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THE DUE PROCESS RIGHTS OF POSTJUDGMENT DEBTORS AND CHILD SUPPORT OBLIGORS

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I. INTRODUCTION

The Due Process Clause of the fourteenth amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law."[1] Although this may well represent an essential principle of a democratic society, it has also long been the inspiration of a litigious one and has prompted the Supreme Court to observe that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause."[2] Recently, this constitutional provision has been the basis for a spate of civil actions in federal courts throughout the country challenging state procedures that enable creditors to collect judgments or court ordered child support awards from third parties. These suits contest the constitutionality of either a state's postjudgment garnishment or attachment procedure,[3] or procedures established pursuant to state programs designed to intercept tax refunds for the purpose of satisfying past due child support arrearages.[4] These cases raise questions

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1. U.S. CONST. amend. XIV, § 1.

2. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

3. *See* Green v. Harbin, 615 F. Supp. 719 (N.D. Ala. 1985); Neeley v. Century Fin. Co., 606 F. Supp. 1453 (D. Ariz. 1985); Reigh v. Schleigh, 595 F. Supp. 1535 (D. Md. 1984), *vacated and remanded*, No. 85-1021 (4th Cir. Mar. 4, 1986); McCahey v. L.P. Investors, 593 F. Supp. 319 (E.D.N.Y. 1984), *aff'd*, 774 F.2d 545 (2d Cir. 1985); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730 (S.D. Ohio 1984); Dionne v. Bouley, 583 F. Supp. 307 (D.R.I. 1984), *aff'd in part, rev'd in part*, 757 F.2d 1344 (1st Cir. 1985); Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983); Phillips v. Robinson Jewelers, Inc., No. CIV-81-190 BT (W.D. Okla. 1982); Deary v. Guardian Loan Co., 534 F. Supp. 1178 (S.D.N.Y. 1982).

4. *See, e.g.*, Coughlin v. Regan, 584 F. Supp. 697 (D. Me. 1984); McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986); Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir.), *cert. denied sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984); Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983); Sorenson v. Secretary of the Treasury of the United States, 557 F. Supp. 729 (W.D. Wash. 1982).

regarding the type of notice and hearing that must be afforded postjudgment debtors (or child support obligors[5]) in order to comply with modern era views of due process.

II. BACKGROUND

The Supreme Court's most recent discussion of a judgment debtor's postjudgment due process rights occurred more than sixty years ago in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*[6] There, the Court held that it was not necessary to provide notice and an opportunity to be heard *before* the issuance of a writ of garnishment on a debtor's wages. The Court reasoned that, since the judgment debtor had already "been granted an opportunity to be heard and has had his day in court" on the merits, he was put on notice that an attachment would follow and was entitled to no further notice or hearing.[7]

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5. A child support obligor would seem to be in a position identical to that of a postjudgment debtor for purposes of due process analysis. At some time in the past, each had an opportunity to contest in court whether he or she owed an obligation to another individual and, in each case, a court determined that the debtor or obligor was, indeed, liable. Although an obligor, unlike a debtor, may have entered into a voluntary agreement to pay child support, this does not diminish the existence of the obligor's liablity or the fact that it has been determined by a court and so is binding as a matter of law. *See, e.g.*, Stern v. Stern, 58 Md. App. 280, 473 A.2d 56 (1984). An obligor who has consented to pay court ordered child support, like a default judgment debtor or consent judgment debtor, is still, after entry of judgment, a postjudgment debtor. *See* Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (en banc).

That an obligor is obliged to make payments in the future, or has more defenses than an ordinary judgment debtor by which to challenge the underlying support order, means only that the obligor is in a more favorable position with regard to effecting changes or modifications to the underlying order. Except for the right to seek modification, an obligor is clearly not in any way in a more favorable position than an ordinary judgment debtor. To the contrary, a support recipient can use all of the collection tools available to a judgment creditor together with several additional remedies provided by statute and by case law. For example, a court can order the immediate sequestration of the real and personal property of a parent who is delinquent in support obligations. *See* Wooddy v. Wooddy, 258 Md. 224, 265 A.2d 467 (1970); Donigan v. Donigan, 208 Md. 511, 119 A.2d 430 (1956); *see generally* MD. R.P. 2-647 through 2-651. Unlike an ordinary judgment debtor, an individual failing to pay support can be imprisoned for nonpayment. *See* MD. CONST. art. III, § 38. And a wage garnishment order to collect child support is given priority over garnishment order by judgment creditors. *See* MD. FAM. LAW CODE ANN. § 10-125(c) (1984 & Supp. 1985). These factors, therefore, have no effect on an obligor's duties pursuant to that order. Like the judgment debtor, an obligor is under a court order to pay.

At least two courts have recognized that the status of the child support obligor is equivalent to that of a postjudgment debtor. *See* Jahn v. Regan, 584 F. Supp. 399, 413 (E.D. Mich. 1984); Hudson v. Tweed, Civ. No. 82-363-WKS (D. Del. 1983) (magistrate's opinion), *aff'd*, 749 F.2d 26 (3d Cir. 1984).

6. 266 U.S. 285 (1924).

7. *Id.* at 288.

In 1968 the Supreme Court granted certiorari in *Hanner v. Demarcus*[8] to determine whether *Endicott-Johnson* should be overruled. In that case, the Arizona Supreme Court had upheld as constitutionally sufficient a state procedure that provided for notice of the underlying debt, but for no additional notice of intent to execute.[9] Although the respondent initially argued in opposing certiorari that the sole federal question in the case had been decided by *Endicott-Johnson*, he claimed in his brief on the merits that the question was not before the Supreme Court because Arizona statutes did require that the debtor be given actual notice. It was probably for this reason that the Supreme Court ultimately dismissed the writ of certiorari as improvidently granted.[10]

Writing for himself and two other Justices, Justice Douglas dissented from the dismissal of certiorari, arguing that an appropriate federal question did exist and noting that the rationale and holding of *Endicott-Johnson*—"that due process does not require notifying a judgment debtor of execution on his property"[11]—had never been reaffirmed by the Court. Justice Douglas specifically relied upon *Griffin v. Griffin*,[12] which he characterized as having rejected the *Endicott-Johnson* rationale some years earlier.[13] It is not at all clear that this is so;[14] in any event, the Supreme Court has not since addressed

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8. Hanner v. DeMarcus, *cert. granted*, 389 U.S. 926, *cert. dismissed as improvidently granted*, 390 U.S. 736, *reh'g denied*, 392 U.S. 917 (1968).

9. Knight v. DeMarcus, 102 Ariz. 105, 425 P.2d 837 (1967) (special master entitled to a writ of execution without providing notice of intent to execute when party refused to pay special master's fee within prescribed time period after receiving notice of the order).

10. *See Hanner*, 390 U.S. at 737-38 (Douglas, J., dissenting).

11. *Id.* at 740 (Douglas, J., dissenting).

12. 327 U.S. 220, *reh'g denied*, 328 U.S. 876 (1946).

13. *Hanner*, 390 U.S. at 741 (Douglas, J., dissenting).

14. In *Griffin*, the petitioner was ordered, pursuant to a divorce proceeding, to pay the respondent, his ex-wife, $3,000 a year in alimony. 327 U.S. at 223. In 1936, after a hearing before a referee on the amount of past due alimony and the petitioner's ability to pay, the New York Supreme Court entered an order dated February 25, 1936, declaring that the petitioner owed $18,493.64 in alimony arrears and interest as of October 25, 1935. *Id.* at 223-24. The respondent subsequently and successfully moved to have an order entered on February 19, 1938, docketing a judgment against the petitioner in the amount of $25,382.75, the higher amount being attributable to additional past due alimony payments and accrued interest that had accumulated since October 25, 1935. *Id.* at 224. However, unlike the arrears attributable to the 1936 order, the additional arrears were never contested, either as to the amount or to the petitioner's ability to pay, by the petitioner, who was never informed of the 1938 judgment. *Id.* at 224-25.

Although the Supreme Court held that the judgment attributable to arrears and interest accruing *since* October 25, 1935 was ineffective, it specifically upheld the portion that had accrued prior to that date.

The 1938 judgment, so far as it confirmed the 1936 order by which petitioner

the viability of *Endicott-Johnson*.[15]

Accordingly, lower courts have applied *Endicott-Johnson* over the years and have concluded that postgarnishment statutes that do not provide any notice to the judgment debtor do not deprive the debtor of due process.[16] Moreover, although the Court in *Endicott-Johnson* held only that "in the absence of a statutory requirement, it is not essential that [the judgment debtor] be given notice *before* the issuance of an execution against his tangible property,"[17] a number of lower courts have seized upon the broad dicta in the opinion and have held that no notice or hearing need be provided at the time of execution.[18]

However, since 1980 no court has been willing to extend the *Endicott-Johnson* rationale in this way or even to regard the *Endicott-Johnson* analysis as good law.[19] Rather, beginning with the Third Circuit's en banc decision in *Finberg v. Sullivan*,[20] courts have almost uniformly questioned the continuing applicability of the *Endicott-Johnson* rationale.[21] This is attributable to two developments—one

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was already bound, impaired no rights of petitioner, and foreclosed no defense which he had not had opportunity to offer. *Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given.* Upon the facts shown, *respondent was therefore entitled to maintain the present suit* on the 1938 judgment for the amount, with interest, thus *adjudicated* to be due by the order of 1936, and as so adjudicated, confirmed by the judgment of 1938.

Id. at 233-34 (emphasis added). Therefore, as to the adjudicated arrearage, the Court specifically upheld the respondent's right to recover, pursuant to the state procedure, the pre-October 25, 1935 amount from the petitioner without further notice. Contrary to the suggestion made by Justice Douglas in his dissent in *Hanner*, *Griffin* seems to be wholly consistent with *Endicott-Johnson*.

15. However, in Moya v. DeBaca, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969) two Justices indicated that they would vacate the district court judgment upholding a postjudgment wage garnishment procedure and would remand the case to be re-examined under Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *See infra* note 25 and accompanying text; *see also* Danila v. Dobrea, *cert. denied*, 391 U.S. 949, *reh'g denied*, 392 U.S. 947, 950 (1968) (Douglas, J., dissenting) (indicating that the issue in that case, similar to that raised in *Hanner*, was a "substantial one which should be decided by this Court").

16. *See, e.g.*, Moya v. DeBaca, 286 F. Supp. at 607-08.

17. 266 U.S. at 288 (emphasis added).

18. *See, e.g.*, Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974); Katz v. Ke Nam Kim, 379 F. Supp. 65 (D. Hawaii 1974); Langford v. State of Tennessee, 356 F. Supp. 1163 (W.D. Tenn. 1973) (per curiam); Moya v. DeBaca, 286 F. Supp. at 606.

19. Although the Fifth Circuit did uphold the constitutionality of a postjudgment garnishment procedure in Brown v. Liberty Loan Corp., it did so for other reasons. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977). *See infra* notes 35-36 and accompanying text.

20. 634 F.2d 50 (3d Cir. 1980) (en banc).

21. *See, e.g.*, Reigh v. Schleigh, 595 F. Supp. 1535, 1548-49 (D. Md. 1984), *vacated and*

in the factual posture of these cases and the other in the law—that the courts have found significant.

The factual development was the enactment, after *Endicott-Johnson*, of various state and federal statutory provisions that exempt certain assets from attachment to satisfy debts.[22] With regard to these exempted assets, the debtor obviously has not yet had his or her "day in court." *Finberg* and its progeny, therefore, have found the existence of these exemptions to indicate that the *Endicott-Johnson* analysis is no longer tenable.[23] Moreover, the courts have found this conclusion particularly compelling in light of more recent Supreme Court pronouncements on the due process rights of debtors in garnishment proceedings.[24]

All of the more recent Supreme Court decisions, however, have interpreted the rights of *pre*judgment, as opposed to *post*judgment, debtors. In *Sniadach v. Family Finance Corp.*,[25] for example, the Court held that due process requires that *pre*judgment debtors be afforded notice and an opportunity to be heard before their wages can be frozen by creditors pending the resolution of an ongoing action.[26] Three years later, in *Fuentes v. Shevin*,[27] the Court applied the same rationale to *pre*judgment replevin procedures. It held shortly thereafter, however, in *Mitchell v. W.T. Grant Co.*,[28] that a *pre*judgment debtor's due process rights were not violated by a procedure that provided, first, for the seizure of goods encumbered by a security

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remanded, No. 85-1021 (4th Cir. Mar. 4, 1986); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 732 (S.D. Ohio 1984); Harris v. Bailey, 574 F. Supp. 966, 969 (W.D. Va. 1983); Phillips v. Robinson Jewelers, Inc., No. CIV-81-190 BT (W.D. Okla. 1982); Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1185-86 (S.D.N.Y. 1982); *see also* Dionne v. Bouley, 583 F. Supp. 307, 314-15 (D.R.I. 1984), *aff'd in part, rev'd in part*, 757 F.2d 1344 (1st Cir. 1985); *see also* Haines v. General Motors Corp., 603 F. Supp. 471, 476 n.3 (S.D. Ohio 1983) (court expressly noting it is bound by controlling case law such as *Endicott-Johnson* when it has not been overruled). *But see* Neeley v. Century Fin. Co., 606 F. Supp. 1453, 1461 (D. Ariz. 1985).

22. For example, Social Security benefits are exempt from attachment under 42 U.S.C. § 407(a) (1982). Some ERISA benefits are also exempt. 29 U.S.C. § 1056(d)(1) (1982). Maryland exempts, as do most states, a certain amount of cash, MD. CTS. & JUD. PROC. CODE ANN. §11-504 (1984 & Supp. 1985), as well as benefits available under state public assistance programs. MD. ANN. CODE art. 88A, § 73 (1985).

23. *See, e.g.*, *Finberg*, 634 F.2d at 56-57; Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1185-86 (S.D.N.Y. 1982).

24. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

25. 395 U.S. 337 (1969).

26. *Id.* at 341-42.

27. 407 U.S. 67, 96-97 (1972).

28. 416 U.S. 600 (1974).

interest, and then notice and an opportunity for a hearing afterward. By contrast, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[29] Georgia's *pre*judgment garnishment procedure was successfully challenged because it afforded debtors neither notice and a hearing before the garnishment, nor sufficient procedural safeguards such as those discussed in *Mitchell*.[30]

This line of Supreme Court decisions[31] culminated in *Mathews v. Eldridge*,[32] in which the Court formally articulated a three-pronged balancing test to be utilized when analyzing the constitutionality of a challenged government procedure that allegedly deprives individuals of their liberty or property interests.[33] Under *Mathews*, due process analysis requires consideration of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[34]

The first postjudgment garnishment case to apply the balancing test set forth in *Mathews* was *Brown v. Liberty Loan Corp.*,[35] in which the Fifth Circuit held Florida's postjudgment garnishment provisions constitutional.[36] Although *Brown* and another case decided

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29. 419 U.S. 601, 606-08 (1975).

30. 416 U.S. 600 (1974).

31. *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (prison procedure resulting in loss of good-time credit or imposition of solitary confinement must afford written notice of alleged violation, opportunity to prepare a defense, written statement by factfinders, and opportunity to call witnesses and present documentary evidence); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation procedure required to provide notice of claimed violation, disclosure to parolee of evidence against him, opportunity to present witnesses and documentary evidence, right to cross-examine and confront witnesses, neutral factfinder, and written statement of reasons for parole revocation); Bell v. Burson, 402 U.S. 535 (1971) (except in emergency situations, a state must afford notice and an opportunity for a hearing before depriving an individual of a driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (pretermination evidentiary hearing must be held before public assistance payments to welfare recipients are cut off).

32. 424 U.S. 319 (1976).

33. *Id.* at 334-35. Neither *Mathews*, however, nor any of the prior Supreme Court decisions that led to the adoption of the balancing test, addresses the rights of postjudgment debtors. *Cf.* Langford v. State, 356 F. Supp. 1163, 1165 (W.D. Tenn. 1973) (rejecting *Sniadach* and *Fuentes* based on this distinction). *See also* Halpern v. Austin, 385 F. Supp. 1009, 1013 (W.D. Ga. 1974) ("absent special circumstances, *Sniadach* and its progeny should be limited to pre-judgment summary seizures").

34. 424 U.S. at 335.

35. 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

36. *Id.* at 1369. Other decisions issued shortly after *Mathews* recognized the need to "accommodate" the debtor's and creditor's interests. *See, e.g.*, First Nat'l Bank v. Hasty,

shortly after *Mathews* both upheld postjudgment attachment procedures on constitutional grounds,[37] courts have since taken an almost complete "about-face," beginning with the seminal decision in *Finberg v. Sullivan*.[38]

In *Finberg*, the Third Circuit held that the challenged Pennsylvania postjudgment garnishment procedures did not adequately protect a judgment debtor's interests, nor fairly accommodate the interests of both debtors and creditors.[39] Though acknowledging that *pre*deprivation notice and a hearing were not required by due process,[40] the court determined that the judgment debtor's "compelling" interest in asserting exemptions in order to regain use of money in her seized bank account demanded a "prompt" *post*-seizure hearing.[41] Because the garnishment rules failed to comply with this requirement, the judgment debtor was not afforded an opportunity to be heard at a meaningful time and, therefore, was not afforded due process.[42] Additionally, because the rules did not require that judgment debtors be supplied with notice containing information concerning exemptions to which they might be entitled, the rules provided constitutionally inadequate notice.[43]

Finberg represents the first of a new, but increasingly long, line

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410 F. Supp. 482, 490 (E.D. Mich. 1976) (upholding Michigan's postjudgment garnishment statute and rules).

37. *See* First Nat'l Bank v. Hasty, 410 F. Supp. 482 (E.D. Mich. 1976).

38. 634 F.2d 50. *See* Green v. Harbin, 615 F. Supp. 719 (N.D. Ala. 1985); Neeley v. Century Fin. Co., 606 F. Supp. 1453 (D. Ariz. 1985); Reigh v. Schleigh, 595 F. Supp. 1535 (D. Md. 1984), *vacated and remanded*, No. 85-1021 (4th Cir. Mar. 4, 1986); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730 (S.D. Ohio 1984); Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983); Deary v. Guardian Loan Co., 534 F. Supp. 1178 (S.D. N.Y. 1982); Phillips v. Robinson Jewelers, Inc., No. CIV-81-190 BT (W.D. Okla. 1982); *see also* Dionne v. Bouley, 583 F. Supp. 307 (D.R.I. 1984), *aff'd in part, rev'd in part*, 757 F.2d 1344 (1st Cir. 1985). *But see* McCahey v. L.P. Investors, 593 F. Supp. 319 (E.D.N.Y. 1984), *aff'd*, 774 F.2d 543 (2d Cir. 1985) (New York procedure, after being initially found unconstitutional, upheld following revision). With regard to the application of the *Mathews* test to attachment procedures that affect child support obligors, see, e.g., Coughlin v. Regan, 584 F. Supp. 697, 707 (D. Me. 1984); McClelland v. Massinga, 600 F. Supp. 558, 566 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986); Jahn v. Regan, 584 F. Supp. 399, 414-17 (E.D. Mich. 1984); Nelson v. Regan, 560 F. Supp. 1101, 1107-09 (D. Conn 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir.), *cert. denied sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984); Marcello v. Regan, 574 F. Supp. 586, 596-98 (D.R.I. 1983); Sorenson v. Secretary of the Treasury of the United States, 557 F. Supp. 729, 738 (W.D. Wash. 1982), *aff'd on other grounds*, 752 F.2d 1433 (9th Cir. 1985).

39. 634 F.2d at 59-62.

40. *Id.* at 59.

41. *Id.* at 58-59.

42. *Id.* at 59-61.

43. *Id.* at 61-62.

of cases in which various postjudgment garnishment procedures have been held unconstitutional.[44] But it must be remembered that these cases all rely on Supreme Court precedent, beginning with *Sniadach*, that addresses only the rights of persons prior to any judgment; thus, these decisions would not seem in any way to affect the rationale of *Endicott-Johnson*, which, like *Finberg* and its progeny, involved a *post*judgment claim of due process rights by a debtor who had already received both notice and an opportunity to be heard with regard to the underlying claim.

Although it is true that, unlike many of the modern era cases, there was no claim of state or federal exemption from garnishment in *Endicott-Johnson*, it is not at all clear that this factor alone is significant enough to overcome the fact that every postjudgment debtor has had a day in court on the merits of the claim and been found liable, and thus has been afforded both notice and opportunity to be heard prior to any garnishment executing that judgment. Accordingly, it well may be, as the Fifth Circuit held in *Brown v. Liberty Loan Corp.*, that there is no constitutional right to notice or an immediate postjudgment hearing even when there is a claim for exemption.[45] Certainly, in other contexts, courts have held that there need be no predeprivation or immediate postdeprivation hearing when the party is afforded an eventual opportunity for judicial examination of his or her legal rights.[46]

However, since the more recent cases almost unanimously reject the *Endicott-Johnson* rationale,[47] the remainder of this article will

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44. *See supra* note 38.

45. 539 F.2d at 1368-69. *See also Finberg*, 634 F.2d at 72 (Aldisert, J., dissenting) ("My position is not that Mrs. Finberg should not have an opportunity to assert her exemption, but that the creditor's greater interest in enforcing its judgment diminishes the urgency of the process that is due her.").

46. *See, e.g.*, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 598-99 (1950) (statute permitting seizure upon probable cause to believe property is dangerous to health is constitutional); Phillips v. Commissioner, 283 U.S. 589, 595 (1931) (statute allowing summary procedures to collect tax does not violate due process); United States v. Articles of Hazardous Substance, 588 F.2d 39, 43 (4th Cir. 1978) (recognizing continued viability of *Ewing* despite series of cases beginning with Goldberg v. Kelly).

47. *But see* Neeley v. Century Fin. Co., 606 F. Supp. 1453 (D. Ariz. 1985), one of the most recent cases dealing with the rights of postjudgment debtors, in which the court found the *Endicott-Johnson* rationale not applicable "where a specific statute, either state or federal, precludes certain assets from being subjected to liability for a person's debts," but specifically held "*where no exemption could possibly apply, the holding of Endicott-Johnson must be applied* and the procedure upheld under due process analysis as no further due process is required." 606 F. Supp. at 1461 (emphasis added). *See also* Haines v. General Motors Corp., 603 F. Supp. 471 (S.D. Ohio 1983) (recognizing *Endicott-Johnson* as controlling in the 6th Circuit).

address the constitutionality of postjudgment garnishment procedures in light of the analysis contained in those cases and will specifically examine the following issues: (1) What type of notice must be provided by postjudgment garnishment procedures in order to comply with due process? and (2) What is the meaning of the phrase "opportunity for a hearing at a meaningful time" in the context of these and similar procedures that affect other classes of postjudgment debtors?[48] With regard to the latter question, this article will focus particular attention on the due process rights of child support obligors.

III. NOTICE

Finberg and its progeny purport to apply the *Mathews v. Eldridge* balancing test to determine the adequacy of *all* challenged postgarnishment procedures. However, even though *Mathews* set forth a specific test to be used when determining whether "government procedures" afford adequate due process, both *Mathews* and *Finberg*, as well as the other post-*Mathews* postjudgment garnishment decisions, actually applied the test only to determine when and what sort of a *hearing* must be provided. None of these cases articulate any application of the *Mathews* factors to determine the type of *notice* that is constitutionally adequate. Instead, courts have examined the constitutional adequacy of the notice provided by a challenged government procedure in light of the principles elucidated in *Mullane v. Central Hanover Bank & Trust Co.*,[49] and further explored in *Memphis Light, Gas & Water Division v. Craft*.[50] In *Mullane*, the Supreme Court held that if the Due Process Clause requires notice in a given situation, that notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the

48. Courts have resolved the notice issues raised in the postjudgment garnishment cases in a substantially similar manner as those raised in the child support obligor cases. Therefore, this article will address the notice questions only in the context of the garnishment decisions. However, as courts in these two areas have differed in the way they address the issue of when an opportunity for a hearing should be afforded, both areas of law will be considered with regard to that issue. *See infra* notes 83-152 and accompanying text.

49. 339 U.S. 306 (1950).

50. 436 U.S. 1 (1978). Indeed, the Court in *Memphis Light* made absolutely no reference to *Mathews* when analyzing the adequacy of the termination notice used by the municipal utility company. *Id.* at 13-15. *Mathews* was not cited until the Court addressed the issue of whether the utility's customers received a meaningful opportunity for a hearing. *Id.* at 16-19.

action and afford them an opportunity to present their objections."[51] The Court refined this language very minimally in *Memphis Light*: "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.' "[52]

In *Finberg* and many of its progeny, the courts have concluded that in order to be constitutionally adequate, the notice provided to judgment debtors must contain a detailed explanation of the procedures available for pursuing exemptions and specifically list all, or at least the principal, exemptions.[53] However, this interpretation of what constitutes adequate notice exceeds that mandated by the Supreme Court in *Mullane* and *Memphis Light*. In those decisions the Court merely required that notice be "reasonably calculated" to inform a party about the pendency of his or her case, not "specifically calculated" to disclose every detail of the case.[54]

The failure of the notice required by various postjudgment garnishment procedures to identify all (or the principal) exemptions, or to detail formally and laboriously the precise procedures by which a defense can be asserted, is constitutionally unimportant. The dispositive inquiry is whether the debtor is made aware that he or she has the opportunity to contest the garnishment proceeding.[55] The Ninth Circuit recently arrived at precisely this conclusion in

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51. 339 U.S. at 314 (citations omitted).

52. 436 U.S. at 14.

53. *See Finberg*, 634 F.2d at 62; Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 734 (S.D. Ohio 1984); Dionne v. Bouley, 583 F. Supp. 307, 317-18 (D.R.I. 1984), *rev'd on this point*, 757 F.2d 1344 (1st Cir. 1985); Harris v. Bailey, 574 F. Supp. 966, 971 (W.D. Va. 1983); Deary v. Guardian Loan Co., 534 F. Supp. 1178, 1187-88 (S.D.N.Y. 1982). *But see* McCahey v. L.P. Investors, 593 F. Supp. 319, 328 (E.D.N.Y. 1984), *aff'd*, 774 F.2d 543, 550-52 (2d Cir. 1985) ("elaborate explanation" of procedures for asserting an exemption not constitutionally required).

54. *Mullane*, 339 U.S. at 314. *Accord* Adams v. Harris, 643 F.2d 995, 998 (4th Cir. 1981) (no constitutional requirement that social security disability applicants be informed with particularity of the medical and vocational reasons for denial of claim); Wilson v. Heckler, 580 F. Supp. 1387, 1393 (D.D.C. 1984) (due process does not require that supplemental social security income recipient be informed of mathematical calculations used to determine amount of benefits); *see also* Garrett v. Puett, 707 F.2d 930 (6th Cir. 1983) (same); Owens v. I.F.P. Corp., 374 F. Supp. 1032, 1035 (W.D. Ky.), *aff'd mem.*, 419 U.S. 807 (1974) (service of a summons merely stating if defendants fail to appear and defend, judgment of default will be entered, constitutes sufficient notice).

55. *See* McCahey v. L.P. Investors, 593 F. Supp. 319, 328 (E.D.N.Y. 1984), *aff'd*, 774 F.2d 543 (2d Cir. 1985); *see also* Diotte v. Blum, 585 F. Supp. 887, 904 n. 13 (N.D.N.Y. 1984) ("The right to challenge the impending attachment . . . is not predicated so much on the nature of the defense that will be raised, *e.g.*, a claimed exemption, as on the right to raise any defense generally.").

Duranceau v. Wallace.[56] The statute contested in that case provided procedures that enabled the state to collect past due child support expeditiously. After receiving notice of the amount due and a statement that his property was subject to the collection action, the debtor received copies, on two occasions, of an order served on his employer to withhold and deliver. Even though only one of these orders in any way indicated a wage exemption— and that was stated only in summary—the court held that the debtor had received adequate notice because he was notified "of the *existence* of the wage exemption."[57] The court further held that a notice, in ordinary clear language, of the debtor's procedural rights provided him with adequate notice of the "manner of asserting" his defenses, even though, according to the debtor, the notice was defective in that it did not "inform him of (a) his right to assert all his defenses and (b) the procedures for challenging the seizure."[58]

In addition to examining whether the required notice informs the judgment debtor that he or she may be entitled to an exemption and that a motion may be filed to assert a defense or objection to the garnishment,[59] courts might also consider whether specific information is given to the debtor with regard to the judgment. For example, the name and address of the judgment creditor, the date on which judgment was entered, a form computing the current amount due, the case number assigned to the writ of garnishment, and the address of the court that issued the writ would also appear to be relevant information.[60] Such information would not only refresh the debtor's recollection of the event giving rise to the original judgment, but would also enable the debtor to recall whether that judgment has been vacated, has expired, or has been satisfied—all of which constitute standard defenses or objections to the garnishment.[61] Thus, the notice should equip the debtor with the ability to formulate defenses that are based on the facts of his or her situation.

Furthermore, any arguable lack of detail regarding the type of notice required to be sent to judgment debtors under postjudgment garnishment procedures must be viewed in light of the debtor's duty to inquire further once the notice is received. The district court in

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56. 743 F.2d 709 (9th Cir. 1984).

57. *Id.* at 713 (emphasis added).

58. *Id.* at 713-14.

59. Maryland's postjudgment garnishment rules, for example, require this form of notice. *See* MD. R.P. 3-645(c).

60. MD. R.P. 3-645(b) and (c) require this and similar information to be provided postjudgment debtors upon attachment.

61. *See, e.g.*, FED. R. CIV. P. 60(b)(5); MD. R.P. 3-643.

Reigh v. Schleigh,[62] for example, made much of the fact that debtors may be ignorant of the available exemptions and the process by which claims for exemptions may be made.[63] However, even if this is true, debtors have no right to remain ignorant. Rather, if the notice does not fully address all the potential ramifications, the recipient is simply placed under a duty to inquire further.[64] The duty of further inquiry[65] is particularly clear in the case of a judgment debtor because all judgment debtors have already received notice from a court of law of the judgment against them.

The *Reigh* court's holding to the contrary may well be attributable to the fact that the court appears to have followed the remedy mandated in *Finberg* and *Deary v. Guardian Loan Co.*[66] In *Finberg*, however, state law failed to require that the debtor be in *any way* informed of the possible exemptions or of the procedures available for asserting those rights.[67] And in *Deary* state law failed to require

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62. 595 F. Supp. 1535 (D. Md. 1984). The Fourth Circuit, however, recently reversed the district court and upheld the constitutionality of the Maryland rules governing postjudgment attachment procedures. Reigh v. Schleigh, No. 85-1021 (4th Cir. Mar. 4, 1986). After noting the reasoning in the *Finberg* dissents and in Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985), the Fourth Circuit held, "[W]e are satisfied that a notice which advises the judgment debtor that there are state and federal exemptions that may be available to him, coupled with notice of the right to contest the attachment, meets the requirements of due process." *Reigh*, slip op. at 13. The court also held that because there was no evidence of an extended delay by the state courts in resolving challenges to garnishment proceedings, the district court erred in holding that the requirement for a "prompt" hearing, if requested, violated due process. *Id.* at 18.

63. *Id.* at 1555-56.

64. *In re* Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983). *See also* Soberal-Perez v. Heckler, 717 F.2d 36, 43 (2d Cir. 1983) and cases cited therein (non-English-speaking individual served with notice in English has "duty of further inquiry"); Wilson v. Heckler, 580 F. Supp. 1387, 1393 (D.D.C. 1984) ("opportunity to inquire about the method of computation or indeed, about any other matter regarding the notice, certainly offsets any prejudice . . . from the lack of detail").

65. Last term, the Supreme Court reiterated this very principle when holding a notice of changes in food stamp benefits constitutionally adequate. Atkins v. Parker, 105 S. Ct. 2520 (1985). The notice in *Atkins* did not inform recipients whether their food stamp allotment would be reduced or terminated, *or* indicate in what amount benefits would be reduced, *or* provide information necessary to determine if an error had been made in calculating benefits. *Id.* at 2525-26 n.15. Nevertheless the Court held the notice sufficient to "prompt" a recipient to make an "appropriate inquiry," reasoning, "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise." *Id.* at 2531.

66. 534 F. Supp. 1178 (S.D.N.Y. 1982).

67. 634 F.2d at 61-62.

that *any notice* of the garnishment be sent to the debtor.[68] Because those decisions addressed statutes that either failed to provide notice of any kind, or provided for a form of notice that contained no information concerning the availability of possible exemptions or the procedures for claiming them, it is understandable, although perhaps not justifiable, why sweeping remedies were imposed.[69] In any event, no alternative remedy or middle ground seems to have been suggested to those courts; certainly no such remedy was rejected. By contrast, in *Reigh* the court was presented with a middle ground, i.e., a state procedure that while not providing the detailed notice required by the *Finberg* and *Deary* courts, certainly required a form of notice superior to that struck down in those cases.[70] The determination of what due process requires necessarily and obviously entails an examination of the particular circumstances of each case.[71]

This point is graphically illustrated by a comparison of two decisions, both of which address the same postjudgment statutory procedure, one before it was revised, and the other after revision. In 1982 the relevant New York statute contained *no* requirement that the debtor be notified, either of the seizure or the possible exemptions, or of procedures available for asserting those exemptions. In *Deary v. Guardian Loan Co.*, the district court found this statute unconstitutional, holding that judgment debtors were "entitled to notice of both (1) the exemptions to which they may be entitled and (2) the procedures for asserting those exemptions."[72] The New York legislature then amended the statute to provide for a notice which

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68. 534 F. Supp. at 1182. Indeed, not only *Deary*, but *all* of the *Finberg* progeny except *Reigh* have involved statutes that either failed to provide any notice of the garnishment procedures, *see* Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 733 (S.D. Ohio 1984); Dionne v. Bouley, 583 F. Supp. 307, 308 n.1 (D.R.I. 1984); Phillips v. Robinson Jewelers, Inc., No. CIV-81-190-BT (W.D. Okla. 1982); or, if notice was provided, failed to require that it be timely. *See* Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983); Simler v. Jennings, Civ. No. C-1-78-618 (S.D. Ohio 1982) (magistrate's opinion).

69. *See, e.g.*, Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 734 (D. Ohio 1984) (order enjoining "the practice of executing upon personal property of judgment debtors prior to providing such debtors with notice of the right to claim exemptions and an opportunity to be heard on the claim"); Simler v. Jennings, Civ. No. C-1-78-618 (S.D. Ohio 1982) (court expressly "declined" to mandate a detailed notice even when striking down a statute that provided no timely notice). *See also* Dionne v. Bouley, 583 F. Supp. 307, 317-18 (D.R.I. 1984), *aff'd in part, rev'd in part*, 757 F.2d 1355 (1st Cir. 1985) (concluding that even though debtors under present law are given no notice of the attachment, they are entitled only to notice of the exemptions to which they may be entitled and the procedures for asserting those exemptions).

70. *See supra* notes 59-61 and accompanying text.

71. *See Mathews*, 424 U.S. at 334; Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

72. 534 F. Supp. at 1187.

(1) listed some, but not all, exemptions, and (2) rather than detailing any procedures for asserting exemptions, simply informed the debtor that he or she could consult a lawyer, including Legal Aid, or the garnishee.[73] When the revised statute was challenged in *McCahey v. L. P. Investors*,[74] the district court, while specifically acknowledging that "the notice does not outline the procedure itself or spell out the specific steps that a debtor must take to assert an exemption," found the notice constitutionally adequate because "it clearly alerts the debtor of her rights."[75] On appeal, the Second Circuit affirmed, remarking, "We are not persuaded even that this additional information would be helpful, much less that it is constitutionally required."[76]

In sum, an elaborate notice listing specific exemptions and the procedures for pursuing them may be helpful to postjudgment debtors, and it may be a good idea,[77] but it is not constitutionally required. Judgment debtors need only be afforded notice that state and federal exemptions may be available and that they have a right to contest a garnishment by filing a motion asserting a defense or objection. Such notice is entirely adequate to protect the postjudgment debtors rights and, accordingly, comply with the requirements of due process. Interestingly, this notice is almost exactly the kind recently mandated by the First Circuit in *Dionne v. Bouley*,[78] in which the court observed:

> We do not agree that, to be constitutional, the notice provided to a judgment debtor after attachment must inform him of all, or even close to all, of the available exemptions. . . . [W]e think *the debtor must be informed of the attachment and of the availability of a prompt procedure to challenge the attachment*, together with the fact, *generally stated*, that there

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73. McCahey v. L.P. Investors, 593 F. Supp. 319, 322-23 (E.D.N.Y. 1984).

74. *Id.* at 328.

75. *Id.*

76. 774 F.2d 543, 550 (2d Cir. 1985).

77. *But see* Harris v. Bailey, 574 F. Supp. 966, 971 (W.D. Va. 1983) ("*There comes a point where too much information confuses rather than clarifies.*" Accordingly, "only essential exemptions" that provide for the "basic necessities of life" must be listed on the notice and "the complex myriad of state and federal exemptions" need not "be set out on the summons.") (emphasis added); *McCahey*, 774 F.2d at 550 ("Elaborate explanation of the procedures for asserting an exemption may so confuse a layman that he or she may be put off by the complexities and simply allow the seizure."); *Duranceau*, 743 F.2d at 714 (summarizing relevant rules of civil procedure "would make the notice so long as to discourage the debtor from reading it"); *Finberg*, 634 F.2d at 84 (Aldisert, J., dissenting) ("[T]here are so many exemptions that to set forth this information on a writ would present a mass of incomprehensible boilerplate reeking with legalese.").

78. 757 F.2d 1344 (1st Cir. 1985).

> are *certain exemptions under state and federal law which the debtor may be entitled to claim* with respect to the attached property. *The state, however, is not required to supply the debtor with a "laundry list" of statutory exemptions. . . . A detailed requirement of this type*—which would have to be constantly updated whenever state or federal law was revised—*contradicts the spirit of modern civil procedure which encourages notices to be effected in a single, concise and direct matter.*[79]

The First Circuit commented that, although "the state is free to adopt such an elaborate [notice] requirement if it wants, we do not think the Constitution compels it."[80] Using this same reasoning, the Second Circuit in *McCahey v. L.P. Investors* rejected a judgment debtor's argument that a notice lacking such specificity was constitutionally inadequate.[81] Thus, *Dionne* and *McCahey* are the first federal circuit court cases to note this difference between legislative prerogative and judicial interpretation, as well as being the most recent appellate court cases to address the notice issue in garnishment cases. These decisions may very well halt, or at least curb, the trend that courts have recently followed of requiring detailed notice.[82]

IV. HEARING

A. Garnishment Cases

In applying the *Mathews* test in garnishment cases to determine the rights of postjudgment debtors to a hearing, *Finberg* and its progeny initially analyzed the first and third *Mathews* factors, i.e., the private interests involved and the governmental interests at issue. With regard to the private interests at stake, these courts recognized "the creditor's interest in the enforcement of the judgment debt and

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79. *Id.* at 1354 (citations omitted) (emphasis added).

80. *Id.* at 1354. *See also* Atkins v. Parker, 105 S. Ct. 2520, 2530-32 (1985) (general, rather than "detailed," notice of change in benefits is all that is constitutionally required).

81. 774 F.2d at 550-52. The Second Circuit refused to require a more detailed notice that would simplify the exemption procedure and facilitate its use by debtors as their own counsel:

> New York of course *could* provide simplified procedures for hearing these claims. However, we find no support for the assertion that New York *must* provide such procedures as a requirement of due process. No matter how laudatory the goal, judicial experience with *pro se* litigants offers no guarantee that a simplified procedure for use by laymen is better than a more complex procedure used by lawyers. Absent such a guarantee, the requirements of due process do not dictate use of one method rather than another.

Id. at 551 (emphasis in original).

82. On appeal, the Fourth Circuit in Reigh v. Schleigh approved a more modest notice than that imposed by the district court.

the debtor's interest in continued use and possession of her property."[83] Since a bank account could very well contain money "required for the basic expenditures of living,"[84] the debtor was entitled to "an especially prompt hearing."[85] On the other hand, since a judgment had already been entered against the judgment debtor, he or she was assigned the burden of acting swiftly once the attachment procedure began. In sum, judgment creditors were recognized to have a "strong interest" in the "prompt and inexpensive satisfaction of the debt owed by the judgment debtor," an interest which is to be accorded "[m]ore weight . . . in a postjudgment context than in prejudgment situations, because there is no question as to the debtor's liability."[86]

With regard to the third *Mathews* factor—the government's interests—*Finberg* and its progeny recognized that these include ensuring the enforcement of judgments and efficient procedures for doing so, maintaining the integrity of the judicial system by preventing asset dissipation by absconding debtors, and assuring the ability of its citizens to maintain a minimal standard of living.[87] Additionally, consideration was given to the burden on state courts and other agencies of changing the procedures used.[88]

Although analysis of the first and third *Mathews* factors in recent cases appears to be largely straightforward and accurate,[89] analysis of the second *Mathews* factor—i.e., the risk of erroneous deprivation under the challenged state hearing procedures—is lacking. The relevant inquiry should be: Do the postjudgment garnishment hearing procedures, taken together, afford adequate protection from erroneous deprivations; and if not, what is the benefit of additional or substitute hearing procedures?[90] Rather than considering these questions fully, a number of courts have *assumed* that the risk of erroneous deprivation under challenged hearing procedures was great, and that more due process—in the form of an even more prompt hearing and even a prompt *adjudication* (rather than just a hearing)—

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83. *Finberg*, 634 F.2d at 58.

84. *Id.* at 59.

85. *Id.*

86. *Reigh*, 595 F. Supp. at 1552.

87. *Finberg*, 634 F.2d at 57. *See also McCahey*, 593 F. Supp. at 327-28; Harris v. Bailey, 574 F. Supp. 966, 969 (W.D. Va. 1983).

88. *See Deary*, 534 F. Supp. at 1186-87.

89. It seems, however, that in the absence of a Supreme Court decision expressly overruling *Endicott-Johnson*, courts perhaps could have been even less deferential to the importance of the private interest of the judgment debtor.

90. *See Mathews*, 424 U.S. at 335.

was necessarily "better" due process.[91]

Thus, in *Finberg*, the court held that a state procedure under which a hearing could not be held sooner than fifteen days after attachment did not provide a prompt enough hearing and therefore violated the debtor's due process rights.[92] A number of courts have followed *Finberg* in striking down state procedures that they regarded as not providing prompt enough hearings.[93] Some have held that a hearing must be held within a specified period of time;[94] however more often courts have declined to impose a specific time limit, holding simply that hearings must be "prompt" or "expeditious."[95]

Furthermore, postattachment procedures that *require* a "prompt" or "early" hearing have generally been upheld. For example, in *Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co.*,[96] the First Circuit recently upheld a postattachment procedure requiring a "prompt" hearing when the debtor "received notice within two days of execution of the attachment and was granted a hearing *within four weeks* of its request for an *expedited* hearing."[97] And in *Brown v. Liberty Loan Corp.*, the Fifth Circuit approved a procedure that did not require an

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91. *See Finberg*, 634 F.2d 50; Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730 (S.D. Ohio 1984); *Dionne*, 583 F. Supp. 307; Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983). This exceeds that which is required by the Supreme Court when testing the constitutionality of a state procedure. "The Federal Constitution does not invalidate state legislation because it fails to embody the highest wisdom or provide the best conceivable remedies." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 550-51 (1949). *See also* Ownbey v. Morgan, 256 U.S. 94, 110-11 (1921) ("The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."); *cf.* Dionne v. Bouley, 757 F.2d 1344, 1354 (1st Cir. 1985) (recognizing that the Constitution does not compel states to adopt "elaborate" notice requirements).

92. *Finberg*, 634 F.2d at 59-61.

93. *See, e.g.*, Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 733 (D. Ohio 1984); *Dionne*, 583 F. Supp. at 318; Harris v. Bailey, 574 F. Supp. 966, 970 (W.D. Va. 1983); *Deary*, 534 F. Supp. at 1188.

94. *Reigh*, 595 F. Supp. at 1557 (14 days). *See also* Phillips v. Robinson Jewelers, No. CIV-81-190 BT (W.D. Okla. 1982) ("The debtor must be given a prompt hearing on his application *preferably* within 10 days or less.") (emphasis added); *cf.* Betts v. Tom, 431 F. Supp. 1369, 1378 (D. Hawaii 1977) (two working days).

95. *Dionne*, 583 F. Supp. at 318 (hearing must be "expeditious" but no time restrictions imposed); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 733 (D. Ohio 1984) (hearing must be "prompt," no time restrictions required); *Deary*, 534 F. Supp. at 1188 (while opining in dicta the need for a prompt hearing, the court nevertheless declined to state how many days would constitute promptness). *See also North Georgia Finishing*, 419 U.S. at 606-07 (1975) (emphasizing the need for an "early" hearing rather than an "immediate" hearing and declining to impose a specific time limit).

96. 743 F.2d 956 (1st Cir. 1984).

97. *Id.* at 962 (emphasis added). The fact that the procedure in *Apex Oil* addressed a

"immediate" hearing, but which "appeared" to be "expeditious."[98]

This approach would clearly seem to be correct, for all that due process requires is that a person be afforded an opportunity to be heard "at a meaningful time."[99] Moreover, a state legislature has the resources and opportunities to consider the needs and rights of creditors or debtors *generally* in light of numerous factors—e.g., the usual practice, congestion in the judicial system—in formulating a statutory requirement with regard to the timing of a hearing; these resources and opportunities are simply unavailable to any court. Thus, a court should be very reluctant to substitute a judicial policy preference for a legislative scheme.[100]

For this reason, the lack of any evidence that hearings were not actually held at a meaningful time has led several courts to refuse to hold that state law did not require a prompt enough hearing.[101] As explained in *Deary v. Guardian Loan Corp.*:

> Recognizing the presumption of constitutionality attaching to legislative acts, it is nevertheless clear that the sufficiency of the . . . procedures depends upon their application in practice and the debtor's actual ability to secure relief without significant delay. No party in this action has presented evidence of the use of [the challenged state laws] to claim exemptions from restraint and execution, and thus we are unable to determine if those provisions would in practice satisfy the need for a prompt opportunity to be heard.[102]

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maritime attachment as opposed to the attachment of an individual's bank account containing exempt funds does not make it inapposite because, as the Supreme Court has pointed out:

> 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. We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.

North Georgia Finishing, 419 U.S. at 608.

98. 539 F.2d at 1368. *See also* Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1496 (1985), in which the Court held that the due process requirement that a hearing be held at a "meaningful time" was not violated by a nine-month delay in finally adjudicating a dismissed employee's administrative appeal.

99. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

100. *Cf.* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 303 (1981) (error for district court to reduce statutorily prescribed time period in which a response must be made to a request for temporary relief).

101. *See, e.g.*, *Brown*, 539 F.2d at 1368; *see also McCahey*, 774 F.2d at 553 ("[W]e are unwilling to invalidate a statute because it might, but need not, be applied in an unconstitutional manner.").

102. 534 F. Supp. at 1188.

The mere possibility of future abuse pertaining to a postattachment hearing procedure is an insufficient basis for finding the procedure unconstitutional.[103] Thus, *Finberg* should not be read as authority for the conclusion that a procedure requiring merely a "prompt" hearing must be held unconstitutional simply because a hearing is not mandated within fifteen days of attachment. In the absence of evidence that postattachment hearings are not, in fact, held promptly, it is difficult to see how the additional requirement of a specific time limit would necessarily lessen the risk of erroneous deprivation. However, in fairness to the *Finberg* court, that was perhaps not its intent,[104] for when the Third Circuit concluded that "fifteen days" was "too long," it was because this was the usual *minimal* period of time that had to elapse before the debtor could obtain a hearing.[105] In its two and one-half page discussion of the timeliness of the postjudgment hearing, the *Finberg* court spoke of due process as requiring that a debtor be permitted a "prompt" hearing, or be heard "promptly," or be afforded a sufficient measure of "promptness" no fewer than thirteen times.[106] Therefore, the thrust, if not the actual holding, of *Finberg* with regard to the timing of the hearing appears to have been an eminently reasonable attempt to apply the *Mathews* test.

There is, however, one aspect of the *Finberg* holding regarding timing that appears to be totally unjustified. Although, as noted above, *Finberg* emphasized the need for a prompt hearing, the Third Circuit also observed in passing that a judgment debtor is entitled to "a prompt . . . adjudication."[107] This suggests that even if no hearing is requested, a debtor is nevertheless entitled to have his or her claim "adjudicated" promptly. Since most state procedures require that a *hearing* be conducted,[108] this suggestion may be largely

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103. *Apex Oil*, 743 F.2d at 963.

104. Only the *Reigh* court has read *Finberg* to require this, and *Reigh* is the *only* case in which a state procedural postjudgment garnishment statute requiring a "prompt" hearing has been held unconstitutional. The district court's conclusion that the state must specifically provide that a hearing be held within two weeks, 595 F. Supp. at 1557, however, was reversed on appeal, Reigh v. Schleigh, No. 85-1021, slip op. at 13-14 (4th Cir. Mar. 4, 1986).

105. 634 F.2d at 59.

106. *Id.* at 59-61.

107. *Id.* at 61.

108. *See, e.g.*, VA. CODE §§ 8.01-512.4 & -512.5 (1984); PA. R. CIV. P. 3123.1, 3252 (1985). *Cf.* N.Y. CIV. PRAC. LAW §§ 5239-40 (McKinney 1978) (permitting challenge to garnishment without specifically providing hearing on exemption claim).

academic.[109] However, courts have long held that when one fails to request a hearing or "sleeps on his rights," that person cannot claim that he or she has been denied due process upon being denied a hearing.[110] It would, therefore, be anomalous to suggest that a person who failed to request a hearing would not be denied due process and is nonetheless *entitled* to a quick adjudication of his or her rights. Only one court has so held and that ruling is being challenged on appeal.[111]

B. Child Support Obligors

Recently, a number of state programs that permit the interception of income tax refunds due individuals who are delinquent in their court ordered child support obligations[112] have been challenged because, *inter alia*, they allegedly fail to provide child support obligors with the opportunity for a hearing at a meaningful time.[113]

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109. However, in the one instance in which state law required that a hearing be provided only "if requested," the court held, relying on *Finberg*, that if a hearing was not requested, a judgment debtor was entitled to have his case adjudicated within two weeks. *Reigh*, 595 F. Supp. at 1557.

110. *Accord* Roslindale Coop. Bank v. Greenwald, 638 F.2d 258, 261 (1st Cir. 1981), *cert. denied*, 454 U.S. 831 (1981) ("We cannot be sympathetic to a party who elects to forego the hearing provided him, and then complains he received none."); FDIC v. American Bank Trust Shares, Inc., 629 F.2d 951, 954 (4th Cir. 1980) (what is necessary is that a postseizure hearing be available, not that it be held); *see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974); *see also* Beckham v. Harris, 756 F.2d 1032, 1038 (4th Cir. 1985) (the Constitution does not require a governmental agency "to provide a hearing to one who sleeps on his rights" to request one); United States v. An Article of Device "Theramatic," 715 F.2d 1339, 1343 (9th Cir. 1983), *cert. denied sub nom.* Cloward v. United States, 465 U.S. 1025 (1984) (a "defendant cannot contend that he did not obtain a prompt hearing when he chose not to avail himself of an opportunity to present his claim"); *cf.* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1982) (plaintiff's failure to avail himself of full procedures provided by state law does not constitute sign of law's inadequacy); Oberlander v. Perales, 740 F.2d 116, 120 (2d Cir. 1984) (same).

111. *Reigh*, 595 F. Supp. at 1557, *vacated and remanded*, No. 85-1021 (4th Cir. Mar. 4, 1986).

112. 42 U.S.C. §§ 651-667 (1982) governs the use of federal income tax refunds for child support purposes and is administered and implemented pursuant to state statutes and regulations. All states will soon be required to pass legislation permitting interception of state income tax refunds. *See* Act of Aug. 16, 1984, Pub. L. 98-378, 98 Stat. 1305 (1984) (amending 42 U.S.C. § 666(a)(3)(1982)).

113. Presley v. Regan, 604 F. Supp. 609 (N.D.N.Y. 1985); Coughlin v. Regan, 584 F. Supp. 697 (D. Me. 1984); McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986); Jahn v. Regan, 584 F. Supp. 399 (E.D. Mich. 1984); Keeney v. Secretary of the Treasury of the United States, No. Civ. 83-2427 Kn (C.D. Cal. 1983); Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir. 1984), *cert. denied sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984); Hudson v. Tweed, Civ. No. 82-363-WKS (D. Del. 1983) (magistrate's opinion), *aff'd*, 749 F.2d 26 (3d Cir. 1984); Marcello v. Regan, 574 F. Supp. 586 (D.R.I.

Although the status of child support obligors is substantially similar, if not identical, to that of postjudgment debtors,[114] their due process right to a timely hearing has been viewed quite differently by some courts.

Unlike the postjudgment garnishment cases, in which courts have unanimously held that judgment debtors are not entitled to a hearing until *after* attachment, some courts that have addressed the due process rights of child support debtors have held that these debtors are entitled to a *pre*deprivation hearing.[115] Such a holding is inexplicable. For although the interests involved in the child support obligor cases are not exactly the same as those at stake in the garnishment cases, application of the *Mathews* test would seem to lead to the conclusion that child support obligors are less, rather than more, entitled to a *pre*deprivation hearing than ordinary judgment debtors.

However, before examining the application of the *Mathews* test in the obligor cases, it is worth noting that a wholly independent basis for questioning the holding of some courts that child support obligors are entitled to a predeprivation hearing might be found in the *Endicott-Johnson* rationale. As previously indicated,[116] the applicability of *Endicott-Johnson* has recently been questioned, principally because that case did not involve seized property statutorily exempt from attachment and because it preceded more recent Supreme Court decisions that discuss the due process rights of prejudgment debtors.[117] However, not one of the cases that question *Endicott-Johnson* has held that judgment debtors must be provided a hearing *prior* to attachment.[118] Rather, in every such case, the court recognized that the *Endicott-Johnson* holding was controlling in this regard

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1983); Sorenson v. Secretary of the Treasury of the United States, 557 F. Supp. 729 (W.D. Wash. 1982), *aff'd on other grounds*, 752 F.2d 1433 (9th Cir. 1985).

114. *See supra* note 5.

115. *Compare* cases recognizing right to preintercept hearing, *e.g.*, Nelson v. Regan, 560 F. Supp. 1101, 1111 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir. 1984), *cert. denied sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984); Marcello v. Regan, 574 F. Supp. 586, 596-98 (D.R.I. 1983) *with* cases stating no such right exists, *e.g.*, Jahn v. Regan, 584 F. Supp. 394, 413-17 (E.D. Mich. 1984); Keeney v. Secretary of the Treasury of the United States, No. Civ. 83-2427Kn (C.D. Cal. 1983); Hudson v. Tweed, Civ. No. 82-363-WKS (D. Del. 1983) (magistrate's opinion), *aff'd*, 749 F.2d 26 (3d Cir. 1984).

116. *See supra* notes 20-24 and accompanying text.

117. *See supra* note 24 and accompanying text.

118. *See, e.g.*, *Dionne*, 757 F.2d 1344; *Finberg*, 634 F.2d 50; Neeley v. Century Fin. Co., 606 F. Supp. 1453 (D. Ariz. 1985); *Reigh*, 595 F. Supp. 1535; *McCahey*, 593 F. Supp. 319; Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730 (S.D. Ohio 1984); Harris v. Bailey, 574 F. Supp. 966 (W.D. Va. 1983); *Deary*, 534 F. Supp. 1178; Betts v. Tom, 431 F. Supp. 1369 (D. Hawaii 1977).

and that a prompt postattachment hearing is the very most to which a postjudgment debtor is entitled.[119] Yet, in the cases in which courts have held that child support obligors are entitled to a *pre*deprivation hearing, the courts have either ignored *Endicott-Johnson* or dismissed it without any real explanation.[120]

Equally puzzling is how application of the *Mathews* test could lead these courts to conclude that a *pre*deprivation hearing is necessary, for in applying the *Mathews* test, the Supreme Court has consistently found an interest based on "brutal need" a necessary condition precedent to the requirement of a predeprivation hearing.[121] An obligor's interest in a tax refund is simply not in any way "akin" to a welfare recipient's "brutal need" for welfare payments,[122] or even a wage earner's interest in his or her wages.[123] Indeed, virtually every court to consider the rights of child support

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119. *See supra* note 118. Not even the Supreme Court's holding in *Griffin*, 327 U.S. 220, *reh'g denied*, 328 U.S. 876 (1946), on which courts and commentators have relied in questioning the applicability of *Endicott-Johnson*, *see, e.g.*, *Hanner*, 390 U.S. at 741-42 (Douglas, J., dissenting), *reh'g denied*, 392 U.S. 917 (1968); Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521, 545 (1973); Dunham, *Post-Judgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S.D.L. REV. 78, 79-82 (1976); Levy, *Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience*, 5 CONN. L. REV. 399, 434-38 (1973), is inconsistent with the proposition that child support obligors have a right to only a *post*deprivation hearing. For in *Griffin*, the execution was based on a judgment "entered without actual notice to or appearance by petitioner, and without any form of service of process calculated to give him notice of the proceedings." 327 U.S. at 228. Thus, *Griffin* addressed a situation in which the alimony obligor was not afforded any notice or opportunity for a hearing. This should be sharply contrasted with the various tax refund intercept programs, which provide many procedural safeguards, both *before* and *after* the interception. *See, e.g.*, *infra* notes 140-151 and accompanying text.

120. *See, e.g.*, McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986); Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983); Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983).

121. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985) ("We have described the 'root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' ") (emphasis in original) (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). In *Mathews* itself, in which the claim to disability payments was arguably based on far greater need than the claim to the tax refund here, the Supreme Court did *not* require a *pre*deprivation hearing. 424 U.S. 319 (1976). Only in Goldberg v. Kelly has the Court held that due process requires a predeprivation hearing similar to that demanded by the obligors in these actions. 397 U.S. 254, 266 (1970). Something less than a *Goldberg*-type hearing is sufficient when the private interest is not based on financial need. *Mathews*, 424 U.S. at 340-41.

122. Jahn v. Regan, 584 F. Supp. 399, 415 (E.D. Mich. 1984) (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

123. Jahn v. Regan, 584 F. Supp. at 415 (citing *Sniadach*, 395 U.S. 337). Even the *Sniadach* Court, though requiring some type of predeprivation hearing, was "entirely silent" on what the hearing must entail. *See Mathews*, 424 U.S. at 333-34.

obligors in this context has recognized that the obligor's interest in a tax refund, while "significant," is "not as great as that of the loss of welfare benefits."[124] In fact, the obligor's interest in a tax refund is not even as significant as the judgment debtor's interest in exempt property, which judgment creditors sought to attach in the garnishment cases; it is not vital to survival in the way exempt property (e.g., AFDC or social security payments) often is.

Furthermore, the obligor's interest "is not hinged on the *immediacy* of receiving the refund" since "[t]ax refunds normally take some time to be determined and sent to the taxpayer,"[125] and child support obligors do not have the same interest as judgment debtors in the "continued use and possession of [their] property."[126] The very fact that the obligor is not in possession of the refund distinguishes his or her situation from that in *Finberg*, in which the debtor, a sixty-eight-year-old widow whose sole source of income was derived from social security retirement benefits, was suddenly deprived of the use of her bank accounts.[127] Of course, not even in

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124. McClelland v. Massinga, 600 F. Supp. 558, 566 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986) (quoting Nelson v. Regan, 560 F. Supp. 1106, 1108 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir. 1984), *cert. denied, sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984)). *See also* Kokoszka v. Belford, 417 U.S. 642, 648 (1974) (a "tax refund is not the weekly or other periodic income required by a wage earner for his basic support" and therefore a consumer protection act's restrictions on garnishment does not prevent the debtor's trustee in bankruptcy from reaching a tax refund); Jahn v. Regan, 584 F. Supp. at 415; Keeney v. Secretary of the Treasury of the United States, No. Civ. 83-2427 Kn (C.D. Cal. 1983) (obligor's interest in refund is not "essential, vital or necessary for existence"); Marcello v. Regan, 574 F. Supp. 586, 596 (D.R.I. 1983) (interception of refund "is far from the kind of deprivation described in *Goldberg v. Kelly*").

125. Jahn v. Regan, 584 F. Supp. at 415 (emphasis in original). For example, note should be made of the length of time the taxpayers in the *McClelland* case were deprived of refunds to which they supposedly were entitled. *See* Joint Appendix (Apx.) filed in the Fourth Circuit, McClelland v. Massinga, No. 85-1138 at 49, 66 (refunds received Apr. 25 and Apr. 26, 1984, respectively). Unlike the federal government, the State of Maryland does not pay interest on belated refunds. The absence of a similar state statutory interest provision suggests there is not even an entitlement to a "timely" refund. Even if interest accrued as of April 15, however, neither claimant in *McClelland* would be "entitled" to a refund until April 15, 1984. The 10 or 11 days that expired between the dates the refunds "should" have been received and when they actually were received falls far short of that period of time courts have permitted to expire between the dates on which a postattachment *hearing* (not resolution) is requested and when it actually takes place. *See, e.g., Apex Oil*, 743 F.2d at 962 (1st Cir. 1984) (four weeks). Furthermore, the taxpayers in the refund intercept cases simply do not contend that they are immediately entitled to a refund, or that they are entitled to a refund within a set period of time.

126. *Finberg*, 634 F.2d at 58.

127. *Id.* at 51-52.

that situation was the widow-debtor found entitled to a predeprivation hearing.[128]

If it is clear, as it seems to be, that the obligor's interest in a tax refund is not as critical as the debtor's interest in exempt property, it is even clearer that the "creditor's" interest in enforcement of the child support order is greater than that of the ordinary judgment creditor. For the "creditor" in the obligor cases is not a merchant or a credit card company, but rather a mother (typically) and her minor children. As the Ninth Circuit recently recognized, there are few interests more compelling than that of minor children dependent on child support: "The problem of delinquent child support is national in scope, and has prompted Congress recently to enact strong measures to help states collect these debts."[129] Since these children have had their support rights declared by a court order, they should, at the very least, be treated as well as ordinary judgment creditors. Yet some courts have refused to do so.[130]

The rights of children to receive court ordered financial support is intricately intertwined with the third factor of the *Mathews* test—the government's interest. Not only is the support of its children often characterized as a "compelling state interest,"[131] but the

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128. *Id.* at 58. Perhaps it is because of these factors and because other procedures exist for filing a claim for a tax refund that courts have taken the position that taxpayers have no right to a hearing before they are deprived of their property by means of an IRS levy. Furthermore, child support obligors often erroneously assume they are in fact entitled to the refund as though it belonged to them. To the contrary, states normally have up to several years to collect taxes after they become due. Mathematical miscalculations and/or the filing of a false or fraudulent return can give rise to a successful tax assessment by the controller. The mere completion of a tax return claiming a refund is not dispositive of ownership. At the very least, this approach should be considered when examining the taxpayer's interest in a tax refund. *See* Zernial v. United States, 714 F.2d 431, 434 (5th Cir. 1983); *see also* Martinez v. IRS, 744 F.2d 71, 72 (10th Cir. 1984); Fredrick v. Clark, 587 F. Supp. 789, 792 (W.D. Wis. 1984). The State of Maryland offers taxpayers such a procedure. MD. CODE ANN. art. 81, §§ 213-219 (1980 & Supp. 1984). In fact, just last term the Supreme Court held that the IRS has the right to levy on joint bank accounts, owned in part by a delinquent taxpayer, prior to an administrative or judicial hearing. *See* United States v. National Bank of Commerce, 105 S. Ct. 2919, 2929 (1985).

129. *Duranceau*, 743 F.2d at 711 (9th Cir. 1984) (citing Child Support Enforcement Amendments Act of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984)). *See also* Caswell v. Lang, 757 F.2d 608, 610 (4th Cir. 1985) (state has a "compelling" interest in protecting the welfare of its dependent citizens); Gorrie v. Heckler, 606 F. Supp. 368, 373 (D. Minn. 1985).

130. *See, e.g.*, McClelland v. Massinga, 600 F. Supp 558, 567 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986).

131. *Duranceau*, 743 F.2d at 711; Caswell v. Lang, 757 F.2d 608 (4th Cir. 1985) (past due child support payments not included in bankruptcy plan because of state's "compelling interest in protecting the welfare of its dependent citizens"). Such a governmental

additional fiscal and administrative burdens that a state would incur were it required to conduct predeprivation hearings, might be passed on to the families who receive the benefits of the intercept program.[132] Courts that have ordered such hearings appear to have underestimated their fiscal and administrative impact by assuming that the number of obligors who would request preintercept hearings, were they available, would not exceed the number of those requesting postintercept hearings.[133] However, not all obligors file returns claiming a refund. Obligors are typically notified that *if* they are to receive a refund, that refund *may* be intercepted.[134] Requiring a hearing on an issue that may never come to fruition would be an enormous waste of a state's finances.[135]

Despite the child's "compelling" interest in receiving support, the obligor's less than compelling interest in the refund, and the governmental interest in avoiding the expense of extra hearings, some courts have found the risk of erroneous deprivation created by the intercept scheme to be so serious and so substantial as to require an extremely rigorous due process protection—i.e., a

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interest in other settings has been regarded as sufficient justification for seizing property without a predeprivation hearing, particularly when, as in McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986), there exists a subsequent opportunity for the determination of rights. *See, e.g.*, Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599 (1950); Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931); Martinez v. IRS, 744 F.2d 71, 72 (10th Cir. 1984); Zernial v. United States, 714 F.2d 431, 434 (5th Cir. 1983); United States v. Articles of Hazardous Substances, 588 F.2d 39, 43 (4th Cir. 1978); *see also* United States v. National Bank of Commerce, 105 S. Ct. 2919, 2925 (1985).

132. *See* Child Support Enforcement Program, State Plan Requirements, 45 C.F.R. § 302.33(d) & 303.102(f) (1985). *See also* Act of Aug. 16, 1984, Pub. L. 98-378, 98 Stat. 1305 (1984) (amending 42 U.S.C. § 664(a) (1982)).

133. *See, e.g.*, McClelland v. Massinga, 600 F. Supp. 558, 567 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986).

134. *See, e.g.*, MD. FAM. LAW CODE ANN. § 10-113(a)-(f) (1984 & 1985 Supp.); MD. ADMIN. CODE tit. 07, § 07.07.02.02-.04 (1984) (state income tax refund intercept program); Act of April 16, 1984, Pub. L. 98-378, 98 Stat. 1305 (1984) (amending 42 U.S.C. § 664(a) (1982)) (federal intercept program to be administered by the states).

135. *See* Maryland Review of the TRIP/TROP Appeals Unit, Brief of Appellants at App. 27-29, McClelland v. Massinga, 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986). (Child Support Enforcement Agency reporting that it had certified 51,682 obligors during the 1983 tax year, but only intercepted 13,752 refunds (27%)); *cf.* Coughlin v. Regan, 584 F. Supp. 697, at 709-10 n.21 (D. Me. 1984) (noting argument that 1% of approximately 335,000 offsets were adjusted as a result of requests for refunds from nonobligated spouse's share of refund); Nelson v. Regan, Civ. No. N-82-173, Ruling on Remedy and Final Order at 7 (D. Conn. 1983) (no benefit by requiring preoffset allocation of nonobligated spouse's share of refund).

predeprivation hearing.[136] Such a finding would perhaps be understandable—though not justifiable, in light of *Endicott-Johnson* and the quality of the respective interests of the obligors and minor children—were the tax intercept procedure to provide only minimal due process protections; however it is totally unwarranted when the state procedure provides numerous safeguards. A comparison of two recent cases—*McClelland v. Massinga*[137] and *Marcello v. Regan*[138]—is illustrative of this point.

In *Marcello*, two obligors and an obligor's spouse successfully challenged an intercept program implemented by the State of Rhode Island in conjunction with the federal government. The United States District Court for the District of Rhode Island held that "a postdeprivation hearing" would not "be an appropriate alternative under the circumstances" and that the failure to provide preintercept notice and a hearing to the complaining parties constituted a violation of their due process rights.[139]

In *McClelland*, the United States District Court for the District of Maryland relied heavily on *Marcello* in holding that obligors are constitutionally entitled to a hearing prior to the interception of a tax refund.[140] Yet the procedures invalidated in *McClelland* were qualitatively superior in three fundamental respects to those held unconstitutional in *Marcello*. First, in *Marcello*, the only preintercept "investigation" available was "a cursory cross-matching" of individual records and agency files,[141] which did not take into account any support payments made after the initial calculation of the past-due amount, and in which the relevant state official had no authority to

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136. *See, e.g.*, Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983), *aff'd on other grounds*, 731 F.2d 105 (2d Cir.), *cert. denied sub nom.* Manning v. Nelson, 105 S. Ct. 175 (1984); Marcello v. Regan, 574 F. Supp. 586 (D.R.I. 1983).

137. 600 F. Supp. 558 (D. Md. 1984), *rev'd and remanded*, No. 85-1138 (4th Cir. Mar. 18, 1986).

138. 574 F. Supp. 586 (D.R.I. 1983).

139. *Id.* at 598.

140. However, relying on Mathews v. Eldridge, the Fourth Circuit recently reversed the district court decision, holding that the Maryland tax refund intercept procedure satisfied the requirements of due process. McClelland v. Massinga, No. 85-1138 (4th Cir. Mar. 18, 1986). The court observed that the Maryland procedure "clearly provides the parent with as much of a pre-deprivation 'hearing' as was given the recipient in *Mathews* or the employee in *Loudermill*," *id.*, slip op. at 21, and distinguished other intercept procedure cases that have reached a different result by concluding that "these cases were reviewing statutes and facts different in significant respects from those with which we are concerned," *id.* at 26.

141. 574 F. Supp. at 589-90.

delete names from the certified list or to correct errors.[142] By contrast, the Maryland program at issue in *McClelland* provided a very complete preintercept investigation;[143] payments made by an obligor after the arrearage was certified were taken into account in determining whether the obligor was in arrears,[144] and the relevant state official who conducted the investigation had the authority to delete names from the list of certified individuals and to correct errors. Second, while there was apparently no written policy providing for postdeprivation hearings at the time the *Marcello* case was instituted,[145] the Maryland statute struck down in *McClelland* contained an intricate postintercept administrative appeal process that could be utilized to challenge any interception. It entitled an obligor to a full evidentiary hearing at which he or she could be represented by an attorney, present testimony, and cross-examine witnesses. Finally, while "judicial review was not available" under the statutes examined in the *Marcello* case,[146] under Maryland law an obligor dissatisfied with the final administrative decision was provided an opportunity to seek judicial review. In fact, a request for an administrative hearing, as well as any subsequent requests for judicial review, automatically stayed payment of the intercepted refund to the support recipient under Maryland law.

Thus, in almost every particular the Maryland statute provided precisely the procedural safeguards that the *Marcello* court found lacking in the Rhode Island law. Indeed, Maryland's intercept procedure reduced very substantially any real risk of error by providing obligors with a preintercept opportunity to contest the arrearage, which could lead to both deletion of the obligor's name from the

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142. *Id.* at 599.

143. 600 F. Supp. at 560-61.

144. This same defense, and others, were made available under state law in *Griffin*, 327 U.S. at 227. Because the attachment procedure there did not afford the alimony obligor any notice of the collection efforts, the obligor "was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New York against the docketing of judgment for accrued alimony, [and] there was a want of judicial due process." *Id.* at 228.

145. After suit was filed, Rhode Island "tentatively" set forth a procedure for postintercept hearings. 574 F. Supp. at 591 n.11. Interestingly, the *Marcello* court recognized that this procedure showed "some good faith attempt by the state to comply with due process," but was "not at issue in this law suit." *Id.* These remarks at least suggest that if the *Marcello* court had been presented with the Maryland statute, which provides far greater due process protections, its conclusions might have been altogether different. *See McCahey*, 774 F.2d at 552 (recognizing that portion of notice, if viewed in isolation, may be misleading, but that any "harmful implications" are eliminated by other satisfactory parts of the notice).

146. 574 F. Supp at 597.

certified list, *and* a full due process hearing with an opportunity for judicial review, after any interception.

In a similar context in which there existed no "brutal need" for the property interest at stake, the Supreme Court recently noted, "all the process that is due is provided by a pretermination *opportunity to respond*, coupled with posttermination administrative procedures."[147] This would seem to be particularly true in a tax intercept context because, typically, the only factors that justify cancellation of an interception are findings that (1) the obligor is not under a court order to pay child support through a public agency, or (2) the obligor is not delinquent under the most recent child support order.[148] Normally, there are no other grounds for defeating an interception. As the most recent court to consider the matter recognized, "since the amount of arrearage is simply a matter of record-keeping there is very little risk of error which would require a preseizure hearing,"[149] especially when one considers that a state agency, as opposed to a private individual, is responsible for calculating the past due amount.[150]

Thus, the fact that the risk of erroneous deprivation is very low suggests that the value of providing additional safeguards, such as a preintercept hearing, is probably slight.[151] Procedures that provide a number of safeguards operate to ensure that inadvertent administrative errors are corrected swiftly and that no erroneous deprivation occurs.[152]

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147. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1496 (1985) (emphasis added) (right of public employee in continued employment). The Court expressly held that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures." 105 S. Ct. at 1496 n.12. *Loudermill* obviously demonstrates the great importance not only of the availability of a postintercept administrative hearing, but also of the availability of judicial review in the Maryland program, a safeguard that was lacking in Rhode Island's program in *Marcello*. *See also* Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[W]hen prompt postdeprivation review is available for correction of administrative error, we have generally required no more than that the pre-deprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.").

148. *See, e.g.*, MD. FAM. LAW CODE ANN. § 10-113(a),(d),(g)(1), (1984 & Supp. 1985); MD. ADMIN. CODE tit. 07, §§ 07.07.02.02B, 07.07.02.05A(3) (1984).

149. Jahn v. Regan, 584 F. Supp. 399, 415 (E.D. Mich. 1984).

150. *Id. See also Duranceau*, 743 F.2d at 712 (risk of error is low because sources of error are few).

151. *See* Keeney v. Secretary of the Treasury of the United States, No. Civ. 83-2427Kn at 8 (risk has been minimized as much as possible; value of additional safeguards would be outweighed by the cost).

152. *See* Atkins v. Parker, 105 S. Ct. 2520, 2529 (1985) (Court refused to find procedures violated due process even though "inadvertent errors were made in calculating

In the light of the substantial differences in the interests at stake in the child support cases, the risk of an erroneous deprivation, particularly when state procedures provide numerous other protections, does not require the rigid interpretation that *Finberg* and its progeny have applied in the garnishment cases. Accordingly, it seems clear that child support obligors need not be afforded a hearing before their claimed tax refunds are intercepted.

V. CONCLUSION

Since *Endicott-Johnson* defined the due process rights of postjudgment debtors over a half century ago, no Supreme Court decision has ruled to the contrary. Although literal adherence to its dicta may no longer be warranted, due to the subsequent enactment of exemption statutes and the line of Supreme Court decisions beginning with *Sniadach*, it is clear that courts should be bound by the holding of *Endicott-Johnson*. Indeed, even the postjudgment garnishment cases decided after *Mathews v. Eldridge* have recognized that judgment debtors are not entitled to notice and a hearing until their property interests are executed upon. Because child support obligors have also had their day in court to contest their underlying liabilities, they too are entitled to no further legal process until after attachment.

Due process simply requires notice informing debtors and obligors of the proceedings initiated against their property and of their rights, guaranteed by law, to challenge these proceedings. The Constitution, as interpreted by the federal courts, is designed only to safeguard these rights. Thus, the relevant inquiry should be whether the notice afforded by a governmental procedure satisfies due process; beyond this, the courts have no discretion. It is the task of the legislative branch of government to exercise its wisdom to create the form of notice most appropriate for a given situation.

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the benefits"; such errors "can occur in the administration of any large welfare program" and "by hypothesis an inadvertent error is one" the Government "did not anticipate"). Thus, even though two plaintiffs in *McClelland* did not receive notice of certification, both received their refunds in a timely manner (on April 26 and April 25 respectively). Such a slight delay is insignificant in a due process analysis. *See* Fusari v. Steinberg, 419 U.S. 379, 389 (1975) (length of the deprivation is significant in evaluating impact of official action on private interest).

> [T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude *any* possibility of error. *The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations.*

Mackey v. Montrym, 443 U.S. 1, 13 (1979) (emphasis added).

Similarly, when addressing the timing of the legal process required by a particular procedure, courts should not define the outermost limits, but rather, the minimal standards imposed by the Constitution. Decisionmaking that is consumed by attention to optimal time frames establishes difficult and confining precedent, for "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[153] Requiring simply that postattachment hearings be held promptly allows courts the flexibility and adaptability they need.

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153. Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961).