

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

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

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. McKinnes*, 279 U.S. 820, 820 (1929) (per curiam).

152. See *McKay v. McKinnes*, 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

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

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 affected¹⁸³ 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-

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-

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 jurisdictional²²⁷ 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-

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-

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-

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.*

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

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-

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-

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.*; *see* 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

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

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

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*

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 slander³⁷⁰ 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-

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 pre-deprivation 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

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.

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.