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TOWARD A CONSTITUTIONAL KLEPTOCRACY: CIVIL FORFEITURE IN AMERICA

*Stefan B. Herpel**

A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY. By *Leonard Levy*. Chapel Hill: The University of North Carolina Press. 1996. Pp. xiii, 272. $29.95.

Leonard Levy, the legal historian who has written a number of highly regarded historical studies on various provisions of the United States Constitution,[1] has added to his impressive oeuvre a new study of civil and criminal forfeiture.[2] *A License to Steal* brings together a discussion of English legal history, a review of a number of Nineteenth Century and late Twentieth Century Supreme Court forfeiture decisions,[3] accounts of actual applications of civil and criminal forfeiture, and a summary and critique of legislative proposals that have been made for reform of the civil forfeiture provisions of the federal drug statute. There is more space devoted in the book to civil than criminal forfeiture because, as Levy explains,

* Lawyer in private practice in Ann Arbor, Michigan. B.A. 1978, J.D. 1982, Michigan. Mr. Herpel argued on behalf of the petitioner, Tma Bennis, in *Bennis v. Michigan,* 516 U.S. 442 (1996). — Ed. I would like to thank Peter Henry, an attorney from Alexandria, Virginia, for his invaluable research assistance, which included reading briefs in Civil War era cases at the Supreme Court library in Washington. I would also like to acknowledge Noah Eliezer Yanich, who read and commented on a portion of a draft of this review, and William Skora, whose cogent ideas about civil forfeiture have influenced my own thinking on this subject.

1. Among these is his Pulitzer Prize-winning *Origins of the Fifth Amendment* (1969).

2. The distinction between civil and criminal forfeiture is a significant one, and it is of primary concern to Levy in *A License to Steal.* Civil forfeiture usually, but not always, proceeds by way of *in rem* actions directed against the property itself, which is named as a party defendant. Under many *in rem* forfeiture statutes, the government need only establish by a "probable cause" standard of proof that the property being sued is forfeitable. Depending on the particular statute, property may be forfeitable either because it was used or intended to be used to facilitate a criminal offense, or because it represents the proceeds of illegal activity, or property that has been purchased with those proceeds. Criminal forfeiture, by contrast, is effected through traditional *in personam* criminal proceedings, in which the usual criminal procedural protections are observed, and property forfeiture is simply part of the sentence which may be imposed following a conviction for a specified offense.

3. The book went to press shortly before the Supreme Court's decision in *Bennis,* 516 U.S. 442 (1996), and does not discuss the innocent-owner issues raised in that case under the Fifth Amendment Takings Clause and the Fourteenth Amendment Due Process Clause. It also went to press before the Court's decision in the pair of cases consolidated as *United States v. Ursery,* 518 U.S. 267 (1996), which addressed whether successive civil forfeiture and criminal proceedings based on the same underlying offense violated Double Jeopardy. Levy does, however, discuss one of the two appellate decisions (a decision from the Ninth Circuit) that was ultimately reversed in *Ursery.* Pp. 189-90.

criminal forfeiture was not widely used through most of the country's history.[4] Levy discusses criminal forfeiture primarily to contrast it with civil forfeiture, which affords virtually none of the procedural protections that are taken for granted in criminal prosecutions. What emerges clearly and forcefully in this book is that civil *in rem* forfeiture proceedings have been used — and increasingly are being used[5] — as an expedient to circumvent the usual protections accorded to defendants in criminal proceedings, and to augment federal, state, and local treasuries. Drawn primarily from secondary sources, *A License to Steal* is footnoted throughout and contains an excellent bibliography.

There is much of value in *A License to Steal.* The book provides a concise and entertaining summary of the historical origins of modern civil and criminal forfeiture in early English law. Levy's discussion of the old English law of "deodands" (pp. 7-20), under which inanimate objects which accidentally caused the death of another human being were forfeited to the Crown, is informative and thought-provoking, and he provides a fascinating digression on the trial and execution of animals, a practice which began in medieval times and continues to this day in some jurisdictions (p. 11). He also summarizes the operation of the complex of statutes known as the English Navigation and Trade Acts, which were enacted in the Seventeenth and Eighteenth Centuries (pp. 39-46). Levy concludes, as others have,[6] that the deodand never truly became a part of the American common law (p. 14), and that the development of civil forfeiture here after Independence owes far more to the tradition of *in rem* forfeiture proceedings in English and Colonial admiralty courts (p. 39).

A License to Steal includes a number of contemporary accounts of civil forfeiture abuse,[7] some drawn from reported cases and

4. The discussion of contemporary criminal forfeiture in *A License to Steal* focuses primarily on two relatively recent revivals of criminal forfeiture that were enacted at the federal level, in the Racketeer Influenced and Corrupt Organizations Act (RICO) and in The Continuing Criminal Enterprise Act (CCE).

5. Citing to a 1992 study, Levy points out that in 1992, at the federal level alone, there were more than 150 forfeiture statutes in existence. P. 47.

6. *See* James R. Maxeiner, *Bane of American Forfeiture Law — Banished at Last?,* 62 CORNELL L. REV. 768, 772 (1977); Michael Schechter, *Fear and Loathing and the Forfeiture Laws,* 75 CORNELL L. REV. 1151, 1154 (1990); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682 (1974) ("Deodands did not become part of the common-law tradition of this country."). Although the deodand did not become part of our common law, that has not deterred the Supreme Court from invoking the "guilty property" fiction as a basis for declining to extend to civil forfeiture various constitutional protections. Pp. 61, 84; *see infra* note 95.

7. Pp. 1-6; 118-43; 168-69. For a discussion of actual cases of forfeiture abuse that provides a useful complement to Levy's accounts, see generally HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS (1995).

others from media reports or official investigations into abuse.[8] Levy makes clear that the abuses described in these compelling accounts — including the forfeiture of property of completely blameless persons — are attributable to the one-sided powers accorded to government in effecting forfeitures. These include the right of authorities to seize, without prior notice or a hearing, cash or personal property simply on the basis that there is "probable cause" to believe it is forfeitable,[9] and the placement of the burden of proving that the property is not forfeitable on the property owner in the ensuing forfeiture proceeding.[10]

While *A License to Steal* provides important historical information, and does much to expose the use of civil forfeiture as a tool of tyranny, the book suffers somewhat from the uneven quality of its writing and from errors in the analysis of certain cases and statutes. In general, the writing — or perhaps the editing — does not seem to be up to the usual high standard of Levy's prior books. There

8. In one especially notorious case recounted by Levy that was the subject of a Pulitzer Prize-winning series of investigative reports in the *Orlando Sentinel,* sheriff's deputies in Volusia County, Florida (which encompasses Daytona Beach) routinely stopped drivers on Interstate 95, most of them African Americans, on the thinnest of pretexts and seized whatever cash they were carrying on "suspicion" that it was "tainted" money. In the overwhelming majority of cases, no criminal charges were ever brought against the affected drivers, and their only recourse under Florida law was to hire an attorney and to either prove that the cash that had been taken from them was not "tainted" or to try to effectuate a settlement for return of some of it. Millions of dollars were seized in this fashion over a several-year period. Pp. 134-37; Jeff Brazil & Steve Berry, *Tainted Cash or Easy Money? Volusia Deputies Have Seized $8 Million from I-95 Motorists,* ORLANDO SENTINEL, June 14, 1992, at A1. This and a similar abuse in Louisiana were the subject of a documentary that included video footage of some of the seizures taken by cameras mounted on police vehicles. *See Investigative Reports* (A & E television broadcast, Aug. 1995) (videotape on file with author); *see also* Reprint of selected articles from *Orlando Sentinel* series (available from *Orlando Sentinel* offices in Orlando, Fla.).

9. The *ex parte* seizure of cash or cars, prior to obtaining a judgment in a forfeiture proceeding, gives the government considerable leverage to extort cash settlements in exchange for either not bringing or dismissing the forfeiture proceeding. Recently, the Supreme Court has curbed that abuse somewhat by holding that, at least in the case of real property, due process precludes the *ex parte* seizure of property during the pendency of an *in rem* forfeiture proceeding against it. *See* United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). *See infra* notes 97-99 and accompanying text.

10. Under many forfeiture statutes, the owner must prove, usually by a preponderance of the evidence, that the acts giving rise to the forfeiture did not occur. *See, e.g.,* United States v. Two Parcels of Property Located at 19 and 25 Castle Street, 31 F.3d 35, 39 (2d Cir. 1994). If such acts were committed by somebody other than the owner, some forfeiture statutes authorize forfeiture regardless of whether the owner knew of or consented to the misuse of his or her property. *See, e.g.,* Bennis v. Michigan, 516 U.S. 442 (1996) (addressing constitutionality of forfeiture under Michigan statute that had been construed by state courts to permit forfeitures without regard to owner's knowledge). Other civil forfeiture statutes afford innocent-owner defenses, but even then the burden of proving lack of complicity in the wrongful use of one's property by another is placed on the owner. *See, e.g.,* 21 U.S.C. § 881(a)(4)(C) (Supp. 1997) (providing that "no conveyance shall be forfeited . . . to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent or willful blindness of the owner").

are some awkward constructions,[11] and the writing too often lacks the precision,[12] clarity,[13] and economy that one would expect in a book of this kind.

There are also mistakes in Levy's explanations of the operation of particular forfeiture statutes, and of the holdings in several recent Supreme Court forfeiture decisions. For example, in discussing the criminal forfeiture provisions of the federal drug law,[14] Levy asserts that "the judgment of forfeiture in a criminal case is based on a jury's determination that the defendant is guilty and that beyond all reasonable doubt the property was somehow involved in the crime" (p. 170). In fact, correctly or not, the courts that have addressed this issue have construed the statute to require that, consistent with traditional rules for factfinding at the sentencing stage, the relationship between the property and the crime need only be established by a mere preponderance of the evidence.[15]

Levy also incorrectly describes the effect of the position the government took in *United States v. James Daniel Good Real Property.*[16] Levy asserts that "[r]ecognition of the government's

11. *See, e.g.*, p. 89 ("Decisions in forfeiture cases are by no means against the property owner if the government has proceeded against him criminally."); p. 105 ("Civil forfeiture cases start with forfeiture because the relation-back doctrine gives the government title to the property at the moment it was used for criminal purposes — if a court subsequently agrees.").

12. For example, Levy sometimes states legal doctrines in categorical terms, only later to elaborate significant qualifications to those doctrines. He asserts, for instance, that, in civil forfeiture, "the guilt or the innocence . . . is simply an extraneous matter of no legal concern," p. 22, and that "in civil forfeiture, the owner's guilt or innocence is irrelevant," p. 138. While this is true of many civil forfeiture statutes, other statutes do provide such defenses, and, indeed, such defenses are the subject of a rather extensive discussion in a later chapter of his book. Pp. 161-76. Another example is to be found in the preface. There, elaborating on the situations in which property implicated in a crime may be forfeited, he states that "[t]he property may be used to commit the crime, be its product, or be obtained with its fruits." P. ix. He then adds that, whether civil or criminal, "the forfeiture has a punishing effect." P. x. But later in the book, Levy suggests, almost in passing, that "[t]he forfeiture of narcotics proceeds does not have to be seen as criminal punishment; it is, rather, merely depriving a narcotics felon of assets that were never rightly his." P. 189.

13. For example, in an otherwise generally accurate discussion of *United States v. 92 Buena Vista Avenue, Rumson, New Jersey,* 507 U.S. 111 (1993), Levy, after describing the holding in the case, adds this observation: "In effect, the Court did what Congress should have done: amend the 1984 act dealing with real property to include the innocent owner's defense." P. 174. The forfeiture provision at issue in *92 Buena Vista Avenue* was not, however, 21 U.S.C. § 881(a)(7), the provision that authorizes the forfeiture of real property used or intended to be used to facilitate the commission of a drug offense. Instead, it was 21 U.S.C. § 881(a)(6), a provision added in 1978 that authorized, *inter alia,* the forfeiture of "all proceeds traceable" to an illegal drug transaction. And since both provisions were enacted with innocent-owner defenses, it is difficult to assess what Levy was thinking of when he made this remark.

14. 18 U.S.C. § 853 (1988).

15. *See, e.g.,* United States v. Tanner, 61 F.3d 231 (4th Cir. 1995); United States v. Bieri, 21 F.3d 819 (5th Cir. 1994); United States v. Elgersma, 971 F.2d 690 (11th Cir. 1992); United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989).

16. 510 U.S. 43 (1993).

argument would have meant that innocent owners would be unable to show that a violation involving their property had occurred without their knowledge or consent" (p. 192). In fact, the Court's adoption of the government's argument would not have precluded the assertion of the innocent owner defense altogether; rather, it simply would have restricted the purposes for which the defense could be offered. The government in *James Daniel Good Real Property* sought the power to seize *ex parte* a home prior to obtaining a judgment in an *in rem* forfeiture hearing, and to begin collecting the rents being paid by the owner's tenant. Nothing in the government's position would, as a legal matter, have precluded the owner from asserting his innocence as a defense to the forfeiture action. The owner would instead have been precluded from making that argument (or any other) to contest the right of the government to seize control of the home before entry of judgment.[17]

I. A Proposal for a Procedural Due Process-Based Prohibition Against the Use of Civil Forfeiture Outside Its Traditional Applications in Revenue, Maritime, and War Power Cases

Perhaps because Levy's approach in *A License to Steal* is primarily historical rather than analytical, his book does not attempt to develop any broad theory for determining whether a particular use of civil, as opposed to criminal forfeiture is constitutional. Nor does he ever acknowledge that the history and rationale of Eighteenth- and Nineteenth-Century uses of civil forfeiture could be relevant to assessing the constitutionality of a contemporary civil forfeiture statute (or its application) that goes far beyond the limited scope of early civil forfeiture. Indeed, since Levy condemns certain early civil forfeitures with the same passion with which he condemns other civil forfeitures (pp. 57-58), he may well be unwilling to concede the constitutionality of any application of civil forfeiture, including applications that were utilized in the Eighteenth and Nineteenth centuries in this country, and in England and her colonies in earlier periods.

17. Also referring to the Court's decision in *James Daniel Good Real Property,* Levy notes that "[i]n 1993, the Supreme Court, which had had difficulty seeing that civil forfeiture can constitute punishment as well as a remedy, sensibly decided a Fifth Amendment due process case." Pp. 190-91. Though the Court's decisions do reveal hopelessly inconsistent conclusions about the punitive nature of forfeiture, see *infra* notes 89-95 and accompanying text, several months prior to the *James Daniel Good Real Property* decision, the Court had in fact declared forfeiture under two provisions of the federal drug forfeiture statute to be punitive, as Levy himself later acknowledges. P. 202 (discussing Austin v. United States, 509 U.S. 602 (1993)). And, while *James Daniel Good Real Property* was an eminently sensible decision, it did not turn on the punitive nature of forfeiture. See *infra* notes 97-99 and accompanying text for a discussion of the holding in *James Daniel Good Real Property.*

In Part I of this review, I will therefore attempt to sketch a constitutional theory for determining under what circumstances governments may forfeit property in civil, as opposed to criminal proceedings. Levy's historical discussion in *A License to Steal* indicates that through much of this country's history, civil forfeiture operated, with rare exceptions, within the rather narrow confines of revenue and admiralty law and the war-making power. Civil forfeiture was used almost exclusively to redress violations of revenue and maritime offenses and to provide a legal mechanism for seizing enemy property in wartime. Most of the significant expansion in the use and scope of civil forfeiture has occurred in the last two decades.

Part I of this review will describe those three traditional uses of forfeiture and their rationales as expressed in judicial opinions. I will then argue that the long history of these three uses of forfeiture — together with the special circumstances that justified those uses — provides a solid foundation for a due process-based limitation regarding the use of forfeiture. Finally, I will show how the Supreme Court has largely overlooked the historical limitations on the scope of civil forfeiture, with the result that its constitutional analysis of forfeiture has become riddled with contradictions.

Under the most far-reaching due process limitation that the Court could adopt, the use of civil *in rem* forfeiture outside its traditional applications in the revenue, maritime, and wartime fields would simply be prohibited as a general matter. If forfeiture were to be used as a sanction for the commission of an offense, it would have to be administered in a criminal proceeding that was conducted with the full panoply of procedural protections that apply in such proceedings.[18]

Implementation of such a limitation would have profound ramifications for the law of forfeiture. It would render unconstitutional much of the significant extension of civil forfeiture that has occurred at the state and federal level in the last two decades, and would greatly restrict further expansion. Furthermore, it would eliminate many of the doctrinal contradictions that abound in the Court's constitutional decisions involving civil forfeiture. But the historical analysis undertaken by Levy will also support less ambitious constitutional objectives than the "criminalization" of a significant class of forfeitures. Recognition of the limited scope of and rationale for the early forms of forfeiture would aid the Court in fashioning specific due process protections for civil forfeiture proceedings, even if they remained civil in form. While not as far-reaching as the criminalization of forfeiture, the incremental fash-

18. Like any legal rule, the one I am proposing would not be without exceptions. See *infra* note 45 for a discussion of one narrow exception to such a rule.

ioning of particular due process protections can still go a long way toward eliminating some of the worst abuses of civil forfeiture.

In Part II of this review, I will propose a specific incremental change to civil forfeiture that Levy and many others regard as absolutely fundamental — namely, the creation of a constitutional protection for innocent owners. I will show how such a protection can be derived from longstanding substantive due process principles that were widely accepted by the time the Fourteenth Amendment was ratified in 1868. My essay will trace the development of the substantive component of due process in judicial opinions and other extra-judicial sources in the Nineteenth Century. It will conclude by suggesting that one of the animating principles behind the development of substantive due process — the belief that private property should not be arbitrarily taken by the government — remains very much alive today. That principle, as embodied in the Due Process Clause, requires the adoption of a protection for innocent owners in forfeiture cases.

A. *Traditionally, Civil Forfeiture Has Been Confined to Revenue, Maritime, and War Power Matters*

Before the American Revolution, the English regularly used civil *in rem* forfeiture in the Colonies to redress violations of customs and admiralty law. Foremost among these *in rem* forfeitures were those administered pursuant to the English Navigation and Trade Acts.[19] Under these Acts, forfeitures of cargo — and, in some cases, entire ships — could be imposed for violations of a complex array of customs regulations governing trade between England and the Colonies.[20] By 1700 or shortly thereafter, Colonial courts — that is, common law courts and the vice-admiralty courts — were "regularly exercis[ing]"[21] jurisdiction to forfeit ships and

19. *See* C.J. Hendry v. Moore, 318 U.S. 133, 140 n.4 (1943) (enumerating, for each Colony, specific forfeiture cases effected under the English Navigation Acts).

20. As Levy explains, the Navigation and Trade Acts imposed various protectionist trade measures for England and her Colonies. They provided, for example, that all trade between England and the Colonies — or between two Colonies — had to be conducted on English-owned vessels in which the master and three-fourths of the crew were citizens of England and her possessions. Many Colonial commodities could only be exported to other Colonies or to England, and the only foreign-made goods that were imported into the Colonies were those that came on English vessels. *See* pp. 40-41; LAWRENCE A. HARPER, THE ENGLISH NAVIGATION LAWS 387-414 (1964) (describing other features of this comprehensive system of trade and customs regulations). While the English Navigation Acts constituted perhaps the most significant statutory basis for *in rem* forfeitures in the Colonies, the individual Colonies also effected civil forfeitures under their own customs laws. As the Supreme Court pointed out in its richly detailed historical discussion in *C.J. Hendry v. Moore,* 318 U.S. 133 (1943), forfeiture was also used as a sanction for violation of provincial laws "fixing customs duties, regulating or prohibiting the exportation or importation of commodities, or requiring a specified manner of marking, storing or selling" such commodities. 318 U.S. at 145.

21. *C.J. Hendry,* 318 U.S. at 140.

cargoes for violation of the Navigation and Trade Acts.[22] After 1763, Colonial authorities increasingly used *in rem* forfeitures to enforce various Acts of Parliament imposing duties on goods shipped from England, including the Sugar Act and the Townshend Revenue Act.[23]

Failure to comply with provisions of the English Navigation and Trade Acts, including those establishing customs duties, was not the only basis for forfeitures of vessels and their cargoes in English admiralty and Colonial vice-admiralty court proceedings. *In rem* forfeitures were also authorized in cases involving illegal fishing[24] and other maritime offenses. In addition, the English admiralty court and its counterpart in the Colonies exercised jurisdiction over wartime confiscations of vessels and their cargoes, known as "prizes."[25] The use of *in rem* forfeiture as a sanction for violations of customs and maritime law — and for confiscating the property of citizens of an enemy during wartime — continued after Independence. As Levy recounts, the First Congress enacted a statute providing for the forfeiture of ships and cargoes involved in violations of customs law, including the failure to pay applicable duties (p. 46). Later Congresses passed statutes providing for forfeiture of vessels in cases involving the smuggling of prohibited goods, and piracy (p. 46). During the Civil War, Congress enacted the Confiscation Acts, which provided for the *in rem* forfeiture of property that, *inter alia*, was owned by citizens of the Confederate States or used to aid the

22. This is not to say that the use of *in rem* forfeiture proceedings to enforce the Navigation and Trade Acts was popular with the American Colonists. Because of the resistance of Colonial juries to rendering verdicts for the Crown in those cases, in 1696 Parliament established juryless courts — the vice-admiralty courts — to exercise that jurisdiction. P. 42; *see also CJ. Hendry,* 318 U.S. at 139-43. But that only further aroused the indignation of American Colonists, who believed they were being deprived of their ancient right to trial by jury. *See* JACK P. GREENE, INTERPRETING EARLY AMERICA: HISTORIOGRAPHICAL ESSAYS 323, 397 (1996). The strong objections of American Colonists to the use of juryless, *in rem* forfeiture proceedings to enforce the revenue acts passed by Parliament after 1763 are regarded by a number of historians as being a "cause" of the American revolution. *See* GREENE, *supra,* at 323, 397, 399. *See generally* CARL W. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960). The same has been said of the notorious writs of assistance, the general search warrants that permitted Colonial authorities to enter homes, warehouses, shops, and other places, and to seize goods found there (for the purpose of forfeiture) if they were suspected of being connected to customs violations. *See* United States v. 92 Buena Vista Avenue, 507 U.S. at 118-19 (1993) (suggesting that "the misuse of the hated general warrant is often cited as an important cause of the American Revolution"). *See generally* MAURICE HENRY SMITH, THE WRITS OF ASSISTANCE CASE (1978) (describing historical development of writs of assistance and providing detailed and colorful account of James Otis's famous legal challenge to the writ).

23. *See* GREENE, *supra* note 22, at 321-23.

24. *See CJ. Hendry,* 318 U.S. at 138 n.2 (citing to early English statutes providing for forfeiture of fishing nets or boats used in unlawful fishing).

25. P. 40; *see also* GREENE, *supra* note 22, at 321.

Confederate side in the Civil War,[26] and the Prize Act, which provided for judicial proceedings to formalize the capture of Confederate prizes.[27]

The longstanding use of *in rem* forfeiture rather than civil or criminal *in personam* proceedings for violations of customs and maritime law rests in significant part on a single factor that is common to all three types of forfeitures. That factor is that at least some of those whose property is subject to forfeiture — and perhaps most of them — are persons or entities over which an American court will typically have no personal jurisdiction. When that is the case, traditional civil or criminal *in personam* proceedings to satisfy a claim for restitution or to impose a fine or other penalty will be unavailing.

With respect to customs regulation, for example, a seller or consignor of goods is typically a foreign person or entity. Criminal and civil fines for customs violations generally have no extraterritorial application and, in any event, a foreign seller who violates such laws will frequently be outside an American court's jurisdiction.[28] If the seller has committed a customs offense, say by preparing invoices which understate the purchase price of the goods, forfeiture of the goods may be the only practical way to exact the equivalent of a civil or criminal fine from the seller, at least where the seller has retained title to the goods, as in a consignment sale.[29]

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26. *See* Act of August 6, 1961, 12 Stat. 319 (providing for forfeiture of property used to aid the Rebellion); Act of July 17, 1862, 12 Stat. 589 (authorizing, *inter alia,* forfeitures of any property owned by Rebels), *both reprinted in* EDWARD MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES DURING THE GREAT REBELLION 195, 196-98 (2d ed. 1865). The second of these statutes, as Levy notes, was passed in retaliation against the Sequestration Act passed by the Confederate Congress in August 1861. P. 51. See *infra* note 150 and accompanying text for a discussion of the Confederate Sequestration Act.

27. Act of June 30, 1864, 13 Stat. 315. While the kinds of confiscations authorized by the Prize Act had a long history in English and international law, the same may not be true of confiscations of enemy property found on land within the jurisdiction of the confiscating government, which is what the Civil War Confiscation Acts authorized. *See* JAMES G. RANDALL, THE CONFISCATION OF PROPERTY DURING THE CIVIL WAR 17 & n.31 (1913).

28. *See* United States v. 25 Packages of Panama Hats, 231 U.S. 358, 361 (1913).

29. *See 25 Packages of Panama Hats,* 231 U.S. at 362 (suggesting that, in a case for fraudulent undervaluing of merchandise so as to avoid payment of duties, the use of "a proceeding against the *res,*" rather than a criminal action, is appropriate because of "the very fact that the criminal provision does not operate extraterritorially against the consignor"); *see also* HARPER, *supra* note 20, at 111 (noting that the use of *in rem* proceedings in English customs cases "proved valuable . . . because the authorities could more often lay their hands upon smuggled merchandise than upon the smugglers"). Of course, in a case in which the foreign seller has no complicity in a customs law violation perpetrated by the buyer or consignee, or where a culpable seller has already transferred title to the goods to the buyer upon their entry into the importing country, then the forfeiture would not truly be functioning as a substitute for imposition of an *in personam* criminal or civil fine on the seller. But in many cases it may not be easy for customs officials to ascertain whether the importer, the foreign seller, or some other party, owns the goods in question — and which party or parties is responsible for a violation — especially if the seller is thousands of miles away and not within the subpoena power of the courts. For that reason, the government could arguably justify the

Scholars have also pointed to the unavailability of ordinary *in personam* civil and criminal processes for many maritime offenses in explaining the longstanding use of forfeiture in those cases. The distinctive feature of maritime activities is that they take place on the oceans, "where sovereignty either does not exist, or is in dispute,"[30] and that, "more often than not . . . the owner of a vessel — or sometimes even the crew . . . [is] not reachable by the laws of any nation against which some offence or injury was alleged on the part of that vessel and its owners."[31] As such, civil *in rem* forfeiture was often the only practical method for satisfying claims against foreign persons or entities arising out of violations of admiralty law.[32]

A similar argument was also offered to justify the use of *in rem* forfeiture in the wartime confiscation cases that arose in connection with the Revolutionary War,[33] the War of 1812,[34] and the Civil War.[35] In *Miller v. United States,*[36] the Supreme Court held that *in rem* forfeitures of, *inter alia,* private property owned by inhabitants of the Confederate states during the Civil War, but situated within the Union states, were proper exercises of the "war powers" of the United States, as those powers are recognized in international law

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use of the forfeiture remedy as a prophylactic measure. Traditional notions of sovereignty could also be invoked to justify the use of civil *in rem* forfeiture in customs cases. *See* Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1903) ("[F]rom the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but also indirectly as a necessary result of provisions contained in tariff legislation.").

30. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty,* 46 TEMP. L.Q. 169, 215 (1973).

31. Finkelstein, *supra* note 30, at 231; *see also* 4 BENEDICT ON ADMIRALTY § 607, at 177 (6th ed. 1940) ("[I]n a great variety of . . . cases [involving violations of the laws of trade, navigation, and revenue committed on navigable waters], the vessels and the goods alone are within the reach of the process of the courts; the individuals concerned are in other countries and are not amenable to the civil or criminal processes of our courts.").

32. In his separate dissent in *Bennis v. Michigan,* 516 U.S. 442 (1996), Justice Kennedy acknowledged this feature of admiralty law as providing a justification for forfeitures on the high seas. *See Bennis,* 516 U.S. at 472 (Kennedy, J., dissenting) ("The forfeiture of vessels pursuant to the admiralty and maritime law has a long, well-recognized tradition, evolving as it did from the necessity of finding some source of compensation for injuries done by a vessel whose responsible owners were often . . . beyond the practical reach of the law and its processes.").

33. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (upholding State of Virginia's power to appropriate various British debts sequestered during the Revolution).

34. *See* Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (finding right of federal government to seize British property found on land at the outbreak of the War of 1812).

35. *See, e.g.,* Miller v. United States, 78 U.S. (11 Wall.) 268 (1871) (upholding Civil War Confiscation Acts in case involving forfeiture of property in Michigan belonging to Virginia "rebel"). See *infra* notes 67-73 and accompanying text for an extended discussion of *Miller.*

36. 78 U.S. (11 Wall.) 268 (1871).

and granted by the Constitution.[37] If the war power does properly extend to such confiscations, then the use of an *in rem,* rather than an *in personam* proceeding to effect a property confiscation would be justified on the grounds that, as a legal or practical matter, courts in the country undertaking the seizure would have no jurisdiction to entertain an *in personam* action over a foreign citizen in an enemy state.[38]

The forfeiture remedy was confined almost exclusively to customs, maritime,[39] and war power confiscations through most of the Nineteenth Century, with two principal exceptions. First, the forfeiture remedy also began to appear in statutes — mostly state liquor prohibition statutes of the 1840s and 1850s — declaring certain activities to be nuisances and providing for their abatement in equitable proceedings, through injunction or property forfeiture (followed by destruction rather than sale). Such statutes, by using civil, equitable proceedings to enforce the criminal law,[40] effected a significant expansion of governmental power and raised serious due process questions.[41] To be sure, these statutes typically employed

37. *See* U.S. CONST. art. I, § 8, cl. 10 ("Congress shall have Power . . . [t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

38. *See* RUFUS WAPLES, A TREATISE ON PROCEEDINGS IN REM 408 (1882). Professor Waples conceded that in the case of civil wars, the inability to obtain *in personam* jurisdiction over enemies may be practical, rather than legal, but thought that this distinction irrelevant for purposes of justifying the use of the *in rem* procedure. *See id.* at 408.

39. Some of the maritime forfeiture provisions were enacted at the state level, including provisions which authorized forfeiture of fish nets and vessels illegally used in fishing in state tidal waters and other navigable waters. *See* C.J. Hendry v. Moore, 318 U.S. 133, 149 (1943).

40. At common law, the general rule was that equity could not enjoin the commission of a crime, except where there was some separate injury to a private interest. *See* United States v. Dixon, 509 U.S. 688, 695 (1993).

41. Indeed, most of the provisions in the prohibition statutes authorizing the summary forfeiture and destruction of liquor were struck down under various state constitutional provisions in the 1850s. *See* RODNEY L. MOTT, DUE PROCESS 314 (1926). These decisions were a precursor to the famous holding of New York's highest court in *Wynehamer v. State of New York,* 13 N.Y. 378 (1856), which applied substantive due process principles to declare unconstitutional the state prohibition law. *See infra* notes 129-31 and accompanying text. To be sure, in 1887, the United States Supreme Court upheld, against a due process challenge, a statute providing for forfeiture of liquor and other property used to maintain the nuisance. *See* Mugler v. Kansas, 123 U.S. 623, 672-73 (1887). In addition to upholding the forfeiture provisions of the Kansas prohibition law, the *Mugler* court rejected the claim that the provision of the statute that forbade the manufacture and sale of alcoholic beverages also violated due process, insofar as it rendered valueless breweries that had once been lawful to operate. *See Mugler,* 123 U.S. at 664. But the soundness of both holdings in *Mugler* is open to serious doubt. In support of its ruling that these "equitable" forfeitures did not violate due process, the *Mugler* Court relied heavily on a historical analysis that has proved to be incorrect. In an attempt to show that equitable proceedings of this kind had been used for centuries, the Court quoted Justice Story's treatise on equity for the proposition that "[i]n regard to public nuisances, the jurisdiction of courts of equity seems to have been of very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth." 123 U.S. at 672. In fact, recent legal scholarship demonstrates that that jurisdiction was not established in England until the Nineteenth Century. *See* J.R. Spencer, *Public Nuisance: A Critical Examination,* 48 CAMBRIDGE L.J. 55, 67-68 (1989); *see also* Henry Schofield, *Equity Jurisdiction to Abate and*

in personam, rather than *in rem* proceedings,[42] and the equitable principles from which these statutory actions were derived[43] had observed strict rules regarding when destruction of property, as opposed to a mere prohibitory injunction, would be ordered.[44] But as equitable proceedings, they were conducted without a jury, and the government's standard of proof was reduced to a preponderance of the evidence. Moreover, in practice, the statutory provisions regarding forfeiture were often mandatory in nature.[45]

The second exception was the use of forfeiture for excise tax violations. This use resulted from a change in tax policy during the Civil War years. From the formation of the Republic through the onset of the Civil War, virtually the only tax imposed by the federal

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Enjoin Illegal Saloons as Public Nuisances, 8 ILL. REV. 19, 20-21 (1914). And a recent Supreme Court case has raised some question as to whether the Court's 1888 holding is still good law. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 n.14 (1992) (stating only that "perhaps" a prohibition statute of the kind at issue in *Mugler* would pass constitutional muster); 505 U.S. at 1051 n.13 (Blackmun, J., dissenting) (suggesting that Court's opinion in *Lucas* has "disavow[ed] the holding and reasoning of *Mugler*"). If the constitutionality of the provisions of the law in *Mugler* prohibiting sale and manufacture of alcoholic beverages is in doubt, then *a fortiori* the constitutionality of the forfeiture provisions of that law are also in doubt.

42. The *in personam* nature of these nuisance abatement proceedings was consistent with the long-standing rule that equity always acts *in personam. See* G. BISPHAM, THE PRINCIPLES OF EQUITY § 26, at 33-35 (1931).

43. The public nuisance statutes apparently were a statutory extension of a new development in the common law during the Nineteenth Century — that of civil courts assuming jurisdiction to "enjoin[ ] [public] nuisances at the suit of the state." H. MCCLINTOCK, MCCLINTOCK ON EQUITY 441 (1948). This jurisdiction, which as of 1888 was "not frequently exercised," Mugler v. Kansas, 123 U.S. 623, 673 (1888), represented a departure from the English common law as it had existed for many centuries. *See* Spencer, *supra* note 41, at 59-61, 67-68 (indicating that public nuisances were crimes at early common law and that their abatement for many centuries was almost exclusively a matter for the criminal courts until the early Nineteenth Century, when English equity courts first began to issue injunctions to abate public nuisances in suits brought by the attorney general).

44. While the usual remedy at common law for public nuisance abatement was a prohibitory injunction, courts would order destruction of property in extreme cases if that was the only way to abate a nuisance. *See* JOHN N. POMEROY, A TREATISE ON EQUITABLE REMEDIES § 534, at 915 (1905); Welch v. Stowell, 2 Doug. 332, 343 (Mich. 1846) (holding that municipality's destruction of house used for prostitution activities was unlawful because it exceeded what was "absolutely necessary to abate the nuisance" and failed to "protect . . . the rights of property, which should be held sacred"). That common law limitation on destruction of property as a remedy for nuisance abatement has continued to this day. *See, e.g.,* City of Minot v. Freelander, 380 N.W.2d 327, 324 (N.D. 1986) ("[D]estruction of property is a drastic remedy, and it must necessarily be a remedy of last resort . . .").

45. In addition to the power to abate public nuisances, it was generally recognized by the Nineteenth Century that states also had the power to destroy private property, without paying compensation to the owner, in times of "great public calamity." MOTT, *supra* note 41, at 344. The principal examples of that era were to prevent property from falling into the hands of the enemy during war, and to prevent conflagrations from spreading through a community. *Id.* at 344-45 & nn.43–44; *see also Lucas,* 505 U.S. at 1029 & n.16 (recognizing states' power at common law to abate public nuisances and to "destr[oy] . . . real and personal property, in cases of actual necessity, . . . to forestall . . . grave threats to the lives and property of others," without providing compensation to property owner) (citations and internal quotation marks omitted).

government — and hence the only revenue measure for which it utilized the forfeiture sanction — was the tariff.[46] When Congress enacted a comprehensive scheme of excise taxes on domestically produced goods during the Civil War,[47] however, a provision for forfeiture was included.[48]

It appears that Congress did not begin using civil forfeiture outside the admiralty, revenue, and war power fields in any significant way until the advent of Prohibition in 1920.[49] But even during

46. There were a few excise taxes imposed by Congress in 1791 and 1794, and a stamp tax was imposed on various legal instruments in 1797. But these taxes were met with considerable opposition, of which the so-called Whiskey Rebellion in Pennsylvania was a part, and the entire system was repealed in 1802. The War of 1812 led to the reintroduction of some of these taxes, but they were abandoned in 1818. *See* RAYMOND E. MANNING, FEDERAL EXCISE TAXES 78-79 (1943).

47. *See* Internal Revenue Act of July 1, 1862, ch. 119, 12 Stat. 432.

48. Because the rationale for using the forfeiture remedy in customs cases did not seem to apply to cases involving taxation of internally produced goods, a case could have been made that employment of *in rem* forfeitures in the latter context violated due process. But that argument does not appear to have been pressed by any person whose property was forfeited for failure to pay excise taxes, at least in any Supreme Court case. The first Supreme Court case involving a forfeiture based on the use of property in a manner that defrauded the government of excise taxes was *Dobbins's Distillery v. United States*, 96 U.S. 395 (1878). The brief for petitioner in *Dobbins's Distillery* did not make that (or any other constitutional argument, *see* Brief of Plaintiff in Error, *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877) (No. 145), and the Court was perfectly content to rely on admiralty and customs precedents in affirming the forfeiture of an allegedly innocent owner's property. *See, e.g.*, 96 U.S. at 400, 401-02, 404 (1877). On the other hand, if such a due process argument had been made, the Court might have countered it by asserting that the collection of the tax revenues is essential to the functioning of government. Recently, the Supreme Court has distinguished revenue forfeitures (including those based on failure to pay excise taxes) from drug forfeitures on precisely the grounds that "[t]he prompt payment of taxes . . . may be vital to the existence of government." United States v. James Daniel Good Real Property, 510 U.S. 43, 60 (1993) (citation and internal quotation marks omitted); *cf.* Boyd v. United States, 116 U.S. 616, 621 (1885) (noting that certain internal revenue measures passed during the Civil War were "adopted at a period of great national excitement, when the powers of government were subjected to severe strain to protect the national existence"). Indeed, at about the time *Dobbins's Distillery* was decided, the federal government was facing something of a crisis in the collection of federal excise taxes on alcohol. After the end of the Civil War, the illicit distilling of spirits became a common means of defrauding the government out of the alcohol tax, particularly in the southern states, where opposition to the government still ran high. *See* ALBERT S. BOLLES, FINANCIAL HISTORY OF THE UNITED STATES, 1861 TO 1885, at 435-36 (1888). According to Bolles, "In some of the districts where illicit distilling was extensively practiced, leading citizens were either directly interested in the business, or were in active sympathy with the distillers . . . ." *Id.* at 436. In his annual report for 1878, the Commissioner of Internal Revenue reported that "twenty-six officers and employees were killed, and forty-seven wounded, while engaged in enforcing the internal revenue laws." *Id.* at 437 (quoting from Report (internal quotation marks omitted)). He reported that, "as a rule, no efforts were made on the part of the State officers to arrest the murderers . . . ." *Id.* at 438 (quoting from Report (internal quotation marks omitted)).

49. The Eighteenth Amendment to the Constitution was ratified in 1919, and the Volstead Act, which implemented national Prohibition, was passed later that year. *See* 41 Stat. 305 (1919). To be sure, Congress had earlier provided for the seizure and *in rem* forfeiture of contaminated and mismarked food in section 10 of the Food and Drug Act of June 30, 1906, Pub. L. No. 59-384, 34 Stat. 768, and the states had begun to exercise similar power to seize adulterated food at approximately the same time. *See* MOTT, *supra* note 41, at 345-46. But the seizure and destruction of contaminated food almost surely falls within the State's power

Prohibition, most liquor-related forfeitures were effected under the forfeiture provisions of the internal revenue laws, rather than those contained in the Volstead Act, which were more in the nature of criminal forfeiture provisions.[50] With the repeal of Prohibition in 1932, the use of civil forfeiture in criminal law enforcement waned considerably, at least at the federal level. But civil forfeiture gained new prominence in the 1980s, when the federal government began using it aggressively in the enforcement of laws prohibiting or regulating the possession or sale of controlled substances.[51] Today, as Levy points out, there are more than 150 federal civil forfeiture provisions.[52] Some of these statutes punish conduct that is specifically made criminal by another statute. Others, while they do not predicate forfeitures on conduct that is the subject of a separate criminal statute, nevertheless impose forfeitures for offenses of a kind that formerly would have been made the subject of a criminal statute, instead of an *in rem* forfeiture proceeding. Analogous forfeiture statutes are increasingly appearing at state and local levels.

B. *A Due Process Prohibition Against the Use of Civil Forfeiture Outside Its Traditional Domains*

In this section, I will suggest a due process-based prohibition against certain uses of civil — as opposed to criminal — forfeiture that draws on the historical analysis presented in the preceding section. The due process limitation I am proposing starts from the self-

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to "destr[oy] real and personal property, in cases of actual necessity . . . to forestall . . . grave threats to the lives and property of others" *Lucas,* 505 U.S. at 1029 & n.16; *see supra* note 45. To that extent, it could be defended on due process grounds.

50. Although the Volstead Act provided for the *in rem* forfeiture of boats or vehicles used in the unlawful transportation of liquor, the statute required that the person "in charge" of the boat or vehicle be convicted criminally before a forfeiture could be effected, and it also contained protections for innocent lienors. *See* KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 128 (1994). Because of these protections, law enforcement authorities during Prohibition usually relied on the forfeiture provisions of the excise tax law, which had their origins in an 1866 statute, as a basis for effecting forfeitures of conveyances in which illicit liquor was found. *See id.* at 131. *See* HOWARD L. MCBAIN, PROHIBITION LEGAL AND ILLEGAL 131 (1928). That law authorized the forfeiture of conveyances "used in the removal or for the deposit or concealment" of liquor "with the intent to defraud" the United States of (liquor) taxes, without the requirement of a criminal conviction and without regard to the innocence of an owner or lienor. *See id.* at 131.

51. Congress included a provision authorizing the forfeiture of conveyances (e.g., automobiles, boats, and airplanes) for violations of federal drug law in 1970. *See* Act of 1970, ch. 511, 84 Stat. 1236, 1276-78 (1970) (current version at 21 U.S.C. § 881(a)(4) (1994)). But the use of that and related civil forfeiture provisions in drug law enforcement did not begin in earnest until the 1980s. *See* COMPTROLLER GENERAL, ASSET FORFEITURE: A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING (1981). The federal asset forfeiture fund grew from $27 million in 1984 to $531 million in 1995. *See* U.S. DEPT. OF JUSTICE, ASSET FORFEITURE FACT SHEET (1993).

52. P. 47. *See generally* CHARLES DOYLE, CONGRESSIONAL RESEARCH SERV., CRIME AND FORFEITURE (1992) (listing various federal forfeiture statutes).

evident proposition that civil forfeiture serves criminal law objectives. As the Supreme Court has said, "[A] forfeiture proceeding is quasi-criminal in character," and "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[53] Seizing a person's property because he or she used it in the commission of a crime, even when that property has many legitimate uses, is in this respect the equivalent of a criminal fine,[54] albeit a fine that exhibits a rather arbitrary variability in amount from case to case.[55] As such, civil forfeiture is quite clearly designed to serve the criminal law objectives of deterrence and retribution.[56]

Because of the difficulty of obtaining *in personam* jurisdiction over perpetrators of certain classes of crime, our legal tradition long ago accepted the use of *in rem* forfeiture actions as a sanction for certain limited classes of violations of law. As discussed at length above, forfeiture was used to redress violations of maritime and revenue law, and to facilitate the confiscation of enemy property in wartime. Civil forfeiture, then, was viewed a narrow exception to the basic requirement that criminal proceedings (with all of the procedural protections that have come to be associated with such proceedings) be used to enforce the criminal law.

The notion that government may use "civil" proceedings to enforce the full spectrum of criminal law offenses is simply not an established part of our legal tradition. It is easy to understand why. For if governments could indiscriminately use civil forfeiture as a tool for enforcing the criminal law, it would, as Justice Field warned more than 125 years ago, "work[ ] a complete revolution in our criminal jurisprudence."[57]

The use of civil *in rem* forfeiture proceedings, rather than criminal proceedings, to enforce the criminal law plainly must have some limits. Could the state, for example, authorize *in rem* forfeiture proceedings of homes where there is merely "probable cause" to believe that the home was used to facilitate a homicide or a larceny,

53. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

54. *See* United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971) ("From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money [for illegal activities] and a man who pays a 'criminal fine' of $8,674 as a result of the same course of conduct.").

55. *See* Austin v. United States, 509 U.S. 602, 621 (1993) (noting the "dramatic variations in the value of conveyances and real property" subject to forfeiture under the federal drug forfeiture statute).

56. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974) (alluding to the "punitive and deterrent" purposes served by civil forfeiture); *see also* Bennis v. Michigan, 516 U.S. 442, 465 (1996) (Stevens, J., dissenting) (quoting Brief for Plaintiff-Appellant at 22, State *ex rel.* Wayne County Prosecutor v. Bennis, 527 N.W.2d 483 (Mich. 1994) (No. 97339) (internal quotation marks omitted)) (mentioning State's own characterization of the forfeiture in that case as "swift and certain punishment" for an offense).

57. Miller v. United States, 78 U.S. (11 Wall.) 268, 323 (1871) (Field, J., dissenting). See *infra* notes 71-73 and accompanying text for a discussion of the Field dissent.

or of cars where there is "probable cause" to believe that the owner was driving while impaired?

Justice Kennedy observed recently that the Court "would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant has the burden of proof."[58] If that is true, then surely the Court would not permit government to create a comprehensive, parallel system of criminal law enforcement that utilized *in rem* forfeiture proceedings to punish for criminal offenses, even if such a system did not formally "replace" the entire system of criminal prosecutions, but was merely an adjunct to it. Giving prosecutors the option of using such a comprehensive scheme of *in rem* forfeiture remedies — whether as a supplement to traditional criminal prosecutions or in place of them (when, for example, they were unwilling or unable to meet the higher burdens associated with criminal prosecutions) — would seem to subvert our entire criminal justice system.[59] But this is precisely the general direction in which state and federal governments seem to be heading.

We can, I think, all agree as a general matter that the use of civil, rather than criminal procedures, to administer the criminal law "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[60] — and, as such, violates due process. That said, if civil proceedings in some circumstances have historically been used to enforce the criminal law, it would be more difficult (though by no means impossible)[61] to establish that similar modern uses of those civil proceedings violate due process. In the case of civil forfeiture, however, there is no longstanding tradition for using civil forfeiture outside the maritime, revenue, and war power fields. If a modern application of

58. Foucha v. Louisiana, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting).

59. To be sure, *in rem* forfeiture can only be used as a law enforcement tool where the wrongdoer's property is somehow involved in the commission of a crime. But many courts, including the Supreme Court, have required only the most tenuous relationship between property and a crime in order to forfeit it on that basis. *See, e.g.,* United States v. James Daniel Good Real Property, 510 U.S. 43, 82 (1993) (Thomas, J., concurring in part and dissenting in part) (stating that under the federal drug forfeiture statute, "large tracts of land [and any improvements thereon] which have no connection with crime other than being the location where a drug transaction occurred are subject to forfeiture") (citation and internal quotation marks omitted) (first alteration in original); *see also Bennis,* 516 U.S. at 446 (upholding forfeiture of wife's interest in car based on husband's single use of car for liaison with a prostitute).

60. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

61. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1990) (noting, in the context of a due process challenge, that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack") (quoting Williams v. Illinois, 399 U.S. 235, 239 (1970) (internal quotation marks omitted)).

civil forfeiture outside its traditional domains depended on the same rationale that justified the traditional uses — the inability to obtain *in personam* jurisdiction over the wrongdoer — perhaps it could pass muster under the Due Process Clause. But absent that, the contemporary extensions of civil forfeiture should be condemned as a violation of due process. If government wishes to use forfeiture as a sanction for enforcing the criminal law, it should be compelled to use criminal forfeiture proceedings, in which all of the customary procedural safeguards are applicable.

C. *In Its Treatment of Civil Forfeiture, the Supreme Court Has Largely Overlooked the Constitutional Significance of the Historically Narrow Scope of Civil Forfeiture*

1. *Nineteenth-Century Cases*

At one time in our constitutional history, it appears that the Supreme Court would have accepted the view that, while the use of civil forfeiture in the administration of tax and admiralty law was perfectly constitutional, its use to enforce other penal statutes would violate due process. In 1871, when the Court decided *Miller v. United States,*[62] it suggested in *dicta* that forfeiting property in a civil proceeding whose purpose was to "punish offenses" against the United States would not comport with the Due Process Clause of the Fifth Amendment. *Miller* involved a constitutional challenge to the Civil War Confiscation Acts enacted by the Union Government in 1861 and 1862. The 1861 Act provided for the forfeiture of property used, or intended to be used to aid, abet, or promote the Confederacy in the Civil War.[63] It contained no criminal provisions. The 1862 Act contained both criminal provisions (which provided for the imposition of fines, imprisonment, and death) and civil forfeiture provisions. Among the criminal offenses defined by the 1862 Act was giving "aid and comfort to . . . [the] rebellion."[64] The civil forfeiture provisions of the Act also authorized the confiscation of property of, *inter alia,* all such persons.[65] The Act provided that the forfeiture proceedings were to be conducted *in rem,* under procedures similar to those used in admiralty or revenue forfeiture cases.[66]

The forfeiture in *Miller* was directed against certain stock in a Michigan corporation owned by Samuel Miller, a resident of Virginia. The United States alleged in the proceeding against the stock

62. 78 U.S. (11 Wall.) 268 (1871).

63. Act of August 6, 1861, ch. 60, 12 Stat. 319.

64. Act of July 17, 1862, ch. 195, § 2, 12 Stat. 589, 590.

65. *See* § 5, 12 Stat. at 590.

66. *See* § 7, 12 Stat. at 591.

that Miller had fought against the United States in the Civil War and had aided, countenanced, and abetted the Confederacy in that war. The petitioner in *Miller* argued, *inter alia,* that, inasmuch as the criminal provisions of the 1862 Act punish individuals for the offense of giving "aid and comfort to . . . [the] rebellion" by fine or imprisonment, the forfeiture provisions, which are triggered by the very same conduct, must also be deemed punishment. As such, he contended, the use of a civil proceeding to administer such a forfeiture offended several constitutional provisions, including the Due Process Clause.

Significantly, the Court in *Miller* acknowledged that if the purpose of the forfeiture provisions of the 1861 and 1862 Acts was to "punish offenses against the sovereignty of the United States," then "there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments of the Constitution."[67] The constitutional provisions to which the Court was referring included the Due Process Clause, and the Grand Jury Indictment and Jury Trial Clauses of the Sixth Amendment.[68] The Court concluded, however, that the forfeiture provisions of the 1861 and 1862 Acts were "not enacted under the municipal power of the Congress to legislate for the punishment of [the crime of treason]," but were instead a legitimate exercise of "the war powers of the government."[69] For that reason, the Court said, the forfeiture provisions of the Confiscation Acts were not subject to the Due Process Clause and other restrictions imposed by the Fifth and Sixth Amendments to the Constitution.[70]

In dissent, Justice Field, joined by Justice Clifford, expressly adopted the principle which the majority had endorsed only in *dicta* — namely, that the use of civil forfeiture proceedings to punish violations of the criminal law was unconstitutional. Justice Field believed that the Confiscation Acts had made precisely that use of civil forfeiture, because, in his view, its provisions were not directed at "enemies" of the United States, but rather at the property of those guilty of the crime of treason.[71] If the government may confiscate the property of a traitor through an *in rem* forfeiture proceeding, Justice Field observed, then logically it would be able to use such civil proceedings "to confiscate the property of the burglar, the highwayman or the murderer . . . . "[72] This, he said, would

67. *Miller,* 78 U.S. at 304.

68. *See Miller,* 78 U.S. at 304.

69. *Miller,* 78 U.S. at 304-05. The war power, the *Miller* Court noted, included express grants in the Constitution to "declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water." 78 U.S. at 305.

70. *See Miller,* 78 U.S. at 305.

71. *Miller,* 78 U.S. at 319-21 (Field, J., dissenting).

72. *Miller,* 78 U.S. at 323 (Field, J., dissenting).

"work [ ] a complete revolution in our criminal jurisprudence" by establish[ing] the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his property alone, or that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offence be inflicted".[73]

The *Miller* dicta held out the promise that the Court would, at the very least, confine civil forfeiture to its traditional uses in maritime, customs, and war power confiscation matters, and preclude its general use as an alternative to or supplement to criminal prosecution. While that would have been a logical development, and one justified by the special circumstances in those fields of law that led to the expedient of civil forfeiture, it has never come to pass. The Court has never held that the use of civil forfeiture proceedings to enforce a penal law is unconstitutional. And, for the most part, it has declined to extend to any kind of civil forfeiture proceedings the constitutional safeguards in the Bill of Rights that apply to criminal cases.

Fifteen years after the decision in *Miller,* the Supreme Court appeared, for a brief time, to be headed in the direction of applying all of the various constitutional safeguards to civil forfeitures, even those effected for revenue offenses. In *Coffey v. United States,*[74] decided in 1886, the Court held that a judgment of acquittal in a criminal proceeding for violating the internal revenue laws barred the United States from bringing a civil forfeiture proceeding against property of the criminal defendant that was predicated on the same underlying offense. By holding that the acquittal was "conclusive" of issues in the subsequent proceeding, the Court seemed to be employing a *res judicata* analysis.[75] But the Court also cited approvingly to a lower court decision, *United States v. McKee,*[76] which held that a conviction for conspiracy to defraud the government of taxes barred a subsequent civil action for payment of a penalty equal to double the amount of the taxes due.[77] By endorsing the holding in that case, the Court in *Coffey* appeared to be saying that forfeiture

73. *Miller,* 78 U.S. at 323. As Levy notes, Justice Field's fears that *in rem* forfeiture would increasingly be used as a substitute for *in personam* criminal proceedings have been borne out by recent history. P. 57.

74. 116 U.S. 436 (1886).

75. Under the usual collateral estoppel analysis, however, the differing burdens of proof in criminal and civil proceedings would have deprived the acquittal of any preclusive effect in a subsequent civil proceeding.

76. 26 F. Cas. 1116 (C.C.E.D. Mo. 1877) (No. 15,688). The decision in *McKee* was authored by Justice Miller, sitting as Circuit Justice.

77. In his opinion in *McKee,* Justice Miller noted that where the offense and transaction in the two proceedings are the same, "our laws forbid that he or any one else shall be punished for the same crime or misdemeanor." 26 F. Cas. at 1117.

proceedings in the circumstances of its case were "criminal" for purposes of the Double Jeopardy Clause,[78] which represented a more logical, though potentially more sweeping, basis for its decision. For if civil forfeiture in excise cases was "criminal" in this sense, then it would seem that the full panoply of procedural protections in criminal cases should apply to civil forfeiture cases.

One month later, the Court in *Boyd v. United States*[79] took another step in that direction by holding that two constitutional protections applicable to criminal proceedings — the Fourth Amendment prohibition against unreasonable searches and the Fifth Amendment Self-Incrimination Clause — were applicable to civil forfeiture proceedings. This decision, which was all the more significant because it involved a customs forfeiture, rested primarily on several considerations. First, the Court rejected the proposition that an *in rem* forfeiture proceeding "is not, in effect, a proceeding against the owner of the property."[80] As the Court observed, "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal."[81] Under the statute at issue in *Boyd,* the conduct that gave rise to a forfeiture was also a crime; and, in addition, the sanction of forfeiture was available in both a civil *in rem* proceeding and in a criminal prosecution.[82] The Court also believed that, in light of the American Colonists' strong opposition to the writs of assistance issued to customs officers to enforce the English customs regulations, the Fourth Amendment's proscription of unreasonable searches and seizures was clearly intended to apply to such proceedings.[83] As for the Fifth Amendment privilege against self-incrimination, the Court believed that wrongfully obtaining an individual's personal papers for the purpose of using them as evidence against him

78. In his opinion for the Court in *Murphy v. United States,* 272 U.S. 630 (1926), Justice Holmes acknowledged the *Coffey* decision, but held that it was inapplicable to a nuisance abatement proceeding under the National Prohibition Act that was commenced after an acquittal in a criminal proceeding brought under the same Act. The Court concluded that the purpose of the decree, which closed the defendants' building for a year, is "prevention, not a second punishment that could not be inflicted after acquittal from the first." *See Murphy,* 272 U.S. at 632. It added that "[t]his seems to us to be shown by the whole scope of the section as well as by the unreasonableness of interpreting it as intended to accomplish a plainly unconstitutional result." *Murphy,* 272 U.S. at 632.

79. 116 U.S. 616 (1886).

80. *Boyd,* 116 U.S. at 637.

81. *Boyd,* 116 U.S. at 634.

82. *See Boyd,* 116 U.S. at 635.

83. *Boyd,* 116 U.S. at 625, 626-27. The writs of assistance gave customs officers the equivalent of a general search warrant to search for (and seize) smuggled goods and other evidence of customs violations. *See supra* note 22.

is not "substantially different from compelling him to be a witness against himself."[84]

But if the Supreme Court in that era was inclined to extend all of the various criminal protections to civil forfeiture cases because of their quasi-criminal nature, it soon abandoned that plan. In *Origet v. United States,*[85] decided just two years after *Boyd* and *Coffey,* the Court declined to read the same customs statute involved in *Boyd* as requiring forfeitures to be imposed only after a criminal conviction for the customs offense.[86] As such, the Court appeared to take for granted that statutory authorization of customs forfeiture in a civil *in rem* proceeding posed no due process problems. And eight years later, in *United States v. Zucker,*[87] the Court unanimously held that the Confrontation Clause of the Sixth Amendment did not apply to a forfeiture arising out of a customs violation.[88]

2. *The Modern Era*

Modern forfeiture law continues to display the ambivalence of earlier eras. The Fourth Amendment and Fifth Amendment holdings in *Boyd* were reaffirmed in *One 1958 Plymouth Sedan v. Pennsylvania*[89] and *United States v. United States Coin & Currency,*[90] respectively, but the *Coffey* holding has been overruled.[91] In 1993, the Court unanimously held in *Austin v. United States* that civil *in rem* forfeiture under two provisions of the federal drug forfeiture statute is punitive, and hence that the Excessive Fines Clause of the

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84. *Boyd,* 116 U.S. at 633.

85. 125 U.S. 240 (1888).

86. *See Origet,* 125 U.S. at 245-46.

87. 161 U.S. 475 (1896).

88. *See Zucker,* 161 U.S. at 476. The Court distinguished *Boyd* on the grounds that, while the constitutional provisions at issue in *Boyd* applied to criminal "cases," the Sixth Amendment Confrontation Clause applied by its terms to "criminal prosecutions." *See Zucker,* 161 U.S. at 480-81. The Court indicated that civil forfeiture proceedings, though they can be considered criminal cases for purposes of the Constitution, could in no event be regarded as "criminal prosecutions." *See Zucker,* 161 U.S. at 480-81.

89. 380 U.S. 693 (1965).

90. 401 U.S. 715 (1971). The holding in *Plymouth Sedan* emphasized that the "object [of a civil forfeiture proceeding], like a criminal proceeding, is to penalize for the commission of an offense against the law," 380 U.S. at 700; and the Court in *United States Coin & Currency* reiterated the statement in *Boyd* that forfeiture proceedings, although "civil in form, are in their nature criminal for Fifth Amendment purposes." 401 U.S. at 718 (internal quotation marks omitted).

91. The holding in *Coffey* was essentially overruled in *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 361 (1984). And recently, in *United States v. Ursery,* 518 U.S. 267 (1996), the Court held that successive civil forfeitures and criminal prosecutions for drug offenses do not violate double jeopardy. The Court in *Ursery* simply ignored *Coffey* and the decisions that followed it when it suggested that successive civil forfeitures and criminal prosecutions have been permitted since the formation of the Republic. *See Ursery,* 518 U.S. at 274.

Eighth Amendment applies to such forfeitures.[92] But three years later, in an 8-1 decision that is hopelessly at odds with *Austin,* the Court held, *inter alia,* that forfeiture under one of the very same statutory provisions[93] is not "punitive" for purposes of the Double Jeopardy Clause.[94] Thus, the contradictions in the Court's treatment of civil forfeiture, which began in the Nineteenth Century, have only been exacerbated by the decision in *Ursery.*[95]

While a strong case can be made for holding that, as a matter of procedural due process, civil forfeiture proceedings must generally be confined to their traditional uses in the maritime, customs, and wartime confiscation fields, and that, as a general rule, forfeiture proceedings outside those areas must be criminal in form, the Supreme Court today shows no signs that it is prepared to resolve the contradictions in its forfeiture decisions by adopting such a rule. The Court has, however, at least recognized in a recent case that procedures applicable to customs and excise tax violations do not necessarily pass muster under the Due Process Clause when utilized in other forfeiture contexts. Thus, in *United States v. James Daniel Good Real Property,*[96] the Court held that the seizure of real property before obtaining a judgment in a forfeiture proceeding — and without affording the owner prior notice and an opportunity to be

92. *See* Austin v. United States, 509 U.S. 602, 622 (1993).

93. 21 U.S.C. § 881(a)(7) (1994) (providing for forfeiture of real property that "is used or intended to be used . . . to facilitate the commission of" a drug offense).

94. *See Ursery,* 518 U.S. at 290. Chief Justice Rehnquist's opinion for the Court rests on the curious proposition that a forfeiture may or may not be punitive in nature and effect, depending on which provision of the Bill of Rights is at issue. *See Ursery,* 518 U.S. at 287.

95. The contradictions in the Court's recent forfeiture jurisprudence have also been manifested by conflicting interpretations it has given to prior case law. In *Austin,* the Court read a series of forfeiture decisions as having been predicated on "the notion that the owner ha[d] been negligent in allowing his property to be misused." *Austin,* 509 U.S. at 615. In *Bennis v. Michigan,* 516 U.S. 442 (1996), the Court read those very same cases as having permitted forfeiture without regard to owner fault. *See Bennis,* 516 U.S. at 447-50. (See *infra* notes 103-08 and accompanying text for a discussion of the holding in *Bennis.*) The Court's recent forfeiture decisions also reveal starkly conflicting views regarding whether the atavistic "guilty property" fiction has any role in modern constitutional adjudication. The fiction was all but abandoned in *Austin,* but the Court once again invoked it in *Bennis* and in *Ursery,* in rejecting the constitutional claims in those cases. *See Bennis,* 516 U.S. at 447; *Ursery,* 518 U.S. at 275 (majority opinion); 518 U.S. at 315 (Stevens, J., concurring in part in the judgment and dissenting in part). As this review was going to press, the Supreme Court decided a very important forfeiture case, United States v. Bajakjian, No. 96-1487, 1998 U.S. LEXIS 4172 (Supreme Court, June 22, 1998). In an opinion authored by Justice Thomas, the Court in *Bajakajian* held that a criminal forfeiture of cash under a currency reporting statute violated the Excessive Fines Clause of the Eighth Amendment. See *Bajakajian,* 1998 U.S. LEXIS 4172, at *42. Justice Thomas's opinion aptly distinguishes traditional *in rem* customs forfeitures from both the criminal forfeiture at issue in *Bajakajian,* see *Bajakajian,* 1998 U.S. LEXIS 4172 at *20-22, *35-36, and from certain other modern *in rem* forfeitures, see *Bajakajian,* 1998 U.S. LEXIS 4172 at *17 n.4, *21 n.6. But the Court's use of the "remedial" and "punitive" dichotomy in drawing that distinction is not very reassuring in light of its failure to apply those concepts consistently in its *Ursery* and *Austin* decisions.

96. 510 U.S. 43 (1993).

heard — violated due process,[97] even though (as the Court acknowledged) its precedents permitted the government to make such seizures in, *inter alia,* revenue cases.[98]

The kind of incremental approach to fashioning constitutional protections for civil forfeiture cases exhibited by *James Daniel Good Real Property* is probably the best we can hope for from the Supreme Court.[99] Yet even this more modest approach can also benefit from the recognition that *in rem* civil forfeiture has historically been narrowly limited in its scope to revenue, maritime, and war powers matters. Because of that traditional limitation, procedures that qualify as "due process" in those kinds of forfeiture proceedings need not automatically be deemed constitutional in other civil forfeiture settings. And due process precedents involving revenue, maritime, and war powers forfeitures should not be regarded as controlling in cases involving modern, nontraditional uses of civil forfeiture. Recognition of the traditional scope of civil forfeiture then should, at the very least, afford the Court greater latitude to devise new due process protections for the newer applications of civil forfeiture.[100] In the next section of this review, I will propose the adoption of one particular due process protection in civil forfeiture cases that is absolutely basic to our system of justice.

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97. Similarly, Justice Kennedy's separate dissent in *Bennis,* 516 U.S. at 473, recognized that the rationale of those admiralty forfeiture cases that made no provision for innocent owners did not necessarily apply to forfeitures arising in other contexts. *See* 516 U.S. at 472-73 (Kennedy, J., dissenting).

98. *See James Daniel Good Real Property,* 510 U.S. at 60; *see supra* note 59. In his partial dissent, Justice Thomas recognized that contemporary civil forfeiture under the drug forfeiture statute, 21 U.S.C. § 881, "differs . . . in kind . . . from its historical antecedents" and has "all but detached [itself] from the ancient notion of civil forfeiture," *James Daniel Good Real Property,* 510 U.S. at 82, 85 (Thomas, J., concurring in part and dissenting in part). But since Justice Thomas disagreed with the majority's basis for distinguishing the revenue cases, he may not have been making the point that modern civil forfeiture has been detached from its moorings in revenue and admiralty cases.

99. Indeed, extending the holding in *James Daniel Good Real Property* to other types of property — such as cash and automobiles — would prevent some of the most serious abuses of civil forfeiture. *See supra* note 9.

100. That recognition might have led to a different result in *Bennis,* which rejected, *inter alia,* a due process-based protection for innocent owners. *See Bennis,* 516 U.S. 453. With the exception of *Van Oster v. Kansas,* 272 U.S. 465 (1926), all of the cases relied upon by the *Bennis* majority, including *J.W. Goldsmith-Jr. Grant Co. v. United States,* 254 U.S. 505 (1921), were admiralty or revenue cases. *Goldsmith-Jr. Grant Co.* was decided during the Prohibition era, but the forfeiture in that case actually predated national Prohibition and was effected under provisions of the excise tax law, rather than the forfeiture provisions of the Volstead Act. *See supra* note 50.

II. A More Modest Proposal: Recognition of a Constitutional Protection for Innocent Owners Derived from Our Long Tradition of Substantive Due Process Restrictions Against Arbitrary Deprivations of Property

In this section of the review, I will propose an incremental constitutional change to forfeiture that Levy and others regard as fundamental — namely, a protection for innocent owners. Levy argues compellingly that "[t]he worst feature of forfeiture . . . is its failure to provide adequately for the rights of innocent people" (p. 161). He suggests, without much elaboration, that the "old substantive due process" doctrine (p. 87) would prevent government from forfeiting a blameless person's property, and condemns the Court for "abdicat[ing its] responsibility of judicial review in such cases . . . ."[101]

A due process-based protection for innocent owners should require that the government prove owner culpability at least amounting to negligence[102] in the forfeiture proceedings, or (at the very least) it should afford the owner an affirmative defense based on lack of such culpability. Using Levy's comments as a point of departure, I will attempt to show how such a protection can be derived from substantive due process principles that are deeply imbedded in our nation's jurisprudence. I will first trace the development of the substantive component of due process doctrine from its pre-Civil War origins in the Nineteenth Century, and show how the protection against arbitrary takings of private property by government was central to the doctrine. I will then suggest that the values that animated the development of substantive due process remain very much alive today, and that a straightforward application of the doctrine would yield an innocent owner protection in civil forfeiture cases.

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101. P. 88. An innocent owner or co-owner may be victimized if, after entrusting property to somebody else or otherwise permitting him or her to use it, that person, without the owner's prior knowledge or consent, then proceeds to use it to facilitate the commission of an offense. The same may happen when a person receives a gift of property without knowledge that the prior owner has engaged in acts that (under the so-called relation-back doctrine) make it forfeitable as of the time of the commission of those acts.

102. In cases where one owner's property was misused by another, negligence in entrusting property would, by analogy to the common law tort of negligent entrustment, require that the owner know or should have known of an impending misuse before a forfeiture could be effected. *See* Restatement (Second) of Torts § 308 (1965). Similarly, in the case of property forfeitable on the basis of acts of a former owner, the minimum level of culpability would be actual or constructive knowledge of the acts of the former owner that rendered it subject to forfeiture, including the former owner's use of money derived from unlawful activities to purchase the property. *See* Grosfield v. United States, 276 U.S. 494, 499 (1927) (upholding equitable decree ordering temporary closure of lessors' building, based on lessee's perpetration of statutory nuisance, but implying that decree would have been reversed if lessors had not "kn[own] of the tenant's violation of law" prior to bringing of suit).

A recent and widely publicized Supreme Court decision, *Bennis v. Michigan,*[103] came to a different conclusion regarding the existence of a constitutional protection for innocent owners. In *Bennis,* the Court upheld, by a slim 5-to-4 majority, the forfeiture of a wife's interest in a family automobile on the basis that her husband had used it for a liaison with a prostitute. Mrs. Bennis had argued that, under the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment Takings Clause (as incorporated against the States by the Fourteenth Amendment), the forfeiture of her property interest[104] was unconstitutional because she neither knew nor should have known that her husband would use the automobile in that fashion.[105] She argued that her interest in the car could not be touched by the state and, therefore, that she was entitled to compensation for it.[106] The Court rejected her Due Process and Takings claims, citing what it characterized as a "longstanding practice" permitting such forfeitures.[107]

This section of my review will not directly critique the *Bennis* decision, and will not simply replicate arguments made in the briefs in that case or in Justice Stevens's powerful dissent. Instead, it will focus more broadly on the deep roots of substantive due process doctrine in our jurisprudence and the component of that doctrine that protects against arbitrary deprivations of private property. Contrary to the Court's intimations in *Bennis,* I will conclude that

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103. 516 U.S. 442 (1996).

104. Her interest in the automobile was likened to that of a co-tenant in a tenancy in common. *See* Transcript of Oral Argument at 4, 6, Bennis v. Michigan, 516 U.S. 442 (1996) (94-8729). If this had been a private proceeding to enforce a judgment against Mrs. Bennis's husband, it is clear that her interest would have been protected. For it is hornbook law that a judgment creditor with a judgment against one co-tenant of joint property is only entitled to satisfy the judgment out of the judgment debtor's interest in the property. *See, e.g.,* 30 AM. JUR. 2D *Executions and Enforcement of Judgments* §§ 171-172 (1994).

105. In addition to urging the Court to adopt a standard of culpability based on whether the owner knew or should have known that somebody to whom she entrusted property would use it illegally, *see* Brief for Petitioner at 25, Bennis v. Michigan, 516 U.S. 442 (1996) (No. 94-8729), Mrs. Bennis also argued that, while she would prevail even if she had the burden of proof as to this issue, both the Due Process and Takings Clauses required that the burden of proof with respect to that standard of culpability properly rested with the State. *See* Brief for Petitioner at 37-45, Bennis v. Michigan (No. 94-8729). While the issue of who should bear the burden of proof with respect to the guilt or innocence of the owner is critical, it is beyond the scope of this review.

106. The order granting forfeiture in *Bennis* directs the proceeds to be used to pay "the filing fee of this action," "attorney costs," and "all police costs," with "any remaining balance . . . [to] be paid to the general treasury of the State of Michigan." Joint Appendix at 28, Bennis v. Michigan, 516 U.S. 442 (1996) (No. 94-8729). Mrs. Bennis argued that, whether for the purpose of paying the law enforcement costs of the forfeiture proceeding or adding to the State treasury, forfeiture of her interest, without payment of compensation to her by the State, was unconstitutional. *See* Brief for Petitioner at 31-32, Bennis v. Michigan, 516 U.S. 442 (No. 94-8729); *see also* Transcript of Oral Argument at 7, 15, Bennis v. Michigan, 516 U.S. 442 (No. 94-8729).

107. 516 U.S. at 453. *But see supra* note 100.

there are "longstanding" principles of due process that would have precluded the forfeiture of an innocent owner's property.[108]

A. *A Constitutional Protection for Innocent Owners Resists Easy Classification Under Either the "Procedural" or "Substantive" Strands of Due Process Doctrine*

Before embarking on my discussion of the history of "substantive" due process, it is worth digressing for a moment about the "procedural" and "substantive" dichotomy in due process analysis, because a claimed protection for innocent owners in forfeiture cases resists such easy classification. Modern constitutional analysis generally distinguishes between "substantive" or "procedural" due process in claims brought under either the Fifth Amendment or Fourteenth Amendment Due Process Clauses. "Procedural" due process is said to impose "constitutional limits on judicial, executive, and administrative *enforcement* of legislative or other governmental dictates or decisions," while "substantive due process" imposes limits "on the *content* of legislative action."[109] While it is certainly useful conceptually, this dichotomy, like the "substance"

108. Space limitations preclude any extensive consideration of the Takings Clause of the Fifth Amendment as a potential constitutional source for a rule that protects blameless owners from forfeiture. The purpose of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," Armstrong v. United States, 364 U.S. 40, 49 (1960). In *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 689-90 (1974), the Court, citing, *inter alia,* to the *Armstrong* principle, declared that it "would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." In *Bennis,* 516 U.S. at 449-50, the Court repudiated the *Calero-Toledo dictum* without explaining why it no longer believed, as it did in 1974, that the *Armstrong* principle would bar a forfeiture of the property of an innocent person. The *Bennis* Court quickly disposed of Tina Bennis's takings claim by stating in so many words that, if the forfeiture passes muster under the Due Process Clause, it must necessarily pass muster under the Takings Clause. *See Bennis,* 516 U.S. at 452-53. But the Court's premise that the Takings Clause is coextensive in scope with the Due Process Clause relies on a string cite to two utterly inapposite cases; and, moreover, runs completely counter to the Court's recent regulatory takings jurisprudence, which has emphasized the status of the Takings Clause as an independent restraint on state power in the Constitution. *See* Nollan v. California Coastal Commn., 483 U.S. 825, 835 n.3 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 n.14 (1992). Also relevant to a takings analysis is the Court's holding in *Lucas* that the use of "confiscatory regulations" that exceed either common law limits on the power of the state to abate public nuisances, or the power to destroy real and personal property in cases of actual necessity involving grave threats to the lives and property of others, *see supra* note 45, will give rise to a compensable taking. If a forfeiture under a nuisance-abatement statute of the kind involved in *Bennis* does not fall within those two traditional powers, then there is a powerful argument that the forfeiture should be treated as a compensable taking under *Lucas,* at least with respect to an innocent owner or co-owner. *See supra* note 44; *see also* Grosfield v. United States, 276 U.S. 494, 499 (1927) (implying that statutory nuisance-abatement action requires proof of owner's knowledge of nuisance committed by another, despite absence of such a requirement in the statute).

109. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 & n.4 (2d ed. 1988).

and "procedure" dichotomy used in other areas of the law,[110] has its limitations. Given the multifarious nature of legal rules and other governmental action that may effect a deprivation of "life, liberty, or property," whether a particular due process claim falls into one category or the other is not always clear,[111] and may even be a function of how the issue is framed.[112]

A claimed protection for innocent owners in forfeiture cases that is grounded in the Due Process Clause avoids easy classification, especially if one believes, on procedural due process grounds, that civil forfeiture outside the maritime, customs, and war power fields is illegitimate, and that any such forfeitures should be administered in criminal proceedings only.[113] For if criminal proceedings were used to effect a forfeiture, the government would almost always be charging a property owner with some criminal offense as the basis for the forfeiture, in which case the issue of whether an innocent owner's property may be forfeited would not arise.[114] But if the issue is framed simply as whether a particular forfeiture stat-

110. For example, the conceptual difficulties experienced by courts in applying the procedural/substantive distinction of *Erie Railroad Co. v. Tomkins,* 304 U.S. 64 (1938), are well known.

111. An example of a due process issue that defies easy classification is whether the state may shift the burden of proof regarding a traditional element of a crime. *See, e.g.,* Mullaney v. Wilbur, 421 U.S. 684, 685-86, 704-05 (1975) (holding that state had to bear the burden of proof as to element of malice in homicide prosecution).

112. Substance and procedure are interrelated anyway, inasmuch as the purpose of a particular procedural protection accorded to a party in an adjudicatory proceeding is usually to advance a substantive goal. Very often, that purpose is to eliminate, as much as possible, the risk of erroneous findings of culpability or liability in a judicial or administrative proceeding. *See* Ake v. Oklahoma, 470 U.S. 68, 78 (1986) (alluding to the "host of [procedural] safeguards" that "diminish the risk of erroneous conviction"). Thus, the very existence of a particular procedural protection that has been held applicable to a particular set of cases — say, the due process requirement that the state prove guilt in a criminal case beyond a reasonable doubt — may imply the existence of certain substantive due process rights, such as the right of a person the government knows or believes to be innocent not to be subjected to punishment.

113. *See supra* notes 53-59 and accompanying text.

114. To be sure, one can imagine a criminal forfeiture statute that targets owners who entrust their property to other persons, who in turn use the property to facilitate an offense. But one would expect such a statute to assume the form of a typical accessory liability statute, which would require as an element of the offense some complicity in the offense giving rise to the forfeiture. Otherwise, the statute would be imposing a kind of vicarious criminal liability, which was unknown at common law here, and today is almost unheard of in our statutory criminal law, except with respect to the special case of corporations, which can be held liable for the acts of their agents. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 251-52, 254-58 (2d ed. 1986). In his classic article on vicarious criminal liability, Professor Sayre observed that "[v]icarious liability is a conception repugnant to every instinct of the criminal jurist." Francis B. Sayre, *Criminal Responsibility for the Acts of Another,* 43 HARV. L. REV. 689, 702 (1930). Of course, the civil forfeiture of an innocent owner's property on the basis of acts of another person itself imposes a kind of vicarious punitive liability on the owner. And since the owner in a civil proceeding has far fewer procedural protections than he would in a criminal proceeding, the imposition of vicarious punitive liability in the context of a civil forfeiture is to that extent even more objectionable than its use in a criminal proceeding would be.

ute must include owner culpability as one of the elements giving rise to a forfeiture, the claim would appear to be substantive in nature. On the other hand, if the issue is framed as whether the owner should be afforded a procedure for asserting an innocent-owner defense in a forfeiture proceeding (or whether the government should have to prove fault), the claim begins to sound more like a procedural due process claim. Other variations in formulating the issue lead to further enigmas of classification. For example, in a case like *Bennis* involving jointly owned property, the issue could be framed narrowly as whether the forfeiture, *without compensation,* of an innocent co-owner's interest in property, on the basis of a co-owner's misuse of it, violated due process. Under that formulation, the proper classification of the due process claim would depend on whether the requirement to pay compensation for certain property deprivations is best regarded as a procedural or substantive limitation on governmental power.

B. *The Doctrine of Substantive Due Process — Including the Principle that Government May Not Engage in Arbitrary Takings of Property — Has Deep Roots in Our Jurisprudence*

Regardless of how a constitutional protection of this kind should be characterized, the notion that due process should protect private property from arbitrary confiscation by government has deep roots in our constitutional and social history that continue to this day.[115] Statements evincing the need to protect private property from arbitrary takings began appearing in Supreme Court opinions very soon after the Court was formed. In its 1798 decision in *Calder v. Bull,*[116] the Supreme Court held that a special act of the Connecticut legislature that retroactively granted a new trial in a probate case did not violate the Ex Post Facto Clause of the Constitution. While upholding the law, Justice Samuel Chase's opinion for the Court included this famous quotation regarding the limits of the authority of state legislatures:

> An Act of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a

115. For much of the discussion of Nineteenth-Century case law that follows, I have relied heavily on Professor Edward Corwin's superb but somewhat forgotten 1948 book, *Liberty Against Government.* That book traces the history of substantive due process from its Roman and English origins to its early development in the period preceding and following the Civil War, where it operated as a bar to arbitrary deprivation of private property, and then to its significant expansion in the so-called *Lochner* era of Supreme Court jurisprudence, from 1905 to 1937, where it operated primarily as a restraint on regulation that was said to impair the liberty of contract of employers. The *Lochner*-era jurisprudence, with its expansive notions of the "liberty" protected by the Due Process Clause, has, of course, long been discredited. But the idea that due process protects against arbitrary deprivations of "property" is, as I will show in this review, an enduring one in our constitutional tradition.

116. 3 U.S. (3 Dall.) 386 (1798).

> *rightful exercise* of *legislative* authority. . . . A law that punished a citizen for an *innocent* action . . . a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes *a man a Judge in his own cause*; or a law that takes *property* from A. and gives it to B: It is against all reason and justice, for a people to entrust a legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. . . . [T]he *general principles of law and reason* forbid them. The Legislature . . . cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right . . . *of private property*.[117]

The principle that the state could not "take[ ] *property* from A. and give[ ] it to B" or "punish[ ] . . . an *innocent* action" became, with some additional elaborations, important to the meaning given to the Fifth Amendment Due Process Clause and analogous provisions in state constitutions in the period preceding the Civil War, and thereafter to the Fourteenth Amendment Due Process Clause. Under an interpretation of the Due Process Clause that came to be embraced in varying degrees by members of the bar, judges, and the general public, the "due" — or "just" — process required to deprive a person of property had to be judicial in nature. Moreover, in order to qualify as "due" process, the judicial proceeding had to be one that both observed traditional judicial procedures *and* applied accepted general principles of the criminal and civil law for divesting a person of his property. A caveat to this requirement was that states could seize private property for a public purpose, but they had to pay just compensation to the affected property owner.[118]

Several state court decisions applying the "law of the land" clauses in their state constitutions, which were a counterpart to the federal Due Process Clause, helped foster this interpretation of due process in the early Nineteenth Century.[119] In 1804, in *University of North Carolina v. Foy,*[120] the North Carolina Supreme Court declared legislation that repealed an earlier grant of lands to the University void under the "law of the land" clause of the state

117. 3 U.S. (3 Dall.) at 388.

118. *See generally* CORWIN, *supra* note 115, at 80 (discussing Chancellor Kent's famous and influential *Commentaries on American Law*).

119. The "law of the land" clauses in the early state constitutions were usually taken almost verbatim from chapter 29 of the Magna Carta of 1225, which provided that "[n]o free man shall be taken or imprisoned or deprived of his freehold or of his liberties or free customs, or outlawed, or exiled, or in any manner destroyed, nor shall we go upon him, nor shall we send upon him, except by a legal judgment of his peers or by the law of the land." *See* CORWIN, *supra* note 115, at 23-24, 90-91; A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968). The phrase "due process of law" is drawn from 28 Edw. III, ch. 3 (1355) (Eng.). *See* CORWIN, *supra* note 115, at 91. The famous English jurist, Sir Edward Coke, maintained that the two phrases were synonymous, and they have generally been understood that way in our jurisprudence. *See id.* at 91.

120. 5 N.C. (1 Murph.) 58 (1805).

constitution. The court stated that such a property deprivation could not occur "until the judiciary of the country in the usual and common form pronounce [the trustees of the University] guilty of such acts as will in law amount to a forfeiture of their rights."[121]

In an 1843 New York case, *Taylor v. Porter,*[122] the court, following *Hoke v. Henderson,*[123] held that the "law of the land" clause in the New York Constitution meant that "before a man can be deprived of his property, 'it must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses.'"[124]

The U.S. Supreme Court offered a consistent, if somewhat more abstract, construction of a state law of the land clause in an 1819 case in which the Court was asked, *inter alia,* to determine whether the Maryland Constitution[125] was violated by a statute which provided banks with a summary remedy for the collection of notes payable to them.[126] The Court rejected the claim because, in its view, the maker of the note had contractually relinquished his rights to the "ordinary administration of justice."[127] But the Court went out of its way to explain the meaning of the law of the land clause in a way that suggested it contained a substantive limitation on state power:

> As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.[128]

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121. 5 N.C. (1 Murph.) at 89. The doctrine embraced in *Foy* was reaffirmed in an 1833 North Carolina case, *Hoke v. Henderson,* 15 N.C. (4 Dev.) 1 (1833). *See* CORWIN, *supra* note 115, at 94. In *Hoke,* the court held that

> in reference to the infliction of punishment and divesting of the rights of property, it has been repeatedly held in this State, and it is believed, in every other of the Union, that there are limitations upon the legislative power . . . and that the [law of the land] clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of rights, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes.

Hoke, 15 N.C. (4 Dev.) at 15-16.

122. 4 Hill (N.Y.) 1401 (1843).

123. 15 N.C. (4 Dev.) 1 (1833).

124. CORWIN, *supra* note 115, at 98 (citation omitted).

125. The "law of the land" provision in the Maryland Constitution provided that "[n]o freeman ought to be taken or imprisoned, etc., or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 241 (1819).

126. *See Okely,* 17 U.S. at 235.

127. 17 U.S. at 243.

128. 17 U.S. at 244. The quotation in *Okely* equates an "arbitrary exercise" of the government's powers with an action that contravenes "established principles" of "distributive

The 1856 New York case of *Wynehamer v. State of New York*[129] occupies an extremely prominent place in the development of due process restrictions against the arbitrary taking of property by the government. In that case, the State of New York enacted a prohibition statute which

> forbade all owners of intoxicating liquors to sell them under any conditions save for medicinal purposes, forbade them further to store such liquors when not designed for sale in any place but a dwelling house, made the violation of these prohibitions a misdemeanor, and denounced the offending liquors as nuisances and ordained their destruction by summary process.[130]

In a 7-to-2 decision, the Court held, *inter alia,* that, in its application to liquor owned and possessed prior to the enactment of the law, the New York intemperance law deprived persons of property without due process of law.[131]

The various opinions in *Wynehamer* made clear that a judicial process that followed the customary procedures was not necessarily enough to constitute "due process." For if the deprivation of property was based on "no offense, except the misfortune of being [an] owner,"[132] the use of "a process and tribunal"[133] would not avoid a violation of due process.[134]

The *Wynehamer* decision was regarded as "epoch-making"[135] very soon after it was announced, and received what Professor Corwin described as a "resounding"[136] endorsement a year later in Chief Justice Taney's opinion in *Dred Scott v. Sandford.*[137] In de-

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justice." Distributive justice is a philosophic concept of Aristotelian origin which refers to the rules by which "a society . . . should allocate its scare resources or products among [the] individuals . . ." who comprise it. *See* JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 1 (1996). A number of theories of distributive justice have been propounded in recent years, including Rawlsian theory and neo-Lockean theories of the kind advanced by Robert Nozick in *Anarchy, State, and Utopia. See* ROEMER, *supra,* at 172-82; 205-07. By "established principles" of distributive justice, the Court in *Okely* presumably meant the prevailing common law rules regarding the acquisition and transfer of property by private persons, and its divestiture through the operation of recognized tort and criminal law rules. As such, an "arbitrary exercise of [governmental] power" would have been any action of government that contravened those prevailing rules.

129. 13 N.Y. 378 (1856).

130. CORWIN, *supra* note 115, at 101.

131. *See* CORWIN, *supra* note 115, at 102 (describing holding of *Wynehamer*); MOTT, *supra* note 41, at 317 (same).

132. *Wynehamer,* 13 N.Y. at 404.

133. *Wynehamer,* 13 N.Y. at 393.

134. *See Wynehamer,* 13 N.Y. at 420 ("To provide for a trial to ascertain whether a man is in the enjoyment of [life, liberty, or property], and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the [Due Process Clause] to a nullity") (Johnson, J., concurring).

135. MOTT, *supra* note 41, at 318.

136. CORWIN, *supra* note 115, at 110.

137. 60 U.S. (19 How.) 393 (1857).

claring the Missouri Compromise void, Justice Taney relied, *inter alia,* on the assertion that the law violated the due process rights of slaveowners. As he wrote,

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.[138]

Despite some recent suggestions to the contrary by Justice Scalia,[139] the *Dred Scott* case was not the first time the Supreme Court (or one or more of its justices) had invoked substantive due process. In *Bloomer v. McQuewan,*[140] the Court interpreted an 1845 act of Congress which extended the life of patents by seven years, from 1849 to 1856, so as to avoid a construction which would have entailed a violation of substantive due process. The issue was whether the Act of 1845 protected the licensee under a patent for a machine (by extending the license during the period of extension), or was solely for the benefit of the owner of the patent. In interpreting the Act of 1845 so as to protect the licensees, the Court said that any contrary construction, by depriving them of their right to use the patented machines, "certainly could not be regarded as due process of law."[141]

The Court's landmark 1870 decision in *Hepburn v. Griswold,*[142] which held the Civil War "Greenback" legislation unconstitutional, also made use of substantive due process. Under that legislation, Congress authorized for the first time the issuance of paper currency not backed by specie, and declared it to be legal tender for all debts public and private. Those notes depreciated in value after their issuance and thus were worth less in gold coin than their face value.[143] In *Hepburn,* the petitioner, Mrs. Hepburn, made a promissory note to Griswold prior to passage of the Legal Tender Act, and tendered the amount owed in paper notes (rather than gold coin) in satisfaction of the debt to Griswold, who refused the tender. On a 4-to-3 vote, the Supreme Court held the Legal Tender

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138. 60 U.S. (19 How.) at 450. In his strong dissent, Justice Curtis took issue with Chief Justice Taney's reliance on the Due Process Clause, but significantly did not reject the proposition that the Clause contains a substantive protection against arbitrary takings of property. *See Dred Scott,* 60 U.S. (19 How.) at 624-27.

139. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 143 n.23 ("As far as I am aware, *Dred Scott* was the first and only pre-Fourteenth Amendment decision of the Supreme Court to employ substantive due process . . . .").

140. 55 U.S. (14 How.) 539 (1852).

141. 55 U.S. at 553; *see also* Bank of Columbia v. Okely, 17 U.S. (4 Wheat) 235 (1819), discussed *supra,* notes 125-28 and accompanying text.

142. 75 U.S. (8 Wall.) 603 (1870).

143. By July 1864, only two years after their issuance, a dollar in paper currency was worth only thirty-five cents in gold coin. *See Hepburn,* 75 U.S. at 608.

Act unconstitutional, insofar as it mandated acceptance of the paper currency as legal tender for all pre-existing debts, in part because it violated the Fifth Amendment proscription against depriving a person of property "without due process of law."[144]

According to Professor Corwin, by the time *Hepburn* was decided in January 1870, "the crucial ruling in Wynehamer v. The People was far on the way to being assimilated into the accepted constitutional law of the country."[145] Not only judges, but also lawyers, scholars, legislators, and even some members of the general public[146] were using due process in the substantive sense. Thus, the brief of the respondent in the *Hepburn* case, which was filed on January 2, 1867, argued that:

> The [Greenback] act does not consist with either the spirit or letter of the Constitution, which provides that no person shall be deprived of property except by due process of law . . . . To compel us to take payment in treasury notes, worth at present only about two thirds of their nominal value, is to deprive us in this instance of nearly half of our property; and, not being done by process of law, is clearly in violation of the Constitution.[147]

And in 1866, Congressman John Bingham, the Ohio legislator who is credited by all commentators with drafting Sections One and Five of the Fourteenth Amendment,[148] when asked whether his draft of the Amendment was directed solely to the protection of American citizens of African descent, responded:

> I should say that it is proposed as well to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of

144. *Hepburn*, 75 U.S. at 624-25. The Court likened the Act to a hypothetical act that would "compel[ ] all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms." 75 U.S. at 625. The Court added, "It is difficult to conceive what act would take private property without process of law if such an act would not." 75 U.S. at 625. The composition of the Court changed shortly after the *Hepburn* decision, and it was overruled approximately a year later, in *Knox v. Lee*, 79 U.S. (12 Wall.) 457 (1870), in an opinion that essentially sidestepped the due process issue.

145. CORWIN, *supra* note 115, at 114. Indeed, some three years later, in *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1873), the first Supreme Court case that dealt primarily with the Due Process Clause of the Fourteenth Amendment, the Court cited approvingly to *Wynehamer*, and stated that a "grave" due process question would be presented by a prohibition statute that prevented the sale of pre-existing stocks of liquor, *see* 85 U.S. at 133 — which meant, of course, that any statute that authorized the destruction of such stocks would also be suspect. *See supra* note 41.

146. For the view that much of the substantive development of due process was inspired by extra-judicial sources, see HOWARD JAY GRAHAM, *Procedure to Substance: Extrajudicial Rise of Due Process, 1830-1860, in* EVERYMAN'S CONSTITUTION 242, 243-62 (1968).

147. Brief for Defendant in Error at 24, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870) (No. 241).

148. *See* Paul R. Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462, 481 (1982).

> the United States whose property, by State legislation, has been wrested from them under confiscation . . . .[149]

Congressman Bingham was referring to the state-level versions of the Sequestration Act passed by the Confederate Congress in August 1861 and used to confiscate property of alien enemies residing in the Confederate States.[150] He, too, was clearly using due process in its substantive sense — as a principle to protect property from arbitrary deprivation.[151] Finally, in 1868, Thomas M. Cooley published his *Constitutional Limitations,* which Professor Corwin described as "the most influential treatise ever published on American constitutional law."[152] Chapter XI of that treatise, which was entitled "of The Protection to Property by 'The Law of the Land,'" contained a systematic treatment of "the outstanding results of constitutional interpretation [of law of the land or due process clauses] in State cases prior to the Civil War."[153]

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149. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (quoted in HOWARD JAY GRAHAM, *The "Conspiracy Theory" of the Fourteenth Amendment: Part I, in* EVERYMAN'S CONSTITUTION 48 (1968)). In an 1857 speech, Congressman Bingham suggested that extending slavery to the new territories would be unconstitutional because the protections for "property" in the Fifth Amendment Due Process Clause "contemplate[d] that no man shall be wrongfully deprived of the fruit of his toil." *See* CONG. GLOBE, 34th Cong. 3d Sess., app. at 140 (1857).

150. *See* GRAHAM, *supra* note 149, at 52. The Sequestration Act passed by the Confederate Congress is reprinted in pertinent part in EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICAN DURING THE GREAT REBELLION 203-4 (2d ed. 1865). The Act called for the seizure of "*all* property belonging to alien enemies still residing in the Confederate States as of May 21, 1861." 1 ENCYCLOPEDIA OF THE CONFEDERACY 388 (R.N. Current ed., 1993). The state-level versions of the Sequestration Act were used to "seize everything from tobacco and cotton to pianos, city property, and ship cargo," *id.* at 389; and Virginia's act reportedly led to the confiscation of $500,000 from Union "enemies" residing in the city of Richmond, *id.*

151. *See also* GRAHAM, supra note 149, at 53 (citing three major speeches of Congressman Bingham in the 1850s that revealed his view of due process as "a limitation upon the substance of legislation"). Abolitionists had also been using due process in the substantive sense at least as early as 1837, usually in connection with the protections for "liberty" in the Clause. *See, e.g.,* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, 266 (1977). The Republican Party Platforms of 1856 and 1860 each invoked the protection from deprivations of "liberty" in the Fifth Amendment Due Process Clause as a basis for asserting that Congress had no power to "give legal existence to slavery in any territory of the United States." *See* CORWIN, *supra* note 115, at 114 (quoting from platform); *see also* 1 NATIONAL PARTY PLATFORMS 27, 32 (Donald B. Johnson, ed., 1978). Antislavery and proslavery advocates alike agreed that the Fifth Amendment Due Process Clause afforded persons substantive protections of life, liberty, and property, but disagreed as to whether slaves were "persons" or "property" within the meaning of the Clause. *See* JACOBUS TENBROEK, EQUAL UNDER LAW 122 (new enlarged ed., Collier Books 1965) (originally published as THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (Univ. of Calif. Press, 1951)).

152. CORWIN, *supra* note 115, at 116.

153. *Id.* at 116-17. *See generally* THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS (1868 ed.).

C. *Substantive Due Process Principles Require the Adoption of an Innocent Owner Protection in Civil Forfeiture Cases*

For those who subscribe to a theory of constitutional interpretation based on original meaning or original intent, the view that the Fourteenth Amendment Due Process Clause had a widely accepted substantive meaning when it was ratified in 1868 must be taken seriously.[154] But even for those who are not strict "originalists," the principle that due process protects citizens from arbitrary takings of property continued to be recognized thereafter,[155] and it remains a

154. Justice Scalia, who is a self-professed "originalist" in constitutional interpretation, *see* SCALIA, *supra* note 139, at 38, has been strongly critical of the doctrine of substantive due process. *See, e.g., id.* at 143 n.23. But in light of the conclusions of Professor Corwin and other evidence relating to how the concept of due process was actually being used near the time of the adoption of the Fourteenth Amendment, his certainty that the original meaning of the Fourteenth Amendment Due Process Clause did not include a substantive component seems completely unwarranted. *See id.* ("[Of course I do not believe] that 'due process' meant 'due substance' when the Fourteenth Amendment was adopted."). In addition, Justice Scalia's suggestion that any understanding of due process which included a substantive component would necessarily have been an "oxymoron," *see* United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment), presupposes that the reference to "process" in the Clause is (or was) entirely synonymous with "procedure." But the two words are not synonymous, at least in contemporary usage, and it seems an entirely reasonable use of language to say of a due or "just" judicial "process" that it must satisfy substantive as well as procedural criteria. Indeed, a respected commentator once observed:

> More than any other single clause of the Constitution, [the Due Process Clause] seems *on its face* to guarantee, so far as any such provision can, both universal and personal justice. No doubt the principal reasons are that one synonym of 'due process' is 'just' process, and one popular connotation of 'law' is 'right and equity.' The . . . substantive element thus is inherent in the terms.

GRAHAM, *supra* note 146, at 249. Justice Thomas appears to have been using the term "process" in the Due Process Clause to refer to a substantive rather than a procedural legal rule when he suggested in *Bennis* that the "forfeiture of property without proof of the owner's wrongdoing" satisfies the requirements of due process because it represents "a process of law that can show the sanction of settled usage both in England and in this country." Bennis v. Michigan, 516 U.S. 442, 454-55 (1996) (Thomas, J., concurring).

155. In Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897), the Supreme Court engaged in an extensive historical discussion of the development of due process as a restraint on arbitrary takings of property. It stated that,

> if, as this Court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen.

166 U.S. at 236. In an echo of statements in the *Wynehamer* decision, the Court made clear that effecting such a deprivation through a judicial process would not satisfy due process, absent payment of compensation:

> Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due Process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.

166 U.S. at 236. *Chicago, B. & Q.R. Co.* is still cited approvingly by the Court, but today the decision is sometimes treated not as if it had reaffirmed the substantive component of the Due Process Clause discussed in this review, but rather as if it had incorporated the Fifth Amendment Takings Clause as against the states. *See* Dolan v. City of Tigard, 512 U.S. 374, 383-84 & n.5 (1994).

vitally important, if somewhat neglected, part of our constitutional tradition. Moreover, judging from the amount and kind of public criticism that greeted the *Bennis* decision,[156] the fundamental American values that underlie this aspect of our constitutional tradition remain very much alive today.

The implications of the doctrine of substantive due process for recognition of an innocent-owner protection in civil forfeiture cases are straightforward. When the government forfeits the property of a person on the basis of its misuse by another person — and the owner neither knew nor should have known of the misuse — the government has engaged in an arbitrary taking of private property. As the above discussion has shown, the prohibition against arbitrary, uncompensated deprivations of private property has been the central tenet of substantive due process doctrine throughout its historical development. As such, it should be easy for the Court to conclude that due process requires a constitutional protection for innocent owners in civil forfeiture cases.

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156. The *Bennis* decision was subjected to nearly universal criticism in the op-ed pages of newspapers across the country. A search through the computer service, NEXIS, whose database contains a representative sampling of the nation's newspapers, revealed thirty-three op-ed pieces and editorials that criticized the decision, and only two that supported it. An English newspaper summed up reaction here by reporting that the Court's ruling "has outraged much of the [United States]," Henry Miller, *Punished For Husband's Romp,* EVENING STANDARD (London), Mar. 6, 1996, at 4A. Besides the near-unanimity of opposition to the decision, much of it was expressed in the kind of scathing terms not often seen in connection with a decision of the nation's highest court. *See, e.g.,* Bruce Fein, *Benchmarks of Absurdity; A Criminal Step Too Far?,* WASH. TIMES, Mar. 12, 1996, at A16 (criticizing decision on the grounds, *inter alia,* that "forfeiting the property of owners whose conduct was faultless . . . betrays a vindictiveness unworthy of any civilized system of law"); *Forfeiting All Reason,* S.F. EXAMINER, Mar. 6, 1996, at A16 (describing decision as "dead wrong" and observing that this is the kind of decision that makes "ordinary citizens wonder if members of the court . . . live and breathe in cloud cuckoo land"); *Forfeiting Fairness,* N.Y. TIMES, Mar. 8, 1996, at A30 (observing that the Supreme Court's "dubious achievement" in *Bennis* was to have issued a ruling that "invites cynicism about the institution [of the Supreme Court] and the justice system generally"); *Improper Reasoning,* ORANGE COUNTY REG., Mar. 6, 1996, at B6 (denouncing the decision with the observation that "it's . . . worth remembering Christian writer C.S. Lewis's admonition that a prostitute, whatever her faults, might be far closer to Heaven than the self-righteous old prig who goes regularly to church—or, to extend the analogy, who sits atop a Supreme Court bench"); *Innocent and Punished,* ST. PETERSBURG TIMES, Mar. 7, 1996, at 18A (calling decision "stunning in its disregard for constitutional principle"); Charles Levendosky, *High Court Takes Low Road on Forfeiture,* DAYTON DAILY NEWS, Mar. 14, 1996 at A15 (calling it "one of the most abysmal decisions to come from this court in years"); *A Mindless Reading of the Law,* CHI. TRIB., Mar. 28, 1996, at 24 (saying that the Court had given "its constitutional approval to a seizure that was the height of injustice"); *Nation's Founders Would Gasp At Court's Stance,* USA TODAY, Mar. 5, 1996, at 10A (characterizing decision as "appallingly unfair"); *Punishing the Innocent,* DES MOINES REG., Mar. 8, 1996, at 14A (suggesting that the majority ought to feel "shame in finding nothing in the Constitution to protect citizens from losing property to the government when they have committed no wrong"); *Seizure Absurdity,* SUNDAY GAZETTE MAIL (Charleston, W. Va.), Mar. 10, 1996, at 6B (saying, in reference to the decision, "[s]orry, but that doesn't sound like America to us"); Stuart Taylor, Jr., *A Car Is Not a Pirate Ship,* LEGAL TIMES, Mar. 11, 1996, at 21; George F. Will, *Mrs. Bennis's Car,* WASH. POST, Mar. 10, 1996, at C7 (implying that *Bennis* belonged in the same category as *Dred Scott v. Sandford, Plessy v. Ferguson,* and *Lochner v. New York*).

Conclusion

Levy's book demonstrates that, with certain narrow exceptions, civil forfeiture is an aberration in our law whose expansion in the past two decades is threatening to "work a complete revolution in our criminal jurisprudence."[157] The Supreme Court's response to this threat, Levy further suggests, has not been adequate. But the history of civil forfeiture offers the Court an opportunity to resolve the many contradictions in its forfeiture jurisprudence and to fashion significant constitutional limitations to the use of civil forfeiture. On due process grounds, the Court could (and in my view should) hold that, outside its traditional domain in maritime, revenue, and war power cases, civil forfeiture would simply be prohibited. Under such a rule, criminal forfeiture would be the only constitutional option for governments wishing to use the forfeiture sanction to administer the criminal law. Alternatively, recognition of the narrow historical scope of civil forfeiture would at least give the Court greater latitude to fashion particular due process protections for the growing number of expansive applications of civil forfeiture. One such protection that Levy and many others regard as fundamental would prevent blameless owners from having their property forfeited. Levy's suggestion that the "old substantive due process" doctrine should be used to develop such a protection is a sound one. A review of the history of substantive due process reveals that it is a deeply imbedded part of our constitutional tradition, and that its core tenet is the prohibition against arbitrary takings of property. A protection for innocent owners in forfeiture cases would follow from a straightforward application of this tenet of substantive due process.

157. Miller v. United States, 78 U.S. (11 Wall.) 304, 323 (1871) (Field, J., dissenting).