Spring 1997

Go Directly to Jail, Do Not Pass Go, Do Not Keep House

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Recommended Citation

Matthew Costigan, Go Directly to Jail, Do Not Pass Go, Do Not Keep House, 87 J. Crim. L. & Criminology 719 (1996-1997)

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GO DIRECTLY TO JAIL, DO NOT PASS GO, DO NOT KEEP HOUSE

United States v. Ursery, 116 S. Ct. 2135 (1996)

I. INTRODUCTION

In *United States v. Ursery*,¹ the Supreme Court reviewed two cases from the Sixth and Ninth Circuit Courts of Appeal. Both appellate courts held that the Double Jeopardy Clause of the Fifth Amendment² prohibited the Government from both criminally punishing a defendant and forfeiting the defendant's property for the same offense in parallel, but separate, proceedings.³ With one Justice dissenting,⁴ the Court reversed both decisions, holding that civil forfeitures generally, and the forfeitures at issue in particular, do not constitute "punishment" for purposes of the Double Jeopardy Clause.⁵

According to the Supreme Court, the purpose of the Double Jeopardy Clause is to protect against multiple punishments by prohibiting the Government from punishing, or attempting to punish, twice for the same offense.⁶ While the Sixth and Ninth Circuits held that the civil forfeitures in the cases before them constituted "punishment" subject to double jeopardy prohibition, the Government challenged that characterization of the forfeitures.⁷ This Note argues that the Court's ruling and agreement with the Government was not only a surprising result given the direction in which the Court has headed in recent years, but a regrettable one as well. While not a reversal of precedent, the Court abandoned the common sense path it had forged in three of its recent cases. The Court reverted to an old test for determination of whether the Double Jeopardy Clause applies to civil forfeitures, and arguably reached the wrong result when applying that test. This Note concludes that the Court mistakenly passed on the opportunity to fashion a more just and meaningful test for deter-

¹ 116 S. Ct. 2135, 2138 (1996).

² U.S. Const. amend. V.

³ See *United States v. Ursery*, 59 F.3d 568 (1995); *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (1994).

⁴ *Ursery*, 116 S. Ct. at 2152.

⁵ *Id.* at 2138.

⁶ *Witte v. United States*, 115 S. Ct. 2199, 2204 (1995).

⁷ *Ursery*, 116 S. Ct. at 2140.

mining when the Double Jeopardy Clause should prohibit civil forfeitures.

II. BACKGROUND

The Fifth Amendment to the United States Constitution states in relevant part that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."⁸ As the Supreme Court has stated, the Double Jeopardy Clause protects against three abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.⁹

The Federal Government has long been able to expropriate personal property used in the commission of crimes.¹⁰ In today's world, civil forfeiture statutes provide law enforcement with a powerful tool against criminal activity,¹¹ and have been strongly employed in the war on drug use and dealing. For most of the Supreme Court's history, the Double Jeopardy Clause applied only to "criminal" punishments.¹² In recent years, however, beginning with *United States v. Halper*,¹³ the Court has shown a willingness to look beyond the "civil" label of a sanction to the underlying intent, thus throwing into uncertainty the traditional understanding that the Double Jeopardy Clause does not apply to civil forfeitures.

A. PRE-HALPER

One of the early cases in which the Supreme Court considered the Double Jeopardy Clause in the context of forfeiture of property was in *In re Various Items of Personal Property*.¹⁴ In *Various Items*, the United States sought to forfeit the distillery, warehouse, and denaturing plant of a distilling corporation on the ground that the corporation violated § 600(a) of the Revenue Act of 1918¹⁵ by defrauding the government of taxes imposed on the spirits distilled on the prem-

⁸ U.S. Const. amend. V.

⁹ See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

¹⁰ See, e.g., Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47 (1850).

¹¹ See Dep't. of Justice Alert 2 (Oct. 3, 1994).

¹² See, e.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984).

¹³ 490 U.S. 435 (1989).

¹⁴ 282 U.S. 577 (1931).

¹⁵ The statute provided:

On and after February 26, 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of \$6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion.

26 U.S.C. § 245(4) (1930).

ises.¹⁶ The Court addressed the issue of whether a criminal conviction of a conspiracy to violate § 600(a) barred the forfeiture proceeding.¹⁷ According to the Court, where the right of forfeiture is in rem and created by statute, it is the property that is primarily considered the offender, or, in other words, the offense attaches to the property.¹⁸ By resort to a legal fiction, the proceeding is against the property, which is held guilty and condemned.¹⁹ By contrast, in a criminal prosecution the proceeding is against the wrongdoer in personam.²⁰ The Court thus distinguished a proceeding in rem to forfeit property used to commit an offense from a civil action to recover taxes.²¹ Because the latter is in fact a penalty and punitive in character, it is barred by a prior conviction of a defendant for a criminal offense involving the same transactions.²² The Court held the forfeiture proceedings before it to be in rem, and thus not part of the punishment for the criminal offense.²³ Accordingly, the Court found inapplicable the double jeopardy provisions of the Fifth Amendment.²⁴

The Court did not address the double jeopardy implications of in rem civil forfeitures again for over forty years until *One Lot Emerald Cut Stones v. United States*.²⁵ In *Emerald Cut Stones*, the defendant entered the country without declaring to United States Customs contraband of one "lot" of emerald cut stones and one ring.²⁶ After acquittal on a criminal smuggling charge,²⁷ the United States government brought an action under both 18 U.S.C. § 545 and 19 U.S.C. § 1497²⁸ seeking

¹⁶ *Various Items*, 282 U.S. at 578.

¹⁷ *Id.* at 579.

¹⁸ *Id.* at 580.

¹⁹ *Id.* at 581.

²⁰ *Id.*

²¹ *Id.* at 580 (distinguishing *United States v. La Franca*, 282 U.S. 568 (1931)).

²² *Id.*

²³ *Id.* at 581.

²⁴ *Id.*

²⁵ 409 U.S. 232 (1972).

²⁶ *Id.*

²⁷ The criminal charge was brought under 18 U.S.C. § 545, which provided:

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced . . . [s]hall be fined not more than \$10,000 or imprisoned not more than five years, or both . . .

. . .

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

¹⁸ U.S.C. § 545 (1970).

²⁸ The civil statute provided:

Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not

forfeiture of the contraband.²⁹ Addressing the double jeopardy issue, the Court held that the Double Jeopardy Clause did not bar the forfeiture because it constituted neither a second criminal trial nor a second criminal punishment.³⁰ Quoting from *Helvering v. Mitchell*,³¹ the Court stated that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense."³² According to the Court, the question of whether a given sanction is civil or criminal is one of statutory construction.³³ The Court characterized forfeitures under § 1497 as remedial rather than punitive sanctions, for they prevented forbidden merchandise from circulating in the country and provided a reasonable form of reimbursing the Government for investigation and enforcement expenses.³⁴ Thus, the Court determined that forfeiture of the emeralds was a civil sanction and not so unreasonable or excessive as to transform its clear civil intent into a criminal penalty.³⁵ Given the civil and remedial nature of the forfeiture, the Court declared that it was not barred by the criminal acquittal.³⁶

A little more than a decade after *Emerald Cut Stones*, the Court decided *United States v. One Assortment of 89 Firearms*.³⁷ The issue in *89 Firearms* was whether a gun owner's acquittal on criminal firearms charges precluded a subsequent in rem forfeiture proceeding against those firearms.³⁸ Following acquittal for dealing in firearms without a license, the defendant in *89 Firearms* faced forfeiture, pursuant to 18 U.S.C. § 924(d),³⁹ of the seized firearms.⁴⁰ As an initial matter, the Court stated that under *Mitchell*, at the very least, an acquittal of a criminal charge did not automatically bar forfeiture of goods involved

required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. § 1497 (1970).

²⁹ *Emerald Cut Stones*, 409 U.S. at 233.

³⁰ *Id.* at 235.

³¹ 303 U.S. 391, 399 (1938).

³² *Emerald Cut Stones*, 409 U.S. at 235.

³³ *Id.* at 237.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 465 U.S. 354 (1984).

³⁸ *Id.* at 355.

³⁹ The statute provided in part:

Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture.

18 U.S.C. § 924(d) (1982).

⁴⁰ *89 Firearms*, 465 U.S. at 356.

in the alleged criminal activity, or other civil penalties.⁴¹ Turning to the applicability of the Double Jeopardy Clause, the Court stated that unless Congress intended the forfeiture statute as punishment, or by its nature the statute necessarily was punitive, so that the proceeding was essentially criminal in character, the prohibition did not apply.⁴²

The Court reiterated that a civil or criminal determination begins as a matter of statutory interpretation.⁴³ Citing *United States v. Ward*,⁴⁴ the Court noted that this determination has two levels.⁴⁵ The first level involves an inquiry into whether Congress indicated either expressly or impliedly a preference for a criminal or a civil label in establishing the statutory penalty.⁴⁶ If the intent was for a criminal sanction, the inquiry need go no further, because a second prosecution would clearly violate the Double Jeopardy Clause.⁴⁷ Where Congress has indicated an intention to establish a civil penalty, however, the second level asks whether the statutory scheme is so punitive either in purpose or effect as to negate that intention.⁴⁸

After a determination that Congress designed § 924(d) as a remedial civil sanction, the 89 *Firearms* Court turned to the second prong of the *Ward* test.⁴⁹ In so doing, the Court examined a list of considerations established in *Kennedy v. Mendoza-Martinez*⁵⁰ to aid in determining whether the statute's purpose or effect negated § 924(d)'s civil intent.⁵¹ The Court found that only one factor—the fact that the proscribed behavior was already a crime—lent any support to the view that the statute imposed a criminal penalty.⁵² This slight overlap of criminal and civil characteristics, however, failed to persuade the Court that a clearly designed civil remedy had been transformed into

⁴¹ *Id.* at 361.

⁴² *Id.* at 362.

⁴³ *Id.*

⁴⁴ 448 U.S. 242, 248 (1980).

⁴⁵ 89 *Firearms*, 465 U.S. at 362.

⁴⁶ *Id.* (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236-37 (1972)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 362-63.

⁴⁹ *Id.* at 363-65.

⁵⁰ 372 U.S. 144, 168-69 (1963) ("Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.").

⁵¹ 89 *Firearms*, 465 U.S. at 365.

⁵² *Id.*

a criminal penalty.⁵³ The Court thus concluded that the Double Jeopardy Clause did not bar the non-criminal forfeiture.⁵⁴

B. *HALPER* AND BEYOND

Beginning with *United States v. Halper*,⁵⁵ the Court decided a trio of cases that indicated a shift in its application of the Double Jeopardy Clause. In *Halper*, the Court considered whether, and under what circumstances, a civil penalty might constitute punishment for purposes of double jeopardy analysis.⁵⁶ Halper, as a manager of a medical service provider, submitted sixty-five false claims for Medicare reimbursement that cost the Government a total of \$585.⁵⁷ When the Government became aware of Halper's scheme, it tried and convicted him on sixty-five counts of violating a false-claims statute⁵⁸ and sixteen counts of mail fraud.⁵⁹ After conviction, the Government brought a claim under the civil False Claims Act,⁶⁰ for which Halper was liable for \$2,000 per false claim, a civil penalty totaling \$130,000.⁶¹

According to the *Halper* Court, a recovery of civil penalties under the False Claims Act does not rise to the level of punishment simply because the recovery exceeds the Government's actual damages.⁶² In the Court's view, however, this did not preclude the possibility that in any particular case, a civil penalty under the Act "may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment," for no precedent established an absolute rule that a civil fine could not be "punishment" under the Double Jeopardy Clause.⁶³ According to the Court, one can identify a violation of the Double Jeopardy Clause only by assessing the purposes actually served by the sanction in question, not the underlying criminal or civil nature of the proceeding.⁶⁴ The Court stated that the labels "criminal" and "civil" were not of paramount importance, for the Court understood punishment to cut across both civil and criminal law.⁶⁵ Any

⁵³ *Id.* at 366.

⁵⁴ *Id.*

⁵⁵ 490 U.S. 435 (1989).

⁵⁶ *Id.* at 436.

⁵⁷ *Id.* at 437.

⁵⁸ 18 U.S.C. § 287 (1988).

⁵⁹ *Halper*, 490 U.S. at 437.

⁶⁰ 31 U.S.C. § 3729 (1988) (providing for violation when "[a] person not a member of an armed force of the United States . . . (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.").

⁶¹ *Halper*, 490 U.S. at 438.

⁶² *Id.* at 442.

⁶³ *Id.*

⁶⁴ *Id.* at 447 n.7.

⁶⁵ *Id.* at 447.

sanction, civil or criminal, constitutes punishment when the sanction serves the punitive goals of either retribution or deterrence as applied in an individual case.⁶⁶ As the Court put it, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."⁶⁷ While the Court acknowledged that this type of inquiry will necessarily be inexact, the Court thought it necessary for those cases where the Government seeks to impose on an already criminally convicted defendant a civil penalty that bears no rational relation to the goal of compensating it for its loss.⁶⁸ The Court thus remanded the case for an accounting of the Government's damages and costs to determine whether the penalty sought was so unrelated to the goal of making the Government whole as to constitute punishment.⁶⁹

Four years after *Halper*, the Court decided *Austin v. United States*.⁷⁰ In *Austin*, the Court faced the question of whether the Excessive Fines Clause of the Eighth Amendment applied to 21 U.S.C. § 881(a)(4) and (a)(7)⁷¹ forfeitures of property.⁷² After the indictment and conviction of petitioner Austin on one count of possession of cocaine with intent to distribute, the United States filed an in rem action seeking forfeiture of Austin's mobile home and auto body shop pursuant to the statutes.⁷³ Austin claimed that the forfeiture would violate the Ex-

⁶⁶ *Id.* at 448.

⁶⁷ *Id.*

⁶⁸ *Id.* at 449.

⁶⁹ *Id.* at 451-52.

⁷⁰ 509 U.S. 602 (1993).

⁷¹ The statute provided:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(4) All 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 property described in paragraph (1), (2), or (9), except that— . . .

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner. . . .

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. §§ 881(a)(4), (7) (1992).

⁷² *Austin*, 509 U.S. at 604.

⁷³ *Id.* at 604-05.

cessive Fines Clause.⁷⁴ The *Austin* Court determined that since the purpose of the clause was to limit the government's power to punish, the question was whether forfeiture was punishment, not, as the United States argued, whether forfeiture was civil or criminal.⁷⁵ In considering the question of punishment, the Court stated that sanctions often serve more than one purpose, and if the forfeiture serves in part to punish, it is subject to the constraints of the Excessive Fines Clause.⁷⁶

The Court thus turned to consider, first, whether forfeitures in general have historically been understood to punish, at least in part, and second, whether forfeitures under § 881(a)(4) and (a)(7) should be so understood in 1993.⁷⁷ The Court first noted it had consistently recognized that statutory forfeitures in particular, and forfeitures in general, serve at least in part to punish the property owner.⁷⁸ In addition, the Court found nothing in the provisions of § 881(a)(4) and (a)(7) to contradict this historical understanding of forfeiture as punishment.⁷⁹ In fact, the Court stated, the express "innocent owner" defenses of the statutes reveal a congressional intent to punish only those involved in drug trafficking by focusing on the culpability of the owner.⁸⁰ Moreover, the Court found that the statute's legislative history confirmed its punitive nature.⁸¹ According to the Court, then, even assuming that the statutory provisions serve *some* remedial purpose, one could not consider them to serve *solely* a remedial purpose.⁸² As such, the forfeitures are a form of punishment, and therefore subject to the limitations of the Excessive Fines Clause.⁸³

In a separate opinion concurring in part and concurring in the judgment, Justice Scalia agreed with the majority that the forfeiture of Austin's property constituted punishment.⁸⁴ In Justice Scalia's opinion, one must consider the taking of lawful property, in whole or in part, punitive, for its purpose is not compensatory.⁸⁵ "Punishment is being imposed, whether one quaintly considers its object to be the property itself, or more realistically regards its object to be the prop-

⁷⁴ *Id.* at 605.

⁷⁵ *Id.* at 609-10.

⁷⁶ *Id.* at 610.

⁷⁷ *Id.* at 610-11.

⁷⁸ *Id.* at 618.

⁷⁹ *Id.* at 619.

⁸⁰ *Id.*

⁸¹ *Id.* at 620.

⁸² *Id.* at 621.

⁸³ *Id.* at 622.

⁸⁴ *Id.* at 623 (Scalia, J., concurring in part and concurring in the judgment).

⁸⁵ *Id.* at 625 (Scalia, J., concurring in part and concurring in the judgment).

erty's owner."⁸⁶ In contrast to what he believed was the Court's position, however, Scalia stated that the affected property owner need not be culpable to establish that a forfeiture provision is punitive, for the Court had never before held that the Constitution required any degree of culpability to support in rem forfeitures.⁸⁷ Regardless of the need for culpability, though, Justice Scalia stated that the forfeiture in the case at hand, and forfeitures generally under § 881(a), were certainly a form of punishment for an offense.⁸⁸

Most recently, the Court decided *Department of Revenue of Montana v. Kurth Ranch*.⁸⁹ The issue for the Court in *Kurth Ranch* was whether a Montana tax on the possession of illegal drugs⁹⁰ assessed after the State had imposed a criminal penalty for the same possession violated the prohibitions of the Double Jeopardy Clause.⁹¹ While the Court rejected a *Halper* mode of analysis, it stated that the question before it was whether the tax had punitive characteristics that subjected it to the constraints of the Double Jeopardy Clause.⁹² While the Court noted that taxes typically differ from fines, penalties, and forfeitures in that they are usually motivated by revenue-raising rather than punitive purposes, it also found that at some point a tax must be considered punishment.⁹³ In the Court's opinion, the high rate associated with Montana's tax and the obvious deterrent purpose, while not dispositive, were consistent with a punitive character.⁹⁴ When viewed in connection with other features of the tax, such as the fact that the tax was conditioned on the commission of a crime, the Court concluded that the tax differed in too many significant respects from a typical tax to escape characterization as punishment.⁹⁵ As such, the tax was not the kind of remedial sanction that could permissibly follow criminal punishment.⁹⁶

In the first of three dissenting opinions in the case, Chief Justice

⁸⁶ *Id.* (Scalia, J., concurring in part and concurring in the judgement).

⁸⁷ *Id.* (Scalia, J., concurring in part and concurring in the judgement). Justice Kennedy, joined by Justices Rehnquist and Thomas, also writing separately, concurring in part and concurring in the judgment, agreed with Justice Scalia that not all in rem forfeitures are on account of the owner's blameworthy conduct. But Justice Kennedy stated that, unlike Scalia, he reserved the question of whether in rem forfeitures always amount to an intended punishment of the owner of forfeited property. *Id.* at 629 (Kennedy, J., concurring in part and concurring in the judgement).

⁸⁸ *Id.* at 627 (Scalia, J., concurring in part and concurring in the judgement).

⁸⁹ 114 S. Ct. 1937 (1994).

⁹⁰ Mont. Code Ann. §§ 15-25-101 to -123 (1987).

⁹¹ *Kurth Ranch*, 114 S. Ct. at 1941.

⁹² *Id.* at 1945.

⁹³ *Id.* at 1946.

⁹⁴ *Id.*

⁹⁵ *Id.* at 1947-48.

⁹⁶ *Id.* at 1948.

Rehnquist stated that the Court asked the right question, but reached the wrong answer.⁹⁷ While Rehnquist agreed that an assessment which is labeled a "tax" could conceivably constitute "punishment" for double jeopardy purposes, those circumstances did not exist in the Montana tax.⁹⁸ In Rehnquist's view, the tax had a nonpenal purpose of raising revenue, as well as a legitimate purpose in deterring conduct.⁹⁹ As such, it was a genuine tax not prohibited by the Double Jeopardy Clause.¹⁰⁰

Justice O'Connor dissented with the view that the Montana tax should be subjected to the *Halper* test.¹⁰¹ According to O'Connor, the Court did not know whether this case failed *Halper*'s first prong, since the Kurths never had to show that the amount of the tax was not rationally related to the government's legitimate nonpunitive objectives.¹⁰² In O'Connor's view, the Court's declaration that the Montana tax is always punitive was an unwarranted expansion of its double jeopardy jurisprudence, and the Court should have remanded with instructions to follow a *Halper* analysis.¹⁰³

In a final dissenting opinion, Justice Scalia stated his personal belief that the text of the Double Jeopardy Clause clearly prohibits only multiple prosecutions, not multiple punishments.¹⁰⁴ According to Scalia, "to be put in jeopardy" does not remotely mean "to be punished."¹⁰⁵ Until *Halper*, the multiple-punishments component of the Double Jeopardy Clause was limited to successive prosecutions—*Halper* gave the no-double-punishments rule a breadth never before enjoyed.¹⁰⁶ In Scalia's view, a civil proceeding successive to a criminal prosecution is not barred even if it has the potential to result in the imposition of a penalty.¹⁰⁷ According to Scalia, the Due Process Clause of the Fifth Amendment keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punish-

⁹⁷ *Id.* at 1950 (Rehnquist, C.J., dissenting).

⁹⁸ *Id.* at 1951 (Rehnquist, C.J., dissenting).

⁹⁹ *Id.* at 1952 (Rehnquist, C.J., dissenting).

¹⁰⁰ *Id.* (Rehnquist, C.J., dissenting).

¹⁰¹ *Id.* at 1954 (O'Connor, J., dissenting). Reviewing the holding of *Halper*, Justice O'Connor stated that a defendant must first show the absence of a rational relationship between the amount of a sanction and the government's nonpunitive objectives. If the defendant meets this first prong, then the burden shifts to the government to justify the sanction with reference to its expenses in the particular case. *Id.* (O'Connor, J., dissenting).

¹⁰² *Id.* at 1955 (O'Connor, J., dissenting).

¹⁰³ *Id.* (O'Connor, J., dissenting).

¹⁰⁴ *Id.* (Scalia, J., dissenting).

¹⁰⁵ *Id.* (Scalia, J., dissenting).

¹⁰⁶ *Id.* at 1956-57 (Scalia, J., dissenting).

¹⁰⁷ *Id.* at 1957 (Scalia, J., dissenting).

ments and the Excessive Fines Clauses of the Eighth Amendment place substantive limits upon what those legislative bounds may be.¹⁰⁸ Since Scalia did not find that the Montana tax constituted a second criminal prosecution, and since the tax was authorized by the Montana legislature, due process was not violated and the Constitution required no more.¹⁰⁹

III. FACTUAL AND PROCEDURAL HISTORY

A. RESPONDENT GUY JEROME URSERY

Following a tip from the ex-fiancee of Guy Jerome Ursery's son, the Michigan State Police executed a search warrant of Mr. Ursery's property and residence on July 30, 1992.¹¹⁰ During a search of the premises, police officers discovered 142 marijuana plants growing anywhere from 25 to 150 feet outside the Ursery property line.¹¹¹ Inside Ursery's home, the police found marijuana seeds, stems, and stalks, two loaded firearms, and a growlight.¹¹² Mr. Ursery and his family had been growing the marijuana for at least three years,¹¹³ but there was no evidence that the marijuana was for anything but the family's personal consumption.¹¹⁴

On September 30, 1992, pursuant to 21 U.S.C. § 881(a)(7),¹¹⁵ the United States government filed an in rem complaint seeking forfeiture of Mr. Ursery's residence and surrounding property on the basis that the property had been used to facilitate the manufacture of marijuana.¹¹⁶ Mr. Ursery and his wife filed an answer to the complaint, and the United States District Court for the Eastern District of Michigan scheduled the forfeiture action for a July 1993 trial.¹¹⁷ On May 17, 1993, however, the Urserys stipulated to a consent judgment in which they would pay \$13,250 to the government in lieu of forfeiture of the property.¹¹⁸ The district judge entered the judgment pursuant to the agreement on May 24, 1993, and the Urserys paid the

¹⁰⁸ *Id.* at 1958 (Scalia, J., dissenting).

¹⁰⁹ *Id.* at 1960 (Scalia, J., dissenting).

¹¹⁰ Brief for the United States at 3, *United States v. Ursery*, 116 S. Ct. 2135 (1996) (No. 95-345).

¹¹¹ Brief for Respondent at 3, *United States v. Ursery*, 116 S. Ct. 2135 (1996) (No. 95-345).

¹¹² Brief for the United States at 3, *Ursery* (No. 95-345).

¹¹³ *Id.*

¹¹⁴ Brief for Respondent at 5, *Ursery* (No. 95-345).

¹¹⁵ See *supra* note 71.

¹¹⁶ Brief for the United States at 3, *Ursery* (No. 95-345).

¹¹⁷ Brief for Respondent at 3-4, *Ursery* (No. 95-345).

¹¹⁸ *Id.* at 4.

\$13,250 on June 17, 1993.¹¹⁹

In the meantime, a federal grand jury indicted Mr. Ursery on one count of manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1)¹²⁰ on February 5, 1993.¹²¹ A trial jury subsequently convicted and sentenced him to sixty-three months of imprisonment, but Ursery filed a motion to dismiss the indictment on the ground that the Double Jeopardy Clause barred his criminal conviction following the civil forfeiture.¹²² The district court denied the motion on two grounds. First, the forfeiture was not an "adjudication" because it was settled by a consent judgment.¹²³ Second, the forfeiture action and criminal conviction were not separate proceedings, but were rather part of a single, coordinated prosecution.¹²⁴

By a divided vote, the Court of Appeals for the Sixth Circuit reversed.¹²⁵ Relying on the Supreme Court opinions of *Halper* and *Austin*, the Sixth Circuit determined that civil forfeitures under § 881(a)(7) were punishment for double jeopardy purposes.¹²⁶ According to the Sixth Circuit, the *Halper* Court established that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment under a double jeopardy analysis.¹²⁷ Applying this test, but in the context of the Excessive Fines Clause of the Eighth Amendment, the *Austin* Court declared that civil forfeitures under § 881(a)(7) were punishment because they did not serve solely a remedial purpose.¹²⁸ Thus, in the Sixth Circuit's view, under *Halper* and *Austin*, any civil forfeiture under § 881(a)(7) categorically constituted punishment for double jeopardy purposes.¹²⁹

Having found Ursery's civil forfeiture to be punishment, the court proceeded to determine that both the civil forfeiture and criminal conviction of Ursery were punishment for the same offense, for

¹¹⁹ *Id.*

¹²⁰ The criminal statute provided:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

¹²¹ 21 U.S.C. § 841(a)(1) (1992).

¹²² Brief for Respondent at 4, *Ursery* (No. 95-345).

¹²³ *Id.* at 5.

¹²⁴ *Id.*

¹²⁵ *Id.* at 6.

¹²⁶ *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995).

¹²⁷ *Id.* at 572-73.

¹²⁸ *Id.* at 573.

¹²⁹ *Id.*

the forfeiture necessarily required proof of the criminal offense.¹³⁰ Lastly, the court declared that the facts of the case failed to support a finding that the civil forfeiture and criminal prosecution constituted a single proceeding.¹³¹ In short, the Sixth Circuit found punishment for the same offense in two separate proceedings, and therefore, a violation of the Double Jeopardy Clause.¹³² The court reversed Mr. Ursery's conviction and vacated his sentence.¹³³

In a dissenting opinion, Judge Milburn disagreed with the court's conclusion that Ursery's civil forfeiture proceeding and criminal conviction were not part of a single, coordinated proceeding.¹³⁴ In Judge Milburn's view, the key factors in a double jeopardy analysis are the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings.¹³⁵ Since the government initiated both the civil and criminal proceedings against Ursery before determination of either outcome, Judge Milburn concluded that there was no potential for abuse of process, as the government was not acting to pursue a second punishment out of dissatisfaction with the first.¹³⁶ As such, Judge Milburn found no reason to consider the civil and criminal actions separate proceedings.¹³⁷ In addition, Judge Milburn disagreed with the majority's conclusion that both actions derived from the same offense.¹³⁸ In his view, the civil forfeiture action required a showing that Ursery's property facilitated the manufacture of marijuana over a period of years, while the criminal indictment charged Ursery only with manufacturing marijuana in 1992.¹³⁹ Since the civil forfeiture action could have been adjudicated without evidence of illegal activities in 1992, Milburn argued that the criminal prosecution did not derive from the same offense as the forfeiture.¹⁴⁰ Because the civil forfeiture and criminal conviction were part of a single, coordinated proceeding on the one hand, and the result of separate offenses on the other, no double jeopardy violation occurred.¹⁴¹

B. RESPONDENT \$405,089.23 IN UNITED STATES CURRENCY

Charles Wesley Arlt and James Wren were charged by a grand

¹³⁰ *Id.* at 573-74.

¹³¹ *Id.* at 574-75.

¹³² *Id.* at 575.

¹³³ *Id.* at 576.

¹³⁴ *Id.* (Milburn, J., dissenting).

¹³⁵ *Id.* at 577 (Milburn, J., dissenting).

¹³⁶ *Id.* at 578 (Milburn, J., dissenting).

¹³⁷ *Id.* (Milburn, J., dissenting).

¹³⁸ *Id.* at 579 (Milburn, J., dissenting).

¹³⁹ *Id.* (Milburn, J., dissenting).

¹⁴⁰ *Id.* (Milburn, J., dissenting).

¹⁴¹ *Id.* at 579-80 (Milburn, J., dissenting).

jury on June 12, 1991, with various counts of conspiracy to aid and abet the manufacture of methamphetamine, in violation of 21 U.S.C. § 846, conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 371, and money laundering, in violation of 18 U.S.C. § 1956.¹⁴² All charges stemmed from a large-scale methamphetamine manufacturing operation.¹⁴³ A jury convicted both on all counts on March 27, 1992, and each received a sentence of life imprisonment.¹⁴⁴

On June 17, 1991, five days after issuance of the indictment, the government filed a civil in rem complaint against various properties held by Arlt, Wren, and Payback Mines, a company controlled by Arlt.¹⁴⁵ Pursuant to 21 U.S.C. § 881(a)(6)¹⁴⁶ and 18 U.S.C. § 981(a)(1)(A),¹⁴⁷ the government sought forfeiture of United States currency from various bank accounts and cash, a helicopter, a boat, an airplane, 138 silver bars, and eleven automobiles.¹⁴⁸ The respondents filed claims to the properties, but the parties agreed to defer the forfeiture proceeding until after criminal prosecutions.¹⁴⁹

After the respondents' convictions, the civil forfeiture case proceeded.¹⁵⁰ Finding all the items sought by the government subject to forfeiture as proceeds of illegal narcotics activity, a district court judge granted the government's motion for summary judgment.¹⁵¹ The

¹⁴² *United States v. Ursery*, 116 S. Ct. 2135, 2139 (1996).

¹⁴³ Brief for the United States at 6, *United States v. Ursery*, 116 S. Ct. 2135 (1995) (No. 95-346).

¹⁴⁴ *Id.* at 6-7.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ The civil statute provided:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(a)(6) (1994).

¹⁴⁷ The civil statute provided in part:

(a)(1) Except as provided in paragraph (2), the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of . . . section 1956 or 1957 of this title, or any property traceable to such property.

18 U.S.C. § 981(a)(1)(A) (1994).

¹⁴⁸ Brief for the United States at 7, *Ursery* (No. 95-346).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Ninth Circuit, however, reversed.¹⁵² According to the court, since both the civil forfeiture action and the criminal prosecution clearly dealt with the same offense, the only consideration was whether they constituted separate proceedings and whether civil forfeitures under § 881(a)(6) and § 981(a)(1)(A) constituted "punishment."¹⁵³

Addressing the issue of separate proceedings first, the Ninth Circuit concluded that a forfeiture action and a criminal prosecution constitute the same proceeding only if brought in the same indictment and tried at the same time.¹⁵⁴ While the government could have proceeded in this fashion, it chose otherwise.¹⁵⁵ The court stated that the Supreme Court case of *Jeffers v. United States*¹⁵⁶ affirmed its position that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes, regardless of whether the government brings them as a single, coordinated prosecution.¹⁵⁷ While *Jeffers* dealt with parallel criminal actions,¹⁵⁸ the Ninth Circuit saw no difference when one proceeding was civil and the other criminal;¹⁵⁹ a civil forfeiture action brought and tried separately from a criminal prosecution was a separate proceeding.¹⁶⁰

Turning to the question of "punishment," the Ninth Circuit held that the Supreme Court "changed its collective mind" in *Halper* as to whether civil forfeitures constitute punishment for double jeopardy purposes.¹⁶¹ As in *Ursery's* appeal, the court stated that the new test for determining whether a nominally civil sanction constitutes punishment is whether it cannot fairly be said solely to serve a remedial purpose.¹⁶² The court interpreted *Austin* as affirming this change of heart, emphasizing that a sanction designed even in part to deter or punish constitutes punishment, regardless of whether it also has a remedial purpose.¹⁶³ To determine whether a sanction has a solely remedial purpose, the court declared that *Austin* stated the applicable legal standard, and that a court must look to the entire scope of the forfeiture statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to

¹⁵² *Id.* at 8.

¹⁵³ *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210, 1215-16 (9th Cir. 1994).

¹⁵⁴ *Id.* at 1216-17.

¹⁵⁵ *Id.* at 1217.

¹⁵⁶ 432 U.S. 137 (1977).

¹⁵⁷ *\$405,089.23 U.S. Currency*, 33 F.3d at 1217.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1218.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1219.

¹⁶³ *Id.*

forfeit.¹⁶⁴

According to the court, *Austin* clarified three relevant principles in determining whether a forfeiture constitutes punishment: 1) because of a historical understanding of forfeiture as punishment, there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose; 2) where a statute focuses on the culpability of the property owner, it is likely that the enactment serves at least in part to deter and punish guilty conduct; and 3) where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to, or punishment for, those violations of law.¹⁶⁵ Applying those principles to §§ 881(a)(6) and 981(a)(1)(A), the court concluded that these statutes always operated at least in part to deter and punish, and thus constituted "punishment."¹⁶⁶ As such, the Ninth Circuit held that the Double Jeopardy Clause barred the civil forfeiture sought by the government, reversed the district court, and remanded with instructions to dismiss with prejudice.¹⁶⁷ A split court denied the government's petition for rehearing en banc.¹⁶⁸

The United States Supreme Court granted certiorari¹⁶⁹ in both cases to determine whether the Fifth Amendment's prohibition against double jeopardy applies to either in rem civil forfeiture action. The Court consolidated the cases for its review.¹⁷⁰

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Chief Justice Rehnquist delivered the opinion of the Court.¹⁷¹ After noting the Court's understanding of the purpose of the Double Jeopardy Clause,¹⁷² the Court began its analysis by stating that since the earliest years of the Nation, Congress has authorized the Government to seek parallel in rem civil forfeiture actions and criminal prosecutions based upon the same underlying events.¹⁷³ The Court, in turn, has consistently concluded that the Double Jeopardy Clause does not apply to civil forfeiture actions because civil forfeitures do

¹⁶⁴ *Id.* at 1220.

¹⁶⁵ *Id.* at 1221.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1222.

¹⁶⁸ *United States v. \$405,089.23 U.S. Currency*, 56 F.3d 41 (9th Cir. 1995).

¹⁶⁹ *United States v. Ursery*, 114 S. Ct. 1937 (1996).

¹⁷⁰ *United States v. Ursery*, 116 S. Ct. 2135, 2138 (1996).

¹⁷¹ Chief Justice Rehnquist was joined by Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer.

¹⁷² See *supra* text accompanying note 6.

¹⁷³ *Ursery*, 116 S. Ct. at 2140.

not impose punishment.¹⁷⁴ To illustrate its point, the Court reviewed *Various Items*, *Emerald Cut Stones*, and *89 Firearms*, and reaffirmed that an in rem civil forfeiture is a remedial civil sanction distinct from potentially punitive in personam civil penalties such as fines.¹⁷⁵

The Court next turned its attention to the Sixth and Ninth Circuits' contention that the Court both abandoned this view in its three most recent decisions and adopted a new test for determining when a nominally civil sanction constitutes "punishment" for double jeopardy purposes.¹⁷⁶ According to the Court, the Sixth and Ninth Circuits misread *Halper*, *Austin* and *Kurth Ranch*, for none of those decisions purported to overrule *Various Items*, *Emerald Cut Stones*, and *89 Firearms*.¹⁷⁷ First, the Court limited *Halper* to the context of civil penalties, excluding civil forfeitures from the case's reach.¹⁷⁸ In the Court's view, since the time of *Various Items*, civil penalties such as fines have been distinguished from in rem civil forfeiture proceedings because the fine, like criminal prosecution, is in personam—the proceeding targets the wrongdoer.¹⁷⁹ In the Court's opinion, a practical application of the *Halper* rule to civil forfeitures would be difficult due to the virtual impossibility of quantifying the nonpunitive purposes served by a particular civil forfeiture.¹⁸⁰ As such, the case-by-case test of *Halper*, which compares the size of a penalty imposed to the damage suffered by the Government, cannot apply to a civil forfeiture, for there is no good way to determine the rational relationship of a particular forfeiture to its nonpunitive purpose, and, in any event, civil forfeitures are not designed merely to compensate the Government.¹⁸¹ Thus, the Court rejected the view that *Halper* adopted a radically different inquiry into whether a civil forfeiture is subject to the Double Jeopardy Clause, instead emphasizing repeatedly the narrow scope of that decision.¹⁸² In addition, according to the majority, the Court expressly disclaimed reliance upon *Halper* in *Kurth Ranch*, finding that its case-specific approach was impossible to apply outside the context of a fixed civil-penalty provision.¹⁸³ As such, *Halper's* approach was held inapplicable to civil forfeitures.¹⁸⁴

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 2140-42.

¹⁷⁶ *Id.* at 2143.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 2144-45.

¹⁸⁰ *Id.* at 2145.

¹⁸¹ *Id.*

¹⁸² *Id.* at 2145 n.2.

¹⁸³ *Id.* at 2146.

¹⁸⁴ *Id.*

Second, the Court declared the *Austin* analysis of the Excessive Fines Clause to be unrelated to the Double Jeopardy Clause.¹⁸⁵ According to the majority, *Austin*'s approval of *Emerald Cut Stones* and *89 Firearms* limited its holding to the Excessive Fines Clause.¹⁸⁶ After *Austin*, forfeitures effected pursuant to 21 U.S.C. § 881(a)(4) and (a)(7) are subject to review for excessiveness under the Eighth Amendment.¹⁸⁷ This review for excessiveness, however, does not render those forfeitures so punitive as to constitute punishment for Fifth Amendment double jeopardy purposes.¹⁸⁸

In short, according to the majority, nothing in *Halper*, *Austin*, or *Kurth Ranch* replaced the Court's historical understanding that civil forfeiture does not constitute punishment for double jeopardy purposes.¹⁸⁹ While *Halper* dealt with in personam civil penalties under the Double Jeopardy Clause, *Austin* with civil forfeitures under the Excessive Fines Clause, and *Kurth Ranch* with tax proceedings under the Double Jeopardy Clause, none dealt with civil forfeitures under the Double Jeopardy Clause, the subject of this case.¹⁹⁰ Chief Justice Rehnquist stated that if the Court had overruled a well-established rule and long line of precedent, it would have stated as much.¹⁹¹

Having dispensed with the Sixth and Ninth Circuits' misapplications of case law, the Court turned to consider the forfeitures at issue under the two-part test of *89 Firearms*.¹⁹² Dealing briefly with the first prong of the test, the Court concluded that Congress intended forfeitures under 21 U.S.C. § 881 and 18 U.S.C. § 981 to establish civil, and not criminal proceedings.¹⁹³ According to the Court, the procedural mechanisms established by Congress for enforcing forfeitures under the statutes were impersonal and targeted the property itself.¹⁹⁴ Thus, the proceedings were in rem, which have traditionally been viewed as civil proceedings.¹⁹⁵

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 2146-47. The Court stated that *Austin* acknowledged that its categorical approach under the Excessive Fines Clause was distinct from the case-by-case analysis of *Halper* for the Double Jeopardy Clause because of the significant difference between the purposes of analysis under each constitutional provision. Since the key question under the Excessive Fines Clause is whether a particular sanction is so large as to be "excessive," there is no reason under the *Austin* inquiry to determine whether the sanction served any remedial purpose.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* See *supra* notes 32-49 and accompanying text.

¹⁹³ *Ursery*, 116 S. Ct. at 2147.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Addressing the second prong of the analysis, the Court found little evidence that forfeiture proceedings under 21 U.S.C. § 881(a)(6) and (a)(7), and 18 U.S.C. § 981(a)(1)(A), were so punitive in form and effect as to render them criminal despite Congress' intent.¹⁹⁶ In the Court's view, the statutes at issue resembled, in most significant respects, the statutes in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*, which the Court held not to be punitive.¹⁹⁷ While acknowledging that the statutes may have certain punitive aspects, the Court noted that they also serve important nonpunitive goals.¹⁹⁸

According to the Court, many considerations support the conclusion that the statutes in question are nonpunitive civil proceedings.¹⁹⁹ For one, it is "absolutely clear" that courts historically have not regarded in rem civil forfeitures as punishment for double jeopardy purposes.²⁰⁰ In addition, the Government need not prove scienter in any of the statutes under review in order to subject the property to forfeiture.²⁰¹ Finally, though the statutes related to criminal activity, this fact by itself does not render them punitive.²⁰² The Court concluded by stating that the civil forfeitures in question in these cases were neither punishment nor criminal for purposes of the Double Jeopardy Clause.²⁰³ Accordingly, it reversed the appellate courts.²⁰⁴

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy wrote separately, in concurrence, to add a few observations to the majority's holding.²⁰⁵ In Justice Kennedy's opinion, the majority correctly relied on *Various Items* as the seminal case in the area of civil forfeitures.²⁰⁶ However, the rule of *Various Items*—that the Double Jeopardy Clause applies only to in personam punishments of the wrongdoer and not in rem forfeitures—did not imply that forfeiture inflicts no punishment.²⁰⁷ Whether the forfeiture statute af-

¹⁹⁶ *Id.* at 2148.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 2149.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* Because the Court concluded that the forfeitures at issue do not constitute "punishment" for double jeopardy purposes, they declined to address three other arguments raised by the Government: that the civil forfeitures at issue do not constitute "jeopardy," arise out of the same offenses as the applicable criminal prosecutions, and constitute proceedings separate from the criminal prosecutions. *Id.* at 2140 n.1.

²⁰⁵ *Id.* (Kennedy, J., concurring).

²⁰⁶ *Id.* at 2150 (Kennedy, J., concurring).

²⁰⁷ *Id.* (Kennedy, J., concurring).

fects those who carry out a crime or owners who are culpable for the criminal misuse of their property, any forfeiture still punishes an individual by taking property involved in a crime.²⁰⁸ Unlike criminal forfeitures, however, civil in rem forfeiture actions do not require a showing that the owner who stands to lose his property has committed a criminal offense.²⁰⁹ According to Justice Kennedy, since the property owner may or may not be the wrongdoer charged with a criminal offense, the civil forfeiture is not a second in personam punishment for the criminal conduct, and thus is not prohibited by the Double Jeopardy Clause.²¹⁰

Justice Kennedy asserted that the two-prong test of *89 Firearms* does not add much to the clear rule of *Various Items* that civil in rem forfeiture of property involved in a crime is not punishment subject to the Double Jeopardy Clause.²¹¹ In Justice Kennedy's opinion, any in rem proceeding is civil, and so long as any forfeiture hinges upon the property's use in a crime, there will always be the remedial purpose of preventing property owners from allowing their property to be used for illegal purposes.²¹² Since the Court's application of the test was consistent with *Various Items*, however, Justice Kennedy joined the majority's opinion in full.²¹³

C. JUSTICE SCALIA'S CONCURRENCE IN THE JUDGMENT

Justice Scalia filed a concurrence in the judgment only.²¹⁴ In his brief opinion, Justice Scalia reiterated his view from *Kurth Ranch* that the Double Jeopardy Clause merely prohibits successive prosecutions, not successive punishments.²¹⁵ Because the civil forfeiture proceedings at issue were not criminal prosecutions, double jeopardy did not bar them.²¹⁶ Thus, Justice Scalia agreed that the cases did not present double jeopardy violations.²¹⁷

D. JUSTICE STEVENS' CONCURRENCE IN THE JUDGMENT IN PART AND DISSENT IN PART

Justice Stevens agreed with the majority that Arlt and Wren's forfeitures did not violate the Double Jeopardy Clause, but dissented with

²⁰⁸ *Id.* (Kennedy, J., concurring).

²⁰⁹ *Id.* at 2151 (Kennedy, J., concurring).

²¹⁰ *Id.* at 2150 (Kennedy, J., concurring).

²¹¹ *Id.* at 2151 (Kennedy, J., concurring).

²¹² *Id.* (Kennedy, J., concurring).

²¹³ *Id.* at 2152 (Kennedy, J., concurring).

²¹⁴ Justice Scalia was joined by Justice Thomas.

²¹⁵ *Ursery*, 116 S. Ct. at 2152 (Scalia, J., concurring in the judgment).

²¹⁶ *Id.* (Scalia, J., concurring in the judgment).

²¹⁷ *Id.* (Scalia, J., concurring in the judgment).

regard to the proceeding against Ursery.²¹⁸ In Justice Stevens' opinion, because numerous federal statutes authorize forfeiture in a wide variety of situations, it is wrong to assume that only one answer exists to the question of whether civil forfeitures constitute "punishment" for purposes of the Double Jeopardy Clause.²¹⁹ According to Justice Stevens, for purposes of double jeopardy analysis in forfeiture cases, it is useful to categorize property subject to seizure as either proceeds, contraband, or property that has played a part in the commission of a crime.²²⁰ Justice Stevens agreed with the majority that the forfeiture of proceeds in Arlt and Wren's case did not violate the Double Jeopardy Clause.²²¹ Since Arlt and Wren's currency derived from illegal activity, they had no right to retain it, and forfeiture of the currency cannot constitute punishment.²²² In addition, one does not have the right to possess contraband; insofar as the majority's opinion explains why forfeiture of contraband does not violate the Double Jeopardy Clause, therefore, Justice Stevens also agreed with the majority.²²³ With regard to the forfeiture of Ursery's home, however, Justice Stevens disagreed with the Court's holding.²²⁴ In Justice Stevens' view, none of the reasons supporting the forfeiture of proceeds or contraband provided a sufficient basis for concluding that forfeiture of the Ursery home was not punitive.²²⁵

Justice Stevens claimed that the majority's decision demonstrated a stunning disregard for precedent.²²⁶ While the majority asserted the primacy of *Various Items* and its categorical rule that the Double Jeopardy Clause is inapplicable to civil forfeiture actions, Justice Stevens stated that the case had disappeared from Supreme Court jurisprudence, and that the two cases supposedly affirming *Various Items*—*Emerald Cut Stones* and *89 Firearms*—do not even mention it.²²⁷ More importantly, according to Justice Stevens, neither of those cases endorsed the absolute rule of *Various Items*, instead insisting on a careful consideration of the nature of a particular forfeiture at issue, classifying it as either punitive or remedial, before deciding whether it implicated double jeopardy.²²⁸ Both cases rejected the view that courts

²¹⁸ *Id.* at 2152-53 (Stevens, J., concurring in the judgment in part and dissenting in part).

²¹⁹ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁰ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²¹ *Id.* at 2152 (Stevens, J., concurring in the judgment in part and dissenting in part).

²²² *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²³ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁴ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁵ *Id.* at 2153 (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁶ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁷ *Id.* at 2154 (Stevens, J., concurring in the judgment in part and dissenting in part).

²²⁸ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

should treat all in rem civil forfeitures the same, and recognized the possibility that some forfeitures might constitute punishment for a criminal act if they cannot properly be characterized as remedial.²²⁹

According to Justice Stevens, the Court has a long history of applying other constitutional protections to forfeitures with a punitive element.²³⁰ By confining its holdings to remedial civil forfeitures, *Emerald Cut Stones* and *89 Firearms* recognized that the Double Jeopardy Clause might apply to certain punitive civil forfeitures.²³¹ Read properly, then, the two cases set the stage for the modern understanding of how the Double Jeopardy Clause applies in a nominally civil proceeding, an understanding developed in *Halper*, *Austin*, and *Kurth Ranch*.²³² In Justice Stevens' opinion, the majority misread these cases by treating them as if they concerned unrelated subjects, when all simply defined the concept of "punishment," whether for the Excessive Fines Clause or the Double Jeopardy Clause.²³³

Halper established a general rule that the Double Jeopardy Clause applies to any type of civil sanction that does not solely serve remedial purposes.²³⁴ In dealing with civil penalties, Justice Stevens noted that, in addition to the above-stated general rule, *Halper* established the more narrow rule that a fixed penalty, which otherwise would serve remedial goals, could still punish a defendant if the amount of the penalty was disproportionate to the damage done.²³⁵ For a sanction that is not punitive in character, then, an accounting of the Government's damages and costs is necessary to determine whether it nevertheless is punitive in application.²³⁶ Thus, while the fine imposed on *Halper* was not by nature punitive, as applied to him, it amounted to

²²⁹ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁰ *Id.* at 2154-55 (Stevens, J., concurring in the judgment in part and dissenting in part). In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), for example, a case in which the Court applied the Fourth Amendment to a proceeding to forfeit an automobile used to transport illegally manufactured liquors, the Court unanimously stated that a forfeiture is quasi-criminal in character. And in *United States v. United States Coin & Currency*, 401 U.S. 715 (1971), the Court applied the Fifth Amendment Self-Incrimination Clause to a forfeiture proceeding under a statute that Justice Stevens described as "similar" to 21 U.S.C. § 881, and concluded that the form of the proceeding as either civil or criminal made no difference since the sanction was a penalty.

²³¹ *Ursery*, 116 S. Ct. at 2154-55 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³² *Id.* at 2155-56 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³³ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁴ *Id.* at 2156 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁵ *Id.* at 2156-57 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁶ *Id.* at 2157 (Stevens, J., concurring in the judgment in part and dissenting in part).

punishment.²³⁷

While *Austin* concerned civil forfeitures in the context of the Excessive Fines Clause of the Eighth Amendment, Justice Stevens stated that the Court applied *Halper's* general rule and held that since forfeitures of property under 21 U.S.C. § 881(a)(4) and (a)(7) can vary so dramatically, any relationship to the Government's actual costs is merely coincidental.²³⁸ Mere compensation to the Government for its costs cannot justify the statutory scheme.²³⁹ As such, sanctions under these statutes cannot be said solely to serve a remedial purpose, and therefore must be considered punishment under the *Halper* test.²⁴⁰ According to Justice Stevens, the majority missed the point of *Halper's* two rules by stating that they find it difficult to see how *Halper's* case-by-case approach applied to *Austin*.²⁴¹ Since the *Austin* Court determined that § 881(a)(4) and (a)(7) are punitive by design under the general rule, there was no need to also determine whether it had a punitive effect in application pursuant to the more narrow rule.²⁴² Thus, there was no need to resort to the "rare case" where an accounting of the Government's damages is necessary.²⁴³

Finally, in *Kurth Ranch*, the Court applied *Halper* to a third type of civil sanction, taxes.²⁴⁴ According to Justice Stevens, in applying *Halper's* categorical approach to a tax imposed on a defendant convicted of owning marijuana, the Court rejected each of the asserted remedial interests offered for the tax, reasoning therefore that the tax had a punitive character that rendered it punishment.²⁴⁵ *Kurth Ranch* thus followed the approach of *Austin*.²⁴⁶ Given *Austin* and *Kurth Ranch*, in Justice Stevens' view, the majority's claim that it is impossible to apply *Halper's* approach to forfeitures or taxes missed the point.²⁴⁷ To decide if a given forfeiture or tax is punitive, the Court need only examine each claimed remedial interest to determine whether the sanction actually promotes it.²⁴⁸ In addition, nothing prevents a court, even in the context of forfeitures, from deciding that although a sanction is designed to be remedial, as applied it is so extreme as to

²³⁷ *Id.* at 2156 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁸ *Id.* at 2156-57 (Stevens, J., concurring in the judgment in part and dissenting in part).

²³⁹ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁰ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴¹ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴² *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴³ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁴ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁵ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁶ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁷ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁴⁸ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

constitute punishment on a case-by-case basis.²⁴⁹

Justice Stevens noted that the Court unanimously decided in *Austin* that § 881(a)(4) and (a)(7) were punitive in nature, and thus, the majority now stood *Austin* on its head by concluding that § 881(a)(7) was remedial in character.²⁵⁰ Justice Stevens claimed that *Austin* preempted the Court's reasons for its conclusion.²⁵¹ First, the Court stated that the forfeiture of Ursery's home was remedial since it was an instrumentality of a drug crime, but *Austin* rejected the argument that a mobile home and body shop were "instruments" of drug trafficking simply because marijuana was sold out of them.²⁵² Second, the Court claimed that § 881(a)(7)'s deterrent utility shows its remedial character, but *Halper* expressly held, and *Austin* and *Kurth Ranch* confirmed, that a sanction that can only be explained as also serving either a retributive or deterrent purpose is punishment.²⁵³ Third, the Court declared the fact that Congress tied § 881(a)(7) to criminal activity to be insufficient to render it punitive, but *Austin* expressly relied upon that tie as evidence of its punitive nature.²⁵⁴ Finally, the Court asserted that § 881(a)(7) has no scienter requirement, whereas *Austin* expressly found that the "innocent owner" provision of the statute, which forced the Government to prove that any claimant to forfeited property was culpable, also lent to the punitive view of the statute.²⁵⁵

According to Justice Stevens, the majority continually relied on the idea that only in personam proceedings can give rise to double jeopardy concerns, but that the idea that a proceeding's label of in rem or in personam is dispositive runs directly contrary to *Halper*, *Austin*, and *Kurth Ranch*.²⁵⁶ In Justice Stevens' opinion, the distinction between in rem and in personam actions allowed the Court to argue that the owner of forfeited property is not being punished, just the property, making the double jeopardy question an easy one.²⁵⁷ This "sleight-of-hand," however, was specifically rejected in *Austin*.²⁵⁸

In Justice Stevens' view, even if the outcome of this case had not been settled by prior decisions, common sense dictated that there was

²⁴⁹ *Id.* at 2158 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁰ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵¹ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵² *Id.* at 2158-59 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵³ *Id.* at 2159 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁴ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁵ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁶ *Id.* at 2159-60 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁷ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁵⁸ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part).

no rational basis for characterizing the seizure of *Ursery's* home as anything other than punishment for his crime.²⁵⁹ The forfeiture simply had no correlation to any damages suffered by society or to the cost of enforcing the law.²⁶⁰

V. ANALYSIS²⁶¹

In light of *Halper*, *Austin*, and *Kurth Ranch*, the result in *Ursery* was more than a little surprising. One need look no further than the fact that the Court reversed both the Sixth and Ninth Circuit Courts of Appeal, which relied on the three previous Court rulings, for evidence of the unpredictability of the Court's decision. After declaring that a fixed civil penalty could violate the Double Jeopardy Clause in *Halper*, that a civil forfeiture statute could be punishment for purposes of the Excessive Fines Clause in *Austin*, and that a tax proceeding could violate the Double Jeopardy Clause in *Kurth Ranch*, the Court appeared poised to find civil forfeitures also constrained by the double jeopardy prohibition. While the majority correctly stated that none of those cases directly addressed the double jeopardy implications of an in rem civil forfeiture,²⁶² the logical extension of its own precedents should have led the Court to declare particular civil forfeitures "punishment"

²⁵⁹ *Id.* at 2161 (Stevens, J., concurring in the judgment in part and dissenting in part).

²⁶⁰ *Id.* (Stevens, J., concurring in the judgment in part and dissenting in part). In concluding his opinion, Justice Stevens briefly addressed three other arguments, not addressed by the majority, but advanced by the Government to support its position that § 881(a)(7) does not constitute double jeopardy. He first rejected the contention that the word "jeopardy" only refers to criminal proceedings, and that since the civil forfeiture preceded the criminal conviction, the criminal case was only the first "jeopardy." According to Justice Stevens, *Halper* and *Kurth Ranch* both rested on the assumption that the civil proceedings in which the second punishment was imposed was a "jeopardy" within the meaning of the Fifth Amendment. *Id.* (Stevens, J., concurring in the judgement in part and dissenting in part).

Justice Stevens next rejected the argument that the civil forfeiture and criminal proceeding in *Ursery* did not involve the same offense by noting that the elements the Government was required to prove to sustain a forfeiture of *Ursery's* home under § 881(a)(7) included each of the elements of his criminal conviction. Thus, the criminal charge was a lesser-included offense of the forfeiture, and the two proceedings did involve the same offense under the test of *Blockburger v. United States*, 284 U.S. 299 (1932). *Ursery*, 116 S. Ct. at 2161-62 (Stevens, J., concurring in the judgement in part and dissenting in part).

Finally, Justice Stevens simply dispensed with the Government's argument that the forfeiture and criminal conviction should be treated as the same proceeding, since both were commenced before either reached a final judgment, by stating that it is simply inaccurate to describe two separate proceedings as one. According to Justice Stevens, there is no procedural obstacle to including a punitive forfeiture in the final judgment of a criminal case.

²⁶¹ This analysis concerns only the case of *Ursery* from the Sixth Circuit. As all nine Justices agreed, the situation of *Arlt* and *Wren* from the Ninth Circuit was clearly not a case of a Double Jeopardy violation.

²⁶² *Ursery*, 116 S. Ct. at 2147.

for purposes of the Double Jeopardy Clause. The *Ursery* decision, however, finds the Court unwilling to so declare. Instead, the Court stated the opposite—that civil forfeitures generally are not “punishment” for double jeopardy purposes—and then fell back on the pre-*Halper* mode of analysis of *89 Firearms*. The refusal of the Court to extend the logic of its more recent trilogy of cases, and its reliance on the inadequate test of *89 Firearms*, was wrong, and leaves individuals without an important constitutional protection against the Government.

A. WHAT IS PUNISHMENT?

Notwithstanding the view of Justices Scalia and Thomas that the Double Jeopardy Clause only prohibits multiple prosecutions, not multiple punishments,²⁶³ the Court’s jurisprudence clearly establishes that the Government can only punish an individual once for an offense.²⁶⁴ With a criminal conviction already secured against *Ursery*, the Court addressed the question of whether the forfeiture of *Ursery*’s property was “punishment.”²⁶⁵ As Justice Stevens observed, determination of when a particular civil sanction is punishment was the Court’s explicit pursuit in *Halper*, *Austin*, and *Kurth Ranch*.²⁶⁶

While the majority correctly noted that neither *Halper* nor *Kurth Ranch* dealt directly with the double jeopardy implications of an in rem civil forfeiture, those cases represented a shift in the Court’s constitutional analysis of the Double Jeopardy Clause. In *Halper*, the Court declared for the first time that a fixed civil penalty, under certain circumstances, could be so punitive as to be prohibited by the Double Jeopardy Clause, and then established a test for determining when that prohibition would occur.²⁶⁷ A few years after *Halper*, the *Kurth Ranch* Court further extended the Double Jeopardy Clause’s reach to tax proceedings, finding that they too could be so punitive as to violate the Clause.²⁶⁸ At the very least, these two cases signaled a willingness on the part of the Court to extend the reach of the Double Jeopardy Clause to certain civil sanctions. According to the majority, however, the case-by-case test set forth in *Halper* is impossible to apply outside the context of a fixed civil-penalty provision, and a tax or civil penalty simply is not the same type of action as a civil forfeiture.²⁶⁹

²⁶³ *Id.* at 2152.

²⁶⁴ *See, e.g.*, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

²⁶⁵ *Ursery*, 116 S. Ct. at 2138.

²⁶⁶ *Id.* at 2156.

²⁶⁷ *United States v. Halper*, 490 U.S. 435 (1989).

²⁶⁸ *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994).

²⁶⁹ *Ursery*, 116 S. Ct. at 2145-46.

Accepting that the *Halper* and *Kurth Ranch* decisions were inapplicable, by themselves, to *Ursery* because they involved civil sanctions crucially different from civil forfeitures, however, the Court's decision in *Austin* further strengthens the impact of these cases.

In *Austin*, the Court considered the same 21 U.S.C. § 881(a)(7) provision that it did in *Ursery*, and asked the same critical question of whether civil forfeitures under that statute constituted "punishment."²⁷⁰ As the *Austin* Court stated, the purpose of the Excessive Fines Clause is to limit the government's power to punish.²⁷¹ Relying on the language and logic of *Halper*, the Court found that sanctions often serve more than one purpose, and that if a sanction serves in part to punish, it is subject to the limitations of the Excessive Fines Clause.²⁷² Thus, the pursuit for the *Austin* Court was to determine whether, at the time of the Eighth Amendment's ratification, forfeitures in general were understood at least in part as punishment, and whether forfeitures under § 881(a) were so understood in modern times.²⁷³ After reviewing the Court's history of finding that statutory in rem forfeitures impose punishment,²⁷⁴ the Court found nothing in the provisions or legislative history of § 881(a) to contradict this historical understanding.²⁷⁵ A mere three years before *Ursery*, then, the *Austin* Court categorically deemed forfeitures under § 881(a)(7) "punishment" for a given offense.²⁷⁶

In ruling *Austin* inapplicable, however, the *Ursery* majority stated that "[t]he holding of *Austin* was limited to the Excessive Fines Clause of the Eighth Amendment, and we decline to import the analysis of *Austin* into our double jeopardy jurisprudence."²⁷⁷ In the Court's view, forfeitures under § 881(a)(7) after *Austin* are subject to a test for excessiveness, but "this does not mean . . . that those forfeitures are so punitive as to constitute punishment for the purposes of double jeop-

²⁷⁰ *Austin v. United States*, 509 U.S. 602, 610 (1993).

²⁷¹ *Id.* at 609.

²⁷² *Id.*

²⁷³ *Id.* at 610-11.

²⁷⁴ *Id.* at 614-15.

²⁷⁵ *Id.* at 619. In fact, the Court noted that Congress explicitly found, when adding subsection (a)(7), that traditional criminal sanctions by themselves were inadequate to deter or punish those engaged in the drug trade. *Id.* at 620.

²⁷⁶ *Id.* at 622.

²⁷⁷ *United States v. Ursery*, 116 S. Ct. 2135, 2147 (1996). As the majority also stated earlier in the opinion:

[b]ut *Austin*, it must be remembered, did not involve the Double Jeopardy Clause at all. *Austin* was decided solely under the Excessive Fines Clause of the Eighth Amendment, a constitutional provision which we never have understood as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment.

Id. at 2146.

ardly.”²⁷⁸ The Court thus explained away *Austin* based on the questionable notion that calling § 881(a) punishment for purposes of the Excessive Fines Clause is entirely irrelevant for purposes of determining punishment under the Double Jeopardy Clause. According to the Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the designers of the Excessive Fines Clause intended to curb the Government’s prosecutorial power—its power to punish.²⁷⁹ In addition, the *Browning-Ferris* Court held that the drafters of the Eighth Amendment understood the word “fine” to mean a payment to a sovereign as *punishment* for some offense.²⁸⁰ Thus, before a civil sanction imposed by the Government is subject to the constraints of the Excessive Fines Clause, it would seem necessary that it first be considered punishment. This would indicate that the standard for excessiveness is higher than that for punishment, and that any given sanction could be “punishment” well before that punishment was “excessive.” At the very least, however, the *Austin* Court unequivocally determined § 881(a)’s punitive nature.

This determination is significant when combined with the central holding of *Halper*. While the Court declined to mix and match its analysis, the Court should have remained on the constitutional path begun in *Halper* and *Kurth Ranch*. The majority stated that *Halper*’s approach is practically difficult to apply to a civil forfeiture, for it is virtually impossible to quantify the non-punitive purposes served by civil forfeitures,²⁸¹ but this practical difficulty did not deter the *Austin* Court from undertaking that type of analysis and determining that § 881(a)(7) did not serve solely a remedial purpose.²⁸² While it is true that *Halper* dealt specifically with a fixed civil penalty provision, the Court clearly stated

that a civil *sanction* that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil *sanction* to the extent that the second sanction may not fairly be characterized as remedial.²⁸³

While certainly far from conclusive, given the language used by the Court, one could make the case that *Halper* anticipated a scope beyond the fixed penalties involved there. Civil forfeitures are a type of

²⁷⁸ *Id.* at 2147.

²⁷⁹ 492 U.S. 257, 266 (1989) (O’Connor, J., concurring in part and dissenting in part).

²⁸⁰ *Id.* at 265.

²⁸¹ *Ursery*, 116 S. Ct. at 2145.

²⁸² *Austin v. United States*, 509 U.S. 602, 619-22 (1993).

²⁸³ *United States v. Halper*, 490 U.S. 435, 448-49 (1989) (emphasis added).

civil sanction, and under *Austin*, § 881(a) is at least in part punitive.²⁸⁴ A partially punitive purpose is all that a *Halper* double jeopardy analysis requires.

While the Court technically did not overrule *Halper*, *Austin*, and *Kurth Ranch*, in artificially confining them to their narrow holdings, the Court abandoned the approach to punishment it had adopted in those cases. Logically, the holdings of *Halper* and *Austin* extend to *Ursery*. Having refused to take the logical next step, however, the Court stated the broad proposition that civil forfeitures do not constitute punishment for double jeopardy purposes, then reverted to the test of *89 Firearms*. Explaining the apparent inconsistency of stating a general immunity of civil forfeitures from double jeopardy analysis, and then subjecting the forfeiture at issue to the test of *89 Firearms*, the Court stated in a footnote that a forfeiture designated as "civil" actually only establishes a presumption that it is not subject to double jeopardy.²⁸⁵ Under *89 Firearms*, a purportedly civil forfeiture does not automatically preclude analysis under the Double Jeopardy Clause, and is not per se exempt from its prohibition. When the "clearest proof" indicates that an in rem civil forfeiture is "so punitive either in purpose or effect" as to be the equivalent of a criminal proceeding, then double jeopardy applies.²⁸⁶ In other words, according to the Court, civil forfeitures cannot be "punishment" for double jeopardy purposes unless they are extremely punitive. With civil forfeitures, as opposed to other types of civil sanctions, the Court apparently felt that the Double Jeopardy Clause's prohibition against multiple punishments does not apply unless the "punishment" is severe enough.

At its most basic, then, the Court did hold that civil forfeitures can be "punishment" for Double Jeopardy Clause purposes, but only when the punishment reaches a degree whereby the forfeiture proceeding must be "criminal." Thus, the question is not whether civil forfeitures can be "punishment," but rather how severely punitive the forfeitures must be before barred by the Double Jeopardy Clause. The problem with the *89 Firearms* test is knowing what is "so punitive" as to be essentially criminal in character. Notwithstanding the "clearest proof" standard, this test is necessarily imprecise, a quality the Court desired to avoid in not extending the *Halper* analysis to civil forfeitures. In essence, the Court's opinion leaves unanswered the question of what is "punishment" under the Double Jeopardy Clause,

²⁸⁴ The *Austin* Court specifically noted that Congress designed § 881(a)(7) to deter and punish. *Austin*, 509 U.S. at 620.

²⁸⁵ *Ursery*, 116 S. Ct. at 2148 n.3.

²⁸⁶ *Id.* (quoting *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984)).

and uncertainty remains under the *89 Firearms* test.

To illustrate the inherent problem with the test, even were one to accept the correctness of analyzing *Ursery* under *89 Firearms*, the Court arguably still concluded the question incorrectly in light of the Court's previous conclusions about § 881(a). In considering the first prong of *89 Firearms*' two-part test, the Court concluded that Congress intended proceedings under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a) to be civil.²⁸⁷ Under the second prong of the test, however, taken as a whole, the punitive purpose and effect of § 881(a) satisfies the "clearest proof" standard. In *Austin*, the Court declared § 881(a) to be outright punitive.²⁸⁸ In fact, the Court rejected the government's contentions that forfeitures under § 881(a) were remedial rather than punitive.²⁸⁹ In the end, the *Austin* Court deviated from the position that the provisions of § 881(a) are punitive only to assume that even if the statute serves some remedial goals, it is still punishment under the *Halper* test.²⁹⁰ Thus, from *Austin*'s analysis of the statute, § 881(a) satisfies the second prong of *89 Firearms*. The Court conducted a new analysis, however, and decided that there was "little evidence" that forfeiture proceedings under the statute meet the "so punitive either in purpose or effect" standard.²⁹¹ In so holding, the Court declared that the statutes involved were indistinguishable, in most respects, from those held not to be punitive in *Various Items*, *Emerald Cut Stones*, and *89 Firearms*.²⁹² Nowhere, however, did the Court acknowledge that *Austin* already completed a similar analysis on § 881(a)(7).

B. THE NEED FOR A NEW TEST

From the viewpoint of precedent, the *Ursery* Court should have followed the pattern established by *Halper*, *Austin*, and *Kurth Ranch* of expanding double jeopardy protection to civil sanctions, even were it not inclined to follow the exact test laid down in *Halper*. Accepting that this trilogy of cases is conceptually distinct from *Ursery*, though, by falling back on *89 Firearms*, the Court mistakenly passed on the opportunity to improve the test articulated in that case. In particular, a major problem with the *89 Firearms* test is that it only looks at the statute

²⁸⁷ *Id.* at 2147.

²⁸⁸ *Austin*, 509 U.S. at 620.

²⁸⁹ *Id.* at 620-21. The government argued that the statute is remedial in two respects: 1) it protects the community from the threat of drug dealing by removing the "instruments" of the drug trade; and 2) it serves to compensate the government for law enforcement activities and other social expenditures associated with drug use and trade.

²⁹⁰ *Id.* at 621-22.

²⁹¹ *Ursery*, 116 S. Ct. at 2148.

²⁹² *Id.*

as a whole, not as applied in an individual case. Thus, as a result of the Court's holding in *Ursery*, the Double Jeopardy Clause could never prohibit a forfeiture pursuant to § 881(a)(7), regardless of what the Government seeks to forfeit.

Despite the undoubted usefulness of forfeiture proceedings as a tool of law enforcement,²⁹³ there exists great possibility for abuse. In *Ursery*'s case, the Government originally sought forfeiture of his house on the basis of its use in the processing and distribution of a controlled substance.²⁹⁴ Ultimately, *Ursery* settled the forfeiture claim through payment to the Government of \$13,250. While *Ursery*'s forfeiture was not unduly severe, under the Court's holding, nothing forfeited to the Government pursuant to § 881(a)(7) in any case would be either, no matter how ridiculously out of line with the offense actually committed. By approaching a civil forfeiture statute under the *89 Firearms* test, unencumbered by the circumstances of its application in a particular case, the Court is potentially withholding an important constitutional protection from individuals in many sympathetic instances. A modified version of the test that takes into account the aspects of a forfeiture statute as applied in an individual case would better serve any notions of justice the Double Jeopardy Clause seeks to protect.

In the final analysis, however, the holding of *Ursery* does not necessarily spell certain disaster for individual liberties. First and foremost is the fact that the Government can utilize civil forfeiture statutes in conjunction with a criminal prosecution anyway, so long as it brings the two actions in the same proceeding.²⁹⁵ Moreover, regardless of the wisdom of the Court's holding, the case did not in fact reverse any precedent, and the majority correctly stated that, historically, the Double Jeopardy Clause has never prohibited civil forfeitures.²⁹⁶

In addition, while the Double Jeopardy Clause of the Fifth Amendment is a key aspect of the individual liberty guarantees of the Bill of Rights, civil forfeitures deal directly with individual's rights in property, and property rights are arguably less crucial than other rights specified. The text of the Fifth Amendment itself allows the argument that the Framers did not intend to cover civil forfeitures when enacting the Double Jeopardy Clause, for there is no mention of property rights in the clause as there is in other basic rights provisions.

²⁹³ See STEVEN L. KESSLER, CIVIL AND CRIMINAL FORFEITURE, § 3.01[2][h] (1995). For example, by using civil forfeitures, law enforcement authorities benefit from a lesser burden of proof.

²⁹⁴ *Ursery*, 116 S. Ct. at 2139.

²⁹⁵ *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994).

²⁹⁶ *Ursery*, 116 S. Ct. at 2140.

For example, the Due Process Clause of the same Fifth Amendment specifically states that no one shall be deprived of "life, liberty, or property, without due process of law."²⁹⁷ In contrast, the Framers of the Bill of Rights only mention "life or limb" in the Double Jeopardy Clause in stating what the Government cannot twice put in jeopardy.²⁹⁸ Thus, the text of the clause itself might help explain the traditional reluctance of the Court to subject civil forfeitures to double jeopardy analysis.

Finally, as Justice Scalia stated in *Kurth Ranch*, other Bill of Rights provisions protect against civil forfeitures that are arguably punishment.²⁹⁹ The Cruel and Unusual Punishments Clause of the Eighth Amendment restricts the nature of a punishment, and the Excessive Fines Clause of the same amendment controls the cumulative extent of punishment.³⁰⁰ In addition, the Due Process Clause of the Fifth Amendment serves to guarantee that a civil forfeiture is authorized by the legislature.³⁰¹

VI. CONCLUSION

The Court in *Ursery* had the opportunity to fashion a new test that extends double jeopardy protection to in rem civil forfeitures. While the Court recently applied such protection to other civil sanctions such as monetary penalties and taxes, it surprisingly and mistakenly chose not to follow the logic of its precedents. At the very least, if not specifically inclined to follow the analysis of *Halper* and *Kurth Ranch*, the Court should have developed some sort of test that considers the applicability of the Double Jeopardy Clause to civil forfeitures as applied on an individual basis. Instead, in reaffirming the test of *89 Firearms* that only looks at a civil forfeiture statute as a whole, for all practical purposes, double jeopardy protection remains unavailable to persons subjected to civil forfeitures sought by the Government. Civil forfeitures are an important law enforcement weapon utilized in the war on drugs, and the particular use of that weapon against *Ursery* was certainly far from unduly severe. The Court's holding, however, was unnecessarily broad and potentially exposes future individuals to unjust punishments that fall outside the protective terms of the Double Jeopardy Clause.

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²⁹⁷ U.S. Const. amend V.

²⁹⁸ *Id.*

²⁹⁹ *Kurth Ranch*, 114 S. Ct. at 1959 (Scalia, J., dissenting).

³⁰⁰ *Id.*

³⁰¹ *Id.*