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Supreme Court's Tilt to the Property Right: Procedural Due Process Protections of Liberty and Property Interests

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THE SUPREME COURT'S TILT TO THE PROPERTY RIGHT: PROCEDURAL DUE PROCESS PROTECTIONS OF LIBERTY AND PROPERTY INTERESTS

BY

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I. INTRODUCTION

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution provide important protections against government oppression. They provide that government may not deprive any person of "life, liberty or property" without due process of law. In recent decisions, the Supreme Court has appeared willing to strengthen its protection of traditional property interests yet weaken its protection of liberty interests.

It has long been accepted, albeit with controversy, that due process has both procedural and substantive elements. This essay concerns the procedural elements. Procedural due process analysis asks two questions: first, whether there exists a liberty or property interest which has been interfered with by the state,[1] and second, whether the procedures attendant upon any deprivation were constitutionally sufficient.[2] Although the Supreme Court has not explicitly stated that liberty and property interests should be treated differently, recent developments in constitutional law have exhibited a decline in the protection accorded to liberty interests (and non-traditional forms of property) and an increase in the protection accorded to traditional property interests.[3] This essay addresses this recent phenomenon.

The best illustration of this phenomenon is found in two cases from the 1990 term which, coincidentally, were argued on the same day. The first, *County of Riverside v. McLaughlin*,[4] concerned the length of time that a person, arrested without a warrant, may be held in jail before being brought before a judge or magistrate for a determination of whether probable cause existed for the warrantless arrest. McLaughlin argued that the Fourth

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[1] Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972).

[2] Hewitt v. Helms, 459 U.S. 460, 472 (1983)

[3] In Parratt v. Taylor, 451 U.S. 527, 545 (1981)(Blackmun, J., concurring), Justice Blackmun hinted that liberty interests might be entitled to greater due process protection than property interests. This view, however, was dismissed in Daniels v. Williams, 474 U.S. 327, 333 (1986), which held that no process is due when the state negligently deprives an individual of "life, liberty or property."

[4] 111 S. Ct. 1661 (1991).

Amendment required that he be brought before a judge[5] immediately after the administrative steps incident to his arrest were completed. The Court acknowledged its prior holding that probable cause hearings must be "prompt,"[6] but it held that the Fourth Amendment does not require that the hearing be held immediately upon completion of administrative steps incident to the arrest. Rather, the Court held that as long as the probable cause hearing occurred within forty-eight hours after arrest there would ordinarily be no constitutional violation even if the hearing could have been held sooner.[7]

In the second case, *Connecticut v. Doehr*,[8] the Court held unconstitutional a Connecticut statute allowing plaintiffs to attach defendants' real property without prior notice or hearing. Under the Connecticut attachment scheme, a plaintiff could attach any real property belonging to the defendant, even if the property were completely unrelated to the lawsuit. Further, the statute contained no requirement that the plaintiff post a bond to cover any damages caused by an erroneous attachment. However, the defendant was entitled to a "prompt" post-attachment hearing to determine whether the requirements for attachment had been met and to damages (perhaps even double damages) if the suit were commenced without probable cause.[9] Rather than challenge the attachment at the prompt, post-attachment hearing, Doehr filed suit in federal court alleging that the procedure was unconstitutional because it afforded no hearing prior to issuance of the attachment.[10] The Court agreed with Doehr and held that the Connecticut procedure violated the due process rights of parties whose property was attached. The Court held that a prompt post-attachment hearing did not satisfy due process and that a pre-attachment hearing was required.

This pair of decisions establishes the following paradigm: due process requires a hearing before the state may partially encumber real property but does not require a hearing until well after the state imprisons an arrested individual. This essay focuses, to a great extent, on these two decisions. More generally, this essay compares the constitutional protection the Court has afforded liberty and property and the jurisprudential approach used to satisfy due process in each case. The denigration of liberty interests, it should be noted, while most pronounced in the criminal context, arises in other civil

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[5] For convenience, "judge" from here on refers to judge or magistrate unless specifically noted otherwise.

[6] *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

[7] 111 S. Ct. at 1670. Even if a probable cause hearing is held within forty-eight hours of a warrantless arrest, the arrestee may establish a Fourth Amendment violation if he or she can prove that the probable cause determination was delayed unreasonably; for example, if the delay was motivated by ill will against the arrested individual. *Id.*

[8] 111 S. Ct. 2105 (1991).

[9] *Id.* at 2117 n.8.

[10] There are substantial doubts over whether the Court should have entertained the suit at all, given the availability of a state forum and the pendency of the underlying lawsuit in state court. *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

rights cases as well, including workers' rights[11] and women's rights in the family planning context.[12]

We found *Doehr* worth focusing on for a number of reasons. *Doehr's* presentation of questions regarding the constitutional protection of property is direct and uncomplicated. Because the Court acted as an arguably neutral referee of a private dispute, the state's interest concerned maintaining an efficient and just system of litigation. The Court's balancing test revealed the degree of deference it was willing to extend to this state interest. Finally, that the conservative members of the Court would join an effort to extend constitutional protection to property owners, rather than limit it as has so often been the case recently,[13] allows for some consideration of the rhetoric and reality of views concerning judicial activism.[14]

McLaughlin provides a good comparison to the Court's treatment of property in *Doehr* because, although the Court relies in *McLaughlin* more strongly on the constraint of precedent, both involve relatively open-ended weighing of state and individual interests. Thus, *McLaughlin* shows both the weight the Court places on liberty interests and how the Court applies discretionary tests. *McLaughlin* also involves issues of flexibility within the federalist system. The reliance on authority in *McLaughlin* was as strong as the Court's invocation in *Doehr* of the notion that due process has no fixed content but is rather a discretion-laden analysis.[15] As a separate issue, *McLaughlin* presents procedural issues regarding deprivations of liberty similar to the issues in *Doehr*. For instance, both cases must address federalism, since state practices are under federal attack. Finally, the fact that Justice Scalia, one of the more conservative members of the Court, would have provided greater protection to individual liberty than the majority makes *McLaughlin* an interesting study. Like *Doehr*, it raises issues of impartiality and the relationship between judicial rhetoric and action.

II. PROCEDURAL DUE PROCESS ANALYSIS IN *MCLAUGHLIN* AND *DOEHR*

A. *Background of* Doehr

Two strands of due process doctrine are woven together in *Connecticut v. Doehr*. One strand involves a line of cases decided by the Court concerning pre-judgment creditor remedies. Due process guidelines for such remedies

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[11] *See* Lechmere, Inc. v. N.L.R.B., 112 S. Ct. 841 (1992), discussed *infra* at 29.

[12] *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (approving serious restrictions on poor women's ability to exercise right to have abortion).

[13] *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), in which the conservative members of the Court accepted a novel equal protection claim that potentially invalidates minority set-aside programs in hundreds of municipalities across the country.

[14] By "judicial activism" we mean judicial willingness to set aside action by other branches of government.

[15] *Doehr*, 111 S. Ct. at 2112.

were developed in several cases decided in the 1960s and 1970s.[16] The other strand of due process analysis is derived from the three-part balancing test of *Mathews v. Eldridge*[17] which attempts to provide a more generally applicable analysis for due process problems.

The pre-judgment attachment cases all present very similar questions: when may a party in litigation attach the other party's property without giving prior notice and affording an opportunity to be heard? Initially, the Supreme Court seemed willing to extend due process protections against pre-judgment attachments fairly significantly. The Court appeared skeptical of schemes under which plaintiffs could obtain attachments without a prior hearing, at least where no special circumstances indicated a need for quick action.[18] In these early attachment decisions, the Court's disapproval appeared to rest upon a combination of a great risk of erroneous attachment and a significant burden on the party whose property was attached. Absent compelling need, the Court's concern for the victim of an attachment without a prior hearing led it to invalidate attachments obtained without prior hearings.

The line from these cases to *Doehr's* holding — that an attachment required a pre-deprivation hearing — was not unbroken. In *Mitchell v. W.T. Grant Co.*,[19] the Court recognized that post-deprivation remedies made available by the State can satisfy due process, stating:

> The pre-*Sniadach* cases . . . . merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided.[20]

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[16] *See* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); *see also* North Georgia Finishing, Inc., v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972).

[17] 424 U.S. 319 (1976).

[18] *See* Sniadach v. Family Finance Corp., 395 U.S. at 340-41. In *Sniadach* the Court struck down a Wisconsin pre-judgment garnishment procedure in which a defendant-debtor's wages could be frozen pending trial because the interim freezing of the wages without notice or a chance to offer a defense (such as fraud) violated Fourteenth Amendment due process requirements. The Court considered the burden on the adverse party to be too great: "A prejudgment garnishment . . . is a taking which may impose tremendous hardship on wage earners with families to support." *Id.* at 340.

In its next pre-judgment remedy case, Fuentes v. Shevin, 407 U.S. 67, 85 (1972), the Court followed *Sniadach* and invalidated Florida and Pennsylvania statutes which permitted pre-judgment writs of replevin through an ex parte application to a court clerk, upon posting a bond for double the value of the property to be seized. The statutes' failure to provide for hearings "at a meaningful time," that is, before the property was seized, violated due process. In both of these cases the Court emphasized that only in situations where the postponement of notice and opportunity for a hearing furthered a necessary public interest would a great burden on the adverse party be tolerated. *Id.* at 91-92.

[19] 416 U.S. 600 (1974).

[20] *Id.* at 611 (footnote omitted).

Thus the Court would allow an attachment without a prior hearing as long as a meaningful opportunity to contest the attachment were available soon after the issuance of the attachment order.[21] In dissent, Justice Stewart characterized the majority opinion as a reversal of the principle established in the Court's prior cases: that court-approved attachments without prior hearings were unconstitutional even if a post-deprivation hearing presented an opportunity to be heard before an attachment ripened into a final deprivation of property.[22]

This apparent approval of post-attachment hearings was paralleled by movement in due process cases toward general approval of post-deprivation remedies. As long as the post-deprivation hearings were available within a reasonable time after the initial government action, the Court considered due process requirements satisfied. In decisions involving disparate areas, such as government disability benefits,[23] negligent and intentional deprivations of prisoner's property,[24] and infliction of corporal punishment on school children,[25] the Supreme Court held that post-deprivation hearings or remedies were constitutionally adequate.[26] The test for how much process is due the victim deprived of a protected interest crystallized into the balancing test of *Mathews v. Eldridge*.[27]

Under *Mathews*, the determination of how much process is due is made by

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[21] *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606-07 (1975) (discussing the result in *Mitchell*).

[22] *Mitchell*, 416 U.S. at 634-35 (1974) (Stewart, J., dissenting) (arguing against the Court's "reversal" of the principle expressed in *Fuentes* only two years after it had been decided; they were "constitutionally indistinguishable"). *See also* M. McCann, Pinsky v. Duncan: *Ex Parte Attachment of Real Property in Connecticut and the Antithetical Restrictions of Due Process*, 11 U. BRIDGEPORT L. REV. 201, 208-10 (1990).

[23] *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (no requirement of a hearing before termination of disability benefits).

[24] *See* Parratt v. Taylor, 451 U.S. 527 (1981) (post-deprivation remedies satisfy due process rights of inmate whose property was negligently lost by prison officials); Hudson v. Palmer, 468 U.S. 517 (1984) (*Parratt* applies to intentional, but random and unauthorized, deprivations of property).

[25] *See* Ingraham v. Wright, 430 U.S. 651 (1977) (school children have no right to a hearing before corporal punishment is administered).

[26] The theory underlying the due process analysis is that in the balancing test that determines the process that is due in any particular situation, the difference in value between a pre- and post-deprivation hearing may not be enough to outweigh the government's interest in postponing process until after it acts. *See* Mathews v. Eldridge, 424 U.S. 319 (1976). In some situations, the impracticality of pre-deprivation procedures means that only post-deprivation process is available. *See* Parratt v. Taylor, 451 U.S. 527, 539-41 (1981). In one area, hearings for termination of government employment, the Court has insisted firmly on pre-deprivation process. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (pre-firing hearing required for government employee who may not be terminated without cause).

[27] 424 U.S. at 332-35.

balancing: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of the interest through the procedures used, and the probable value, if any, of additional safeguards; and 3) the government's interest in minimizing the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[28] At the risk of over-generalizing, in applying this balancing test, the Court of late has been very receptive to arguments that post-deprivation remedies are sufficient to justify governmental infringement on private interests. The Court has not required pre-deprivation hearings if post-deprivation remedies present a realistic possibility of making the claimant whole without great procedural complication.[29]

Given this trend, the Court's holding in *Connecticut v. Doehr* was surprising. In earlier cases, the Court downplayed the individual's interest when compared with that of the state. In *Doehr*, however, the Court applied the *Mathews* test to invalidate a Connecticut statute even though a prompt post-attachment hearing was available.

B. *The Supreme Court's Due Process Analysis of Property Interests in* Connecticut v. Doehr

i. Balancing the Interests in *Doehr*

The defendant in *Doehr* challenged a Connecticut law that permitted a plaintiff to attach a defendant's real property based solely on the strength of an affidavit. A judge would decide whether the affidavit established the existence of "probable cause to sustain the validity of the plaintiff's claim."[30] This determination was made ex parte, before the papers initiating the lawsuit were even served on the defendant.[31] The attachment placed a cloud on the defendant's title, and the defendant could not contest the attachment until after it was granted. Then, the defendant was entitled to a prompt hearing to challenge the validity of the attachment or to substitute a bond for the attachment on the real property.[32]

The advantage an attaching party gains from such a scheme should be obvious — once an attachment occurs, the bargaining power between the parties shifts toward the party holding the attachment. Further, defendants are prevented from becoming "judgment proof" by selling or encumbering real property and moving liquid assets out of the jurisdiction. As a practical matter, plaintiffs fare better if they obtain the attachment without prior notice to the defendant because, after notice, a defendant might take steps to alienate the

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[28] *Id.* at 335.

[29] *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436-37 (1982) (post-deprivation common law tort remedy not adequate because, inter alia, of difficulty in pursuing it).

[30] 111 S. Ct. at 2109, quoting CONN. GEN. STAT. § 52-278e (1991).

[31] 111 S. Ct. at 2110 & n.1.

[32] *Id.* at 2114.

property or otherwise safeguard it against the attachment.[33] The plaintiff wants the benefit of surprise and the benefit of the increased leverage that comes with power over the defendant's property.

The question for the Court was whether the post-attachment remedy was sufficient to satisfy due process or whether due process required that the hearing take place before the attachment was granted. Due process analysis, as previously discussed, comprises two steps, identification of a protected interest (life, liberty or property) and specification, under the *Mathews v. Eldridge* balancing test, of the required procedures for state deprivation of that interest. The identification of the interest carries with it implications for the process that is due, because if certain interests are considered more important than others, greater process will be required for the deprivation of those interests.[34] On the impairment of the protected interest in *Doehr*, the Court stated that attachment of real property affected "significant" interests because attachment "clouds title; impairs the ability to . . . alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause."[35] The Court thus found that the attachment of property implicated a protected property interest even though the owner retained possession and use, and at the same time made it clear that it considered the restrictions inherent in attachment quite serious.

Once a deprivation of a protected interest has been identified, the next issue concerns the determination of what process is due. The Court's characterization of the attachment's consequences reveals that the Court finds a substantial interest on behalf of the owner in providing more process. As to the risk of an erroneous attachment, the second factor under the *Mathews* balancing test, the primary safeguard in the Connecticut statute was that the attachment could not issue without a finding by a judge that the plaintiff's affidavit established probable cause.[36] Whether this requirement constituted much of a safeguard was disputed because the judge could make the decision with only the plaintiff's side of the story and because the plaintiff's affidavit in support of the attachment might not be very detailed. While the degree of support that must be provided by the affidavit was also disputed,[37] the Court decided that, on any reading, the risk of erroneous attachment was "substantial," and that the post-attachment adversary hearing and double damages, if the suit were filed

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[33] *Cf.* Chambers v. NASCO, Inc., 111 S. Ct. 2123 (1991) (approving the disciplining of a client for, inter alia, attempting to place disputed property beyond the reach of the court after receiving notice of a hearing on a temporary restraining order).

[34] *Mathews*, 424 U.S. at 335 (the greater the private interest at stake, the more process is required).

[35] *Doehr*, 111 S. Ct. at 2113.

[36] *Id.* at 2113-14.

[37] The different readings of the probable cause requirement included an objective likelihood of the plaintiff's claim succeeding, a good faith belief by the plaintiff that the suit will succeed and sufficient facts in the affidavit to survive a motion to dismiss. *Id.*

without probable cause, were not sufficient to reduce the risk to an acceptable level.[38] By balancing the strength of the private interests, the risk of error and the state interest in minimizing process, the Court found this process unconstitutional.

In a strikingly anti-federalist analysis, the Court minimized the interest of the state and the plaintiff in pursuing the attachment without a hearing. The Court stated that without an indication that the defendant was about to attempt to place property beyond the reach of the state court, the plaintiff's interest in pursuing attachment without prior notice and a hearing was minimal.[39] The Court further stated that the government's interest was also minimal. First, the Court reasoned that the government's interest in insuring compensation for the plaintiff could be no greater than the plaintiff's own interest, which the Court had already held was not great.[40] Second, the state's interest in avoiding the expense of a pre-attachment hearing was not substantial because the State admitted that it would incur the expense of a post-attachment hearing anyway.[41]

There are any number of reasons why states might wish to allow attachment without a hearing. While defendants might rarely attempt to remove property from the reach of the state court, it may be difficult for a plaintiff to know when a defendant would be likely to take such action. The state might also believe that plaintiffs, as a class, are worse off than defendants and might view attachment as a way to equalize litigation or bargaining power. Finally, the state might hope that attachment without a hearing will save expenses in those cases in which defendants decide not to challenge the attachments.

ii. The Reality of Judicial Activism in *Doehr*

Due process analysis allows the Court to invoke simultaneously the notions of law and discretion. The three-part balancing test that "governs" due process analysis leaves the Court free to choose the level of process it finds appropriate.[42] The Court's citation to *Mathews* as authority for a test that imposes no constraints invokes the notion of legal constraint only enough to remind us that the Court may rely on such limitations when necessary but that these constraints are lacking in principle. There is very little substance to the determination of what process is due. The weight the Court gives to particular interests and protections provided by certain processes can change over time and as applied to different situations. The Court exercises great discretion to establish this balance. Thus, *Doehr* represents more than an example of this Court's rhetoric about property interests, it also illustrates the reality of con-

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[38] *Id.* at 2114-15.

[39] *Id.* at 2115.

[40] *Id.*

[41] *Id.*

[42] *See* Mathews v. Eldridge, 424 U.S. 319 (1976), *discussed in Doehr*, 111 S. Ct. at 2112.

servative judicial activism.[43]

Perhaps the most interesting aspect of *Doehr* is the reasoning the Court employed to protect the individual's property interest. The Court invoked a particular approach to constrain the states' discretion to fashion their own procedures. First, the Court supports the characterization of the state's interest in *Doehr* as minimal by noting that most other states manage well without making attachment as easy to achieve as Connecticut.[44] Second, the Court points out that attachment was unknown at common law.[45] This observation seeks to portray Connecticut as the "other," as an aberrant community that is both untrue to its historical and cultural commonalties with the rest of the states and unable to see the light of reason as other states have through their more enlightened practices. Finally, by invoking this method of analysis, the Court shows its willingness to selectively consider the issue of federalism.

Most striking is the Court's use of current practice in a majority of other states to justify denying Connecticut the choice of proceeding without a pre-attachment hearing. The Court notes that "nearly every State requires either a pre-attachment hearing, a showing of some exigent circumstance, or both, before permitting an attachment to take place."[46] Rather than glorifying in the experimentation and flexibility that federalism allows at the state level, the Court criticizes Connecticut for not living up to the standards of other states.[47]

The Court's reliance on the facts that attachment was "unknown at common law" and that historically, when attachment arose, it had limitations not present in the Connecticut statute represents an attempt to recover the appearance of law in the Court's unbounded due process project. The common law, as relied on by the Court, has the potential for becoming a canon against which to measure legal validity. Justice Scalia, in separate opinions in both cases examined in this article, used the common law in just this way. In *Doehr*, apparently to justify his endorsement of judicially active measuring of the due process validity of the Connecticut procedure, Justice Scalia noted in a brief concurring opinion that the due process balancing test applied because "the manner of attachment here was not a recognized procedure at common law."[48] Recent and innovative legal practices, for reasons about which less is

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[43] By "conservative judicial activism," we mean the willingness of conservative members of the Court, who often urge their liberal colleagues to show restraint, to actively pursue a conservative agenda.

[44] 111 S. Ct. at 2116.

[45] *See id.* at 2115-16.

[46] *Id.* at 2116. The Court also criticizes Connecticut for not requiring, as many states do, the plaintiff to post a bond to cover any damages the defendant might suffer due to a wrongful attachment.

[47] *Cf.* County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991) (flexibility means each state should be allowed to choose its own system of processing arrestees). The Court also ignores the state's interest in operating its judicial system free from federal interference. *See infra* notes 50-54 and accompanying text.

[48] 111 S. Ct. at 2123 (Scalia, J., concurring).

revealed than in many religious practices, are presumptively illegitimate insofar as they deviate from the canon.

The use of tradition to criticize Connecticut's practice is an inherently anti-democratic and conservative element in constitutional law. It is a mode of analysis that has been rejected in the past by the Supreme Court as contrary to the spirit of federalism which allows states to enter new fields on the same footing as when they carry out more traditional government programs.[49] It is important to realize that the use of tradition and predominant practice tilts constitutional law in an anti-progressive direction.

Although the Court did not concern itself with the procedural history of the case, *Doehr* was unusual because the defendant did not challenge the attachment via a post-attachment hearing in state court. Rather, he took his due process claim directly to federal court by filing a constitutional challenge to the Connecticut attachment statute in the district court. It is surprising that the Court did not even mention the serious doubts it ought to have entertained over whether the district court should have heard the case at all. There is a strong argument that the federal district court should abstain from hearing a challenge to state procedures in a pending case when the state court will hear the challenge itself.[50]

The principles of federalism demand that federal courts think long and hard before interfering with ongoing state proceedings.[51] Normally, federal court relief against state judicial procedures is not available once state proceedings have begun.[52] There is no indication that the constitutional challenge to the attachment's validity would not have been entertained by the Connecticut courts in conjunction with the other grounds that Doehr might have raised in the post-attachment hearing. While a declaration of unconstitutionality would not cure the temporary deprivation of property without due process, neither will a federal court order to dissolve the attachment. Here, the plaintiff's success presumably means that the federal court will order the state court to dissolve the attachment, an outcome that goes against the reluctance to interfere with state proceedings expressed most strongly by conservative members of the Court.

While it might be surprising that the Court would endorse this sort of interference with state court proceedings, it should not be surprising that the Court ignored self-imposed limitations on its competence. The Court does not generally attempt to create coherence across subject areas, but it has in the past

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[49] *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (rejecting distinction between traditional and non-traditional state functions).

[50] *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

[51] *See* 28 U.S.C. § 2283 (1988) (anti-injunction statute); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

[52] Standing problems may foreclose relief even in the absence of state proceedings. In the absence of pending proceedings, a plaintiff would have to show that she is likely to be subject again to the unconstitutional procedure, a showing that is often very difficult. *See* Los Angeles v. Lyons, 461 U.S. 95 (1983).

reached out to decide important questions when in similar circumstances it might have held that the Court lacked jurisdiction or that the plaintiff had no cause of action.[53] The old saw about standing — that the Court finds standing if the plaintiff's case lacks substance, but the Court does not find standing if the plaintiff would win on the merits — illustrates the point, but only so far.[54]

The Court sometimes ignores certain issues altogether, issues that on another day the Court would characterize as fundamental to the proper role of the federal courts, either as a matter of federalism or of separation of powers. The best example is found in *Goldman v. Weinberger*,[55] a *Bivens*[56] action, where the Court was willing to decide the constitutionality of the Navy's rule disallowing Jewish service members from keeping their heads covered in accord with their religious beliefs, despite repeated adamant statements that the *Bivens* action was not available to challenge military-related action.[57] While the *Bivens* action is usually one for damages, and *Goldman* was a suit for declaratory and injunctive relief, the Court completely ignored questions regarding the propriety of entertaining any challenge to military practices.

It is unfortunately commonplace for the Supreme Court to accept as fundamental a principle in one case that it completely ignores in another. It is hard to believe that the Court is not engaging in conscious deception. Either the Court did not consider a principle as fundamental (and hence the Court might forget it in a later case), or the Court was so eager to reach the constitutional question in a later case that it refrained from applying the principle, knowing it would be unacceptable to mention it and still not apply it. The complication that perhaps no party mentioned the problem to the Court only raises questions about the wisdom of adherence by the Supreme Court, especially when fundamentals are involved, to the notion that it should not address an issue that neither party raises. Why would the Court disable itself from vindicating important interests of federalism and separation of powers, interests that in other contexts were held more important than vindicating constitutional rights?

A final interesting aspect of *Doehr* is the explicit discussion in Chief Justice Rehnquist's concurring opinion of whether the decision was novel or a logical extension of prior decisions. The Chief Justice, pointing to an opinion by Jus-

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[53] *See infra* notes 55-57 and accompanying text.

[54] *But see* Mark V. Tushnet, *The New Law of Standing: a Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977). For an illustration of the manipulation of standing requirements, *compare* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) *with* Simon v. Eastern Ky. Welfare Rights Org., Inc., 426 U.S. 26 (1976).

[55] 475 U.S. 503 (1986).

[56] After Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in which the Supreme Court recognized a cause of action against federal officials for constitutional violations.

[57] *See* Chappell v. Wallace, 462 U.S. 296 (1983); *and* United States v. Stanley, 483 U.S. 669 (1987).

tice Holmes, noted that the Court had in dicta "casually" expressed the view that attachment, apparently with only a post-deprivation remedy, was common.[58] Further, he accused the majority of attempting to conceal the novelty of its decision and of making it appear that the "result follows . . . inexorably" from prior decisions.[59] Thus, while the Court and Justice Scalia find it necessary to present attachment as novel and contrary to tradition, Chief Justice Rehnquist presents the Court's holding as a "significant development in the law."[60] The Chief Justice, who authored one of the most shamefully formalistic opinions in recent years,[61] now glorifies the path-breaking role the Court has taken in protecting the rights of owners of real property.[62] He apparently feels comfortable actively protecting property rights, but sometimes he would rather appear passive when denying claims involving personal liberty.

The Chief Justice was correct that in many other contexts, post-deprivation hearings have been held adequate. It is very difficult to construct a principled difference between those situations and *Doehr*. For example, the Court has held that a post-deprivation hearing is adequate to redress the complete deprivation, both negligent and intentional, of a prisoner's personal property.[63] The Court has also decided that to hold a person in jail without a hearing for forty-eight hours is reasonable under the Fourth Amendment on evidence that may be relatively unreliable.[64] In fact, the Court's discussion of the reliability of the evidence upon which the attachment issued is markedly different from what some members of the Court have characterized as a lack of concern over information supplied by anonymous informants used to procure warrants.[65]

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[58] *See* 111 S. Ct. at 2122 (Rehnquist, C.J., concurring) (discussing Coffin Bros. v. Bennett, 277 U.S. 29, 31 (1928)).

[59] 111 S. Ct. at 2121.

[60] *Id.* at 2122.

[61] *See* DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989). The formalism in *DeShaney* is shameful because of the context. A battered child should be entitled to at least as much consideration of his interests as the owner of real property whose use and possession have not been disturbed.

[62] In the context of habeas corpus, the Chief Justice has also been very willing to characterize legal rules as "new" despite the deciding court's view that the decision was logically controlled or governed by prior cases. This characterization means that the rule will not be applied in habeas corpus under recent decisions that hold only rules existing at the time of trial to apply on federal habeas corpus. *See* Butler v. McKellar, 494 U.S. 407 (1990) (Rehnquist, C.J.).

[63] *See* Parratt v. Taylor, 451 U.S. 527 (1981) (state post-deprivation tort remedy is adequate to redress random and unauthorized deprivation of property); Hudson v. Palmer, 468 U.S. 517 (1984) (*Parratt* applies to intentional, but random and unauthorized, deprivations of property). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (requiring hearing before commitment to state mental hospital); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) (requiring hearing before state may deprive individual of cause of action for employment discrimination).

[64] *See* County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991).

[65] *See* Illinois v. Gates, 462 U.S. 213, 274-295 (1983) (Brennan, J., dissenting). *See*

C. *Background of* McLaughlin

Textually, the Due Process Clauses of the Fifth and Fourteenth Amendments treat property and liberty equally. They prohibit deprivations of life, liberty and property without due process of law. Thus, it should not be surprising that an analysis similar to due process protections of property has evolved for protections of liberty interests as well.[66] While the creation of liberty interests is somewhat more complicated than the creation of property interests, once a protected interest is found to exist, under due process analysis the same test determines what process is due a victim of a deprivation of liberty.[67]

The analysis of liberty interests is more complicated than that of property interests because many provisions of the Bill of Rights in essence protect different aspects of liberty. Several provisions, for example, aimed at the fairness of criminal trials provide procedural protections when liberty is at stake. Even more directly, the restrictions on searches and seizures create liberty safeguards. Thus, a number of constitutionally-based doctrines protecting liberty have evolved parallel to due process. These doctrines can either highlight the importance of liberty interests or provide alternative protections, rendering due process protection less necessary. It is in this context that we compare the protection of liberty and property interests.

D. *The Supreme Court's Treatment of Liberty Interests in* County of Riverside v. McLaughlin

In *County of Riverside v. McLaughlin*,[68] decided a few weeks before *Doehr*, the Court addressed how long a person arrested without a warrant could be held in jail without a judicial determination of whether there was probable cause for the arrest. The issue was not due process but rather reasonableness under the Fourth Amendment's restrictions on seizures; however, given the Court's characterization of its approach as "a 'practical compromise' between the rights of individuals and the realities of law enforcement,"[69] the analysis in *McLaughlin* is not likely to differ much in substance from due process balancing.

In *McLaughlin*, arrested parties sued for a prompt adversary hearing before a judge to determine whether their custody should continue.[70] The issue of whether custody without prior judicial supervision, either adverse or ex parte,

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also Alabama v. White, 496 U.S. 325 (1990) (anonymous tip was sufficiently reliable to justify stop of vehicle under reasonable suspicion standard, despite inaccuracy of tip in some respects).

[66] *See, e.g.*, Board of Pardons v. Allen, 482 U.S. 369 (1987); *and* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989).

[67] *See* Wolff v. McDonald, 418 U.S. 539, 557-58 (1974); Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

[68] 111 S. Ct. 1661 (1991).

[69] *Id.* at 1668 (quoting Gerstein v. Pugh, 420 U.S. 103, 113 (1975)).

[70] 111 S. Ct. at 1665.

was allowed at all was no longer open, having been conclusively determined against the arrestees.[71] The question in *McLaughlin*, therefore, was what balance should be struck between the procedures that would ensure that erroneous custody was as short as possible and the law enforcement interests that militated in favor of some delay.

Essentially, the Court had to decide whether the Fourth Amendment required that arrestees be brought before a judge immediately upon completion of the administrative steps required for arrest, such as fingerprinting, photographing and completing necessary paperwork, or whether states could delay the probable cause hearing to allow other pre-trial procedures to occur at the same time. The actual procedures implicated the more substantive question of how long those administrative steps could take. In Riverside County, California, for example, probable cause hearings were combined with arraignment, the formal procedure for initiating a criminal process, entering a plea and setting conditions for pre-trial release.[72]

i. The Constitutional Interests at Stake in *McLaughlin*

The Court in *McLaughlin* recognized that the plaintiffs interpreted the Fourth Amendment to require a prompt probable cause hearing after arrest, meaning that arraignment could no longer be consolidated with that hearing, because preparation of the criminal complaint required extra time after completion of the administrative steps incident to arrest. To reject the claim that the Fourth Amendment required the immediate post-arrest hearing, the Court repeatedly invoked *Gerstein v. Pugh*[73] as establishing the principle that states were free to choose whether to combine probable cause hearings with arraignment.[74] The *Gerstein* opinion became a tenth member of the Court with the power of thought and action, as we learn what *Gerstein* "permits," "explicitly contemplated," and clearly "contemplates."[75] We also are told that *Gerstein* "struck a balance," issued an "invitation to the States," and is neither "a blank check" nor "inflexible."[76] While in *Doehr* the primary judicial metaphor may have been discretion, in *McLaughlin* greater emphasis was placed on the constraint of authority.

The reliance on authority in *McLaughlin* renders unnecessary much attention to factors that might be important to fixing the appropriate level and

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[71] *See Gerstein*, 420 U.S. 103 (1975).

[72] 111 S. Ct. at 1665.

[73] 420 U.S. 103 (1975).

[74] *See, e.g.*, 111 S. Ct. at 1668 ("Inherent in *Gerstein's* invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of probable cause upon completing the administrative steps incident to arrest.") The Court's opinion in *McLaughlin* reads like a thesis on *Gerstein*. *See* 111 S. Ct. at 1668-1671 (citing or referring to *Gerstein* at least 34 times).

[75] 111 S. Ct. at 1668-70.

[76] *Id.* at 1668-69.

timing of process. For example, there is little discussion of the consequences of a complete deprivation of liberty, even if temporary. While the Court does refer to the possibility that a person's job and family relationships might be impaired while in jail, this reference is really no more than a passing mention of what the lower court had noted.[77] There is no discussion of the potential misery of sitting in jail even for a couple of days, the myriad business and personal relationships that might be disrupted, the potential health problems that the lower level of health care likely to exist in jail might cause or aggravate, the permanent psychological damage that unjustified time in jail might cause, or the risk of injury due to exposure to violent fellow arrestees. Suppose, for example, that the arrestee had a real estate closing scheduled for the time period that he was in jail or a rent payment due during this period. The inability to alienate property during that time, or to safeguard existing property interests, might mirror or exceed the disability in *Doehr*, especially in light of the State's argument in *Doehr* that the post-attachment hearing was available immediately after the attachment.[78]

Also absent from the Court's discussion is concern about the potential unreliability of the process under which the plaintiffs in *McLaughlin* remained in custody. By definition, a warrantless arrest is made without even the minimal judicial supervision present when a judge issues a warrant (or approves a request for attachment).[79] Further, warrantless arrests are most often made in the heat of the moment when the necessity of quick action increases the likelihood of mistake. Because the focus in *McLaughlin* is on the schedule for post-arrest process, and because Fourth Amendment jurisprudence does not contain the same focus on reliability as due process, the Court did not need to address the reliability of the process.

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[77] *Id.* at 1668.

[78] *See* 111 S. Ct. at 2114 n.5.

[79] We do not mean to argue that a warrant, issued ex parte and often based on very unreliable information, cures the unreliability completely. Even when an arrest is made pursuant to a warrant, mistakes are possible, either because the information upon which the warrant was issued was erroneous or because the police, with a valid warrant, arrest the wrong person. While the veracity of the information leading to the arrest might be best addressed at trial, the arrestee's mistaken identity is better addressed at a pre-trial hearing because issues regarding the guilt or innocence of the real party the police were after would complicate the simple question of whether the arrested person is really the person named (or the person who should have been named) in the warrant. *See, e.g.*, Baker v. McCollan, 443 U.S. 137 (1979) (eight day mistaken detention because arrestee's brother used arrestee's name; no due process right to any process in addition to speedy trial); *and* Rivas v. Freeman, 940 F.2d 1491 (1991) (six day mistaken detention because officers did not believe arrestee when he stated that he was Alfredo Falcon Rivas and not Alfredo Celestino Rivas who was wanted for probation violation).

ii. *McLaughlin's* Due Process Analysis

Even though the Court repeatedly invoked authority as the basis for its decision, it also recognized that the ultimate decision involved weighing competing interests.[80] The Court found it difficult, however, to identify a significant state interest that ran counter to the arrestee's interest in having probable cause determined more promptly than forty-eight hours after arrest. The Court did not question the states' power to conduct warrantless arrests, so the interest in quick arrests of suspects was not relevant to the balancing. The main interest the Court cited for allowing states to delay probable cause hearings in order to combine them with arraignments was the need for (and recognition in *Gerstein* of) flexibility and experimentation among the states so that each state remained free to choose its method of compliance with the requirement of a prompt probable cause determination.[81]

The Court also invoked state fiscal interests in rejecting Justice Scalia's suggestion that twenty-four hours should be the maximum pre-hearing detention. The Court noted that this recommendation would force "countless" localities to "speed up" their procedures "presumably by allotting local tax dollars to hire additional police officers and magistrates."[82] It is unclear from the opinion on what basis the Court predicted the likely effects of its forty-eight-hour rule. Insofar as the Court's decision turned on predictions concerning the relative fiscal hardship that the forty-eight-hour and twenty-four-hour rules would produce, the decision was no more than an educated guess. The Court's predictions about the consequences of procedural rules have in the past been wrong.[83]

Once the twin interests in flexibility and fiscal integrity were identified, the game apparently was over. The majority did not explicitly weigh these interests against the hardship suffered by people wrongly held in custody. Elevating the fiscal interest, and especially the interest in flexibility, to the level of important state interests strongly tilted the constitutional analysis against the recognition of rights because safeguarding rights always limits flexibility and often implicates fiscal interests as well. Perhaps the Court invoked the metaphor of balancing to make the reader think that interests on both sides were relevant.

By relying on authority, the Court can purport to agree with the philosophical or moral merits of the plaintiffs' claim at the moment of denying it. The

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[80] *See* 111 S. Ct. at 1669. The combination of references to authority and discretion is most striking in the following pair of sentences in which the Court restates the question before it: "As mentioned at the outset, the question before us today is what is 'prompt' under *Gerstein*. We answer that question by recognizing that *Gerstein* struck a balance between competing interests." *Id.*

[81] *Id.*

[82] *Id.* at 1670.

[83] *Compare* Mathews v. Eldridge, 424 U.S. 319 (1976), *with* Schweiker v. Chilicky, 487 U.S. 412 (1988), on the consequences and reliability of terminations of disability benefits without prior hearings.

Court notes that some states "laudably" hold probable cause hearings as soon as the arrest process is completed.[84] Apparently, while this approach may be "laudable," it is not compelled by the Constitution or *Gerstein*.[85] If several states are able to comply with the stricter rule, and if the majority thinks that this practice is better, it is difficult to understand how a practical compromise would work against the preferred procedure.

As he did in *Doehr*, Justice Scalia in *McLaughlin* again invoked the common law as the basis for constitutional interpretation. Justice Scalia argued that the common law established that arrestees must be brought before a judge as soon as the arrest was completed and a judge could be found.[86] He claimed that the common law provided a clear answer to *McLaughlin* in 1791, the year of the adoption of the Fourth Amendment; implicitly he must be arguing that the Bill of Rights incorporated the common law analogs to the rights it contains.[87] The majority disagreed with Justice Scalia's view that the common law spoke so clearly on the subject and thus declined to follow it. Once again, Justice Scalia feels comfortable actively protecting individual rights when he can portray his role as the conservative protector of the canon against illegitimate innovation by states and members of the Court.

iii. Justiciability of *McLaughlin*

In *McLaughlin*, as in *Doehr*, there was reason to doubt whether the federal courts should have heard the challenge. Had the plaintiffs in *McLaughlin* asked the federal court to order their release from custody, they might have been turned away on the ground that they must first seek such relief from the state courts, unless they provided some indication that the state courts would not consider the issue. The plaintiffs, however, were not asking that they be released from custody; rather, they were asking for an order that the state provide probable cause hearings sooner than was the prevailing practice. This request, in their cases, was impossible due to the passing of time and because they would lack standing to raise their claim with regard to future arrests. The Court generally assumes that individuals are not likely to be arrested again and therefore will not have standing to challenge procedures incident to arrest.[88] The Court determined, however, that the plaintiffs had standing because, at the time the complaint was filed, the states had not yet provided several of the plaintiffs in custody with probable cause hearings; the Court also determined that even though their individual claims had expired, the claims of

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[84] 111 S. Ct. at 1671.

[85] *Id.*

[86] *See id.* at 1672 (Scalia, J., dissenting).

[87] Interestingly, none of Justice Scalia's citations date back as far as 1791, his earliest citation being to an English case from 1825. The only quotations in this part of the discussion state the requirement that the arrestee be brought before a judge as soon as the arresting officer "reasonably" can. *See* 111 S. Ct. at 1672.

[88] *See* Los Angeles v. Lyons, 461 U.S. 95 (1983).

the rest of the class would remain valid.[89]

Despite the doctrinal support for the Court's justiciability ruling, substantial doubts over federal court adjudication of the case should remain. The Court has been very hesitant to approve intervention into the operation of local law enforcement institutions, even when a pattern of unconstitutional conduct is involved.[90] The federalism principle is that federal courts should not issue injunctive remedies against local law enforcement operations but instead should prefer damages, at least when the defendants do not establish that they should be immune.[91] Thus, with no indication that the state courts were closed to the constitutional challenge, and with at least the theoretical availability of damages for the constitutional violation, the best explanation for the Court's willingness to grant injunctive relief might be that the injunction requested was a relatively narrow one that the conservative members of the Court could tolerate.

As a majority of the Court becomes more conservative on matters of substance, more liberal application of justiciability doctrines should not be surprising. While the liberal judicial activism of the 1960s and 1970s lowered many of the barriers to justiciability, the present conservative efforts seek to reverse the liberal trend. This phenomenon, which has prevailed for quite some time,[92] places liberals in the uncomfortable position of arguing against their former positions regarding expansive judicial power. Perhaps this posture is not so uncomfortable, given the traditional judicial practice of disregarding yesterday's ideas in service of today's goals.

E. *Comparison of* Doehr *and* McLaughlin

Many comparisons between *McLaughlin* and *Doehr* are implicit or even explicit from the separate discussions of each above. In this subsection, we make explicit a few comparisons, some of substance and some of form. Although it should become clear, if it is not clear already, that we think the Court improperly orders its priorities when it extends greater protection to property than to liberty, the main purpose of the comparison is not to support this view but to illustrate the different methodologies employed by the Court to reach its incongruous results. In fact, in the final analysis, while we may agree that effective attachment could help plaintiffs overcome some disadvantages they face in litigation, we might conclude that the Court's decision in *Doehr* was desirable, although it would be difficult to persuade us to endorse *McLaughlin.*

The frameworks of the two cases illustrate how doctrines become solidified so that the Court can treat similar problems differently without explanation.

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[89] 111 S. Ct. at 1667.

[90] *See* Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976).

[91] *See* Los Angeles v. Lyons, 461 U.S. at 111-13.

[92] *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983).

Both cases concerned what process should accompany a temporary deprivation of a protected interest. One case was governed by due process norms[93] while the other was governed by Fourth Amendment reasonableness standards.[94] Even though both involve balancing of competing interests, the due process three-part test used in *Doehr* directed the Court to a much more explicit consideration of the private interest at stake, while the Fourth Amendment's more vague reasonableness standard allowed the Court to focus almost exclusively on the state's reasons for seeking greater leeway in fashioning process.

The Court's treatment of the private interests at stake in the two cases is strikingly different. In *Doehr*, the Court seems extremely concerned with the limitations that attachment places on the property owners' rights, while in *McLaughlin* the Court mentions only in passing the problems that might be caused for arrestees by a couple of days in jail. It is important to realize that the deprivation in *McLaughlin* might be much more serious than that in *Doehr* since deprivation of an arrestee's liberty is complete, while the property owner retains many of the most important incidents of ownership, including use and possession. Further, the post-attachment hearing might have been available within the same forty-eight hour time-frame the Court prescribes for probable cause hearings.

The private interests in the two cases should be compared in light of the safeguards already provided in each context. For a variety of reasons, the likelihood of error may be substantially higher with the process required in *McLaughlin* than in *Doehr*. There was, by definition, no pre-arrest judicial involvement in *McLaughlin*, while in *Doehr* there was at least a hearing, albeit ex parte, held before attachment could issue. While only the plaintiff's side of the story was heard in *Doehr*, a prior hearing could serve to filter out implausible or insubstantial claims. The Court casts serious doubts on the reliability of any ex parte determination leading to attachment, yet the pre-attachment hearing resembles the sort of ex parte hearing leading to an arrest warrant.[95] Potential unreliability is apparently a much more serious problem when temporary restrictions on the alienability of property are involved than when temporary deprivations of liberty are at stake.

Conversely, the Court treats the state interests supporting the various schemes differently. The state interests in *Doehr* are treated as non-existent while the state interests in *McLaughlin*, as flimsy as they may be, are elevated to the status of important structural elements of federalism. The Court could find no important interest behind allowing attachment with only post-attachment hearings. Apparently, any state interests in equalizing litigation and bargaining power between plaintiffs and defendants, such as protecting plaintiffs

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[93] *Doehr*, 111 S. Ct. at 2112.

[94] *McLaughlin*, 111 S. Ct. at 1671.

[95] *Cf.* Illinois v. Gates, 462 U.S. 213 (1983) (easing standards for issuing warrants based on anonymous tips). *See also* Malley v. Briggs, 475 U.S. 335 (1986) (holding police officer amenable to damages remedy for making arrest with warrant when warrant was issued without probable cause).

from defendants who might shield their property from attachment and saving the expense of holding pre-attachment hearings, are worth very little in the eyes of the Court.

The state interests in flexibility and fiscal integrity in *McLaughlin* were held as extremely important. The interest in flexibility is difficult to comprehend. It is much more abstract than the usual interest weighed in constitutional balancing,[96] and it always works against recognition of restrictions on state practices. Administrative efficiency is a more tangible interest. Dollars can be counted. The state fiscal interest is almost always present, but sacrificing important personal interests to save state money is a fairly controversial proposition. Since *McLaughlin* did not implicate the propriety of warrantless arrests, no real public safety interest was involved.

The Court's treatment of federalism principles is also at odds in the two cases. In *Doehr*, the Court cites the fact that Connecticut is in the minority of states that allow attachment without a hearing, bond or some involvement of the property in the litigation to justify overruling Connecticut's choice.[97] The protection of property rights is thus deemed more important than preserving local choice regarding how to provide for attachment incident to litigation. In *McLaughlin*, by contrast, preservation of local choice was the main interest raised against recognizing a violation of constitutional rights for arrestees held up to forty-eight hours without a probable cause hearing.[98] The fact that some states manage without holding arrestees so long was laudable, but not an indication that other states could, and therefore should, be more solicitous of the arrestees' interests.

The importance of precedent in the two cases is also treated quite differently. In *Doehr*, the Court essentially disavowed the importance of precedent by noting that due process decisions depend on the unique context of the case.[99] In *McLaughlin*, although the issue was also decided by balancing competing interests, the Court repeatedly limited the options it would consider to those not foreclosed by its prior decision concerning the rights of warrantless arrestees.[100] Thus, while in *Doehr* the Court was free to engage in wide-ranging balancing of competing interests, in *McLaughlin* the Court, due to the constraints of authority, would not consider the private interest against forcing arrestees to languish in jail while the state prepared arraignment papers. The balancing test in *McLaughlin* began with an explicit thumb on the state's side of the scale.

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[96] Usually, constitutional balancing involves weighing the state's interest in accomplishing its policy against some private interest. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978). The interest in pure "flexibility" is much more difficult to calculate than the interest in some actual policy.

[97] 111 S. Ct. at 2112.

[98] 111 S. Ct. at 1671.

[99] *See* 111 S. Ct. at 2112.

[100] 111 S. Ct. at 1669 (citing *Gerstein*).

III. The Continued Tilt to the Property Right

The derogation of liberty interests in *McLaughlin* is not surprising in light of other recent developments at the Supreme Court. Some examples outside the criminal area are worth considering. In a recent labor case, the Court held that the National Labor Relations Board erred when it ordered an employer to allow non-employee labor organizers access to the employer's parking area.[101] The organizers wanted to come onto the property to communicate with the employees, in furtherance of the employees' right to take collective action under the labor laws.[102] The associational interests of the employees and the organizers, and their rights under the statute, were, in the Court's view, outweighed by the property interests of the employer.[103] Stated simply, the employer's right to exclude non-employees from its property outweighed the liberty-type interests on the other side.[104]

A couple of recent employment discrimination claims also provide good examples of tilt in Supreme Court decisions away from parties thought to need protection of their interests and in favor of more privileged members of society. Women claiming that a seniority system discriminated against them were told they sued too late because they waited until the rules were applied against them rather than suing when the rules were first put into effect.[105] Male firefighters, on the other hand, were allowed to sue when affirmative action rules were applied against them even though they could have sued when the rules were being made.[106]

In the criminal arena, the Court recently stated strongly that persons facing severe deprivations of liberty through conviction of criminal offenses are entitled to less due process protection than the property owners in cases like *Doehr*.[107] Recall that although *McLaughlin* did not explicitly apply the *Mathews* test to assess procedural due process, its reasoning nevertheless exhibits a balancing test similar to the *Mathews* analysis. The Court "reconcile[d] important competing interests. On the one hand, States have a strong interest in public safety . . . . On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, inter-

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[101] Lechmere, Inc. v. N.L.R.B., 112 S. Ct. 841, 850 (1992).

[102] *Id.* at 844.

[103] *Id.* at 849-50.

[104] The Court declined to defer to the N.L.R.B.'s interpretation of the labor laws because the Court itself had already interpreted the statute not to allow access to non-employees in similar circumstances. *See id.* (citing Labor Bd. v. Babcock & Wilcox Co., 351 U.S. 105 (1956)). In turn, the *Babcock* decision reflected skepticism that the Board would adequately take into account employers' property interests as opposed to employees' interests in taking collective action.

[105] Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

[106] Martin v. Wilks, 490 U.S. 755 (1989). Similarly, the *McLaughlin* Court considered the liberty interests of the incarcerated less worthy of protection than the interests of property owners such as Doehr.

[107] *See* Medina v. California, 112 S. Ct. 2572 (1992).

rupt his source of income, and impair his family relationships.' "[108] Referring to its analysis as a "calculus," the Court held that any custody beyond forty-eight hours would require the County of Riverside to show "the existence of a bona fide emergency or other extraordinary circumstance."[109] Thus, the Court created the impression that even in criminal due process challenges, a test at least similar to the *Mathews* test was being applied. Additionally, although the extent of the practice was in controversy, the Court, in the past, had admittedly applied the *Mathews* test to determine whether rules of criminal procedure afforded the defendant due process.[110] However, in *Medina v. California*,[111] the Court rejected *Mathews* balancing in the criminal procedure context and applied a test that is much more deferential to government authority.

Medina challenged a California statute that placed the burden on the defendant to prove that he was incompetent to stand trial.[112] Medina argued that placing the burden on him violated procedural due process and that the proper test for determining his due process rights was the *Mathews* balancing test.[113] The Court rejected outright the applicability of *Mathews* and stated instead that a rule of criminal procedure would not violate due process unless it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[114]

The reasons the Court offered for this more deferential standard for due process scrutiny of criminal procedure rules — deference to historical state practice, the seriousness of the social interest in criminal prosecution and the expertise of the states[115] — should not be surprising. But it might be startling that the Court believes that the Constitution should be less protective when a person's freedom is at stake than when a temporary freeze on a person's economic assets is imminent.

Parallel to this trend of lowered protection for liberty interests run a number of decisions that at first glance might seem inconsistent with the Court's recent extension of greater protection to property interests. In several cases, the Court denied prisoners' claims that they had been deprived of property interests.[116] It appeared then that the Court used these prisoner cases, which

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[108] *McLaughlin*, 111 S. Ct. at 1668 (quoting Gerstein v. Pugh, 420 U.S. 103, 114).

[109] *Id.* at 1670.

[110] *Medina*, 112 S. Ct. at 2576-77, 2581-82 (O'Connor, J., concurring in the judgment).

[111] 112 S. Ct. 2572 (1992).

[112] *See id.* at 2575. The Court did not question its prior holdings that it violates due process to prosecute an incompetent defendant. *See id.* at 2574 (citing Drope v. Missouri, 420 U.S. 162 (1975)).

[113] *Id.* at 2576.

[114] *Id.* at 2577 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

[115] *Id.* at 2577.

[116] *See, e.g.*, Parratt v. Taylor, 451 U.S. 527 (1981); *and* Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984). *See also* Jack M. Beer-

would not generate a great deal of sympathy from observers, to narrow due process protections in general.[117] Instead, it now appears as if the Court is confining its narrower due process protections to cases involving small property interests with disadvantaged claimants while increasing protection where land is at issue.[118] Rather than protect those most in need of judicial protection, the Court chose to protect owners of real property, and leave prisoners, tort victims and criminal suspects to their own devices.

This trend has important implications on at least two fronts. On the liberty front, clearly police departments will take advantage of the Court's permission to hold suspects for forty-eight hours with no judicial determination. Courts have allowed, for example, twenty-six-hour detentions to give police an opportunity to arrange a line-up,[119] rejecting a magistrate's interpretation that *McLaughlin* prohibits detention merely to build a case. A district court held that *McLaughlin* allows the police to detain the wrong person for the forty-eight-hour period as long as the officers reasonably believed that they apprehended the right person.[120] In general, courts appear willing to allow lengthy detention of suspects without judicial supervision, enabling the police to determine if there is sufficient evidence for bringing charges.[121] This inquiry is the kind usually required before arrest when the judge issuing a warrant or the police officers acting without a warrant determine whether probable cause to

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mann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 298-99 n.89 (1988).

[117] Beermann, *supra* note 116, at 298-99 n.89.

[118] Takings jurisprudence has also become more protective of landowners' interests. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

[119] Bostic v. City of Chicago, No. 86 C 5482, 1991 WL 96430 (N.D. Ill. May 23, 1991), *aff'd*, 981 F.2d. 965 (7th Cir. 1992). *See also* Arnold v. City of Chicago, 776 F. Supp. 1259 (N.D. Ill. 1991); Sanders v. City of Houston, 543 F. Supp. 694 (S.D. Tex. 1982), *aff'd mem.*, 741 F.2d 1379 (5th Cir. 1984). The *Arnold* court added that the Seventh Circuit, in Patrick v. Jasper County, 901 F.2d 561, 567 (7th Cir. 1990), had "noted its approval of *Sanders* by including 'identity verification' as one of the procedures the court must consider in determining if a detention is reasonable." *Arnold*, 776 F. Supp. at 1264. It is not clear that by "identity verification" the *Jasper* court meant to include line-ups.

[120] Holliman v. Avery, No. 90 C 1771, 1991 WL 259496 (N.D. Ill. Dec. 3, 1991). The police had an arrest warrant for Mark Holliman, and went to an address listed on it as his residence. The police knocked, identified themselves, and were admitted into the apartment. In the apartment at the time were Mark's brother Manuel Holliman, and their mother. One officer entered with his gun drawn, and Manuel raised his hands. Stating that they had an arrest warrant for Mark Holliman, they handcuffed Manuel. Their mother tried to tell the officers that they had the wrong brother. Manuel was detained for a total of five hours and forty-five minutes, until it was discovered that his fingerprints did not match those of the suspect they were seeking. The Court held that because it was reasonable for the officers to believe that the man with hands raised was the person they sought to arrest, there was no false arrest, and because the detention was within the limits of *McLaughlin*, there was no excessive detention.

[121] *See supra* notes 82, 83.

arrest exists.

On the property front, *Doehr* has had some important implications, many of which in isolation we find positive. The due process principles affirmed in *Doehr* have been applied to restrain government from seizing property of suspected criminals (under forfeiture provisions) without prior hearings.[122] These principles have also been applied to protect property owners from government action under an environmental law that takes property without prior notice and hearing.[123]

Generally, these developments in the protection of property are positive. The government possesses great power, and in the area of forfeiture of property, requiring a hearing before a neutral magistrate prior to seizure might safeguard innocent parties against wrongful government action. In the context of the reduced protection the Court affords liberty, however, and its unwillingness to protect individual liberty and small property interests of prisoners, the increased protection given to the real property of suspected drug dealers and polluters is problematic. If greater protection of property interests comes at the expense of our liberty rights, the cost is too high. This trade-off certainly does not evidence a judicial commitment to the protection of liberty rights. Ironically, in the forfeiture cases, the individuals might receive less due process protection than their property.

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[122] *See, e.g.*, United States. v. Two Parcels of Property, 774 F. Supp. 87 (D. Conn. 1991). In this case, the district court held that ex parte attachment of commercial properties, which the government alleged were used in the distribution and use of cocaine, was in derogation of the record owner's due process rights. Finding probable cause that the parcels were being used or were intended to be used to commit a felony, a district judge issued a warrant for an in rem arrest and seizure of the property. The owner moved to dismiss the forfeiture action, claiming that this ex parte attachment of his commercial property violated due process rights. The court, applying *Doehr*'s version of the *Mathews* test, agreed. It found that the seizure significantly impacted the owner's property interest, rejecting the government's argument that the seizure's significance was lessened because commercial, rather than residential property, was involved. Further, the court found the risk of erroneous deprivation in the absence of pre-seizure notice too great. Assessing the strength of the government's interest in the seizure, the court held that this case did not present the exigent or extraordinary circumstances that would justify postponement of notice and hearing. *See also* United States v. Certain Real Property on Hanson Brook, 770 F. Supp. 722 (D. Me. 1991). In these cases, the courts relied on the fact that there was no special need for quick action to hold that pre-seizure process was required under *Doehr*. It is interesting that even suspected and known drug traffickers are accorded these generous due process rights concerning property involved in illegal transactions.

[123] *See* Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991). This case concerned a provision which gave the EPA authority to record notice of lien on property whose owners may be subject to liability for cleanup costs. The court held that the provision violated due process by not providing notice and a pre-deprivation hearing to a property owner who claims that the property to be encumbered is "not subject to or affected by a removal or remedial action." *Id.* at 1511.

IV. CONCLUSION

Although we criticize the apparent inconsistency of disparate lines of legal doctrine, we are not surprised to find that courts apply different methodologies in different cases, or that they do not appear to treat similar problems in quite the same way. The question that often arises is: what value is there in pointing out inconsistencies within legal doctrine? One may argue that ideology, as embodied in doctrine, serves as a tool of oppression insofar as it convinces victims that their oppression is just or is perhaps an unfortunate by-product of just social arrangements. Under this argument, if ideology is exposed as false or self-contradictory, liberation is soon and sure to follow.

If the acceptance of legal doctrine as legitimate rests upon its determinacy, then once it is exposed as indeterminate, the belief in its legitimacy will evaporate. The merits of this view have been questioned by those who fear that there is more coercion than ideology behind the subjugation of women and minorities in our society, although there are many who still believe in the liberating power of indeterminacy analysis.[124] Reliance on determinacy may limit arbitrariness in judicial decision-making, if those in power must at least abide by their own standards for legitimacy.

Further, pointing out the contradictions in legal doctrine helps establish that law, as with other disciplines, should be understood as embodying contradiction; perhaps rather than feel anxious about contradiction, we should glorify in it because it frees us to reshape law as we desire. But to some, this attitude depends on the author adopting an ironic tone or stance to her work.[125] The Supreme Court, even when it makes wildly implausible claims about its methodology,[126] attempts to sound serious and authoritative. In this environment, the critic who adopts an ironic tone may appear, within the legal establishment, marginal as compared with the author of the text.

Perhaps it is useless to worry about the absence of a unifying fabric in our constitutional law, because current society may not be amenable to organiza-

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[124] *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 84-88 (1989); *see also*, Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 420-27 (1984).

[125] *See* James Boyle, *Is Subjectivity Possible? The Post Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489, 503 (1991). *See generally*, Günter Frankenberg, *Down By Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360 (1989).

[126] *See, e.g.*, Malley v. Briggs, 475 U.S. 335 (1986). In *Malley*, the Court stated that its job in applying immunities "is not to engage in free-wheeling policy analysis" but rather to discover and apply the intent of the Congress that enacted 42 U.S.C. § 1983, the statute under which the case arose. This claim was wildly implausible because the Court was applying an elaboration of the immunity doctrine it had developed, based on policy considerations alone, in a non-statutory *Bivens* action and had never cited any historical support for the elaboration. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982) (refining qualified immunity test based on policy against distracting public officials from the jobs with extensive pre-trial litigation and discovery).

tion around a unifying fabric. Constitutional interpretation separates issues into categories, and incongruencies across categories might be irrelevant in the same way that the validity of attachment of real property has no bearing on the procedures whereby people are detained pursuant to less reliable pre-arrest procedures even though the adverse consequences of detention may be great.

In the Supreme Court's evaluation of constitutional claims, the identity or status of the party claiming the constitutional right becomes an important factor. In general, if the Court views the party asserting the right as marginal, perhaps as a criminal or a litigious trouble-making malcontent, the Court is less likely to uphold the claim.

Freeing the tools of creation from methodologies that are capable of constraint and evaluation increases the power of those who possess it and decreases the power to resist of those lacking such power. For example, Chief Justice Rehnquist may write a formalistic opinion denying children abused by their parents the right to state intervention[127] while in other contexts he may write an opinion free from the constraint provided by authority.[128] The critic, of course, is left with a broad arsenal of criticism because she too is not confined by a canon. But what critique stings? Since those with power can always successfully answer the critic, perhaps the lack of constraint on all sides increases the level of oppression as the critic, left without a solid basis for criticism, dangles out on the limb of personal preference.

So how do we argue against the Court's apparent preference for traditional property interests as against liberty interests? Our strategy is relatively simple: point out to others that the Court treats liberty interests with less respect than property interests, that the Court's contemporaneous holdings — that a person may be imprisoned for forty-eight hours with no judicial process while a piece of property may not be attached for a similar amount of time without a pre-attachment hearing — seem inconsistent with our sense of the Constitution. In an open society, democratic institutions give people who are convinced of propositions such as ours the opportunity and the means to move law in a better direction.

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[127] *See* DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989).

[128] *See Doehr*, 111 S. Ct. at 2120 (Rehnquist, C.J., concurring); Butler v. McKellar, 494 U.S. 407 (1990) (Rehnquist, C.J.).