

RECENT DEVELOPMENTS

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

American in rem, or civil, forfeiture laws seem to implicate constitutional concerns insofar as such laws may authorize the government to confiscate privately owned property, regardless of the guilt or innocence of the owner.¹ Historically, the justification of in rem forfeiture law has rested on the legal fiction that “[t]he thing is . . . primarily considered as the offender, or rather the offense is attached primarily to the thing.”² Last Term, in *Bennis v. Michigan*,³ the Supreme Court upheld the constitutionality of a public nuisance statute that authorized the government to abate a car-owner’s property interest, even though there had been no showing of negligence or wrongdoing on the part of the owner herself. Referring to this country’s “longstanding practice”⁴ of in rem forfeiture proceedings, the Court held that abatement under the Michigan statute neither offended due process⁵ nor violated the Fifth Amendment’s prohibition against takings without just compensation.⁶ By basing its decision on precedent, the Court prudently resisted the temptation to legislate from the bench. The Court also reached the right result in denying relief to Mrs. Bennis. Unfortunately, the Court’s appeal to past practice did not adequately address the constitutional concerns raised by the case. If the Court had said more about the traditional purpose and limits of in rem forfeitures, it could have addressed these concerns, while still avoiding the dangers of judicial activism.

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

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

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

4. See *id.* at 1001.

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

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

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

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

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

8. See *id.*

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

10. See Mich. Comp. Laws Ann. § 600.3801 (Supp. 1995). The statute provides, in part: Any building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes or other disorderly persons, . . . is declared a nuisance, . . . and all . . . nuisances shall be enjoined and abated as provided in this act and as provided in the court rules. Any person or his or her servant, agent, or employee who owns, leases, conducts, or maintains any building, vehicle, or place used for any of the purposes or acts set forth in this section is guilty of a nuisance.

Id.

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

12. See *id.*

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

14. *Id.* at 732.

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

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

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

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

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

18. *Id.*

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

20. *Id.* at 493.

21. *Id.*

22. See *id.*

23. *Id.* at 495.

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

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

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

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

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

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

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

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

29. *Id.* at 998.

30. *Id.*

31. *Id.*

32. *Id.* at 999.

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

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

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

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

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

35. *See id.*

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

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

38. *See id.*

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

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

41. *Id.*

42. *Id.* at 1001-02.

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

44. *Id.*

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

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

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

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

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

47. *Id.*

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

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

50. *Id.* at 1005.

51. See *id.*

52. *Id.* at 1006.

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

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

In the third part of his dissent,⁵⁹ Justice Stevens argued that the majority’s opinion was “dramatically at odds with our holding in *Austin v. United States*,”⁶⁰ according to which the Eighth Amendment’s Excessive Fines Clause⁶¹ imposes limits on a forfeiture when the forfeiture constitutes “payment to a sovereign as punishment for some offense.”⁶² Because the forfeiture of Mrs. Bennis’s half-interest in the car was a form of punishment, he argued, *Austin* compelled reversal.

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

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

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

56. *Id.*

57. *Id.*

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

59. *See id.* at 1010.

60. *Id.* at 1010.

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

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

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

64. *Id.*

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

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

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

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

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

68. *Id.* at 1011.

69. *Id.*

70. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reciprocal failings of both the majority and the dissenters could have been avoided through a more careful analysis of the traditional purpose and limits of American *in rem* forfeiture laws. The long history of civil forfeiture in the United States⁸² reveals that the legal fiction of "guilty property" has traditionally been understood functionally.⁸³ Briefly stated, the function of the legal fiction has been to relieve governments of the usual burden of proving negligence or wrongdoing by owners, when such proof would have been impossible or too costly relative to the social goals to be served. The fiction itself implied two

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael J. Baur

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

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

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

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

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

to this puzzle, however, it is that the courts must make an inquiry into the circumstances of each case in order to forge the delicate compromise that is needed to safeguard the interests of the government, the accused, and society at large.

Last Term, in *United States v. Ursery*,¹ the Supreme Court had the opportunity to devise such a solution in the context of the Double Jeopardy Clause. The Court was presented with the question whether a civil forfeiture action against property involved in a narcotics violation, when imposed in conjunction with a criminal prosecution of the property's owner for the same infraction, subjects the individual to double jeopardy. Unfortunately, relying upon formalistic legal distinctions and dismissing recent precedent, the Court held that civil forfeiture does not punish the individual and therefore does not raise an issue under the Double Jeopardy Clause. This conclusion fails to strike the balance needed to preserve effective methods of law enforcement while guarding individuals from governmental overreaching. If the Court had instead held that civil forfeitures are generally punitive,² future courts would have been free to make a further inquiry into whether the timing of the government's actions against an individual in a given case violated that individual's constitutional right against double jeopardy.

In *Ursery*, the Supreme Court consolidated cases on appeal from the Sixth and Ninth Circuits. In *United States v. \$405,089.23 U.S. Currency*,³ claimants-appellants Charles Arlt and James Wren had previously been convicted of conspiracy to aid and abet the manufacture of methamphetamine, conspiracy to launder monetary instruments, and various counts of money laundering.⁴ Both Wren and Arlt had received sentences including life imprisonment.⁵ Five days after the grand jury had issued an indictment in the criminal proceeding, the government instituted civil forfeiture proceedings, seizing property including cash, bank accounts, and various boats, automobiles, and aircraft. The government claimed that the

1. 116 S. Ct. 2135 (1996).

2. As discussed below, however, a distinction should be made between forfeitures of contraband or the proceeds of crime, and forfeitures of property which has served as the instrumentality of a crime.

3. 33 F.3d 1210 (9th Cir. 1994).

4. See *Ursery*, 116 S. Ct. at 2139.

5. See *id.*

property was forfeitable as proceeds of illegal narcotics transactions under 21 U.S.C. § 881(a)(6) and as property involved in money laundering violations under 18 U.S.C. § 981(a)(1)(A).⁶ Nine months after the criminal convictions were handed down, the government filed for summary judgment in the forfeiture action, arguing (1) that the criminal convictions constituted probable cause that the forfeitures were legitimate, thus shifting the burden of proof to the defendants, and (2) that the defendants had failed to prove that the property was not subject to forfeiture. Summary judgment was granted.⁷ On appeal, the Ninth Circuit reversed the civil forfeiture ruling on double jeopardy grounds.

In *United States v. Ursery*,⁸ Guy Ursery had been charged with manufacturing marijuana in violation of 21 U.S.C. § 841(a)(1).⁹ Police searched Ursery's home and seized contraband items including a growlight and plastic bags filled with marijuana.¹⁰ After the seizure of the contraband but before the issuance of the criminal indictment, the government instituted a civil forfeiture proceeding against Ursery's home under 21 U.S.C. § 881(a)(7).¹¹ After both the initiation of the forfeiture

6. See §405,089.23 U.S. Currency, 33 F.3d at 1214. 21 U.S.C. § 881(a) (1994) provides: [t]he following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

18 U.S.C. § 981(a)(1) (1994) provides:

the following property is subject to forfeiture to the United States:

(A) Any property, real or personal, involved in a transaction or attempted transaction in violation of section 5313(a) or 5324(a) of title 31 or of section 1956 or 1957 of this title, or any property traceable to such property.

Id.

7. See §405,089.23 U.S. Currency, 33 F.3d at 1214.

8. 59 F.3d 568 (6th Cir. 1995).

9. See *id.* at 570.

10. See *id.*

11. See *id.* 21 U.S.C. § 881(a) (1994) provides:

The following shall be subject to forfeiture to the United States and no property right shall exist in them: . . .

(7) All real property, including any right, title, and interest . . . in the whole of any lot or tract of land and any appurtenances or improvements, which is used,

proceeding and the issuance of the criminal indictment, Ursery and the government entered into an agreement, pursuant to which Ursery paid roughly \$13,000 to settle the forfeiture claim.¹² Several days later, the criminal trial began, and Ursery was convicted and sentenced to sixty-three months imprisonment.¹³ On appeal, the Sixth Circuit held that Ursery had been subjected to double jeopardy and reversed the conviction.

The courts of appeals in both *Ursery* and *\$405,089.23 U.S. Currency* recognized that the Double Jeopardy Clause of the Fifth Amendment¹⁴ has been interpreted by the Supreme Court to protect against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.¹⁵ Additional precedent provides that multiple punishments are not barred by the Double Jeopardy Clause if both penalties are imposed in the same trial or the same proceeding.¹⁶ Thus, in order for the combination of civil forfeiture and criminal conviction to violate the Double Jeopardy Clause, the civil forfeiture would have to constitute punishment, it would have to punish an individual for the same offense for which he was criminally convicted, and it would have to be sought in a separate proceeding from the conviction. Both circuit courts held that the civil forfeitures did constitute punishment for the

or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter . . . except that no property shall be forfeited . . . by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

12. See *Ursery*, 59 F.3d at 570.

13. See *id.*

14. The Double Jeopardy Clause of the Fifth Amendment states, “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

15. See *Ursery*, 59 F.3d at 571 (citing *United States v. Halper*, 490 U.S. 435, 440 (1989)); see also *United States v. Dixon*, 509 U.S. 688 (1993) (noting that double jeopardy protections apply to “both successive punishments and to successive prosecutions for the same criminal offense”); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (interpreting the Double Jeopardy Clause to prohibit both a second prosecution for an offense after conviction or acquittal, and multiple punishments for the same offense), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). Regarding the protection against multiple punishments, see *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168 (1873). *But see* *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting) (arguing that the Double Jeopardy Clause bars multiple prosecutions only, and not multiple punishments).

16. See *Missouri v. Hunter*, 459 U.S. 359 (1983).

same offenses for which the defendants had been convicted, and that the forfeitures and the convictions had been obtained in separate proceedings.¹⁷

Both circuit courts also asserted that the combination of the holdings of two recent cases, *United States v. Halper*,¹⁸ and *Austin v. United States*,¹⁹ necessitated the conclusion that civil forfeitures are punitive in nature. After acknowledging previous precedent in which the Supreme Court held that civil forfeiture does not constitute punishment for double jeopardy purposes,²⁰ the Ninth Circuit ruled that *Halper* and *Austin* represented a collective change of mind of the Court, overriding the older cases.²¹ The Sixth Circuit, citing the Ninth Circuit's opinion, made a similar argument.²² Both courts used the following analysis. The Court in *Halper* stated that a civil sanction that does not serve a *solely* remedial purpose, but also serves a retributive or deterrent function, constitutes punishment.²³ *Halper* did not involve a forfeiture proceeding, but rather a monetary civil penalty imposed to compensate the government for harms inflicted by a defendant who had been convicted of making false medical reimbursement claims.²⁴ In *Austin*, however, the Court applied *Halper's* definition of punishment to forfeitures specifically, albeit in the context of the Excessive Fines Clause of the Eighth Amendment.²⁵ Despite the fact that neither *Halper* nor *Austin* dealt explicitly with civil forfeiture in a double jeopardy context, both circuits argued that read together, the two cases implied that civil forfeiture under the relevant statutes constituted punishment, thereby implicating the protections of the Double Jeopardy Clause.²⁶

The circuit courts also found it significant that the civil forfeitures were pursued in proceedings separate from the

17. See *Ursery*, 59 F.3d at 573, 575; §405,089.23 U.S. Currency, 33 F.3d at 1216-17, 1221.

18. 490 U.S. 435 (1989).

19. 509 U.S. 602 (1993).

20. See §405,089.23 U.S. Currency, 33 F.3d at 1218 (discussing *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984)); see also *United States v. Ward*, 448 U.S. 242 (1979) (holding that a sanction labelled "civil" by Congress will be presumed remedial, rather than punitive, in nature).

21. See §405,089.23 U.S. Currency, 33 F.3d at 1218-19.

22. See *Ursery*, 59 F.3d at 572-73.

23. See §405,089.23 U.S. Currency, 33 F.3d at 1219 (citing *Halper*, 490 U.S. at 448).

24. See *Ursery*, 59 F.3d at 572.

25. See §405,089.23 U.S. Currency, 33 F.3d at 1219.

26. See *id.*; *Ursery*, 59 F.3d at 573.

criminal trials. The Sixth Circuit acknowledged that although in some cases the civil forfeiture action and the criminal trial might be considered part of the same proceeding, the case at issue, in which the criminal trial did not commence until after the forfeiture action had been settled, was not such a case.²⁷ The Ninth Circuit, on the other hand, rejected the notion that such parallel proceedings could ever be viewed as parts of a single proceeding.²⁸

On appeal, the Supreme Court reversed both decisions and held that civil forfeitures do not constitute punishment and therefore cannot impose a second penalty in violation of the Double Jeopardy Clause.²⁹ Chief Justice Rehnquist, writing for the majority, relied primarily on three cases: *Various Items of Personal Property v. United States*,³⁰ *One Lot Emerald Cut Stones v. United States*,³¹ and *United States v. One Assortment of 89 Firearms*,³² which he argued were indicative of the Court's consistent conclusion that civil forfeiture is non-punitive for double jeopardy purposes. He then flatly rejected the circuit courts' contention that the more recent decisions in *Halper* and *Austin* had overruled this line of precedent.³³

In *Various Items*, the Court focused on the distinction between the in rem nature of civil forfeiture actions and the in personam nature of criminal proceedings. By resort to a legal fiction, it is the *property* that is found guilty and condemned in an in rem action. According to this fiction, although penalties such as fines and taxes are in personam and might implicate the Double Jeopardy Clause, civil forfeitures are directed at the property forfeited and technically do not punish the convicted individual.³⁴ The Court held, therefore, that a civil forfeiture proceeding does not subject a property owner previously convicted in a criminal trial to double jeopardy.³⁵ According to the Chief Justice, *Emerald Cut Stones* reaffirmed the rule of

27. See *Ursery*, 59 F.3d at 574-75.

28. See *\$405,089.23 U.S. Currency*, 33 F.3d at 1216.

29. See *United States v. Ursery*, 116 S. Ct. 2135 (1996).

30. 282 U.S. 577 (1931).

31. 409 U.S. 232 (1972) (per curiam).

32. 465 U.S. 354 (1984).

33. See *Ursery*, 116 S. Ct. at 2144.

34. See *id.* at 2141.

35. See *id.* at 2140 (discussing *Various Items*, 282 U.S. 577).

*Various Items.*³⁶ In *Emerald Cut Stones*, the Court held that civil forfeiture does not implicate the Double Jeopardy Clause because the Clause "prohibits merely punishing twice . . . criminally, for the same offense," and civil forfeiture is not a criminal proceeding.³⁷ Because the forfeiture statute involved in that case was codified separately as a civil sanction and did not impose an in personam penalty, the forfeiture did not constitute a second criminal punishment barred by the Double Jeopardy Clause.³⁸ More recently, in *89 Firearms*, the Court outlined a two-part test for determining whether the Double Jeopardy Clause applies to forfeiture actions. First, if Congress intended to impose a "civil remedial sanction," then the Clause might not be implicated.³⁹ Second, even when the sanction was not explicitly intended to be criminal, if it is determined that the "statutory scheme was so punitive either in purpose or effect as to negate Congress's express intention to establish a civil remedial mechanism," the Double Jeopardy Clause might apply.⁴⁰ In *89 Firearms*, the Court concluded that because the forfeiture sanction at issue had not been established through the "clearest proof" to be so punitive as to convert a civil action into a criminal punishment, the forfeiture was a remedial civil sanction and did not invoke the protection of the Clause.⁴¹ In light of these cases, Chief Justice Rehnquist concluded that it was "absolutely clear" that in rem civil forfeiture has not been traditionally perceived as punishment.⁴²

The Chief Justice then applied the two-part inquiry of *89 Firearms* to the facts in *Ursery*. First, he argued that Congress clearly intended to create *civil* sanctions in 21 U.S.C. § 881 and 18 U.S.C. § 981, and asserted as proof the civil procedural mechanisms provided by both statutes.⁴³ In the second stage of

36. *See id.* at 2141.

37. *Emerald Cut Stones*, 409 U.S. at 235-36 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938)); *see also Ursery*, 116 S. Ct. at 2141 (discussing *Emerald Cut Stones*); *United States v. Ward*, 448 U.S. 242 (1980) (holding that a sanction labeled "civil" by Congress will be presumed remedial, rather than punitive, in nature).

38. *See Ursery*, 116 S. Ct. at 2141.

39. *Id.* at 2142.

40. *Id.* at 2141-42.

41. *See id.* at 2142.

42. *See id.* at 2149.

43. *See id.* at 2147. The Court noted the in rem nature of civil forfeiture actions and pointed out that both statutes are subject to 19 U.S.C. § 1607 (1994), which allows actual notice of a forfeiture to be foregone where the government cannot identify the party to

the inquiry, the Chief Justice argued that the “important non-punitive goals” served by the statutes precluded a finding of the “clearest proof” that forfeiture proceedings were so punitive as to override Congress’s intent to make them civil sanctions.⁴⁴ Because forfeiture of property used in the commission of narcotics violations may serve the remedial goals of abating nuisances, encouraging property owners to take care that their property is not used for illegal activities, and forcing criminals to disgorge the fruits of illicit actions, the statutes in question could not be considered sufficiently punitive to circumvent Congress’s intent to make them civil.⁴⁵

Chief Justice Rehnquist dismissed the appellate courts’ contention that *Halper* and *Austin* represent a collective change of the Court’s mind regarding the non-punitive nature of civil forfeiture and rejected the argument that these cases overruled the earlier cases upon which his argument relied. Regarding *Halper*, he did not address the statement upon which the lower courts had relied: that a civil sanction that does not *solely* serve a remedial purpose constitutes punishment.⁴⁶ He focused instead on the *Halper* Court’s application of this statement to the facts of that case. The *Halper* Court held that a penalty such as the one involved in that case, which was intended to serve as liquidated damages to compensate the government for harms resulting from the offenders’ misconduct, is punishment if out of proportion with the government’s injury.⁴⁷ Chief Justice Rehnquist rejected the use of the *Halper* test in *Ursery*, arguing that it was intended to apply narrowly only to in personam civil penalties.⁴⁸ He contended that by contrast, forfeiture is an in rem action intended to serve goals other than that of compensation, and that a case-by-case balancing of the value of the forfeited property with the value of goals such as confiscation of property used in the commission of an illegal act cannot be practically implemented.⁴⁹ He bolstered this argument by relying on *Department of Revenue of Montana v. Kurth*

whom the property belongs, arguing that this indicated that Congress intended the forfeiture proceedings to be civil and impersonal.

44. *Ursery*, 116 S. Ct. at 2148.

45. *See id.*

46. *See Halper*, 490 U.S. at 448.

47. *See Ursery*, 116 S. Ct. at 2143.

48. *See id.* at 2144-45.

49. *See id.* at 2145.

Ranch,⁵⁰ in which the Court declined to utilize the *Halper* test in determining whether a tax imposed upon illegal marijuana was remedial or punitive.⁵¹ He then eschewed any reliance on *Austin*, disregarding its definition of civil forfeiture as punishment, because the case specifically addressed the Exclusive Fines Clause and not the Double Jeopardy Clause.⁵²

Justice Kennedy joined the majority opinion, but added a separate concurrence to explain why the Court's ruling was consistent with previous cases that had described forfeiture as punitive.⁵³ The statutes in question, he argued, do not necessarily impose punishment on the individual convicted for the criminal offense, but instead are directed at the property used in that offense, whoever the owner might be.⁵⁴ Although it is true that in some cases, such as those at hand, the property owner is identical to the criminal offender, it is nonetheless true that the forfeiture statute is directed against the property and does not impose a second in personam penalty in violation of the Double Jeopardy Clause.⁵⁵ Justice Kennedy did not claim that forfeiture does not constitute punishment, but rather claimed that the property is being punished, and not the criminal defendant.⁵⁶ The fact that proof of some criminal wrongdoing is necessary to pursue forfeiture does not indicate that the forfeiture is punishing the convicted rather than the property, because the wrongdoing may have been by someone other than the property owner.⁵⁷

In a two-sentence concurrence, Justice Scalia, joined by Justice Thomas, argued that the Double Jeopardy Clause prohibits only successive prosecutions, not successive punishments, and that civil forfeiture proceedings are not criminal prosecutions.⁵⁸

Justice Stevens, in a lengthy opinion, concurred in the judgment with respect to \$405,089.23 U.S. Currency, but

50. 511 U.S. 767 (1994).

51. See *Ursery*, 116 S. Ct. at 2146.

52. See *id.* at 2147.

53. See *Ursery*, 116 S. Ct. at 2149 (Kennedy, J., concurring). *Austin*, 509 U.S. at 619-22, described civil in rem forfeiture as punitive. *Libretti v. United States*, 116 S. Ct. 356 (1995), held that criminal forfeiture constituted punishment.

54. See *id.*

55. See *Ursery*, 116 S. Ct. at 2150 (Kennedy, J., concurring).

56. See *id.*

57. See *id.* at 2151.

58. See *Ursery*, 116 S. Ct. at 2152 (Scalia, J., concurring).

dissented from the Court's disposition of *Ursery*.⁵⁹ The key distinction, he argued, is that because the items seized in \$405,089.23 U.S. Currency were the proceeds of illegal activity, their forfeiture was not punishment because the defendants had no legal interest in them; in contrast, the home seized from Guy Ursery was an instrumentality that had played only a marginal role in the crime.⁶⁰ As to the home, Stevens rejected the majority's holding that the forfeiture did not punish the owner, and argued that precedent and common sense indicate that it was "unmistakably punitive in character."⁶¹

According to Justice Stevens, the majority not only ignored the precedent created by *Halper*, *Austin*, and *Kurth Ranch*, but also misinterpreted older precedent.⁶² Justice Stevens rejected the majority's rationale for distinguishing civil forfeitures from other types of civil sanctions, asserting that "formalistic distinctions that obscure the obvious practical consequences of governmental action disserve the 'humane interests' protected by the Double Jeopardy Clause."⁶³ He labeled *Various Items*' "fanciful premise"—that civil forfeiture punishes the property and not the person—as "pedantic" and "sleight-of-hand."⁶⁴ He argued that neither *Emerald Cut Stones* nor *89 Firearms* created a categorical rule that civil forfeiture does not constitute punishment; rather, both contained narrower rulings that civil forfeitures pursuant to particular statutes were remedial in nature, leaving open the possibility that certain forfeitures might be so punitive in nature as to constitute punishment.⁶⁵ Thus, in his opinion, *Emerald Cut Stones* and *89 Firearms* actually created a basis for the possibility that civil forfeitures may impose punishment, contrary to the majority's interpretation.⁶⁶ He argued further that *Austin*, *Halper*, and *Kurth Ranch* support this contention, and that it was the Court's majority, not the

59. See *Ursery*, 116 S. Ct. at 2152-63 (Stevens, J., concurring in part and dissenting in part).

60. See *id.* at 2152-53.

61. *Id.*

62. See *id.* at 2153.

63. *Id.* at 2161 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (Frankfurter, J., concurring)).

64. *Id.* at 2154.

65. See *id.*

66. See *id.* at 2155-56.

circuits, which misread these rulings.⁶⁷ In sum, Justice Stevens argued that “[t]here is simply no rational basis for characterizing the seizure of this respondent’s home as anything other than punishment for his crime.”⁶⁸ Thus, “[f]idelity to both reason and precedent dictates the conclusion that *this forfeiture* was ‘punishment’ for purposes of the Double Jeopardy Clause.”⁶⁹

The Court in *Ursery*, through a series of formalistic distinctions, reached the puzzling conclusion that civil forfeiture in general does not impose punishment on the individual whose property is seized. This holding not only ignored recent precedent and historical notions of punishment, but was unnecessary to preserve the government’s ability to use civil forfeiture proceedings as a law enforcement tool.

If the Court had instead characterized some civil forfeitures as punishment,⁷⁰ it could have struck a workable balance allowing law enforcement authorities to utilize civil forfeiture while honoring the purpose of the Double Jeopardy Clause. Civil forfeiture has been described as a “powerful weapon” in the war on drugs⁷¹ and is a measure that Congress clearly intended to be an added deterrent to drug-related crimes.⁷² It would be unfortunate if the government were entirely precluded from the use of such a useful sanction. However, the state’s legitimate interest in combating crime must be balanced with the important goal of upholding constitutional guarantees, such as the protection against double jeopardy. As noted by one respondent’s brief in *Ursery*, “[w]e cannot permit these rights to become fatalities of the government’s war on drugs.”⁷³

The Court’s ruling in *Ursery* failed to forge the necessary compromise. The sweeping determination that civil forfeitures are non-punitive precludes any further inquiry into double jeopardy considerations in such cases, thus leaving no room for consideration of the Double Jeopardy Clause’s “humane”

67. *See id.*

68. *Id.* at 2161.

69. *Id.*

70. This refers to forfeiture of the instrumentalities of crime, as opposed to the proceeds of crime or contraband. *See* discussion of this distinction, *infra*, at note 92 and accompanying text.

71. *See United States v. Millan*, 2 F.3d 17, 21 (2d Cir. 1993).

72. *See Austin*, 509 U.S. at 620 (citing S. REP. NO. 98-225, at 191 (1983)).

73. Respondent’s Brief at 17, *Ursery* (1996 WL 139762).

objectives.⁷⁴ By contrast, treating civil forfeitures as punitive would level the playing field. In the interests of individual liberty, it would open the door for the courts to consider whether an individual in any given case was being forced to “run the gantlet” [sic] multiple times for the same offense⁷⁵ or to “marshal the resources and energies necessary for this defense more than once for the same alleged acts.”⁷⁶ Moreover, because the Double Jeopardy Clause does not bar the government from pursuing multiple punishments in the same action, the government would still be able to bring civil forfeiture proceedings against criminal defendants if it carried out these proceedings against an individual in a coordinated proceeding.

The Court’s assertion that civil forfeiture is not punishment is unsatisfactory for several reasons. First, although the Court asserted history and *stare decisis* as justification for its holding, neither history nor precedent is conclusive regarding whether civil forfeiture is punitive in nature. Second, in dismissing the courts of appeals’ argument that *Halper* and *Austin* stand for the proposition that civil forfeiture is punitive, the Court relied on formalistic arguments that ignored the spirit of the Double Jeopardy Clause. Third, because of the differences between forfeitures of contraband and crime proceeds, and forfeitures of instrumentalities of crime, it is too simplistic to make such a broad generalization regarding the purpose of civil forfeiture.

1. History is inconclusive as to the traditional status of civil forfeiture as punishment. Although the Chief Justice argued that “it is absolutely clear that in rem civil forfeiture has not historically been regarded as punishment,”⁷⁷ the Court had concluded exactly the opposite just three years earlier in *Austin*, stating that “forfeiture proceedings generally have been understood as imposing punishment despite their in rem nature.”⁷⁸ Examining early forfeiture statutes, the *Austin* majority concluded that they reflected a congressional understanding of civil forfeiture as punishment because they listed forfeiture

74. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring).

75. *\$405,089.23 U.S. Currency*, 33 F.3d at 1217 (citing *Green v. United States*, 355 U.S. 184, 190 (1957)).

76. *Id.* at 1215 (citing *Abbate v. United States*, 359 U.S. 187, 198-99 (1959)).

77. *Ursery*, 116 S. Ct. at 2149.

78. *Austin*, 509 U.S. at 616 n.9.

along with other measures of punishment and seemed to use "forfeiture" and "fine" interchangeably.⁷⁹ It was also noted that contemporaneous dictionaries of the English language used those two terms to define each other.⁸⁰

Further, the combined holdings of *Austin* and *Halper* may have weakened the force of the *Ursery* Court's implicit stare decisis argument.⁸¹ Although, as acknowledged by the Ninth Circuit, "[a] decade ago, the law was clear that civil forfeitures did not constitute 'punishment' for double jeopardy purposes,"⁸² the Court had recently called this into question with its holdings in the above-mentioned cases.

At the core of *Halper* was the statement that "a civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."⁸³ Although, as noted by the Court, civil forfeiture can serve non-punitive law enforcement functions,⁸⁴ the fact that this sanction serves remedial goals does not diminish its punitive objectives. Thus, under the *Halper* standard, civil forfeiture, which clearly serves punitive as well as non-punitive interests, must be considered punishment for double jeopardy purposes. Perhaps even more persuasive precedent on this point is provided by *Austin*, which held that civil forfeiture under 21 U.S.C. § 881(a), one of the statutes with which *Ursery* specifically dealt, constituted punishment.

2. More disturbing is the majority's reliance on formalistic arguments in rejecting *Halper* and *Austin*. In concluding that civil forfeiture does not constitute punishment, *Ursery* rested heavily on the procedural distinction between in rem and in personam actions.⁸⁵ The Court had previously found the civil

79. *See id.* at 614.

80. *Id.* at 613-14 n.7.

81. *See Ursery*, 116 S. Ct. at 2142. The Court stated, "[o]ur cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme . . . [T]he conclusion was the same in each case: in rem civil forfeiture . . . does not constitute a punishment under the Double Jeopardy Clause." The Court also quoted *Gore v. United States*, 357 U.S. 386, 392 (1958), which stated, "In applying a provision like that of double jeopardy, which is rooted in history . . . a long course of adjudication in this Court carries impressive authority."

82. *\$405,089.23 U.S. Currency*, 33 F.3d at 1218.

83. *United States v. Halper*, 490 U.S. 435, 448 (1989) (emphasis added). *Halper* also noted that "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." *Id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)).

84. *See Ursery*, 116 S. Ct. at 2148.

85. *See id.* at 2144-45.

penalties in *Halper* and the taxes in *Kurth Ranch* to be punishment.⁸⁶ It seems logical that if relinquishment of one's money to the government is punitive, relinquishment of one's property should be considered punitive as well. However, the legal fiction that the property, and not the owner, is found guilty in an in rem action, enabled the Court to argue that the owner is not punished by an in rem forfeiture.

The Court relied on a similarly formalistic argument to justify its disregard of *Austin*. It dismissed *Austin's* precedential value because that case addressed the Excessive Fines Clause rather than the Double Jeopardy Clause.⁸⁷ This distinction is unpersuasive. Although it is true that *Austin* ultimately went on to determine whether the forfeiture in question had constituted an excessive penalty, it first decided the narrower question of whether civil forfeiture met the general definition of punishment—the identical issue considered in *Ursery*.⁸⁸

The Court's willingness to justify, on such contrived arguments, the seizure of property as crucial as one's home is worrisome. Although the Court acknowledged the fictional nature of the in rem-in personam distinction, it failed to recognize that reliance on such a fiction in this case undermines the spirit of the Double Jeopardy Clause. Justice Stevens was correct: such "formalistic distinctions" do indeed undermine the "humane interests' protected by the Double Jeopardy Clause."⁸⁹ As Justice Kennedy's concurrence noted, "[i]t is the owner who feels the pain and receives the stigma of the forfeiture, not the property."⁹⁰ Therefore, it is disingenuous to acknowledge that one of the purposes of the Clause is to protect individuals from being punished twice,⁹¹ and yet hold that civil forfeiture—when combined with criminal conviction—does not violate this

86. See *Halper*, 490 U.S. 435; *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767 (1994).

87. See *Ursery*, 116 S. Ct. at 2146-47.

88. See *Austin*, 509 U.S. at 618 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 686-87 (1974)) (noting that "forfeiture serves 'punitive and deterrent purposes,'" and "imposes an economic penalty"). For the Ninth Circuit's assessment of this issue, see *\$405,089.23 U.S. Currency*, 33 F.3d at 1219.

89. *Ursery*, 116 S. Ct. at 2161 (Stevens, J., concurring in part and dissenting in part) (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (Frankfurter, J., concurring)).

90. *Ursery*, 116 S. Ct. at 2151 (Kennedy, J., concurring).

91. *Ursery*, 116 S. Ct. at 2139-40 (stating that the Double Jeopardy Clause protects against both multiple prosecutions and multiple punishments).

protection.

3. Finally, the Court failed to address the distinction between the forfeiture of contraband or the proceeds of a crime—neither of which can be obtained legally—and the forfeiture of instrumentalities, legitimately acquired property used to facilitate commission of crime. Neither forfeiture of the proceeds of crime, such as money obtained from a drug deal or property bought with that money, nor forfeiture of contraband, such as illegal drugs, deprives an accused of anything to which he has a legal right.⁹² It merely returns him to the position in which he stood prior to commission of the crime. Justice Stevens's partial concurrence declined to define the forfeiture of contraband or proceeds as punishment because it "exact[s] no price in liberty or lawfully derived property."⁹³ Forfeiture of instrumentalities, on the other hand, may result in the seizure of property that was legally obtained and owned and that may have been only tangentially related to the crime. It also may result in a seizure of property the value of which is grossly disproportionate to the harm caused by the crime. In such a case, a conclusion that the forfeiture did not punish the property's owner would be much more troubling.

Because the issues surrounding the implications of civil forfeiture in the double jeopardy context are complex, a blanket conclusion that all civil forfeitures are non-punitive in nature, and therefore do not implicate the Double Jeopardy Clause, is unsatisfying. Instead, the Court should have started from the premise that civil forfeitures *are* punitive unless they result only in the seizure of proceeds or contraband. Such a solution would reduce the potential for governmental encroachment upon constitutional rights. At the same time, for the reasons stated below, the government's ability to use civil forfeiture proceedings as a tool of law enforcement could be preserved.

The Court has held that when Congress intended to impose multiple punishments for the same offense, imposition of such punishments is not barred by the Constitution if done in a

92. A number of courts have recognized the distinction between forfeitures of proceeds and other forfeitures, holding that forfeiture of proceeds is remedial in nature. *See, e.g.,* United States v. Alexander, 32 F. 3d 1231 (8th Cir. 1994); United States v. Tilley, 18 F. 3d 195 (5th Cir. 1994). *But see* United States v. 9844 South Titan Court, 75 F. 3d 1470 (10th Cir. 1996) (declining to treat forfeiture of proceeds of illegal activity differently from other forfeitures).

93. *Ursery*, 116 S. Ct. at 2152 (Stevens, J., concurring in part and dissenting in part).

single proceeding.⁹⁴ Thus, if the government properly coordinates its actions, it should not be precluded from pursuing both criminal conviction and civil forfeiture against an individual for one offense. *Halper* stated that in a single proceeding, the only limitation placed on multiple punishments is that the “total punishment [may not] exceed that authorized by the legislature.”⁹⁵ Thus, even if civil forfeiture is considered punishment, the Double Jeopardy Clause would not preclude the government from instituting a civil forfeiture proceeding as well as a criminal prosecution if both actions constituted part of the same proceeding.

Although the *Halper* Court ruled that a monetary civil penalty constituted punishment for double jeopardy purposes, it maintained that its holding did not “prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding.”⁹⁶ The Second Circuit in *United States v. Millan*⁹⁷ noted that although “civil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately,” this should not preclude them from being considered part of the same proceeding.⁹⁸ The question then becomes how to determine whether civil and criminal actions, necessarily filed separately, constitute parts of the same proceeding in any given case. *Millan* suggested that this should be done on a case-by-case basis, with an inquiry into “when, how, and why” the two actions were initiated.⁹⁹ As support for its contention that the government’s actions in that case were a “coordinated effort,” the Second Circuit noted that the two actions were predicated on warrants issued on the same day and based on the same affidavit, and that the warrants were “contemporaneous and not consecutive.”¹⁰⁰ In a similar case, the Eleventh Circuit also used the timing of the forfeiture action and the criminal prosecution as evidence that the government’s

94. “Where Congress intended . . . to impose multiple punishments, imposition of these sentences does not violate the Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 368 (1983) (citing *Albernaz v. United States*, 450 U.S. 333, 340 (1981)).

95. *United States v. Halper*, 490 U.S. 435, 450 (1989).

96. *Id.*

97. 2 F.3d 17 (2d Cir. 1993).

98. *Id.* at 20.

99. *Id.*

100. *Id.*

actions "[fell] within the contours of a single, coordinated prosecution."¹⁰¹

The Ninth Circuit in *\$405,089.23 U.S. Currency* argued that "[a] forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time."¹⁰² However, language in *Halper* indicated that civil penalties and criminal penalties may be brought in the same proceeding.¹⁰³ This language, given the procedural impossibility¹⁰⁴ of pursuing criminal and civil remedies in the same action, implies that the Ninth Circuit was incorrect, and that two actions filed separately may in some cases be treated as parts of a single proceeding.

It has been asserted that the primary reason for the Double Jeopardy Clause's protections is that

the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.¹⁰⁵

In the case at hand, a particular concern of the Ninth Circuit was that the government had gained an unfair advantage by holding the civil action "in abeyance pending the outcome of the criminal prosecution."¹⁰⁶ However, if the government were required to bring both the civil and criminal actions as part of a single, coordinated proceeding, the defendant would not be subjected to the uncertainty that might result if the government were allowed to "[act] abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first

101. *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994).

102. *\$405,089.23 U.S. Currency*, 33 F.3d at 1216; see also *Ursery*, 116 S. Ct. at 2163 (Stevens, J., concurring in part and dissenting in part) ("[I]t is simply inaccurate to describe two separate proceedings as one.").

103. See *United States v. Halper*, 490 U.S. 435, 450 (1989).

104. For a discussion of the procedural difficulties that would be faced in an attempt to consolidate civil and criminal actions into one proceeding, see Andrew Z. Glickman, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishments Doctrine to Parallel Proceedings after United States v. Halper*, 76 VA. L. REV. 1251, 1280-81 (1990).

105. *Green v. United States*, 355 U.S. 184, 187-88 (1957).

106. *\$405,089.23 U.S. Currency*, 33 F.3d at 1217.

action.”¹⁰⁷ Requiring the government to determine in advance whether it will bring a criminal indictment, a civil forfeiture proceeding, or both, would shield defendants from a significant amount of uncertainty that they otherwise might face and would allow them to plan their legal defenses in the most effective and efficient manner.

Use of the “coordinated proceeding” rationale should be restricted to cases in which the government has planned its actions in such a way that the separate filings can legitimately be considered to be contemporaneous. In each case, the court must make a particularized inquiry to ensure that the government has not exploited its ability to bring separate actions by waiting for the outcome of the first proceeding before determining whether the second proceeding is desirable, thereby circumventing the protections of the Double Jeopardy Clause. For example, when, as in *Millan*, the government institutes both proceedings on the same day, the government clearly does not intend to subject the accused to separate prosecutions. If, however, the government waited to institute the civil forfeiture proceeding until after an individual had been acquitted in a criminal trial, it would be implausible to claim that such an action did not subject the individual to double jeopardy.¹⁰⁸

Although requiring a particularized inquiry into the timing and intent of the government’s actions in each case may increase administrative costs and create some initial confusion as to the definition of a coordinated proceeding, these consequences would be a small price to pay for the benefits of the balance that might be struck between the protection of individuals from governmental over-reaching and the interest of law enforcement in utilizing civil forfeiture.

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107. *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994).

108. It is beyond the scope of this Recent Development to provide a detailed test for determining what constitutes a coordinated proceeding. For examples of cases in which the civil and criminal actions were sufficiently close in time to be considered parts of a coordinated proceeding, see *Millan*, 2 F.3d 17 (2d Cir. 1993) and *One Single Family Residence*, 13 F.3d 1493.

WORSE THAN *TXO*: SUBSTANTIVE DUE REASONABLENESS IN *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996).

Three years ago in *TXO Production Corp. v. Alliance Resources Corp.*,¹ the Supreme Court declined to overturn a punitive damages award that petitioners claimed was so large that it violated their rights to substantive due process. Nevertheless, Justice Stevens's plurality opinion² and Justice O'Connor's dissenting opinion³ directly affirmed the possibility that a punitive damage award *could* be so large as to violate substantive due process limits.⁴ In his concurrence, Justice Scalia stated a desire to eliminate this possibility by "shut[ting] the door the Court leaves slightly ajar."⁵ However, despite the fact that the door remained slightly ajar in *TXO*, Justice Scalia did not think much would actually pass through it. The *TXO* Court refused to reverse a punitive damages award of \$10 million, despite the facts that the particular wrong involved was unlikely to be repeated⁶ and that the compensatory damages amounted to only \$19,000. Therefore, Justice Scalia observed, "the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*.'"⁷

Three years later, a due process challenge has managed to squeeze through that door. Indeed, it seems that the door is open wider in 1996 than it was in 1993. The majority opinion in last Term's *BMW of North America, Inc. v. Gore*⁸ attempts to fashion a new "adequate notice" framework for review of punitive damage awards, a framework not enunciated in *TXO*.

1. 509 U.S. 443 (1993).

2. Justice Stevens was joined by Chief Justice Rehnquist and Justice Blackmun; Justice Kennedy joined in Parts I and IV of the plurality opinion.

3. Justice O'Connor was joined by Justice White, and by Justice Souter in Parts II-B-2, II-C, III, and IV.

4. See *id.* at 453-55 (Stevens, J., plurality opinion); *id.* at 478-80 (O'Connor, J., dissenting).

5. *Id.* at 472 (Scalia, J., concurring in the judgment). Justice Scalia was joined by Justice Thomas.

6. In the words of Justice Kennedy, it was an "odd application of an already unusual tort." *Id.* at 469 (Kennedy, J., concurring in part and concurring in the judgment).

7. *Id.* at 472.

8. 116 S. Ct. 1589 (1996).

In doing so, *BMW* misapplies precedent and suffers from logical incoherency. *BMW* is an unfortunate and unwise decision in that it claims for the United States Supreme Court ultimate authority over an area of law that the Court is ill-suited to manage, an area which has been, and should be, left to the States.

Dr. Ira Gore, Jr. bought a new BMW automobile from a Birmingham, Alabama dealership.⁹ Dr. Gore was not informed at the time of purchase that the car had been partially refinished to repair damage sustained in transit from Germany.¹⁰ After driving the car for approximately nine months, Gore took it to an automobile detailing shop for the purpose of making it look "snazzier."¹¹ He had not previously noticed flaws in the paint, but was informed by the detailer that the car had been partially refinished.¹²

BMW of North America, Inc. (BMW NA), the American distributor of BMW automobiles, had followed a company policy of nondisclosure of transit damage to both dealers and customers if the cost of repairing the damage was less than three percent of the manufacturer's suggested retail price.¹³ The cost of refinishing Gore's automobile was only \$601, a cost that fell below the disclosure threshold.¹⁴ Neither the dealer nor Gore had been informed of the damage.¹⁵

Gore sued the Birmingham dealership, BMW Aktiengesellschaft (BMW AG), and BMW NA for fraud, suppression of a material fact and breach of contract.¹⁶ On the suppression count the jury returned an award of \$4,000 in compensatory damages against all three defendants for the reduced value of a repainted car.¹⁷ The jury assessed \$4 million in punitive damages against the BMW defendants jointly based on a finding of "gross, malicious, intentional, and wanton fraud."¹⁸

9. *See* BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 621 (Ala. 1994).

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* The evidence showed that 983 refinished cars had been sold nationwide, of which fourteen were sold in Alabama. *See id.* at 623.

14. *See id.* at 621.

15. *See id.*

16. *See id.* at 622.

17. *See id.*

18. *Id.*

Alabama law requires judicial review of the rationality of punitive damage awards according to factors set forth in *Green Oil Co. v. Hornsby*,¹⁹ as well as a comparison of the award with other awards in similar cases.²⁰ The United States Supreme Court has held that the application of these review processes provides a constitutionally sufficient constraint on the discretion of factfinders awarding punitive damages.²¹

The trial court reviewed the punitive award according to the *Green Oil* factors and upheld the award on the basis of its review.²² On appeal BMW argued that the trial court had erred in its application of each of the *Green Oil* factors.²³ The Supreme Court of Alabama rejected all but one of BMW's contentions, finding with respect to six of the seven factors that the facts could support the trial judge's decision to uphold the award.²⁴

However, with regard to the requirement that the award bear a reasonable relationship to the harm that did occur and that was likely to occur from the defendant's conduct,²⁵ the Alabama Supreme Court rejected what seemed to it to be the means of

19. 539 So. 2d 218, 223-24 (Ala. 1989). The *Green Oil* factors are as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. . . . (2) The degree of reprehensibility of the defendant's conduct should be considered. . . . (3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit. . . . (4) The financial position of the defendant would be relevant. (5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial. (6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award. (7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Id.

20. *See BMW*, 646 So. 2d at 628-29.

21. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (upholding a punitive damages award against a due process challenge). For a description of this case, see *infra* text accompanying notes 35-43.

22. *See BMW*, 646 So. 2d at 622.

23. *See id.* at 624.

24. *See id.* at 625-26. The Supreme Court of Alabama found (1) that the proof of a "pattern and practice of knowingly failing to disclose damage" affecting the value of the cars supported a finding that BMW's conduct was reprehensible; (2) that the finding of \$4,000 in compensatory demonstrated that BMW was profiting from its conduct; (3) that the \$4,000,000 judgment "would not have a substantial impact upon BMW NA's financial position"; (4) that the costs of litigation were high, supporting a large penalty "to encourage plaintiffs to bring wrongdoers to trial"; (5) that no criminal sanctions had been imposed that would mitigate punitive damages; and (6) that, although another civil action based on the same conduct had been completed, no punitive damages had been awarded in that case that would mitigate punitive damages in this case. *Id.*

25. *See supra* note 19.

calculating the award. It was "apparent" to the court that the jury arrived at the \$4 million sum by multiplying the compensatory damages in the case before it by 1,000, a number approximately equal to the number of refinished cars sold by BMW in the United States.²⁶ While affirming that evidence of similar acts in other jurisdictions could form the basis of a finding of a "pattern and practice" of questionable conduct, the court denied that the jury was free to use the number of acts committed in other jurisdictions as a multiplier absent a showing that the conduct was wrongful in the other jurisdictions.²⁷

The Alabama Supreme Court, having found this flaw in the trial court's decision, proceeded with the next step in Alabama review procedure: a comparison of the award with similar cases in Alabama and in other jurisdictions. After reciting several prior opinions holding that jury awards are not to be overturned unless clearly "wrong and unjust,"²⁸ the court found that, in light of comparable cases²⁹ and the *Green Oil* factors analysis, the evidence could support a punitive damages award of no more than \$2 million. The court ordered a remittitur in that amount.³⁰

BMW is the latest in a line of cases brought to challenge the constitutionality of a punitive damages award on the ground that the award violates the Due Process Clause of the Fourteenth Amendment.³¹ The Court considered the punitive damages question in the early part of this century and held that the Due

26. See *BMW*, 646 So. 2d at 627.

27. *Id.*

28. *Id.* at 628-29.

29. The concurring opinion cited *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985), as having "a fact pattern similar to" *BMW*. *BMW*, 646 So. 2d at 629 (Houston, J., concurring specially). In that case, the general verdict for a car sold as new that had been damaged in transit was \$65,000. As the maximum cost to repair the car was \$600, the apparent punitive award was \$64,400. This yields a punitive-to-compensatory award ratio of approximately 107 to 1. However, no pattern of wrongdoing was found in *Boyd*. Justice Houston noted that the highest punitive award in Alabama for fraud in the sale of a single automobile was an inflation-adjusted \$162,637. Apparently in light of the pattern of wrongdoing resulting in the sale of fourteen other refinished automobiles in Alabama, Justice Houston concluded that an award of \$2 million in punitive damages was supportable. See *BMW*, 646 So. 2d at 630.

30. See *BMW*, 646 So. 2d at 629.

31. The constitutionality of punitive damage awards has been challenged (unsuccessfully) on other grounds as well. See, e.g., *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (rejecting a challenge to a punitive damages award based on the Excessive Fines Clause of the Eighth Amendment).

Process Clause imposes limits “beyond which penalties may not go,”³² effectively setting a substantive due process limit on punitive damages. These substantive limits are defined in early twentieth-century opinions by phrases such as “grossly excessive”³³ and “plainly arbitrary and oppressive.”³⁴

The question of due process limits on punitive damages was confronted by the Court for the first time in recent decades in *Pacific Mutual Life Insurance Co. v. Haslip*.³⁵ *Haslip* involved the same Alabama standards for review of punitive damage awards whose application was at issue in *BMW*. Justice Blackmun, writing for the majority, applied a reasonableness test to Alabama’s procedures for awarding and reviewing punitive damages to determine whether the procedures violated the defendant’s due process rights. Justice Blackmun wrote that “unlimited jury discretion—or unlimited judicial discretion for that matter . . . may invite extreme results that jar one’s constitutional sensibilities.”³⁶ Therefore, “general concerns of reasonableness . . . enter into the constitutional calculus.”³⁷ Justice Blackmun found several procedures in the Alabama system that sufficiently limited the discretion of juries and courts.³⁸ Having decided that Alabama’s procedures imposed a “definite and meaningful” constraint on punitive damages awards,³⁹ the majority upheld the award.⁴⁰

Justices Scalia and Kennedy, writing in separate concurrences, questioned the majority’s inquiry into the reasonableness of the common-law procedure. Both stated that inquiry into the constitutionality of traditional procedures for the award of punitive damages should stop with the acknowledgment that the traditional procedures are historically approved.⁴¹ Both also

32. *Seaboard Air Line Ry. Co. v. Seegers*, 207 U.S. 73, 78 (1907) (upholding a punitive damages award, but acknowledging the existence of due process limits on punitive damages); see also *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (reversing a punitive damages award on the ground that it was “so plainly arbitrary and oppressive” that it violated due process).

33. See *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

34. *Southwestern*, 238 U.S. at 491.

35. 499 U.S. 1 (1991).

36. *Id.* at 18.

37. *Id.*

38. See *id.* at 21. Chief among these was the set of *Green Oil* factors, described in note 19, *supra*.

39. *Id.* at 22.

40. See *Haslip*, 499 U.S. at 24.

41. See *id.* at 28 (Scalia, J., concurring) (arguing that “it is not for the Members of this

professed not to understand how a concern with reasonableness might actually be applied to overturn a common-law procedure, given the majority's willingness to approve the procedure generally.⁴²

The *TXO* decision ended the confusion. The majority in *Haslip*, while hinting that substantive concerns about the size of punitive damage awards were driving the Court to apply due process analysis,⁴³ had reviewed only the reasonableness of the processes by which the award had been reached. In contrast, in *TXO* five Justices wrote or joined opinions stating that the Constitution requires not only that the process be reasonable but also that the result be reasonable.⁴⁴

According to the *TXO* plurality opinion by Justice Stevens, an award will run afoul of the Constitution if it is "grossly excessive."⁴⁵ The "grossly excessive" standard, according to the plurality, is not reducible to a "mathematical" test.⁴⁶ Rather, it is driven by the same "general concern of reasonableness" that drove the *Haslip* opinion. Thus the plurality reviewed both procedure and result according to the same reasonableness standard, and neither was found to violate the defendant's due process rights.

Justice Scalia (with whom Justice Thomas joined) and Justice

Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process . . ."); *id.* at 40 (Kennedy, J., concurring) (arguing that "[j]ury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary").

42. *See id.* at 37 (Scalia, J., concurring) (stating that he "can conceive of no test relating to 'fairness' in the abstract that would approve this procedure If the imposition of millions of dollars of liability in this hodge-podge fashion fails to 'jar [the Court's] constitutional sensibilities,' it is hard to say what would") (citation omitted); *id.* at 42 (Kennedy, J., concurring) (arguing that "[i]t is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter").

43. *See Haslip*, 499 U.S. at 18 (stating that "unlimited jury discretion . . . may invite extreme results that jar one's constitutional sensibilities").

We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages While the monetary comparisons are wide and, indeed, may be close to the line [w]e conclude . . . that in this case [the award] does not cross the line into the area of constitutional impropriety.

Id. at 23-24.

44. The five were Chief Justice Rehnquist and Justices White, Blackmun, Stevens, and O'Connor.

45. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. at 458 (1993) (quoting *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)).

46. *TXO*, 509 U.S. at 458 (quoting *Haslip*, 499 U.S. at 18).

Kennedy wrote concurrences rejecting the substantive due process inquiry.⁴⁷ Justice Kennedy wrote that a “reviewing court employing this [‘grossly excessive’] formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution.”⁴⁸ Satisfied that the jury had not acted on “bias, passion, or prejudice,” Justice Kennedy found no sufficient basis on which to overturn the award.⁴⁹ Justice Scalia wrote that “[t]o say . . . that ‘procedural due process’ requires judicial review of punitive damages awards for reasonableness is not to say that there is a federal constitutional right to a substantively correct ‘reasonableness’ determination.”⁵⁰ Justices Scalia and Thomas found no procedural violations, and agreed to affirm the award on that basis alone.⁵¹

Perhaps feeling the force of arguments decrying the imposition into constitutional law of the Court’s own intuitions regarding reasonableness, Justice Stevens’s majority opinion in *BMW of North America, Inc. v. Gore*⁵² created a new argument purporting to justify the Court’s decision to overturn the punitive award approved by the Alabama Supreme Court.⁵³ Failing even to mention the substantive due process analysis performed in prior cases,⁵⁴ Justice Stevens instead cloaked the “grossly excessive” standard in the more acceptably procedural

47. See *id.* at 466 (Kennedy, J., concurring), 470 (Scalia, J., concurring). Some commentary on *TXO* has suggested that Justice Kennedy articulated his own substantive due process standard. See, e.g., Rita Kelley Franco, *TXO Production Corporation v. Alliance Resources Corporation: The United States Supreme Court’s Equivocal Reply to the Punitive Damages Predicament*, 27 CONN. L. REV. 735, 762-66 (1995); Colbern C. Stuart III, Note, *Mean, Stupid Defendants Jarring Our Constitutional Sensibilities: Due Process Limits on Punitive Damages After TXO Production v. Alliance Resources*, 30 CAL. W. L. REV. 313, 333-34 (1994). Justice Kennedy’s opinion is rightly understood as an application of traditional procedural safeguards. It “focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so.” *TXO*, 509 U.S. at 467 (Kennedy, J., concurring). For Justice Kennedy in *TXO*, the substantive result was unimportant for due process analysis, other than as evidence of potential flaws in procedure.

48. *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring).

49. *Id.* at 467-69.

50. *Id.* at 471 (Scalia, J., concurring).

51. See *id.* at 470.

52. 116 S. Ct. 1589 (1996).

53. Justice Stevens was joined in his opinion by Justices O’Connor, Kennedy, Souter, and Breyer.

54. In contrast, Justice Stevens referred four times to substantive due process as a valid basis of review in his *TXO* opinion. See *TXO*, 509 U.S. at 453-58. The “grossly excessive” standard was clearly presented as a test to determine whether the award was in violation of substantive due process rights. See *id.* at 458.

guise of “adequate notice.”⁵⁵ He then identified three “guideposts” that indicated that BMW NA was not given adequate notice of the magnitude of the sanction that might be imposed for its conduct. The guideposts are: “the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”⁵⁶

Justice Stevens’s attempt to frame his opinion in terms of adequate notice rather than in terms of substantive due process fails. The reliance by the majority on “adequate notice” as the justification for constitutionalizing the “grossly excessive” standard creates perplexing questions. Having been placed on notice (by cases such as *BMW*) that Alabama juries give very large punitive damages awards in cases of fraud, can defendants still complain that they did not receive adequate notice of those awards? If defendants have been placed on notice, are those awards still “grossly excessive”?

Given the absolutist quality of the early opinions on which the current Court relies as precedent for its substantive review,⁵⁷ notice is irrelevant to the question of whether an award is “excessive” or not. Excessiveness is not commonly understood as a measure of the foreseeability of a particular punishment. Rather, excessiveness is seen as a measure of the disparity between the wrongfulness of a particular behavior and the sanction imposed. An excessive penalty remains excessive even if the party to be penalized has been informed of the magnitude of the potential sanction.

Despite Justice Stevens’s attempt to frame the issue in a new way, *BMW* actually follows the substantive due process review of *Haslip* and *TXO*. With the possible exception of the third guidepost relating to statutory penalties, the majority opinion does not treat the issue of excessiveness as a notice issue, but rather treats it as an issue of disparity between conduct and sanction. Both dissenting opinions simply assume that the majority opinion is based on a substantive due process standard

55. *BMW*, 116 S. Ct. at 1598.

56. *Id.* at 1598-99.

57. See *Seaboard Air Line Ry. Co. v. Seegers*, 207 U.S. 73, 78 (1907) (stating that the Constitution imposes limits “beyond which penalties may not go”).

of review.⁵⁸ They are justified in doing so.

The majority opinion focuses the bulk of its attention on the reprehensibility of the defendant's conduct, the element it views as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."⁵⁹ As the majority reminds us, the *TXO* court "placed special emphasis on the principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.'"⁶⁰ Justice Stevens's attempt to reframe reprehensibility in procedural due process terms fails to convince because reprehensibility is difficult to understand as a notice issue. Rather, reprehensibility is understood as an element in the calculation of behavior versus punishment, i.e., as an element in the substantive due process standard established in earlier cases.

Justice Stevens then turns to an explanation of why the 500 to 1 ratio of punitive to compensatory damages in *BMW* is more objectionable than the 526 to 1 ratio in *TXO*. Relying on *TXO*, Justice Stevens identifies the sum of the actual and potential harm to Dr. Gore (\$4,000) as the relevant sum to be used in comparison with the punitive damages award, yielding a ratio of 500 to 1.⁶¹ Justice Stevens then distinguishes *TXO*. In that case, actual harm to the plaintiff was insignificant in comparison with potential harm.⁶² When actual and potential harm are added in that case, the ratio of punitive to compensatory damages is "not more than 10 to 1."⁶³

Justice Stevens apparently misunderstands the plurality decision he authored in *TXO*. In that opinion he stated: "It is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future

58. See *BMW*, 116 S. Ct. at 1610-12 (Scalia, J., dissenting); 1617 (Ginsburg, J., dissenting). Justice Scalia was joined in his opinion by Justice Thomas. Justice Ginsburg was joined in her opinion by Chief Justice Rehnquist.

59. *Id.* at 1599.

60. *Id.* (citing *TXO*, 509 U.S. at 482).

61. See *BMW*, 116 S. Ct. at 1601-02.

62. See *TXO*, 509 U.S. at 446 (1993). Actual damages were \$19,000. Plaintiffs estimated the potential damage at between \$5 million and \$8.3 million. See *id.* at 461. The Court was willing to contemplate a lower potential figure, "closer to \$4 million, or \$2 million, or even \$1 million." *Id.* at 462.

63. *BMW*, 116 S. Ct. at 1602.

behavior were not deterred.”⁶⁴ Consistent with the deterrent purpose of punitive damages,⁶⁵ and according to the logic of Justice Stevens’s opinion in *TXO* as quoted in this paragraph, the existence of a “pattern and practice” of wrongful conduct, evidence of damage to other persons, and the likelihood that “similar future behavior” would continue if not deterred are all relevant to the question of potential damages. Therefore, before calculating the compensatory-to-punitive ratio, Justice Stevens should have added to Gore’s loss an estimate of the past and future losses to other BMW customers resulting from BMW’s conduct. Why Justice Stevens chose to change his rules of comparison for the *BMW* case is unclear.

Finally, Justice Stevens applies his third guidepost, noting that the maximum statutory penalty under Alabama law for the type of fraud in this case would be \$2,000.⁶⁶ Justice Stevens concludes that a corporation would have inadequate notice that the conduct at issue in this case could warrant a multimillion dollar penalty. Justice Stevens simply ignores evidence offered by Justice Houston of the Alabama Supreme Court that the history of punitive damage awards in Alabama could indeed have put persons on notice that fraud can carry a very high price in Alabama.⁶⁷ Again, notice is not the real issue. Justice Stevens introduced his third guidepost by quoting Justice O’Connor: “a reviewing court engaged in determining whether an award of punitive damages is excessive should ‘accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue.’”⁶⁸ Justice Stevens’s concern is not with adequate notice, but with the appropriateness of sanctions as related to particular conduct.

BMW completes the process of placing ultimate authority over the size of state punitive damage awards in the Supreme Court of the United States. This reassignment of decision-making authority is unwise for (at least) three reasons. First, the Court has infringed state autonomy without a sufficient basis for doing

64. *TXO*, 509 U.S. at 460.

65. See *BMW*, 116 S. Ct. at 1595.

66. See *id.* at 1603.

67. See *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629-30 (Ala. 1994) (Houston, J., concurring specially).

68. *BMW*, 116 S. Ct. at 1603 (O’Connor, J., concurring in part and dissenting in part) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989)).

so. Second, the Court has taken for itself responsibility for review of punitive awards despite the fact that the Court is inherently ill-suited to the task. Third, it strengthens and extends substantive due process law, a line of jurisprudence that demands intuition rather than interpretation from the Court.

Imposition of constitutional "reasonableness" standards through substantive review of punitive awards is quite simply an infringement of the States' power to make and enforce their own laws. The imposition will tend to eliminate the potential for common law differences between the States, reflecting differing ideas of reasonableness. State court judges must now not only consider their own ideas of reasonableness, but they also must guess at what five Justices of the Supreme Court will consider reasonable.⁶⁹ As discussed above,⁷⁰ the Court's legal justifications for arrogating to itself ultimate power over state damage awards are unsound. Furthermore, as Justice Ginsburg points out in dissent, the Supreme Court's foray into punitive damages review is simply unnecessary given the obvious capacity and willingness of the States to limit punitive damage awards through legislation when and if they desire to do so.⁷¹

The detailed examination of facts required to arrive at a finding of "reasonableness" or "reprehensibility" is a type of decision-making in which the Supreme Court is ill-suited to engage. The unalterably uncertain and subjective quality of the "excessiveness" standard makes every case that results in a punitive damage award a candidate for certiorari, with no means of drawing clear distinctions between cases in which certiorari is granted and cases in which it is denied.⁷² Justice Ginsburg

69. The Eighth Circuit recently reviewed a punitive damages award according to the constitutional "excessiveness" standards of *TXO*. This was done without reference to state law, in spite of established procedure calling for a review according to state law standards. The existence of constitutional standards appeared not only to *limit* the freedom of States to fashion their own standards, but to make those state standards *irrelevant*. The leap from state standards to constitutional interpretation was so unremarkable to the Eighth Circuit as to escape mention in the opinion. See *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995) (overturning a punitive damages award on substantive due process grounds).

70. See *supra* text accompanying notes 56-68.

71. See *BMW*, 116 S. Ct. at 1614, 1618 (Ginsburg, J., dissenting).

72. The Justices favoring substantive review of punitive damage awards have been careful to "consistently reject[] the notion that the constitutional line is marked by a simple mathematical formula." *BMW*, 116 S. Ct. at 1602. Decisions regarding writs of certiorari for punitive damages cases seem no more susceptible to "mathematical" precision.

observes that the Court itself has formalized a principle that disapproves of review of such cases: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."⁷³

Finally, the Court has made concrete what had heretofore been only a theoretical possibility: the rejection of a punitive award by the Supreme Court, not because a state court has failed to ensure "procedural" due process under the Fourteenth Amendment,⁷⁴ but because the award is "too big."⁷⁵ The Court's implementation of substantive review forces state courts to conform awards to the intuitions of Supreme Court Justices, assuming state courts can discover an effective means of divining those intuitions.

Justice Stevens's objections aside,⁷⁶ the practice of reviewing punitive damages awards according to notions of substantive due process does exactly what Justice Scalia said it did in *TXO*: it creates "a federal constitutional right to a substantively correct 'reasonableness' determination."⁷⁷ The right to a substantively correct determination of reasonableness is now an established part of punitive damages law. Despite the apparently limitless applicability of the right to other areas of law, the Court should refuse to extend the doctrine and the tortuous interpretation of "due process" that has yielded a right to substantive due reasonableness.

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73. *Id.* at 1617 (Ginsburg, J. dissenting) (quoting S. Ct. Rule 10).

74. The Supreme Court ruled 7-2 that an amendment to the State Constitution of Oregon disallowing review by judges of punitive awards granted by juries was unconstitutional on *procedural* due process grounds. *See Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994).

75. *See BMW*, 116 S. Ct. at 1611 (1996) (Scalia, J. dissenting); *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995) (holding that an award of punitive damages violated substantive due process because it was too large).

76. *See TXO*, 509 U.S. at 458 n.24 (1996) (Stevens, J., plurality opinion).

77. *Id.* at 471 (Scalia, J., concurring).

