9 million obtained through these businesses.98 Alexander challenged the constitutionality of the forfeiture, arguing that it violated the First and Eighth Amendments. The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's forfeiture order.99

The Supreme Court affirmed the Eighth Circuit with respect to the First Amendment claim but vacated and remanded on the Eighth Amendment claim, concluding that the Eighth Circuit erred in declining to apply any form of proportionality analysis.100 It emphasized that the

93. See id. at 609–10, 614 (characterizing punitive forfeitures as, in essence, in-kind fines).
94. See id. at 611. Some of the analysis in the Court's opinion in United States v. Bajakajian, 524 U.S. 321 (1998), arguably is inconsistent with this characterization of civil forfeiture, an inconsistency that left the majority vulnerable to Justice Kennedy's observation in his dissenting opinion that the Austin majority's analysis excludes civil forfeiture from the scope of Excessive Fines Clause inquiry. See infra notes 190–207 and accompanying text.
95. See Austin, 509 U.S. at 619 ("We find nothing in these provisions or their legislative history to contradict the historical understanding of forfeiture as punishment.").
97. See id. at 546.
98. See id. at 548.
99. See Alexander v. Thornburgh, 943 F.2d 825, 835 (8th Cir. 1991). In ruling that the forfeiture order did not violate the Eighth Amendment's prohibitions against cruel and unusual punishments or excessive fines, the court expressly declined to consider whether the forfeiture was disproportionate to the offense, concluding that the Eighth Amendment "does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole." Id. at 836 (quoting United States v. Pryba, 900 F.2d 748, 757 (4th Cir. 1990)).
100. See Alexander, 509 U.S. at 559.
appellate court failed to adequately distinguish the Cruel and Unusual Punishments Clause from the Excessive Fines Clause:

Unlike the Cruel and Unusual Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." The in personam criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional "fine." Accordingly, the forfeiture in this case should be analyzed under the Excessive Fines Clause.101

Austin and Alexander thus revived the Excessive Fines Clause as an independent check on punitive forfeitures, bringing that provision out of the shadow of the Cruel and Unusual Punishments Clause. The Court left substantial work undone, however. In both Austin and Alexander, the Court specifically declined to adopt a test or even a framework for determining "excessiveness," choosing to leave this task to the lower courts.102 This is the task with which the state and federal lower courts have struggled, with only a moderate degree of success.

C. Aftermath of Austin and Alexander: Developing a Framework for Determining What Constitutes an "Excessive" Fine

Left without significant direction from the Austin Court, lower federal and state courts implementing Austin were unable to achieve consensus in formulating a test for determining an "excessive" fine in the forfeiture context. Courts articulated excessiveness tests in a variety of ways,103 though the approaches fell basically into two categories: (1) the "instrumentality" approach Justice Scalia suggested in his concurring opinion in Austin, which focuses exclusively on the nature and degree of connection between the forfeitable property and the underlying offense;104 and (2) the "proportionality" approach, which requires some comparison of the severity of the forfeiture to the seriousness of the property owner's underlying offense.105

101. Id. at 558–59 (quoting Austin, 509 U.S. at 609–10).
102. See supra note 15 and accompanying text.
103. See, e.g., Welling & Hager, supra note 2, at 853–78 (cataloging various excessiveness tests).
104. See infra notes 108–12 and accompanying text.
105. See infra notes 113–24 and accompanying text. Some commentators distinguish between those courts applying a "pure" proportionality test and those employing an approach that combines elements of instrumentality and proportionality. See, e.g., Welling & Hager, supra note 2, at 855–78 (describing existing excessiveness approaches in three categories: the instrumentality approach, the proportionality approach, and tests combining proportionality and instrumentality considerations). I do not find this taxonomy particularly useful. From a constitutional standpoint, there would seem to be little difference between a "pure" proportionality test of the sort purportedly employed by the Eleventh Circuit in United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996), and a proportionality test that also takes into account the level of connection between the property and the offense.
1. The Instrumentality Approach: Its Nature and Rationales

A significant number of courts\textsuperscript{106} and commentators\textsuperscript{107} expressed support for the instrumentality test, an approach which has its origins in Justice Scalia's concurring opinion in \textit{Austin}.	extsuperscript{108} Although agreeing with the majority that "[s]tatutory forfeitures under 21 U.S.C. § 881(a) are certainly \textit{payment} (in kind), to a sovereign as \textit{punishment} for an \textit{offense}"\textsuperscript{109} and thus properly characterized as fines within the meaning of the Excessive Fines Clause, Justice Scalia wrote separately to emphasize that the excessiveness determination in the context of civil forfeiture proceedings depends exclusively on the nexus between the forfeitable property and the underlying offense. According to Justice Scalia:

Unlike monetary fines, statutory \textit{in rem} forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been "tainted" by unlawful use, to which issue the value of the property is irrelevant . . . . The question is not \textit{how much} the confiscated property is worth, but \textit{whether} the confiscated property has a close enough relationship to the offense.\textsuperscript{110}

Justice Scalia acknowledged that this analysis likely differs from the excessiveness analyses applicable both to ordinary monetary fines and to in personam criminal forfeitures, each of which, he conceded, involve application of a proportionality test.\textsuperscript{111} Justice Scalia was terse in explaining the rationale for the instrumentality test, relying largely on historical continuity. His principal argument seems to be that excessiveness in the forfeiture context is limited to the instrumentality determination because it always has been that way.\textsuperscript{112}

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109. \textit{Id.} at 627.


111. \textit{See id.} at 627 (acknowledging that the "touchstone" of the excessiveness determination in monetary fine cases is "the value of the fine in relation to the offense" and that the Court in \textit{Alexander} indicated that the same is true for \textit{in personam} forfeiture").

112. \textit{See id.} (emphasizing that forfeitures "traditionally" have been fixed solely with reference to nexus to unlawful use).
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2. The Proportionality Approach: Excessive Fines and Gross Disproportionality

A substantial majority of the courts that addressed the issue of forfeiture excessiveness declined to adopt Justice Scalia’s instrumentality test as the sole determining factor, concluding that the Excessive Fines Clause requires that the severity of the forfeiture sanction be in some degree proportional to the property owner’s underlying offense.\(^{113}\) These courts criticized the instrumentality approach on the ground that it is not true to the text, history, and purpose of the Excessive Fines Clause—it fails to capture important elements of what it means for a fine to be excessive.\(^{114}\)

Nearly all these courts articulated a consistent theme of judicial deference and restraint in conducting the excessiveness analysis, however. Typically, this restraint was implemented through the requirement that the defendant establish that a forfeiture is grossly disproportionate to the offense to prevail in an Excessive Fines Clause challenge.\(^{115}\) Although

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113. See, e.g., United States v. Van Brocklin, 115 F.3d 587, 601–02 (8th Cir. 1997) (applying a proportionality test in conjunction with instrumentality analysis); United States v. One Parcel Property, 106 F.3d 336, 338 (10th Cir. 1997) (same); United States v. 427 and 429 Hall St., 74 F.3d 1165, 1170 (11th Cir. 1996) (adopting a pure proportionality test); United States v. 6380 Little Canyon Rd., 59 F.3d 974, 983 (9th Cir. 1995) (applying a test incorporating proportionality and instrumentality considerations); United States v. Milbrand, 58 F.3d 841, 847 (2d Cir. 1995) (same); United States v. R.R. #1, 14 F.3d 864, 876 (3d Cir. 1994) (remanding with instruction to apply a test incorporating proportionality characteristics).

The First, Fifth, Sixth, and District of Columbia Circuits did not expressly resolve whether the excessive fines determination should be made under an instrumentality or a proportionality approach. The Sixth Circuit noted the existence of the competing approaches but declined to adopt one. See, e.g., United States v. 11869 Westshore Dr., 70 F.3d 923, 930 (6th Cir. 1995) (affirming the district court’s conclusion that a particular forfeiture was not excessive under either an instrumentality test or a proportionality test and stating that “this court chooses not to establish any one test to be applied in every case”). The remaining circuits had no occasion to address the issue.

114. The limitations of the instrumentality approach have been articulated in different ways. Some courts have argued that the plain meaning of the term “excessive,” coupled with the Austin Court’s characterization of certain types of in rem forfeitures as punishment for some offenses, necessarily implies that excessiveness be evaluated with an eye to the nature of the relationship among the offense, the offender, and the forfeiture. See, e.g., 427 and 429 Hall St., 74 F.3d at 1171 (explaining that because the Excessive Fines Clause “necessarily protects the person punished, i.e., the owner,” the term excessive “necessarily implies a comparison of the amount of the fine with the acts of the individual”); 6380 Little Canyon Rd., 59 F.3d at 983 (noting that “the instrumentality test rests on a sharp distinction between in personam (criminal) and in rem (civil) forfeitures, the importance of which was reduced by the Court’s decision in Austin”); see also United States v. 829 Calle de Madero, 100 F.3d 734, 738 (10th Cir. 1996) (characterizing the Eleventh Circuit’s analysis in 427 and 429 Hall St. as persuasive and concluding that the instrumentality test fails because it “relies solely on the nexus between the forfeited property and the offense” and thus “does not consider other factors which are relevant when considering whether a forfeiture is excessive”).

Other courts go beyond this textual analysis. Some emphasize that a proportionality analysis is supported by the history of the Excessive Fines Clause. See, e.g., 427 and 429 Hall St., 74 F.3d at 1171 (explaining that “the historical antecedents of the Excessive Fines Clause [specifically, the Magna Carta and the English Declaration of Rights of 1689] themselves required proportionality review”). Others rely on extrinsic policy considerations. See, e.g., United States v. 25 Sandra Court, 135 F.3d 462, 465–66 (7th Cir. 1998) (“One can easily imagine cases in which Justice Scalia’s freestanding instrumentality approach could lead to results that would seem grossly unfair.”).

115. See, e.g., Van Brocklin, 115 F.3d at 601 (“Whether a forfeiture is ‘grossly disproportionate’
these courts did not explore exactly what the modifier "grossly" adds to the proportionality analysis, it is clear that the gross disproportionality analysis was designed to be meaningfully distinct from what one might characterize as a "strict" proportionality requirement.116

Occasionally, courts have used alternative language to emphasize the degree of restraint courts should exercise in addressing Excessive Fines Clause challenges to forfeitures. For example, in State v. Hammad,117 the Wisconsin Court of Appeals, using language reminiscent of the Supreme Court's due process "shock the conscience" test from Rochin v. California,118 stated that:

In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.119

The Tenth Circuit similarly articulated the extreme restraint associated with its application of the Excessive Fines Clause to forfeiture by explaining that the provision requires that "constitutionally cognizable disproportionality reach such a level of excessiveness that in justice the punishment is more criminal than the crime."120

Regardless of the precise language employed, the underlying message of extreme restraint in application of Excessive Fines Clause limitations to forfeitures was unmistakable.121 It is also clear that this extreme

and thus violates the Eighth Amendment is a fact-sensitive inquiry that depends on a number of factors."); 829 Calle de Madero, 100 F.3d at 738 (stating that a "forfeiture will not be considered excessive unless the defendant ... shows that the forfeiture is grossly disproportionate in light of the totality of the circumstances"); United States v. Elder, 90 F.3d 1110, 1133 (6th Cir. 1996) (concluding that the forfeiture of cars, a residence, and currency connected with drug trafficking was not "so grossly disproportionate to the crime that it constituted cruel and unusual punishment or an excessive fine") (citing United States v. Smith, 966 F.2d 1045, 1056 (6th Cir. 1992)); 6380 Little Canyon Rd., 59 F.3d at 985 (employing a gross disproportionality test).

116. Courts and legislatures long have interposed the "gross" modifier to generate legally meaningful distinctions. For example, many statutes permit the imposition of punitive damages only upon a showing of gross negligence. See Richard L. Blatt et al., Punitive Damages: A State by State Guide to Law and Practice 61–63 (1991) (listing Florida, Illinois, Kansas, Mississippi, North Carolina, Oklahoma, Tennessee, and Texas as states requiring a showing of at least gross negligence as a prerequisite for imposing punitive damages). Indeed, in some jurisdictions, the distinction between civil and criminal negligence is stated in terms of ordinary versus gross negligence. See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 235 (2d ed. 1986) (stating that criminal liability often is predicated "not upon mere negligence or carelessness but upon that degree of negligence or carelessness which is denominated 'gross'") (quoting Fitzgerald v. State, 20 So. 966, 968 (Ala. 1896)).

117. 569 N.W.2d 68 (Wis. Ct. App. 1997).

118. 342 U.S. 165 (1952).

119. Hammad, 569 N.W.2d at 73 (quoting State v. Seraphine, 62 N.W.2d 403, 405 (Wis. 1954)).

120. 829 Calle de Madero, 100 F.3d at 738 (quoting United States v. Sarbello, 985 F.2d 716, 724 (3d Cir. 1993)).

121. Indeed, the Eighth Circuit has been quite explicit about this, characterizing forfeiture review under the gross disproportionality standard as a narrow review and noting that "a successful proportionality challenge to criminal forfeiture will be a rare occasion." United States v. Myers, 21 F.3d 826,
restraint, although not inevitably outcome-determinative, had a significant impact on the effectiveness of the Excessive Fines Clause as a check on forfeitures. The extreme deference usually associated with the gross disproportionality standard is apparent from the seemingly disproportionate forfeitures upheld under that standard.

D. Bajakajian: The Supreme Court Re-enters the Fray

Despite the lack of consensus among lower federal and state courts regarding the proper excessiveness analysis, the Court exhibited no inclination to clarify its Excessive Fines Clause jurisprudence until 1998, when it granted certiorari in a case involving U.S. Customs officials’ seizure of over $300,000 of Hosep Bajakajian’s currency. Bajakajian was caught attempting to board a flight to Cyprus from Los Angeles International Airport while carrying $357,144 in cash. He was taken into custody and charged with criminal failure to report the transportation of more than $10,000 in currency from the United States. The Government sought forfeiture of the entire amount of unreported cash. Bajakajian pled guilty to violating the reporting provision and sought a bench trial on the forfeiture count. The district court found the entire

830–31 (8th Cir. 1994).
122. Courts occasionally find particular forfeitures to meet the gross disproportionality standard. See, e.g., United States v. Van Brocklin, 115 F.3d 587, 602 (8th Cir. 1997) (holding that a $1.3 million forfeiture in a case involving bank fraud and money laundering was excessive where the defendant was a “secondary figure” in the scheme and received no direct share of the proceeds); United States v. 18755 N. Bay Rd., 13 F.3d 1493, 1498 (11th Cir. 1994) (finding that the forfeiture of a $150,000 residence belonging to an 80-year-old invalid man and his 66-year-old wife for conducting illegal poker games violated the Excessive Fines Clause).

123. In its effect on judicial resolution of particular cases, the gross disproportionality standard is broadly analogous to “strict scrutiny” of governmental action in Fourteenth Amendment equal protection and fundamental rights due process challenges—it is an inquiry that usually is outcome-determinative. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 416 (1997) (noting that actions subject to strict scrutiny almost never pass constitutional muster); Gerald Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972) (characterizing constitutional scrutiny that is “strict” in theory as being “fatal in fact”); see also supra note 116 (discussing “gross” negligence as a requirement for criminal conviction or for imposition of punitive damages).

124. See, e.g., United States v. 427 and 429 Hall St., 74 F.3d 1165 (11th Cir. 1996) (affirming the forfeiture of legitimate business worth over $65,000, which constituted the offender’s principal source of income, for sales of small quantities of cocaine); United States v. 429 S. Main St., 52 F.3d 1416, 1422 (6th Cir. 1995) (affirming the forfeiture of a dwelling worth in excess of $80,000 for three marijuana sales that generated criminal fines in state court of $2000); Myers, 21 F.3d 826 at 831 (affirming the forfeiture of an entire farm for a marijuana-growing offense).

126. See id. at 325; see also 31 U.S.C. § 5316(a)(1)(A) (1994) (specifying a reporting requirement for the import or export of currency in the amount of $10,000 or more).


128. See Bajakajian, 524 U.S. at 325.
$357,144 to be "involved in" the offense and thus potentially forfeitable under § 982(a)(1). The court concluded, however, that forfeiture of the entire $357,144 would be "grossly disproportionate to the offense in question" and thus would constitute a violation of the Excessive Fines Clause. Reasoning that forfeiture of $15,000 (in addition to a sentence of three years of probation and a fine of $5,000) would be an appropriate penalty, the district court ordered forfeiture of that amount.

The United States appealed, seeking forfeiture of the full $357,144, and the Ninth Circuit rejected the Government's claim to the cash. Applying the first prong of the Ninth Circuit's two-prong test for forfeitures under the Excessive Fines Clause, the majority of the panel held that the currency was not an "instrumentality" of the offense or conviction and thus not forfeitable under § 982(a)(1). In a concurring opinion, Judge Wallace found the currency to be a forfeitable instrumentality of the offense but agreed with the court's determination that forfeiture of the entire $357,144 would constitute an excessive fine.

Because the majority's holding effectively declared unconstitutional an act of Congress, the Supreme Court granted certiorari. By a five-to-four vote, the Court affirmed the judgment of the Ninth Circuit, holding that forfeiture of the full $357,144 would constitute a violation of the Excessive Fines Clause. In reaching this conclusion, the Court undertook the task it had deferred in Austin and Alexander and began to lay the foundations of a newly emerging Excessive Fines Clause jurisprudence.

129. See id. at 325–26.
130. See id. at 326.
131. See id.
132. See United States v. Bajakajian, 84 F.3d 334, 335 (9th Cir. 1996).
133. See United States v. 6380 Little Canyon Rd., 59 F.3d 974, 982 (9th Cir. 1995) (articulating a two-pronged test for determining whether a forfeiture violates the Excessive Fines Clause). In applying this test, the court first determines whether the forfeited property is an "instrumentality" of the offense—that is, whether there is a sufficiently close connection to the offense to render forfeiture of the property not "excessive." See id. at 984–85. If this prong is satisfied, the court then asks whether the forfeiture is grossly disproportionate to the severity of the offense. See id. at 985–86.
134. See Bajakajian, 84 F.3d at 338. The panel concluded, however, that it lacked jurisdiction to reverse the district court's order requiring Bajakajian to forfeit $15,000 because Bajakajian had failed to cross-appeal that order. See id.
135. See id. at 338–40 (Wallace, J., concurring).
136. Under the majority's analysis, any forfeiture of currency for a 31 U.S.C. § 5316 violation apparently would violate the Excessive Fines Clause. See Bajakajian, 84 F.3d at 337–38 ("Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is a mere failure to report pursuant to 31 U.S.C. § 5316.").
137. See United States v. Bajakajian, 520 U.S. 1239 (1997); see also United States v. Bajakajian, 524 U.S. 321, 327 (1998) ("Because the Court of Appeals' holding—that the forfeiture ordered by [18 U.S.C.] § 982(a)(1) was per se unconstitutional in cases of currency forfeiture—invalidated a portion of an act of Congress, we granted certiorari.").
138. See Bajakajian, 524 U.S. at 344.
1. The Majority Opinion

   a. The Applicability of the Excessive Fines Clause

   Writing for the majority, Justice Thomas began by analyzing the applicability of the Excessive Fines Clause to the forfeiture of Bajakjian's currency. Citing Austin, Justice Thomas framed the question in terms of whether the forfeiture constituted a payment to the government as punishment for an offense and concluded that it was. He rejected on two separate grounds the Government's argument that because § 982(a)(1) forfeitures were designed in part to deter illicit movements of currency, they necessarily must be characterized as remedial and thus outside the scope of Excessive Fines Clause inquiry. First, Justice Thomas explained that deterrence was primarily associated with punishment, suggesting that remedial purposes are limited to compensation of the government for actual damages associated with the offense. Second, Justice Thomas suggested that the Excessive Fines Clause governs forfeitures that serve both punitive and remedial purposes.

   In the portion of the opinion dealing with the applicability of the Excessive Fines Clause, Justice Thomas also addressed two additional arguments made in the Government's brief: (1) the Government's claim that § 982(a)(1) forfeitures could not be deemed constitutionally excessive because of the long historical acceptance of forfeiture of property tainted by criminal offense, regardless of that property's value; and (2) its related argument that the forfeiture of Bajakjian's currency was nec-

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139. See id. at 328.
140. See id. ("We have little trouble concluding that the forfeiture of currency ordered by § 982(a)(1) constitutes punishment."). As the majority's analysis suggests, this was an easy question, given that the case involved in personam criminal forfeiture that is, by definition, punishment. The majority acknowledged that the question often will be a closer one when a case involves an in rem forfeiture, although it took care to emphasize that the in rem label is not determinative. As in Austin, if the forfeiture is punitive in purpose, it is governed by the Excessive Fines Clause. See id. at 331 & n.6 ("[W]e have held that a modern statutory forfeiture is a 'fine' for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled in rem or in personam."). For further discussion of the implications of the Bajakjian majority's analysis for civil forfeiture, see infra notes 186–207 and accompanying text.

141. See Bajakjian, 524 U.S. at 329. This arguably represents a more restrictive view of what constitutes "remedial" sanctions than the Court has embraced in some of its earlier decisions. See e.g., One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237 (1972) (per curiam) (suggesting that the forfeiture of smuggled goods plus a fine equal to the value of those goods is remedial, in part because it serves to reimburse the government for enforcement expenses). For a more complete discussion of the implications of the Bajakjian Court's treatment of the punitive/remedial distinction, see Barry L. Johnson, An Innocent Owner Defense by any Other Name: Excessive Fines Clause Review of Civil Forfeitures and the Limits of Due Process 34–37 (unpublished manuscript, on file with the University of Illinois Law Review).

142. See Bajakjian, 524 U.S. at 329 & n.4 ("Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture would still be punitive in part... This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause.").

143. See Brief for the United States at 15–17, Bajakjian (No. 96-1487).
essarily permissible because the currency was an "instrumentality" of the offense of failure to report transport of currency.\footnote{144}

The Government's historical acceptance argument was grounded in an originalist approach to constitutional interpretation.\footnote{145} The Government emphasized that customs laws dating to the acts of the first Congress permitted forfeitures of property involved in customs offenses without regard to the economic value of that property, a practice that suggests that the Framers did not view such forfeitures as unconstitutionally excessive.\footnote{146} The Government contended that this conclusion was bolstered by long-standing practice, including Congress's subsequent enactment of additional, similar civil forfeiture provisions, as well as the Court's consistent rejection of Due Process Clause and Double Jeopardy Clause challenges to forfeitures fixed by reference to the connection of the property to the offense.\footnote{147} In short, the Government argued that:

Congress's 200-year practice of providing for the forfeiture of instrumentality without a separate inquiry into the value of the property involved in the offense or the culpability of the owner "goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice."\footnote{148}

Justice Thomas rejected the Government's claim that historical acceptance of in rem forfeitures without regard to the value of the forfeited property was controlling, concluding that these early forfeitures, unlike the one at issue in *Bajakajian*, were not traditionally considered punitive and, therefore, deemed to be outside the scope of the Excessive Fines Clause.\footnote{149} In contrast to both traditional in rem civil forfeitures and cus-

\footnote{144} See id. at 17–20.

\footnote{145} See id. at 15–17. The originalist approach treats as supreme binding authority the original understanding of the relevant constitutional provision held by the Framers (or the ratifiers) of the Constitution. See, e.g., Michael J. Perry, Morality, Politics and Law 122–23 (1988); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1211–17 (1989). Some have used the term more loosely to mean any theory of constitutional interpretation that accords conclusive status to the text or original understanding. See Paul Brest, The Misconceived Quest for Original Understanding, 60 B. U. L. Rev. 204, 204 & nn.1–2 (1980). Others label this approach "interpretivism" and contrast it with various "noninterpretivist" approaches, which include reference to sources of authority (natural law, policy, etc.) extrinsic to the Constitution. See John Hart Ely, Democracy and Distrust 1–2 (1980). Indeed, Brest expressly equated his originalism with John Hart Ely's interpretivism. See Brest, supra, at 204 n.1. Fallon suggests, however, that originalism and interpretivism are not synonymous. See Fallon, supra, at 1211. Rather, originalism is a form of interpretivism that accords privileged status both to the original understanding of the text of the relevant constitutional provision (as opposed to the contemporary meaning of the text) and to the specific intent of the Framers regarding a particular provision (as opposed to a more general or abstract intent). See id.

\footnote{146} See Brief for the United States at 14, *Bajakajian* (No. 96-1487) ("The necessary premise of the early customs laws is that the forfeiture of property involved in an offense is not an excessive fine.").

\footnote{147} See id. at 16 (summarizing Supreme Court holdings concerning the forfeiture of property involved in an offense).

\footnote{148} Id. (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936)).

\footnote{149} Justice Thomas emphasized that in rem forfeitures were not historically considered "punishment against the individual for an offense" and thus "traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause." United States v. Bajakajian, 524 U.S. 321,
toms fines, the forfeiture at issue in Bajakajian was a sanction for a
criminal offense and clearly punitive under the Austin framework for de-
termining the applicability of the Excessive Fines Clause.150

Similarly, Justice Thomas rejected the Government’s argument that
traditional practice permitted the forfeiture of any instrumentality of an
offense. First, he noted that the instrumentality question was relevant
only to in rem civil proceedings, not in personam criminal forfeitures.151
Second, he suggested that Bajakajian’s currency did not fit the traditional
understanding of “instrumentality,” which he viewed as being limited to
property used to facilitate the offense.152

b. The Test for Excessiveness

After concluding that the forfeiture of Bajakajian’s currency fell
within the purview of the Excessive Fines Clause, Justice Thomas turned
to the application of that provision. Recognizing that he was writing on a
clean slate,153 Justice Thomas began with foundational principles. First,
he concluded that considerations of proportionality, which require some
relationship between the gravity of the offense and the severity of the
punishment, are central to application of the Excessive Fines Clause.154

331 (1998). He explained that such forfeitures were instead based on the “guilty property” fiction, id.
at 330 n.5, and his uncritical acceptance of Austin’s reasoning implies that the traditional acceptance of
in rem forfeiture is not controlling in determining the scope of contemporary Excessive Fines Clause
jurisprudence, see infra notes 186–207 and accompanying text.

Justice Thomas similarly placed customs fines based on the value of the goods outside the scope of
Excessive Fines Clause inquiry because such fines “were considered not as punishment for an offense,
but rather as serving the remedial purpose of reimbursing the Government” for lost revenues associ-
ated with evasions of customs duties. Bajakajian, 524 U.S. at 342.

150. See id. at 327–24 (characterizing 18 U.S.C. § 982(a)(1) forfeitures as “punishment”).
151. See id. at 333.
152. See id. at 334 n.9. With respect to a currency-reporting offense like 31 U.S.C. § 5316, the cur-
rency is merely the subject of the offense. The luggage in which it is carried might be viewed as an
instrumentality, as might the automobile in which the luggage was carried.

It is useful to note that various forfeiture provisions historically subject to seizure fall within one or
more of three categories of property: contraband (e.g., illegal drugs), proceeds of illegal activity (e.g.,
cash obtained in illegal drug transactions or property purchased with such cash), and instrumentalities
facilitating the illegal activity (e.g., vehicles used to transport illegal drugs to the point of sale). See,
remedial interests in contraband and proceeds, only the forfeiture of instrumentalities is likely to be
the type of punitive forfeiture subject to Excessive Fines Clause analysis under Austin and Bajakajian.
See, e.g., United States v. Tilley, 18 F.3d 295, 300 (5th Cir. 1994) (holding that the forfeiture of drug
proceeds is not punishment for double jeopardy purposes); In re Forfeiture of $25,505, 560 N.W.2d
341, 347 (Mich. Ct. App. 1996) (ruling that the forfeiture of drug proceeds “will by definition be pro-
portional to the amount of drugs sold and the harm inflicted” and, therefore, cannot violate the Exces-
sive Fines Clause).

153. See Bajakajian, 524 U.S. at 327 (“This Court has had little occasion to interpret, and has
never actually applied, the Excessive Fines Clause.”).

154. See id. at 334 ("The touchstone of the constitutional inquiry under the Excessive Fines
Clause is the principle of proportionality."). Although the Court did not say so directly, this view rep-
resents a rejection of the instrumentality approach Justice Scalia advocated in Austin. See infra notes
186–207 and accompanying text.
This conclusion was based on both the plain meaning of the clause's text and its history.

Justice Thomas acknowledged, however, that an emphasis on proportionality considerations provided only one dimension to the Excessive Fines Clause question. The Court needed also to address the next logical question: how disproportionate must a forfeiture be before it rises to the level of constitutional excessiveness? Justice Thomas viewed the text and the history of the Excessive Fines Clause as inconclusive on this question. He ultimately concluded that two policy considerations counseled in favor of the judicial deference embodied in a standard of "gross" disproportionality. First, invoking the Court's Cruel and Unusual Punishments Clause jurisprudence, Justice Thomas emphasized that judgments about the appropriate punishment for particular offenses are legislative judgments to which courts generally should defer; and second, he acknowledged that judicial determinations regarding offense gravity are necessarily imprecise. Together, he suggested, these policy considerations favored rejection of an interpretation of the Excessive Fines Clause requiring strict proportionality between offense gravity and punishment severity.

c. Applying the Gross Disproportionality Standard

Applying the gross disproportionality standard, Justice Thomas affirmed the $15,000 forfeiture imposed by the district court, concluding that the $357,144 forfeiture sought by the Government would violate the Excessive Fines Clause. He emphasized several related features of Bajakajian's offense in support of the view that the offense was a relatively minor one. First, it involved a "mere" reporting offense—it was perfectly legal for Bajakajian to remove the currency from the country, so long as he reported it. Second, there was no evidence that Bajakajian's money was related to any illegal activities. Third, the maximum sentence for

155. See id. at 335 (quoting eighteenth- and early-nineteenth-century dictionaries defining "excessive" as "beyond the common measure or proportion").
156. See id. (noting that the Magna Carta and the English Bill of Rights of 1689, precursors of the Eighth Amendment, prohibited imposition of disproportionate fines).
157. See id. at 336.
158. See id.
159. See id. (citing Solem v. Helm, 463 U.S. 277, 290 (1983)).
160. See id.
161. See id.
162. See id. at 337.
163. See id.
164. See id. at 338. Import or export of undeclared cash is often associated with more serious criminal activities, such as drug trafficking, money laundering, and tax evasion. Justice Thomas suggested that this type of tainted cash is the principal target of the reporting provisions and that the fact that Bajakajian's money appeared to be clean was relevant in assessing the social harm associated with his conduct. See id. ("Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader."); see also id. at 339 ("The harm that respondent caused was also minimal.").
Bajakajian's offense under the United States Sentencing Guidelines was six months in prison and a $5000 fine, far below the authorized statutory maxima of five years in prison and a $250,000 fine.\textsuperscript{165} According to Justice Thomas, these features suggested that Bajakajian was minimally culpable, both in absolute terms and relative to other violators of 31 U.S.C. § 5316.\textsuperscript{166}

Given the relatively minor levels of culpability and social harm associated with Bajakajian's failure to declare his legally obtained currency, Justice Thomas concluded that forfeiture of the entire $357,144 "would be grossly disproportional to the gravity of the offense"\textsuperscript{167} and affirmed the judgment of the court of appeals.\textsuperscript{168}

2. \textit{The Dissenting Opinion}

Justice Kennedy's dissenting opinion attacked the majority's analysis on several grounds, including its treatment of forfeiture history and precedent, its characterization of the seriousness of Bajakajian's offense, and the level of deference accorded Congress in setting the penalties for offenses involving the failure to report the export of currency.

a. Scope of the Excessive Fines Clause and the Remedial/Punitive Distinction

Justice Kennedy began by excoriating the majority for striking down a forfeiture under the Excessive Fines Clause "for the first time in its history,"\textsuperscript{169} despite "a six-century-long tradition of \textit{in personam} customs fines equal to one, two, three, or even four times the value of goods at issue."\textsuperscript{170} Justice Kennedy acknowledged the majority's efforts to distinguish traditionally accepted forfeitures and customs fines on the ground that they were not considered punitive\textsuperscript{171} but characterized that distinction as "mistaken."\textsuperscript{172} He argued that the effect of the majority's analysis is to exclude from the coverage of the Excessive Fines Clause a large number of sanctions that should (under existing case law) be considered punitive, including most civil forfeitures.\textsuperscript{173}

\textsuperscript{165} See \textit{id.} at 339 n.14.
\textsuperscript{166} See \textit{id.} at 339.
\textsuperscript{167} \textit{Id.} at 339–40.
\textsuperscript{168} \textit{See id.} at 344.
\textsuperscript{169} \textit{Id.} (Kennedy, J., dissenting).
\textsuperscript{170} \textit{Id.} at 345 (Kennedy, J., dissenting).
\textsuperscript{171} \textit{See supra} notes 149–52 and accompanying text.
\textsuperscript{172} \textit{Bajakajian}, 524 U.S. at 345 (Kennedy, J., dissenting).
\textsuperscript{173} \textit{See id.} at 355 (Kennedy, J., dissenting). According to Justice Kennedy, the majority's characterization of traditional civil forfeitures as nonpunitive, and thus outside the scope of Excessive Fines Clause review, would compel a similar conclusion with respect to contemporary civil forfeitures, a conclusion "inconsistent, or at least in tension with \textit{Austin v. United States.}" \textit{Id.} (Kennedy, J., dissenting).
Moreover, he argued that the majority, by engaging in an inappropriately intrusive review of the excessiveness of in personam forfeitures, while at the same time excluding civil forfeitures from Excessive Fines Clause analysis, provides incentives for legislatures to use the latter, resulting in fewer procedural protections for citizens against whom forfeitures are sought. He also suggested that a fair application of the remedial/punitive distinction would require the conclusion that Bajakajian’s forfeiture was remedial. He explained that the majority could not adequately distinguish One Lot Emerald Cut Stones and One Ring v. United States, which held that the forfeiture of smuggled goods plus a fine equal to their value was remedial because the fine “serves to reimburse the Government for investigation and enforcement expenses.”

Finally, Justice Kennedy criticized the majority’s suggestion that Bajakajian’s cash was not an instrumentality of the § 5316 currency reporting offense. He argued that if a car used to transport goods concealed from taxes has a close enough connection to the offense to warrant forfeiture, then, a fortiori, the currency has a close enough connection to the offense to warrant forfeiture.

b. Offense Seriousness

Much of Justice Kennedy’s ire was directed toward the majority’s application of the gross disproportionality standard. Although acknowledging that the gross disproportionality standard is “a proper way to apply the [Excessive Fines] Clause,” Justice Kennedy accused the majority of substituting its own flawed judgment of the seriousness of the offense for the judgment of Congress. This view was grounded in two related observations. First, currency export reporting offenses, as a group, are quite serious offenses, given their close relationship to drug trafficking, money laundering, and tax evasion. Second, apart from whether currency reporting offenses are objectively serious, Congress concluded that they were serious and acted upon a perceived need for

174. See id. (Kennedy, J., dissenting).
175. See id. at 347 (Kennedy, J., dissenting) (citing One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972) (per curiam)).
176. Id. (Kennedy, J., dissenting) (quoting Emerald Cut Stones, 409 U.S. at 237).
177. See id. (Kennedy, J., dissenting).
178. Id. at 343 (Kennedy, J., dissenting).
179. See id. at 348–53 (Kennedy, J., dissenting).
180. See id. at 349 (Kennedy, J., dissenting). In connection with this observation, Justice Kennedy emphasized that the Government’s inability to prove that Bajakajian’s currency transport was connected to any of these offenses did not undermine the seriousness of the currency reporting offense. Indeed, Justice Kennedy hinted that Bajakajian’s lies to authorities, his “suspicious and confused stories” regarding the source of the funds, and his purposes in transporting the money indicated his involvement in more serious offenses. See id. at 352 (Kennedy, J., dissenting) (criticizing the majority for ignoring the suspiciousness of Bajakajian’s behavior and for its ratification of the “District Court’s see-no-evil approach”).
severe punishments for such offenses as a means to control money laundering and similar illegal activities.\footnote{See id. at 350 (Kennedy, J., dissenting). Justice Kennedy emphasized that Congress deliberately designated forfeiture as a punishment for this class of offense without the need for proof of involvement in additional, more serious offenses because of the difficulty in proving such involvement. See id. at 353 (Kennedy, J., dissenting) (Because of the problems of individual proof, Congress found it necessary to enact a blanket punishment.). In essence, these forfeiture provisions were designed to attack the narrower problems of drug trafficking, money laundering, and tax evasion by encompassing behavior that correlates with those more serious offenders. According to Justice Kennedy, the potential overbreadth caused by relieving the government of the need to prove involvement in these more serious offenses is mitigated by the willfulness requirement, which would exclude from forfeiture the accidental or unknowing violation of the reporting requirements. See id. at 352 (Kennedy, J., dissenting) (In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proven.). In Justice Kennedy’s view, judgments about the relative seriousness of these offenses, the scope of coverage of the statute, and the need for deterrence are peculiarly legislative judgments beyond the legitimate purview of the Eighth Amendment. See id. at 354 (Kennedy, J., dissenting) (criticizing the majority for second-guessing Congress’s considered judgment about offense severity and the need for a blanket approach to punishment without explaining why such an approach was unreasonable).}

IV. THE EXCESSIVE FINES CLAUSE AFTER BAJAKAJIAN

Bajakajian embodies at least three major doctrinal developments that merit attention in any effort to understand future application of the Excessive Fines Clause. First, the Court rejected tradition as the basis for evaluating forfeiture excessiveness, embracing instead a functional approach that focuses on proportionality.\footnote{See id. at 327–34.} Thus, Bajakajian represents a repudiation of the instrumentality test—a repudiation that, the dissenters’ views notwithstanding, should be interpreted to apply to in rem civil forfeitures as well as criminal forfeitures like the one at issue in Bajakajian.

Second, the Court adopted a version of proportionality review that involves case-specific comparison of offense gravity and sanction severity.\footnote{See id. at 334–36.} Although the Court did not acknowledge it expressly, Bajakajian’s proportionality review imposes a distinctly nonutilitarian, desert-oriented limitation on the power of legislatures to punish. The Court’s repudiation of the dissent’s approach to proportionality review—which takes into account, among other factors extrinsic to the defendant’s culpability, the need to impose severe punishment to achieve general deterrence—is consistent with traditional understanding of the meaning of proportionality limitations on appropriate punishment, as well as the Court’s existing Cruel and Unusual Punishments Clause and substantive due process jurisprudence. Understanding the distinct types of proportionality review employed by the majority and the dissenters is crucial because the majority’s implicit adoption of a desert-oriented proportionality review has significant implications for future application of the Excessive Fines Clause.
Third, the Court’s rejection of a rigid traditionalism and embrace of a desert-oriented version of proportionality review implies a potentially robust Excessive Fines Clause review of forfeitures. At the same time, however, the Court appears to have restricted the impact of the Excessive Fines Clause by borrowing from its Cruel and Unusual Punishments Clause case law a deferential gross disproportionality standard. The Court’s adoption of gross disproportionality language is unfortunate, given that the best explanations for extremely deferential review of legislative sentencing determinations under the Cruel and Unusual Punishments Clause—the textual limitations of the “cruel and unusual” language and the perceived necessity to defer to legislative characterizations of offense seriousness and accompanying choice of appropriate punishment—are significantly weaker in the Excessive Fines Clause context.

A. The Role of Tradition, the Punitive/Remedial Distinction, and the Scope of the Excessive Fines Clause

To determine the constitutionality of the forfeiture at issue in Bajakajian, the Court first addressed the long tradition of acceptance of in rem forfeitures and customs fines based on some multiple of the value of the goods. The majority, in adopting its gross disproportionality standard, rejected the view that this tradition conclusively establishes that the forfeiture of the full amount of Bajakajian’s currency would be constitutional. The result is correct, but the majority’s analysis arguably raises some question about whether the gross disproportionality standard applies to in rem forfeitures and other civil penalties, as well as to criminal forfeitures. Although the Court could have and should have averted this issue by abandoning the guilty property fiction, the best interpretation of Bajakajian requires the conclusion that its proportionality analysis applies to in rem forfeitures as well as in personam forfeitures.

Some background is in order. The Government raised the role of tradition in its argument asserting that the forfeiture of Bajakajian’s currency was constitutionally permissible. One of the Government’s major claims was that forfeiture of goods for customs offenses cannot be excessive under the Eighth Amendment because the Excessive Fines Clause was enacted against a background of acceptance of such forfeitures, the first Congress authorized such forfeitures, and the Court long has permitted such forfeitures. In essence, the Government argued that because the Framers apparently did not consider analogous forfeitures to be excessive fines within the meaning of the Eighth Amendment, the forfeiture of Bajakajian’s currency could not be constitutionally excessive.

184. See id. at 334.
185. See Brief for the United States at 15, Bajakajian (No. 96-1487).
186. See id. at 17.
187. See id. This is an originalist argument operating on the level of what Professor Ronald Dworkin would call Framer conception. See RONALD DWORKIN, LAW’S EMPIRE 71 (1986) (contrast-
The Court rejected this argument by attacking one of its factual assumptions—namely, that the Framers adopted the excessive fines language of the Eighth Amendment with a specific view that this language did not invalidate traditional in rem forfeitures or customs fines. Justice Thomas argued, in effect, that the Framers never considered the implications of the Excessive Fines Clause for the accepted practice of in rem forfeitures or customs fines because these actions were traditionally viewed as remedial rather than punitive in nature and thus seen as beyond the scope of Excessive Fines Clause inquiry. He distinguished Bajakajian's forfeiture, noting that it was clearly punitive because it was imposed as part of a sentence pursuant to an in personam criminal proceeding.

Although the majority's arguments plausibly refute the Government's claims, the majority's reliance on the distinction between in personam criminal forfeitures and in rem and customs forfeitures left it vulnerable to Justice Kennedy's argument that its reasoning is inconsistent with Austin and effectively excludes most, if not all, in rem civil forfeitures from the scope of Excessive Fines Clause inquiry. If accurate, Justice Kennedy's analysis is not only a devastating critique of the majority's reasoning but also underscores the fact that Bajakajian eviscerates the Excessive Fines Clause as a check on prosecutors' use of forfeiture. Unfortunately, some lower courts, relying on Justice Kennedy's analysis, have already suggested that Bajakajian is inapplicable to in rem forfeitures.

188. See Bajakajian, 524 U.S. at 331.
189. See id. at 331–32.
190. Justice Kennedy is undoubtedly correct to the extent that part of the rationale of Austin was that in rem forfeitures were traditionally considered punitive, at least in part. See Austin v. United States, 509 U.S. 602, 613 (1993) (arguing that the first Congress viewed forfeiture as punishment).
191. Prosecutors already use civil forfeiture proceedings much more often than criminal forfeitures. See Guerra, supra note 39, at 362. Thus, if Justice Kennedy is correct, Bajakajian places the vast majority of forfeitures outside the scope of Excessive Fines Clause review. Moreover, if, as Justice Kennedy contends, the Excessive Fines Clause applies to criminal forfeitures and not to civil forfeitures, prosecutors would have a strong incentive to rely even more on civil forfeitures, further restricting the application of the Excessive Fines Clause.
192. See, e.g., United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) (relying on Justice Kennedy's opinion in suggesting that certain civil penalties "may not be subject to the Excessive Fines Clause at all, because like customs forfeitures they serve" remedial purposes); United States v. DuBose, 146 F.3d 1141, 1145 (9th Cir. 1998) (citing Bajakajian for the proposition (in dicta) that in rem forfeiture is not a "fine" for Eighth Amendment purposes); see also Matthew C. Solomon, Note, The
The majority’s analysis, however, need not be interpreted in the manner suggested by Justice Kennedy and followed by these lower courts. This analysis assumes, without defense, a conception-based originalism in interpreting the scope of the Excessive Fines Clause.\(^{193}\) In other words, Justice Kennedy’s critique is valid only if the Framers’ view that in rem civil forfeitures are not fines is binding on the Court in its contemporary interpretation of that provision. The Court, however, is not so bound. Although the Court should adhere to the general concepts embodied in the text of constitutional provisions, the Framers’ specific conceptions are not necessarily controlling,\(^{194}\) particularly where the legal presuppositions of a particular doctrine have changed.\(^{195}\) Precisely such a change has occurred in connection with the application of the Excessive Fines Clause to in rem forfeiture in the form of the erosion of support for the guilty property fiction.\(^{196}\) If, as the Bajakajian majority contends, the Framers did not view in rem forfeiture as punitive, this view necessarily rested upon the legal fiction that such forfeitures were directed toward the offending property rather than toward the property owner. The Court easily could have (and, in my view, should have) concluded that this idea is so counter to contemporary sensibilities that it can no longer be taken seriously,\(^{197}\) thus undermining a critical presupposition of the Framers’ characterization of in rem forfeiture.\(^{198}\)

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193. See supra note 187 and accompanying text.


196. See supra notes 31–34 and accompanying text (discussing the guilty property fiction as basis for in rem forfeiture).

197. See, e.g., George M. Dery III, Adding Injury to Insult: The Supreme Court’s Extension of Civil Forfeiture to Its Illogical Extreme in Bennis v. Michigan, 48 S.C.L. Rev. 359, 376 (1997) (criticizing the Bennis Court for “unquestioningly promot[ing] the ancient legal fiction of the guilt of inanimate objects,” a fiction without “relevance in today’s legal proceedings”); see also Cheh, supra note 16, at 6 (characterizing guilty property fiction as an “irrational and superstitious idea”).

Indeed, the Court did something of the sort in Shaffer v. Heitner, 433 U.S. 186 (1977), in which it repudiated the view that states may exercise jurisdiction over a noncitizen solely on the basis of that person’s ownership of property in the forum state. The Court explained:

We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State... This history must be considered as supporting the proposition that jurisdiction based solely on the presence of property satisfies the demands of due process, but it is not decisive. “[T]raditional notions of fair play and substantial justice” can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports the ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.

Id. at 211–12 (alterations in original) (citations omitted). Shaffer makes two points relevant to the debate over the continued legitimacy of the guilty property fiction in forfeiture cases. First, the Shaffer
Indeed, Justice Kennedy’s apparent embrace of a conception-based interpretation of the scope of Excessive Fines Clause review is difficult to square with his dissenting opinion in *Bennis v. Michigan*.* In *Bennis*, Justice Kennedy argued that the Court’s traditional admiralty forfeiture jurisprudence could best be explained not by “earlier, more mechanistic rationales” (referring to the guilty property fiction) but as a pragmatic response to the inability to obtain jurisdiction over foreign owners of vessels engaged in illegal trade.* Justice Kennedy then suggested that this pragmatic rationale did not extend to the contemporary automobile forfeiture at issue in *Bennis*, a conclusion more consistent with the pragmatic, functional analysis of forfeiture represented by *Austin* than with the rigid, conception-based originalism of his *Bajakajian* dissent.

In other words, the result in *Bajakajian* is consistent with a rejection of the guilty property fiction and any resulting distinction between civil and criminal forfeiture for purposes of application of the Excessive Fines Clause. Rather, *Bajakajian* could be interpreted in light of *Austin*’s functional approach to forfeiture. This functional approach looks to whether the particular forfeiture scheme at issue functions as punishment. Under this approach, it is irrelevant whether the particular forfeiture is in persona or in rem. The Excessive Fines Clause would apply in either case, as long as the forfeiture serves a punitive function.

Although it would have been preferable for the *Bajakajian* majority to have forthrightly addressed this characterization problem, it is not particularly surprising that it did not do so nor is its failure to do so best

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198. See Lessig, supra note 195, at 1213–33 (discussing the relevance of changes in legal presuppositions underlying existing constitutional doctrines).


200. Id. at 472 (Kennedy, J., dissenting).

201. See id. at 473 (Kennedy, J., dissenting).

202. The author of the majority opinion, Justice Thomas, long has advocated a constitutional jurisprudence emphasizing the centrality of original intent. See, e.g., Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 9 (1997) (citing cases demonstrating Justice Thomas’s stated adherence to original intent). His reluctance to explore the appropriate limits of a conception-based originalism is understandable, given that he could achieve the result in *Bajakajian* by simply distinguishing the in persona forfeiture involved in that case from traditional in rem forfeitures upheld in the Court’s previous cases. Moreover, this is not the first time the Court has engaged in questionable (some would say specious) reasoning to avoid grappling with what is perceived to be a deeper or more difficult problem. See, e.g., Alan M. Dershowitz & John Hart Ely, Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 YALE L.J. 1198, 1199–1200 (1971) (suggesting that the Court’s opinion in *Harris v. New York*, 401 U.S. 222 (1971), fell short of “traditional standards of candor and logic” in its treatment of the record and of applicable precedent); Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109, 1120 (1990) (characterizing the Court’s use of precedent in *Employment Division v. Smith*, 494 U.S. 872 (1990), as “troubling, bordering on the shocking” and criticizing the Court for not forthrightly addressing the theoretical underpinnings of its decision); Chai Feldblum, Based on a Moral Vision: The Majority in Romer v. Evans Could—and Should—Have Engaged the Dissent Directly on the Role of Popular Morality in Making Laws, LEGAL TIMES, July 29, 1996, at S31 (criticizing
interpreted as a decision to overrule *Austin* implicitly and to exclude in rem forfeitures from the scope of Excessive Fines Clause coverage. The majority expressly adhered to the view that *Austin* is still good law, explaining that:

[i]t does not follow [from the observation that civil in rem forfeitures traditionally were viewed as nonpunitive], of course, that all modern civil in rem forfeitures are nonpunitive and thus beyond the coverage of the Excessive Fines Clause. Because some recent federal forfeiture laws have blurred the traditional distinction between civil in rem and criminal in personam forfeiture, we have held that a modern statutory forfeiture is a “fine” for Eighth Amendment purposes if it constitutes punishment even in part, regardless of whether the proceeding is styled in rem or in personam.\(^{203}\)

Moreover, the quoted language, particularly the reference to recent laws blurring the civil/criminal distinction, suggests adherence to a functional approach to forfeiture, an adherence certainly in keeping with much of the Court’s analysis in *Austin*.\(^{204}\)

In short, given both the majority’s expressed desire to preserve *Austin* and the availability of legitimate interpretive arguments to harmonize *Austin* and *Bajakajian*, it would be precipitous to conclude that in rem forfeitures are now beyond the scope of Excessive Fines Clause review. Rather, it would appear that, at least for Excessive Fines Clause purposes, it is the guilty property fiction that gives way to a functional approach determining the applicability of that provision. The Court’s proportionality analysis thus should apply to in rem forfeitures as well as in personam forfeitures.

This interpretation of *Bajakajian* suggests that the Supreme Court’s adoption of the gross disproportionality standard in that case necessarily represents a repudiation of Justice Scalia’s instrumentality test\(^{205}\) in favor of a more comprehensive proportionality analysis.\(^{206}\) Once one accepts

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204. See *Austin* v. United States, 509 U.S. 602, 619–22 (1993) (analyzing the text and legislative history of 21 U.S.C. §§ 881(a)(4) and (a)(7) to conclude that those provisions function as punishment). The Court advanced this functional argument, as well as the historical argument, as grounds for treating the in rem forfeiture of Austin’s property as a fine for Eighth Amendment purposes. Even if *Bajakajian* calls into question Austin’s historical treatment of in rem forfeiture as punishment, this alternative rationale for treating in rem forfeitures is sufficient to support the conclusion that the Excessive Fines Clause governs in rem forfeitures.
205. See *supra* notes 106–12 and accompanying text.
206. Indeed, the majority hints that the nexus between the property and the offense plays no role at all in the proportionality determination, observing at one point that whether the offending property is an instrumentality of the offense is “irrelevant” and that the excessiveness test “involves solely a proportionality determination.” *Bajakajian*, 524 U.S. at 333–34 (emphasis added). Perhaps the major-
the continued validity of *Austin* (which treats punitive in rem forfeitures as fines for Eighth Amendment purposes), it is difficult to defend, on textual grounds, limiting *Bajakajian'*s gross disproportionality test to in personam forfeitures while applying Justice Scalia’s instrumentality test to in rem forfeitures. If both types of forfeitures constitute “fines” for Excessive Fines Clause purposes, they are governed by the same constitutional text. It would be quite odd indeed to apply entirely different excessiveness tests depending upon the procedural format in which the fine is imposed.\(^{207}\) In short, the best interpretation of *Bajakajian* suggests that all punitive forfeitures, whether in rem or in personam, are subject to the gross disproportionality standard.

**B. Deterrence, Desert, and the Nature of Proportionality Review**

The *Bajakajian* majority and the dissenters also expressed contrasting views about the nature of proportionality review. The majority embraced an individualized, desert-oriented vision of proportionality review, focusing on a comparison of the gravity of the individual’s particular offense with the severity of the particular punitive forfeiture imposed.\(^{208}\) In contrast, the dissent embraced a utilitarian proportionality review, emphasizing legislative determinations about the seriousness of *classes* of offenses and taking into account factors not related to the individual’s offense, such as the need for severe punishment to serve crime control interests.\(^{209}\) Recognizing this distinction is essential because the majority’s approach creates the potential for a more expansive application of the Excessive Fines Clause. Moreover, the majority’s interpretation of the meaning of proportionality review appropriately reflects the rights-oriented traditions of the Eighth Amendment and analogous substantive due process jurisprudence.

**1. Contrasting Conceptions of Proportionality**

The contrast between the frames of reference of the majority and dissent in applying proportionality principles is readily apparent. Justice Kennedy’s dissent took a macro-level view of the seriousness of *Bajakajian*’s offense, focusing less on the harm associated with *Bajakajian*’s failure to report his currency than on the harm posed by the entire class of currency reporting offenses.\(^{210}\) In characterizing *Bajakajian*’s offense as a

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\(^{207}\) This is, however, precisely the stance of the United States Court of Appeals for the Fourth Circuit prior to *Bajakajian*. See United States v. Wild, 47 F.3d 669, 674–75 (4th Cir. 1995) (applying a proportionality standard in determining whether an in personam forfeiture was an excessive fine).

\(^{208}\) See *Bajakajian*, 524 U.S. at 337–40.

\(^{209}\) See id. at 350–54 (Kennedy, J., dissenting).

\(^{210}\) See id. at 351 (Kennedy, J., dissenting) (“The crime of smuggling or failing to report cash is
serious one, Justice Kennedy repeatedly invoked the connection between reporting offenses like Bajakajian's and more serious offenses such as drug trafficking, money laundering, and tax evasion.\textsuperscript{211}

Justice Kennedy also emphasized that Congress exercised "reasoned judgment" in reaching its own conclusion that currency reporting offenses were sufficiently serious to warrant severe punishment\textsuperscript{212} and castigated the majority for failing to defer to this judgment. He explained that Congress enacted the currency reporting requirements as part of a broader effort to control serious offenses like drug trafficking, money laundering, and tax evasion.\textsuperscript{213} He also emphasized that it was Congress's choice to impose severe sanctions for reporting violations,\textsuperscript{214} in part to deter these more serious (and more difficult to prove) offenses.\textsuperscript{215} In Justice Kennedy's view, proportionality principles do not prevent Congress from basing its prescribed punishment on factors, like the need to impose severe sanctions to achieve deterrence, extrinsic to the individual offense to achieve deterrence.\textsuperscript{216}

In contrast, Justice Thomas's analysis emphasized an individualized approach to offense seriousness. First, he expressly focused on the specific acts Bajakajian committed, highlighting the absence of any proof that Bajakajian's attempts to remove the currency from the country were

\textsuperscript{211} See id. at 350–52 (Kennedy, J., dissenting).
\textsuperscript{212} See id. at 350–51 (Kennedy, J., dissenting).
\textsuperscript{213} See id. at 351 (Kennedy, J., dissenting).
\textsuperscript{214} See id. at 350 (Kennedy, J., dissenting) (noting that the seriousness with which Congress viewed these offenses is evidenced by the statutory maximum five years imprisonment and $250,000 fine).
\textsuperscript{215} See id. at 350 (Kennedy, J., dissenting) ("Congress experimented with lower penalties [for currency reporting violations], but it found the punishments inadequate to deter lucrative money laundering."); id. at 351 (Kennedy, J., dissenting) ("By its very nature, money laundering is difficult to prove . . . . The point of the statute, which provides for even heavier penalties if a second crime can be proved, is to mandate forfeiture regardless.").
\textsuperscript{216} The only individualized indicium of offense seriousness Justice Kennedy cited was Bajakajian's culpability, which he characterized as high due to the willfulness of Bajakajian's offense. Justice Kennedy seemed to suggest that Bajakajian's culpability was alone sufficient to negate a claim of gross disproportionality. See id. at 352 (Kennedy, J., dissenting) ("In my view, forfeiture of all the unreported currency is sustainable whenever a willful violation is proved."). I question whether this is a sensible approach to evaluating offense seriousness. Traditionally, both harm and culpability are relevant to the seriousness inquiry. See, e.g., ANDREW VAN HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 79 (1976) ("Analytically, seriousness has two major components: harm and culpability.") (emphasis omitted). Willfulness of violation alone does not a serious offense make. That a driver's speeding violation was grounded in a conscious decision to exceed a 55-mile-per-hour speed limit by setting the cruise control for 58 does not, in itself, make the speeding violation an especially serious one.
related to other offenses. From this perspective, Bajakajian’s reporting offense could be characterized as a relatively minor one.

Second, Justice Thomas looked to the United States Sentencing Guidelines, rather than to the statutory maxima, as a relevant “objective” indicator of offense seriousness. He noted expressly that the latter encompasses a broad range of offense conduct and thus is a less reliable indicator of the seriousness of the particular offender’s conduct than are the guidelines, which are designed to provide a more refined evaluation of the conduct of particular offenders.

Although he did not articulate it in these terms, Justice Thomas’s approach is consistent with principles of just desert, which require that the severity of an offender’s punishment be in proportion to the seriousness of the offense. Just desert principles, whether characterized as an absolute requirement of justice or merely as imposing outer limits on sentences determined largely on utilitarian grounds, posit that it is wrong to punish an individual to a greater degree than offense seriousness would dictate, even if such disproportionate punishment generates significant social gain. In this regard, desert theories stand in sharp con-

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217. See Bajakajian, 524 U.S. at 338 (emphasizing that Bajakajian “is not a money launderer, a drug trafficker, or a tax evader”).

218. See id. at 337–40 & nn.12–14. Justice Thomas emphasized that Bajakajian’s actions did not deprive the government of any tangible economic benefit and noted the absence of any correlation between the amount of money involved and the intangible harm to society associated with the loss of information about the movement of Bajakajian’s money. See id. Justice Thomas convincingly explained that the social harm associated with Bajakajian’s offense might well be substantially less than that caused by a similar failure to report a much smaller amount of money derived from drug trafficking. See id. at 339.

219. See id. at 338–39 & n.14. Justice Kennedy responded by criticizing the majority’s reliance on the Sentencing Guidelines on two grounds. First, he maintained that the guidelines are designed to “select punishments with precise proportion, not to opine on what is a gross disproportion,” while the statutory maximum punishment reflects “congressional judgment of what is constitutional.” Id. at 350–51 (Kennedy, J., dissenting). Second, he noted that the guidelines’ fine and imprisonment ranges contemplate imposition of these sanctions in addition to any authorized forfeiture, suggesting that the guidelines are not inconsistent with congressional judgment about the appropriateness of forfeiture. See id. at 351.

These arguments miss the point entirely. The majority looked to the guidelines not to evaluate the permissibility of forfeiture under the statutory scheme but as a proxy for offense seriousness as a factor in conducting its constitutional inquiry. Moreover, Justice Thomas selected the guidelines, rather than the statutory maxima, because they represent a more sophisticated, individualized analysis of reporting offenses involving the relevant characteristics of Bajakajian’s offense than do the broadly applicable, highly general, statutory maxima.

220. See id. at 339 n.14 (contrasting the statute and the guidelines, which “show that respondent’s culpability relative to other potential violators of the reporting provision . . . is small indeed”).

221. Professor von Hirsch prefers the term “commensurate desert” to reflect the underlying premise that the severity of the punishment should be commensurate with the seriousness of the offense. See von Hirsch, supra note 216, at 66.

222. See, e.g., id. at 73 (noting that the commensurate deserts principle bars disproportionate leniency as well as disproportionate severity in sentencing).

223. See, e.g., Norval Morris, The Future of Imprisonment 74 (1974) (explaining that sentences should be determined largely on the grounds of deterrent effect, with offender desert setting only broad outer limits).

224. See, e.g., von Hirsch, supra note 216, at 74–75. Thus, if a relatively minor offense could be deterred effectively through severe punishment, a utilitarian might well urge the imposition of that
contrast to utilitarian approaches to punishment, reflecting instead what has been characterized as a Kantian approach. Put another way, desert theories are much more consistent with the view that all individuals, even criminal offenders, possess rights that cannot be abridged for the benefit of society, and imposing disproportionate punishment to achieve social objective represents a violation of those rights.

Understanding the contrasting views of proportionality analysis expressed in Bajakajian is critical because these differing philosophical approaches have important implications for concrete application of the Excessive Fines Clause. The focus on individual culpability and desert that is the hallmark of the majority’s proportionality analysis is likely to affect at least two fairly common classes of forfeiture cases. The first involves situations in which the property owner played a minor role in a relatively serious crime and faces the forfeiture of extremely valuable property. An example would be forfeiture of a residence on the basis of the owner’s peripheral participation in a drug trafficking offense. Bajakajian’s proportionality analysis emphasizes that it is not sufficient merely to invoke the notion that because drug trafficking is a serious offense, the forfeiture is, therefore, permissible.

A second class of cases potentially influenced by the majority’s desert-oriented focus involves what could be called an “innocent owner” situation—cases in which the owner’s property is involved in the offense due solely to the behavior of third parties. An example would be forfeiture of a residence because a lessor or a family member of the owner used the property to engage in drug trafficking activities without the

punishment because the disutility imposed upon the individual would be outweighed by the benefit to society generated by reduction in that crime. See id. at 50. Such a punishment would be inconsistent with desert principles. See id.

225. See, e.g., Jeffrie G. Murphy, Marxism and Retribution, 2 Pitt. & PUB. AFF. 215, 218–19 (1973) [hereinafter Murphy, Marxism and Retribution]. Murphy contrasts utilitarian approaches to punishment from a Kantian approach, explaining that the former could, for example, justify the punishment of an innocent citizen if such punishment created a net benefit for society. See id. at 219. The Kantian approach, in contrast, would view such punishment as inappropriate use of that citizen as a mere instrument to achieve a broader social goal, a use that violates that citizen’s fundamental personal dignity. See id. at 218–19. This notion can be extended to allocation of punishment. Permitting punishment of an individual to a degree beyond that merited by the seriousness of his offense (i.e., beyond that deserved by the offender) to achieve social utility represents a violation of individual dignity analogous to scapegoating. See, e.g., Von Hirsch, supra note 216, at 70.

226. See Murphy, Marxism and Retribution, supra note 225, at 220 (“What the utilitarian theory cannot really capture, I would suggest, is the notion of persons having rights . . . . Even if punishment of a person would have good consequences, what gives us (i.e., society) the moral right to inflict it?”); see also Richard S. Murphy, The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court, 55 U. CHI. L. REV. 1303, 1306–07 (1988) [hereinafter Murphy, Philosophy of Punishment] (noting both that Kantian retributivism is grounded in the view that punishment is not to be inflicted to achieve social utility and that the goal that punishment be proportional to the actor’s culpability is central to retributivism).

227. Cf. United States v. 6380 Little Canyon Rd., 59 F.3d 974, 986 n.13 (9th Cir. 1995) (citing United States v. 38 Whalers Cove Dr., 954 F.2d 29, 37 (2d Cir. 1992)) (applying a culpability analysis similar to that suggested in Bajakajian, explaining that “[t]he court, however, must not put ‘full responsibility for the ‘war on drugs’ on the shoulders of every individual claimant.’”).
owner's knowledge or consent. Bajakajian would seem to offer significant protection for innocent owners whose own culpability in the offense is virtually nonexistent. 228

2. Proportionality as Desert

Justice Thomas's desert-oriented focus on the culpability of the individual offender is more consistent with traditional understandings of the concept of proportionality than is Justice Kennedy's utilitarian approach. Justice Thomas's approach also is easier to square with the Court's interpretation of the Eighth Amendment and related constitutional provisions, which establish that individual citizens possess rights that the government may not override to achieve utilitarian goals. 229

Proportionality concerns are inextricably linked to the concept of desert. Punishment theorists often articulate the view that proportionality considerations are central to an understanding of retributive, or desert-oriented, punishment. 230 Indeed, proportionality considerations are tied so closely to desert-based approaches to sentencing that the very notion of proportionality becomes incoherent when other sentencing purposes, such as deterrence or incapacitation, are considered. 231

The link between proportionality and desert also is implicit in certain aspects of the Court's constitutional jurisprudence. For example, much of the Court's Eighth Amendment Cruel and Unusual Punishments Clause case law represents, at some level, the same deontological commitment to the sanctity of individual dignity in the face of contrary governmental interests contained in desert-based sentencing theories. 232 Specifically, there are two separate strands of the Court's capital punishment jurisprudence that reflect desert-oriented limitations on criminal sentences. First, the Court has long held that the Eighth Amendment requires individualized sentencing in capital cases, highlighting the importance of case-specific, mitigating factors in capital sentencing. 233 Implicit

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228. For a more complete discussion of the impact of Bajakajian on the efforts of innocent owners to raise constitutional challenges to forfeitures, see Johnson, supra note 141, at 34–38.

229. See, e.g., Murphy, Philosophy of Punishment, supra note 226, at 1323 (suggesting that a focus on offender culpability is an inevitable consequence of viewing the Eighth Amendment as a component of a rights-based constitutional system).

230. See, e.g., Von Hirsch, supra note 216, at 74–75; Murphy, Philosophy of Punishment, supra note 226, at 1306–07.

231. As Justice Scalia has observed, "it becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law." Harmelin v. Michigan, 501 U.S. 957, 989 (1990) (Scalia, J., concurring).

232. See, e.g., Furman v. Georgia, 408 U.S. 238, 392 (1972) (Burger, C.J., dissenting) ("The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them."). Thus, it is beyond dispute that the Eighth Amendment would, for example, prohibit the passage of legislation authorizing the death by torturing or drawing and quartering convicted terrorists, even if there were legislative findings attesting to the demonstrable deterrent effects of imposing such punishments.

233. See, e.g., Lockett v. Ohio, 438 U.S. 586, 605 (1978) (declaring unconstitutional a statutory
in this requirement is the view that factors extrinsic to the defendant’s culpability are, in themselves, insufficient to justify imposition of the death penalty. Second, the Court, in a separate line of cases, has imposed explicit, culpability-based limitations on imposition of the death penalty, limitations grounded in the Court’s conclusions about a defendant’s deserved punishment.234

Desert considerations also are implicit in the Court’s Fourteenth Amendment due process proportionality review set forth in BMW of North America, Inc. v. Gore,235 a process that closely resembles the Excessive Fines Clause proportionality review set out in Bajakajian. In evaluating whether the punitive damages imposed in Gore were “grossly excessive,” the Court applied three “guideposts,” two of which involved a desert-oriented comparison of the severity of the penalty with the wrongfulness of the tortfeasor’s conduct.236 The first guidepost, the degree of reprehensibility of the defendant’s conduct, involves a direct comparison between the offender’s blameworthiness and the severity of the sanc-

scheme that did not permit the sentencing judge to take into account as mitigating evidence such factors as the defendant’s age and minor role in the offense, explaining that “individualized consideration [is] a constitutional requirement in imposing the death sentence”; see also Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982) (applying Lockett principles to prohibit the trial judge from excluding the defendant’s proffered mitigation evidence); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (stating that “in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death” (emphasis added)).

234. For example, in Enmund v. Florida, 458 U.S. 782 (1982), the Court struck down a capital sentence for felony murder imposed upon the driver of the getaway vehicle in a robbery that resulted in the robbery victims’ deaths. In concluding that Enmund’s death sentence was unconstitutionally disproportionate to the seriousness of his offense, the Court eschewed the general, categorical characterization of offense seriousness in favor of an individualized inquiry that takes into account Enmund’s culpability. The Court concluded that “[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.” Id. at 801; see also Solem v. Helm, 463 U.S. 277, 291 (1983) (noting that the Enmund Court’s proportionality analysis involved a detailed examination of Enmund’s offense conduct).

At least one commentator has attributed similar characteristics to the Court’s noncapital proportionality jurisprudence as well. See David S. Mackey, Rationality Versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions, 51 TENN. L. REV. 623, 638 (1984) (suggesting that although the Court does not clearly define proportionality in Solem, its “use of the term suggests the development of a constitutional requirement that sentences be imposed on the basis of the particular culpability of an offender and not on the grounds of some independent social goal”).

235. 517 U.S. 559 (1996). In Gore, the Court held that the imposition of grossly disproportionate punitive damages violated principles of due process. See id. at 585–86.

236. See id. at 574. The third guidepost, a comparison of the punitive damages awarded with available civil and criminal sanctions for comparable misconduct, see id. at 583–84, seems designed to provide a relatively objective basis for evaluating the comparative severity of the punishment inflicted in a particular case, cf. Solem, 463 U.S. at 290 (describing the need for objective indicators of disproportionality). To the extent that legislative determinations of appropriate penalties are driven in part by desert considerations, however, a significant component of this guidepost amounts to a quick and dirty read of the legislature’s evaluation of the seriousness of particular types of offenses.
tion.\textsuperscript{237} The second guidepost, the ratio between punitive damages and actual damages, similarly reflects an effort to gauge punishment disproportionality by comparing the severity of the penalty to the wrongfulness of the defendant's conduct, using actual damages as a proxy for the social harm caused by the offender.\textsuperscript{238} Thus, the \textit{Gore} guideposts compare the magnitude of the offense to the severity of the punishment using each of the traditional components of offense seriousness: the offender's culpability and the social harm the offender's conduct caused.\textsuperscript{239}

In short, the \textit{Bajakajian} majority's individualized, desert-oriented version of proportionality review is consistent with the traditional understanding of the meaning of proportionality, as well as with the Court's general approach to proportionality limitations imposed by the Constitution.

\textbf{C. The Cruel and Unusual Punishments Clause, Gross Disproportionality, and the Autonomous Excessive Fines Clause}

Perhaps the one point of consensus in \textit{Bajakajian} was the decision to borrow a gross disproportionality standard from the Court's Cruel and Unusual Punishments Clause jurisprudence.\textsuperscript{240} Unfortunately, this decision represents both a failure to grasp the paradigm shift occasioned by the Court's earlier opinions in \textit{Austin} and \textit{Alexander}, which highlight the autonomy of the Excessive Fines Clause, and a failure to appreciate the critical distinctions between the two clauses that render the Cruel and Unusual Punishments Clause's gross disproportionality standard inappropriate for use in addressing Excessive Fines Clause challenges to forfeitures.

\textbf{1. The Weak Proportionality Standard of the Cruel and Unusual Punishments Clause}

It is clear that the Eighth Amendment's prohibition of "cruel and unusual" punishments operates as a ban on torture and similar modes of

\textsuperscript{237} In support of this guidepost, the Court stated that "[t]he principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" \textit{Gore}, \textvisiblespace 517 U.S. at 575 n.24 (quoting \textit{Solem}, 463 U.S. at 284).

\textsuperscript{238} See id. at 580–81.

\textsuperscript{239} See, e.g., \textsc{Von Hirsch}, \textit{supra} note 216, at 77–83 (explaining that harm and culpability are the traditional criteria for evaluating offense seriousness in a desert-based punishment scheme).

\textsuperscript{240} See United States v. \textit{Bajakajian}, 524 U.S. 321, 334 (1998); \textit{supra} text accompanying notes 158–60 (describing the majority's adoption of the gross disproportionality test); see also \textit{Bajakajian}, 524 U.S. at 348 (Kennedy, J., dissenting); \textit{supra} text accompanying note 178 (noting the dissent's conditional acceptance of the gross disproportionality test). This is a point of consensus if one takes seriously Justice Kennedy's statement that the gross disproportionality test "would be a proper way to apply the [excessive fines] clause, if only the majority were faithful in applying it." \textit{Bajakajian}, 524 U.S. at 348 (Kennedy, J., dissenting). This statement, however, is difficult to square with the first section of Justice Kennedy's dissenting opinion, which appears to suggest that the tradition of similar forfeitures conclusively establishes their constitutionality. See id. at 344–47 (Kennedy, J., dissenting); \textit{supra} text accompanying notes 169–72.
punishment.\textsuperscript{241} Whether that prohibition also implies a constitutional ban on disproportionately lengthy prison sentences has been a much more difficult and contentious issue.\textsuperscript{242} Although the Court's pronouncements on the topic have been less than clear,\textsuperscript{243} the thrust of its case law, both in rationale and in application, indicates that the Eighth Amendment ban on cruel and unusual punishments encompasses some proportionality limitations on sentence severity. These limitations are, however, very weak, affecting only those few sentences that involve the most extreme divergence from proportionality principles.

The Court first suggested that the Cruel and Unusual Punishments Clause embodies proportionality limitations on sentence length in 1910\textsuperscript{244} in \textit{Weems v. United States}.\textsuperscript{245} In holding that Weems's punishment violated the Eighth Amendment's prohibition of cruel and unusual punishments, the Court declared that "it is a precept of justice that punishment for crime should be graduated and proportional to the offense"\textsuperscript{246} and that "the inhibition [of the Cruel and Unusual Punishments Clause] was directed, not only against punishments which inflict torture, 'but against

\textsuperscript{241} See, e.g., \textit{In re Kemmler}, 136 U.S. 436, 447 (1890) (holding that the Eighth Amendment prohibits "inhuman and barbarous" punishments); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) ("[P]unishments of torture ... and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth] Amendment to the Constitution.").


\textsuperscript{243} See Steven Grossman, \textit{Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment}, 84 KY. L.J. 107, 107 (1995–96) (opining that "the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations").

\textsuperscript{244} Actually, the first reference to Eighth Amendment proportionality limitations occurred eighteen years earlier in Justice Field's dissenting opinion in \textit{O'Neil v. Vermont}, 144 U.S. 324 (1892). The rest of the Court declined to address the Eighth Amendment issue, however, concluding that it had not been raised by the petitioner and that the Eighth Amendment did not, in any event, apply to the states. \textit{See id.} at 331–32.

\textsuperscript{245} 217 U.S. 349 (1910). Weems, a government disbursing officer, was convicted of making false bookkeeping entries. He was sentenced by a Philippine court to 15 years of \textit{cadena temporal}, a punishment with origins in the Spanish Penal Code that included incarceration at hard labor while in shackles, permanent disqualification from such privileges of citizenship as marriage, property rights, and parental rights, and subjection of the offender to lifelong governmental surveillance. \textit{See id.} at 364.

\textsuperscript{246} Id. at 367.
all punishments which by their excessive length or severity are greatly dis-
proportioned to the offenses charged.\footnote{247}

Since \textit{Weems}, the Court has acknowledged the force of Eighth Amendment proportionality principles on several occasions in its modern death penalty jurisprudence, invoking those principles to strike down legislatively approved punishments in \textit{Coker v. Georgia}\textsuperscript{248} and \textit{Enmund v. Florida}.\textsuperscript{249} The Court also has found prison terms to violate Cruel and Unusual Punishments Clause proportionality principles on two occasions. In \textit{Robinson v. California},\textsuperscript{250} the Court invoked Eighth Amendment proportionality limitations (as well as due process principles) in declaring unconstitutional a state statute criminalizing the status of narcotics addiction.\textsuperscript{251} The Court also embraced such limitations in declaring unconstitutional a sentence of life imprisonment without the possibility of parole for a recidivist check bouncer in \textit{Solem v. Helm}.\textsuperscript{252} Justice Powell's opinion for the \textit{Solem} Court emphasized that proportionality principles were "deeply rooted" in English common law jurisprudence and embodied in the English Bill of Rights,\textsuperscript{253} a lineal ancestor of the Eighth Amendment.\textsuperscript{254} He concluded that:

\footnote{247. \textit{Id.} at 371 (Field, J., dissenting) (emphasis added) (quoting \textit{O'Neil}, 144 U.S. at 339–40).}

\footnote{248. 433 U.S. 584 (1977). In \textit{Coker}, the Court found that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." \textit{Id.} at 592.}

\footnote{249. 458 U.S. 782 (1981). In \textit{Edmund}, the Court concluded that the Eighth Amendment does not allow the imposition of the death penalty for a person who "aids and abets a felony in the course of which a murder is committed by others but who does not . . . intend that a killing take place." \textit{Id.} at 797.}

\footnote{250. 370 U.S. 660 (1962).}

\footnote{251. \textit{See id.} at 666–67. Courts and commentators sometimes characterize \textit{Robinson} as a case that merely imposes limitations on punishment of "status" crimes, rather than articulating sentencing proportionality principles of broader application. \textit{See}, e.g., Powell v. Texas, 392 U.S. 514, 532–33 (1968) (distinguishing \textit{Robinson}'s treatment of criminalization of the status of addiction from criminalization of an act of public intoxication, which Powell claimed arose from the status of alcoholism); \textit{see also GEORGE FLETCHER, RETHINKING CRIMINAL LAW} 429 (1978) (characterizing \textit{Robinson} as a limitation on the state's ability to criminalize status); LAFAVE & SCOTT, \textit{supra} note 116, at 182–84 (same). However, Justice Stewart's majority opinion appeared to invoke proportionality principles, characterizing even the relatively modest 90-day sentence required by the statute as an infliction of cruel and unusual punishment in light of the defendant's lack of culpability. \textit{See Robinson}, 370 U.S. at 666–67 (comparing the statute at issue to one authorizing the imprisonment of the mentally ill and noting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold"). In his concurring opinion, Justice Douglas was even more explicit in linking the Eighth Amendment implications of imprisonment for the status of narcotics addiction to broader proportionality principles. He cited Justice Field's opinion in \textit{O'Neil v. Vermont}, 144 U.S. 323 (1892), and explained that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." \textit{Robinson}, 370 U.S. at 676 (Douglas, J., concurring).}

\footnote{252. 463 U.S. 277 (1983). Helm was convicted of bouncing a check, a felony ordinarily punishable under South Dakota law by a fine and term of imprisonment not to exceed five years. \textit{See id.} at 281. Because Helm was a repeat offender, however, he was sentenced under that state's recidivist statute to life imprisonment without the possibility of parole. \textit{See id.}}

\footnote{253. \textit{See id.} at 284–85. The English Bill of Rights, like the subsequently adopted Eighth Amendment, contained no language referring specifically to proportionality in punishment. Justice Powell pointed out, however, that Blackstone interpreted that provision's prohibition of "cruel" punishments to encompass those that are overly severe or excessive. \textit{See id.} at 283 (citing 4 \textit{WILLIAM BLACKSTONE},}
[w]hen the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. . . . Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.255

Another strand of the Court’s noncapital Eighth Amendment jurisprudence, however, has emphasized the extremely limited nature of proportionality limitations under the Cruel and Unusual Punishments Clause. For example, in Rummel v. Estelle256 and Hutto v. Davis,257 the Court significantly downplayed the role of that provision in limiting punishment severity. In Rummel, the Court upheld a mandatory sentence of life imprisonment imposed under a Texas recidivist statute upon the defendant’s conviction for the third of three fraud and theft convictions involving a grand total of approximately $220.258 Rummel all but foreclosed the possibility that a disproportionately lengthy prison sentence could be held to violate the Eighth Amendment, explaining that:

one could argue without fear of contradiction by any decision of this Court that for crimes concededly classifiable as felonies, that is, punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.259

The Court did, however, acknowledge that it was at least theoretically possible that a sufficiently extreme punishment for a sufficiently minor offense might violate the Eighth Amendment, giving the example of a hypothetical statute imposing a sentence of life imprisonment for overtime parking.260 Two years later, the Court employed a similar analysis in Hutto v. Davis,261 upholding a forty-year sentence for the crime of possession with intent to distribute a total of nine ounces of marijuana and invoking Rummel for the proposition that ““successful challenges to

254. See Solem, 463 U.S. at 285 & n.10 (explaining that the Eighth Amendment was based on the language of article I, section 9 of the Virginia Declaration of Rights, which in turn was based on the English Declaration of Rights).
255. Id. at 285–86 (citations omitted). Justice Powell also invoked stare decisis, arguing that the proportionality principle “has been recognized explicitly [by the Court] for almost a century.” Id. (citing Justice Field’s dissent in O’Neil and the Court’s decisions in Weems and Robinson).
259. Id. at 274 (emphasis added). The Court distinguished Weems, arguing that the Court’s ruling in that case was grounded in the nature of the punishment inflicted on Weems rather than its severity. See id.
260. See id. at 274 n.11 (conceding that “a proportionality principle [might] come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment”).
the proportionality of particular sentences' should be 'exceedingly rare.'

The tension between the two strands of the Court's Cruel and Unusual Punishments Clause proportionality case law, represented by Weems, Robinson, and Solem on the one hand and Rummel and Hutto on the other, did not go unnoticed, either by academic commentators or by lower courts. The Court attempted to harmonize these cases in Harmelin v. Michigan, the Court's final word to date on the Cruel and Unusual Punishments Clause and proportionality in noncapital sentencing. The Court, in a fractured five-to-four ruling, rejected Harmelin's claim that a mandatory prison term of life without the possibility of parole for possessing 672 grams of cocaine violated the Eighth Amendment. Justice Scalia, writing for himself and Chief Justice Rehnquist, argued that the text and history of the Eighth Amendment precluded any proportionality review. In his view, the Eighth Amendment governs only the nature and legality of the punishment, not its length.

Textual analysis played a significant role in Justice Scalia's affirmative case for the absence of proportionality limitations in the Cruel and Unusual Punishments Clause. Noting that the "cruel and unusual" language "would have been an exceedingly vague and oblique way" of setting out a proportionality requirement, Justice Scalia explained that New Hampshire's constitution, adopted eight years before the ratification of the Eighth Amendment, contains separate provisions prohibiting "cruel or unusual punishments" and requiring that "all penalties ought to be proportioned to the nature of the offence." Other state constitutions, including those of Pennsylvania and South Carolina, also contain

262. Id. at 374 (quoting Rummel, 445 U.S. at 272).
263. See, e.g., Thomas E. Baker & Fletcher N. Baldwin, Jr., Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent," 27 ARIZ. L. REV. 25, 41–49 (1985) (exploring the difficulty in reconciling Solem with Rummel and Hutto).
264. Compare United States v. Owens, 902 F.2d 1154, 1158 (4th Cir. 1990) (attempting to reconcile Solem by holding that Eighth Amendment proportionality limitations apply to terms of imprisonment only in cases involving life imprisonment without the possibility of parole), and Chandler v. Jones, 813 F.2d 773, 778–80 (6th Cir. 1987) (same), with United States v. Gracia, 755 F.2d 984, 989–90 (2d Cir. 1985) (applying proportionality analyses to terms of imprisonment ranging from four to nine years), and Brown v. Commonwealth, 818 S.W.2d 600, 600–01 (Ky. 1991) (same, with respect to defendant's sentence of 10 years).
266. See id. at 961.
267. See id. at 961–64 (Scalia, J., plurality).
268. See id. Justice Scalia argued that Weems cannot be read as establishing a broad proportionality limitation because the Court's decision in that case turned in large part on the unusual character of cadena temporal. See id. at 990–92 (Scalia, J., plurality). He also distinguished cases such as Enmund and Coker, noting that the Rummel Court properly treated these cases as setting out proportionality limitations unique to the Court's death penalty jurisprudence. See id. at 994 (Scalia, J., plurality) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides.").
269. Id. at 977 (Scalia, J., plurality).
270. Id. at 977–78 (Scalia, J., plurality) (quoting N.H. CONST. arts. XVIII, XXXIII ).
proportionality provisions.\textsuperscript{271} According to Justice Scalia, this suggests both that the Framers' contemporaries did not view the language of the English Bill of Rights as sufficient to establish proportionality limitations and that the Framers' choice to exclude specific proportionality language from the Eighth Amendment was a deliberate one.\textsuperscript{272}

In dissent, Justice White (joined by Justices Blackmun and Stevens) echoed the Court's approach in \textit{Solem}, arguing that a proportionality limitation was consistent with the language and history of the Cruel and Unusual Punishments Clause.\textsuperscript{273} Employing \textit{Solem} proportionality principles, Justice White concluded that Harmelin's sentence exceeded constitutional limits.\textsuperscript{274}

Justice Kennedy, writing for himself and Justices O'Connor and Souter, provided the crucial swing votes. He explicitly avoided the linguistic and historical debate between Justices Scalia and White, purporting to rely strictly on principles of stare decisis to conclude that: (1) there is a "narrow" proportionality principle in the Court's case law, traceable to its decision in \textit{Weems};\textsuperscript{275} and (2) this narrow proportionality principle is not offended by the imposition of a sentence of life in prison without parole for a first-time drug offender convicted of possession of more than 650 grams of cocaine.\textsuperscript{276}

In short, although the Court has vacillated in its emphasis and rhetoric,\textsuperscript{277} Harmelin embraces the highly deferential sensibility of \textit{Rummel} and \textit{Hutto}, establishing that Cruel and Unusual Punishments Clause proportionality limitations on the length of prison sentences are extremely weak. Indeed, a recent analysis of lower courts' implementation of \textit{Harmelin} suggests that its gross disproportionality standard is, in practice, tantamount to a complete abdication of judicial review of sentence proportionality.\textsuperscript{278}

\textsuperscript{271} See \textit{id.} at 977 (Scalia, J., plurality) (citing PA. \textit{CONST.} § 38; S.C. \textit{CONST.} art. XL).
\textsuperscript{272} See \textit{id.} at 977–78 (Scalia, J., plurality).
\textsuperscript{273} See \textit{id.} at 1009 (White, J., dissenting).
\textsuperscript{274} See \textit{id.} at 1027 (White, J., dissenting).
\textsuperscript{275} Justice Kennedy recognized the "tensions" present in the Court's Eighth Amendment proportionality case law and attempted to harmonize this tangled case law, finding a "narrow" proportionality limitation that prevents the imposition only of "grossly disproportionate" sentences. \textit{Id.} at 997–98 (Kennedy, J., concurring).
\textsuperscript{276} See \textit{id.} at 1002–02 (Kennedy, J., concurring).
\textsuperscript{277} See \textit{id.} at 996 (Kennedy, J., concurring) (noting that the Court's "proportionality decisions have not been clear or consistent in all respects").
\textsuperscript{278} See Kathi A. Drew & R. K. Weaver, \textit{Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?}, 2 \textit{TEX. WESLEYAN L. REV.} 1, 19–20 (1995) (noting that "[i]n the literally hundreds of cases dealing with proportionality since Harmelin, the federal courts have not declared a single prison sentence to be disproportionate"); see also Louis D. Bilionis, \textit{Process, the Constitution, and Substantive Criminal Law}, 96 \textit{MICH. L. REV.} 1269, 1319 & n.203 (1998) (contrasting the "theoretical promise of a substantive judicially enforceable limit" on punishment suggested by the Supreme Court's Cruel and Unusual Punishments Clause proportionality case law with the "limited significance" of that case law in practice, due to the narrow scope of review under the current gross disproportionality standard). In criticizing the Court's approach in \textit{Rummel}, Justice Powell predicted that lower courts would respond in this deferential fashion, observing:
2. Why Such a Weak Standard? Explaining the Stringent Limitations on Cruel and Unusual Punishments Clause Proportionality Review

There appear to be two grounds for the Supreme Court’s adherence to an extremely limited form of proportionality review in its Cruel and Unusual Punishments Clause case law. First, there are prudential concerns about the proper institutional roles of courts and legislatures in setting penal policy. Such concerns are the principal rationale the Court has offered for its extremely limited Eighth Amendment proportionality review. Specifically, the Court has suggested that strict proportionality review would promote inappropriate judicial activism in evaluating the seriousness of criminal offenses and in gauging appropriate punitive responses. The core of the judicial role argument, outlined in Rummel and echoed in Hutto, is that proportionality determinations require inherently subjective comparisons of sentence severity with offense seriousness, as well as arbitrary drawing of lines in distinguishing sentences that are disproportionate from those that are not. These determinations, according to the Court, should be left to legislatures, which are institutionally better positioned to determine the seriousness of a given offense and the nature and severity of its appropriate punishment. In reviewing the Supreme Court’s proportionality jurisprudence in his

The Rummel Court therefore did not reject the proportionality principle long settled by our cases. It did take such a restricted view of the principle that—in the future—appellate courts, duty bound to follow the decision of this Court, often will be compelled to accept sentences that arguably are cruel and unusual.


279. In Rummel, the Court’s first major case emphasizing the limited nature of Eighth Amendment proportionality review, the Court also engaged in doctrinal analysis of its earlier case law. The Rummel Court minimized or distinguished arguably contrary precedent, characterizing Weems as a case focusing on the unusual nature of Weems’s punishment rather than its severity, and thus limited the holding “to its peculiar facts.” Rummel v. Estelle, 445 U.S. 263, 274 (1980). The Rummel Court also distinguished the Court’s death penalty cases on the ground that they have created limitations unique to the capital context. See id. at 272. It also invoked cases like Badders v. United States, 240 U.S. 391 (1916), and Graham v. West Virginia, 224 U.S. 616 (1912), to support a claim that the Court traditionally has not interfered with legislatively approved punishments on Eighth Amendment grounds. See Rummel, 445 U.S. at 274–76. However, the only rationale the Court could offer for these earlier decisions (and for its choice to adhere to them) was the judicial role argument. See id.

280. See Rummel, 445 U.S. at 283–84.

281. See Hutto, 454 U.S. at 373; Rummel, 445 U.S. at 275.

282. The Court explained:

But to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen $5000, $50,000, or $500,000, rather than the $120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed “subjective,” and therefore properly within the province of legislatures, not courts.

Rummel, 445 U.S. at 275–76. The Court distinguished its capital proportionality case law, emphasizing that bright line distinctions could be drawn in that context, thereby obviating the need for the arbitrary line drawing associated with proportionality limitations on terms of imprisonment. See id. at 274–75 (citing Coker v. Georgia, 433 U.S. 584, 592 (1977); Furman v. Georgia, 408 U.S. 238, 272 (1972)). The Court used the same reasoning to distinguish Weems, arguing that the unusual characteristics of cadena temporal permitted the Court to distinguish objectively that punishment from more traditional forms of imprisonment. See id. at 275.
Harmelin concurrence, Justice Kennedy similarly emphasized these prudential considerations.\footnote{283. See Harmelin v. Michigan, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring) (suggesting that deference to legislatures’ penological choices is the first principle underlying the Court’s Cruel and Unusual Punishments Clause proportionality jurisprudence).}

Textual limitations are the second basis for the extremely limited scope of proportionality review under the Cruel and Unusual Punishments Clause. The role of the text is not explicit in the Court’s case law, and the Court has not emphasized overt textual analysis in its Cruel and Unusual Punishments Clause proportionality cases. The Court’s reticence in employing proportionality review under that provision, however, may arise in part from its textual limitations. Justice Scalia relied in part on these textual limitations in adhering to the view that the Cruel and Unusual Punishments Clause contains no proportionality limitations.\footnote{284. Justice Scalia forcefully articulated this position in his opinion in Harmelin. See id. at 961–64 (Scalia, J., plurality); supra text accompanying note 268.}

Moreover, even the supporters of proportionality limitations have struggled to identify an adequate textual basis for such limitations.\footnote{285. Justice Powell’s opinion in Solem largely avoided textual analysis, relying upon historical and doctrinal arguments. See supra notes 253–54 and accompanying text. Justice White, dissenting in Harmelin, acknowledged the lack of explicit textual basis for proportionality limitations on prison sentences but bootstrapped such a limitation from the excessive fines and excessive bail clauses. See Harmelin, 501 U.S. at 1009–10 (White, J., dissenting) (conceding that “[t]he language of the [Eighth] Amendment does not refer to proportionality in so many words” but arguing that proportionality limitations on prison sentences can be inferred from corresponding restrictions on excessive fines and bail).}

If pushed to identify a plausible textual basis for Cruel and Unusual Punishments Clause-based proportionality limitations, proponents of such limitations could argue that the plain meaning of the term “cruel” encompasses not only inhumane and barbarous punishments but also those that exhibit a sufficient degree of disproportion.\footnote{286. Indeed, Justice Powell employed this analysis in Solem, suggesting that this interpretation of the term “cruel” is consistent with Blackstone’s understanding. See supra notes 252–53.}

Even so, the term “cruel” seems to connote something beyond mere excess; a range of punishments might be excessive, but only the most egregiously excessive are worthy of the label “cruel.”\footnote{287. See Rummel, 445 U.S. at 274 n.11; supra text accompanying note 260 (discussing the “overtime parking” hypothetical).}

It is in this sense that the Court’s “gross disproportionality” standard, although not explicitly grounded in a textual analysis, seems to flow, at least in part, from the text.\footnote{288. The importance of the text in the Court’s Cruel and Unusual Punishments Clause proportionality case law can be tested by a little thought experiment. Imagine a counterfactual scenario in which the Eighth Amendment language is borrowed from the New Hampshire Constitution, rather than from the English Bill of Rights, and explicitly provides that all penalties are to be proportioned to the offense. See supra text accompanying note 270 (discussing the New Hampshire constitution’s punishment proportionality provision). The Court simply could not legitimately interpret this hypothetical provision the way it interpreted the Cruel and Unusual Punishments Clause in Rummel, Hutto, and Harmelin. The jurisprudential and policy arguments the Court made in those cases in support of an extremely deferential gross disproportionality standard are persuasive (to the extent they are persuasive) only given the background ambiguity of the text. See, e.g., Fallon, supra note 145, at 1195–96 (ob-
3. What the Court Ignored in Bajakajian: Why the Excessive Fines Clause Contains a More Robust Proportionality Requirement Than Does the Cruel and Unusual Punishments Clause

The Supreme Court recognized in Alexander v. United States\(^{289}\) that the Excessive Fines Clause operates independently of the Cruel and Unusual Punishments Clause, holding: "Petitioner argues that this forfeiture violated the . . . Eighth Amendment," either as a cruel and unusual punishments or as an excessive fine.\(^{290}\) The appellate court, however, failed to distinguish between these two components of petitioner's Eighth Amendment challenge. According to the Alexander court, the appellate court lumped the two clauses together, disposing of both with the general statement that the Eighth Amendment does not require any proportionality review of a sentence less than life imprisonment without the possibility of parole.\(^{291}\) But that statement has relevance only to the Eighth Amendment's prohibition against cruel and unusual punishments. Unlike the Cruel and Unusual Punishments Clause, which is concerned with matters such as the duration or conditions of confinement, "[t]he Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense. . . . Accordingly, the forfeiture in this case should be analyzed under the Excessive Fines Clause.\(^{292}\)

The Alexander Court's analysis anticipates that, in theory, Excessive Fines Clause proportionality standards might be different than those arising from the Cruel and Unusual Punishments Clause. In fact, this should be so.\(^{293}\) The rationales—prudential and textual—underlying the extreme judicial restraint represented by the weak proportionality principle of the Cruel and Unusual Punishments Clause do not operate to the same degree with respect to the Excessive Fines Clause. Unfortunately, the Bajakajian Court's use of the Cruel and Unusual Punishments Clause's gross disproportionality standard obscures the differences between these two provisions in a way that risks undermining the effective-
ness of the Excessive Fines Clause as a check on excessively zealous use of forfeiture.

a. The Breakdown of Institutional Process Constraints Requires Robust Judicial Review of Forfeitures

The extreme deference that characterizes the Court's Cruel and Unusual Punishments Clause's gross disproportionality standard is largely grounded in the institutional logic of legislative primacy in determining penal policy. This logic, however, presupposes certain process constraints that, although at least arguably present in legislative and prosecutorial decisionmaking regarding traditional sanctions, are noticeably absent in the area of forfeiture. The absence of these important process constraints undermines the rationale for judicial deference in imposing proportionality limitations on forfeitures.

i. A Process Theory of Legislative Primacy

The extremely limited proportionality review embodied in the Court's Cruel and Unusual Punishments Clause jurisprudence is merely one aspect of a broader pattern of judicial deference to legislative penal decisionmaking explored in a recent article by Professor Louis Bilionis. Professor Bilionis observes that the Supreme Court long has resisted litigants' efforts to locate in the Constitution (in particular, in notions of substantive due process) constraints on the authority of legislatures to define criminal conduct and to prescribe appropriate punishment. He explains that the central feature of the Court's approach is the concept of legislative primacy in making criminal justice policy, a notion that is, in turn, largely grounded in theories of institutional competence and majoritarian principles. Professor Bilionis argues, however, that this central organizing principle of legislative primacy presupposes certain process-oriented safeguards: (1) that the legislature is making purposeful

294. See supra notes 279–83 and accompanying text (noting the Court's reliance on prudential institutional role considerations as a basis for extremely deferential proportionality review).

295. See Bilionis, supra note 278, at 1272.

296. See id. at 1301–18. Much of Professor Bilionis's focus is on unsuccessful efforts to have the Court declare strict liability offenses unconstitutional. See id. at 1288–99; see also, e.g., United States v. Dotterweich, 320 U.S. 277, 279–84 (1943) (interpreting a federal statute criminalizing the shipping of adulterated or misbranded drugs to impose strict liability and affirming the conviction in the face of a constitutional challenge to strict criminal liability). The Court's constitutional criminal law jurisprudence, however, is rife with similar examples of the Court's deference to legislative decisionmaking. See, e.g., Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (upholding the legislature's authority to declare voluntary intoxication irrelevant to criminal liability); McMillan v. Pennsylvania, 477 U.S. 79, 84–88 (1986) (declaring to apply a reasonable doubt standard to a mandatory minimum sentence triggered by a finding characterized by the legislature as a sentencing factor, rather than an offense element); Patterson v. New York, 432 U.S. 197, 205–10 (1977) (declaring to apply a reasonable doubt standard to a factor characterized by the legislature as an affirmative defense and upholding broad legislative authority to define elements of crimes and affirmative defenses).

297. See Bilionis, supra note 278, at 1301–18.
policy decisions through deliberative legislative choice;\(^\text{298}\) and (2) that institutional safeguards such as prosecutorial discretion and sentencing judges' discretion exist to ameliorate the possible injustices associated with potentially overinclusive criminal laws.\(^\text{299}\) He contends that the role the Court has played (and properly should play) is to reinforce these process protections.\(^\text{300}\) The rare occasions in which the Court has used the Constitution to override legislative substantive criminal law choices involve process failures—the absence of deliberative legislative choice or proper discretionary institutional safeguards.\(^\text{301}\)

Professor Bilionis’s process reinforcement theory of judicial review of legislative decisions defining and prescribing punishment for criminal conduct is instructive in understanding the nature and limits of the Court's Cruel and Unusual Punishments Clause proportionality case law. The Court’s deference in this area is grounded in the same notions of legislative primacy guiding its decisions in cases analyzed by Professor Bilionis, such as United States v. Dotterweich,\(^\text{302}\) Patterson v. New York,\(^\text{303}\) McMillan v. Pennsylvania,\(^\text{304}\) and Montana v. Egelhoff.\(^\text{305}\) These notions are sensible only to the extent that process protections operate to vitiate the need for aggressive judicial oversight. In the sections below, I suggest why these process protections are less likely to be present in cases governed by the Excessive Fines Clause than in those governed by the Cruel and Unusual Punishments Clause.

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\(^{298}\) See id. at 1323–27.

\(^{299}\) See id. at 1327–32.

\(^{300}\) See id. at 1333. In this sense, Professor Bilionis borrows from Dean John Hart Ely’s seminal process theory of judicial review. See ELY, supra note 145.

\(^{301}\) See Bilionis, supra note 278, at 1328 (“Just as the logic of process leads the Court to relax the rigors of legislative primacy when deliberative legislative policy choices seem pointedly absent, so too will it elicit a process-reinforcement response from the Court when strong evidence suggests that these political and institutional safeguards are malfunctioning.”). Examples include cases in which the Court has declared criminal statutes void for vagueness, implying absence of due deliberation on the part of the legislature, and capital sentencing regimes that provide the sentencer with unguided discretion. See, e.g., Kolender v. Lawson, 461 U.S. 352, 358 n.7 (1983) (explaining that vague statutes effectively delegate to judges responsibility for placing limits on the laws' scope, a job that belongs to the legislature); Furman v. Georgia, 408 U.S. 238, 239–40 (1975) (holding that unguided discretion in capital sentencing may constitute cruel and unusual punishment). According to Professor Bilionis, these cases “demonstrate the sensitivity to extreme situations where politics seems largely to have abdicated.” Bilionis, supra note 278, at 1326.

\(^{302}\) 320 U.S. 277 (1943) (affirming the conviction of a corporate president, under a vicarious liability theory, for violation of acts prohibiting shipment of misbranded or adulterated products).

\(^{303}\) 432 U.S. 197 (1977) (holding that a state may, consistent with the Due Process Clause, require a defendant to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence).

\(^{304}\) 477 U.S. 79 (1986) (holding that a state may treat visible possession of a firearm as a sentencing consideration requiring proof only by preponderance of the evidence).

\(^{305}\) 518 U.S. 37 (1996) (holding that a legislature may, consistent with the Due Process Clause, bar the introduction of purportedly exculpatory evidence of a defendant’s intoxication).
ii. Forfeiture Windfalls and the Distortion of Penal Policy

A critical difference between monetary penalties (including punitive forfeitures) governed by the Excessive Fines Clause and the types of sanctions (including sentences of imprisonment) governed by the Cruel and Unusual Punishments Clause is that the latter impose significant direct costs on the government while the former generate a financial windfall. Forfeiture, in particular, has become a major source of revenue for federal and state governments.

The financial rewards of forfeiture create a serious risk of distortion of both legislative and prosecutorial decisionmaking. As Justice Scalia has observed:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue.

It has long been recognized that the financial rewards of forfeiture create powerful incentives for the Justice Department (and its state counterparts) to be overly zealous in pursuing forfeiture cases. As Professor Fried explains:

Forfeitures, especially administrative civil forfeitures, can become a source of fast cars, boats and planes for undercover and interdiction efforts, and of cash to supplement appropriations, to pay rewards to informants, and to finance drug buys.

Moreover, to the extent that policymakers in the Justice Department and in Congress view the quantity of forfeited assets as an indicator


307. In 1993, for example, net deposits into the U.S. Justice Department's Asset Forfeiture Fund totaled more than $550 million, up from just over $93 million in 1986. See Asset Forfeiture: Historical Perspective on Asset Forfeiture Issues: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 106th Cong. 4 fig.1 (1996) (statement of Laurie E. Ekstrand, Assoc. Dir., Admin. of Justice Issues, Gen. Gov't Div., GAO), available at <http://www.gao.gov/InIndexFY96/abstracts/gg96040.htm> (accessible through the GAO's web site under GAO Reports link, Fiscal 1996 Annual Index link). Much of this booty goes directly into law enforcement coffers. See 28 U.S.C. § 524(c) (1994) (changing the previous practice of depositing forfeited funds to the general treasury to provide that such funds be earmarked exclusively for law enforcement).

308. See generally Blumenson & Nilsen, supra note 6, at 40 (noting the distortion that forfeiture's windfalls create for criminal justice policymaking).


310. The financial incentives for law enforcement officials to prosecute forfeiture cases overzealously are not generally rooted in personal gain. Rather, the incentives relate to institutional aggrandizement, a kind of empire-building long familiar to those who study managerial behavior. See, e.g., Oliver Williamson, The Economics of Discretionary Behavior: Managerial Objectives in a Theory of the Firm 28–37 (1967) (describing the phenomenon of business managers seeking to maximize firm growth at the expense of profitability).

311. Fried, supra note 25, at 362 (footnotes omitted).
of prosecutorial effectiveness, lower-ranking officials have a powerful incentive to pursue forfeiture aggressively. A former head of the Justice Department's Asset Forfeiture Office characterized that section's approach as "Forfeit, forfeit, forfeit. Get money, get money, get money."  

Less often acknowledged but just as important is the potential distortion of the legislative process involved in determining the proper scope of forfeiture laws. Members of Congress are clearly aware of the financial implications of forfeiture statutes. Although much of the money and other booty seized under the forfeiture laws goes toward law enforcement crime-fighting efforts, every dollar of law enforcement budget that comes from forfeited assets is one fewer dollar from general revenues that needs to be diverted to law enforcement from legislators' other priority projects. This provides a powerful incentive to maintain extremely broad forfeiture laws.

This is not to say that forfeitures do not serve legitimate penological functions. Clearly they do. However, the money at stake in forfeitures risks the possibility that both prosecutorial and legislative decisionmaking may be shaped, at least in part, by factors other than effective punishment, incapacitation, and deterrence. This distortion of criminal justice policy, both at the legislative and enforcement levels, has important implications for the scope of judicial review of forfeitures under the Excessive Fines Clause, implications that the Bajakajian Court ignored.

iii. Process Breakdown and its Implications for Excessive Fines Clause Review

The possibility of distortions of legislative and executive decisionmaking in the forfeiture area suggest the need for a serious judicial oversight that is absent with respect to nonmonetary criminal sanctions. The Supreme Court acknowledged as much in 1993, when it held that due process requires notice and an adversary hearing prior to seizure of

312. See id.
314. See, e.g., Fried, supra note 25, at 360 (quoting a member of the House of Representatives as characterizing forfeiture as a "huge business for the federal government").
315. See, e.g., Fine & Pepe, supra note 3, at 615--16.
316. See generally Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223 (1986) (highlighting the important role of courts in mitigating the distorting effects of interest group politics on legislative outcomes). As Professor Macey explains, "the conclusion that judges cannot, on constitutional grounds, substitute their own notions of the public good for the will of the legislature does not mean that they must shrink from their responsibility to constrain legislative excess." Id. at 267.
property pursuant to civil forfeiture.\textsuperscript{317} It explained:

The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all government decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceeding.\textsuperscript{318}

The prudential deference to legislative decisionmaking that underlies the Cruel and Unusual Punishments Clause proportionality jurisprudence presupposes legislative choice—-a careful legislative determination regarding the seriousness of particular offenses and evaluations of the range of appropriate punishments in light of relevant penological considerations and resource constraints.\textsuperscript{319} Although one may question on occasion the wisdom of the balance struck by legislatures with respect to incarceration and other nonmonetary punishments,\textsuperscript{320} at least there is some reason to believe that a balance is being struck and that legislators are grappling with issues of resource allocation, social benefit, and fairness.\textsuperscript{321} Yet where punishment is even better than cost-free, the Court can have little confidence that legislatures are even attempting to make the tough policy decisions that Rummel, Hutto, and Harmelin presuppose. Further, prosecutors cannot be trusted to exercise the restraint necessary to ameliorate the effects of exceedingly broad legislative forfeiture schemes. Even if it is appropriate for the Court to abdicate its role in reviewing

\textsuperscript{317} See James Daniel Good Real Property, 510 U.S. at 48.

\textsuperscript{318} Id. at 55–56 (emphasis added). Justice Scalia made a similar observation in connection with Eighth Amendment proportionality considerations. After noting that the financial windfall effect of fines can distort criminal justice decisionmaking, he concluded that "it makes sense to scrutinize governmental action more closely when the State stands to benefit." Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (Scalia, J., plurality).

\textsuperscript{319} See supra notes 241–78 (discussing deferential proportionality review in cruel and unusual punishments cases); supra notes 295–301 (discussing process theory).

\textsuperscript{320} Professor Donald Dripps has pointed out that because voters who perceive themselves as potential accused criminals are vastly outnumbered by those who perceive themselves as potential crime victims, legislatures will inevitably undervalue the rights of the accused. See, e.g., Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice: Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 SYRACUSE L. REV. 1079, 1089 (1993). The same dynamic operates, perhaps even more powerfully, with respect to the treatment of convicted criminals. Not surprisingly, a number of commentators have complained that the criminal justice system suffers increasingly from an overly punitive legislative ethos. See, e.g., Lois G. Forer, A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING 6 (1994) (criticizing the excessive harshness of mandatory minimum sentencing); Marvin E. Frankel & Leonard Orland, A Conversation About Sentencing Commissions and Guidelines, 64 U. COLO. L. REV. 655, 656 (1993) (noting a tendency toward an increasingly punitive legislative approach to sentencing and the ineffectiveness of sentencing commissions in checking this tendency); Richard Lowell Nygaard, On Responsibility: Or, the Insanity of Mental Defenses and Punishment, 41 VILL. L. REV. 951, 953 (1996) (decrying "the vindictive nature of our sentencing policy"); Margaret P. Spencer, Sentencing Drug Offenders: The Incarceration Addiction, 40 VILL. L. REV. 335, 367 (1995) (criticizing incarceration-oriented legislative response to drug offenses).

\textsuperscript{321} For example, a number of states have relied, with some success, on the use of sentencing commissions and sentencing guidelines, partly in efforts to rationally serialize sentences within relevant resource constraints. See, e.g., Michael Tonry, The Success of Judge Frankel's Sentencing Commission, 64 U. COLO. L. REV. 713, 720 (1993) (discussing the role of resource constraints on efforts of sentencing commissions in Minnesota, Washington, and Oregon).
prison sentences, these factors suggest that it is not appropriate to do so when monetary penalties are at issue.

Moreover, even if one accepts that there remain prudential grounds for limiting the scope of proportionality review under both the Cruel and Unusual Punishments Clause and the Excessive Fines Clause, the textual, structural, and historical distinctions between those provisions suggest that the latter entails more robust proportionality limits on legislative action.

b. Textual and Historical Distinctions Between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause

The relevant provision of the Excessive Fines Clause prohibits the imposition of “excessive fines.” 322 Excessive is the operative word requiring amplification of its meaning. 323 Its ordinary definition suggests that excessive, in this context, means “disproportionate.” 324 Nothing inherent in the ordinary meaning of the term “excessive” necessarily requires reference to gross disproportionality. 325

Moreover, reading the Excessive Fines Clause’s proportionality limitations to be co-extensive with those of the Cruel and Unusual Punishments Clause is troubling from a structural standpoint. Once fines are viewed as punishments, a separate prohibition on grossly disproportionate fines is superfluous, given that the Cruel and Unusual Punishments Clause prohibits grossly disproportionate punishments. 326 Put differently, the fact that the Framers expressly prohibited, in adjacent clauses, excessive bail and excessive fines without also prohibiting excessive terms of imprisonment is strong textual evidence of an intent to treat fines and imprisonment differently under the Eighth Amendment.

Relying in part on this structural argument, Justice Scalia concluded that the Cruel and Unusual Punishments Clause contains no proportionality guarantee. 327 However, an equally plausible interpretation of the

322. U.S. CONST. amend. VIII.
323. The Court already has determined that the term “fine” encompasses forfeitures that are designed to punish. See Austin v. United States, 509 U.S. 602, 609–11 (1993); Alexander v. United States, 509 U.S. 544, 558–59 (1993).
325. Justice Thomas observed that the converse also is true. In his view, the ordinary meaning of “excessive” does not necessarily preclude reference to gross disproportionality either. See id. at 335–36. It is notable that he did not, however, base his adoption of the gross disproportionality standard on the plain language of the Excessive Fines Clause but rather on the extrinsic policy considerations discussed in the previous section. See id. From a purely textual standpoint, Justice Thomas’s reading is not the most natural reading of the language of that provision.
327. See id. at 979 (Scalia, J., plurality). In Justice Scalia’s view, had the drafters of the Eighth Amendment intended to prohibit grossly disproportionate terms of imprisonment, they could have said so. Some existing state constitutions did. See, e.g., N.H. CONST. art. XVIII (“[A]ll penalties ought to be proportioned to the nature of the offense.”); PA. CONST. § 38 (punishments should be “in gen-
two clauses is that they provide proportionality limitations of varying degrees—only the most egregiously disproportionate sentences of imprisonment are “cruel and unusual,” while any significantly disproportionate fine is “excessive.” This reading of the Eighth Amendment gives meaning to each of the clauses in a manner consistent with the plain language and structure of the Eighth Amendment, while at the same time accommodating the Court’s existing Cruel and Unusual Punishments Clause jurisprudence.

One possible objection to this textual analysis is that it has the counterintuitive effect of imposing more stringent constitutional proportionality limitations on fines than on lengthy terms of imprisonment. Whether characterized as a textual argument or a prudential argument, this objection assumes that there is no plausible reason for imposing more stringent proportionality limitations on fines than on imprisonment. The Eighth Amendment’s text and structure, however, can be reasonably interpreted as a reflection of the Framers’ special concern with governmental powers to inflict monetary penalties. From a historical standpoint, it is plausible to argue that the Framers recognized the unique potential for abuse associated with fines. The Magna Carta devoted considerable attention to proportionality limitations on amerce- ments, the common-law ancestor to today’s fines. Moreover, the state constitutions of Connecticut and Georgia each prohibited excessive fines without imposing any parallel constitutional restrictions on other

328. The Solem Court noted:
There is no basis for the State’s assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes “parallel limitations” on bail, fines and other punishments, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.

329. It could be either. A textual form of the argument would resemble the following: “I don’t know for sure what ‘cruel and unusual means,’ but it might encompass a sentence of imprisonment that is disproportionate to the seriousness of the crime. The fact that there is a proportionality limitation on the imposition of fines, which are less intrusive than imprisonment, suggests that the ‘cruel and unusual’ language embodies a similar limitation.”
A prudential form of the argument would be: “The act of interpreting the ‘excessive fines’ language to create proportionality limitations on fines, while simultaneously denying a similar limitation for imprisonment, is logically and morally indefensible and, therefore, is a flawed constitutional interpretation.” For a discussion of the forms of constitutional argument, including textual and prudential arguments, see PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 14–17 (1991).

330. For example, chapter 20 of the Magna Carta declared that “[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it.” Magna Carta ch. 20, quoted in Solem, 463 U.S. at 284 n.9.

331. See John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 VA. L. REV. 139, 154–55 (1986) (emphasizing the similarities between amerce- ments and fines); Massey, supra note 61, at 1259–64 (discussing the origins and functions of amerce- ments and fines at common law).
punishments. In this light, the apparent distinction between fines and other punishments in the Eighth Amendment does not seem at all anomalous but rather may be viewed as a considered constitutional response to potential governmental abuses that predictably could flow from institutional incentives to impose excessive monetary punishment for reasons not grounded in sound penological principles. Moreover, from a prudential standpoint, the process constraint arguments articulated in the previous section suggest there is less need for exacting judicial review of sentences of imprisonment than for monetary penalties.

In short, the text and structure of the Eighth Amendment strongly suggest that the proportionality limitations the Excessive Fines Clause imposes are more rigorous than any proportionality limitations associated with the Cruel and Unusual Punishments Clause. If this is correct, it is illegitimate for the Court to permit prudential concerns about an inappropriately activist judicial role in monitoring criminal justice policy to override this constitutional command.

Unfortunately, the proper distinction between the Harmelin and Bajakajian versions of proportionality review is not clear from the Court's analysis in Bajakajian. Indeed, the Court's explicit invocation of its Cruel and Unusual Punishments Clause cases in support of Bajakajian's gross disproportionality standard invites the conclusion that proportionality review of forfeitures under the Excessive Fines Clause is to be as ineffectual as proportionality review of prison sentences under the Cruel and Unusual Punishments Clause. On the other hand, there is some divergence between the Court's actions and its rhetoric. A majority did, after all, hold that the forfeiture in Bajakajian was grossly disproportional, a conclusion that suggests there is some bite to the test. Some lower courts also have found forfeitures to be grossly disproportional. However, unless the Court articulates a different test or clarifies that a difference exists between the Bajakajian and Harmelin versions of the gross disproportionality standard, there remains a substantial risk that

332. See Conn. Const. of 1818, art. I, § 13 (prohibiting excessive fines); Ga. Const art. LIX (same).
333. See supra notes 306–21 and accompanying text.
334. Cf. Michael W. McConnell, The Role of Democratic Politics in Transforming Moral Convictions into Law, 98 Yale L.J. 1501, 1539 n.156 (1989) ("If the Constitution, properly interpreted, clearly indicates that a practice of the government is unconstitutional, and if the case is properly within the court's jurisdiction, a judge would be derelict in his duty if he voted to sustain it. Misplaced judicial restraint can be a disaster.").
335. The four dissenters' version of the gross disproportionality test may, however, more closely resemble the test's utterly ineffectual counterpart in the Cruel and Unusual Punishments Clause.
336. See, e.g., United States v. 3814 N.W. Thurman St., 164 F.3d 1191 (9th Cir. 1999) (holding that forfeiture of residential property worth more than $200,000 for the offense of making false statements in connection with a loan application violated the Excessive Fines Clause); One 1995 Toyota Pickup Truck v. District of Columbia, 718 A.2d 558 (1998) (concluding that in rem civil forfeiture of a pickup truck worth over $15,000 used in connection with sexual solicitation violated the Excessive Fines Clause).
lower courts will fail to recognize the autonomy of the Excessive Fines Clause.

V. CONCLUSION

For observers of the contemporary forfeiture scene hoping for more effective judicial supervision of forfeitures, Bajakajian is a mixed bag. The good news is that the Court expressly recognized the existence of Excessive Fines Clause proportionality limitations, applied a case-specific, desert-oriented version of proportionality analysis (thereby foreclosing utilitarian, crime-control considerations as grounds sufficient in themselves to impose severe forfeitures), and applied the standard to hold unconstitutionally excessive the forfeiture sought by the Government in that case. This holds out the promise of meaningful judicial review of forfeitures under a revitalized Excessive Fines Clause.

The bad news is that the Court failed to articulate an appropriate rationale for its rejection of traditional acceptance as the sole determinant of constitutionality of particular forfeiture practices, instead distinguishing earlier cases in a manner that invites the conclusion that Bajakajian's proportionality analysis is inapplicable to in rem forfeiture. Even worse, the Court employed a rhetoric of extreme caution and restraint in application of the Excessive Fines Clause analysis, adopting a gross disproportionality standard that, in its familiar Cruel and Unusual Punishments Clause applications, is tantamount to complete judicial abdication of meaningful proportionality review. The Court's choice to borrow this standard from its Cruel and Unusual Punishments Clause jurisprudence is distressing because it risks undermining the gains in forfeiture review that Bajakajian potentially represents. One can only hope that the lower courts applying the Excessive Fines Clause will heed the Court's actions, not its rhetoric, and that the Court will, in the future, acknowledge that proportionality review under the Excessive Fines Clause is more exacting than the empty gross disproportionality standard of its Cruel and Unusual Punishments Clause jurisprudence.