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

Linda Beale
NOTES

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

INTRODUCTION

When the Supreme Court addressed the prejudgment remedy case of Connecticut v. Doehr in the October 1990 Term, it grappled with the Sniadach tetrad, 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...

---

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

Attachment is the 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).


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 an 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 also 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 recovering 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.


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

Snidadach v. Family Finance Corp. of Bay View, 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.

The next two cases seemed to contradict one another. Fuentes v. Shevin extended Snidadach to require predeprivation process for repossession of consumer goods. A narrow exception covered "extraordinary circumstances." Two years later, the Court in Mitchell v. W.T. Grant Co. upheld a repossession statute because of the alternative safeguards it provided. 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.

———

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 opportunity 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 circumstance 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 allowing 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 Snidadach 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.


8 See discussion infra part I.A.


10 See infra notes 80-84 and accompanying text.


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*, 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.\(^1\)

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.\(^2\) The *Doehr* Court required notice and hearing prior to attachment of real property to secure a potential judgment in an unrelated tort action.\(^3\) The Justices modified an interest balancing test introduced in *Mathews v. Eldridge*,\(^4\) an administrative law entitlements case.\(^5\)

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

---


\(^{15}\) 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\(^2\) is to encourage credit by easing the burden of debt collection and protecting creditors from defaulting debtors.\(^2\) The state also has an interest in protecting its judicial process and resources by insuring that sufficient funds are available to satisfy adjudicated claims.\(^2\)

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

---

\(^2\) 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. \(52-278\) (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.


\(^2\) 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 Snidach (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 cases26 that establish the procedural due process framework for prejudgment remedies27 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 View29

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-

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.
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.
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," 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. Although the deprivation involved only the loss of the use of the garnished wages during adjudication of the underlying claim, the significant impact of the taking convinced the Court that predeprivation process was required.

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

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
NOTE—PROCEDURAL DUE PROCESS

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 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.”

Many early interpreters of Sniadach viewed the case as a narrow exception to the traditional understanding of the constitutionality of attachment proceedings. Others interpreted Sniadach to apply broadly to garnishments of any type. 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.

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.”

The narrow “hardship” interpretation rests on Sniadach’s language and its relationship to a series of cases in which the Court ex-

---

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 Frankfurter. Id. at 350 (Black, J., dissenting) (citation omitted).

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


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).


CORNELL LAW REVIEW

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

After Sniadach, the trend toward protection of indigent rights continued briefly in early welfare entitlement cases such as Goldberg v. Kelly, in which the Court found the stark need of welfare recipients worthy of special protection from summary termination of government benefits. 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." In Boddie v. Connecticut, the Court also provided protection

---

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.


47 Id. at 357.


49 Id. at 666.


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).


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).

to indigents challenging state divorce fee requirements.\textsuperscript{57} Finally, \textit{Tate v. Short}\textsuperscript{58} invalidated a Texas law jailing the poor for inability to pay fines.\textsuperscript{59}

Amidst this concern for indigents and the accompanying uncertainty about the breadth of the \textit{Sniadach} decision, the Court considered a second prejudgment remedy case, \textit{Fuentes v. Shevin}.\textsuperscript{60}

\subsection*{B. \textit{Fuentes v. Shevin}}

The \textit{Fuentes} Court\textsuperscript{61} found Florida’s\textsuperscript{62} and Pennsylvania’s\textsuperscript{63} re-

\footnotesize
\begin{enumerate}
\item Id. at 374.
\item 401 U.S. 395 (1971).
\item Id. at 397. To some extent, the court continued to consider the extent to which deprivations may produce grievous loss. \textit{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).
\item 407 U.S. 67 (1972).
\item Justice Stewart wrote for “a four-Justice majority of a seven-Justice shorthanded Court.” \textit{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.
\item FLA. STAT. ANN. §§ 78.01-78.13 (Supp. 1972-73), \textit{quoted in Fuentes}, 407 U.S. at 73-74 n.5, provides as follows:
\begin{itemize}
\item 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 . . . .
\item 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 . . . .
\item 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 . . . .
\item 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 . . . .
\end{itemize}
\item PA. STAT. ANN., tit. 12, § 1821, \textit{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, \textit{quoted in Fuentes}, 407 U.S. at 76-77 n.7, set forth procedural prerequisites for issuance of a prejudgment writ:
\begin{itemize}
\item Rule 1073. Commencement of Action
\item (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 . . . .
\item Rule 1076. Counterbond
\item (a) A counterbond may be filed with the prothonotary by a defendant . . . . within seventy-two (72) hours after the property has been replevied . . . .
\item (b) The counterbond shall be in the same amount as the original bond . . . .
\end{itemize}
plevin statutes unconstitutional. 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. The Pennsylvania case involved four different individuals whose property had been replevied.

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, requiring only that the party post a security bond and file a complaint for repossession. 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. 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.

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

---

Rule 1077. Disposition of Replevied Property. Sheriff’s Return
(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.

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.

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.

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.

Id. at 74.

Id.

Id. at 75.

Id. at 75 n.7.
interest at stake and then determined the appropriate process by balancing state and private interests. 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. Having concluded that the deprivation "[could] not be characterized as de minimis," the Court determined that traditional due process required "some kind of notice and opportunity to be heard" regardless of any possible increased administrative burden.

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

---


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.


74 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)).

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

76 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 repleived 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. When 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).

77 "[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.

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 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 might 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. 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." 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 and concerns for the practicalities of prior hearings when self-help measures are also available, 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. White emphasized that there is "no automatic test for determining whether and when due process of law requires adversary proceedings." Given the duality of interests, White urged that balancing was necessary to determine required procedures.

C. Mitchell v. W.T. Grant Co.

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

---

83 Id. at 93.
84 Id.
85 Id. at 102 (White, J., dissenting).
86 Id. at 102-103. 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. 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).
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\textsuperscript{93} when an installment seller retained a statutorily created vendor's lien.\textsuperscript{94} Because the vendor faced legitimate concerns that the buyer would transfer the property\textsuperscript{95} and eliminate the state-created lien\textsuperscript{96} in the period pending resolution of the underlying action, the Court considered procedural protections for the interests of both parties.\textsuperscript{97}

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


\textsuperscript{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).

\textsuperscript{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)).

\textsuperscript{96} Under 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 that possibility. Id. at 609.

\textsuperscript{97} Id. at 604.

\textsuperscript{98} We 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 Doebr. 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.

\textsuperscript{99} Mitchell, 416 U.S. at 607.
est in preventing further deterioration or loss merited substantial weight in the balance,\textsuperscript{100} whereas the impact on the debtor figured only minimally.\textsuperscript{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;\textsuperscript{102} judicial oversight of the process;\textsuperscript{103} provisions for the plaintiff to secure the attachment and for the defendant to dissolve the attachment by posting bond;\textsuperscript{104} the availability of damage awards;\textsuperscript{105} and an immediate opportunity for a post-seizure hearing.\textsuperscript{106}

Given the ostensible \textit{Sniadach-Fuentes} rule requiring predeprivation process for property interests subject to due process protection unless the narrow exigency exception applies,\textsuperscript{107} the \textit{Mitchell} Court drew several distinctions.\textsuperscript{108} First, the Court read the pre-\textit{Sniadach} cases as requiring some sort of hearing before the deprivation of property is finalized but not necessarily before initial seizure is allowed.\textsuperscript{109} This refocused \textit{Fuentes} on considerations of timing.\textsuperscript{110} Second, the Court explicitly adopted the narrow interpretation of \textit{Sniadach},\textsuperscript{111} explaining that it dealt with the special situation of wage garnishment in which the creditor had no preexisting interest.\textsuperscript{112} \textit{Fuentes}, on the other hand, presented a "typical case" involving a creditor's secured interest,\textsuperscript{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.\textsuperscript{114}

\textsuperscript{100} \textit{Id.} at 608-09, 616.
\textsuperscript{101} The Court noted that \textit{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. \textit{Id.} at 611, 618.
\textsuperscript{102} \textit{Id.} at 609, 618.
\textsuperscript{103} \textit{Id.} at 610, 616.
\textsuperscript{104} \textit{Id.} at 608.
\textsuperscript{105} \textit{Id.} at 616.
\textsuperscript{106} \textit{Id.} at 611.
\textsuperscript{107} \textit{See supra} note 80 and accompanying text.
\textsuperscript{108} \textit{Mitchell}, 416 U.S. at 611-17.
\textsuperscript{109} \textit{Id.} at 611. The pre-\textit{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." \textit{Id.}
\textsuperscript{110} \textit{See supra} notes 77-79 and accompanying text.
\textsuperscript{111} \textit{See supra} notes 40-44 and accompanying text.
\textsuperscript{112} \textit{Mitchell}, 416 U.S. at 614. The forbidding consequences of wage garnishment present "distinct problems in our economic system" meriting special procedural protection. \textit{Id.} (quoting \textit{Sniadach}, 395 U.S. at 340).
\textsuperscript{113} \textit{Id.} at 614-15.
\textsuperscript{114} \textit{Id.} at 617.
Mitchell seems at the least to posit a broad "alternative safeguards" exception to the Sniadach-Fuentes prior hearing rule. 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, 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.

Mitchell reflects the Court's internal disagreement about the constitutional standard for the prejudgment remedy. 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. North Georgia Finishing, Inc. v. Di-Chem, Inc. casts doubt upon that interpretation.

---

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, J.J., 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[es] on a fundamentally different interpretation[ ] of the mandates of due process" than Fuentes).

D. North Georgia Finishing, Inc. v. Di-Chem, Inc.\textsuperscript{121}

In \textit{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,\textsuperscript{122} Di-Chem filed an affidavit for garnishment of North Georgia Finishing's bank account along with its complaint in the underlying action.\textsuperscript{123}

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

\begin{flushleft}
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} GA. CODE ANN. § 46-101 to 103 (1974) (repealed 1976), quoted in \textit{Di-Chem}, 419 U.S. at 602-03 n.1:
\begin{footnotesize}
\vspace{-1em}$§ 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 . . . .
\end{footnotesize}
\textsuperscript{123} \textit{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 \textit{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." \textit{Id.} at 611-12.

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

\textsuperscript{125} The majority opinion is only seven pages long. \textit{Di-Chem}, 419 U.S. at 601-08.
\textsuperscript{126} \textit{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. \textit{Id.} at 608. Some commentators had suggested that \textit{Fuentes} and \textit{Sniadach} could best be reconciled with \textit{Mitchell} as special exceptions protecting low income consumers disadvantaged in the bargaining process. \textit{See, e.g., supra} notes 40-43 and accompanying text. Justice Powell's interpretation in \textit{Mitchell} suggested that \textit{Sniadach} and \textit{Fuentes} created a "brutal need" exception to normal provisional remedy procedures. \textit{Mitchell}, 416 U.S. at 625. The \textit{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.
\end{flushleft}
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.

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. 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.

In spite of different underlying rationales, the "momentum towards a rule" inherent in the analogy mechanism of judicial decision-making 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. If these

---

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 significance 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. 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. Although ostensibly revitalizing Fuentes by relying on it as precedent for the Di-Chem decision, Justice White's additional gloss to the Fuentes rule—invalidating seizures "without notice and without opportunity for a hearing or other safeguard against mistaken repossession"—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. Powell presented an even more explicit listing of the safeguards in his concurring opinion in Di-Chem. 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. 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. Therefore, to minimize such injustices, safeguards should favor the debtor in those cases where the creditor does not have a written security interest.

---

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.
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. 355, 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


\(^{150}\) 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.


\(^{159}\) 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

---

\(^{160}\) 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. Similarly, a "minimal risks" exception applies if the minimal risks to the creditor's interests demonstrate that the creditor is not entitled to the additional protection that seizure affords—again, prior notice and hearing are required. Finally, the Sniadach-Fuentes "extraordinary situation" standard allows summary seizures necessitated by compelling government interests.

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."

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 Hutchinson 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.\footnote{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).} McLaughlin proposes a “neutral
magistrate rule” similar to the principle from Fourth Amendment jur-
isprudence.\footnote{Id. at 210, 216-17.} Although both \textit{Mitchell} and \textit{Di-Chem} emphasized vari-
ous specific requirements such as factual allegations and a bonding
 provision, the \textit{Mitchell} Court referred generally to a process under “ju-
dicial control . . . from beginning to end.”\footnote{Mitchell, 416 U.S. at 616.} 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.\footnote{McLaughlin, supra note 174, at 210.} Following this principle, summary seizure statutes
that require participation by a neutral judicial officer who has discre-
tion to deny the writ would meet the procedural due process test.\footnote{Id. See also Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978) (finding
that \textit{Mitchell} does not require ad hoc balancing but that a neutral magistrate with discre-
tion to deny the writ of attachment is an essential constitutional safeguard).}

Although McLaughlin’s emphasis on a neutral factfinder inter-
posed between the defendant and plaintiff brings procedural due pro-
cess to the forefront, the rule does not fully explicate the role of the
various \textit{Mitchell} safeguards. Magistrate process alone may not be a
sufficient safeguard if the statute allows the magistrate to render deci-
sions based on conclusory affidavits. In addition, the lack of a statu-
tory 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 \textit{Mitchell} and
\textit{Di-Chem}.

Thus, the \textit{Sniadach} tetrad leaves the procedural due process ques-
tion 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 begin-
nings: 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.\footnote{See Logue, supra note 136, at 199 (offering such a rule as the consistent holding
across the \textit{Sniadach} tetrad).}
These interwoven procedural issues come together again in Connecticut v. Doebr. 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, Doebr provides another window to the Court's procedural due process analysis.

A. Facts and Procedural Posture

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

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

\textsuperscript{182} \textit{Doehr}, 501 U.S. at 5. The Court noted that DiGiovanni had no preexisting interest in the home. \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textsc{Conn. Gen. Stat.} \textsection\textsuperscript{52-278e(a) (1) (1991).}

\textsuperscript{185} \textit{Doehr}, 501 U.S. at 6.

\textsuperscript{186} \textsc{Conn. Gen. Stat.} \textsection\textsuperscript{52-278e(a) (1991).}

\textsuperscript{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.”

\textit{Doehr}, 501 U.S. at 6-7 (citations omitted).

\textsuperscript{188} \textit{Id.} at 7.

\textsuperscript{189} \textit{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. \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} Pinsky v. Duncan, 716 F. Supp. 58 (D. Conn. 1989).

\textsuperscript{192} Pinsky v. Duncan, 898 F.2d 852 (2d Cir. 1990).

\textsuperscript{193} \textit{Id.} at 855.

\textsuperscript{194} \textit{Id.} at 856.

\textsuperscript{195} \textit{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." Revisuing the Sniadach tetrad, the Court distinguished Mitchell from Fuentes and Sniadach based on Mitchell's "factual and legal background." The Court specified the important features of the Mitchell statute which spared it from invalidation:

> Provision 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.

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.

The Court's method of determining the validity of the Connecticut statute is significant. Reiterating the Cafeteria Workers 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. It offered little explanation other than a noted similarity of inquiry. The Mathews three-pronged test, developed in the context of agency terminations of statutorily created entitlements, considers the following factors:

---

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.
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.
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.\textsuperscript{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.\textsuperscript{206} As a result, the burden from additional procedural safeguards falls mainly on the party seeking attachment rather than on the government.\textsuperscript{207} Given the emphasis on the dual private interests of creditor and debtor, the Court modified the \textit{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 \textit{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.\textsuperscript{208}

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

\textsuperscript{205} \textit{Id.} at 335.
\textsuperscript{206} \textit{Doehr}, 501 U.S. at 10-11.
\textsuperscript{207} \textit{Id.} at 11.
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{See supra} notes 71-72; \textit{infra} notes 210, 287-90 and accompanying text.

[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.

\textit{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{213}

In assessing the risk of erroneous deprivation, the Court considered the ultimate goal of securing an award to the plaintiff that the defendant might not otherwise satisfy.\textsuperscript{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,\textsuperscript{215} the Court noted an unresolved ambiguity suggesting a lesser standard.\textsuperscript{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.\textsuperscript{217} These limitations are particularly likely to lead to mistaken deprivation when the underlying claim is a tort action not subject to documentary proof.\textsuperscript{218}

\textsuperscript{211} \textit{Doehr}, 501 U.S. at 11.

\textsuperscript{212} \textit{Id.} at 12.

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

\textsuperscript{214} \textit{Doehr}, 501 U.S. at 12.

\textsuperscript{215} \textit{See supra} note 181.

\textsuperscript{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." \textit{Doehr}, 501 U.S. at 13 (citations omitted).

\textsuperscript{217} \textit{Id.} at 14.

\textsuperscript{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.\textsuperscript{219} Three key Mitchell factors, however, were missing: (1) a plaintiff’s pre-existing interest in the property, (2) an underlying claim subject to documentary proof, and (3) bonding provisions.\textsuperscript{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.\textsuperscript{221} There was no preexisting interest in the property,\textsuperscript{222} and the plaintiff had not alleged actions that would render the property unavailable to satisfy the judgment.\textsuperscript{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.\textsuperscript{224}

The Court noted that historical practice and national trends provide additional support for invalidating the Connecticut statute.\textsuperscript{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.\textsuperscript{226} The tort claim in Doehr is thus less closely related to the origins of attachment than the

\textsuperscript{219} Id. at 14-15.  
\textsuperscript{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.  
\textsuperscript{221} Id. at 16.  
\textsuperscript{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.  
\textsuperscript{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.  
\textsuperscript{224} Id.  
\textsuperscript{225} Id.  
\textsuperscript{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 suits②③1 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

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.

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-

---

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.
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.
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." The difficulty with this rule as a constitutional guide lies in the amorphous concept of "some exigent circumstance." 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. 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. He stressed the lack of a preexisting creditor interest, at least for the application of due process protections to nonpossessory encumbrances on real property. For the majority, the "highly factual," fault-based nature of the underlying claim seemed

---

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.


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 50.
particularly important. A preexisting creditor interest was just one of the possible "countervailing considerations" found lacking. 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.

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. 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 and the District Court of Connecticut in Shaumyan v. O'Neil 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

---

251 Doehr, 501 U.S. at 14.
252 Id. at 15-16.
253 See supra note 235 and accompanying text.
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 document-
tary proof.\footnote{Heggelund, 594 A.2d at 466 n.3 (quotations and citations omitted).}

In \textit{Shaumyan II}, the district court relied heavily on Rehnquist's concurrence to interpret the applicability of \textit{Doehr} to a mechanic's lien.\footnote{Shaumyan II, 795 F. Supp. at 531, 532-33. The court noted that "the scope of \textit{Doehr}'s holding is at best unclear." \textit{Id.} at 532.} The lien has an effect substantially similar to that of the attachment in \textit{Doehr}, a cloud on title that impairs marketability and credit availability.\footnote{The District Court had discussed these aspects of the deprivation in its original opinion. \textit{Shaumyan v. O'Neill}, 716 F. Supp. 65, 77 (1989).} The court concluded, however, that the lien would not fall within \textit{Doehr}'s requirement for a predeprivation hearing. The plaintiff's lack of a preexisting interest was crucial to \textit{Doehr},\footnote{Shaumyan II, 795 F. Supp. at 532.} so that the case, the \textit{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."\footnote{\textit{Id.} at 531.} In \textit{Shaumyan II}, however, the mechanic's lien existed prior to the attachment and rested on a contractual claim. The \textit{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."\footnote{\textit{Id.} at 529 (emphasis added).}

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 \textit{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 \textit{Doehr} to assess the necessity for a bonding provision is illustrative.\footnote{See supra notes 229-34 and accompanying text.} 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.\footnote{See, \textit{e.g.}, supra note 191 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.\textsuperscript{264} The doctrinal framework that emerges from the \textit{Sniadach} quintad can be described as follows. Prior to \textit{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.\textsuperscript{265}

Standing alone, \textit{Sniadach} (B) focuses on the defendant’s “brutal need.” The Court created an exception to the general presumption for garnishment of wages.\textsuperscript{266}

(A) \textbf{Summary proceedings are constitutional}

\textit{unless} the defendant shows “brutal need”

(B) \textbf{Summary proceedings are unconstitutional}

\textit{unless} there is an “extraordinary circumstance”

\textit{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.\textsuperscript{268}

\textsuperscript{264} In effect, this is a refinement of the “disjunct rules” approach discussed in Section II-C \textit{supra} based on the additional perspective provided by \textit{Doehr}.

\textsuperscript{265} See \textit{supra} notes 229-34 and accompanying text.

\textsuperscript{266} See discussion \textit{supra} part 1.A.

\textsuperscript{267} See discussion \textit{supra} part 1.B.

\textsuperscript{268} See \textit{supra} notes 90-119, 175-78 and accompanying text. As discussed, the \textit{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 \textit{Mitchell} is necessary to the exception or whether some subset might be constitutionally sufficient.
Summary proceedings are unconstitutional

unless there is an "extraordinary circumstance"

or there is "neutral magistrate" process

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.

Summary proceedings are unconstitutional

unless there is an "extraordinary circumstance"

or there is "neutral magistrate" process

except when there are "insufficient safeguards"

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.
Summary proceedings are unconstitutional

unless there is an "extraordinary circumstance"

or there is "neutral magistrate" process

except when there are "insufficient safeguards"

or plaintiff's interests are insufficient

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

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

In the 1960s, however, the Court turned its attention to welfare rights 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. In Board of Regents v.  

---


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, 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, and only then determines what type of procedures due process requires. Consequently, inquiry shifted from when a hearing will occur to whether there should be one at all.

Due process theory has thus shifted from its core focus of ensuring adjudicatory legitimacy for vulnerable individual interests. 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." 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." Under the Mathews utilitarian test, 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.

Commentators have sharply criticized the Mathews test. 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.


291 See Rubin, supra note 274, at 1066.


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.

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

The utilitarian test is also problematic because of incomplete balancing. It ignores the societal "dignity" and "equality" values of individual participation in the process. 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. 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.

Finally, the Mathews utilitarian calculus unduly emphasizes administrative convenience. 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

---

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.
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." 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.

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

---

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).


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.
terminating 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.\textsuperscript{311} Although \textit{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 \textit{Mathews-Doehr} test establishes the relationship among the factors (such as preexisting creditor interest, exigent circumstances, and the various procedural safeguards) that are relevant in determining the minimum procedural requirements.\textsuperscript{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.\textsuperscript{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. \textit{The "More Vulnerable" Rule}

By providing the unifying principle that expresses the procedural due process value of "minimum procedures,"\textsuperscript{314} the \textit{Mathews-Doehr} test

\textsuperscript{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.

\textsuperscript{312} See Van Alstyn, 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).

\textsuperscript{313} The \textit{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 \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938) and its progeny. See \textit{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." \textit{Id. at 240}.

\textsuperscript{314} Judge Richard Posner described this function of the modified \textit{Mathews} test in \textit{Penn Cent. Corp. v. United States R.R. Vest Corp.}, 955 F.2d 1158, 1163 (7th Cir. 1992): "[T]he \textit{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.\textsuperscript{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:

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

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”\textsuperscript{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 cognizable 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 \textit{North American Cold Storage v. City of Chicago}\textsuperscript{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-
ing many other structures. In adjudicatory contexts, 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.

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," 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. 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, 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.

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

---


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. The plaintiff's sole interest in the property—created by the attachment to secure a potential tort judgment—was de minimis. 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. 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:

![Diagram showing the relationship between extraordinary interest, increasing importance of the plaintiff's interest, de minimis interest, inadequate safeguards, and increasing vulnerability of the defendant's interests.]

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 Snidadach tetrad and cases addressing jurisdictional due process requirements was the continuing viability of attachment jurisdiction. 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 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 Friedenthal 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).
NOTE—PROCEDURAL DUE PROCESS

the defendant that is unrelated to the property itself.\textsuperscript{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.\textsuperscript{331}

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

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

\begin{itemize}
\item There are two types of territorial jurisdiction based on the state's power over things rather than persons: in rem and quasi in rem. \textit{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. \textit{See, e.g., Friedenthal, supra} note 328, §§ 3.2-3.11, §§ 3.14-3.18 (1985).
\item \textsuperscript{330} Clermont, supra note 313, at 147.
\item \textsuperscript{331} \textit{See Pennoyer v. Neff, 95 U.S. 714, 726-27 (1877).}
\item \textsuperscript{332} \textit{Fuentes, 407 U.S. at 91 n.23.}
\item \textsuperscript{333} 256 U.S. 94 (1921) (allowing attachment to secure jurisdiction over a nonresident defendant in state court).
\item \textsuperscript{334} The characterization of attachment jurisdiction as an extraordinary circumstance stems from the \textit{Ownbey} Court's own description of the process:
\item [A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed \textit{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. \textit{Ownbey, 256 U.S. at 111.}
\item \textsuperscript{335} It should be noted, however, that \textit{Ownbey} was decided in the context of a different concept of territorial jurisdiction. \textit{See Moore, supra} note 317, at 214-15. Under \textit{Pennoyer}, states were "exclusively powerful" over persons and things within their boundaries, but "absolutely powerless" over persons and things outside those boundaries. \textit{Friedenthal, supra} note 328, at 100.
\item \textsuperscript{336} Id. at 111.
\item \textsuperscript{337} "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 . . . ." \textit{Id. at 111.}
\item \textsuperscript{338} \textit{Fuentes, 407 U.S. at 91 n.23.}
\item \textsuperscript{337} The use of attachment jurisdiction "usually is superfluous" due to growth of state long-arm statutes providing in personam jurisdiction over nonresidents. \textit{Friedenthal, supra} note 328, at 152. \textit{See also Quasi in Rem, supra} note 328, at 1034 (suggesting that attachment jurisdiction should be restricted to situations of genuine necessity).
\end{itemize}
otal Supreme Court cases. In *International Shoe Co. v. Washington*, 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. In *Shaffer v. Heitner*, the Court extended *International Shoe* to cover all assertions of territorial jurisdiction. Procedural due process concerns weighed heavily against the historical and expediency rationales supporting attachment jurisdiction since "the only role played by the property is to provide the basis for bringing the defendant into court."

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

Moreover, in *Mullane v. Central Hanover Bank & Trust Co.*, the Court faced another jurisdictional question not explicitly resolved by *Shaffer*. 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. 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." The Surrogate Court addressed personal rights that were being settled in what would normally be considered an in personam action, 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)).


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.*


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

351 *Id.* at 311.

352 *Id.*
itself.\textsuperscript{353} Noting the confusion of ancient classificatory schemes,\textsuperscript{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.\textsuperscript{355} No other forum was available to settle the accounts established under the state's laws.\textsuperscript{356}

\textit{Shaffer} and \textit{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.\textsuperscript{357} Otherwise, because in personam jurisdiction is unavailable, attachment jurisdiction should be unconstitutional.\textsuperscript{358}

1. \textit{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 \textit{Shaffer} and under \textit{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.\textsuperscript{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 \textit{International Shoe} reasonableness standard or the \textit{Mathews-Doehr} vulnerability analysis. As in \textit{Doehr}, the plaintiff's interest is too insignificant to subject the defendant to attachment proceedings.

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

\textsuperscript{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." \textit{Id.}

\textsuperscript{355} \textit{Id.} at 313.

\textsuperscript{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 . . . .

\textit{Id.}

\textsuperscript{357} See Moore, \textit{supra} note 317, at 226-30; \textit{Quasi in Rem}, \textit{supra} note 328, at 1032.

\textsuperscript{358} See \textit{supra} notes 343-47 and accompanying text. \textit{See also} Moore, \textit{supra} note 317.

\textsuperscript{359} Convenience jurisdiction thus falls within the shaded portion of "de minimis plaintiff interest" on the chart \textit{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: 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

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-
NOTE—PROCEDURAL DUE PROCESS

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

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 have long been available. See supra notes 36-37 and accompanying text.