

NOTES

CIVIL FORFEITURE AND THE STATUS OF INNOCENT OWNERS AFTER *BENNIS* *V. MICHIGAN*

You get married based on mutual love and respect. A few years later, you and your spouse purchase a brand new automobile as joint tenants. Soon afterwards you hear the shocking news of your spouse's arrest for picking up a prostitute and performing an indecent act in the car that you had recently purchased. Your unfaithful spouse gets convicted of gross indecency, but the nightmare does not end. The government confiscates the car because it was an instrument used to create a nuisance. The government, however, does not compensate you as an innocent owner for your interest in the vehicle. As if the realization of your spouse's infidelity is not enough, you are now left without a car, which you need to drive to work, to go to the doctor or to take the kids to school. Is this possible in the United States? Yes, said the United States Supreme Court in *Bennis v. Michigan*.¹

In 1996, in *Bennis*, the United States Supreme Court upheld as constitutional a Michigan statute that permits the forfeiture of a married couple's jointly owned car due to its use by the husband for an unlawful act without the wife's acquiescence, knowledge or consent.² The Court, following a long and unbroken line of cases firmly fixed in American jurisprudence, held that such a forfeiture does not violate the Due Process Clause of the Constitution. The Court held, rather, that such a forfeiture is consistent with those past decisions in which the Court held that an owner forfeits any interest in property when the property is used improperly—even if the owner had no knowledge of the improper use.³ The Court also held that such a forfeiture does not violate the Takings Clause of the Constitution because the government does not have to compensate an owner for property acquired

¹ See 116 S. Ct. 994, 996 (1996).

² *Id.*

³ *Id.* at 998, 1001.

through a governmental authority other than the power of eminent domain.⁴ In so holding, the Supreme Court gave uncontrollable power to the state and federal governments to confiscate any property put to an illegal use without performing any inquiry as to the property owner's conduct.⁵

This Note examines the *Bennis* decision and argues that it was decided wrongly.⁶ By focusing on a tradition that evolved out of necessities not present in *Bennis*, the Court ignored not only some of its more recent decisions but also the fundamental notions of fairness that underlie the Constitution.⁷ Section I provides a background discussion of civil forfeiture and its historical roots and purpose.⁸ Section II examines previous constitutional challenges to forfeiture statutes and the case law.⁹ Section III discusses the *Bennis* decision in detail.¹⁰ Section IV argues that the *Bennis* Court reached its decision on the basis of flawed reasoning.¹¹

I. HISTORICAL DEVELOPMENT OF CIVIL FORFEITURE LAWS AND THEIR PURPOSE

Where a man killeth another with the sword of John at Stile, the sword shall forfeit as deodand, and yet no default is in the owner.

—Oliver W. Holmes¹²

English law provided three grounds for the forfeiture of a person's property.¹³ Originally, early English common law developed a procedure known as deodand, under which the King forfeited any object causing the death of an English citizen.¹⁴ The King would in turn use the money derived from the forfeiture for religious or charitable purposes.¹⁵ Over time, the original application of deodand for religious or charitable purposes faded, and it became a source of revenue justified

⁴ *Id.* at 1001.

⁵ *See id.* at 1003 (Stevens, J., dissenting).

⁶ *See infra* notes 125–304 and accompanying text.

⁷ *See infra* notes 255–304 and accompanying text.

⁸ *See infra* notes 12–32 and accompanying text.

⁹ *See infra* notes 32–124 and accompanying text.

¹⁰ *See infra* notes 125–254 and accompanying text.

¹¹ *See infra* notes 255–304 and accompanying text.

¹² OLIVER W. HOLMES, *THE COMMON LAW* 25 (1881).

¹³ *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–83 (1973).

¹⁴ *Id.* at 681. Deodand derives from the Latin *Deo dandum*, “to be given to God.” *Id.* at 681 n.16.

¹⁵ *See id.* at 681.

as a penalty for negligence.¹⁶ At the same time, English common law provided for forfeiture of the property of someone convicted for felonies and treason.¹⁷ Finally, English law provided for statutory forfeitures of offending objects used in violation of the custom and revenue laws.¹⁸

Of England's three kinds of forfeiture, only statutory forfeiture emerged as a ground for forfeiture in the United States.¹⁹ Early United States forfeiture law focused primarily on admiralty law, subjecting to forfeiture ships and cargoes involved in customs offenses.²⁰ The government brought in rem proceedings because it often found locating ship owners difficult.²¹ In rem proceedings, in turn, granted courts proper jurisdiction over the property even if they could not acquire in personam jurisdiction over the property owner.²²

Contemporary federal and state forfeiture statutes, however, reach virtually any type of property used in the conduct of a criminal enterprise.²³ Approximately one hundred different federal statutes currently provide for civil forfeiture in a variety of criminal contexts.²⁴ In particular, the use of forfeiture has become an increasingly popular means to combat drug trafficking.²⁵

As a response to the growing influx of illegal drugs, Congress adopted the Comprehensive Drug Abuse Prevention and Control Act of 1970.²⁶ The Act authorized the United States Department of Justice to bring civil forfeiture actions against any property used or acquired in violation of narcotics laws.²⁷ The Comprehensive Crime Control Act

¹⁶ *Id.*

¹⁷ *Id.* at 682. A breach of criminal law was an offense to the King's peace, which justified the denial of the right to own property. *Id.*

¹⁸ *Calero-Toledo*, 416 U.S. at 682.

¹⁹ *Austin v. U.S.*, 113 S. Ct. 2801, 2807 (1993). Deodands did not become part of the common law traditions of this country. *Id.* The Constitution forbids forfeiture of estates as a punishment for treason, "except during the life of the person attained." U.S. CONST. art. III, § 3, cl. 2. The first Congress of the United States also abolished forfeiture of estates as a punishment for felons. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 117 (1790); see also *Austin*, 113 S. Ct. at 2807.

²⁰ *Austin*, 113 S. Ct. at 2807.

²¹ See *id.* at 2808-09 n.9. In rem proceedings are based on the legal fiction that the object—rather than the owner of the property—serves as the offending party or the "defendant." See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

²² *Austin*, 113 S. Ct. at 2808-09 n.9.

²³ *Calero-Toledo*, 416 U.S. at 683.

²⁴ See Eaddy Lynette, *How Much Is Too Much? Civil Forfeitures and the Excessive Fines Clause After Austin v. United States*, 45 FLA. L. REV. 709, 713 (1993).

²⁵ Damon G. Salzburg, *Real Property Forfeitures As a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 217 (1992).

²⁶ *Id.*

²⁷ *Id.* In 1978 Congress expanded civil forfeiture law to reach proceeds derived from drug

of 1984 further amended the forfeiture laws, specifically allowing forfeiture actions against real property purchased with drug proceeds or intended for use in narcotics trafficking.²⁸ As a result, the government has dramatically increased the use of civil forfeitures in recent years.²⁹

The in rem nature of forfeiture proceedings has made it very easy for the government to seize property without considering the conduct of the owner involved.³⁰ Such ease, however, has increased the potential for abuse by government officials.³¹ Although some federal statutes now provide some protections for innocent owners, many federal and state statutes still do not.³²

II. IN REM CIVIL FORFEITURE AND THE INNOCENT OWNER

A. *The innocence of the owner of property subject to forfeiture is not a defense to forfeiture*

Historically, courts did not consider the innocence of owners when their property became subject to forfeiture because courts regarded the property itself as the evil that the forfeiture statute sought to remedy.³³ In 1827, in *The Palmyra*, the United States Supreme Court held that a ship owner's conviction did not serve as a prerequisite to the forfeiture of a ship allegedly engaged in violation of a federal statute.³⁴ The *Palmyra* was an armed vessel that allegedly attempted a piratical aggression, search, depredation, restraint and seizure on the high seas upon a United States vessel.³⁵ The defendant argued that the Court could not hear the in rem forfeiture suit prior to the conviction of the alleged offenders in an in personam action.³⁶ The Supreme Court reasoned that because it regarded the property itself as the

transactions, including any assets bought with such proceeds and exchanged, or intended to be exchanged, for controlled substances. *Id.* at 217-18.

²⁸ *Id.* at 218.

²⁹ See Mary M. Cheh, *Can Something This Easy, Quick, and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 3 (1994). The Federal government effected 35,295 seizures of property in 1991, reflecting 18 increases since 1986. *Id.* According to figures provided by the Justice Department's Executive Office for Asset Forfeiture, net deposits in the Asset Forfeiture Fund grew from \$93.7 million in 1986 to \$643.6 million, \$531 million and \$555.7 million in 1991, 1992 and 1993, respectively. *Id.*

³⁰ See *id.* at 2-3.

³¹ See *id.* at 7.

³² See, e.g., 31 U.S.C. § 5317 (1994); 18 U.S.C. § 1955 (1994); MICH. COMP. LAWS ANN. § 600.3801 (West 1987 & Supp. 1995).

³³ See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827).

³⁴ *Id.* at 12, 15.

³⁵ *Id.* at 1.

³⁶ *Id.* at 12.

offender in an in rem proceeding, the conviction of the owner of the property in a criminal proceeding had no bearing on the forfeiture of the property.³⁷ The Court thus enforced the forfeiture of The Palmyra without inquiring whether the owners were guilty of any crime.³⁸

In 1844, in *United States v. Cargo of the Brig Malek Adhel*, the United States Supreme Court held that the statutory forfeiture of a vessel remained valid despite the innocence of the owner.³⁹ Although the lower court convicted the possessors of the vessel of piracy, it also established the innocence of the owners of the vessels.⁴⁰ Applying the *Palmyra* rationale, the Court treated the vessel as the offender, without regard to the owners' conduct.⁴¹ The Court reasoned that this was the only adequate means of "suppressing the offense or wrong, or insuring an indemnity to the injured party."⁴² Despite the owners' innocence, therefore, the *Brig Malek* Court held that the forfeiture of the vessel was proper because it was used in an unlawful activity.⁴³

In 1877, in *Dobbin's Distillery v. United States*, the United States Supreme Court again allowed the forfeiture of property despite the owner's assertion of innocence as a defense.⁴⁴ The case involved a lessee, operator and occupant of a distillery who made false entries in his record books in violation of revenue laws and kept them in the distillery.⁴⁵ Subsequently, the government seized all real and personal property used in connection with the distillery.⁴⁶ The owner of the property sought to contest the forfeiture by maintaining that he had no knowledge that the lessee had committed a fraud on the public revenue.⁴⁷ The Court reasoned that by permitting another to use his land as a distillery, the law placed the owner on the same footing as if he were the distiller.⁴⁸ The Court therefore determined the owner's conduct of no consequence because the offense attached primarily to the distillery and the real and personal property used in connection

³⁷ See *id.* at 14–15.

³⁸ The *Palmyra*, 25 U.S. (12 Wheat.) at 15.

³⁹ See *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233–34, 237 (1844).

⁴⁰ See *id.* at 230.

⁴¹ *Id.* at 234.

⁴² *Id.* at 233.

⁴³ *Id.* at 234, 237.

⁴⁴ See *Dobbin's Distillery v. United States*, 96 U.S. 395, 396, 404 (1877).

⁴⁵ *Id.* at 396.

⁴⁶ *Id.* at 397.

⁴⁷ *Id.*

⁴⁸ See *id.* at 399.

with the distillery.⁴⁹ The Supreme Court thus upheld the forfeiture of property used by a lessee in violation of federal revenue laws without considering the lessor's conduct.⁵⁰

In the early twentieth century, the Court addressed the issue of whether the application of a forfeiture statute to innocent owners survived constitutional scrutiny.⁵¹ In 1921, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*, the United States Supreme Court held that the federal tax-fraud forfeiture statute did not violate the Due Process Clause of the Fifth Amendment.⁵² The case involved the forfeiture of a taxicab used to transport alcohol in violation of federal law.⁵³ The owner of the taxicab, a dealer in cars who retained title while financing the purchase, had no knowledge, notice or reason to suspect that the purchasers would use the car illegally.⁵⁴ The *Goldsmith* Court ultimately rejected arguments that the application of the statute to cover an innocent owner was unconstitutional, although it did acknowledge that the arguments had some validity.⁵⁵

The *Goldsmith* Court analogized the federal tax-fraud statute to the law of deodand that provided for the forfeiture of a chattel causing a person's immediate death.⁵⁶ The Court reasoned that the assumption underlying the law of deodand was that the misfortune resulted from the owner's negligence; therefore punishment of the owner was appropriate.⁵⁷ The *Goldsmith* Court noted that whether this reason for forfeiture was artificial or real, forfeiture had become too firmly fixed in the punitive and remedial jurisprudence of the country for the Court to replace it.⁵⁸ The Court reserved its opinion as to whether the statute could extend to property stolen from the owner or otherwise taken without the owner's privity.⁵⁹ The *Goldsmith* Court, therefore, concluded that a tax-fraud statute did not violate the Constitution by forfeiting property of an innocent owner.⁶⁰

In 1926, in *Van Oster v. Kansas*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment did

⁴⁹ *Dobbin's*, 96 U.S. at 401.

⁵⁰ *See id.* at 396, 404.

⁵¹ *See J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-11 (1921).

⁵² *See id.* at 508, 510, 513.

⁵³ *See id.* at 508, 509.

⁵⁴ *Id.* at 508, 509.

⁵⁵ *Id.* at 510.

⁵⁶ *Goldsmith*, 254 U.S. at 510.

⁵⁷ *See id.* at 511.

⁵⁸ *Id.*

⁵⁹ *See id.* at 512.

⁶⁰ *See id.* at 508, 510, 513.

not limit the state's power to forfeit property of an innocent owner who entrusted its possession and use to a wrongdoer.⁶¹ In *Van Oster*, the plaintiff purchased an automobile from a local dealer and, as partial consideration, had agreed to allow an associate of the local dealer to use the automobile for business.⁶² The State of Kansas later arrested the associate for using the plaintiff's automobile to transport liquor and sought to forfeit the automobile as a common nuisance under a Kansas statute.⁶³ The plaintiff claimed that the transportation of the liquor had taken place without her knowledge or authority and that the statute denied her due process of law as guaranteed by the Fourteenth Amendment.⁶⁴

The *Van Oster* Court reasoned that it did not need to consider the innocence or guilt of the owner because state legislatures, in the exercise of their police power, remained free to determine that certain uses of property were undesirable and to take strong preventive measures against such uses.⁶⁵ The Court, citing *Goldsmith* and *Dobbins*, noted that statutory forfeiture of property entrusted by an innocent owner to another who used it in violation of the revenue laws of the United States did not violate the Due Process Clause of the Fifth Amendment.⁶⁶ The *Van Oster* Court determined no valid reason to distinguish between the application of the Fourteenth Amendment to the exercise of the state's police power in this case and the application of the Fifth Amendment to the similar exercise of the federal government's taxing power.⁶⁷ Accordingly, the Supreme Court held that forfeiting property involved in illegal liquor transfers under Kansas law satisfied the dictates of the Fourteenth Amendment.⁶⁸

In sum, through 1926 the United States Supreme Court almost uniformly rejected the innocence of the owner as a valid defense to such a forfeiture.⁶⁹ This trend illustrated the Court's willingness to carry out legislative intent by rejecting an innocent owner defense where the statute did not provide for it.⁷⁰ Moreover, it emphasized the existence of judicial skepticism towards the claims of innocence by

⁶¹ See *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926).

⁶² *Id.* at 465-66.

⁶³ *Id.* at 466.

⁶⁴ See *id.* at 466-67.

⁶⁵ *Id.* at 467.

⁶⁶ *Van Oster*, 272 U.S. at 468.

⁶⁷ *Id.*

⁶⁸ *Id.* at 466-68.

⁶⁹ *Calero-Toledo*, 416 U.S. at 683.

⁷⁰ George T. Pappas, *Civil Forfeiture and Drug Proceeds: The Need to Balance Societal Interests with the Rights of Innocent Owners*, 77 MARQ. L. REV. 856, 863 (1994).

property owners.⁷¹ The Court's underlying purpose for rejecting innocent owner claims was to encourage property owners to exercise greater care with their property and thus reduce any risk of collusion.⁷²

B. *Change in the Court's Attitude and Constitutional Limits to In Rem Forfeiture Statutes Before Bennis v. Michigan*

In 1974, faced again with the constitutionality of a broad forfeiture statute, in *Calero-Toledo v. Pearson Yacht Leasing Co.*, the United States Supreme Court held that a Puerto Rican forfeiture statute was constitutional as applied to an innocent lessor.⁷³ The Court reasoned that even if a statutory scheme affords no defense to innocents, it nonetheless remains constitutional in light of both the historical background of forfeiture statutes in the United States and the Court's prior decisions sustaining the constitutionality of such statutes.⁷⁴ The Supreme Court suggested in dicta, however, that some constitutional limits do exist with respect to the government's power to forfeit property.⁷⁵

In *Calero-Toledo*, the police found marijuana aboard a yacht leased from its owners, a yacht company.⁷⁶ Although the owners had no involvement in or knowledge of the lessee's wrongful use of the boat, the government forfeited their vessel.⁷⁷ The *Calero-Toledo* Court rejected the yacht company's argument that the forfeiture violated the Takings Clause of the Fifth Amendment.⁷⁸

The Court found that the Puerto Rican forfeiture statute furthered punitive and deterrent purposes.⁷⁹ Such purposes, the Court reasoned, were sufficient to uphold the application of forfeiture statutes to the property of innocents against constitutional challenge.⁸⁰ The *Calero-Toledo* Court reasoned that the statute served the purpose of preventing illegal uses by imposing an economic penalty on the owner, thus rendering the illegal behavior unprofitable.⁸¹ The Court

⁷¹ Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1271 ("A survey of the cases reveals that claimants were not as innocent as they maintained. Indeed, they often were 'strawmen' holding title on behalf of a drug dealer.").

⁷² See *Austin v. United States*, 113 S. Ct. 2801, 2808-09 (1993); *Goldsmith*, 254 U.S. at 511.

⁷³ 416 U.S. 663, 680 (1974).

⁷⁴ *Id.*

⁷⁵ *Id.* at 689.

⁷⁶ *Id.* at 665.

⁷⁷ *Id.* at 668.

⁷⁸ *Calero-Toledo*, 416 U.S. at 680.

⁷⁹ *Id.* at 686.

⁸⁰ See *id.* at 688-89.

⁸¹ *Id.* at 687.

further indicated that, to the extent that such forfeiture provisions apply to innocent "lessors, bailors or secured creditors," confiscation might have the desirable effect of inducing these owners to exercise greater care in transferring possession of their property.⁸²

In sustaining the constitutionality of the Puerto Rican statute, the *Calero-Toledo* Court noted the potential difficulty of rejecting a constitutional challenge of the application of a forfeiture statute to an owner whose property had been taken without his or her privity or consent.⁸³ Similarly, the Court indicated the potential difficulty of rejecting the constitutional claim of an owner who proved not only a lack of involvement in or awareness of the wrongful activity, but also that he or she had made every reasonable effort to prevent the proscribed use of his or her property.⁸⁴ In those circumstances, the *Calero-Toledo* Court reasoned, the Court would find it difficult to conclude that the forfeiture served a legitimate purpose and was not unduly oppressive.⁸⁵ The Supreme Court concluded, however, that the owner in this case had voluntarily entrusted the lessee with possession of the yacht and had made no allegation or proof that the yacht company did all that it could have reasonably done to prevent the unlawful use of its property.⁸⁶ The *Calero-Toledo* Court thus upheld the constitutionality of a Puerto Rican forfeiture statute as it applied to an innocent lessor.⁸⁷

In 1993, in *Austin v. United States*, the United States Supreme Court held that the Eighth Amendment's Excessive Fines Clause applies to in rem civil forfeiture proceedings.⁸⁸ In that case, Austin pleaded guilty to one count of possession of cocaine with intent to distribute.⁸⁹ Consequently, the prosecution filed an in rem proceeding in the United States District Court of South Dakota seeking forfeiture of Austin's mobile home and auto body shop under 21 U.S.C. §§ 881(a)(4) and (a)(7).⁹⁰ According to the government, Austin had brought two ounces of cocaine from his mobile home to the body shop to consummate a prearranged sale.⁹¹ The defendant challenged the proceeding, asserting that the forfeiture violated the Excessive Fines

⁸² *Id.* at 688.

⁸³ *Calero-Toledo*, 416 U.S. at 689.

⁸⁴ *Id.*

⁸⁵ *Id.* at 690.

⁸⁶ *Id.*

⁸⁷ *Id.* at 680.

⁸⁸ 113 S. Ct. 2801, 2803 (1993) ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," (quoting U.S. CONST. amend. VIII)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

Clause of the Eighth Amendment.⁹² The Supreme Court first noted that previous case law recognized that statutory in rem forfeitures imposed punishment.⁹³ The *Austin* Court went on to note that the understanding that forfeiture is partly punitive runs through those cases rejecting innocent ownership as a defense.⁹⁴ According to the Court, the guilty-property fiction of in rem proceedings rested on the notion that the owner who allowed the property to become involved in an offense has been negligent and is properly punished for it.⁹⁵ The Court noted that it had never applied the guilty-property fiction to justify forfeiture where the owner had done all that reasonably could be expected to prevent the unlawful use of the property.⁹⁶ The Court reserved the question of whether the forfeiture of a truly innocent owner's property would comport with due process because the forfeiture provision at issue in *Austin* exempted "innocent owners."⁹⁷ The Supreme Court held that the forfeiture statute at issue in *Austin* served in part as punishment and therefore became subject to the Excessive Fines Clause of the Eighth Amendment.⁹⁸ The Court remanded the case to the lower courts to determine whether the forfeiture, as applied to *Austin*, was constitutionally excessive.⁹⁹

In sum, in dicta, the *Calero-Toledo* Court provided for the possibility of some limitations to civil forfeiture.¹⁰⁰ In addition, the Supreme Court in *Austin* made civil forfeiture statutes subject to the Excessive Fines Clause of the Constitution.¹⁰¹ The most significant aspect of the *Austin* decision, however, involved the Court's apparent willingness to move away from the strict historical in rem doctrine by adding that the owner's negligence was an underlying assumption to in rem forfeitures.¹⁰²

⁹² *Id.* at 2804. The Excessive Fines Clause limits the Government's power to extract payments, whether in cash or in kind, as punishment for some offense. *Id.* at 2805.

⁹³ *Austin*, 113 S. Ct. at 2808.

⁹⁴ *Id.*

⁹⁵ *Id.* at 2808-2809.

⁹⁶ *Id.* at 2809.

⁹⁷ *Id.* at 2809 n.10.

⁹⁸ *Austin*, 113 S. Ct. at 2812.

⁹⁹ *Id.*

¹⁰⁰ See *Calero-Toledo*, 416 U.S. at 689.

¹⁰¹ *Austin*, 113 S. Ct. at 2803.

¹⁰² See *id.* at 2808-09.

C. *Application of the Constitutional Limits to Civil Forfeiture as Set Forth in Calero-Toledo*

[I]t would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture has been taken from him without his privity or consent. . . . Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that he could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive.¹⁰³

The Supreme Court's dicta in *Calero-Toledo* set forth a three pronged test to determine whether a property's forfeiture is constitutional in a particular case.¹⁰⁴ The *Calero-Toledo* Court indicated that the Constitution would prevent the forfeiture of property owned by a person who (i) had no involvement in the wrongful conduct; (ii) had no knowledge of it; and (iii) had done all that reasonably could be expected to prevent the proscribed use of the property.¹⁰⁵

Courts have construed state and federal statutes that do not contain innocent owner provisions in light of the three limitations set forth in *Calero-Toledo*.¹⁰⁶ Generally, courts have imposed stringent standards to determine whether an owner took all the reasonable steps outlined in *Calero-Toledo* to prevent illegal use of the property.¹⁰⁷ Many cases have led to harsh results, partly due to judicial skepticism regarding third party claims of innocence.¹⁰⁸

¹⁰³ *Calero-Toledo*, 416 U.S. at 689-90.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.*, *United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); *Therkeld v. State*, 586 So. 2d 756, 759 (Miss. 1991) (construing state forfeiture statute to avoid violation of state constitution's due process guarantee); *State v. 1979 Pontiac Trans Am*, 487 A.2d 722, 726-27 (N.J. 1985) (construing state forfeiture statute to avoid violation of Fourteenth Amendment Due Process Clause).

¹⁰⁷ *See, e.g.*, *United States v. One Mercedes Benz*, 604 F. Supp. 1307, 1317 (S.D.N.Y. 1984) (out-of-town owner who had left his Mercedes in care of acquaintance did not satisfy the all reasonable test because garaging car would have been a more reasonable means of preventing its illegal use), *aff'd*, 762 F.2d 991 (2d Cir. 1985).

¹⁰⁸ *Goldsmith & Linderman, supra* note 71, at 863.

In contrast, a few courts have tried to avoid the harsh results of forfeiture by applying the *Calero-Toledo* test more liberally.¹⁰⁹ For example, in 1979, in *United States v. One 1976 Lincoln-Mark IV*, the United States District Court for the Western District of Pennsylvania held that a forfeiture statute could not constitutionally provide for the forfeiture of an innocent car owner's vehicle.¹¹⁰ The car owner had loaned the car to his brother-in-law.¹¹¹ The owner knew that his brother-in-law had been involved in a securities violation but was unaware of his involvement with drugs.¹¹² The government forfeited his car because the brother-in-law used the car in connection with a drug transaction.¹¹³ The court held that the owner had done all that could be reasonably expected of him to prevent the illegal use of the vehicle.¹¹⁴ The court, citing reputable authority, did acknowledge, however, that the case was close in that it could have reached an opposite conclusion.¹¹⁵ Nevertheless, the court reasoned that a truly affirmative duty to protect one's property from illegal use would only be triggered by knowledge or suspicion of potential wrongdoing.¹¹⁶ Because the owner had no reason to suspect his brother-in-law's involvement with drugs, the *Lincoln Mark IV* court held that the owner had acted reasonably under the circumstances and thus refused to allow a government forfeiture of the car.¹¹⁷

In 1984, in *United States v. One Mercedes-Benz*, the United States District Court for the Southern District of New York criticized the *Lincoln Mark IV* decision as outside the mainstream authority, holding that the owner of the vehicle at issue did not do all that reasonably could be expected in order to prevent illegal use of the vehicle.¹¹⁸ The owner in *One Mercedes-Benz* left his Mercedes in the care of a parolee who frequented social clubs where consumption of narcotics was part of the lifestyle.¹¹⁹ The court held that the claimant bore the burden of proof in demonstrating that he was entirely innocent of the underlying crime and did all that reasonably could be expected to prevent the

¹⁰⁹ See, e.g., *United States v. One 1976 Lincoln-Mark IV*, 462 F. Supp. 1383, 1392 (W.D. Pa. 1979).

¹¹⁰ *Id.* at 1391-92.

¹¹¹ *Id.* at 1385-86.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Lincoln-Mark IV*, 462 F. Supp. at 1391.

¹¹⁵ *Id.* at 1392.

¹¹⁶ *Id.* at 1391.

¹¹⁷ *Id.* at 1392.

¹¹⁸ 604 F. Supp. 1307, 1318 (S.D.N.Y. 1984).

¹¹⁹ *Id.* at 1317.

proscribed use of the property.¹²⁰ In this respect the court reasoned that, although the owner had demonstrated his innocence, he had failed to prove the second prong of the test, which required him to take some affirmative action.¹²¹ The court acknowledged the possessor's apparent rehabilitation from his prior conviction and asserted that no evidence existed that either the owner or the possessor of the car themselves used drugs.¹²² The *Mercedes-Benz* court reasoned, however, that under the circumstances, it would have been more reasonable for the owner to place the car in a garage to avoid possible unlawful use or at least to exercise maximum efforts to see that no one else used the car.¹²³ The *Mercedes-Benz* court thus held that the forfeiture of the innocent owner's car did not violate the Due Process Clause because the owner failed to demonstrate that he had taken sufficient action to prevent the illegal use of his car.¹²⁴

III. *BENNIS V. MICHIGAN*

In 1996, in *Bennis v. Michigan*, the United States Supreme Court upheld the constitutionality of a Michigan nuisance abatement statute that provided for the forfeiture of property where a co-owner had no knowledge that her husband used the vehicle illegally.¹²⁵ The Court held that such a forfeiture does not violate the Due Process Clause of the Constitution under a long and unbroken line of cases, firmly fixed in American jurisprudence, which hold that an owner forfeits any interest in property when the property is used improperly even if the owner had no knowledge of the improper use.¹²⁶ The Court also held that such a forfeiture does not violate the Takings Clause of the Constitution because the government does not have to compensate an owner for property acquired through a governmental authority other than the power of eminent domain.¹²⁷

Detroit police arrested John Bennis after observing him engaged in a sexual act with a prostitute in an automobile parked on a Detroit city street.¹²⁸ A court later convicted John Bennis of gross indecency in

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See *One Mercedes-Benz*, 604 F. Supp. at 1317.

¹²⁴ *Id.* at 1318.

¹²⁵ See *Bennis v. Michigan*, 116 S. Ct. 994, 996 (1996).

¹²⁶ *Id.* at 998, 1001.

¹²⁷ *Id.* at 1001.

¹²⁸ *Id.* at 996.

violation of a Michigan criminal law.¹²⁹ Subsequently, the Wayne County prosecutor brought an action against the co-owners of the car, Mr. Bennis and his wife, Tina, alleging that the vehicle constituted a public nuisance subject to abatement under the Michigan Public Nuisance Abatement Statute ("Michigan Statute").¹³⁰ In her defense, Tina Bennis claimed that she had no knowledge that her husband ever used the vehicle in violation of the Michigan Statute.¹³¹

Specifically, the Michigan Statute declares that "any . . . vehicle . . . used for the purpose of lewdness, assignation, or prostitution" constitutes "a nuisance."¹³² It authorizes the state attorney general or a county prosecuting attorney to bring an abatement action against the owners of the property alleged to constitute a nuisance.¹³³ In addition, it provides for the forfeiture of certain property used for the purpose of creating a nuisance.¹³⁴ The Michigan Statute explicitly provides that "proof of knowledge of the existence of the nuisance on the part of the defendants or any of them is not required."¹³⁵

At trial, the Wayne County Circuit Court held that the vehicle was a nuisance and abated the interests of both John and Tina Bennis.¹³⁶ On appeal, the Michigan Court of Appeals reversed the decision of the trial court.¹³⁷ The Michigan Court of Appeals held that the prosecution had an obligation to demonstrate that the defendant knew of the use of the vehicle as a nuisance, despite the fact that the Michigan Statute made it irrelevant whether Tina Bennis knew of her husband's illegal conduct.¹³⁸ The Court of Appeals also held that a single incident of lewdness, assignation or prostitution was insufficient to establish a nuisance.¹³⁹ Finally, the Court of Appeals held that the prosecution had failed to demonstrate that an act of lewdness, assignation or prostitution had occurred because no proof existed that Mr. Bennis's sexual activity involved the payment of money.¹⁴⁰

¹²⁹ *Id.*; MICH. COMP. LAWS ANN. § 750.338b (West 1987 & Supp. 1995).

¹³⁰ *Bennis*, 116 S. Ct. at 996; MICH. COMP. LAWS ANN. § 600.3801 (West 1987 & Supp. 1995).

¹³¹ *Bennis*, 116 S. Ct. at 997.

¹³² MICH. COMP. LAWS ANN. § 600.3801.

¹³³ *Id.* § 600.3805.

¹³⁴ *Id.* § 600.3825.

¹³⁵ *Id.* § 600.3825(2).

¹³⁶ *Michigan v. Bennis*, 527 N.W.2d 483, 486 (Mich. 1994).

¹³⁷ *Id.*

¹³⁸ *Bennis*, 116 S. Ct. at 997.

¹³⁹ *State v. Bennis*, 504 N.W.2d 731, 734 (Mich. Ct. App. 1993).

¹⁴⁰ *Id.* at 735.

The Michigan Supreme Court reversed the Court of Appeals' decision and upheld the abatement of the car.¹⁴¹ The Michigan Supreme Court disagreed with the Court of Appeals' holding on the statutory issues and rejected Tina Bennis's claim that the forfeiture of her interest violated the Due Process and Takings Clauses of the United States Constitution.¹⁴² The Michigan Supreme Court first concluded that Mr. Bennis used the car for an act of "lewdness, assignation, or prostitution" within the meaning of the abatement statute.¹⁴³ In addition, the court upheld the abatement of the vehicle because the defendant had entered a neighborhood that was known for prostitution and used his vehicle to engage in illicit activity, thereby contributing to an existing nuisance.¹⁴⁴ The court further held that the Michigan Statute by its language did not require knowledge of the illicit act on Tina Bennis's part.¹⁴⁵

The Michigan Supreme Court then addressed the constitutionality of the forfeiture statute as it applied to Tina Bennis.¹⁴⁶ The court relied on the U.S. Supreme Court decisions in *Van Oster* and *Calero-Toledo* to conclude that Tina's claim lacked constitutional consequence.¹⁴⁷ The Michigan Supreme Court noted that *Van Oster* had rejected the innocent owner's Fourteenth Amendment due process claim because "the offense of unlawful transportation was committed by one entrusted by the owner with the possession and use of the offending vehicle."¹⁴⁸ The Michigan Supreme Court reasoned that Tina's claim had no constitutional consequence because she explicitly or implicitly entrusted Mr. Bennis with the use and possession of their vehicle.¹⁴⁹ Moreover, the court noted that the United States Supreme Court had indisputably allowed forfeiture of an innocent owner's property unless evidence existed that the property was stolen or used without the consent of the owner.¹⁵⁰ Because the vehicle in this case was neither stolen nor driven without Tina Bennis's consent, the court permitted the abatement.¹⁵¹ The Michigan Supreme Court, thus,

¹⁴¹ *Bennis*, 116 S. Ct. at 997.

¹⁴² *See id.*

¹⁴³ *Michigan*, 527 N.W.2d at 489.

¹⁴⁴ *See id.* at 491.

¹⁴⁵ *Bennis*, 116 S. Ct. at 997.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Michigan*, 527 N.W.2d at 494 (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467 (1926)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 495.

¹⁵¹ *Id.* at 493.

held that the Michigan Statute unquestionably passed constitutional muster.¹⁵²

In a five-to-four decision, the United States Supreme Court affirmed the decision of the Michigan Supreme Court and upheld the constitutionality of the forfeiture.¹⁵³ The majority opinion, written by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Thomas and Ginsburg, held that the Michigan Statute did not violate the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.¹⁵⁴

The Court first rejected Tina Bennis's due process claim that she had a right to contest the forfeiture by showing that she did not know her husband would use the car to violate the Michigan Statute.¹⁵⁵ The Court asserted that a long and unbroken line of cases held that an owner's interest in property may be forfeited by reason of its use even when the owner has no knowledge of such use.¹⁵⁶ The Court reasoned that Tina Bennis's lack of knowledge that her husband would use the car in an illegal activity did not differentiate her from the various owners involved in the forfeiture cases beginning with *The Palmyra* in 1827.¹⁵⁷ On the basis of these cases, the Court held that the Due Process Clause of the Fourteenth Amendment did not protect Tina Bennis's interest against forfeiture by the government.¹⁵⁸

The Court also rejected Tina Bennis's assertion that the *Calero-Toledo* Court established that the Constitution bars the forfeiture of property when owners prove that they took all the reasonable steps to prevent the property's illegal use.¹⁵⁹ The Court dismissed this argument because it relied on a passage from *Calero-Toledo* that the *Bennis* Court considered "obiter dictum."¹⁶⁰ The Court noted that it should focus on the holdings of the cases rather than their dicta.¹⁶¹ Tina Bennis, according to the Court, had not made any showing stronger than that made by the yacht owner in *Calero-Toledo* where the Court upheld the constitutionality of the forfeiture despite the owner's lack of knowledge of the illegal activity.¹⁶² The *Bennis* Court, thus, concluded that the forfei-

¹⁵² *Bennis*, 116 S. Ct. at 997.

¹⁵³ *Id.* at 996, 997-98.

¹⁵⁴ *Id.* at 996.

¹⁵⁵ *Id.* at 998.

¹⁵⁶ *Id.*

¹⁵⁷ *Bennis*, 116 S. Ct. at 999.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Bennis*, 116 S. Ct. at 999.

ture of Tina Bennis's interest was constitutional under the *Calero-Toledo* holding.¹⁶³

The Court rejected the dissent's distinction that Supreme Court cases have treated contraband differently from instrumentalities used to convey contraband, like cars.¹⁶⁴ According to the majority, the dissent reasoned that although the objects in the former class are forfeitable "however blameless or unknowing the owners may be," in the latter class, an owner's innocence is not a defense only when the instrumentalities' principal use is an illegal one.¹⁶⁵ The Court stated that its precedent never hinged the due process inquiry on whether the use for which the instrumentality was forfeited was the property's principal use.¹⁶⁶ Furthermore, the Court reasoned that such a distinction, if it existed, might have produced a different result in cases like *Calero-Toledo* where there was no showing that the yacht's principal use was to smuggle drugs.¹⁶⁷ Moreover, the *Bennis* Court rejected the suggestion by the dissent that the line of cases following *The Palmyra*, as interpreted by the majority, would justify the confiscation of an ocean liner just because one of its passengers sinned while on board.¹⁶⁸ When such an application is made, the Court stated, it "would be time enough to pronounce upon it."¹⁶⁹

The Court also rejected Tina Bennis's argument that the Court should import a culpability requirement to forfeiture.¹⁷⁰ The Court noted that the argument, which would in effect overrule well-established authority rejecting the innocent owner defense, relied on cases having at best a tangential relation to the "innocent owner" doctrine in the forfeiture context.¹⁷¹ Tina Bennis had argued that the holding in *Austin* would be difficult to reconcile with any rule that allows punishment of innocent parties.¹⁷² The Court indicated that *Austin* held that forfeiture serves at least in part to punish the owner, but that

¹⁶³ See *id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Bennis*, 116 S. Ct. at 1000. The Court noted that only one marijuana cigarette was found on the yacht. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (quoting *Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 512 (1921)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Tina Bennis's argument was based in part on the proposition that the government may not punish a criminal defendant for a crime if he or she is found to be not guilty. *Id.* (citing *Foucha v. Louisiana*, 504 U.S. 71 (1992)). The *Bennis* Court held that, putting aside the extent to which a forfeiture proceeding is punishment in the first place, *Foucha* did not purport to discuss, let alone overrule, the line of cases following *The Palmyra*. *Id.*

¹⁷² *Bennis*, 116 S. Ct. at 1000.

it did not address the validity of the "innocent owner defense."¹⁷³ The *Bennis* Court noted that *Austin* merely pointed out that an innocent owner defense provision in a statute provides additional evidence that the statute itself is punitive in motive.¹⁷⁴ The Court reasoned that the forfeiture proceeding as provided by the Michigan Statute, however, was an equitable action in which the trial judge had discretion to consider alternatives to abating the entire interest in the vehicle.¹⁷⁵

In any event, the *Bennis* Court stated that forfeiture served a deterrent purpose distinct from any punitive purpose.¹⁷⁶ The Court reasoned that the forfeiture prevents further illicit use of the property by imposing an economic penalty that renders the illegal behavior unprofitable.¹⁷⁷ The Court explained that this deterrent mechanism is not unique to forfeiture and analogized it to tort law in that it would make the petitioner potentially liable for her husband's use of the car in violation of Michigan negligence law.¹⁷⁸ The Court concluded that the law provided a secondary defense against an illegal use and precluded the possibility of evasion by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.¹⁷⁹

The Court next held that the forfeiture was not a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment.¹⁸⁰ The Court reasoned that because the forfeiture proceeding did not violate the Due Process Clause of the Constitution, the property was properly transferred to the State.¹⁸¹ The *Bennis* Court reasoned that the Constitution does not require the government to compensate for property that it has already acquired under the exercise of governmental authority other than eminent domain.¹⁸²

Finally, the Court rejected Tina Bennis's argument that the Michigan Statute was unfair in that it relieved prosecutors from the burden of separating innocent co-owners from those who are partners in the wrongful use of property.¹⁸³ The Court acknowledged that the argu-

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Bennis*, 116 S. Ct. at 1000.

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* (citing *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926)).

¹⁸⁰ *Id.* at 1001.

¹⁸¹ *Id.*

¹⁸² *Bennis*, 116 S. Ct. at 1001.

¹⁸³ *Id.*

ment had considerable appeal in the abstract.¹⁸⁴ The Court indicated that the argument, however, loses its force because of the trial court's remedial discretion and Michigan's power to forfeit the jointly owned car whether or not Tina remained entitled to compensation for her interest in the vehicle.¹⁸⁵ The *Bennis* Court thus affirmed the judgment of the Supreme Court of Michigan, holding that the Michigan Statute did not violate the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.¹⁸⁶ In conclusion, the Court stated that the cases authorizing actions of the kind at issue were too firmly fixed in the punitive and remedial jurisprudence of the country for the Court to replace them.¹⁸⁷

Justice Thomas, in his concurring opinion, wrote that this case served as an ultimate reminder that the federal Constitution does not protect its citizens from everything that is intensely undesirable.¹⁸⁸ Justice Thomas noted that, historically, courts have permitted the forfeiture of property used in a crime without proof of the owner's wrongdoing.¹⁸⁹ According to Justice Thomas, the sole restrictions on the state's ability to take property from those it merely suspects, or does not even suspect, of colluding in crime involves asking whether the property was used in, or was an instrumentality of, a crime.¹⁹⁰ Even though these limitations are not clear, Justice Thomas reasoned that courts should apply them strictly by adhering to historical standards when constitutional challenges arise.¹⁹¹ Justice Thomas went on to reason that the facts in this case were not distinguishable from *Van Oster*.¹⁹² He also noted that Tina Bennis had not asserted that the car was not an instrumentality of the crime.¹⁹³

Justice Thomas acknowledged that improperly used forfeiture laws could become a roulette wheel—employed to raise revenue from innocent, but hapless owners whose property is unforeseeably misused—or a tool, wielded to punish those who associate with criminals, rather than a component of a system of justice.¹⁹⁴ Nevertheless, Justice Thomas concluded that when the property forfeited has been en-

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 996, 1001.

¹⁸⁷ *Bennis*, 116 S. Ct. at 1001.

¹⁸⁸ *Id.* (Thomas, J., concurring).

¹⁸⁹ *Id.* at 1002 (Thomas, J., concurring).

¹⁹⁰ *Id.* (Thomas, J., concurring).

¹⁹¹ *Id.* (Thomas, J., concurring).

¹⁹² *Bennis*, 116 S. Ct. at 1002 (Thomas, J., concurring).

¹⁹³ *Id.* (Thomas, J., concurring).

¹⁹⁴ *Id.* at 1003 (Thomas, J., concurring).

trusted by its owner to one who uses it for a crime, the Constitution apparently assigns to the States and to the political branches of the Federal government the primary responsibility for avoiding an undesirable result.¹⁹⁵

In another concurring opinion, Justice Ginsburg highlighted the features key to her finding against Tina Bennis.¹⁹⁶ First, Justice Ginsburg noted that John Bennis always had Tina Bennis's consent to use the car because the car belonged to both of them.¹⁹⁷ Second, Justice Ginsburg noted that the Michigan Statute's equitable nature was critical to the judgment of the Michigan Supreme Court.¹⁹⁸ To accuse the Michigan Supreme Court of inequitable administration of an "equitable action," Justice Ginsburg reasoned, shows no respect.¹⁹⁹ Justice Ginsburg noted, moreover, that two practical reasons existed for the trial judge's decision not to order a division of sale proceeds: the Bennis family had another automobile and the age and value of the forfeited car (an eleven-year-old Pontiac purchased for \$600) left practically nothing to divide after subtraction of the costs.²⁰⁰ According to Justice Ginsburg, therefore, Michigan's decision to deter people like John Bennis from using cars they own (or co-own) to contribute to neighborhood blight, and the abatement endeavor, hardly warranted the Court's disapprobation.²⁰¹

Justice Stevens, joined by Justices Souter and Breyer, dissented from the Court's holding and reasoning.²⁰² The logic of the Court's analysis, according to Justice Stevens, would permit the States to exercise unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts.²⁰³ Neither logic nor history, Justice Stevens argued, supported the Court's apparent assumption that an owner's complete innocence does not impose a constitutional impediment to the seizure of his or her property simply because it provided the locus of a criminal transaction.²⁰⁴

The dissent first noted that the tenuous connection between the property forfeited and the illegal act committed distinguished this case

¹⁹⁵ *Id.* (Thomas, J., concurring).

¹⁹⁶ *Id.* (Ginsburg, J., concurring).

¹⁹⁷ *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

¹⁹⁸ *Id.* (Ginsburg, J., concurring).

¹⁹⁹ *Id.* (Ginsburg, J., concurring).

²⁰⁰ *Id.* (Ginsburg, J., concurring).

²⁰¹ *Id.* (Ginsburg, J., concurring).

²⁰² *Bennis*, 116 S. Ct. at 1003 (Stevens, J., dissenting).

²⁰³ *Id.* (Stevens, J., dissenting).

²⁰⁴ *Id.* at 1004 (Stevens, J., dissenting).

from the precedents on which the majority relied.²⁰⁵ Second, the dissent argued that the forfeiture violated the Due Process Clause of the Constitution in light of Tina Bennis's complete lack of culpability.²⁰⁶ Finally, the dissent argued that the recent decision in *Austin* compelled a reversal of the decision reached by the Michigan Supreme Court.²⁰⁷

First, in an attempt to distinguish *Bennis* from prior Supreme Court decisions, the dissent identified three different categories of property subject to seizure: pure contraband, proceeds of criminal activity and tools of the criminal's trade.²⁰⁸ The dissent explained that the first category, pure contraband, includes items like narcotics or adulterated food, the mere possession of which constitutes a crime.²⁰⁹ The second category, enlarged by recent federal statutes, includes not only stolen property, but also earnings made from various criminal activities.²¹⁰ The property forfeited in *Bennis*, the dissent explained, fell within the third category, which includes tools or instrumentalities that a wrongdoer has used in commission of a crime.²¹¹

Forfeiture in this category proved more problematic to the dissent because of its potentially broader sweep and because the dissent found the government's remedial interest in the confiscation less apparent.²¹² The dissent argued that early admiralty cases demonstrated that when the use subjecting the instrumentality to forfeiture is its principal use, the court may presume that the owner knew of the unlawful use and may deprive the owner of the property.²¹³ According to the dissent, although the cases justify the seizure of a freighter when its entire cargo consists of smuggled goods, they do not justify confiscation of an ocean liner just because one of its passengers sinned while on board.²¹⁴ Applied to the *Bennis* facts, the dissent reasoned that the principal use of

²⁰⁵ *Id.* (Stevens, J., dissenting).

²⁰⁶ *Id.* at 1107 (Stevens, J., dissenting).

²⁰⁷ *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

²⁰⁸ *Id.* (Stevens, J., dissenting).

²⁰⁹ *Id.* (Stevens, J., dissenting). With respect to such items, Justice Stevens reasoned, the government has an obvious remedial interest in removing such property from private circulation, however blameless or unknowing their owners are. *Id.* (Stevens, J., dissenting).

²¹⁰ *Id.* (Stevens, J., dissenting). Justice Stevens explained that the cases arising out of the seizure of proceeds have not addressed the validity of the innocent owner defense under the Constitution because those federal statutes already include protection for innocent owners. *Id.* (Stevens, J., dissenting). The statutory protection given to innocent owners, Justice Stevens explained, supported the conclusion that elementary notions of fairness require some attention to the impact of a seizure on the rights of innocent parties. *Id.* (Stevens, J., dissenting).

²¹¹ *Id.* at 1004 (Stevens, J., dissenting).

²¹² *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).

²¹³ *Id.* at 1005 (Stevens, J., dissenting).

²¹⁴ *Id.* (Stevens, J., dissenting).

the car was not to provide a site for prostitution and, thus, the isolated misuse did not justify the forfeiture of an innocent owner's property on the theory that it constituted an instrumentality of the crime.²¹⁵

The dissent further commented that, unlike the Court's historical precedents, the property in this case did not actually facilitate the offense.²¹⁶ The leading decisions, Justice Stevens wrote, involved offenses in which transportation was an element of the crime and the property forfeited actually facilitated the transportation of a controlled substance.²¹⁷ Unlike *Calero-Toledo*, the dissent noted, the forfeited car in *Bennis* did not bear the necessary connection to the offense committed by Tina Bennis's husband.²¹⁸ Although the act occurred in the car, the dissent reasoned, it could have occurred in any location.²¹⁹ Justice Stevens concluded that the nexus in this case between the crime and the property was insufficient to support the forfeiture.²²⁰

The dissent went on to reject the argument that the forfeiture served exclusively remedial, rather than punitive, purposes because it sought to abate a nuisance.²²¹ The dissent determined that the majority had conceded that forfeiture itself is in part punishment and that the state had earlier acknowledged that the forfeiture was a swift and certain punishment of the voluntary vice consumer.²²² Furthermore, the dissent noted that forfeiture may serve remedial ends when removal of certain items (such as a burglar's tools) will prevent repeated violations of the law (such as housebreaking).²²³ Because the confiscation of the petitioner's car did not disable her husband from using other venues to commit this offense, the dissent reasoned, the forfeiture at issue was punitive and served no remedial purpose.²²⁴

In his second argument, Justice Stevens contended that fundamental fairness prohibits the punishment of innocent people.²²⁵ The

²¹⁵ *Id.* (Stevens, J., dissenting).

²¹⁶ *Id.* at 1005-06 (Stevens, J., dissenting).

²¹⁷ *Bennis*, 116 S. Ct. at 1005-06 (Stevens, J., dissenting).

²¹⁸ *Id.* (Stevens, J., dissenting).

²¹⁹ *Id.* at 1006 (Stevens, J., dissenting).

²²⁰ *Id.* (Stevens, J., dissenting). Justice Stevens criticized the tenuous theory advanced by the Michigan Supreme Court that the car contributed to the neighborhood's ongoing "nuisance condition." *Id.* at 1006 n.9. (Stevens, J., dissenting). The theory, Justice Stevens argued, confirmed the irrelevance of the car's mobility because if the husband had merely continued to drive after picking up the prostitute, the car would not have been a nuisance at all. *Id.* (Stevens, J., dissenting).

²²¹ *Id.* at 1006 (Stevens, J., dissenting).

²²² *Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting).

²²³ *Id.* at 1007 (Stevens, J., dissenting).

²²⁴ *Id.* (Stevens, J., dissenting).

²²⁵ *Id.* (Stevens, J., dissenting).

dissent criticized the majority for holding that it is a settled rule of law that owners of property are strictly liable for wrongful uses of their property, when only three terms prior, in *Austin*, the Court had held that all of its forfeiture decisions rested on the notion that the owner has been negligent in allowing the property to be misused and that the owner is properly punished for such negligence.²²⁶ The dissent opined that the *Bennis* majority simply ignored *Austin*'s detailed analysis of the case law without explanation or comment.²²⁷

The dissent determined that the Court has consistently recognized an exception for truly blameless individuals like Tina Bennis.²²⁸ The dissent maintained that *Calero-Toledo* clearly established this exception.²²⁹ The dissent criticized the majority for simply dismissing the *Calero-Toledo* standard as "obiter dictum," despite that the Court has assumed that such a principle existed or expressly reserved the question in a line of cases going back nearly two hundred years.²³⁰ In support of protecting such blameless individuals, Justice Stevens concluded that the Due Process Clause of the Constitution mandated such an exception.²³¹

Tina Bennis, the dissent reasoned, was as blameless as if a thief, rather than her husband, had used the car in a criminal episode.²³² The dissent rejected the majority's conclusion that the Michigan Statute served both a deterrent purpose and a punitive purpose because deterrence is itself one of the aims of punishment.²³³ Moreover, the dissent reasoned that forfeiture could not fairly serve as a deterrent when a person has taken all reasonable steps to prevent illegal use of the property.²³⁴ In *Bennis*, the dissent found no reason to think that the threat of forfeiture would deter an individual like Tina Bennis from buying a car with her husband if she neither knows nor has reason to know that he plans to use it wrongfully.²³⁵ Similarly, the dissent found the majority's attempt to analogize this forfeiture to the system of tort

²²⁶ *Id.* (Stevens, J., dissenting).

²²⁷ *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting).

²²⁸ *Id.* at 1007-08 (Stevens, J., dissenting).

²²⁹ *Id.* (Stevens, J., dissenting).

²³⁰ *Id.* at 1008 (Stevens, J., dissenting).

²³¹ *Id.* (Stevens, J., dissenting). Justice Stevens noted that, in one of the Court's earliest decisions, Chief Justice Marshall recognized as "unquestionably a correct legal principle" that "a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forfeiture may be employed." *Id.* (Stevens, J., dissenting).

²³² *Bennis*, 116 S. Ct. at 1008 (Stevens, J., dissenting).

²³³ *Id.* at 1008-09 (Stevens, J., dissenting).

²³⁴ *Id.* (Stevens, J., dissenting).

²³⁵ *See id.* (Stevens, J., dissenting).

liability for automobile accidents unpersuasive.²³⁶ Tort law, the dissent noted, is primarily tied to the goals of compensation, while forfeitures are concededly punitive.²³⁷

The dissent also rejected the majority's second assertion that the forfeiture relieves the state of the difficulty of proving collusion or disproving the lack thereof.²³⁸ The dissent reasoned that whatever validity the argument might have in another case, it was not applicable in *Bennis*.²³⁹ The dissent noted that it was perfectly clear that Tina Bennis did not collude with her husband to carry out the offense.²⁴⁰ Because Tina Bennis had done nothing to warrant punishment, the dissent concluded that the seizure constituted an arbitrary deprivation of property without due process of law.²⁴¹

Finally, Justice Stevens noted that the Court's holding could not be reconciled with *Austin*.²⁴² His opinion stated that forfeiture of Tina Bennis's interest constituted a form of excessive punishment.²⁴³ For an individual who merely let her husband use her car to commute to work, the dissent reasoned, even a modest penalty is out of all proportion to her blame-worthiness.²⁴⁴ The dissent opined that Michigan could have equally forfeited a brand new luxury sedan under the Court's analysis because it made the value of the car irrelevant.²⁴⁵ "Dramatic variations" in the value of conveyances subject to forfeiture actions, the dissent reasoned, undercut any argument that the latter are reasonably tied to remedial ends.²⁴⁶ The dissent, therefore, concluded that the penalty imposed by the Michigan Statute violated the Eighth Amendment of the United States Constitution.²⁴⁷

In sum, Justice Stevens concluded that the Court erred both by assuming that the power to seize property is virtually unlimited and by implying that the opinions in *Calero-Toledo* and *Austin* were misguided.²⁴⁸ The dissent stated that *Bennis* was the appropriate case in which to pronounce that the Constitution limits the government's

²³⁶ *Id.* at 1009 n.13 (Stevens, J., dissenting).

²³⁷ *Bennis*, 116 S. Ct. at 1009 n.13 (Stevens, J., dissenting).

²³⁸ *Id.* at 1009 (Stevens, J., dissenting).

²³⁹ *Id.* (Stevens, J., dissenting).

²⁴⁰ *Id.* (Stevens, J., dissenting).

²⁴¹ *Id.* (Stevens, J., dissenting).

²⁴² *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

²⁴³ *Id.* (Stevens, J., dissenting).

²⁴⁴ *Id.* (Stevens, J., dissenting).

²⁴⁵ *Id.* (Stevens, J., dissenting).

²⁴⁶ *Id.* (Stevens, J., dissenting).

²⁴⁷ *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

²⁴⁸ *Id.* (Stevens, J., dissenting).

power to seize property.²⁴⁹ Although Justice Stevens declined to draw a bright line that would separate permissible and impermissible forfeitures of the property of innocent owners, he remained convinced that the blatant unfairness of the *Bennis* seizure placed it on the unconstitutional side.²⁵⁰

Justice Kennedy also dissented in the *Bennis* decision.²⁵¹ Justice Kennedy stated that forfeiture under admiralty law had evolved out of necessity.²⁵² Although he disagreed with *Austin* that culpability always constituted part of the forfeiture rationale, he reasoned that the necessities that gave rise to and justified the broad forfeiture powers do not exist in today's forfeiture cases.²⁵³ Accordingly, Justice Kennedy determined that the *Bennis* forfeiture did not meet the requirements of due process because it did not result out of the owner's negligence or a presumption thereof.²⁵⁴

IV. THE FLAWS IN THE *BENNIS* DECISION

The right to own private property is central to a free society.²⁵⁵ The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without the due process of law."²⁵⁶ The Supreme Court has recognized that individual freedom finds tangible expression in property rights.²⁵⁷ A fundamental interdependence exists between the personal right to liberty and the personal right to property, for neither could have meaning without the other.²⁵⁸ When a government possesses uncontrollable power over the private property of every citizen, all other rights become worthless.²⁵⁹ The ability of the government to forfeit the property of wholly innocent owners, like Tina Bennis, strikes at the core of the constitutional right to own and control property and violates the Due Process Clause of the Constitution.²⁶⁰ The *Bennis* majority held, however, that the Constitution does not limit the government's power to seize property

²⁴⁹ See *id.* (Stevens, J., dissenting).

²⁵⁰ *Id.* (Stevens, J., dissenting).

²⁵¹ *Id.* (Kennedy, J., dissenting).

²⁵² *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

²⁵³ See *id.* at 1010-11 (Kennedy, J., dissenting).

²⁵⁴ *Id.* (Kennedy, J., dissenting).

²⁵⁵ See U.S. CONST. amend. V.

²⁵⁶ *Id.*

²⁵⁷ *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993).

²⁵⁸ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

²⁵⁹ *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

²⁶⁰ See *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (indicating that application of forfeiture statute to owner who did not participate in or have knowledge of

involved in a crime, no matter how innocent the owner may be.²⁶¹ Upon close examination, this decision is fundamentally unfair and flawed.

The majority's opinion justifying the forfeiture rested primarily on two propositions: first, the Court has always upheld forfeiture of property based solely on its use; and second, forfeiture serves a deterrent purpose and prevents collusion.²⁶² Traditionally, the cases rejecting the innocence of the owner as a common-law defense to forfeiture have justified the forfeitures on the theory that the property itself is "guilty" of the offense and that the owner is accountable for the wrongs of others to whom he or she entrusts the property.²⁶³ Courts originally viewed civil forfeiture as an extraordinary power that arose from the necessities of enforcing admiralty and customs laws.²⁶⁴

Recently, the Court recognized that the fictions of in rem forfeiture were developed primarily to expand the reach of the courts, particularly in admiralty proceedings, where they might have lacked in personam jurisdiction over the owners who were often half a world away and beyond the reach of the law.²⁶⁵ The impracticality of adjudicating the innocence of the owners justified eliminating their lack of culpability as a defense.²⁶⁶ Today's federal and state forfeiture statutes, however, far exceed the original limited purpose of in rem forfeiture.²⁶⁷ The necessities that gave rise to the justification for in rem forfeiture no longer exist. In most cases, courts can easily acquire in personam jurisdiction over the owners of the property they seek to forfeit.²⁶⁸

The majority's interpretation of its precedents, moreover, is completely at odds with *Austin*, where the Court pointed out that all of its precedents upholding the forfeiture of an innocent owner's property involved a penalty for negligence.²⁶⁹ In *Austin*, the Court held that the in rem forfeiture was subject to the Excessive Fines Clause of the Constitution because forfeiture rested on the notion that the owner has been negligent in allowing the misuse of the property and is

illicit use of property seems to violate the foundation of due process of law required by the Constitution).

²⁶¹ See *Bennis v. Michigan*, 116 S. Ct. 994, 997-98 (1996).

²⁶² *Id.* at 997-1001.

²⁶³ *Austin v. United States*, 113 S. Ct. 2801, 2808 (1993).

²⁶⁴ See *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).

²⁶⁵ See *Austin*, 113 S. Ct. at 2809 n.9.

²⁶⁶ *Bennis*, 116 S. Ct. at 1010 (Kennedy, J., dissenting).

²⁶⁷ See, e.g., MICH. COMP. LAWS ANN. § 600.3801 (WEST 1987 & SUPP. 1995).

²⁶⁸ See *Bennis*, 116 S. Ct. at 996.

²⁶⁹ See *Austin*, 113 S. Ct. at 2809.

properly punished for that negligence.²⁷⁰ The *Bennis* majority, however, completely and unjustifiably ignored *Austin*, holding that property owners are strictly liable for wrongful uses of their property and that the punishment of truly innocent owners does not violate the Due Process Clause of the Constitution.²⁷¹

In addition, the majority opinion in *Bennis* ignored the limitations provided by *Calero-Toledo* by concluding that those limitations were mere dictum.²⁷² The majority, however, did not give a valid explanation as to why *Calero-Toledo's* proposition—i.e., that the forfeiture of an innocent owner's property is unduly oppressive and serves no legitimate interest—was misguided.²⁷³ According to the majority, states apparently have an interest in forfeiting property because forfeiture serves a deterrent purpose and prevents collusion.²⁷⁴

As Justice Stevens pointed out in his dissent, however, there is no deterrent value in the forfeiture of Tina Bennis's car.²⁷⁵ Tina was completely reasonable in all of her actions and there is no reason to think that forfeiture will deter individuals like her from entrusting their spouse with their car when no reason exists to suspect that the spouse would use the car illegally.²⁷⁶ Furthermore, in this case, Tina clearly did not collude with her husband.²⁷⁷ The Supreme Court thus missed the perfect opportunity to hold that the Constitution will not allow the forfeiture of property of innocent owners when no deterrent purpose exists because the owner has already taken all reasonable steps to prevent the illegal use of the property.

In sum, the necessities that gave rise to the personification of property for purposes of civil forfeiture no longer exist.²⁷⁸ By allowing the forfeiture of a truly innocent owner's property, the Michigan Statute serves no legitimate purpose. The Michigan Statute, therefore, violates the Due Process Clause of the Constitution by arbitrarily depriving innocent owners of their property.

Justice Stevens in his dissent also stated that the Michigan Statute violated the Due Process Clause of the Constitution but was unwilling to provide a bright line test as to when an owner is sufficiently innocent

²⁷⁰ *Id.* at 2809–10, 2812.

²⁷¹ *See Bennis*, 116 S. Ct. at 997–98.

²⁷² *See id.* at 999; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974).

²⁷³ *See Bennis*, 116 S. Ct. at 999.

²⁷⁴ *See id.* at 1000.

²⁷⁵ *See id.* at 1007–08 (Stevens, J., dissenting).

²⁷⁶ *Id.* (Stevens, J., dissenting).

²⁷⁷ *Id.* (Stevens, J., dissenting).

²⁷⁸ *See Austin*, 113 S. Ct. at 2809 n.9; *United States v. Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844).

to seek the Constitution's protection.²⁷⁹ In fact, determining whether the owner is truly innocent must be approached on a case-by-case basis.²⁸⁰ The *Calero-Toledo* Court suggested that the standard should focus on whether the owner did all that is reasonably expected to prevent the illegal use of the property.²⁸¹ The standard proposed by the *Calero-Toledo* dicta, however, is difficult to apply.²⁸² It connotes an affirmative duty, whereas innocence of crime and ignorance of potential wrongdoing are passive conditions.²⁸³ On the other hand, a truly affirmative duty to prevent one's property from illegal use might only be triggered by knowledge or suspicion of potential wrongdoing.²⁸⁴

A better test would provide that if an owner knows or should have known of the potential wrongful use of his or her property, the owner should take some affirmative steps to prevent that use.²⁸⁵ An owner's lack of knowledge of any wrongdoing, however, reduces or eliminates the owner's duty to prevent the wrongful use.²⁸⁶ Whether a property owner knew or should have known of the illicit use of his or her property would depend upon a variety of factors.²⁸⁷ Among them one can include: the relationship between the owner and user, the manner in which the owner transferred possession of the property to the wrongful user, the nature of the property surrendered and the freedom of use or scope of permission given.²⁸⁸

Accordingly, under this knowledge-based test, Tina Bennis had no knowledge of her husband's illegal use of the car, nor did she have any reason to suspect her husband's illegal use.²⁸⁹ Thus, Tina did all that she could have reasonably done to prevent the illegal use. The Court therefore should not have sanctioned a forfeiture of her property.

In addition to the Due Process violation, the Michigan Statute violates the Takings Clause of the Fifth Amendment.²⁹⁰ Central to the requirements of the Takings Clause is the notion that private parties ought not bear costs that should in fairness and justice be borne by

²⁷⁹ *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

²⁸⁰ *State v. 1979 Pontiac Trans Am*, 487 A.2d 722, 729 (N.J. 1985).

²⁸¹ *Calero-Toledo*, 416 U.S. at 689.

²⁸² *United States v. One 1976 Lincoln Mark IV*, 462 F. Supp. 1383, 1391 (W.D. Pa. 1979).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *1979 Pontiac*, 487 A.2d at 728.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *See Bennis*, 116 S. Ct. at 996.

²⁹⁰ The Takings Clause of the Fifth Amendment provides that "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The Court has held that

the public.²⁹¹ If the government chooses to forfeit the *Bennis* automobile to further the public purpose of law enforcement and "cleaning up" Detroit, then it must compensate innocent persons who hold an interest in the property.²⁹² As an innocent owner, Tina Bennis should not bear the financial burden of law enforcement activities designed to address urban problems.²⁹³

The order granting forfeiture directs the government to use the proceeds to pay the "filing fee of this action," "attorney costs" and "all police costs" with "any remaining balance to be paid to the general treasury of the State of Michigan."²⁹⁴ The government can, without violating the Takings Clause, recover true law enforcement costs connected with a criminal proceeding from a convicted criminal's property or from the public generally.²⁹⁵ The government should not be able, however, to recover its costs of law enforcement by seizing, without compensation, the property of an individual who, like Tina Bennis, is wholly innocent of the offense that necessitated the law enforcement costs.²⁹⁶ Although the government might have a legitimate interest in forfeiting property to prevent certain illegal uses, it should not do so at the expense of innocent owners.²⁹⁷ When the government is unable to or unwilling to compensate an innocent owner adequately for lost property, it violates the Takings Clause of the Fifth Amendment.²⁹⁸

Finally, because Tina Bennis is a truly innocent co-owner, imposing punishment upon her is unduly oppressive, serves no legitimate purpose and violates the Excessive Fines Clause of the Eighth Amendment. Under *Austin*, forfeiture is subject to the Excessive Fines Clause of the Constitution, which implies that a fine must be proportional to the wrong committed by a person.²⁹⁹ In the *Bennis* scenario, any amount of fine imposed upon a person who is totally innocent of any wrongdoing fails the proportionality requirement and is thus excessive.

The *Bennis* holding departed dramatically from recent Supreme Court cases curtailing the government's right to take property through

the Takings Clause was made applicable to the States by the Fourteenth Amendment. See *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

²⁹¹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²⁹² Brief of the Institute for Justice as Amicus Curiae in Support of Petitioner at 21, *Bennis v. Michigan*, 116 S. Ct. 994 (1996).

²⁹³ *Id.*

²⁹⁴ *Id.* at 31.

²⁹⁵ *Id.* at 31-32.

²⁹⁶ *Id.* at 32.

²⁹⁷ Saltzburg, *supra* note 25, at 238.

²⁹⁸ *Id.*

²⁹⁹ See *Austin*, 113 S. Ct. at 2812.

civil forfeiture law.³⁰⁰ The *Bennis* Court showed indifference to fundamental notions of justice and fair play by holding that the Michigan Statute did not violate the Due Process Clause of the Constitution or the Takings Clause of the Fifth Amendment.³⁰¹ As Justice Thomas indicated in his concurring opinion, forfeitures could now be used like a roulette wheel employed to raise revenue from innocent but hapless owners whose property was unforeseeably misused.³⁰² The *Bennis* ruling puts in jeopardy the rights of all property owners and, more significantly, the rights of lenders, lien holders, co-owners and many other commercial parties because it permits no constitutional protection to even the most blameless and reasonable owners. The Supreme Court has held that if a statute does not provide protection to innocent owners, an owner entrusts his or her property to another at his or her own peril.³⁰³ One can only hope that legislatures will show more sympathy to the rights of innocent parties than did the majority of the United States Supreme Court in *Bennis*. If they do not, however, Justice Thomas would remind owners that the Federal Constitution, as interpreted by the majority of the Supreme Court, does not protect everything that is intensely undesirable.³⁰⁴

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³⁰⁰ See *id.*; *Calero-Toledo*, 416 U.S. at 689.

³⁰¹ *Bennis*, 116 S. Ct. at 996.

³⁰² *Id.* at 1002-03 (Thomas, J., concurring).

³⁰³ See *id.* at 996-98, 1000.

³⁰⁴ See *id.* at 1001 (Thomas, J., concurring).