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Brown v. Liberty Loan Corp., 392 F. Supp. 1023 (M.D. Fla. 1974)

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Its purposes, as well as that of international uniformity of laws, would be better served by a single statute modeled after the British law,[58] which allows shipowners to limit their liability without entirely depriving claimants of recovery.

It is difficult to justify COGSA and Harter Act provisions abrogating cargo owners' right to recover damages. The chief virtue of those provisions has been the ability of the courts to circumvent them through the rule of *The Chattahoochee*. Statutory reform, of course, requires congressional action. Until it is forthcoming, the courts may only apply the laws to achieve substantial justice whenever possible. *Reliable Transfer,* by replacing the divided damages rule with comparative negligence, helps to facilitate that task. The next step should be comparative contribution.

EDWARD P. NICKINSON, III

Constitutional Law—DUE PROCESS—POSTJUDGMENT WAGE GARNISHMENT PROCEDURE THAT GIVES DEBTOR NO NOTICE OR OPPORTUNITY TO ASSERT STATUTORY EXEMPTION PRIOR TO GARNISHMENT IS UNCONSTITUTIONAL.—*Brown v. Liberty Loan Corp.,* 392 F. Supp. 1023 (M.D. Fla. 1974).

On July 13, 1973, a judgment was entered for Liberty Loan Corporation of Duval against Etta Jane Brown and her husband Saul F. Brown. On July 25, 1973, a motion for garnishment after judgment was filed by Liberty Loan and a writ of garnishment was issued by the clerk of the circuit and county courts. The motion for garnishment was made and the writ of garnishment was issued pursuant to sections 77.01 and 77.03 of the Florida Statutes. The writ was served on Etta Brown's employer, Baby's Best Diaper Service, which was required to withhold a portion of her wages. After notice was received from her employer, she filed an affidavit of exemption pursuant to section 222.12, Florida Statutes, stating that she was the head of a family and that the money attached was for personal labor and services. Liberty Loan denied the

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Eyer, note 17 *supra;* Thede, *Statutory Limitations (Other Than Harter and COGSA) of Carrier's Liability to Cargo—Limitation of Liability and the Fire Statute,* 45 TUL. L. REV. 959 (1971).

58. *See* note 25 *supra.*

affidavit of exemption. Following a hearing, the writ of garnishment was ordered dissolved because she did in fact fall within the exemption.[1]

Etta Brown then filed a complaint for declaratory relief on behalf of herself and a class of persons similarly situated, asserting that sections 77.01, 77.03, and 222.12, and the actions of the defendants taken pursuant to those sections, violated the due process clause of the fourteenth amendment of the United States Constitution. In *Brown v. Liberty Loan Corp.*[2] the United States District Court for the Middle District of Florida held that those sections, to the extent that they permit postjudgment garnishment of wages without prior notice to the debtor and an opportunity for a hearing, violate procedural due process under the fourteenth amendment.[3] The decision is presently on appeal.[4]

Florida's postjudgment garnishment procedures are governed by sections 77.01 and 77.03, Florida Statutes. Section 77.01 gives a judgment creditor the right to garnishee any property of the debtor held by third persons, and any debt owed to the debtor by third persons.[5] Section 77.03 provides that to obtain a garnishment writ the creditor must file a motion specifying the amount of judgment and asserting that he does not believe the judgment debtor possesses visible property sufficient to satisfy the judgment.[6]

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1. Brown v. Liberty Loan Corp., 392 F. Supp. 1023, 1026-27 (M.D. Fla. 1974). For discussion of the statutory provisions involved in *Brown*, see notes 5-8 and accompanying text *infra*.

2. 392 F. Supp. 1023 (M.D. Fla. 1974).

3. *Id.* at 1039. In addition to the merits of the case, the court discussed abstention, the alleged necessity of a three-judge court, and alleged overinclusiveness of the class. *Id.* at 1027-31. This comment deals only with that portion of the opinion devoted to the merits.

4. Florida v. Brown, No. 75-1460 (5th Cir., filed Jan. 9, 1975).

5. FLA. STAT. § 77.01 (1973) provides:

> Every person who has sued to recover a debt or has recovered judgment in any court against any person, natural or corporate, has a right to a writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person, and any tangible or intangible personal property of defendant in the possession or control of a third person. The officers, agents and employees of any companies or corporations are third persons in regard to the companies or corporations, and as such are subject to garnishment after judgment against the companies or corporations.

6. FLA. STAT. § 77.03 (1973) provides:

> After judgment has been obtained against defendant but before the writ of garnishment is issued, the plaintiff, his agent or attorney, shall file a motion (which shall not be verified or negative defendant's exemptions) stating the amount of the judgment and that movant does not believe that defendant has in his possession visible property on which a levy can be made sufficient to satisfy the judgment. The motion may be filed and the writ issued either before or after the return of execution.

Garnishment of wages is subject to sections 222.11 and 222.12, Florida Statutes. Section 222.11, entitled "Exemption of wages from garnishment," flatly prohibits issuance of garnishment writs affecting wages of heads of households.[7] But section 222.12, entitled "Proceedings for exemption," gives judgment debtors the right to assert wage exemptions only after the writ has been issued.[8] Furthermore, if the judgment creditor promptly denies the debtor's affidavit of exemption, the writ remains in force until a trial is held to determine applicability of the exemption. In *Brown,* the court considered section 222.12, but ignored section 222.11.

The *Brown* court recognized that due process questions require a two-step analysis.[9] The first step is to determine whether the due process clause is applicable. That question turns on whether challenged procedures affect liberty or property interests. Once such interests are identified, the remaining question is what protections are required to implement due process guarantees in a given case. Though notice and opportunity to be heard are fundamental due process requirements, the nature and timing of notice and hearing are determined by balancing competing interests.[10]

As applied to judgment debtors who qualify for the exemption, the Florida postjudgment garnishment procedures arguably cause depriva-

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7. FLA. STAT. § 222.11 (1973) provides:

No writ of attachment or garnishment or other process shall issue from any of the courts of this state to attach or delay the payment of any money or other thing due to any person who is the head of a family residing in this state, when the money or other thing is due for the personal labor or services of such person.

8. FLA. STAT. § 222.12 (1973) provides:

Whenever any money or other thing due for labor or services as aforesaid is attached by such process, the person to whom the same is due and owing may make oath before the officer who issued the process that the money attached is due for the personal labor and services of such person, and he is the head of a family residing in said state. When such an affidavit is made, notice of same shall be forthwith given to the party, or his attorney, who sued out the process, and if the facts set forth in such affidavit are not denied under oath within two days after the service of said notice, the process shall be returned, and all proceedings under the same shall cease. If the facts stated in the affidavit are denied by the party who sued out the process within the time above set forth and under oath, then the matter shall be tried by the court from which the writ or process issued, in like manner as claims to property levied upon by writ of execution are tried, and the money or thing attached shall remain subject to the process until released by the judgment of the court which shall try the issue.

9. 392 F. Supp. at 1031. *See* Board of Regents v. Roth, 408 U.S. 564, 569-71 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

10. *See, e.g.,* Goss v. Lopez, 419 U.S. 565, 579 (1975); Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part, dissenting in part); *id.* at 212 (Marshall, J., dissenting); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

tion of three interests protected by the due process clause: a liberty interest in reputation; a property interest in the continued use of wages; and a property interest in the benefit created by the statutory exemption.[11] *Brown* was complicated considerably by the possibility that Florida's procedures affect these multiple interests—each of which theoretically requires distinct due process analysis. The case was made even more difficult by the fact that each of these interests has been the subject of recent Supreme Court decisions that leave considerable uncertainties. *Goss v. Lopez*,[12] decided after *Brown*, suggests that the Court is expanding the range of reputational interests that fall within due process liberty. A line of cases beginning with *Sniadach v. Family Finance Corp.*[13] and culminating in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[14] has dealt with due process requirements applicable to prejudgment creditors' remedies that temporarily deprive defendants of property interests in wages and personal property. Though the Court appears to be applying a balancing test in this area, it has not clearly stated the factors to be weighed. Finally, a line of cases beginning with *Goldberg v. Kelly*[15] and *Board of Regents v. Roth*[16] has made it plain that certain governmentally conferred benefits—entitlements—are property within the meaning of the due process clause. Those cases have not, however, settled how procedural provisions included in or related to a statutory benefit affect the scope of the entitlement.

Goss v. Lopez held that the suspension of students for misconduct worked a deprivation of reputational interests that fell within fourteenth amendment liberty.[17] The Court stated that charges of misconduct "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[18] If, as the *Goss* minority implied,[19] the majority opinion reflects a willingness to expand the

11. The fact that judgment debtors may only be temporarily deprived of their property interests does not remove those interests from the ambit of the due process clause. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975), *quoting* Fuentes v. Shevin, 407 U.S. 67, 86 (1972). Temporary deprivations may, however, require less stringent due process protections than permanent deprivations. *See id.; cf.* Mitchell v. W.T. Grant Co., 416 U.S. 600, 611 (1974). *See also* note 36 *infra*.

12. 419 U.S. 565 (1975), *noted in* 3 FLA. ST. U.L. REV. 301 (1975).

13. 395 U.S. 337 (1969).

14. 419 U.S. 601 (1975).

15. 397 U.S. 254 (1970).

16. 408 U.S. 564 (1972).

17. 419 U.S. at 576. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *Goss* also rested on a finding that suspensions deprived students of an entitlement to public education. *See* notes 66-70 and accompanying text *infra*.

18. 419 U.S. at 575 (footnotes omitted).

19. *Id.* at 589 (Powell, J., dissenting). Justice Powell, joined by Justices Burger, Blackmun, and Rehnquist, argued that under past cases liberty interests were implicated

scope of reputational protections, debtors may have a new weapon in attacks on summary creditors' remedies. Since unjustified garnishment may seriously affect a debtor's standing in the eyes of his employer, his banker, or his creditors,[20] it is now arguable that unjustified garnishment constitutes deprivation of a liberty interest. Though the *Brown* court did not consider this issue directly, it was very concerned that unjustified garnishment might result in loss of employment.[21] If the Supreme Court shares this fear, it should not find it difficult to analogize the type of reputational interests considered in *Goss* to those reputational interests affected by garnishment.

While it is unclear whether garnishment affects liberty interests, there is no doubt that it affects property interests in wages. The difficulty in this area is discerning what steps are required to protect such property interests. There has been no question that when wages or personalty is taken by government action, notice and hearing " 'must be granted at a meaningful time and in a meaningful manner.' "[22] But cases dealing with creditors' summary remedies have left the meaning of the quoted phrase uncertain. In the context of creditors' prejudgment remedies, the central question has been whether due process requires that debtors be given an opportunity to speak before any deprivation of property occurs, or whether it is sufficient that the debtor have an opportunity to speak before the deprivation becomes final.

In *Sniadach v. Family Finance Corp.*, the Supreme Court found that the special importance of wages made it inappropriate to permit prejudgment garnishment of wages without giving the wage earner advance notice and opportunity to be heard.[23] In *Fuentes v. Shevin*, the Court held Florida and Pennsylvania replevin statutes unconstitutional because they permitted seizure of personalty without prior notice

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only if damage to reputation was "serious" or "grievous," citing Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). *See* 3 FLA. ST. U.L. REV. 301, 306 n.28 (1975).

20. *Cf., e.g.*, Phillips v. Bartolomie, 121 Cal. Rptr. 56, 58 (Ct. App. 1975); *Cf. also* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 n.21 (1972). In *Phillips*, a checking account was garnisheed even though all funds in that account were exempt from garnishment. After receiving the garnishment writ, the bank dishonored the debtor's checks and informed payees that the account had been closed. In evaluating the constitutionality of California statutes that permitted garnishment of such exempt funds without prior hearing, the court did not consider the possible impact of those procedures on debtors' reputational interests. The *Phillips* court held the California procedures were not violative of due process. In so holding, it rejected *Brown, id.* 121 Cal. Rptr. at 61 n.13, and relied heavily on Raigoza v. Sperl, 110 Cal. Rptr. 296 (Ct. App. 1973); *see* notes 75, 120 *infra*.

21. *See* notes 89-91 and accompanying text *infra*.

22. Fuentes v. Shevin, 407 U.S. 67, 80 (1972), *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

23. 395 U.S. 337, 340-42 (1969).

and hearing.[24] The Court took the view that, except in "extraordinary situations," notice and hearing are required prior to *any* taking of a property interest.[25]

In *Mitchell v. W.T. Grant Co.*,[26] however, the Court receded from that premise. It asserted that where only property interests are involved, due process is generally satisfied if a hearing is provided before the taking becomes final.[27] The *Mitchell* Court, in effect, treated the *Sniadach* situation as the exception, stressing both the special nature of wages and the substantial risks that the *Sniadach* wage garnishment procedures would be abused by creditors.[28] The Court indicated that the *Fuentes* holding resulted from failure to provide adequate safeguards against abuse of prejudgment repossession procedures: creditors could obtain repossession writs by making conclusory allegations to a court functionary, and a hearing on the propriety of the repossession was not provided promptly after the taking.[29] The Court felt the Louisiana sequestration procedures at issue in *Mitchell* did provide adequate safeguards against wrongful repossession, and minimized the impact of repossession on the debtor.[30] The Louisiana procedure required a creditor seeking a sequestration writ to file a bond and make a showing to a judicial officer of specific facts supporting issuance of the writ. It further required an immediate postseizure hearing at which the creditor was required to prove the grounds on which the writ was issued, and provided for assessment of damages if the creditor's claim proved unfounded.[31] The Court held that this procedure "effects a constitutional accommodation of the conflicting interests of the parties."[32] The Court stated:

> [T]he Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits.[33]

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24. 407 U.S. 67, 96 (1972).

25. *Id.* at 90; *accord*, Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). *But see* note 36 *infra*.

26. 416 U.S. 600 (1974).

27. *Id.* at 611-14.

28. *Id.* at 614.

29. *Id.* at 615-16 (White, J.); *see* note 37 and accompanying text *infra*.

30. *Id.* at 616-18.

31. For the statutory provisions, see *id.* at 620-23.

32. *Id.* at 607.

33. *Id.* at 618.

North Georgia Finishing, Inc. v. Di-Chem, Inc.,[34] decided after *Brown*, involved prejudgment garnishment of a corporate bank account. The Georgia Supreme Court had reasoned that the *Sniadach* rule was applicable only to wages.[35] The Supreme Court, however, stated that *Fuentes* was applicable to the Georgia procedure.[36] *Fuentes*, the Court stated, stood for the proposition that due process was violated where an official seizure occurred without prior notice and opportunity to be heard "or other safeguard against mistaken repossession."[37] The *Di-Chem* Court then found that the Georgia procedure suffered from the *Fuentes* infirmity. The Georgia procedure, unlike that in *Mitchell*, permitted issuance of the garnishment writ on conclusory allegations made to "a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer."[38] In response to arguments that garnishment of corporate assets was distinguishable from garnishment of consumer goods, the Court stated: "It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error."[39]

Though these cases suggest a balancing test is being applied, the Court has not clearly indicated what factors are to be weighed. The *Mitchell* Court referred to the necessity of evaluating the impact on debtors of temporary property deprivations,[40] and to the need to ac-

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

35. North Georgia Finishing, Inc. v. Di-Chem, Inc., 201 S.E.2d 321, 323 (Ga. 1973).

36. 419 U.S. at 605. Some members of the *Mitchell* Court felt that *Mitchell* overruled *Fuentes*, *see* 416 U.S. at 623 (Powell, J., concurring); *id.* at 634 (Stewart, J., dissenting). In *Di-Chem*, several Justices concluded *Fuentes* had been revitalized, *see* 419 U.S. at 608 (Stewart, J., concurring); *id.* (Powell, J., concurring); *see also id.* at 615-16, (Blackmun, J., dissenting). But *Di-Chem* cannot be read as a reversion to the pre-*Mitchell* presumption that notice and hearing are required prior to *any* taking of property. In discussing the applicability of the due process clause to temporary deprivations of property, the *Di-Chem* Court quoted *Fuentes* for the proposition that "[t]he Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property. Any significant taking of property is within the purview of the Due Process Clause." 419 U.S. at 606, *quoting* 407 U.S. at 86. The *Di-Chem* Court, however, pointedly ignored the sentence that followed the language quoted from *Fuentes*: "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of *the basic right to a prior hearing* of some kind." 407 U.S. at 86 (emphasis added).

37. 419 U.S. at 606 (White, J.); *see also* Arnett v. Kennedy, 416 U.S. 134, 200 (1974) (White. J., concurring in part, dissenting in part): ". . . *Fuentes* merely required something more than an *ex parte* hearing before a court clerk."

38. 419 U.S. at 606.

39. *Id.* at 608.

40. 416 U.S. at 610, 618.

commodate the conflicting interests of debtors and creditors.[41] *Di-Chem* indicates that where summary seizure procedures are needed to protect creditor interests, safeguards against wrongful deprivations must be provided. *Di-Chem* also implies that those safeguards approved in *Mitchell* suffice in most cases. Yet it is unclear whether summary seizure of wages works such great hardships on debtors and provides so few benefits to creditors that prior notice and hearing are the only safeguards that will satisfy the due process clause when wages are garnisheed.[42]

Apart from these difficulties, it is also unclear whether prejudgment seizure cases are applicable to postjudgment garnishment of wages. *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*,[43] decided in 1924, involved a due process challenge to New York postjudgment garnishment procedures. The Supreme Court squarely held that due process did not require that judgment debtors be given postjudgment notice and opportunity to be heard prior to issuance of a wage garnishment writ.[44] The Court reasoned that a judgment debtor has already had an opportunity to contest the justice of the judgment, and the judgment places him on notice that wage garnishment may follow.[45] Though *Endicott* did not involve a statutory wage exemption, it suggests that constructive notice that wage garnishment may follow the judgment provides an adequate safeguard against wrongful deprivation of exempt wages, at least where the debtor can initiate proceedings to prevent issuance of garnishment process.

Endicott has been criticized,[46] but has never been overruled. The Court had a recent opportunity to do so in *Moya v. DeBacca*.[47] In *Moya*, a three-judge court had relied on *Endicott* in holding that New Mexico postjudgment garnishment statutes permitting garnishment of exempt wages without supplemental notice or hearing were not unconstitutional.[48] The Supreme Court summarily dismissed the *Moya* appeal —just two weeks after it decided *Sniadach*.[49] While the Court has recently cast doubt on the precedential value of its summary decisions,[50]

41. *See* text accompanying note 32 *supra*.

42. *See* Arnett v. Kennedy, 416 U.S. 134, 201 (1974) (White, J., concurring in part, dissenting in part): "The greater the level of deprivation which may flow from a decision, the less one may tolerate the risk of a mistaken decision . . . ."

43. 266 U.S. 285 (1924).

44. *Id.* at 290.

45. *Id.* at 288-90.

46. *See* Hanner v. DeMarcus, 390 U.S. 736, 740-42 (1968) (Douglas, J., dissenting from dismissal of certiorari); notes 110-14 and accompanying text *infra*.

47. 286 F. Supp. 606 (D.N.M. 1968), *aff'd*, 395 U.S. 825 (1969).

48. 286 F. Supp. at 607.

49. 395 U.S. 825 (1969).

50. Edelman v. Jordan, 415 U.S. 651, 671 (1974).

Moya suggests that when wages are garnisheed following judgment, the judgment provides adequate protection of the judgment debtor's property interest in wages.

The third due process interest involved in *Brown*—the property interest in the entitlement—has been recognized only recently. The basic approach to entitlement interests—once identified—was presented in *Goldberg v. Kelly*.[51] In *Goldberg v. Kelly*, the Court held that procedural due process was applicable to termination of welfare benefits. The Court stated that welfare "benefits are a matter of statutory entitlement," and could not be excluded from due process protections by characterization as "privileges" rather than "rights."[52] Though the *Goldberg v. Kelly* Court suggested that welfare entitlements were akin to property, it did not explicitly classify them as a property interest.[53] It did indicate, however, that a balancing test is to be applied in determining whether due process prohibits termination of a particular entitlement before notice is given and a hearing held. The Court stated: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."[54] *Goldberg v. Kelly* found that the welfare recipients had strong interests in receiving benefits pending resolution of eligibility disputes. The Court noted that temporary termination of such aid "may deprive an *eligible* recipient of the very means by which to live while he waits."[55] The Court determined that the recipient's strong interest, together with the governmental interest in providing assistance to eligible recipients that underlies welfare programs,[56] outweighed governmental interests in avoiding payment of funds to those ultimately found to be ineligible.[57]

Goldberg v. Kelly was decided after both *Sniadach* and *Moya*. If garnishment exemptions are entitlements, the *Moya* analysis is thus incomplete and hence of tenuous value. But *Goldberg v. Kelly* did not offer a general definition of entitlements. That definition was not provided until *Board of Regents v. Roth*.[58] The *Roth* Court made it clear that entitlements were property interests, and again rejected the

51. 397 U.S. 254 (1970).
52. *Id.* at 262.
53. *See id.* n.8.
54. *Id.* at 262-63.
55. *Id.* at 264.
56. *Id.* at 265.
57. *Id.* at 265-66.
58. 408 U.S. 564 (1972).

notion that applicability of the due process clause to deprivations of governmentally conferred benefits turns on whether a particular benefit is a "right" or a "privilege."[59] In attempting to provide concise guidelines for identifying entitlements, the Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[60]

Roth, however, did not address the problem of determining what legitimate expectations are created by statutes that couple the grant of a benefit with explicit procedures for seeking that benefit. It was thus unclear whether statutory procedures for asserting a benefit constituted one dimension of the entitlement.

That issue was raised in *Arnett v. Kennedy.*[61] There a three-Justice plurality took the view that any entitlement created by statutory and regulatory provisions prohibiting employee discharge without cause was necessarily limited by a provision setting forth discharge procedures. In the plurality's view, the procedural provisions were an integral part of and a limitation upon the entitlement. The plurality stated that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[62]

The plurality's view was unacceptable to six members of the Court. The position of those Justices, expressed in three opinions, was that once government elects to confer an entitlement, it has created a pro-

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59. *Id.* at 571 & n.9. In addition to cases cited by the *Roth* Court for the proposition that the rights-privileges distinction is no longer tenable, see cases cited in Arnett v. Kennedy, 416 U.S. 134, 211-12 n.7 (1974) (Marshall, J., dissenting).

60. 408 U.S. at 577.

61. 416 U.S. 134 (1974).

62. *Id.* at 153-54. The plurality opinion, written by Justice Rehnquist, was joined by Chief Justice Burger and Justice Stewart.

perty interest to which the due process clause is fully applicable.[63] In the view of those Justices, it is the government that must "take the bitter with the sweet"; once it grants an entitlement, the government has created a property interest to which constitutional safeguards are applicable despite statutory attempts to limit procedural protections. According to those Justices, treating procedural provisions as limitations on entitlements would empower states to write exceptions to the due process clause,[64] or to revitalize by statutory edict the rejected view that application of the due process clause turns on whether a benefit is a right or a privilege.[65]

Arnett thus suggested that procedural provisions do not constitute one dimension of an entitlement. That suggestion was reinforced by *Goss v. Lopez*,[66] which addressed the due process rights of suspended high school students. The *Goss* majority found that Ohio free-education and compulsory attendance laws gave students a claim of entitlement to a public education.[67] Though the Ohio statutes also gave principals the power to suspend students, the majority treated that provision as conditioning the entitlement only to the extent of permitting suspension for misconduct. The Court then held that the due process clause required fundamentally fair procedures for determining whether such misconduct had occurred.[68]

The *Goss* minority reasoned:

> [T]he very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend [summarily] is one.[69]

The dissenters asserted that the majority had read into Ohio law a provision that suspensions were to be based on "cause." The minority argued, in effect, that the lack of express "suspension for cause"

63. *Id.* at 166-67 (Powell, J., concurring in part); *id.* at 185 (White, J., concurring in part, dissenting in part); *id.* at 210-11 (Marshall, J., dissenting). Justice Powell's opinion was joined by Justice Blackmun. Justice Marshall's opinion was joined by Justices Douglas and Brennan.

64. *Id.* at 166-67 (Powell, J., concurring).

65. *Id.* at 211 (Marshall, J., dissenting).

66. 419 U.S. 565 (1975), *noted in* 3 FLA. ST. U.L. REV. 301 (1975).

67. *Id.* at 573.

68. *Id.* at 574. The *Goss* Court also held that fundamentally fair procedures were required because suspension for misconduct could affect liberty interests. *See* notes 17-20 and accompanying text *supra*.

69. *Id.* at 586-87.

language made the *Goss* entitlement distinguishable from the *Arnett* entitlement.[70]

Because *Goss* and *Arnett* were decided by shifting blocks of Justices,[71] those cases are unstable precedents from which to draw generalizations concerning the scope of entitlements. But they do make it clear that the threshold questions in any entitlement case are whether an entitlement exists and what its dimensions are.

The *Brown* court reached its decision without extensively exploring the complex questions surrounding the three due process interests. It found, with little discussion, that Florida postjudgment garnishment procedures affected protected property interests. It first noted that wages were clearly property.[72] It then found that the garnishment exemption referred to in section 222.12, Florida Statutes, constitutes a property interest under the entitlement theory recognized in *Roth*.[73] Though these are distinct property interests, and hence theoretically require distinct due process analyses, the court may have confused them.[74] Though such confusion may have hampered the court's at-

70. *Id.* at 587 n.4.

71. Justice Stewart joined the plurality opinion in *Arnett,* but voted with the majority in *Goss.* Justices Powell and Blackmun rejected the plurality view of entitlements in *Arnett,* but dissented in *Goss.*

72. 392 F. Supp. at 1031.

73. *Id.*

74. The court was most unclear as to what interests it was addressing. Much of the opinion was devoted to outlining the substantial hardships created by depriving debtors of the use of wages, and the substantial risk of wrongful deprivation inherent in the Florida procedure. Wrongful wage deprivation may certainly occur where no exemption is claimed. For instance, a creditor may initiate wage garnishment even though he knows other property exists by which to satisfy the judgment. FLA. STAT. § 77.03 (1973), *see* note 6 *supra,* does not require verification of the creditor's claim that wages are the only property available. Moreover, that section permits garnishment process to issue before the return of execution. The *Brown* court's logic thus suggests that failure to provide *Mitchell*-type protections for a judgment debtor's interest in wages, *see* 392 F. Supp. at 1034-36, makes Florida postjudgment wage garnishment procedures violative of due process whether or not exemption statutes are considered. *Cf.* Bunton v. First National Bank, 394 F. Supp. 793 (M.D. Fla. 1975) (Florida prejudgment garnishment procedure declared unconstitutional).

Though the above considerations suggest the *Brown* court focused on the property interest in wages, other aspects of the opinion suggest the court was concerned primarily with the entitlement interest. The *Brown* court referred repeatedly, if ambiguously, to the *Roth* statement that property interests may be created by state law, 392 F. Supp. at 1031, 1037, and clearly stated that the purpose of requiring a prior hearing is to give the debtor an opportunity to assert statutory exemptions. *Id.* at 1038.

Though it is uncertain which of the two property interests the court was addressing, it is apparent that the court lost sight of the fact that two distinct property interests were involved. It referred to the "uniquely valuable nature of the property *right* involved herein," *id.* at 1037 (emphasis added), the "nature of the property *interest*" at issue, *id.* at 1038 (emphasis added), and "the unique nature of the property *interest* involved in this case," *id.* (emphasis added). While it is unclear whether that right/interest was

tempts to distinguish *Endicott* and related cases,[75] it did not severely affect the court's ability to balance the relevant interests.

Goldberg v. Kelly indicates that in entitlement cases due process requirements are to be determined by weighing government interests against those of the claimant to the entitlement.[76] *Mitchell* suggests that in garnishment and replevin cases, due process analysis should focus on the competing interests of debtor and creditor.[77] The *Brown* court framed its analysis in terms of government and debtor interests,[78] thereby implying that its primary concern was with the entitlement interest. But the court also gave some consideration to the interests of creditors in summary postjudgment garnishment. In considering debtor interests, the court did not clearly state whether the interest at issue was the property interest in wages, or the property interest in the exemption. As a practical matter, the distinction makes little difference; the impact on the debtor of garnisheeing exempt wages is identical to the impact on him of wrongfully withholding the exemption.

"unique" because it was an entitlement, or was unique because it was an interest in wages afforded special protection by *Sniadach,* it is obvious that the court was concerned with only one property right. *See also id.* at 1031, where language appears that suggests the court thought the property interest in wages was extinguished by the judgment on the debt; the court may have treated the entitlement as revitalizing that interest rather than constituting a distinct property right.

75. The court distinguished two cases that were arguably in conflict with its holding, Langford v. State, 356 F. Supp. 1163 (W.D. Tenn. 1973), and Raigoza v. Sperl, 110 Cal. Rptr. 296 (Ct. App. 1973). Both of these cases could easily have been distinguished by noting that they had failed to consider the ramifications of the entitlement doctrine. But the *Brown* court did not explicitly make that distinction. It rejected *Langford* on the bases that it placed undue reliance on *Endicott,* and that the property involved in *Langford*—an automobile—raised different notice risks than the property involved in *Brown*—wages. 392 F. Supp. at 1036; *see* text accompanying notes 94-97, 109-16 *infra.* Though the court's discussion of *Raigoza* seemed to be rooted in entitlement theory, the court did not apply entitlement concepts rigorously. It stated the *Raigoza* court erred in taking the view that "because the policy for legislative [wage] exemption was not constitutionally required, the constitutional requirement of procedural due process did not apply." *Id.* at 1037. The *Brown* court indicated that view was incorrect, *id.,* but failed to explain why. The court also stated that the *Raigoza* court erred in failing to accept the argument that postjudgment garnishment involves different issues than those determined in the main suit. The *Brown* court failed, however, to explain that those different issues are relevant only if they relate to different protected interests—such as entitlements. Instead, the *Brown* court quarreled with *Raigoza's* allocation of the burden of proof. *Id.* at 1038. That approach, of course, missed the point. The issue in both *Brown* and *Raigoza* was not whether the debtor could be required to carry the burden of proving he was qualified for an exemption, but whether his property could be taken before he had a chance to meet his burden.

76. *See* text accompanying note 54 *supra.*

77. *See* notes 40-41 and accompanying text *supra.*

78. 392 F. Supp. at 1031-32.

In balancing these interests, the court considered four basic factors: the risk that Florida's postjudgment wage garnishment procedures might wrongfully deprive a debtor of property, however defined; the impact on the debtor of temporarily withholding exempt wages while his exemption claim is litigated; the impact on the creditor of requiring notice and hearing before wages are garnisheed; and statutory provisions indicating the strength of the governmental interest in summary wage garnishment procedure.

The *Brown* court found that the Florida procedure created significant risks that a debtor qualified for the exemption would be wrongfully—albeit temporarily—deprived of property. The court stressed that the Florida law does not require the creditor to state under oath that the debtor is unqualified for the statutory exemption.[79] Moreover, the writ may be issued by a court functionary rather than a judge.[80] The result, the court stated, is "substantial risk that a writ of garnishment may be obtained by a creditor who knows full well . . . that the debtor is the head of a family and is thus entitled to an exemption under state law."[81]

The court stated that permitting seizure of judgment debtors' exempt wages prior to notice and hearing has two serious effects. First, it temporarily deprives wage earners of vital funds. Quoting from *Sniadach v. Family Finance Corp.*, the *Brown* court noted that "wages are 'a specialized type of property presenting distinct problems in our economic system,' "[82] that wage garnishment "may impose a 'tremendous hardship on wage earners with families to support,' "[83] and that wage garnishment " 'may as a practical matter drive a wage earning family to the wall.' "[84] The *Brown* court noted that although the Consumer Credit Protection Act[85] severely restricts use of wage garnishment as a small-debt collection device,[86] it does permit garnishment of up to 25 percent of weekly disposable earnings.[87] The court found that for many families, the temporary loss of that proportion

79. *Id.* at 1033-35. The court noted that Florida law once required the creditor to swear that the debtor was ineligible for the wage exemption. *Id.* at 1033 n.7.

80. *See id.* at 1026, 1035.

81. *Id.* at 1033.

82. *Id.* at 1032, *quoting* 395 U.S. at 340.

83. *Id.*

84. *Id.* at 1032, *quoting* 395 U.S. at 341-42 (footnote omitted).

85. 15 U.S.C. §§ 1601-81t, 18 U.S.C. §§ 891-96 (1970). Garnishment restrictions are set out in 15 U.S.C. §§ 1671-77.

86. 392 F. Supp. at 1032.

87. *Id.* at 1032, *citing* 15 U.S.C. § 1673 (1970).

of wages might well produce temporary deprivation of necessities of life.[88]

The second adverse effect noted by the court is the risk that wage garnishment may cost the debtor his job. The court recognized that garnishment procedures create substantial administrative burdens for the garnishee and hence may induce him to discharge an employee whose wages have been garnisheed.[89] The Consumer Credit Protection Act prohibits discharge based on garnishment for any one indebtedness.[90] But a debtor whose wages have been garnisheed once is not protected from discharge based on garnishment arising from a second debt. Under Florida's procedure, a debtor might thus be discharged by reason of a garnishment writ that should never have issued; since a debtor with a valid but disputed exemption claim cannot prevent issuance of the garnishment writ, he may find himself victorious but unemployed when the court finally rules.[91]

The court noted further that these adverse effects are exacerbated by failure to require a prompt hearing on exemption claims. Failure to provide a prompt hearing increases the economic impact on a debtor by extending the period during which he will be deprived of exempt wages. It also extends the period during which the garnisheed employer is subjected to the administrative burdens of garnishment, and thereby gives the employer increased reason to discharge the employee.[92] Though a tort action for wrongful garnishment is available, the *Brown* court stated that such a remedy does little to reduce the adverse effects of wage garnishment on the debtor.[93]

The *Brown* court dealt summarily with creditors' interests in summary garnishment. Like the *Sniadach* Court,[94] the *Brown* court found

88. *Id.* at 1032, *quoting* Note, *Florida Wage Garnishment: An Anachronistic Remedy*, 23 U. FLA. L. REV. 681, 687 (1971).

89. *Id.* at 1033-34 & n.8. In Endicott Johnson Corp. v. Encyclopedia Press, 266 U.S. 285 (1924), the Court rejected the contention that administrative burdens imposed on the garnisheed employer violated the employer's constitutional rights. *Id.* at 290.

90. 15 U.S.C. § 1674(a) (1970).

91. *See* 392 F. Supp. at 1033.

92. *See id.* at 1035 & n.11. *See also* Mitchell v. W.T. Grant Co., 416 U.S. 600, 610, 618 (1974) (White, J.) (implies provision of prompt hearing reduces impact on debtor of summary seizure); Arnett v. Kennedy, 416 U.S. 134, 192 (1974) (White, J., concurring in part, dissenting in part): "The impact of deprivation increases, of course, the longer the time period between the initial deprivation and the opportunity to have a full hearing."

93. 392 F. Supp. at 1033. *See also id.* at 1035 (requirement that debtor show malice to recover for wrongful garnishment, Strickland v. Commerce Loan Co., 158 So. 2d 814 (Fla. 1st Dist. Ct. App. 1963), makes Florida cause of action distinguishable from Louisiana provision involved in *Mitchell* that permitted debtor to recover damages for wrongful garnishment).

94. 395 U.S. at 339 ("[S]ummary procedure may well meet the requirements of due

no basis for assuming that preseizure notice and hearing would subject creditors to undue economic or administrative burdens.[95] The opinion did, however, imply that wage garnishment was distinguishable from seizures of other forms of property. The court suggested that giving debtors notice of impending seizure of tangible property exposed creditors to possible destruction or secretion of the property.[96] The court stated that such risks were minimal when wages were garnisheed, since "it is highly improbable that a wage earner will quit his job to frustrate the efforts of his judgment creditor. The reason is that wages generally provide the exclusive means upon which the wage earner supports himself and his family."[97]

Finally, the *Brown* court stated that the Consumer Credit Protection Act indicated wage garnishment was a disfavored governmental interest.[98] Though it did not do so, the court might have noted that a governmental interest exists in assuring that exempt wages are not temporarily withheld from debtors. The purpose of Florida's exemption provision is "to preserve to the unfortunate debtor and his family a means of living without becoming a charge upon the public."[99] Temporary withholding of exempt wages clearly frustrates that purpose.[100]

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process in extraordinary situations. . . . But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts . . . .").

95. 392 F. Supp. at 1038. *See* note 97 and accompanying text *infra.*

96. *Id.* at 1036.

97. *Id.; see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (White, J.) ("[I]n *Sniadach* . . . obviously the creditor's claim [of need for summary wage garnishment] could not rest on the danger of destruction of wages, the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job."); Arnett v. Kennedy, 416 U.S. 134, 193 (1974) (White, J., concurring in part, dissenting in part) (in *Sniadach,* provision of notice and hearing prior to garnishment exposed creditor to minimal risks of loss, and those risks that existed resulted from creditor's decision to extend unsecured credit).

98. 392 F. Supp. at 1032. *See id.* at 1037, 1038. The court relied heavily, *id.* at 1032, on congressional findings set forth at 15 U.S.C. § 1671(a) (1970):

> (1) The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.
>
> (2) The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.
>
> (3) The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.

99. Elvine v. Public Fin. Co., 196 So. 2d 25, 26 (Fla. 3d Dist. Ct. App. 1967); *see* Noland Co. v. Linning, 132 So. 2d 802, 804 (Fla. 1st Dist. Ct. App. 1961).

100. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 265 (1969) (government interest that

The *Brown* court concluded that the Florida procedure created substantial risks of wrongful deprivation, and that such deprivation could produce undue hardships on debtors. It therefore declared the Florida procedure unconstitutional, holding that the due process clause requires that judgment debtors be afforded notice and an opportunity to assert statutory exemptions before their wages are garnisheed.[101]

Though the balance reached by the *Brown* court seems reasonable, it may be irrelevant. *Endicott* and *Moya* seemed to control the *Brown* situation. The court did not distinguish *Endicott* convincingly, and totally ignored *Moya*. If the court had carefully distinguished the property interest in the entitlement from the property interest in wages, *Endicott* and *Moya* would have posed no problem. Both cases were decided before the entitlement doctrine was enunciated. They thus speak only to the debtor's property interest in the use of his wages.

To the extent that *Brown* does rest on entitlement theory, it is seriously flawed. Despite the court's assertion that section 222.12 is unambiguous,[102] *Roth, Arnett,* and *Goss* raise the possibility that the section's procedural provisions limit the scope of any entitlement interest. The *Brown* court totally ignored that possibility. Considered in isolation, section 222.12 would probably be construed by at least four

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underlies provision of welfare benefits also counsels uninterrupted provision of benefits to eligible persons).

101. 392 F. Supp. at 1038.

102. *Id.* at 1028. Though §§ 77.01, 77.03. 222.11, and 222.12 are obviously difficult to reconcile, at least one Florida court has done so. *See* Noland Co. v. Linning, 132 So. 2d 802, 804-05 (Fla. 1st Dist. Ct. App. 1961). At the time *Noland* was decided, § 77.03 required that a judgment creditor file an affidavit stating the amount of judgment and averring a belief that the judgment debtor had no visible property on which levy could be made. The question before the court was whether § 222.11 required that the creditor's affidavit include an averment that the debtor was ineligible for a garnishment exemption. The court concluded that such an averment was necessary to implement the policy of § 222.11, even though § 77.03 did not explicitly require that the creditor negative exemptions. The *Noland* court held that § 222.11 "is a limitation upon the court's jurisdiction to issue a writ of garnishment unless it affirmatively appears by sworn affidavit that the money or other thing sought to be garnisheed is not due for personal labor or services to a head of a family residing in this state." *Id.* at 804. The court also found that § 222.12 was "intended to provide the procedural vehicle by which a judgment debtor may claim the exemption accorded him by the statute in the event . . . a writ of garnishment issues . . . ." *Id.* at 805. The *Noland* question has been rendered moot by an amendment to § 77.03 that states the creditor's motion for a garnishment writ need "not be verified or negative defendant's exemptions." Fla. Laws 1967, ch. 67-254, § 27 (§ 77.03). But the *Noland* case, together with Elvine v. Public Fin. Co., 196 So. 2d 25 (Fla. 3d Dist. Ct. App. 1967), suggests that Florida courts will construe Florida's various provisions affecting wage garnishment in favor of the debtor.

members of the Supreme Court as defining one dimension of the entitlement. While the section recognizes the exemption, it appears to attach significant limitations on any entitlement to that exemption. In essence, section 222.12 suggests that at the time his wages are garnisheed a judgment debtor has no more than a right to claim an exemption; no entitlement to an exemption arises, and hence no basis for contesting withholding of wages, unless the debtor prevails on that claim.[103] So construed, Florida procedures permitting wage garnishment of arguably exempt wages without notice and hearing deprive a debtor of no entitlement.

If the *Brown* court had considered this problem, it could easily have solved it by looking beyond section 222.12. Section 222.11 expressly prohibits issuance of garnishment writs that "attach or delay the payment of" wages of heads of households.[104] It thus gives judgment debtors a legitimate expectation that qualified wages will never be garnisheed. This entitlement exists prior to and independent of the procedure for claiming exemptions set out in section 222.12. Because section 222.11 grants the entitlement in express terms, even the *Goss* dissenters might be persuaded that it is analogous to the express "termination for cause" provisions at issue in *Arnett.*[105] *Arnett* requires that statutory procedures producing deprivation of entitlements meet the mandate of the due process clause. Thus section 222.12 is not self-justifying. Because the procedures embodied in section 222.12 temporarily deprive judgment debtors of the entitlement created by section 222.11, those procedures are invalid if they do not afford the debtor due process.

If the *Brown* court had based its holding on the above entitlement rationale, *Endicott* and *Moya* could have been easily distinguished. *Endicott* involved no issue akin to the entitlement interest. Even if a wage exemption had been at issue in *Endicott,* it is unlikely that the Court would have found that it required due process protections. At the time *Endicott* was decided, statutory benefits were classified as "rights" or "privileges."[106] The due process clause applied only to

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103. In Elvine v. Public Fin. Co., 196 So. 2d 25 (Fla. 3d Dist. Ct. App. 1967), the court stated in dicta: "The exemption is for the benefit of the debtor, and its benefit may only be accorded to him by the statutory termination of the proceedings." *Id.* at 26.

104. *See* note 7 *supra.*

105. *See* note 70 and accompanying text *supra.*

106. For discussion of the rights/privileges distinction in due process cases and its gradual erosion prior to recognition of the entitlement doctrine, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

rights, and in all probability the *Endicott* Court would have classified a garnishment exemption as a privilege.[107]

Moya, too, was decided without the benefit of *Roth, Arnett,* or *Goss. Moya* begs the question that those cases raise: whether a state violates the due process clause by simultaneously granting an entitlement and requiring a judgment debtor to clear a series of procedural hurdles before he may benefit from that entitlement. If the *Moya* court had addressed the entitlement question, it could not have foreclosed the debtor's due process attack simply by reference to the *Endicott* case. To resolve the entitlement issue, the *Moya* court would have had to determine whether an entitlement existed, the scope of any entitlement found, and whether temporary denial of such entitlement, however qualified, must be preceded by a hearing. The *Moya* court addressed none of these issues. It simply stated that New Mexico's exemption statutes were not self-executing and that the judgment debtor was required to assert successfully his exemption claim before exempt wages could be recovered.[108]

While the *Brown* court might have outflanked the *Endicott-Moya* rule by applying entitlement theory, it chose a frontal attack. The court asserted, in effect, that *Endicott* had been impliedly overruled by later cases.[109] In rejecting *Endicott,* the court relied primarily on Justice Douglas' dissent to the dismissal of certiorari in *Hanner v. DeMarcus.*[110] Mrs. Hanner was a judgment debtor whose property had been levied upon and sold without supplemental notice. State law provided that a judgment debtor could select the property to be levied upon. But because Mrs. Hanner had no notice of execution and sale, she did not do so. The judgment creditor was thus able to levy upon real property worth far more than the judgment, and purchase that property at judicial sale for far less than its market value.

Justice Douglas' dissent, joined by Justices Warren and Black, argued that due process notice concepts had evolved to the point that the *Endicott* constructive notice rationale was no longer tenable. Justice

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107. *Cf.* Myers v. Moran, 99 N.Y. Supp. 269 (Sup. Ct. 1906) (wage exemption is "a gratuity, not a vested right").

108. 286 F. Supp. at 608. These statements merely reflected the procedural provisions of the New Mexico scheme. The court made no attempt—since none seemed necessary—to determine whether those provisions violated the due process clause by temporarily depriving the debtor of a property interest in the exemption. The *Moya* court might, of course, have reached the same result under the entitlement theory. If it had closely examined the relevant statutes, it might have found that an entitlement to an exemption arose only after the debtor successfully asserted his claim. *Cf.* note 120 *infra.*

109. 392 F. Supp. at 1036.

110. 390 U.S. 736 (1968).

Douglas placed particular reliance on *Griffin v. Griffin*,[111] decided in 1946. The *Griffin* Court had held that although a divorce decree ordering payment of alimony gave the petitioner constructive notice that further proceedings might follow to enforce that obligation, actual notice was required of any later proceedings seeking a judgment for unpaid alimony. Supplementary notice was required, the Court reasoned, because proceedings to reduce the alimony obligation to judgment "substantially . . . affect [Griffin's] rights in ways in which the [initial] decree did not."[112] The rights to which the *Griffin* Court referred were the opportunities afforded by statute to seek modification of the original decree and assert defenses to the claim that alimony was due and unpaid. The Court's chief concern was that these rights might be cut off by the judgment. But the Court noted that even if the judgment could be set aside on a showing that defenses to the judgment existed, the fact that Griffin's property could be levied upon as soon as the judgment was entered negated any argument that the judgment without notice did not affect substantial rights. The Court stated: "There can be no doubt that a levy upon any property petitioner might have . . . would substantially, and in at least some instances, permanently affect his rights. We cannot say that this could be done without notice of the proceeding said to justify the levy."[113]

If the *Griffin* reference to the "proceeding said to justify the levy" referred to a judgment, *Griffin* neither overruled *Endicott* nor controlled *Hanner*. In *Endicott,* the debtor had notice of the judgment and asserted no claim that wage garnishment would affect any right other than his property interest in wages. The *Hanner* debtor also had notice of the judgment. Justice Douglas argued in *Hanner* that execution and sale, like the unpaid alimony judgment in *Griffin,* were proceedings that affected substantial rights in ways that the original judgment did not.[114] That assertion, however, rested on the unexamined premise that statutory provisions permitting the debtor to select property by which to satisfy the judgment created a liberty or property interest protected by the due process clause. If these provisions created no protected interest, no basis existed for arguing that due process notice requirements were applicable to the proceedings following judgment. By contrast, the Court took *Griffin* beyond the *Endicott* rule by recognizing protected interests other than those at stake in the initial proceeding.

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111. 327 U.S. 220 (1946).
112. *Id.* at 229 (footnote omitted).
113. *Id.* at 232.
114. 390 U.S. at 742.

The *Brown* court recognized none of these distinguishing factors. It simply stated it found Justice Douglas' reasoning "to be applicable to the instant case and is all the more persua[sive] . . . when one considers that these statements were made before *Sniadach, Fuentes,* Goldberg v. Kelly . . . and their progeny."[115] The reference to these cases apparently was meant to suggest that since *Endicott* the Supreme Court had reached a new balance between conflicting interests of creditors and debtors. The *Brown* court stated that "the instant case is stronger than these others because of the disfavored nature of the governmental function and the uniquely valuable nature of the property right involved herein."[116] The *Brown* court thus seemed to conclude that *Sniadach's* recognition of the importance of property interests in wages made the *Endicott* constructive notice rationale untenable.

The fact that *Moya* was summarily affirmed within days of the *Sniadach* decision makes that conclusion questionable. The *Brown* court did, however, suggest a more solid basis for its result by referring to *Goldberg* and stating that "post-judgment garnishment involves significantly different legal issues than those arising under the proceedings to secure the judgment."[117] The court failed to explain the relevance of *Goldberg v. Kelly* or the "different issue" observation to *Endicott.*[118] But if the court had developed the point, it could have

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115. 392 F. Supp. at 1037.

116. *Id.*

117. *Id.*

118. The court's undeveloped reference to *Goldberg v. Kelly* is of little import. *Goldberg v. Kelly* assumed that an entitlement existed. To analogize *Goldberg v. Kelly* to *Brown,* the court needed to show that an entitlement existed, and that procedural provisions related to that entitlement did not so limit it in scope as to foreclose a claim that the due process clause required notice and hearing prior to wage garnishment.

Similarly, the observation that wage garnishment and the underlying judgment involved different issues is irrelevant in itself; no inherent right to be heard on different issues exists unless that hearing operates to protect an interest subject to the due process clause. The *Brown* court failed to relate its "different issue" observation to either of the property interests at stake. As to the property interest in wages, the court might have reasoned that the exemption gave the debtor a means of protecting that interest that did not exist until after judgment. Thus, the court might have reasoned, even though under *Endicott* the initial proceedings gave her constructive notice her wages might be garnisheed, they did not provide an opportunity to be heard on the propriety of garnisheeing those wages. This analysis, of course, would require a determination that, whether or not the exemption were an entitlement, it arose as soon as judgment was entered. If that determination were made, the court could then have proceeded to consider whether the Florida procedures permitting delay of the hearing adequately protected the property interest in wages.

If the court had focused on the entitlement interest, it could have shown that the initial proceedings neither provided notice that plaintiff's entitlement to an exemption would be temporarily withheld, *see* page 647 *infra,* nor provided an opportunity to raise objections to that temporary deprivation.

shown that the emergence of entitlement theories made *Brown* distinguishable from *Endicott*.

Had the *Brown* court adequately analyzed Florida's wage exemption statutes, it could have shown that an entitlement to a wage exemption existed and was not limited in scope by the procedural provisions of section 222.12.[119] If that entitlement had been firmly established, *Endicott* could easily have been distinguished. In *Endicott,* the debtor was placed on constructive notice only that further proceedings might ensue that would affect his property interest in the continued use of wages and personalty. The judgment did not place him on constructive notice that action might be taken affecting other property interests. Phrased otherwise, *Endicott* means only that a judgment places the debtor on constructive notice that the judgment creditor will initiate proceedings to seize whatever property state law permits. But the judgment debtor cannot be expected to foresee that the judgment creditor will attempt to seize assets the state has indicated are immune from execution. If the judgment debtor has an entitlement to an exemption, the judgment places him on notice only that the creditor will attempt to levy on nonexempt assets. The debtor thus cannot be expected to initiate proceedings to prevent judgment creditors from temporarily depriving him of property—his entitlement to a wage exemption—that the state has placed beyond the reach of creditors. If state law permits the judgment creditor to deprive a judgment debtor of that property temporarily, the debtor has sound grounds to attack that law as a violation of due process.

The above rationale makes it apparent why *Moya* could properly be affirmed after *Endicott* and *Sniadach* but does not control cases arising after *Goldberg v. Kelly, Roth, Arnett,* and *Goss. Sniadach* requires only that a temporary seizure of wages be preceded by notice and opportunity to be heard as to the propriety of depriving the wage earner of his property interest in wages. Under *Endicott,* the judgment debtor has constructive notice that the creditor may initiate proceedings to seize that property. But after *Goldberg v. Kelly, Roth, Arnett,* and *Goss,* a debtor may have a property interest to which the initial judgment does not speak—his entitlement to a wage exemption. If that entitlement is not limited in scope by procedural statutes, the debtor can correctly contend that garnishment of exempt wages constitutes a deprivation of a property interest that was not at stake in the suit on the debt.

In summary, *Brown* probably reached the correct result. But because the court failed to analyze adequately the entitlement interests

119. *See* notes 102-05 and accompanying text *supra.*

at issue, the decision is open to attack on the ground that any entitlement created by section 222.12 is so limited that judgment debtors cannot assert a right to an unqualified exemption. Nonetheless, judgment debtors who look beyond section 222.12 stand an excellent chance of success even if *Brown* is reversed. The question for Florida, then, is how to modify its garnishment statutes so as to avoid due process attacks.

The legislature can choose among several possible approaches. First, it might eliminate the wage exemption entirely, thereby eliminating the entitlement issue. Even if that approach were desirable from a public policy standpoint, it might prove ineffective. Despite *Moya,* the possibility remains that the Supreme Court might ultimately rule that wages are so sensitive that they may not be garnisheed unless the debtor is given prior notice and an opportunity to show that other, less sensitive, assets exist by which to satisfy the judgment. Secondly, the legislature might attempt to modify the wage exemption so that any entitlement arises only when the debtor proves his eligibility.[120] While that approach would theoretically avoid the entitlement problem, it might not be successful. *Goss* and *Arnett* suggest the Supreme Court will not tolerate attempts to avoid the due process clause by qualification of the entitlement.

A third approach is to escape the entitlement difficulty by adopting procedures that will alter the balance of creditor and debtor interests. The legislature might, for instance, attempt to minimize the initial risk of wrongful deprivation of the entitlement by requiring a judge to authorize garnishment, and by requiring that the creditor seeking garnishment show to that judge in *ex parte* proceedings that the debtor is unqualified for exemptions and has no other property that can be levied upon.[121] Such *ex parte* procedures should be coupled with a

120. *See, e.g.,* CAL. CIV. PRO. CODE § 690 (West Supp. 1975), which divides assets into two classes: those which are exempt from execution without filing an exemption claim, and those which are exempt "when claim for exemption is made . . . by the judgment debtor . . . ." As interpreted in Raigoza v. Sperl, 110 Cal. Rptr. 296 (Ct. App. 1973), the latter class of assets is not exempt as soon as the claim is made; the debtor must prevail on his claim before the wages are released. *See* CAL. CIV. PRO. CODE § 690.50 (West Supp. 1975). In holding that temporary wage deprivations resulting from these procedures did not violate the due process clause, the *Raigoza* court did not apply entitlement concepts. Had it done so, it could not have reached its result without finding: (1) no entitlement to the wage exemption created by CAL. CIV. PRO. CODE § 690.6 (West Supp. 1975) exists before the debtor files a claim; and (2) the procedural provisions contained in CAL. CIV. PRO. CODE § 690.50 (West Supp. 1975) limit the scope of that entitlement by requiring the debtor to prevail on his claim before he may benefit from the exemption.

121. In discussing the risk of wrongful deprivation, the *Brown* court repeatedly noted that Florida did not require that the creditor's motion be verified, or that it

requirement that the creditor indemnify the debtor for any losses incurred by temporary deprivation of his entitlement, a requirement that a prompt hearing be afforded the debtor on exemption claims, and a prohibition against employers discharging employees on the basis of wage garnishment unless a court has ruled that any exemption claims are unfounded. Such an approach might alter enough of the factors considered in the *Brown* balancing test to meet due process requirements. Since the possibility exists that reputational interests may be affected by wage garnishment procedures,[122] the legislature should buttress these provisions by prohibiting garnishors and garnishees from informing third parties of the garnishment unless a debtor is ruled unqualified for any exemption.

The simplest solution, however, is to require that judgment debtors be afforded notice of garnishment proceedings and an opportunity to assert exemptions before a wage garnishment writ issues.[123] If the *Brown* and *Mitchell* courts are correct, such a procedure would have minimal impact on creditors,[124] and would protect judgment debtors against government action that may wrongfully deprive them of funds needed to acquire necessities of life.

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negate the debtor's exemptions. *See* note 79 and accompanying text *supra*. At a minimum, any revision of Florida's garnishment laws should therefore require more than the conclusory allegations that now suffice for issuance of a garnishment writ.

122. *See* notes 17-21 and accompanying text *supra*.

123. Fla. S. 170 (1975) would have added the following provision to both FLA. STAT. § 77.03 (1973) (procurement of postjudgment garnishment writ) and FLA. STAT. § 77.031 (1973) (procurement of prejudgment garnishment writ): "Before a writ of garnishment shall issue for any money or other thing due the defendant for personal labor or services the defendant shall be given notice and a court hearing at which the application of any exemptions provided for by law shall be determined."

The Senate Judiciary-Civil Committee deleted the provision affecting § 77.03 (postjudgment garnishment) and substituted the following language for the provision affecting § 77.031 (prejudgment garnishment):

> Before a writ of garnishment shall issue the defendant shall be given notice and opportunity for a court hearing at which the probable validity of the allegations in the plaintiff's motion for the writ and the application of any exemptions provided for by law shall be determined. Notice to the defendant of the proposed garnishment shall be accompanied by a copy of plaintiff's motion for writ of garnishment and shall state the possibility of defendants' entitlement to exemptions and the opportunity for a hearing if a motion requesting such hearing is filed and served within five days. If, within five days after the service of the notice of the proposed garnishment, the defendant has not filed with the court and served the plaintiff with a motion requesting the court hearing, then the writ shall issue without the prior hearing.

As amended, the bill was passed by the senate, FLA. S. JOUR. 560 (1975). It was then referred to the House Judiciary Committee, FLA. H.R. JOUR. 1014 (1975), where it died.

124. *See* notes 94-97 and accompanying text *supra*.