The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Snidach to North Georgia Finishing

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THE EVOLVING DEFINITION OF PROCEDURAL DUE PROCESS IN DEBTOR-CREDITOR RELATIONS:
FROM SNIADACH TO NORTH GEORGIA FINISHING

The debtor seeking to contest prejudgment seizure of his property on grounds that the ex parte statutory procedure employed violates the fourteenth amendment proscription against deprivations of property without due process of law is confronted with the problem of reconciling United States Supreme Court pronouncements upon state procedures which possess indistinct dissimilarities. *Fuentes v. Shevin* set forth the broad rule that due process under the fourteenth amendment requires that an individual be afforded notice and an opportunity to be heard before being deprived of his property. This rule was sidestepped in *Mitchell v. W.T. Grant Co.*, where the Supreme Court sustained under fourteenth amendment due process attack a Louisiana sequestration procedure permitting judicially authorized seizure of goods on the ex parte application of an installment contract creditor. Notice to the debtor and an opportunity to be heard prior to being deprived of property to which he held full legal title were not statutorily provided. By leaving *Fuentes* intact, the *Mitchell* Court preserved parallel and partially conflicting lines of authority in the area of summary prejudgment remedies. Due process analysis could proceed with either of two tests pronounced by the court within a span of two years: *Fuentes*’ absolute standard proscribing deprivation not preceded by notice and hearing or *Mitchell*’s balancing approach which weighs each party's respective interest in the property claimed and the risks inherent in either position, adjudicating the constitutionality of the procedure on the basis of an accommodation between these factors.

Against this background of dual precedent stands *North Georgia Fin-

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1. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law....” U.S. Const. amend. XIV, § 1.
3. Id. at 96.
5. See note 47 infra.
6. 416 U.S. at 601, 603.
7. 407 U.S. at 96.
8. 416 U.S. at 604-07.
ishing, Inc. v. Di-Chem, Inc., a case involving the garnishment of a corporate debtor's bank account. While invalidating the garnishment procedure on fourteenth amendment grounds similar to Fuentes, the Court distinguished Mitchell because the garnishment did not sufficiently compare with the mechanics of sequestration which assure procedural due process. Whether Fuentes is to represent the rule and Mitchell the exception or whether North Georgia Finishing itself composes a synthetic due process standard for reviewing summary ex parte procedures remains unclear. The future disposition of this issue will depend upon a critical dissection of the statutory procedures under these precedents.

I. SNIADACH-FUENTES

The sweeping due process test enunciated by the Court in Fuentes received nascent formulation in Sniadach v. Family Finance Corp. Sniadach had represented a departure from traditional due process scrutiny where rights in property were sought to be protected by summary ex parte prejudgment remedies.

A. The Pre-Sniadach Position

Although pre-Sniadach precedent required that notice and hearing, the essentials of due process of law under the fourteenth amendment, be granted before final dispossession, neither were deemed fundamental at the prejudgment stage:

Where only property rights are involved, mere postponement of the ju-

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10. Id. at 722-23.
12. The Court had approved prejudgment attachment liens effected by creditors without notice and opportunity for hearing where quasi-in rem jurisdiction was secured by the attachment over a foreign defendant’s local property. Ownbey v. Morgan, 256 U.S. 94 (1921). Broad language had also supported the general practice of the creditor’s use of prejudgment attachment liens in Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928), cited without comment in McKay v. McInnes, 279 U.S. 820 (1929). Where immediate state intervention would alleviate threats to public health posed by misbranded articles in commerce, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), or where other significant governmental interests were at stake, Fahey v. Malonese, 332 U.S. 245 (1947) (bank regulation); Phillips v. Commissioner, 283 U.S. 589 (1931) (enforcement of federal tax lien), use of summary prejudgment attachment process by the state received the Court’s sanction. Prior to Sniadach, however, McKay had been the only case to deal with summary prejudgment seizure for exclusively private purposes. See Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972).
dicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.\textsuperscript{14}

Summary ex parte prejudgment remedies found precedent in situations where the dispossessing party could demonstrate private action undertaken pursuant to contractual agreement,\textsuperscript{15} an overriding governmental interest in securing the property pendente lite,\textsuperscript{16} or danger that the purpose of a final action would be defeated, or made excessively difficult, by requiring a prior hearing.\textsuperscript{17} The fact that certain practices in debtor-creditor relations were perpetuated by tradition has entered into the test of procedural due process.\textsuperscript{18}


\textsuperscript{15} The due process clause by its terms comprehends only state action. Section 9-503 of the Uniform Commercial Code, adopted with variations by every state except Louisiana, authorizes self-help repossession of collateral by a secured creditor on debtor's default under the terms of the parties' security agreement. Whether such statutory authorization constitutes state action so as to be brought within the operation of the Snidach-Fuentes principle has been negatively answered. Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971). For the view that invalidation of section 9-503 may not necessarily follow from invalidation of other summary prejudgment remedies, see Comment, Remedies on Default Under the Proposed Uniform Commercial Code as Compared to Remedies Under Conditional Sales, 39 Marq. L. Rev. 246, 256 (1956).


18. \textsuperscript{[l-othing is more common than to allow parties alleging themselves to be
In light of traditional trade customs, "attachment was deemed 'part of the remedy provided for the collection of the debt' . . . and repre-
sented a practice that 'had become fully established . . .'" With-
out the full protection of this remedy, creditors would presumably be
less inclined to extend secured credit because of concomitant decreases
in profit margins. To the seller, the utility of sales credit is integrally
related to collateralization of the loan and the summary availability of
the collateral once the buyer has defaulted. For this purpose, it was
deemed necessary for the creditor's remedy at law to be both summary
and ex parte. If relief is delayed by the requirements of prior notice
and hearing, it may become altogether worthless. Prior to Sniadach,
the timing of the hearing to adjudicate property interests in commercial
transactions was construed by the courts to be variable, depending upon
such factors as the nature of the property or the interest to be di-
vested.

B. The Sniadach-Fuentes Opposition

Sniadach dealt with the prejudgment garnishment of wages, a "spe-
cialized type of property," deprivation of which could, as a practical
matter, "drive a wage earning family to the wall." In holding garnish-
ment proceedings violative of the due process guarantee of the four-
teenth amendment because taking of a significant property interest was
effected without prior notice and hearing, the opinion stands as a
landmark not only in reawakening to due process scrutiny prejudgment
creditor remedies not reviewed by the Court since 1928, but also in

creditors to establish in advance by attachment a lien dependent for its effect upon
the result of the suit. We see nothing in this case that requires further argument
to show that the decision below was right.
Bennett, 277 U.S. 29, 31 (1928) (emphasis added).
20. Creditors will seek to eliminate buyers who pose poor credit risks. The rippling
economic effects of discarding summary repossession remedies may be particularly harsh
on lower income purchasers who must rely upon credit to secure many necessities. See
Brief for Appellee Firestone Tire & Rubber Co. at 14-25, Fuentes v. Shevin, 407 U.S.
67 (1972).
22. For history and discussion of the type and timing of the hearing required under
the due process clause, see Arnett v. Kennedy, 416 U.S. 134, 177-203 (1974) (White,
J., concurring in part and dissenting in part).
23. 395 U.S. at 340.
24. Id. at 341-42.
25. Id. at 342.
26. See note 12 supra.
subjecting such procedures to an analysis which for the first time took into account the deprivative impact on the dispossessed party.\textsuperscript{27}

Granted that severity of the deprivation and its effect on the debtor's livelihood enter into the assessment of procedural due process in commercial transactions, distinctions may logically arise depending upon the nature of the specific items of property to be dispossessed. The timing of a hearing sufficient to satisfy due process might thus depend upon whether the property is to be categorized as a necessity or a non-necessity. As many federal and state courts construed the lesson of Sniadach, the greater the necessity of the particular goods in maintaining a rudimentary standard of living, the earlier the hearing was necessitated.\textsuperscript{28} "Necessities" would thus form a seemingly logical dividing line between preseizure hearings and those which might constitutionally be postponed until the creditor has regained control over the subject matter of the debt.\textsuperscript{29}

Gradations in the importance or severity of the deprivation of various consumer goods in determining whether they are deserving of preseizure notice and hearing protection, insofar as they rest on subjective evaluation, must be artificial.\textsuperscript{30} Fuentes, in laying to rest such limited constructions of Sniadach, found it necessary to distill the central meaning of procedural due process from precedent.\textsuperscript{31} The purpose of

\textsuperscript{27} 395 U.S. at 340-42.


\textsuperscript{29} See note 28 supra.

\textsuperscript{30} No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."


\textsuperscript{31} Three Supreme Court cases prior to Sniadach dealt with the constitutionality of prejudgment attachment liens effected by creditors without notice or hearing: McKay v. McInnes, 279 U.S. 820 (1928); Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); Ownbey v. Morgan, 256 U.S. 94 (1921).
a constitutional right to be heard is to "protect [the individual's] use
and possession of property from arbitrary encroachment," thus mini-
mizing "substantively unfair or mistaken deprivations of property, a
danger that is especially great when the State seizes goods simply upon
the application of and for the benefit of a private party."  

In the estimation of the Fuentes Court, the right to a hearing would
be purposeless were it not granted to the debtor in time to prevent arbi-
trary or mistaken seizures by state officials: "[N]o later hearing and
no damage award can undo the fact that the arbitrary taking that was
subject to the right of procedural due process has already oc-
curred." Hence, while the sufficiency and form of the hearing itself
"are legitimately open to many potential variations" and while the
deprivation is only temporary and not final, the Court held due proc-
cess to be denied absent "the right to a prior opportunity to be heard
before chattels are taken from their possessor."

Exceptional circumstances were the sole exemptions from the rigor-
ous exercise of the Fuentes principle. The Court painstakingly de-
lineated those "truly unusual" situations where seizure without oppor-
tunity for a prior hearing to contest the seizure had been allowed by
the Court and would in the future be justifiable.

The guarantee of a hearing prior to dispossession necessarily entails
greater costs by diminishing the speed and efficiency with which a se-
cured creditor may by judicial process attach collateral in the possession
of his debtor. This delay in turn affects a credit seller's interest by
diminishing the value of security he may have for the debt, yet the
Fuentes majority concluded that such costs "cannot outweigh the consti-
tutional right." Fuentes reasons that procedural due process cannot
equally accommodate both parties' interests under an installment sale
of goods because only one is entitled to possession of which he may
be deprived:

Procedural due process is not intended to promote efficiency or accom-
modate all possible interests: it is intended to protect the particular in-

32. 407 U.S. at 81.
33. Id.
34. Id. at 82.
35. Id. at 96.
36. Id. at 84, 85.
37. Id. at 96 (emphasis added and footnote omitted).
38. Id. at 90.
39. Id. at 91-92; see note 12 supra.
41. 407 U.S. at 90 n.22, 92 n.29.
terests of the person whose possessions are about to be taken. While the installment contract creditor might stand to lose his security or remaining interest in the merchandise through his debtor's improper acts, these rights are not in jeopardy from processes sanctioned by law. Where conflicting private claims to property arise, due process would require those rights most susceptible to deprivation without due process of law to take precedence. The paramount interest which must receive procedural due process protection is the one subject to wrongful deprivation under process of law. Therefore, under Fuentes' construction of the due process clause, if exceptional circumstances cannot be demonstrated, the party in possession may not have his possession disrupted by any procedure which does not provide him the due process preseizure safeguards of notice and a hearing.

II. MITCHELL'S ACCOMMODATION

W.T. Grant Company, a nationwide chain store retailer of general merchandise, filed a petition in the First City Court for the City of New Orleans, alleging $574.17 past due and owing on purchases of a refrigerator, stove, washing machine and phonograph made by defendant Lawrence Mitchell. Grant's petition declared entitlement to a vendor's lien, prayed for judgment in the amount of $574.17 with legal interest and requested that a writ of sequestration immediately issue "to protect plaintiff's interest in the matter." The petition contained

42. Id. at 90 n.22.
43. Id.
44. Id. at 96.
45. 416 U.S. at 601.
46. See note 77 infra.
47. Petitioner's Brief for Certiorari at 3, Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) [hereinafter cited as Petitioner's Brief]. Louisiana's relevant statutory provisions are as follows:

A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain when the writ is obtained wrongfully. La. Code Civ. Proc. Ann. art. 3501 (West 1961).

The defendant by contradictory motion may obtain the dissolution of a writ of attachment or of sequestration, unless the plaintiff proves the grounds upon which the writ was issued . . . .

Id. art. 3506.

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste
an affidavit by Grant's credit manager verifying these facts, coupled with an assertion that the petitioner had reason to fear and believe that the defendant would "encumber, alienate or otherwise dispose of the merchandise ... during the pendency of these proceedings ... ."48

Upon Grant's furnishing bond for $1,125.00, the Judge of the City Court signed an order authorizing the requested writ of sequestration. Approximately ten days later, the constable of the City Court served Mitchell at his residence with Grant's petition and the writ of sequestration. At the same time, Mitchell's appliances were seized, loaded into Grant's truck and taken to Grant's place of storage.49

After an adversary hearing on Mitchell's motion to dissolve the writ of sequestration on the ground that seizure of his appliances without prior notice and hearing deprived him of procedural due process, the trial court judge denied the motion. He assigned in his "Reasons for Judgment" that "provisional seizure enforced through sequestration was not a denial of due process and, in this instance, did not impinge upon defendant's constitutional rights."50 The Louisiana Supreme Court, reviewing the motion to dissolve on Mitchell's application after the Louisiana Court of Appeals had refused to dissolve the writ, affirmed the ruling of the trial court.51 The United States Supreme Court, granting Mitchell's petition for writ of certiorari,52 affirmed on the question of whether the sequestration by judicial order of property purchased on credit without prior notice to the installment buyer and opportunity for a hearing violated the fourteenth amendment.53

Petitioner Mitchell urged that the same prior hearing and notice due petitioner Fuentes under the Florida replevin statute was due him under the Louisiana sequestration statute because the two procedures were constitutionally indistinguishable. The Mitchell Court, however, rejecting such analogy to precedent,54 found Fuentes "decided against

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48. 416 U.S. at 602; see LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).
49. Petitioner's Brief, supra note 47, at 4.
50. Id. at 5.
51. 269 So. 2d 186 (1972).
53. 416 U.S. at 603.
54. At least one state court was reluctant to declare unconstitutional a state statute based upon a decision supported by less than a clear majority of the Court. In Roofing Wholesale Co. v. Palmer, 502 P.2d 1327, 1331 (Ariz. 1972), the argument was accepted that, because two justices did not participate in the Fuentes opinion (Justices Powell and
Mitchell's due process standard takes for its starting point the premise that the fourteenth amendment due process clause is neither a technical nor an inflexible formula applicable to all situations, but rather an ad hoc constitutional accommodation between competing interests. Mitchell implements such an accommodation through a two-fold analysis. First, if the state, in providing statutory intervention to a disputant over possession of chattels, minimizes the risk of mistaken wrongful deprivation by its officials, and, second, if upon a review of the "realities" of the transaction, the Court concludes that the state procedure as a whole reaches a constitutional accommodation of the respective interests, then the procedure will be upheld.

A. Risk Minimization

The Court's initial premise is that judicial control will minimize the risk that the ex parte sequestration procedure will lead to a wrongful taking. It supports this proposition by adumbrating the factors which the Louisiana procedures provided to enable judicial control of the process. First, the applicant for the writ of sequestration must make a factually convincing showing to the issuing magistrate. The nature of the claim, the amount, and the grounds relied upon for issuance of the writ must clearly appear from "specific facts" shown by verified petition or affidavit. Second, the petitioner must make the requisite showing to a magistrate, rather than to a court clerk or other court functionary, before authorization for the seizure may be obtained.

Rehnquist), the four justice majority decision is only an advisory opinion, therefore not binding on state courts. Compare Justice Stewart's perception of similar treatment of Fuentes by the Court. 416 U.S. at 634-36.
55. 416 U.S. at 615.
56. Id. at 607.
57. Id. at 616-18. By contrast, no risk of wrongful seizure by state officials was acceptable to the Fuentes Court so long as an alternative procedure was available which could foreclose the possibility of error: opportunity for an adversarial hearing prior to issuance of the writ. 407 U.S. at 81-83.
58. 416 U.S. at 608-09, 618-19. In contradistinction, Fuentes' due process analysis initially determined at what point in time the debtor was afforded notice and opportunity to defend against summary process, broadly invalidating any procedure which permitted hearing of the issues pertinent to seizure subsequent to the actual taking of the property. 407 U.S. at 80-86.
59. 416 U.S. at 608-10.
60. Id. at 625 (Powell, J., concurring).
61. See note 47 supra.
62. 416 U.S. at 615-16.
Judicial approval of the writ is not a function exercised by a judge in a ministerial capacity. Third, the issues to be determined and the ease with which they may be proven by documentary evidence under the Louisiana procedures reduce both the need for an adversarial hearing on whether the writ should issue and the risk that the writ wrongfully issue.

The dissenting opinions seriously challenge the Mitchell majority's assertion that judicial participation in this circumstance may in fact reduce wrongful seizures. Justices Powell and Stewart debate issuance of the writ as a "ministerial" function and the extent to which the issuing trial judge acts on knowledge before permitting the state to enter into the conflict over property. Justice Stewart openly avows that sequestration procedure is indistinguishable from replevin albeit the ex parte application is to be made to a judge instead of a court clerk.

63. Id. at 616 n.12.
64. Id. at 617-18. Contra, id. at 633-34 (dissenting opinion). The Court draws an analogy from tort law in distinguishing sequestration from Fuentes' replevin procedure. Replevin, which under the Florida statute must be utilized only if the property was wrongfully detained (FLA. STAT. ANN. § 78.01 (Supp. 1972-73)) is a fault standard "inherently subject to factual determination and adversarial input." 416 U.S. at 617. Sequestration, by analogy to strict liability, apparently does not require a showing of complicated interrelationship between certain factors as does a fault showing, but in this case only the existence of a lien, possession by the debtor, and an allegation of default under the terms of the sales contract. Accord, Sugar v. Curtiss Circulation Co., 383 F. Supp. 643 (S.D.N.Y. 1974) (where the issue before the state court considering issuance of attachment order is an allegation of fraud, ex parte determination not suitable). But see Mitchell v. W.T. Grant Co., 416 U.S. 600, 633 (1974) (Stewart, J., dissenting) ("[t]here is, however, absolutely no support for this purported distinction").
65. 416 U.S. at 631 (Stewart, J., dissenting).
66. Id. at 616 n.12; cf. id. at 632-33 (Stewart, J., dissenting). At least one lower federal court has recently considered the issue:

The presence of the justice of the peace in the West Virginia procedural pattern is a distinction without a difference. When issuing the distress warrant, the justice of the peace is performing a nonjudicial act similar to the Pennsylvania prothonotary [in Parham v. Cortese, consolidated with Fuentes], and his magisterial imprint on the warrant does nothing to ameliorate the unconstitutional seizure of the property.


The Court in Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928), dismissed a similar argument:

The fact that the execution is issued in the first instance by an agent of the State, but not from a Court . . . is a familiar method in Georgia and is open to no objection.

Id. at 31, quoted with approval in Mitchell v. W.T. Grant Co., 416 U.S. 600, 613 (1974). The state agent in Coffin was the state banking commissioner. See Fuentes v. Shevin, 407 U.S. 67, 83 n.13 (1972); LA. CODE CIV. PRO. ANN. art. 282, comment (b) (West 1961); Petitioner's Brief, supra note 47, at 22-23.

67. See 416 U.S. at 632 (dissenting opinion). See also notes 47, 64 & 66 supra; notes 68-69 infra.
is clear that the Louisiana judge passing upon an application for a writ of sequestration is presented with no more evidence than presented before an authorized court clerk under the replevin procedure in *Fuentes*.

In both cases, the sufficiency and truth of the creditor's claim of contractual default must be determined from his verified affidavit, the credibility of which is buttressed by posting bond as security for payment of damages the defendant may sustain should the writ be wrongfully obtained. Yet the majority does not clarify how a judge may divine more factual background data from the four corners of an affidavit than may a court clerk, especially where the critical factual issue is the existence of a default under the terms of an installment sales contract unilaterally declared by a party whose self-interest is evident.

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Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided.

*FLA. STAT. ANN.* § 78.01 (Supp. 1972-73). To conform with Florida procedure, the creditor-seller needed only to fill in the blanks on the appropriate form, then submit it to the small claims court clerk to sign and stamp before issuing the writ of replevin.

69. See note 47 supra. Justice Powell, concurring, states that the showing required by article 3501 is equivalent to a showing of probable cause to believe that the applicant is entitled to the requested relief—a "factually convincing showing" that the property is wrongfully in the possession of the debtor.

407 U.S. at 75. To comply with the Pennsylvania statute, also invalidated in *Fuentes*, the procedure was identical *(PA. RULE Civ. PRO. 1073 (1967))*, although a prothonotary rather than a court clerk issued the writ. Under both statutes, bond in double the value of the property to be seized had to be posted by the applicant before the writ would issue.

70. *Mitchell* does not satisfactorily address itself to the question of how the validity of the facts alleged in the vendor-creditor's supporting affidavit for a writ of sequestration may be evaluated other than in the context of an adversarial hearing where all relevant facts are exposed.
The Court would answer that to comply with procedural due process, the statutory procedure need not provide total safeguard against wrongful seizure so long as the risk is minimized; thus, the truth of the affidavit need not be ascertained beyond a probabilistic standard, precluding the absolute necessity for a preseizure hearing.\textsuperscript{71} Even so, the opinion provides little to convince one that such a showing by a self-interested party, revealing at best a reasonable basis for his claim, can be accurately characterized as a "factually convincing showing."\textsuperscript{72} It must remain, dicta in the majority and dissenting opinions to the contrary,\textsuperscript{73} an open question whether the judiciary may influence, at the initiation of the sequestration process, the number of wrongful issuances of the writ merely by affidavit review.

\textsuperscript{71} 416 U.S. at 609. When the risk of error can, as completely as judicially possible, be eliminated by a hearing prior to issuance of the writ, this risk does not appear to be one which the state must necessarily assume unless a special state or creditor interest was thereby furthered. Fuentes v. Shevin, 407 U.S. 67, 90-93 (1972). Justice Douglas in \textit{Sniadach} had emphasized that summary processes which delayed a hearing could be constitutionally employed in limited circumstances where a compelling state or creditor interest was manifest. 395 U.S. at 339. In \textit{Fuentes}, due process analysis determined the taking to be a deprivation if the procedures employed did not protect a "special state or creditor" interest. 407 U.S. at 90-93. The holding in \textit{Fuentes} ostensibly foreclosed a creditor's concurrent interest in property sought to be replevied from qualifying as a "special" interest.

The state interest secured by the unconstitutional \textit{Fuentes} procedure is arguably identical to that secured by the valid \textit{Mitchell} procedure. Yet the \textit{Mitchell} majority opinion is singularly devoid of reference to the accomplishment of a state interest under sequestration. The relative merit of the state's interest in providing creditors with summary process would appear to have no weight in \textit{Mitchell}'s due process balancing test. Despite Justice White's emphasis in \textit{Mitchell} upon what the vendor must show to obtain the writ and its judicial issuance, he would agree that perfection is not possible under the procedure. 416 U.S. at 609-10, 618. \textit{Mitchell} declares that the state action involved is satisfactory under fourteenth amendment due process standards so long as authorized wrongful repossessions are "minimized." \textit{Id.}

In effect, the state is creating a presumption in favor of the validity of the seller's declaration of contractual default by permitting issuance of the writ prior to judicial determination of default. \textit{Id.} at 629-30 n.1. The risk "diminished" by this procedural safeguard may not be otherwise defined than as action undertaken by the state to deprive a person of property rightfully possessed, yet outside the fourteenth amendment proscription against depriving persons of property without due process. In sanctioning such risk, \textit{Mitchell} accords due process to a system which has a built-in capacity to err on the side of the only person whose interests may be affected under the fourteenth amendment. The adverse effect upon the seller by being unable to dispossess his debtor without a prior hearing is not the result of state action and thus not subject to due process attack. In essence, \textit{Mitchell} holds it to be within the scope of due process for a state to expose one party to the risk of a wrongful deprivation of his property in order to mitigate the other's contractual losses.

\textsuperscript{72} 416 U.S. at 626 (Powell, J., concurring).

\textsuperscript{73} \textit{Id.} at 608, 609-10, 615, 616 (majority opinion); \textit{id.} at 633 (Stewart, J., dissenting).
B. Realities

The Mitchell Court’s second line of inquiry into the due process afforded by the Louisiana sequestration procedure examines the “realities” of installment sales transactions with the object of determining whether the procedure as a whole reaches a constitutional accommodation of the respective interests of buyer and seller in permitting prehearing sequestration of the seller’s collateral.\textsuperscript{74}

The installment credit realities, as viewed by the Court, are that the seller shoulders the greatest risk in event of buyer’s default, because from the moment of default until he regains possession of the goods, the seller is uncompensated for the deterioration in resale value of his security. Such deterioration is normally offset by the buyer’s continuing installment payments.\textsuperscript{75} Concealment from judicial process and destruction or alienation of the goods by the buyer also pose risks to the seller, doubly so because of the precarious nature of the statutory security interest he has retained.\textsuperscript{76} Sequestration reduces the possibility that the buyer will transfer possession of the goods and thus defeat a Louisiana statutory vendor’s privilege.\textsuperscript{77} If the opportunity were af-

\textsuperscript{74} Id. at 607-09.
\textsuperscript{75} Id. at 608. The major justification for sequestration advanced by the Mitchell Court is that, prior to issuance of the writ, while the chattel remains in the debtor’s possession, the seller will suffer unmitigated loss if the buyer in fact has defaulted on the installment sales contract. \textit{Id.} at 608. The writ enables the seller to suspend such loss by cutting short the duration of a debtor’s wrongful possession.
Without summary process, apart from other legal or contractual remedies available to a creditor faced with a defaulting debtor, the seller appears to be without protection against this risk. Under the procedure, however, the risks inherent in the installment sales transaction are shifted to the debtor and become the single risk that the writ of sequestration will wrongfully issue. The fact that it is against the seller’s interest to initiate the process, in the Mitchell analysis, counterbalances the necessary risk under the procedure of mistaken issuance of the writ:

The potential damages award available, if there is a successful motion to dissolve the writ, as well as the creditor’s own interest in avoiding interrupting the transaction, also contributes to minimizing this risk [wrongful or mistaken issuance of a writ of sequestration by a trial judge].

\textit{Id.} at 610.

\textsuperscript{76} \textit{Id.} at 608-09.

\textsuperscript{77} \textit{Id.} The vendor’s privilege is an unrecorded security interest in goods sold on a credit basis attaching automatically by operation of Louisiana law, providing the seller with high preference in the collateral against other creditors. \textit{La. Civ. Code Ann.} art. 3227 (West 1952). The privilege generally continues in effect only so long as the collateral is in the possession of the buyer. \textit{La. Civ. Code Ann.} art. 3228 (West 1952); see Comment, \textit{Vendor’s Privilege}, \textit{4 Tul. L. Rev.} 239 (1930). It should be noted that in jurisdictions adopting the Uniform Commercial Code, a secured creditor appears to be in a stronger position to assert his interest against transferees of his buyer. \textit{See Uniform Commercial Code} § 9-307.
forded for notice and hearing prior to the buyer being dispossessed of
the collateral, the risks of concealment, alienation and destruction ap-
parently could not be insured against under the design of a statu-
tory procedure: "The danger of destruction or alienation cannot be
guarded against if notice and a hearing before seizure are supplied.
The notice itself may furnish a warning to the debtor acting in bad
faith." 78

Mitchell's due process assurance of an accommodation of buyer and
seller's respective interests ultimately favors the party best able to make
the other whole in event his possession is later determined wrongful. 79
The "realities" focused upon by the Court which entitle Louisiana to
arm its creditors with sequestration process pertain to the interim period
prior to seizure, after the buyer has defaulted, during which time the
buyer is not in a position to make the seller whole. 80 The seller alone,
by virtue of a statutorily required bond covering payment of expenses,
damages, and attorney's fees in event the writ of sequestration wrong-
fully issues, is in this position. 81

With alluring logic, Mitchell reasons that, since no court-ordered sei-
zure procedure could guarantee against a buyer's contractual default,
nor would it be feasible for a statutory procedure aimed at repossession
to be preventative rather than remedial, Louisiana may terminate the
transaction at the creditor-seller's request upon buyer's default. Rela-
tively greater statutory protection for an installment contract seller is
thus held to be a constitutionally justifiable accommodation of buyer's
and seller's interests. 82

78. 416 U.S. at 609 (emphasis added). Note that sequestration apparently guards
against the particular risk of the debtor's destroying, alienating, or concealing collateral
in his possession because he is given no advance notice of the seizure of the collateral.
Sequestration has no deterrent effect when the same acts by the debtor are not motivated
by retaliation. Sequestration, as with other remedies, can only be used well if used
wisely. There are no inherent limitations on the procedure which might guarantee that
the seller's unannounced intervention would be opportune.

79. Id. at 608.

80. In pursuit of the practical realities of the sequestration procedure's effects in ter-
minating the transaction between buyer and seller, the Court arrives at its ratio deci-
dendi in one core proposition: "The debtor, unlike the creditor, does not stand ready
to make the opposing party whole, if his possession, pending a prior hearing, turns out
to be wrongful." Id. at 608.

81. Id.

82. Id. at 608-09; cf. Fuentes v. Shevin, 407 U.S. 67, 100-03 (1972) (White, J., dis-
senting). Mitchell did not mention the promotion of debtor, creditor, and state interests
which may flow from adherence to the Fuentes principle. Though less practically ex-
pedient, prior notice and an opportunity to defend against seizure pursuant to a writ of
The Mitchell characterization of the realities of secured installment sales significantly affects the weight given to the creditor or debtor balance of interests.\textsuperscript{83} Installment buyer Mitchell's interest in the sequestered property was one of full legal title subject to divestment and possible dispossession in event of default under the terms of the installment sales contract.\textsuperscript{84} A factor which does not appear in the Mitchell analysis is the equity in the purchased merchandise represented by installment payments accumulated over the period of the buyer's possession. Under the Court's balance of interests analysis, the greater the buyer's equity in the sequestered property the more accommodating to his interests fourteenth amendment due process apparently must become, because as the buyer builds equity through installment payments, the seller's risk of substantial loss in the event of default correspondingly diminishes in proportion.

A comparison of risks inherent in the credit transaction further reveals that, while the seller is assuming a risk in extending credit by giving value in exchange for the buyer's promise to pay at a future date, the seller normally provides against adverse contingencies by finance charges or increased prices in the merchandise sold on credit.\textsuperscript{85} In ex-

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\section*{Footnotes}

\textsuperscript{83} The right to a prior hearing . . . is the only truly effective safeguard against arbitrary deprivation of property.” 407 U.S. at 83. Were the judiciary to fully step into the property contest prior to issuing the writ, more benefit than cessation of wrongful seizures might follow. If sequestration afforded no one-upmanship to the creditor, the overall effect of utilizing the earliest opportunity for a hearing would be a tightening of judicial control over credit transactions. This in turn should promote the peaceful and orderly settlement of commercial disputes. At a pretermination hearing, the ignorant purchaser would be immediately advised of the legal recourses open to him. \textit{Id.} at 83 n.13. The indigent purchaser would be directed to legal services and counsel where the jurisdiction of the court permitted them. \textit{Id.} Leverage gained by the creditor in initiating suit or threatening to repossess would be attenuated because the hearing would reveal previous overreaching or procedural abuses.

\textsuperscript{84} Much, of course, may depend upon how either party to the contract is characterized in evaluating the realities of credit transactions. Courts in general have a marked tendency to award judgment to “ignorant,” “uneducated,” “poor” consumers and sellers who “deal at arms length,” reflecting perhaps latent empathy or philosophic amity for the respective positions. The Mitchell Court did not so indulge itself in illustrating the plight of the prevailing party.

\textsuperscript{85} The transaction in Mitchell was not cast in the form of a conditional sales agreement (seller retains title) as in \textit{Fuentes}, where the Court qualified the seemingly lesser entitlement of a right to possession as a property interest capable of deprivation under the fourteenth amendment. \textit{Fuentes} held that the form of the transaction did not affect the fourteenth amendment character of the property. 407 U.S. at 86-87.

\textsuperscript{86} See generally D. Caplovitz, \textit{The Poor Pay More}}
change for immediate possession, petitioner Mitchell agreed to pay a major financing charge beyond the basic price of the merchandise. To the extent that finance charges reflect risks of the seller other than buyer default, the debtor is insuring the seller against more than the possibility that he individually will alienate, conceal, or eventually prove judgment proof. The seller, while clearly the party in the position to suffer the loss occasioned by buyer's default, is thus in a position to minimize such loss resulting from deterioration in the resale value of his security during court supervised possession, his own tentative repossession, or retention by the buyer pending final outcome of a hearing as required by Fuentes.

Sniadach and Fuentes' consideration of the impact upon the debtor in having his possession summarily terminated remains a viable component in the due process accommodation analysis, according to the Mitchell Court. Justice White gives short shrift to Mitchell's argument as to the severity of the deprivation of the appliances at issue: first, because petitioner did not immediately avail himself of an opportunity for a "full hearing on the matter of possession," and, second, because his "basic source of income is unimpaired." This logic is based on a premise that the debtor will, if truly feeling the severity of being deprived, take the most immediate measures to regain possession.

(1963); Commercial Law and Practice Course Handbook Series No. 85, Consumer Credit 1973 (1973); The Law and the Low Income Consumer (H. Katz ed. 1968). Unlike other forms of insurance, the finance charge does not particularize the risk posed by an individual installment sales contract purchaser by offering reduced rates to individuals considered unlikely to default. Rather, by standardized financing charges, the seller is able to absorb and spread over all credit purchasers the defaults and consequent loss caused by a few.

86. Buyer defaults only partially account for the increased costs and higher finance charges in lower income urban areas. See note 85 supra.
87. See notes 75, 78 supra.
88. 416 U.S. at 610, 618.
89. Id. at 610. Mitchell asserted his challenge at the first opportunity offered by the Louisiana sequestration procedure, and his appeal was taken from a motion to dissolve the writ of sequestration made in the City Court of New Orleans. Id. at 602-03. Is the Court implying that Mitchell himself presumed that he had no non-constitutional defenses to assert at the hearing of his motion, therefore that a loss on the contractual cause of action by Mitchell would moot his constitutional challenge to the procedure? See note 102 infra. Bootstrapping aside, the immediacy of the buyer's challenge or whether buyer in fact does challenge may entail factors such as intimidation or ignorance of a statutory right to challenge the taking, as well as a lack of defense on the merits to the creditor's action. If impact is to be measured by the rapidity with which the debtor challenges the taking, the Mitchell opinion does not expose the force of its reasoning. So far as the Court adopts this argument, its premises must be implied.
90. 416 U.S. at 610.
versely, if he does not challenge the taking, the deprivation is not sufficiently severe and its impact not appreciable.91

In demonstrating that Mitchell's deprivation was of de minimis severity, the Court concludes its consideration of debtor impact in a single phrase—"his basic source of income is unimpaired."92 This phrase reaches directly back to the holding in Sniadach.93 Mitchell would disregard the severity of any deprivation which does not affect the debtor's basic source of income, apparently limiting the impact argument to wage garnishments.94 The Fuentes rationale, however, retains its cogency: how may a constitutional basis of distinction be drawn between deducting a percentage of a debtor's paycheck and removing his refrigerator or stove?95

The assessment of the impact on the individual debtor and the weight to be granted it in the Court's due process balancing analysis remains undefined and indeterminate after Mitchell. It is an inescapable conclusion that Mitchell vitiates the informed conscious concern for the impact of summarily depriving individuals of necessities of life evident in Sniadach and Fuentes.96

91. Compare the following statement:
To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.
92. 416 U.S. at 610 (emphasis added).
93. See notes 28-30 supra and accompanying text.
94. See note 28 supra and accompanying text. What Fuentes had joined, Mitchell in a single phrase put asunder, returning to limitations Fuentes clearly abrogated, if the Sniadach opinion itself did not. Fuentes' extensive analysis of debtor impact would appear to have been overlooked by the Mitchell Court.
95. See note 30 supra and accompanying text.
96. From the standpoint of severe deprivation, no more sympathetic a factual situation for implementing the purpose of preseizure notice and hearing requirements could be before a court than that in Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974). After an asserted delinquency in installment payments under a secured sales contract, seller's assignee attached a mobile home in which the buyer was residing. Contesting the attachment leading to his eviction, the buyer relied upon Sniadach and Fuentes to assert that seizure without prior notice and hearing pursuant to North Dakota attachment statutes violated fourteenth amendment due process. The court cited Mitchell extensively in rejecting the constitutional challenge:
That such an eviction does create a hardship on the debtors cannot be challenged, but to be free from resultant hardships is not one of the rights guaranteed by the Constitution or laws of the United States.
Id. at 1267. A constitutional argument based solely upon the severity of the summary deprivation of property in the eighth circuit would appear to be insufficient to invoke an application of the Fuentes preseizure hearing standard of review.
III. The North Georgia Finishing Shuffle

The North Georgia Finishing Court, noting that the defendant's corporate or individual status is nondeterminative on the issue of whether the debtor will suffer irreparable injury as a result of the seizure, held that the garnishment procedure lacked sufficient safeguards against risk of initial error in issuing summary process.\(^{97}\) Immediately after filing a complaint seeking judgment against North Georgia Finishing, Inc., on a defaulted account, Di-Chem, Inc., filed an affidavit stating that an action was pending and that it "had reason to apprehend the loss of said sum \([51,279.17]\), or some part thereof, unless process of garnishment issues..."\(^{98}\) Summons of garnishment thereupon issued and was served upon the bank in which the defendant had its bank account.

The majority opinion in North Georgia Finishing did not identify the specific grounds for its decision.\(^{99}\) By a recitation of Sniadach, Fuentes, and Mitchell, the Court indicated that the Fuentes or Mitchell analyses were confined neither to secured sales transactions nor to consumers who might be irreparably damaged by a summary deprivation of necessities.\(^{100}\) North Georgia Finishing reaffirms Fuentes' expansion of the Sniadach principle to encompass more than wage garnishments and reiterates Fuentes' insistence that the right to a hearing is not to be conditioned upon the severity of particular deprivations;\(^{101}\) however, the Court makes the word "prior" conspicuous by its omission when stating the Fuentes holding:

Because the official seizures had been carried out without [ ] notice and without opportunity for a hearing or other safeguard against mistaken repossession, they were held to be in violation of the Fourteenth Amendment.\(^{102}\)

97. 95 S. Ct. at 722-23.
100. 95 S. Ct. at 722-23.
101. Id.
102. Id. at 722 (emphasis added). Fuentes did not look beyond prior notice and hearing requirements for a safeguard against "mistaken repossession." "Other safeguards" are discussed solely in the Mitchell analysis. Fuentes had foreseen that matters such as the posting of bond and filing of sworn factual allegations, the length or severity of the deprivation, and the relative simplicity of the issues underlying the creditor's claim to possession were relevant, but only in determining the formal adequacy of the dispossessionary hearing. 407 U.S. at 83-84. The procedures sub judice in Fuentes both permit-
Holding the Georgia garnishment statute "vulnerable for the same reasons" as the attachment procedures in *Fuentes*, the *North Georgia Finishing* majority goes on to cite the lack of opportunity for an early hearing and the absence of participation by a judicial officer in issuing the writ—two key factors in the *Mitchell* analysis. By stopping short of an absolute proscription against seizures not preceded by notice and hearing, yet grafting judicial participation onto *Fuentes' requirement of an "appropriate" form of hearing, the majority clearly desires to reconcile or consolidate factors of both the *Mitchell* and *Fuentes* tests. Having fashioned this hybrid analysis by which to strike down the garnishment procedures at issue, the Court found lacking the procedural assurances which were the "saving characteristics" distinguishing the statutes in *Mitchell* from those in *Fuentes*: (1) the writ of garnishment was issued by a court clerk, (2) plaintiff's affidavit, stating the amount claimed to be due and the reason for apprehending "loss of said sum or part thereof" unless garnishment issues, was required to contain only conclusory allegations, (3) there was no provision for an early hearing, nor was the plaintiff required to demonstrate probable cause for the garnishment, and (4) in order to dissolve the garnishment the debtor was required to post bond to secure payment to plaintiff of any judgment rendered.

The *North Georgia Finishing* decision may presage a diminishing in significance of realities discussed under *Mitchell's* accommodation analysis. First, the Court makes no inquiry into, nor does it attempt to balance, the creditor's interest in prejudgment garnishment. Second, in entertaining respondent garnishor's contention that the holdings

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103. 95 S. Ct. at 722.
104. Id. The Court states:
Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.

105. Id. at 722-23.
106. See notes 74-96 supra and accompanying text.
in Fuentes and Mitchell must be limited because of the individual debtor's particular susceptibility to irreparable damage, the Court responded:

It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error.\(^\text{107}\)

This brief allusion to a subject which, under Sniadach, Fuentes, or Mitchell, would be within the proper scope of due process analysis,\(^\text{108}\) gives rise to an inference that a factual, ad hoc determination of realities may no longer be necessary in each case. The "saving characteristics" serving to minimize the risk of wrongful dispossession in Mitchell are objective criteria which have application independently of debtor-creditor realities.\(^\text{109}\) Statutory minimization of risk may thus foreclose a debtor from an examination of individual realities to show a paramount interest in the property deserving of constitutional protection.

The debtor seeking to invalidate a summary prejudgment remedy must establish a lack of substantial parallels between a challenged attachment procedure and the "narrow door"\(^\text{110}\) of the Louisiana constitutional paradigm.\(^\text{111}\) Thus, the debtor must be capable of demonstrating which of the following indices of constitutionality are necessary and which are merely sufficient due process assurances of a statutory attachment procedure:

1) A judge must participate in the issuance of the attachment writ;\(^\text{112}\)

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\(^\text{107}\) 95 S. Ct. at 723.
\(^\text{108}\) See notes 28-40, 74-96 supra and accompanying text.
\(^\text{109}\) Such an approach may be intimated from North Georgia Finishing's recital of the Mitchell statutory protections. 95 S. Ct. at 722-23.
\(^\text{110}\) The issue before us . . . is whether the New York provisions . . . squeeze through the narrow door of constitutionality left open in Mitchell, or remain out in the unconstitutional territory charted in Fuentes.


\(^\text{112}\) Justices Powell (95 S. Ct. at 723), Blackmun (id. at 726), and Stewart (416 U.S. at 629) have authored opinions which disagree as to the constitutional significance of a judicial issuance of ex parte writs. Justice Brennan may hold the same view, based upon his dissent in Mitchell. A requirement of judicial participation would be to insure preliminary discretion in issuing the writ; discretion could not be exercised unless a finding can be made on the applicant's showing. If the applicant need only make conclusory allegations in the form of an affidavit without evidentiary support, the judge would possess no greater discretion than a court clerk. Thus the factor of judicial participation is subsidiary to whether a sufficient showing is a mandatory prerequisite to the court ordered seizure. See Guzman v. Western State Bank, 381 F. Supp. 1262, 1266
2) Grounds for the attachment are clearly demonstrated before the writ may issue;\textsuperscript{113}
3) The attaching creditor must post bond;\textsuperscript{114}
4) A hearing at which the grounds for attachment are proven or at which all issues relevant to a continued enforcement of the attachment are resolved must be provided, if not prior to the seizure, at the earliest opportunity thereafter;\textsuperscript{115}

(D.N.D. 1974) ("[h]owever, the fact that the issuance of the warrant of attachment by a clerk or a judge after a showing of probable cause is a ministerial act is not a constitutional deficiency"); notes 68-69 supra.

113. Evidentiary (i.e., a showing similar to probable cause for the seizure) rather than conclusory allegations made by affidavit would gain majority support from the Court, as demonstrated by the holdings in Mitchell and North Georgia Finishing. For this purpose, the creditor or his representative must at a minimum have personal knowledge of the facts alleged in the affidavit. North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719, 722 (1975). The Mitchell court introduced this factor primarily for the purpose of distinguishing the Pennsylvania replevin procedure in Fuentes, which did not require a hearing upon the debt itself. 407 U.S. at 77. Insistence upon evidentiary proof of the basis upon which the writ is to be issued is critical if the party seeking the writ need not initiate a court action on the underlying debt for which the attached property is claimed as security. Under the Mitchell holding, since a hearing in connection with the prejudgment seizure must be had at some time, the importance of a nonconclusory affidavit supporting the writ would seem lessened. Chief Justice Burger and Justices Blackmun and Rehnquist would hold a conclusory affidavit constitutionally permissible so long as the procedure is incidental to suit and requires plaintiff to post double bond. North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719, 729 (1975). The quantum of proof required depends upon state court construction of the practice necessary under the particular attachment statute. Sugar v. Curtis Circulation Co., 383 F. Supp. 643, 648 (S.D.N.Y. 1974). A typical example of allegations made by filling in the blanks on a standardized application form appears in Guzman, where the attachment statute requires that the affidavit set forth the grounds for attachment in the same language provided by the statute. N.D. CENT. CODE § 32-08-05 (1960). Justices Stewart, Douglas, Marshall, and Brennan (perhaps), dissenting in Mitchell, would contend that such pro forma allegations are per se conclusory, never providing evidentiary support for a creditor's affidavit unless more information is required.


At the hearing, the creditor must sustain the burden of demonstrating probable cause for the attachment;\(^ {116} \)

Suit must be initiated on the debt underlying the attachment;\(^ {117} \)

The debtor must have an unconditional right to challenge the attachment upon motion to the court.\(^ {118} \)

**CONCLUSION**

The Supreme Court's recent decisions in the field of debtor-creditor relations and procedural due process may be criticized on a number of grounds. Nothing in *Mitchell* demonstrates that the "realities" of installment sales transactions are dissimilar from those under considera-
tion in *Fuentes*; thus, an exception to the preseizure hearing rule is required to permit judicially issued ex parte writs. The deprivation in *Mitchell* is undeniably a deprivation of the same property interest which is affected, if not by an identical procedure, by one insufficiently distinct from the *Fuentes* attachment procedures.\(^{119}\) A particularly damning critique of a system of jurisprudence based upon stare decisis is that precedent may be recast to support the constitutional “gut reactions” of individual members of the Court,\(^ {120}\) yet the *Mitchell* holding, drawn from the Court’s examination of prior court decisions, stands in direct contradiction to the one the *Fuentes* Court drew from the same examination.\(^ {121}\) Several justices themselves fault the Court for not adhering to precedent.\(^ {122}\) The opinions in *Mitchell* and *North Georgia Finishing* attest to an internal debate on the issue of whether the result in *Mitchell* differed from that in *Fuentes* solely because of changes in Court membership.\(^ {123}\)

This ostensible lack of consistency may equally be attributable to a Court caught in the throes of an accelerated evolution of procedural due process in debtor-creditor relations. The judiciary has been responsive, as have the legislatures of state and federal governments, to a heightened demand for consumer rights. Birth pangs of a consumer

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\(^{119}\) See 416 U.S. at 631-34; notes 64, 66 & 68-69 supra.

\(^{120}\) As Justice Stewart stated in *Mitchell*: “The only perceivable change that has occurred since the *Fuentes* case is in the makeup of this Court.” 416 U.S. at 635 (dissenting opinion) (footnote omitted).

\(^{121}\) Compare:

The pre-*Sniadach* cases are said by petitioner to hold that “the opportunity to be heard must precede any actual deprivation of the private property . . . . They merely stand for the proposition that a hearing must be had before one is finally deprived of his property . . . .” 416 U.S. at 611.

\(^{122}\) Id. at 609 (emphasis added).

\(^{123}\) The Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. 407 U.S. at 82 (emphasis added). If the *Mitchell* majority is using the word “finally” to qualify the scope of the principle announced in *Fuentes*, it introduces a limitation which is not to be found in the latter case. Id. at 84, 96-97. *Mitchell* would similarly remove Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950), from its exceptional status as precedent (see note 12 supra) and reinstate it as stare decisis in direct contradiction to the analysis of that case perpetuated through Boddie v. Connecticut, 401 U.S. 371 (1971), *Sniadach* and *Fuentes*, 416 U.S. at 612.

\(^{122}\) Justice Stewart (joined by Justices Douglas and Marshall) dissenting in *Mitchell*, Justice Blackmun (joined by Justice Rehnquist) dissenting in *North Georgia Finishing*.

\(^{123}\) 416 U.S. at 635 (Stewart, J., dissenting).
consciousness were evident in Sniadach and provided the impetus for the decision in Fuentes. This impetus subsided in Mitchell, to be partially revived in North Georgia Finishing. The Court's jurisprudential methodology may thus present a dialectic ultimately culminating with North Georgia Finishing.

North Georgia Finishing intimates that Mitchell occupies a key position in the evolving definition of due process in debtor-creditor relations and that neither Mitchell nor Fuentes are to be limited to installment sales contracts or consumer debtors. With the synthetic test in North Georgia Finishing, the Supreme Court has established a flexible definition of due process and a pattern for fourteenth amendment review: Fuentes renders summary ex parte deprivations of property constitutionally suspect, Mitchell provides the paradigm of constitutionality by which to measure the procedure.

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