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PROCEDURAL DUE PROCESS AND PRE-JUDGMENT CREDITOR REMEDIES: A PROPOSAL FOR REFORM OF THE BALANCING TEST

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I. *Introduction*

The foundation of the commercial world rests upon the certainty of debtor-creditor rights and remedies and the realization, in the due course of time, of reasonable expectations.[1] The judicial function with regard to commercial practice is to provide an orderly framework within which the rights and remedies of both debtor and creditor may be enforced. In the absence of such a framework, reasonable expectations will be disrupted, hardship may result, and the foundation of the commercial world will, accordingly, be shaken.[2]

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[1] *See, e.g., Anderson and Guidry, Mitchell v. W. T. Grant Co.: Recognition of Creditors' Rights,* 80 COM. L.J. 63, 63 (1975) [hereinafter cited as Guidry] ("The commercial world revolves around the fixing of obligations between debtors and creditors and the efficient utilization of remedies upon default of these obligations. Accordingly, the certainty of creditor-debtor rights and remedies is the foundation of the commercial world. There is no greater means of upsetting this foundation, and thereby causing furor in this world, than to question the validity of either the rights or remedies *vis-a-vis* creditors and debtors."); Steinheimer, *Address-Summary Pre-judgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After Mitchell v. W.T. Grant Company,* 32 WASH. & LEE L. REV. 79, 95 (1975) [hereinafter cited as Steinheimer] ("Certainty is ideally the morality of the market place. Summary prejudgment creditors' remedies have had precious little of this lately. I say again, the Supreme Court and commercial law make strange bedfellows."). *See also,* Jones, *An Invitation To Jurisprudence,* 74 COLUM. L. REV. 1023, 1027 (1974) ("In our society, and particularly as concerns larger commercial, industrial and property interests, lawyers—legal counselors— are the principal agents for the engineering of expectations. The counselor in his law office is the retailer of the legal system . . . to make it as sure as such things can be that the expectations arising from contracts, settlements, wills, negotiations and transactions will . . . be realized in fact."). The need for certainty in connection with commercial transactions is embodied in the stated purpose of the Uniform Commercial Code of promoting simplicity, clarity, and uniformity. *See* U.C.C. § 1-102. *See also* Howarth v. Universal C.I.T. Credit Corp., 203 F. Supp. 279 (W.D. Pa. 1962); Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (Ct. App. 1972).

[2] The Uniform Commercial Code was drafted as a direct result of numerous irreconcilable court decisions which "had resulted in ever-increasing uncertainty in the law." F. WHITNEY, THE LAW OF MODERN COMMERCIAL PRACTICES, § 29 at 45 (2d ed. 1965). *See* Fordham, *Judicial Policy-Making at Legislative Expense,* 34 GEO. WASH. L. REV.

Recent decisions of the United States Supreme Court with respect to prejudgment creditor remedies[3] have interjected substantial confusion into commercial affairs, effectively undermining the entire commercial world.[4] Specifically, in connection with determining those circumstances where procedural due process requires opportunity for a pre-seizure hearing before allowing a deprivation of property, the present test results in uncertainty, making accurate predictions as to future litigation impossible.[5] The formulation of an acceptable alter-

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829, 838 (1966) [hereinafter cited as Fordham] (recognizing that overruling prior court decisions may created "hardships for many people who have relied on the law as previously declared.").

[3] *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment of corporate bank account); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (sequestration of consumer or household goods); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin of consumer of household goods); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages).

[4] *See, e.g.*, Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 78 COM. L. J. 283, 284 (1973) [hereinafter cited as Anderson]. ("It has been advanced that *Sniadach* and especially *Fuentes* have injected chaos into the commercial world by overturning the basic concepts upon which the prejudgment creditor's remedies are founded."); Brownstein, *Sniadach and Fuentes: The Challenge and the Aftermath*, 78 COM. L. J. 13, 15 (1973) ("[T]he remedies which have been struck down . . . have an impact upon the commercial credit community. It is here that the *Sniadach* and *Fuentes* cases can create serious havoc to the business community."); McCormick, *Sniadach and Randone: Their Impact Upon the Surety*, 39 INS. COUNSEL J. 312, 317 (1972) ("[O]ne of the ramifications of *Sniadach* . . . is the matter of the position of the surety on the various bonds and undertakings written pursuant to statutes now declared void because unconstitutional. Many questions on the subject have been asked, but few have been answered."); Steinheimer, *supra* note 1.

[5] *See, e.g., The Supreme Court 1973 Term*, 88 HARV. L. REV. 41, 82 (1974) [hereinafter cited as *The Supreme Court*] ([Just as courts and commentators were uncertain as to the intended reach of *Sniadach*, so also will uncertainty result from the Court's holding in *Mitchell.*"); Guidry, *supra* note 1, at 66 ("In the final analysis, one can only speculate that *Mitchell* is not the final word in the area of creditors' remedies. The decision leaves too many unanswered questions and is too self-limiting to provide the ultimate solution to the *Sniadach-Fuentes* problem. If the certainty of the pre-*Sniadach* era is to become reestablished as an essential component of commercial practice, the Supreme Court will have to speak once more with sufficient clarity to explain to what extent its 'accommodation' test is to be applied."); *Recent Cases*, 28 VAND. L. REV. 879, 920 (1975) [hereinafter cited as *Recent Cases*] ("The Court's movement to a flexible standard is more in keeping with traditional practice and provides an analytical device for considering and accommodating both creditor and debtor interests, but the Court's failure fully to formulate meaningful safeguards . . . contributes to confusion and subjectivity."); Note, *Specifying The Procedures Required By Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1521 (1975) [hereinafter cited as *Specifying Procedures*] ([[T]he uncertainty engendered when the Supreme Court invalidates governmental action . . . may

native[6] can be made only after determination of the underlying cause of existing instability. Such inquiry requires thorough analysis of the present test and consideration of available alternatives in light of whether they go to the heart of the matter, actually resulting in correction of the uncertainty engendered by the present test.

II. *Applicability of the Right to Due Process*

The right of due process[7] is applicable only if governmental action[8] resulting in a deprivation of property[9] is first found to exist. The

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require citizens affected by similar governmental action to relitigate repeatedly the issue of whether the minimum requirements of due process have been satisfied. Moreover, the present climate of uncertainty reduces the value of litigation as a device for clarifying the constitutional requirements because even lower courts may be as uncertain concerning the precise procedures required by the interest-balancing fomula as are the other branches of government.").

[6] Whether a pre-seizure hearing is required could be deferred to the legislature. *See, e.g.*, Steinheimer, *supra* note 1, at 80, 81 ("I must confess to a certain sympathy for the position taken by Mr. Justice Black in his stinging dissent in *Sniadach.* If the garnishment remedy was to be hedged in by restrictions on its use, was it not a matter more appropriately accomplished by legislation rather than through the medium of the fourteenth amendment? I believe so."). A fundamental right of notice and an opportunity to be heard could be created. *See, e.g., The Supreme Court, supra* note 5, at 78; *Specifying Procedures, supra* note 5, at 1511.

[7] The Fifth and Fourteenth Amendments of the United States Constitution afford the right of due process as against federal and state government, respectively. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 462 (1941); Georgia Power Co. v. Decatur, 281 U.S. 505, 508 (1929). The two provisions are generally given the same interpretation. *See e.g.*, Hibben v. Smith, 191 U.S. 310, 325 (1903) (dictum). However, technical distinctions are possible. *See, e.g.*, French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1900) ("While the language of those amendments is the same, yet as they are ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper.").

[8] The right of due process is applicable with respect to either federal or state governmental action, not action by private persons. *See, e.g.*, Buchalter v. New York, 319 U.S. 427, 429 (1943); United States v. Classic, 313 U.S. 299, 315 (1941); Sinking Fund Cases, 99 U.S. 700, 718-19 (1879). If a creditor has sought the assistance of Governmental authorities to regain possession, the requisite action undisputably exists but where self-help remedies are involved, the result is unclear. *See generally*, Comment, *Due Process Evolution—Fuentes And The Deed Of Trust*, 26 SW. L. J. 876 (1972); Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws And Other Summary Procedures*, 25 BAYLOR L. REV. 215, 249 (1973); Del Duca, *Pre-Notice, Pre-Hearing, Pre-Judgment Seizure Of Assets—Self-Helf Repossession Under UCC § 9-503, Its Antecedents and Future*, 79 DICK L. REV. 211, 216 (1975).

[9] The deprivations need be only temporary. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 86 (1972) ("The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the

present uncertainty in commercial transactions does not involve applicability of the right of due process; rather, it is the requirements of due process once such right is found to exist that are in issue.[10]

III. *Requirements of the Present Due Process Test*

In determining whether governmental action resulting in a deprivation of property is in accord with due process, no particular form of procedure is necessary, rather; "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every . . . situation."[11] Instead the Court makes a case-by-case analysis of the specific facts involved and subjectively weighs the result under its balancing test.[12] Though flexible, this test does require that notice and opportunity for a hearing be provided "before one is finally deprived of his property."[13]

With regard to when the hearing relative to the deprivation of property should occur, the usual rule is "where only property rights

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State is within the purview of the Due Process Clause."). Accordingly, though the procedure provides for the posting of security to regain possession, a deprivation has occurred, irrespective of whether the debtor "has the funds, the knowledge, and the time needed to take advantage of the recovery provision." *Id.* at 85.

"[A]s long as a property deprivation is not *de minimis*" the right of due process exists without regard to the nature or particular kinds of property interests involved. *See* Goss v. Lopez, 419 U.S. 565, 576 (1975); Board of Regents v. Roth, 408 U.S. 564 (1972). The qualifying deprivation suffered by a debtor is that of "continued possession and use of the" seized property. *See* Fuentes v. Shevin, 407 U.S. 67, 86 (1972), *citing* Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (Harlan, J., concurring). *But see* Arnett v. Kennedy, 416 U.S. 134, 154 (1974). (In a plurality opinion by Justice Rehnquist, the Court held the right of public employment conditioned and governed by termination procedures contained in the statute creating such right. Accordingly, the absence of a pretermination hearing posed no barrier since the "appellee must take the bitter with the sweet.") *See generally,* Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L. J. 875 (1975).

[10] This distinction is not always clearly made. *See, e.g,* Goss v. Lopez, 419 U.S. 565, 576-78 n.8 (1975). *See also, Recent Cases, supra* note 5, at 917-20 (discussing the requirements of due process, but applying the test for applicability); *see* note 38 *infra.*

[11] Mitchell v. W. T. Grant Co., 416 U.S. 600, 610 (1974), *quoting* Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

[12] *See, e.g.,* Case Note, 43 FORDHAM L. REV. 870, 872 (1975) [hereinafter cited as Case Note [discussing the balancing test as applied in *Mitchell* and *North Georgia Finishing*]. *See generally* Freedman, *Summary Action by Administrative Agencies,* 40 U. CHI. L. REV. 1, 20-26 (1972) [hereinafter cited as Freedman]. *See also, The Supreme Court, supra* note 5, at 78 (suggesting that *Fuentes* represented an attempt to establish a fundamental right under due process of notice and an opportunity to be heard but that *Mitchell* constituted a retreat from that position).

[13] Mitchell v. W. T. Grant Co., 416 U.S. 600, 611 (1974).

are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate."[14] Nevertheless, the Court, in weighing the facts, will require that the hearing "be granted at a meaningful time and in a meaningful manner."[15] The most uncertainty, confusion, and resulting commercial litigation has obtained in delineating those circumstances where the Court will hold procedural due process requires opportunity for full adversary hearing before even a temporary deprivation of property can occur.

In applying the balancing test, the Court examines the nature of the governmental action and the interests, both of the party asserting the need for a pre-seizure hearing and of the party opposing said hearing, affected by that action.[16] The former interest is weighed against the latter. Where the procedure is said to affect a "constitutional accommodation"[17] between these conflicting interests, no violation occurs. Nevertheless, if the Court decides the interest of the party attempting to avoid the deprivation outweighs his opponents' interest in summary adjudication, the procedure will be struck down as violative of due process.[18]

Those interests of the party asserting the need for a pre-seizure hearing that the Court brings into play are: (1) the risk of error under the procedure of a wrongful deprivation, and (2) the severity of the impact or the magnitude of the harm resulting from not having the property pending a full hearing on the merits.[19] The Court's rationale

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[14] *Id., quoting* Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931).

[15] Armstrong v. Manzo, 380 U.S. 545, 552 (1955).

[16] *See, e.g.,* Mitchell v. W. T. Grant Co., 416 U.S. 600, 604 (1974) (examining the interests of both debtor and creditor). *See also,* Arnett v. Kennedy, 416 U.S. 134, 188 (1974) (White,J., concurring in part and dissenting in part) (providing a general discussion of conflicting interests); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 691 (1974) (White, J., concurring) (indicating "the presence of important public interests" is only one of the situations "which permits dispensing with a pre-seizure hearing.")

[17] Mitchell v. W. T. Grant Co., 416 U.S. 600, 610 (1975) (sequestration procedure effected the proper accommodation). *See also* Arnett v. Kennedy, 416 U.S. 134, 171 (1974) (Powell, J., concurring) (procedure providing for removal of an unsatisfactory public employee was said to provide "a reasonable accommodation of the competing interests").

[18] *See, e.g.,* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-08 (1975) (garnishment of corporate bank account); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin of goods); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (wage garnishment). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970) (summary termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (summary suspension of driver's license).

[19] In *Mitchell* both criteria were satisfied, while in *North Georgia Finishing,*

for considering these interests is its stated need to determine whether the procedure reduces the probability of a wrongful deprivation to acceptable levels,[20] and, if so, whether the procedure, should the deprivation be found in error, after a full hearing on the merits, places the party suffering the deprivation in the same position as if it had not occurred.[21]

Whether the risk of error has been minimized depends upon the extent to which the summary deprivation results in a greater incidence of error than does a full hearing on the merits. In making this inquiry, the Court has gone beyond the scope of the particular facts presented and has examined empirical studies reflecting the frequency with which the *ex parte* seizure has been reversed after a full hearing.[22] Studies reflecting a high frequency of reversal have been cited by the Court as its underlying rationale for holding that the risk of error has not been minimized.[23]

Fuentes, and *Sniadach* neither was satisfied. *See, e.g., The Supreme Court, supra* note 5, at 75; *Specifying Procedures, supra* note 5, at 1514.

[20] If the procedure hypothetically were to reduce the risk of error to zero, meaning it was "totally accurate," "never mistaken and never unfair," the issue of severity of impact would be "mostly academic." Goss v. Lopez, 419 U.S. 565, 579-80 (1975). *But cf., Specifying Procedures, supra* note 5, at 1517 n.35 (suggesting that due process may be used to serve "other purposes" beyond merely insuring the accuracy of a deprivation of property).

[21] In all cases approving summary seizure, the creditor, or other party advancing the claim, "stands ready to make whole the party who has been deprived of his property, if the initial taking proves to be wrongful, either by the credit of the public fisc or by posting a bond." Arnett v. Kennedy, 416 U.S. 134, 189-90 (1974) (White, J., concurring in part and dissenting in part).

[22] *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. 337, 341 (1959) ("What we know from our study of this problem is that in a vast number of cases the debt is a fraudulent one, saddled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up his pound of flesh, and being fired besides."); *quoting from* 114 CONG. REC. 1832 (1968); *id.* at 341 n.6. *See also* Goldberg v. Kelly, 397 U.S. 254, 264 n.12 (1970) ("The welfare recipient's impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility.") *See generally* Comment, *Eligibility Determinations In Public Assistances: Selected Problems And Proposals For Reform In Pennsylvania*, 115 U. PA. L. REV. 1307, 1326-27 (1967); Handler, *Justice for the Welfare Recipient: Fair Hearing in AFDC—The Wisconsin Experience*, 43 SOC. SERV. REC. 12, 22 (1969).

[23] *See, e.g.*, Richardson v. Wright, 405 U.S. 208, 221 (1972) (Brennan, J., dissenting) (The cited studies appeared "to confirm that the Court's reference in *Goldberg* to 'the welfare bureaucracy's difficulties in reaching correct decisions on eligibility,' is fully applicable to the administration of the [social security] disability program.") Arnett v. Kennedy, 416 U.S. 134, 214 n.10 (1974) (Marshall, J., dissenting). *But see* Goss v. Lopez, 419 U.S. 565, 580 (1975) (citing no authority for its conclusion that

The propriety of the Court's reliance on such studies is subject to dispute. The Court functionally lacks the means available to the legislature—through public debate, committee hearings, and diversity of viewpoints—for obtaining the necessary factual input to make a thorough inquiry into the accuracy of such studies and the commercial ramifications of reliance thereon.[24] For example, it is probable that the claims of those persons who persevere to a final hearing are not representative but more meritorious than those of persons who do not.[25] Moreover, while the Court is ostensibly acting to assist the debtor by requiring a pre-seizure hearing, the net result may be exactly the opposite in that there could be less available, more expensive credit.[26] Accordingly, lacking complete information, the Court in subjectively relying on such studies will likely reach an inaccurate result having a harmful effect upon the commercial world. Despite these cogent arguments, the Court has moved forward to

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"[d]isciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.").

[24] *See, e.g.*, Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, J., dissenting) (In this companion case to *Goldberg*, the Chief Justice states, "I would wait until more is known about the problems before fashioning solutions in the rigidity of a constitutional holding. By allowing [Federal] administrators to deal with these problems we leave room for adjustments if, for example, it is found that a particular hearing process is too costly.") *See also* Fordham, *supra* note 2, at 829-30 ("[I]n crucial decision-making we in this country have come to rely excessively on the judicial branch at the expense of representative government." The result is "policy-making through greater proliferation of court-declared constitutional doctrines, with a resulting denigration of the legislative institution and sphere.").

[25] *See* Freedman, *supra* note 12, at 21 ("It may be that these persons who persevered to the conclusion of the hearing process were not a representative group. Nonetheless, the incidence of error was sufficiently high to warrant the Court's concern with the use of summary procedures . . . .").

[26] *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 618-19 n.13 (1974) ("As revealed in the various studies and proposals, the principal question yet to be satisfactorily answered is the impact of prior notice and hearing on the price of credit, and, more particularly, of the mix of procedural requirements necessary to minimize the cost. The commentators are in the throes of debate . . . ," *citing* Symposium, *Creditors' Rights*, 47 S. CAL. L. REV. 1 (1973); Note, *Self-Help Repossession; The Constitutional Attack, The Legislative Response, And The Economic Implications*, 62 GEO. L. J. 273 (1973). With respect to this issue the Court took " no view whatsoever on the desirability of one or more of the proposed reforms."); Anderson, *supra* note 4, at 284 n.12. *See also*, Goldberg v. Kelly, 397 U.S. 254, 278-79 (1970) (Black, J., dissenting) (predicting adverse effects to welfare recipients, resulting from the requirement of a pre-termination hearing).

require the presence of certain specific statutory elements,[27] before holding the risk of error minimized.

Those statutory elements that the Court requires, based upon the examined empirical study, vary depending upon the particular circumstances of each case. Accurate predictions concerning future commercial litigation are impossible. Instead of specificity, it may only be generally stated that the degree of accuracy of a summary deprivation will be enhanced by inclusion of all possible statutory elements affording protection against loss pending opportunity for an adversary hearing.[28]

The leading case of *Mitchell v. W. T. Grant Co.*[29] held that the presence of certain specific statutory elements[30] resulted in effectively

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[27] *Compare* Mitchell V. W. T. Grant Co., 416 U.S. 600 (1974) (emphasizing specific statutory elements in finding the risk of error minimized), *with* Fuentes v. Shevin, 407 U.S. 67 (1972) *and* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (distinguished on the basis of the absence of those statutory elements present in *Mitchell*). Dissents to the Court's action have been vigorous. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 102 (1972) (White, J., dissenting) ("The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law"); Sniadach v. Family Finance Corp., 395 U.S. 337, 344 (1969) (Black, J., dissenting) ("Of course the Due Process Clause of the Fourteenth Amendment contains no words that indicate that this Court has power to play so fast and loose with state laws. The arguments the Court makes to reach what I consider to be its unconstitutional conclusion, however, show why it strikes down this state law. It is because it considers a garnishment law of this kind to be bad state policy, a judgment I think the state legislature, not this Court, has power to make."). *See also,* Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (Burger, J., dissenting) ([I am baffled as to why we should engage in 'legislating' via constitutional fiat when an apparently reasonable result has been accomplished administratively.").

[28] *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 618 (1974) ("To summarize, the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnished protection against loss or damage to the other pending trial on the merits.").

[29] 416 U.S. 600 (1974).

[30] Statutory elements relied upon in *Mitchell* for minimizing the risk of error were: (1) the writ authorizing seizure was based on specific facts rather than conclusory allegations; (2) judicial control of the process from beginning to end; (3) the facts relevant to obtaining the writ were narrowly confined; (4) the party requesting a full hearing was entitled to damages should the seizure subsequently be found wrongful and could regain possession by filing an appropriate bond; and (5) the writ was issuable only after the party requesting seizure had filed a bond. *See Recent Decisions,* 63 ILL. B. J. 212 (1974); Note, 26 MERCER L. REV. 325 (1974); *The Supreme Court, supra* note 5. The requirement of an immediate hearing after seizure relates to the severity of impact on the debtor, rather than minimization of risk of error. *See* text accompanying notes 49-51 *infra.*

minimizing the risk of a wrongful deprivation. However, the distinctions drawn between those statutory elements present for *Mitchell* and lacking in *Fuentes v. Shevin*[31] may be more illusory than real. Moreover, *Mitchell* failed to specify which of the identified elements or combination thereof must co-exist before the degree of error will be deemed sufficiently reduced.[32] Certainly if the Court is applying a balancing test, it is unreasonable to assume all such elements must be found in every factual context.[33]

The recent decision in *North Georgia Finishing, Inc. v. Di-Chem., Inc.*[34] failed to provide needed clarification. Apart from indicating that the absence of two of the statutory elements present in *Mitchell* resulted in a failure to minimize the risk of error,[35] *North Georgia Finishing* shed no light on the degree of flexibility or rigidity afforded by the balancing test.[36] Which statutory elements are to be required within each factual context must await further pronouncement as the Court proceeds with its case-by-case analysis. In the meantime, con-

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[31] 407 U.S. 67 (1972). *Mitchell* noted that in *Fuentes:* (1) the creditor was not required to allege specific facts; (2) the state official issuing the writ was a court clerk rather than a judge; and (3) the facts relevant to obtaining the writ were not narrowly confined. *See* Mitchell v. W. T. Grant Co., 416 U.S. 600, 631 (1974) (Stewart, J., dissenting).

[32] *See id.* at 634 ("In short, this case is constitutionally indistinguishable from *Fuentes v. Shevin*, and the Court has simply rejected the reasoning of that case and adopted instead the analysis of the *Fuentes* dissent."); *Recent Decisions*, 63 ILL. B. J. 212, 213 (1974) ("Each of [the] three points of difference between *Fuentes* and *Mitchell* is minor and of questionable importance").

[33] *See* Case Note, *supra* note 12, at 874 (Although five safeguards were isolated in *Mitchell*, it is as yet an unwarranted assumption that Louisiana's garnishment law constitutes the sole configuration of statutory provisions constitutionally permissible absent notice and hearing.)

[34] 419 U.S. 601 (1975).

[35] The risk of error is that *North Georgia Finishing* was not minimized since the writ authorizing seizure was: (1) based on conclusory allegations rather than specific facts, and (2) issued by a court clerk rather than a judge. *See* 419 U.S. at 607.

[36] *North Georgia Finishing* failed to discuss whether the facts relevant to obtaining the writ were narrowly confined. Moreover, there is no indication they were so confined; instead, the party seeking summary seizure was merely required to broadly assert "the debt and reason to apprehend the loss of said sum or part thereof unless process . . . issues." North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 604 (1975). Further, though the procedure included the statutory requirements that the creditor file a protective bond and that the debtor be entitled to damages and to regain possession, the Court gave no indication as to how the presence of such elements, or lack thereof, will affect future litigation. *See id.* at 614 (Blackmun, J., dissenting) ("One gains the impression, particularly from the final paragraph of its opinion, that the Court is endeavoring to say as little as possible in explaining just why the procedure violated due process").

fusion and uncertainty in the commercial world continues.[37]

Even if the Court in some future decision were to elucidate those statutory elements it deems necessary, whether such enlightenment would in the end analysis actually result in reducing the risk of error could not be immediately determined. Instead, this inquiry would have to await the result of later empirical studies. Depending upon such result, the Court could then presumably determine that additional statutory elements are required.

The second interest of the party asserting the need for a preseizure hearing is the severity of impact or magnitude of harm resulting from not having the property pending a full hearing on the merits. The magnitude of harm resulting from the deprivation depends upon: (1) the effect of the deprivation upon the debtor, including whether he is thereby prevented from effectively participating in a subsequent hearing, and (2) the length of time between the initial deprivation and the subsequent hearing.

The effect of the deprivation upon the debtor requires consideration of the particular type of property involved.[38] Where the nature

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[37] *See id.* at 614 (Blackmun, J., dissenting) (The Court's decisions with regard to "due process aspects of a State's old and long-unattacked commercial statutes" leaves "corresponding commercial statutes of all other states in questionable constitutional status" which is ". . . an undesirable state of affairs"). With respect to wage garnishment, the balancing test provides authority for factually distinguishing *Sniadach. See, e.g.,* Mitchell v. W. T. Grant Co., 416 U.S. 600, 614 (1974) ("In *Sniadach,* the Court also observed that garnishment was subject to abuse by creditors without valid claims, a risk that may be minimized by . . . the protections to the debtor offered by Louisiana procedure. Nor was it apparent in *Sniadach* with what speed the debtor could challenge the validity of the garnishment . . . ."); *see* text accompanying notes 48-51 *infra.* Could a mere change in Court membership, in conjunction with corrective legislative action, provide the necessary impetus for such a distinction? *See id.* at 635 (Stewart, J., dissenting) (suggesting that the real rationale for *Mitchell,* in light of *Fuentes,* lay with the appointment of Justices Powell and Rehnquist to the Court).

Moreover, individual Court members cannot determine from case to case what their respective positions will be. *See, e.g.,* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (Justice White, writing for the majroity, cited *Fuentes* as controlling although he wrote the latter dissent). The rationale in this instance could not be *stare decisis. See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting) (expressing the view that *stare decisis* is not an inexorable command and that the function of the Court is ". . . to make new law and new public policy").

[38] The nature or type of property is not determinative of the right to notice and a hearing of some sort, but comes into play with respect to determining appropriate form of notice and hearing. *See* note 10 *supra. Compare* North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. at 608 (1975) ("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") *with* Mitchell v. W. T. Grant Co., 416 U.S. at 610 (1974) ("[W]e remain unconvinced that the impact on the debtor or deprivation of the household

of the property is such that the deprivation ". . . may as a practical matter drive a wage-earning family to the wall . . ."[39] or cause a person to ". . . be unable to exist at even a minimum standard of decency . . . ,"[40] the Court has found a severe impact. Whether the impact on the debtor is in fact severe is a highly subjective inquiry, effectively leaving the majority of justices free to hold unconstitutional any deprivation which they personally decide is unfair.[41] "[I]t is exactly this kind of subjective comparison of interests in different types of property which invites confusion among lower courts . . ."[42] requiring them ". . . to draw lines too fine to be meaningfully applied."[43]

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goods here in question overrides his inability to make the creditor whole for wrongful possession . . . .") *and* Fuentes v. Shevin, 407 U.S. at 90 n.21 (1972) ("The relative weight of . . . property interests is relevant, of course, to the form of notice and hearing required by due process").

[39] Sniadach v. Family Finance Corp., 395 U.S. at 341-42 (1969) (discussing the effect of wage garnishment).

[40] Arnett v. Kennedy, 416 U.S. at 191 (1974) (White, J., concurring in part and dissenting in part) (considering prior holdings of the Court with respect to the effect of deprivations of particular types of property).

[41] Reliance on such a subjective procedural due process test has been criticized. *See, e.g.*, Goldberg v. Kelly, 397 U.S. at 276 (1970) (Black, J., dissenting) ("This decision [requiring a hearing before termination of welfare benefits] is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences.' *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952). ("Neither these words nor any like them appear in the Due Process Clause"); Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting) ("Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a 'shock the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics. I believe the only way to steer this country toward its great destiny is to follow what our Constitution says, not what judges think it should have said").

[42] *The Supreme Court, supra* note 5, at 81.

[43] *Id. Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (finding severe impact as to termination of welfare benefits); Bell v. Burson, 402 U.S. at 539 (1971) (impact as to suspension of driver's license may be severe where license essential to pursuit of one's livelihood); Sniadach v. Family Finance Corp., 395 U.S. 337, 340-42 (1969) (severe impact as to wage garnishment) *with* Mitchell v. W. T. Grant Co., 416 U.S. at 610 (1974) (impact as to household goods not severe); Arnett v. Kennedy, 416 U.S. at 169 (Powell, J., concurring in part and concurring in the result in part) (impact as to dismissal from public employment, not severe since employee ". . . may well have independent resources to overcome any temporary hardship, and he may be able to

Furthermore, the conclusion that a deprivation of a specific type of property will in all instances result in a severe impact on every debtor is both superficial and illogical.[44] If the Court is to apply a balancing test under which it weighs all the facts and circumstances, specific classifications of property should not be singled out such that in every situation where that property is involved, the deprivation is held severe. Irrespective of the type of property involved, only where actual facts have been presented to a court establishing the magnitude of harm as to the particular debtor can it be said with any degree of accuracy that the impact is in fact severe. In the absence of actual proof, determination of the severity of impact will continue to rest on speculation, conjecture, and the subjective notions of individual judges.

Linked with the effect of depriving the debtor of possession of the particular property involved is the extent to which such deprivation prevents effective participation in a subsequent hearing on the merits. In *Goldberg v. Kelly*, the Court noted that few decisions terminating welfare payments were ever appealed.[45] The majority stated that the recipient's ". . . need to concentrate upon finding the means for daily subsistence . . . adversely affects his ability to seek redress from the welfare bureaucracy."[46] While the propriety of the Court's reliance on empirical studies is subject to dispute,[47] when a debtor's property is subjected to the various creditor remedies, he also may be found to have been prevented from pursuing a final hearing.[48]

The final aspect of the severity of impact test is the length of time between the initial deprivation and the full hearing on the merits. The magnitude of harm is found to increase in direct proportion to the time lapse between the deprivation and the opportunity for a full

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secure a job in the private sector. Alternatively, he will be eligible for welfare benefits").

[44] Would application of the sequestration procedure in *Mitchell* to the automobile of a traveling salesman result in a severe impact? *See* Bell v. Burson, 402 U.S. at 539 (1971).

[45] Goldberg v. Kelly, 397 U.S. at 265 (1970).

[46] *Id.* at 264.

[47] *See* text accompanying notes 24-27 *supra*.

[48] *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 341 & n.6 (1969), *quoting from* Comment, *Wage Garnishment in Washington—An Empirical Study*, 43 WASH. L. REV. 743, 753 (1958). However, with respect to a debtor, as opposed to a welfare recipient, the impact may not be as severe since "[a]lternatively, [the debtor] will be eligible for welfare benefits." Arnett v. Kennedy, 416 U.S. at 169 (1974) (Powell, J., concurring in part and concurring in the result in part).

hearing.[49] In *North Georgia Finishing,* the Court held that " . . . the length or severity of a deprivation of use or possession [is] another factor to weigh in determining the appropriate form of hearing . . . ."[50] Accordingly, the Court may require that opportunity for a hearing be "immediately" provided after seizure.[51]

Balanced against the interests of the party asserting the need for a pre-seizure hearing are the conflicting interests of the party opposing the hearing. While the interests of the latter[52] are numerous and

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[49] Arnett v. Kennedy, 416 U.S. at 219 (Marshall, J., dissenting) ("The longer the period between the discharge and the hearing, the more devastating will be the impact of the loss of [public] employment"); Fuentes v. Shevin, 407 U.S. at 86 (1972) ("While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind").

[50] 419 U.S. at 606 (1975).

[51] The Louisiana sequestration statute under consideration in *Mitchell* expressly provided for an "immediate" hearing after seizure, whereas the Florida and Pennsylvania prejudgment replevin statutes invalidated in *Fuentes* "left [the debtor] in limbo to await a hearing that might or might not 'eventually' occur." Mitchell v. W. T. Grant Co., 416 U.S. at 618 (1974). The Georgia garnishment statute under review in *North Georgia Finishing* did not provide for an early hearing. "Indeed, [under that statute], without the filing of a bond the . . . debtor's challenge to the garnishment [would not have been] entertained, whatever the grounds may [have been.]" 419 U.S. at 607 (1975). The Court, however, has not specified what constitutes an "immediate" as opposed to an "eventual" hearing. *See Specifying Procedures, supra* note 5, at 1519 (discussing the need for specifying procedures with respect to internal reform of the balancing test in order to avoid uncertainty).

[52] Interests of those seeking seizure without prior notice and hearing may relate to matters of important public or private concern. The Court in *Fuentes* appeared to preclude protection of private interests through summary seizure. *See* Fuentes v. Shevin, 407 U.S. at 92 (1972) ("The Florida and Pennsylvania prejudgment replevin statutes serve no . . . important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake"). *See also* Case Note, *supra* note 12, at 873-74 ("A creditor was hard pressed, in light of *Fuentes,* to show that his or the state's interest justified any prejudgment seizure"). The decision reached in *Mitchell,* however, makes clear that summary seizure may be afforded to protect the interest of a private creditor when that interest is a present interest in the goods themselves. Mitchell v. W. T. Grant Co., 416 U.S. at 604 (1975) ("The question is not whether a debtor's property may be seized by his creditors, *pendente lite,* where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property. . . .") *See also* Arnett v. Kennedy, 416 U.S. at 180 (1974) (White, J., concurring in part and dissenting in part) (discussing the availability of summary seizure for both "the Government or a private party"). The result reached in *Mitchell* has been subject to criticism. *See, e.g., Recent Decisions,* 63 ILL. B. J. 212, 213 (1974). *But cf.* Freedman, *supra* note 12, at 23 ("It would be hazardous to assert that state protection of a private interest is never entitled to the same degree of constitutional respect as state protection of a government interest—there is an obvious state interest in protecting important private interests").

varied,[53] a common denominator among such interests is the effect of a full adversary hearing prior to seizure. In making its inquiry, the Court analyzes both the risk and extent of loss to the party seeking seizure should the possessor be notified and the property left in his hands pending a full hearing on the merits.[54]

In most cases where the Court has concluded that the risk of notifying the possessor would result in the outright or total defeat of a legitimately protected public interest, summary seizure has been upheld.[55] In *Central Union Trust Co. v. Garvan,*[56] the Court held that to protect and secure the general public interest in meeting the needs of a national war effort, the federal government may summarily seize property of a declared enemy nation without a prior hearing. In *Mitchell,* the Court upheld a state statute providing for summary seizure in order to protect the security interest of a private creditor in consumer goods, which interest is subject to defeasance on transfer by the possessor to a third party.[57]

The risk and the extent of resulting harm to the public has been deemed sufficiently great to allow summary seizure of misbranded drugs,[58] of a federal savings and loan association[59] and of vessels used for unlawful purposes,[60] as well as to allow attachment of property[61] and collection of outstanding federal taxes without a prior hearing.[62] Furthermore, the risk to the public has been found in some cases to

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[53] *See, e.g.,* Fuentes v. Shevin, 407 U.S. at 91-92, nn.23-28 (1972); *Specifying Procedures, supra* note 5, at 1515 n.26.

[54] *See generally* Arnett v. Kennedy, 416 U.S. at 190 (1974) (White J., concurring in part and dissenting in part).

[55] *See, e.g.,* Phillips v. Commissioner, 283 U.S. 589, 597 (1931) ("Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied"); Goss v. Lopez, 419 U.S. 565, 582 (1975) ("[S]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school." A hearing prior to suspension was not required.)

[56] 254 U.S. 554 (1921).

[57] 416 U.S. at 609 ("An important factor . . . is that under Louisiana law, the vendor's lien expires if the buyer transfers possession").

[58] Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

[59] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

[60] Fahey v. Mallonee, 332 U.S. 245 (1947).

[61] Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1923); Ownbey v. Morgan, 256 U.S. 94 (1921). *See also* Fuentes v. Shevin, 407 U.S. at 91 n.23 (1972). *See generally,* Comment, *Foreign Attachment After Sniadach and Fuentes,* 73 COLUM. L. REV. 342 (1973). *But cf.* Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?,* 3 FLA. ST. L. REV. 1, 13 (1975) (criticizing the upholding of foreign attachment procedures in light of *Fuentes*).

[62] Phillips v. Commissioner, 283 U.S. 539 (1931).

be so great as to permit destruction of the seized property before a full hearing is held. In *North American Cold Storage Co. v. Chicago*,[63] the Court held that state agents may seize and destroy unwholesome food and need not provide previous notice or opportunity to be heard.[64]

While the Court has held that if the seizure is later found to have been wrongful, the party summarily deprived of his property should be placed in the same position as if the deprivation had not occurred, it has not required such protection for the party opposing the pre-seizure hearing. Where summary seizure is not allowed, the party seeking seizure is not compensated should his adversary's interim possession after a full hearing on the merits be found wrongful.[65] Accordingly, while the risk of some loss to the party opposing the pre-seizure hearing may be great, the Court may not realistically consider the extent of loss to be sufficient to authorize summary seizure.[66]

IV. *Proposal for Reform*

As the above analysis indicates, the balancing test is a complicated and intricate piece of created logic making interesting legal pirouettes for academic discussion but doing little to promote stability and clarity in the market place. Indeed, no one can predict what will be the requirements of procedural due process as to any set of disputed facts until the Court makes a pronouncement with respect to those facts.

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[63] 211 U.S. 306 (1908).

[64] *Id.* at 320 ("If a hearing were to be always necessary . . . the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of the investigation, which would involve expense and might not even then prove effectual").

[65] Benefits paid welfare recipients pending a full hearing on the merits ". . . probably cannot be recouped, since these recipients are likely to be judgment-proof." Goldberg v. Kelly, 397 U.S. at 266 (1970). "[T]he inability to garnish wages could leave [a] creditor uncompensated, if the debtor prove[s] judgment proof . . . ." Arnett v. Kennedy, 416 U.S. at 193 (1974) (White, J., concurring in part and dissenting in part). It is unclear what consideration led the Court to conclude that the debtor should be fully protected against loss while the creditor should not. If the Court is applying an impartial balancing test, it appears that the interests of both should be protected.

[66] In both *Goldberg* and *Sniadach* there was a risk of loss to the party opposing the pre-seizure hearing but in neither instance did the Court conclude the probable extent of laws resulting from the created risk to be substantial enough to justify summary seizure.

Determination of the underlying causes of existing uncertainty and confusion requires a conscious realization that each member of the Court, in applying the balancing test, examines the totality of the facts and circumstances involved and reaches a result based on his own personal evaluations, appraisals and conclusions. Outcomes vary directly with the subjective predispositions and notions of individual justices. Instead of engaging in "subjective judgments" under an "unguided balancing test,"[67] each justice should exercise "extraordinary intellectual disinterestedness and penetration lest limitations in personal experience and imagination be interpreted, however consciously or unconsciously, as constitutional limitations."[68] In short, correction of the present confusion and instability requires application of an objective, rather than a subjective standard for gauging the constitutional requirements of procedural due process.[69]

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[67] *The Supreme Court, supra* note 5, at 78. Where Court opinions change with the mere addition of new members, and existing members shift positions, on a case by case basis, can it be denied that subjectivity is the underlying difficulty? *See* note 37 *supra. See also* Time, Inc. v. Hill, 385 U.S. 374, 399 (1967) (Black, J., concurring) ("The 'weighing' doctrine plainly encourages and actually invites judges to choose for themselves between conflicting values . . ."); text accompanying notes 41-43 *supra.*

[68] Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 685 (1961) [hereinafter cited as *Constitutional Opinions*]. *See also* O. HOLMES, COLLECTED LEGAL PAPERS, 295 ("it is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong . . . . We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold clear to be done away with short of revolution by the orderly change of law").

[69] Application of an objective procedural due process test is well grounded in constitutional law. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting) ("In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. (citations omitted). If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law . . . ."); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 159 (1931) ("[w]hen the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded"); Griswold v. Connecticut, 381 U.S. 479, 507 (Black, J., dissenting) ("I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutonal on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is my Brethren of the majority and my Brothers HARLAN, WHITE] AND GOLDBERG, who reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law

Moreover, subjective inquiry into the wisdom of specific legislation is not a judicial responsibility.[70] The Court is an interpreter, not a maker of law.[71] It does not possess the constitutional authority to determine the desirability of legislation under its own concept of public policy.[72] Nor is the Court functionally equipped to determine

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make it unconstitutional"). *See also, Constitutional Opinions, supra* note 68, at 694 ("What makes [the] opinions [of Justice Holmes] significant beyond their immediate expression is that they came from a man who, as a judge, enforces statutes based upon economic theories which he does not share, and of whose efficacy in action he is skeptical. (footnote omitted). The judicial function here finds its highest exercise").

[70] *See, e.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare"); Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic, or social philosophy . . . . This intrusion by the judiciary into the realm of legislative value judgments was strongly objected to at the time, particularly by Mr. Justice Holmes and Mr. Justice Brandeis"); Sniadach v. Family Finance Corp., 395 U.S. at 339 (1969) ("The question is not whether the Wisconsin law [authorizing wage garnishment] is a wise law or unwise law. Our concern is not what philosophy Wisconsin should or should not embrace (citation omitted). We do not sit as a super-legislative body"). Judicially requiring the presence of certain specific statutory elements, based upon examined empirical studies, before upholding constitutionality has substantially the same effect as legislative statute drafting. *See* text accompanying note 27 *supra*.

[72] *See, e.g.*, Goldberg v. Kelly, 397 U.S. at 274 (1970) (Black, J., dissenting) ("[W]hen federal judges use . . . judicial power for legislative purposes, . . . they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people); Ferguson v. Skrupa, 372 U.S. at 730 (1963) ("The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws"). *See generally* Fordham, *supra* note 2 at 831 ("[T]he American people are committed, in the basic constitutional framework, to the idea that the legislative institution is the central and basic policy-making aim. This commitment has been subjected to severe strain, so much so that there is basis for very real concern as to the effectiveness of representative government in our system").

[71] *See, e.g.*, Sniadach v. Family Finance Corp., 395 U.S. at 345 (1969) (Black, J., dissenting) ("There is not one word in our Federal Constitution or in any of its Amendments and not a word in the reports of that document's passage from which one can draw the slightest inference that we have authority . . . to try to supplement or strike down the State's selection of its own policies. The Wisconsin [wage garnishment] law is simply nullified by this Court as though the Court had been granted a super-legislative power to step in and frustrate policies of States adopted by their own elected legislatures. The Court thus steps back into the due process philosophy which brought on President Roosevelt's Court fight").

what the law ought to be. In contrast with the legislature, it lacks a thorough fact-finding ability to determine precisely what are the needs of society and how, correspondingly, public policy should be altered to meet those needs. Lacking complete factual input, there is substantial likelihood that the Court, relying on the preconceived, subjective opinions of its members, rather than applying an objective standard, will miss the target entirely, reaching an inaccurate result harmful to the very segment of society it seeks to help.[73]

Within the context of the fourteenth amendment Due Process Clause, objectivity as characterized by an independence of mind and the ability to cope with reality apart from personal reflections or desires as to how things should be—in contrast with subjectivity—is the key to successful judicial operation.[74] Objectivity requires that

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[73] *See* text accompanying notes 24-27 *supra*. *See also* Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, J., dissenting) ("I can share the impatience of all who seek instant solutions; there is a great temptation in this area to frame remedies that seem fair and can be mandated forthwith as against administrative or congressional action that calls for careful and extended study. That is thought too slow. But, however cumbersome or glacial, this is the procedure the Constitution contemplated").

[74] Members of the Court should not use due process objections to strike down legislation they personally deem unwise or undesirable. *See, e.g.*, Baldwin v. Missouri, 281 U.S. 526, 595 (1929) (Holmes, J., dissenting) ("I have not yet adequately expressed the more than anxiety that I feel at the ever-increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constititonal rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course, the words 'due process of law,' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass"). Instead state legislation should be struck down only when violative of a specific constitutional provision or valid federal law enacted by Congress pursuant to its delegated constitutional authority. *See, e.g.*, Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) ("[t]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Courts may happen to entertain"); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 534-536 (1949) (in rejecting due process challenges to state legislation "designed to safeguard the opportunity of non-union members to get and hold jobs," the Court noted that it had "returned closer and closer to the earlier constitutional princi-

justices transcend limitations in personal experience and look beyond their own concept of the wisdom of the legislation at hand. Plainly stated, it requires realization that reasonable men, whether they be judges or legislators, may differ. When they do, the Court, in an effort to promote stability in the marketplace and in recognition of its role within the constitutional framework, should defer to the legislative judgement[75] if the latter is not patently arbitrary.[76]

Alternatively, the Court may hold that procedural due process requires that notice and an opportunity to be heard must be afforded as to all deprivations of property.[77] The Government would then have the burden of establishing a compelling interest justifying summary seizure, as it does with respect to those fundamental rights said to

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ple that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law).

[75] *See* Steinheimer, *supra* note 1, at 80 (advocating deferral to the legislative judgment with respect to the wisdom of allowing wage garnishment). *See also* Freedman, *supra* note 12, at 26 (acknowledging the Court's disinclination "to defer to particular legislative judgments" since it considered "the state's interest in summary action" to have "become more attenuated").

[76] The determination of whether legislation is patently arbitrary does not require a subjective inquiry into personal reflections or feelings but instead requires objectivity, *i.e.*, projection beyond one's self to a hypothetical, reasonable man. Where any set of facts can reasonably be conceived which would provide a rational foundation for the legislation, due process should pose no objection. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525, 567 (1923) (Holmes, J., dissenting) ("When so many intelligent persons, who have studied the matter [of fixing minimum wages for women] more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men"); Morey v. Doud, 354 U.S. 457 (1957) (finding the Illinois Community Currency Exchanges Act, which singled out and exempted only American Express Co. from its requirements, as without any reasonably conceivable factual basis). *See also* note 69 *supra*. When a majority of the legislature has enacted a specific piece of legislation, it is difficult to conclude such legislation has no reasonable basis in fact. *See, e.g.*, Tyson & Brother v. Banton, 273 U.S. at 447 (1927) (Holmes, J., dissenting) ("I am far from saying that I think this particular law [regulating prices at which theatre tickets might be resold] a wise and rational provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will"). An even stronger case can be made for the rationality of prejudgment creditor remedies since they "have withstood the test of time." *See* Guidry, *supra* note 1, at 63. *See also* Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) ("The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .").

[77] *See* note 6 *supra*.

exist under the Equal Protection Clause.[78] Such a proposal, however, is subject to the same limitations as the balancing test because it rests on a subjective rather than objective standard. If the Court is to establish a fundamental right of notice and a pre-seizure hearing, what is to prevent it from later picking out other procedures it determines equally desirable and characterizing them to be fundamental as well?[79] While today's fundamental right may include a pre-seizure hearing, the only limits on tomorrow's are the subjective attitudes and personal convictions of individual justices.

Thus, this proposal would not correct the uncertainty and confusion created by the balancing test but instead would perpetuate and compound the existing problem. Moreover, by subjectively characterizing certain procedures as fundamental under an unusually stringent due process test, the Court continues to set public policy, which it is neither constitutionally nor functionally equipped to do.

V. *Conclusion*

The underlying cause of existing instability in commercial transactions is the Supreme Court's reliance on a subjective rather than an objective standard for gauging the constitutional requirements of procedural due process. A subjective standard, whether in application of the present balancing test or in creation of limitless fundamental rights, promotes uncertainty and confusion in the market place, abrogating the functional rule of the Court within the constitutional context. An objective standard, however, would defer judgment regarding commercial matters to the appropriate legislative body. As with respect to formulation of the Uniform Commercial Code,[80] no longer would judicial action be responsible for upsetting the reasonable expectations of the parties to a commercial transaction. Rather, any modification in existing commercial practice would be affected in a concise, stable, and orderly fashion—as it should be—by the deliberative legislative process.

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[78] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 655-677 (1969) (Harlan, J., dissenting) (explaining both the "suspect criteria" and "fundamental rights" branches of the equal protection test).

[79] It has been suggested that the Court may ultimately require appointment of counsel and exhaustion of all appeals before authorizing a deprivation of property. *See* Goldberg v. Kelly, 397 U.S. at 278-79 (1970) (Black, J., dissenting).

[80] *See* note 80 *supra*.