RECENT DEVELOPMENTS

INNOCENT OWNERS AND GUILTY PROPERTY: *Bennis v. Michigan*, 116 S. Ct. 994 (1996).

American in rem, or civil, forfeiture laws seem to implicate constitutional concerns insofar as such laws may authorize the government to confiscate privately owned property, regardless of the guilt or innocence of the owner.[1] Historically, the justification of in rem forfeiture law has rested on the legal fiction that "[t]he thing is . . . primarily considered as the offender, or rather the offense is attached primarily to the thing."[2] Last Term, in *Bennis v. Michigan*,[3] the Supreme Court upheld the constitutionality of a public nuisance statute that authorized the government to abate a car-owner's property interest, even though there had been no showing of negligence or wrongdoing on the part of the owner herself. Referring to this country's "longstanding practice"[4] of in rem forfeiture proceedings, the Court held that abatement under the Michigan statute neither offended due process[5] nor violated the Fifth Amendment's prohibition against takings without just compensation.[6] By basing its decision on precedent, the Court prudently resisted the temptation to legislate from the bench. The Court also reached the right result in denying relief to Mrs. Bennis. Unfortunately, the Court's appeal to past practice did not adequately address the constitutional concerns raised by the case. If the Court had said more about the traditional purpose and limits of in rem forfeitures, it could have addressed these concerns, while still avoiding the dangers of judicial activism.

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1. *See* DAVID B. SMITH, 1 PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 2.01, at 2-2 to 2-3 (1992).

2. The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

3. 116 S. Ct. 994 (1996).

4. *See id.* at 1001.

5. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

6. *See id.* amend. V ("[N]or shall private property be taken for public use, without just compensation.").

On October 3, 1988, two Detroit police officers arrested John Bennis after witnessing a suspected prostitute perform a sex act on him in the front seat of a 1977 Pontiac automobile.[7] The vehicle, owned jointly by Mr. Bennis and his wife, Tina Bennis, was parked on a residential street at the time.[8] In the trial court, Mr. Bennis was convicted of gross indecency.[9] The State also filed an action alleging that Mr. Bennis had used the car for the purpose of lewdness, and that the car was therefore a public nuisance subject to abatement under Michigan law.[10] Petitioner Tina Bennis defended against the abatement of her interest in the car by arguing that, when she entrusted the car to her husband, she did not know that he would use it to engage in illegal activity.[11] The Wayne County Circuit Court rejected Mrs. Bennis's defense, declared the car a public nuisance, and abated it pursuant to Michigan law.[12]

In a two-to-one decision, the Michigan Court of Appeals reversed.[13] According to the court, the prosecution was obligated to demonstrate that Tina Bennis "knew of the use of the vehicle as a nuisance" before her interest in the vehicle could be abated.[14] The court acknowledged that this conclusion apparently contradicted the language of the statute itself, according to which "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required."[15] Nevertheless, the court referred to a prior

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7. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 486 (Mich. 1994).

8. *See id.*

9. *See* Mich. Comp. Laws Ann. § 750.338b (1991).

10. *See* Mich. Comp. Laws Ann. § 600.3801 (Supp. 1995). The statute provides, in part:

> Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

Id.

11. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d at 486.

12. *See id.*

13. *See* Michigan *ex rel.* Wayne County Prosecuting Attorney v. Bennis, 504 N.W.2d 731 (Mich. App. 1993).

14. *Id.* at 732.

15. Michigan *ex rel.* Wayne County Prosecuting Attorney, 504 N.W.2d at 733 (quoting Mich. Comp. Laws Ann. § 600.3815(2) (1987)).

Michigan Supreme Court decision, *People v. Schoonmaker*,[16] in support of its claim that "proof of knowledge is required for abatement."[17] While subsequent decisions of the Michigan Supreme Court have apparently ignored *Schoonmaker*, the court argued that its reliance on *Schoonmaker* was justified since "*Schoonmaker* has never been expressly overruled."[18]

The Michigan Supreme Court reversed in a four-to-three decision.[19] The court distinguished between two issues: the statute's meaning and the statute's constitutionality. With regard to the first issue, the court acknowledged that *Schoonmaker* "begat confusion regarding the statutory requirement of knowledge."[20] While the statute clearly indicates that a property owner's knowledge or consent is not required, "*Schoonmaker* seemingly required proof of an owner's consent to the illegal use of the property to be abated."[21] The court resolved this apparent conflict in favor of the "plain language" of the statute.[22] With regard to the second issue, the court held that "no constitutional violation results from the abatement of Mrs. Bennis's interest in the vehicle."[23] Echoing the landmark decision in *The Palmyra*,[24] the court stated that the guilt or innocence of the owner need not be taken into account, because "the property subject to forfeiture was the evil sought to be remedied."[25]

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16. 216 N.W. 456 (1927).

17. Michigan *ex rel.* Wayne County Prosecuting Attorney, 504 N.W.2d at 733.

18. *Id.*

19. *See* Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994).

20. *Id.* at 493.

21. *Id.*

22. *See id.*

23. *Id.* at 495.

24. 25 U.S. (12 Wheat.) 1 (1827). In *The Palmyra*, the appellee was the owner of a ship that had been commissioned as a privateer and used to attack a vessel of the United States. *See id.* at 8-9. The ship was captured by a U.S. warship and brought to port for adjudication. *See id.* at 8. The Supreme Court, per Justice Story, rejected the appellee's contention that the vessel could not be forfeited unless the owner himself were convicted of privateering. *See id.* at 14-15.

25. Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d at 493-94. The court also noted that other decisions of the U.S. Supreme Court have followed *The Palmyra* and have similarly rejected "innocent owner" defenses against in rem forfeitures. The court expressly referred to four subsequent Supreme Court cases: *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844) (also called *The Brig Malek Adhel*); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878); *Van Oster v. Kansas*, 272 U.S. 465 (1926); and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). *See id.* at 494 & n.32.

In a five-to-four decision, the U.S. Supreme Court affirmed.[26] Writing for the majority,[27] Chief Justice Rehnquist identified two constitutional issues: (1) whether Michigan's abatement scheme deprived Mrs. Bennis of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, and (2) whether Michigan took Mrs. Bennis's interest in the car for public use without just compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment.[28]

With regard to the first issue, the Chief Justice noted that Mrs. Bennis's due process claim was "not that she was denied notice or an opportunity to contest the abatement of her car."[29] Her contention, rather, was that she was "entitled to contest the abatement by showing she did not know her husband would use [the car] to violate Michigan's indecency law."[30] The Chief Justice responded to Mrs. Bennis's due process claim by relying on Supreme Court precedent: "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."[31] Chief Justice Rehnquist observed that Mrs. Bennis was in "the same position as the various owners involved in the forfeiture cases beginning with *The Palmyra* in 1827."[32] In *The Palmyra* and five subsequent decisions,[33] he noted, the Court clearly had rejected the "innocent owner" defense and upheld the constitutionality of in rem forfeiture laws.

Chief Justice Rehnquist went on to argue that this resolution of Mrs. Bennis's due process claim provided adequate grounds for rejecting her takings claim.[34] Because the State's forfeiture proceeding against Mrs. Bennis did not violate the Fourteenth

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26. *See* Bennis v. Michigan, 116 S. Ct. 994 (1996).

27. Justices O'Connor, Scalia, Thomas, and Ginsburg joined Chief Justice Rehnquist's opinion.

28. *See Bennis*, 116 S. Ct. at 997-98.

29. *Id.* at 998.

30. *Id.*

31. *Id.*

32. *Id.* at 999.

33. These five other cases were: *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844) (also called *The Brig Malek Adhel*), *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878), *Van Oster v. Kansas*, 272 U.S. 465 (1926), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), as well as *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921). *See id.* at 998-1000.

34. *See Bennis*, 116 S. Ct. at 1001.

Amendment, he reasoned, Mrs. Bennis's interest in the automobile was rightfully transferred to the State by virtue of that proceeding, and not through the power of eminent domain.[35] According to prior Court decisions,[36] the government is not required to compensate an owner for property that it has already lawfully seized by virtue of governmental power "other than the power of eminent domain."[37] Therefore, the State of Michigan was not required to compensate Mrs. Bennis for the forfeiture of her interest in the car, which was abated pursuant to a public nuisance statute.[38]

Justice Thomas joined the opinion of the majority, but also wrote a concurring opinion to underscore the Court's acknowledgment that "evasion of the normal requirement of proof before punishment might well seem 'unfair.'"[39] While such "unfairness" might seem to "violate that justice which should be the foundation of the due process of law required by the Constitution,"[40] the Court was nevertheless justified in upholding the Michigan statute, "based upon the historical prevalence and acceptance of similar laws."[41] This should serve to remind us, Justice Thomas observed, that "the Federal Constitution does not prohibit everything that is intensely undesirable."[42]

Justice Ginsburg also joined the opinion of the majority, but added a concurring opinion in order to "highlight features of the case key to my judgment."[43] First she observed that the car in question belonged to John and Tina Bennis as equal co-owners. Thus the crucial question was not whether Mrs. Bennis was entitled to the car itself, but whether she was entitled to a "portion of the proceeds" from the sale of the car.[44] Secondly, Justice Ginsburg noted that "it was 'critical' to the judgment of the Michigan Supreme Court that the nuisance abatement

35. *See id.*

36. *See, e.g.*, United States v. Fuller, 409 U.S. 488, 492 (1973); United States v. Rands, 389 U.S. 121, 125 (1967).

37. *Bennis*, 116 S. Ct. at 1001.

38. *See id.*

39. *Bennis*, 116 S. Ct. at 1001 (Thomas, J., concurring).

40. *Id.* (quoting J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510 (1921)).

41. *Id.*

42. *Id.* at 1001-02.

43. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

44. *Id.*

proceeding is an 'equitable action.'"[45] Accordingly, broad deference should be granted to the Michigan Supreme Court, which is authorized to police the inequitable administration of equitable actions such as this one.[46] Finally, Justice Ginsburg noted that two practical reasons guided the trial court in its refusal to share with Mrs. Bennis any portion of the proceeds from the sale of the car: first, the Bennises owned a second automobile which they could use for transportation; and secondly, "the age and value of the forfeited car . . . left 'practically nothing' to divide after subtraction of costs."[47]

Justice Stevens wrote a three-part dissent.[48] In the first part, Justice Stevens argued that previous Supreme Court decisions involving in rem forfeitures have implicitly required that there be more than a tenuous connection between the illegal activity being policed and the property being forfeited.[49] The traditional requirement of a sufficient nexus was based on the notion that forfeiture is justified only if one can impute to the owner some degree of negligence or complicity. Where there is more than a tenuous nexus, "the law may reasonably presume that the owner of valuable property is aware of the principal use being made of that property."[50] Justice Stevens noted that there are two ways in which the requisite nexus was lacking in the Bennis case. First, the "principal use" of the car in this case was not to facilitate the illegal activity.[51] Secondly, Mrs. Bennis's car "bore no necessary connection to the offense committed."[52]

In the second part of his dissent, Justice Stevens argued that Mrs. Bennis's lack of culpability dictated against forfeiture.[53] Contrasting his own view to the "strict liability" view of the majority, Justice Stevens argued that the Court's earlier forfeiture decisions had rested, in essence, on the idea that the owner had been "negligent in allowing his property to be

45. *Id. See also* Michigan *ex. rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 495 (Mich. 1994) (stating that because abatement is an equitable action, the trial judge's confiscation of the entire vehicle was properly within his discretion).

46. *See Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

47. *Id.*

48. Justice Stevens was joined by Justices Souter and Breyer.

49. *See Bennis*, 116 S. Ct. at 1004-07 (Stevens, J., dissenting).

50. *Id.* at 1005.

51. *See id.*

52. *Id.* at 1006.

53. *See id.* at 1007-09.

misused."[54] Even the fiction of "guilty property" was based on the idea that "such misfortunes are in part owing to the negligence of the owner."[55] Because Mrs. Bennis was not negligent in her entrustment of the car to Mr. Bennis, "no forfeiture should have been permitted."[56] Next, Justice Stevens argued that, even if one were to accept strict liability as a standard, the Court has traditionally "recognized an exception for truly blameless individuals."[57] Moreover, the two rationales commonly put forth in support of strict liability ("deterrence-value" and "judicial efficiency") did not apply in Mrs. Bennis's situation.[58]

In the third part of his dissent,[59] Justice Stevens argued that the majority's opinion was "dramatically at odds with our holding in *Austin v. United States*,"[60] according to which the Eighth Amendment's Excessive Fines Clause[61] imposes limits on a forfeiture when the forfeiture constitutes "payment to a sovereign as punishment for some offense."[62] Because the forfeiture of Mrs. Bennis's half-interest in the car was a form of punishment, he argued, *Austin* compelled reversal.

Justice Kennedy wrote a separate dissenting opinion, in which he observed that, historically, two factors combined in admiralty and maritime law to eliminate the owner's lack of culpability as a defense in the context of in rem forfeiture proceedings: first, the "prospect of deriving prompt compensation from in rem forfeiture,"[63] and second, "the impracticality of adjudicating" the innocence or carefulness of the ship-owners.[64] Based on this historical observation, Justice Kennedy expressed some doubt

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54. *Id.* at 1007 (quoting Austin v. United States, 509 U.S. 602, 615 (1993)).

55. *Id.* (quoting *Austin*, 509 U.S. at 616, in turn quoting J.W. Goldsmith, Jr.-Grant Co., 254 U.S. 505, 511 (1921)).

56. *Id.*

57. *Id.*

58. *Id.* According to Justice Stevens, the threat of forfeiture could not have induced Mrs. Bennis to alter her behavior in any significant and reasonable way. Furthermore, while the imposition of strict liability did relieve the State of having to prove collusion between Mr. and Mrs. Bennis, such relief is meaningless here; after all, it is already "patently clear that the petitioner did not collude with her husband to carry out *this* offense." *Id.* at 1009.

59. *See id.* at 1010.

60. *Id.* at 1010.

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

62. *Bennis*, 116 S. Ct. at 1010 (quoting Austin v. United States, 509 U.S. 602, 622 (1993), quoting Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 265 (1989)).

63. *Id.* (Kennedy, J., dissenting).

64. *Id.*

about the claim, articulated in *Austin*[65] and repeated by Justice Stevens,[66] that "the owner's personal culpability was part of the forfeiture rationale"[67] in the Court's previous forfeiture decisions. Nevertheless, Justice Kennedy argued that it is possible to accept "the continued validity of our admiralty forfeiture cases without in every analogous instance extending them to the automobile."[68] Furthermore, Justice Kennedy noted that the government did not prove that its interest in preventing criminal activity could not be equally well served by alternative means. Thus it is quite possible that the government could fight crime just as effectively if its standard of strict liability were replaced by a strong, but rebuttable, presumption of "negligent entrustment or criminal complicity" on the part of the owner-defendant.[69] Accordingly, the forfeiture of Mrs. Bennis's property interest "cannot meet the requirements of due process."[70]

The Supreme Court's decision in *Bennis* was correct; however, the Court's reliance on precedent did not provide an adequate rejoinder to Mrs. Bennis's due process challenge. Reduced to its essentials, the Court's reasoning was based on two propositions: (1) Mrs. Bennis was factually in "the same position" as other petitioners whose "innocent owner" defenses were rejected by the Court; (2) precedent should provide the controlling norm for deciding this case. There is no doubt that *if* these two propositions hold, then the Court's conclusion would follow. Unfortunately, there are good reasons for doubting both propositions. In the face of such doubt, the Court's heavy reliance on the principle of *stare decisis* made its decision appear overly dogmatic and mechanical.[71] At the very least, the Court

65. *See Austin*, 509 U.S. at 615-17.

66. *See Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting).

67. *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

68. *Id.* at 1011.

69. *Id.*

70. *Id.*

71. This is evidenced by the many negative reactions that appeared in the popular media immediately after the Court announced its decision. *See, e.g.*, Robyn E. Blumner, *Moving One Step Closer to a Police State*, ST. PETERSBURG TIMES, March 17, 1996, at 4D; *Forfeiting Fairness*, N.Y. TIMES, March 8, 1996, at A30; Joe Geshwiler, *Confiscation Out of Control*, ATLANTA J. & CONST., March 9, 1996, at 12A; *Improper Reasoning*, ORANGE COUNTY REG., March 6, 1996, at B6; *A Mindless Reading of the Law*, CHI. TRIB., March 28, 1996, at 24; *Property Wrongs*, PHILADELPHIA INQUIRER, March 12, 1996, at A10; Robert Reno, *Victim Sideswiped By Rolling Wreck of Justice System*, NEWSDAY, March 7, 1996, at A49; Deborah J. Saunders, *The Death of Fundamental Fairness*, SAN FRANCISCO

should have shown greater care in addressing the reasonable doubts surrounding its two basic propositions.[72]

First of all, it is not obvious that Mrs. Bennis was in "the same position" as previous owner-defendants.[73] In fact, there seem to be significant differences. For example, in all the earlier cases cited by the majority, the owner-defendants—unlike Mrs. Bennis—stood in business relationships with those who had made illegal use of their property.[74] In addition, the problem of the "absent owner," which was especially acute in the context of admiralty law, did not apply in the case of Mrs. Bennis. Furthermore, as Justice Stevens pointed out, the nexus between Mrs. Bennis's property and the crime committed was arguably more tenuous than the nexus that had characterized earlier in rem forfeiture cases.[75] Finally, as Justice Stevens also noted, earlier justifications for imposing strict liability upon owners (i.e., "deterrence-value" and "judicial efficiency") apparently did not apply in the case of Mrs. Bennis.[76]

Secondly, even if Mrs. Bennis really were factually in "the same position" as previous owner-defendants, there is no rule that dictates that precedent must determine the outcome of every new case before the Court.[77] There are at least two reasons for this. First, the valid social goals that governed past decisions may no longer apply in a contemporary context.[78] Secondly,

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CHRON., March 11, 1996, at A19; *A Wife Doubly Wronged*, THE PLAIN DEALER, March 10, 1996, at 2C.

72. For a classic argument in favor of reasoned explanation by the courts, see HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 143-52 (William M. Eskridge, Jr. & Philip P. Frickey eds., 1994).

73. Bennis v. Michigan, 116 S. Ct. 994, 999 (1996).

74. This is potentially relevant because those who rent or lease property in a commercial context might be able to protect themselves by including indemnity clauses in their contracts with lessees. By contrast, it would have been highly cumbersome, not to mention strange, for Mrs. Bennis to insist upon an indemnification agreement with her husband.

75. *See supra* notes 49-52 and accompanying text (describing Justice Stevens's discussion of nexus).

76. *See supra* notes 57-58 and accompanying text (describing Justice Stevens's discussion of strict liability).

77. A healthy policy of judicial restraint generally does go hand-in-hand with a strong presumption in favor of precedent. Furthermore, precedent-following generally supports core values such as stability, predictability, efficiency, and impartiality in the legal process. *See* HART & SACKS, *supra* note 72, at 568-70. Nevertheless, the presumption in favor of precedent need not always oblige the Court to follow its earlier decisions.

78. Along these lines, Justice Thomas has suggested that differences between contemporary forfeiture laws and their historical antecedents may eventually compel the

there may be good reasons for re-evaluating past social goals and rejecting such goals—in retrospect—as invalid.

The Court's reluctance to give reasons beyond the principle of *stare decisis* is understandable, since judicial reason-giving can all too easily become judicial activism.[79] Nevertheless, it would be wrong to pretend that an appeal to the facts of the past can eliminate the need for a reasoned analysis of difficult normative issues. After all, the crucial factual question is not simply whether Mrs. Bennis was in "the same position" as other owner-defendants. It is clear that she was not in *exactly* the same position. The real question is whether Mrs. Bennis's situation was *relevantly similar* to that of the other owner-defendants *in light of the Constitution's due process requirement.* Thus, in order to answer the *factual* question concerning which similarities are relevant, one must consider the *normative* question concerning what the Constitution requires. However, since the Constitution itself says nothing directly about abatement under public nuisance statutes, one can properly understand the Constitution's due process requirement only by referring to legislative and judicial precedent. One is thus caught in a circle: the question concerning which factual similarities are relevant cannot be answered apart from some consideration of the Constitution's due process requirement; but conversely, the meaning and substance of the Constitution's due process requirement can be gleaned only by considering the history of cases that are relevantly similar to the case at issue.[80]

The *Bennis* Court should have acknowledged the genuine difficulty of this case and should have addressed *both* the factual

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Court "to reevaluate our generally deferential approach to legislative judgments in this area of civil forfeiture." United States v. James Daniel Good Real Property, 510 U.S. 43, 82 (1993) (citation omitted).

79. Frederick Schauer has suggested that the practice of "giving reasons" is inherently problematic, since it runs the risk of committing the reason-giver to future outcomes that the reason-giver neither intended nor anticipated. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

80. This is by no means a vicious circle. In essence, this is nothing other than the so-called "hermeneutical circle," discussed by Martin Heidegger and later by Hans-Georg Gadamer: one cannot understand the part (the singular case) in abstraction from the whole (history or precedent in its entirety), and one cannot understand the whole in abstraction from the parts. *See* MARTIN HEIDEGGER, SEIN UND ZEIT (15. Aufl. 1979); HANS-GEORG GADAMER, WAHRHEIT UND METHODE (1990). In a similar vein, Hart and Sacks have suggested that one may re-interpret (and thus transform) precedent in the very process of applying it. In other words, by relying on tradition or precedent (the whole) in order to settle a particular case (the part), one may transform the meaning of precedent itself. *See* HART & SACKS, *supra* note 72, at 545-54.

issues *and* the normative issues head on. In challenging the majority's opinion, the dissenters correctly intimated that the appeal to precedent cannot automatically settle the normative and constitutional difficulties raised by this case. However, the dissenters also erred by straying too far from precedent and by displacing the Constitution's requirement of due process (as revealed through precedent) with their own notions of what might be "fair."[81] In short, both the majority and the dissenters argued from *within* a basic circularity (according to which an understanding of the relevant facts depends on an understanding of the relevant norms, and *vice versa*), but they did so in equally one-sided ways: the majority relied on historical facts without adequately addressing the relevant normative issues, while the dissenters emphasized the normative requirement of due process without adequately considering how it has been understood and applied in past cases.

The reciprocal failings of both the majority and the dissenters could have been avoided through a more careful analysis of the traditional purpose and limits of American in rem forfeiture laws. The long history of civil forfeiture in the United States[82] reveals that the legal fiction of "guilty property" has traditionally been understood functionally.[83] Briefly stated, the function of the legal fiction has been to relieve governments of the usual burden of proving negligence or wrongdoing by owners, when such proof would have been impossible or too costly relative to the social goals to be served. The fiction itself implied two

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81. Thus Justice Stevens tried (contrary to the bulk of the evidence) to read into constitutional history an implicit requirement of negligence or wrongdoing by owners involved in forfeiture cases. Less egregiously but still erroneously, Justice Kennedy suggested that the Constitution requires, for the purpose of in rem forfeitures, something like a rebuttable presumption of negligent entrustment or criminal complicity.

82. American in rem forfeiture laws have their remote roots in the English common law. As far back as the mid-1600s, "English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974). In America, long before the adoption of the U.S. Constitution, the colonies—and later the States during the period of Confederation—"were exercising jurisdiction *in rem* in the enforcement of [English and local] forfeiture statutes." C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943). Almost immediately after the adoption of the U.S. Constitution, the First Congress enacted laws that authorized in rem forfeiture of ships and cargoes involved in customs offenses. *See* Act of July 31, 1789, §§ 12, 36, 1 Stat. 39, 47; Act of Aug. 4, 1790, §§ 13, 22, 27, 28, 67, Stat. 157, 161, 163, 176.

83. Thus Holmes observed that one can find a valid "hidden ground of policy" behind the "personifying language" of in rem forfeiture laws. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 30 (1991).

limitations: first, owners' property could not be seized unless the owners consented to another person's use of the property;[84] second, owners of the "guilty property" were not criminally liable and stood to lose no more than the property that they entrusted to another. In addition to these inherent limits, the government's power of in rem forfeiture was subject to further restrictions, depending on a variety of other factors, such as: the significance of the social goal to be achieved by the forfeiture law;[85] the relative value of the forfeitable property;[86] the increase in the level of judicial efficiency afforded by the forfeiture law;[87] the existence or non-existence of alternative methods of crime prevention;[88] the remedial value of the forfeiture (e.g., the removal of instrumentalities of crime from social commerce); and the deterrence value of the forfeiture.[89] An estimation of the deterrence value of the forfeiture might depend on two other factors: first, the nexus between the property used and the kind

84. But historically there was no requirement that the owner consented to the *illegal* use of the property. The Michigan Supreme Court articulated this distinction in its disposition of the *Bennis* case: "The United States Supreme Court indisputably allows forfeiture of an innocent owner's property, unless evidence was submitted that the property was stolen or used without the consent of the owner." Michigan *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483, 495 (Mich. 1994). In drawing this distinction, the Michigan Supreme Court relied on two prior Supreme Court cases: *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926), and *Calero-Toledo*, 416 U.S. at 689. Because of this requirement of consent by the owner, it is somewhat misleading to refer, as some of the courts have done, to the plight of the "truly innocent owner." *See, e.g.*, J.W. Goldsmith, Jr.-Grant Co., 254 U.S. 505, 512 (1926). Owners affected by civil forfeiture law may be "innocent" in the sense that they are not negligent or complicit in the wrongful use of their property. However, owners who consent to another person's use of their property are, in principle, able to foresee that the property *might* be used for criminal activity (no matter how remote that possibility may be). Historically, in rem forfeiture laws have granted immunity to *really*, truly innocent owners, that is, owners whose property was stolen or otherwise taken without their consent.

85. Thus the Court has referred to various social goals, including "the necessities of the Government, its revenues and policies," as relevant factors in determining the validity of civil forfeiture laws. *Goldsmith-Grant*, 254 U.S. at 510. *See also Calero-Toledo*, 416 U.S. at 679 (referring to "significant governmental purposes").

86. *See, e.g.*, United States v. James Daniel Good Real Property, 510 U.S. 43, 62 (1993) (observing that "the importance of the private interests at risk" is relevant in determining whether some judicial proceedings may be circumvented).

87. *See, e.g., Calero-Toledo*, 416 U.S. at 679 (arguing that judicial proceedings may be curtailed when they "might frustrate the interests served by the statutes").

88. Thus Justice Story observed that the government may sometimes seize property "without any regard whatsoever to the personal misconduct or responsibility of the owner thereof" when such seizure is "the only adequate means of suppressing the offense or wrong." Harmony v. United States, 43 U.S. (2 How.) 210, 233 (1844).

89. *See, e.g., Calero-Toledo*, 416 U.S. at 687 (arguing that forfeiture of vehicles can serve governmental purposes, "both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable").

of crime committed;[90] and secondly, the relationship between the property owner and the person(s) who used the property for illegal activity.[91]

The Court could have and should have provided a more elaborate and reasoned analysis of these precedent-guiding factors and their relevance to Mrs. Bennis's due process claim. Such an analysis would not have been a departure from precedent, but only a more differentiated articulation of precedent itself. This is not to suggest that precedent inevitably points in the direction of any specific kind of balancing test.[92] Nor is this to suggest that the Michigan statute may not need some fine-tuning. But this is to imply that the Michigan statute does at least meet the requirements of due process, as these have been unfolded through precedent.[93]

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90. Justice Stevens correctly observed that this nexus was relevant in determining the extent to which owners might foresee that their property could be used for criminal activity; however, he wrongly concluded that the foresight requirement must be understood in connection with a standard of negligence. For an analysis of strict liability as it has been applied in the context of civil forfeiture, see Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 334-35 (1994). For an analysis of "foresight-based strict liability" in general, see DAVID ROSENBERG, THE HIDDEN HOLMES 118-23 (1995). Justice Stevens's analysis of the nexus issue was flawed in yet another respect. Even if Mr. Bennis's "principal use" of the car was not unlawful, it is not obvious that his use of the car did not actually "facilitate" the crime itself. If one considers the fact that the business of street-prostitution depends on automobile traffic for quick and efficient solicitations, encounters, and get-aways, then perhaps the car *did* bear a "necessary connection" to the crime itself.

91. Different kinds of relationships involve different kinds of entrustment, different levels of foreseeability, and different levels of possible self-protection for owners. For example, as suggested above, owners who entrust property to others for commercial purposes might protect themselves against forfeiture by including indemnification clauses in their lease agreements.

92. One might say that precedent points in the direction of a general balancing test, but one in which the scales are taken from precedent itself. The concurring opinion of Justice Ginsburg seems to have come closest to this general balancing approach.

93. The foregoing argument also provides the beginnings of a response to Justice Stevens's contention that the Supreme Court's decision in *Austin v. United States*, 509 U.S. 602, 615 (1993), compels reversal in this case. First of all, there are good reasons to suspect that the *Austin* decision rested on a misunderstanding of precedent. *See* Harrington, *supra* note 90, at 329-45 (1994). In addition, even if the *Austin* decision was historically sound, the decision is not necessarily determinative for the *Bennis* case, since *Austin* left many crucial issues unresolved. For example, it is unclear whether the decision in *Austin* was meant to apply to all civil forfeiture actions, or only to those brought under 21 U.S.C. § 881. Furthermore, the majority in *Austin* deliberately declined to establish a multi-factor test "for determining whether a forfeiture is constitutionally 'excessive'" under the Eighth Amendment. *Austin*, 509 U.S. at 622. As a result, it is not clear that the standard for measuring "excessiveness" in *Austin* would apply to the different fact-pattern of *Bennis*. Finally, *Bennis* might be distinguished from *Austin* on the grounds that the forfeiture law in *Austin* required some degree of culpability on the part of the property owner, and therefore was appropriately

In sum, the *Bennis* decision teaches the important lesson that the concept of judicial restraint is a Janus-faced, dialectical concept. Judicial restraint remains an important guiding principle within the context of democratic self-government, because it stands opposed to the authoritarian tendencies of judicial activism. Nevertheless, it is does not follow that a greater amount of judicial restraint always entails a greater benefit to the democratic process. On the contrary: if the Court practices too much judicial restraint, then it risks appearing as a silent, anti-democratic authority that refuses to explain its decisions to the people who are affected by them. Both an excess and a deficiency of judicial restraint are extremes, and therefore vices,[94] within the legal process. However, one vice is worse than the other. Because excellence consists in hitting the mean, the correct policy is to struggle more strenuously against the extreme that is harder to avoid.[95] Thus, while the *Bennis* Court erred, it erred prudently in the direction away from judicial self-aggrandizement.

Michael J. Baur

CIVIL FORFEITURE AS JEOPARDY: *United States v. Ursery*, 116 S. Ct. 2135 (1996).

Balancing the government's interest in effective law enforcement with the protection of the accused's constitutional rights has long been a source of frustration for the courts. It is essential to preserve both, but the promotion of one often seems to work in direct opposition to the other. The complexity of this question combined with its polarizing political implications makes it tempting to forego careful consideration and heavily favor one side or the other, depending on one's ideological bent. If there is a satisfactory and workable solution

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characterized as imposing a form of punishment. By contrast, the question of negligence or wrongdoing by the property owner was entirely irrelevant under the statute in *Bennis*; therefore, the statute in *Bennis* arguably had nothing to do with "punishment" at all. Along these lines, Chief Justice Rehnquist noted that, in *Austin*, the possibility of an "innocent owner" defense provided some evidence that the statute in question was partly punitive in motive. *See Bennis*, 116 S. Ct. 994, 1000 (1996).

94. *See* ARISTOTLE, NICOMACHEAN ETHICS 1106a15-1107a25.

95. *See id.* at 1109a30-1109b5.