An Eighteenth-Century Statute Meets Twenty-First Century Procedural Due Process: The Dubious Constitutionality of Tennessee Prejudgment Attachment

ELIZABETH R. MCCLELLAN*

* Staff Attorney, Tennessee Coalition to End Domestic and Sexual Violence. The author would like to thank Professor Robert Banks, Jr. for his considerable assistance with this work, Kobelah S. Bennah for his participation, and Lori R. Holyfield, for being here from day one.

I. INTRODUCTION

Imagine that, on one fine Tennessee afternoon, you are driving a company car when you get into a fender-bender with another motorist. You exchange insurance information with the other driver, snap a couple of pictures of the damage on your phone, and go on about your day. Six months later, however, after a brief absence from town for a two-week vacation, you check your mail to find a letter from the bank that holds your home mortgage, headed "Notice of Default." Knowing that you're current on your payments, you immediately call the bank to correct their error. Instead, an agent tersely informs you that the terms of your loan make any secondary liens on the property an event of default. The agent claims your entire balance is due immediately because of this secondary lien. "But I haven't taken out any other loans on the house!" you exclaim. The agent tells you a fifty-thousand-dollar lien has been recorded in your local county clerk's office. Assuring the agent that it must be a mistake, you start to call the county clerk when the doorbell rings. It's the sheriff, bearing a lawsuit. You have been sued by the other driver from the fender-bender accident, who is claiming $50,000 in damages. Attached to the lawsuit is a document you've never seen before—something called a "writ of attachment." As you read down the page, your stomach sinks. The writ describes your house, right next to the ominous phrase "Property to be attached." Horrified, you realize the bank agent was right. There is a second lien on your home, and your mortgage is in default.

In Tennessee, this type of unexpected situation can befall any property owner without notice, thanks to the antiquated prejudgment

attachment procedure provided by Tennessee Code Annotated §§ 29-6-101 to -165 ("Tenn. Code Ann. § 29-6-101 *et seq*."). While attachment statutes that predicate the attachment solely on the lack of a person's presence in the state generally should not survive an analysis under the procedural due process framework in both *Shaffer v. Heitner*[1] and *Connecticut v. Doehr*,[2] the Sixth Circuit in *McLaughlin v. Weathers* failed to make that analysis and, in a classic case of bad facts making bad law, upheld the Tennessee prejudgment attachment statute based on findings that contradict Tennessee's own jurisprudence.[3] Tenn. Code Ann. § 29-6-101 *et seq*. should be legislatively revised to close this enormous, easily abused loophole in our state's laws governing service and attachment and to bring our statutory code into compliance with the United States Constitution.

II. NO NOTICE, NO HEARING, NO JUDGE, NO PERSONAL KNOWLEDGE, NO PROBLEM: TENNESSEE PREJUDGMENT ATTACHMENT PROCEDURES IN ACTION

Prejudgment attachment is a statutory device allowing plaintiffs, in certain limited circumstances, to attach a defendant's property before final judgment in an action, often at the outset of the proceedings and sometimes by ex parte order without prior hearing.[4] In

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1. Shaffer v. Heitner, 433 U.S. 186 (1977).

2. Connecticut v. Doehr, 501 U.S. 1 (1991).

3. McLaughlin v. Weathers, 170 F.3d 577, 578 (6th Cir. 1999).

4. *See Prejudgment Attachment*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "prejudgment attachment" as "[a]n attachment ordered before a case is decided."). This definition cross-references to "provisional attachment," defined as:

> A prejudgment attachment in which the debtor's property is seized so that if the creditor ultimately prevails, the creditor will be assured of recovering on the judgment through the sale of the seized property. *Ordinarily, a hearing must be held before the attachment takes place, and most courts require the creditor to post a bond for any damages that result from the seizure* (esp. if the creditor ultimately loses in the lawsuit).

Id. (emphasis added).

As will be discussed more thoroughly in Parts III and IV of this opinion, the dictionary provides the map without fully representing the territory, either in Tennessee or in the United States Supreme Court doctrines governing procedural due process protections like pre-deprivation hearings and, in some cases, bond require-

the late twentieth century, the United States Supreme Court (the "Supreme Court") addressed various state statutory schemes allowing for prejudgment remedies such as attachment, finding that many of the procedures did not provide sufficient procedural due process protection to meet the guarantees of the Fourteenth Amendment to the United States Constitution.[5]

Attachment and similar prejudgment remedies allow one private party to deprive another of a property interest without notice or hearing based on the existence of an underlying, unresolved lawsuit.[6] The twentieth-century Supreme Court spent considerable time examining a variety of state procedures to determine if they provided sufficient procedural due process under the Fourteenth Amendment.[7] Prejudgment remedies depriving persons of property without prior notice or hearing received particular Supreme Court attention beginning in the late 1960s.[8] After a major change in the law of jurisdiction and the development of its analysis over several cases assessing state prejudgment remedies, the Supreme Court prescribed a balancing test weighing the interests of the private parties and the risk of wrongful deprivation to assess procedural due process in all prejudgment remedy cases.[9]

In Tennessee, the general prejudgment attachment scheme is Tenn. Code Ann. § 29-6-101 *et seq*., which derived from prestatehood statutory provisions and remains largely unchanged since

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ments. Further, the use of "debtor" and "creditor" in the dictionary definition is interesting, considering the existing state of the doctrine regarding when and whether prejudgment attachment is appropriate in tort actions. *See infra* text accompanying notes 61, 109, and 162 (discussing problems with prejudgment attachment in tort actions).

5. *See, e.g.*, *Doehr*, 501 U.S. at 1; N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); *see also infra* Section III.B.

6. *Doehr*, 501 U.S. at 9 (describing prejudgment attachment as "a state statute enabling an individual to enlist the aid of the State to deprive another of his or her property").

7. *See infra* text accompanying note 13 (discussing representative examples of late twentieth-century procedural due process cases).

8. *See supra* text accompanying note 5.

9. *Doehr*, 501 U.S. at 9–11 (prescribing the balancing test to be applied in all prejudgment attachment cases).

that time. This Article will show that Tenn. Code Ann. § 29-6-101 *et seq*. does not comport with procedural due process, contrary to the Sixth Circuit's holding in *McLaughlin*.[10] Part III explores the historical development of the Tennessee prejudgment attachment statute and its supporting case law. It then examines the modern Supreme Court decisions leading up to *Connecticut v. Doehr*, which established the formal balancing test for assessing the sufficiency of procedural due process in prejudgment attachment statutes.[11] Part IV examines the Sixth Circuit's decision in *McLaughlin*, concluding that this sole decision assessing Tenn. Code Ann. § 29-6-101 *et seq*. since *Doehr* misapplied the *Sniadach v. Family Finance Corp.*[12] line of cases, particularly inasmuch as it failed to apply the mandated *Doehr* balancing test to the facts. Part V examines the questionable features of the Tennessee statute through hypotheticals, illustrating the insufficiency of procedural due process protection in its permitted applications. Part VI proposes considerations for legislative and judicial officers in assessing the clear problems posed by the prejudgment attachment scheme, recommending statutory revisions and reexaminations of precedent that will align the statute with modern conceptions of procedural due process. Part VII briefly concludes the examination of the statute's due process protections.

III. EIGHTEENTH-CENTURY JURISPRUDENCE MEETS MODERN PROCEDURAL DUE PROCESS GUARANTEES: TENN. CODE ANN. § 29-6-101 ET SEQ. AND THE SNIADACH CASES

Procedural due process is a variable concept, largely dependent upon facts and circumstances.[13] The Supreme Court has noted

10. *See infra* Part III.A.

11. *Doehr*, 501 U.S. at 9–11.

12. *See* Sniadach v. Family Fin. Corp., 395 U.S. 337, 339–40 (1969) (explaining the question to be answered as what constitutes "the right to be heard").

13. *See* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (noting that unlike other legal rules, "'due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances'") (quoting Cafeteria and Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961)); *McElroy*, 367 U.S. at 895 (explaining that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"); *see also* Inland Empire Dist. Council v. Millis, 325 U.S. 697, 710 (1945) (finding due process requirements are "not technical, nor is any particular form of procedure necessary");

that social and systemic changes can render a once-satisfactory procedure insufficient to ensure due process under the Fourteenth Amendment to the United States Constitution.[14] Many forms of prejudgment attachment derive from pre-colonial common law or English customs.[15] The United States has seen immense changes in community size, makeup, mobility, and methods of law enforcement since its inception. Statutes like Tenn. Code Ann. § 29-6-101 *et seq*. reflect the needs of the smaller, less mobile, and more isolated communities common two hundred years ago, including concepts of due process tied irrevocably into the practical circumstances of those early communities and since abandoned by the Supreme Court.[16] To understand the effect of the modern procedural due process cases on a statutory scheme like Tenn. Code Ann. § 29-6-101 *et seq*., the history and purpose of the remedy in relation to the community it was adopted to serve and the procedural safeguards Tennessee courts initially imposed on the procedure are essential prerequisites.

NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 351 (1938) (noting that due process of law does not guarantee a "particular form of procedure; it protects substantial rights"). The variability of procedural due process analysis is not without its critics. *See, e.g.*, *Sniadach*, 395 U.S. at 350–51 (Black, J., dissenting) (stating "[t]his holding savors too much of the 'Natural Law,' 'Due Process,' 'Shock-the-conscience' test of what is constitutional for me to agree" and that "[t]hese so-called standards do not bind judges within any boundaries that can be precisely marked or defined by words for holding laws unconstitutional").

14. *See Sniadach*, 395 U.S. at 340 (noting the rules that generally satisfy due process "do[] not necessarily satisfy procedural due process in every case. *The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms*.") (emphasis added).

15. *See, e.g.*, *Doehr*, 501 U.S. at 16 (noting that prejudgment attachment was "unknown at common law . . . 'trac[ing] its origin to the Custom of London'") (quoting Ownbey v. Morgan, 256 U.S. 94, 104 (1921)); Mitchell v. W.T. Grant Co., 416 U.S 600, 605 (1974) (describing the challenged sequestration statute as "the modern counterpart of an ancient civil law device to resolve conflicting claims to property").

16. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (stating the "continued acceptance [of this ancient rule] would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant").

A. What Works in a Colonial Frontier Will Not Ensure Due Process in All Cases: Historical Development of Tenn. Code ANN. § 29-6-101 et seq.

Large portions of the prejudgment attachment statute found at Tenn. Code Ann. § 29-6-101 *et seq*. predate Tennessee's independent statehood.[17] In part because of jurisdictional concerns, the North Carolina legislature (which governed the territory that would later become Tennessee) provided for prejudgment attachment of both real and personal property[18] without notice or hearing in certain circumstances.[19] Bases for attachment under the earliest versions of the statute applicable in the territory that would become Tennessee included: a return of original process by the county sheriff as "not to be found in my county"; private (e.g., secretive) removal from the county of one's person or property; absconding or concealing oneself from service of process; or a foreign debtor, alive or dead, having property within the territory.[20] The statutes were brought forward unchanged when Tennessee became an independent state.[21]

The statute was of limited application and contained procedures to safeguard the interests of the attached party, as well as to prevent misuse of the statute to wrongfully circumvent other required procedural mandates.[22] The prejudgment attachment provisions in the Act of 1794 contemplate use primarily in debtor-creditor dis-

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17. *See* 1 EDWARD SCOTT, LAWS OF THE STATE OF TENNESSEE, INCLUDING THOSE OF NORTH CAROLINA NOW IN FORCE IN THIS STATE FROM THE YEAR 1715 TO THE YEAR 1820, INCLUSIVE 462–67 (1821) [hereinafter "Act of 1794"] (containing Acts of 1794, §§ 17–25, providing the first prejudgment attachment laws for Tennessee, which was, at the time, part of North Carolina).

18. *See* Act of 1794, *supra* note 17, § 23 (permitting attachment procedures used against goods and chattels to be applied against lands or tenements, with restriction that personalty should be attached before realty). This preference for personalty remains part of the Tennessee attachment statute. *See* TENN. CODE ANN. § 29-6-133 (2012).

19. *See* Act of 1794, *supra* note 17, §§ 17, 19, 21.

20. *Id.*

21. *Id.*

22. *See id.* § 23 (requiring that all judicial process against out-of-state parties be based either on original attachment complying with statutory requirements or personal service on the party while within the state).

putes.[23] Attachment in tort actions did not enter the statute until 1865.[24] Procedural safeguards included a stay of proceedings and attempted notice to an attached debtor, where reasonable.[25]

It is important to remember that jurisdiction itself was a different creature in 1794. The modern "long-arm" statute was unknown. During this period and thereafter, the jurisdiction of a state was limited to people and property within its borders.[26] Personal service in hand on a defendant was required to obtain service of process of a lawsuit in most cases.[27] Persons owing debts or responsible for claims could avoid their financial responsibilities by the simple expedient of either removing themselves or their property from the territorial boundaries of the jurisdiction in which such obligations were incurred, hiding within the (often largely unsettled) state, or remaining physically outside the state to avoid service of process. However, since the state had jurisdiction over property within its borders, even that owned by nonresidents, it could subject the property of a nonresident to the payment of debts owed to state citizens and obtain jurisdiction in rem as a substitute for personal service on the debtor within

23. *See id.* § 19 (upon a showing of exigent circumstances, including the amount of "debt or demand" and other required showings, the judge or justice is "empowered and required to grant an attachment against the estate of such debtor").

24. *See infra* note 64.

25. *See, e.g.*, Act of 1794, *supra* note 17, § 25 (noting that in attachments based on the extraterritorial residence of the property owner, the court is required to stay proceedings for six months to a year and attempt notice to the debtor so attached where reasonable). This post-taking stay appears in slightly altered form in the current statute. *Compare id., with* TENN. CODE ANN. § 29-6-160 (2012) (providing for the same stay as the 1794 Act and for liberal grant of stay where the basis of attachment is nonresidence but without a notice provision). Some form of notice of the attachment is still required under the Tennessee statute. *See* TENN. CODE ANN. § 29-6-146 (2012) (requiring the clerk to mail a copy of the published notice of attachment to nonresident defendants).

26. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[N]o State can exercise direct jurisdiction and authority over persons or property without its territory."). *But see* Shaffer v. Heitner, 433 U.S. 186, 204 (1977) ("Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction.").

27. *See, e.g.*, Harris v. Balk, 198 U.S. 215, 221–23 (1905) (describing the process of issuing and serving garnishment to obtain jurisdiction in the early twentieth century).

the state necessary to obtain in personam jurisdiction.[28] This view of jurisdiction fell into disfavor in the twentieth century, bringing the use of jurisdictional attachment without notice or hearing into serious doubt.[29]

Years before these changes, however, at the turn of the nineteenth century, both the scope of jurisdiction and the world itself were vastly different than our modern one. Communities in the territory that would become Tennessee were small, still mostly frontier towns. In 1794, Knoxville, although soon to become Tennessee's first capital, was a mere "village outpost" of "ten stores and seven taverns . . . [and] one Court House;" six years later, it would still have only 387 inhabitants.[30] The first constable in the newly formed City of Memphis patrolled less than half a square mile.[31] Like most constables and sheriffs in the early 1800s, Constable John J. Balch of Memphis was a part-time lawman who worked a trade but earned additional funds by collecting fines and license fees as constable.[32] Balch became Constable of Memphis in 1827.[33] By 1840, the City's population had grown to 1,799 people, up from 50 in 1819.[34] Memphis's population is now estimated at over 652,000; the City covers approximately 315 square miles.[35]

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28. *See Pennoyer*, 95 U.S. at 723–26 (describing in detail the state's ability to subject the property of a nonresident to the payment of debts owed and to obtain jurisdiction in rem).

29. *See, e.g.*, *Shaffer*, 433 U.S. at 207 (dismissing the idea that a lower standard of procedural due process in providing notice and hearing is warranted based on an exercise of in rem jurisdiction); *see also infra* Section III.B.4 (discussing *Shaffer* and in rem-in personam jurisdictional questions).

30. EDDIE M. ASHMORE, TENNESSEE LAWMAN: HISTORY OF THE MEN AND WOMEN BEHIND THE BADGE 355 (2006) [hereinafter TENNESSEE LAWMAN].

31. *Id.* at 275.

32. *Id.*

33. *Id.*

34. *Id.* at 276; *A Brief History of Shelby County*, SHELBY COUNTY TENN., https://www.shelbycountytn.gov/1264/A-Brief-History-of-Shelby-County (last visited Dec. 19, 2018).

35. *QuickFacts Memphis City, Tennessee*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/memphiscitytennessee (last visited Dec. 19, 2018).

During these periods, the county sheriff played the central role in both civil and criminal law enforcement.[36] The sheriff's many duties, from collecting taxes to administering criminal penalties and serving civil process, gave him extensive knowledge of his community and its inhabitants. In addition to being the chief law enforcement official in a county, the sheriff in the early 1800s acted as the county tax collector.[37] Early sheriffs were further responsible for publicly carrying out the criminal penalties imposed by the courts, including whipping, pillorying, branding, cutting off ears, and hanging.[38] The sheriff's position as the central law enforcement agent gave him inroads into the lives of his community and opportunities to familiarize himself with the county's inhabitants. The sheriff also had assistance in his information-gathering efforts from other officials such as the County Ranger, whose duties in rounding up stray livestock and capturing escaped slaves made him a valuable source of knowledge about activities and individuals in rural areas of the county.[39]

Sheriffs were expected to provide a sizeable bond to guarantee they would perform to the high standards expected of them as constitutional officers.[40] Courts imposed strict presumptions as to the level of diligent effort required before a sheriff could return civil process declaring a defendant "not to be found."[41] An officer serving process was expected to visit the party's home, place of business if any, and

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36. *See* TENNESSEE LAWMAN, *supra* note 30, at 463. In addition to "suppress[ing] all affrays, riots, routs, unlawful assemblies, insurrections and breaches of the peace," the sheriff's duties included but were not limited to court attendance and service of civil process and criminal warrants. *Id.*

37. EDDIE M. ASHMORE, A CHRONICLE OF LAW ENFORCEMENT IN THE SOUTH: THE HISTORY OF THE JACKSON, TENNESSEE, POLICE DEPARTMENT 4 (2002).

38. TENNESSEE LAWMAN, *supra* note 30, at 167.

39. *See id.* at 464 (discussing the role of the County Ranger).

40. *See id.* at 476 (recounting that the first sheriff of Shelby County paid a $5,000 bond "to insure faithful performance of his duties" before taking office in 1820).

41. *See* Robson, Black & Co. v. Hunter, 16 S.W. 466, 467 (Tenn. 1891) (stating a sheriff serving process required is "to use, in the execution of the process, a degree of diligence exceeding that which a prudent man employs in his own affairs") (citation omitted); *see also* Welch v. Robinson, 29 Tenn. (10 Hum.) 264, 266 (1849) (noting that a "not to be found" return "clearly imports that, after diligent inquiry and search, by the sheriff, at the usual residence of the defendant and elsewhere, he is not to be found").

other locations if not found there, as well as inquire of other county residences as to the party's whereabouts and, if absent, the reasons for and probable duration of the absence.[42] Such an expectation was reasonable, not just because of the importance of the sheriff's duties, but because his compensation, along with the expenses of running the sheriff's office, came almost entirely from fees and fines, including fees for service of process.[43] This practice continued well into the latter half of the twentieth century before the legislature outlawed it. Thereafter, fines and fees were paid into the county general fund, and funding for the sheriff's office became a county budget item.[44] Under the insular, sparsely populated conditions prevalent during this period, this system of service, predicated on extensive, detailed local knowledge, posed far less risk of error than it would in even a small town in modern Tennessee.

Today, Tennessee communities bear little or no resemblance to their eighteenth-century counterparts. Tennessee's current population is almost twice that of the entire United States population in 1794.[45] In 1790, the United States Census recorded a national population of 3.9 million, increasing to 5.3 million by the 1800 census.[46] The estimated 2010 population of the State of Tennessee was just over 6.3 million.[47] While the sheriff's duties, including the service of criminal and civil process, remain largely unchanged, even the smallest Tennessee counties are significantly more populous than they were immediately following statehood. Trousdale County, the smallest geographical county in Tennessee, had an estimated population of 7,800 people as of 2010.[48] Trousdale County Sheriff Ray Russell

42. *See Robson, Black & Co.*, 16 S.W. at 467.

43. *See* TENNESSEE LAWMAN, *supra* note 30, at 465 (describing "base revenue" of the sheriff's office as derived from fees for service of process, arrests, and housing prisoners).

44. *Id.*

45. *See infra* notes 46–47.

46. *Population, Housing Units, Area Measurements, and Density: 1790 to 1990*, U.S. CENSUS BUREAU (1993), http://www.census.gov/population/www/censusdata/files/table-2.pdf.

47. *QuickFacts Tennessee*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/tn/PST045218 (last visited Dec. 19, 2018).

48. *QuickFacts Trousdale County, Tennessee*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/trousdalecountytennessee/PST045217 (last visited Dec. 19, 2018).

("Russell") states that his office serves around 150–200 warrants a month, with one officer generally assigned to serve civil process full time, along with attending court and transporting prisoners.[49] Recent economic instability has resulted in more civil process than usual.[50] The county's increased population also poses difficulties. "We have so many new people [in the county] that serving civil process is harder than it used to be," Russell states.[51]

Sheriff's departments are no longer funded directly by fees collected for process service nor are they privy to the information used for tax collection as they once were. Sheriffs cannot, as a practical matter, perform the exhaustive searches for civil defendants once expected of them; larger population size and mobility also mean they no longer possess the intimate community knowledge imputed to sheriffs of an earlier era. Lieutenant John Brake ("Lt. Brake") of the Sumner County, Tennessee Warrants Division notes that "without increasing the manpower and the cost of doing business, you wouldn't have the same degree of due diligence on civil papers just because of the difference in the number of papers generated now as opposed to 1870."[52] According to Lt. Brake, the department goes only to the address provided on the service but will try to get information from persons other than the party to be served who are found at the address or neighbors.[53] At one time, the sheriff's department could rely on the post office for information, but, as with hospitals, newer federal regulations prevent these entities from giving information informally to the sheriff's office.[54] The local utility companies remain a good source of information for the department.[55] Lt. Brake's department does not keep formal records of the number of attempts to serve process, but generally officers make seven to eight attempts over the course of several weeks before a return of "not to

49. Telephone Interview with Ray Russell, Sheriff, Trousdale Cty. Tenn. (Dec. 10, 2010).

50. *Id.*

51. *Id.*

52. Telephone Interview with John Brake, Lieutenant, Sumner Cty., Tenn. Warrants Division (Oct. 28, 2010).

53. *Id.*

54. *Id.*

55. *Id.*

be found."[56] Neighboring Davidson County generally requires that its officers return civil process within seventeen days, meaning only about three attempts are made before a return of "not to be found."[57] Other than sending officers to attempt service during all three shifts, including overnight, Sumner County's officers are unable to make additional searches for civil defendants.[58] Because the case law has not kept up with the realities of modern process service, it would not be incorrect to say that the average return of "not to be found" in Tennessee is probably deficient under the strict nineteenth-century standards that have never been reexamined in the present day.

The few revisions to the statutory scheme in its 200-year history have neither limited the statute's reach nor provided additional safeguards. The first change to Tennessee's general attachment procedure, fifty years after its adoption, merely added to the permissible bases of a prejudgment attachment.[59] This 1838 revision added a provision allowing a creditor to attach the property of a nonresident debtor held by a state resident or debts owed by such a resident to the nonresident debtor.[60] In 1843, the Tennessee state legislature amended its attachment laws for greater uniformity but did not add or remove any basis for attachment.[61] An 1852 legislative act allowed creditors to obtain prejudgment attachment based on a fraudulent conveyance of property to hinder, delay, or defraud creditors.[62] The 1858 Code drew from all these previous enactments, listing the then seven bases for original attachment in forms almost identical to those appearing in the modern statute.[63] Prejudgment attachment in tort claims entered the Code in 1865.[64] The final basis for original attachment in the current statute, dealing with attachment and corporate

56. *Id.*

57. *Id.*

58. *Id.*

59. 1838 Tenn. Pub. Acts 234–35.

60. *Id.*

61. *See* 1843 Tenn. Pub. Acts 30–31.

62. *See* 1852 Tenn. Pub. Acts 674–75.

63. *Compare* TENN. CODE ANN. § 3455 (1858), *with* TENN. CODE ANN. § 29-6-160 (2012).

64. *See* TENN. CODE ANN. § 9397 (1932).

entities, was added to the Code in 1967 as part of a larger revision of the state's general corporation statutes.[65]

To avoid abuse of the statute, early Tennessee decisions strictly construed all statutory requirements to obtain prejudgment attachment, often by attacking minor details in the form of pleading. In the 1849 case of *Welch v. Robinson*, the Tennessee Supreme Court discussed the necessity for "great strictness" in prejudgment attachment proceedings because "[t]hese proceedings are in derogation of the common law; they are *ex parte* in their character, and liable to great abuse, and, therefore, the courts have not felt warranted, by any latitude of construction, or implication, to go beyond the plain words of the statute."[66] In *Welch*, the Tennessee Supreme Court refused to uphold an attachment based on a return stating "defendant not found in my county," finding that a return using the exact statutory "not to be found" language, with its attendant presumptions, was required to sustain the attachment.[67] The early Tennessee decisions reflect more concern about the potential for abuse from this statutory scheme than did the twentieth-century federal court opinion assessing its constitutionality.[68]

Extraordinary process under the prejudgment attachment statute could be issued by the court clerk, a judicial officer, or the court itself, under both the 1858 and modern statutes.[69] Clerks of court could only grant attachment on original, not amended process.[70] The

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65. *See* TENN. CODE ANN. § 29-6-160(8) (2012).

66. Welch v. Robinson, 29 Tenn. (10 Hum.) 264, 265 (1849).

67. *Id.* at 266; *see also* Cheatham v. Trotter, 7 Tenn. (Peck) 198, 200 (1823) (finding attachment laws "requisite; of necessity . . . frequently resorted to; the practice upon them should be uniform, and in order to be so should be settled upon established principles").

68. *Compare Welch*, 29 Tenn. (10 Hum.) at 265 (discussing the great risk of abuse from the Tennessee attachment statute and the need for technical pleading to counteract it), *with* McLaughlin v. Weathers, 170 F.3d 577, 581 (6th Cir. 1999) (dismissing summarily any risk of wrongful deprivation as adequately prevented by the Tennessee attachment statute's protections).

69. *See* TENN. CODE ANN. § 3463 (1858) (authorizing attachment by judges, chancellors, justices of the peace, and the clerk of court to which an attachment is returnable).

70. *See* Dillin v. O'Donnell, 63 Tenn. 213, 215–16 (1874) (holding that where attachment was requested by an amended bill and not as original process and the original bill did not allege a basis for attachment under the replevin statute, at-

clerk could not have issued the attachment in the *McLaughlin* case discussed in Part IV because the application was made in the *amended* complaint, after service was complete.[71] On post-attachment review, the courts would examine closely whether exigent circumstances warranting attachment were legitimately present.[72] In the case of attachment based on a sheriff's return, the courts examined the return's validity.[73] The majority of Tennessee decisions construing and interpreting this prejudgment attachment procedure were decided prior to the twentieth century.[74]

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tachment sought in the amended bill could not be granted by the clerk of court, and attachment based on such process was void). According to *Dillin*, clerks of court are only authorized to issue attachments *as original process*. *Id.* at 216.

71. *McLaughlin*, 170 F.3d at 578.

72. *See*, *e.g.*, Stratton v. Brigham, 34 Tenn. (2 Sneed) 420 (1854) (voiding attachment based on a finding that defendant, who moved to Tennessee to work on a long-term construction project, brought his family and personal effects with him, and left no property of any kind in his former state of residence, was a resident of Tennessee at the time suit was commenced by attachment alleging his nonresidence as grounds).

73. *See* Robson, Black & Co. v. Hunter, 90 Tenn. 242, 248–51 (1891) (stating that a return of "not to be found" after two to three hours of inquiry by the sheriff and information that defendant would return from Kentucky in a day or two was false; "not to be found" return should not be made where the sheriff knows the absence is temporary and such return cannot sustain attachment); Carlisle v. Corran, 2 S.W. 26, 27–28 (Tenn. 1886) (holding that where a statute limits attachment based on return of "not to be found" to residents of the county, return of "not to be found" as to nonresident defendants was a false return by the sheriff and could not sustain attachment based thereon); *Welch*, 29 Tenn. at 265–67 (omitting "to be" from the language of a return voided attachment based on the return because presumptions of diligence attaching to "not to be found" could not be imputed to return of service using abbreviated language).

74. *See* McEwan v. Lookout Mountain Hotel, Inc., 338 S.W.2d 601 (Tenn. 1960); Willshire v. Frees, 201 S.W.2d 675 (Tenn. 1947); Brown v. Brown, 261 S.W. 959 (Tenn. 1924); Brewer v. De Camp Glass Casket Co., 201 S.W. 145 (Tenn. 1918); Keelin v. Graves, 165 S.W. 232 (Tenn. 1914); Green v. Snyder, 84 S.W. 808 (Tenn. 1905); *Robson, Black & Co.*, 90 Tenn. at 242; *Carlisle*, 2 S.W. at 27; Herndon v. Pickard, 73 Tenn. 702, 702–03 (1880); Rogers & Perry v. Newman, 73 Tenn. 255 (1880); Greenlaw v. Logan, 70 Tenn. 185 (1879); *Dillin*, 63 Tenn. at 213; Sherry v. Divine, 58 Tenn. (11 Heisk.) 722 (1872); Klepper v. Powell, 53 Tenn. (6 Heisk.) 503 (1871); August v. Seeskind, 46 Tenn. (6 Cold.) 166 (1868); Friedlander, Stick & Co. v. Pollock & Co., 45 Tenn. (5 Cold.) 490 (1868); *Stratton*, 34 Tenn. (2 Sneed) at 420; *Welch*, 29 Tenn. at 264; Cheatham v. Trotter, 7 Tenn. (1 Peck) 198

In the twentieth century, Tennessee courts examined neither the modern revisions to the statute nor the relevant developments in constitutional law since the adoption of the Fourteenth Amendment. All the twentieth-century Tennessee state court decisions addressing Tenn. Code Ann. § 29-6-101 *et seq*. or its predecessors address issues of substantive law, not challenges to the validity of the procedure. Tennessee courts did not issue any opinions construing the prejudgment attachment statute in the late twentieth century. In particular, Tenn. Code Ann. § 29-6-101(8), the 1968 revision to the statute, has not been the subject of any construction attempts. It appears that plaintiffs making use of the attachment procedure against nonresident corporations may be relying on the general nonresidence ground in Tenn. Code Ann. § 29-6-101(1), rather than the less clear provisions of subsection (8).[75] The only authority by which to evaluate the Tennessee statute, then, is the lengthy line of Supreme Court authority that addressed prejudgment takings and culminated in the balancing test of *Doehr* in 1991.[76]

B. The Interests, the Risk, the Relative Value: Procedural Due Process Developments in Prejudgment Attachment

Procedural due process analysis under the Fourteenth Amendment underwent major shifts in multiple related areas during the twentieth century. Early Supreme Court decisions regarding prejudgment seizures dismissed due process concerns arising from individual hardships posed by summary deprivations of property. Both attachments solely for the purpose of obtaining jurisdiction and requirements of "special bail" before a party could appear to protest the taking of his property were considered commensurate with the Fourteenth Amendment's due process guarantee because of historical

(1823); People's Bank of Springfield v. Williams, 36 S.W. 983 (Tenn. Ct. Ch. App. 1896).

75. *See* Union Exp. Co. v. N.I.B. Intermarket, 786 S.W.2d 628, 632 (Tenn. 1990) (grounding attachment against a nonresident corporate defendant on section 29-6-101(1) of the Tennessee Code). *But see* Four Guys v. Thrasher Leasing Co., 1985 Tenn. App. LEXIS 3387, at *40–41 (Tenn. Ct. App. Feb. 6, 1985) (pleading both nonresidence under § 101(1) and foreign corporate defendant under § 101(8) as grounds for attachment).

76. Connecticut v. Doehr, 501 U.S. 1, 9–11 (1991).

support for the practices. The statute in *Ownbey v. Morgan* was a foreign attachment statute, allowing the courts to take jurisdiction over a nonresident defendant by way of attaching his property within its territorial jurisdiction.[77] In *Ownbey*, the Supreme Court upheld a Delaware statute requiring special bail to be posted by a defendant before he could appear or dispute the attachment of his property as not antithetical to due process.[78]

Because the procedure—requiring defendants to post special bail even to appear in the action—derived from the Custom of London, was in place at the time the United States Constitution was adopted, and because of the then-predominant approach to jurisdictional issues, the Supreme Court in *Ownbey* found that the procedure was consistent with the Fourteenth Amendment and due process, irrespective of the individual hardships the procedure imposed.[79] While the need to obtain jurisdiction was an extraordinary or exigent circumstance at one time, a separate line of authority now draws the modern validity of that basis for attachment into doubt.[80] By the early twentieth century, the Supreme Court had also established that certain vitally important government interests warranted summary seizure of property without prior judicial determination.[81] However, in the ensuing decades, the harshness of these decisions was mitigated by the Supreme Court's focus on ensuring fairness and preventing erroneous deprivations of property.

Beginning in 1969 through the late 1990s, the Supreme Court ruled on several cases assessing state prejudgment attachment procedures in the context of procedural due process under the United States Constitution, as well as radically reevaluating the concept of in rem jurisdiction altogether. Having addressed disparate prejudgment remedies over the course of the previous two decades, the Supreme Court in *Doehr* prescribed a balancing test to assess due process challenges to prejudgment remedy procedures.[82] The *Sniadach* line of cases culminating in *Doehr*, representing the modern approach to

77. Ownbey v. Morgan, 256 U.S. 94, 107–08 (1921).

78. *Id.* at 112.

79. *Id.* at 105–11; *see infra* Section III.B.2 (discussing later treatment of *Ownbey*).

80. *See supra* text accompanying note 26.

81. *See* Shaffer v. Heitner, 433 U.S. 186, 216–17 (1977).

82. Connecticut v. Doehr, 501 U.S. 1, 9–11 (1991).

procedural due process, stand in stark contrast to the Tennessee procedures found in Tenn. Code Ann. § 29-6-101 *et seq*.

1. *Sniadach* and *Fuentes*: Significant Interests, Significant Risks

As part of a larger late twentieth-century trend of examining procedural due process in state deprivations of property interests[83] and other protected areas,[84] the Supreme Court in *Sniadach v. Family Finance Corp.* considered whether prejudgment garnishment of wages, without notice or hearing to the wage-earner, was consistent with procedural due process in light of the Fourteenth Amendment.[85] Sniadach had half of her total wages, which were only sixty-three dollars and eighteen cents, garnished without notice or hearing based on the affidavit of counsel for an alleged creditor.[86] The challenged Wisconsin statute allowed the clerk of court to issue the garnishment upon affidavit of the alleged creditor's attorney.[87] The attorney could serve the garnishee immediately but forestall service on the defendant whose wages were being garnished for up to ten days.[88] The statute allowed for the alleged debtor's wages to be frozen, with a maximum subsistence allowance not to exceed one-half the wages.[89] The challenger, Sniadach, had one-half of her wages garnished by Family Fi-

83. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (stating that while a hearing is not required before termination of disability benefits, a hearing is required before termination becomes final); Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970) (notice and hearing required prior to termination of welfare benefits).

84. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 542–43 (1971) (holding that summary seizure of a driver's license denies due process); Boddie v. Connecticut, 401 U.S. 371, 382–83 (1971) (holding that denial of divorces to indigent persons unable to pay filing and service costs constitutes denial of procedural due process).

85. Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969) ("In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment."). Having identified this as the sole subject of its inquiry, the Supreme Court, without preamble, began its analysis of the "right to be heard" and the necessity of notice and a hearing to address the question. *See infra* text accompanying note 92 (discussing the connection between procedural due process principles and notice and hearing).

86. *Sniadach*, 395 U.S. at 338–39.

87. *Id.*

88. *Id.* at 338.

89. *Id.* at 338 n.1.

nance Corporation pursuant to a promissory note.[90] Although the statute permitted the attorney to forestall service, Sniadach was served with the lawsuit and notice of garnishment on the same day as her employer.[91]

After taking care to address the in rem-in personam distinction that remained part of the constitutional analysis until *Shaffer*, the Supreme Court determined that the challenged procedure failed to provide sufficient due process protection to a wage-earner such as Sniadach. In light of its prior decisions applying due process protections inconsistently depending on whether an action's original jurisdiction was in rem or in personam, and holding that attachments to obtain in rem jurisdiction are consistent with procedural due process, the Supreme Court in *Sniadach* specified that the seizure in question was in rem and that in personam jurisdiction could have been obtained.[92]

The Supreme Court took note of the significant interest of wage-earners in their wages, as well as the risk of abuse of the garnishment process by unscrupulous creditors.[93] Not only did the Wisconsin statute not allow the garnishee to keep enough wages to sup-

90. *Id.* at 338.

91. *Id.*

92. *Id.* at 338–39. The Supreme Court would not address the unsuitability of the in rem-in personam distinction to justify variable procedural due process standards until *Shaffer v. Heitner*, 433 U.S. 186 (1977). While the Supreme Court's dismissal in *Shaffer* of the in rem classification as a justification for imposing a lower standard of due process under the Fourteenth Amendment addressed the exercise of jurisdiction, not the requirement of notice and a hearing, its pointed dismissal of the use of the classification to excuse a lower due process standard suggests that the distinction may be disfavored in such analysis outside the jurisdictional context. *See Shaffer*, 433 U.S. at 208. The Supreme Court did not address the in rem-in personam distinction again in the *Sniadach* line of cases, and such classifications do not enter the calculus of the *Doehr* balancing test for assessing procedural due process in prejudgment remedy cases. *See infra* note 222 and accompanying text (discussing *Doehr*'s unequivocal statement that state prejudgment attachment procedures must comport with procedural due process).

93. *Sniadach*, 395 U.S. at 340 ("We deal here with wages—a specialized type of property presenting distinct problems in our economic system."). The "inhuman doctrine" of summary wage garnishment "compels the wage earner, trying to keep his family together, to be driven below the poverty level." *Id.* (internal quotations omitted). The challenged statute provided a subsistence allowance generally insufficient to support an individual for one week. *Id*. at 341.

port a family,[94] but at the time of the decision, the employee could also be fired by an employer who did not wish to deal with imposing the garnishment.[95] The Supreme Court found that allowing garnishments of this nature with so little protection posed a "tremendous hardship," as shown by Congressional findings and statements about "grave injustices" arising from prejudgment attachment where a hearing came only after the taking.[96] According to the Supreme Court, permitting such takings "may as a practical matter drive a wage[-]learning family to the wall."[97] In light of the context and circumstances,[98] including the nature of the property and hardships arising from its summary seizure, fundamental principles of procedural due process entitled the wage-earner to notice and a hearing before garnishment.[99]

The Supreme Court's focus on the particular property interest seized, and risks of abuse particular thereto, led some lower courts to interpret *Sniadach* as only applicable to wages.[100] While these courts

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94. *Id.* at 340.

95. *Id.* This practice is now forbidden by a separate act of Congress. *See* 15 U.S.C. § 1674 (2012).

96. *Sniadach*, 395 U.S. at 340.

97. *Id.* at 341–42.

98. *See supra* notes 13–14 and accompanying text (discussing the context-sensitive nature of procedural due process).

99. *See Sniadach*, 395 U.S. at 341–42; *see also supra* note 85 and accompanying text (discussing the fundamental nature of the "right to be heard" in procedural due process). The Supreme Court in *Sniadach* equated these "fundamental principles" with the right to be heard, which "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Sniadach*, 395 U.S. at 339–40 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Interestingly, given the *Sniadach* opinion's repeated references to in rem and in personam considerations, *Mullane* concluded that procedural due process applied to either and was not dependent on in rem-in personam distinction, and an action's in rem character did not justify a lower procedural due process standard. *See Mullane*, 339 U.S. at 312. *But see generally* Shaffer v. Heitner, 433 U.S. 186, 207–12 (1977) (distinguishing in rem and in personam due process issues).

100. For example, the Supreme Court would later overrule the Georgia Supreme Court's holding that its garnishment statute was constitutional and interpret *Sniadach* as an individual wage-earners' exception to otherwise acceptable garnishment procedures. *See infra* Section III.B.3 (discussing the Supreme Court's interpretation of *Sniadach* in *Di-Chem*).

treated *Sniadach* as a narrow holding of limited applicability, other lower federal courts found various state prejudgment remedies unconstitutional under *Sniadach* and its progeny.[101]

Three years later, the Supreme Court in *Fuentes v. Shevin* made clear that the need to guarantee procedural due process protection in state prejudgment remedy procedures was not limited to wages.[102] In that case, Florida and Pennsylvania class action plaintiffs challenged the summary seizure of their household goods under their respective state replevin procedures.[103] The facts surrounding the *Fuentes* class action plaintiffs illustrate the dangers of a broad prejudgment attachment statute, particularly one that lacks strict state oversight and does not limit its applicability to extraordinary circumstances. The *Fuentes* plaintiffs were the named parties in class-action suits challenging Florida and Pennsylvania state replevin procedures as lacking sufficient procedural due process and seeking damages

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101. *See* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130 (3d Cir. 1976) (holding a Pennsylvania attachment procedure unconstitutional), *discussed in* Connecticut v. Doehr, 501 U.S. 1, 17 n.6 (1991); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013, 1014–15 (D. R.I. 1972) (holding Rhode Island's attachment procedure, allowing for bulk, pre-signed writs delivered by attorneys directly to constable for service and immediate seizure of the attached property, unconstitutional in light of *Fuentes*, *Goldberg*, and *Sniadach*), *aff'd sub nom.*, Georges v. McClellan, 409 U.S. 1120 (1973). *But see* Spielman-Fond, Inc. v. Hanson's, Inc., 379 F. Supp. 997, 999–1000 (D. Ariz. 1973) (holding Arizona materialmen's lien statutes constitutional because the only interest impaired thereby is economic and the only deprivation is cloud to title, not physical taking), *aff'd*, 417 U.S. 901 (1974). The Supreme Court would later clarify that it affirmed *Spielman-Fond* in part because the lien at issue in the case heightened the plaintiff's interest in obtaining the attachment. *Doehr*, 501 U.S. at 12 n.4.

102. *See* Fuentes v. Shevin, 407 U.S. 67, 72 n.5 (1972) (citing to cases in which lower courts "construed *Sniadach* as closely confined to its own facts and . . . upheld [similar] summary prejudgment remedies"). *Fuentes* went on to cite *Sniadach* for the "well-settled" principle that "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Id.* at 84–85 (citing *Sniadach*, 395 U.S. at 341–42). *Fuentes* rejected the "narrow" reading which would apply *Sniadach* and related authority to provide due process protection only to "absolute necessities of life." *Id.* at 88; *see also infra* note 154 and accompanying text (noting inappropriateness of trial court inquiry into what property is "necessary" in conducting procedural due process analysis).

103. *Fuentes*, 407 U.S. at 69–72.

pursuant to 42 U.S.C. § 1983 ("§ 1983").[104] Florida's statute required only that the party seeking attachment allege wrongful taking of chattels to which the applicant was lawfully entitled and file a double bond, without any further showing of cause or judicial involvement.[105] Parties could recover their attached property by posting a double bond or by successfully defending the underlying action for repossession.[106] One appellant's ex-husband, a sheriff's officer familiar with the broad statute, used the Florida procedure to harass her during their custody battle by obtaining a writ of replevin for their child's "clothes, furniture, and toys."[107]

The Pennsylvania statute was substantially similar, including no judicial involvement requirement and a double bond, but the statute did not require a formal allegation that the attaching party was entitled to the property.[108] Further, Pennsylvania's statute did not assure that the defendant would ever have an opportunity to protest a wrongful taking.[109] The Supreme Court noted that a Pennsylvania party seeking replevin was not required to prosecute an action for repossession of the property after obtaining the attachment, in contrast with the Florida statute; instead, a party seeking to dispute the attachment was required to initiate a lawsuit or post a counterbond.[110]

The Supreme Court in *Fuentes* stressed that Fourteenth Amendment protection attaches to even temporary or partial deprivations of *significant* property interests.[111] The Supreme Court acknowledged that "[t]he relative weight of liberty or property interests is relevant . . . to the form of notice and hearing required by due

104. *Id.* at 73–74; *see also infra* note 292 and accompanying text (discussing *McLaughlin*'s erroneous conclusion that § 1983 does not allow a procedural due process challenge to the prejudgment remedy statute unless state remedies are exhausted).

105. *Fuentes*, 407 U.S. at 73–74.

106. *Id.* at 75.

107. *Id.* at 72.

108. *Id.* at 75–78.

109. *Id.* at 77–78.

110. *Id.*

111. *Id.* at 84–86 (citing Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) as establishing that "temporary, nonfinal" takings are "deprivations" for purposes of the Fourteenth Amendment).

process."[112] However, notice and hearing is required unless the property interest affected is *de minimis*.[113] Length and severity of deprivation affect the form, not the requirement, of notice and hearing whenever "significant" property interests are involved.[114] "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property."[115] Some of the items seized from the appellants under the challenged statutes were subject to conditional sales contracts and paid for in installments, meaning that the appellants did not have full title.[116] The Supreme Court in *Fuentes* found that the appellants' "substantial" payments and established possessory interest in the goods were sufficient to trigger due process protection.[117]

Fuentes established that a property interest need not be "absolute necessities of life" to be "significant" enough to trigger due process protection.[118] The federal district courts focused on the facts of *Sniadach* and *Goldberg* to conclude that, because the household goods replevied in *Fuentes* were not absolute necessities like welfare benefits or wages, no hearing prior to deprivation was required.[119] The Supreme Court rejected this narrow reading, noting that *Sniadach* and *Goldberg* did not "mark[] a radical departure from established principles of procedural due process. . . . Both decisions . . . ha[d] little or nothing to do with the absolute 'necessities' of life but establish[] that due process requires an opportunity for a hearing before a deprivation of property."[120] The Supreme Court went on to note that it would be inappropriate for a court to give due process protection to property only where it deemed the property "necessary."[121] This presages the *Doehr* determination that all property in-

112. *Id.* at 90 n.21 (citing Boddie v. Connecticut, 401 U.S. 371, 378 (1971)).
113. *Id.* (citing *Sniadach*, 395 U.S. at 342).
114. *Id.* at 86.
115. *Id.*
116. *Id.*
117. *Id.* at 86–87.
118. *Id.* at 88–90.
119. *Id.* at 88.
120. *Id.* (citations omitted).
121. *Id.* at 90.

terests affected by attachment are significant, requiring procedural due process protection.[122]

To justify summary seizure without notice or hearing, some important government or public interest requiring especially prompt action must be at stake, with a high degree of state control and oversight of such seizures.[123] Because of the state's "monopoly of legitimate force" in conducting seizures without prior hearing, such seizures should involve a responsible government official acting under a narrow statute only permitting ex parte seizure where "necessary and justified in the particular instance" due to "a special need for very prompt action" that is "directly necessary to secure an important governmental or general public interest."[124] The Supreme Court relied on its early twentieth-century cases emphasizing the seriousness of the government interests that may warrant summary seizure without offending due process.[125] The state's interest in intervening in a private debtor–creditor dispute is not comparable to its interest in "furthering a war effort or protecting the public health."[126] Neither its interest in the private dispute nor the costs of instituting a notice and hearing requirement justify dispensing with the procedural due process requirement of prior notice and a hearing.[127] Takings premised on "no more than private gain [of another]" without exigent circumstances warranting state intervention, or appropriate state oversight of the procedure, do not afford sufficient procedural due process.[128]

Without such exigent circumstances, heightened interest, or appropriate oversight, seizure without notice and a hearing was improper.[129] The question of oversight recurs throughout *Sniadach* and its progeny. One important factor when considering the sufficiency of state oversight, recurring throughout the *Sniadach* line of cases, is whether a judicial officer reviews and grants the application for a prejudgment remedy. Statutes that provide for prejudgment attachments to be issued by the clerk of court, without the involvement of a judge,

122. *See infra* note 317 and accompanying text.
123. *Fuentes*, 407 U.S. at 90–93.
124. *Id.* at 91.
125. *Id.* at 91–92.
126. *Id.* at 93.
127. *Id.* at 92 n.29.
128. *Id.* at 92.
129. *Id.*

have not fared well under these decisions. In *Sniadach*, the Supreme Court decried the use of bulk writs "signed" by the court clerk, requiring no court involvement prior to the sheriff's service and execution of the attachment.[130] *Fuentes* likewise treated the clerk-issued attachment with extreme disfavor.[131] *Fuentes* did not explicitly hold that clerk-issued attachments were impermissible, although its focus on an "informed evaluation by a neutral official" infers a preference for judicial involvement, because court clerks are not generally informed evaluators of substantive law issues.[132] The Supreme Court would continue to treat procedures requiring judicial participation as more constitutionally appropriate, noting with approval two years later that the parish court in *Mitchell v. W.T. Grant Co.* required a judicial officer to issue the attachment.[133] The issue of judicial participation would continue to be an important factor leading into *Doehr*.[134]

The "right to be heard" is fundamental to procedural due process, existing "to minimize 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."[135] The "fair process of decision making" guaranteed by the notice and hearing requirement "works, by itself, to protect against arbitrary deprivation of property" by ensuring that the State must listen to the party in danger of loss if she chooses to speak against the taking.[136] The *Fuentes* Court quoted Justice Frankfurter's stirring concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath* opposing the unilateral designation of certain charitable organizations by the Attorney General as "communist," excerpting his

130. Sniadach v. Family Fin. Corp., 395 U.S. 337, 338–39 (1969).

131. *See Fuentes*, 407 U.S. at 67, 73–74, 76–77 (discussing with disapproval the Florida statute's provision allowing the clerk of court to issue summary attachment on affidavit and initiation of repossession action).

132. *See id.* at 83.

133. Mitchell v. W.T. Grant Co., 416 U.S. 600, 605–06 (1974).

134. Although the Supreme Court in *Doehr* had no reason to address clerk-issued attachments, which were not permitted by the challenged statute, the lack of judicial involvement and oversight in permitting clerks to issue attachment writs increases the risk of erroneous deprivation posed by the challenged procedure, a major factor in the *Doehr* analysis. *Cf.* Connecticut v. Doehr, 501 U.S. 1, 13–14 (1991).

135. *Fuentes*, 407 U.S. at 80–81.

136. *Id.* at 81.

eloquent dissertation on procedural due process, notice, and hearing as guarantees of fairness: "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[137] While the Supreme Court did not go so far as to prescribe for the legislature what precise form of hearing would satisfy procedural due process, it noted:

> [I]t is axiomatic that the hearing must provide a real test [to prevent unfair and mistaken deprivations of property]. '[D]ue process is afforded only by the kinds of 'notice' and 'hearing' that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . .[138]

Lacking these features, the statutes challenged in *Fuentes* failed to provide sufficient procedural due process;[139] the wrongful takings permitted by the statutes were not excused by the ability to recover the property or sue for damages. *Fuentes* stressed that the ability of a person to recover wrongfully attached property or receive damages for a wrongful attachment does not vitiate an initial wrongful taking.[140]

While the Supreme Court characterized its *Fuentes* holding as narrow,[141] the controversial decision was poorly received by the fed-

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137. *Id.* (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170–172 (1951) (Frankfurter, J., concurring)).

138. *Id.* at 97 (quoting Sniadach v. Family Fin. Corp., 395 U.S. 337, 343 (1969) (Harlan, J., concurring)). The Supreme Court later expressed serious doubt as to whether a judge could establish such probable validity when dealing with tort claims or other causes of action in which the questions of fact are complex and not generally susceptible to documentary proof; *see infra* Section III.B.5 (discussing particular issues of tort claims as bases for attachment).

139. *Fuentes*, 407 U.S. at 96.

140. *Id.* at 81–82 (noting that "no 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 occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" (quoting Stanley v. Illinois, 405 U.S. 645, 647 (1972))).

141. *Id.* at 96–97.

eral courts in Tennessee and even critiqued by sitting members of the Supreme Court. In *Mitchell v. Tennessee*, the United States District Court for the Western District of Tennessee declared Tennessee replevin statutes "unconstitutional with regret," noting that the court is "bound to follow [*Fuentes v. Shevin*] unless and until it is overturned or reconsidered."[142] Further, in his dissent in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, Supreme Court Justice Blackmun opined that the 4-3 decision in *Fuentes* should have been postponed until a full Supreme Court was available to consider the constitutional issue, and that the Supreme Court's failure to withhold judgment in *Fuentes*, combined with later decisions, had unnecessarily confused the law.[143] While *Fuentes* remains good law, the initial judicial reaction to it was poor, and the decision in *Mitchell* that would come next in the Supreme Court's line of guidance would be seen as another blow to the gains made by *Sniadach* and *Fuentes*.

2. *Mitchell*: Plaintiff's Interests, Exigencies, and Appropriate Protections

While some had bemoaned the death of prejudgment remedies entirely following *Sniadach* and *Fuentes*, the Supreme Court in *Mitchell v. W.T. Grant & Co.* made clear that prejudgment seizure without notice was still constitutionally appropriate in limited circumstances.[144] The *Mitchell* petitioners, debtors on rent-to-own cred-

142. Mitchell v. Tennessee, 351 F. Supp. 846, 847 (W.D. Tenn. 1972).

143. *See* N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 614–19 (1975) (Blackmun, J., dissenting). The Sixth Circuit in *McLaughlin v. Weathers* used Blackmun's dissent to assert that *Di-Chem* rendered *Fuentes* unreliable precedent, ignoring the effect of the majority opinion in *Di-Chem*. *Compare* McLaughlin v. Weathers, 170 F.3d 577, 581 n.3 (6th Cir. 1999) (stating that *Fuentes* "was felt not to have 'much influence or precedent[ial] value'" in *Di-Chem*, citing only to the Blackmun dissent), *with Di-Chem*, 419 U.S. at 605 (rejecting lower court's interpretation of *Sniadach* as a narrow wage-earner's exception on grounds that it "failed to take account of" *Fuentes*).

144. Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974) (noting that where the question of possession pending trial depends upon "the existence of the debt, the lien, and the delinquency," which the Supreme Court characterized as "ordinarily uncomplicated matters that lend themselves to documentary proof," due process "permit[s] the initial seizure on sworn ex parte documents, followed by the early opportunity to put the creditor to his proof").

it contracts, challenged the summary sequestration procedure used by their contract creditors to repossess personal property following default on the loans.[145] The Supreme Court had previously emphasized when a heightened interest on the part of either the government or the party seeking a prejudgment remedy required particularly prompt action, due process permitted a strictly controlled procedure for summary attachment.[146] The *Mitchell* Court referred to an extensive history of cases establishing the type of serious public or government interest and the need for prompt action that justifies forgoing prior notice and hearing. Building upon the use of distraint to collect past due taxes, the Supreme Court in *Phillips v. Commissioner* stated that, in the context of tax seizures and other such important government interests requiring immediate action, the usual rule has been "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[147] Taken out of context, this language might suggest that all summary takings without notice or hearing are acceptable, as long as a hearing is eventually provided. However, *Phillips* immediately went on to summarize cases exemplifying the serious nature of the government interests warranting forms of summary seizure, which included wartime seizures, seizures for public health protection, and seizures warranted by eminent domain.[148] After *Phillips*, the Supreme Court would continue to uphold summary seizure and even destruction of property where such compelling government and public interests were at stake.[149]

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145. *Id.* at 601.

146. *See supra* notes 115–120 and accompanying text.

147. Phillips v. Comm'r, 283 U.S. 589, 596–97 (1931).

148. *Id.* at 597.

149. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598 (1950) (upholding an ex parte seizure of misbranded goods not posing a danger to health because the appellee was provided a hearing before the final administrative order). *Ewing* used the *Phillips* "only property rights" rationale in support of its holding. *Ewing*, 339 U.S. at 599 (citing *Phillips*, 283 U.S. at 596–97). Prior to *Phillips*, the Supreme Court in *Ownbey v. Morgan* upheld a special bail requirement in suits commenced on foreign attachment against a challenge on procedural due process grounds, relying on the accepted practice of jurisdictional attachment as an important state interest. Ownbey v. Morgan, 256 U.S. 94, 109–10, 112 (1921). This underlying assumption of *Ownbey*, based on *Pennoyer v. Neff* and its progeny,

One of the cases addressed by both *Phillips* and *Mitchell* was *Coffin Bros. v. Bennett*, in which the Supreme Court upheld a lien on the effects of shareholders for failure to pay a depositor's assessment on demand as commensurate with due process because of the state's need to take prompt action in the event of a potential bank failure.[150] In the year following *Coffin Bros.*, the Supreme Court in *McKay v. McKinnes*, citing *Ownbey* and *Coffin Bros.* in support, summarily affirmed a prejudgment attachment against a nonresident as a means of obtaining jurisdiction over the suit at the commencement of the action and securing the nonresident's property to satisfy a judgment for the creditor.[151] *McKay* shares the underlying assumptions of *Ownbey* regarding the validity of jurisdictional attachments; it further adheres to a now-discredited conception that liens and attachments do not deprive a person of property because the deprivation is less than total.[152]

The *Mitchell* Court acknowledged that *Sniadach* had addressed *McKay* and similar cases with disfavor as providing a procedural rule that, while potentially sound in general, did not "'necessarily satisfy procedural due process in every case,' [or] 'give[] necessary protection to all property in its modern forms.'"[153] However, the *Mitchell* Court applied this extensive early twentieth-century jurisprudence to conclude that protection of a creditor's lien by temporarily sequestering property in which both parties to a debt-based claim have competing present interests was sufficiently important and pressing to bring it within the *Phillips* rationale—that when such heightened government interests and the need for prompt action are implicated, a post-seizure hearing provides sufficient procedural due process protection.[154] The Supreme Court did not fully

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has been called into serious doubt by late twentieth-century decisions. *See infra* Section III.B.4 (discussing *Shaffer v. Heitner*).

150. *See* Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 30–31 (1928). Curiously, the *Mitchell* Court stated that *Ownbey* was to the same effect as *Coffin Bros*. regarding the availability of attachment to creditors, despite the different bases for attachment provided in those cases. Mitchell v. W.T. Grant Co., 416 U.S. 600, 613 (1974).

151. *See* McKay v. McInnes, 279 U.S. 820, 820 (1929) (per curiam).

152. *See* McKay v. McInnes, 141 A. 699, 701–03 (Me. 1928), *aff'd per curiam*, 279 U.S. 820 (1929).

153. *Mitchell*, 416 U.S. at 614 (quoting Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969)).

154. *See id.* at 611–13.

explain the compelling government interest served by protection of the creditor's private lien right, although it appears that a historical motivating factor in the development of this procedure was protecting public welfare by discouraging the potential violence that can accompany self-help repossession.

The *Mitchell* Court's fact-intensive inquiry focused on both the plaintiff's present interest in the property sought to be sequestered and the statute's adequate protection of the interests of both parties.[155] The Supreme Court, in conducting its due process analysis, relied heavily on the specific circumstances of the taking and on the features of the Louisiana statute at issue in conducting its due process analysis. Like the seizures in *Fuentes*, the seizure in *Mitchell* was of personal and household goods and appliances.[156] The goods in *Mitchell*, like most in *Fuentes*, were purchased on some type of installment or rent-to-own credit terms.[157] However, the seller in *Mitchell* had a vendor's lien, enforced by filing a petition on the debt and a motion for writ of sequestration of the goods.[158] To obtain the writ, the vendor had to make a specific showing to a judge regarding the claim, amount, and grounds for attachment, as well as post a bond.[159] The state statute allowed for writs to be issued by the clerk but provided that in Orleans Parish, where the *Mitchell* suit arose, the judge was the only official authorized to issue the writs.[160] The Supreme Court thus did not reach the validity of Louisiana's procedures in other parishes permitting clerk-issued attachments.[161]

The statute featured protective procedures other than the bond. For example, the goods were held by the sheriff rather than being immediately delivered to the party seeking sequestration and could not be sold until after final judgment on the merits.[162] The debtor

155. *Id.* at 604–05.

156. *See id.* at 601; Fuentes v. Shevin, 407 U.S. 67, 70 (1972).

157. *See Mitchell*, 416 U.S. at 607 (discussing vendor's need to "recover[] the unpaid balance" on items seized).

158. *Id.* at 601–02.

159. *Id.* at 602, 605–06.

160. *Id.* at 606.

161. *Id.*

162. *Id.* at 606, 606 n.7. Contrast this with the procedure in *Fuentes*, in which some debtors had to file their own court action to even be heard on the summary seizure. Fuentes v. Shevin, 407 U.S. 67, 77–78 (1972).

could seek to have the writ dissolved immediately or regain possession prior to a hearing by posting a bond to cover any incidental damages suffered by the seller.[163] If the vendor could not prove its grounds for the writ or existence of the debt, the vendor's bond paid any damages ordered by the court on the debtor's behalf.[164] The debtor did not have to file his own bond to appear or plead in his defense.[165] This combination of limited application, easily documentable questions of fact, and protective statutory features led the Supreme Court to uphold the Louisiana sequestration procedure.

Presaging the balancing test it would eventually adopt in *Doehr*, the Supreme Court looked at the competing interests in the property in making its determination. The Supreme Court attached considerable significance to the fact that the vendor and the buyer had "current, real" interests in the property attached by virtue of the vendor's lien, with the buyer's interests being "subject to defeasance in the event of default. . . . [And] no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default . . . ."[166] Thus, "[r]esolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."[167] In holding that the statute "effect[ed] a constitutional accommodation of the conflicting interests of the parties," the Supreme Court noted with approval both the nature of the required showing and the protections supplied for the debtor.[168] The Supreme Court found it significant that, rather than a fault-based standard like those found in the *Fuentes* replevin statutes, the Louisiana sequestration statute focused on matters "particularly suited for questions of the existence of a vendor's lien and the issue of default," which the Supreme Court felt would give rise to far less risk of wrongful or improper seizure than the fault-based "wrongfully detained" property standard in the *Fuentes* statutes.[169]

Mitchell held that, because the Louisiana statute based the availability of attachment on factual questions like the existence of

163. *Mitchell*, 416 U.S. at 606–07.
164. *Id.* at 606.
165. *Id.* at 606–07.
166. *Id.* at 604.
167. *Id.*
168. *Id.* at 607.
169. *Id.* at 617–18.

debt, lien, and default, an ex parte seizure satisfied procedural due process requirements when: (1) supported by documentary proof; (2) followed by a swift evidentiary hearing at which the debtor can challenge the existence of the debt, lien, or default; and (3) bolstered by a bond for damages in the event of wrongful seizure.[170] Given the specific circumstances, interests of the parties, and features of the statute, the Supreme Court concluded that the Louisiana sequestration statute "protects [the] debtor's interest in every conceivable way, except allowing him to have the property to start with."[171]

The Supreme Court placed the protection of vendor's liens by sequestration of personal property in its line of previous authority justifying summary seizure in pursuit of important government or public interests, also noting with approval the historical justification for summary sequestration procedures.[172] Sequestration, deriving from an "ancient civil law device," was developed to allow courts to take possession of property in which parties asserted competing present interests to prevent waste by either party and improper disposal by the party in possession.[173] The remedy was thought to "forestall violent self-help and retaliation" by involving authorities in the process.[174] It is not unreasonable to infer that sequestration protects both the private party's present interest in the property and the state interest in providing the procedure to protect both parties and prevent violent resolution of their disputes. [175]

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170. *Id.* at 618–20. Tennessee's statute, not limited to actions on debts or actions for possession, prescribes a "just cause" standard. *See* TENN. CODE ANN. § 29-6-113 (2012).

171. *Mitchell*, 416 U.S. at 618.

172. *Id.* at 611.

173. *Id.* at 605.

174. *Id.*

175. Had the *Doehr* balancing test been applied to the facts in *Mitchell*, the creditor's private interest would receive principal attention, but this ancillary government interest in providing the particular procedure to serve these public protection and safety interests would factor into the analysis as well. *See* Connecticut v. Doehr, 501 U.S. 1, 10–11 (1991). After *Doehr*, a present interest like that of a vendor's lien is a factor heightening the plaintiff's interest in having the summary procedure available, similar but not identical to *Mitchell*'s balancing of the "competing interests" of vendor and buyer. *Compare Doehr*, 501 U.S. at 16 (preexisting interest in property attached, as with a vendor's lien, would heighten plaintiff's interest in receiving attachment), *with Mitchell*, 416 U.S. at 608–09 (explaining that a vendor's

Ultimately, the Supreme Court held that the challenged sequestration procedure, applicable only where parties had competing present interests in the sequestered property, afforded sufficient procedural due process protection.[176] Summing up its analysis of the competing interests at stake in the case, the Supreme Court echoed the balancing approach of *Fuentes*: "Here, the initial hardship to the debtor is limited, the seller has a strong interest, [due] process proceeds under judicial supervision and management, and the prevailing party is protected against all loss."[177]

Rather than treating *Mitchell* as the type of exceptional case explicitly anticipated by *Fuentes*, some lower courts persisted in treating it as a major limitation of *Fuentes* and *Sniadach*.[178] The district court for the Eastern District of Tennessee stated that "*Mitchell* can only be interpreted as a significant limitation upon . . . *Sniadach* and *Fuentes*."[179] However, this misapprehension did not last long, as

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lien requires the court to balance competing present interests in property). Both the *Mitchell* reasoning and *Doehr* analysis provide for consideration of any particularized risks on the part of the creditor seeking to recover property used to secure a debt. Given the harmonious nature of the Supreme Court's approach in *Mitchell* and *Doehr*, it is difficult to reconcile the Sixth Circuit's discordant interpretation of the so-called "*Mitchell* rationale" in McLaughlin v. Weathers, 170 F.3d 577 (6th Cir. 1999). *See infra* Part IV.

176. *Mitchell*, 416 U.S. at 618–20.

177. *Mitchell*, 416 U.S. at 618–19. *Compare id.*, *with McLaughlin*, 170 F.3d at 581 (citing the "*Mitchell* rationale" for approving a statutory scheme as never requiring a pre-taking hearing if only property rights are involved).

178. *See, e.g.*, Maxwell v. Hixson, 383 F. Supp. 320, 325 (E.D. Tenn. 1974) (upholding Tennessee's judicial attachment procedure based on a sheriff's return of "not to be found" against a challenge based on *Sniadach* and *Fuentes* because "*Mitchell* can only be interpreted as a significant limitation upon the rules laid down in both *Sniadach* and *Fuentes*").

179. *Id.* Like the Supreme Court in *Mitchell*, the federal district court in *Maxwell* relied on *Ownbey* as distinguishing *Sniadach* and *Fuentes* in upholding the Tennessee statutes providing for summary wage garnishment pursuant to a sheriff's return of "not to be found." *Id.* at 325. The district court in *Maxwell* spoke approvingly of the use of attachment to obtain jurisdiction over a nonresident debtor, acknowledging it as the historical purpose of the challenged statutes. *Id.* Citing *Fuentes* in support of this practice, the court noted that the majority in *Fuentes* had called attachment to secure jurisdiction "a most basic and important public interest." *Id.* (quoting Fuentes v. Shevin, 407 U.S. 67, 91 n.23 (1972)). Not until after *Shaffer v. Heitner* would the weakening of attachment as a basis for jurisdiction become clear in Supreme Court decisions. *See infra* Section III.B.4.

the Supreme Court took up yet another case on prejudgment attachment the year following *Mitchell*, making clear that *Mitchell* did not negate *Sniadach* and *Fuentes.*

3. *Di-Chem*: Clarifying the State of the Doctrine

The Supreme Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[180] established the continued vitality of the *Sniadach* and *Fuentes* holdings following the *Mitchell* decision.[181] North Georgia Finishing's corporate bank accounts were garnished by Di-Chem on a claimed debt, after which North Georgia Finishing challenged the validity of the Georgia statute used by Di-Chem on procedural due process grounds.[182] The Supreme Court reiterated its hesitance to vary procedural due process requirements based on the type of property interest affected[183] and rejected the lower court's narrow reading of *Sniadach* as an individual wage-earner's exception.[184]

According to the Supreme Court in *Di-Chem*, the temporary and partial taking permitted by the statute still implicated the Due Process Clause pursuant to *Fuentes* but lacked the "saving characteristics" of *Mitchell* and was inconsistent with due process.[185] As in *Fuentes*, the Georgia statute took property without notice or hearing and without the oversight of a judge.[186] Unlike *Mitchell*, the affidavit in Georgia garnishment actions could be conclusory and sworn to without averring personal knowledge.[187] The writ was "issued by a

180. N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

181. *See id.* at 604–06.

182. *Id.* at 603–05.

183. *Id.* at 608 ("We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.").

184. *Id.* at 605. The Georgia statute challenged expressly disallowed prejudgment garnishment of wages. *Id.* at 602–03 (citing GA. CODE ANN. § 46-101 (1975)). After the Georgia Supreme Court's decision but prior to Supreme Court review, a federal court held the Georgia statute unconstitutional. *See* Morrow Electric Co. v. Cruse, 370 F. Supp. 639, 642 (N.D. Ga. 1974).

185. *Di-Chem*, 419 U.S. at 607.

186. *Id.* at 606.

187. *Id.* at 607.

court clerk . . . and without participation by a judicial officer."[188] The only method provided by the statute to dissolve the garnishment required the defending party to post a bond.[189] The respondent argued that *Sniadach*, *Fuentes*, and *Mitchell* were inapplicable in commercial cases such as this one where the parties had equal bargaining power. While the Supreme Court acknowledged that the risk of irreparable injury through the application of these statutes was greater for individuals, it found enough possibility of injury to corporations to warrant procedures to prevent initial error.[190] Ultimately, the Supreme Court concluded that the Georgia statute was "vulnerable for the same reasons" as the replevin statutes invalidated in *Fuentes*, with "none of the saving characteristics" of the sequestration statute upheld in *Mitchell*.[191]

Di-Chem balanced the *Fuentes* and *Sniadach* considerations of the interests of the party against whom attachment is sought with the risks posed by the procedure against the example in *Mitchell* of heightened interest of the party seeking attachment and circumstances warranting summary seizure. With the Supreme Court's position clearly established that due process matters in all prejudgment attachment cases, even those between corporate parties, talk about "wage-earner's exceptions" and the like disappeared. The *Di-Chem* approach presaged the *Doehr* balancing approach the Supreme Court would ultimately prescribe some sixteen years later.

4. A Related Shift: *Shaffer v. Heitner* and the Equalization of Due Process

One other case, not precisely part of the *Sniadach* line of decisions, made an important change that would significantly affect the outcome in *Connecticut v. Doehr* after the *Di-Chem* ruling. *Shaffer v. Heitner* was a 1977 case that reexamined the distinctions drawn by previous decisions between in rem and in personam jurisdiction as it applies to guarantees of procedural due process under the United States Constitution.[192] *Shaffer* concluded that previous distinctions

188. *Id.* at 606.
189. *Id.* at 607.
190. *Id.* at 608.
191. *Id.* at 606–07.
192. *See generally* Shaffer v. Heitner, 433 U.S. 186 (1977).

allowing for a lower standard of procedural due process where jurisdiction was in rem were not constitutional, guaranteeing that every case, irrespective of how jurisdiction is obtained, enjoys the same procedural due process protection.[193]

Like other cases in the *Sniadach* line of decisions, *Shaffer* dealt with sequestration of property under an in rem jurisdiction theory. Heitner, a nonresident of Delaware who owned a single share of stock in the Greyhound bus company, brought a shareholders' derivative action against Greyhound and twenty-eight corporate officers thereof, only seven of whom were Delaware residents, following a large antitrust judgment and contempt fine against Greyhound.[194] Delaware law defined Delaware as the physical situs of the stock owned by the shareholders, and jurisdiction over the twenty-one nonresidents was brought by initiating an ex parte sequestration of their interest in Greyhound stock, which prevented them from selling their stock.[195] The nonresident defendants entered a special appearance to quash the order, arguing that the court lacked jurisdiction over them due to a lack of minimum contacts with Delaware and that the Delaware sequestration statute was unconstitutional in that it did not afford them procedural due process.[196]

The lower court rejected these arguments, rationalizing that the purpose of the Delaware sequestration procedure was to bring parties into court, not to determine the ownership of disputed property.[197] Because the sequestration was for a limited time and to obtain jurisdiction, the lower court held that the *Fuentes* rationale did not apply and that the Delaware statute was sufficient to exercise *quasi in rem* jurisdiction over the nonresident defendants.[198]

The Delaware Supreme Court upheld the lower court, focusing primarily on its contention that the *Sniadach* line of cases did not apply to the action because it was used to compel the attendance of a defendant, which was not the basis of attachment in that line of authority.[199] Like the pre-*Sniadach* cases, the Delaware Supreme Court

193. *Id.* at 213–17.
194. *Id.* at 189–92.
195. *Id.* at 191–93.
196. *Id.* at 192–93.
197. *Id.* at 193.
198. *Id.* at 193–94.
199. *Id.* at 194.

noted with approval the long-standing usage of sequestration, approval for that process in its prior decisions and Delaware's interest in protecting shareholders from corporate mismanagement.[200] The Delaware Supreme Court gave almost no attention to the question of minimum contacts as it applies to the exercise of jurisdiction, giving that subject only two paragraphs in its written opinion and basically stating that minimum contacts aside, Delaware could constitutionally provide a procedure for *quasi in rem* jurisdiction without conducting a minimum contacts analysis.[201]

The Supreme Court reversed the lower courts in a decision that was a major blow to the ancient vestiges of distinction between jurisdiction in rem and in personam in the context of due process. It rejected the precedent set by *Pennoyer v. Neff* in 1878,[202] which echoed the Tennessee courts' acceptance of the historic use of prejudgment attachment to obtain jurisdiction before the states were recognized to have any jurisdiction over persons without its borders, and *Pennoyer's* progeny that had determined a lesser due process standard applied to proceedings in rem, including actions without notice to a defendant.[203] The Supreme Court noted the advent of the *International Shoe Co. v. Washington*[204] decision, which dealt with in personam jurisdiction, but reconceived the concept of jurisdiction as the "minimum contacts test" that dealt with the relationship between the parties and the litigation, not the strict "jurisdiction only within its borders" rule applied to states by *Pennoyer* and its progeny.[205] The Supreme Court then determined that the concepts of fair play and substantial justice that prompted the minimum contacts test of *International Shoe* required it to consider whether *International Shoe* should apply to actions in rem as well as in personam.[206]

The Supreme Court gave due consideration to, but ultimately rejected, the historic reasons for a lower due process standard applicable to jurisdiction in rem. In a post-*International Shoe* framework, the historic reason of ensuring that there would be assets available to

200. *Id.*
201. *Id.* at 195.
202. *See generally* Pennoyer v. Neff, 95 U.S. 714 (1878).
203. *Shaffer*, 433 U.S. at 196–206.
204. *See generally* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).
205. *Shaffer*, 433 U.S. at 202–04.
206. *Id.* at 206.

satisfy a judgment in the state was not enough, because in personam jurisdiction was now easier to obtain and full faith and credit would make the judgment enforceable in whatever state the property had been removed to.[207] The long history of attachment of property as a basis for jurisdiction and the rule in cases such as *Ownbey* was not sufficient to reify the practice.[208] While in rem jurisdiction was not eliminated, it must still meet the standards of minimum contacts prescribed by *International Shoe*.[209]

The Supreme Court concluded that, under the minimum contacts standard, the nonresident defendants' stock should not have been attached as a basis for jurisdiction alone.[210] The property had nothing to do with the subject matter of the lawsuit or the underlying cause of action.[211] The contacts of the nonresident defendants with the state of Delaware were solely their positions within a corporation chartered in Delaware.[212] While Heitner claimed a significant state interest in regulating corporate management in Delaware, the Supreme Court noted that the Delaware law asserted no such state interest but was based solely on the possession of property within the state.[213] The position of the nonresident defendants in corporate roles did not require them to obtain interests in the corporation, and simply acquiring an interest in a corporation is not consent to be sued in its locus without having other contacts there.[214] Due process did not permit the suit to go forward in Delaware based on its sequestration statute, and the decisions of the lower courts were accordingly reversed.[215]

While not precisely part of the *Sniadach* line of decision, *Shaffer* was a major change and a necessary development toward the eventual decision in *Connecticut v. Doehr* in 1991. By eliminating the distinction between in rem and in personam jurisdiction in terms of due process standards, *Shaffer* strengthened the underlying con-

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207. *Id.* at 210.
208. *Id.* at 211–12.
209. *Id.* at 212.
210. *Id.* at 213.
211. *Id.*
212. *Id.* at 213–14.
213. *Id.*
214. *Id.* at 215–16.
215. *Id.* at 216–17.

cepts of fairness that are hallmarks of the *Sniadach* line of decision. *Shaffer* standing alone could be enough to eliminate several of the purely jurisdictional bases for attachment in the Tennessee prejudgment attachment law, but *Doehr* would cement the precedent that the statute is self-evidently deficient in providing due process to all parties involved in an attachment suit.

5. *Doehr*: A Formal Approach to Balancing Interests in Prejudgment Attachment

In *Connecticut v. Doehr*, the Supreme Court synthesized its considerations in the *Sniadach* line of cases into a formal balancing test for analyzing the procedural due process afforded by prejudgment remedy statutes.[216] Following *Di-Chem*, the Supreme Court in *Mathews v. Eldridge* had propounded a balancing test for procedural due process analysis in state takings of private property.[217] *Mathews* dealt with a challenge to a federal procedure permitting summary termination of Social Security disability benefits.[218] Relying heavily on the *Sniadach* line of cases, the Supreme Court determined that the review and appeals process for termination of disability benefits provided sufficient procedural due process protection, promulgating a multi-factor test.[219] In *Doehr*, the Supreme Court modified the *Mathews* test for use in cases where the state, rather than taking private property for itself, assists a private individual in taking the property of another.[220] This balancing test weighs the private interest affected by the prejudgment procedure and the risk of erroneous deprivation from the current procedure against the primary interest of the party seeking the remedy and any ancillary government interest.[221] The *Doehr* balancing test set the standard for assessing wheth-

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216. Connecticut v. Doehr, 501 U.S. 1, 10–11 (1991).

217. Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976).

218. *Id.* at 323–26.

219. *Id.* at 340–49 (identifying factors to be considered in procedural due process analysis where the government takes property rights for its own benefit, including the degree of potential deprivation; the fairness and reliability of existing procedures; the value of additional procedural safeguards; and the public interest).

220. *Doehr*, 501 U.S. at 10–11.

221. *Id.* at 11.

er prejudgment remedy statutes provide sufficient procedural due process and has not been further modified by the Supreme Court.

In *Doehr*, the Supreme Court reviewed Brian Doehr's challenge to the Connecticut statute's constitutionality on procedural due process grounds, stemming from the attachment of his home.[222] When John DiGiovanni sued Doehr for assault and battery, DiGiovanni had applied for and received a $75,000 attachment on Doehr's home.[223] DiGiovanni was able to secure a lien on Doehr's home on the basis of a conclusory five-line affidavit and the complaint, without posting a bond.[224] While the statute provided state remedies, Doehr did not make use of them; instead, he challenged the constitutionality of the procedure in federal court.[225]

The Connecticut prejudgment attachment statute allowed for ex parte attachments on real property based on a plaintiff's affidavit, alleging only "probable cause" of the suit's eventual success.[226] The statute did not require the party applying for attachment to post a bond, but the supporting affidavit had to contain an assertion of probable cause and an assertion *either* that the attachment was sought on real property *or* that a reasonable likelihood existed of one of the various conditions defined by the statute, either jurisdictional[227] or exigent.[228] The attachment on Doehr's home was the first notice he received of DiGiovanni's lawsuit; he was not served with the complaint until after the attachment was executed.[229] While the attachment pro-

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222. *Id.* at 7.

223. *Id.* at 5–7.

224. *Id.*

225. *Id.* at 7.

226. *Id.* at 5–6. The Supreme Court did not choose to address these latter applications of the statute, likely because the probable cause standard permitted such a high risk of erroneous deprivation that exigent circumstances could not heighten interests in using or providing the procedure enough to sufficiently outweigh that risk. *See id.* at 13–14.

227. The jurisdictional grounds were nonresidence, avoidance of service of process, or removal of the party from the state. *Id.* at 5–6, 5 n.1 (reproducing text of CONN. GEN. STAT. § 52-278e (1991)).

228. The exigent circumstances grounds included removal of property from the state, fraudulently hiding or withholding assets from creditors, or a statement of insolvency. *Id.* at 5 n.1 (reproducing text of CONN. GEN. STAT. § 52-278e (1991)).

229. *See id.* at 7. The Supreme Court commented on the fact that normally service of a complaint is required to commence a civil action in Connecticut. *Id.*

vided Doehr with explicit notice of his right to a hearing and the grounds on which he could challenge the attachment in state court, he chose instead to file a federal suit, alleging that the statute provided insufficient procedural due process under the Fourteenth Amendment.[230] Doehr's claim was denied in the district court, after which the Second Circuit reversed and the Supreme Court granted certiorari.[231]

In formulating its *Doehr* balancing test, the Supreme Court immediately turned to *Mathews*, which based its procedural due process analysis for state takings almost entirely on the *Sniadach* line of cases.[232] Instead of the *Mathews* balancing test, weighing the individual property interest and risk of erroneous deprivation against the government's interest in the taking, the *Doehr* balancing test requires a court to balance the former two factors against the interests of the party seeking attachment, relegating the government's interest to an ancillary consideration.[233] Having thus formalized the appropriate inquiry into procedural due process in prejudgment attachment cases, consistent with the inquiry in other state-effectuated takings, the Supreme Court proceeded to assess the Connecticut statute, finding its procedure provided insufficient procedural due process. [234]

In evaluating Doehr's individual property interest, the Supreme Court made clear that the property interests that are impaired by attachment statutes are uniformly significant, always implicating

230. *Id.* Given that the plaintiff in *Doehr* eschewed state remedies for wrongful prejudgment attachment and proceeded immediately to challenge the statute in federal court, the *McLaughlin* court's conclusions regarding required exhaustion of state remedies before a federal challenge to a statute's deficient procedural due process become even more incomprehensible. *See infra* text accompanying note 312 (discussing deficiencies in *McLaughlin*'s assessment of a § 1983 cause of action).

231. *Doehr*, 501 U.S. at 7–9.

232. *Id.* at 10 (citing Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (discussing N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), in formulating a balancing test for evaluating due process in state takings of property)).

233. *Doehr*, 501 U.S. at 10–11.

234. *Id.* at 11–18.

procedural due process.[235] The Supreme Court rejected the implication that its summary affirmation of *Spielman-Fond, Inc. v. Hanson's, Inc.*, upholding an Arizona federal court decision holding the state's mechanic's lien procedure constitutional, was inconsistent with its determination that attachments always constitute a sufficient taking to implicate due process.[236] With a stern reminder that a summary affirmation is not equal to a decision on the merits, the Supreme Court distinguished *Spielman-Fond* on the basis that the creditor involved had a pre-existing interest in the property, one of the circumstances in which "a heightened plaintiff interest . . . can provide a ground for upholding procedures that are otherwise suspect."[237] The *Doehr* decision emphasized that the duration, severity, and extent of the deprivation are not relevant to the significance of the property interest for purposes of determining whether due process protection is necessary.[238] Attachments and liens, as well as total deprivations of physical property, all affect significant property rights, entitling the owner to procedural due process protection. The Supreme Court in *Doehr* thus reaffirmed its consistent stance that procedural due process is not dependent on the type of property attached.

Having firmly established that a party subject to attachment has a significant interest in the property attached, triggering the necessity for procedural due process analysis, the Supreme Court then examined the risk of erroneous deprivation posed by the Connecticut prejudgment attachment statute.[239] Assessment of the risk requires consideration of the procedures the statute permits, any procedural safeguard it provides, and the likely value of adding or altering such safeguards.[240] In *Doehr*, the Supreme Court found the statute permit-

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235. *See id.* at 12 ("Without doubt, state procedures for creating and enforcing attachments, as with liens, 'are subject to the strictures of due process.'" (citation omitted)).

236. *Id.* at 12 n.4.

237. *Id.*; *see also supra* note 101 and accompanying text (discussing the *Spielman-Fond* distinction).

238. *Doehr*, 501 U.S. at 11–12 ("[While the] effects [of attachment and liens] do not amount to a complete, physical, or permanent deprivation of real property . . . . the Court has never held that only such extreme deprivations trigger due process concern.").

239. *Id.* at 12–15.

240. *Id.* at 11.

ted an unacceptably substantial risk of erroneous deprivation.[241] Because prejudgment attachment is primarily directed at ensuring the availability of assets to satisfy a theoretical future judgment, judges issuing ex parte attachments must be able to make reasonable determinations as to the applicants' likelihood of success in their underlying claims.[242] The challenged statute permitted attachment in any type of claim based on an assertion of "probable cause" of the suit's eventual success.[243] The parties variously argued that the standard required the plaintiff to prove "the objective likelihood of the suit's success," to "demonstrate a subjective good-faith belief" in the likelihood of success, or to state a claim "with sufficient facts to survive a motion to dismiss."[244]

The Supreme Court held that however "probable cause" was defined, permitting prejudgment attachment based on such nebulous assertions presented an unacceptably high risk of erroneous deprivation.[245] The Supreme Court found that all the standards were insufficient, thus permitting takings when the allegations would not satisfy a jury, when the facts claimed by the plaintiff are or would be disputed, or even when the complaint failed to state a claim upon which relief could be granted.[246] The potential for erroneous taking in such cases is "self-evident."[247] This risk is even more pronounced in cases where attachment is based on a tort claim since, unlike debts and delinquencies, such claims are generally complicated and lack supporting documentary proof.[248] The underlying complaint in *Doehr* dealt with an assault, which the Court of Appeals and Supreme Court agreed would result in the judge receiving only the plaintiff's version

241. *Id.* at 12–13.

242. *Id.* at 12 (citing Ownbey v. Morgan, 256 U.S. 94, 104–05 (1921)); *see also supra* Section III.B (discussing *Ownbey* and related authority).

243. *See Doehr*, 501 U.S. at 12–13.

244. *Id.* at 13.

245. *Id.* at 13–14.

246. *Id.*

247. *Id.* at 14. The Supreme Court may have been too optimistic in declaring the obviousness of this principle. *See infra* text accompanying note 297 (discussing the Sixth Circuit's approval of the Tennessee prejudgment attachment standard, predicated on a showing of "just cause" for the debt or damages claimed).

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

of the events.[249] The *Doehr* Court distinguished this situation from one involving debt collection or delinquency, noting that "the issue does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.'"[250] The risk of error posed by permitting attachments where a judge must decide the likelihood of eventual judgment in the plaintiff's favor based only on the plaintiff's version of events at the outset of the action is considerable unless the issues are simple and documentary proof is routine. In condemning the Connecticut statute's use of attachment in tort cases under its broad "probable cause" standard, the Supreme Court echoed *Fuentes*'s reminder that "'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.'"[251] Attachment in tort cases means that the judge must reasonably determine the likely outcome of the suit based solely on the plaintiff's self-interested version of events, and such a determination is "self-evident[ly]" unrealistic.[252] The Supreme Court rejected the State's contention that the judicial practice of reviewing both the complaint and affidavit reduced the risk of erroneous deprivation because the complaint could be as conclusory as the affidavit.[253]

The Connecticut prejudgment attachment scheme's procedural safeguards did not mitigate the high risk of erroneous deprivation.[254] The statute provided for an arguably prompt post-attachment hearing; notice thereof at the time of attachment; additional judicial review of any adverse decision at such hearing; and double damages if the underlying suit lacked probable cause. [255] However, such factors did not reduce the substantial risk of erroneous deprivation since prompt review and later damages cannot cure a wrongful deprivation that

249. *Id.*

250. *Id.* (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974)). One of the saving factors in *Mitchell*, which prompted the Court to uphold the Louisiana sequestration procedure, was the nature of the proof, which focused on the existence of debt and delinquency and tended to be supported by written evidence. *Mitchell*, 416 U.S. at 617–18.

251. *Doehr*, 501 U.S. at 14 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951)).

252. *Id.* at 13–14.

253. *Id.* at 14.

254. *Id.*

255. *Id.* at 14–15.

should have been prevented by prior notice and hearing.[256] Again, the Supreme Court echoed the principles of its past prejudgment remedy decisions: the preference for notice and hearing irrespective of the duration of a taking;[257] the undesirability of premising prejudgment takings on the preliminary determination of complicated factual questions not readily resolved by documentary proof;[258] and the insufficiency of a post-attachment hearing or damages to rectify a wrongful taking.[259]

Against the substantial interests affected and the high-risk procedure of the Connecticut statute, the Supreme Court considered the interest of the party seeking attachment as well as the ancillary government interest, determining that neither was sufficient to warrant attachment without notice or hearing.[260] DiGiovanni had only the minimal interest in receiving the procedure conferred by the desire to satisfy a potential future judgment.[261] Relying primarily on *Mitchell*, the Supreme Court determined that no other exigent circumstance or preexisting interest in the property heightened this minimal interest.[262] The government's interest in providing a prejudgment remedy

256. *Id.* at 15. In noting that post-seizure hearing does not undo a deprivation already suffered that a prior hearing would have forestalled, the *Doehr* court echoed *Fuentes*'s reminder that "[t]he Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Id.* (quoting Fuentes v. Shevin, 407 U.S. 67, 86 (1972)).

257. *Id.*; *see also supra* text accompanying note 256.

258. *Doehr*, 501 U.S. at 13–14 (distinguishing *Mitchell* because the statute upheld in *Mitchell* based the likelihood of recovery on "uncomplicated matters that lent themselves to documentary proof") (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 609–10 (1974)); *see also supra* Section III.B.2 (discussing *Mitchell* as addressing all ownership interests in a property).

259. *Doehr*, 501 U.S. at 15; *see also supra* text accompanying note 256.

260. *See Doehr*, 501 U.S. at 11 (noting that balancing should give "principal attention to the interest of the party seeking the prejudgment remedy, with . . . due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections").

261. *Id.* at 16 (noting that plaintiff's interest in attachment was limited to "ensur[ing] the availability of assets to satisfy his judgment if he prevailed").

262. *Id.* (explaining that a properly supported claim of transfer or encumbrance rendering property unavailable for future judgment would be "an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected") (citing *Mitchell*, 416 U.S. at 609; Fuentes v. Shevin, 407 U.S. 67, 90–92 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969)). According to the

cannot be greater than the applicant's interest in receiving it.[263] Likewise, providing a pre-attachment hearing cannot be said to be overly burdensome where one of the supposed savings features of the statute is a prompt post-attachment hearing.[264]

The Supreme Court further took note that Connecticut's practice compared unfavorably with both historical and current trends in prejudgment attachment.[265] Noting that prejudgment attachment was not a common-law feature but rather derived from the Custom of London, the Supreme Court reviewed the safeguards historically provided to reduce risk of erroneous deprivation, including authorizations only in exigent circumstances, limitations of prejudgment attachments to creditor claims, and bond requirements.[266] Looking at modern practice and procedure, the Supreme Court conducted a fifty-state survey of prejudgment attachment statutes, included as an appendix to the *Doehr* opinion.[267] Reviewing exigency requirements, pre- and post-attachment hearing requirements, and bond requirements, the Supreme Court determined that Connecticut's statute was particularly lacking in protections against erroneous deprivation.[268] The Supreme Court noted this potential for error when it cautioned that exigency requirements do not necessarily protect a prejudgment attachment statute from constitutional issues and that their state sur-

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Doehr Court, the diminishing factors in *Mitchell* were the vendor's lien; reduced risk of error due to debt involving documentary proof; and the requirement that the vendor post a bond before the property was sequestered. *Id.* at 15.

263. *Id.* at 16.

264. *Id.*

265. *Id.* at 16–18.

266. *Id. But see supra* Section III.B (discussing authority finding procedural due process sufficient based in part on procedures examined having derived from English custom in place at the time of the adoption of the United States Constitution).

267. *Doehr*, 501 U.S. at 24–25.

268. *See id.* The Supreme Court's analysis of these statutes not before it, however, was not without its flaws. For instance, the Supreme Court found that "[o]nly Washington, Connecticut, and Rhode Island authorize attachments without a prior hearing in situations that do not involve any purportedly heightened threat to the plaintiff's interests." *Id.* at 18. *But see* TENN. CODE ANN. § 29-6-101(1)–(2) (2012) (allowing prejudgment attachment based solely on a defendants' out-of-state residence or removal from the state); *id.* § 29-6-107(a) (allowing prejudgment attachment based solely on sheriff's return of "not to be found").

vey did not infer the statutes reviewed were "necessarily free of due process problems or other constitutional infirmities."[269]

Because of the minimal interests of the party seeking the remedy and that the state could not outweigh the serious risk of erroneous deprivation of a substantial property interest permitted by the Connecticut prejudgment attachment statute, the Supreme Court ultimately held that the statute did not provide sufficient procedural due process to withstand a constitutional challenge.[270] After *Doehr*, a court assessing a constitutional challenge to a prejudgment remedy is required to use the *Doehr* analytical framework. *Doehr* makes clear that, like the *Mathews* test of state takings, its balancing test is applicable to all challenges to prejudgment remedies, not just attachment.[271] However, at least one court appears to have taken the lengthy *Doehr* plurality, examining whether a bond is a necessary requisite of procedural due process, as more instructive than the analysis mandated by an eight-Justice majority. In *McLaughlin*, the Sixth Circuit misconstrued the effect of the entire *Sniadach* line of cases, resting its holding on Tenn. Code Ann. § 29-6-101 *et seq*. and a "*Mitchell* rationale" that bore no resemblance to the Supreme Court's own interpretations of *Mitchell*. Rejecting *Doehr* as inapplicable despite the mandated *Doehr* analysis, the *McLaughlin* opinion is a serious misreading of the modern procedural due process decisions. Accordingly, the *McLaughlin* opinion should be rejected by any future court considering the constitutionality of Tenn. Code Ann. § 29-6-101 *et seq*.

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269. *Doehr*, 501 U.S. at 18. Lower federal courts did not universally heed this caution. *See* McLaughlin v. Weathers, 170 F.3d 577, 582 (6th Cir. 1999) (referring solely to the *Doehr* appendix to illustrate the "stark and important differences" between the Connecticut and Tennessee statutes for purposes of procedural due process analysis).

270. *Doehr*, 501 U.S. at 12–13.

271. *Id.* at 9–10 (noting that prejudgment remedies take various forms before recommending analysis applicable when considering "what process must be afforded by a state statute enabling an individual to enlist the aid of the State to deprive another of . . . property by means of the prejudgment attachment or similar procedure").

IV. A TALE OF TWO LAWSUITS: *MCLAUGHLIN* AND THE *DOEHR* ANALYSIS THAT WASN'T

No Tennessee state court has addressed Tenn. Code Ann. § 29-6-101 *et seq*. in light of *Doehr*. In 1999, the Sixth Circuit Court of Appeals addressed the Tennessee statute's constitutionality in *McLaughlin*, holding the Tennessee prejudgment attachment statute facially valid as to procedural due process.[272] Described by the court as a "confusing controversy,"[273] the Sixth Circuit in *McLaughlin* produced an equally baffling result due to its misguided approach to *Doehr* and the other late twentieth-century procedural due process cases. The *McLaughlin* reasoning rejected the *Doehr* opinion as inapplicable to its facts despite the Supreme Court's clear mandate that the *Doehr* balancing analysis is required in all procedural due process challenges to prejudgment attachment statutes.[274] The Sixth Circuit's serious misreading of the *Sniadach* line of cases is apparent from its reasoning and taints its analysis of both the constitutionality of the statute and the validity of the federal claim used to make that challenge, leaving behind a flawed and confusing precedent regarding the Tennessee prejudgment attachment statute.

McLaughlin arose out of two interrelated cases in Davidson County's Circuit Court.[275] In the first action ("*Weathers I*"), a highly combative landlord-tenant dispute, the parties reached a settlement in favor of plaintiffs Robert Catz ("Catz") and Kimberly McLaughlin ("McLaughlin"), and defendant Charles Weathers ("Weathers") deposited $3,000 with the Davidson County Circuit Court Clerk to satisfy the agreed judgment.[276] Catz was a party to the Weathers cases

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272. *McLaughlin*, 170 F.3d at 578.

273. *Id.*

274. *See Doehr*, 501 U.S. at 10–11 (promulgating the form of analysis for use in all procedural due process challenges to attachment statutes and similar prejudgment remedies).

275. *McLaughlin*, 170 F.3d at 578–79; *see also* Weathers v. Catz, No. 96C-527 (Davidson Cty. Tenn. Cir. Ct. 1996), *available at* http://caselink.nashville.gov/ (password available from Clerk upon request) [hereinafter "*Weathers I*"]; Weathers v. Catz, No. 96C3898 (Davidson Cty. Tenn. Cir. Ct. 1996), *available at* http://caselink.nashville.gov/ (password available from Clerk upon request) [hereinafter "*Weathers II*"].

276. *McLaughlin*, 170 F.3d at 578–79.

but served as counsel on appeal to the federal court.[277] Catz and McLaughlin were dissatisfied with their landlord, Weathers, a non-practicing attorney, almost from the first day of the lease.[278] Matters quickly deteriorated into threats of lawsuits, accusations of maintaining slum conditions, allegations of illegal videotaping, and harassment.[279]

Weathers then filed a second suit ("*Weathers II*") against McLaughlin and Catz and then amended the complaint to include an application for a writ of prejudgment attachment.[280] The second lawsuit alleged further rent and damages due on the property, which were the subjects of the first lawsuit, as well as abuse of process, defamation, and assault.[281] The Sixth Circuit did not specify which of the statutory bases for attachment Weathers claimed but examination of the trial court record indicates that the court issued the attachment under Tenn. Code Ann. § 29-6-101(5).[282] Weathers sought to attach the funds his insurer had deposited with the clerk to satisfy the prior judgment, based on a questionable affidavit.[283] Weathers asserted

277. *See id.* at 578; Complaint for Injunctive Relief, *Weathers I*, *supra* note 275, No. 96C-527 (Davidson Cty. Tenn. Cir. Ct. Mar. 27, 1996).

278. *See* Exhibit B to Defendant's Answer, Defenses, Set-Off and Counterclaim, *Weathers I*, *supra* note 275, No. 96C-527 (Davidson Cty. Tenn. Cir. Ct. Nov. 29, 1995) (attaching a copy of a letter sent on October 5, 1995, to Weathers from McLaughlin and Catz, listing issues with the rented property and Weathers's conduct as landlord, to Defendants' Answer).

279. *See id.* (reproducing a letter sent October 12, 1995, to Weathers from McLaughlin and Catz, asserting harassing telephone calls following Weathers's receipt of the first letter and a letter sent November 13, 1995, from McLaughlin and Catz to Weathers, responding to Weathers's threats of eviction with, among other statements, notice to Weathers that unauthorized videotaping inside the leasehold is a violation of tenant privacy).

280. *Id.*

281. First Amended Complaint & Application for Writ of Attachment, *Weathers II*, *supra* note 275, No. 96C3898 (Davidson Cty. Tenn. Cir. Ct. Oct. 28, 1995) [hereinafter "Amended Complaint"] (on file with author).

282. *See id.*; Affidavit of Charles H. Weathers in Support of Application for Writ of Attachment, *Weathers II*, *supra* note 275, No. 96C3898 (Davidson Cty. Tenn. Cir. Ct. Oct. 28, 1996) [hereinafter "Attachment Affidavit"]; *see also* TENN. CODE ANN. § 29-6-101(5) (2012) (providing grounds for attachment where the defendant is absconding or having absconded, or is concealing or has concealed person or property).

283. McLaughlin v. Weathers, 170 F.3d 577, 578–79 (6th Cir. 1999).

that the defendants were absconding, then made a laundry list of allegations including obtaining electric and cable service in the names of minor children, using a mail drop, and previous adjudications of dishonest conduct in other jurisdictions.[284] It is unclear from the record how such allegations amounted to a claim of present or past absconding with person or property as provided by the statute, when the property at issue remained in the hands of the court clerk, and the facts alleged by Weathers indicated that he knew the parties and their assets were still in Davidson County.

Judge Walter Kurtz granted the application, but he required Weathers to post a bond equal in value to the attached funds.[285] Judge Kurtz presided over both *McLaughlin* actions. His reasons for granting the attachment in *Weathers II*, contradicting his own Order in *Weathers I* requiring that the clerk of court pay the funds over to Catz and McLaughlin, are likely to remain unclear.[286] It is further unclear why the judge did not comply with Tenn. Code Ann. § 29-6-116 and require Weathers to post a bond in excess of the amount of the funds attached "sufficient to cover" costs and damages.[287] Weathers's bond was equal to the amount of the funds attached, with no additional margin for costs or damages.[288]

The attachment remained in place for ten weeks.[289] During this time, McLaughlin filed a motion in Judge Kurtz's court to dismiss the complaint and underlying attachment.[290] She further filed a federal lawsuit seeking damages pursuant to § 1983,[291] as well as a

284. *See* Attachment Affidavit, *supra* note 282.

285. *McLaughlin*, 170 F.3d at 579.

286. *Compare* Amended Complaint, *supra* note 281, at Exhibit C (ordering settlement funds from the *Weathers I* lawsuit to be paid over to Catz and McLaughlin twenty days following October 18, 1996), *with* Fiat for Clerk to Issue Attachment, *Weathers II*, *supra* note 275 (authorizing clerk to issue attachment as of October 30, 1996).

287. *See* TENN. CODE ANN. § 29-6-116(2) (2012) (requiring funds to cover the estimated fees and damages from wrongful attachment to be added to the amount of the bond when the property attached is less than the value of damages claimed by the party seeking attachment).

288. *See McLaughlin*, 170 F.3d at 579.

289. *Id.*

290. *Id.*

291. Along with its decisions regarding procedural due process in the *Sniadach* line of cases discussed in Part III, the Supreme Court by 1999 had consid-

declaratory judgment that the Tennessee prejudgment attachment procedure was unconstitutional.[292] The state court motion was heard the day after the federal action was filed.[293] Determining that it had improvidently granted the attachment, the state court dissolved it, releasing the funds to Catz.[294] Thereafter, the federal district court dismissed McLaughlin's federal suit,[295] finding that Tennessee's re-

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ered whether an attachment under a constitutionally unsound prejudgment attachment statute entitled the person whose property was attached to sue out of a federal claim for damages under 42 U.S.C. § 1983 (2012), which provides a cause of action and damages for state violations of rights guaranteed by the Fourteenth Amendment. To sustain a cause of action under § 1983, there must be "state action," either directly by the state or by a private individual working jointly with the state. The procedural due process claim in *Fuentes*, challenging replevin writs issued by court and judicial officers and carried out by sheriff's officers, proceeded to federal court under § 1983. *See* Fuentes v. Shevin, 407 U.S. 67, 71 n.3 (1972). In *Flagg Bros., Inc. v. Brooks*, the Supreme Court held that a Virginia warehouseman's lien statute which allowed for self-help by the landlord and private sale of stored goods did not involve state action within the meaning of § 1983. Flagg Bros. v. Brooks, 436 U.S. 149, 151–54, 166 (1978). Resolving debtor-creditor disputes is not the exclusive function of the state, nor is enacting a self-help provision an act by the state compelling the private action. *See id.* at 161–65. But in *Lugar v. Edmondson Oil Co.*, the Supreme Court reversed the Fourth Circuit Court of Appeals and determined that the issuance of a prejudgment attachment by a court clerk and its direct levy by a sheriff constitutes action under color of state law within the meaning of § 1983. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 927 (1982). The Supreme Court in *Lugar* sternly criticized the Fourth Circuit for "misread[ing]" *Flagg Bros.* and "fail[ing] to give sufficient weight to that line of cases, beginning with *Sniadach.*" *Id.* The *Sniadach* line of cases each "involved a finding of state action as an implicit predicate of the application of due process standards." *Id. Flagg Bros.* was a distinguishing case in which, unlike the prejudgment attachment remedies in the *Sniadach* cases, there was not "overt, official involvement in the property deprivation" sufficient to create state action and sustain a § 1983 claim. *Id. Doehr* made clear that all takings pursuant to attachment statutes are significant, requiring due process protection. *See supra* note 122 and accompanying text.

292. *McLaughlin*, 170 F.3d at 579–80.

293. *Id.*

294. *Id.*; *see also* Order Dismissing All Claims as to Defendant McLaughlin, Dismissing Some Claims as to Defendant Catz, Granting Leave to Amend and Dissolving Prejudgment Writ of Attachment, at 2–3, *Weathers II*, *supra* note 275, No. 96C3898 (Davidson Cty. Tenn. Cir. Ct. Jan. 16, 1997) [hereinafter "Order of Dismissal and Dissolution"].

295. *McLaughlin*, 170 F.3d at 579. The State's motion alleged two grounds for dismissal: McLaughlin's failure to utilize state remedies available prior to filing

quired showing of exigent circumstances and other procedural safeguards afforded sufficient procedural due process protection.[296]

On appeal of the district court dismissal, the Sixth Circuit assessed Tenn. Code Ann. § 29-6-101 *et seq*. and found the statute constitutionally permissible because it only permits attachment under certain circumstances the court found exigent. It interpreted the statute to require a plaintiff to show strict "just cause bases for . . . extraordinary relief,"[297] completely misinterpreting the weight of Tennessee precedent regarding the risk of abuse posed by the Tennessee statute. The Sixth Circuit based its unsupportable reading of the Tennessee standard as requiring "strict . . . just cause bases" on a 1947 Tennessee Supreme Court case, *Willshire v. Frees*.[298] *Willshire* discusses how the statutory bases for attachment in Tennessee "are very strictly *construed* [precisely] because 'the remedy is in derogation of the common law, harsh and summary in its operation, and very liable to be abused as an instrument of injustice and oppres-

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the federal suit and effectual attainder of relief (by virtue of the state court dismissal) prior to service of process in the federal suit (although the federal suit was filed one day before the dismissal of the state suit, service was not attained until four days after the dismissal). *Id.*

296. *Id.* at 579–80 (noting that in Tennessee "[a] writ of attachment may only issue under certain specified exigent circumstances [and t]he statutory scheme has safeguards to challenge the grounds upon which a writ is issued and recover damages"). *But see* Connecticut v. Doehr, 501 U.S. 1, 15 (1991) (stating that a prompt post-judgment hearing does not undo the harm an earlier hearing could have prevented); Fuentes v. Shevin, 407 U.S. 67, 85–86 (1972) (noting that the Fourteenth Amendment applies equally irrespective of the length of the wrongful deprivation); *but see also supra* cases and text accompanying notes 66–68 (discussing Tennessee precedents acknowledging the high risk of abuse posed by the Tennessee prejudgment attachment scheme).

297. *McLaughlin*, 170 F.3d at 580. The Sixth Circuit's reading of Weathers's burden under the statute is misleading. Title 29, Chapter 6 of the Tennessee Code does not require "just cause bases for . . . extraordinary relief" before a grant of attachment but only requires the party seeking attachment to allege one of the causes for prejudgment attachment found in § 101. *Id.*; s*ee* TENN. CODE ANN. §§ 29-6-106 to -113 (2012). It also requires that a party, or its attorney, swear by affidavit that the damages sought in the underlying action are justly due (for tort claims) or that the claim itself is just (for debts and contracts claims). *See id.* TENN. CODE ANN. § 29-6-113 (2012). The Tennessee bases for requesting ex parte attachments are not wholly based on considerations of exigency. *See infra* Part VI.

298. *McLaughlin*, 170 F.3d at 580 (citing Willshire v. Frees, 201 S.W.2d 675, 678 (Tenn. 1947)).

sion.'"[299] *Willshire* does not address in any respect the "just cause" standard of proof in Tennessee attachment cases, resting instead on the examination of whether the sheriff validly issued the return of "not to be found" used as the basis for the attachment.[300] *Willshire* echoed Tennessee precedent dating back to the 1800s, which fully recognized the dangers implicit in the Tennessee attachment statute.[301] While federal courts are required to consider a state supreme court's position on the state's law, the Sixth Circuit entirely ignored the cautions extensively discussed in Section III.A regarding the Tennessee statute, which the Tennessee Supreme Court had categorized early in the statute's life as "liable to great abuse."[302]

Focusing on Supreme Court precedent, the Sixth Circuit concluded that *Mitchell v. W.T. Grant Co.*, not *Connecticut v. Doehr*, controlled, since the plaintiff was required to state his claim specifically and support it with an affidavit as well as post a bond.[303] The *McLaughlin* opinion does not provide enough relevant facts to conclude that the court considered, but inadequately explained, the *Doehr* factors.[304] The court discussed many of the cases preceding *Doehr*, as well as *Doehr* itself, but it did not address the competing interests nor discuss at all the risks of erroneous deprivation under the statute.[305] Ignoring the plain language requirement of *Doehr* that the *Doehr* balancing test be performed, the Sixth Circuit instead devised a so-called "*Mitchell* rationale" to justify temporary deprivations of property without pre-deprivation notice and hearing.[306] The Sixth Circuit admitted in *McLaughlin* that it based its determination as to

299. *Willshire*, 201 S.W.2d at 678 (emphasis added) (incorrectly quoting Seals v. State, 62 Tenn. 459, 460, 467 (1874)) (actually quoting J.H. Wrompelmeir v. Moses, 62 Tenn. 467, 472 (1874) ("[N]o material departure from the specific requirements of the law has ever been tolerated by the Court. The remedy is in derogation of the common law, harsh and summary in its operation, and very liable to be abused as an instrument of injustice and oppression.")).

300. *See id.* at 677–78.

301. *See supra* notes 66–70, 72–74 and accompanying text (discussing early nineteenth-century cases acknowledging the high risk of erroneous deprivation inherent in Tennessee attachment procedure).

302. Welch v. Robinson, 29 Tenn. (10 Hum.) 264, 265 (1849).

303. *McLaughlin,* 170 F.3d at 580–81.

304. *See generally McLaughlin*, 170 F.3d 577.

305. *See generally id.* at 580–83.

306. *See generally id.*

the adequacy of the statute on the "*Mitchell* rationale" that "where only property rights are involved, mere postponement of the judicial [inquiry] is not a denial of due process."[307] This "*Mitchell* rationale" is based on the *Mitchell* Court's use of cases like *Phillips v. Commissioner*.[308] Without regard for the Supreme Court's later discussions of the significant features or import of *Mitchell*, the Sixth Circuit seized on irrelevant similarities between the *Mitchell* sequestration statute and the Tennessee prejudgment attachment scheme to conclude that Tennessee's statutory protections, primarily its bond requirement, rendered the risk of erroneous deprivation minimal.[309] Concluding that *Sniadach v. Family Finance Corp.* and *Fuentes v. Shevin* were not comparable to the case before it, the Sixth Circuit contrasted the two with *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, reasoning that the Tennessee statute was permissible because it lacked some of the specific deficiencies found in the *Di-Chem* statutes.[310] Most seriously, the Sixth Circuit distinguished *Doehr* based on differences in the facts and statutory schemes, concluding that "*Doehr* was simply a very different case" without precedential value in interpreting Tenn. Code Ann. § 29-6-101 *et seq*.[311] Ignoring the Supreme Court's repeated insistence that procedural due process does not distinguish between different types of property, the Sixth Circuit

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307. *McLaughlin*, 170 F.3d at 581 (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974), citing Phillips v. Comm'r, 283 U.S. 589, 596–97 (1931)).

308. *See supra* Section III.B.2 (discussing the *Mitchell* Court's treatment of *Phillips*). *But see* Connecticut v. Doehr, 501 U.S. 1, 11–12 (1991) (noting that not only total or permanent deprivations of property trigger due process concerns but also that types of deprivation permitted by attachment are always significant, requiring procedural due process protection).

309. *See McLaughlin*, 170 F.3d at 582–83 (discussing differences in *Doehr* and *McLaughlin*, including Tennessee's "adequate bond protection"). *But see Doehr*, 501 U.S. at 22 (White, J., plurality opinion) (stating the argument that a bond renders other protection unnecessary is "unconvincing . . . [because] it ignores certain harms that bonds could not undo" which protections like a pre-attachment hearing would prevent).

310. *McLaughlin*, 170 F.3d at 581, n.3 (distinguishing *Di-Chem* and *McLaughlin* because *Di-Chem* had "*none* of the saving characteristics of the [*Mitchell*] statute," while Tennessee's statute imposed a bond requirement) (quoting N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975)).

311. *Id.* at 582. *But see Doehr*, 501 U.S. at 10–11 (promulgating the analysis to be used in all procedural due process challenges to attachment statutes).

made much of the fact that *Doehr* dealt with the attachment of a home while *McLaughlin* dealt with cash.[312] These basic failures to comprehend the effect of existing Supreme Court precedents, particularly *Doehr*, are unjustifiable, as is the Sixth Circuit's conclusion that Tenn. Code Ann. § 29-6-101 *et seq*. comports with procedural due process requirements.

The *McLaughlin* reasoning shows a staggering failure to grasp the import of the *Sniadach* line of cases and the effect of *Doehr* on procedural due process analysis in prejudgment attachment cases. The "*Mitchell* rationale" cited by the Sixth Circuit in *McLaughlin* bears not even a passing resemblance to later interpretations of *Mitchell* by the Supreme Court. In *Mitchell*, the Supreme Court treated several factors as particularly significant in concluding that the Louisiana sequestration statute provided sufficient procedural due process: the preexisting ownership interest of the vendor in the property sequestered; the nature of the showing required before the vendor could sequester the property, which focused on documentary proof of debt, lien, and default and required judicial involvement; the interests of vendors with respect to their security interest in items purchased on credit and heightened threat to those interests because subsequent property transfer by the debtor would invalidate the lien; and the availability of a prompt post-attachment hearing without the need for the defendant to post a bond to plead.[313] However, the Sixth Circuit did not concentrate on these factors in concluding that *Mitchell* controlled the *McLaughlin* case. While it made reference to the *Mitchell* argument that sequestration is specifically intended to resolve "*conflicting* claims to property,"[314] the Sixth Circuit failed to note that in *McLaughlin* there were no such conflicting claims to the

312. *See McLaughlin*, 170 F.3d at 582 (distinguishing *Doehr* from the facts of *McLaughlin* in part because "[t]he amount involved was very substantial [and] the defendant's *home*, unrelated to the nature of plaintiff's claim, was encumbered"). *But see, e.g.*, *Di-Chem*, 419 U.S. at 608 (rejecting an attempt to distinguish a commercial garnishment from a household goods seizure in *Fuentes*, the Supreme Court noted it was "no more inclined now than . . . in the past to distinguish among different kinds of property in applying the Due Process Clause"). *Doehr*'s statement regarding the universality of due process requirements in state attachment procedures further condemns the Sixth Circuit's § 1983 analysis. *See also supra* note 291 and accompanying text (assessing the invalidity of *McLaughlin*'s § 1983 analysis).

313. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 605–10 (1974).

314. *McLaughlin*, 170 F.3d at 581 (emphasis added).

property attached nor was there a preexisting interest in the property on the part of Weathers. The court incorrectly concluded that the relevant factors of *Mitchell* were the bond provided by the creditor seeking attachment, the requirement of an affidavit, and a prompt post-dissolution hearing.[315] Rather than a *Mitchell*-type focus on the nature of the claim sought to be proved and whether it was generally accompanied by documentation to reduce the risk of deprivation, the Sixth Circuit focused on the requirement that "the creditor . . . set out with specificity the 'nature of the claim . . . shown by a verified petition or affidavit.'"[316] *Doehr* rejected the idea that a court could make a reasonable determination of how likely the suit was to succeed based on a one-sided affidavit regarding a tort claim, such as the one in *McLaughlin*.[317] While the Supreme Court in *Mitchell* did discuss bond requirements as a safeguard against erroneous deprivation, the Supreme Court in *Doehr* made clear that it was only one factor in conjunction with others reducing the risk of erroneous deprivation.[318] *Doehr* featured a four-justice plurality arguing in favor of a bond requirement in all prejudgment attachment cases to protect the interests of the defendant but cautioned that concluding a bond could "excuse[] the need for a hearing or other safeguards altogether" was "unconvincing . . . for [that conclusion] ignores certain harms that bonds could not undo but that hearings would prevent."[319]

The Sixth Circuit elided entirely the factors, which formed the bulk of the *Mitchell* decision, stating only that the Supreme Court "acknowledged, but minimized, the risk that a writ might be 'wrongfully issued by a judge' in light of statutory protections."[320] The specific nature of those statutory protections, particularly the standard of proof and issues to be proved prior to receiving a sequestration writ, was perhaps the most significant of the factors examined by the Su-

315. *Id.*

316. *Id.* (quoting *Mitchell*, 416 U.S. at 605). *But see Doehr*, 501 U.S. at 13–14 (noting that a judge reviewing a conclusory, self-interested affidavit and complaint alleging assault could not make a reasonable determination of the likelihood of the suit's success, as the cause of action did not lend itself to documentary proof of the allegations).

317. *Doehr*, 501 U.S. at 13–14.

318. *Id.* at 22–23 (White, J., plurality opinion).

319. *Id.* at 22.

320. *McLaughlin*, 170 F.3d at 581 (quoting *Mitchell*, 416 U.S. at 609–610).

preme Court in *Mitchell*.[321] This misconception of the *Mitchell* holding forms the bulk of the Sixth Circuit's reasoning regarding the Tennessee statute in *McLaughlin*.

The Sixth Circuit further found that *Mitchell* treated as adverse the failure of the party whose property was sequestered to make use of provided state remedies.[322] The Supreme Court in *Mitchell* said only that the argument regarding the severity of deprivation advanced by the defendant could not bear much weight where he had failed to take advantage of a prompt post-termination hearing.[323] However, failure to take advantage of state remedies, contrary to the *McLaughlin* position, does not waive a claim that the challenged procedure fails to afford sufficient due process protection.[324]

The cases underlying this so-called "*Mitchell* rationale" deal with takings by the government where a pressing public welfare or safety concern can only be redressed by prompt seizure. The Sixth Circuit cited irrelevant factual distinctions between *McLaughlin* and *Doehr* to conclude that the *Doehr* analysis was not required in assessing the Tennessee statute's procedural due process protection when application of the *Doehr* balancing test is mandated in every procedural due process challenge to a prejudgment attachment statute. Ignoring the analysis mandated in *Doehr* for all statutes, which allows one private party to involve the state in depriving another private party of its property by procedures like attachment, the Sixth Circuit in *McLaughlin* felt the facts were distinguishable from *Doehr* and relied totally on *Mitchell*.[325] While the Supreme Court in *Doehr* noted that all property interests affected by attachment are significant, the Sixth Circuit attempted to distinguish *McLaughlin* because the amount of the lien and the property attached in *Doehr* were more

321. *Mitchell*, 416 U.S. at 617–18.

322. *McLaughlin*, 170 F.3d at 581.

323. *Mitchell*, 416 U.S. at 610.

324. *Compare McLaughlin*, 170 F.3d at 581–82 (indicating that a failure to use the provided state remedies was adverse to a claim that the attachment procedure denies due process and to the underlying § 1983 action), *with Doehr*, 501 U.S. at 7–8 (noting a failure to use the provided state remedies was not considered germane to an assessment of the due process protection afforded by an attachment statute).

325. *See McLaughlin*, 170 F.3d at 582.

substantial.[326] Other factors cited by the Sixth Circuit to distinguish *McLaughlin* from *Doehr* better serve to distinguish it from *Mitchell*, such as the standard of proof; the non-creditor, non-contractual relationship between the parties; and the minimal affidavit requirements of the challenged statute in *Doehr*.

The Sixth Circuit's wrongheaded approach to the *Sniadach* line of cases is also apparent from its unsupported and misguided conclusions that McLaughlin was not entitled to relief under § 1983 and that dissolution of the attachment was all that was required to undo the deprivation of attachment. While a detailed analysis of the § 1983 cause of action is outside the scope of this Article, the Sixth Circuit's apparent confusion on the relevant standards in that related area of inquiry sheds some light on its similar confusion about the due process analysis applicable in prejudgment attachment challenges after *Doehr*.[327] The Sixth Circuit relied primarily upon the case of *Parratt v. Taylor* in dismissing the *McLaughlin* § 1983 claims.[328] However, the *Parratt* requirement that statutory remedies be exhausted prior to a federal challenge applies only when the challenge is to a deviation from statutory procedures.[329] When, as in *McLaughlin*, the challenge is to the facial application of a statute, not an unauthorized taking by a state actor, *Parratt* is inapposite.[330] In further support of its misplaced *Parratt* analysis, the Sixth Circuit went on to state that *Hudson v. Palmer*, which affirmed *Parratt*, involved "an intentional deprivation of a constitutional right."[331] In fact, *Hudson* held that no

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326. *Compare Doehr*, 501 U.S. at 11–12 (stating types of property affected by attachment and not just the property interest attached in the instant case, are significant), *with McLaughlin*, 170 F.3d at 582 (minimizing the importance of the property interests of McLaughlin and Catz attached by Weathers).

327. *See supra* text accompanying note 291 (discussing authority establishing that due process challenges in the *Sniadach* line of cases infer an appropriate basis for § 1983 challenges of similar statutes on due process grounds).

328. *McLaughlin*, 170 F.3d at 582 (discussing Parratt v. Taylor, 451 U.S. 527 (1981)).

329. *See* Logan v Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982) (distinguishing *Parratt* as applicable to "random and unauthorized act[s] by a state employee," as opposed to the deprivation of a property interest through "the state system itself" (quoting *Parratt*, 451 U.S. at 541)).

330. *Id.* at 436.

331. *McLaughlin*, 170 F.3d at 582 (discussing Hudson v. Palmer, 468 U.S. 517, 536 (1984)).

deprivation of a constitutional right took place—because the state provided appropriate remedies to rectify a *negligent or unauthorized* taking by its employee.[332] The rationale behind dismissing the § 1983 claim, then, is as weak as the constitutional analysis of the case, often totally misreading the underlying case law to read the opposite of what it states.

Both of these assertions, as well as the failure to apply the mandated *Doehr* balancing test, reflect the Sixth Circuit's fundamental failure to comprehend well-developed lines of Supreme Court authority regarding procedural due process and prejudgment remedies. Because the Sixth Circuit elected to ignore the indisputable requirements of existing Supreme Court precedent in interpreting the constitutionality of Tenn. Code Ann. § 29-6-101 *et seq*., its *McLaughlin* holding and conclusions are entirely without merit. By unaccountably rejecting a party's clear right to challenge the Tennessee prejudgment attachment statute under § 1983, the *McLaughlin* opinion is likely to deter future litigants from making federal challenges to the constitutional deficiencies of Tenn. Code Ann. § 29-6-101 *et seq*.

Had the Sixth Circuit conducted the required *Doehr* balancing of the interests in *McLaughlin*, Tenn. Code Ann. § 29-6-101 *et seq*. could not have survived the procedural due process challenge. Contrary to the Sixth Circuit's reasoning, the type of property involved does not vary the substantial nature of the interests impaired by attachment.[333] For purposes of procedural due process protection, McLaughlin's interest in the funds held by the clerk was equally as significant as Doehr's interest in his home.[334] The risk of erroneous deprivation presented by the Tennessee statute is enormous, and the "just cause" basis for a grant of attachment in Tennessee shares the

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332. *Hudson*, 468 U.S. at 534–35.

333. *See* Connecticut v. Doehr, 501 U.S. 1, 11–12 (1991). "[T]he property interests that attachment affects are significant . . . . [E]ven the temporary or partial impairments to property rights that attachments . . . entail are sufficient to merit due process protection. *Without doubt, state procedures for creating and enforcing attachments . . .* '*are subject to the strictures of due process*.'" *Id.* (emphasis added) (quoting Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 85 (1988); *see also supra* note 309 and accompanying text (discussing due process protection in temporary takings and the *McLaughlin* Court's attempts to distinguish *Doehr*).

334. *See supra* note 312 and accompanying text (discussing the inappropriate nature of distinctions between types of property in determining whether due process protection attaches to their deprivation).

precise deficiencies that the Supreme Court found so troubling in *Doehr*.

The risk of erroneous deprivation from use of the ex parte attachment procedure decreases when the matters to be proved are simple issues that, in most cases, can be established by documentary proof.[335] In *Doehr*, the Supreme Court roundly condemned Connecticut's attachment procedure because the sparse affidavit centered on averments of "probable cause" that the plaintiff would eventually succeed in the underlying lawsuit.[336] Because the Connecticut general attachment procedure, like Tennessee's, did not limit the types of claims in which attachment was granted, plaintiffs could obtain attachment in tort actions while claiming their own untested assertions in pleading as probable cause of success.[337] *Doehr* stands for the proposition that a judge cannot make reasonable determinations as to the likely outcome of a suit based on such one-sided presentations of tort claims.[338]

Tennessee's "just cause" standard has no feature distinguishing it from the Connecticut "probable cause" standard that reduces this well-established, significant risk of erroneous deprivation. First of all, the attachment claim should have been rejected as a collateral attack on a prior judgment. Weathers did not file for attachment until after his failed attempt to have the agreed upon judgment and settlement in *Weathers I* set aside.[339] The filing of the attachment in *Weathers II* was possibly in response to the defendants' allegations in *Weathers I* that the plaintiff's motion to set aside the judgment effectively sought an attachment without complying with Tenn. Code Ann. § 29-6-101.[340] In that regard, and inasmuch as some of the un-

335. *See Doehr*, 501 U.S. at 14 (comparing Connecticut's inadequate "probable cause" standard to permit ex parte attachment with the Louisiana statute upheld in *Mitchell* requiring simple factual determination of debt, default, and liens).

336. *See id.* at 13–14.

337. *See supra* note 138 and accompanying text (discussing disfavor for the use of attachment where matters asserted require complex factual determinations and are generally unsupported by documentary proof).

338. *See supra* notes 317–19 and accompanying text.

339. *See* Attachment Affidavit, *supra* note 282, at 3–4 (citing damages due in the second action, which were part of damages alleged in the first action).

340. *See* Response of Defendant McLaughlin to *Pro Se* Motion of Plaintiff, at 2, *Weathers I*, *supra* note 275, No. 96C-527 (Davidson Cty. Tenn. Cir. Ct. Oct. 4, 1996).

derlying claims and damages had already been unsuccessfully raised in *Weathers I*, the *Weathers II* attachment appears to be a collateral attack on the judgment challenged and affirmed in *Weathers I*. The cited bases for the unsuccessful motion to set aside the judgment in *Weathers I* are functionally indistinguishable from the bases cited in the affidavit supporting the writ of attachment claiming absconding and concealment by McLaughlin.[341] Even leaving aside this collateral attack, the trial judge could not have made a reasonable determination of the justness of Weathers's claims of assault, defamation, or abuse of process from the materials provided in support of his application.[342] In fact, the trial court judge who granted the attachment in *McLaughlin* determined on his own initiative ten weeks later that he had "improvidently granted" the application.[343] Even though the judge was familiar with the acrimonious nature of the long-standing and previously litigated dispute between the *McLaughlin* parties, he still wrongfully granted attachment. As the *Doehr* Court made clear, a trial court presented with an unknown plaintiff's affidavit alleging just cause for a tort claim of damages could no more make a reasonable determination of whether "just cause" existed for the underlying claim than it could for "probable cause" of that claim's success.[344] No procedural safeguard offered by Tenn. Code Ann. § 29-6-101 *et*

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341. *Compare* Affidavit and Argument in Support of Motion of Charles H. Weathers, at 2–4, *Weathers I*, *supra* note 275, No. 96C-527 (Davidson Cty. Tenn. Cir. Ct. Sept. 9, 1996) [hereinafter Motion to Set Aside Judgment-Affidavit], *with* Attachment Affidavit, *supra* note 282, at 1–4 (stating the bases for the unsuccessful motion to set aside the judgment and requesting funds to be paid to the clerk are functionally indistinguishable from the bases cited in the affidavit supporting the writ of attachment as support for the claims of absconding and concealing by the defendants).

342. *See* Connecticut v. Doehr, 501 U.S. 1, 14 (1991) (plurality opinion) (discussing the "self-evident" truth that an affidavit alleging probable cause and a complaint alleging tort claims do not permit a judge to reasonably determine the likelihood of a suit's success).

343. McLaughlin v. Weathers, 170 F.3d 577, 579 (6th Cir. 1999) (noting the court's admission that the writ of attachment was "improvidently granted"); *see also supra* notes 317–19 and accompanying text (discussing the *Doehr* "reasonable determination" standard).

344. *See supra* text accompanying note 317 (discussing the "self-evident" truth that a judge under such circumstances cannot make a reasonable determination of a suit's outcome).

seq. sufficiently protects against this unjustifiable risk of erroneous deprivation.

While even a substantial risk of erroneous deprivation may be counterbalanced by adequate statutory safeguards, Tennessee's pre-judgment attachment statute does not contain sufficient safeguards to lessen its long-recognized substantial risk. This substantial risk was recognized from the early 1800s on by the Tennessee courts.[345] Strict compliance with procedural forms of language in the issuance of writs generally—the safeguard relied upon by early Tennessee courts to mitigate this risk—has been systemically supplanted by the notice pleading standard adopted by the Tennessee Rules of Civil Procedure.[346] Even if strict forms of technical pleading were still *en vogue*, they are not the type of risk-reduction factors that can prevent the erroneous deprivation of the attached party's property.

In *Doehr*, the Supreme Court rejected the idea that a post-attachment hearing, even if prompt, or the opportunity to sue for damages for wrongful attachment are sufficient to prevent erroneous deprivations or undo their effect.[347] Because post-taking review cannot undo an initial wrongful deprivation, Tennessee's post-taking review is not an appropriate risk reduction factor. *Doehr* discussed a *prompt* post-taking review.[348] Tennessee's statute does not guarantee a separate post-attachment hearing, although a party with sufficient funds can replevy its property prior to judgment on the underlying action by posting a bond.[349] If the defendants cannot replevy, they can still appear to plead and defend but cannot recover their property.[350] Comparing the Connecticut statute with the Louisiana statute upheld in *Mitchell*, the *Doehr* Court noted that in *Mitchell* the protections reducing the risk of erroneous deprivation were: the lien-based nature of the vendor's claim; the reduced risk presented by a debt-based ac-

345. *See, e.g.*, Welch v. Robinson, 29 Tenn. (10 Hum.) 264, 265 (1849).

346. *See* TENN. R. CIV. P. 8.05 (abolishing technical forms of pleading requirements in Tennessee); *see also Welch*, 29 Tenn. at 264 (discussing the risk of abuse if forms of technical pleadings are not observed in granting attachment).

347. *See Doehr*, 501 U.S. at 15; *see also supra* notes 254–259 and accompanying text (discussing the insufficiency of a post-attachment hearing or remedy to undo the initial wrongfulness of an erroneous taking).

348. *Doehr*, 501 U.S. at 15.

349. *See* TENN. CODE ANN. § 29-6-149 (2012).

350. *See* TENN. CODE ANN. § 29-6-148 (2012).

tion subject to documentary proof; and the bond requirement.[351] Tennessee's statute has only one protective feature in common with those in *Mitchell*: the bond requirement.[352] Tennessee's statute is not limited to where a party has a vendor's lien, nor does its standard focus on the type of simple, documented, factual circumstances required by the statute in *Mitchell*. However, even the Justices who wrote the *Doehr* plurality, considering whether a bond is a necessary requisite of procedural due process, stated that a bond requirement alone is not sufficient to protect against a substantial risk of erroneous deprivation.[353] Sadly, the *McLaughlin* court chose to disregard this, citing the *Doehr* plurality opinion's emphasis on the importance of a bond requirement while ignoring its emphatic caution that a bond alone is not a sufficient procedural safeguard.[354] With no legitimate factors reducing the risk of erroneous deprivation other than the bond requirement, the substantial risk of such wrongful deprivation of significant property interests under Tenn. Code Ann. § 29-6-101 *et seq*. is considerable.

In a *Doehr* procedural due process analysis, a substantial risk of erroneous deprivation of significant property interests is weighed against the interests a party seeking attachment may have in obtaining the remedy. A party's interest in receiving the prejudgment remedy is minimal if grounded solely in its desire to have funds available to satisfy a judgment.[355] Some other factor heightening the interest in receiving the procedure must be present before the party seeking attachment can be said to have a substantial interest in the procedure's availability; these factors include a present interest in property connected to the underlying litigation or exigent circumstances like a party's fraudulent disposal of property to defraud creditors.[356] Ten-

351. *Doehr*, 501 U.S. at 12–15.

352. *See* TENN. CODE ANN. § 29-6-115 (2012).

353. *See Doehr*, 501 U.S. at 22 (White, J., plurality opinion).

354. *See supra* note 309 and accompanying text (discussing the *Doehr* plurality on whether a bond is a requisite element of procedural due process in attachment).

355. *See Doehr*, 501 U.S. at 16 (stating that the plaintiff's sole interest in having a source of property to satisfy a potential future judgment was "too minimal" to outweigh the risk of erroneous deprivation).

356. *See id.* at 12 (discussing cases where a heightened interest in the attached property existed at the time of attachment).

nessee's prejudgment attachment statute is largely premised on allowing parties to obtain jurisdiction in a cause of action by attachment.[357] Obtaining jurisdiction alone is not a valid exigent circumstance, particularly where other means to obtain jurisdiction are available.[358] A party seeking attachment in Tennessee is not required to have a preexisting interest in the property attached, nor is the use of the procedure limited to situations where the plaintiff has a heightened interest above the bare desire to satisfy a judgment.[359] In *McLaughlin*, Weathers had no present interest in the attached funds. It is arguable if Weathers had any preexisting interest in the funds at all. While the court rendered judgment against Weathers personally, his insurer paid the funds deposited with the court clerk.[360] Despite claiming attachment under an exigent circumstances basis, his affidavit failed to establish any legitimate heightened interest warranting attachment. Weathers claimed that parties represented by counsel and amenable to service of process were themselves absconding, as well as absconding with property still held by the clerk of court.[361] It is difficult to conclude that defendants have absconded or concealed their persons when they are represented by counsel and available for service of process, as in *McLaughlin*. It is similarly difficult to claim that they have absconded or are absconding with property relevant to the plaintiff's interest when the property attached is still in the hands of the clerk. Weathers's posted bond, contrary to the statute's explicit requirements, did not include an amount over the value of the prop-

357. *See* TENN. CODE ANN. § 29-6-110 (1932) (describing attachments under TENN. CODE ANN. § 29-6-101 *et. seq.* as "suits by original attachment," in the section titled "Jurisdiction" of courts); *see also supra* text accompanying note 70 (discussing how the clerk of court is limited when issuing attachments because the statute provides for the clerk to issue attachment only as original process).

358. *See supra* Section III.B.4 (discussing *Shaffer v. Heitner,* 433 U.S. 186 (1977)).

359. *See* TENN. CODE ANN. § 29-6-101 (2012) (listing bases for attachment in Tennessee). Only the grounds of secretive removal or fraudulent disposal of property represent true exigent circumstances heightening the interest in the procedure's availability; the remainder are jurisdictional, not exigent.

360. *See* Motion to Set Aside Judgment-Affidavit, *supra* note 341, at 1–2 (stating that State Farm Insurance Company paid the funds owed on settlement sought to be set aside and identifying State Farm as the source of funds paid to the clerk).

361. *See supra* note 284 and accompanying text.

erty to cover costs or damages incurred by the defendants. Weathers's interest in receiving the attachment was only the minimally significant interest in having funds available to satisfy a potential future judgment, which cannot outweigh the substantial risk of erroneous deprivation posed by the Tennessee prejudgment attachment procedure.[362]

While the party seeking attachment has the primary interest to be considered against risk of deprivation, the government does have ancillary concerns regarding the desirability of providing the procedure or the burden of adding safeguards.[363] Even a substantial risk of erroneous deprivation may be offset by the need to promptly protect an important government or public interest by ex parte seizure.[364] Absent such public interest concerns, which are generally not present in prejudgment remedy situations, the government's interest in providing such a remedy cannot outweigh a party's interest in receiving it.[365] Since Weathers's interest in receiving an attachment merely to guarantee funds to pay a judgment was minimal, and no other public interest was affected, the government's interest in providing the procedure was likewise minimal. The vast majority of the bases for attachment under the Tennessee statute do not represent circumstances that heighten the need for prompt action to secure an important government or public interest.[366] Likewise, Tennessee's interest in avoiding the additional safeguard of a pre-deprivation hearing is not substantial where it already provides a post-attachment hearing conditioned on posting bond.[367] Because no heightened party or gov-

362. *Compare* TENN. CODE ANN. § 29-6-116 (2012) (requiring the amount of the bond to exceed the value of property attached to provide for potential damages and costs if the attachment was wrongfully issued), *with* McLaughlin v. Weathers, 170 F.3d 577, 578–79 (6th Cir. 1999) (stating that the amount of the bond posted by Weathers should be equal to the amount of the attachment sought).

363. *See* Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (discussing the balance of interests in assessing procedural due process challenges to prejudgment attachment statutes).

364. *Id.*

365. *Id.* at 16. ("The State's substantive interest in protecting any rights of the plaintiff cannot be any more weighty than those rights themselves.")

366. *See supra* text accompanying note 179 (discussing the jurisdictional nature of attachment under TENN. CODE ANN. § 29-6-101 *et seq*.).

367. *See Doehr*, 501 U.S. at 16 (dismissing the state's argument that providing a pre-deprivation hearing was burdensome where it purported to offer a prompt

ernment interest offsets the substantial risk of deprivation posed by Tenn. Code Ann. § 29-6-101 *et seq*., the statute cannot be said to provide sufficient procedural due process to the party whose significant property interests may be erroneously taken through use of the statute's procedures. Examining further permutations of the Tennessee statute's application throws its questionable constitutionality into even sharper relief.

V. PREJUDGMENT PROCEDURES: ASSESSING THE RISKS OF TENN. CODE ANN. § 29-6-101 *ET SEQ*.

As the preceding discussion of *McLaughlin* illustrates, Tenn. Code Ann. § 29-6-101 *et seq*. presents pitfalls in the pursuit of procedural due process under the United States Constitution. As illustrated by the following hypotheticals, some further issues with the statute on its face emerge upon examination of specific provisions, while others inhere to all or most attachments under the title. A further examination of these hypotheticals under the *Doehr* balancing analysis reveals serious flaws in the *McLaughlin* holding that Tenn. Code Ann. § 29-6-101 *et seq*. comports with procedural due process facially and as applied.

Consider the hypothetical case of *Astor v. Bartleby*. Astor, a Tennessee resident, sues Bartleby, also a Tennessee resident, for trespass. Astor's attorney has discovered that Bartleby has a small account at a Tennessee bank. Bartleby has said several times that he prefers not to live in Tennessee and may move to Kentucky. (The fictional Bartleby "preferred not to" do anything to the point of practical paralysis and was arrested and jailed when he would not leave his former employer's office after he had been fired.)[368] Along with preparing the underlying lawsuit, Astor's attorney prepares a motion for a writ of prejudgment attachment with affidavits asserting that Bartleby is preparing to leave the state. Finding that no judge is available, the attorney petitions the clerk of court to grant the attachment for the $1,000 in damages claimed in the suit. Astor's attorney

post-deprivation hearing). Tennessee's post-attachment hearing process is not necessarily prompt, unless the party attached seeks to replevy. *See supra* note 170 and accompanying text.

368. *See generally* HERMAN MELVILLE, BARTLEBY, THE SCRIVENER: A STORY OF WALL-STREET (1856).

signs a signature bond for $1,500, and the clerk issues the attachment. The lawsuit is dismissed after three months, releasing Bartleby's bank account.[369] Bartleby, now facing penalties on his car loan and credit cards for failure to pay while his funds were attached, seeks to recover damages out of Astor's bond. However, the trial judge does not award damages because he finds that the attachment was issued in accordance with the statute. Bartleby's attorney advises him that *McLaughlin v. Weathers* foreclosed his right to sue in federal court under § 1983 for the unconstitutional taking. Bartleby never attempted to leave the state.

Next, consider the case of *Edison v. Tesla*. Edison is a Tennessee resident and long-time rival of Tesla. Tesla has lived at the same address in Improve, Mississippi, since 1970. While obsessively Googling his rival, Edison noticed a property tax website showing that Tesla owns a small farm in Defeated, Tennessee. Thereafter, Edison files a frivolous suit against Tesla for slander[370] and requests an attachment on the Tennessee farm, citing Tesla's Mississippi resi-

369. Attachment and garnishment are both devices sometimes used as prejudgment remedies, and both require procedural due process protection. *See* Connecticut v. Doehr, 501 U.S. 1, 9 (1991) (addressing "the question of what [due] 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 [] prejudgment attachment or similar procedure" and providing an analytical framework for the assessment of all such cases). Unlike its prejudgment attachment statute, Tennessee's garnishment procedure was held unconstitutional on procedural due process grounds in the late twentieth century. *See generally* Mitchell v. Tennessee, 351 F. Supp. 846, 846–48 (W.D. Tenn. 1972); *see also supra* text accompanying note 142 (discussing the holding in *Mitchell v. Tennessee*).

370. Edison never sued Tesla in the "War of the Currents," the famous conflict between the inventors over direct and alternating current, although he did attempt to legislate Tesla's alternating current out of existence, backing down only after a threat of a conspiracy suit from Tesla's financial backer. *See* MARGARET CHENEY, TESLA: MAN OUT OF TIME 68 (2001). Tesla might well have had a cause of action for slander or libel against Edison, whose tactics in the "War" included a smear campaign involving public electrocution of animals to demonstrate the alleged danger of the technology Tesla was promoting. *Id.* at 69. One such dramatic spectacle—the electrocution of Topsy, a circus elephant who killed multiple abusive handlers—was committed to film in 1903. *See* ELECTROCUTING AN ELEPHANT (Edison Manufacturing Co. 1903).

dence as the basis.[371] The lien constitutes a default under Tesla's mortgage, requiring significant attorney's fees to correct. While the underlying suit is dismissed fairly quickly, the trial court does not award Tesla damages for the wrongful attachment because the attachment was properly issued in accordance with the statute.

Further, consider Linus Pauling,[372] a Tennessee resident who wants to file a products liability claim against Vit-C Corp., a manufacturer of vitamin supplements, in a Tennessee state court. While Vit-C employs no agent for service of process in the State of Tennessee, it holds as an investment a one-half interest in some undeveloped real property. With no intention to defraud its creditors, Vit-C has decided to sell its interest in the property. Pauling files a *pro se* lawsuit and an affidavit for a writ of attachment, averring only that his claim for damages in the amount of $5,000 is just and that Vit-C is a foreign corporation with no agent for service of process in the county where the property is located. When the intended buyers of Vit-C's interest in the property discover it is encumbered by an attachment, they withdraw their offer to buy-out Vit-C. Although Vit-C gets the suit dismissed and the trial judge orders Pauling's bond be forfeited for damages, Vit-C suffers more damage to its reputation than a $10,000 bond can repay.

Pauling could serve process on the Secretary of State if Vit-C was doing business in the State of Tennessee without having a registered agent for service of process in the state.[373] Given the broad meaning of "doing business" in this and related contexts, the Secretary of State could probably be construed as Vit-C's agent for service of process even if no Vit-C personnel, but only product, entered the

371. TENN. CODE ANN. § 29-6-101(1) (2012) (providing that attachment may be had "[w]here the debtor or defendant resides out of the state").

372. Linus Pauling, the only person to receive two unshared Nobel Prizes for work in different fields, had these achievements partially overshadowed by his failure in an area outside his particular expertise. Rather than his seminal work on molecular structure or the Nobel Peace Prize for his contribution to the success of the Nuclear Test Ban Treaty, Pauling is often remembered for championing the ultimately disproven theory that megadoses of Vitamin C can cure cancer. *See Linus Pauling Biography*, ACADEMY OF ACHIEVEMENT, http://www.achievement.org/achiever/linus-pauling/ (last updated May 7, 2018).

373. *See* TENN. CODE ANN. § 48-15-104(b) (2012).

state.[374] It is difficult to conceive of a situation in which a foreign corporation could both have property within Tennessee and be otherwise subject to the jurisdiction of Tennessee courts for the cause of action alleged, without the Secretary of State becoming its agent for service of process by operation of law when it failed to name an agent. However, it is theoretically possible that a judge could fail to notice this issue and grant an attachment anyway, particularly given the unusual averment requirements.

The averments made in the above hypothetical are the only ones required in the affidavit of a party seeking attachment against a foreign corporation with no agent for service of process in the state.[375] Although the attachment will lie only where no agent is present in the state, the plaintiff only has to swear that no agent is available in the county where the property is located.[376] This poorly drafted subsection was added to the bases for attachment in 1968 as part of a mass of changes and repeals within the Tennessee General Corporations Act.[377] Even if the Secretary of State's legal designation as substitute agent for corporations without an agent in the state who do business within it does not moot the statute, any plaintiff outside Davidson County, where the Secretary of State's office is located, could apparently aver that the corporation had no agent within the county where the property was located and properly obtain an attachment.

Finally, consider the "Wittgenstein's Poker" hypothetical. At a recent Nashville party, Wittgenstein, a Tennessee resident, began gesturing with a fireplace poker during a heated intellectual argument with Popper, another Tennessee resident. Popper asserts that Wittgenstein threatened him with the poker and threw it at him. Wittgenstein, a long-time resident of Nashville, travels extensively to teach courses in philosophy. He leaves to teach a month-long seminar at Harvard the day Popper files a lawsuit for assault. Despite a few attempts at various times of the day and night, the Davidson County sheriff's office cannot obtain personal service. After two and a half

374. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945) (discussing the presence of a corporation within the state for purposes of exercise of jurisdiction as function of its activity within a state and minimum contacts with it).

375. *See* TENN. CODE ANN. § 29-6-101(8) (2012).

376. *Id.*

377. *See* 1968 Tenn. Pub. Acts 385–89 (originally codified at TENN. CODE ANN. § 23-601 (1968)).

weeks,[378] the sheriff's office returns the process "not to be found in Davidson County." Popper's poor opinion of Wittgenstein has led his attorney to believe Wittgenstein is unreliable. Instead of spending money on a private process server, Popper's attorney uses the return of "not to be found" to obtain a judicial attachment on Wittgenstein's Nashville residence. Wittgenstein's mortgage provides that additional liens constitute an event of default. Due to conflicting eyewitness testimony, Popper is unsuccessful in his suit and the attachment is ultimately dissolved, but Wittgenstein's credit is damaged because of the mortgage default, which costs him considerable time and money to rectify.

Despite numerous eyewitnesses to the events underlying the legend, the widely held belief that twentieth-century philosopher Ludwig Wittgenstein threw a poker at young philosopher Karl Popper in the course of a Vienna Society meeting, or threatened him with one, has never been proven, being the subject of much conflicting testimony from those present.[379] Had the two great men taken to the Tennessee courts after their famous argument, Popper would only have had to assert that his claim was "just" and provide a copy of the return of service to apply for a writ of attachment against Wittgenstein's property after the return of "not to be found."[380] Further, the legend of Wittgenstein's poker, with its conflicting eyewitness versions, is an excellent example of the benefits of getting all sides of the story before concluding what the truth of a matter is, a truism that the Supreme Court often notes in assessing due process.

The hypotheticals discussed above share some features in common when analyzed under the *Doehr* framework of competing private and state interests and risk of erroneous deprivation. Even though some deprivations discussed could be categorized as temporary or partial, all four defendants were deprived of a significant property interest without notice or hearing. If a property interest can be attached, it is significant enough to trigger the procedural due pro-

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378. *See supra* note 57 and accompanying text (estimating the average return time for civil process in Davidson County as seventeen days).

379. *See generally* DAVID EDMONDS & JOHN EIDINOW, WITTGENSTEIN'S POKER: THE STORY OF A TEN-MINUTE ARGUMENT BETWEEN TWO GREAT PHILOSOPHERS (2001).

380. *See* TENN. CODE ANN. § 29-6-107(a) (2012).

cess analysis under *Doehr*.[381] The particular *type* of interest or *extent* of deprivation may heighten, but not lessen, its significance when assessed with the risk of erroneous deprivation and against the competing interest of the attaching party.[382]

The general risk of erroneous deprivation posed by Tenn. Code Ann. § 29-6-101 *et seq*. is universal to the hypothetical defendants, irrespective of the grounds on which their attachments were issued. The Tennessee "just cause" standard of pleading for obtaining attachment is one of its most serious flaws from a procedural due process standpoint.[383] The Supreme Court has favorably treated prejudgment remedy statutes that are limited to debtor-creditor disputes and require fact-based showings usually satisfied by documentary evidence.[384] By contrast, the Supreme Court treats broad and variable pleading standards, like "probable cause" for a tort claim, as inappropriate for prejudgment attachment because they encompass matters from which a judge cannot make a reasonable preliminary determination by examining only one party's affidavits and pleadings.[385] Tennessee's "just cause" standard is functionally indistinguishable from the "probable cause" standard already condemned by the Supreme Court in *Doehr* and seriously compromises the procedural due process protection offered by the Tennessee prejudgment attachment statute.

The practical likelihood of erroneous deprivation from routinely allowing prejudgment attachment based on allegations of "just cause" without any further required showing is a significant risk in each hypothetical discussed above. If "probable cause" is an inappropriate basis because the judicial determination will be based only on the plaintiff's self-serving version of events,[386] "just cause" is

381. *See* Connecticut v. Doehr, 501 U.S. 1, 10–11 (1991).

382. *See id.*; *see also supra* text accompanying note 326 (comparing property interests in *Doehr* and *McLaughlin*).

383. *See* TENN. CODE ANN. § 29-6-113 (2010) (requiring an affidavit by the plaintiff, agent, or attorney swearing that the debt or demand is "just," or in the case of attachment on a tort claim, that "damages sued for are justly due the plaintiff"); *see also supra* note 317 and accompanying text (discussing the *Doehr* "reasonable determination" standard).

384. *See, e.g.*, *Doehr*, 501 U.S. at 16–17.

385. *See, e.g.*, *id.* at 20–21.

386. *Id.* at 13–14.

equally inappropriate. All the hypotheticals involve different types of torts, to wit: assault, slander, trespass, and products liability. The probable existence of a debt and default is much easier to determine from an initial showing than the probable recovery of unliquidated damages for a tort, because debt-related matters can be demonstrated by reference to documents such as loan agreements and payment histories. The Supreme Court has already discussed that a high likelihood of error exists where prejudgment attachment issues based on an affidavit alleging probable cause and a complaint of assault, as in the Wittgenstein hypothetical.[387] Likewise, Astor's trespass claim, Pauling's products liability claim, and Edison's slander allegation are all tort allegations. The *McLaughlin* court granted attachment in a lawsuit alleging assault, defamation, and abuse of process along with a debt.[388] In each of our hypotheticals, the plaintiffs obtained attachments on their word alone, swearing their claims were just. All but Edison likely believed their own averments, but none prevailed at trial. The clerk and judge in these hypotheticals did not and could not accurately assess the outcome of these tort actions from the plaintiff's filings with enough certainty to adequately reduce the risk of erroneous deprivation, illustrating the danger of a broad "just cause" standard in tort-based prejudgment attachment.

The safeguards provided by the statute for the parties whose property is attached are likewise uniform across examples—uniformly inadequate. A plaintiff is required to post a bond to protect a defendant against costs and damages from a wrongful attachment,[389] but a bond alone is not sufficient to protect against wrongful deprivation. The bond required may be insufficient to cover eventual costs and damages even if the writ of attachment is issued in accordance with the statute, and judges are not required to award costs and damages even if a defendant prevails. Further, defendants are not guaranteed a prompt post-deprivation hearing, only an eventual trial

387. *Id.* at 14 ("[T]he issue [of alleged assault] does not concern 'ordinarily uncomplicated matters that lend themselves to documentary proof.'" (quoting Mitchell v. W.T. Grant Co., 416 U.S. 600, 609 (1974))).

388. *See* Amended Complaint, *supra* note 281, at 1–6.

389. *See* TENN. CODE ANN. §§ 29-6-115–116 (2012) (requiring and specifying considerations for setting the amount of the plaintiff's bond required to obtain attachment).

in the underlying lawsuit.[390] While the statute mandates a stay of final judgment in certain circumstances,[391] it fails to protect the interests of many defendants who are subject to attachment under the statute. A statute that provides only a bond for the protection of parties who may be deprived of significant property interests without notice or hearing does not provide sufficient safeguards for the interests of those parties attached.

The interests of the various plaintiffs in the hypotheticals are almost identical for purposes of the *Doehr* analysis. In each case, the plaintiff's only cognizable interest is in having the property of the defendant available to satisfy a prospective judgment. Without more, the interest in having funds available to satisfy a potential future judgment is insufficient to outweigh a defendant's substantial property interest and a high risk of erroneous deprivation through the use of the attachment procedure. While the Supreme Court has not specifically addressed the question of the motives of the party seeking an attachment, from a practical standpoint it is important that plaintiffs seeking attachment may not always do so for appropriate reasons, especially where the statute is broad. In *Fuentes*, a plaintiff used the replevin statute to harass his ex-wife during a custody dispute.[392] In *McLaughlin*, the attachment could be viewed as a collateral attack on the prior judgment, given the contentious history of the parties and the litigation. The Tennessee courts recognized early on that its ex parte attachment procedure was "liable to great abuse," requiring a narrow construction of the original statute as a result.[393] A preexisting interest in or claim to the specific property attached heightens the interest of a plaintiff in receiving the attachment procedure, but the hypothetical plaintiffs have no such heightened interest. None of our

390. Tennessee requires that the plaintiff's bond be conditioned upon prosecuting the suit, but the statute does not provide for a separate, prompt post-termination hearing, only that a trial on the merits eventually be had. *See id.* § 29-6-115.

391. If a defendant fails to appear in a suit conditioned on original attachment in General Sessions, final judgment must be stayed for six to twelve months. TENN. CODE ANN. § 29-6-160(a) (2012). The stay is optional for failure to appear in similar suits in Circuit or Chancery Court. *Id.* A stay of execution of the judgment is also required whenever the attachment is conditioned on non-residence, although the stay may be waived for good cause. *Id.* § 29-6-160(b).

392. *See* Fuentes v. Shevin, 407 U.S. 67, 69–72 (1972).

393. Welch v. Robinson, 29 Tenn. (10 Hum.) 264, 265 (1849).

hypothetical plaintiffs had any interest in the property they attached, nor was the property connected with the subject matter of their underlying lawsuits. The jurisdictional grounds for attachment used by the hypothetical plaintiffs do not represent exigent circumstances heightening their interest in receiving the attachment. Correspondingly, the state's interest in providing the attachment is also low, no greater than the plaintiffs' minimal interest in receiving it.[394] Further, a predeprivation hearing requirement would not substantially burden the state.

The general features of this Tennessee statute subject defendants' substantial property interests to a high risk of erroneous deprivation, without a sufficient enough competing interest of plaintiffs or the government to justify the suspect procedures used. The preceding hypotheticals illustrate specific features of the statutory scheme that further heighten the risk of erroneous deprivation. Astor received his writ of attachment from the clerk of court, an official even less likely than a learned trial judge to make a reasonable preliminary assessment of legal issues and a suit's chances of success. Because the attachment was not wrongful, even though the underlying suit was unsuccessful and, in fact, frivolous, Tesla was not made whole for his damages, despite Edison's bond. The Tennessee prejudgment attachment statute requires that a plaintiff who is unsuccessful pay any court costs adjudged against a defendant.[395] However, a plaintiff is only required to pay damages accruing to a defendant if the attachment is wrongful.[396] A plaintiff may thus effect an erroneous deprivation of a defendant's property and, barring his wrongdoing, not make a defendant whole for damages arising from the deprivation. Such circumstances illustrate one basis for the reluctance of the Supreme Court to hold that the limited protection afforded by a bond is a sufficient substitute for other protective procedures, such as exigency requirements or prompt post-deprivation hearings.[397]

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394. *See* Connecticut v. Doehr, 501 U.S. 1, 16 (1991) (noting that a state's interest in providing an attachment procedure cannot be greater than a plaintiff's interest in receiving it).

395. TENN. CODE ANN. § 29-6-115 (2012).

396. *Id.*

397. *See Doehr*, 501 U.S. at 22–23 (White, J. plurality opinion); *see also supra* text accompanying note 268 (discussing the importance of a bond along with

Likewise, Vit-C suffered losses that Pauling's posted bond could not undo. In considering whether a bond could obviate the need for other protective procedures, the Supreme Court in *Doehr* affirmatively found that it could not.[398] The harm inflicted for which a bond might eventually provide a source of reimbursement could often be prevented by a prior or prompt post-deprivation hearing.[399] The harm from damages incurred by attachment tends to grow greater with time, and where prompt hearing is not provided, years may elapse between a grant of attachment and a trial on the merits.[400] The amount of the bond, too, may be insufficient to make up the damages suffered, even if damages can be awarded that compensate for the various inconveniences and harms a debtor who has been attached may suffer.[401]

Wittgenstein's attachment was based on a procedure whose modern reality in no way resembles the presumptions that once justified its use. None of these hapless hypothetical defendants even received a prompt post-judgment hearing but were forced to wait until the time of trial to be heard by the court about the taking of their property. When these applications of the statute are factored into the analysis, Tennessee's antiquated and unconstitutional prejudgment attachment procedure is assuredly unconstitutional under any properly conducted modern procedural due process analysis, contrary to the holding in *McLaughlin*. As the federal court failed abysmally in assessing the constitutionality of Tenn. Code Ann. § 29-6-101 *et seq*., it falls to the Tennessee courts and legislature to ensure that Tennessee citizens are no longer wrongfully and summarily deprived of their property under this anachronistic eighteenth-century statute.

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the need for protective measures in addition to a bond to guard against the risk of erroneous deprivation).

398. *See Doehr*, 501 U.S. at 22–23 (White, J. plurality opinion).

399. *Id.* at 22.

400. *Id.* at 22–23.

401. *Id.* at 23.

VI. A CALL FOR SOLUTIONS: LEGISLATIVE AND JUDICIAL RESPONSES TO DUE PROCESS CONCERNS REGARDING TENN. CODE ANN. § 29-6-101 *ET SEQ*.

When viewed historically and in light of modern decisions, Tenn. Code Ann. § 29-6-101 *et seq*. does not satisfy Fourteenth Amendment procedural due process requirements. As the foregoing illustrates, any discussion of the statutory scheme requires familiarity not only with the recent due process cases interpreting prejudgment remedies but also with the historical development of the statute and the legal and practical assumptions of an earlier era. The statute is in dire need of revision if it is to comport with modern due process.

The bases for attachment are enumerated in Tenn. Code Ann. § 29-6-101, as follows:

> Any person having a debt or demand due at the commencement of an action, or a plaintiff after action for any cause has been brought, and either before or after judgment, may sue out an attachment at law or in equity, against the property of a debtor or defendant, in the following cases:
>
> (1) Where the debtor or defendant resides out of the state;
> (2) Where the debtor or defendant is about to remove, or has removed, the debtor's or defendant's person or property from the state;
> (3) Where the debtor or defendant has removed, or is removing, the debtor's or defendant's person out of the county privately;
> (4) Where the debtors or defendants concealed is so that the ordinary process of law cannot be served upon the debtor or defendant;
> (5) Where the debtor or defendant absconds, or absconded concealing the debtor's or defendant's person or property;
> (6) Where the debtor or defendant has fraudulently disposed of, or is about fraudulently to dispose of, the property;

> (7) Where any person liable for any debt or demand, residing out of the state, dies, leaving property in the state; or
> (8) Where the debtor or defendant is a foreign corporation which has no agent in this state upon whom process may be served by any person bringing suit against such corporation; provided, that the plaintiff or complainant need only make oath of the justness of the claim, that the debtor or defendant is a foreign corporation and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.[402]

The Tennessee legislature should extensively revise Tenn. Code Ann. § 29-6-101 in light of modern procedural due process concerns and the practical realities of Tennesseans. First, the legislature should remove the bases for attachment that are jurisdictional rather than aimed at exigent circumstances. Tennessee's long-arm statutes more than adequately provide for jurisdiction over out-of-state residents without resorting to methods of dubious constitutionality.

To rid the statute of unconstitutional grounds for attachment while retaining the ability to grant attachment in truly exigent circumstances, the legislature should remove Tenn. Code Ann. § 29-6-101 (1), (2), (7), and (8) from the statute, as they are purely jurisdictional with no exigency. Subsection (1) provides for attachment based purely on a defendant's non-residence within the state.[403] Subsection (2) provides for attachment based purely on a defendant's removal of self or property from the state, without restriction.[404] Subsection (7) provides for attachment when a debtor or defendant dies out-of-state, leaving property in the state.[405] Assuming our decedent is an out-of-state resident, any property in the State of Tennessee at the time of death will be handled by Tennessee courts as an ancillary estate, permitting claimants against the estate to pursue their claims in the Tennessee courts without resort to a jurisdictional attach-

402. TENN. CODE ANN. § 29-6-101 (2012).
403. *Id.* § 29-6-101(1).
404. *Id.* § 29-6-101(2).
405. *Id.* § 29-6-101(7).

ment.[406] Finally, the confusingly drafted subsection (8) should be removed because it is both jurisdictional and superfluous. Any registered corporate debtors or defendants without properly registered agents for service of process in Tennessee, or unregistered corporations "transact[ing] business or conduct[ing] affairs" in Tennessee, are automatically subject to service on the Secretary of State as its *de facto* agent.[407] It is difficult to conceive of a circumstance in which a foreign corporation could have sufficient minimum contacts with Tennessee to sustain jurisdiction over it, but not be subject to service of process through the Secretary of State under the more liberal "transact[ing] business or conduct[ing] affairs" standard of the Tennessee statute.[408]

To protect parties where unavailability of service of process or disposal of property constitute truly exigent circumstances, Tenn. Code Ann. § 29-6-101 (4), (5), and (6) should be retained. Subsections (4), (5), and (6) all deal with situations in which the defendant is either wrongfully avoiding service of process by absconding or concealing their person, or where they are absconding with, concealing, or fraudulently disposing (or preparing to dispose) of property.[409] These situations heighten a plaintiff's interest in having the procedure available. While ordinary removal from the state no longer prevents a plaintiff from obtaining jurisdiction against a defendant, calculated efforts to avoid service of process may make service impossible. In these circumstances, a plaintiff should have the attachment procedure available to affect the service. Likewise, where a defendant is removing his property, not in the ordinary course of affairs but to frustrate efforts to collect a later judgment, or fraudulently disposing of it to defraud creditors or other parties with an interest in it, the attachment procedure should still be warranted because the circumstances heighten a plaintiff's interest in expeditiously securing the property against such improper actions. However, the legislature should make

406. *See* TENN. CODE ANN. § 30-1-103 (2015) (governing the administration of estates of nonresident decedents, including where the decedent's assets were in Tennessee at the time of death or have been brought to the state thereafter).

407. *See* TENN. CODE ANN. § 48-15-104(b) (2012).

408. *Compare id.*, *with* Int'l Shoe Co. v. Washington, 326 U.S. 310, 315–18 (1945) (discussing the "minimum contacts" standard for the exercise of jurisdiction over a corporate defendant).

409. *See* TENN. CODE ANN. § 29-6-101(4)–(6) (2012).

clear that attachment pursuant to these subsections is to be limited to circumstances in which the defendant is behaving improperly to avoid the judicial process or to defraud a party and is not to be used in the course of ordinary events.

In addition, Tenn. Code Ann. § 29-6-101 (3) should be amended. Subsection (3) provides that attachment is available when the defendant is removing either himself or his property from the county "privately."[410] Private removal indicates the same kind of wrongful intent as absconding and concealing, inferring that the defendant is sneaking out of the county for some inappropriate reason. If simple removal from the state as provided for by subsection (2) is deleted from the statute, however, private removal from the state should be added into subsection (3). While this section may be in some sections duplicative of subsections (4)–(5), which govern concealing and absconding from service of process, it should be retained as indicative of the kinds of exigent circumstances in which the wrongful or avoidant conduct of a defendant heightens a plaintiff's interest in having a summary attachment procedure available.

However, the needed revisions do not stop with eliminating the jurisdictional bases for attachment under Tenn. Code Ann. § 29-6-101 *et seq*. Grants of writs of attachment should be available only from a judge, not the clerk of court. While the "just claim" standard provided in the statute may be constitutionally acceptable for actions on debts, creditors should be required to show some form of documentary proof to establish that the debt or demand is justly owed in fact. If permitted at all, attachment in tort actions should be strictly limited to situations where a true exigent circumstance exists on the part of the plaintiff and only in uncomplicated tort actions where the facts are such that a judge can reasonably determine the plaintiff's likelihood of success only from the initial pleadings.[411] Similarly, attachment based on a sheriff's return of "not to be found" should be seriously restricted, if it is to be retained at all. More than one unsuccessful return of service, whether by the sheriff's office or other means, should be required before a court attaches property. Legisla-

410. TENN. CODE ANN. § 29-6-101(3) (2012).

411. It is difficult to conceive of a tort action in which a judge could reasonably determine the outcome of the action based solely on the plaintiff's pleadings, given the broad pleading standard of TENN. R. CIV. P. 8.05. *See supra* note 346 and accompanying text; *see also* Part V.

tive restructuring of these elements of the attachment statute to reduce the risk of erroneous deprivation from the procedure is badly needed if the Tennessee statute is to provide sufficient due process.

Likewise, the Tennessee courts should reexamine their precedents in light of modern due process decisions and changes in Tennessee's communities and law enforcement agencies since the early days of statehood. While the strict construction called for by Tennessee decisions when applying the prejudgment attachment statute is wise, their approving stance on the use of jurisdictional attachments is obsolete. Likewise, the courts should reexamine early decisions which treat strictness in the form of pleading as a protective device, given that strict forms of pleading have been supplanted by the notice pleading standard. Further, the early Tennessee presumptions regarding a sheriff's return of "not to be found" need to be reconsidered with an eye to practical twenty-first century realities.

Tennessee trial judges should refuse to grant attachments under the statute unless the specific facts indicate that the plaintiff's interest in receiving the remedy is legitimately heightened and reduces the risk of erroneous deprivation. Appellate judges receiving future challenges to the application of Tenn. Code Ann. § 29-6-101 *et seq*. should reject *McLaughlin*'s determination that the statute provides sufficient procedural due process, either under the federal Constitution by correct application of the *Doehr* balancing test, or by interpreting Tennessee's own takings clause and due process guarantee to forbid the practice of summary attachment without notice and hearing in the absence of exigent circumstances.[412]

VII. CONCLUSION

A coordinated effort between the Tennessee state courts and legislature to modernize the prejudgment attachment provisions and bring them in harmony with fundamental due process guarantees is long overdue. As the Sixth Circuit's mistaken holding in *McLaughlin* effectively forecloses future federal challenges to Tenn. Code Ann. § 29-6-101 *et seq*., these much-needed reforms will come only through Tennessee lawmakers and jurists. Eighteenth-century at-

412. *See* TENN. CONST. art. I, § 8 (containing the Tennessee Constitution's takings and due process clauses).

tachment procedures, which take into account neither modern due process concerns nor the changed circumstances of Tennessee communities, courts, and county officers, cannot be said to serve the interests or safeguard the property of twenty-first century Tennesseans against wrongful takings. The courts and legislature should promptly seek comprehensive reform and reexamination of Tenn. Code Ann. § 29-6-101 *et seq*. with an eye to providing prejudgment attachment procedures that accommodate the competing interests of parties without creating enormous risks of procedural abuse.