

**FIFTH AND FOURTEENTH AMENDMENTS — TAKINGS CLAUSE AND DUE PROCESS — FORFEITURE OF AN INNOCENT OWNER'S PROPERTY INTEREST AS AN ABATABLE PUBLIC NUISANCE UNDER STATE LAW VIOLATES NEITHER THE TAKINGS CLAUSE NOR THE DUE PROCESS CLAUSE — *Bennis v. Michigan*, 64 U.S.L.W. 4124 (U.S. March 4, 1996).**

The United State Supreme Court recently held that the forfeiture of an innocent owner's property interest as abatable public nuisance does not violate either the Takings Clause of the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment. *Bennis v. Michigan*, 64 U.S.L.W. 4124 (U.S. March 4, 1996). In so holding, the Court relied on firmly rooted precedent which established that due process permits forfeiture of an owner's interest in property, even if that owner was unaware of the illegal conduct for which the property was used. *Id.* at 4125 (citations omitted). Furthermore, the Court opined that since the forfeiture did not offend due process, the lawful seizure of the property by the government did not constitute a taking for which a partial owner of the property must be compensated. *Id.* at 4127 (citing *United States v. Fuller*, 409 U.S. 488, 492 (1973)). While the Court's reasoning appears solidly grounded in precedent, such a result is inequitable for an unknowing property owner and could conceivably allow the government to profit on a windfall from a criminal's behavior while depriving an innocent owner of their legitimate property rights.

John Bennis was arrested by Detroit police after he was caught engaging in sexual activity with a prostitute in a parked car owned jointly by he and his wife, the petitioner, Tina B. Bennis. *Id.* at 4125. Bennis was convicted of violating Michigan's indecency law. *Id.* (citation omitted). Subsequently, the state sued Mr. Bennis and the petitioner, Mrs. Bennis, to have the vehicle abated as a public nuisance. *Id.* (citation omitted).

The petitioner, as part owner of the vehicle, challenged the abatement proceeding, claiming that she had no knowledge or warning that her husband would violate the state indecency law when she entrusted him with the car. *Id.* In exercising its discretion, as provided by state case law, the trial court ordered that the vehicle be declared a public nuisance and abated. *Id.* In so doing, the trial court remarked that the couple owned another care and that the forfeited car was of marginal value; thus, dividing the proceeds of the sale would result in "practically nothing." *Id.*

The Michigan Court of Appeals reversed the decision of the trial court, reasoning that state precedent could not allow the authorities to abate Mrs. Bennis's interest in the vehicle without any showing that she indeed knew the purpose for which the car ultimately would be used. *Id.* Additionally, the court held that the vehicle could not be proclaimed a public nuisance as only one instance of promiscuity took place in the vehicle and it was unclear

whether payment to the prostitute actually occurred within the vehicle. *Id.* (citation omitted).

The Michigan Supreme Court reversed and reinstated the trial court's findings. *Id.* (citation omitted). The court held that the occurrence was an abatable nuisance as a matter of law and a co-owner's knowledge of another co-owner's intended illegal usage of a piece of property is unnecessary to abate the property. *Id.* Addressing federal constitutional challenges to the state abatement scheme, the court held that while it was presumed that consent was not given to use the property in an illegal manner, the Constitution did not require the State to provide Mrs. Bennis with an innocent-owner defense. *Id.*

The United States Supreme Court granted *certiorari* to determine whether the forfeiture of Mrs. Bennis's property interest under the state abatement scheme violated due process under the Fourteenth Amendment, or whether the forfeiture constituted a taking without just compensation in violation of the Fifth Amendment. *Id.* In a five to four decision, the Court affirmed the Michigan Supreme Court's decision, holding that the abatement did not violate either the Fifth or the Fourteenth Amendments. *Id.*

Writing for the majority, Chief Justice Rehnquist first noted that the petitioner did not base her due process violation on a lack of notice or opportunity to be heard, but rather on the fact that she was not allowed to contest the abatement by showing a lack of knowledge of her husband's illegal use of the vehicle. *Id.* Turning to long established precedent, the Chief Justice explained that an owner's interest in a piece of property could indeed be forfeited based solely on its actual illegal use, regardless of an owner's knowledge of such use. *Id.* This supposition, the Chief Justice stated, was rooted in admiralty law, beginning with the case of the *The Palmyra* in 1827. *Id.* (citing *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827)).

The Chief Justice noted that in *The Palmyra*, a captured Spanish ship was deemed forfeited, even though the owner had not been convicted for the crime of privateering. *Id.* (citing *Palmyra*, 25 U.S. (12 Wheat.) at 8). Chief Justice Rehnquist noted that the Court gave no credence to the owner's contentions because the property is considered the offender. *Id.* at 4125-26 (quoting *Palmyra*, 25 U.S. (12 Wheat.) at 14). The Chief Justice discussed additional case law affirming the principle that an owner's knowledge of a ship's ultimate illegal usage by a captain and crew is irrelevant. *Id.* at 4126 (quoting *Harmony v. United States*, 43 U.S. (2 How.) 210, 234 (1844)).

Continuing to survey precedent, the Chief Justice next considered the case of *Dobbins's Distillery v. United States*. *Id.* The Chief Justice noted that in *Dobbins's Distillery*, the Court upheld the forfeiture of property utilized by a lessee for fraudulent purposes, reasoning that the possessor's acts bound the owner regardless of the owner's innocence. *Id.* (quoting *Dobbins's Distillery v. United States*, 96 U.S. 395, 401 (1878)). The

majority stated that this premise was again upheld in the case of *Van Oster v. Kansas*. *Id.* In *Van Oster*, the purchaser of an automobile was unaware that when he lent the car to an associate, it was then used to illegally transport liquor and was subsequently forfeited. *Id.* (citing *Van Oster v. Kansas*, 272 U.S. 465, 465-66 (1926)). Chief Justice Rehnquist noted that the *Van Oster* Court upheld the forfeiture based upon established principles that innocent owners could statutorily relinquish property interests through the illegal usage of that property by another. *Id.* (quoting *Van Oster*, 272 U.S. at 467-68). The Chief Justice concluded the review of precedent with the more recent case of *Calero-Toledo v. Pearson Yacht Leasing Co.* also affirmed the proposition that an owner's innocence is not a defense to forfeiture. *Id.* (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974)). The majority concluded that Mrs. Bennis was in precisely the same position as all the owners in the forfeiture cases reviewed by the Court. *Id.*

First, the court rejected several of the petitioner's claims that the abatement scheme violated her constitutional rights. *Id.* The Court declined to accept petitioner's reliance on a passage from *Calero-Toledo*, which suggested that a constitutional claim may arise where an innocent owner's property is subject to forfeiture. *Id.* (quoting *Calero-Toledo*, 416 U.S. at 689). The majority quickly disposed of this contention, stating that as the quoted passage was merely obiter dictum, it had no binding weight on the Court's decision. *Id.* (citation omitted). Second, the majority rejected the petitioner's assertion that the Court should essentially overrule historical precedent by introducing a culpability requirement because the cases supporting such a doctrine only tangentially related to the issue before the Court. *Id.* at 4127. Third, Chief Justice Rehnquist declined to accept the petitioner's view that the abatement scheme served to punish those who were in fact not guilty, explaining that the forfeiture served a deterrent purpose, separate from any punitive aspect. *Id.*

The majority then turned to consider the petitioner's Fifth Amendment claim under the Takings Clause. *Id.* The Court held that since the forfeiture proceeding was in compliance with the due process requirements of the Fourteenth Amendment, governmental authorities need not compensate an owner for property the state rightfully acquired through enforcement of its laws. *Id.* (citing *United States v. Fuller*, 409 U.S. 488, 492 (1972); *United States v. Rands*, 389 U.S. 121, 125 (1967)).

Chief Justice Rehnquist next examined the petitioner's final argument that the state forfeiture statute unjustly relieved prosecutors from the burden of distinguishing between the property rights of the innocent co-owner and the criminal co-owner. *Id.* While acknowledging that this argument had "considerable appeal," the Chief Justice agreed with the Michigan Supreme Court's finding that the trial court had validly exercised its remedial

discretion. *Id.*

Justices Thomas authored concurring opinions. *Id.* (Thomas, J., concurring). Justice Thomas began by reiterating the majority's conclusion that, while dispensing the requirement of proof before punishment could be conceived as profoundly unjust, such a scheme does not violate due process under the Federal Constitution. *Id.* at 4128 (Thomas, J., concurring) (citing *Herrera v. Collins*, 506 U.S. 390, 428 (1993) (Scalia, J., concurring)).

Justice Thomas explained that the law of forfeiture provides that property belonging to an innocent could be owner could be confiscated based upon another's wrongful use of the property. *Id.* (citations omitted). To ascertain precisely what property may be forfeited, Justice Thomas admonished that, according to historical standards, the property in issue should be an "instrumentality" of crime to warrant its forfeiture. *Id.* (citation omitted).

Distinguishing *Van Oster v. Kansas*, the Justice noted that the forfeiture of the petitioner's car was more justifiable than the forfeiture which occurred in *Van Oster*. *Id.* Justice Thomas placed considerable weight on the trial court's finding that the proceeds which could have been turned over to the petitioner were minimal. *Id.* Furthermore, the Justice noted that under a different statutory scheme, property deemed a nuisance could be destroyed under a state's remedial discretionary powers, leaving owners no compensation whatsoever. *Id.* Simply because the state chose to sell the property instead of destroying it, the Justice proffered that the state action was, nonetheless, "remedial" in nature. *Id.* In conclusion, the Justice stated that, while improper use of forfeiture could serve as "a roulette wheel" to raise state revenues from property belonging to innocent owners but used for criminal purposes, the Constitution extended a responsibility to government to ensure that forfeitures occurred within the boundaries of the law. *Id.*

Justice Ginsburg, in a brief concurrence, first noted that, while the vehicle was owned jointly by the petitioner and her husband, the real issue was whether the petitioner had a constitutional right to the proceeds after the forfeiture and sale of her property. *Id.* (Ginsburg, J., concurring). Secondly, the Justice stated a strong belief in deferring to the states' highest judicial bodies, particularly in the context of equitable actions. *Id.* at 4128-29 (Ginsburg, J., concurring).

Next, Justice Ginsburg remarked that the trial judge acted reasonably in not distributing any remaining proceeds to the petitioner based on the age and minimal residual value of the automobile and the additional finding that the Bennises owned another vehicle for transportation use. *Id.* at 4129 (Ginsburg, J., concurring). The Justice concluded by specifically stating that, in confiscating the petitioner's car without compensation, Michigan acted within its authority to enforce its laws against prostitution. *Id.*

Justice Stevens, who was joined by Justices Souter and Breyer, filed a

dissenting opinion. *Id.* (Stevens, J., dissenting). In remarking on the recent trend to punish innocent third parties by confiscating property used in an act of prostitution, the Justice expressed that the majority's reasoning would extend an enormous power to the states, enabling the seizure of property utilized in other illegal acts. *Id.*

Justice Stevens then classified forfeitable property into three distinct categories: pure contraband; proceeds derived from criminal activity; and "tools of the criminal's trade." *Id.* The Justice noted that the first category was comprised of items, possession of which was itself illegal. *Id.* Justice Stevens stated that, while the government had a warranted remedial interest in the removal of such property from the general circulation, an automobile did not fall into this category. *Id.*

Justice Stevens explained that proceeds historically consisted of only stolen property, but that, in recent years, this category had been considerably expanded to include proceeds stemming from illegal transactions. *Id.* (citing *United States v. Parcel of Rumson, N.J., Land*, 507 U.S. 111, 121 & n.16 (1993)). The Justice stated that federal statutory provisions under this category provided protections for innocent owners, thus alleviating the necessity for an innocent-owner defense. *Id.* The Justice maintained, however, that such protections gave credence to an equitable concept of fairness designed to shield innocent victims from criminal wrongdoing. *Id.*

Moving to the third category, instrumentalities used in committing a crime, the Justice opined that the reach of this category was more broad than the other two and, therefore, seizure and subsequent forfeiture, based on a government's remedial interest, became more problematic. *Id.* Justice Stevens noted that many of the Court's early decisions in this area arose from maritime cases encompassing piracy, the slave trade, and smuggling of goods. *Id.* (footnotes omitted). In explaining that the forfeiture of an entire ship had its basis in admiralty law, the Justice maintained that those cases imparted the presumption that an owner of valuable property was knowledgeable of its ultimate use. *Id.* at 4129-30 (Stevens, J., dissenting). It was this presumption, the Justice explained, which formed the basis for a forfeiture of an owner's title in realty on which illegal wrongdoing occurred, even if the actual owner was ignorant of the unlawful conduct. *Id.*

Addressing the petitioner's constitutional claims, Justice Stevens proffered that they were distinguishable from precedent in two distinct ways. *Id.* First, the Justice noted, the unlawful conduct which took place in the petitioner's vehicle appeared to be only an isolated incident, no evidence having been presented to the contrary. *Id.* Justice Stevens maintained that a one-time occurrence did not warrant forfeiture of innocent owner's property interest. *Id.* The second distinguishing factor, the Justice stated, was that precedent involving forfeited conveyances normally had an element of mobile transportation. *Id.* (citing *Van Oster*, 272 U.S. at 465; *Carroll v.*

*United States*, 267 U.S. 132, 136 (1926); *Calero-Toledo*, 416 U.S. at 663). Justice Stevens opined that the mobility of the automobile contributed only to the negotiation of the unlawful act, not its actual consummation. *Id.*

The Justice then turned to the Court's agreement in recent years that there must be some limitation to instrumentalities subject to forfeiture. *Id.* (citations omitted). Accordingly Justice Stevens took issue with the state's assertion that the forfeiture was only remedial, and not punitive, in nature. *Id.* at 4131 (Stevens, J., dissenting). The Justice maintained that the excessiveness of the seizure was clear evidence of the punitive goals inherent in the abatement scheme. *Id.* Furthermore, the Justice opined that the forfeiture of the petitioner's car did not serve the state's remedial interest because prostitution may be committed in places other than cars. *Id.* Justice Stevens also explained that the petitioner's car could be confiscated as a public nuisance because the nuisance existed only while the unlawful act was actually occurring. *Id.*

Next, Justice Stevens discussed the inherent unfairness in punishing innocent people. *Id.* The Justice noted that in a recent decision by the Court, relying on the identical precedent outlined by the majority, it was held that forfeiture decisions rested on an owner's negligence in permitting misuse of his property, for which he should accordingly be punished. *Id.* (citations omitted). Thus, Justice Stevens concluded that since the petitioner was not negligent in entrusting the vehicle to her husband, no forfeiture was justified. *Id.*

Additionally, the Justice proffered that even if a strict liability theory was applicable to innocent owners, the Court had historically maintained an exception "for truly blameless individuals," necessitated by due process. *Id.* at 4131-32 (Stevens, J., dissenting). Justice Stevens noted that because the petitioner did not know of her husband's wrongdoing or his intention to use the car for such purposes, the petitioner could not have prevented the husband's wrongdoing. *Id.* Hence, the Justice asserted that no deterrent rationale supported the forfeiture and only further illustrated the truly punitive nature of the abatement scheme. *Id.*

Justice Stevens concluded the dissenting opinion with an assertion that the forfeiture also violated the Eighth Amendment's Excessive Fines Clause. *Id.* at 4132-33 (Stevens, J., dissenting). The Justice reasoned that the forfeiture of an innocent party's interest in their car was blatantly excessive punishment. *Id.* at 4133 (Stevens, J., dissenting). Concluding that, while the boundary between a rightful forfeiture and an improper one were not distinctively drawn, the petitioner's forfeiture was clear inequitable, placing it in the latter category. *Id.*

Justice Kennedy also wrote a brief dissent, declaring that the Bennis forfeiture was clearly violative of due process. *Id.* (Kennedy, J., dissenting). Acknowledging precedent, Justice Kennedy took exception with the

majority's extension of those principles to all types of forfeiture cases, particularly cases not involving transport and trafficking of illegal goods. *Id.* Without any indication of negligent entrustment by the petitioner, the Justice concluded that irrespective of the property's value, the government's abatement was not proper. *Id.*

### *Analysis*

While the majority's reasoning appears solidly rooted in precedent, such a result is not equitable for an unknowing victim. As noted by Justice Thomas, improper use of forfeitures as a remedy could conceivably allow the government to profit from a criminal's behavior, while depriving an innocent owner of the value of a share in property. *See id.* at 4128 (Thomas, J., concurring).

Furthermore, as Justice Stevens commented, the Court has acknowledged that there should be limitations placed on the abatement of mere instrumentalities of crime. *See id.* at 4130 (Steven, J., dissenting). While the monetary amount involved in *Bennis* may not have been substantial enough to warrant such limits, it is plausible that forfeiture of an innocent owner's interest with significant worth could cause the Court to establish such a rule. To do so would be consistent with the inherent, fundamental fairness embodied in due process and would constitute a judicially created exception, analogous to the statutory protections provided innocent owners under federal forfeiture of proceeds. *See id.* at 3129 (Stevens, J., dissenting).

The forfeiture of the petitioner's interest in the automobile might not seem so inequitable had Mrs. Bennis been given notice of her husband's intentions. With such notice, Mrs. Bennis could have refused to entrust the automobile to her husband. Yet, as noted by Justice Stevens, even had she wished to do so, there was very little the petitioner could do to prevent her husband's illegal acts. *See id.* at 4131-32 (Stevens, J., dissenting). Mrs. Bennis was completely blameless, yet she lost her property and was punished for a crime she did not commit. In light of the inherent unfairness in punishing an innocent owner for a crime they did not commit, and the possibility of significant government windfalls occurring from forfeiture of valuable property, it is likely that the Court will be forced to reexamine this issue again in the future.

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