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Comment

Civil Forfeiture Hits Home: A Critical Analysis of United States v. Lot 5, Fox Grove

Alejandro Caffarelli

It makes sense to scrutinize governmental action more closely when the State stands to benefit.¹

In April 1992, the United States filed a forfeiture complaint against the home of Savanah Wims² under the federal civil drug-related forfeiture statute.³ The government alleged that her house was being used to facilitate drug transactions.⁴ Government evidence established probable cause⁵ necessary to forfeit the house.⁶ Wims responded that the Florida Constitution exempted her home from forfeiture.⁷ In United States v. Lot 5,

2. United States v. Lot 5, Fox Grove, 23 F.3d 359, 360 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). Because civil forfeitures are in rem actions, the government must file the complaint against the “offending property.” See infra note 31 (discussing the in rem nature of civil forfeitures).
   (a) Subject Property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:
   
   (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.

Note the “innocent owner” provision; spouses have used this provision successfully to retain their interest in forfeited property. United States v. 2525 Leroy Lane, 910 F.2d 343, 347 (6th Cir. 1990), cert. denied, 111 S. Ct. 1414 (1991); United States v. 15621 S.W. 209th Ave., 894 F.2d 1511 (11th Cir. 1990).

4. Lot 5, 23 F.3d at 360-61.
5. See infra note 33 (discussing the probable cause standard).
7. Id. at 361.
Fox Grove\(^8\) ("Lot 5"), the Eleventh Circuit became the first federal appellate court to decide whether a state constitutional provision protecting homesteads precludes federal civil drug-related forfeitures.\(^9\) The court ultimately dismissed Wims's argument, holding that federal forfeiture law preempts state homestead protection.\(^10\)

Several federal claimants\(^11\) preceding Wims have used the homestead defense without success.\(^12\) The claimants argued that state legislatures have traditionally protected homesteads from forfeiture,\(^13\) and that this protection extended to their homes notwithstanding the federal forfeiture law.\(^14\) The courts, however, responded that Congress intentionally destroyed state homestead protections, because the federal civil drug-related forfeiture statute constitutes part of a long line of congressional anti-drug measures designed to increase prosecutorial strength.\(^15\)

\(^8\) 23 F.3d 369 (11th Cir. 1994).

\(^9\) One other appellate court has decided the homestead exemption issue under a state statute. United States v. Curtis, 965 F.2d 610 (8th Cir. 1992).

\(^10\) Lot 5, 23 F.3d at 363.

\(^11\) In forfeiture actions, the court refers to the property owner as a "claimant," not a defendant, because the action is against the property itself. Id. at 360.


\(^13\) State courts commonly protect homesteads from forfeiture under state forfeiture statutes. See infra note 72 and accompanying text (explaining state court protection of homesteads from similar state drug-related forfeiture laws).

\(^14\) Federal bankruptcy courts have protected homesteads in bankruptcy cases. See, e.g., In re Johnson, 880 F.2d 78, 82-83 (8th Cir. 1989) (relying on state law to determine whether to protect a homestead from forfeiture); In re Hersch, 23 B.R. 42, 44-45 (Bankr. M.D. Fla. 1982) (same).


\(^15\) Since the late 1970s, Congress and other branches of the federal government have consistently increased prosecutorial power to fight the war on drugs. See, e.g., Eric Schlosser, Reefer Madness: Why Is It That Today, When We Don't Have Enough Jail Cells for Violent Criminals, There May Be More
This Comment contends that the real property provision of the federal civil drug related forfeiture statute does not completely destroy state homestead protections. Part I details traditional preemption jurisprudence and congressional adoption of the Comprehensive Crime Control Act of 1984. Part I also describes the rationale and history behind state homestead protection. Part II describes the Eleventh Circuit's holding in Lot 5. Part III contends that the Lot 5 court failed to apply properly the preemption doctrine and concludes that states, through constitutional or statutory means, should determine the extent of homestead protection. This Comment proposes that federal courts honor the traditional role that individual states have in homestead protection by shifting the burdens at trial. Specifically, when the government files a claim against a state-exempted homestead, it should bear the burden of proving by a preponderance of the evidence that the property is subject to forfeiture under the federal drug forfeiture statute.

I. FEDERAL SUPREMACY, STATE SOVEREIGNTY, AND THE SCOPE OF THE FEDERAL CIVIL DRUG-RELATED FORFEITURE STATUTE

When Congress enacted the civil drug-related forfeiture statute, 21 U.S.C. § 881 ("Forfeiture Statute"), as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, it gave prosecutors the power to seize drug-related property. In 1984, Congress amended the Forfeiture Statute with

People in Prison for Marijuana Offenses Than Ever Before?, S.F. CHRON., Aug. 28, 1994, at 7 (noting the zeal with which Congress has increased prosecutorial strength); Has the GOP Gone Soft on Crime?, PLAIN DEALER (Cleveland), May 23, 1992, at 4C (same).

Courts have also recognized Congress's strong dislike of the drug trade. See, e.g., United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501 (1993) (noting that Congress intended the drug forfeiture statute to be a powerful tool against the drug trade); United States v. Accounts Nos. 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith, Inc., 971 F.2d 974, 976 (3d Cir. 1992) (noting that Congress intended federal forfeiture under money laundering statute to increase prosecutorial strength).

16. 21 U.S.C. § 881(a)(7). For the statutory text, see supra note 3. For a discussion of the statute's development and forfeiture in general, see infra part I.A.

17. See infra part I.C (discussing the nature and scope of state homestead protection laws).

the Comprehensive Crime Control Act, which, among other things, included real property among the assets liable under the statute.

A. FEDERAL CIVIL DRUG-RELATED FORFEITURE: A NEW WEAPON FOR THE WAR ON DRUGS

The first civil forfeiture statute came into being more than a century ago, but only recently did Congress decide to use civil forfeiture to combat criminal activity. In the mid-1980s, drug abuse and the violence associated with it became a major national issue. As a result, the government implemented an aggressive campaign against illegal drug use and trade known as the "drug war." Despite criticism that fighting drug abuse was a misguided attempt to remedy underlying social problems, the media and the law enforcement community con-
continued to perceive drugs as the root cause of violence and criminal activity.\textsuperscript{27} In response to public and political pressure, Congress looked for a strong weapon with which to fight the drug war. That weapon was forfeiture.\textsuperscript{28}

Forfeitures generally fall into two categories: civil and criminal.\textsuperscript{29} Criminal forfeitures depend entirely on the trial and conviction of the property owner.\textsuperscript{30} Civil forfeitures, however, are actions against the property, wholly unaffected by the property owner's criminality.

\textsuperscript{27} CAMPAIGNS ABOUT DRUGS, supra note 24, at 1 (describing how the government and media created the war on drugs); SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 58, 413-14 (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (arguing that legalization would actually help drug addicts and that drug abuse may actually be higher than it would be without prohibition); cf. John a. powell & Eileen B. Hershonov, Hostage to the Drug War: The National Purse, the Constitution and the Black Community, 24 U.C. DAVIS L. REV. 557 (1991) (pointing to the failure of the war on drugs and its ill effects in the black community).

\textsuperscript{28} A Senate report best explained the purpose of forfeiture:

Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

\textsuperscript{29} 1 KESSLER, supra note 23, \S 1.04. The terms “civil” and “criminal” do not necessarily indicate the nature of the forfeiture. Even though the word “civil” is placed on some forfeiture statutes, they are in reality “quasi-criminal” in that they have just as much punitive effect as criminal forfeitures. Id.

The Supreme Court recognized the criminal aspect of civil forfeitures as early as 1886. Boyd v. United States, 116 U.S. 616, 633-34 (1886) (“We are also clearly of [the] opinion that proceedings instituted for the purpose of declaring the forfeiture of a [person’s] property by reason of offenses committed by [that person], though they may be civil in form, are in their nature criminal.”).


In criminal in personam actions, courts provide defendants with a variety of constitutional protections ranging from the Excessive Fines Clause to the Due Process and Double Jeopardy Clauses. United States v. Two A-37 Cessna Jets, No. 90-CV-0852E, 1994 WL 167998, at *3 (W.D.N.Y. Apr. 20, 1994) (stat-
property owner's guilt or innocence.\textsuperscript{31} The two types of actions differ most significantly in the burden of proof that each places on the property owner. In a criminal forfeiture, the property owner has no burden; the government must prove beyond a reasonable doubt that the property and its owner were involved in the illegal activity.\textsuperscript{32} In a civil forfeiture, however, the government need only establish probable cause\textsuperscript{33} linking the property to an

\textsuperscript{31} The Palmyra, 25 U.S. (12 Wheat.) 1, 15 (1827) ("[T]he practice has been, and so this Court understand [sic] the law to be, that the proceeding \textit{in rem} stands independent of, and wholly unaffected by any criminal proceeding \textit{in personam}."); United States v. $152,160 U.S. Currency, 680 F. Supp. 354, 356 (D. Colo. 1988) ("A civil forfeiture proceeding is an \textit{in rem} action that proceeds on the legal fiction that the property itself is guilty of wrongdoing."); 1 KESSLER, supra note 23, § 1.04 ("Civil forfeiture statutes authorize actions which have as their object the ‘offending’ property, not individuals.") (citing United States v. One Mercedes Benz 380 SEL, 604 F. Supp. 1307 (S.D.N.Y. 1984), aff'd, 762 F.2d 991 (2d Cir. 1985)). "In rem" is "[a] technical term used to designate proceedings or actions \textit{against the thing}, in contradiction to personal actions, which are said to be \textit{in personam}." BLACK'S LAW DICTIONARY, supra note 30, at 793.

\textsuperscript{32} United States v. Monsato, 852 F.2d 1400, 1412 n.1 (2d Cir. 1988) (Mahaney, J., dissenting) ("[T]he requirement of proof beyond a reasonable doubt as to the forfeitability of assets is the majority rule."), rev'd on other grounds, 491 U.S. 600 (1989); United States v. Nichols, 841 F.2d 1485, 1500 (10th Cir. 1988) (applying the same burden of proof to a forfeiture under the federal criminal forfeiture statute as the court would in any other criminal action); United States v. Dunn, 802 F.2d 646, 647 (2d Cir. 1986) (stating that criminal forfeitures require proof beyond a reasonable doubt as opposed to proof by a preponderance of the evidence).

Nonetheless, some circuits consider criminal forfeitures to be an element of the punishment rather than a separate offense, and follow the preponderance of the evidence standard. United States v. Elgersma, 971 F.2d 690, 694 (11th Cir. 1992) (en banc) (holding that criminal forfeiture under the criminal forfeiture statute, 21 U.S.C. § 853, is part of the punishment and consequently the government must only prove its case by a preponderance of the evidence); United States v. Hernandez-Escarsega, 886 F.2d 1560, 1576 (9th Cir. 1989) (same), cert. denied, 497 U.S. 1003 (1990); United States v. Sandini, 816 F.2d 869, 874-76 (3d Cir. 1987) (same).

\textsuperscript{33} The probable cause standard is the same in criminal cases and civil forfeitures. Compare United States v. Riemer, 392 F. Supp. 1291, 1294 (S.D. Ohio 1975) (defining probable cause as a set of probabilities grounded in the factual and practical considerations that govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction) with United States v. $22,287 in U.S. Currency, 709 F.2d 442, 446-47 (6th Cir. 1983) (using same definition of probable cause in a civil forfeiture action) and United States v. One 1978 Chevrolet Impala, 614 F.2d 983, 984 (5th Cir. 1980) (per curiam) (same).

Law enforcement agencies are typically held to the probable cause standard when deciding whether to make an arrest. To convict, however, the government must prove its case "beyond a reasonable doubt." In re Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be estab-
illegal use.\textsuperscript{34} The property owner must then prove by a preponderance of the evidence that the property is not subject to forfeiture.\textsuperscript{35}

In addition to the lower burden of proof, civil forfeiture provides the government with many tactical advantages otherwise unavailable in a criminal proceeding. For example, the government may use hearsay evidence and a wider range of civil discovery procedures in a civil forfeiture hearing.\textsuperscript{36} Courts may also draw negative inferences if claimants choose not to speak in their defense.\textsuperscript{37} Concerned with a need for fairness in civil forfeiture proceedings,\textsuperscript{38} the Supreme Court has traditionally con-

\begin{footnotesize}
\textsuperscript{34} E.g., $22,287, 709 F.2d at 446-47 (finding government had established probable cause to believe defendant was storing heroin at his home); 1978 Chevrolet Impala, 614 F.2d at 984 (finding only issue on appeal was whether government had established probable cause that property was used for drug activities); United States v. 2306 N. Eiffel Court, 602 F. Supp. 307, 308 (N.D. Ga. 1985) (finding government established house purchased with proceeds traceable to drug sales and thus forfeitable).

\textsuperscript{35} One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759, 761 (8th Cir. 1986) (shifting burden); accord United States v. 900 Rio Vista Blvd., 803 F.2d 625, 629 (11th Cir. 1986); United States v. $84,000 in U.S. Currency, 717 F.2d 1090, 1101 (7th Cir. 1983), cert. denied, 469 U.S. 836 (1984); $22,287, 709 F.2d at 446.

\textsuperscript{36} 1 KESSLER, supra note 23, § 1.04.

\textsuperscript{37} In a criminal case, defendants may exercise their Fifth Amendment right against self-incrimination, and the court can not use their silence against them. United States v. Robinson, 485 U.S. 25, 30-32 (1988); Lakeside v. Oregon, 435 U.S. 333, 336-38 (1978); Bruno v. United States, 308 U.S. 287, 292-93 (1939). In a civil forfeiture, however, courts may draw adverse inferences when a claimant remains silent. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that the Fifth Amendment does not bar adverse inferences against claimants in civil actions who do not testify in response to the prosecutor’s evidence). This puts claimants who are also facing a criminal trial in the difficult situation of having to choose whether to waive their Fifth Amendment rights and risk making inculpating statements, or exercise them and risk losing their property in the civil forfeiture. In Lot 5, 23 F.3d 359, 361 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995), Savannah Wims faced a similar dilemma because the government threatened possible criminal drug charges. Infra note 87.

strued civil forfeiture statutes narrowly to avoid harming the constitutional rights of claimants. 39

Although government use of civil forfeiture has expanded greatly in the last two decades, three recent Supreme Court cases significantly limit the Forfeiture Statute. In United States v. 92 Buena Vista Avenue, 40 the Court defined "innocent owners" 41 under the Forfeiture Statute as all owners, without limitations or qualifications, not just bona fide purchasers for value. 42 In Austin v. United States, 43 the Court held that forfeitures constitute monetary punishments subject to the Eighth Amendment's excessive fines clause. 44 Finally, in United States


The recent Supreme Court decision of United States v. Halper, 490 U.S. 435 (1989), highlights one of the problems that arise when civil forfeitures become punitive. In Halper, the Court barred a civil penalty under the Double Jeopardy Clause of the Constitution, claiming that it constituted an illegal "second punishment." Id. at 441-46. Other claimants have been able to successfully challenge civil forfeitures under the Double Jeopardy Clause as well. See, e.g., United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1222 (9th Cir. 1994) (finding civil forfeiture penalty did not serve solely remedial function and therefore constituted an unconstitutional second punishment).

40. 113 S. Ct. 1126 (1993) (plurality opinion). Joseph Brenner, a drug trafficker, gave his girlfriend approximately $240,000 in drug proceeds in order to buy a home. Id. at 1130. The girlfriend and her children were the only occupants, and she was the sole owner of the house. Id. The government then sought forfeiture of the house pursuant to 21 U.S.C. § 881(a)(6). The Court held that the "innocent owner" defense applied to the girlfriend even though she was not a bona fide purchaser for value. Id. at 1138.

41. See supra note 3 (identifying the "innocent owner" provision of the Forfeiture Statute).

42. 113 S. Ct. at 1138.

43. 113 S. Ct. 2801 (1993). Richard Austin met with an undercover police officer at his auto body shop in South Dakota. Id. at 2803. Austin agreed to sell cocaine to the officer, left his shop, went to his mobile home, and returned to the shop. He then sold two grams of cocaine to the officer for about $200. Id. A search of the shop and the mobile home produced small amounts of marijuana and cocaine, a revolver, drug paraphernalia, and $4700 in cash. Id. A jury convicted Austin of possession with intent to distribute and the court sentenced him to seven years imprisonment. The government subsequently sought forfeiture of his body shop and mobile home. Id.

44. The Court did not allow forfeiture of the mobile home and body shop. The Court reasoned that 21 U.S.C. § 881(a)(4), (7) was punitive in nature because it provided for an "innocent owner" defense. Id. at 2809. Thus, in this
v. James Daniel Good Real Property, the Court ruled that ex parte civil forfeiture violated the claimant’s due process rights. With James Daniel Good, the Supreme Court effectively destroyed the “guilty property” fiction by highlighting the direct consequences that forfeitures have on individual property owners.

B. THE CHANGING FACE OF FEDERAL PREEMPTION

The Forfeiture Statute derives its power from the Supremacy Clause of the United States Constitution, which provides the basis for federal preemption of state laws. From its earliest decisions on the scope of preemption, the Supreme Court did not allow forfeiture on the basis that it would violate the “excessive fines” clause of the Eighth Amendment. Id. at 2810.

45. 114 S. Ct. 492 (1993). Authorities sought an in rem forfeiture of James Good’s home without notice several years after his conviction for the underlying offense. Id. at 497. Despite the lapse in time, the forfeiture fell within the five year statutory limitations period. Id.

46. The Supreme Court held that the seizure violated the Due Process Clause. The government must give owners notice and a meaningful opportunity to be heard in order to satisfy constitutional due process requirements. Id. at 501-02. The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution assure substantive and procedural fairness. Id. at 497-98.

47. See supra note 31 (discussing in rem proceedings and the “guilty property” fiction).

48. U.S. Const. art. VI, cl. 2. The Supremacy Clause of the United States Constitution gives federal laws the power to preempt state laws. The text reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding.


Commentators generally regard Gibbons to be the first significant Supremacy Clause decision. See MAURICE G. BAXTER, THE STEAMBOAT MONOPOLY: GIBBONS V. OGDEN, 1824 (1972); FREDERICK D. GOODWIN RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY ch. 15 (1937); Thomas P. Campbell,
Court has made it clear that where there is a “direct collision” between state and federal law, federal law prevails.\textsuperscript{51} Courts have defined “direct collisions” narrowly, limiting them to instances in which it is impossible to comply with both the federal and state laws.\textsuperscript{52} Where the statutory language does not explicitly delineate the scope of a federal law, courts must infer the extent to which Congress intended to preempt any relevant state law.\textsuperscript{53} Courts often infer Congress’s intent by using their own judgment and interpreting the statute’s legislative history.\textsuperscript{54}


\textsuperscript{52} In the words of Chief Justice Marshall: “Should this collision exist . . . the acts of New York must yield to the law of congress . . . .” Gibbons, 22 U.S. (9 Wheat.) at 210. Three years later, Chief Justice Marshall reinforced that notion. “When [a collision between state and federal law] happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things.” Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448 (1827).

\textsuperscript{53} Where there is a direct collision, courts do not need to consider congressional intent. See, e.g., Rose v. Arkansas State Police, 479 U.S. 1 (1986) (holding state law reducing state workers’ compensation liability for any federal benefits received was in direct conflict with federal Death Benefits Act providing compensation “in addition” to benefits from any other source); Southland Corp. v. Keating 465 U.S. 1 (1984) (holding that federal Arbitration Act preempts state law nullifying arbitration clauses); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (finding preemption analysis “requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility”).


Relatively few Supremacy Clause cases involve direct conflicts of law. For the most part, courts have had to determine when and to what extent federal agencies have acted within the scope of congressional intent. Starr et al., supra note 49, at 14-15.

Courts have developed three traditional doctrinal approaches to discern legislative intent in inferred preemption cases: occupation of the field, obstacle, and administrative. Preemption by occupation of the field occurs when Congress legislates in a particular area so thoroughly that any state regulation in that particular field is presumptively void. The courts apply obstacle preemption when state law stands as an obstacle to the full purposes and objectives of Congress, even though the federal law may not "occupy the field." Obstacle preemption differs from direct conflict preemption in that the state law need only unduly burden the purpose behind federal law without facially contradicting it. Finally, administrative agencies may preempt state law with administrative rulings.

55. See Starr et al., supra note 49, at 34-39 (discussing the failure of such approach to harmonize the Court's requirements of clear legislative intent to preempt).

56. The classic "occupation of the field" case is Rice, 331 U.S. 218. In Rice, the Court held that because federal agencies licensed grain warehouses, the states could not regulate them. Id. at 234-36. The Court pointed out that federal regulation of grain warehouses was "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Id. at 230.

Federal law most often "occupies the field" when it involves an issue of peculiar federal interest such as immigration or international relations. For example, foreign affairs and the regulation of aliens are areas of particular federal interest. See Hines, 312 U.S. at 52. In Hines, the court struck down the Pennsylvania Alien Registration Act of 1940, which required aliens to register with state authorities by holding that the legislation affected international relations and thus "demand[ed] broad national authority." Id. at 68. The court effectively held that where the federal government has a strong sovereign interest, state law could not even complement federal law. Id. at 66-67.

57. International Paper Co., 479 U.S. at 493. In International Paper Co., Vermont property owners filed a state law claim against a New York paper mill that was discharging pollutants into a lake bordered by both states. Id. at 483-84. The Court held their claims invalid, because Congress had intended "to establish an all-encompassing program of water pollution regulation." Id. at 492 (quoting Milwaukee v. Illinois, 451 U.S. 304, 318 (1981)).

58. Id. at 492.

59. Administrative agencies may preempt state and local laws pursuant to official and legitimate duties "unless it appears from the statute [that created the agency] or its legislative history [that the preemption] is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 383 (1961).

Notwithstanding formal preemption doctrine, the Supreme Court has often shifted the balance of power between the states and federal government. Commentators generally divide the Supreme Court's shifting perspective on the preemption doctrine into the following four phases:

First, early in this century, the Court's analysis was merely limited to discerning whether state law fell within a field of congressional regulation. Second, during roughly the 1930s, the Court focused on whether there was a congressional purpose or intent to displace state law. Dur-
In recent years, the Supreme Court created an alternative to the traditional preemption doctrines: the clear statement rule. The Court announced the clear statement rule in *Gregory v. Ashcroft*, holding that courts must find a clear congressional mandate whenever federal legislation "intrudes on traditional state authority." The area of traditional state authority in *Ashcroft* was the election and regulation of state officials.

One year after *Ashcroft*, the Court added state police powers to the areas of "traditional state authority" subject to the clear statement rule. In *Cipollone v. Liggett Group, Inc.*, the Court recognized direct conflict preemption, that when state law di-

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Preemption cases have once again become a volatile issue. "Compared to twenty years ago, the number of preemption cases on the Supreme Court's docket has increased by a factor of four." STARR ET AL., supra note 49, at 1.

60. 501 U.S. 452 (1991). In *Ashcroft*, Missouri state judges brought an action against the governor challenging the mandatory retirement provision in the state Constitution. The judges based their cause of action under the Federal Age Discrimination in Employment Act of 1967 (ADEA). *Id.* at 455-56. Using traditional notions of federalism, the Supreme Court held, among other things, that the federal government did not have the power to regulate Missouri's governmental functions. *Id.* at 471-72. The Court defined those functions as areas of traditional state interest. *Id.* at 471-72.

61. *Id.* at 468. The Court relied on Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981), to assert that Congress must state its intent clearly before courts will enforce the Fourteenth Amendment in a way that might intrude upon traditional state authority. *Id.*

More recent decisions have limited the areas of "traditional state authority" to laws that "impact a state's self-identification as a sovereignty." Reich v. New York, 5 F.3d 681, 689-90 (2d Cir. 1993) (refusing to interpret *Ashcroft* to resurrect undue deference to state's political decisions), *cert. denied*, 114 S. Ct. 1187 (1994); EEOC v. Massachusetts, 987 F.2d 64, 69 (1st Cir. 1993) (stating that *Ashcroft* made "unequivocally clear . . . the narrowness of its holding").

62. 112 S. Ct. 2608 (1992). In *Cipollone*, Rose and Antonio Cipollone alleged in federal court that Mrs. Cipollone developed lung cancer by smoking cigarettes made by three cigarette manufacturers, including Liggett Group, Inc. *Id.* at 2613-14. At issue in the case was whether the Federal Cigarette Labeling Act preempted Cipollone's state common-law claims. *Id.* at 2614. The Supreme Court held that it did not. *Id.* at 2625.
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rectly conflicts with federal law it is “without effect.” Yet, with respect to inferred preemption, the Court stated that any preemption analysis begins with the presumption that federal laws do not supersede “historic [state] police powers... unless that [is] the clear and manifest purpose of Congress.” Rather than construing federal law in the broadest manner possible, the Court sought to “identify the domain” of state law that Congress intended to preempt.

The courts are not alone in advocating the clear statement rule. Both the U.S. Advisory Commission on Intergovernmental Relations and an American Bar Association task force recently recommended adopting a broad and powerful version of the rule. In response, the Supreme Court further refined the clear statement rule in BFP v. Resolution Trust Corp. The BFP Court classified the regulation of real estate as an “essential state interest” that federal statutes could not preempt absent a clear congressional mandate. The Court noted that the security of real estate titles and the power to regulate and control that security “inheres in the very nature of [state] government.”

63. Id. at 2617 (quoting Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).
64. Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
65. Id. at 2618.
66. STARR ET AL., supra note 49, at 55-56; U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, supra note 54, at 2. Congress created the U.S. Advisory Commission on Intergovernmental Relations in 1959 to monitor the operation of the American federal system and to recommend improvements. Id. at 88. It is an independent and bipartisan body composed of 26 members: nine representing the federal government; 14 representing state and local government; and three representing the general public. Id.
67. 114 S. Ct. 1757 (1994) (5-4 decision). In BFP, a Chapter 11 debtor brought a fraudulent transfer claim on the theory that the price received at the federal foreclosure sale was less than the “reasonably equivalent value” of the property as mandated by 11 U.S.C. § 548(a)(2). Id. at 1759-60. The majority opinion held that the foreclosure sale price conclusively established a “reasonably equivalent value” for the property, as long as the state’s foreclosure laws were met. Id. at 1764. The Court added that in order to preempt a traditional state regulation, the federal statutory purpose must be ‘clear and manifest.’” Id. at 1765 (quoting English v. General Electric Co., 496 U.S. 72, 79 (1990)).
68. Id. at 1764.
69. Id. at 1764-65 (quoting American Land Co., 219 U.S. at 60). As a result, California was free to determine the fair market value of foreclosed prop-
C. STATE HOMESTEAD PROTECTION

To protect their citizens' security in title to real estate, some states have created constitutional or statutory "homestead exemption" provisions that exclude homesteads from forced sale or governmental forfeiture. Courts in those states generally construe homestead protection liberally in favor of the homeowner. In several state cases, courts have prevented state law enforcement agencies from seizing a homestead, even when the property significantly facilitated an underlying crime.

For example, the Florida Constitution provides in pertinent part that:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or [the owner's] family.

FLA. CONST. art. X, § 4. For examples of statutory homestead exemptions, see, e.g., IOWA CODE § 809 (1991); OKLA. STAT. tit. 31, §§ 1, 2 (1991).

71. One Florida court remarked: "[O]ur courts have always held that homestead laws should be construed liberally in the interest of the family and in favor of the person entitled to them." Vandiver v. Vincent, 139 So. 2d 704, 707 (Fla. Dist. Ct. App. 1962) (citing Jetton Lumber Co. v. Hall, 64 So. 440 (Fla. 1914)).

72. See Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992) (prohibiting forfeiture of a homestead under Florida's anti-racketeering statute); In re Bly, 456 N.W.2d 195 (Iowa 1990) (prohibiting forfeiture by construing forfeiture statute narrowly and homestead exemption liberally); State ex rel. Braun v. 918 N. County Line Rd., 840 P.2d 453 (Kan. 1992) (holding that state constitution provides for three exceptions to absolute homestead protection and forfeiture is not one of them); State ex rel. Means v. Ten Acres of Land, 877 P.2d 597 (Okla. 1994) (finding that courts should liberally construe homestead laws while strictly construing forfeiture laws).

Nonetheless, two state appellate courts have taken the opposite view, holding that legislators did not intend to shield criminal activity with homestead laws. See In re 1632 N. Santa Rita, 801 P.2d 452 (Ariz. Ct. App. 1990) (concluding that use of a homestead exemption to avoid forfeiture is against public policy); People v. Allen 767 P.2d 798, 800 (Colo. Ct. App. 1988) (protecting homestead against "debt, contract, or civil obligation," but not forfeiture). It is
American citizens have historically enjoyed the benefits of home ownership and secure titles to real estate. The Supreme Court recognized the benefits of home ownership more than a century ago when it remarked that "[t]he great end for which [people] entered into society was to secure their property." Despite occasional federal regulation in the field of property rights, states have traditionally defined the scope and nature of those rights. As a result, federal courts incorporate state law to define a property owner's interest.

The basic concern behind state homestead protection is family welfare. State courts have emphasized that constitutional
or statutory exemptions provide a "safety net" to keep families from losing their homes during difficult times or to protect families from the consequences of one family member's wrongdoing. Courts have also recognized that in addition to protecting individual families, homestead protection increases overall social stability. The public's reaction to the homeless crisis largely echoes past concerns about the sanctity of the American home. By taking legislative action to stem the flow of home-

Homestead laws are founded upon considerations of public policy, their purpose being to promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen, and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune. The homestead exemption is designed to benefit not only the head of the household, but also the family, and to protect the family home. The laws are intended to secure to the householder a home for himself and family... [T]heir purpose is to secure the home to the family even at the sacrifice of just demands, the preservation of the home being deemed of paramount importance.


78. For example, the Oklahoma Supreme Court recently dismissed the forfeiture of a homestead under a state civil forfeiture statute. State ex rel. Means v. Ten Acres of Land, 877 P.2d 597, 601-02 (Okla. 1994). The state attempted to seize and forfeit all of their real property, including their homestead, pursuant to the Oklahoma Uniform Controlled Substances Act. Id. at 598; see OKLA. STAT. ANN. tit. 63, §§ 2-101, 2-503(a)(8) (West Supp. 1995). In denying the forfeiture, the court reasoned that the "constitutional and statutory provisions for homestead were made for the purpose of protecting the entire family." 877 P.2d at 601 (citing In re Carother's Estate, 167 P.2d 899 (Okla. 1946)). The court based its reasoning on the maxim that a family should not suffer because of one person's wrongdoing. Id. (citing Cassady v. Morris, 91 P. 888 (Okla. 1907)). Courts in Iowa, Florida, and Kansas have reached similar conclusions. See supra note 72 (citing cases). See also Carothers' Estate, 167 P.2d at 899 (noting that the homestead provisions were drafted for the benefit of the entire family); Cassady v. Morris, 91 P. 888 (Okla. 1907) (holding that the homestead of a family is exempt to the family and cannot be taken on attachment for the tort of the husband or father).

79. In re McAtee, 154 B.R. 346, 347-48 (N.D. Fla. 1993) (noting that the homestead exemption "furthers important public policy considerations of promoting the stability and welfare of state... by preserving a home where a family may live beyond reaches of economic misfortune") (citation omitted); In re Tierney, 263 N.W.2d 533, 534 (Iowa 1978) (stating that homesteads "provide a margin of safety to the family, not only for the benefit of the family, but for the public welfare and social benefit which accrues to the state by having families secure in their homes") (quoting In re McClain's Estate, 262 N.W. 666, 669 (Iowa 1935)).

80. A federal court recently made the connection between homelessness and civil forfeitures of homesteads when it stated that "[s]ociety already has
less persons, Congress itself recognized that having a home is sacrosanct.81

II. UNITED STATES v. LOT 5, FOX GROVE: STATE HOMESTEAD PROTECTION FALLS VICTIM TO THE FORFEITURE STATUTE

In United States v. Lot 5, Fox Grove,82 the Eleventh Circuit determined of whether the Forfeiture Statute preempts Florida's constitutional homestead exemption.83 In federal district court, the government alleged that Savanah Wims's home facilitated drug transactions in violation of § 881(a)(7).84 The government also intended to indict her on criminal charges for her drug-related activities.85 Consequently, Wims stipulated to probable cause in the civil forfeiture to prevent civil discovery of potentially harmful information that the government could use against her at her criminal trial.86 Because Wims did not present any evidence contradicting the government's evidence, the district court ordered her home forfeited to the United States.87

more than it wants or can take care of, and this court is wary of adding the [claimant] to the list of the homeless.” United States v. 461 Shelby County Rd., 857 F. Supp. 935, 938 (N.D. Ala. 1994). The court added that “[i]t does not mean to condone what the [claimants] did, but the fact that drug trafficking cannot be condoned does not lead inexorably to the taking away of the only residence of two small drug traffickers.” Id.

Legal and social commentators have recognized homelessness to be one of America's biggest problems. See, e.g., Mary E. Hombs, Federal Policy for the Homeless, 1 STAN. L. & POL'Y REV. 57 (1989).


83. Id. at 361.
84. Id. at 360.
85. Id. at 361.
86. Id. The government had enough evidence to establish probable cause. One of Wims's stepsons, Tim Wims, confessed to leaving drug proceeds at the property. Id. at 360. Tim Wims also stated that Ms. Wims knew that he and her husband Roosevelt Wims had participated in drug transactions while at the residence. Id. See supra note 33 (describing the probable cause standard).
87. 23 F.3d at 361. Savanah Wims faced the dilemma of remaining silent and automatically losing her homestead or facing the possibility that the government would use her statements against her at a later criminal trial. Id.
On appeal, Wims argued that Florida's Constitution protected her homestead from forfeiture. Wims asserted that the trial court's decision was inconsistent with the United States Supreme Court decision in *Gregory v. Ashcroft*. The court responded that Ashcroft was "limited to federal laws impacting a state's self-identification as a sovereignty," and that Florida's constitutional homestead exemption was a substantive policy choice rather than a means of sovereign self-identification. Accordingly, rather than applying the clear statement rule, the *Lot 5* court looked to traditional preemption jurisprudence.

Ironically, in support of its decision to apply traditional preemption jurisprudence, the *Lot 5* court relied heavily on dicta in the recent clear statement rule case, *Cippolone v. Liggett Group*. The court purported to apply the "direct conflict" doctrine, stating that its "sole inquiry [was] whether the federal and state provisions conflict." The court then relied on what it described as the "plain language" of the Forfeiture Statute, stating that because § 881(a)(7) refers to "all real property," it preempted Florida's homestead protection.

The court also looked to the legislative history of the federal law to support its conclusion that § 881(a)(7) preempts state homestead laws. It remarked that Congress must have intended the courts to read § 881(a)(7) broadly because Congress enacted the federal drug forfeiture law to "eliminate the statutory limitations and ambiguities" that have frustrated law enforcement agencies. The court concluded that because the legislative history indicated that forfeiture of a "house" would

Many claimants face this problem whenever the government chooses to pursue the civil forfeiture before commencing the criminal action. See supra note 37 (explaining the dilemma claimants face between waiving or exercising their Fifth Amendment rights when faced with the prospect of civil forfeiture).

88. 23 F.3d at 361.
90. 23 F.3d at 362.
91. Id.
92. Id.
94. Id. at 362. For a discussion of the "direct conflict" preemption doctrine, see supra note 52.
95. 23 F.3d at 363.
96. The court relied on United States v. Monsanto, 491 U.S. 600, 609, 614 (1989) (holding that language in a federal criminal forfeiture statute precluded exemption of assets used to pay attorney's fees because the term "any property" is broad and unambiguous). 23 F.3d at 363 n.6.
provide a powerful deterrent to potential criminals, Congress must have intended to extend civil forfeiture to state protected homesteads.\textsuperscript{98}

III. LIMITING FEDERAL FORFEITURES OF PROTECTED HOMESTEADS

The Lot 5 court took a step in the wrong direction when it held that § 881(a)(7) unequivocally preempts state homestead laws. The court disregarded recent Supreme Court rulings that narrow the scope of preemption. The court also misapplied traditional preemption doctrines by failing to identify any substantive congressional intent to override state homestead law. Considering the traditional role of the states in regulating property interests, courts should protect those interests to the extent that Congress does not clearly indicate its intent to negate them.

A. THE LOT 5 COURT ERRED IN ITS PREEMPTION ANALYSIS

1. The Clear Statement Rule Comes of Age

The Supreme Court has progressively strengthened the clear statement doctrine.\textsuperscript{99} \textit{BFP v. Resolution Trust Corp.}\textsuperscript{100} provides the most recent example of this movement. A strong clear statement rule is of paramount importance in maintaining the checks and balances necessary to avoid a concentration of power in the federal government.\textsuperscript{101} As the Supreme Court em-

\textsuperscript{98} Id.

\textsuperscript{99} Although the Supreme Court has recognized the limited scope of Ashcroft, it has generally widened the scope of "traditional state interests" that require a clear statement by Congress in order to be preempted. See supra notes 60-69 and accompanying text (discussing clear statement rule).

Commentators have generally praised the clear statement trend. U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, supra note 54, at 13; STARR ET AL., supra note 49, at 40-56; Chatowski, supra note 59, at 800-01 (arguing that the Supreme Court should adopt an unambiguous and broad rule requiring unequivocal language, "plain to anyone reading the act," for federal preemption of state law) (citation omitted).

\textsuperscript{100} 114 S. Ct. 1757, 1765 (1994). For a discussion of \textit{BFP} and its holding, see supra note 67 and accompanying text.

\textsuperscript{101} Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."). See generally SAMUEL H. BEER, \textit{TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM} (1993) (treatise discussing federalism in general); PATRICIA A. LUCIE, \textit{FREEDOM AND FEDERALISM: CONGRESS AND COURTS, 1861-1866} (1986) (same); DAVID B. WALKER, \textit{TOWARD A FUNCTIONING FEDERALISM} (1981) (same). In a recent decision, the Supreme Court struck down a federal law that purported to regulate gun possession in schools on the basis that the federal government is one of the enumerated powers and that the Commerce Clause does
phasized in BFP, "[W]here the intent to override [a state statute] is doubtful, our federal system demands deference to long established traditions of state regulation."102

Considering that the clear statement rule hinges on whether a traditional state interest is involved,103 the main issue in preemption cases has become defining the areas of traditional state interest. The Supreme Court in BFP clearly demarcated property regulation as an area of traditional state interest by refusing to preempt California's right to define fair market value in a federal foreclosure.104

Similarly, a traditional state right, the right to a secure title in real property, was precisely the interest at stake in Lot 5. Yet, the court failed to recognize the state interest and apply the clear statement rule. Although the Lot 5 court recognized the Supreme Court's limited clear statement rule in Ashcroft, it did not mention the Court's expansion of the rule in Cippolone.105 Relying solely on the Ashcroft decision, the court severely limited the clear statement rule by deciding that Florida's interest in protecting homesteads was "not a means of sovereign definition."106 Consequently, the court failed to consider the tradi-

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102. 114 S. Ct. at 1765-66. "Likewise, when faced with two plausible interpretations of a federal criminal statute, [the court] will generally take the alternative that does not force [it] to impute an intention to Congress . . . to regulate, conduct traditionally and ably regulate by the states." Lopez, 1995 WL 238424, at *36 (Souter, J. dissenting). Other branches of the federal government have joined the judiciary in demanding more deference to state law. President Clinton recently signed a law reducing the federal government's ability to pass unfunded mandates that would burden the states. Unfunded Mandate Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995). In addition, politically conservative commentators are now calling themselves "populists," and urging a return to greater state self-governance. See, e.g., Richard A. Viguerie, A Populist, and Proud of It, Nat'l Rev., Oct. 19, 1984, at 42 (defining populists as those urging "a return of power from the Federal Government to the states and localities and to the individual").

103. See supra notes 60-69 and accompanying text (discussing the development of the clear statement rule and the gradual development of the "traditional state interest" concept).

104. 114 S. Ct. at 1765.


106. Id. at 362.
tional state role of regulating property rights and protecting the homestead.

2. The Lot 5 Approach: Giving Preemption the Benefit of the Doubt

Rather than deferring to Florida's interest in homestead protection under the clear statement rule, the Lot 5 court chose to rely on traditional preemption jurisprudence. Yet, even using the traditional doctrines of preemption, the Lot 5 court falls short in its analysis by considering merely whether § 881(a)(7) and the homestead exemption directly conflict.

Certainly the term "real property," as contained in § 881(a)(7), may encompass homesteads. Nevertheless, courts have stated that a "direct conflict" exists only when it is a physical impossibility to comply with both federal and state law. As such, the Forfeiture Statute and Florida's homestead exemption do not directly conflict. Much in the same way that the homestead exemption does not preclude enforcement of the state drug-related forfeiture statute, the homestead exemption does not preclude federal agents from seizing a vast array of real property. A true "direct conflict" would exist only if Florida exempted all real property from forfeiture.

Furthermore, although purporting to apply a direct conflict analysis, the Lot 5 court looked to congressional intent underlying § 881(a)(7), an irrelevant factor in direct conflict cases. Direct conflict cases concern only the effect, and not the purpose, of opposing laws. Perhaps the court realized that under a proper traditional preemption analysis, it should have applied obstacle preemption.

107. Id.
108. Id. at 362-63.
109. See supra notes 51-52 (discussing "direct conflict" preemption).
110. The "direct conflict" cases are generally much more narrow in scope and involve instances where it is a "physical impossibility" to comply with both federal and state laws. See supra note 52 (listing cases that involved a direct conflict preemption).
111. Florida's state civil drug-related forfeiture statute operates despite the state's homestead exemption. Consequently, it is not "physically impossible" to comply with both laws. See supra note 76 (describing cases where state homestead exemptions limited but did not nullify the state civil drug-related forfeiture statute).
112. 23 F.3d at 363.
113. See supra notes 52-53 (describing direct conflict preemption).
114. The other two traditional approaches to implied preemption do not lend themselves to the facts in Lot 5. The Forfeiture Statute does not occupy the field of forfeiture law so as to make all state forfeitures invalid. States often use
3. Obstacle Preemption: Congressional Intent and the Presumption of State Sovereignty

Obstacle preemption analysis requires a determination of whether the state regulation unduly burdens or “serves as an obstacle” to the purpose behind federal law. Although a homestead exemption arguably serves as an obstacle to facial compliance with § 881(a)(7), it does not unduly burden the purpose behind the Forfeiture Statute. Congress clearly intended the Forfeiture Statute to increase prosecutorial efficacy, but the legislative history of § 881(a)(7) does not indicate any substantive intent to extend federal civil forfeiture to include all homes, even those of “small time” drug dealers.

In fact, the legislative history of § 881(a)(7) reveals a congressional intent to focus on large scale drug operations such as “a secluded barn to store tons of marihuana” or “a manufacturing laboratory for amphetamines.” Congress emphasized its focus on real property “indispensable to the commission of a major drug offense.” Other drug laws harshly target small-time dealers. Congress wanted § 881(a)(7) to strike at the economic base of large scale drug operations.

When Congress intends to preempt state property regulations, it usually does so on the face of the statute. Recognizing the traditional state role in regulating property interests, federal courts have generally deferred to state law in defining an owner’s property interest, even in drug forfeiture actions.

state forfeiture statutes that are very similar to federal forfeiture statutes. See supra notes 70-72, 77-79 and accompanying text (discussing state forfeiture cases); see also supra note 56 and accompanying text (discussing the traditional preemption doctrine of “occupation of the field”). Nor does the case involve an administrative forfeiture. See supra note 59 (discussing administrative preemptions).

115. See supra note 56 (citing an “occupation of the field” case and how it applies the doctrine).


117. Id. (emphasis added).


119. With the Racketeer Influenced and Corrupt Organizations Act, Congress specifically wrote on the face of the statute that the government had the power to forfeit property “irrespective of any provision of state law.” See supra note 13 (discussing the bankruptcy and RICO statutes).

120. See supra note 76.
More significantly, the Supreme Court had those interests in mind in *BFP*:

Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation."  

Although the courts can not expect each member of Congress to know all the intricacies of state property regulation, the homestead exemption should nonetheless exist "in the consciousness of lawmakers."

State homestead exemptions are notorious, especially in Florida. Given this well-known protection, the Comprehensive Crime Control Act of 1984 and its legislative history do not contain a sufficiently clear expression of Congress's intent to override state homestead exemptions. The legislative history of § 881(a)(7) indicates that lawmakers intended to take the economic incentive out of drug trafficking. The *Lot 5* court, however, reads § 881(a)(7) too broadly by including all homesteads within its reach.

**B. THE LOT 5 COURT TOO QUICKLY SACRIFICED STATE HOMESTEAD LAW**

1. Narrowing the Scope of Civil Forfeiture

Considering the relatively low government burden in civil forfeitures, courts should read civil forfeiture statutes as narrowly as possible. Furthermore, courts should not construe civil forfeiture statutes in light of criminal forfeiture statutes, as the

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122. When very rich people go spectacularly bust, they usually manage to hold on to their mansions .... Florida and Texas both have a generous homestead act .... Houston developer Melvin Powers successfully held a $68 million office building as his 'home' for a while during the early 1980s [and] ... Donald Trump has successfully shielded from his creditors his palatial Palm Beach estate worth millions. Randall Lane, *Stiff thy creditor*, *Forbes*, Oct. 18, 1993, at 64, 66. See also James R. Hagy, *What's It Going to Be? We Searched for the Most Important Trends Influencing Florida's Future*, *Fla. Trend*, Dec. 1993, at 40 (alluding to the notoriety of Florida's homestead exemption).

123. "Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made." S. Rep. No. 225, *supra* note 20, at 192, reprinted in 1984 U.S.C.C.A.N. at 3374.
Although civil and criminal forfeitures achieve the same end, they provide the property owner vastly different levels of protection. Whereas criminal forfeitures require the government to prove its case beyond a reasonable doubt, civil forfeitures only require the government to demonstrate probable cause. Criminal trials also provide the defendant with constitutional safeguards. Courts can therefore read criminal forfeiture statutes more broadly than their civil counterparts.

2. Protecting the Homestead

Forfeiture of a home often leaves innocent parties, typically drug dealers’ families, without a place to live. The government premised the war on drugs on the notion that drugs destroy family and social welfare. Ironically, efforts at enforcement have arguably produced as much of a negative effect on family and social structure as the drugs themselves. Meanwhile, state legislators drafted homestead exemption laws

125. See supra notes 29-35 and accompanying text (differentiating between civil and criminal forfeitures).
126. See supra notes 32-35 and accompanying text (discussing the relative burdens of proof in civil and criminal forfeiture cases).
127. See supra note 30 and accompanying text (discussing constitutional protections in criminal trials).
128. In fact, the Supreme Court recently limited the scope and power of civil forfeitures under the Excessive Fines and Due Process Clauses of the United States Constitution. See supra notes 43-46 and accompanying text (citing cases).

The Court has also limited civil forfeitures under the Double Jeopardy Clause by finding that they constitute an unconstitutional double punishment. The courts in the double jeopardy cases held that the government could not use a “compensatory” civil statute for punitive purposes. See supra note 39. By defining civil forfeitures as punitive, the Court has created a dilemma. If § 881(a)(7) forfeitures are truly “punishment,” they must be prohibited altogether because they deny claimants the presumption of innocence and due process rights of a criminal trial. Although the Supreme Court has not yet explicitly classified the Forfeiture Statute as punitive, the Ninth Circuit has. See United States v. $405,089.23, 33 F.3d 1210, 1222 (9th Cir. 1994).
129. "In reality, the people who are most affected by drug forfeitures are the parents, spouses, employers, mortgagees, banks, and car rental companies of small time drug traffickers." John J. Kerrigan, When Drug Forfeitures Touch the 'Little Guy', XVII Pa. L. Wkly. 37, Sept. 12, 1994, at 6.
130. See supra notes 24-26 (sources that describe the effects of the war on drugs and suggest government motives).
131. See powell & Hershenov, supra note 26, at 609-12 (noting that “[m]any ... innocent [minority youths] will ... have their lives altered by living in
with the protection of families in mind, and courts have realized that homestead protection also stabilizes overall social structures.

Although § 881(a)(7) contains a provision protecting “innocent owners,” it does not compensate for the other inequities of civil forfeiture. For example, spouses with a property interest have often prevented the forfeiture of their homesteads, particularly in states that recognize tenancies by the entirety. Yet, the innocent owner exception does not protect innocent children whose interest in their home, although not legal, is as significant as their parents’ interest. Considering that civil forfeiture does not depend on the culpability of the claimant, allowing “innocent owners” an exemption while not taking innocent children into account makes no sense. Homestead forfeitures potentially hurt children as much as “innocent” spouses.

In light of the many inequities of current homestead forfeitures, courts must develop a new approach in applying the Forfeiture Statute. This approach must take into account the significant state interest in homesteads.

C. A New Approach to Section 881(a)(7) Forfeitures: Honor the State’s Homestead Protection

1. Reassessing Parties’ Burdens in a Civil Forfeiture Proceeding

Considering the combination of strong state interest in homestead protection and the lack of congressional directive in interpreting the Forfeiture Statute, courts should limit the scope of § 881(a)(7). Critics have recently denounced the government’s militarized ghettos where their lives and liberties remain hostage to police and drug violence.

See supra part I.C (discussing legislative intent and family protection behind homestead exemptions).

See supra note 80 (citing case recognizing a connection between forfeitures and homelessness).

See United States v. 15621 S.W. 209th Ave., 894 F.2d 1511, 1518 (11th Cir. 1990) (holding that federal drug forfeitures did not preempt Florida’s law on tenancies by the entirety, effectively preventing the forfeiture of any portion of the innocent spouse’s interest in the property).

See supra note 3 (noting the “innocent owner” provision of § 881(a)(7)).

The Supreme Court implied that innocent occupants are protected in United States v. 92 Buena Vista Ave., 113 S. Ct. 1126, 1134-37 (1993).

See supra note 31 (discussing the concept of “offending” property).

In truth, the “innocent owner” provision reveals the fallacy that is the “guilty property” theory. If the property itself were truly the guilty party, it would make an owner’s innocence irrelevant.
use of civil forfeitures because of its perceived lack of fairness. One observer even suggested rewriting criminal forfeitures so as to do away with civil forfeitures altogether. This solution, however, may be a bit extreme. Although Congress may not have intended to preempt traditional state property rights, it knowingly enacted civil forfeiture with the intention of increasing prosecutorial power and efficacy.

To best comport with the congressional intent behind § 881(a)(7) forfeitures, courts should reassess the relative burdens borne by the government and the homeowners. Under the current approach, once the government merely establishes probable cause under § 881, the burden shifts to the claimants to prove by a preponderance of the evidence that they did not use the property in an illegal manner. Because of the punitive nature of civil forfeitures, the current approach effectively makes the homeowner “guilty until proven innocent.”

Under this new approach, the government must establish the necessary probable cause. Then, if the claimant can establish by prima facie evidence that the property is a state-protected homestead, the government would bear the burden of proving by a preponderance of the evidence that Congress intended to include such a property under its Forfeiture Statute. The government would satisfy its burden by proving one of the following three elements, drawn from the purposes underlying § 881(a)(7): the homestead substantially represents the product of ill-gotten gain; the homestead became “indispensable in the commission of a crime;” or the claimant did not use the homestead as a primary residence.

The proposed “burden-shifting” approach respects traditional state interests while honoring congressional intent to strike out at large scale drug traffickers. The first element under the new approach acknowledges congressional intent to forfeit the monetary gain of a criminal enterprise and “take the

139. See supra note 38 (citing commentators who criticize civil forfeitures).
140. Leach & Malcolm, supra note 38, at 289-90 (proposing to replace civil forfeitures involving crimes with a criminal forfeiture provision).
142. E.g., United States v. One 1986 Nissan Maxima GL, 895 F.2d 1063, 1065 (5th Cir. 1990) (explaining the shift of burdens in a civil forfeiture); see also supra notes 35-36.
143. “State-protected homesteads” would include both statutory and constitutional provisions exempting homesteads from judicial sale or forfeiture.
144. See supra note 35 and accompanying text (describing preponderance of the evidence standard).
economic incentive” out of crime. The second element satisfies congressional intent to reach property “indispensable” to the criminal enterprise, such as the storage barns and manufacturing labs. Finally, the residential requirement honors the primary purpose behind state homestead exemptions: protecting the family.

Most of all, shifting the burden back to the government would bring a sense of fairness to the process of civil forfeiture. The “burden-shifting” approach gives claimants the due process they deserve without significantly compromising the government’s ability to fight crime. More importantly, homeowners like Savanah Wims will no longer have to risk losing their home based on probable cause solely for invoking their constitutional right to avoid self-incrimination.

2. Applying the Burden-Shifting Approach to Lot 5

In Lot 5, the government had clearly established probable cause that Savanah Wims’s home was subject to the Forfeiture Statute. If Savanah Wims could have then presented evidence that her home was a homestead under Florida law, the government would have had the burden of proving that it was either the product of ill-gotten gain, indispensable to the underlying drug crimes, or that Wims did not use it as a primary residence. Although the government may be able to successfully satisfy one of the three elements, the “burden-shifting” approach would add important criminal-law protection to defendants effectively involved in a criminal trial.

CONCLUSION

In United States v. Lot 5, Fox Grove, the Eleventh Circuit held that the federal civil drug-related forfeiture statute

145. See supra note 28 (discussing Congress’s intent to take the economic benefit out of the drug trade).
146. Id.
147. See supra notes 71, 78 (referring to the state’s interest in protecting the family).
148. For a discussion of the due process problems created by civil forfeitures, see supra note 46.
149. Shifting the burden of proof to the government may actually help fight crime. Claimants/defendants will not be able to shield legitimate criminal prosecutions by claiming that they were already “punished” by the forfeiture and invoking the Double Jeopardy Clause. See supra note 39 (discussing Halper and its progeny).
150. See supra note 37 (discussing the dilemma that claimants face if they are also involved in a criminal proceeding).
preempts state homestead protections. Congress amended the forfeiture statute in 1984 to include real property that facilitated the drug trade. The homestead exemption provision of Florida’s constitution, however, bars judicial disposition of homestead property. The Lot 5 court rejected the claimant’s contention that Florida’s homestead exemption protected her homestead from forfeiture, concluding instead that the federal forfeiture statute preempted state law.

The Lot 5 court undermined recent Supreme Court decisions by disregarding the clear statement rule in its preemption analysis. Furthermore, although the court decided instead to apply traditional preemption doctrines, it failed to do so properly. Given the traditional role of the states in regulating property interests, and the Court’s recent narrowing of preemption doctrines, this Comment proposes that the government assume the burden of proving that a state-exempted homestead is subject to forfeiture. This approach would ensure fairness and respect state sovereignty, while leaving the government with the tools necessary to fight crime with forfeitures.