Chapter 10:
The Fifth Amendment Guarantees Against Compelled Self-Discrimination and Double Jeopardy

The Rehnquist Court has consistently issued conservative decisions in most Fifth Amendment cases and nothing in the 1995, 1996, or 1997 terms altered that established pattern. However, all three of the Court’s self-incrimination decisions during the 1998 and 1999 terms produced liberal results, including a case that required a direct consideration of the continuing validity of Miranda warnings.

During the 1997 term, the Court decided three self-incrimination cases and produced conservative results in each decision [Brogan v. United States (1998); Ohio Adult Parole Authority v. Woodard (1998); U.S. v. Balsys (1998)]. In the 1995 term, it produced one liberal outcome in a decision related to the Fifth Amendment by deciding a habeas corpus case concerning the review standard to be applied in examining Miranda claims [Thompson v. Keohane (1995)]. The Court's most important Fifth Amendment cases concerned issues other than self-incrimination, and these cases all produced conservative results. The Court decided three notable cases with Fifth Amendment issues, two raising double jeopardy issues [United States v. Ursery (1996) and Kansas v. Hendricks (1997)] and the other concerning whether the government improperly seized property without due process or just compensation [Bennis v. Michigan (1996)]. A near-unanimous Court decided one double jeopardy issue (United States v. Ursery), but the Court was deeply divided over the issues in the other cases. Kansas v. Hendricks raised a double jeopardy issue, but the justices divided over the ex post facto issue in the case instead. The Court decided two additional double jeopardy cases during the 1997 term and produced conservative outcomes in both cases [Hudson v. United States (1997); Monge v. California (1998)].

DOUBLE JEOPARDY AND DUE PROCESS

In United States v. Ursery (1996), Michigan police found marijuana growing next to Guy Ursery's home and marijuana seeds, stalks, and growlights inside the house. The federal government instituted civil forfeiture proceedings against the house, alleging that it was subject to forfeiture under federal law because it had been used to facilitate the unlawful processing and distribution of an illegal drug. Ursery ultimately paid the government $13,250 to settle the forfeiture claim. Subsequently he was indicted for criminal violations related to the production of illegal marijuana. He was convicted on the criminal charges and sentenced to five years in prison. On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed his criminal conviction by finding that the criminal charges violated his Fifth Amendment right against double jeopardy. The appellate court ruled that the civil forfeiture penalty constituted a punishment for double jeopardy purposes so that the later criminal conviction constituted an improper second prosecution and punishment for the same offense. The Ninth Circuit Court of Appeals made a similar decision in a companion case decided simultaneously by the Supreme Court.

In an 8-to-1 decision, the Supreme Court reversed the Sixth Circuit's decision in Ursery and the Ninth Circuit's decision in the companion case. In a majority opinion by Chief Justice
Rehnquist, the Court held that civil forfeiture actions aimed at property (in rem forfeiture proceedings) do not constitute either punishment or criminal prosecution for Fifth Amendment double jeopardy purposes. According to Rehnquist, "this Court has considered the application of the Double Jeopardy Clause to civil forfeitures, consistently concluding that the Clause does not apply to such actions because they do not impose punishment" (116 S.Ct. at 2140). The Court distinguished Ursery's case from two prior Rehnquist era decisions in which the combination of criminal and civil penalties had been found to violate the right against double jeopardy. Rehnquist's opinion pointed to special and improper punitive aspects of the state tax applied to the marijuana grower in Department of Revenue of Montana v. Kurth Ranch (1994). He also distinguished Ursery's case from Halper v. United States (1989), in which a person convicted of welfare fraud was also assessed $130,000 in civil penalties -- an amount that was clearly punitive because it was eight times greater than the amount actually needed to compensate the government for its investigation and prosecution (Whitebread and Slobogin, 1993, p. 795). Although the Ursery case presented the opportunity for the Court to reverse its two prior liberal decisions on related issues, nearly all of the justices viewed this case as distinguishable from the two preceding Rehnquist Court decisions.

In an opinion concurring in judgment in part and dissenting in part, Justice Stevens focused closely on the facts of the case in concluding that the government did indeed undertake to punish Ursery through the forfeiture action. According to Stevens, the facts indicated that Ursery grew small amounts of marijuana for consumption by his family. There was no evidence that he sold marijuana to any third parties and there was no evidence that his house was purchased with the proceeds of illegal activities. Thus Stevens concluded that the punitive nature of the government's effort to seize the home should trigger the protection of the Double Jeopardy Clause.

Kansas's Sexually Violent Predator Act was at issue in Kansas v. Hendricks (1997). Under the Act, individuals who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence" may be committed indefinitely to mental institutions. The civil commitment statute was targeted at several categories of sex offenders: those scheduled to be released from prison; those found incompetent to stand trial on criminal charges; those who have been found not guilty by reason of insanity; and those found not guilty because of a mental disease or defect. Kansas sought to commit Hendricks, a man with a forty-year record of sexually molesting children, immediately upon his completion of a prison term. Hendricks challenged the law by claiming it violated his right to due process, his constitutional protection against double jeopardy, and the ban on ex post facto laws. The Kansas Supreme Court invalidated the Act on due process grounds, but the U.S. Supreme Court reversed the state court's decision.

Writing for a five-member majority containing the Court's most conservative members (Kennedy, O'Connor, Rehnquist, Scalia, and Thomas), Justice Thomas found that the statute's definitions of and procedures for finding a "mental abnormality" or a "personality disorder" satisfied the requirements of due process. Thomas also rejected the double jeopardy and ex post facto claims because the "civil" nature of the proceedings did not constitute either a second prosecution or punishment.

On behalf of the four dissenters, Justice Breyer took issue with the majority's conclusions concerning the ex post facto issue. The dissenters questioned why the statute sought to commit Hendricks after he had served his sentence if its true intention was to treat rather than punish him for his mental abnormality and behavior. Because the dissenters concluded that the statute actually imposed punishment, they argued that it violated Hendricks' constitutional protection against ex post facto laws. Despite the deep division (5 to 4) within the Court, however, the justices were less divided than they may appear. Even the dissenters agreed that states can have civil commitment statutes to confine sex offenders indefinitely. They simply believed that such
statutes must be written prospectively (i.e., not consider behavior that occurred prior to the statute's passage) and sincerely advance the goal of providing treatment for mental abnormalities.

The Court's decision in *Kansas v. Hendricks* expanded governmental authority. It did so by diminishing the due process, double jeopardy, and *ex post facto* concerns underlying civil commitment statutes aimed at sex offenders, including those scheduled for release after completing their prison terms.

In the 2000 term, a similar case concerning the state of Washington’s Community Protection Act raised the question whether a civil statute could ever be regarded as “punitive” and thereby implicate rights under the Double Jeopardy and *Ex Post Facto* Clauses [*Seling v. Young* (2001)]. Similar to the Kansas statute in *Hendricks*, Washington’s law authorized the civil commitment of “sexually violent predators.” Over the lone dissent of Justice Stevens, an eight-justice majority decided that a statute that has been determined to be civil in nature cannot be deemed as “punitive” in its application to a single individual in order to trigger double jeopardy and *ex post facto* law protections. The Court left open the possibilities that such civil statutes could implicate due process rights and, indeed, later accepted for hearing in the 2001 term a case that would address whether the Due Process Clause requires the state to prove that a sexually violent predator “cannot control” his criminal sexual behavior before he can be subject to civil commitment [*Kansas v. Crane*, 7 P.3d 285 (2000)].

In other double jeopardy cases, the Court unanimously concluded that criminal charges may be filed even when the government has already imposed administrative penalties on individuals involved in violating banking laws through unlawful loans [*Hudson v. United States*, (1998)]. By contrast, the Court was deeply divided in deciding that the Double Jeopardy Clause does not bar the retrial of a prior conviction allegation in noncapital sentencing proceedings [*Monge v. California* (1998)]. The issue arose because judges in states with "three-strikes-and-you're-out" life imprisonment laws must consider whether prior convictions qualify as a "strike" to be used in determining if a defendant should get a life sentence as a habitual offender. Interestingly, Justice Breyer, the Clinton appointee who is among the Court's more liberal justices, joined consistent conservatives Rehnquist, O'Connor, Kennedy, and Thomas in rejecting the double jeopardy claim. Meanwhile, the usually conservative Justice Scalia joined his more liberal colleagues, Stevens, Ginsburg, and Souter, in dissent.

The Court’s major due process decision concerned forfeiture of property used in a crime. In *Bennis v. Michigan* (1996), Tina Bennis was the joint owner, with her husband, of an automobile. Her husband was arrested after Detroit police observed him engaged in a sexual act with a prostitute in the car. Under Michigan law, the car was seized after the city won a judicial determination that the car was a "public nuisance" because of its use in criminal prostitution activities. The state judge had the authority to order the automobile sold in order to pay one-half of the proceeds, minus court costs, to the innocent owner. However, because the eleven-year-old Pontiac had so little resale value, he simply had the car seized on the assumption that there would be virtually no proceeds available for Tina Bennis. The Michigan Supreme Court supported the lower court decision by ruling that there was no requirement that the state prove that the owner knew or agreed that the vehicle would be used in an illegal manner.

The case divided the U.S. Supreme Court 5-to-4, but not along the predictable liberal-conservative fault line in the middle of the Court. Clinton appointee, Justice Ruth Bader Ginsburg, provided the decisive fifth vote for four of her most conservative colleagues (Rehnquist, Scalia, Thomas, O'Connor). Meanwhile, conservative Reagan appointee, Justice Anthony Kennedy, dissented along with the Court's three most liberal justices (Stevens, Souter, Breyer). The Supreme Court decided that the Michigan law and procedures did not violate Tina Bennis's rights to due process and just compensation. According to Chief Justice Rehnquist's majority opinion, "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use" (116 S.Ct. at 998). He also noted that Mrs. Bennis
received due process considerations because she was given the opportunity to challenge the seizure in the state's public nuisance judicial proceedings. Rehnquist acknowledged that Bennis' argument that the interests of innocent and guilty co-owners should be treated separately "in the abstract, has considerable appeal," but he continued that "we conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are too firmly fixed in the punitive and remedial jurisprudence of the country to now be displaced" (116 S.Ct. at 1001).

In a concurring opinion, Justice Thomas evinced some sympathy for Mrs. Bennis and raised concerns about the risk that "[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused" (116 S.Ct. at 1003). However, he concluded that "[t]his case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable" (116 S.Ct. at 1001-1002). He relied on his philosophical deference to other branches of government in seeing no role for the Constitution or judicial action in remedying Mrs. Bennis's loss.

By contrast, Justice Ginsburg's concurring opinion scolded the dissenters, and Justice Stevens in particular, for not having more respect for the Michigan courts and their ability to avoid imposing unduly unfair burdens on property owners. She also emphasized the fact that the guilty party, John Bennis, was a co-owner of the vehicle in question.

Justice Stevens, joined by Justices Breyer and Souter, dissented by decrying "the logic of the Court's analysis [which] would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts" (116 S.Ct. at 1003). He raised questions about whether the Court would permit the government to seize an airliner if one passenger possessed a marijuana cigarette or a hotel if a prostitute committed an illegal act in one of the rooms. He complained that the property in question had an insufficient connection to the crime being prosecuted and, more importantly, that it violated basic principles of fairness to punish innocent people for acts committed by others. Justice Kennedy issued a separate dissent, which quoted approvingly from Justice Stevens's dissent, while concluding that "[t]his forfeiture cannot meet the requirements of due process" (116 S.Ct. at 1011).

SELF-INCrimINATION

Except for one habeas corpus case involving a self-incrimination issue, the Supreme Court did not decide any self-incrimination cases during the 1995 and 1996 terms. However, the Court decided three cases raising such issues during the 1997 term followed by one in the 1998 term and two in the 1999 term.

In the 1995 term, one of the Court's liberal decisions in a habeas corpus case touched upon the Fifth Amendment [Thompson v. Keohane (1995)]. Thompson confessed during a two-hour, tape-recorded session at Alaska state police headquarters that he killed his former wife. He sought to have the confession excluded from evidence because he was never informed of his Miranda rights, but the Alaska court found that he was not "in custody" during the questioning and therefore no Miranda warnings were required. Under Miranda, police need not inform people of their rights if those people are free to leave and therefore not in the custody of the police. When Thompson challenged his subsequent murder conviction through habeas corpus proceedings, the lower federal courts deferred to the Alaska court's determination that he was not "in custody" for Miranda purposes. However, the U.S. Supreme Court, in a 7-to-2 decision, required the lower federal courts to reexamine the case by making their own decision about whether or not Thompson was "in custody." The decision clarified the level of review that state prisoners' Miranda claims would receive during federal habeas corpus proceedings. Chief Justice Rehnquist and Justice Thomas dissented.
In the 1997 term, *United States v. Balsys* (1998) determined that the privilege against compelled self-incrimination does not permit individuals to decline to answer questions based on fears of prosecution by a foreign government. Balsys had refused to answer questions about his activities in Europe during World War II and his subsequent immigration to the United States because he claimed that he might be prosecuted by Israel or Lithuania. Justices Ginsburg and Breyer were the lone dissenters. In *Brogan v. United States* (1998), the Court found no Fifth Amendment violation for prosecuting a government official who lied to investigators by claiming that he had not broken any laws. Justices Stevens and Breyer dissented on a separate issue in the case concerning the interpretation of a federal criminal statute, but the dissenters did not express any disagreement with the Court's conservative decision on the constitutional self-incrimination issue. In *Ohio Adult Parole Authority v. Woodard* (1998), the Court unanimously rejected a claim that the privilege against compelled self-incrimination was violated by Ohio's clemency procedures which required prisoners to be interviewed by the parole board in order to be considered for clemency. Justice Stevens issued an opinion concurring in part and dissenting in part which discussed a separate due process issue.

The Court's 1998 term produced *Mitchell v. United States* (1999). In the 5-to-4 decision, Justice Kennedy deserted his usual conservative colleagues in order to provide the decisive vote and write the majority opinion for his four more liberal colleagues. The majority decided that the entry of a guilty plea did not waive the Fifth Amendment privilege against compelled self-incrimination at the defendant's sentencing hearing. Moreover, "in determining facts about the crime which bear upon the severity of the sentence, the trial judge may [not] draw an adverse inference from the defendant’s silence" (526 U.S. at 316-317). On behalf of his colleagues Rehnquist, O'Connor, and Thomas, Justice Scalia's dissenting opinion argued that the ban on negative inferences from a defendant’s silence that applies during the guilt determination phases of criminal proceedings should not apply during the sentencing hearing after the defendant has admitted guilt.

During the 1999 term, an eight-member majority issued a liberal decision concerning one of President Bill Clinton's associates who had been convicted of crimes arising from the Whitewater investigation [*United States v. Hubbel* (2000)]. Webster Hubbell, a close friend of President Clinton and a former law partner to Hilary Clinton, pleaded guilty to mail fraud and tax evasion. As part of his plea agreement, he promised to provide information to the Whitewater Independent Counsel. While Hubbell was in prison, the Independent Counsel served a subpoena seeking additional documents from Hubbell, but Hubbell asserted his Fifth Amendment privilege against compelled self-incrimination in declining to respond. The Independent Counsel obtained a court order directing Hubbell to respond to the subpoena and granting him immunity to the extent allowed by law. The documents obtained in this fashion were used to indict Hubbell on additional tax and fraud charges. Hubbell challenged the prosecution as a violation of his Fifth Amendment rights.

Writing for the majority, Justice Stevens concluded that the indictment must be dismissed. As Stevens observed:

> In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That constitutional privilege has the same application to the testimonial aspect of a response as to a subpoena-seeking discovery of those sources (530 U.S. at 43).

Although the contents of the documents produced in response to the subpoena did not constitute "compelled testimony" for Fifth Amendment purposes, the act of producing those documents did constitute "testimony." Thus Hubbell’s rights were violated when he was forced to produce documents that were subsequently used as the basis of a prosecution against him.
Chief Justice Rehnquist was the lone dissenter in the case. A concurring opinion by Justice Thomas, joined by Justice Scalia, agreed that the Court had properly applied the doctrine of treating the production of documents as testimony for Fifth Amendment purposes. However, the Court’s two advocates of originalist constitutional interpretation argued that this doctrine may be inconsistent with the Fifth Amendment’s original meaning, and therefore they expressed a willingness to reconsider the doctrine in a future case.

In the Court’s most highly publicized Fifth Amendment case, Dickerson v. United States (2000), the Court examined a decision by the Fourth Circuit Court of Appeals that declared that Miranda warnings are not constitutionally required, and therefore Congress can enact statutes to free federal law enforcement officers from the requirements of the Warren Court’s 1966 landmark decision. The case was the product of a lengthy crusade by University of Utah law professor Paul Cassell who represented a conservative legal foundation in arguing the prosecution’s case before the Supreme Court after the Clinton administration refused to defend the Fourth Circuit’s decision (Mauro 1999). The issue provided the Rehnquist Court with a clear opportunity to overturn the landmark Miranda decision. However, the Court ultimately disappointed Miranda’s critics by strongly endorsing the Warren Court’s decision as enunciating a constitutionally-mandated rule for police procedures.

Chief Justice Rehnquist’s majority opinion relied on the language and reasoning of the Miranda precedent as well as considerations of stare decisis to overrule the Fourth Circuit decision. According to Rehnquist’s opinion:

Whether or not we would agree with Miranda’s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now… Miranda has become embedded in routine police practice to the point where warnings have become part of our national culture …. [O]ur subsequent cases [after Miranda] have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision’s core ruling that unwarned statements may not be used as evidence in the prosecution’s case in chief …. In sum, we conclude that Miranda announced a constitutional rule that Congress may not supersede legislatively. Following the rule of stare decisis, we decline to overrule the Miranda decision ourselves (120 S.Ct. at 2336).

Because a seven-member majority supported Rehnquist’s opinion, critics were put on notice that there is little reason to make further efforts to overturn Miranda unless the Court’s composition changes significantly.

A strong dissenting opinion by Scalia, joined by Thomas, criticized the Court sharply for its “judicial arrogance” in “imposing its Court-made code upon the States” (120 S.Ct. at 2348). Consistent with his penchant for graphic language and strong condemnations of those with whom he disagrees (Smith 1993), Scalia went so far as to question the sanity of people would support the judicial preservation of Miranda warnings:

Far from believing that stare decisis compels this result, I believe we cannot allow to remain on the books even a celebrated decision--especially a celebrated decision--that has come to stand for the proposition that the Supreme Court has the power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people (120 S.Ct. 2348).

The Dickerson decision was consistent with the Rehnquist Court’s inclination to preserve landmark precedents yet whittle away at their impact through decisions that create exceptions and otherwise give greater flexibility to law enforcement personnel. Indeed, one commentator has
implicitly argued that conservative justices have an incentive to preserve liberal landmarks in order to give fellow conservatives a focal point and motivation for continued political and legal mobilization in pursuit of conservative policy goals (Alexander 1990). If the Court were to overturn landmark precedents established by the Warren Court, there is a risk of liberal political and legal mobilization in response.

In the 2001 term, the Court is scheduled to decide whether the privilege against compelled self-incrimination is violated by a prison sex offender treatment program that requires prisoners to disclose their sexual histories, including admission of guilt for the crime convicted, in order to participate. A prisoner who maintained he was innocent of the sex crime for which he was convicted refused to make any admissions and thereby lost privileges for failing to participate in the program [McKune v. Lile, 224 F.3d 1175 (10 Circuit U.S. Court of Appeals 2000)].

Overall, the Rehnquist Court’s Fifth Amendment decisions moved the law in a conservative direction when faced with new kinds of issues, such as civil commitment of sex offenders and property forfeiture, while also making liberal decisions that preserved existing rights related to self-incrimination.

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**BENNISS V. MICHIGAN**

(116 S.Ct. 994 (1996))

[The facts of this case are omitted because they were discussed in the preceding paragraphs.]

The case is important because it clarified the government's power to affect the interests of innocent owners in seizing property related to criminal activities. As you read the opinion, consider the following questions: (1) Why can an innocent property owner be subjected to a property seizure? (2) Under the Court's reasoning, could the government seize an entire hotel if a hotel guest used one room for illegal drug or prostitution activities?

**VOTE:**

5 justices found the government's actions constitutional (Ginsburg, O'Connor, Rehnquist, Scalia, Thomas)

4 justices found the government's actions unconstitutional (Breyer, Kennedy, Souter, Stevens)

Chief Justice Rehnquist delivered the opinion for the Court.

Petitioner was a joint owner, with her husband, of an automobile in which her husband engaged in sexual activity with a prostitute. A Michigan court ordered the automobile forfeited as a public nuisance, with no offset for her interest, notwithstanding her lack of knowledge of her husband's activity. We hold that the Michigan court order did not offend the Due Process Clause of the Fifth Amendment.

Detroit police arrested John Bennis after observing him engaged in a sexual act with a prostitute in the automobile while it was parked on a Detroit city street. Bennis was convicted of gross indecency. The State then sued both Bennis and his wife, petitioner Tina B. Bennis, to have the car declared a public nuisance and abated as such under 600.3801 and 600.3825 of Michigan's Compiled Laws.

Petitioner defended against the abatement of her interest in the car on the ground that, when she entrusted her husband to use the car, she did not know that he would use it to violate Michigan's indecency law. The Wayne County Circuit Court rejected this argument, declared the
car a public nuisance, and ordered the car's abatement. In reaching this disposition, the trial court judge recognized the remedial discretion he had under Michigan's case law... He took into account the couple's ownership of "another automobile," so they would not be left "without transportation." *** He also mentioned his authority to order the payment of one-half of the sale proceeds, after the deduction of costs to "the innocent co-title holder." *** He declined to order such a division of sale proceeds in this case because of the age and value of the car (an 11-year-old Pontiac sedan recently purchased by John and Tina Bennis for $600); he commented in this regard: "There's practically nothing left minus costs in a situation such as this." ***

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We granted certiorari in order to determine whether Michigan's abatement scheme has deprived petitioner of her interest in the forfeited car without due process, in violation of the Fourteenth Amendment, or has taken her interest for public use without compensation, in violation of the Fifth Amendment as incorporated by the Fourteenth Amendment....We affirm.

The gravamen of the petitioner's due process claim is not that she was denied notice or an opportunity to contest the abatement of her car; she was accorded both.... Rather, she claims she was entitled to contest the abatement by showing she did not know her husband would use it to violate Michigan's indecency law. But a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.

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*** This Court rejected Van Oster's claim [in Van Oster v. Kansas (1926)]: "It is not unknown or indeed uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty, so much of the statute and common law of liens as enables a mere bailee to subject the bailed property to a lien, the power of a vendor of chattels in possession to sell and convey good title to a stranger, are familiar examples .... They suggest that certain uses of property may be regarded as so undesirable that the owner surrenders his control at his peril ...."

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The dissent argues that our cases treat contraband differently from instrumentalities used to convey contraband, like cars: Objects in the former class are forfeitable "however blameless or unknowing their owners may be,"...but with respect to an instrumentality in the latter class, an owner's innocence is no defense only to the "principal use being made of that property." *** However, this Court's precedent has never made the due process inquiry depend on whether the use for which the instrumentality was forfeited was the principal use.***

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The petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain....

At bottom, the petitioner's claims depend on an argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners. This argument, in the abstract, has considerable appeal, as we acknowledged in [a prior case]. Its force is reduced in the instant case, however, by the Michigan Supreme Court's confirmation of the trial court's remedial discretion,...and petitioner's recognition that Michigan may forfeit her and her husband's car whether or not she is entitled to an offset of her interest in it....

We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are "too firmly fixed in the punitive and remedial jurisprudence of the country to
be now displaced."...The State here sought to deter illegal activity that contributes to neighborhood deterioration and unsafe streets. The Bennis automobile, it is conceded, facilitated and was used in criminal activity. Both the trial court and the Michigan Supreme Court followed our longstanding practice, and the judgment of the Supreme Court of Michigan is therefore Affirmed.

Justice Thomas, concurring.

I join the opinion of the Court.

Mrs. Bennis points out that her property was forfeited even though the State did not prove her guilty of any wrongdoing. The State responds that forfeiture of property simply because it was used in crime has been permitted time out of mind. It also says that it wants to punish, for deterrence and perhaps also for retributive purposes, persons who may have colluded or acquiesced in criminal use of their property, or who may at least have negligently entrusted their property to someone likely to use it for misfeasance. But, the State continues, it does not want to have to prove (or to refute proof regarding) collusion, acquiescence, or negligence.

As the Court notes, evasion of the normal requirement of proof before punishment might well seem "unfair." *** One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless -- a violation of due process....

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This case is ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable....As detailed in the Court's opinion and the cases cited therein, forfeiture of property without proof of the owner's wrongdoing, merely because it was "used" in or was an "instrumentality" of crime, has been permitted in England and this country, both before and after the adoption of the Fifth and Fourteenth Amendments.***

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Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice. When the property sought to be forfeited has been entrusted by its owner to one who uses it for crime, however, the Constitution apparently assigns to the States and to the political branches of the Federal Government the primary responsibility for avoiding that result.

Justice Ginsburg, concurring.

I join the opinion of the Court and highlight features of the case key to my judgment.

The dissenting opinions target a law scarcely resembling Michigan's "red light abatement" prescription, as interpreted by the State's courts. First, it bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis. At all time he had her consent to use the car, just as she had his.***

Second, it was "critical" to the judgment of the Michigan Supreme Court that the nuisance abatement proceeding is an "equitable action." ***That means the State's Supreme Court stands ready to police exorbitant applications of the statute. It shows no respect for Michigan's high court to attribute to its members tolerance of, or insensitivity to, inequitable administration of an "equitable action."

Nor is it fair to charge the trial court with "blatant unfairness" in the case at hand....That court declined to order a division of sale proceeds, as the trial judge took pains to explain, for two practical reasons: the Bennises have "another automobile"...; and the age and value of the forfeited car...left "practically nothing" to divide after subtraction of costs....
Michigan, in short, has not embarked on an experiment to punish innocent third parties....Nor do we condone any such experiment. Michigan has decided to deter Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court's disapprobation.

Justice Stevens, with whom Justice Souter and Justice Breyer join, dissenting.

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

The logic of the Court's analysis would permit the States to exercise virtually unbridled power to confiscate vast amounts of property where professional criminals have engaged in illegal acts. Some airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes. The State surely may impose strict obligations on the owners of airlines, hotels, stadiums, and vehicles to exercise a high degree of care to prevent others from making illegal use of their property, but neither logic nor history supports the Court's apparent assumption that their complete innocence imposes no constitutional impediment to the seizure of their property simply because it provided the locus for a criminal transaction.

While our historical cases establish the propriety of seizing a freighter when its entire cargo consists of smuggled goods, none of them would justify the confiscation of an ocean liner just because one of its passengers sinned while on board....The principal use of the car in this case was not to provide a site for the petitioner's husband to carry out forbidden trysts. Indeed, there is no evidence in the record that the car had ever previously been used for a similar purpose. An isolated misuse of a stationary vehicle should not justify the forfeiture of an innocent owner's property on the theory that it constituted an instrumentality of the crime.

This case differs from our historical precedents in a second, crucial way. In those cases, the vehicles or the property actually facilitated the offenses themselves.*** Here, on the other hand, the forfeited property bore no necessary connection to the offense committed by petitioner's husband. It is true that the act occurred in the car, but it might just as well have occurred in a multitude of other locations. The mobile character of the car played a part only in the negotiation, but not in the consummation of the offense.

***But confiscating the petitioner's car does not disable her husband from using other venues for similar illegal rendezvous, since all that is needed to commit this offense is a place. In fact, according to testimony at trial, petitioner's husband had been sighted twice during the previous summer, without the car, soliciting prostitutes in the same neighborhood. The [State's] remedial rationale is even less convincing according to the State's "nuisance" theory, for that theory treats the car as a nuisance only so long as the illegal event is occurring and only so long as the car is located in the relevant neighborhood....The need to "abate" the car thus disappears the moment it leaves the area. In short, therefore, a remedial justification simply does not apply to a confiscation of this type....

Apart from the lack of a sufficient nexus between petitioner's car and the offense her husband committed, I would reverse because the petitioner is entirely without responsibility for that act. Fundamental fairness prohibits the punishment of innocent people.
***It is conceded that petitioner was in no way negligent in her use or entrustment of the family car. Thus, no forfeiture should have been permitted. The majority, however, simply ignores Austin's [Austin v. United States (1993)] detailed analysis of our case law without explanation or comment.

Even assuming that strict liability applies to "innocent" owners, we have consistently recognized an exception for truly blameless individuals.***

***While I am not prepared to draw a bright line that will separate the permissible and impermissible forfeitures of the property of innocent owners, I am convinced that the blatant unfairness of this seizure places it on the unconstitutional side of that line.

I therefore respectfully dissent.

Justice Kennedy, dissenting.

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We can assume the continued validity of our admiralty forfeiture cases without in every analogous instance extending them to the automobile, which is a practical necessity in modern life for so many people. At least to this point, it has not been shown that a strong presumption of negligent entrustment or criminal complicity would be insufficient to protect the government's interest where the automobile is involved in a criminal act in the tangential way that it was here. Furthermore, as Justice Stevens points out,...the automobile in this case was not used to transport contraband, and so the seizure here goes beyond the line of cases which sustain the government's use of forfeiture to suppress traffic of that sort.

This forfeiture cannot meet the requirements of due process. Nothing in the rationale of the Michigan Supreme Court indicates that the forfeiture turned on the negligence or complicity of petitioner, or a presumption thereof, and nothing supports the suggestion that the value of her co-ownership is so insignificant as to be beneath the law's protection.

For these reasons, and with all respect, I dissent.

DICKERSON V. UNITED STATES
120 S.Ct. 2326 (2000)

[The facts of this case are omitted because they were discussed in the preceding paragraphs.]

The case is important because it gave the Rehnquist Court the opportunity consider whether Miranda warnings should be eliminated. As you read the case, ask yourself the following questions: (1) Does the Constitution require Miranda warnings? (2) What impact do Miranda warnings really have on police and suspects? and (3) What role should stare decisis play in Supreme Court cases?

VOTE:

7 Justices decided that Miranda warnings are required by the Constitution [Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer]

2 Justices argued that Miranda warnings should be eliminated as a requirement for police [Scalia, Thomas]

Chief Justice Rehnquist delivered the opinion of the Court
In *Miranda v. Arizona* (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. [section] 3501 which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received "*Miranda* warnings" before being interrogated....[The Fourth Circuit U.S. Court of Appeals] agreed with the District Court's conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that [section] 3501, which in effect makes the admissibility of statements such as Dickerson's turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that therefore Congress could by statute have the final say on the question of admissibility....

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We have never abandoned [our pre-*Miranda*] due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily. But our decisions in *Malloy v. Hogan* (1964), and *Miranda* changed the focus of much of the inquiry in determining the admissibility of suspects' incriminating statements. In *Malloy*, we held that the Fifth Amendment's Self-Incrimination Clause is incorporated in the Due Process Clause of the Fourteenth Amendment and thus applies to the States.... We decided *Miranda* on the heels of *Malloy*.

In *Miranda*, we noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion.... Because custodial police interrogation, by its very nature, isolates and pressures the individual, we stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems,...custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals....We concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment...not to be compelled to incriminate himself."... Accordingly, we laid down "concrete constitutional guidelines for law enforcement agencies and courts to follow."..."

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The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.... Congress retains the ultimate authority to modify or set aside any judicial created rules of evidence and procedure that are not required by the Constitution....

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution....This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. Recognizing this point, the Court of Appeal surveyed *Miranda* and its progeny to determine the constitutional status of the *Miranda* decision.... Relying on the fact that we have created several exceptions to *Miranda*'s warnings requirement and that we have repeatedly referred to the *Miranda* warnings as "prophylactic," [quoting *New York v. Quarles* (1984)]....and "not themselves rights protected by the Constitution," [quoting *Michigan v. Tucker*]...
the Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required.

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side--that *Miranda* is a constitutional decision--is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts....Since that time, we have consistently applied *Miranda's* rule to prosecutions arising in state court.... With respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution." ***

The *Miranda* opinion itself begins by stating that the Court granted certiorari "to explore some facets of the problems...of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.... In fact, the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule. Indeed, the Court's ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* "were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege." ***

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The Court of Appeals also relied on the fact that we have, after our *Miranda* decision, made exceptions from its rule in cases such as *New York v. Quarles* (1984), and *Harris v. New York* (1971).... But we have also broadened the application of the *Miranda* doctrine in cases such as *Dovle v. Ohio* (1976), and *Arizona v. Roberson* (1988). These decisions illustrate the principle -- not that *Miranda* is not a constitutional rule -- but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

*** Whether or not we would agree with *Miranda* 's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.***

We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture....Our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his "rights," may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-circumstances test which [section] 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner....

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore *Reversed*.

Justice Scalia, with whom Justice Thomas joins, dissenting.

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*** [T]o justify today's agreed-upon result, the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that "announced a
constitutional rule,".... That is an immense and frightening antidemocratic power, and it does not exist.

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Moreover, history and precedent aside, the decision in Miranda, if read as an explication of what the Constitution requires, is preposterous. There is, for example, simply no basis in reason for concluding that a response to the very first question asked, by a suspect who already knows all of the rights described in the Miranda warning, is anything other than a volitional act.... And even if one assumes that the elimination of compulsion absolutely requires informing even the most knowledgeable suspect of his right to remain silent, it cannot conceivably require the right to have counsel present. There is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in Miranda, between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord. Only the latter (which is not required by the Constitution) could explain the Court's inclusion of a right to counsel and the requirement that it, too, be knowingly and intelligently waived. Counsel's presence is not required to tell the suspect that the need not speak; the interrogators can do that. The only good reason for having counsel there is that he can be counted on to advise the suspect that he should not speak....

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Non-threatening attempts to persuade the suspect to reconsider that initial decision [to remain silent] are not, without more, enough to render a change of heart the product of anything other than the suspect's free will. Thus, what is more remarkable about the Miranda decision--and what made it unacceptable as a matter of straightforward constitutional interpretation--is its palpable hostility toward the act of confession per se, rather than toward what the Constitution abhors, compelled confession....The Constitution is not, unlike the Miranda majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity....

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Today's judgment converts Miranda from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance. In imposing its Court-made code upon the States, the original opinion at least asserted that it was demanded by the Constitution. Today's decision does not pretend that it is--and yet still asserts the right to impose it against the will of the people's representatives in Congress. Far from believing that stare decisis compels this result, I believe we cannot allow to remain on the books even a celebrated decision--especially a celebrated decision--that has come to stand for the proposition that the Supreme Court has power to impose extraconstitutional constraints upon Congress and the States. This is not the system that was established by the Framers, or that would be established by any sane supporter of government by the people.

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REFERENCES

