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Connecticut v. Doehr and Procedural Due Process Values: The Sniadach Tetrad Revisited

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NOTES

CONNECTICUT v. DOEHR AND PROCEDURAL DUE PROCESS VALUES: THE *SNIADACH* TETRAD REVISITED

INTRODUCTION

When the Supreme Court addressed the prejudgment remedy[1] case of *Connecticut v. Doehr*[2] in the October 1990 Term, it grappled with the *Sniadach* tetrad,[3] a line of precedent that meandered across the due process constitutional law landscape leaving a trail of invalidated state statutes and confused lower courts. Prior to *Doehr*, various commentators attempted, with little success, to harmonize the tetrad's

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1 The prejudgment remedy area of law refers to various provisional creditors' remedies including attachment, sequestration, replevin, and repossession.

> Attachment [is t]he legal process of seizing another's property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered. . . . The remedy of attachment is governed strictly by state statutes, with such differing considerably as to when attachment is available (the majority of states providing that such is available at or after the commencement of the main action until entry of judgment).

BLACK'S LAW DICTIONARY 126 (6th ed. 1990).

> Sequestration . . . [is] the process by which property or funds are attached pending the outcome of litigation. . . . In the law of creditors' rights, [it] most often refers to an equitable form of attachment, although occasionally used (or misused) to identify a replevin-like process.

Id. at 1366.

> Replevin [is a]n action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels. [It a]lso refers to a provisional remedy that is an incident of a replevin action which allows the plaintiff at any time before judgment to take the disputed property from the defendant and hold the property pendente lite.

Id. at 1299.

> Repossession [is the action of] recover[ing] goods sold on credit or in installments when the buyer fails to pay for them. [As a self-help measure without state action it is governed by] U.C.C. § 9-503. [However,] the conditions for repossession are entirely statutory and due process standards must be met . . . .

Id. at 1301.

2 501 U.S. 1 (1991).

3 The *Sniadach* tetrad includes the following cases: Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601 (1975). With the addition of Connecticut v. Doehr, 501 U.S. 1 (1991), the tetrad becomes the *Sniadach* quintad.

seemingly disparate rulings.[4] Others, including the Justices themselves, explained the disparate rulings in part in terms of changes in Court personnel.[5] Whatever the reason, the tetrad produced an unclear and perhaps even internally contradictory constitutional standard.[6]

Sniadach v. Family Finance Corp. of Bay View,[7] the first in the line of cases, invalidated a state garnishment statute that failed to provide prior notice and hearing to the garnished wage earner. The decision apparently established a "brutal need" exception to the traditional creditors' remedies.[8]

The next two cases seemed to contradict one another. *Fuentes v. Shevin*[9] extended *Sniadach* to require predeprivation process for repossession of consumer goods. A narrow exception covered "extraordinary circumstances."[10] Two years later, the Court in *Mitchell v. W.T. Grant Co.*[11] upheld a repossession statute because of the alternative safeguards it provided.[12] Given the factual similarity to *Fuentes*, members of the Court suggested that the attempt to distinguish *Mitchell* was flawed and that, in fact, *Fuentes* had been overruled.[13]

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4 *See infra* part II. *See also* Alison Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135 (1972) (a pre-*Mitchell*, pre-*Di-Chem* article finding that it is the fact that a private actor chooses to take advantage of court-authorized process to limit personal liability for seizure that requires that the person who bears the consequence of the proceeding be given prior notice and opportuuity for hearing); Richard S. Kay & Harold M. Lubin, *Making Sense of the Prejudgment Seizure Cases*, 64 KY. L.J. 705 (1976) (seeking to harmonize the tetrad through an extension of the *Fuentes* extraordinary circumstauce exception to encompass *Mitchell*); William F. Newton & Durward E. Timmons, *Fuentes "Repossessed"*, 26 BAYLOR L. REV. 469 (1974) (suggesting that *Mitchell* relegated *Fuentes* to its specific fact pattern by allowiug alternative safeguarding mechanisms to replace the need for prior notice and hearing); Steve H. Nickles, *Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas*, 31 ARK. L. REV. 607 (1978); Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975) (suggesting that the Court's "dual interest analysis" is applicable when a creditor holds a consensually agreed written security interest in the attached property); Robert E. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975) (suggesting that the *Sniadach* tetrad cases display an inconsistent understanding of the requirements of due process and emphasize factors that do not significantly increase the accuracy of the decision or the protection of the debtor's interest).

5 Justice Blackmun, dissenting in *Di-Chem*, suggested that "Fuentes, a constitutional decision, obviously should not have been brought down and decided by a 4-3 vote when there were two vacancies on the Court at the time of argument." *Di-Chem*, 419 U.S. at 616 (Blackmun, J., dissenting).

6 *See* discussion *infra* part II.

7 395 U.S. 337 (1969).

8 *See* discussion *infra* part I.A.

9 407 U.S. 67 (1972).

10 *See infra* notes 80-84 and accompanying text.

11 416 U.S. 600 (1974).

12 *Id.* at 609-10.

13 *Compare id.* at 623 (Powell, J., concurring) *with id.* at 634-35 (Stewart, J., dissenting, joined by Douglas & Marshall, JJ., dissenting).

The Court's next decision in *North Georgia Finishing v. Di-Chem*,[14] however, invalidated *ex parte* garnishment of a corporate bank account to recover the purchase price of goods. *Di-Chem* could be interpreted as an application of *Mitchell*: because the statutory safeguards did not match those in *Mitchell*, predeprivation process was necessary. Yet the Court explicitly relied on *Fuentes* as precedent.[15]

After a hiatus of more than fifteen years, the Court provided another perspective on the due process standards for prejudgment remedies in the unanimous *Connecticut v. Doehr* decision.[16] The *Doehr* Court required notice and hearing prior to attachment of real property to secure a potential judgment in an unrelated tort action.[17] The Justices modified an interest balancing test introduced in *Mathews v. Eldridge*,[18] an administrative law entitlements case.[19]

This Note suggests that the *Mathews-Doehr* test provides the missing clue to the puzzle of prejudgment remedies, permitting a synthesis of the apparently discrete rules and exceptions derived from the *Sniadach* tetrad. Part I reviews the cornerstone cases in the context of the Supreme Court's changing analysis of poverty. Part II summarizes several commentators' interpretations of the procedural due process standard for prejudgment remedies. Part III discusses the facts and holding of the *Doehr* case, and the Justices' varying approaches to bonding, exigent circumstances, and preexisting interests. Part IV contends that the *Doehr* modification of the *Mathews* test underscores the constitutional values of procedural due process and elucidates the principle that harmonizes the provisional remedy cases. The resulting

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14 North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

15 *See infra* note 126 and accompanying text.

16 501 U.S. 1 (1991). Although the decision itself was unanimous, there remained some disagreement concerning the constitutional necessity of bonding provisions. Compare Sections IV and V of the opinion of the Court joined by only four of the Justices, *id.* at 18-24 (finding a bond constitutionally required) with the Chief Justice's concurring opinion, *id.* at 26-29 (Rehnquist, C.J., joined by Blackmun, J., concurring) (abstaining from the constitutional question regarding bonding provisions).

The opinions also illustrate the Court's inability or unwillingness to speak clearly about key concepts in the *Sniadach* quintad such as preexisting creditor interests, exigent circumstances, and alternative safeguards. *Compare id.* at 2114 (White, J., opinion of the Court) *with id.* at 2123 (Rehnquist, C.J., concurring).

17 For the first time, the Court applied an interest balancing test to traditional property interests in land—in this case, the interest of an owner in unclouded title to his home. *Id.* at 2109.

18 424 U.S. 319 (1976) (finding that the termination of social security disability benefits deprives a person of a protected property interest and that the appropriate deprivation procedure is determined by weighing the government's interest and risk of erroneous deprivation against the individual's interest).

19 The procedural due process analysis suggested here posits the central importance of the modification of the *Mathews* test in understanding the provisional remedy cases. The judicial process of analogy allows the Court to move gradually through a field of law establishing a pattern perceptible only by looking at the whole. *See* discussion *infra* part IV.A.3-4.

"more vulnerable" rule is also consistent with the Court's analysis of quasi in rem attachment jurisdiction and suggests that such jurisdiction should not be available unless the plaintiff can show a compelling need.

I
THE CORNERSTONE CASES

A primary rationale supporting state provisional remedies[20] is to encourage credit by easing the burden of debt collection and protecting creditors from defaulting debtors.[21] The state also has an interest in protecting its judicial process and resources by insuring that sufficient funds are available to satisfy adjudicated claims.[22]

Countering these creditor-related interests, however, is the concern that the state not provide unfair coercive assistance to creditors

[20] These statutes are primarily remedies for creditors, although they may be used to secure jurisdiction over a nonresident defendant. *See* discussion *infra* part IV.B. Attachment is perhaps the most general term, covering court authorization to a private party to seize property in the possession of another private party for the purpose of satisfying a potential judgment against the defendant. Attachment is most frequently used by creditors to secure property of a debtor by creating a provisional lien. If the creditor is successful on the underlying claim, the asset is liquidated to pay the creditor's judgment award. THOMAS D. CRANDALL ET AL., DEBTOR-CREDITOR LAW MANUAL, ¶ 6.04 [1] (1985 & 1990 Cum. Supp. No. 2). Garnishment is an attachment of the defendant's property that is controlled by a third party, such as funds held in a bank account. STANLEY MORGANSTERN, LEGAL PROTECTION IN GARNISHMENT AND ATTACHMENT 1-3 (1971). Attachment was historically limited to actions on contracts or based on security interests in a particular chattel and was not ordinarily available to seize property to satisfy a judgment in tort actions. *Id.* at 70. Susan S. Blasik, *H.B. 254: Changes in Ohio's Attachment, Replevin and Garnishment Statutes*, 8 U. DAYTON L. REV. 407 (1983), discusses fully the various actions.

Historically, English common law required the defendant to be within the jurisdiction of the court. MORGANSTERN, *supra*, at 68. Modern attachment statutes, however, frequently allow attachment to secure quasi in rem jurisdiction over a nonresident defendant. *See, e.g.*, CONN. GEN. STAT. § 52-278e(a)(2)(A).

Note that the covered actions involve the assistance at some level of a law enforcement officer. They contrast with the provisions under Article 9 of the Uniform Commercial Code for peaceable self-help measures of repossession without the involvement of law enforcement officers. U.C.C. § 9-503 (1993). Such self-help does not involve the requisite state action to bring the proceedings under the protection of the Due Process Clause. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (finding that the state action requirement is not met in a warehouseman's lien sale of a debtor's stored property in which the only state involvement is the statute authorizing the sale). *See* Rendleman, *supra* note 4, at 563-68, for further discussion of self-help repossession.

[21] "The assurance of protection from the consequences of debtor default is a fundamental necessity in the commercial world, whose order depends upon the predictability of the debtor-creditor relationship and the realization of reasonable expectations." Special Project, *Recent Developments in Commericial Law*, 11 RUT.-CAM. L.J. 527, 657 (1980) [hereinafter *Prejudgment Attachment*]. *See also* Barry L. Zaretsky, *Attachment without Seizure: A Proposal for a New Creditor's Remedy*, 1978 U. ILL. L.F. 819, 825 (1978).

[22] *See, e.g.*, Amicus Brief for the National Legal Aid and Defender Association at 13, Fuentes v. Shevin, 407 U.S. 67 (1972) (No. 70-6060), *reprinted in* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, DUE PROCESS IN CONSUMER AFFAIRS AFTER SNIADACH (Michael G. West & Howard T. Reben eds., 1971) [hereinafter Amicus Brief].

who use the process to manipulate innocent debtors. Debtors—especially those without recourse to legal assistance—may be particularly susceptible in installment contract purchases:

> [A]n unscrupulous merchant can continue an account until a major portion of the debt is paid and then take advantage of a minor default, which may be prompted by the merchandise being defective or provoked by acceleration of payments, in order to repossess the purchased merchandise. After repossession the merchant can resell the goods and charge his costs and legal expenses against the proceeds while retaining the right to sue the buyer for any deficiencies.[23]

If attachment remedies do not provide appropriate safeguards against abuse, consumers may be pressured to pay the purchase price rather than pursue a claim against the creditor for faulty devices or for failure to provide services as contracted.[24] Thus, consumer advocates, especially those working with the poor, have sought strict limitations on the availability of summary procedures.[25]

The four cases[26] that establish the procedural due process framework for prejudgment remedies[27] were considered within six years of each other, from 1969 to 1975. They addressed state statutory provisions for judicial authority for prejudgment property seizure.[28]

A. *Sniadach v. Family Finance Corp. of Bay View*[29]

In *Sniadach*, the Court invalidated a Wisconsin procedure that allowed a garnisher to freeze up to half an employee's income without prior notice or hearing.[30] The garnishment could only be lifted if the employee won at trial on the merits of the underlying claim.[31] Although conceding that "[a] procedural rule . . . may satisfy due pro-

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23 Amicus Brief, *supra* note 22, at 8.

24 *See* Dean Gloster, Comment, *Abuse of Process and Attachment: Toward a Balance of Power*, 30 UCLA L. Rev. 1218 (1983) (suggesting that attachment proceedings generate leverage on debtors to settle regardless of the merits of the underlying creditor claim). *But see* Zaretsky, *supra* note 21, at 825 (indicating that the leverage gained through *ex parte* attachment procedures serves a reasonable function by inducing defaulting debtors to settle, thus reducing the burden on courts).

25 *See* Amicus Brief, *supra* note 22, at 14.

26 North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969).

27 *See, e.g.*, John P. Clarkson, *Creditors' Prejudgment Remedies and Due Process of Law—Connecticut's Summary Procedure Summarily Upheld:* Fermont Division, Dynamics Corp. of America v. Smith, 12 Conn. L. Rev. 174 *passim* (1979) (reviewing the *Sniadach* tetrad as the dominant background for constitutional due process as applied to prejudgment remedies).

28 *See supra* note 20.

29 395 U.S. 337 (1969).

30 Wis. Stat. § 267.18(2)(a), *quoted in Sniadach*, 395 U.S. at 338 n.1.

31 *Sniadach*, 395 U.S. at 337.

cess for attachments in general,"[32] the Court recognized the "tremendous hardship" that resulted in "grave injustice" because of the creditor's ability to gain leverage to collect the alleged debt.[33] Although the deprivation involved only the loss of the *use* of the garnished wages during adjudication of the underlying claim,[34] the significant impact of the taking convinced the Court that predeprivation process was required.[35]

Supporting a traditional approach to due process in his dissenting opinion, Justice Black argned that the historical roots of garnishment provided adequate pedigree for its continued constitutional validity.[36] He contended that because temporary deprivations had been acceptable process historically, such losses should not be protected by the Due Process Clause today.[37]

Douglas' majority opinion and Black's dissent shaped the debate that continues today: what kind of property interests does the Due Process Clause encompass, and what role do traditionally acceptable

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[32] *Id.* at 340. For the notion of "attachments in general," Justice Douglas cites McKay v. McInnes, 279 U.S. 820 (1929) (upholding a Maine attachment law where the attachment was considered a basic mechanism of debtor-creditor law resulting in conditional, temporary deprivations not rising to a constitutionally protected interest).

This one sentence illustrates much of the confusion regarding the holding of the entire series of cases. It can easily be interpreted as a statement that attachment cases must always be adjudicated on the particular facts of the case, rather than through the establishment of broad principles that carry over to generalized fact situations. As such, *Sniadach* suggests the validity of a "narrow" reading holding only that garnishment of wages of low-income individuals is unconstitutional.

[33] *Sniadach*, 395 U.S. at 340, 341. *See also* Scott, *supra* note 4, at 816 n.31 ("There is substantial evidence that wage garnishment is used by creditors less as a collection dervice [sic] than as a way to exert leverage, prompting the debtor either to refinance the obligation or pay the debt."); C. Kenneth Grosse & Charles W. Lean, Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743 (1968); James A. Jablonski, Comment, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

[34] *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring).

[35] "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process." *Id.* (Douglas, J., writing for the Court) (citations omitted).

The conclusory nature of the discussion of the process due suggests that the categorization of the deprivation as one that came within the terms of the Due Process Clause was the acute constitutional question for the Court. The Court at one point characterized the issue by asking "wbether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment . . . [i.e.,] 'the right to be heard.' " *Id.* at 339.

[36] *Id.* at 344-351 (Black, J., dissenting).

[37] "The ability to place a lien upon a man's property, such as to temporarily deprive him of its beneficial use, without any judicial determination of probable cause dates back not only to medieval England but also to Roman times." *Id.* at 349 (Black, J., dissenting) (citation omitted). Contrast this with the emphasis on the change in the economic system in the majority opinion. *Id.* at 340 ("The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms.").

procedures play in determining constitutional validity? Black and Douglas suggested diametrically opposed theories of the constitutional floor of due process—reliance on pedigreed requirements underlying the Framers' procedural understanding at the time of the amendments[38] versus an evolving interpretation of fundamental fairness derived "from the specifics of the Constitution . . . [and] from concepts which are part of the Anglo-American legal heritage."[39]

Many early interpreters of *Sniadach* viewed the case as a narrow exception to the traditional understanding of the constitutionality of attachment proceedings.[40] Others interpreted *Sniadach* to apply broadly to garnishments of any type.[41] Still others were uncertain whether the holding was limited to circumstances involving severe deprivation:

> It was not clear whether the Supreme Court was ruling solely on constitutional due process grounds or was acknowledging a "hardship" exception to venerable prejudgment remedies. Another area of confusion was whether the factual context of *Sniadach* could be taken as describing the full extent of the opinion's reach, or whether the language "specialized type of property" implied a somewhat larger category of affected property rights.[42]

However broad the interpretation, some feared that the case had "open[ed] a Pandora's box that [would] leave in ruin a very large and well recognized part of our jurisprudence."[43]

The narrow "hardship" interpretation rests on *Sniadach*'s langnage and its relationship to a series of cases in which the Court ex-

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38 Jurists such as Justice Black who support an "original intent" approach tend to decry calls to fairness as little more than a resort to undefined principles of natural law. Justice Black held little regard for "those canons of decency and fairness which express the notions of justice of English-speaking peoples," a description of due process attributed to Justice Frankfurther. *Id.* at 350 (Black, J., dissenting) (citation omitted).

39 *Id.* at 342-43 (Harlan, J., concurring).

40 The following cases are illustrative of courts interpreting *Sniadach* only to require extraordinary procedural protection for wages: American Olean Tile Co. v. Zimmerman, 317 F. Supp. 150, 152 (D. Haw. 1970) ("garnishment of wages [is] a limited exception to the general rule of legality of garnishment statutes"); Roofing Wholesale Co. v. Palmer, 502 P.2d 1327 (Ariz. 1972) (limiting *Sniadach* to wages); Termplan Inc. v. Superior Court, 463 P.2d 68 (Ariz. 1969) (general property attachment); People *ex rel.* Lynch v. Superior Court, 464 P.2d 126 (Cal. 1970) (property attachment).

41 *See, e.g.*, Randone v. Appellate Dep't of the Superior Court, 488 P.2d 13 (Cal. 1971) (finding the attachment of a bank account included within the principle of *Sniadach*); Jones Press, Inc. v. Motor Travel Servs., Inc., 176 N.W.2d 87 (Minn. 1970) (considering *Sniadach* based on a broad due process principle requiring prior hearing and notice); Larson v. Fetherston, 172 N.W.2d 20 (Wis. 1969) (finding no distinction between wages and other property in garnishment proceedings in a case involving prejudgment garnishment of accounts receivable).

42 Etheredge v. Bradley, 502 P.2d 146, 149 (Alaska 1972).

43 Lawrence J. Fleming, *Garnishment and the Supreme Court*, 74 Com. L.J. 264, 265 (1969), *quoted in* Nickles, *supra* note 4, at 612-13.

amined the impact of legal process upon those who were most disadvantaged by the system—the poor and welfare recipients.[44] The Court granted extra protection to indigents without declaring them a protected suspect class under the Equal Protection Clause.[45] For example, in *Douglas v. California*,[46] the Court held that the state must appoint counsel for an indigent for a first appeal granted of right after a criminal conviction.[47] *Harper v. Virginia Board of Elections*[48] invalidated the poll tax requirement for voting as a discriminatory measure that prevented equal electoral participation by indigents.[49] *Shapiro v. Thompson*[50] invalidated a state statute that denied welfare benefits to new residents, finding the denial a penalty that infringed upon the fundamental right to travel.[51]

After *Sniadach*, the trend toward protection of indigent rights continued briefly[52] in early welfare entitlement cases such as *Goldberg v. Kelly*,[53] in which the Court found the stark need of welfare recipients worthy of special protection from summary termination of government benefits.[54] Like *Sniadach*, *Goldberg* acknowledged that the balancing of interests might require adjustment to consider the extent to which the one deprived would be "condemned to suffer grievous loss."[55] In *Boddie v. Connecticut*,[56] the Court also provided protection

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44 *See generally* Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 71 (1969) (suggesting that indigency should be considered a suspect class for the purpose of Equal Protection Clause analysis).

45 *See infra* note 52.

46 372 U.S. 353 (1963).

47 *Id.* at 357.

48 383 U.S. 663 (1966).

49 *Id.* at 666.

50 394 U.S. 618 (1969).

51 *Id.* at 527-29. The Court rejected the state's argument that a waiting period was justified to preserve fiscal integrity by discouraging indigents from entering the jurisdiction. *Id.* at 629.

52 This incipient recognition of special constitutional protection for the poor never fully materialized. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a Maryland statute limiting the award a family could receive under Aid to Families with Dependent Children). The *Dandridge* Court explicitly refrained from applying a different standard in spite of the situation of dire need: "[t]he administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings . . . but we can find no basis for applying a different constitutional standard." *Id.* at 485. The move towards greater protection for indigents ended abruptly in 1972 with the addition of Justices Rehnquist and Powell to the Court. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (Powell, J.) (refusing to invalidate a public school financing scheme even though it disadvantaged the poor who resided in districts with low property tax bases and rejecting the lower court's finding that poverty was a suspect classification).

53 397 U.S. 254 (1970).

54 *Id.* at 264.

55 *Id.* at 262-63 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). *See also* Jeanne C. Ferriot, *Garnishment and the Poor in Louisiana*, 33 LOY. L. REV. 79, 103 (1987).

56 401 U.S. 371 (1971).

to indigents challenging state divorce fee requirements.[57] Finally, *Tate v. Short*[58] invalidated a Texas law jailing the poor for inability to pay fines.[59]

Amidst this concern for indigents and the accompanying uncertainty about the breadth of the *Sniadach* decision, the Court considered a second prejudgment remedy case, *Fuentes v. Shevin*.[60]

B. *Fuentes v. Shevin*

The *Fuentes* Court[61] found Florida's[62] and Pennsylvania's[63] re-

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57 *Id.* at 374.

58 401 U.S. 395 (1971).

59 *Id.* at 397. To some extent, the court continued to consider the extent to which deprivations may produce grievous loss. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (considering the seriousness of the loss in determining procedural requirements for termination of utilities).

60 407 U.S. 67 (1972).

61 Justice Stewart wrote for "a four-Justice majority of a seven-Justice shorthanded Court." *Di-Chem*, 419 U.S. at 617 (Blackmun, J., dissenting). The majority consisted of Justices Stewart, Douglas, Brennan, and Marshall. Newly appointed Justices Powell and Rehnquist did not participate in the decision because the case had been argued before the Court prior to their installment. Justice White, joined by Chief Justice Burger and Justice Blackmun, dissented.

62 FLA. STAT. ANN. §§ 78.01-78.13 (Supp. 1972-73), *quoted in Fuentes*, 407 U.S. at 73-74 n.5, provides as follows:

> 78.01: Right to Replevin.—Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them . . . .
> 78.07: Bond; requisites.—Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay . . . .
> 78.08: Writ; form; return.—The writ shall command the officer . . . to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint . . . .
> 78.13: Writ; disposition of property levied on.—The officer executing the writ shall deliver the property to plaintiff after the lapse of three (3) days from the time the property was taken unless within the three (3) days defendant gives bond . . . in double the value of the property . . . .

Id.

63 PA. STAT. ANN., tit. 12, § 1821, *cited in Fuentes*, 407 U.S. at 75-76 n.7, authorizes writs of replevin "in all cases whatsoever, where replevins may be granted by the laws of England." PA. R. CIV. P. 1073, 1076, 1077, *quoted in Fuentes*, 407 U.S. at 76-77 n.7, set forth procedural prerequisites for issuance of a prejudgment writ:

> Rule 1073. Commencement of Action
> (a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with (1) the plaintiff's affidavit of the value of the property to be replevied, and (2) the plaintiff's bond in double the value of the property . . . .
> Rule 1076. Counterbond
> (a) A counterbond may be filed with the prothonotary by a defendant . . . . within seventy-two (72) hours after the property has been replevied . . . .
> (b) The counterbond shall be in the same amount as the original bond . . . .

plevin statutes unconstitutional.[64] The Florida case involved the purchase of a stove and stereo on an installment contract under which the vendor retained title to the goods until payments were completed.[65] The Pennsylvania case involved four different individuals whose property had been replevied.[66]

The Court noted the limited protections provided by the statutes. Neither required notice or opportunity for hearing before permitting *ex parte* seizures. Florida's statute contained no probable cause requirement: a clerk issued the writ on the "bare assertion" of the party seeking replevin,[67] requiring only that the party post a security bond and file a complaint for repossession.[68] Debtor safeguards included 1) an opportunity for a hearing on the merits at the trial for repossession and 2) a bonding provision allowing an alleged debtor to recover the property in return for providing other security.[69] The Pennsylvania statute provided even fewer safeguards: it did not require that the party seeking the writ initiate a court action on the underlying claim. As a result, an alleged debtor might never have an opportunity for a hearing on the merits unless she initiated an independent recovery action.[70]

In *Fuentes*, the Court applied a two-step due process analysis that first addressed whether the Due Process Clause protected the type of

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> Rule 1077. Disposition of Replevied Property. Sheriff's Return
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> (b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

In addition, Rule 1037(a) provides process to require the plaintiff to file a post-seizure complaint.

64 The Court also addressed an ancillary issue of whether a buyer waives due process rights by signing a default clause in an installment contract. After discussion of the problems of contracts of adhesion involving parties of unequal bargaining power, the Court concluded that the clause on its face did not constitute a waiver. *Fuentes*, 407 U.S. at 95.

65 *Id.* at 70. The purchaser defaulted on payments after a dispute over servicing, so the vendor filed for repossession. *Id.* The repossession procedure required completion of a form document, clerk issuance of a writ, and sheriff action to seize the chattel. *Id.* at 71. Fuentes brought a 42 U.S.C. § 1983 claim challenging the constitutionality of Florida's replevin statute and seeking both declaratory and injunctive relief from the replevin. *Id.* at 71 n.3.

66 *Id.* For three defendants, writs were executed on the vendor's claim that they were falling behind in payments for a bed, table, and other household goods purchased on installment contracts. *Id.* The writ for the fourth defendant, Rosa Washington, was issued to seize her son's clothes, furniture and toys during a custody dispute with her former husband. *Id.* at 72.

67 *Id.* at 74.

68 *Id.*

69 *Id.* at 75.

70 *Id.* at 75 n.7.

interest at stake[71] and then determined the appropriate process by balancing state and private interests.[72] The *Fuentes* Court answered the threshold question affirmatively even though the replevin was potentially temporary and the debtor had never held full title to the property because of the installment sales agreement.[73] Having concluded that the deprivation "[could] not be characterized as *de minimis*,"[74] the Court determined that traditional due process required "some kind of notice and opportunity to be heard"[75] regardless of any possible increased administrative burden.[76]

Variations of the phrase "some kind of prior hearing" echo like a litany throughout the *Fuentes* opinion.[77] The appropriate *timing* of notice and hearing thus became central to the constitutional due process analysis.[78] The Court suggested that due process tolerates variances in

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71 *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). The first prong of the analysis asks whether the government action constitutes a deprivation of life, liberty, or property. Brock v. Roadway Express, Inc., 481 U.S. 252, 260 (1987).

72 Morrisey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."). The *Morrisey* Court emphasized the importance of avoiding rigid rules in due process analysis: "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

The key cases in the development of the two-step due process analysis were Perry v. Sindermann, 408 U.S. 593 (1973); Board of Regents v. Roth, 408 U.S. 564 (1972); Lynch v. Household Fin. Corp., 405 U.S. 538 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). *See generally* Wayne McCormack, *Federalism and Section 1983 Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1, 64-66 (1974) (discussing the two steps in entitlement due process analysis). For further discussion of the two-step analysis within the prejudgment remedy context, see *infra* notes 288-91 and accompanying text.

73 *Fuentes*, 407 U.S. at 84-85 (analogizing the *Fuentes* deprivation to the loss suffered from suspension of a driver's license, which it had found protected under due process in Bell v. Burson, 402 U.S. 535 (1971)).

74 *Id.* at 90 n.21 (quoting Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 342 (1960) (Harlan, J., concurring)).

75 *Id.* at 79-80. In deciding what process was due, the Court looked first to the historical underpinnings of replevin. *Id.* at 78. Early common law actions allowed the replevied owner to attempt to halt the action by claiming rightful possession. The sheriff was then empowered to decide the question of ownership. *Id.* at 79 (citing 3 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 284 (1927)). A creditor seeking state assistance to recover goods wrongfully detained had to proceed through an action for debt or detinue, which did not allow seizure of the property before judgment on the underlying claim. *Id.* "[W]hen the common law did allow prejudgment seizure by state power, it provided *some kind of notice and opportunity to be heard* . . . and a state official made at least a summary determination of the relative rights of the disputing parties before . . . taking goods from one of them." *Id.* at 79-80 (emphasis added).

76 "[O]rdinary hearing costs are no more able to override due process rights in the creditor-debtor context than in other contexts." *Id.* at 92 n.29.

77 *See, e.g., id.* at 70, 77, 82, 84, 86.

78 "The issue is whether procedural due process *in the context of these cases* requires an opportunity for a hearing *before* the State authorizes its agents to seize property." *Id.* at 80 (first emphasis added). Notice and an opportunity for hearing "must be granted at a meaningful time and in a meaningful manner." *Id.* (citation omitted). " 'No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss

the *form* of a hearing but still requires a hearing *before* replevin and similar deprivations.[79]

The replevin statutes clearly did not fall within the "extraordinary circumstances" exception to this "root requirement" for prior notice and hearing outlined in *Fuentes*.[80] The Court listed three requirements for the exception:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[81]

The statutes under consideration for prejudgment replevin did not meet the three-factor test. First, the creditor's private gain was not comparable to war efforts or protection of the public health.[82] Second, the statutes were not limited to situations demanding prompt

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notice of the case against him and opportunity to meet it.' " *Id.* at 81 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)). "[T]o serve its full purpose, . . . it must be granted at a time when the deprivation can still be prevented." *Id.*

See also Kay & Lubin, *supra* note 4, at 716 ("These cases are concerned solely with the timing of state takings with respect to notice and hearing, not with the substantive policy reasons which migbt prompt the state to engage in such takings."); Nickles, *supra* note 4, at 611 n.16 (the timing of the hearing is the heart of the *Fuentes* decision).

79 *Fuentes*, 407 U.S. at 82.

80 *Id.* at 81. In illustrating the exception, the Court refers to the following cases allowing attachment without prior hearing: Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928) (allowing outright seizure to protect the public from the immediate harm of a bank failure); Ownbey v. Morgan, 256 U.S. 94 (1921) (allowing attachment necessary to secure jurisdiction in state court); McKay v. McInnes, 279 U.S. 820 (1929) (upholding an attachment statute creating a lien as security for judgment in litigation where a non-resident sues a resident to collect a debt). *Fuentes*, 407 U.S. at 91 n.23. The Court also provides the following "outright seizure" cases as examples of the underlying rationale for the exception: Phillips v. Commissioner, 283 U.S. 589, 597 (1931) ("Delay in the judicial determination of property rights is not uncommon where it is *essential* that governmental needs be *immediately* satisfied." (internal quotations marks omitted)); Central Union Trnst Co. v. Garvan, 254 U.S. 554, 566 (1921) (upholding immediate seizure of property belonging to the enemy during wartime); Stoehr v. Wallace, 255 U.S. 239, 245 (1921) (upholding immediate seizure of goods in the hands of the enemy during war); United States v. Pfitsch, 256 U.S. 547, 553 (1921) (upholding requisitioning of goods to meet the needs of the national war effort); Fahey v. Mallonee, 332 U.S. 245 (1947) (upholding appointment of a conservator to take possession of a financial institution as protection against the economic disaster of a failure); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (allowing seizure to protect the public from misbranded drugs that might be misleading); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (allowing seizure of warehoused goods to protect the public from contaminated foods unfit for consumption). *Fuentes*, 407 U.S. at 92 nn.24-28.

81 *Fuentes*, 407 U.S. at 91.

82 *Id.* at 92-93.

attention, even though some creditors might show immediate danger of concealment or destruction of disputed property.[83] Third, the statutes allowed private parties to use state power to replevy goods without official evaluation of the proceeding, leaving the state to "act[ ] largely in the dark."[84]

Emphasizing the dual creditor-debtor interests, Justice White set the stage for the next two cases in his dissenting opinion. Spurred by interests in federalism[85] and concerns for the practicalities of prior hearings when self-help measures are also available,[86] White stressed that both parties in the typical installment contract creditor-debtor relationship have property interests: the buyer wants continued use until actual adverse judgment, and the seller wants protection of the security from further deterioration.[87] White emphasized that there is "no automatic test for determining whether and when due process of law requires adversary proceedings."[88] Given the duality of interests, White urged that balancing was necessary to determine required procedures.[89]

C. *Mitchell v. W.T. Grant Co.*[90]

In *Mitchell*, the Court[91] seemed to overrule *Fuentes* by upholding a Louisiana statute[92] that permitted sequestration without prior notice

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83 *Id.* at 93.

84 *Id.*

85 *Id.* at 102 (White, J., dissenting).

86 Justice White noted that creditors can continue to repossess chattels by putting more explicit provisions in the contract, by giving notice of a hearing and taking possession on default, or by showing probable cause at a hearing. *Id.* The additional procedural requirements, however, would presumably result in increased costs for—and lesser availability of—credit. *Id.* at 103.

87 *Id.* at 99-100. Later, White adds "I would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. . . . [T]he creditor has a 'property' interest as deserving of protection as that of the debtor." *Id.* at 102.

88 *Id.* at 101.

89 *Id.* at 101-02. "[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* (citation omitted).

90 416 U.S. 600 (1974).

91 Justice White, the dissenter in *Fuentes*, wrote the opinion for the majority, joined by Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun. Justice Stewart, joined by Justices Douglas and Marshall and by Justice Brennan in part, dissented.

92 LA. CODE CIV. PROC. ANN. arts. 281-83, 2373, 3501, 3571 (West 1961), *quoted in Mitchell*, 416 U.S. at 620-23. The Louisiana sequestration procedure involved the filing of a suit alleging sale, overdue balance, and vendor's lien. A judge signed the order for the writ after the creditor filed an affidavit claiming possible waste and posted a bond for an amount double the value of the property subject to sequestration. If the debtor requested a hearing for immediate dissolution, the burden of proof was on the creditor to establish debt, lien, and delinquency. The debtor could end the sequestration by filing her own bond. *Mitchell*, 416 U.S. at 605-07.

or hearing[93] when an installment seller retained a statutorily created vendor's lien.[94] Because the vendor faced legitimate concerns that the buyer would transfer the property[95] and eliminate the state-created lien[96] in the period pending resolution of the underlying action, the Court considered procedural protections for the interests of both parties.[97]

Balancing these dual interests,[98] the Court found that the statute provided "a constitutional accommodation of the conflicting interests" that met Due Process Clause requirements.[99] The vendor's inter-

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93 Various commentators interpreted *Mitchell* as retreating from the *Fuentes* rule. *See, e.g.*, John C. Anderson & Greg Guidry, Mitchell v. W.T. Grant Co.: *Recognition of Creditors' Rights*, 80 COM. L.J. 63 (1975); Robert J. Hobbs, Mitchell v. W.T. Grant Co.: *The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974); Nickles, *supra* note 4, at 616; Albert M. Pearson, *Due Process and the Debtor: The Impact of* Mitchell v. W.T. Grant, 28 OKLA. L. REV. 743 (1975) (discussing the distinction between the fault-based standard of *Fuentes* and the fact-based statutory scheme of *Mitchell*); *The Supreme Court 1973 Term*, 88 HARV. L. REV. 41 (1974); Comment, *A Coufusing Course Made More Confusing: The Supreme Court, Due Process, and Summary Creditor Remedies*, 70 NW. U. L. REV. 331 (1975); Note, *Changing Concepts of Consumer Due Process in the Supreme Conrt—The New Conservative Majority Bids Farewell to Fuentes*, 60 IOWA L. REV. 262 (1974); Note, *Prejudgment Creditors' Remedies—Another Recipe for the Due Process Cookbook*, 47 U. COLO. L. REV. 129 (1975) (suggesting that *Mitchell* represents a distinctly different approach to prejudgment due process).

94 *Mitchell*, 416 U.S. at 601. The Louisiana legislature created the vendor's lien in lieu of the liens arising under the Uniform Commercial Code [hereinafter UCC] because Louisiana is the only state that has not adopted the UCC provisions. "[S]tate law provided . . . a vendor's lien to secure the unpaid balance of the purchase price." *Id.* at 604. Generally, a vendor's lien is "[a]n equitable security which arises from the fact that a vendee has received from his vendor property for which he has not paid the full consideration, and such lien exists independently of any express agreement." BLACK'S LAW DICTIONARY 1555 (6th ed. 1990).

95 *Mitchell*, 416 U.S. at 608-09. The Court noted "[t]wo principal concerns[:] . . . that, pending resolution of the dispute, the property would deteriorate or be wasted in the hands of the possessor and that the latter might sell or otherwise dispose of the goods. A minor theme was that official intervention would forestall violent self-help and retaliation." *Id.* at 605 (citing Robert Wyness Millar, *Judicial Sequestration in Louisiana: Some Account of Its Sources*, 30 TUL. L. REV. 201, 206 (1956)).

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> [U]nder Louisiana law, the vendor's lien expires if the buyer transfers possession. It follows that if the vendor is to retain his lien, superior to the rights of other creditors of the buyer, it is imperative when default occurs that the property be sequestered in order to foreclose th[at] possibility.

Id. at 609.

97 *Id.* at 604.

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> [W]e remain unconvinced that the impact on the debtor of deprivation of the household goods here in question overrides his inability to make the creditor whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession through the procedures now employed.

Id. at 610.

The *Mitchell* decision preceded the administrative balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976). The balance in *Mitchell*, however, is like the modified *Mathews* test outlined in *Doehr*. *See* discussion *infra* part III.B. It compares the competing parties' interests in the object property and considers in the equation statutory safeguards to forestall error. For further discussion of the *Mathews* test, see the discussion *infra* part IV.A.3.

99 *Mitchell*, 416 U.S. at 607.

est in preventing further deterioration or loss merited substantial weight in the balance,[100] whereas the impact on the debtor figured only minimally.[101] Safeguards minimizing the risk of error included the requirement that the seller establish probable success based on allegations—subject to documentary proof—of debt, lien, and delinquency;[102] judicial oversight of the process;[103] provisions for the plaintiff to secure the attachment and for the defendant to dissolve the attachment by posting bond;[104] the availability of damage awards;[105] and an immediate opportunity for a post-seizure hearing.[106]

Given the ostensible *Sniadach-Fuentes* rule requiring predeprivation process for property interests subject to due process protection unless the narrow exigency exception applies,[107] the *Mitchell* Court drew several distinctions.[108] First, the Court read the pre-*Sniadach* cases as requiring some sort of hearing before the deprivation of property is finalized but not necessarily before initial seizure is allowed.[109] This refocused *Fuentes* on considerations of timing.[110] Second, the Court explicitly adopted the narrow interpretation of *Sniadach*,[111] explaining that it dealt with the special situation of wage garuishment in which the creditor had no preexisting interest.[112] *Fuentes*, on the other hand, presented a "typical case" involving a creditor's secured interest,[113] but the statutory procedures failed to provide adequate safeguards for the debtor's interest. They allowed repossession without judicial supervision based on conclusory assertions premised on a fault standard.[114]

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100 *Id.* at 608-09, 616.

101 The Court noted that *in this case* the debtor did not even take advantage of a full hearing immediately following execution of the writ, one of the safeguards provided under the law to reduce the risk of wrongful deprivation. *Id.* at 611, 618.

102 *Id.* at 609, 618.

103 *Id.* at 610, 616.

104 *Id.* at 608.

105 *Id.* at 616.

106 *Id.* at 611.

107 *See supra* note 80 and accompanying text.

108 *Mitchell*, 416 U.S. at 611-17.

109 *Id.* at 611. The pre-*Sniadach* cases "merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided." *Id.*

110 *See supra* notes 77-79 and accompanying text.

111 *See supra* notes 40-44 and accompanying text.

112 *Mitchell*, 416 U.S. at 614. The forbidding consequences of wage garnishment present " 'distinct problems in our economic system' " meriting special procedural protection. *Id.* (quoting *Sniadach*, 395 U.S. at 340).

113 *Id.* at 614-15.

114 *Id.* at 617.

Mitchell seems at the least to posit a broad "alternative safeguards" exception to the *Sniadach-Fuentes* prior hearing rule.[115] The Court, however, failed to specify either the exception's limits or its requirements. Although deciding that *in the Mitchell case* the safeguards adequately protected the mutual interests of the parties,[116] the Court acknowledged that the decision did not substantially alter garnishment or summary self-help remedies of secured creditors and landlords nor undermine the validity of the cases invalidating replevin or similar statutes which did not clearly subject prejudgment deprivations to continuous judicial supervision.[117]

Mitchell reflects the Court's internal disagreement about the constitutional standard for the prejudgment remedy.[118] The majority had distinguished *Mitchell* from precedent by drawing attention to specific statutory safeguards, so commentators (though uncertain of the importance of the creditor's secured interest) interpreted *Mitchell* as providing a checklist of ordinary process requirements for provisional creditors' remedies.[119] *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[120] casts doubt upon that interpretation.

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[115] The breadth of the exception is emphasized in Justice Powell's concurring opinion. He concluded that *Fuentes* was essentially overruled. *Id.* at 623 (Powell, J., concurring). He implies that the *Fuentes* presumption of prior notice and hearing applies at most only when the *Mitchell* alternative safeguards are missing.

> In my view, the constitutional guarantee of procedural due process is fully satisfied *in cases of this kind* where state law requires, as a precondition to invoking the State's aid to sequester property of a defaulting debtor, that the creditor furnish adequate security and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration to determine the merits of the controversy, with the burden of proof on the creditor.

Id. at 625 (Powell, J., concurring) (emphasis added). *See* discussion *infra* part II.A.

[116] *Id.* at 619-20. In his dissent, Justice Stewart objected that the additional safeguards did not suffice to save the statute. *Id.* at 629-36 (Stewart, J., joined by Douglas & Marshall, JJ., dissenting). The affidavit still represents a pro forma conclusory allegation, *id.* at 632; the ministerial functions of the judge provide no greater protection than when performed by a clerk, *id.*; and the vanishing vendor's lien is not substantially different from the creditor's security interest considered in *Fuentes*, *id.* at 633.

[117] *Id.* at 620 n.14.

[118] Justice Stewart condemned the *Mitchell* decision as a politicization of the Court:

> A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.

Id. at 636.

[119] *See, e.g.*, Kenneth B. Coffey & William H. Benson, *Freezing Cash Before Judgment: Narrow Remedies and Needed Reform*, 57 FLA. B.J. 349 (1983) (suggesting that the five procedural safeguards outlined in *Mitchell* are the current procedural due process standard); *Prejudgment Attachment*, *supra* note 21, at 667 (finding that the *Mitchell* checklist "rest[s] on a fundamentally different interpretation[ ] of the mandates of due process" than *Fuentes*).

[120] 419 U.S. 601 (1975).

D. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[121]

In *Di-Chem*, Di-Chem, Inc. filed suit to recover the purchase price for goods sold and delivered to North Georgia Finishing, Inc. As permitted under the Georgia garnishment statute,[122] Di-Chem filed an affidavit for garnishment of North Georgia Finishing's bank account along with its complaint in the underlying action.[123]

At first glance, *Di-Chem* seems to be a reprise of *Sniadach* and *Fuentes*, ostensibly "relegat[ing] *Mitchell* to its narrow factual setting."[124] Justice White, who had also authored *Mitchell*, wrote a brief[125] opinion finding the Georgia statute invalid "for the same reasons" as the statutes in *Fuentes*.[126] However, White provided a *Mitchell* gloss to the *Fuentes* rnle, indicating that the seizures in *Fuentes* were unconstitutional because they "had been carried out without notice and without opportunity for a hearing *or other safeguard against mis-*

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121 *Id.*

122 GA. CODE ANN. § 46-101 to 103 (1974) (repealed 1976), *quoted in Di-Chem*, 419 U.S. at 602-03 n.1.:

> § 46-101 Right to writ; wages exempt until after final judgment . . . .
> § 46-102 Affidavit; necessity and contents. Bond. The plaintiff . . . shall make affidavit before some officer . . . or the clerk of any court of record in which the said garnishment is being filed . . . , stating the amount claimed . . . , and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond . . . in a sum at least equal to double the amount sworn to be due . . . .
> § 46-103 Affidavit by agent or attorney; When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief . . . .

123 *See Di-Chem*, 419 U.S. at 601-04.

124 *Id.* at 609 (Powell, J., concurring in the judgment). Powell concurred because the Georgia statute fell short of the requirements of strict state control outlined in *Mitchell*: bonding and prompt post-seizure hearing provisions requiring the garnishing party to establish a factual basis of need for the remedy before a "neutral officer." *Id.* at 611-12.

For commentary suggesting that *Di-Chem* limited *Mitchell* to its particular facts and statutory context, see Richard M. Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and its Progeny*, 65 GEO. L.J. 1, 11 (1976); Comment, *supra* note 93, at 346.

125 The majority opinion is only seven pages long. *Di-Chem*, 419 U.S. at 601-08.

126 *Id.* at 606. The Court explicitly eschewed the opportunity to look at the particular factual background of the suit; the fact that both parties were corporations involved in commercial transactions was irrelevant. *Id.* at 608. Some commentators had suggested that *Fuentes* and *Sniadach* could best be reconciled with *Mitchell* as special exceptions protecting low income consumers disadvantaged in the bargaining process. *See, e.g., supra* notes 40-43 and accompanying text. Justice Powell's interpretation in *Mitchell* suggested that *Sniadach* and *Fuentes* created a "brntal need" exception to normal provisional remedy procedures. *Mitchell*, 416 U.S. at 625. The *Di-Chem* Court's refusal to consider the equal bargaining status of the commercial parties, however, weakened those arguments while steering the Court clear of substantive due process protection of the contractual bargaining process.

taken repossession."[127] Georgia's statute likewise provided "none of the saving characteristics" of the statute in *Mitchell.*[128]

In his concurrence, Justice Powell explicitly interpreted *Di-Chem* and *Mitchell* as establishing specific criteria for *ex parte* attachment: (1) provision of adequate security, (2) evaluation of the attachment request by a neutral court officer, (3) grounding of the request in adequate facts, (4) establishment of need to prevent removal or dissipation of the assets to satisfy the underlying claim, (5) provision for a prompt postgarnishment judicial hearing, (6) requirement of a probable cause standard at the hearing, and (7) opportunity for the owner to dissolve garnishment by posting bond.[129] The Georgia statute's conclusory affidavit and lack of hearing, bonding and probable cause provisions rendered it deficient.[130] Justice Blackmun objected that "the Court now has embarked on a case-by-case analysis . . . . That road . . . provides no satisfactory answers to issues of constitutional magnitude."[131] Blackmun urged that *Sniadach*'s holding be restricted to wages[132] and that *Fuentes* be seen as "severely limited by *Mitchell.*"[133] In any event, Blackmun considered *Fuentes,* a four to three decision of a "shorthanded Court," of little precedential value.[134]

The majority, concurring, and dissenting opinions raise important questions regarding the relationship between *Di-Chem, Mitchell,* and the earlier cases. If *Di-Chem* limits the holding in *Mitchell* to its facts, it revitalizes the *Sniadach-Fuentes* presumption of prior notice and hearing. Alternatively, it could be understood to limit *Sniadach* and *Fuentes* to situations involving serious deprivations by establishing a catalog of criteria that meet the constitutional test for normal creditor-debtor situations. From yet another perspective, it could be interpreted to limit *Sniadach* and *Fuentes* to their factual situations by requiring ad hoc balancing of competing interests and procedural safegnards in each case.

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127 *Di-Chem,* 419 U.S. at 606 (emphasis added).

128 *Id.* at 607.

129 *Id.* at 611-13 (Powell, J., concurring).

130 "I consider the combination of these deficiencies to be fatal to the Georgia statute. Quite simply, the Georgia provisions fail to afford fundamental fairness in their accommodation of the respective interests of creditor and debtor." *Id.* at 613-14.

131 *Id.* at 620 (Blackmun, J., dissenting).

132 *Id.* at 615 (noting that Douglas's opinion in *Sniadach* referred to "a specialized type of property"). Blackmun later wrote that *Sniadach* "reeks of wages." *Id.* at 619.

133 *Id.* at 616.

134 *Id.* at 616, 617.

II
The Search for a Rule

In a system where constitutional doctrine evolves by analogy, doctrinal parameters are not always clear. When changes in Court personnel result in differing jurisprudential approaches, doctrinal clarity may be especially limited. The changeover from the Warren Court to the Burger-Rehnquist Court paralleled the rapid development of the administrative state and a shift in judicial focus from protection of individual rights to consideration of traditional procedures and administrative burdens. These changes were reflected in the *Sniadach* tetrad's shifting interest analysis.[135] Initially, the analysis focused on concern about the impact of state processes on those individuals least able to bear severe loss. The analysis thereafter shifted to significant weighting of the administrative burdens of protective procedures and of traditionally supported vested property interests.[136]

In spite of different underlying rationales,[137] the "momentum towards a rule" inherent in the analogy mechanism of judicial decision-making[138] can be seen in the *Sniadach* tetrad. Each decision redefines the issue by highlighting a different aspect of the problem. Each precedent is slightly reshaped by the new decision. A synthesis begins to emerge that pulls the competing strands into a coherent rule of law.

A. The Checklist Approach

The most categorical approach to a synthesis of the *Sniadach* tetrad is a "checklist analysis" that interprets *Mitchell* as establishing a constitutionally acceptable set of procedural safeguards.[139] If these

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135 By "interest analysis," I refer to the equitable balancing approach adopted in one form or another throughout the series of cases as the basis for evaluating provisional remedies.

136 *See generally* Thomas W. Logue, *Due Process, Postjudgment Garnishment, and "Brutal Need" Exemptions*, 1982 Duke L.J. 192 (1982) (positing two distinct and contradictory approaches to underlying rationales in the *Sniadach* tetrad, but suggesting that the resultant holdings are consistent); Scott, *supra* note 4, at 831, 829 (suggesting a shift from the recognition of a need for substantive regulation of the bargaining process to prevent "constitutional unconscionability" to a focus on "providing an efficient mechanism for resolving disputes between private parties.").

137 I stress the difference in rationales because of the siguificance ascribed to due process as a constitutional value. *See Prejudgment Attachment*, *supra* note 21, at 667 (finding that *Mitchell* and *Fuentes* "rest on fundamentally different interpretations of the mandates of due process").

138 *See* Kay & Lubin, *supra* note 4, at 726 ("[T]he momentum towards a rule which reconciles the demands of the present with the decisions of the past is always present."). *See also* Logue, *supra* note 136.

139 *See supra* notes 102-06 and accompanying text. *See also* Philip Shuchman, *Prejudgment Attachments in Three Courts of Two States*, 27 Buff. L. Rev. 459, 462 n.10 (1978):

> "While the Court has referred to this set of criteria to invalidate other statutes . . . , it has neither stated that all five characteristics are necessary to satisfy the Constitution, nor has it suggested which, if any, characteristics

safeguards are statutorily required, private parties may invoke state assistance in attachment proceedings without prior notice and hearing.[140] According to this view, *Fuentes* and *Sniadach* are limited to their respective fact situations. "Extraordinary circumstances" would presumably also provide a narrow exception for public emergencies.[141] Although ostensibly revitalizing *Fuentes* by relying on it as precedent for the *Di-Chem* decision, Justice White's additional gloss to the *Fuentes* rule[142]—invalidating seizures "without notice and without opportunity for a hearing *or other safeguard against mistaken repossession*"[143]—supports this analysis. White suggested, in effect, that the *Fuentes* statute was invalidated because it failed to provide the *Mitchell* safeguards.

The difficulty with the "checklist analysis" is the lack of specificity in *Mitchell* itself. Although the majority and the concurring opinions both mention additional safeguards, the concurrence much more clearly asserts their importance.[144] Powell presented an even more explicit listing of the safeguards in his concurring opinion in *Di-Chem*.[145] As discussed earlier, the *Mitchell* majority also emphasized the importance of the secured creditor interest and its special vulnerability due to its extinction upon transfer.[146] Some commentators suggest that the *Mitchell* safeguards are insufficient without a preexisting creditor interest. Barry Zaretsky, for example, argues that there is a "justice loss" in allowing some unscrupulous creditors to invoke the state's authority to generate leverage over debtors.[147] Therefore, to minimize such injustices, safeguards should favor the debtor in those cases where the creditor does not have a written security interest.[148]

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are not necessary. In the absence of clear guidelines, most state and lower federal courts have used all five criteria in assessing a statute's constitutionality."

140 *See, e.g.*, Coffey & Benson, *supra* note 119; John E. Gregorich, *The Constitutionality of Real Estate Attachments*, 37 WASH. & LEE L. REV. 701, 703-04 & n.16 (1980).

141 A public emergency would clearly qualify as an "extraordinary circumstance" under the three-prong *Sniadach-Fuentes* test. *See supra* note 80 and accompanying text; *infra* note 150 and accompanying text.

142 *See* Comment, *Justice White's Chemistry: The Mitchelization of Fuentes*, 50 WASH. L. REV. 901 (1975).

143 *Di-Chem*, 419 U.S. 601, 606 (1975) (emphasis added).

144 *Compare Mitchell*, 416 U.S. at 605-10 *with id.* at 625.

145 *See supra* note 129 and accompanying text.

146 *See supra* notes 95-96 and accompanying text.

147 Zaretsky, *supra* note 21, at 837.

148 *Id.* at 831. *See also* Laurence Levine, *Due Process of Law in Pre-Judgment Attachment and the Filing of Mechanics' Liens*, 50 CONN. B.J. 335, 345 (1976) (suggesting that a crucial factor in *Mitchell* was the creditor's pre-existing interest); Rendleman, *supra* note 4, at 555 (suggesting that the *Mitchell* "dual interest analysis" should apply only to situations in which the creditor holds a "consensual written security interest").

B. The Extraordinary Circumstances Exception

Other commentators have reconciled *Mitchell* with *Fuentes* through the *Sniadach-Fuentes* "extraordinary circumstances" exception.[149] Although the three-factor test for the exception seemed narrowly limited to public emergencies,[150] Justice Douglas proffered special creditor interests, in the context of narrowly drawn statutes, as a potential exceptional situation.[151] Accordingly, these commentators suggest that safeguarded creditor interests may also be considered part of this "extraordinary" exception.[152] Predeprivation process is required only when the safeguards are missing.

Richard Kay and Harold Lubin have developed the "extraordinary circumstances" analysis in detail.[153] They argue that the three criteria operate independently; any one is sufficient to generate a constitutional exception to the prior notice and hearing requirement.[154] The first two criteria—necessity to an important public interest and urgency of action—are substantive requirements that justify governmental actions to address national emergencies.[155] These include meeting wartime needs,[156] preventing distribution of dangerous products in the national food supply,[157] and undergirding the financial system.[158] The third criterion, a procedural requirement of strict governmental control of the seizure, is the "most important" of the three in establishing the limits of procedural due process.[159] Kay and Lubin

149 *See, e.g.*, Clarkson, *supra* note 27; Kay & Lubin, *supra* note 4; Newton & Timmons, *supra* note 4.

150 *See supra* note 80 and accompanying text. The attachment jurisdiction cases fit uneasily within the exception. At the time the cases were decided, however, plaintiffs could not reach nonresident defendants in many circumstances. Today, such defendants can be legitimately brought under a court's jurisdiction by long-arm statutes. *See* discussion *infra* part IV.B.

151 Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 339 (1969) ("[S]ummary procedure may well meet the requirements of due process in extraordinary situations. But in the present case no situation requiring special protection to a state *or creditor* interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.") (emphasis added) (citations omitted).

152 *See, e.g.*, Kay & Lubin, *supra* note 4, at 708-22. Even in this context, *Mitchell* is a special case because of the statutorily created vendor's lien that is extinguished by the debtor's transfer of the property. This special status under Louisiana's non-UCC statutory scheme, it is suggested, allows *Mitchell* to be categorized within the 'extraordinary circumstances' exception of *Fuentes*—a situation involving a compelling creditor interest, requiring urgency, and protected by strict state control of process. *Id.*

153 *Id.*

154 *Id.* at 709 & n.23.

155 *Id.* at 710.

156 Central Union Trust Co. v. Garvin, 254 U.S. 554 (1921), *cited in Fuentes*, 407 U.S. at 92.

157 North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908), *cited in Fuentes*, 407 U.S. at 92.

158 Fahey v. Mallonee, 332 U.S. 245 (1947), *cited in Fuentes*, 407 U.S. at 92.

159 Kay & Lubin, *supra* note 4, at 711.

suggest that the "ordinary" creditor concerns are not sufficiently urgent to invoke the state's potentially abusive process; most creditors have some such concerns regarding the harms from depreciation, destruction, or transfer that may occur through delays in repossession.[160] The state must, therefore, either provide prior notice and hearing or establish additional procedures which are "exceptionally protective of the interests of the party against whom the seizure is directed."[161] These exceptional protections bring the creditor interests within the "extraordinary circumstances" exception.[162]

The "extraordinary circumstances" analysis, however, allows the exception to swallow the rule. Ordinary creditor interests seem to be magically transformed into extraordinary circumstances that circumvent the normal procedural safeguards of prior hearing and notice. Although some commentators would require that the creditor demonstrate urgent need for the summary procedure,[163] *Mitchell* merely suggests that a creditor have a preexisting interest and face the *possibility* of loss through transfer.[164] In the "extraordinary circumstances" analysis, the fact that the requisite procedural safeguards are replaced by substitute safeguards becomes the justification for the replacement itself.[165]

C. The Disjunct Rules Approach

Steve Nickles offers a third approach to synthesis, positing a number of disjunct rules that, added together, cover the "due process spectrum."[166] Nickles suggests a basic *Fuentes* prior notice and hearing rule with numerous exceptions.[167] The *Mitchell* "other procedural safeguards" standard is the major exception; it applies to normal seizure situations.[168] There are, however, several exceptions to the

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160 *Id.* at 712.

161 *Id.* at 713.

162 *Id.*

163 For example, Barkley Clark and Jonathan Landers find that creditor interests may come within the exception if a showing of need is required. *See* Barkley Clark & Jonathan M. Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, at 369-70 (1973). They argue that delaying the debtor's opportunity for a hearing requires a showing of imminent possibility of loss of the property at stake. If the creditor can also show that there are no other assets to satisfy the potential judgment and that there is substantial probability that he will prevail on the merits on the underlying claim, then *ex parte* seizure should be allowed. *Id.*

164 *See supra* notes 95-96 and accompanying text.

165 "Although the predeprivation 'extraordinary situation' exception has been noted by courts there has been no meaningful discussion of what the term means. It appears to be a conclusion rather than the starting point of the analysis." Cristiano v. Courts of the Justices of the Peace, 669 F. Supp. 662, 669 (D. Del. 1987).

166 *See* Clarkson, *supra* note 27; Nickles, *supra* note 4, at 636. *See also* Rendleman, *supra* note 4.

167 Nickles, *supra* note 4, *passim.*

168 *Id.* at 624, 636.

"other procedural safeguards" exception. A "brutal need" standard applies when the particular circumstances of the debtor demand greater protection—in such cases, prior notice and hearing are required.[169] Similarly, a "minimal risks" exception applies if the minimal risks to the creditor's interests[170] demonstrate that the creditor is not entitled to the additional protection that seizure affords—again, prior notice and hearing are required.[171] Finally, the *Sniadach-Fuentes* "extraordinary situation" standard allows summary seizures necessitated by compelling government interests.[172]

This synthesis produces categories of ordinary, unusual, and extraordinary situations, each with its correlated procedural requirements. Although the set of rules and exceptions provides a comprehensive doctrinal approach because it encompasses the decided cases, it fails to capture any underlying generalization explaining the exceptions. Its predictive value as a rule of law is, therefore, limited to those cases that are obvious analogies.

D. The Neutral Magistrate Rule

The search for an underlying due process rationale has focused on the various balancing approaches in the tetrad. John Clarkson criticized the "atomistic" approach that compares the facts of the case to a "checklist of specific provisions," suggesting instead a "holistic" approach that applies an "*ad hoc* balancing test."[173]

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169 *Id.* at 624-25.

170 Minimal risks to the creditor's interests include situations in which the creditor lacks a preexisting interest in the property or has failed to show probable waste by the current possessor. *Id.* at 623-36.

171 *Id.* Doug Rendleman would limit application of the *Mitchell* standard to those cases involving a "dual interest" established by written contracts. *See* Rendleman, *supra* note 4, at 555.

172 Nickles, *supra* note 4, at 631-36. Nickles explicitly rejects the inclusion of creditor interests with *Mitchell* safeguards under this exception. He calls attention to the minimal protection offered the owner in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) in which the Court upheld a Puerto Rican civil forfeiture statute based on the *Fuentes* three-factor exception. There the owner was not aware that his yacht had been seized for use in illegal drug activities until long afterwards when he sought to revoke the lease for nonpayment. "The conclusion must be that if 'extraordinary situations' exist which require procedural safeguards less substantial than those demanded by *Mitchell*, they involve state intervention in other than private disputes." *Id.* at 636.

173 *See* Clarkson, *supra* note 27, at 187-88. Examples of courts adopting the "atomistic" approach include Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976) (striking Pennsylvania's foreign attachment statute for inadequate safeguards) and Guzman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975) (invalidating a seizure of a mobile home without adequate safeguards). Examples of courts adopting the "holistic" approach include Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975) (upholding prejudgment attachment of real estate even though no judge was involved in the proceeding) and Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336 (Iowa 1977) (upholding an attachment process involving a clerk rather than a judge).

James McLaughlin counters, however, that ad hoc balancing by individual courts tends to result in deference to the legislature; the result of balancing should instead be the development of a generally applicable constitutional rule.[174] McLaughlin proposes a "neutral magistrate rule" similar to the principle from Fourth Amendment jurisprudence.[175] Although both *Mitchell* and *Di-Chem* emphasized various specific requirements such as factual allegations and a bonding provision, the *Mitchell* Court referred generally to a process under "judicial control . . . from beginning to end."[176] The central idea of the neutral magistrate process is that an unbiased judicial officer should decide whether summary seizure is appropriate based on a probable cause standard.[177] Following this principle, summary seizure statutes that require participation by a neutral judicial officer who has discretion to deny the writ would meet the procedural due process test.[178]

Although McLaughlin's emphasis on a neutral factfinder interposed between the defendant and plaintiff brings procedural due process to the forefront, the rule does not fully explicate the role of the various *Mitchell* safeguards. Magistrate process alone may not be a sufficient safeguard if the statute allows the magistrate to render decisions based on conclusory affidavits. In addition, the lack of a statutory bonding requirement may place the debtor in too vulnerable a position in spite of a probable cause assessment. Without clarification of the relative significance of accompanying safeguards, a neutral magistrate rule alone will not answer the questions left by *Mitchell* and *Di-Chem*.

Thus, the *Sniadach* tetrad leaves the procedural due process question incompletely answered. Each of the approaches outlined above represents a plausible approximation of the constitutional rule, but only the "neutral magistrate rule" seeks a unifying principle. In some ways, the sum of the commentary carries the analysis back to its beginnings: prejudgment seizures are constitutional only if they are carried out with adequate safeguards to prevent constitutionally unacceptable error and to provide acceptable remedies when errors do occur.[179]

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174 James A. McLaughlin, *Essay—Prejudgment Attachments and the Concept of the Neutral Magistrate: A Tale of Two Cases*, 83 W. VA. L. REV. 203, 216-17 (1981).

175 *Id.* at 210, 216-17.

176 *Mitchell*, 416 U.S. at 616.

177 McLauglin, *supra* note 174, at 210.

178 *Id. See also* Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978) (finding that *Mitchell* does not require ad hoc balancing but that a neutral magistrate with discretion to deny the writ of attachment is an essential constitutional safeguard).

179 *See* Logue, *supra* note 136, at 199 (offering such a rule as the consistent holding across the *Sniadach* tetrad).

III
CONNECTICUT V. DOEHR

These interwoven procedural issues come together again in *Connecticut v. Doehr.*[180] Preexisting creditor interests, the sufficiency of additional safeguards, exigent circumstances, and interest balancing all figure in the 1991 decision. The first addition to the *Sniadach* line of cases since *Di-Chem, Doehr* provides another window to the Court's procedural due process analysis.

A. Facts and Procedural Posture

The *Doehr* Court addressed the constitutionality of Connecticut's prejudgment attachment remedy.[181] DiGiovanni, the plaintiff, filed

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180 501 U.S. 1, 9-11 (1991).

181 CONN. GEN. STAT. § 52-278e (1991), *cited in Doehr,* 501 U.S. at 5-6 n.1, outlines the applicable procedure for prejudgment attachment:

> Allowance of prejudgment remedy without hearing. Notice to defendant. Subsequent hearing and order. Attachment of real property of municipal officers.
>
> (a) The court . . . may allow the prejudgment remedy to be issued by an attorney without hearing . . . upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claim and (1) that the prejudgment remedy requested is for an attachment of real property; or (2) that there is reasonable likelihood that the defendant (A) neither resides in nor maintains an office or place of business in this state and is not otherwise subject to jurisdiction over his person by the court, or (B) has hidden or will hide himself so that process cannot be served on him or (C) is about to remove himself or his property from this state or (D) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or (E) has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or (F) has stated he is insolvent or has stated he is unable to pay his debts as they mature.
>
> (b) If a prejudgment remedy is granted pursuant to this section, the plaintiff shall include in the process served on the defendant the following notice prepared by the plaintiff: YOU HAVE RIGHTS SPECIFIED IN THE CONNECTICUT GENERAL STATUTES, INCLUDING CHAPTER 903a, WHICH YOU MAY WISH TO EXERCISE CONCERNING THIS PREJUDGMENT REMEDY. THESE RIGHTS INCLUDE: (1) THE RIGHT TO A HEARING TO OBJECT TO THE PREJUDGMENT REMEDY FOR LACK OF PROBABLE CAUSE TO SUSTAIN THE CLAIM; (2) THE RIGHT TO A HEARING TO REQUEST THAT THE PREJUDGMENT REMEDY BE MODIFIED, VACATED OR DISMISSED OR THAT A BOND BE SUBSTITUTED; AND (3) THE RIGHT TO A HEARING AS TO ANY PORTION OF THE PROPERTY ATTACHED WHICH YOU CLAIM IS EXEMPT FROM EXECUTION.
>
> (c) The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no probable cause, the prejudgment remedy shall be dis-

for a $75,000 attachment on Doehr's home[182] as security for a tort suit alleging assault and battery against Doehr.[183] Connecticut allowed attachment of real property[184] without notice or prior hearing or bond[185] "upon verification by oath of the plaintiff . . . that there is probable cause to sustain the validity of the plaintiff's claim."[186] Based on the allegations in the required affidavit,[187] the state court judge found probable cause and ordered attachment.[188] Doehr received neither service of the complaint in the underlying action nor notice of attachment until after the sheriff attached the property.[189]

Doehr challenged the Connecticut statute in federal court under the Due Process Clause of the Fourteenth Amendment.[190] Although the district court found the statute constitutional,[191] the Second Circuit reversed.[192] Concluding that the applicable rule from the *Sniadach* tetrad is "that a prior hearing may be postponed where exceptional circumstances justify such a delay, *and where* sufficient additional safeguards are present,"[193] the Second Circuit found the risk of wrongful attachment too great.[194] The fault-based nature of a tort claim and the lack of a plaintiff security bond requirement left the defendant unprotected.[195]

> solved. An order shall be issued by the court setting forth the action it has taken.

182 *Doehr*, 501 U.S. at 5. The Court noted that DiGiovanni had no preexisting interest in the home. *Id.*

183 *Id.*

184 CONN. GEN. STAT. § 52-278e(a)(1) (1991).

185 *Doehr*, 501 U.S. at 6.

186 CONN. GEN. STAT. § 52-278e(a) (1991).

187 The affidavit consisted of five one-sentence statements alleging as follows:

> [T]hat the facts set forth in [the plaintiff's] previously submitted complaint were true; that "I was willfully, wantonly and maliciously assaulted by the defendant, Brian K. Doehr"; that "[s]aid assault and battery broke my left wrist and further caused an ecchymosis to my right eye, as well as other injuries"; and that "I have further expended sums of money for medical care and treatment." The affidavit concluded with the statement "In my opinion, the foregoing facts are sufficient to show that there is probable cause that judgment will be rendered for the plaintiff."

Doehr, 501 U.S. at 6-7 (citations omitted).

188 *Id.* at 7.

189 *Id.* The attachment notice included information about Doehr's right to a hearing in which he could challenge probable cause, claim an exemption, or vacate or modify the attachment. *Id.*

190 *Id.*

191 Pinsky v. Duncan, 716 F. Supp. 58 (D. Conn. 1989).

192 Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990).

193 *Id.* at 855.

194 *Id.* at 856.

195 *Doehr*, 501 U.S. at 8-9.

B. The Notice and Hearing Requirement

The Supreme Court characterized the issue as determining "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property by means of the prejudgment attachment or similar procedure."[196] Reviewing the *Sniadach* tetrad, the Court distinguished *Mitchell* from *Fuentes* and *Sniadach* based on *Mitchell*'s "factual and legal background."[197] The Court specified the important features of the *Mitchell* statute which spared it from invalidation:

> [P]rovision of an immediate postdeprivation hearing along with the option of damages; the requirement that a judge rather than a clerk determine that there is a clear showing of entitlement to the writ; the necessity for a detailed affidavit; and an emphasis on the lienholder's interest in preventing waste or alienation of the encumbered property.[198]

The Court then described the *Di-Chem* decision as an invalidation based both on failure to provide notice and prior hearing and on failure to provide additional safeguards.[199]

The Court's method of determining the validity of the Connecticut statute is significant.[200] Reiterating the *Cafeteria Workers*[201] caveat that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," the Court applied a balancing test adapted from its entitlement cases.[202] It offered little explanation other than a noted similarity of inquiry.[203] The *Mathews*[204] three-pronged test, developed in the context of agency terminations of statutorily created entitlements, considers the following factors:

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196 *Id.* at 9.

197 *Id.* at 9-10.

198 *Id.* at 10.

199 *Id.*

200 Although the Court was unanimous in holding the statute invalid, Justice Scalia did not join the section of the opinion reviewing the *Sniadach* tetrad and developing the modified *Mathews* test. *Id.* at 4. Scalia wrote separately, basing his support for the application of the modified *Mathews* test on the historical lack of recognition of such attachment procedures. *Id.* at 30 (Scalia, J., concurring in part and concurring in the judgment). This is consistent with Justice Scalia's opinion in Burnham v. Superior Court, 495 U.S. 604 (1990) (finding that transient jurisdiction enjoys constitutional validity due to its "pedigree" as the paradigm of the traditional concept of territorial jurisdiction). *See also* note 361 *infra*.

201 Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

202 *Doehr*, 501 U.S. at 10 (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976) and *Cafeteria Workers*, 367 U.S. at 895).

203 *Id.* The Court commented that the *Mathews* test had "dr[awn] upon [the] prejudgment remedy decisions to determine what process is due when the government itself seeks to effect a deprivation on its own initiative." *Id.*

204 Mathews v. Eldridge, 424 U.S. 319 (1976).

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[205]

Although prejudgment remedy statutes meet the state action requirement for Due Process Clause analysis, they are essentially remedies for private party disputes that only minimally involve the government.[206] As a result, the burden from additional procedural safeguards falls mainly on the party seeking attachment rather than on the government.[207] Given the emphasis on the dual private interests of creditor and debtor, the Court modified the *Mathews* test for the provisional remedy context:

> [The test balances:] first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.[208]

In applying the modified *Mathews-Doehr* test, the Court collapsed the first prong of the due process two-step analysis[209] into the first prong of the balancing test, discussing whether the interests involved are even entitled to constitutional protection.[210] The Court accepted

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205 *Id.* at 335.

206 *Doehr*, 501 U.S. at 10-11.

207 *Id.* at 11.

208 *Id.*

209 *See supra* notes 71-72; *infra* notes 210, 287-90 and accompanying text.

210 *Doehr*, 501 U.S. at 10-11. According to Judge Frank Easterbrook, the due process two-step analysis in the entitlement area of administrative law decisions relies on a substance-process dichotomy: the courts specify process once the legislature has specified substance by creating a property interest statutorily. Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85.

> [Entitlement] due process analysis is a two-step routine. First the Court determines whether by statute or regulation the State has created an entitlement ("liberty or property") the existence or extent of which turns on some determinable facts. It also is enough that there is an antecedent interest in personal liberty, one the government may not extinguish except for cause. . . . Many cases stop here with a finding that the claim involves neither liberty nor property. . . .
>
> . . . No entitlement, no process. . . . If, however, the constitution, statute, or regulation creates a liberty or property interest, then the second step—determining "what process is due"—comes into play.

Id. at 87-88.

the Second Circuit's finding that the attachee had significant property interests, finding that "[the proceeding] clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause."[211] Note that the attachee suffers neither permanent nor complete physical deprivation of real property. The attachment may be less injurious than a temporary deprivation of necessary household goods and wages.[212] Yet the Court stated summarily that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."[213]

In assessing the risk of erroneous deprivation, the Court considered the ultimate goal of securing an award to the plainuff that the defendant might not otherwise satisfy.[214] In effect, the Court evaluated the statutory considerations of the plaintiff's likelihood of success on the merits to ascertain the increased risks of error in the absence of additional safeguards. Although the statute required probable cause,[215] the Court noted an unresolved ambiguity suggesting a lesser standard.[216] Aggravating the risk of error were the "one-sided, self-serving, and conclusory submissions" in both the affidavit and complaint that provided no basis for judicial review.[217] These limitations are particularly likely to lead to mistaken deprivation when the underlying claim is a tort action not subject to documentary proof.[218]

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211 *Doehr*, 501 U.S. at 11.

212 *Id.* at 12.

213 *Id.* The Court thus expanded due process protection to temporary encumbrances of real estate formerly considered de minimis deprivations not entitled to constitutional protection. *See generally* Janice Gregg Levy, *Lis Pendens and Procedural Due Process: A Closer Look After* Connecticut v. Doehr, 51 Md. L. Rev. 1054 (1992) (finding that *Doehr*'s holding requires due process protection for lis pendens actions). The Court distinguished *Doehr* from Spielman-Fond, Inc. v. Hanson's, Inc., 417 U.S. 901 (1974), in which the Court summarily affirmed a finding that a mechanic's lien was not a siguificant taking of a property interest sufficient to entail additional procedural protection under the Due Process Clause. The *Doehr* Court noted that a summary affirmance carries limited precedential value. In addition, *Spielman* can be distinguished because the mechanic's lien relies on a preexisting creditor interest in the property. *Doehr*, 501 U.S. at 12 n.4.

214 *Doehr*, 501 U.S. at 12.

215 *See supra* note 181.

216 The Court discussed three possible interpretations: (1) "the objective likelihood of the [underlying] suit's success," (2) "a subjective good faith belief that the suit will succeed," or (3) "a claim with sufficient facts to survive a motion to dismiss." *Doehr*, 501 U.S. at 13 (citations omitted).

217 *Id.* at 14.

218 Permitting a court to authorize attachment merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury, when it rested on factual allegations that were sufficient to state a cause of action but which the defen-

The Court found few safeguards to alleviate this risk. The statute did provide for postattachment notice and hearing and for a double damages action for commencement of suit without probable cause.[219] Three key *Mitchell* factors, however, were missing: (1) a plaintiff's preexisting interest in the property, (2) an underlying claim subject to documentary proof, and (3) bonding provisions.[220]

Finally, the Court considered the plaintiff's interests de minimis—nothing more than the plaintiff's desire to ensure availability of sufficient assets to meet the potential tort judgment award.[221] There was no preexisting interest in the property,[222] and the plaintiff had not alleged actions that would render the property unavailable to satisfy the judgment.[223] The Court found no additional state interest, specifically stating that the difference between pre- and post-deprivation hearings could mean little in terms of administrative or financial burdens.[224]

The Court noted that historical practice and national trends provide additional support for invalidating the Connecticut statute.[225] Tracing the origins of modern attachment to proceedings in the mayor's and sheriff's courts in London, the Court noted that plaintiffs were entitled to attach goods only when defendants' actions threatened the satisfaction of potential awards.[226] The tort claim in *Doehr* is thus less closely related to the origins of attachment than the

> dant would dispute, or in the case of a mere good-faith standard, even when the complaint failed to state a claim upon which relief could be granted.

Id. at 13-14.

219 *Id.* at 14-15. *See* statutory provisions *supra* note 181.

220 *Doehr*, 501 U.S. at 15. The Court's listing of these factors creates ambiguity regarding the holding of the case. It suggests that the Connecticut statute *might* have been saved if it had included further safeguards, such as being restricted to preexisting interests rather than applying in cases where the plaintiff's underlying suit is entirely unrelated to the property.

221 *Id.* at 16.

222 The Court gives considerable emphasis to whether the plaintiff has a preexisting interest in the property. It is a factor both in the evaluation of the plaintiff's interest in the attachment proceeding and in the assessment of the risk of error. *Id.*

223 *Id.* The Court's statement supports the interpretation that *Mitchell* falls within a category of private creditor extraordinary circumstances under *Fuentes*. "Our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected." *Id.* (citing *Mitchell*, 416 U.S. at 609; *Fuentes*, 407 U.S. at 90-92; and *Sniadach*, 395 U.S. at 339). It is not clear, however, whether the proper support for such a claim includes both a preexisting creditor interest and a likelihood of transfer or waste.

224 *Id.*

225 *Id.*

226 *Id.* at 16-17 (citing CHARLES D. DRAKE, A TREATISE ON THE LAW OF SUITS BY ATTACHMENTS IN THE UNITED STATES, §§ 40-82 (1866); 1 ROSWELL SHINN, A TREATISE ON THE AMERICAN LAW OF ATTACHMENT AND GARNISHMENT § 86 (1896)).

creditor-debtor disputes in the *Sniadach* tetrad.[227] Similarly, most modern state attachment provisions provide greater protection to the attachee than the disputed Connecticut statute.[228]

C. The Bond Requirement

Only four of the Justices considered whether due process requires the plaintiff to post bond to ameliorate the potentially severe consequences of mistaken *ex parte* prejudgment remedies.[229] Even after a hearing, the defendant's interests remain at risk until a final determination on the merits.[230] Connecticut's double damages remedy for frivolous suits[231] provides inadequate protection, because it is unavailable until resolution on the merits and easily defended by an attorney opinion supporting the suit.[232] The Justices concluded, therefore, that the protection of the bonding provision is necessary.[233] The additional safeguard, however, is insufficient to dispense with a prior hearing.[234]

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227 *Doehr*, 501 U.S. at 17.

228 *Id.* at 17-18. The Court notes that "nearly every State requires either a preattachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place." *Id.* at 17.

229 *Id.* at 18. The Court was, however, unanimous in its judgment. *See id.* at 4. All but Justice Scalia concurred in the review of the *Sniadach* tetrad and the rationale for the modified *Mathews* test. *See id.* at 30 (Scalia, J., concurring in part and concurring in the judgment). Chief Justice Rehnquist, joined by Justice Blackmun, found the discussion of a bonding requirement and a possible exigent circumstances exception "both unwise and unnecessary." *Id.* (Rehnquist, C.J., concurring). Justices White, Marshall, Stevens, and O'Connor found it appropriate to discuss the bonding provision for three reasons:

> First, . . . the notice and hearing question and the bond question are intertwined and can fairly be considered facets of the same general issue. . . . Second, this aspect of prejudgment attachment ". . . [is one] with regard to which the lower courts are in need of guidance." Third, ". . . both parties have briefed and argued the question."

Id. at 18 n.7 (quoting Berkemer v. McCarty, 468 U.S. 420, 435-36 n.23 (1984)) (alterations in original).

230 *Id.* at 20.

231 CONN. GEN. STAT. § 52-568(a) (1991) provides that:

> Any person who commences and prosecutes any civil action or complaint against another, in his own name, or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages.

232 *Doehr*, 501 U.S. at 20-21.

233 *Id.* at 23.

234 *Id.* "[T]he right to be compensated at the end of the case, if the plaintiff loses, for all provable injuries caused by the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held." *Id.* at 22. The Justices considered the impact on someone who lost an opportunity to sell the property because of the attachment, a parent forced to forego an equity loan which was to have been used to support his child's education, an entrepreneur unable to find financing to begin a business because of the attachment blemish on her credit history, or a homeowner faced with disruptions caused by a technical default. *Id.*

D. Chief Justice Rehnquist's Concurring Opinion

Chief Justice Rehnquist supported the judgment based on the circumstances in the application of the Connecticut prejudgment remedy *in this case*.[235] His reservation stemmed from recognition of the Court's decision as "a significant development in the law"[236] following the *Sniadach* tetrad. Whereas the tetrad limited the availability of provisional remedies for creditors attempting to secure a defendant's personal property through physical seizure,[237] the *Doehr* Court evaluated an "incipient lien" impairing full ownership rights to real property without actually depriving the defendant of its use.[238]

Rehnquist implied that the extension of procedural due process protections to encumbrances on real property becomes constitutionally necessary only when the plaintiff does not have a preexisting interest.[239] He noted that various lower courts have cited the Court's summary affirmance of a mechanic's lien statute in *Spielman-Fond, Inc. v. Hanson's, Inc.*[240] to support the proposition that imposition of a lien on real property does not constitute a deprivation requiring due process protection.[241] The case may alternatively be viewed, he suggested, as protecting the preexisting interest created by statute in favor of unpaid mechanics.[242] The Court's refusal to review a *lis pendens* for want of a substantial federal question in *Bartlett v. Williams*,[243] he claimed, also rested on the preexisting interest.[244] He thus argued that the *Doehr* holding only applies to statutes to the ex-

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235 *Id.* at 26 (Rehnquist, C.J., concurring).

236 *Id.* at 29 (Rehnquist, C.J., concurring). Rehnquist compares the Court's holding to Holmes' "almost casual statement" writing for a unanimous Court in Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 31 (1928): "[N]othing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit." *Doehr*, 501 U.S. at 29.

237 *Id.* at 27 (Rehnquist, C.J., concurring).

238 *Id.*

239 *See id.* at 27-28.

240 417 U.S. 901 (1974).

241 *Doehr*, 501 U.S. at 27.

242 *Id.* at 28. As the Court had done, Rehnquist merged the two-step analysis in this discussion by concluding that to require hearings for mechanic's liens would defeat the liens' purpose:

> Since neither the labor nor the material can be reclaimed once it has become a part of the realty, [the mechanic's lien] is the only method by which workmen or small businessmen who have contributed to the improvement of the property may be given a remedy. . . . To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes.

Id.

243 464 U.S. 801 (1983).

244 *Doehr*, 501 U.S. at 29. The state court had sustained the lien filed in conjunction with a suit to enjoin defendants from engaging in any transaction to affect title. Williams v. Bartlett, 457 A.2d 290, 291-92 (Conn. 1983) (finding that a postsequestration hearing provision was sufficient to allow attachment *pendente lite* even though there was no provision

tent that they allow parties to encumber property in which the parties have no preexisting interest.

IV
FINDING A SYNTHESIS

A cursory reading of the majority opinion in *Doehr* elicits a rule superficially similar to the *Fuentes* rule: prejudgment remedies require prior notice and hearing absent a showing of "some exigent circumstance."[245] The difficulty with this rule as a constitutional guide lies in the amorphous concept of "some exigent circumstance."[246] As discussed in Part I, the "extraordinary circumstances" exception in the *Sniadach* tetrad originated as a three-factor procedural exception for legitimate public emergencies. The term as used in *Doehr* functions instead as a "catch-all" category for dual interest creditor-debtor attachments that do not require prior notice and hearing. Under another section of the Connecticut statute in question in *Doehr,* even attachment for jurisdiction over a nonresident defendant is considered an exigency allowing *ex parte* proceedings.[247] Without a foundation in fundamental due process values, the term is little more than a convenient peg on which to hang the cases. It provides no justifying rationale or principle for the protection required.

The disagreements underlying the decision in *Doehr* provide little help. For Rehnquist, the decision depended on a "totality of the circumstances" view of the statute *as applied* to the particular fact situation of the case.[248] He stressed the lack of a preexisting creditor interest, at least for the application of due process protections to nonpossessory encumbrances on real property.[249] For the majority, the "highly factual," fault-based nature of the underlying claim seemed

for security bonds). The plaintiffs claimed that the defendant had misappropriated the property from the partnership while occupying a fiduciary position. *Id.* at 295.

245 *See, e.g.,* Levy, *supra* note 213, at 1073. This rule is plainly stated in the conclusion of Section III of the majority opinion in *Doehr* and again in the introduction to the plurality's discussion of bonding provisions in Section IV. *Doehr,* 501 U.S. at 18-19.

246 *Id.*

247 *See* David J. Baker, Note, *The Ex Parte Attachment of Nonresidents' Personal Property in Connecticut: A Statutory Revitalization of* Harris v. Balk *"Attachment Jurisdiction"?,* 11 U. BRIDGEPORT L. REV. 651, 654-656, 654 n.9 (1991).

248 *See supra* note 235 and accompanying text.

249 *Doehr,* 501 U.S. at 27 (Rehnquist, C.J., concurring). *See supra* notes 239-44 and accompanying text. However, Rehnquist disagreed with the "exigent circumstances" requirement discussed by the plurality: "We should await concrete cases which present questions involving bonds and exigent circumstances before we attempt to decide when and if the Due Process Clause of the Fourteenth Amendment requires them as prerequisites for lawful attachment." *Doehr,* 501 U.S. at 30.

particularly important.[250] A preexisting creditor interest was just one of the possible "countervailing considerations" found lacking.[251] Others included safeguards such as a bonding provision or an "exigent circumstance," defined here as a threat of imminent loss through transfer, encumbrance, or other action by the defendant.[252]

A. Harmonizing the Quintad

1. *Some Lower Court Applications of* Doehr

Chief Justice Rehnquist's concurring opinion supports a case by case adjudication of the constitutionality of attachment statutes *as applied* to particular fact patterns.[253] Apparently, *either* a preexisting interest held by the attacher *or* one of the several exigent circumstances mentioned in the cases, *plus* some appropriate alternative safeguards set forth in *Mitchell*, would meet procedural due process requirements without need for a prejudgment hearing. On balance—a balance performed by the reviewing court for the particular application of the statute to the particular plaintiffs and defendants—the weight will favor either the attachee's interest or the attacher's interest in any particular situation.

Both the Connecticut Supreme Court in *Union Trust Co. v. Heggelund*[254] and the District Court of Connecticut in *Shaumyan v. O'Neill*[255] have adopted this approach. The result in these cases grants the preexisting interest criterion equal importance with the various criteria establishing the extraordinary circumstances exception, without requiring that the plaintiff demonstrate imminent loss. The *Heggelund* court found that *Doehr* was not relevant to the case:

> [T]his is not a tort suit, but a suit on a debt, and disputes between debtors and creditors more readily lend themselves to accurate *ex parte* assessments of the merits. Here, as in *Mitchell v. W.T. Grant Co.*, the risk of error was minimal because the likelihood of recovery

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250 *Id.* at 8, 14-15. The Connecticut statute allowed attachment for *any* civil action. Pinsky v. Duncan, 898 F.2d 852, 856 (2d Cir. 1990), *aff'd*, 501 U.S. 1 (1991) (citations omitted).

251 *Doehr*, 501 U.S. at 14.

252 *Id.* at 15-16.

253 *See supra* note 235 and accompanying text.

254 594 A.2d 464 (Conn. 1991).

255 795 F. Supp. 528 (D. Conn. 1992), *aff'd*, 987 F.2d 122 (2d Cir. 1993) [hereinafter *Shaumyan II*]. Basing its decision on such a reading, the district court held—and the Second Circuit affirmed—that a mechanic's lien does not raise the same due process concerns even though it creates a similar encumbrance on real property. "[T]he fact specific application of the Statute to an intentional tort action predicated on a fist fight, rather than to an action to recover payment for work performed on real property as in *Shaumyan I* . . . limited the scope of the Court's analysis in *Doehr*." *Id.* at 531.

involved uncomplicated matters that lent themselves to documentary proof.[256]

In *Shaumyan II*, the district court relied heavily on Rehnquist's concurrence to interpret the applicability of *Doehr* to a mechanic's lien.[257] The lien has an effect substantially similar to that of the attachment in *Doehr*, a cloud on title that impairs marketability and credit availability.[258] The court concluded, however, that the lien would not fall within *Doehr*'s requirement for a predeprivation hearing. The plaintiff's lack of a preexisting interest was crucial to *Doehr*,[259] so that the case, the *Shaumyan* court concluded, "turn[ed] largely on the high risk implicit in a probable cause determination . . . where the underlying claim involves complex and disputed factual allegations."[260] In *Shaumyan II*, however, the mechanic's lien existed prior to the attachment and rested on a contractual claim. The *Shaumyan II* court thus granted a summary judgment motion dismissing the constitutional claim, stressing that its decision upheld "the Statute's constitutionality *only as applied to the facts of this case*."[261]

Determining constitutionality by this "statute as applied" approach is problematic because it yields inconsistent results and invites litigation. People are entitled to know the law before they act, but under this ad hoc balancing approach, parties will not know whether the procedure is acceptable in their situation until the case is decided in court. The *Sniadach* quintad does provide a catalog of factors relevant to the constitutionality of summary attachment proceedings, but the Supreme Court has not explicitly assessed the value of each factor. The refusal of a majority of the Justices in *Doehr* to assess the necessity for a bonding provision is illustrative.[262] The lower courts may emphasize one or another of the factors according to their reading of the opinions. Each decision on the constitutionality of the "statute as applied" may, therefore, adjust the weighting or the minimal requirements according to the deciding court's perspective. Both the outcomes and the underlying rationales may vary from court to court. The question inevitably arises whether the constitutional protections can, indeed, be upheld without a clearer understanding of the underlying principle.[263]

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256 *Heggelund*, 594 A.2d at 466 n.3 (quotations and citations omitted).

257 *Shaumyan II*, 795 F. Supp at 531, 532-33. The court noted that "the scope of *Doehr*'s holding is at best unclear." *Id.* at 532.

258 The District Court had discussed these aspects of the deprivation in its original opinion. Shaumyan v. O'Neill, 716 F. Supp. 65, 77 (1989).

259 *Shaumyan II*, 795 F. Supp. at 532.

260 *Id.* at 531.

261 *Id.* at 529 (emphasis added).

262 *See supra* notes 229-34 and accompanying text.

263 *See, e.g.*, *supra* note 131 and accompanying text.

2. *The Prejudgment Remedy Doctrinal Tree*

One way to avoid ad hoc balancing would be to make the exceptions to the predeprivation hearing requirement doctrinally explicit.[264] The doctrinal framework that emerges from the *Sniadach* quintad can be described as follows. Prior to *Sniadach* (A), there was an irrebuttable presumption of constitutional validity for attachment proceedings. Creditors traditionally relied on the state's assistance in collecting consumer debts, the state could confiscate goods to protect the public, and plaintiffs could resort to the state's control over property within its jurisdiction to vindicate their rights against a nonresident defendant.[265]

Standing alone, *Sniadach* (B) focuses on the defendant's "brutal need." The Court created an exception to the general presumption for garnishment of wages.[266]

(A) Summary proceedings are constitutional
unless
(B) the defendant shows "brutal need"

The addition of *Fuentes* (C), however, reverses the presumption: summary proceedings were unconstitutional unless justified by a compelling public necessity or other "extraordinary circumstance."[267]

(C) Summary proceedings are unconstitutional
unless
there is an "extraordinary circumstance"

Mitchell (D) shifts the focus back to the state's role in protecting creditors' interests. The Court allowed summary attachments when there was a "neutral magistrate" process. The rule created an expansive exception to the presumption covering ordinary creditor-debtor proceedings.[268]

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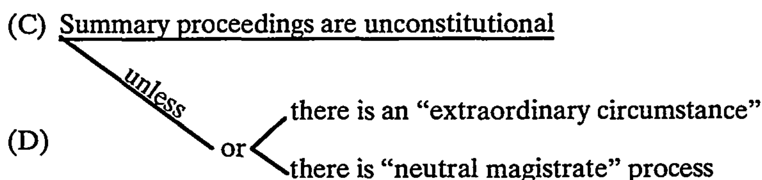
264 In effect, this is a refinement of the "disjunct rules" approach discussed in Section II-C *supra* based on the additional perspective provided by *Doehr*.

265 *See supra* notes 229-34 and accompanying text.

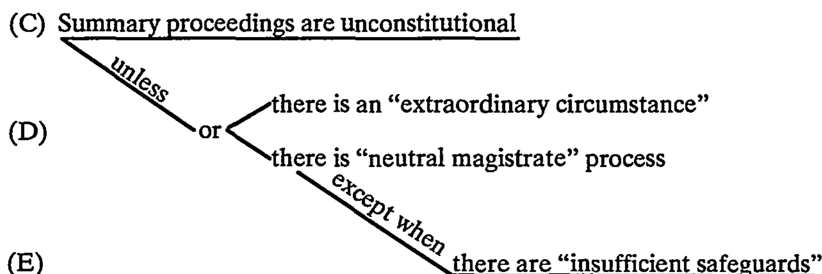
266 *See* discussion *supra* part I.A.

267 *See* discussion *supra* part I.B.

268 *See supra* notes 90-119, 175-78 and accompanying text. As discussed, the *Mitchell* rule clearly creates an exception to the requirement for a prejudgment hearing. It is not clear whether each of the safeguards explicitly mentioned in *Mitchell* is necessary to the exception or whether some subset might be constitutionally sufficient.



Di-Chem (E) limits the *Mitchell* rule most clearly by focusing on the conclusory nature of the allegations.[269] The ultimate effect of *Di-Chem* is the creation of an "insufficient safeguards" exception to the *Mitchell* "neutral magistrate" exception to the *Sniadach-Fuentes* "prior hearing required" presumption.



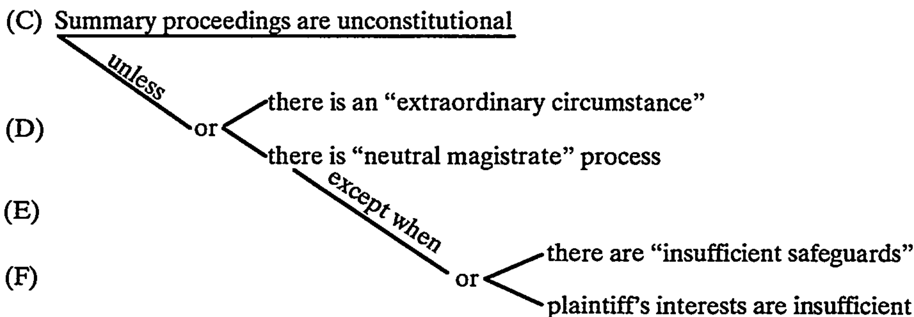
Doehr (F) extends protection to attachments of real property. It thus brings de minimis restrictions on marketability under the aegis of the Due Process Clause.[270] The Court also clarified the *Di-Chem* exception to *Mitchell*: attachment proceedings are constitutionally deficient when based on "highly factual" causes of action even though a judge issues the writ on a probable cause assessment.[271] The dangers of erroneous deprivation are simply too high. The implication, however, is that the plaintiff's lack of a preexisting interest or exigent circumstance would also render summary procedure unconstitutional, even with other safeguards.[272] In such cases, the plaintiff's interest would be insufficient to justify summary proceedings.

269 Although the majority stated that the "statute has none of the saving characteristics" of *Mitchell*, the Court focused on the conclusory nature of the allegation. *Di-Chem*, 419 U.S. at 607. Powell also emphasized that the "simple and conclusory affidavit" is an inadequate safeguard even when subject to the discretionary review of a "neutral officer." *Id.* at 612 (Powell, J., concurring).

270 *See supra* note 213 and accompanying text.

271 *Doehr*, 501 U.S. at 8. *See also supra* notes 217-18 and accompanying text.

272 In other words, the Court seems to suggest that either a preexisting interest or an exigent circumstance (as defined) combined with a neutral magistrate process would overcome the Court's concerns regarding the inadequacy of the probable cause standard. Without those interests weighing on the plaintiff's side, postdeprivation process is deficient.



Although the doctrinal tree removes some of the confusion of the apparent inconsistencies among the cases, it obscures rather than clarifies the underlying due process values. An alternative approach to understanding *Doehr* and the *Sniadach* tetrad looks instead to the modified *Mathews-Doehr* balancing test. As noted in Part I, some type of interest balancing figures in each of the quintad cases. Even before *Doehr*, one commentator noted that "[t]he *Mathews* formulation could be viewed as a generalization of the concerns indicated in Justice White's prejudgment seizure opinions, affirming that due process involves a balancing test that can require different procedural safeguards when different interests are at stake."[273] To understand *Doehr*, then, we must look briefly at the history and underlying values of procedural due process.

3. *The Role of Interest Balancing in Due Process Analysis*

Due process is the "oldest of our civil rights"[274] yet perhaps—as the primary protection against the intrusiveness of bureaucratic power—one of the more controversial ones.[275] Procedural due process developed in this century with the advent of the administrative state.[276] Early Court decisions imposed absolute limits on administrative agency powers.[277] Later, the Court distinguished between rights protected by common-law causes of action and privileges created by

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273 Kathleen A. Hillegas, Note, 9 U. ARK. LITTLE ROCK L.J. 517, 522 (1987).

274 Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1044 (1984).

275 *See, e.g.*, Easterbrook, *supra* note 210, at 109 (suggesting that "the current approach to due process is unsupportable" because it provides too much power to the courts to overturn legislative enactments).

276 *See id.* at 99-109 (arguing that the Due Process Clause, understood as a limited provision that merely guaranteed certain established legal procedures, was "largely irrelevant" before the advent of the administrative state and the judicial development of entitlement protection).

277 *See, e.g.*, Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) (requiring a trial *de novo* when a company appealed from an agency ratesetting that took its property without due process).

governmental action, finding the latter exempt from due process protection.[278]

The government's denial of benefits to leftists in the 1940s and '50s led to new due process rationales,[279] such as the doctrine of unconstitutional conditions.[280] Courts limited agency retaliation by requiring that agency actions come within the scope of legislative authorization.[281] Perhaps most importantly, the courts developed the doctrine of invalidating arbitrary action.[282] Arbitrariness contradicts the rule-of-law principle and undermines the fundamental right to fair process[283] central to our "scheme of ordered liberty."[284] According to Edward Rubin, these concepts of "rule-obedience" and "minimum procedures" are the core requirements of procedural due process protection.[285]

In the 1960s, however, the Court turned its attention to welfare rights[286] and limitations on the role of due process in protecting government benefits. Three cases decided at the peak of the welfare rights movement—*Sniadach*, *Goldberg*, and *Fuentes*—balanced the individual's interest against governmental interests to determine the appropriate *timing* of a deprivation hearing.[287] In *Board of Regents v.*

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278 *See, e.g.*, McCormack, *supra* note 72, at 65; Rubin, *supra* note 274, at 1051-53; William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 445 (1977).

279 For an extensive analysis of these "loyalty-security cases," see Rubin, *supra* note 274, at 1053-60.

280 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (finding that denial of unemployment compensation to a Seventh Day Adventist who refused to work on Saturday was an unconstitutional condition on the free exercise of her religion).

281 *See, e.g.*, Cole v. Young, 351 U.S. 536 (1956) (finding that the Food and Drug Administration had exceeded its authority in applying a loyalty requirement to one of its inspectors).

282 *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952) (finding that the arbitrariness of a state law barring individuals from employment solely because of membership in certain organizations violated due process).

283 The Court has described the procedural due process requirement simply as "a guarantee of fair procedure." Zinermon v. Burch, 494 U.S. 113, 125 (1990).

284 *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937). The liberty underlying due process analysis has been consistently identified by this phrase from *Palko* as well as by the concept of liberties "deeply rooted in this Nation's history and tradition" from Moore v. East Cleveland, 431 U.S. 494 (1977).

285 Rubin, *supra* note 274, at 1105-10.

286 *See supra* notes 44-58 and accompanying text. For information about the welfare rights movement and its impact on legal issues at the time, see Michelman, *supra* note 44; Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). For a general discussion of the concerns and issues surrounding welfare rights, see ALFRED J. KAHN, SOCIAL POLICY AND SOCIAL SERVICES (1973).

287 *See supra* notes 77-79 and accompanying text. *See also* Rubin, *supra* note 274, at 1063-64 & n.103 (detailing the argument that the Court focused not on the applicability question, but exclusively on the timing issue).

Roth,[288] however, the Court set forth the two-step substantive-procedural due process analysis that first asks whether the state-created entitlement is a protected liberty or property interest,[289] and only then determines what type of procedures due process requires.[290] Consequently, inquiry shifted from when a hearing will occur to whether there should be one at all.[291]

Due process theory has thus shifted from its core focus of ensuring adjudicatory legitimacy for vulnerable individual interests.[292] The initial two-step determination set forth in *Roth* is a categorical analysis similar to the earlier right-privilege distinction. The difference is the recognition that intangible interests created by government are "the modern equivalent of property . . . [that] sustain the life of the modern man as much as soil did the medieval farmer."[293] Protected property interests are defined in terms of entitlements "created and . . . defined by existing rules or understandings that stem from an independent source such as state law."[294] Under the *Mathews* utilitarian test,[295] a court assesses the procedural requirement by weighing government interests, including the efficacy and costs of additional safeguards, against the individual's interest in the entitlement.[296]

Commentators have sharply criticized the *Mathews* test.[297] First, the test requires subjective and impressionistic evaluations, asking

288 408 U.S. 564 (1972) (upholding nonrenewal of an untenured faculty member after concluding that he had neither a protected liberty nor property interest in continued employment).

289 *See, e.g., id.* at 569. The Court later explicitly rejected any consideration of the weight of the interest. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Id.* at 570-71. For further discussion of the two-step analysis, see *supra* notes 71-72, 210 and accompanying text.

290 *See* Ingraham v. Wright, 430 U.S. 651, 672 (1977); Goss v. Lopez, 419 U.S. 565, 577 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

291 *See* Rubin, *supra* note 274, at 1066.

292 Mark Tushnet terms the two-step analysis "wrong and unproductive" due to the inconsistencies it generates and its reliance on an arbitrary substance-procedure distinction. The deference to state law definitions of property interests means that federally guaranteed due process rights of individuals may be lost in the balance. Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 262, 267-73.

293 McCormack, *supra* note 72, at 64.

294 *Roth*, 408 U.S. at 577.

295 *See* discussion *supra* part IV.A.3.

296 Rubin points out that *Mathews* was initially perceived as "a separate theory for defining minimum procedures in administrative adjudications." Rubin, *supra* note 274, at 1137.

297 *See, e.g.,* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Rubin, *supra* note 274, at 1137 (characterizing *Mathews* as a test with "debatable" premises, "impractical" methodologies, and "of questionable relevance"). *But see* Marc A. Bernstein, Note, *Mathews v. Eldridge Reviewed: A Fair Test on Balance*, 67 GEO. L.J. 1407, 1421, 1425-26 (1979) (suggesting that the test is a workable and correct analytic tool in spite of its subjective determinations and unpredictable results).

questions that can only be answered with "pervasive indeterminancies."[298] Ranking degrees of deprivation to determine the weight of a private interest is inherently subjective.[299] In addition, the error analysis assigns risks based on a priori assumptions without empirical verification.[300]

The utilitarian test is also problematic because of incomplete balancing. It ignores the societal "dignity" and "equality" values of individual participation in the process.[301] Part of the concept of "minimum procedures" is the idea that "nonalienating" procedures demonstrate society's respect for an individual's role in governmental decisionmaking.[302] If similar cases do not receive similar protections or if the decisionmaking process is particularly disadvantageous for particular classes of individuals, then the process is a sham.[303]

Finally, the *Mathews* utilitarian calculus unduly emphasizes administrative convenience.[304] It thus tends to undermine the principal value of constitutional due process protection—providing fundamentally fair procedures to the individual *even when those procedures come at*

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298 Mashaw, *supra* note 297, at 48. *See also* Easterbrook, *supra* note 210. Easterbrook contends that the subjective nature of the test argues against the non-interpretivist approach to the Due Process Clause. Due process, he claims, simply means the historical process accorded by law. The Court's only role in due process analysis is to review the language and structure of the Constitution, informed by constitutional history. *Id.* at 91. In Easterbrook's view, all else is simply "the Justices' substantive preferences." *Id.* at 115. This is most evident in the *Mathews* balancing test which provides for a "judicial rebalancing" of the utilities of a policy decision. *Id.* at 112. Easterbrook argues:

> The formula exalts instrumental objectives. The goal of due process is to hold as low as possible the sum of two costs: the costs created by erroneous decisions, including false positives and false negatives, and the costs of administering the procedures. Holding this sum to a minimum maximizes society's wealth, and the gains may be shared among all affected persons. . . . If the goal of the [*Mathews*] formula is the maximization of society's wealth, why did the legislature not enact the preferable procedures in the first place?

Id. at 110.

299 *See* Bernstein, *supra* note 297, at 1411. *See also* Mathew O. Tobriner & Harold Cohen, *How Much Process is Due?: Parolees and Prisoners*, 25 HASTINGS L.J. 801, 802 (1974):

> Establishment of a 'pecking order' of the relative severity of disparate deprivations would largely be a subjective task as to which is more serious: dismissal from a job or eviction from one's home, loss of a driver's license or a misdemeanor conviction for disturbing the peace, the attachment of one's refrigerator or stigmatization as an 'excessive drinker'?

300 Mashaw, *supra* note 297, at 42-45. Mashaw illustrates the point with a discussion of the assumption that medical evidence of disability renders a documentary-based determination of disability for Social Security purposes relatively error free. Undermining the assumption is evidence that personal exchanges correlate with acceptance of claims. Similarly, administrative decisions based on paper records tend to suffer high reversal rates on appeal. *Id.*

301 *Id.* at 49-54.

302 *Id.* at 50.

303 *Id.* at 52-53.

304 This misplaced emphasis on administrative convenience is more troublesome in the administrative entitlement context than in the civil prejudgment remedy context.

a cost to the general public.[305] Balancing group rights (governmental interests measured in terms of administrative costs and convenience) against individual rights "transforms the right to due process from a constitutional limit upon the total power of government over the individual into merely an institutional check upon whether the state's procedural policies in fact promote the general welfare."[306] When the government determines the extent of protection it will grant an individual against generally desirable governmental action solely by using such an instrumental calculus, it mocks the underlying due process right to freedom from arbitrary adjudicatory procedures. Because government intrusions have utility whenever the benefit to the group even minimally outweighs the impact on the individual, the utilitarian calculus too easily allows majoritarian perceived needs to overrule the rule-of-law principle and administrative convenience to erode the minimum procedures necessary to fairness.[307]

However, the Court's modification of *Mathews* in *Doehr* represents an appropriate shift in the due process calculus in the summary seizure context.[308] When the government acts as an arbiter seeking accommodation between individuals with conflicting rights, it is proper to ensure minimum procedural safeguards.[309] Subjective considerations still impinge on the quality of the decisionmaking,[310] but the public welfare interest no longer weighs heavily against the individual. Instead, the Court compares similar individual interests in de-

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305 Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1511 (1975) [hereinafter *Specifying the Procedures*].

306 *Id. But see* Easterbrook, *supra* note 210, at 111 & n.82 (suggesting that the calculus is appropriate since it "treats errors in individual cases as a cost but not as an independent violation of the [due process] guarantee." Errors in the procedure are equitable since they "do not alter *ex ante* prospects.").

307 *Fuentes*, 407 U.S. at 90 n.22 (citation omitted):

> [O]ne might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

In a recent case, the District of Columbia Circuit noted that "while cost to the government is a factor to be weighed . . . , it is doubtful that cost alone can ever excuse the failure to provide adequate process." Propert v. District of Columbia, 948 F.2d 1327, 1335 (D.C. Cir. 1991).

308 One commentator reviewing the Second Circuit decision (Pinsky v. Duncan, 898 F.2d 852 (2nd Cir. 1990)), contends that the court erred in not directly applying the *Mathews* balancing test. Martin McCann, Pinsky v. Duncan: *Ex Parte Attachment of Real Property in Connecticut and the Antithetical Restrictions of Due Process*, 11 U. BRIDGEPORT L. REV. 201, 203 (1990).

309 *See* Rubin, *supra* note 274, at 1139-40; *Specifying the Procedures*, *supra* note 305, at 1528-32.

310 For example, Mark Tushnet, commenting on the interest balancing approach implicitly used in *Mitchell*, notes that the Court provided only a conclusory determination of the balance with little attention to the primary objections to repossession. Tushnet, *supra* note 292, at 285.

termining the appropriate timing for a hearing before a neutral officer on the merits of the attachment. Equality values are affirmed because the comparison is between similar debtor and creditor interests rather than between the group and the individual, except in those few cases of legitimate public emergency.[311] Although *ex parte* proceedings deny the defendant a participatory opportunity at the outset, the immediate postattachment proceeding does satisfy the dignity requirements of due process in some circumstances.

In addition, the *Mathews-Doehr* test establishes the relationship among the factors (such as preexisting creditor interest, exigent circumstances, and the various procedural safegnards) that are relevant in determining the minimum procedural requirements.[312] Although the balancing process is inevitably subjective, it serves as a reasonable tool for accommodating the conflicting demands inherent in private disputes over property ownership. The resulting constitutional decisions resolve particular questions of law, providing not a categorical checklist but an archetype against which lower courts can measure similar cases.[313]

The test thus substantially effectuates the core procedural value of ensuring adequate process in the summary seizure context, and thereby advances the goal of granting the individual freedom from arbitrary adjudicative procedure.

4. *The "More Vulnerable" Rule*

By providing the unifying principle that expresses the procedural due process value of "minimum procedures,"[314] the *Mathews-Doehr* test

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311 Special protections must apply when the government is the plaintiff. Only governmental interests that meet a strict compelling need test should override the protections the Constitution guarantees an individual. Thus, the "extraordinary circumstances" exception must remain truly extraordinary if the core procedural due process values are to be upheld.

312 *See* Van Alstyne, *supra* note 278, at 487 (suggesting that the procedural due process right to "freedom from arbitrary adjudicative procedures" is a substantive element of personal liberty).

313 The *Sniadach* decisions apply procedural due process interest balancing in a way that establishes guideline decisions defining focal pockets of attachment process law. The result is a constitutional chart of archetypes for the prejudgment remedy territory. The constitutional process resembles the Court's ambling shifts through choice of law issues in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and its progeny. *See* KEVIN M. CLERMONT, CIVIL PROCEDURE 240-45 (2d ed. 1988). Clermont suggests that the Court's role in constitutional analysis is "to create a series of general rules that soundly make the choice between state and federal law for all the common situations." *Id.* at 240.

314 Judge Richard Posner described this function of the modified *Mathews* test in Penn Cent. Corp. v. United States R.R. Vest Corp., 955 F.2d 1158, 1163 (7th Cir. 1992): "[The *Mathews*] test is an alternative way of . . . generating . . . exceptions to the requirement of predeprivation process. Instead of enumerating discrete exceptions, such as emergency or infeasibility, a court in applying the test asks whether, all things considered, predeprivation process is a reasonable requirement to impose."

explains the exception branches of the prejudgment remedy doctrinal tree.[315] A defendant's interest in the property subject to attachment may be so vulnerable due to lack of safeguards that it cannot be outweighed by the plaintiff's interest in summary procedure. Similarly, the defendant may belong to a class of individuals for whom the decisionmaking process is particularly disadvantageous, and thus the defendant's interest becomes more vulnerable. Only if the plaintiff's need is greater than the defendant's vulnerability may the plaintiff avail itself of summary procedures to repossess the defendant's property. This "more vulnerable" principle can be expressed as follows:

$$\text{IFF} \quad \frac{\pi\text{'s need}}{\Delta\text{'s vulnerability}} > 1, \text{ then } \pi \text{ may use summary procedures}$$

In effect, the *Mathews-Doehr* test places the importance of the plaintiff's interest on the scale opposite considerations of the vulnerability of the defendant's interest, in a context where there is "presumptively greater weight"[316] to the interests of the defendant in avoiding summary deprivation and in having an opportunity to participate in the decisionmaking process prior to any official action. Genuine emergency or a preexisting, legally coguizable interest contribute to the importance of the plaintiff's interests. Brutal need, gaps in the statutory safeguards, a fault-based underlying claim, or inadequate remedies for wrongful deprivation make the defendant's interest more vulnerable.

Thus, the extraordinary circumstances of a public crisis may tip the scale heavily in the plaintiff's favor. The government's summary seizure of warehoused food unfit for human consumption in *North American Cold Storage v. City of Chicago*[317] is constitutional, even though the owner did not benefit from predeprivation notice and hearing. Such emergency situations that require prompt government action to protect the public are archetypal situations in which the government may act summarily against the individual's interests. In nonadjudicatory contexts, this archetype is readily accepted. For example, even when the individual affected suffers serious loss, fire officials may decide to sacrifice a building to prevent a fire from ultimately consum-

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315 *See supra* notes 305-06 and accompanying text.

316 Kay & Lubin, *supra* note 4, at 723: "[T]he due process clause is an endorsement of the interest of the party in possession. The clause is an injunction against disturbing the existing balance of property interests unless valid legal reasons are shown in an appropriate procedure."

317 211 U.S. 306 (1908). *See generally* Karen Nelson Moore, *Procedural Due Process in Quasi in Rem Actions after* Shaffer v. Heitner, 20 Wm. & Mary L. Rev. 157, 208-15 (1978) (discussing the cases listed in *Fuentes*).

ing many other structures.[318] In adjudicatory contexts,[319] extraordinary circumstances in the narrow confines of an urgent public crisis preempt the individual's right to freedom from arbitrary procedures. The courts must, therefore, be especially vigilant to ensure that the compelling need principle is not eroded by allowing summary procedures for lesser emergencies when other, less intrusive means of addressing the problem would suffice.[320]

Similarly, the brutal need that accompanies deprivations of wages or basic necessities presumptively tips the scale in the defendant's favor against summary seizure. Garnishment proceedings that risk taking an individual's means of livelihood should be subject to prior notice and hearing to provide the defendant with a better opportunity to avoid the deprivation or to arrange another means of settling the debt.

In the "broad, gray middle range . . . where the interests of the parties are in relative balance,"[321] the plaintiff must have a legally cognizable preexisting interest and the defendant must be protected by sufficient safeguards to tip the scale in favor of the plaintiff. Thus, in *Fuentes*, where the plaintiff merely had a security interest in the consumer goods and there was no provision for judicial review of the process, replevin was unconstitutional.[322] And in *Di-Chem*, although the defendant was a commercial entity not subject to brutal need, its interest was still vulnerable because of the lack of safeguards,[323] while the plaintiff had no preexisting interest in the assets subject to garnishment. In both cases, predeprivation process was required. In *Mitchell*, however, the statutorily created vendor's lien elevated the importance of the plaintiff's interest, while the range of procedural safeguards it provided reduced the vulnerability of the defendant's interests enough to allow *ex parte* seizure.[324]

Doehr involved a temporary encumbrance on real estate. Even though the attachment lien was nonpossessory and only affected mar-

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318 *See, e.g.*, RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 57-60 (5th ed. 1990) (discussing the public necessity defense); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 147 (5th ed. 1984) (same).

319 Edward Rubin argues that the phrase "life, liberty or property" should not be interpreted as specific types of interests, but rather as encompassing adjudication of interests in general. The two-step analysis is wrong, because any adjudication affecting an individual interest is subject to due process protection. Its procedures must follow the rule-obedience principle and must meet the minimum procedural requirements for constitutional accepted procedures of its type. *See* Rubin, *supra* note 274, at 1095-96, 1105-10.

320 *See, e.g.*, *Specifying the Procedures*, *supra* note 305, at 1533-34, 1536-37 (discussing the need for additional measures of procedural fairness in contexts where the state acts against individuals for the public welfare, such as in civil forfeitures).

321 Nickles, *supra* note 4, at 636.

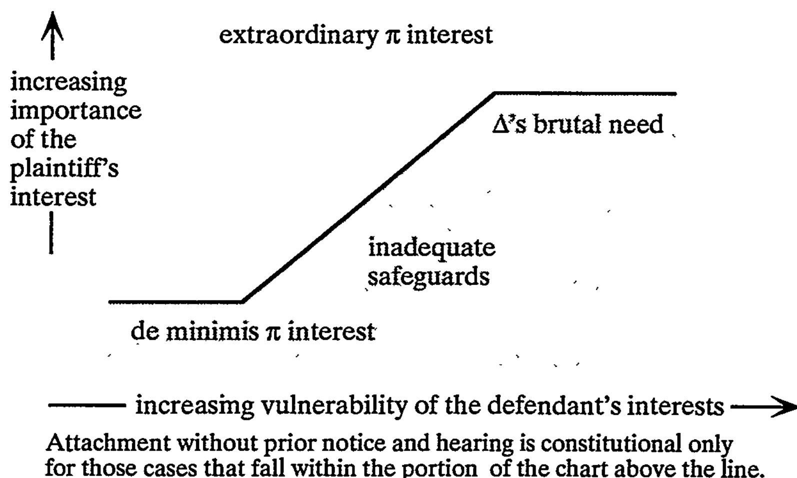
322 *See* discussion *supra* part I.B.

323 *See* discussion *supra* part I.D.

324 *See* discussion *supra* part I.C.

ketability, predeprivation notice and hearing were required.[325] The plaintiff's sole interest in the property—created by the attachment to secure a potential tort judgment—was *de minimis*.[326] On the other hand, *ex parte* attachment based on the likelihood of success on the merits of a tort case creates significant vulnerability for the defendant's interest.[327] Thus, even though the defendant's interest is much less significant than that of others facing deprivation, these factors require predeprivation process.

The resulting procedural due process relationships in the summary seizure context can be portrayed as follows:



Attachment without prior notice and hearing is constitutional only for those cases that fall within the portion of the chart above the line.

B. Incorporating Quasi in Rem Attachment Jurisdiction

An important question that remained unanswered by the *Sniadach* tetrad and cases addressing jurisdictional due process requirements was the continuing viability of attachment jurisdiction.[328] The "more vulnerable" rule, however, also provides a useful analytic approach to attachment jurisdiction. Attachment jurisdiction is a subtype of quasi in rem territorial jurisdiction[329] by which the plaintiff looks to the defendant's subject property to discharge a claim against

325 *Doehr*, 501 U.S. at 11-12.

326 *Id.* at 16.

327 *Id.* at 13-14.

328 *See, e.g.*, JACK FRIENDENTHAL ET AL., CIVIL PROCEDURE § 3.21 at 174 (1985); Baker, *supra* note 247; Note, *Quasi in Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023 (1973) [hereinafter *Quasi in Rem*].

329 Territorial jurisdiction defines a forum court's authority to adjudicate a claim in terms of the geographic relationships among the parties, the forum, and the litigation. CLERMONT, *supra* note 313, at 147. *See generally id.* at 146-60 (explaining the concept and categories of territorial jurisdiction); FRIEDENTHAL, *supra* note 328, § 3.1 (discussing the concept of territorial jurisdiction).

the defendant that is unrelated to the property itself.[330] Traditionally, the existence of property within the forum state gave the state sufficient power to attach the property as a means of acquiring territorial jurisdiction to adjudicate the claim.[331]

One of the examples the *Fuentes* Court chose to illustrate extraordinary circumstances[332] was *Ownbey v. Morgan*,[333] an early case upholding quasi in rem attachment jurisdiction.[334] The *Ownbey* Court upheld the procedure based on its "time-honored" use even in the Colonial period.[335] *Fuentes* seemed to adopt that rationale, suggesting that attachment jurisdiction represented "a most basic and important public interest."[336] More recent developments, however, cast considerable doubt on the continuing validity of attachment jurisdiction.[337]

The general requirements for procedural due process in assuming jurisdiction over a defendant or her property were set in two piv-

There are two types of territorial jurisdiction based on the state's power over things rather than persons: in rem and quasi in rem. *See* CLERMONT, *supra* note 313, at 146. In rem proceedings settle title against all possible claimants and include actions for forfeiture, alimony, escheat, wills, condemnation, registration of title to land, and action to quiet title. Quasi in rem proceedings, on the other hand, are brought against a particular defendant's interest in particular property. Subtype One involves a related, preexisting interest such as that entailed in liens, mortgages, contracts to purchase land, actions to partition an estate, or adverse possession. Subtype Two looks to the subject property to discharge an unrelated claim. *See, e.g.*, FRIEDENTHAL, *supra* note 328, §§ 3.2-3.11, §§ 3.14-3.18 (1985).

330 CLERMONT, *supra* note 313, at 147.

331 *See* Pennoyer v. Neff, 95 U.S. 714, 726-27 (1877).

332 *Fuentes*, 407 U.S. at 91 n.23.

333 256 U.S. 94 (1921) (allowing attachment to secure jurisdiction over a nonresident defendant in state court).

334 The characterization of attachment jurisdiction as an extraordinary circumstance stems from the *Ownbey* Court's own description of the process:

> [A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted.

Ownbey, 256 U.S. at 111.

It should be noted, however, that *Ownbey* was decided in the context of a different concept of territorial jurisdiction. *See* Moore, *supra* note 317, at 214-15. Under *Pennoyer*, states were "exclusively powerful" over persons and things within their boundaries, but "absolutely powerless" over persons and things outside those boundaries. FRIEDENTHAL, *supra* note 328, at 100.

335 *Ownbey*, 256 U.S. at 102-08. "A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law . . . ." *Id.* at 111.

336 *Fuentes*, 407 U.S. at 91 n.23.

337 The use of attachment jurisdiction "usually is superfluous" due to growth of state long-arm statutes providing in personam jurisdiction over nonresidents. FRIEDENTHAL, *supra* note 328, at 152. *See also Quasi in Rem*, *supra* note 328, at 1034 (suggesting that attachment jurisdiction should be restricted to situations of genuine necessity).

otal Supreme Court cases. In *International Shoe Co. v. Washington*,[338] the Court established a reasonableness test for in personam jurisdiction: a defendant must have "minimum contacts" with the forum state that satisfy " 'traditional notions of fair play and substantial justice' " before the state can exercise authority over him.[339] In *Shaffer v. Heitner*,[340] the Court extended *International Shoe* to cover all assertions of territorial jurisdiction.[341] Procedural due process concerus weighed heavily against the historical and expedience rationales supporting attachment jurisdiction[342] since "the only role played by the property is to provide the basis for bringing the defendant into court."[343]

Attachment jurisdiction survives *Shaffer*, however, in those situations in which other connections with the state make the jurisdiction reasonable.[344] These include instances in which (1) the state has in personam jurisdiction over the defendant,[345] (2) the property secures the judgment for a suit in another jurisdiction where in personam jurisdiction is available,[346] or (3) the property is the basis for the enforcement of a judgment already rendered.[347]

Moreover, in *Mullane v. Central Hanover Bank & Trust Co.*,[348] the Court faced another jurisdictional question not explicitly resolved by *Shaffer*.[349] The defendant Central Bank brought an action for judicial settlement of its accounts as trustee of a common trust fund established under New York banking law.[350] The accounting would seal and terminate "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund during the period covered by the accounting."[351] The Surrogate Court addressed personal rights that were being settled in what would normally be considered an in personam action,[352] yet the court also exercised in rem jurisdiction over the *res* of the trust fund

338 326 U.S. 310 (1945) (holding that territorial jurisdiction requires minimal contacts between the party and the forum state that satisfy traditional notions of fair play and substantial justice).

339 *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

340 433 U.S. 186 (1977).

341 *Id.* at 212.

342 *Id.* at 209-12.

343 *Id.* at 209.

344 *See id.* at 207-12.

345 See the discussion of sufficient contacts in *id.* at 207.

346 *Id.* at 210.

347 *Id.*

348 339 U.S. 306 (1950).

349 *See* Moore, *supra* note 317, at 180-91.

350 *Mullane*, 339 U.S. at 309.

351 *Id.* at 311.

352 *Id.*

itself.[353] Noting the confusion of ancient classificatory schemes,[354] the Court held that jurisdiction could be exercised over the unascertainable beneficiaries: "the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement" was dispositive.[355] No other forum was available to settle the accounts established under the state's laws.[356]

Shaffer and *Mullane* together suggest that the reasonableness test for territorial jurisdiction should permit states to adjudicate claims when there is no other forum and adjudication is sufficiently important to the state's interests.[357] Otherwise, because in personam jurisdiction is unavailable, attachment jurisdiction should be unconstitutional.[358]

1. *Convenience Jurisdiction*

The "more vulnerable" rule developed in the prejudgment remedy context also provides a unifying rationale for analyzing the constitutionality of attachment jurisdiction. Run-of-the-mill seizures for jurisdictional purposes are unconstitutional under *Shaffer* and under *Mathews-Doehr* procedural due process analysis. When the plaintiff seeks to force a nonresident defendant into court by attaching property, the plaintiff's interest—mere personal convenience—is presumptively unimportant.[359] On the other hand, the impact on the defendant is significant. Hauled into court because of his property, the defendant faces suit on an unrelated claim. Such "convenience jurisdiction" falls outside the range of acceptability under either the *International Shoe* reasonableness standard or the *Mathews-Doehr* vulnerability analysis. As in *Doehr*, the plaintiff's interest is too insignificant to subject the defendant to attachment proceedings.

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353 "Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely *quasi in rem*, or more vaguely still, 'in the nature of a proceeding *in rem*.' It is not readily apparent how the courts of New York did or would classify the present proceeding . . . ." *Id.* at 312.

354 "The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of property law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification." *Id.*

355 *Id.* at 313.

356
> [T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants . . . .

Id.

357 *See* Moore, *supra* note 317, at 226-30; *Quasi in Rem*, *supra* note 328, at 1032.

358 *See supra* notes 343-47 and accompanying text. *See also* Moore, *supra* note 317.

359 Convenience jurisdiction thus falls within the shaded portion of "de minimis plaintiff interest" on the chart *supra* p. 1647.

2. *Necessity Jurisdiction*

On the other hand, given the continuing viability of exigency in determining the weight given to the plaintiff's claim in the *Sniadach* quintad, "necessity jurisdiction" should be constitutionally acceptable. In the *Mullane* example, finalizing accounting records is important to trustees and to the states that set the framework for the trusteeship. Such cases satisfy the three factors defining an extraordinary circumstance:[360] there is a compelling need to maintain healthy financial institutions, a demand for prompt action at intervals that allow the institutions to make adjustments and continue functioning, and appropriate state procedural controls. Just as the "more vulnerable" rule allows attachment in cases of public emergencies at the upper end of the scale of plaintiff need, the same principle supports attachment jurisdiction in cases of necessity where no alternative means exists to adjudicate the interests at stake.

3. *Parallel in Personam Jurisdiction*

In the instances where attachment jurisdiction unambiguously survives *Shaffer*, the defendant is subject to in personam jurisdiction of the primary adjudicating court—either the attaching state's court, a prior adjudicating state's court (in cases where a judgment is being enforced), or a simultaneously adjudicating state's court in cases where the attached property in one state provides security for a suit in another state. The availability of in personam jurisdiction assures that there are adequate procedural safeguards. The plaintiff's right to pursue a judicial resolution or enforce a judgment is therefore predominant in the balance, favoring availability of attachment jurisdiction.

Thus, while *ex parte* attachment to acquire jurisdiction over a nonresident defendant, without more, is clearly unconstitutional, quasi in rem attachment jurisdiction is reasonable when the plaintiff's needs are paramount and the defendant's protections sufficient. At the middle part of the vulnerability scale, where another forum in a related matter has in personam jurisdiction over the defendant, and at the upper end of the scale, where the appropriate showing of compelling need, urgency, and procedural control can be made, attachment jurisdiction satisfies the vulnerability analysis requirements proposed for due process assessments of prejudgment remedies.[361]

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360 *See supra* notes 80-81 and accompanying text.

361 *See Quasi in Rem*, *supra* note 328, at 1035.

The decision in Burnham v. Superior Court, 495 U.S. 604 (1990) (Scalia, J., majority) (upholding transient jurisdiction based primarily on arguments from historical pedigree) suggests that the Court will continue to emphasize tradition as the underlying due process value. *See generally* Hayward D. Reynolds, *The Concept of Jurisdiction: Conflicting Legal Ideolo-*

CONCLUSION

Procedural due process analysis developed primarily in the administrative context with a utilitarian balancing test as its primary tool. A significant change emerged, however, with the Court's 1991 decision in *Connecticut v. Doehr.* The modified *Mathews-Doehr* test represents an explicit formulation of the government's duty to provide adjudicatory legitimacy in accommodating conflicting interests in private disputes. Balancing private interests serves as a tool to establish procedural archetypes—cases that demarcate the minimum procedural protections necessary for specific types of attachment proceedings. The result is a "more vulnerable" rule that provides a unifying explanation of the *Sniadach* quintad decisions grounded in procedural due process principles. The application of the rule to quasi in rem attachment jurisdiction demonstrates the consistency of procedural due process requirements across the spectrum of attachment actions.

Linda Beale

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gies and Persistent Formalist Subversion, 18 HASTINGS CONST. L.Q. 819 (1991) (suggesting that the *Burnham* decision represents a return to a conservative, formalist due process jurisprudence). An alternative analysis of *Doehr* shows the Court marching enthusiastically to the drumbeat of tradition flavored by a heavy dose of federalism. In extending procedural due process protection to at least some temporary encumbrances of real property, the Court has drawn a parallel to recent Takings Clause cases that suggest limits to states' ability to restrict property use under the police power without compensation. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (Scalia, J., majority) (stating that temporary deprivation of all economic use of land constitutes a taking requiring compensation by the state). The result is a renewed emphasis on vested rights, carried into the attachment context by the importance given "preexisting creditor interests" in determining the required procedural protections. Such interests count more than the brutal need that individuals may face, for as the discussion of the cases after *Sniadach* demonstrated, the Court had rejected explicit consideration of grievous losses in the calculus.

The repeated references to historical procedures for attachment, replevin, and garnishment in the *Sniadach* quintad suggest a willingness to rely on historical pedigree. Justice Black's dissent in *Sniadach*, if taken to heart by the Court, would support statutory provisions providing little protection to the debtor simply because creditor remedies bave long been available. *See supra* notes 36-37 and accompanying text.