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COMMENTS

JUSTICE WHITE’S CHEMISTRY: THE MITCHELLIZATION OF FUENTES

In the course of four decisions over the past six years, the United States Supreme Court has sought to construct a constitutional framework for the prejudgment accommodation of the conflicting rights of creditors and debtors in the context of both secured and unsecured financial transactions. In *Sniadach v. Family Finance Corp.*,1 the Supreme Court declared unconstitutional a Wisconsin statute permitting prejudgment wage garnishment without notice or opportunity for hearing.2 Three years later, in *Fuentes v. Shevin*,3 the Court, in a 4–3 decision,4 found violative of the due process clause Florida and Pennsylvania replevin5 statutes which provided for issuance, upon the secured party’s *ex parte* application, of a writ authorizing seizure by state agents of the alleged debtor’s property.6 While recognizing some of the interests of the secured conditional sales vendor, the Court held that procedural due process requires “some form of notice and hearing”7 prior to deprivation of not merely property over which the alleged debtor has clear title (as in *Sniadach*), but of any significant “property interest that ‘cannot be characterized as de minimis.’”8

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2. The “opportunity to be heard” should include a determination of the probable validity of the creditor’s claim against the alleged debtor before deprivation of the subject property or restriction of its use. 395 U.S. 337, 343 (1969) (Harlan, J., concurring).


4. Justice Stewart, writing the opinion of the Court, was joined by Justices Brennan, Douglas and Marshall. Justice White, dissenting, was joined by Justices Burger and Blackmun. Justices Powell and Rehnquist did not participate in the decision.

5. Replevin is a personal action by which the owner, or one who has a specific property interest in chattel taken or detained, seeks to recover possession *in specie*. See *BLACK’S LAW DICTIONARY* 1463–64 (4th ed. 1968).

6. Both of the cases consolidated for review by the Court involved personal household goods.

7. 407 U.S. at 90 n.21, citing *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring).

Fuentes Court relied on Sniadach, stressing the inadequacy of the statutory protections afforded the debtor. The Court did not attempt to balance the creditor's property interests against those of the debtor.\(^9\)

Two years after Fuentes, the Court upheld the constitutionality of Louisiana's sequestration statutes\(^10\) in Mitchell v. W.T. Grant Co.,\(^11\) a case involving facts nearly identical to those in Fuentes.\(^12\) Writing for the plurality, Justice White, author of the dissenting opinion in Fuentes,\(^13\) distinguished that ruling by noting that the Louisiana statutes at issue in Mitchell provided numerous safeguards not present in Fuentes: the writ of sequestration was issuable only by a judge, rather than a court clerk;\(^14\) the writ would issue only upon a clear showing of entitlement, rather than a mere conclusory allegation of ownership.

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9. Writing for the majority, Justice Stewart stated:

The replevin was not cast as a final judgment. Most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter of dispute . . . . Nonetheless, it is clear, that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment . . . . The Fourteenth Amendment's protection of "property," however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather it has been read broadly to extend protection to "any significant property interest."

407 U.S. at 84, 86. The term "property interests" refers to current and real interests that both buyer and seller may have in the property at issue. Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974). Under a conditional sales contract or security agreement, the subject property is not exclusively owned by the debtor until the purchase price is paid in full. Id. The creditor has an interest measured by the unpaid balance of the purchase price. Id.


Sequestration is a mesne process by which a writ is issued at the commencement of or pending an action, enabling the claimant to have property in the possession of the defendant or a third person taken into legal custody until after judgment so that the property may be delivered to the party adjudged to be entitled to it, where the defendant has the power to place the claimant in a disadvantageous position and the claim is against the particular property.


12. In both Fuentes and Mitchell creditors sought repossession of personal household goods after an alleged default by the debtor under a conditional sales contract with security agreement. In each case, the creditor proceeded by judicial repossession, rather than self-help, utilizing the sheriff's services without giving prior notice and an opportunity for hearing.

13. Justice White was joined in Mitchell by the Chief Justice and Justices Blackmun and Rehnquist. Justice Powell concurred in a separate opinion but appeared to join also in the majority opinion. Dissenting Justice Stewart was joined by Justices Douglas and Marshall. Justice Brennan dissented in a separate opinion.

14. Orleans Parish, in which Mitchell arose, was at that time the only parish in Louisiana which confined the authority to issue writs to a judge. LA. CODE Civ. PRO. art. 281 (1960).
Creditors' Rights

This page contains a detailed discussion of creditors' rights and the legal proceedings related to them. It outlines the requirements for creditors to demonstrate their right, even upon issuance of the writ, and the property's disposal by the court. It also mentions the statute's authorization for the debtor to request a dissolution of the writ, in contrast to the approach of the Fuentes Court. The text references the Mitchell Court's decision, which balanced property interests and held that the Louisiana statutory procedure constitutionally accommodated all such interests.

Most recently, eight months after Mitchell, the Court held unconsti-

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15. The nature of the claim, the amount thereof, if any, and the grounds relied upon for issuance of the writ must clearly appear from specific facts. Id. art. 3501.

16. Id. art. 3571. It is interesting to note that historically the writ would issue "only if the creditor had 'good reason to fear' that the debtor would damage, alienate or waste the goods, and the creditor was required to show the grounds for such fear." 416 U.S. at 605 n.4.

17. In Louisiana, the creditor is required to post a bond prior to issuance of the writ, to protect the debtor from unlawful sequestration. LA. CODE Civ. PRO. arts. 3501, 3574 (1960). After a sequestration writ is served upon the debtor, the sheriff becomes responsible for the property's safekeeping. The creditor, however, may take possession of the goods if the debtor does not post a bond within 10 days to secure possession. Id. arts. 3507, 3576. The creditor may not sell the goods until final judgment on the merits. Id. art. 3510. For further discussion, see Johnson, supra note 10, at 21-22.

18. LA. CODE Civ. PRO. art. 3506 (1960). Dissolution of the writ must be ordered unless the creditor proves the grounds on which the writ was issued. Mitchell filed a motion to dissolve the writ, claiming that the seizure violated the due process clauses of the state and federal constitutions since it had occurred without prior notice and hearing. 416 U.S. at 602-03. The motion was denied by the trial judge who stated: [P]laaintiff insured defendant's right to due process by proceeding in accordance with Louisiana law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process. Id. at 603. The trial judge's decision was later affirmed in turn by the Louisiana Court of Appeals and the state supreme court. W.T. Grant Co. v. Mitchell, 263 La. 627, 269 So. 2d 186 (1972); see Note, The Supreme Court, 1973 Term, 88 HARV. L. REV. 43, 73 n.18 (1973).

19. Property interests were not the only interests balanced by the Mitchell Court. See discussion in Part II-A infra.

20. What set Mitchell apart from Sniadach and Fuentes was that the protections afforded the debtor by Louisiana law were deemed sufficient by the Court, after balancing, to alleviate the need for the imposition of further safeguards such as prior notice and hearing. This flexible-interests-balancing approach adopted by the Court is characteristic of traditional due process adjudication. See, e.g., Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895-96 (1960) (balancing the nature of the government function with the private interest affected by it; interest of civilian employee in retaining his job can be summarily denied when balanced against the necessity of security of a military base); Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970) (balancing the interests of welfare recipients in receiving their benefits without being placed in "brutal need" with the government's interest in promoting an efficient system and the welfare of the general public by declining to give benefits to those not entitled to them).
tutional a Georgia garnishment statute21 in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,22 which involved prejudgment garnishment by an unsecured creditor of defendant corporation's bank account. Like the statutes at issue in *Fuentes*, the Georgia statute was relatively devoid of debtor safeguards except for bond and counterbond provisions,23 and a requirement that the creditor show "reason to apprehend the loss of the [amount due] or some part thereof unless process of garnishment shall issue."24 Justice White, writing for a 6–3 Court (Justice Powell concurring only in the judgment25), relied on *Fuentes* to find that the Georgia statutory procedure was unconstitutional for lack of an "early hearing"26 at which the creditor would be required to demonstrate at least probable cause for the garnishment.27 Justice White also noted that the Georgia statute had "none of the saving characteristics of the Louisiana statute" in *Mitchell*.28

This comment will explore the interaction of these four major cases, and interpret their composite message to the secured creditor. It initially will analyze the various opinions of Justice White, concentrating particularly on the roles of stare decisis and supremacy in *Di-Chem*, and of Justice Powell, particularly his emphasis upon distinguishing secured from unsecured transactions. Second, the comment will discuss the three basic remedies available to the secured creditor: the adversary hearing under *Fuentes*, self-help repossession, and the *ex parte* procedure under *Mitchell.* *Mitchell*’s due process balancing analysis is favored as an appropriate compromise between self-help on the one hand and *Fuentes*’ stringent adversary hearing requirement on the other, in the context of secured transactions. Finally, the comment will discuss current developments in this area in Washington, and pre-

22. 419 U.S. 60 (1975).
23. *Id.* at 606.
25. 419 U.S. at 609.
26. Justice White referred variously, in discussing the Georgia statute’s infirmity under *Fuentes*, to "hearing," "hearing or other safeguard," and "early hearing." In distinguishing *Mitchell*, he noted the lack of a "provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." 419 U.S. at 607. Despite the ambiguity of these references, it is submitted that in *Di-Chem*, as in *Sniadach*, the statutory scheme was infirm for failure to provide a pre-seizure adversary hearing in the context of unsecured transactions. See notes 57–58 and accompanying text infra.
27. 419 U.S. at 607.
28. *Id.* See notes 14–20 and accompanying text supra.
Creditors' Rights

sent a proposed statutory amendment to comport with Mitchell's guidelines.

I. STARE DECISIS AND SUPREMACY: FUENTES REVITALIZED, MITCHELL REAFFIRMED

A. Justice White's Attempt for Greater Unity

In his dissenting opinion in Fuentes, Justice White noted: "It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid . . . ." Writing for the majority in Mitchell, Justice White similarly recognized:

Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor . . . . The reality is that both seller and buyer had current, real interests in the property.

Proceeding from this recognition in Mitchell, Justice White balanced the parties' property interests in the sequestered goods with their interests in due process, and found that the Louisiana procedure effected "a constitutional accommodation of the conflicting interests of the parties." Although Justice White could have regarded Mitchell as an "extraordinary situation" constituting an exception to the Fuentes rule, he chose not to do so. Rather he carved out yet another exception to the Fuentes due process requirements based on factual distinctions between the statutory schemes.

29. 407 U.S. at 99.
30. 416 U.S. at 604.
31. Id. at 607
32. In Fuentes, 407 U.S. at 91-92, the Court outlined the limited circumstances in which it has allowed summary seizures:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

The Louisiana Supreme Court found Mitchell within the Fuentes exceptions, noting that where the creditor can show there is an immediate danger that the debtor will destroy or conceal the goods, seizure before notice and hearing may be justified. W. T. Grant Co. v. Mitchell, 263 La. 627, 269 So. 2d 186 (1972). Justice White, however, noticeably disregarded this analysis.

33. After Fuentes, one commentary suggested that four elements must necessarily be present before Fuentes' procedural due process safeguards come into play: (1) the
Certainly Justice White, in *Mitchell*, made good his dissenting comment in *Fuentes* that he “would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has a substantial interest.” 34 Indeed, four Justices35 and some commentators36 felt that *Fuentes* was overruled by *Mitchell*. Yet Justice White's recent opinion in *Di-Chem* suggests that “report[s] of the demise of *Fuentes* . . . have been greatly exaggerated.”37

Although before *Mitchell* was decided the commentary was generally favorable to *Fuentes*,38 that opinion experienced rough sledding in the inferior courts. In *Roofing Wholesale Co. v. Palmer*,39 the Arizona Supreme Court found unnecessary prior notice and an opportunity for hearing in attachment and garnishment proceedings when wages were not involved. In an opinion reminiscent of that of the Virginia Court of Appeals in *Martin v. Hunter's Lessee*,40 the Arizona court refused to abide by the principles set forth in *Fuentes*:41

Admittedly, were we convinced that the four man majority of the United States Supreme Court in *Fuentes* . . . would become at least a five man majority when the two judges who did not participate in the particular case are called up to participate in a similar question, we would then be inclined to follow the decision as set down in *Fuentes* . . . . When, however, we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority.

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34. 407 U.S. at 102 (White, J., dissenting).
37. 419 U.S. at 608 (Stewart, J., concurring).
40. 14 U.S. (1 Wheat.) 304 (1816).
Creditors' Rights

The Arizona court has been severely (and properly) criticized for its refusal to follow precedent; yet the Supreme Court itself in Mitchell showed little more respect for stare decisis than had the Arizona court for the supremacy clause. As Justice Stewart, author of the Fuentes opinion, stated in his Mitchell dissent:

It seems to me that unless we respect the constitutional decisions of this Court, we can hardly expect that others will do so . . . . [T]he Court today has unmistakenly overruled a considered decision of this Court that is barely two years old, without pointing to any change . . . that might justify this total disregard of stare decisis.

The Georgia Supreme Court in Di-Chem upheld its garnishment statute by interpreting Sniadach as a limited exception in favor of wage earners to "the general rule of legality of garnishment statutes." Ruling without the benefit of Mitchell, the Georgia court, like the Arizona court, failed to give due regard to the governing principles of Fuentes.

Thus in Di-Chem the Court was squarely confronted with the unreserved refusal of an inferior tribunal to follow the supreme law of the land, as enunciated in Fuentes. Justice White's reliance upon Fuentes, an opinion with which he personally disagreed, demonstrates without doubt the insistence of the Court that its rulings be obeyed. Moreover, that reliance reflects in no small measure the Court's

42. See, e.g., 86 Harv. L. Rev. 1307 (1973), in which the author notes that if all lower courts began a study in personalities of the Supreme Court Justices, the result would be quagmires of uncertainty, uneven application of constitutional and federal law, and the opportunity for judges to adjust their "predictions" to suit their individual views. Congress has provided that six Justices constitute a quorum. 28 U.S.C. § 1 (1970). The Court not only hands down four member decisions, but recognizes their precedential value and finds it necessary to follow or distinguish them. See 86 Harv. L. Rev. at 1312.

43. 416 U.S. at 634–35 (Stewart, J., dissenting).
45. In this respect the Georgia court was not without supporters on the Court. In their dissenting opinion in Di-Chem, Justices Blackmun and Rehnquist stated that Fuentes should not have been decided by a 4–3 vote when Justices filling the vacant seats were qualified and available to participate on reargument. 419 U.S. at 616. In addition, they stated that they could not regard Fuentes as much influence or precedent for the Di-Chem case. Id. at 615–16. They would have affirmed, by distinguishing Sniadach as "reek[ing] of wages," id. at 619, and deciding that since debtor North Georgia Finishing was an operating corporation, the Georgia system afforded all the protections required by commercial entities.

46. While the Mitchell Court was aware of the challenge presented by the Arizona court, see 416 U.S. at 634 (Stewart, J., dissenting), the problem was not squarely before the Court. Indeed, the Louisiana Supreme Court properly deferred to Fuentes, but purported to distinguish it. See note 32 supra. Perhaps for this reason, the Mitchell Court preferred not to address the problem.
mindfulness of Justice Stewart’s exhortation in *Mitchell* that the Court itself respect its own constitutional decisions.\(^47\) That Justice White, rather than one of the four Justices forming the majority in *Fuentes*, wrote the opinion of the Court in *Di-Chem* adds significantly to the impact of its holding. His decision in *Di-Chem* to join in a majority decision, rather than to concur in the judgment and file a separate opinion similar in approach to that of Justice Powell (as his personal views on the substantive issues would dictate), represents praiseworthy magnanimity.

Most difficult for Justice White was the task of preserving the reach of his own opinion in *Mitchell*, while at the same time revitalizing *Fuentes*. Once having espoused reliance upon *Fuentes*, Justice White could ill afford to ignore his own opinion in *Mitchell*, for to do so would have implicitly relegated it to its own narrow factual setting.\(^48\) Hence, Justice White proceeded to treat *Mitchell* as equally applicable in the *Di-Chem* setting, finding the statutory scheme infirm under *Mitchell* because of its total lack of safeguards.\(^49\) His discussion of *Mitchell* may lead the unwary observer to conclude that a statutory scheme with only *Mitchell* safeguards might be constitutional in the context of unsecured transactions, as in *Di-Chem*. Yet, reliance upon *Fuentes* frustrates such analysis; Justice White’s reliance on both *Fuentes* and *Mitchell* suggests that *Fuentes* principles apply in the context of unsecured transactions, and those of *Mitchell* in secured. This reading of *Di-Chem* is harmonious with Justice White’s earlier opinions in *Fuentes* and *Mitchell*.

B. The Secured-Unsecured Dichotomy and the Interrelationship of *Fuentes* and *Mitchell*

The *Mitchell* Court introduced the use of a balancing test only in

\(^47\) 416 U.S. at 634.

\(^48\) Although concurring Justice Powell suggests that Justice White “relegate[d] *Mitchell* to its narrow factual setting,” 419 U.S. at 609, he overstates the case. Since the Georgia statute at issue in *Di-Chem* did not require any kind of hearing, *ex parte* or otherwise, prior to garnishment, Justice White had only to rely on *Fuentes* to the extent that it required a hearing. Indeed, Justice White found the Georgia scheme infirm under *Fuentes* for failure to provide for “an early hearing,” *id.* at 606, and likewise infirm under *Mitchell* for failure to provide for “an early hearing.” *Id.* at 607. It is submitted, then, that while apparently revitalizing *Fuentes*, Justice White has done so in such a manner that *Mitchell*’s reach is not one whit restricted. The secured creditor may proceed *ex parte* under the *Mitchell* standards after *Di-Chem*, just as before.

\(^49\) *Id.* at 607.
the context of secured transactions, where there are mutual property interests in goods. Where, as in the case of unsecured transactions, the debtor has "full legal title" to the property in question, a balancing approach is simply inappropriate. This suggests a meaningful distinction between secured and unsecured transactions for purposes of determining the requirements of due process. This approach finds doctrinal support in Justice White's opinion previously discussed, and in Justice Powell's concurring opinions in Mitchell and Di-Chem as well.

Justice Powell recognized that Sniadach was readily distinguishable from Mitchell because the Sniadach creditor did not have a pre-existing property interest, as did the conditional sales vendor in Mitchell. He specifically noted the failure of the Fuentes Court to perceive that a secured transaction necessarily involves mutual property interests, both entitled to protection.

Justice Powell again relied on this distinction in Di-Chem, expressing a continuing doubt whether Fuentes strikes a proper balance when accounting for the creditor's interest. He would not, however, use the dichotomy to restrict the use of Mitchell standards to secured transaction disputes alone. His position accords more weight to the creditor's "right" to invoke prejudgment garnishment and attachment remedies than to the debtor's right to property to which he or she has full legal title. Such a position represents an improper disregard for the secured-unsecured dichotomy espoused by Justice Powell himself, and seems at odds with the Court's opinions in both Mitchell and Di-Chem.

There are several reasons for restricting the application of Mitchell to secured transaction disputes in states with appropriate statutory schemes. First, property interests in goods have historically been re-

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50. Fuentes, 407 U.S. at 86.
52. 416 U.S. at 628 n.3.
53. Id.
54. 419 U.S. at 609.
55. Unfortunately, Justice Powell does not make extensive use of the dichotomy in fashioning different remedies. He seems to indicate that Mitchell-type safeguards would satisfy procedural due process requirements, even with regard to unsecured transactions, if adequate security is provided by the creditor prior to garnishment or attachment, a specific factual showing of probable cause is made to a neutral official, and there is an opportunity for a prompt post-seizure adversary hearing to determine the merits of the controversy with the burden of proof on the creditor. Justice Powell would find such procedures inadequate only when the debtor is financially driven "to the wall," as in Sniadach. See 419 U.S. at 609.
garded as special and deserving of extra protection;\textsuperscript{56} if prehearing seizure were allowed in garnishment and attachment situations in states with \textit{Mitchell}-type statutes, the creditor would be taking property, without notice, in which only the debtor had an interest. Second, such actions seem contrary to the recent trend, first surfacing in \textit{Sniadach}, to grant greater protection to the debtor, long left unprotected by older "creditor remedies" laws. A third, and perhaps the most convincing, reason is practical: While a judicial repossession scheme less onerous than that outlined in \textit{Fuentes} is essential to dissuade secured creditors from using self-help repossession under the Uniform Commercial Code (UCC),\textsuperscript{57} the self-help alternative is not available to the unsecured creditor; judicial proceedings are the only option. Therefore, the need is not as great for a more flexible and less onerous alternative to encourage the unsecured creditor to use judicial alternatives.

Surveying the field at this point, and assuming some doctrinal and practical validity to the secured-unsecured dichotomy, the following picture is presented by \textit{Di-Chem, Mitchell, Fuentes} and \textit{Sniadach}: Read together, \textit{Di-Chem, Fuentes} and \textit{Sniadach} suggest that states will be required to provide for notice and opportunity for an adversary hearing prior to prejudgment garnishment (and by analogy attachment)\textsuperscript{58} by an unsecured creditor. In the context of secured transactions \textit{Mitchell} remains controlling even after \textit{Di-Chem}. Should a state fail to provide the full range of safeguards outlined in \textit{Mitchell} and reiterated in \textit{Di-Chem}'s discussion of \textit{Mitchell}, it would then apparently be required to comply with the stricter \textit{Fuentes} guidelines governing judicial repossessions by unsecured creditors.

\textsuperscript{56} "Property and law were born together and die together. Before laws were made there was no property; take away laws and property ceases." \textit{J. Bentham, Theory of Legislation, Principles of the Civil Code}, Part 1, 112 (Dumont ed., Hildreth transl. 1864). "[T]he right to private property is one of the pillars of western faith. . . . Private property is an unmistakable index of social welfare." \textit{J. Cribbet, Principles of the Law of Property} 6 (2d ed. 1975). \textit{See also U.S. Const. amend. XIV, § 1 ("No State . . . shall . . . deprive any person of . . . property without due process of law . . . ."); and amend. V ("nor shall private property be taken for public use, without just compensation")}.\textsuperscript{57}

\textit{UCC} § 9–503; \textit{Wash. Rev. Code} § 62A.9–503 (1974). Louisiana is the only state which has not adopted the UCC; Maryland, Pennsylvania and Utah are the only states which have enacted § 9–503 in a form different from the Official Code. For the variations, see \textit{R. Anderson, The Uniform Commercial Code} § 9–503(2), at 591 (1971).

\textsuperscript{58} \textit{See Rogoski v. Hammond, 9 Wn. App. 500, 513 P.2d 185 (1973), discussed in note 144 and text accompanying notes 144–48 infra.}
Creditors’ Rights

II. REMEDIES CURRENTLY AVAILABLE TO THE SECURED CREDITOR

A. Background: Conflicting Interests in Secured Transactions

The *Mitchell* Court made clear that the debtor and creditor have conflicting interests in secured property. The debtor “owns” the goods under the installment sales contract, but title is encumbered and, until the purchase price is paid in full, the debtor’s interest is no greater than the surplus remaining after foreclosure and sale in the event of default. The creditor has a corresponding interest in the property measured by the unpaid balance of the purchase price, which is secured by a lien.59

The *Mitchell* Court also identified interests other than the mutual property interests which are present in the typical personal property secured transaction. The debtor has the right to continued use and possession of the goods if payments are current and has an interest in avoiding a wrongful deprivation of the goods.60 The creditor has an interest in minimizing the diminishment of his or her security interest caused by deterioration of the goods resulting from continued debtor usage. The creditor may protect him or herself against the possibility that the debtor will either dispose of the goods, causing the vendor’s lien to expire,61 or abscond with them.

Looking first at the debtor’s interests, aside from any interest in legal title, it seems that his or her interests are not as great in the case of repossession as in that of garnishment. In garnishment, either of wages or of a bank account, the appropriation of a debtor’s current

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59. 416 U.S. at 604.
60. The Court in *Mitchell* indicated that the initial hardship to the debtor on repossession by the creditor was limited, since the debtor could immediately seek dissolution of the writ which must be ordered unless the creditor proved the grounds upon which the writ issued. 416 U.S. at 606; La. Code Civ. Proc. art. 3506 (1960). Even if the debtor neither sought a dissolution of the writ nor posted a redelivery bond, the seized property could not be sold by the creditor until a final judgment on the merits was rendered. 416 U.S. at 622; La. Code Civ. Proc. arts. 3507, 3508, 3510 (1960). The Court indicated that since the debtor in *Mitchell* did not avail himself of the right to request an immediate full hearing on the matter of possession, he could hardly expect his claim of severe deprivation to carry much weight. 416 U.S. at 610.
61. Under Louisiana law, a vendor’s privilege “exists on the price due on moveable effects, if they are yet in the possession of the purchaser.” La. Code Civ. Proc. art. 3217 (1960). By asserting this privilege, the creditor gains preference over other creditors of the purchaser only if the property still remains in the possession of the purchaser. Id. art. 3227. Analogous situations do exist in UCC jurisdictions. See notes 70–73 and accompanying text infra.
assets will inevitably cause substantial disruption of personal or business activities, and often will cause unmitigated hardship. Repossession of specific, previously-identified secured property will not ordinarily have such consequences.\textsuperscript{62} The effect of repossession on the debtor is more similar to that in the case of prejudgment attachment. Yet in attachment, the sheriff typically levies on property worth 50 percent more than the amount claimed due,\textsuperscript{63} and has considerable discretion in choosing property to attach.\textsuperscript{64} Wrongful or oppressive levy voids any subsequent proceeding only pro tanto,\textsuperscript{65} and the debtor must proceed affirmatively to obtain remedial relief from such attachment.\textsuperscript{66} Since the secured creditor may proceed by repossession only against specific secured property, the potential detriment to the debtor is clearly less than in either garnishment or attachment proceedings.

Of the creditor's nonproperty interests, that of preventing deterioration of secured property is probably the least important. Deterioration of some types of collateral, such as cars which have intrinsic resale value, is perhaps of greater concern than deterioration of small appliances, clothing and other soft goods, which are often essentially worthless as collateral.\textsuperscript{67} Presumably, however, in the short time span between notice to the debtor and judicial hearing, deterioration of collateral with intrinsic resale value will be only marginally significant.

The creditor's interest in preventing destruction or concealment of secured goods seems more important than that of minimizing deterioration. The results of such activity are sufficiently harmful to the cred-

\textsuperscript{62} The repossession of consumer goods should not produce the extreme hardship evidenced in the \textit{Sniadach} garnishment situation. "The truly temporary deprivation of the right to continue to use an automobile has no inherent characteristic of hardship." Mentschikoff, \textit{Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis}, 14 \textit{W. & MARY L. REV.} 767, 783 (1973) [hereinafter cited as Mentschikoff]. There is evidence, however, that the Supreme Court may consider the use of an automobile to be of somewhat greater value. For example, "Once [driver's] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood." Bell v. Burson, 402 U.S. 535, 539 (1971); similarly, deprivation of the use of cars can result in the loss of a job which, no less than garnishment of wages, can be disastrous for a wage-earning family. \textit{Sniadach}, 395 U.S. at 341-42 (1969).

\textsuperscript{63} \textit{WASH. REV. CODE} § 7.12.090 (1974).

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} McConnell v. Kaufman, 5 Wash. 686, 32 P. 782 (1893).


\textsuperscript{67} Mentschikoff, \textit{supra} note 62, at 779 n.34.
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itor to justify serious consideration of this interest in the balancing process.68

The creditor's interest in preventing improper disposition of the collateral by the debtor is equally as important as preventing destruction or concealment. This creditor interest is somewhat stronger in Louisiana due to the unusual nature of the vendor's lien in that state; i.e., the lien loses its priority if the property is conveyed to a third party by the debtor.69 Notably, however, the Louisiana vendor's lien is not without its analogue in UCC jurisdictions. Under Section 9–307(2) of the UCC,70 a creditor who takes a purchase money security interest in consumer goods and perfects without filing can lose rights to those goods if the purchasing consumer sells them to another consumer. Although the secured creditor may protect him or herself by filing,71 this option may be uneconomical in the case of sales of small appliances and personal household items.72 Thus, a secured creditor under the UCC is entitled to protection similar to a secured creditor under Louisiana law.

Section 9–307(1) of the UCC73 presents another analogue. Even though perfected by filing, the secured party's purchase money security interest is not protected when the debtor sells to a buyer in the ordinary course of business. Thus, the possibility that a debtor could by disposing of secured goods destroy the vendor's lien is not unique to civil law jurisdictions.

B. Fuentes' Strict Adversary Hearing Requirements

In interpreting the familiar maxim that procedural due process requires notice and an opportunity to be heard "at a meaningful time
and in a meaningful manner, the \textit{Fuentes} Court enunciated fairly stringent requirements. Notice and an opportunity to be heard must be given before state seizure, even if only a nonfinal deprivation\textsuperscript{75} of "any significant property interest."\textsuperscript{76} Such a property interest includes continued use and possession\textsuperscript{77} under a conditional sales contract, of all goods, whether or not necessities of life.\textsuperscript{78}

The \textit{Fuentes} Court noted that some "extraordinary situations" might justify postponement of notice and hearing until after seizure.\textsuperscript{79} Such situations, however, were indeed limited and required narrowly drawn statutory schemes not present in \textit{Fuentes}.\textsuperscript{80} In all other situations, some form of notice and hearing was required. The Court noted that costs in time, effort and expense would result, but felt the costs were outweighed by the constitutional rights protected.\textsuperscript{81}

Assuming, \textit{arguendo}, that \textit{Fuentes} were the only remedy available to the secured creditor, several problems are presented. An adversary hearing would be required in every case, despite the fact that in the vast majority of instances the debtor would have no affirmative defense\textsuperscript{82} sufficient to forestall or prevent the impending repossession.\textsuperscript{83} The additional costs of such hearings (which no doubt would be indirectly borne by debtors) would in most cases unnecessarily increase the size of the deficiency judgments awarded against the defaulting debtor. Deficiency judgments would also be enlarged because of the diminution in value of "wasting assets"\textsuperscript{84} between notice and hearing. Again, this result is in most cases an unnecessary one, since the vast

\begin{itemize}
\item \textsuperscript{74} 407 U.S. at 80, \textit{quoting} Armstrong v. Manzo, 380 U.S. 545, 552 (1964).
\item \textsuperscript{75} \textit{Id.} at 85.
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} at 88–89.
\item \textsuperscript{79} See note 32 \textit{supra}.
\item \textsuperscript{80} In the Pennsylvania scheme, the creditor had only to file an affidavit of the value of the property; in the Florida scheme, only to assert that he or she was lawfully entitled to possession. Neither statute met the requirements set out by the Court for summary, \textit{ex parte} seizures. \textit{Id.}
\item \textsuperscript{81} 407 U.S. at 90 n.22.
\item \textsuperscript{82} Typically available defenses are fraud and breach of warranty. Mentschikoff. \textit{supra} note 62, at 775–76.
\item \textsuperscript{83} \textit{Id.} at 775–78.
\item \textsuperscript{84} Automobiles and most consumer goods are wasting assets, since each passing day of consumer use presumably lowers their resale value and exposes the goods to risk of accident. \textit{Id.} at 779.
\end{itemize}
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majority of debtors will lose at the hearing, most often by default. The increased number of hearings would impose additional burdens on an already overburdened court system, resulting in higher taxes to be paid by the general public. Finally, if prior notice of repossession induces an increased number of persons to secrete or transfer their goods, or to "skip" the jurisdiction, the resultant financial injury to the creditor would undoubtedly be reflected in higher credit charges to all debtors where allowed under existing usury limitations, and thus foreclose some consumers from obtaining credit. Other retailers would increase the purchase price paid by both cash and credit customers or simply deny credit altogether to consumers whose credit worthiness is marginal.

The state of affairs presented by Fuentes, particularly the troublesome, time-consuming and expensive nature of adversary hearings, encourages many creditors to utilize the self-help provisions of Section 9-503 of the UCC. Recognizing this likelihood, Justice White commented in his Fuentes dissent:

[Fuentes] represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without . . . resort to judicial process at all.

85. Attorney Middlebrooks, supra note 72, indicated that most defaulting debtors simply lack the funds to meet their payments, therefore the creditor usually obtains the relief requested at hearing, and the added costs of such adversary hearings must be borne, albeit indirectly, by debtors.
86. Mentschikoff, supra note 62, at 769.
87. See note 68 supra.
88. Such foreclosure may be problematical, however, since the economics of the marketplace, particularly the movement of interest rates, undoubtedly has far more to do with the availability of credit than the indirect imposition of repossession costs on the general consuming public. See Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974).
89. Section 9-503 of the UCC, WASH. REV. CODE § 62A.9-503 (1974), provides:
   Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . .

   The effects of self-help repossession on the debtor are basically the same as those of the replevin procedure held invalid in Fuentes. In either situation, the debtor is deprived of his or her possessory interest in goods without prior notice and opportunity to be heard. For further discussion, see Comment, Self-Help Repossession: The Constitutional Attack, the Legislative Response, and the Economic Implications, 62 GEO. L.J. 273, 288-92 (1973).
90. 407 U.S. at 102.
C. Self-Help Repossession

Justice White's incisive commentary prompts one to consider just what sort of self-help repossession may be privately agreed upon by use of controlling credit instruments. Yet, an initial question worthy of consideration is whether the self-help remedy is available at all. Such consideration requires an analysis of the "state action" concept in the context of Article Nine of the UCC.

1. State action

The complexity of the UCC repossession provisions, often accentuated by additional individual state law requirements not patterned after the UCC provisions, has prompted much recent litigation over the question whether "self-help" repossession under the UCC constitutes state action. Two basic arguments have been urged for finding state action in self-help repossession cases: (a) the authorization or encouragement argument; and (b) the public or state function argument. Although the matter is far from settled, recent federal rulings on state action issues in Article Nine and analogous contexts sug-

91. For example, in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974), Judge Hufstedler, dissenting, noted that the auto-secured credit industry in California was heavily regulated by statute. She maintained that such regulation combined with self-help repossession so involved the state as to constitute state action. 492 F.2d at 340. See CAL. CIV. CODE §§ 2981-84.4 (West Supp. 1975); CAL. COMM. CODE § 9503 (West Supp. 1975).

A similar argument was made in Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974). In finding state action, the district judge stated the role of the Michigan Secretary of State in issuing new certificates of title for repossessed automobiles was qualitatively the same as the role of the clerk under the Florida replevin statute in *Fuentes* and was equivalent to ratification of the seizure by the state. Id. at 972. See MICH. COMP. LAWS §§ 257.236a(a), (d) (1970). For further discussion, see Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 19-23 (1973).


93. The Supreme Court has found state action present where the state authorized use of its courts to enforce private racially discriminatory acts, see, e.g., Barrows v. Jackson, 346 U.S. 249 (1953) (restrictive land covenants); Shelley v. Kraemer, 334 U.S. 1 (1948) (restrictive land covenants); where a state constitution encouraged pri-
suggest that self-help repossession under Section 9–503 is not state action.95

a. The authorization argument. It has been argued that the creditor using repossession remedies sanctioned by statute is clothed with the authority of state law.96 This argument was presented in Adams v. Egley,97 in which defendant secured creditor utilized summary self-help procedures permitted by California statutes to repossess plaintiff debtor's automobile.98 The federal district court's holding that such proceedings amounted to state action99 was reversed by a divided Ninth Circuit Court of Appeals, sub nom. Adams v. Southern California First National Bank.100 The Ninth Circuit Court majority in Adams reasoned that the California statutes merely codified previously existing private remedies and did not thereby clothe the creditor with the authority of state law.101

Judge Byrne, dissenting from the panel opinion in Adams,102 reason-
soned that state action was present under *Reitman v. Mulkey*. Judge Hufstedler, dissenting from denial of hearing *en banc*, argued that the complex and pervasive California statutory scheme governing repossession of automobiles supported a finding of state action under the “authorization” and “symbiotic relationship” rationales.

In *Turner v. Impala Motors*, a post-*Mitchell* case, the Sixth Circuit Court of Appeals echoed the Ninth Circuit Court’s holding in *Adams* that the mere finding of some degree of state involvement was insufficient to constitute state action: the level of involvement must be “significant.” The *Turner* court stated that Section 9-503 of the UCC was simply permissive; the state exercised no control or compulsion over the creditor’s decision to repossess. In response to the argument that the mere existence of the statute might encourage self-help, the *Turner* court suggested that, as a practical matter, creditor decisions to repossess by self-help were principally influenced by economic factors, not formal legal considerations.

103. 387 U.S. 369 (1967); see note 99 *supra*.
104. 492 F.2d at 340.
105. This argument has recently been undermined by the Supreme Court’s holding in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).
106. 503 F.2d 607 (6th Cir. 1974).
107. Most courts have found weaknesses in the authorization argument and have declined to find sufficient state action. In *Oiler v. Bank of America*, 342 F. Supp. 21, 23 (N.D. Cal. 1972), the court stated:

> It is difficult to imagine any statutory provision that does not, in some way, control human relationships. To say, as plaintiff seems to contend, that all human behavior which conforms to statutory requirements is “State action” or is “under color of State law” would far exceed not only what the framers of the Civil Rights Act ever intended but common sense as well.

*Oiler* involved repossession of plaintiff’s automobile under terms of a conditional sales contract. Plaintiff relied on 42 U.S.C. § 1983 (1970), providing for equal rights of citizens when a deprivation is accomplished under state law. The court found, however, that the defendant bank’s repossession under authority of California statutes was not “under color of State law”; since the bank was not a governmental agency, no government officials acted with the bank in the matter of repossession, and the authority to repossess was based on a contract right judicially approved prior to the adoption of the statutes in question.

108. 503 F.2d at 609.
109. *Turner* was decided shortly after another post-*Mitchell* decision by a district court in the Sixth Circuit. *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974). Using the state function argument discussed *infra*, the district court found state action in automobile repossession and resale and, upon balancing, determined that by authorizing self-help repossession the State had sanctioned abuses of corporate power and failed to accommodate the debtor’s interests. The court especially noted a lack of court supervision and of any simple procedure by which the creditor could be put to his or her proof.
110. 503 F.2d at 611.
b. The public or state function argument. The public or state function theory deems private action equivalent to state action when the private person is performing a function traditionally that of the state, or is performing the activity as an agent of the state and therefore subject to its constitutional limitations.111

The state function theory has prevailed in cases involving landlord’s private seizures, pursuant to authorizing statute, from persons failing to make rental payments. For example, in Hall v. Garson,112 a landlady’s statutory seizure of a television set to enforce her lien was viewed as a function traditionally performed in Texas by public officials. Thus, the landlady was “clothed with state authority.”113

The state function theory has not fared as well, however, in repossession cases concerning secured parties. Courts can generally distinguish self-help repossession by secured parties, reasoning that the right of repossession is based on the long-standing private right of contract which provides the secured creditor (in contrast to an unsecured landlord) with a property right in the goods.114 For example, in Gibbs v. Titelman,115 the Third Circuit Court of Appeals denied the theory that by permitting self-help repossession, Pennsylvania had abdicated to private individuals the traditional state function of deciding “that one’s rights are superior to another’s” and carrying “out that decision by seizing another’s property.”116

111. See Clark & Landers, supra note 33, at 377.
112. 430 F.2d 430 (5th Cir. 1970). Hall was remanded for trial and appealed again to the Fifth Circuit Court on a challenge to the constitutionality of the Texas landlord lien statute. On the second appeal, the court held the statute violative of the fourteenth amendment, 468 F.2d 845 (5th Cir. 1972).
113. 430 F.2d at 443. The court reasoned in dictum that: [T]he execution of a lien, whether a traditional security interest or a quasi writ of attachment or judgment lien has in Texas traditionally been the function of the Sheriff or constable. Thus [the statute] vests in the landlord and his agents authority that is normally exercised by the state and historically has been a state function.
114. Borseth v. Raden, Civ. No. 777-523, Wash. Super. Ct. King County, filed March 4, 1974 (Oral Decision at 9–10). In a succinct and well-reasoned opinion holding Washington’s Innkeepers Laws (WASH. REV. CODE chs. 60.64–66 (1974)) unconstitutional, the Borseth court found that the statutorily authorized private execution of landlord liens constituted state action since that function had been performed by the sheriff.
115. 502 F.2d 1107 (3d Cir. 1974).
116. Id. at 1113. Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974) (breaking into debtor’s home to repossess a washing machine held not state action under
A recent United States Supreme Court decision, *Jackson v. Metropolitan Edison Co.*,\(^{117}\) suggests that it is most unlikely the Court would hold Article Nine self-help repossession to be state action. Justice Rehnquist, writing for the Court, held that termination of utility service by a publicly regulated private utility did not constitute state action. He stated that even though the utility was heavily regulated and enjoyed at least a partial monopoly, utility service did not constitute a public function since it was not a service traditionally considered an obligation of the state.\(^{118}\) These cases suggest that Article Nine self-help repossession will in the future, as now, be considered only a private remedy. It is unlikely that a state action argument will succeed under either of the above theories.\(^{119}\) Consequently, absent *Mitchell*, secured creditors would increasingly turn to self-help to avoid the burden of proceeding by means of a *Fuentes* hearing.

2. The UCC's repossession scheme

Although Section 9–507 of the UCC by its terms does not require the creditor to post a bond prior to repossession, the debtor with a right to continued possession may immediately request a mandatory

Hall v. Garson, 430 F.2d 430 (5th Cir. 1970)); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir. 1974) (action against banks by depositors whose deposits had been set off against indebtedness arising from use of bank credit cards. not state action).

118. *Id.* at 353.
119. Even if repossession or resale pursuant to §§ 9–503 & 9–504 of the UCC were held to be state action and invalid on due process grounds, creditors might be able to insert a waiver clause in the security agreement. Two recent cases, D.H. Overmyer Co. v. Frick, 405 U.S. 174 (1972), and Swarb v. Lennox, 405 U.S. 191 (1972), indicate that an informed, voluntary waiver of due process rights may be constitutionally valid. See generally Anderson, *A Proposed Solution for the Commercial World to the *Sniadach*-Fuentes Problem: Contractual Waiver*, 79 CASE & COMMENT 24, 36 (1974).

It is suggested that such clauses should state clearly both the debtor's rights and the waiver of them and be printed in large and conspicuous type so as to create the presumption that the debtor was fully aware of the waiver. In order to avoid the appearance of adhesion, the creditor might give consideration for the waiver, such as reducing the interest rate. *See* Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 TEX. TECH. L. REV. 23, 43 (1972). *See also* Berg v. Stromme, 79 Wn. 2d 184, 484 P.2d 380 (1971), in which the court held a waiver of warranty to be ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity showing the qualities and characteristics of fitness which are to be waived. *Id.* at 196, 484 P.2d at 386. The case dealt with a printed disclaimer of warranty in the purchase of a new automobile.
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injunction restoring possession to the debtor on such terms as a court of equity may decree.120 The secured party must exercise reasonable care in preservation of the collateral upon repossession121 and must dispose of it in a commercially reasonable manner after proper notification of the time and place of sale.122 The debtor may redeem the property prior to its disposition123 unless the right has been waived after default.124 Violation by the creditor of any UCC provision is grounds for damages.125

While these provisions appear to provide appropriate guidelines for resolving secured creditor-debtor conflicts, in practice they may be inequitable. Some commentators suggest that most consumers are unaware of their rights and will not try to challenge the creditor's right to declare default and repossess, even when the creditor's position may be tenuous.126 Of course where the consumer is aware of his or her rights and insists upon asserting them, the possibility of breach of the peace, inherent in any self-help repossession scheme, looms large.

120. WASH. REV. CODE § 62A.9–507 (1974). It has been argued that the existence of legal service programs in poverty areas, and the continuing tendency in consumer legislation to add attorney's fees as an item of damage, make the right to request immediate restoration of possession a real, and not a theoretical one. Mentschikoff, supra note 62, at 782 n.41.
124. Id.
125. If the secured party . . . behaves in bad faith or in a commercially unreasonable manner or violates any . . . provisions of the Code, including taking possession where there is no default, he may be enjoined and ordered to behave in an appropriate way with appropriate damages to the debtor, including, in the case of consumer goods, penalty damages. Mentschikoff, supra note 62, at 774.
126. See, e.g., E. CAPLOVITZ, THE POOR PAY MORE 161–67 (1963). On the other hand, Justice White indicated that he was willing to trust the UCC drafters in fairly allocating the various burdens. Fuentes, 407 U.S. at 103.
3. Breach of the peace

The secured party has a right to repossess without judicial process only if it can be accomplished without breach of the peace.\(^{127}\) This requirement attempts to insure that recovery will be conducted in an orderly and peaceable fashion, but its exact limits are still undergoing development.

The Washington Supreme Court spoke to the breach of the peace issue in Burgin v. Universal Credit Co.,\(^{128}\) in which the court gave the following instructions:\(^{129}\)

>[I]f buyer is in personal possession of the [collateral] and protests against such repossession and attempts to obstruct the seller in doing so, . . . it becomes the duty of the seller to proceed no further in such attempted repossession and to resort to legal process to enforce his right of possession . . . .

In this case, physical resistance was sufficient to create a duty on the seller to retreat or risk breach of the peace.

It appears, however, that less than physical resistance will suffice. In Morris v. First National Bank & Trust Co.,\(^{130}\) the Ohio Supreme Court held that when three of creditor’s agents physically confronted debtor’s son on the debtor’s premises and seized a rotary mower found on the ground near a tool shed, despite the son’s requests to desist their repossession or depart the premises, they breached the peace. The court found it irrelevant that the son failed to lash out or that no assault occurred; it was sufficient that an act likely to produce violence had occurred.\(^{131}\) Similarly, a refusal to permit entry into the place where the collateral is kept will likely preclude self-help repossession.\(^{132}\)

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128. 2 Wn. 2d 364, 98 P.2d 291 (1940).
129. Id. at 373, 98 P.2d at 295.
130. 21 Ohio St. 2d 25, 254 N.E.2d 683 (1970).
131. Similarly, in Stone Machinery Co. v. Kessler, 1 Wn. App. 750, 463 P.2d 651 (1970), the court held that the fact that a sheriff accompanied the seller to the site of the secured goods when the sheriff lacked proper papers to authorize a repossession “amounted to constructive force, intimidation and oppression constituting a breach of the peace . . . .” Id. at 757, 463 P.2d at 655. It was sufficient that the buyer objected to the taking, although he offered no physical resistance.
132. Mentschikoff, supra note 62, at 772.
Nonetheless, it remains unclear what acts are sufficient to constitute refusal or how strenuous objections must be.\textsuperscript{133} Since the UCC "makes no attempt to articulate the standards for determining whether the repossession can be accomplished without breach-of-the-peace,"\textsuperscript{134} the field is open for seller's agents to push the breach of the peace limitation to its farthest extreme in order to avoid the necessity of proceeding under the stringent \textit{Fuentes} judicial repossession standards.\textsuperscript{135}

\textbf{D. The Mitchell Compromise—A Needed Alternative}

If \textit{Mitchell} standards are implemented in numerous states, presumably more creditors would be willing to abstain from self-help repossession and proceed \textit{ex parte} under the less onerous judicial procedures authorized by \textit{Mitchell}. Since public policy favors minimizing breach of the peace, such a result should be viewed favorably.

Under a strict reading of \textit{Mitchell}, the following provisions must appear in the underlying statutory scheme for it to constitutionally balance the conflicting interests\textsuperscript{136} of the creditor and debtor, so as to justify an \textit{ex parte} proceeding:

1. The complaint or affidavit must contain specific factual allegations that the applicant is entitled to the goods;\textsuperscript{137}

\begin{itemize}
\item Clarity is also lacking where repossessions have not involved objections or refusals. For example, in Girard v. Anderson, 219 Iowa 142, 257 N.W. 400 (1934), creditor's employees merely entered the house through what they claimed was an unlocked door and reposessed a piano while the debtor was out. Although the contract involved allowed for self-help repossession, the court held that there was no right to enter in that fashion. The court in Morris v. First Nat'l Bank & Trust Co., 21 Ohio St. 2d 25, 29, 254 N.E.2d 683, 687 (1970), stated in dictum that a creditor should not attempt to enter any private structure without express consent of the party in charge. But in Cherno v. Bank of Babylon, 54 Misc. 2d 277, 282 N.Y.S.2d 114 (1967), the court upheld the use of a surreptitiously obtained duplicate key to enter the place where the goods were kept since the action was neither violent nor disturbing.
\end{itemize}
(2) the applicant must post a protective bond before the writ can
issue, and even then it will issue only on the signature of a
judge after determining the existence of the debt, lien and
delinquency; and
(3) after issuance, the debtor must have the right to post a coun-
terbond to regain possession or to obtain an early hearing on
the merits of seizure.

Such a statutory scheme provides the needed compromise in the spec-
trum of creditor remedies. The creditor avoids the problems presented
by the procedure contemplated in Fuentes, and the inducement of
repossession by state official action protects the debtor from the prob-
lems of overreaching inherent in repossession by a creditor under the
UCC. When the occasion arises in which the debtor has a valid de-
fense to repossession, a remedy is readily available in the form of an
early adversary hearing.

III. THE WASHINGTON APPROACH TO SECURED
TRANSACTION DISPUTES—PRESENT AND
PROPOSED

Washington has adopted Fuentes standards in the context of pre-
judgment attachment. Although this approach can arguably be ex-
tended to cover the entire field of prejudgment remedies, in situations

138. The Mitchell dissenters viewed this difference as of no constitutional signi-
cance. They stated that the issuing functionary did no more than ascertain the formal
sufficiency of the allegations. 416 U.S. at 632.
139. The Mitchell Court found these matters were especially susceptible of docu-
mentary proof. 416 U.S. at 617–18. The statutes in Fuentes had only demanded an alle-
gation that the property was “wrongfully detained.” The Fuentes Court considered such
a generalized “fault” standard ill-suited for preliminary ex parte determinations. 407
U.S. at 79. The Mitchell dissenters took issue with the distinction between the two stan-
dards stating that the issues in both Mitchell and Fuentes were the same: “the creditor-
vendor needed only to establish his security interest and the debtor-vendee’s default.”
416 U.S. at 633.
140. There are several possible bases for dissolution of a writ at this point, e.g.,
prematurity, novation, payment, improper process, faulty pleading, inadequate surety,
lack of jurisdiction and improper parties. Brief of the Att’y General of Louisiana at 9,
141. See notes 82–86 and accompanying text supra.
Bureau v. Hibbitt, 7 Wn. App. 219, 499 P.2d 92 (1972). Washington’s attachment stat-
utes are found in Wash. Rev. Code ch. 7.12 (1974). Attachment is a provisional, aux-
iliary remedy, created by statute, whereby a creditor obtains a contingent lien on prop-
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involving both secured and unsecured obligations,\textsuperscript{143} no Washington court has explicitly reached this result. Nor does any Washington decision or statute provide \textit{Mitchell}-type safeguards in the context of secured transactions. It is proposed that a statute constitutional under \textit{Mitchell} be enacted in Washington to govern secured transactions generally, leaving the \textit{Fuentes} standards to govern prejudgment attachment and garnishment.

\textbf{A. The Fuentes-Rogoski Model}

In \textit{Rogoski v. Hammond},\textsuperscript{144} Judge Horowitz saved Washington's prejudgment attachment statute from constitutional attack\textsuperscript{145} by read-
ing into it the requirements set forth in *Fuentes.* Under *Rogoski,*
the taking cannot be summary in nature; there is no possibility that
the state's power would be unilaterally invoked by a creditor on the basis
of an untested and conclusory affidavit. Rather, a judge or magis-
trate will determine in an adversary contest the probability that the
plaintiff creditor's case will succeed.

The procedure set forth in *Rogoski* seems especially appropriate for
the attachment remedy, which is most often used by unsecured credi-
tors. In such situations it would seem more appropriate to require
prior notice and hearing even if *Mitchell*-type safeguards were avail-
able, since the creditor would not have a property interest in the goods
attached. Yet, it seems inappropriate that these stringent procedures
apply equally to secured transaction disputes.

**B. The Constitutional Inadequacy of Washington Replevin Statutes**

Washington's replevin statutes are similar in effect to the Loui-
siana sequestration statutes reviewed in *Mitchell,* in that both proce-
dures provide that the property at issue be held by a state official pend-

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146. Judge Horowitz, in writing the majority opinion, set out the essential ingredi-
ents of notice and hearing required by due process in prejudgment attachment. The min-
imum requirements are: (1) timely and adequate notice on the probable validity of the
creditor's claim which states the basis for the claim and allows the debtor adequate time
to prepare for the hearing; (2) an independent and impartial decisionmaker; (3) the right
to appear personally at the hearing, with or without retained counsel; (4) the right at the
hearing to confront and cross-examine any adverse witness and to present evidence and
oral argument in support of one's claim or defense; and (5) the right to a decision based
on applicable legal rules and evidence adduced at the hearing. Reasons for the determi-
nation and an indication of the evidence relied upon should be stated. But formal find-
ings are not required. 9 Wn. App. at 506, 513 P.2d at 289.

Judge Horowitz also stated that courts should evaluate the creditors' chances of pre-
vailing in a trial on the merits. *Id.* at 507, 513 P.2d at 290.

147. This was of concern to both the *Fuentes* and *Mitchell* Courts. The Court in
*Mitchell* stated: "Mitchell was not at the unsupervised mercy of the creditor and court
functionaries. The Louisiana law provides for judicial control of the process from begin-
ning to end." 416 U.S. at 616. *See also Fuentes,* 407 U.S. at 83, where the Court ex-
pressed its disapproval of *ex parte* allegations which test "no more than the strength of
the applicant's own belief in his rights," and yet are the unsupported bases on which
clerks issue prejudgment writs.

148. It is not yet settled exactly what standard the plaintiff must meet in these pre-
liminary determinations. In *Mitchell,* Justice Powell speaks of establishing the "probabili-
ty that [the creditor's] case will succeed." 416 U.S. at 609. *But see Bell v. Burson,*
402 U.S. 535, 542 (1971), in which the Court held that plaintiff's driver's license could
not be suspended without due process, in which the standard for the required hearing
was whether there was a "reasonable possibility of a judgment being rendered against
him . . . ."

149. *WASH. REV. CODE* ch. 7.64 (1974). Washington's statutes are supplemental in
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ing a trial on the merits. Both statutes provide for the creditor to take possession if the debtor does not regain possession by counterbond, but the goods may not be sold until final judgment on the merits. To trigger replevin a Washington plaintiff creditor must submit an affidavit stating the actual value of the property, claiming its delivery, showing that he or she is owner of the property claimed or lawfully entitled to possession of it and that the property is wrongfully detained by the defendant. Upon receipt of the affidavit and a double value security bond, the sheriff is directed to take possession of the property and retain it in custody.

Although in practice a Washington judge sees the affidavit and signs the writ before issuance by the clerk, there is no statutory requirement in Washington like that in the Louisiana statute, reviewed in , that specific factual allegations be made to support a judicial finding of the probable validity of the plaintiff's claim. Indeed, a Washington judge by statute can do little more than check the pro forma sufficiency of the documents. Nor do the Washington provisions allow the defendant to move to dissolve plaintiff's writ prior to a trial on the merits.

The debtor in a Washington replevin proceeding is clearly not accorded the safeguards found necessary by the Court to justify proceedings. A fortiori, the statutory scheme is constitutionally infirm under .

nature, only requiring the filing of a suit to recover possession of personal property before a writ of replevin is issued. This appears to have been the case in Louisiana also since Grant Co. was requesting sequestration of the merchandise pending the outcome of its underlying suit. The writ issued in stated in part that "the Constable of this court [shall] sequester and take into his possession the articles of merchandise described in the foregoing petition." 416 U.S. at 602.


Id. § 7.64.010.

Id. § 7.64.020.

Id. § 7.64.030.

Interview with Mary Duckering, King County Clerk's Office, in Seattle, Washington, May 15, 1975.

By contrast, the Louisiana statutes in required the creditor to make specific factual allegations in the complaint or affidavit examined by the judge, and allowed the debtor to regain possession by posting a bond or challenging the repossession in an immediate proceeding to dissolve the writ. 416 U.S. at 605-07.

Washington's replevin statutes not only fail to provide for prior notice and an opportunity for hearing, but neither are they narrowly drawn to allow for prehearing seizures only in extraordinary situations. See note 32 supra.
Curing Washington's Replevin Statutes

There are basically two ways to correct the unconstitutionality of Washington's replevin statutes. First, a Washington appellate court confronted with a constitutional attack on the statutes could follow the lead of Rogoski by exerting its jurisdiction under R.C.W. § 2.28.150159 to adopt judicial procedures which complement the statutes and provide the necessary safeguards. Fuentes-Rogoski requirements of due process could be required in all transactions, secured and unsecured;160 such an approach, however, would impose onerous and unwarranted burdens on the secured creditor.161 Preferable would be judicial imposition of Mitchell-type safeguards for secured transaction disputes.

As an alternative to judicially imposed safeguards, Washington could adopt a Mitchell-type statute to govern secured transactions. The following statute is suggested as part of a scheme permissible under Mitchell:

A writ of replevin may be granted by a judge without written or oral notice to the adverse party or his or her attorney only if, from specific facts shown by affidavit or by verified complaint, the probable validity of

1. the balance of the debt owing to the applicant,
2. the existence of a valid, enforceable security agreement between the alleged debtor and the applicant entitling the secured party to possession upon default,
3. the applicant's statement that in his or her informed belief the applicant has complied with all contractual agreements,

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159. WASH. REV. CODE § 2.28.150 (1974); see note 145 supra.
160. The requirements a replevin statute must meet when the Fuentes extraordinary circumstances are not present have been previously discussed in this law review. Briefly, prior notice and an opportunity for hearing must be provided before seizure of the debtor's goods under nonextraordinary circumstances. See Comment. Creditor-Debtor Law: Procedural Due Process and Washington's Prejudgment Seizure Procedures, 48 WASH. L. REV. 646 (1973).

The Rogoski court used the rationale of the United States Supreme Court prejudgment garnishment and replevin cases to determine its due process requirements of notice and hearing. Likewise, Rogoski's requirements can be used as guidelines in Washington replevin statutes to provide adequate notice and hearing before allowing replevy of property. If this is done, it appears that Washington requirements will be more stringent than Mitchell's: the Washington procedure would require that the opportunity for a procedure similar to full-scale litigation be extended in advance of every trial on the merits, whereas under its statutory procedure, Mitchell requires only an ex parte showing to the judge in each instance.

161. These burdens, and their undesirability, are discussed in Part II-B supra.
(4) the claim of default on the part of the alleged debtor, and
(5) that it is within the adverse party's power fraudulently to
convey or abscond with the property during the pendency of
these hearings,
clearly appears:

*Provided*, That before any writ shall issue, an action to recover pos-
session of the personal property shall be initiated and a bond shall be
filed by the applicant, the amount of which shall be double the value
of the secured property as stated in the affidavit, or such greater
amount as set by the court, and, *provided further*, That the alleged
debtor is entitled to immediate repossession of the property pending
trial by furnishing security for the satisfaction of any judgment which
may be entered against the debtor.

Every writ of replevin granted without notice to the adverse party
shall be endorsed with the date and hour of issuance; shall be filed
forthwith in the clerk's office and entered of record; shall state why the
writ was issued without notice; and shall expire by its terms within
such time as the court fixes, unless within such time so fixed, the writ,
for good cause shown, is extended for a like period or unless the party
against whom the writ is directed shall agree by a statement of record
that it may be extended for a longer period. The reasons for any such
extension shall be entered of record.

In cases where a writ of replevin is granted without notice, a chal-
lenge to the writ by the alleged debtor shall be set for hearing at the
earliest possible time and take precedence over all matters except
prior matters of the same character; and when the challenge comes on
for hearing the party who obtained the writ shall defend its issuance
and, if he or she does not do so, the court shall dissolve the writ. On
two (2) days notice to the party who obtained the writ without notice,
or on such shorter notice to that party as the court may prescribe, the
adverse party may appear and move its dissolution or modification,
and in that event the court shall proceed to hear and determine such
motion as expeditiously as the ends of justice require.

The proposed statute incorporates the following significant features
from *Mitchell*: (1) specific factual allegations must be made in the
affidavit; (2) a judge examines the affidavit and may issue the writ
only after determining the probable validity of the applicant's claim;
(3) a protective bond is posted before issuance of the writ; and (4)
provision is made for an immediate challenge of the writ, or reposses-
sion by counterbond of the debtor.

The proposed statute also provides for a record which can be used
in later proceedings. The challenge procedure allows the debtor to interpose defenses, such as breach of warranty, sufficient to warrant return of the property pending trial on the merits.\textsuperscript{162} It allows for a summary taking by the creditor\textsuperscript{163} if the debtor has power to abscond with the property, rather than requiring proof that he or she probably will do so.\textsuperscript{164}

Finally, the statute gives the debtor’s challenge priority status on the court’s docket.\textsuperscript{165} This is consistent with the emphasis in \textit{Mitchell} that “the debtor may immediately have a full hearing on the matter of possession . . . thus cutting to a bare minimum the time of creditor or court supervised possession.”\textsuperscript{166}

\textbf{IV. CONCLUSION}

The state of the law governing secured as well as unsecured transactions remains uncertain in many respects. It does appear, however, that \textit{Mitchell} heralds an easing of previously inflexible procedural due process standards in the creditor-debtor area. \textit{Di-Chem} does not undercut the Court’s holding in \textit{Mitchell} if Justice White’s reliance on \textit{Fuentes} is viewed in terms of stare decisis and supremacy; neither does it explain, however, \textit{Mitchell’s} relevance or its potential use in cases outside the narrow factual setting of Louisiana. \textit{Fuentes} can now be considered applicable in the unsecured context, and in secured transactions in states which have not adopted a \textit{Mitchell}-modeled statutory scheme.

The use of \textit{Mitchell’s} balancing analysis in self-help repossession cases seemingly will not be widespread, due to the courts’ unwilling-

\begin{itemize}
  \item \textsuperscript{162} If the debtor’s challenge is successful, extra costs and attorney’s fees should be chargeable to the creditor.
  \item \textsuperscript{163} A summary taking is one without prior notice or an opportunity to be heard afforded the debtor. \textit{See} note 2 \textit{supra}.
  \item \textsuperscript{164} Similarly, the statutes in \textit{Mitchell} required only a showing that it was within the power of the debtor to abscond with the goods. \textit{See} note 16 \textit{supra}. There may be times when the property is in the hands of a third party, \textit{e.g.}, being held under a mechanic’s lien, and secure from any untoward disposition by the debtor. In such an instance, the need for immediate repossession is not present.
  \item \textsuperscript{165} The author realizes that the language calling for precedence over all other matters conflicts with identical language in Rule 65(b) of the Civil Rules for Superior Court (Temporary Restraining Orders) after which this statute was modeled in part. It is submitted, however, that the provision is necessary to protect both creditor’s and debtor’s interests and should take precedence over Rule 65(b) when the two conflict.
  \item \textsuperscript{166} 416 U.S. at 610.
\end{itemize}
ness to find state action in this area; should it be used, the result need no longer be a foregone conclusion as under Fuentes. The acceptance of Mitchell-modeled statutes will undoubtedly be forthcoming due to the advantages of the scheme, and later testing of state statutes which are similar to Mitchell's in some respects, but not in others, should clarify the necessity of each statutory protection and the part it plays.

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