

PIRATE SHIPS, PONTIACS, AND PROSTITUTES:
THE INNOCENT OWNER'S ALIENABLE RIGHT OF
PROPERTY UNDER *BENNIS V. MICHIGAN*

Property is surely a right of mankind as real as liberty. The moment the idea is admitted into society that property is not sacred as the laws of God, and there is not a force of law and public justice to protect it, anarchy and tyranny commence.¹

The signers of the Declaration of Independence, who entrusted their lives, fortune and sacred honor to the protection of divine Providence,² believed that the right to own and enjoy private property was preeminent among our natural human rights. The founders of this nation included as part of the Bill of Rights that, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”³ The meaning of those historic words regarding the sanctity of property has been eroded by United States Supreme Court decisions.

Recently, in *Bennis v. Michigan*,⁴ the United States Supreme Court considered the constitutionality of Michigan’s abatement scheme, which included a statute that prohibited the claim of innocence as a defense in a forfeiture proceeding. The pertinent portion of the statute reads “proof of knowledge of the existence of the nuisance on the part of the defendants or any of them is not required”⁵ for forfeiture. In 1993, the United States Supreme Court reserved the issue of whether due process would allow the state to forfeit the property of a truly innocent owner.⁶ The issue presented

1. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 20 (1995) (quoting John Adam’s argument in the defense of John Hancock’s confiscation of the schooner *Liberty* by the Crown).

2. THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776).

3. U.S. CONST. amend. V.

4. 116 S. Ct. 994 (1996).

5. MICH. COMP. LAWS § 600.3815(2) (1987).

6. *Austin v. United States*, 509 U.S. 602, 617 n.10 (1993).

itself in *Bennis*. The United States Supreme Court held that “[t]he thing is . . . the offender”⁷ and may be seized by the government, regardless of whether its owner is innocent of any wrongdoing.⁸ The Court allowed the State of Michigan to seize Mrs. Tina Bennis’ one-half ownership interest in the family’s 1977 Pontiac sedan,⁹ even though Mrs. Bennis was innocent of any wrongdoing.

This comment examines *Bennis v. Michigan*. The purpose of this comment is not to provide an exhaustive commentary on the history of forfeiture law in the United States,¹⁰ but an exposition of the *Bennis* analysis and the United States Supreme Court’s failure to recognize and uphold the principle of Due Process. Section one frames the factual and procedural background of *Bennis*, followed by a description of the Supreme Court’s decision in *Bennis*.

Section two develops the thesis that the Court’s reliance on certain precedent is misplaced. The “long and unbroken line of cases” based on admiralty law rejects the historical precedent of the core principles of the Declaration of Independence embodied in the Due Process Clause of the Fourteenth Amendment. The inalienable¹¹ right of property is embodied in the personhood clause of the Fourteenth Amendment.¹² “[T]he right of acquiring, possessing, and protecting

7. *Bennis*, 116 S. Ct. at 998 (quoting *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)).

8. *Id.*

9. *Id.*

10. For a history of forfeiture law in the United States see *Austin*, 509 U.S. at 611-19; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 633, 680-90; HYDE, *supra* note 1; Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 WM. MITCHELL L. REV. 265 (1995); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911 (1991).

11. The Declaration of Independence refers to unalienable rights, however throughout this article the author will use the term “inalienable.” Inalienable and unalienable are both acceptable spellings of the word which means “[u]nalienable; that cannot be legally or justly alienated or transferred to another. The dominions of a king are *inalienable*. All men have certain natural rights which are *inalienable*.” NOAH WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* 107 (1st ed. 1828).

12. “[N]or shall any State deprive any *person* of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1 (emphasis added). The first section of the Fourteenth Amendment contains two distinct categories. The first part deals with citizenship language which defines a citizen of the United States and also extends protection to the “privilege and immunities” of a citizen. The second part of the Fourteenth

property is natural, inherent, and unalienable. It is not a right *ex gratia* from the legislature, but *ex debito* from the constitution."¹³ The correct precedent for determining the constitutionality of forfeiture schemes is to embrace the principle of the inalienable right of property that proceeds from the Declaration of Independence. When a state law violates the principle of an individual's inalienable right of property, it is the United States Supreme Court's duty to declare that abatement scheme unconstitutional. *Bennis v. Michigan*, demonstrates the great disparity between the Court's precedent and the principles of the Declaration of Independence.

I. *BENNIS V. MICHIGAN*

Prostitutes enjoyed a flourishing business along Eight Mile Road in Detroit, Michigan.¹⁴ Wayne County prosecutors attempted to control the problem by reviving a Prohibition-era statute that had been used in the 1920's against Canadian moonshine runners.¹⁵ The Prosecutors applied Sections 600.3801¹⁶ and 600.3825¹⁷ of the

Amendment shifts from citizenship language to personhood terminology, with the effect that *any* person regardless of citizenship on United States soil is guaranteed those rights.

13. Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308 (1795) (Property is not a right from the grace of the state but a matter of right from the Constitution.)

14. David G. Savage, *Innocence Punished*, A.B.A. J., May 1996, at 47.

15. *Id.*

16. Section 600.3801 states in pertinent part:

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

MICH. COMP. LAWS § 600.3801 (Supp. 1995).

17. Section 600.3825 states in pertinent part:

(1) Order of abatement. If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgement in the case, which order shall direct the removal from the building or

Michigan Compiled Laws to seize and forfeit the Bennis' 1977 Pontiac. *Bennis* was the first case to test the newly implemented automobile seizure policy.¹⁸

A. Factual and Procedural Background

On the evening of October 3, 1988, Mr. Bennis drove the family sedan to an area in Detroit along Eight Mile Road.¹⁹ That evening, Detroit police officers Jacob Anthony and John Howe set up surveillance after they witnessed a woman "flagging"²⁰ potential customers on the corner of Eight Mile and Sheffield Road.²¹ The officers observed a 1977 Pontiac turn onto Sheffield and stop near the prostitute.²² The prostitute, identified as Kathy Polarchio, entered the vehicle on the passenger side.²³ The officers followed the Pontiac, which proceeded a block, made a U-turn, and stopped. Surveillance continued until the officers noticed Ms. Polarchio's head disappear toward the driver's side of the Pontiac.²⁴ Immediately, the officers approached the Pontiac, shined a flashlight into the passenger's

place of all furniture, fixtures and contents therein and shall direct the sale thereof in the manner provided for the sale of chattels under execution. . . .

(2) Vehicles, sale. Any vehicle, boat, or aircraft found by the court to be a nuisance within the meaning of this chapter, is subject to the same order and judgment as any furniture, fixtures and contents as herein provided.

(3) Sale of personalty, costs, liens, balance to state treasurer. Upon the sale of any furniture, fixture, contents, vehicle, boat or aircraft as provided in this section, the officer executing the order of the court shall, after deducting the expenses of keeping such property and costs of such sale, pay all liens according to their priorities . . . , and shall pay the balance to the state treasurer to be credited to the general fund of the state. . . .

MICH. COMP. LAWS § 600.3825 (1987).

18. Savage, *supra* note 14, at 47.

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

20. "Flagging" is the way prostitutes solicit business from potential customers in passing vehicles. *Id.* at 486 n.2.

21. *Id.* at 486.

22. *Id.*

23. *Id.*

24. *Id.*

window, and observed Ms. Polarchio performing an act of fellatio on Mr. Bennis.²⁵ Mr. Bennis was arrested for gross indecency.²⁶ The Bennis automobile was seized, and the Wayne County prosecutor, acting for the State of Michigan, filed a civil action against John and Tina Bennis seeking, *inter alia*, a finding that the Bennis' 1977 Pontiac was an abatable nuisance under a Michigan statute²⁷ and that it was subject to forfeiture.²⁸ On November 16, 1988, the Wayne Circuit Court declared the Bennis' Pontiac to be a nuisance and terminated the Bennis' interest in the automobile.²⁹ Mrs. Bennis, who co-owned the 1977 Pontiac with her husband,³⁰ defended against the abatement of her interest in the car on the grounds that she did not know that her husband would use the Pontiac to violate Michigan's indecency law.³¹

The court rejected her argument and declared the car a public nuisance.³² The judge ordered the car's abatement according to Section 600.3825 of the Michigan Compiled Laws. "[T]he trial court judge recognized the remedial discretion he had under Michigan's case law.³³ He took into account the couple's ownership of 'another automobile,' . . . [and] his authority to order the payment of one-half of the sale proceeds, after the deduction of costs, to 'the innocent co-title holder.'"³⁴ The judge subsequently declined to grant Mrs. Bennis any proceeds from the sale of the Pontiac in this case because of its age and value.³⁵ Mrs. Bennis appealed the decision to the Michigan

25. *Bennis*, 527 N.W.2d at 486.

26. "Ms. Polarchio was arrested the next day for accosting and soliciting. She had formerly been arrested on several occasions for disorderly conduct, accosting and soliciting, and indecent and obscene conduct." *Id.*

27. *See supra* notes 16-17.

28. *Bennis*, 527 N.W.2d at 486.

29. *State ex rel Wayne County Prosecutor v. Bennis*, 504 N.W.2d 731, 735 (Mich. Ct. App. 1993).

30. *Bennis*, 116 S. Ct. at 996.

31. *Bennis*, 527 N.W.2d at 486.

32. *Id.*

33. *Bennis*, 116 S. Ct. at 997.

34. *Id.*

35. *Id.* The 11-year-old Pontiac sedan had been recently purchased for \$600 by John and Tina Bennis. The trial judge commented on its value: "[T]here's practically nothing left minus costs in a situation such as this." *Id.*

Court of Appeals.

The Michigan Court of Appeals reversed the circuit court judge's decision,³⁶ holding that despite the language of Michigan Compiled Laws § 600.3815(2),³⁷ the prosecution had an obligation under Michigan Supreme Court precedent to demonstrate that Mr. Bennis' wife knew to what end the car would be used.³⁸ The court of appeals ruled in the alternative that the conduct in question did not qualify as a public nuisance because only one occurrence of prostitution was shown and there was no evidence of payment for the sexual act.³⁹

The Michigan Supreme Court reversed the court of appeals in a 4-3 decision⁴⁰ and reinstated the forfeiture of the Bennis' automobile.⁴¹ Of the four justices who voted to uphold the forfeiture, three justices joined a plurality opinion and a fourth concurred in the result only without writing separately.⁴² The court held that as a matter of state law, the episode in the Bennis' automobile was an abatable nuisance.⁴³ Rejecting the court of appeals' interpretation of Section 600.3815(2), the court announced that in order to abate the owner's interest in her vehicle, Michigan did not need to prove that Tina Bennis knew or agreed that her vehicle would be used in a manner proscribed by Section 600.3801 when she entrusted the Pontiac to her husband.⁴⁴

The court also addressed Mrs. Bennis' federal constitutional challenges to Michigan's abatement statute.⁴⁵ The court assumed that Mrs. Bennis "did not have knowledge of or consent to the misuse of

36. *Bennis*, 504 N.W.2d at 732.

37. "Proof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." MICH. COMP. LAWS. § 600.3815(2) (1987).

38. *Bennis*, 504 N.W.2d at 733.

39. *Id.* at 733-35.

40. *Bennis*, 527 N.W.2d at 495.

41. *Id.*

42. The plurality opinion was written by Justice Riley joined by Justice Boyle and Justice Mallett. *Id.* at 485, 495. Justice Griffin concurred in result only. *Id.* at 483. Chief Justice Cavanaugh wrote the dissenting opinion that was joined by Justice Brickley and Justice Levin. *Id.* at 495-502. Justice Levin wrote a separate dissenting opinion that dealt exclusively with statutory issues. *Id.* at 502-05.

43. *Id.* at 486.

44. *Id.* at 492.

45. *Id.* at 493.

the Bennis vehicle, of which she was co-title owner.”⁴⁶ Notwithstanding, the court concluded in light of the United States Supreme Court’s decisions in *Van Oster v. Kansas*⁴⁷ and *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁴⁸ that Michigan’s failure to provide an innocent-owner exception to the abatement statute was “without constitutional consequence.”⁴⁹

The Michigan Supreme Court also differentiated between the situation where a vehicle is used without the owner’s consent and the situation where the owner consents to the use of the vehicle but not in the manner used.⁵⁰ The court stated, “[i]n the former, the innocent owner’s interest could not be abated.”⁵¹ The court confirmed the trial court’s description of the nuisance abatement proceeding as an “equitable action.”⁵² The court considered it “critical” that the trial judge considered alternatives and in the exercise of his discretion, the trial judge did not abuse his authority by abating the whole interest in the vehicle.⁵³ The Michigan Supreme Court reversed the decision of the court of appeals and stated that “the statute unquestionably passes constitutional muster.”⁵⁴

Mrs. Bennis petitioned the United States Supreme Court on March 29, 1995. The Supreme Court granted certiorari on June 5, 1995,⁵⁵ in order to decide what constitutional protections, if any, an innocent owner possesses when his or her property is used by a third party in connection with illegal activity.

B. The “Long and Unbroken Line of Cases” Decides Bennis

On March 4, 1996, in a 5-4 decision, the Supreme Court held

46. *Bennis*, 527 N.W.2d at 493.

47. 272 U.S. 465 (1926).

48. 416 U.S. 663 (1974).

49. *Bennis*, 527 N.W.2d at 493.

50. *Id.* at 495 n.36.

51. *Id.* at 495.

52. *Id.*

53. *Id.*

54. *Id.* The dissent was also unpersuaded by Mrs. Bennis’ constitutional claim, at least to the extent it was grounded in due process. *Id.* 495-502.

55. *Bennis v. Michigan*, 115 S. Ct. 2275 (1996).

“that the Michigan court order did not offend the Due Process Clause of the Fourteenth Amendment or the Takings Clause of the Fifth Amendment.”⁵⁶ The Supreme Court’s decision was sharply divided. Chief Justice Rehnquist delivered the majority opinion of the Court, in which Justices O’Connor, Scalia, Thomas and Ginsburg joined.⁵⁷ Justices Thomas and Ginsburg also filed concurring opinions.⁵⁸ Justice Stevens filed a dissenting opinion in which Justices Souter and Breyer joined.⁵⁹ Justice Kennedy filed a separate dissenting opinion.⁶⁰

The majority viewed *Bennis* as an easy case to decide. The Court’s holding was anchored to a “long and unbroken line of cases”⁶¹ which held that an innocent owner’s interest in property may be forfeited by reason of the use to which the property is put even though the innocent owner did not know of such use.⁶²

Only Michigan argued that there was no constitutional protection for an innocent property owner.⁶³ The United States government conceded that the Due Process Clause protected the property of a truly innocent owner from forfeiture when the owner did not know of or consent to the misconduct and had done all that reasonably could be expected to prevent the unlawful use of the property. However, the United States argued the position that Mrs. Bennis was not an innocent owner under this test.⁶⁴

The Supreme Court rejected the federal government’s argument and fully embraced Michigan’s argument. By accepting Michigan’s theory, the Supreme Court rejected the federal government’s argument that would give innocent owners some protection from forfeiture. Particularly surprising was the Court’s reliance on

56. *Bennis*, 116 S. Ct. at 996.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 998. The first two cases are anchored in admiralty law: *The Palmrya*, 25 U.S. (12 Wheat) 1 (1827); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844).

62. *Bennis*, 116 S. Ct. at 998.

63. Brief for Respondent at 34, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

64. Brief for the United States as Amicus Curiae Supporting Respondent at 8, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

nineteenth century cases which authorized forfeiture of ships used in piracy.⁶⁵

II. THE SUPREME COURT'S HISTORICAL PRECEDENT

A. *The Petitioner's Argument*

The crux of Mrs. Bennis' argument was that the Michigan statute violated the Due Process Clause because the statute authorized the punishment of an innocent person.⁶⁶ The petitioner's argument did not include a claim that she was denied notice or an opportunity to be heard to contest the abatement.⁶⁷ The petitioner also claimed the protection of the Fifth Amendment. She argued that the case *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁶⁸ provided dictum for a negligence standard to be applied in determining whether an owner was truly innocent.⁶⁹ The petitioner's counsel claimed that because Mrs. Bennis clearly was not negligent in entrusting the car to her husband, the forfeiture by the State of Michigan constituted a "taking" without just compensation.⁷⁰ Therefore, Michigan violated the Due Process Clause of the Fourteenth Amendment and, the Takings Clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment.⁷¹ The Supreme Court rejected the petitioner's argument and stated, "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."⁷²

65. See *The Palmrya*, 25 U.S. (12 Wheat) 1 (1827); *Harmony v. United States*, 43 U.S. (2 How.) 210 (1844).

66. *Bennis*, 116 S. Ct. at 998.

67. Cf. *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 498 (1993) (holding that the Due Process Clause generally requires the Government to afford notice and opportunity to be heard before seizing property subject to civil forfeiture).

68. 416 U.S. 663 (1974).

69. *Id.* at 690.

70. *Bennis*, 116 S. Ct. at 998-1001.

71. *Id.* at 1001.

72. *Bennis*, 116 S. Ct. at 998.

B. *Pirate Ship Law and the Long and Unbroken Line of Cases*

In 1993, the Supreme Court reserved the question of “whether it would comport with due process to forfeit the property of a truly innocent owner.”⁷³ Chief Justice Rehnquist, writing for the majority, answered this question in *Bennis*. Ironically, he relied on the same “long and unbroken line of cases” that Justice Blackmun stated “reserved the question.”⁷⁴ The foundation of the majority’s decision was Justice Story’s opinion in *The Palmyra*,⁷⁵ which authorized the forfeiture of ships used for piracy. *The Palmyra*, which had been commissioned as a privateer by the King of Spain, had attacked two United States vessels. It was captured by the United States’ vessel of war, *Grampus*, and brought into Charleston, South Carolina, for adjudication.⁷⁶ On the Government’s appeal from a circuit court’s acquittal of the vessel, the vessel’s owner argued that *The Palmyra* could not be forfeited until he was convicted for the acts of piracy. Justice Story rejected this argument, explaining; “*The thing* is here primarily considered as the offender, or rather the offence is attached primarily to the thing.”⁷⁷ Justice Story applied the legal fiction that the guilt or the innocence of the owner was unrelated to the forfeiture of the “guilty” property.⁷⁸ In defense of its position, the majority quoted *Harmony v. United States*.⁷⁹ In *Harmony*, Justice Story stated that as concerning in rem admiralty proceedings “the acts of the master and crew . . . bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.”⁸⁰

73. *Austin*, 509 U.S. at 617 n.10.

74. *Id.* at 615-17.

75. 25 U.S. (12 Wheat) 1 (1827).

76. *Id.* at 8.

77. *Id.* at 14 (emphasis added).

78. See *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971) (explaining that “[t]raditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. Simply put, the theory has been that if the object is ‘guilty,’ it should be held forfeit.”).

79. 43 U.S. (2 How.) 210 (1844).

80. *Id.* at 234.

The Court supplemented its opinion with *Dobbin's Distillery v. United States*.⁸¹ In *Dobbins*, the Supreme Court upheld the forfeiture of a distillery, distilled spirits and distilling apparatus used by a lessee after he used the property to defraud the United States of federal alcohol taxes. The court expanded the admiralty law and concluded that “[the possessors] bind the interest of the owner . . . whether he be innocent or guilty.”⁸²

In the prohibition era, the United States Supreme Court used the “guilty fiction”⁸³ to uphold the forfeiture of a purchaser’s interest in a car misused by the seller.⁸⁴ Stella Van Oster purchased an automobile from a local dealer.⁸⁵ As part of the consideration for the sale of the vehicle, Van Oster agreed that the dealer could use the vehicle in his business.⁸⁶ An associate of the dealer used the vehicle to transport intoxicating liquor.⁸⁷ Kansas brought a forfeiture action pursuant to a Kansas statute, and Van Oster defended on the ground that the transportation of the liquor in the car was accomplished without her knowledge or authority. The Supreme Court rejected that argument and stated that “[i]t has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.”⁸⁸

The majority used the “long and unbroken line of cases” of *Palmyra*, *Harmony*, *Dobbins*, and *Van Oster* to decide the *Bennis* case with relative ease. The question of whether a truly innocent owner’s property interest could be forfeited was answered in the affirmative.⁸⁹ The *Bennis* Court finished its examination of the “long and unbroken

81. 96 U.S. 395 (1877).

82. *Id.* at 401.

83. “Guilty fiction” coined from the concept that the “thing” is the guilty. *See supra* note 78.

84. *Van Oster v. Kansas*, 272 U.S. 465 (1926).

85. *Id.*

86. *Id.* at 466.

87. *Id.* at 465-66.

88. *Id.* at 467-68.

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

line of cases,” with another prohibition era case which involved the forfeiture of an owner’s interest in an automobile used for the distribution of distilled spirits.⁹⁰ In *Goldsmith*, the owner of the automobile was “without guilt.”⁹¹ The majority in *Bennis* concluded “whether the reason for [the challenged forfeiture scheme] be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”⁹²

Chief Justice Rehnquist continued the majority’s decision by addressing Mrs. Bennis’ argument that *Calero-Toledo* required, at the minimum, proof of negligence by the innocent owner to uphold the forfeiture of her property. The majority held that reliance on this “obiter dictum”⁹³ is clearly erroneous, since Mrs. Bennis is in the same position as the yacht lessor in *Calero-Toledo*.⁹⁴ Rehnquist noted that “it is to the holdings of our cases, rather than their dicta, that we must attend.”⁹⁵

The Court then addressed Mrs. Bennis’ argument that the forfeiture would punish her for a crime she did not commit and that Michigan should be required to demonstrate a punitive interest in depriving Mrs. Bennis of her interest in the forfeited car.⁹⁶ Mrs. Bennis cited *Foucha v. Louisiana*⁹⁷ to support the proposition that a criminal defendant may not be punished for a crime if he is found to be not guilty.⁹⁸ The Court dismissed this argument in one sentence, stating that “putting aside the extent to which a forfeiture proceeding is ‘punishment’ in the first place, *Foucha* did not purport to discuss,

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

91. *Id.*

92. *Bennis*, 116 S. Ct. at 999 (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511).

93. “Words of an opinion entirely unnecessary for the decision of the case.”

BLACK’S LAW DICTIONARY 967 (6th ed. 1990).

94. See *Bennis*, 116 S. Ct. at 999.

95. *Id.* (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994)).

96. Brief for Petitioner at 17-19, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

97. 504 U.S. 71 (1992) (holding that a criminal defendant may not be punished for a crime if he is found to be not guilty).

98. *Bennis*, 116 S. Ct. at 1000.

let alone overrule, *The Palmyra* line of cases.”⁹⁹

The majority pointed out that forfeiture serves as a deterrent distinct from a punitive purpose. “Forfeiture of property prevents illegal uses ‘both by preventing further illicit use of the [property] and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.’”¹⁰⁰ Forfeiture has a built-in deterrence mechanism much like Michigan’s dangerous driving laws which hold the automobile owner liable for the negligence of those persons entrusted with use of the vehicle. Michigan, by enacting a forfeiture statute, “sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets.”¹⁰¹

Finally, the Court held that because the forfeiture proceeding did not deny Mrs. Bennis her due process, the state is not required to compensate her for property which it legally acquired under the exercise of governmental authority.¹⁰² Accordingly, the Court held that there was no violation of the Takings Clause of the Fifth Amendment.¹⁰³

In closing, Chief Justice Rehnquist summarized the majority’s decision, attempting to put a positive spin on its harshness. He noted that Mrs. Bennis’ “unfair[ness]” argument, “in the abstract, has considerable appeal.”¹⁰⁴ But the force of that appeal is reduced by both “the trial court’s remedial discretion” and Mrs. Bennis’ concession that the state could forfeit the car regardless of her entitlement to an offset for her interest in the vehicle.¹⁰⁵ The majority concluded, as the Court concluded seventy-five years ago, that “the cases authorizing actions of the kind at issue are ‘too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.’”¹⁰⁶

99. *Id.*

100. *Id.* (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 687 (1974)).

101. *Id.* at 1001.

102. *Id.*

103. *Id.*

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

105. *Id.*

106. *Id.* (quoting *Goldsmith-Grant Co.*, 254 U.S. at 511).

Justice Thomas and Justice Ginsburg both wrote separate concurring opinions. Justice Thomas acknowledged the “unfair” and even “intensely undesirable” result reached in the *Bennis* case.¹⁰⁷ He also remarked, “[o]ne unaware of the history of forfeiture laws and 200 years of this Court’s precedent regarding such laws might well assume that such a scheme is lawless--a violation of due process.”¹⁰⁸ However, Thomas concluded that, “the Federal Constitution does not prohibit everything that is intensely undesirable.”¹⁰⁹ Justice Thomas further explained that forfeiture was used by England and the United States before and after the enactment of the Fourteenth Amendment.¹¹⁰ Thomas further surmised that “a process of law that can show the sanction of settled usage both in England and in this country must be taken to be due process of law.”¹¹¹

Reluctantly, Thomas indicated that he was unclear as to “*what* property can be forfeited as a result of what wrongdoing.”¹¹² He explained that those limits, whatever they may be, become significant when they are the sole restriction on government’s ability to take property from people who it merely suspects, or does not even suspect, of collusion in a crime. Based on case law spanning seventy-five years and uncertainty as to what limits can and should be imposed upon a state, Thomas concluded that the Court should strictly construe a constitutional challenge. According to Justice Thomas, the facts in *Bennis* appear indistinguishable from those in *Van Oster*; hence, the same result should follow.¹¹³ However, Thomas concluded with the following words of caution:

Improperly used, forfeiture could become more like 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,

107. *Id.* at 1001-02.

108. *Id.* at 1001.

109. *Id.* at 1001-02.

110. *Bennis*, 116 S. Ct. at 1002.

111. *Id.* (quoting *Hurtado v. California*, 110 U.S. 516 (1884)).

112. *Id.* (emphasis added).

113. *Id.*

than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.¹¹⁴

Justice Ginsburg's concurrence rebutted the dissenters. Ginsburg first remarked that the automobile in question belonged to Mr. Bennis as much as it did to his wife.¹¹⁵ Justice Ginsburg distinguished between the use of a vehicle without consent and the use of a vehicle with consent but in an unauthorized manner.¹¹⁶ Also, Ginsburg stressed that the nuisance abatement proceeding was an "equitable action," meaning that the Michigan Supreme Court was ready to "police exorbitant applications of the statute."¹¹⁷ Finally, Justice Ginsburg was offended by the dissenting justices' charge of the trial court's "blatant unfairness."¹¹⁸ "[T]he Bennis have 'another automobile,' and the age and value of the forfeited car left 'practically nothing' to divide after subtraction of costs."¹¹⁹ Therefore, she concluded, Michigan had not embarked on an "experiment to punish innocent third parties" but rather, decided to prevent "Johns¹²⁰ from using cars they own (or co-own) to contribute to neighborhood blight."¹²¹

C. *The Dissent's Fairness Argument*

Justice Stevens wrote a poignant dissent, joined by Justices Breyer and Souter, which criticized the majority opinion. Stevens wrote:

114. *Id.* at 1003.

115. *Id.*

116. *Bennis*, 116 S. Ct. at 1003.

117. *Id.*

118. *Id.*

119. *Id.*

120. A generic Police term used for males who pick up prostitutes.

121. *Bennis*, 116 S. Ct. at 1003.

For centuries prostitutes have been plying their trade on other people's property. Assignations have occurred in palaces, luxury hotels, cruise ships, college dormitories, truck stops, back alleys and back seats. A profession of this vintage has provided governments with countless opportunities to use novel weapons to curtail its abuses. . . . [I]t was not until 1988 that any State decided to experiment with the punishment of innocent third parties by confiscating property in which, or on which, a single transaction with a prostitute has been consummated.¹²²

Justice Stevens warned that the Court's analysis would permit the States to exercise "unbridled power" to confiscate innocent owner's property.¹²³ He stated, "[w]ithout some form of an exception for innocent owners, the potential breadth of forfeiture actions for illegal proceeds would be breathtaking indeed. Needless to say, a rule of strict liability would have catastrophic effects on the nation's economy."¹²⁴ As an example, Justice Stevens argued that the majority's holding might allow the forfeiture of airplanes if a single passenger had a marijuana cigarette in his luggage.¹²⁵

Justice Stevens then identified three categories that are subject to forfeiture: pure contraband, proceeds of criminal activity, and tools of the criminal's trade.¹²⁶ He defined pure contraband as "objects the possession of which, without more, constitute a crime."¹²⁷ Justice Stevens went on to explain that the government has an obvious remedial interest in removing pure contraband from circulation regardless of the property owner's guilt or innocence. He concluded, however, that "automobiles are not contraband."¹²⁸

122. *Id.* (Stevens, J., dissenting).

123. *Id.*

124. *Id.* at 1004 n.1 (Stevens, J., dissenting).

125. *Id.* at 1003. (Stevens, J., dissenting).

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

127. *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting, quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)).

128. *Id.* (Stevens, J., dissenting).

Further, Justice Stevens noted, that the automobile would fit into the third category of tools of the criminal trade or instrumentalities, also known as “derivative contraband.”¹²⁹ These are items that the wrongdoer has used in the commission of a crime. The remedial purpose of forfeiture becomes more tenuous within this category of seizable property. Historically, Justice Stevens argued, the early admiralty cases involving piracy on the high seas presumed that the owner of the vessel was aware of the unlawful use of the property.¹³⁰ Forfeiture of the vessel was allowed because under “the maritime law of the Middle Ages the ship was not only the source [of the crime], but the limit of liability.”¹³¹ Accordingly, the Supreme Court has upheld forfeiture where the entire cargo,¹³² the entire property,¹³³ or the entire vehicle¹³⁴ was used to transport or manufacture contraband. None of these cases, Justice Stevens argued, “would justify the confiscation of an ocean liner just because one of its passengers sinned while on board.”¹³⁵ Therefore, Stevens concluded that, “the isolated misuse of a stationary vehicle should not justify the forfeiture of an innocent owner’s property on the theory that it constituted an instrumentality of the crime.”¹³⁶

Additionally, Stevens argued, the properties involved in forfeiture historically facilitated the crime. Here, the property was not instrumental to the crime. Stevens wrote, “[t]he car, in this case, was used as little more than an enclosure for a one-time event”¹³⁷ Therefore, the nexus between the vehicle and the crime is insufficient to support forfeiture.¹³⁸

Next, Stevens explained that a reversal was in order because “[f]undamental fairness prohibits the punishment of innocent

129. *Id.*

130. *Id.*

131. *Id.* at 1005 (quoting OLIVER W. HOLMES, *THE COMMON LAW* 27 (1881)).

132. *The Palmyra*, 25 U.S. (12 Wheat) 1 (1872).

133. *Dobbin’s Distillery v. United States*, 96 U.S. 395, 399 (1878).

134. *Van Oster v. Kansas*, 272 U.S. 465 (1926).

135. *Bennis*, 116 S. Ct. at 1005 (Stevens, J., dissenting).

136. *Id.* (Stevens, J., dissenting).

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

138. *Id.*

people.”¹³⁹ He pointed to both *Austin*¹⁴⁰ and *Calero-Toledo*¹⁴¹ which “established the proposition that the Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to prevent its illegal use.”¹⁴² For this very reason, Justice Stevens argued that the self-evident principle that persons cannot be punished when they are innocent is required by due process.¹⁴³ Because Mrs. Bennis alleged and proved that she is without culpability and is not responsible for her husband’s actions, Justice Stevens concluded that the seizure constituted an arbitrary, capricious, and unreasonable deprivation of property without due process of law.¹⁴⁴

Finally, Justice Stevens argued that the majority essentially ignored the Court’s holding in *Austin v. United States*.¹⁴⁵ The Court established in *Austin* that, when a forfeiture constitutes “payment to a sovereign as punishment for some offense,” it is subject to the limitations of the Eighth Amendment’s Excessive Fines Clause.¹⁴⁶ Because Mrs. Bennis is not blameworthy, any amount of forfeiture is excessive. Under the majority’s reasoning, Justice Stevens argued, “the value of the car is irrelevant.”¹⁴⁷ Either a brand-new Porsche or 1977 Pontiac would be equally forfeitable.¹⁴⁸ This “dramatic variation” undermines any argument that the forfeiture is tied to remedial ends.¹⁴⁹

In a final discussion, Justice Stevens stated that the majority erred “by assuming that the power to seize property is virtually unlimited and by implying that our opinions in *Calero-Toledo* and *Austin* were misguided.”¹⁵⁰ While playing on the final statement of the majority’s

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

140. *Austin v. United States*, 509 U.S. 602, 615 (1993).

141. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-90 (1974).

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

143. *Id.*

144. *Id.* at 1008-10 (Stevens, J., dissenting).

145. *Id.* at 1010 (Stevens, J., dissenting).

146. *Austin*, 509 U.S. at 602

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

148. *Id.* (Stevens, J., dissenting).

149. *Id.*

150. *Id.*

opinion, Justice Stevens argued, that seventy-five years ago, when presented with the argument that the forfeiture scheme approved by the Court had no limit, the Court insisted that an expansive application had not yet come to pass.¹⁵¹ “When such application shall be made,” the Court said, “it will be time enough to pronounce upon it.”¹⁵² Justice Stevens stated that the time had arrived to draw a line when a state confiscates an innocent owner’s car because the owner’s spouse secretly committed a misdemeanor inside the car. Stevens forcefully declared that the arbitrary decision by the majority of this Court places the seizure on the “unconstitutional side of [that] line.”¹⁵³

III. THE ANALYSIS: PIRATE SHIP PRECEDENT PRODUCES ALIENABLE RIGHT OF PROPERTY

The Court’s decision in *Bennis* demonstrates, “that the Federal Constitution does not prohibit everything that is intensely undesirable.”¹⁵⁴ However, there is a fundamental flaw in the Supreme Court’s decision to uphold a forfeiture scheme which does not protect a truly innocent owner’s property from government seizure. The dangerous aspect of the *Bennis* decision is not its supposed betrayal of an amorphous sense of “fairness,”¹⁵⁵ but rather, its erosion of the core principle that the right of property is inalienable, and therefore, not subject to arbitrary government seizure.

The majority in *Bennis* based their decision on seventy-five years of case law rooted in maritime law concerning pirate ships. In embracing this type of precedent, the Court rejected a line of precedent over 220 years long established by the founders of this country who, by upholding the laws of nature’s God, sought to secure forever the fundamental rights of the American people.

151. *Id.*

152. *Id.* (Stevens, J., dissenting) (quoting *Goldsmith-Grant Co.*, 254 U.S. at 512).

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

154. *Id.* at 1001-02 (Thomas, J., concurring).

155. “Fundamental fairness prohibits the punishment of innocent people.” *Id.* at 1007 (Stevens, J., dissenting); “I am convinced that the blatant unfairness of this seizure places it on the unconstitutional side of that line.” *Id.* at 1010 (Stevens, J., dissenting).

The Declaration of Independence emphasizes that the United States government was instituted not to create rights, but to “secure” rights.¹⁵⁶ As Thomas Jefferson explained, “it is to secure our just rights that we resort to government at all.”¹⁵⁷ The nature of the statutes¹⁵⁸ that affected the *Bennis* case indicate the Michigan legislature’s failure to make secure the inalienable right of property. The United States Supreme Court’s decision in *Bennis* demonstrates the Court’s unwillingness to “secure” private property rights of the innocent.

A. *The Weak Link: Admiralty Law*

The Court’s reliance in *Bennis* on the principle of law in admiralty which states, “[t]he thing is . . . the offender”¹⁵⁹ is misplaced. Former Supreme Court Justice Oliver Wendell Holmes noted that “a ship is the most living of inanimate things. . . . [E]veryone gives a gender to vessels. . . . It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible.”¹⁶⁰ Justice Holmes explained further by example:

A collision takes place between two vessels, the *Ticonderoga* and the *Melampus*, through the fault of the *Ticonderoga* alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. He is free from personal

156. “that all [persons] . . . are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness—That to secure these rights, governments are instituted among men.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

157. 8 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 165 (Paul Leicester ed., Fed. ed., 1904); *Cf. Hague v. C.I.O.*, 307 U.S. 496, 527 (1939).

158. *See supra* notes 5, 16 and 17.

159. *Bennis*, 116 S. Ct. at 998. (quoting *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)).

160. OLIVER WENDELL HOLMES, THE COMMON LAW 26-27 (1881).

liability on elementary principle. Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. If a livery-stable keeper lets a horse and wagon to a customer, who runs a man down by careless driving, no one would think of claiming a right to seize the horse and wagon.¹⁶¹

Holmes recognized that practical motivations were at work in the employment of the “guilty fiction”¹⁶² in admiralty law. However, Holmes realized that these practical motivations were unique to the problems of admiralty. Holmes noted:

The ship is the only security available in dealing with foreigners, and rather than send one’s own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.¹⁶³

Here, Mrs. Bennis is the livery-stable keeper in Holmes’ example because there are other avenues to secure satisfaction for the injury. The majority’s holding in *Bennis* unleashed the historical moorings of the “guilty fiction” upon innocent property owners. The majority’s analysis discards core principles by reaffirming a maritime law doctrine that punishes the innocent.

B. The Foundation: The Declaration of Independence

The inalienable right of property is a core principle that emanates from God and is found in the Declaration of Independence. From this foundation flows an approach which will lend itself to consistent

161. *Id.* at 27.

162. “[T]he thing is . . . the offender.” *Bennis v. Michigan*, 116 S. Ct. 994, 998 (1996) (quoting *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)). See *supra* note 78.

163. HOLMES, *supra* note 160, at 26.

holdings in the area of civil forfeiture.

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the *Laws of Nature and of Nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain *unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness*. That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. . . .¹⁶⁴

The starting point of the Declaration of Independence is the "Laws of Nature and Nature's God." This legal term, which Jefferson relied upon, was a centuries-old legal premise. Sir Edward Coke addressed "the law of nature" as early as the seventeenth century. Coke wrote:

The Law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this *lex aeterna*, the moral law, called also the law of nature. And by the law, written with the finger of God in the heart of man, were the people

164. THE DECLARATION OF INDEPENDENCE para. 1, 2 (U.S. 1776) (emphasis added).

of God a long time governed, before the law was written by Moses. . . . This law of nature, which indeed is the eternal law of the Creator, infused into the heart of the creature at the time of his creation, was two thousand years before any laws written, and before any judicial or municipal laws.¹⁶⁵

In the eighteenth century, Sir William Blackstone provided an exposition of the laws of nature and of nature's God. Blackstone, in his *Commentaries*, explained the legal definition of this term as Jefferson later understood it. Blackstone explained that all law rests upon two foundations.¹⁶⁶ The first, is the "will of [man's] maker," which is called the law of nature.¹⁶⁷ "These are the eternal, immutable laws of good and evil, to which the creator himself in all dispensations conforms; which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions."¹⁶⁸ Blackstone continued his explanation:

if our reason were always, as in our first ancestor before his transgression, clear and perfect, . . . we should need no other guide but [the law of nature]. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.¹⁶⁹

Blackstone's second foundation is the "revealed or divine law, and they are to be found only in the holy scriptures."¹⁷⁰ Blackstone wrote, "[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."¹⁷¹

Blackstone used the two separate phrases, the "law of nature" and the "law of revelation," because they referred to different expressions

165. Calvin's Case, 77 Eng. Rep. 377, 392 (K.B. 1608).

166. 1 WILLIAM BLACKSTONE, COMMENTARIES 42.

167. *Id.* at 39.

168. *Id.* at 40.

169. *Id.* at 41.

170. *Id.* at 42.

171. *Id.*

of God's revelation. The "law of nature" referred to moral precepts revealed in Creation. The "law of revelation" referred to the moral precepts revealed in God's Word.

Blackstone's symmetry was adopted in Jefferson's phrase "the laws of nature and of nature's God."¹⁷² "By using the distributive plural 'laws,' Jefferson distinguishes between two laws: the law of nature, and the law of God who is over nature. At the same time, the distributive plural links the two together to show that they really signify the same thing."¹⁷³

The Declaration's foundation is the moral precepts of God's Word. This objective standard serves as the authenticator of all law and of all rights. From there, if a law or a right is in contradiction with the moral precepts of God's Word, then that law or right is nonexistent. The core principles of the Declaration of Independence flow from this foundation.

The Declaration presupposes man's divine creation and endowment with certain inalienable rights.¹⁷⁴ The source of inalienable rights is the Creator, as acknowledged by the Declaration.¹⁷⁵ By inalienable, the founders of our Nation recognized that there are rights that are inherent in personhood. No government issued these rights; they inhere in all mankind and exist apart from government. In fact, they precede the existence of government. Therefore, all just civil governments must uphold these God-given rights.

However, the Declaration does not explicitly state that property is an inalienable right. The phrase Jefferson used in the document was the "pursuit of happiness."¹⁷⁶ Jefferson borrowed the phrase from the Bill of Rights to the Constitution of Virginia, adopted June 12, 1776, almost one month prior to the Declaration of Independence:

172. THE DECLARATION OF INDEPENDENCE para 1 (U.S. 1776).

173. GARY T. AMOS, DEFENDING THE DECLARATION 46-7 (1989).

174. "[A]ll men are created equal and endowed by their Creator with certain inalienable rights." THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776). *See also Genesis 1.*

175. *Id.*

176. *Id.*

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.¹⁷⁷

Blackstone used the term “pursuit of happiness” to mean that God has “so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and the former be punctually obeyed, it cannot but induce the latter.”¹⁷⁸ Hence, according to Blackstone, happiness only comes by observing God’s moral precepts.¹⁷⁹

Blackstone went on to discuss the fundamental rights of Englishmen in light of the Magna Carta. The declaration of rights and liberties in the Magna Carta conforms to the natural liberties of all individuals.¹⁸⁰ The natural liberties inherent in a person were endowed by God at creation.¹⁸¹ These rights are vested by the immutable law of nature.¹⁸² Blackstone explained that these rights may be reduced to three principle articles: the right of personal security, the right of personal liberty, and the right of private property.¹⁸³

An inalienable right to the “pursuit of Happiness” means simply that every person was created with the inherent right to live in accordance with God’s moral precepts.¹⁸⁴ In Genesis 1:26-27,¹⁸⁵ God

177. SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 311 (Richard L. Perry, ed., 1978).

178. BLACKSTONE, *supra* note 166, at 40.

179. *Id.*

180. *Id.* at 127-29.

181. *Id.* at 125.

182. *Id.* at 124.

183. *Id.* at 125.

184. *Id.* at 40.

185. The passage reads:

commands mankind to take dominion of the earth. In this dominion mandate, God commands man to take possession of the earth, from which flows the inalienable right of property. Thus, to “pursue one’s happiness” includes acquiring and possessing property and living in accordance with God’s moral law. Jefferson wanted a phrase that embodied more than the word property, so he chose the phrase “pursuit of Happiness” which embodies the former along with a richer meaning.¹⁸⁶

It may be concluded, from this foundation, that man’s law cannot be arbitrary, without offending the law of nature and of nature’s God. Truth can be known, sometimes so clearly as to be self-evident.¹⁸⁷ God created mankind, and created them equal.¹⁸⁸ God endowed each person with inalienable rights, one of which is the right of property. Denial of property rights is “destructive of man’s real happiness, and therefore the law of nature forbids it.”¹⁸⁹ Because God created mankind and endowed persons with rights, mankind creates governments under God’s law to make secure those rights.¹⁹⁰ A government that destroys inalienable rights violates its purpose and exceeds its authority to rule.¹⁹¹

The problem is not dissecting the meaning of the Declaration, but rather finding the authority in the Federal Constitution for the Judicial Branch to apply the principles found in the Declaration of Independence.

And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created he him; male and female created he them. And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Genesis 1:26-28. (King James).

186. 4 JEFFERSON, *supra* note 157, at 221.

187. THE DECLARATION OF INDEPENDENCE para 2 (U.S. 1776).

188. *Id.*

189. BLACKSTONE, *supra* note 166, at 41.

190. AMOS, *supra* note 173, at 32.

191. *Id.*

C. *The Inalienable Right of Property Linked to the Fourteenth Amendment*

Prior to the ratification of the Fourteenth Amendment, Due Process of Law was interpreted to mean that the Court could place certain limitations upon the legislative power that were not specifically enumerated as limitations within the words of the written Constitution.¹⁹² But how were limitations upon legislative power transformed into effective constitutional law? The answer is found prior to the Civil War in the doctrine of vested rights,¹⁹³ “which is the foundational doctrine of constitutional limitations in this country, and which in turn rests, not upon the written Constitution, but upon the theory of fundamental and inalienable rights.”¹⁹⁴ The principal case that brought the doctrine of vested rights within the Constitution was *Van Horne’s Lessee v. Dorrance*.¹⁹⁵ Judge Paterson stated:

[T]he right of acquiring and possessing property and having it protected is one of the natural, inherent and unalienable rights of man. . . . The legislature therefore had no authority to make an act divesting one citizen of his freehold and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort peace and happiness of mankind; . . . and lastly, it is contrary both to the letter and spirit of the constitution.¹⁹⁶

192. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (declaring an act of the State legislature unconstitutional and void by using the doctrine of vested rights and the obligation of contracts); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

193. For a comprehensive explanation of vested rights SEE WILLIAM G. MEYER, *VESTED RIGHTS* (1891); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

194. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, *supra* note 193, at 375.

195. 2 U.S. (2 Dall.) 304 (1795).

196. *Id.* at 316.

On the basis of this reasoning, a state act of 1789 was pronounced “void . . . a dead letter and of no more virtue or avail than if it never had been made.”¹⁹⁷ This idea of inalienable rights limiting the power and authority of state legislatures was the central idea in the debates in Congress over the Civil Rights Act of 1866 and the Fourteenth Amendment.¹⁹⁸

Debate on the Civil Rights Bill began on January 29, 1866.¹⁹⁹ Senator Trumbull, who introduced the bill, explained that:

[The measure] was intended to give effect to the Thirteenth Amendment and to secure to all persons within the United States practical freedom. . . . Of what avail had been the abstract truths enunciated in the Declaration of Independence [Trumbull quoted the familiar phrases] to the millions of slaves? . . . Of what avail would the Amendment now be if in the late slaveholding States, laws are to be enacted and enforced depriving persons of African descent of privileges which are essential to freemen? It is the intention of this bill to secure these rights.²⁰⁰

The rights that Trumbull wanted secure were the inalienable rights mentioned in the Declaration of Independence. Senator Trumbull continued to define these rights by reading the frequently quoted passage from *Corfield v. Coryell*.²⁰¹ On February 2, 1866, the Civil

197. *Id.*

198. *See infra* text accompanying notes 200-04.

199. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

200. *Id.*

201. 6 F. Cas. 546, (C.C.E.D. Pa. 1823) (No. 3230).

[W]hat are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states, . . . these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue

Rights Bill passed the Senate. The vote was 33 in favor, 12 against, 5 absent.²⁰²

The Fourteenth Amendment was made part of the Constitution in 1868.²⁰³ The theme of the debates on the amendment centered around Congressman Bingham's remarks about the meaning of the amendment. The amendment's purpose was to give the federal government the authority to secure the core principles of the Declaration of Independence for each citizen from infringement by the states under the guise of an exercise of police power.

Congressman Bingham, in the last major speech before the House voted the Amendment stated:

The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict--that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our Country, which the proposed amendment will supply. . . . It is the power in the people, the whole people of the United States, by express authority of the

happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

Id. at 550.

202. *Id.* at 505. President Johnson vetoed the bill, but Congress overruled the veto and enacted the Act into law on April 9, 1866. See also Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

203. The Amendment reads:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all citizens of the Republic and the *inborn rights of every person* within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional act of the state.²⁰⁴

Congressman Bingham, the force behind the ratification of the Fourteenth Amendment, explained that the amendment's purpose was to protect the inherent rights of personhood, one of which is the inalienable right of property.

In the Senate debate, the discussion followed the same line of logic as in the House. The amendment was established to give the Federal Government the authority to enforce the principles of inalienable rights. Senator Poland of Vermont opened the debate on July 5, 1868.²⁰⁵ Prior to his service in the Senate, Poland had served as Justice and Chief Justice of the Vermont Supreme Court. He gave an explanation of the first section's meaning:

Now that slavery is abolished, and the whole people of the nation stand upon the basis of freedom, it seems to me that there can be no valid or reasonable objection to the residue of the first proposed amendment:

Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this, we know that State law exist, and some of them of very recent enactment, in direct violation of

204. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (emphasis added).

205. *Id.* at 2961.

these principles. Congress has already shown its desire and intention to uproot all such partial State legislation in the passage of what is called the civil rights bill. The power of Congress to do this has been doubted and denied by persons entitled to high consideration. It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States.²⁰⁶

Senator Poland stated that the Due Process Clause embodies the principles of the Declaration of Independence.²⁰⁷ If a State passes a law that violates those principles in the Due Process Clause, there is now authority in the Constitution to enforce the principles of the Declaration of Independence.²⁰⁸ The Fourteenth Amendment's intended purpose was to separate citizenship rights and personhood rights. This was done by the distinct usage of citizenship language and personhood language in the Fourteenth Amendment.²⁰⁹

Congressman Bingham explained what was protected by this Amendment:

Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be *secured* in the equal protection of his *personal rights*. Your Constitution provides that no man, no matter what his

206. *Id.*

207. *Id.*

208. *Id.*

209. This language reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens* of the United States; nor shall any State deprive any *person* of life, liberty, or property, without due process of law; nor deny any *person* within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 2 (emphasis added).

color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law--*law in its highest sense*, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.²¹⁰

Congressman Bingham's purpose for proposing the Fourteenth Amendment was to secure the rights that are inherent in personhood. The standard for due process of law is the law of nature and of nature's God. Congress brought the principles of the Declaration of Independence within the framework of the Constitution to enforce those principles upon the various States. When action violates the core principles of inalienable rights, then the federal judiciary, by the authority of the due process clause, has the authority to strike down that regulation.²¹¹

D. The Core Principle: Inalienable Right of Property

Instead of binding themselves to a legal principle from pirate ship law²¹² the United States Supreme Court, must again, reaffirm the core principles of inalienable right of property found in the Declaration of Independence and linked to the Fourteenth Amendment.

Today, the Supreme Court's concept of Due Process of Law is

210. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866) (emphasis added).

211. Sir William Blackstone explained in his *Commentaries*, the effect of recognizing personhood rights in England's Law. The rights of Englishmen were premised in the absolute rights: the right of personal security, the right of personal liberty, and the right of property. This spirit of liberty was so deeply implanted in England's soil that a slave, the moment he landed in England, the slave fell under the protection of the laws, and because of his personhood rights became a freeman. BLACKSTONE, *supra* note 166, at 127-29.

212. "The thing is . . . the offender." *Bennis*, 116 S. Ct. at 998 (quoting *The Palmyra*, 25 U.S. (12 Wheat) 1 (1827)).

notice and a right to be heard.²¹³ If due process does not embrace the core principles of the Declaration, what is the good in notice and the right to be heard if the laws are unjust? Mrs. Bennis was afforded both notice and a right to be heard,²¹⁴ but the results were inequitable; that is, an innocent woman had her property seized by the state. When Due Process of Law does not embrace the core principles of inalienable rights, this result is inevitable. Courts will continue to arbitrarily and capriciously decide cases where the innocent are punished.²¹⁵

The correct precedent to follow is to recognize that property rights are inalienable. No forfeiture scheme should allow an innocent owner's property to be seized and forfeited by the government.²¹⁶ The problem with confiscating an innocent owner's piece of property is that the government is depriving a person of his or her God-given right to own property.

This raises the question, whether the government can ever seize and forfeit any property. The laws of God allow governments to punish.²¹⁷ The English Common Law, which the United States adopted, used forfeiture to impose punishment.²¹⁸ God, Himself, has always blessed the righteous man and cursed the unrighteous man.²¹⁹ Since governments are ministers of God²²⁰ and God discriminates between the righteous and unrighteous, human authorities must distinguish between good and evil. Thus, it is acceptable for governments to seize and forfeit a wrongdoer's property, but to do the

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

214. *Bennis*, 116 S. Ct. at 998.

215. "Forfeiture serves, at least in part to punish the owner." *Austin v. United States*, 509 U.S. 602, 618 (1993).

216. The Michigan statutes explicitly stated that "[p]roof of knowledge of the existence of the nuisance on the part of the defendants or any of them, is not required." § 600.3815(2). See *supra* notes 5 and 8.

217. *Romans* 13: 1-14. "[Government] is the minister of God . . . [b]ut if thou do that which is evil, be afraid; for [the government] beareth not the sword in vain. . . . A revenger to execute wrath upon him that doeth evil." *Romans* 13:4 (King James).

218. *Austin*, 509 U.S. at 611.

219. See *Genesis* 6:5-18, 18:20-25; *Deuteronomy* 27:15-26; *Matthew* 5:6.

220. *Romans* 13.

same to an innocent person violates God's moral law.²²¹ Just as a person who commits a crime can be punished by spending time in prison, in effect having his inalienable right to liberty deprived, so too, the government can deprive someone of their property for doing something wrong. This coincides with the distinction of the righteous and unrighteous in God's moral law.

Also, governments may take property from innocent owners when there is just compensation and the property is used for a public purpose.²²² The Fifth Amendment applies to this situation. In *Bennis*, there was a taking, and probably one could argue that a public purpose was served, but just compensation was not given. One of God's moral precepts, which all human laws include, is "[t]hou shalt not steal."²²³ The United States Supreme Court, by violating God's moral law and Mrs. Bennis' personhood rights, allowed the State of Michigan to steal Mrs. Bennis' 1977 Pontiac.

The next logical question is, what determines innocence in regard to *in rem* civil forfeiture? Federal laws regarding drug forfeiture contain an innocent owner defense.²²⁴ Real property used to facilitate a federal drug crime is forfeitable unless the violation was "committed or omitted without the knowledge or consent of [the] owner."²²⁵ If a property owner lacks knowledge or, even with such knowledge, did not consent to the use, the property owner prevails.²²⁶

In contrast to Michigan, the State of Missouri has adopted an approach which embraces inalienable rights. For forfeiture to apply, the property owner must have been convicted of a felony "substantially related" to the forfeiture.²²⁷ This distinction more closely aligns with God's moral precept of distinguishing between the

221. The one limitation, which the United States Supreme Court has recognized, is the Excessive Fines Clause of the Eighth Amendment. *Austin*, 509 U.S. at 602 (holding that the Eighth Amendment's excessive fines clause applies to *in rem* civil forfeiture).

222. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

223. *Exodus* 20:15; *Romans* 13:9.

224. 21 U.S.C. § 881 (1988).

225. *Id.* at § 881(a)(7).

226. *United States v. 107.9 Acre Parcel*, 898 F.2d 396, 398 (3d Cir. 1990) ("[A] party in interest could successfully assert an innocent owner defense by proving either lack of knowledge or lack of consent").

227. MO. ANN. STAT. § 513.600-.645 (Vernon Supp. 1994).

righteous and the unrighteous. The Missouri Statute embodies the principle of inalienable right of property. However, the *Bennis* Court made the distinction that the innocent owner may be protected if the property is stolen before its use.²²⁸ So consent, in the minds of the justices, goes to the individual using the property, instead of, consent to the particular usage.²²⁹ In other words, if a property owner lets someone use their property, the owner is consenting to everything the possessor does with that property.²³⁰ This violates God's moral precepts, for each individual must account for his or her own conduct.²³¹ The minimum standard for a statute regarding forfeiture should be consent to the wrongful use. Clearly, Mrs. Bennis would pass this standard, because she had no knowledge²³² that her husband was using the vehicle for an illicit purpose. According to the principle of inalienable right of property, the State of Michigan had authority to seize Mr. Bennis' property interest because he broke the law. On the other hand, the state should have compensated Mrs. Bennis for the property interest taken from her because she had no knowledge nor did she consent to the wrongful use.

IV. CONCLUSION

With the increase in crime, legislatures all across the United States have slowly expanded the area of forfeiture law as evidenced by *Bennis* and the war on drugs.²³³ The United States Supreme Court has allowed this expansion through flawed application of precedent, which dates back to a time of Spanish Buccaneers and pirate ships. When a crisis arose, like the Civil War, prohibition, or the drug war, the courts and legislatures helped solve or confuse the problem by expanding forfeiture law. This trend has resulted in the unfortunate punishment of innocent property owners. To make matters worse, the

228. *Bennis*, 116 S. Ct. at 999 n.5.

229. *Id.*

230. *Id.*

231. See *Matthew* 16:27; *Romans* 14:11-12; *I Peter* 4:5.

232. *Bennis*, 527 N.W.2d at 493.

233. HYDE, *supra* note 1, at 23-24.

United States Supreme Court is not finished. In *Bennis*, the majority reserved the question of whether this case would justify the confiscation of an ocean liner just because one of its passengers sinned while on board.²³⁴ The Court answered, “[w]hen such application shall be made it will be time enough to pronounce upon it.”²³⁵

The primary problem with the *Bennis* decision is its impact on state legislation. Legislators are looking for ways to raise revenue. Now lawmakers have a ready way to seize innocent owner’s property, because innocence has been limited as a defense. The *Bennis* Court was sadly correct that taking innocent owners’ property is “too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”²³⁶ The people of this country must change their state laws which punish innocent property owners. No less than thirty-six states of the Union have inserted the substance of the principles of inalienable rights from the Declaration of Independence into their state constitutions, and have therefore made it the written law of those states.²³⁷ The laws in these states must conform to inalienable rights. If not, we must effect change in the laws to conform to these principles.

Moreover, there must be constitutional limitations to civil forfeiture. Such limitation must include a workable innocent owner exemption.²³⁸ Innocent third parties should not be treated as criminals. Supreme Court Justices must learn to recognize the

234. *Bennis*, 116 S. Ct. at 1000.

235. *Id.*

236. *Id.* at 1001.

237. ALA. CONST. art. I, § 1; ARK. CONST. art. II, §§ 1,2,3; ALASKA CONST. art. I § 1; CAL. CONST. art. I § 1 (1974); COLO. CONST. art. II § 3; DEL. CONST. pmbl; FLA. CONST. art. I § 2; HAW. CONST. art. I § 2 (1978); IDAHO CONST. art. I § 1; ILL. CONST. art. I § 1; IND. CONST. art. I § 1 (1984); IOWA CONST. art. I § 1; KAN. BILL OF RIGHTS § 1; KY. BILL OF RIGHTS § 1,2; LA. CONST. art. I § 1; ME. CONST. art. I § 1; MASS. CONST. part I art. 1; MO. CONST. art. I § 2; MONT. CONST. art. II § 3; NEB. CONST. art. I § 1 (1988); NEV. CONST. art. I § 1; N.H. CONST. part I art. 2 (1974); N.J. CONST. art. I § 1; N.M. CONST. art. II § 4; N.C. CONST. art. I § 1; N.D. CONST. art. I § 1; OHIO CONST. art. I § 1; OKLA. CONST. art. II § 2; PA. CONST. art. I § 1; S.D. CONST. art. VI § 1; UTAH CONST. art. I § 1; VT. CONST. ch. I art. 1; VA. CONST. art. I § 1; W. VA. CONST. art. III § 1; WIS. CONST. art. I § 1; WYO. CONST. art. I §§ 1,2.

238. See *supra* text accompanying notes 224-25.

principles of the Declaration of Independence as embodied in the Constitution. The inalienable right of property must not be deprived by upholding a state forfeiture scheme which allows the seizure of an innocent person's property without just compensation. If not, ultimately the decisions will become more inconsistent and the people will become cynical and lose all respect for the Law. Let us hope that the Court and the legislature redefine innocence in a way that reflects the inalienable right of property, which will lead to true justice and equity.

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