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Due Process and Consumer Protection:
Concepts and Realities in Procedure and Substance—Repossession and Adhesion
Contract Issues

By JAMES R. McCALL*

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I. Introduction

American jurisprudence has long been troubled by the friction be-
tween traditional legal concepts and the realities of the consumer mar-

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his appreciation to Robin B. Wakshull and Carl Lippenberger, third year students at
Hastings College of the Law, for their assistance in the preparation of this article.
In a previous article, the author examined the difficulties caused by this friction in determining the due process validity of consumer class action procedures. Similar problems appear in recent decisions applying the due process clause to repossession procedures and adhesion contracts. These decisions are of great importance to consumers and the law governing retail transactions.

While neither repossessions nor adhesion contracts are found exclusively in consumer sales, they are used more frequently in these transactions than in dealings between businessmen. Moreover, due to the consumer's relative lack of sophistication and economic power, repossession procedures and adhesion contracts are often used as instruments of exploitation against him. Therefore, it is appropriate to discuss these general subjects as part of the accelerating development of a common law of consumer protection.

As is well known, repossession procedures have increasingly been attacked under the due process clause during the last five years. The United States Supreme Court's decision in Mitchell v. W.T. Grant, is the most recent and, in some respects, the most perplexing decision in this area. While the implications of Mitchell are as confusing as they are substantial, the constitutional law of repossession has developed to a point where it is appropriate to propose statutory guidelines to reform certain repossession procedures. Such guidelines are furnished herein in the hope that discussion and legislative action will be stimulated.

The proposal herein made for a constitutionally valid statutory framework for self-help repossession presupposes that due process rights may be waived by contract. This assumption, of course, can be made only when the waiver is truly consented to. The necessity for consent raises the question of the validity of waivers contained in adhesion contracts, for in such contracts consent is arguably not present. The relationship between due process requirements and adhesion contracts has drawn judicial attention for the first time only recently. Although this relationship may in the future be of great importance, at

1. McCall, Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Class Action Issues, 25 Hastings L.J. 1351 (1974) [hereinafter cited as McCall]. The present article is, in many respects, a continuation of the consideration of the themes developed in the first article on class actions. However, the present article will, for good or ill, stand alone, and reference to the prior article will be necessary, it is hoped, only in relation to specific points as shown by appropriate footnotes hereafter.

2. See text accompanying notes 7-65 infra.


4. See text accompanying notes 114-24 infra.

5. See text accompanying notes 146-72 infra.
this time a commentator can only speculate as to its eventual significance. Such speculation, with the risks necessarily involved, is the principal burden of Part III of this article.

Compared to the opinions applying due process requirements to class action procedures, the decisions concerning the constitutional validity of repossession procedures and adhesion contracts are generally more sophisticated and attentive to the realities of the seller-consumer relationship. As will be seen, these latter decisions generally attempt to deal with the economics of the consumer marketplace and to accommodate the conflicting interests of consumers and sellers.

II. Repossession and Due Process

A. The Authorities to Date.

1. The Three Questions After Sniadach

In Sniadach v. Family Finance Corp., decided in 1969, the Supreme Court held that a prejudgment garnishment of the wages of a consumer-debtor constituted a taking of the defendant's property. Since there had been no noticed hearing on the merits of the plaintiff's claim prior to seizure, the taking lacked procedural due process as required by the Fourteenth Amendment. Despite Justice Douglas' disarming comment to the effect that the Court's decision was clearly expectable, the bar and the consumer credit industry were indeed surprised. This surprise was due, at least in part, to the fact that prejudgment remedies allowing for seizure of a debtor-defendant's property without prior hearing had been accepted by English and American courts for hundreds of years.

Three vitally important questions regarding the full reach of the Sniadach rationale were not answered by Justice Douglas' opinion. The first was whether the due process rights recognized in the decision could be effectively waived by a contract provision. The Supreme

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6. The lack of judicial attention to the real world of consumer transactions in class action decisions was the author's primary concern in McCall, supra note 1, at 1354.
8. "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process." 395 U.S. at 342 (citations omitted).
10. Clearly Justice Douglas is not to be faulted for failing to answer the question, as the issue was not presented by the facts in the case.
Court considered this issue two years later, and the resulting decisions will be examined below in connection with the relationship between adhesion contract theory and the concept of due process.\textsuperscript{11}

A second and more basic question was whether the due process analysis in \textit{Sniadach} should be used to evaluate other forms of prejudgment seizure, specifically procedures which do not involve garnishment of wages. In the opinion, Justice Douglas had emphasized the particular economic hardship which attends the garnishment of wages,\textsuperscript{12} and some courts were therefore led to the conclusion that, absent the seizure of wages, due process scrutiny would not be required.\textsuperscript{13} For two years following the \textit{Sniadach} decision, lower level federal and state courts rendered conflicting decisions on this point.\textsuperscript{14} The issue was laid to rest in June 1972 in \textit{Fuentes v. Shevin}.\textsuperscript{15} In that case the Supreme Court held that the replevin statutes of Florida and Pennsylvania, which provided for prejudgment seizure of a defendant's chattels by a sheriff pursuant to court-issued process, were unconstitutional. Relying on \textit{Sniadach}, the Court concluded that statutory seizure of chattels without prior opportunity for the defendant to be heard on the merits of the plaintiff's claim was invalid. Thus, the \textit{Sniadach} rationale was held to apply regardless of the nature of the property seized.

The third major question left open by the \textit{Sniadach} decision is intrinsic to the due process clause. That question is whether, in any given situation, the requisite "state action" is present to bring the case

\textsuperscript{11} See text accompanying note 136-45 \textit{infra}.

\textsuperscript{12} Justice Douglas pointed out that "[w]e deal here with wages—a specialized type of property presenting distinct problems in our economic system." 395 U.S. at 340. Congressman Sullivan, Chairman of the House Subcommittee on Consumer Affairs, and Congressmen Reuss and Gonzales are quoted to the effect that the debtor whose wages are garnished is usually a poor, ignorant person trapped in an easy credit nightmare and that because garnishment puts such a great drain on the family income, the family must often go without essentials and is driven below the poverty level. \textit{Id}. at 340-42.


\textsuperscript{15} 407 U.S. 67 (1972).
within the reach of the Fourteenth Amendment.\textsuperscript{18} Since statutory wage garnishment and replevin procedures involve action by a constable or sheriff, pursuant to a writ issued by a court, action by state officials was clearly present in both \textit{Sniadach} and \textit{Fuentes}.\textsuperscript{17} On the other hand, in many instances of default on secured obligations, the creditor personally seizes the chattel (e.g., an automobile sold on installment payments or used as collateral for a loan), thereby exercising self-help repossession.\textsuperscript{18}

In self-help repossession, absent the prospect of a breach of the peace, no court official or law enforcement officer plays a role. However, the statutes of every state include provisions giving a creditor the right to repossess, without necessity of court order, upon default in payment by the debtor.\textsuperscript{19} In \textit{Adams v. Egley},\textsuperscript{20} a 1972 federal district court case, two consumer-debtors argued that the existence of such a statute constituted state action under the due process clause. Specifically, the contention was made that sections 9-503 and 9-504 of the Uniform Commercial Code (UCC), as enacted in the state of California,\textsuperscript{21} unconstitutionally authorized repossession by a secured creditor, because no noticed, preseizure hearing was required. The district court, relying on its view of the reasoning of the United States Supreme Court in \textit{Reitman v. Mulkey};\textsuperscript{22} held that California's enactment of the UCC sections


17. In neither case is the point discussed.


19. Sections 9-503 and 9-504 (1962 version) of the Uniform Commercial Code (UCC) titled "Secured Party's Right to Take Possession After Default" and "Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition" have been substantially adopted by 49 states and the District of Columbia. Louisiana, the only state which has not adopted the UCC, has a specific statute providing for court-assisted repossession. The Louisiana statute was discussed at length in \textit{Mitchell v. W.T. Grant Co.}, 94 S. Ct. 1895 (1974). \textit{See text accompanying notes} \textsuperscript{30-56 infra}.


constituted the requisite state action and that private action taken pursuant to them was unconstitutional under Sniadach. The Ninth Circuit, in *Adams v. Southern California First National Bank*,\(^2\) reversed the decision of the district court, holding that the enactment of sections 9-503 and 9-504 did not constitute state action for purposes of the due process clause. A petition for certiorari has been denied in *Adams*, and the issue of whether self-help repossession involves state action, is as yet, undecided by the Supreme Court.\(^2\)

As of the spring of 1974, then, the only issue of consequence raised by the Sniadach decision which appeared to be unresolved was whether state action is present in self-help repossession.\(^2\) Commentators\(^2\) and lower courts\(^2\) read the *Fuentes v. Shevin* decision as invalidating, without general exception, any state-assisted repossession procedures which did not provide for a prior judicial hearing to establish the probable validity of the creditor's claim against the property. Such an interpretation appeared justified, in view of the sweeping language of *Fuentes*,\(^2\) and certainly this was the meaning of the majority opinion, as construed by those justices who dissented from it.\(^2\)

\(^{23}\) 492 F.2d 324 (9th Cir. 1973).


\(^{25}\) See text accompanying notes 66-77 infra.


\(^{28}\) "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor . . . . The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation—not adjudication. Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." *Fuentes v. Shevin*, 407 U.S. 67, 96-97 (1972).

\(^{29}\) Justice White, joined by the Chief Justice and Justice Blackmun in the dissent, states: "The Court holds it constitutionally essential to afford opportunity for a prob-
2. *Mitchell v. W.T. Grant*

In *Mitchell v. W.T. Grant*,\(^40\) decided in May 1974, the Supreme Court eviscerated the broad principle announced in *Fuentes* by upholding the constitutionality of a Louisiana statute authorizing sheriff-executed sequestration of a debtor-defendant's personal property, ordered *ex parte* upon the application of a plaintiff-creditor. The defendant-debtor received neither notice nor opportunity to appear prior to the seizure. The Louisiana Code of Civil Procedure provides that a sequestration writ\(^31\) shall issue only when the nature of the claim of the repossessing creditor, the amount thereof and the grounds relied upon for the issuance of the writ clearly appear from the specific facts alleged in a verified petition filed with the court. Moreover the petitioning creditor must furnish a bond as security for any damage (including attorneys fees) suffered by the debtor if the writ is wrongfully obtained. By subsequent motion, the debtor may obtain dissolution of the writ, unless the creditor proves the allegations upon which the writ is issued. In addition, the debtor may obtain a release of the seized property, without seeking dissolution of the writ, by furnishing security for satisfaction of any judgment which may be rendered against him.\(^32\)

Pursuant to the statute, Grant filed suit to enforce a vendor's lien, alleging an overdue and unpaid balance on the purchase price for certain consumer goods sold to Mitchell on an installment contract. A writ of sequestration was executed, and Mitchell thereafter filed a motion to dissolve the writ. The motion asserted that the seizure violated the due process clause, because Mitchell had been given no prior notice or opportunity to contest Grant's right to possession. The trial court rejected the debtor's motion, and the Supreme Court of Louisiana affirmed, expressly rejecting the due process claim.\(^33\) The Supreme Court granted review.

Justice White, writing for the Court, noted that any resolution of the due process question must take into account the fact that both the buyer and the seller have current, real and conflicting interests in the

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\(^{31}\) The difference in nomenclature among the various state-executed, prejudgment, chattel seizure procedures appears to be legally insignificant. Thus, the function of a writ of sequestration is the same as that of a writ of attachment or a writ of replevin when issued on a preliminary basis. *See* Blair v. Pitchess, 5 Cal. 3d 258, 265, 486 P.2d 1242, 1246-47, 96 Cal. Rptr. 42, 46-47 (1971).

\(^{32}\) 94 S. Ct. at 1899-1900.

\(^{33}\) *Id.* at 1897-98.
property. This was the first time that a majority of the Supreme Court had recognized the property interest of the seller in a repossession case, and Justice White emphasized the fact that the seller retained a distinct and valuable property interest in goods which had been sold on credit. Based on this perception, the Court held that due process requires an accommodation of the interests of both the debtor and creditor and concluded that "the Louisiana procedure as a whole [reaches] a constitutional accommodation of the respective interests of buyer and seller." This spirit of accommodation, although described as compelled by precedent, contrasts sharply with the seemingly absolute requirement of a noticed, preseizure judicial hearing established by the *Fuentes* decision. Not surprisingly, the debtor asserted that he had an absolute right to a hearing before his property was seized, based upon *Sniadach*, *Fuentes* and, in a more general way, other Supreme Court decisions. As to precedents other than *Fuentes*, the Court responded that the decisions either dealt with property in which the seizing party had no existing property interest or merely stood for the proposition that a hearing must be held prior to a final deprivation of property. Thus, the Court felt that these cases did not address the issue of the need for a preliminary hearing on interim dispossession. With respect to the seemingly compelling *Fuentes* decision, the Court declared:

> [W]e are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied to this case.

In distinguishing the Florida and Pennsylvania laws voided in *Fuentes* from the Louisiana statute before it, the Court found four major areas of difference:

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34. "Plainly enough, this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor. The question is not whether a debtor's property may be seized by his creditors, pendente lite, where they hold no present interest in the property sought to be seized. The reality is that both seller and buyer had current, real interests in the property . . . . Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." *Id.* at 1898.

In *Sniadach* and *Fuentes* the Court failed to consider the property interest of the seller in determining whether the replevin procedure was a "taking of property" which violated due process. This lack of recognition of the seller's interest was criticized in Justice White's dissenting opinion in *Fuentes*. See *Fuentes v. Shevin*, 407 U.S. 67, 102 (1972) (White, J., dissenting).

35. 94 S. Ct. at 1901.
36. *Id.* at 1902-04.
37. See text accompanying notes 26-29 *supra*.
38. 94 S. Ct. at 1902-04.
39. *Id.* at 1904.
40. *See id.* at 1904-05.
1. Judicial involvement. In Fuentes, the statute authorized repossession of the goods without judicial order, approval or participation. In Mitchell, however, the statute required that a showing be made to a judge and judicial authorization obtained. Thus, the Court found there was "judicial control of the process from beginning to end."41

2. Proof of applicants' claim. The statute in Fuentes did not require the applicant to make a convincing showing that he was entitled to a writ before the seizure, whereas under the Louisiana procedure, a writ can be authorized "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for issuance of the writ clearly appear from specific facts shown by verified petition or affidavit."42

3. Risk of wrongful use of the writ procedure in the context of issues to be determined at that proceeding. In Fuentes, property could be replevied under the statute only if "wrongfully detained," and the Mitchell Court deemed this a broad "fault" standard requiring factual determination through adversary contest. On the other hand, the facts relevant to the issuance of a writ under the Louisiana statute (i.e. the existence of the debt, lien, and delinquency) are, in the Court's opinion, narrowly confined and particularly suited to documentary proof which is normally uncontestable.43

4. Impact on the debtor. In Fuentes, the Florida statute guaranteed a debtor-defendant an eventual opportunity for a hearing, while the Pennsylvania law offered a debtor no such assurance. The Louisiana statutory procedure, on the other hand, expressly provides for an immediate hearing on the possession issue; therefore, the debtor is not left to await an uncertain hearing.44

The majority opinion distinguished Fuentes without dealing with the obvious conflict between the broad principle of that decision and the holding in Mitchell. The concurring opinion by Justice Powell, however, accurately focused on the significance of Mitchell as a clear renunciation of the full reach of the Fuentes principle.45 In a vigorous dissent, Justice Stewart argued that Mitchell was directly controlled by Fuentes and that the factual distinctions drawn by the majority were

41. Id.
42. Id. at 1904.
43. Id. at 1905.
44. Id.
45. Justice Powell stated, "To this extent I think it fair to say that the Fuentes opinion is overruled." Id. at 1908 (Powell, J., concurring).
Rebuking the majority for failing to follow stare decisis, Justice Stewart wrote:

A substantial departure from precedent can only be justified, I had thought, in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment. Yet the Court today has unmistakably overruled a considered decision of this Court that is barely two years old, without pointing to any change in either societal perceptions or basic constitutional understandings that might justify this total disregard of stare decisis.

It is clear that the Mitchell approach requires a consideration of the relative economic interests of the buyer and the seller. In connection with the seller's claim to interim repossession, Mitchell emphasized (1) the risk of decline in the value of the goods as both security for the purchase price and as resale items, when the buyer continues to possess and use the goods, and (2) the risk that the buyer will conceal, transfer or damage the goods, if the buyer remains in possession.

In evaluating the buyer's interest in retaining possession, the Court noted that the debtor's basic source of income is unimpaired by the prehearing seizure and that an immediate postseizure hearing on the right of possession is available to the debtor. The Court concluded:

[W]e remain unconvinced that the impact on the debtor of the deprivation of the household goods here in question overrides his inability to make the creditor whole for wrongful possession, the risk of destruction or alienation if notice and a prior hearing are supplied, and the low risk of a wrongful determination of possession through the procedures now employed.

This "accommodation approach" to the question of proper and timely notice and hearing is sustainable on the basis of certain pre-Fuentes decisions of the Court. Nevertheless, the dissent appears

46. See id. at 1912-13 (Stewart, J., dissenting). Justices Douglas and Marshall concurred in the dissent, while Justice Brennan separately registered a dissenting opinion in which he concluded that Fuentes compelled a reversal of the judgment of the Louisiana Supreme Court. See id. at 1910 (Douglas & Marshall, JJ., joining in dissent); id. at 1914 (Brennan, J., dissenting).

47. Id. at 1913 (Stewart, J., dissenting). The dissent ends with these dire words: "The only perceivable change that has occurred since the Fuentes case is in the makeup of this Court.

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." Id. at 1914.

48. Id. at 1900.
49. Id. at 1901.
50. Id.
51. See Stanley v. Illinois, 405 U.S. 645, 650-51 (1972), quoting Cafeteria Work-
correct in rejecting the majority's grounds for distinguishing the facts in *Mitchell* from those of *Fuentes*. Thus, the valid debate appears to be between Justice Powell, author of the concurring opinion, and the dissenters on the point of the requirements of stare decisis. Although this debate raises difficult issues which are beyond the scope of this article, it should be noted that the Supreme Court has, in *Mitchell*, clearly adopted a theory of review of statutory civil procedures which takes into account the practical consequences of the provisions for notice to affected parties.\(^5\) This flexible view contrasts with the rigid requirements for specific forms of notice in class action litigation announced by the Second Circuit in *Eisen v. Carlisle & Jacquelin*.\(^5\) The Supreme Court based its partial affirmance of that decision on the statutory language involved and did not pass upon the Second Circuit's due process pronouncements.\(^5\) Following the Supreme Court's *Mitchell* decision, it can be argued that Congress and state legislatures should view the accommodation approach adopted in that case as authority for fashioning new and more flexible class action notification procedures.\(^5\)

As a technical matter, with regard to state-executed repossession, the *Mitchell* decision stands for the following proposition: a statute authorizing a sheriff to seize chattels which were purchased on credit from a vendor-plaintiff can be held valid under the due process clause even when such procedure is ordered *ex parte* upon the application of the vendor without preseizure notice and hearing. To be valid, a statute should provide that: (1) there be judicial control of the process of the repossession from beginning to end; (2) the grounds relied upon for issuance of the writ be sufficiently proved by verification of specific

\(^1\) *Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (“[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”); *Inland Empire Dist. Counsel v. Millis*, 325 U.S. 697, 710 (1945) (“The requirements imposed by that guaranty [of due process] are not technical, nor is any particular form of procedure necessary.”); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 351 (1938) (“The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights.”).

\(^5\) See generally *McCall*, supra note 1, at 1387-1410.
facts which are suited to documentary proof; (3) the debtor have an
absolute right to an immediate hearing to challenge the seizure; and
(4) the prevailing party be protected by bond against all possible loss
caused by the seizure. Justice Powell summarized the Court’s view in
his statement that due process is fully satisfied in cases of this kind where

state law requires, as a precondition to involving the State’s aid to
sequester property of a defaulting debtor, that the creditor furnish
adequate security and make a specific factual showing before a
neutral officer or magistrate of probable cause to believe that he
is entitled to the relief requested. An opportunity for an adversary
hearing must then be accorded promptly after sequestration to de-
termine the merits of the controversy, with the burden of proof on
the creditor. 56

A few months before Mitchell, the California Supreme Court
demonstrated a similar awareness of the need for accommodating the
conflicting interests of buyers and sellers. In Adams v. Department
of Motor Vehicles, 57 that court reviewed a due process challenge to the
constitutionality of a statutory garageman’s labor and materials lien.
State statutes authorized an unpaid garageman to retain and sell ve-
hicles upon which he has made repairs and required the California De-
partment of Motor Vehicles (DMV), upon proof of a lien sale and no-
tice to the owner, to transfer registration of the car to a purchaser with-
out prior hearing. 58 The court found government action so entwined
with private action as to constitute state action on the grounds that the
vehicle service lien and the procedures for its enforcement were
created and governed by statute; that the procedure was actively super-
vised by the DMV; and even more importantly, that by these statutes
the state delegated to a private party the traditional governmental func-
tion of lien enforcement. 59

The court considered whether the garageman’s lien law violated
due process by authorizing retention of the auto without prior notice
or hearing, pending payment for the repairs or eventual sale of the
car. 60 The court held that this statutory privilege did not violate the

ring).
57. 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).
58. See CAL. CIV. CODE §§ 3068(a), 3071-74 (West Supp. 1974); CAL. VEH.
CODE § 5909(a) (West 1971).
59. 11 Cal. 3d at 152-53, 520 P.2d at 964-65, 113 Cal. Rptr. at 148-49.
60. Id. at 154, 520 P.2d at 966, 113 Cal. Rptr. at 150. The Court also ruled on
the constitutionality of the lien sale and registration transfer provisions of the statute
and held that the sections authorizing a sale of the car by the garageman and transfer
due process rights of the debtor because a garageman has an interest in the car which is different in kind from that of a general creditor, conditional vendor or chattel mortgagee: the garageman has a possessory interest in the car because he has "mixed his own labor with it [and] more significantly, he [has] added to it materials to which he originally had a right of possession." Thus, the garageman, as well as the owner, has a property interest in the particular car which has been repaired.

The court further distinguished this situation from the usual repossession case on the basis that "the creditor [here] is in rightful possession at the time he asserts his lien." Relying upon this reversal of the usual roles of debtor and creditor, the court declared that "[t]o strike down the garageman's possessory lien would be to alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in Shevin and Blair." For these reasons, the garageman's lien statute was held valid.

The wisdom of any retreat from absolute requirements of notice and hearing prior to a deprivation of a property interest can be debated. However, the interests of a creditor in property which secures payment of a debt will often be jeopardized unless repossession without prior notice and hearing is possible. This is true, for example, where the debtor's continued possession will result in substantial devaluation or possible destruction of the chattel's value. Assuming compliance with the requirements set out in Mitchell, state legislatures may now draft a prejudgment property seizure statute which can be used to protect the creditor's interests in such situations.

of registration by the DMV were unconstitutional because they permitted an involuntary sale and transfer of a vehicle without affording the owner an opportunity for a hearing. The court found that "there is no assurance, and indeed little probability, that trial of a contested lien claim could be held within the minimum period preceding transfer to the buyer . . . . Since temporary injunction is an extraordinary remedy and is thus discretionary . . . it lacks the certainty necessary to insure a hearing prior to permanent deprivation." Id. at 156, 520 P.2d at 967, 113 Cal. Rptr. at 151. Thus, a California garageman may no longer sell the car of an owner who is unwilling to pay, but is relegated to common law or statutory remedies consonant with due process requirements. See id.  

61. Id. at 155, 520 P.2d at 966, 113 Cal. Rptr. at 150.
62. Id.
64. See text accompanying note 48 supra.
65. See text accompanying notes 19-27 supra.
B. The State Action Concept

In *Adams v. Southern California First National Bank*, the Ninth Circuit reviewed the two most widely recognized tests for state action and concluded that neither was satisfied. In discussing the first test, the court stated that California must be shown to be "significantly involved" in promoting or encouraging the reposessor's activities. Such significant involvement was found lacking, even though the instant repossession procedures were, and are, specifically authorized by California Commercial Code section 9503. The court thus rejected the debtors' argument that mere statutory authorization constitutes involvement sufficient to render the repossession procedures state action. The court held that the section merely states a common law right long possessed by secured creditors and is therefore a neutral enactment which cannot be said to show significant involvement of the state in promoting the activity. The Ninth Circuit also concluded that despite a comprehensive statutory scheme, California's regulatory involvement in self-help repossession was not so "pervasive" as to encourage the activity.

Similarly the Ninth Circuit found that the second state action test was not met, because the creditor had not performed a "public function" that would otherwise have been performed only by the state. The court acknowledged that the delegation of an exclusive state function to a private party would constitute state action under such cases as *Smith v. Allwright*. However, the court reasoned that since self-help repossession had apparently been accepted as a private remedy by the laws of England and this country prior to the drafting of the Fourteenth Amendment, repossession could not be considered to be an

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66. 492 F.2d 324 (9th Cir. 1973). See text accompanying notes 20-24 supra.
67. 492 F.2d at 329.
68. The debtors relied upon *Reitman v. Mulkey*, 387 U.S. 369 (1967), as the principal legal support for their argument that "[t]hese state laws . . . set out a clear policy, authorizing and encouraging the use of self-help remedies which significantly involves California in the challenged activity." 492 F.2d at 332.
69. Id. at 328-32.
70. California regulated all aspects of installment sales of motor vehicles, the clearance of title to repossessed vehicles and the licensing of reposessors. Id. at 331-32; id. at 341 (Hufstedler, J., dissenting).
71. Id. at 334.
72. Id. at 335-36.
73. 321 U.S. 649 (1944). *Smith v. Allwright* held that a privately-conducted political party primary was state action due to the exclusively public nature of a political primary. See id., discussed in *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 335 n.31 (1973).
exclusive right of the state.\textsuperscript{74}

Whether the \textit{Adams} conclusions will be adopted by the Supreme Court remains to be seen,\textsuperscript{75} and the issue is clearly not free from doubt. The two other circuit courts which have addressed the issue also found no state action present in self-help repossession;\textsuperscript{76} however, district courts have reached conflicting results applying the same state action tests used in \textit{Adams}.\textsuperscript{77} Given the current vague nature of the state action analysis, it appears that different results are almost equally appealing on the basis of precedent. For this reason, a new approach to this threshold due process issue is required to assure more certainty in Fourteenth Amendment litigation.

\section*{C. State Action and Self-Help Repossession—A Suggested Rationale}

Language in the Supreme Court's opinion in \textit{Burton v. Wilmington Parking Authority}\textsuperscript{78} has been relied upon to justify a greater judicial readiness to find state action when the constitutional interest at stake is freedom from racial discrimination as secured by the equal protection clause:

\begin{quote}
[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible
\end{quote}


\textsuperscript{75} A petition for certiorari has been denied. \textit{See} note 24 supra.

\textsuperscript{76} These are the Second and Eighth Circuits. \textit{See} Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974); Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974) (statutory authorization of creditor attachment of wages); Shirley v. First Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Wooten v. First Nat'l Bank, 490 F.2d 1275 (8th Cir. 1974); Bichel Optical Labs., Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973).

\textsuperscript{77} District court cases holding that self-help repossession is state action include:

\textsuperscript{78} 365 U.S. 715 (1961).
task" which "This Court has never attempted ..." Only by sifting facts and weighing the circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance. 79

Illustrative of the view which this passage and other state action-racial discrimination cases have engendered is the observation by Judge Friendly that

rational discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute "state action" with respect to it than would be required in other contexts . . . 80

The language of Burton may also be read to support the broader principle that the presence of state action should always be determined with a sensitivity to the nature of the right which is being infringed. We are here concerned with the due process rights of consumers and the developing judicial awareness of the importance of consumer property rights. While Mitchell established that the property rights of sellers must be given attention, the case does not detract from the Court's evolving solicitude for the interests of the consumers. Given the nature of the consumer's plight in a marketplace in which he lacks the necessary sophistication 81 and bargaining power to protect himself, an analogy to the racial discrimination cases seems appropriate. Hence, it can be argued that courts should be willing to adopt a more flexible test for state action in order to afford consumers the protection of the Fourteenth Amendment. This, of course, is something which the circuit courts, in self-help repossession cases, have refused to do. 82

As background for an understanding of a new approach to the state action question, it is valuable to review certain themes and ideas which have consistently appeared in the circuit court opinions. First, much importance has been attached to the fact that the Fourteenth Amendment was aimed at the elimination of racial discrimination. The inference drawn from this fact has been that a greater state involvement is necessary to support a finding of state action where other types of offensive conduct are involved. This judicial timidity contrasts with the courts' traditionally flexible use of constitutional principles to achieve a number of national goals, such as the expansion of the commerce clause 83 to achieve federal control over economic activity and the use

79. Id. at 722, citing Kotch v. Pilot Comm'rs, 330 U.S. 552, 556 (1947).
82. See cases cited note 76 supra.
of the equal protection clause to insure the rights of aliens and women.

Second, as a technical matter, courts have consistently reasoned that since the secured creditor was empowered under common law to resort to self-help repossession, codification of this power by the state is a "neutral" act. Neutral state action which offers no encouragement to the challenged activity is viewed as insufficient to trigger application of the Fourteenth Amendment. On this basis, *Reitman v. Mulkey*, which involved a state enactment which reversed prior law prohibiting racial discrimination in housing, has been distinguished by nearly every circuit court. The relative "neutrality" of particular repossession statutes, however, has often been hotly debated.

To predicate the application of the due process clause upon the degree of "neutralness" of a statute avoids the basic issues involved and focuses attention on essentially peripheral matters. Not surprisingly, this standard has been criticized both by those who argue that self-help repossession is not state action and by those who argue that it is. For example, two commentators have stated:

The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law upon private ordering, not the law's age or historical underpinnings.

As noted by Judge Kaufman in his dissent in *Shirley v. State National Bank*, "[A]nalysis of the 'state action' question begins rather than ends with the observation that the right of peaceful repossession without a hearing was recognized under the common law . . . ." The inquiry should properly focus, in Judge Kaufman's view, on whether the private act authorized or permitted by the state is an act which otherwise may be performed only by the state. Hence, Judge Kaufman has argued that a creditor's exercise of the "state's monopoly power to lawfully seize a significant property interest without the

86. 387 U.S. 369 (1967).
87. *But see* *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970).
90. 493 F.2d 739 (2d Cir. 1974) (Kaufman, C.J., dissenting).
91. *Id.* at 746.
consent of the holder" constitutes state action. 92

It should be noted that we are here concerned with self-help repossession which is not carried out pursuant to an agreement between the debtor and secured creditor reached after the debtor has defaulted. Our concern is with those situations in which the debtor claims that he has not defaulted on the debt and therefore does not consent to the creditor's seizure of the property in question. In short, the occurrence of the condition precedent to the creditor's right to repossess is in dispute. It is also crucial to keep in mind that there is no longer a question as to whether the property in which the creditor has a security interest "belongs" to, or is a possession of, the debtor. The Supreme Court in Sniadach, Fuentes and D.H. Overmyer Co. v. Frick Co. 93 has established that the debtor has, for constitutional purposes, a legally protected property interest in the chattel. 94 While the Court in Mitch-ell acknowledged the creditor's property interest in the chattel, it also reaffirmed the constitutionally protected status of the debtor's concurrent interest in the same property. 95

Consideration of the public character of self-help repossession in the light of the above points will demonstrate the deficiency in the circuit courts' analysis of the state action issue. In no legally sanctioned activity, other than self-help repossession, is a private party authorized to seize the property of another upon a unilateral decision that he is entitled to take possession of the property in question. When the creditor makes this decision, he personally resolves any disputes which may exist between himself and the debtor as to the right to repossess the property. 96 Binding settlement of disputes is solely the province of politically responsible state officials whose authority to resolve disputes rests upon the citizens' consent to the nature and function of their government. Where parties have not validly consented to a different dis-

92. Id. at 747; see Bond v. Dentzer, 494 F.2d 302, 312-14 (2d Cir. 1974) (Kauf- man, C.J., dissenting).
95. 94 S. Ct. at 1898. The creditor's property interest consisted of a statutory lien designed to secure the unpaid balance of the purchase price. This duality of interests led the Court to conclude that "[r]esolution of the due process question must take into account not only the interests of the buyer . . . but those of the seller as well." Id.
96. Such disputes or conflicts may occur when the debtor claims that he is not in default on the installments of the debt because he has made the proper payments. They may also occur when the debtor claims that the goods are defective and devalued to an extent which offsets the outstanding debt or when he claims that the goods were sold fraudulently and are thus devalued to an offsetting extent.
pute-resolving mechanism, only the state has the authority to render legally enforceable resolutions of disputes. This principle is essential to any system of law upon which an ordered and just society depends.\textsuperscript{97}

Given the nonconsensual nature of certain prejudgment seizures, dispossession of the debtor could also be categorized as an exercise of force, even in the absence of physical violence. A basic precept of our legal system is that the state possesses an exclusive monopoly over the legitimate exercise of force. By virtue of common law recognition and statutory authorization, however, any coercion which does not breach the peace in the exercise of self-help repossession has been legitimatized. In effect, the state has delegated to the creditor one of its inherent powers; therefore, the debtor should be accorded those protections which would otherwise be available had the state retained its exclusive control over the use of force.

These perceptions demonstrate that the nature of prehearing seizure of property is uniquely "public." In the view of Judge Kaufman, self-help repossession is a "public function" which can be carried out only when due process protections are guaranteed:

\textsuperscript{97} This point is nowhere stated as eloquently as by the late Justice John Harlan in Boddie v. Connecticut, 401 U.S. 371 (1971). Justice Harlan wrote:

"At its core, the right to due process reflects a fundamental value in our American constitutional system. Our understanding of that value is the basis upon which we have resolved this case.

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."

American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." \textit{Id.} at 374-75. This language is quoted in Judge Kaufman's dissent, in Shirley v. State Nat'l Bank, 493 F.2d at 746-47.
[O]ur system of laws is bedrocked in the principle that the State has a "monopoly over techniques for binding conflict resolution." Moreover, the decisive difference between "binding conflict resolution," on the one hand, and "private structuring and . . . repair," on the other, is the element of voluntary, mutual consent, the presence of which permits the latter just as its absence requires the former. Accordingly, where, as here, the creditor is empowered whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process.

Under the so-called "public function" test, then, self-help repossession is infused with the requisite "state action" because the creditor acts pursuant to a grant of the state's monopoly power to lawfully seize a significant property interest without the consent of the holder.98

Well established principles of constitutional law support Judge Kaufman's conclusion. The finding of state action in private repossession is consistent with Supreme Court decisions which have found state action in the administration of primary elections by a private political party,99 the management of a private shopping center,100 and the maintenance and control of private parks.101 Similarly, in Adams v. Department of Motor Vehicles,102 the California Supreme Court held that a private lien sale constituted state action, because the lien holder was performing the "traditional governmental function of lien enforcement."103 Such a holding is clearly correct and shows an awareness of the exclusive nature of the state's right to make binding determinations of disputes.

Governmental involvement in self-help repossession is also clearly manifest where the debtor chooses to resist the assertion of the creditor's unilaterally determined right to retake possession and a breach of the peace is required to make the seizure. In such a case, a private party cannot effect the repossession but must rely upon judicial process and state officials to seize the property.104 The presence of the state

104. Uniform Commercial Code section 9-503 provides: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking
to assist the creditor, in the event repossession involves a breach of the peace, implicates the state in a relationship with the creditor which provides mutual benefits to both. By sanctioning peaceful self-help repossession, the state is relieved of its obligations of dispute resolution when repossession can be accomplished peaceably. When it cannot, the creditor is benefited by the assistance of the state through replevin and similar remedies. Given the fact that the state's monopoly over the legitimate use of force stands behind the creditor's individual efforts, actual state intervention would presumably be rare. One court, however, has asserted that statutory self-help repossession encourages "a close working arrangement between repossessors and the police and court officials authorized to issue process." Thus, through the state's authorization of self-help repossession, a system of mutual benefits is created, and the interdependence of the state and the creditor is firmly established.

Since 1967 the Supreme Court has not issued a single decision which expands the state action concept, and many commentators perceive a contraction of this concept in the Court's decisions. However there are indications in *Mitchell* that the Court may be led to consider a broader concept of state action in order to implement its apparent preference for judicial supervision over all repossession procedures. First, the Court cited *Adams v. Southern California National* possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504."

UnIFORM COMMERCIAL CODE § 9-503.


106. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), stressed the mutual exchange of benefits between a state and private parties as a factor in determining the existence of state action. See *id.* at 724. *Burton* involved a lease to a private party of a restaurant located in a parking facility which was owned and maintained by a state agency. This arrangement enabled the state to finance the construction of the building, to increase its patronage and to forego the expense of furnishing restaurant service. *Id.* at 723-24. This last benefit was described in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), as the discharge of a function "that would otherwise in all likelihood [have been] performed by the state." *Id.* at 175.

Bank in connection with its assertion that "self-help repossession could easily lessen protections for the debtor." Second, this recognition of the negative aspects of self-help repossession is particularly important when viewed in light of the Court's stress on the need, under the Fourteenth Amendment, for continuous judicial supervision of state-executed repossession procedures. It would indeed be anomalous if the Court were to hold that less than complete judicial supervision is constitutionally adequate in state-assisted repossession, but that the total absence of court supervision of self-help repossession makes that procedure constitutionally valid.

The Court's approach to a prehearing property seizure statute in the recent Calero-Toledo v. Pearson Yacht Leasing Co. decision suggests that the Court may be receptive to the public function analysis recommended here. Calero-Toledo involved a seizure by police of a pleasure yacht, after marijuana had been discovered aboard the vessel. The statutory prehearing seizure involved in the case was upheld on the basis of the certain exceptional circumstances which the Fuentes court had indicated might justify such a procedure: the Calero-Toledo Court found that the seizure served important governmental purposes which required prompt, summary procedures and that the repossession was instituted by government officers pursuant to narrow, statutory standards, thus permitting the state to retain strict control over its monopoly of legitimate force. The decision clearly signals the Court's preference for "public," as opposed to "private" repossession. More importantly, the opinion implicitly acknowledged that nonconsensual prehearing seizure involves the exercise of legitimate force, a function inherently within the exclusive power of the state.

The approach which the Supreme Court will adopt when presented with the question of the relationship between state action and self-help repossession will be crucial to the ultimate determination of the due process issue. The realistic and analytically impeccable "public function" test formulated by Judge Kaufman is to be greatly pre-

108. 94 S. Ct. at 1905. See text accompanying notes 66-75 supra for a discussion of the Adams decision.
109. It should also be noted that the Mitchell court carefully avoided comment on the constitutionality of self-help repossession in the two footnotes which note the procedure. See 94 S. Ct. at 1905-06 nn.13-14. Certainly if the traditional formulations of the state action tests used by the circuit courts were appealing to the Supreme Court, it could have so indicated in these appropriate footnotes.
110. 94 S. Ct. 2080 (1974).
111. Id. at 2090.
112. Id. at 2089-90.
113. See text following note 97 supra.
ferred over the tests used by the circuit courts. While prediction is difficult, it is to be hoped that the Supreme Court will look through form to inherent function, and that state action will accordingly be found in self-help repossession.

D. A Statutory Proposal for Legal Self-Help Repossession

It is appropriate at this point to consider the implications of the conclusion that UCC sections 9-503 and 9-504 involve sufficient state action under the "public function" test and that due process protections must be observed whenever a secured creditor seeks to repossess collateral in case of default. The essence of the due process rights of one whose protected interests are threatened is an opportunity to be heard. From Mitchell we know that temporary court-assisted repossession, pending a full trial on the underlying issues of the creditor's claim, is valid even without a noticed preseizure hearing. However, the court filing procedure sanctioned in that case, as well as the eventual necessity for a trial on the merits, results in additional expense to the creditor. A uniform requirement of court participation in all repossessions would eliminate self-help repossession and probably increase the costs of doing business for retailers and consumer lenders. This additional

114. It is clear that in a great number of consumer goods repossession cases, the consumer will allow judgment to be taken against him by default. Johnson, supra note 18, at 114. It can be assumed that minimal legal fees will be incurred in those situations in which the consumer defaults, as creditors will likely "bureaucratize" their response to this event by having clerical help prepare default papers and handle the filing thereof. However, in many jurisdictions (e.g., California), default judgments require a pro forma court hearing which, in cases outside small claims court, should be handled by attorneys. In any event, the essential point is that if self-help repossession is held invalid under the due process clause, additional expense will arise for legal services in the initial seizure hearing and in subsequent procedures and hearings leading to a final judgment of repossession.

115. The economic analysis generated by the perceived threat to the validity of self-help repossession has been based on the assumption that the Fuentes principles discussed above would remain applicable. See text accompanying note 28 supra. Thus, these articles assume that if state action was found to be present in self-help repossession procedures and those procedures, therefore, held invalid under the due process clause, nothing less than a court hearing on the probable success of the creditor's claim would be required. After Mitchell, a less rigorous and expensive procedure will be available to repossession creditors as an alternative to self-help repossession. However, the procedures validated in Mitchell will, as indicated in note 114, supra, entail expense beyond that incurred in a self-help repossession. With this in mind the reader is referred to: Johnson, supra note 18, at 96-115; Dauer & Gilhool, The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply, 47 S. Cal. L. Rev. 116 (1973); Johnson, A Response to Dauer and Gilhool: A Defense of Self Help Repossession, 47 S. Cal. L. Rev. 151 (1973); Note, Self-Help Repossession: The Constitutional Attack, the Legislative Response and the Economic Implication, 62 Geo. L.J. 273 (1973).
cost would in turn be passed along to the consumer, it is usually assumed, in the form of higher costs for consumer credit. However, this general assumption is probably invalid in most jurisdictions, because sellers invariably charge the highest permitted interest rate on their consumer loans and installment sales. Thus, the actual economic effect would probably be higher cash prices for consumer goods or a narrowing of the availability of consumer credit to those buyers who are good risks, or some combination of the two.¹¹⁶

Assuming there is some basis for this fear, it is worthwhile to consider the possibility of a statutory procedure which would avoid requiring a creditor to resort to costly judicial assistance. Such a procedure should reflect the fact that a great many consumer defaults result from nothing more than an inability or refusal to pay one's debts. It should also, however, provide ample opportunity for debtor-purchasers, whose nonpayment is based on a bona fide claim that they are not in default on the obligation, to submit that claim to impartial adjudication prior to dispossession. For example, a debtor-purchaser might assert that he is current in his payments but that his account has not been credited due to creditor error or that he has a valid set off because of a breach of warranty which excuses payment of all or a portion of the debt.

A satisfactory principle upon which to base such a procedure may be found in Fuentes v. Shevin,¹¹⁷ wherein the Court recognized that a knowing and voluntary waiver of the debtor's due process rights is enforceable.¹¹⁸ While few standard form consumer contract waiver provisions facilitate knowing and voluntary waiver, it should be possible to structure a statute which would insure compliance with these standards. Such a statute should require a creditor to give consumer installment debtors sufficient warning, on several meaningful occasions, of the fact that they are making a waiver and should plainly inform them of its extent and consequences.

The following proposal, which is not drafted in statutory form, is suggested as a means of securing a valid waiver and thereby preserving economical self-help repossession procedures in appropriate circumstances. It should be noted that any jurisdiction adopting this procedure should also enact a statute for court-assisted repossessions which contains those features that met with the Supreme Court's approval in Mitchell.¹¹⁹

¹¹⁶ See Johnson, supra note 18, at 109-10 (auto sales).
¹¹⁹ See text accompanying notes 40-45 supra.
Proposal for Self-Help Repossession Procedure:

Self-help repossession is authorized only in situations which are specifically in compliance with this statute.

(a) All retailers who sell consumer goods on credit in this state and who intend to exercise self-help repossession in the event of default must include on the face of the document evidencing the sale transaction a waiver of the right to a hearing prior to self-help repossession. Retailers must also provide consumer-debtors with periodic statements, each containing a detachable form, which, if returned by registered mail, would indicate the consumer's termination of or objection to installment payments.

(b) If a consumer defaults on one installment payment without returning the detachable form within ten days after the due date of the installment, the seller must send the consumer a warning by registered mail, in clear and understandable language, together with a stamped self-addressed postcard, that the failure of the consumer to return the postcard by registered mail or to resume payments will expose the goods to repossession.

120. In order to assure, as much as possible, that the consumer is aware of the fact that he is making a waiver of the right to a hearing, the specific statutory language drafted on the basis of paragraph (a) should include the requirement that the waiver be in large print, in a contrasting color from the print used on the remainder of the face of the document and in language which is clear and understandable to the particular consumer involved. Thus, the statute should require the use of layman's language, which in the case of a non-English speaking consumer would be the consumer's native tongue. Further, the waiver should be accompanied by a space in which the consumer can sign his initials. These protections will give as much assurance as is possible that the consumer has had the waiver provisions brought to his attention and has affirmatively consented thereto. It is hoped that this type of provision will overcome the adhesive nature of the standard form consumer sale contract. Of course, the remainder of the statutory proposal includes features which will provide that the effect of the waiver provision will be brought to the consumer's attention on several occasions prior to the actual repossession. If the consumer fails to take action in response to the subsequent notices (see paragraphs (b) and (c) of the statutory proposal) the consumer is deemed to have "ratified" his prior waiver of the right to a hearing. This result is supportable by analogy to the contract doctrine of ratification: "ratification results if the party who executed the contract under duress . . . remains silent . . . after opportunity is afforded to annul or void it." Mellor v. Budget Advisors, Inc., 415 F.2d 1218, 1220-21 (7th Cir. 1969); see Smith v. Jones, 76 Misc. 2d 656, 660, 351 N.Y.S.2d 802, 807 (1973).

121. A statute based on the proposal should include specific language requiring that the consumer be informed, on the detachable form, that he should use the form for purposes of registering complaints concerning the purchased chattel or the transaction which, in his opinion, should release him from paying all or a portion of the installments of the purchase price. The creditor should also be required to explain on the detachable form that a repossession may occur in case of failure to use the detachable form for registering complaints.
(c) If, after a reasonable time, the consumer has neither cured the default nor returned the postcard, the seller may proceed with self-help repossession, provided:

(1) an affidavit is filed by the creditor with the clerk of the court of general jurisdiction for the county in which debtor lives, stating facts sufficient to prove the debt, the lien, the delinquency, and the creditor’s full compliance with sections (a) and (b) of this statute, and

(2) a bond is posted to insure the consumer against damage and expense.

(d) If, within the prescribed time limits, the consumer returns the forms or postcards, the seller is precluded from self-help repossession and must use judicial process to recover his collateral.

(e) In the event of a knowing and false assertion by a consumer of a claim of breach of warranty or the like, the consumer shall be liable to the seller for a $100 penalty and for the seller’s legal expenses.

(f) In the event of a bad faith filing of an affidavit by the creditor, he shall be guilty of contempt of court and shall also be liable to the consumer for a $100 penalty and for the consumer’s legal expenses.

Under this suggested statute, a consumer-debtor, whose default was based upon a good faith claim, would be given ample opportunity to express his dissatisfaction. Failure to do so would expose him to the possibility of self-help repossession but would not constitute a waiver of his defense to the contract—he could later assert a breach of warranty or like claim in a suit to recover possession of the seized item. However, by failing to take advantage of the opportunity to notify the creditor of his dissatisfaction with the goods the consumer would waive his right to a hearing prior to the repossession of his goods. When the default is based on a good faith claim and the debtor gives the prescribed notice to the creditor in the manner indicated, the creditor would have no alternative but to resort to judicial process and state-executed repossession procedures.

122. For the purposes of this statute, the buyer should have 30 days in which to either cure the default or return the postcard after receiving the registered mail warning, before the seller may file an affidavit for self-help repossession.

123. The Court, in Mitchell, observed that these matters are ordinarily subject to documentary proof and therefore minimize the likelihood of judicial error. 94 S. Ct. at 1901.

124. The statute should include a provision that the bond will be returned in full to the seller, if the buyer takes no action within 20 days from the filing of the affidavit.
In the event of an inexcusable default, a debtor might fraudulently make use of the provisions which allow bona fide objections to a seller’s performance. In such a case, the creditor would, just as in the case of a good faith claim by a purchaser, be forced to go to court; however, the debtor would be liable for a penalty payable to the wronged creditor and for the attorneys fees incurred by the creditor. If the debtor failed to make a claim, the goods would be subject to peaceable, self-help repossession by the creditor. The creditor would first be required to file an affidavit with the court showing that the debtor had waived the opportunities to assert his claim. In the event of the fraudulent filing of a creditor affidavit, followed by peaceable self-help repossession, the debtor who, in accordance with the statute, had made an objection to payment would be entitled to recover a penalty and his attorney’s fees.

This statutory procedure would, in the great majority of inexcusable default cases, permit the creditor to recover collateral at a minimum of increased cost. The right to a hearing of a debtor-purchaser who claims no excuse for his default is effectively denied. Waiver of the debtor’s claim is based upon the assumption that, in most instances, the failure to assert the right is indicative of a lack of a bona fide excuse for nonpayment. Where this hypothesis is invalid, failure to notify the creditor of a good faith claim will expose the debtor’s property to peaceable, self-help repossession. The debtor, in this instance, could subsequently sue either for damages or to recover the property, but he would have no claim arising from the fact that repossession was accomplished through self-help repossession without opportunity for a hearing. Under the *Mitchell* accommodation approach to due process requirements, this statutory proposal would appear to be valid; however, the constitutionality of this procedural scheme rests on the premise that meaningful waiver of the right to a hearing is possible.

III. Adhesion Contracts and Due Process

A. The Relationship Between the Theories

One of the controversies stimulated by the *Sniadach* decision was whether a contracting party could waive his right to a preseizure, judicial hearing. The Supreme Court considered this issue in three cases decided in 1972. The first two, *D. H. Overmyer Co. v. Frick Co.*125 and *Swarb v. Lennox,*126 decided on February 24 of that year, involved the constitutionality of the cognovit note device authorized by the laws

of Pennsylvania and Ohio, respectively. Under the terms of a cognovit note, the debtor agrees in advance that upon default in payment, the holder may obtain judgment against him without notice or hearing. The principle issue in both cases was whether the due process rights of a person to notice and hearing prior to a civil judgment against him are subject to waiver, but the Court's holding is also controlling with respect to a debtor's waiver of notice and hearing prior to seizure of property which is security for a debt.\textsuperscript{127}

In \textit{Overmyer}, the Court held that the corporate defendant, against whom the cognovit note procedure had been used for the procurement of a judgment, had "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences."\textsuperscript{128} This conclusion was based on the facts of the case, which included equality of bargaining power of the contracting parties, lack of overreaching and a course of meaningful negotiation between counsel for the parties prior to the execution of the cognovit note. The Court limited its holding to these facts and added the proviso that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue."\textsuperscript{129}

In \textit{Swarb}, the lower court held that the Pennsylvania cognovit note procedure was unconstitutional when used to obtain confessed judgments against consumer-debtors who earn less than $10,000 annually.\textsuperscript{130} Only those plaintiffs who had argued the constitutional invalidity of the cognovit note procedure per se chose to appeal; the Supreme Court therefore addressed only the narrow issue of whether the alleged due process rights were waivable under any circumstances. Citing the \textit{Overmyer} decision, the Court held that a waiver made intelligently, knowingly and voluntarily would be valid. The Court also observed that its caveat concerning adhesion contracts in \textit{Overmyer}, quoted above, might be pertinent to the present case.\textsuperscript{131}

The third decision in which the Court considered the effect of a

127. Indeed, it would seem that the "substantial property interest" to be protected under the due process clause is more certain in the self-help repossession case than in the cognovit note situation. \textit{See} Fuentes v. Shevin, 407 U.S. 67, 75 (1972) (discussion of the hardship which prehearing repossession visits upon a debtor).

128. 405 U.S. at 187.

129. \textit{Id.} at 188.

130. 407 U.S. at 199.

131. \textit{Id.} at 201.
debtor's waiver was *Fuentes v. Shevin.*\(^{132}\) The opinion noted that the printed form sale contract involved in the case was the result of an unequal bargaining situation and that the consumer-debtor was not shown to have been aware of the significance or existence of the waiver.\(^{133}\) The Court clearly intimated that certain adhesion contract provisions would not be sufficient to waive due process rights,\(^{134}\) but it avoided a direct holding on this issue by basing its decision instead on the fact that the waiver provision made no specific reference to the debtor's right to a preseizure hearing. Thus, *Fuentes* held that the provision did not possess the minimum clarity required for the waiver of a constitutional right.\(^{135}\)

In light of the Supreme Court's recognition of "contract of adhesion" as a useful legal category in determining the validity of waivers of due process rights, it is appropriate to note that both the due process clause and the theory of adhesion contracts require the judiciary to perform the same function for similar purposes: although both have been viewed as vehicles for the exercise of arbitrary power by the judiciary, their essential purpose is to provide for judicial curtailment of abuses of extreme power. Application of the due process clause at times requires the courts to restructure legal relationships in order to protect the relatively powerless individual from misuse of governmental power. This safeguard of individual liberty is necessary in contemporary American society to promote both a general belief in the "justness" of the political system and to insure domestic tranquility.

Adhesion contract theory, in a similar manner, is directed at mitigating imbalances in economic power which deprive the individual of the opportunity to bargain in a meaningful fashion in order to protect his property interests. Such a theory is necessary in order both to prevent individual instances of exploitation and to sustain a consensus that our economic system operates in a humane fashion. This feeling of trust is, of course, essential to the long-term vitality of any economic system in a democratic society.

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133. "These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning." *Id.* at 94.
134. *Id.* at 94-95.
135. *Id.* at 95-96. The language of the alleged waiver merely gave the seller the right to "retake" or "repossess" the goods upon default and did not specify the mode or timing of the repossession. *Id.* at 94, 96. In support of its conclusion, the Court cited cases which indicate that attempts to restrict constitutional rights will be strictly construed. *Id.* at 94 n.31.
B. The Supreme Court's Test for an Unenforceable Adhesion Contract Provision

The phrase "contract of adhesion" is generally taken to mean a contract, the terms of which are dictated by one party to the contract and presented to the other party on a nonnegotiable, "take-it-or-leave-it" basis. In essence, the submitting party is given the choice of "adhering" to the terms dictated by the dominant party or foregoing the transaction. Most frequently adhesion contracts are standard forms prepared by attorneys for the dominant party. Because the overwhelming majority of installment sales of products and services to consumers in the American economy are made by such contracts, the Supreme Court's introduction of the concept of adhesion contract into due process jurisprudence is highly significant for consumers.

The Supreme Court, in Fuentes and Overmyer, has suggested a two part test for determining the enforceability of a waiver of a constitutionally protected right through a provision in an adhesion contract. The Court has indicated that such a waiver may not be given effect where: (1) the disparity in bargaining power of the parties is great; and (2) the debtor (or more generically, the adhering or submitting party) receives nothing in return for his "consent" to the waiver provision. In light of Fuentes and Overmyer, the disparity test apparently would be satisfied by a showing that the weaker party virtually could not avoid doing business under the particular adhesion contract.
terms. Such would be the case either when the dominant contracting party has monopolized the relevant geographic or product market or when all the competitors of the dominant party use essentially the same contract terms. The disparity test, thus formulated, will be satisfied in a substantial majority of consumer transactions.

The meaning of the second test is not readily apparent. In what situations could the weaker party be said to have received “nothing” for a particular standard form contract provision? In making a purchase, a consumer clearly receives something of value in return for the price he pays; and that purchase price includes the money he pays as well as all the terms in the standard form contract to which he consents.” Clearly the Court must have intended the phrase “receives nothing” to be used as a term of art; otherwise, an adhesion contract provision would be enforced whenever goods or services were delivered to the weaker party. In the absence of Supreme Court clarification of this uncertain test, lower courts will likely act upon their subjective views of the “unfairness” of a challenged adhesion contract provision. The danger of arbitrary judicial action is clear, and analytical guidelines are sorely needed.

A few scholars have attempted to provide a framework of analysis for the general problem which is raised by the Court’s second test, and their efforts are instructive. Professor Oldfather has suggested that a
court should compare adhesion contract provisions with the terms in truly negotiated agreements used in similar transactions. If the former results in prejudice to the adhering party which is unreasonable compared to that which results from the terms of contracts based upon actual bargaining, the court should refuse to enforce the challenged provision. Using the phrase of the Supreme Court, Professor Oldfather would say that the adhering party, in such a case, “received nothing” for the challenged provisions.

Where comparison of contract provisions is impossible because all contracts in similar transactions are “adhesive,” an analysis developed by Professor Slawson could be employed. Under this approach, a court determines the “core” of the transaction actually agreed upon by the parties, that is those terms of the contract to which the weaker party has meaningfully assented. Generally this would include those terms establishing the product, the price and the terms of payment. A court would then enforce the adhesion contract provisions only to the extent that such provisions are shown to conform to: (1) the actual “core” of the transaction or (2) standards demonstrably in the public interest. Of course neither test insures that a court would not resort to an arbitrary finding of “overreaching” or “gross unfairness” in order to support a conclusion that the consumer “received nothing” for the contract provision. Nevertheless, if carefully used, these approaches should produce greater predictability of judicial result in this area.

C. Adhesion Contract Theory and Unconscionability

For fifty years, scholars have advocated the principle that courts should be explicitly skeptical and interventionist in reviewing adhesion contracts as opposed to negotiated agreements. Nevertheless, the acceptance of the adhesion contract theory by the Supreme Court is a

143. See Slawson, supra note 136, at 532-33.
144. Id. at 563.
145. Implementation of UCC section 2-207, entitled Additional Terms in Acceptance or Confirmation, has provided courts with experience in a similar type of analysis. This section establishes guidelines for determining which of the varying provisions contained in the confirmatory memoranda of the respective parties have been reasonably agreed upon by both parties. Between merchants, whether or not additional or different terms will become part of the agreement depends upon whether the offer expressly limits acceptance to its terms, whether notice of objection to those terms has been or is given within a reasonable time, and whether the additional terms materially alter the original bargain. Between nonmerchants additional terms are to be construed as proposals for addition to the contract. See Uniform Commercial Code § 2-207.
major innovation in federal jurisprudence. Indeed, as late as 1943, Professor Kessler noted that the term “contract of adhesion” had not been recognized in our legal system. For some time, however, federal courts have exercised discretion in handling contract cases where one party has obtained a decidedly unreasonable advantage over the other. Such agreements have been restructured on the basis of several rather opaque theories which take into account some of the considerations encompassed in the Supreme Court's tests for unenforceable adhesion contract waiver provisions.

In United States v. Bethlehem Steel Corp., government representatives accepted certain contract terms dictated by Bethlehem, because the company was thought to be indispensable to wartime construction of naval vessels. The contract included a provision for substantial profits in addition to the usual cost plus 10 percent profit provision in wartime procurement contracts. The Court held that the contract was valid, but Justice Frankfurter, in his dissent, argued that the contract provision which authorized excessive profits should be denied enforcement on the principle that courts will not enforce transactions in which the relative positions of the parties are such that one has taken unconscionable advantage of the other. Thus, as early as 1942, at least one member of the Supreme Court recognized bargaining disparity and gross inadequacy of benefit to the weaker party as facts relevant to the issue of the enforceability of a contract.

Additionally, federal courts have long refused to enforce release-from-liability clauses in railroad and steamship contracts on the grounds of “public policy.” In these cases, the courts generally noted

146. Comparing the extensive scholarly comment on the theory with the paucity of express judicial acceptance of the theory, one is tempted to conclude that, until quite recently, the theory was solely a creature of the commentators. See, e.g., Ehrenzweig, Adhesion Contracts in the Conflict of Laws, 53 Colum. L. Rev. 1072, 1075 n.17 (1953); Kessler, supra note 136, at 632; Oldfather, Toward a Usable Method of Judicial Review of the Adhesion Contractor's Lawmaking, 16 U. Kans. L. Rev. 303 (1968); Patterson, The Delivery of a Life-Insurance Policy, 33 Harv. L. Rev. 198, 222 (1919); Schuchman, Consumer Credit by Adhesion Contracts, 35 Temple L.Q. 125, 128-29 (1962); Slawson, supra note 136, at 549-50.


149. Id. at 326-31 (Frankfurter, J., dissenting).

150. Id.

151. Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873).


153. See id. "Viewed in light of this history, we think The Syracuse, The Wash Gray and intervening lower court cases together strongly point to the existence of a judi-
that the transportation industry was comprised of a few corporations whose market position enabled them to control the industry and to impose such conditions upon transportation as they saw fit. These circumstances were viewed as supporting "an additional argument [to the judicial policy] that conditions imposed by common carriers ought not to be adverse . . . to the dictates of public policy and morality. The status and relative positions of the parties render any such conditions void."

A clearer and more pointed example of the previous use of the elements of the Supreme Court's newly adopted adhesion contract theory appears in Justice Black's dissent in *National Equipment Rental, Ltd. v. Szukhent*. Urging the Court to give more careful scrutiny to the contract bargaining process, Justice Black stated:

> Where one party, at its leisure and drawing upon expert legal advice, drafts a form contract, complete with waivers of rights and privileges by the other, it seems to me to defy common sense for this Court to formulate a federal rule designed to treat this as an agreement coolly negotiated and hammered out by equals.

The central issue in *Szukhent* was the validity of a standard form contract provision which appointed a New York agent to receive service of process on behalf of defendants who resided in Michigan. The defendants were unaware of the existence of the provision. Justice Black argued that enforcement of such nonnegotiated "take-it-or-leave-it" contracts would permit powerful litigants to achieve far-reaching and unjust results. He noted that, "[h]eretofore judicial good common sense has, on one ground or another, disregarded contractual provisions like this one, not encouraged them."

In *Szukhent*, Justice Black identified the components of an unenforceable adhesion contract provision by calling special attention to the form of the contract, the relative economic positions of the parties and the impact of the particular provision on the adhering party. The thrust....

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156. 375 U.S. 311, 318 (1964) (Black, J., dissenting).
157. *Id.* at 326.
158. *Id.* at 329.
of Justice Black's dissent seems to have become the majority focus in Fuentes, and his language in the former case now seems prophetic.

While courts in a few states accepted adhesion contract theory earlier than federal courts, explicit use of the phrase and theory has been rare. Moreover, state courts which openly accepted adhesion contract theory almost invariably used the doctrine as reinforcement for more traditional legal theories. Coherent development of adhesion contract analysis by state courts has faltered due, in part, to a conflict over the significance of the submitting party's "awareness" of the oppressive provision. At least three alternative positions could be taken on this point: (1) an otherwise unenforceable adhesive provision is valid if the submitting party is aware of the existence of the provision; (2) an other-

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159. Examples of cases where the adhesion contract theory has been used as reinforcement for a more traditional theory are listed below. They are grouped according to the traditional common law theory the court applied.

(1) **Ambiguities will be construed against the drafter.**


(2) **Contracts against public policy will not be enforced.**

See, e.g., Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (clause exculpating a charitable research hospital from its own negligence not enforced); Akin v. Business Title Corp., 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968) (clause exculpating title company from its own negligence not enforced); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (disclaimer of implied warranty of merchantability to preclude recovery for personal injury resulting from defective product not enforced). These cases demonstrate that principles of adhesion contract doctrine are used to determine violations of public policy.

(3) **A contract requires a valid consent.**

"Ordinarily when a person with capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, imposition or excusable neglect, avoid its terms on the ground he failed to read it before signing it. However, with respect to standardized adhesion contracts between parties of unequal bargaining strength, exclusionary clauses and provisions limiting liability have been held to be ineffective in the absence of 'plain and clear notification to the public' and 'an understanding consent.'" Bauer v. Jackson, 15 Cal. App. 3d 358, 370, 93 Cal. Rptr. 43, 50 (1971) (citations omitted) (circumstances such that plaintiff's signature on bill of lading did not manifest valid consent to liability limitation). See also Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962) (plaintiff did not consent to limitation on coverage of flight insurance purchased from vending machine, absent clear notice of the provision).

(4) **Courts have inherent equity power to reform contracts to accord with principals of fair dealing.**

See, e.g., Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 377, 294 A.2d 253, 264 (1972) (lease and dealer agreements reformed to include covenant that Shell would renew the agreements if the defendant had substantially performed his obligations); Grossman Furniture Co. v. Pierre, 119 N.J. Super. 411, 424, 291 A.2d 858, 865 (1972) (contract reformed to exclude a recapture clause).
wise unenforceable adhesive provision is valid, if the submitting party is aware of both the existence and legal import of the adhesive provision;\textsuperscript{160} or (3) awareness is irrelevant because adhesion contract theory is predicated on the belief that it is unfair to hold the submitting party to a provision to which he was forced to "consent"; thus, an otherwise unenforceable provision will be held invalid, even though the submitting party is aware of the existence and legal significance of the provision. The first theory has apparently never been adopted in state court decisions, and the third position has been adopted only occasionally.\textsuperscript{161} Although relatively few courts have expressly followed it, the second position is clearly the majority view.\textsuperscript{162}

\textsuperscript{160} It is highly unlikely that the submitting party will be aware of both the existence and the legal import of the provision unless he is an attorney or the dominant party explains the legal significance of the provision to him.

\textsuperscript{161} See Tunkl v. Regents of Univ. of California, 60 Cal. 2d 92, 95 n.1, 383 P.2d 441, 442 n.1, 32 Cal. Rptr. 33, 34 n.1 (1963) (clause exculpating a charitable research hospital from its own negligence held invalid as against public policy even though the plaintiff knew or should have known its significance); Akin v. Business Title Corp., 264 Cal. App. 2d 153, 70 Cal. Rptr. 287 (1968) (release from liability clause held contrary to public policy without discussion of plaintiff's awareness of the provision, but Tunkl cited as controlling precedent).

\textsuperscript{162} Some courts have used adhesion contract doctrine to support the general rule of interpretation that ambiguities in a contract will be construed against the drafter; thus, in effect, requiring that the adhering party must be made fully aware of the legal import of a provision before it can be enforced against him. In Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 54 Cal. Rptr. 104 (1966), the court refused to enforce an exclusionary clause which relieved the insurer of the obligation to defend the insured against claims of intentional infliction of injury, where the insurance contract, taken as a whole, would lead an insured to expect defense in any suit, regardless of cause. In Tahoe Nat'l Bank v. Phillips, 4 Cal. 3d 11, 480 P.2d 320, 92 Cal. Rptr. 704 (1971), the court refused to construe an instrument as a mortgage where the borrower's reasonable expectation was that it was an assignment of rents.

Other courts have refused to enforce adhesive provisions on the dual ground that the adherent was reasonably unaware of the provision and that, even if he was aware he could not reasonably have been expected to understand its effect. In Steven v. Fidelity & Cas. Co., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962), the court held that a limitation of coverage in a flight insurance policy purchased from a vending machine was ineffective where the clause was inconspicuous and unclear. In Henningson v. Bloomfield Motors, Inc., 32 N.J. 358, 404, 161 A.2d 69, 92-93 (1960), the court held a disclaimer of implied warranty of merchantability was unenforceable, because a reasonable buyer would neither notice it nor understand its purported legal effect. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court's comparison of the facts of that case and the facts of Overmyer indicated that awareness of the legal significance of the waiver provision was one of several important grounds for distinguishing the cases and determining the enforceability of such a provision. 407 U.S. at 94.

Still other courts have held that reasonable unawareness of the existence of unambiguous provisions is enough to preclude endorsement.

In Lomanto v. Bank of America, 22 Cal. App. 3d 663, 99 Cal. Rptr. 442 (1972), the court held that a clause in a deed of trust—adhesion contract—would be unenforce-
During the last ten years considerable attention has been given to the powerlessness of the individual consumer in the marketplace. Since adhesion contracts are often used in consumer transactions, one would have expected a full development of adhesion contract theory in state courts during that period. However this has not been the case, due to the preference of state courts for the use of the doctrine of unconscionability, established in section 2-302 of the Uniform Commercial Code, in reviewing consumer contracts. California is the only state of the forty-nine adopting the UCC to omit section 2-302, and only the courts of that state have made significant use of adhesion contract theory during the last twelve years.

In view of the numerous decisions and articles based on the doctrine of unconscionability, one might expect the Supreme Court to

able if the wife was unaware of it and it was not a usual provision in a deed of trust (implying reasonable unawareness). In Bauer v. Jackson, 15 Cal. App. 3d 358, 93 Cal. Rptr. 43, 50 (1971), the court held that if the plaintiff's failure to read a standard form contract constituted excusable neglect, the adhesive limitation on liability would not be enforced because there was no valid consent.

163. UCC section 2-302 provides: "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." Uniform Commercial Code § 2-302.


165. See cases cited notes 159, 161-62 supra.

166. See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (clause found unconscionable where title to all goods remained in seller until payment for all items was completed, and previously contracted for goods were security for subsequently purchased goods); Jefferson Corp. v. Marcano, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (1969) (installment credit contract held unconscionable where buyer had only a sketchy knowledge of English and did not understand the clauses waiving the warranties of merchantability and fitness); Jones v. Star Credit Corp., 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (installment credit contract held unconscionable where seller charged $900 for a freezer having an actual retail value of $300). See also Paragon Homes, Inc. v. Carter, 56 Misc. 2d 463, 288 N.Y.S.2d 817 (1968); Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966); Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966).

analyze a waiver of constitutional rights in terms of the unconscionability of the challenged waiver provision. The scope of the unconscionability doctrine is clearly greater than that of the adhesion contract test. Adhesion contract analysis requires the existence of a one-party dictated contract; however, nothing in the theory of unconscionability precludes its application to terms of a negotiated contract. Unlike adhesion contract theory, unconscionability can also be used to void transactions on the ground that the seller engaged in unethical behavior during solicitation of the sale or negotiation of the terms. Finally, unconscionability has been used several times to void sales contracts on the sole ground that the disparity between the price of the item sold and its "value" was so gross as to shock the conscience of the court. There is no reported decision in which a court, using adhesion contract analysis, has voided a contract on the ground that the price charged was excessive; and one cannot imagine the theory being used in such a way.

The broad nature of a court's power to void a contract under UCC section 2-302 has been criticized by Professor Leff who has argued that the term "unconscionable" does not describe any discernable quality or attribute of the transaction process or the contract involved but "rather describes the emotional state of the tryer [of fact] which will justify his use of the section." One can speculate that the Supreme Court

168. See, e.g., Frostifresh Corp. v. Reynoso, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (1966) (contract held unconscionable where seller told buyer in negotiations in Spanish that refrigerator would cost him nothing because he would be paid bonuses for sales to neighbors; contract in English set refrigerator price and finance charge at over three times cost of refrigerator to seller); Kugler v. Romaine, 58 N.J. 522, 279 A.2d 640 (1971) (contract held unconscionable where seller charged two and one-half times a reasonable market price and misrepresented the functional adequacy of "educational" books, in sales to minority consumers with limited education and economic means); Lefkowitz v. ITM, Inc., 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966) (contract held unconscionable where seller represented that products could not be obtained elsewhere at the price charged, but price was actually two to six times the cost to seller).


170. See text accompanying note 142 supra. One of the requirements for an unenforceable adhesion contract provision is that the buyer has received "nothing of value for the provision." Since a consumer does acquire the desired product in exchange for the purchase price, it is impossible to find that "nothing of value" was received in return for the price charged.

171. Leff, supra note 136, at 516. Professor Leff criticizes the unconscionability doctrine as a method for substituting government regulation for regulation by the parties. He does not believe that the quality of mass distribution contracts requires regulation
has chosen to rely on adhesion contract theory out of a justifiable reluctance to add the uncertainties of the doctrine of unconscionability to those already inherent in the use of the due process clause of the Fourteenth Amendment. Insofar as the Court's two part adhesion contract test more narrowly limits judicial discretion than does the doctrine of unconscionability, one can also surmise that the Court intends to pursue a relatively conservative approach to invalidating provisions in un-bargained contracts.

D. The Extent and Significance of the Emerging Right to be Protected from Enforcement of an Adhesion Contract Provision

By its language in Swarb, Overmyer and Fuentes, the Supreme Court has indicated acceptance of adhesion contract theory. It also appears that the Court will hold that a waiver in an adhesion contract of a right protected by the due process clause will not be enforced when there is a great disparity in the bargaining power of the contracting parties and the weaker receives insignificant benefit in return for the waiver provision. Freedom from enforcement of certain adhesion contract waivers of due process rights would therefore be a constitutional freedom of American citizens, similar to the right to be protected from the enforcement of a nonvoluntary waiver of representation in criminal cases. We thus might expect to see a continuing development of adhesion contract theory as a necessary supplement to the due process

by an open-ended directive to courts to strike what he terms "nasty" practices. Nor does he believe that the judiciary is the proper governmental institution to exercise quality-control over private contracts. Leff, Unconscionability and the Crowd—Consumers and the Common Law Tradition, 31 U. Pitt. L. Rev. 349 (1969). Professor Leff's view of unconscionability as a doctrine embodying all of the uncertainty of older doctrines is shared by only a minority of commentators. See note 167 & accompanying text supra, for favorable scholarly reaction to UCC section 2-302.

172. Criticism similar in nature to Professor Leff's criticism of UCC section 2-302 has been leveled at the Supreme Court's use of the due process clause as a justification for weighing the wisdom and social policy of economic legislation, and substituting its judgment for that of the legislators. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924) (Brandeis, J., dissenting); B. Schwartz, Constitutional Law 166 (1972); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920 (1973); Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319 (1957); Tribe, Forward: Toward a Model of Roles in Due Process Life and Law, 87 Harv. L. Rev. 1 (1973).

clause in cases involving contractual waivers of rights protected by the Fourteenth Amendment.

Our concern with adhesion contracts exists only insofar as adhesive provisions attempt to waive due process rights of consumers, and it is important to note that the concept of "waiver" has been developed in other areas of constitutional law. In 

_Fuentes_, the Court noted its prior decisions concerning the waiver of constitutional rights in civil cases;174 however, as in the 

_Overmyer_ decision, the Court discussed the waiver provision before it in terms of the standards applicable to waivers in criminal cases.175 This choice should not be taken to mean that the Court will inevitably apply the criminal standards in future civil cases, since the 

_Overmyer_ decision, as noted in 

_Fuentes_, did not hold that criminal standards necessarily govern.176 Nevertheless, even if ultimately rejected as direct precedents, certain criminal decisions present striking analogies to the usual adhesion contract situation.

The standard generally applied in criminal cases requires that a waiver be voluntarily, intelligently and knowingly made,177 but the recent 

_Schneckloth v. Bustamonte_178 decision established a less rigorous test of the validity of a waiver of a criminal defendant's Fourth Amendment right against unreasonable searches and seizures. In 

_Schneckloth_, the Court held that a waiver of Fourth Amendment rights is valid if it is "voluntary," and that the defendant's knowledge, or lack thereof,  

174. 407 U.S. at 94 n.31.
175. Id. at 94-95.
176. Id. at 94.
177. "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused . . . ." Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938).
concerning his constitutional rights is merely one among a number of facts relevant to the question of voluntariness.\textsuperscript{179} Even under the less rigorous test announced in \textit{Schneckloth}, it would appear that adhesion contract waivers of constitutional rights which meet the Supreme Court's suggested two part test should not be enforceable due to the lack of meaningful consent or voluntary agreement on the part of the waiving party.

As stated above,\textsuperscript{180} it appears that a waiver in a contract of adhesion will be unenforceable when the adhering party's assent thereto is unavoidable because of the economic position of the dominant party. The involuntary nature of such waivers is illustrated by the facts in \textit{Tunkl v. Regents of the University of California}.\textsuperscript{181} In that case the dominant party offered the consumer a scarce benefit (emergency medical services) on the condition that the consumer waive the right to sue the dominant party in case of malpractice.\textsuperscript{182} The consumer's dilemma in this situation is like that of the defendant in a criminal case who makes an "induced confession." The prospect of the benefit of prosecutor leniency, obtainable only from that official, coerces the defendant into choosing between two disadvantageous alternatives: foregoing the advantage of the leniency or waiving the constitutional freedom from self-incrimination. In such situations, it is well established that if a promise of leniency is made as an inducement to a defendant, any confession is deemed involuntary as a matter of law.\textsuperscript{183} Similarly, a consumer is effectively denied a voluntary choice if compelled to elect between doing without a product he desires or obtaining it under a contract which waives constitutionally protected rights.

On this point, \textit{Marchetti v. United States}\textsuperscript{184} is instructive. In \textit{Marchetti}, the Supreme Court found no meaningful waiver of the privilege against compulsory self-incrimination where a gambler was required to pay a federal wagering tax. The Court reasoned that the federal stat-

\begin{itemize}
  \item \textsuperscript{179} \textit{Id.} at 248-49.
  \item \textsuperscript{181} 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963). See also \textit{Henningsen v. Bloomfield Motors, Inc.}, 32 N.J. 358, 161 A.2d 69 (1960), in which the court equated a situation in which all possible sellers of a product use a standardized form with the situation in which only one seller of the product is available to the buyer.
  \item \textsuperscript{182} The California Supreme Court, applying adhesion contract theory, held the waiver of malpractice liability to be invalid. 60 Cal. 2d at 94, 383 P.2d at 441-42, 32 Cal. Rptr. at 33-34.
  \item \textsuperscript{184} 390 U.S. 39 (1968).
\end{itemize}
ute gave the gambler "no choice" when it presented him with the alternatives of giving up gambling, an illegal activity under the relevant state law, or providing incriminating information by paying the tax. Without a meaningful choice, the alleged waiver was involuntary and unenforceable.185

The foregoing criminal decisions are so clearly analogous to adhesion contract situations that they appear to compel the invalidation of adhesion contract waivers which satisfy the Court's two part test. Furthermore, although the law regarding waivers of constitutional rights in civil cases is not as well developed, the Supreme Court has nevertheless shown great reluctance to enforce such waivers.186 Thus, when the Court is squarely presented with the issue of the enforceability of an adhesion contract waiver of a constitutional right, it can be expected that the implications of the Fuentes opinion will be realized.

As discussed above, a court will not exercise judicial power under the due process clause absent some form of state action. The parameters of the state action concept will therefore limit the scope of the evolving right to be protected against the enforcement of certain adhesion contract clauses. The state action analysis used by Judge Kaufman in his dissent in Shirley v. State National Bank187 appears to be a desirable expansion of the state action concept to include, under the "public function" test all private, nonconsensual, conflict resolution. If this enlightened view is adopted, due process scrutiny will be given to all adhesion contract waivers which provide for unilateral, binding, conflict resolution. Under Judge Kaufman's theory, not only is state action present whenever a private party unilaterally resolves a dispute with another, but also the due process rights of the other party are violated because he is entitled to have his dispute resolved by the techniques and procedures prescribed by the state. If an adhesion contract provision waives the submitting party's due process rights to the government's dispute

186. See, e.g., Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937), where the Court refused to find a waiver of jury trial, stating "but, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." Id. at 393; cf. Ohio Bell Tel. Co. v. PUC, 301 U.S. 292 (1937). In Ohio Bell, the Court held that the Public Utilities Commission could not take judicial notice of price trends, because due process required the data to be put into evidence to allow challenge by its opponent and a basis for judicial review of the decision. The Court found that the public utility company had not consented to the procedure: "We do not presume acquiescence in the loss of fundamental rights." Id. at 307.
resolving procedures, it may be unenforceable assuming the Supreme Court's two part test is satisfied.

If only the state can lawfully resolve disputes, then the state must also have the exclusive power both to provide procedures for lawful dispute resolution and to prescribe the rules governing access to those procedures. Thus, if Judge Kaufman's theory is given a logical extension, adhesion contract provisions which change the state's prescribed rules of access will also be subject to attack under the due process clause. Provisions which materially alter these rules of access are often found in consumer contracts. Common examples include terms which: (1) shorten the statute of limitations period within which a submitting party must bring suit; (2) select venue for any legal action relating to the contract; (3) provide for the payment of the dominant party's legal fees in the event of litigation; or (4) limit the remedies to which the consumer is entitled in the event of a breach of contract on the part of the dominant party. Heated litigation over the validity of such contract provisions under the due process clause can be anticipated; and if such terms are contained in adhesion contracts, there is a substantial likelihood that they will be subjected to the Supreme Court's two part test for enforceability.

Provisions of the type mentioned above might be attacked as unconscionable in state courts; however, if a constitutional right to be free of such adhesion contract clauses is recognized, recourse to the federal courts would be available. With this development, the Supreme Court would have ultimate authority over the substance of this right, and greater uniformity and predictability in adhesion contract cases would follow. Thus, a constitutional theory of adhesion contract could develop which would significantly affect consumer transactions in this country.

IV. Conclusion

In Mitchell, the United States Supreme Court departed from the absolute requirement of notice and hearing prior to a seizure of property by the state. The question of whether self-help repossession constitutes state action remains unanswered by the Supreme Court, but Judge Kaufman of the Second Circuit has proposed a new and realistic "public function" test under which the procedure would constitute state action. Regardless of the ultimate resolution of the state action question, a truly voluntary waiver of seizure notice and hearing by a defaulting debtor should be acceptable, and the author has suggested a statu-
tory scheme which would permit the exercise of self-help repossession only where the debtor has meaningfully waived his rights to a judicial hearing. Where waivers of due process protected rights are contained in adhesion contracts the Supreme Court has recently suggested that it may apply a two part test to determine their validity. This development has, as noted, great potential significance to American consumers.