

STATE ACTION AND LIBERAL THEORY:
A CASENOTE ON *Flagg Brothers v. Brooks*

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I. INTRODUCTION

Justice Rehnquist's opinion for the Court in *Flagg Brothers v. Brooks*¹ invites commentary in a symposium on the public/private distinction. The case arose out of a dispute between a moving and storage company and the owners of personal belongings stored in its warehouse. When storage charges alleged to be due the company remained unpaid, Flagg Brothers sought to enforce its statutory warehouseman's lien by selling the goods. The owners challenged the proposed sale on the ground that disposition of their goods without a prior administrative or judicial hearing would deprive them of their property without due process of law. The Supreme Court dismissed this claim, holding that the sale constituted private, not state, action and therefore was not within the purview of the fourteenth amendment.

In *Flagg Brothers*, Justice Rehnquist simultaneously asserts the "essential dichotomy" between public and private acts² and a concept of legal rights—what I shall call "constitutional positivism"—that threatens to collapse the dichotomy. Justice Rehnquist is the Court's most forceful proponent of constitutional positivism, a view held as an article of faith by many contemporary judges, lawyers, and legal scholars. The tension between constitutional positivism and the public/private distinction is, therefore, not only Justice Rehnquist's problem, but one for American legal theory in general.

Let me elaborate on what I mean by "constitutional positivism" and situate it in the context of liberal political theory. From its inception, liberal theory has had two traditions, originating in the writings of Locke and Hobbes respectively. Under the Lockean or "natural rights" version, citizens retain certain inalienable rights, held in the pregovernmental state of nature, that the state may not

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¹ 436 U.S. 149 (1978).

² *Id.* 165 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)).

abridge. Under the Hobbesian or "positivist" version, citizens entering into civil society relinquish all natural rights and possess only those rights granted by legislatures and other lawmaking institutions. As the writings of H.L.A. Hart, Lon Fuller, and Ronald Dworkin illustrate,³ both of these traditions remain vital in modern liberal theory.

The tension between positivism and natural law has been a perennial theme in American constitutional jurisprudence. I refer here not to Hart's ultimate constitutional questions about the meta-rules or practices that determine what decisions by what institutions can be characterized as "law," but to more substantive questions concerning the theories and sources that decisionmakers—especially courts and most especially the United States Supreme Court—should use to resolve constitutional disputes. The debate has centered on the extent to which the Justices may protect interests or rights beyond those explicitly mentioned in the document. Since the Civil War, this controversy has focused on whether the contents of "liberty" and "property" in the due process clauses should ultimately be determined by legislative policy or by transcendent principles.

The opposing views of Justices Peckham and Holmes in *Lochner v. New York*⁴ can be understood as the opposition of the natural law and positivist branches of liberalism. Justice Peckham's opinion for the Court, striking down a law limiting the working hours of bakers, was premised on the natural liberty of employers and employees to contract for the purchase and sale of labor without government interference. Justice Holmes, dissenting, referred disparagingly to liberty of contract as a "shibboleth [of] some well-known writers" and asserted that the Constitution was not intended to embody a particular theory of "the organic relation of the citizen to the State."⁵ For Holmes, the definition of rights was a matter of legislative policy, not of judicially discovered transcendent principles.

In its extreme form, constitutional positivism regards all property interests as creatures of the state and accords the state plenary discretion to define the circumstances by which, and the procedures through which, such interests are acquired, held, and lost. Justice

³ See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); H. HART, *THE CONCEPT OF LAW* (1961); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630 (1958).

⁴ 198 U.S. 45 (1905).

⁵ *Id.* 75.

Rehnquist described the conceptual foundations of this position in *Flagg Brothers*:

[A] property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law.⁶

If this is true of traditional forms of private property, it holds a fortiori for statutory entitlements. Under a constitutional positivist view, the "metes and bounds" of procedural due process in the granting and withholding of a statutory entitlement are determined solely by the legislation creating the entitlement. For example, in *Arnett v. Kennedy*⁷ Justice Rehnquist wrote that the legislature's power to create a particular government job included discretion to determine the conditions under which employment could be held or terminated. In rejecting a federal employee's constitutional challenge to the procedures by which he was dismissed for cause, Rehnquist found it conclusive that the procedures were part of the same statutory scheme that created the employment:

The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause. . . .

. . . .

. . . [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.⁸

⁶ 436 U.S. at 160 n.10. Compare Bruce Ackerman's description of "Scientific Property Talk." B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26-27 (1977).

⁷ 416 U.S. 134 (1974).

⁸ *Id.* 152, 153-54. Justice Stevens seemed to adopt this view in his opinion for the Court in *Bishop v. Wood*, 426 U.S. 341 (1976). In rejecting a police officer's

By contrast, other judges and commentators, less committed to constitutional positivism, have urged that the due process clause protects values such as individual dignity and participation even against infringement by explicit legislative action.⁹

The natural law and positivist branches of liberalism also have different implications for the perennial problem of state action. Under a regime of natural law, the state's enforcement of fundamental property and contractual interests is not the product of state policy or action, but the recognition of preexisting, natural rights of property and contractual liberty. For Justice Peckham, a New York court's enforcement of the contract between *Lochner* and his employees would not have been state action.¹⁰ On the other hand, Peckham likely would have viewed a state court's refusal to uphold the contract—even if New York had not fined *Lochner* for entering into it—as state action of the most egregious sort, depriving both parties of their natural liberty to contract, and their right to property as well.¹¹

claim that the due process clause guaranteed him a right to a hearing before being discharged for cause, he wrote:

A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. . . .

. . . [T]he ordinance may . . . be construed as granting no right to continued employment but merely conditioning an employee's removal on compliance with certain specified procedures. . . .

In this case, as the District Court construed the ordinance, the City Manager's determination of the adequacy of the grounds for discharge is not subject to judicial review; the employee is merely given certain procedural rights which the District Court found not to have been violated in this case. . . .

Under that view of the law, petitioner's discharge did not deprive him of a property interest protected by the Fourteenth Amendment.

Id. 344-45, 347 (footnotes omitted). *But see* *Flagg Bros.*, 416 U.S. at 169-70 n.3 (Stevens, J., dissenting):

It could be argued that since the State has the power to create property interests, it should also have the power to determine what procedures should attend the deprivation of those interests. See *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (Rehnquist, J., [plurality opinion]) [A] majority of this Court has never adopted that position

⁹ See, e.g., Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153.

¹⁰ Cf. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29-30 (1959) (criticizing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

¹¹ Cf. *Truax v. Corrigan*, 257 U.S. 312 (1921) (discussed *infra* text accompanying notes 84-85).

The connection between natural rights and state action is not one of logical necessity. Nonetheless, the doctrines are mutually sympathetic: the natural rights doctrine posits a sphere of autonomous private conduct immune from state regulation; the state action doctrine protects that sphere from certain kinds of governmental interference.

It is no coincidence that state action was born during the ascendancy of a constitutional jurisprudence of natural rights.¹² The state action doctrine originated in the *Civil Rights Cases*,¹³ in which the Supreme Court held that the fourteenth amendment did not authorize Congress to prohibit discrimination by privately owned inns, conveyances, and places of amusement; rather, its purpose was to "provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."¹⁴ Justice Bradley, a strong advocate of the constitutional enforcement of natural rights,¹⁵ assumed for the purpose of the opinion that citizens have a natural right, recognized by the common law, to equal access to public facilities, and that a state would violate the fourteenth amendment by failing to protect that right. However, the Civil Rights Act of 1875 was not "corrective legislation":

It does not profess to be corrective of any constitutional wrong committed by the States It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment.¹⁶

The Court held that Congress's power under the fourteenth amendment was limited to remedying *state* derelictions, and that the statute was constitutionally defective because it applied without

¹² See Nerkin, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977).

¹³ 109 U.S. 3 (1883).

¹⁴ *Id.* 11.

¹⁵ See, e.g., *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111 (1873) (Bradley, J., dissenting).

¹⁶ 109 U.S. at 13, 14.

regard to whether a particular state protected its citizens' natural rights.¹⁷

Subsequent to that decision, more positivist-oriented Courts have rejected Justice Bradley's view of natural liberties. For the positivist, the common law does not reflect a constitutionally acknowledged natural order. Whatever constraints the state judiciary or legislature imposes, or fails to impose, on discrimination by privately owned public accommodations are simply the result of government policy; they are not dictated by natural law. Indeed, for the positivist, rights of liberty and property exist only *by virtue of* the state's protection of them.

The doctrine of state action is an attempt to maintain a public/private distinction by attributing some conduct to the state and some to private actors. The doctrine seems, at least, less secure under constitutional positivism than under a natural law regime. The positivist cannot invoke the inherently private realm entailed by the very concept of natural rights. More fundamentally, since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every "private" action not prohibited by law.

In *Flagg Brothers*, Justice Rehnquist recognizes this danger and disavows the broadest implications of his constitutional positivism. Immediately following the positivist description of property rights quoted above, he writes:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.¹⁸

¹⁷ Although this implies that Congress could protect blacks' access to public facilities where a state systematically failed to do so, Justice Bradley hedged:

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no state can abridge or interfere with. Whether it is such a right, or not, is a different question which . . . it is not necessary to examine.

109 U.S. at 19.

¹⁸ 436 U.S. at 160 n.10.

Indeed, the decision in *Flagg Brothers* rests on the premise of an "essential dichotomy" . . . between public and private acts."¹⁹

The thesis of this essay is that positivists—which means most of us most of the time—cannot so readily have it both ways: To appropriate Justice Rehnquist's phrase in *Arnett v. Kennedy*, we "must take the bitter with the sweet."²⁰ The recognition that all social relationships and transactions are governed by law does not itself collapse the public/private distinction—so long as one maintains a substantive, normative theory of rights. But Rehnquist's positivism rejects such a theory and in so doing renders the distinction at best meaningless and at worst a vehicle for manipulating outcomes to suit the Justices' distributive tastes.

Many aspects of my analysis parallel the writings of scholars, including Lawrence Alexander, Charles Black, Harold Horowitz, Ira Nerken, Laurence Tribe, and William Van Alstyne, who in various ways have cast doubts on the "essential dichotomy."²¹ If yet another contribution to this literature can be justified it is because of the perspective provided by Justice Rehnquist's tenacious adherence to both the state action doctrine and an extreme form of constitutional positivism. The state action problem vividly illustrates the ambivalent, if not contradictory, relationship of citizen and state that plagues modern liberal theory.

II. CREDITORS' REMEDIES AND THE PUBLIC/PRIVATE DISTINCTION IN STATE ACTION DOCTRINE

A. *From Sniadach to Flagg Brothers: State Help and Self-Help*

In *Sniadach v. Family Finance Corp.*²² the Court struck down a Wisconsin statute under which, when a creditor filed the appropriate papers, the clerk of court issued a garnishment order to an allegedly defaulting debtor's employer. The clerk's task was purely ministerial, and the order issued without notice to the debtor. The Supreme Court held that prejudgment garnishment without notice

¹⁹ *Id.* 165 (citation omitted) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (Rehnquist, J.)).

²⁰ 416 U.S. at 154.

²¹ See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1147-74 (1978); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Black, "State Action," *Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Nerken, *supra* note 12; Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219.

²² 395 U.S. 337 (1969).

and a prior hearing deprived the debtor of her property without due process. *Sniadach* involved a contract between a finance company and a consumer. In *North Georgia Finishing, Inc. v. Di-Chem, Inc.*²³ the Court extended the *Sniadach* holding to prohibit the prejudgment garnishment of a commercial debtor's bank account under similar circumstances. *Fuentes v. Shevin*²⁴ relied on *Sniadach* to invalidate state statutes that authorized the sheriff to seize household goods sold under conditional sales contracts on the basis of a writ issued by the clerk of court upon the seller-creditor's ex parte application.

The only contested issue in these cases was whether the due process clause required a hearing before the debtor's property was garnished or seized.²⁵ Both the majority and the dissenting Justices assumed, without discussion, the existence of state action—that is, they assumed that the challenged procedures or transactions were constrained by the requirements of the due process clause of the fourteenth amendment.

In the years following *Sniadach*, other creditors' remedies were challenged on due process grounds. These included various "self-help" remedies, whereby creditors having security interests in goods repossessed the goods from defaulting debtors simply by taking them—without even the ministerial intervention of a state official. Such self-help repossession by secured creditors has long been permitted in many jurisdictions, and the practice is codified by section 9-503 of the Uniform Commercial Code: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace" ²⁶ Most courts dismissed the constitutional challenges to section 9-503 on the ground that, in the absence of any participation by a state official, self-help repossession was private, not state, action, and therefore not within the purview of the fourteenth amendment.²⁷ In *Flagg Brothers v. Brooks*,²⁸ the Supreme Court ad-

²³ 419 U.S. 601 (1975).

²⁴ 407 U.S. 67 (1972).

²⁵ See also *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), in which the Court upheld a Louisiana procedure under which the seller of goods on an installment sales contract had enforced a vendor's lien by having the goods sequestered without a prior hearing.

²⁶ U.C.C. § 9-503 (1972).

²⁷ See, e.g., *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973) (car repossession).

²⁸ 436 U.S. 149 (1978).

dressed a variant of the self-help procedure and held that the debtors' complaint was properly dismissed on these grounds.

Flagg Brothers, Inc., a moving and storage company, had gained possession of the complainants' furniture and household belongings when each of them was evicted from her apartment. Shirley Brooks' complaint averred:

13. When defendant Levister [the city marshal] appeared to remove plaintiff and her possessions from her apartment on June 13, 1973, plaintiff informed defendant Levister that she wanted to call someone to store her furniture and other household possessions. Defendant Levister informed plaintiff that she couldn't get anyone to store her furniture and that the man with him, defendant Flagg, was the man who would store her furniture. Plaintiff was led to believe by defendant Levister's comments that she had no choice but to let defendant Flagg store her goods.

14. Defendant Flagg informed plaintiff that plaintiff would have to pay \$65 per month for the moving and storage of the furniture. Plaintiff informed defendant Flagg that this sounded like a high price, but believing that she had no choice in the matter, told defendant Flagg to proceed with the moving and storage of her furniture and household possessions.²⁹

Gloria Jones' complaint in intervention tells essentially the same story, except she averred that she had "never . . . authorized defendant Flagg Brothers, Inc. to store her furniture and household possessions, either by written or oral contract, or otherwise."³⁰ Brooks and Jones soon became engaged in a dispute with Flagg Brothers over the charges for storage. Eventually, Flagg Brothers notified them of its intent to sell their goods as authorized by section 7-210 of the New York Uniform Commercial Code: "[A] warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods."³¹ Brooks and Jones brought a federal class action seeking damages and injunctions against the sale of their belongings. Relying on the *Sniadach* line of cases, they argued that Flagg Brothers could not enforce the

²⁹ Record at 10a.

³⁰ *Id.* 45a.

³¹ N.Y.U.C.C. § 7-210(1) (McKinney 1964).

warehouseman's lien without seeking a prior hearing to resolve their disputes.³²

The district court dismissed the complaint for want of jurisdiction, holding that Flagg Brothers' conduct was not that of the state.³³ The Second Circuit reversed.³⁴ Writing for the Court of Appeals, Judge Bryan emphasized the change in the common law made by section 7-210 of the New York Uniform Commercial Code and its statutory predecessor:

[B]y enacting § 7-210, New York not only delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, but also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff.

This delegation expanded the warehouseman's remedies far beyond those existing at common law. . . .

. . . .

Were it not for this statute, the warehouseman would stand in the position of any other creditor, i.e., he would have to have the debts he claims he is owed judicially established, and then have the sheriff execute upon the goods which he concededly has a common law right to hold as security. The action of the state in granting the warehouseman the privileged position he enjoys under § 7-210 . . . drastically changes the balance of power between debtor and creditor. It permits complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any disputes over storage charges, and as the sheriff who will enforce his own decisions. While we recognize generally the value of preserving a sphere for private activity free from the restrictions imposed upon the state by the fourteenth amendment, it is plain that the state's conscious election to delegate a portion of its uniquely governmental power to the warehouseman in order to enhance his common law position as creditor constitutes state action.³⁵

The Supreme Court reversed in an opinion written by Justice Rehnquist.³⁶ Justice Marshall wrote a short dissenting opinion.

³² For reasons that are not clear from the opinions, Levister, the marshal, was dismissed as a defendant with the complainants' consent, and nothing was made of whatever colorable state authority Mr. Flagg enjoyed by virtue of his association with the marshal.

³³ *Brooks v. Flagg Bros.*, 404 F. Supp. 1059 (S.D.N.Y. 1975).

³⁴ *Brooks v. Flagg Bros.*, 553 F.2d 764 (2d Cir. 1977).

³⁵ *Id.* 771-72 (citations & footnotes omitted).

³⁶ *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978).

Justice Stevens wrote a lengthy dissent, joined by Justices White and Marshall. Justice Brennan did not participate.

1. Justice Rehnquist's Opinion for the Court

Justice Rehnquist found the situation "clearly distinguishable" from *North Georgia Finishing*, *Fuentes*, and *Sniadach*:

In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor. . . .

. . . New York, unlike Florida in *Fuentes*, Georgia in *North Georgia Finishing*, and Wisconsin in *Sniadach*, has not ordered respondents to surrender any property whatever. It has merely enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title.³⁷

The respondents argued that Flagg Brothers' conduct was attributable to the state because the state had (1) "delegated" to Flagg "the resolution of private disputes,"³⁸ and (2) "authorized and encouraged" its conduct by enacting section 7-210.³⁹ Justice Rehnquist responded that the delegation theory applied only to functions "traditionally exclusively reserved to the State,"⁴⁰ and that

[the] system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign. . . .

. . . .

³⁷ *Id.* 161-62 nn.10 & 11 (citation omitted).

³⁸ *Id.* 157.

³⁹ *Id.* 164.

⁴⁰ *Id.* 157 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

. . . [T]he settlement of disputes between debtors and creditors is not traditionally an exclusive public function. Creditors and debtors have had available to them historically a . . . [large] number of choices . . .”⁴¹

This passage is accompanied by three lengthy footnotes which discuss the nature of state law and its relation to “self-help.” Justice Rehnquist begins with the positivist description of property rights and the statement of the public/private distinction, both quoted above in Part I.⁴² After asserting the absence of state involvement in Flagg Brothers’ conduct, he emphasizes “the important part that [self-help] remedies have played in our system of property rights.”⁴³ Referring to creditors’ liens in general, Justice Rehnquist portrays Flagg Brothers’ authority to sell the goods as arising from its private property interest in the goods rather than from the state’s conferral of power:

The conduct of private actors in relying on the rights established under these liens to resort to self-help remedies does not permit their conduct to be ascribed to the State.

. . . .

Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York’s statute has done nothing more than authorize (and indeed limit)—without participation by any public official—what Flagg Brothers would tend to do, even in the absence of such authorization, *i.e.*, dispose of respondents’ property in order to free up its valuable storage space. The proposed sale pursuant to the lien in this case is not a significant departure from traditional private arrangements.⁴⁴

Justice Rehnquist responds in similar terms to the claim that “Flagg Brothers’ proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting § 7-210.”⁴⁵ Writing that “[t]his Court . . . has never held that a State’s mere acquiescence in a private action converts that action into that of the State,”⁴⁶ he continues:

⁴¹ *Id.* 158, 160-62 (citations & footnotes omitted).

⁴² See *supra* text accompanying notes 6 & 18.

⁴³ 436 U.S. at 162 n.11.

⁴⁴ *Id.* 162 nn.11 & 12 (citations omitted).

⁴⁵ *Id.* 164.

⁴⁶ *Id.*

It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

. . . [T]his notion [is] completely contrary to that "essential dichotomy" between public and private acts [T]he State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings.

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time.⁴⁷

2. Justice Stevens' Dissenting Opinion

While Justice Rehnquist focused on Flagg Brothers' conduct, Justice Stevens focused on the state legislation and on its delegation of power to Flagg Brothers: "The State's conduct in this case takes the concrete form of a statutory enactment, and it is this statute that may be challenged."⁴⁸ Noting that "respondents have a property interest in the possessions that the warehouseman proposes to sell,"⁴⁹ and that the warehouseman's power to sell derives not from

⁴⁷ *Id.* 165-66 (emphasis in original) (citations omitted).

⁴⁸ 436 U.S. at 176.

⁴⁹ *Id.* 169 (footnote omitted). "Of course the warehouseman may also have a property interest and the ultimate resolution of the due process issue will require a balancing of these interests." *Id.* 169 n.1 (citation omitted).

contracts with the respondents, but from section 7-210,⁵⁰ Justice Stevens posed the question presented by *Flagg Brothers* as "whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause" ⁵¹ For Justice Stevens,

[t]his question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections.

. . . Under this approach a State could enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute could authorize the warehouseman to retain all proceeds of the lien sale, even if they far exceeded the amount of the alleged debt; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize "any person with sufficient physical power" [quoting the Court] to acquire and sell the property of his weaker neighbor. . . . The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.⁵²

Stevens contested the majority's view that only the delegation of an "exclusive" state function amounted to state action. The proper question, rather, was "whether the State has delegated a function traditionally and historically associated with sovereignty," ⁵³ and his answer was that "the nonconsensual transfer of property rights is . . . a traditional function of the sovereign."⁵⁴ Justice Stevens understood the garnishment cases to reflect this view.⁵⁵ State action came not from the clerk's ministerial role in signing the order, but from the "State's role in defining *and controlling* the debtor-creditor relationship"⁵⁶; the constitutional defect inhered in the unsupervised delegation to private parties of the "state power to achieve a nonconsensual resolution of a commercial dispute":⁵⁷

⁵⁰ "[P]etitioners conceded in this Court that, taking respondents' allegations as fact, as we must, there is no contractual issue in this case." *Id.* 169 n.2.

⁵¹ *Id.* 169.

⁵² *Id.* 169-70.

⁵³ *Id.* 171.

⁵⁴ *Id.* 171-72.

⁵⁵ *Id.* 171-76.

⁵⁶ *Id.* 174 (emphasis in original).

⁵⁷ *Id.*

[W]e expect government "to provide a reasonable and fair framework of rules which facilitate commercial transactions . . ." This "framework of rules" is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause.⁵⁸

Justice Stevens found it ironic that "the very defect that made the statutes in *Shevin* and *North Georgia Finishing* unconstitutional—lack of state control—is, under today's decision, the factor that precludes constitutional review of the state statute."⁵⁹

B. *State and Private Action in the Creditors' Remedies Precedents*

Where was the state action in *Sniadach* and *North Georgia Finishing* that the Court found missing in *Flagg Brothers*? The Wisconsin and Georgia laws struck down in the two earlier cases provided for prejudgment attachments ancillary to an action brought by the creditor against the debtor. In Wisconsin the clerk of court issued a summons ordering the garnishee "to retain such property . . . and make no payment . . . to the principal defendant pending the further order of the court."⁶⁰ The garnishment order was effective when the garnishee was served with the summons and various other papers. In Georgia

[t]he plaintiff . . . shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action . . . and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue.⁶¹

Upon the creditor's filing a bond for twice the amount alleged due, the official issued a garnishment summons.

This was the full extent of state involvement in the creditors' remedies. How did it differ from the state's involvement in *Flagg Brothers*? Justice Rehnquist's answer⁶² is both confusing and unpersuasive. He begins by observing that "[i]n each of those cases a government official participated in the physical deprivation" of the

⁵⁸ *Id.* 178-79 (citations & footnotes omitted).

⁵⁹ *Id.* 175.

⁶⁰ *Family Fin. Corp. v. Sniadach*, 37 Wis. 2d 163, 175, 154 N.W.2d 259, 265 (1968).

⁶¹ 15 Ga. Code Ann. 46-102 (1965) (amended 1977).

⁶² See *supra* text accompanying note 37.

complainant's property.⁶³ "Physical deprivation" accurately describes the action taken in *Fuentes*, where the sheriff went to the debtors' home and actually seized their goods. In *Sniadach* and *North Georgia Finishing*, however, the debtors' property was intangible, as was the process of seizing it.

What "government official" participated in the deprivation in *Sniadach* and *North Georgia Finishing*? Only the clerk was involved, and, as Justice Rehnquist himself suggests, the clerk's participation was of no moment: "The constitutional protection attaches not because . . . a clerk issued a ministerial writ out of the court . . ." ⁶⁴ In this respect, Rehnquist seems to agree with Stevens, who remarked on the large "number of private actions in which a government functionary plays some ministerial role" and on the peculiarity of basing constitutional review "on the fortuity of such governmental intervention." ⁶⁵ It is worth taking a moment to see why the Justices are correct.

Suppose that a state law permits a creditor who files the requisite documents with the clerk to serve a paper demanding that an employer or bank attach the debtor's salary or bank account. This paper is binding without the signature of any official; a garnishee who fails to comply is liable to the creditor for amounts that should have been but were not attached.⁶⁶ Here the creditor's "demand" is functionally identical to the clerk's "order" issued upon the creditor's filing of the proper papers. In neither case has any official adjudication or other discretionary proceeding taken place. In both cases the garnishee who fails to comply acts at the risk of liability, ultimately imposed by a state court. In short, the existence of a piece of paper called an "order," routinely issued by a clerk, is of no operational significance.

Justice Rehnquist goes on, however, to assert that in *North Georgia Finishing* state action inheres in the *effect* of the writ: The creditor has "invoked the authority of the Georgia court"; he has invoked the "affirmative command of the law of Georgia."⁶⁷ This seems a more promising source of state action. It may be significant that a state court or, more generally, state law, *has ordered* someone to do something. Even without the prior involvement of an official,

⁶³ 436 U.S. at 161 n.10.

⁶⁴ *Id.*

⁶⁵ *Id.* 174.

⁶⁶ This appears to have been the only consequence of a Wisconsin garnishee's failure to comply with the garnishment order. In Georgia, the noncomplying garnishee was potentially subject to punishment for contempt.

⁶⁷ 436 U.S. at 161 n.10.

the state stands *contingently* ready to aid a creditor who follows the proper garnishment procedures by threatening to impose sanctions on a noncomplying garnishee. Doubtless, the threat usually induces compliance.

Why should this subject the transaction to fourteenth amendment requirements of procedural due process? The usual answer goes something like this: Government officials exercise great power; their exercises of power are subject to corruption, abuse, and error; the requirements of procedural due process are accordingly designed to constrain their discretion. When the state lends (the threat of) its enforcement processes to a creditor, the creditor's self-interested determination that the debtor is in default must, a fortiori, be subject to the constraints of procedural due process.⁶⁸

How, then, does the state's role in self-help cases compare with its role in the garnishment cases discussed above? The apparent difference is this: In the garnishment cases, the state's threat of sanctions *aids the creditor in gaining possession* of the debtor's property, while in the self-help cases the state merely *grants the creditor the power or right to keep or dispose of property* that he came into possession of without the state's assistance. Does this difference justify characterizing the creditor's action as "state action" in one instance but not the other? I think not.

Let me begin with an example—a highly atypical one, I think—in which the state assumes a hands-off attitude toward debtors' and creditors' claims to the property. Suppose that the law permits a debtor and creditor to engage in an ongoing game of capture-the-security: Any creditor with a lien against a debtor's property may grab and sell it if he can, and any debtor whose property is seized by a creditor may grab it back and keep it if she can. Within this little state of nature, exempt from the usual rules that forbid us from taking whatever we think is ours or can get away with, one might conceivably say that the State has not acted when the property changes hands. In such a situation, of course, title would never be settled; indeed, the concept of "property" as we know it would not exist, and the concepts of "creditor" and "debtor" would lose definition. It seems likely that the state would eventually be called upon to impose stability or to assure that the strongest did not end up with everything.

Suppose, however, that the state intervenes to protect one or the other party's possession, once he or she has gained it. For

⁶⁸ If the due process clause applied, procedures employed by self-helping creditors would surely fail to meet one of its most elementary requirements—that one not be the judge of one's own cause.

example, suppose that the state threatens to punish Mrs. Brooks if she engages in some self-help of her own by sneaking into Flagg Brothers' warehouse and liberating her goods, or if she obstructs the public auction at which Flagg Brothers seeks to sell her goods. Although the state did not assist the creditor in gaining possession, it treats his possession as the occasion for transferring to him, and protecting against the debtor, property interests (the rights to possess and dispose of the goods) that were formerly the debtor's. Even if the creditor's *gaining* of possession cannot be characterized as action of the state, the state surely acts when it *protects* the possessory interest once gained. Unless positivism includes a covert tenet that possession is nine points of the law, the rationale for procedural due process does not seem less applicable to this exercise of state power than to the exercise of power to induce the transfer of possession.

At this point, a critic might respond that if the state's protection of the creditor's possession makes his possession state action, then state action inheres in every assertion of a property interest. For there is no conceptual or structural difference between the state's protection of the creditor's possession against the debtor, and its protection of anyone's possession against another's claim of right (or, indeed, against another's attempt to gain possession without such a claim, for example, by theft). This is a dilemma of the constitutional positivist's own making, however. In any case, it fails as a *reductio* argument against ubiquitous state action: The finding of state action in virtually all acts of possession hardly entails that anyone who claims an interest in property is entitled to a hearing before the possessor disposes of it. That is a question of *substantive* policy—as was the question whether the debtors in the garnishment cases were constitutionally entitled to a prior hearing.

This brings me to one more distinction that Justice Rehnquist draws between *Flagg Brothers* and the creditors' remedies precedents. In the earlier cases, he writes, the state participated in a "deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred"; the assets attached in *North Georgia Finishing* "previously had been the property of the debtor."⁶⁹ This is presumably in contrast to *Flagg Brothers*, where the moving and storage company, as well as the complainants, had a property interest—a lien—in their stored goods.

⁶⁹ 436 U.S. at 161 n.10.

This analysis ignores the fact that Mrs. Brooks and Mrs. Jones continued to have a property interest in the goods held by Flagg Brothers.⁷⁰ The distinction is even more fundamentally flawed, however. First, to hold that "ownership" goes to whether there was "state action" rather than to whether the complainants had a sufficient property interest in the goods to entitle them to a hearing is to conflate the "no state shall" and "deprive of property" phrases of the due process clause. This denies any autonomy to state action doctrine by subordinating it to questions of substantive law—in this case, the law of property. It is, in effect, a confession of the doctrine's bankruptcy.

Second, for a positivist of any ilk, Mrs. Sniadach's claim that the Family Finance Company took *her* property, however intuitively appealing, is premised on an incomplete description of the interests in her salary. A fuller description would include the finance company's potential right to some or all of it: Conditional sales contracts of the sort involved in *Fuentes* often explicitly grant the seller-creditor a continuing property interest in the goods sold. Indeed, a thoroughgoing constitutional positivist who reached the merits of *Sniadach*, *Fuentes*, or *North Georgia Finishing* would readily uphold the state procedures. As Justice Rehnquist's plurality opinion in *Arnett v. Kennedy* demonstrates, constitutional positivism collapses procedural into substantive due process; the debtors' claims in the earlier creditors' remedies cases would founder on the positivist's question, "what property have you been deprived of?" Put in another (positivist) way, Mrs. Sniadach had a constitutionally cognizable property interest only because the Court accorded her one; Mrs. Brooks lacks such an interest only because the Court chooses not to grant one to her.

The creditors' remedies precedents, then, must have been responsive to nonpositivist conceptions of procedural due process—perhaps conceptions that accord weight to values such as "dignity" and "participation."⁷¹ If *Flagg Brothers* is distinguishable, the difference is not a qualitative one: The concerns that require a hearing before the state assists a creditor in gaining possession of the debtor's property are also present when the state protects Flagg Brothers' retention and disposition of property that Mrs. Brooks turned over only for temporary storage.

⁷⁰ Justice Rehnquist concedes that the respondents did have such an interest, *id.* 160 n.10, but his analysis ignores its effect.

⁷¹ See *supra* note 9.

III. LAWMAKING AS STATE ACTION

Does a state's mere legislative authorization of, or acquiescence in, private conduct amount to "state action"? Justice Stevens finds state action in the governmental power underlying New York's legislative policy permitting self-help repossession: "The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged."⁷² For Justice Rehnquist, any claim of state action must be based on the status or conduct of the moving and storage company itself. Mrs. Brooks "must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York."⁷³ It is worth repeating Justice Rehnquist's response to Justice Stevens' characterization of the issue in *Flagg Brothers v. Brooks*:

It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.⁷⁴

Justice Rehnquist captures a theme strongly implicit in the body of state action doctrine. Nonetheless, there are several situations in which the Court *has* implicitly found state action in the mere existence of laws—laws not enforced against the complainant or, indeed, enforced at all.

A. Equal Protection Claims

Suppose that section 7-210 of the New York Uniform Commercial Code read as it does, but required a hearing before the sale where commercial rather than household goods were involved. Suppose that Mrs. Brooks' federal complaint averred that, whether or not the due process clause required New York to grant a hearing to anyone, the statutory distinction between personal belongings and commercial goods violated the equal protection clause.

Whatever the merits of this or any similar equal protection claim, this much is clear: First, the complaint would be treated as

⁷² *Flagg Bros. v. Brooks*, 436 U.S. 149, 176 (1978).

⁷³ *Id.* 156.

⁷⁴ *Id.* 160 n.10.

directed against the *legislation* itself and not against Flagg Brothers. Second, the existence of "state action" would be assumed without discussion, even though no state process was being enforced against Mrs. Brooks.

A court would justify adjudicating this claim on the merits by invoking a rationale for the equal protection clause along these lines: The clause is designed to prevent the state from inequitably preferring some citizens to others, or, more fundamentally, to prevent one group from capturing control of government and exploiting other groups to its own advantage. However one describes it, the equal protection clause is concerned with *comparative* treatment, and for this reason a citizen has a grievance not only when she is unfairly burdened but also when she is denied a benefit accorded others. In short, the purpose and structure of the doctrine explain why "the mere existence of a body of property law in a State" amounts to state action when it is challenged on equal protection grounds.

B. Claims Based on Retroactivity

Suppose that the contract between Mrs. Brooks and Flagg Brothers had explicitly provided that, in the event of a dispute, the storage company must apply for a judicial hearing before selling her goods. The New York legislature now passes a law relieving storage companies of such contractual obligations even with respect to the sale of goods under existing contracts. Mrs. Brooks sues Flagg Brothers in federal court, averring that the state law impairs Flagg Brothers' obligations of contract in violation of article I, section 10 of the Constitution: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁷⁵

The court would treat this as a complaint not about Flagg Brothers' conduct, but about the legislation, and would entertain the suit without questioning the existence of state action. For, though I have perversely exchanged the traditional roles of debtor and creditor, Mrs. Brooks has filed the paradigmatic contract clause complaint: State legislation has impaired the obligations of an existing contract. From *Sturges v. Crowninshield*⁷⁶ in 1819 to *Home Building & Loan Association v. Blaisdell*⁷⁷ in 1934 and since, the Court has adjudicated such cases, under the due process clause⁷⁸

⁷⁵ U.S. CONSR. art. I, § 10.

⁷⁶ 17 U.S. (4 Wheat.) 122 (1819).

⁷⁷ 290 U.S. 398 (1934) (the *Minnesota Mortgage Moratorium Case*).

⁷⁸ Although the contract clause does not apply to the federal government, courts have treated Congress's release of a private party from contractual claims as

as well as the contract clause, without questioning the existence of "state action"—indeed, without uttering the phrase.

The nature of a contract clause claim may explain the intuition of state action: the legislature has *changed* the law, frustrating the creditor's legitimate expectations. On the merits, this may seem a special circumstance even to a constitutional positivist, who, while according the state virtually plenary discretion to order property relations prospectively, would hold (perhaps for utilitarian or Kantian reasons) that the state must honor whatever interests it has once created. Yet, it is worth emphasizing that the state is not enforcing any law. Indeed, its nonenforcement is the basis of the obligee's constitutional complaint.

C. Substantive Due Process and Uncompensated Takings

Recall Justice Stevens' parade of horrors. Under the Court's analysis, he wrote, "a State could enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute . . . could authorize 'any person with sufficient physical power' to acquire and sell the property of his weaker neighbor."⁷⁹ On Stevens' view, the Constitution imposes substantive limitations on the state's power to define private property interests. As support, he might invoke *AFL v. Swing*,⁸⁰ which invalidated, essentially on first amendment grounds, a state court order issued on an employer's behalf enjoining peaceful labor picketing. And he could cite the more recent line of decisions, beginning with *New York Times Co. v. Sullivan*,⁸¹ imposing first amendment constraints on state defamation law.

These decisions differ from Justice Stevens' examples in two ways, however. They involve a relatively specific constitutional provision (the first amendment), while Stevens' examples sound in due process. Moreover, *Swing* and *New York Times* constrain state courts from "acting" by entering judgments altering the status quo between the parties. In Justice Stevens' examples, the state is *not* acting when he thinks it should; it is leaving the parties as it finds them.⁸²

a deprivation of property sounding in due process. See, e.g., *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948).

⁷⁹ 436 U.S. at 170 (citation omitted).

⁸⁰ 312 U.S. 321 (1941).

⁸¹ 376 U.S. 254 (1964).

⁸² There is another distinction, but one that the modern court does not find salient: Justice Stevens' examples are of legislation, while most of the cases involving picketing and defamation have involved judge-made rules.

Although there is at least one contemporary precedent,⁸³ the clearest instance of a holding that judicial *inaction* can deprive someone of property without due process comes from the era of economic due process. In *Truax v. Corrigan*⁸⁴ the Court struck down an Arizona statute that forbade judges from issuing injunctions to prohibit peaceful picketing in labor disputes. The essence of Chief Justice Taft's opinion appears in these sentences:

Plaintiffs' business is a property right . . . and free access for employees, owner and customers to his place of business is incident to such right. Intentional injury caused to either right or both by a conspiracy is a tort. . . .

A law which operates to make lawful such a wrong as is described in plaintiffs' complaint deprives the owner of the business and the premises of his property without due process

It is argued that, while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the State for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the State may withdraw all protection to a property right by civil or criminal action for its wrongful injury if the injury is not caused by violence. . . . It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve⁸⁵

Swing in effect overruled *Truax* and substantially *required* states to adopt the Arizona policy invalidated by the Taft Court. What has changed during the intervening decades? For one thing, the particular rights that the Court is prepared to protect. The Taft Court's solicitude for property and contract has been superseded by concerns for free speech, equal protection, and the like. Second, the natural rights jurisprudence embodied in *Truax*—a

⁸³ See *infra* text accompanying notes 89-95.

⁸⁴ 257 U.S. 312 (1921).

⁸⁵ *Id.* 327-29 (citations omitted).

view under which some property rights have the status of higher law so that the state's nonprotection of those rights is tantamount to a deprivation of property without due process—has become problematic for the modern Court.

Traces of the natural rights view still can be found in state decisions addressing the constitutionality of statutes that modify common law rules of liability for car accidents and medical malpractice.⁸⁶ Analogous issues have arisen in two contemporary Supreme Court decisions. Although the Court denied the constitutional claims in both cases, it is noteworthy that it simply *assumed* the existence of state action.

In one of these cases, *Duke Power Co. v. Carolina Environmental Study Group*,⁸⁷ the Court upheld the Price-Anderson Act's \$560 million limitation of liability for nuclear accidents caused by power plants. Chief Justice Burger dealt only briefly with the due process objection that the provision "fails to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates":

Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy. However, we need not resolve this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common-law or state tort law remedies it replaces.⁸⁸

The more interesting case is *PruneYard Shopping Center v. Robins*,⁸⁹ which grew out of a series of state action decisions concerning constitutional constraints on the power of shopping centers to exclude picketers and leafleters. In *Amalgamated Food Employees Union v. Logan Valley Plaza*,⁹⁰ the Court held that a shopping center acted as the state and was bound by the first and fourteenth amendments. In a dissenting opinion, Justice Black expressed a constitutional concern for the shopping center's property rights:

[T]he Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment

⁸⁶ See, e.g., *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971).

⁸⁷ 438 U.S. 59 (1978).

⁸⁸ *Id.* 87-88 (footnotes omitted).

⁸⁹ 447 U.S. 74 (1980).

⁹⁰ 391 U.S. 308 (1968).

... means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take a part of Weis' property to give to the pickets for their use, the Court should also award Weis just compensation for the property taken.⁹¹

Logan Valley was limited severely four years later by *Lloyd Corp. v. Tanner*,⁹² and was formally overruled in 1976.⁹³ Justice Powell, writing for the Court in *Lloyd Corp.*, echoed Justice Black's concerns that "the Fifth and Fourteenth Amendment rights of private property owners . . . must be respected and protected."⁹⁴

The respondents in *PruneYard* were students, prohibited by the shopping center's guards from distributing leaflets on the premises. In an action brought by the leafleters against PruneYard, the California Supreme Court held for the complainants. The court acknowledged that, as a matter of federal constitutional law, the privately owned shopping center was not bound by the first and fourteenth amendments. But it interpreted the California Constitution to permit "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned,"⁹⁵ and it rejected the shopping center's argument that such a holding constituted a "taking" of property without just compensation or a deprivation without due process.

The United States Supreme Court unanimously affirmed on the merits. Writing for the Court, Justice Rehnquist easily concluded that the California policy was not so burdensome or unreasonable as to violate the fifth and fourteenth amendments. He also asserted what is in effect the federalist corollary of constitutional positivism—that "as a general proposition . . . the United States, as opposed to the several States, [is not] possessed of residual authority that enables it to define 'property' in the first instance."⁹⁶

Justice Blackmun joined in the Court's opinion except for the sentence just quoted.⁹⁷ Justice Marshall concurred at some length.

⁹¹ *Id.* 330.

⁹² 407 U.S. 551 (1972).

⁹³ *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁹⁴ 407 U.S. at 570.

⁹⁵ 23 Cal. 3d 899, 910, 592 P.2d 341, 347, 153 Cal. Rptr. 854; 860 (1979).

⁹⁶ 447 U.S. at 84.

⁹⁷ *Id.* 88-89.

He linked the case to the "question of whether and to what extent a State may abrogate or modify common-law rights."

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State If accepted, that claim would represent a return to the era of *Lochner*

On the other hand, I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way.⁹⁸

"State action" was never mentioned in *PruneYard*. Perhaps the posture of the case and the relief granted (the California court enjoined the shopping center from excluding the leafleters) made it apparent that the state was acting. But from what I can glean from the state and federal court opinions, the case would not have been treated differently if the shopping center had brought an action to enjoin the leafleting and relief had been denied. In essence, the Supreme Court viewed *PruneYard* as an inverse condemnation action, treating the shopping center's claim like those of the property owners in such cases as *United States v. Causby*⁹⁹ and *Griggs v. Allegheny County*,¹⁰⁰ in which it required that compensation be paid for the diminution of property values caused by low-flying aircraft. In other words, the state action at issue in *PruneYard* was nothing more than a state property rule.

Although the equal protection and contract clause cases seem remote from the issue in *Flagg Brothers*, the takings and substantive due process cases are closely related, and they contradict Justice Rehnquist's assertion that "the mere existence of a body of property law in a State . . . [does not] itself amount[] to 'state action' even though no state process or state officials were ever involved in en-

⁹⁸ *Id.* 93-94 (footnote omitted).

⁹⁹ 328 U.S. 256 (1946).

¹⁰⁰ 369 U.S. 84 (1962).

forcing that body of law.”¹⁰¹ How could the Court deny the existence of state action in *Flagg Brothers* when state action had been assumed without question in *PruneYard*?

IV. THE PERSISTENCE OF STATE ACTION

The preceding sections have examined two doctrinal issues presented by *Flagg Brothers v. Brooks*:¹⁰² whether the moving and storage company's self-help enforcement of the warehouseman's lien constitutes state action, and whether the existence of a state law (in this case, section 7-210 of the New York Uniform Commercial Code) that permits self-help enforcement is state action. With respect to the first, I have argued that there is no conceptual difference between the state involvement in cases such as *Sniadach v. Family Finance Corp.*,¹⁰³ in which the threat of sanctions aids the creditor in gaining possession of the debtor's property, and *Flagg Brothers*, in which the threat of sanctions aids the creditor in maintaining possession of and control over property already in his possession but claimed by the debtor. With respect to the second, I have shown that “the mere existence of a body of property law” sometimes does amount to state action, and more particularly that the Court has implicitly found state action in laws that distribute property interests among citizens in situations, such as *PruneYard Shopping Center v. Robins*,¹⁰⁴ that are not readily distinguishable from *Flagg Brothers*.

Having done with doctrinal arguments, it remains to account for the intuition that there are nonetheless some differences. Let me suggest two related possibilities, one having to do with “change,” the other with “consent” and more broadly with the value of individual autonomy in our society.

In our everyday life we notice change and movement, while things that do not change fade into the background. It is consistent that we perceive the state as involved in our affairs when it assists in changing the status quo, and not when it assists in maintaining it. The invention of the phrase “state action” to describe the ambit of the fourteenth amendment reflects and buttresses the distinction. This probably underlies the perception of greater state involvement in *Sniadach* than in *Flagg Brothers*, but it does not distinguish the latter case from *PruneYard*. In any event, I do not find the distinction persuasive.

¹⁰¹ 436 U.S. at 160 n.10.

¹⁰² 436 U.S. 149 (1978).

¹⁰³ 395 U.S. 337 (1969).

¹⁰⁴ 447 U.S. 74 (1980).

The role that consent plays in state action doctrine is illustrated by a comparison of *AFL v. Swing*¹⁰⁵ and *New York Times Co. v. Sullivan*¹⁰⁶ with *Shelley v. Kraemer*¹⁰⁷ (a suit to enforce a racially restrictive covenant) and *Bell v. Maryland*¹⁰⁸ (a criminal trespass prosecution against blacks who had refused to leave a "white" restaurant when denied service). All four cases involved private litigation in which state courts entered judgments against the defendants. In *Swing* and *New York Times* the existence of state action was not doubted, for the courts were enforcing substantive state policies. State action was problematic in *Shelley* and *Bell*,¹⁰⁹ however, because the courts were perceived to be enforcing the results of consensual private ordering.

The doctrinal importance of consent reflects our psychological and ideological need to believe that there are essentially private realms, albeit circumscribed by state and society, in which actions are autonomous. To treat all relations among individuals as state action contradicts any sense we have of such autonomy and denies its very possibility. We therefore tend to view the law of contracts as merely the given background against which private consensual transactions can take place.

This partly explains why state action is readily assumed in *PruneYard* and other inverse condemnation cases and why it is thought problematic in the creditors' remedies cases. In the former cases the state is imposing a (nonconsensual) order on private relations. In the latter, the debtor is assumed to have implicitly consented to existing common law or statutory remedies by not contracting out of them.

"Consent" does not explain the different outcomes in *Sniadach* and *Flagg Brothers*, however—especially with respect to Mrs. Jones' complaint, which specifically averred that she had *not* agreed to have her goods stored.¹¹⁰ Even if the contracts signed by the debtors had referred to the remedies available to the creditors, this would not entail that the debtors had "consented" to them in a psychologically, politically, or constitutionally adequate way. For example,

¹⁰⁵ 312 U.S. 321 (1941). See *supra* text accompanying note 80.

¹⁰⁶ 376 U.S. 254 (1964). See *supra* text accompanying note 81.

¹⁰⁷ 334 U.S. 1 (1948).

¹⁰⁸ 378 U.S. 226 (1964).

¹⁰⁹ Although in *Shelley* the Court found that judicial enforcement of the covenant was unconstitutional state action, that finding was and continues to be controversial. See, e.g., Wechsler, *supra* note 10. And in *Bell*, as in other sit-in cases of the period, the Court assiduously ducked the state action question.

¹¹⁰ 436 U.S. at 160. This apparently struck the Court as so atypical (or, perhaps, unbelievable) that it ignored the claim.

it would remain open to question whether the debtors had "knowingly and intentionally" placed their personal belongings under the creditor's unilateral control.¹¹¹

If conceptions of change and consent do not provide adequate explanations for the state action doctrine, perhaps the doctrine may be instrumental to other legal, political, or social aims. The very existence of the doctrine serves as a limitation on the exercise of judicial power—especially federal judicial power—and the doctrine may therefore be thought to protect the autonomy of individuals and legislatures from judicial intrusion, and the autonomy of the states from federal intrusion.

Assessing whether the state action doctrine actually serves these functions requires at least two inquiries. First, one must measure the results of applying the doctrine against those entailed by a substantive theory of constitutional constraints—a theory that indicates what (if any) conduct of individuals, associations, corporations, and privately owned public utilities should be subject to the free speech, equal protection, and due process clauses. Second, one must determine whether the state action doctrine is more administerable (or less manipulable) than addressing these substantive questions directly.

The first inquiry lies well beyond the scope of this essay. Although the second is familiar ground, it is worth mentioning four somewhat different approaches to state action: "sifting and weighing," "authorization and encouragement," "delegation of public function," and "formalism."

The first of the four approaches was articulated by Justice Clark, who wrote in *Burton v. Wilmington Parking Authority*¹¹²

¹¹¹ See *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972), which, while upholding a corporation's waiver of a hearing on a cognovit note, implied that the due process clause requires scrutiny of the debtor's supposed contractual waiver of a hearing. Writing for the Court, Justice Blackmun assumed for purposes of argument that any waiver must be "knowingly and intelligently made," but held that this standard was met, emphasizing that the complainant was a large corporation bargaining on equal terms with the holder of the note. He noted that "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." *Id.* 188. In *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972), see *supra* text accompanying note 24, the Court quoted this language approvingly and emphasized the different bargaining posture of the parties, but held that there had been no consent of any sort.

¹¹² 365 U.S. 715 (1961). The case involved the refusal of a coffee shop, located in a municipally owned and operated parking garage, to serve black customers. The Court was concerned, among other things, with the *symbolic* involvement of the state in the putatively private activity. Under a theory of the equal protection clause going back at least to Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 552-64 (1896), the insult or stigma inflicted when the

that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."¹¹³ This differs from Justice Stewart's famous "I know it when I see it" standard for judging obscenity¹¹⁴ mainly in the comparative precision of the latter:

The complainants in *Flagg Brothers* relied on the different strategy articulated by the Court in *Reitman v. Mulkey*¹¹⁵ when they argued that section 7-210 of the New York Uniform Commercial Code implicated the state in the warehouse's self-help by "authorizing" and "encouraging" the private conduct. Justice Rehnquist acknowledged that private action "compelled" or "ordered" by the state is tantamount to state action, but asserted that "a State's mere acquiescence in a private action" does not convert it into state action.¹¹⁶ With respect to the issue in *Flagg Brothers* he wrote:

If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.¹¹⁷

This seems essentially correct, and *Reitman* itself is widely understood to illustrate the malleability of the "authorization and encouragement" approach.

state expresses the view that some racial groups are superior to others renders the expression unconstitutional without regard to any material consequences that may accompany or be caused by the expression.

¹¹³ 365 U.S. at 722 (citation omitted).

¹¹⁴ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹¹⁵ 387 U.S. 369 (1967). In *Reitman* the Court affirmed the California Supreme Court's invalidation on equal protection grounds of an amendment to the California Constitution which repealed the state's fair-housing laws and prohibited their future enactment by the legislature. The Court agreed with the California high court that the amendment "was intended to authorize, and does authorize, racial discrimination . . ." *Id.* 381.

¹¹⁶ 436 U.S. at 164.

¹¹⁷ *Id.* 165.

The "delegation of a public function" approach originated in *Marsh v. Alabama*,¹¹⁸ in which the Court held that the first amendment prevented the Gulf Shipbuilding Corporation from prohibiting a Jehovah's Witness to speak within the limits of its company town, and in the *White Primary Cases—Nixon v. Condon*¹¹⁹ and *Terry v. Adams*¹²⁰—which held that political parties and clubs must permit blacks to vote in internal elections that effectively determined the outcome of state elections. These decisions have been thought to establish that operating a town and running state and local elections are intrinsically governmental functions and, hence, constitute state action no matter who performs them. The complainants in *Flagg Brothers* argued, along these lines, that section 7-210 of the New York Uniform Commercial Code delegated a public function to the moving and storage company. As Justice Stevens wrote in dissent, the "power to order binding, nonconsensual resolution of a conflict between debtor and creditor" is a public function, and "the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny."¹²¹

Justice Rehnquist responded that the "delegation" theory applied only to functions "'traditionally *exclusively* reserved to the State.'"¹²² With respect to the situation in *Flagg Brothers* he wrote:

[T]he proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute. The system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.

. . . [T]he settlement of disputes between debtors and creditors is not traditionally an exclusive public function. Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of

¹¹⁸ 326 U.S. 501 (1946).

¹¹⁹ 286 U.S. 73 (1932).

¹²⁰ 345 U.S. 461 (1953).

¹²¹ 436 U.S. at 176.

¹²² 436 U.S. at 157 (emphasis added) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974), which held that a privately owned public utility's decision to terminate service to a customer was not constrained by fourteenth amendment standards of due process. Among the complainant's arguments was that the utility performed a "public function" and that this subjected it to constitutional limitations).

Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided.¹²³

Justice Rehnquist's argument contains, and perhaps depends on, an ambiguity. His claim is that Flagg Brothers is not performing "an exclusive prerogative of the sovereign."¹²⁴ But here, and in the excerpt quoted immediately below, he focuses on the exclusivity of the prerogative of the *private* actors, that is, on their effective monopolistic power over the constitutional complainants. Although this confusion is not inevitable, it exemplifies a structural defect in any "public function" analysis: Any characterization of the archetypal public function and the private activity supposedly fitting into the archetype is inherently indeterminate. Consider, for example, Justice Rehnquist's description of the *White Primary Cases* and *Marsh* and his comparison of them with *Flagg Brothers*:

While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function. . . . The doctrine . . . encompasses only . . . elections conducted by organizations which in practice produce "the uncontested choice of public officials." . . .

. . . Just as the Texas Democratic Party in *Smith* and the Jaybird Democratic Association in *Terry* effectively performed the entire public function of selecting public officials, so too the Gulf Shipbuilding Corp. performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned. . . .

These two branches of the public function doctrine have in common the feature of exclusivity. Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute. Respondent Brooks never has alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law.¹²⁵

¹²³ *Id.* 160-62 (citations omitted).

¹²⁴ *Id.* 160 (footnote omitted) (emphasis added).

¹²⁵ *Id.* 158-60 (citations & footnotes omitted).

While "conducting" a local government election certainly seems a uniquely governmental function, influencing or even determining the outcome of a local government election does not. Formally, the democratic clubs did not perform a governmental function. But they had the same effect: their elections "were the only meaningful elections in Texas." But if the issue in those cases was "meaningfulness," why isn't that the issue in *Flagg Brothers* as well? Brooks could, in theory, have obtained a waiver—just as blacks could, in theory, have gained admission to the political clubs. The chances were probably the same in both cases.¹²⁶

What government function did the Gulf Shipbuilding Corp. perform "exclusively"? Justice Rehnquist quotes Justice Black's assertion that Chickasaw possessed "all the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated.'" ¹²⁷ Chickasaw apparently was not a municipal corporation, however, nor did the company perform all of the functions that are often undertaken by municipalities—such as holding elections, taxing, and operating public libraries, schools, and other facilities.¹²⁸

While Justice Rehnquist focused on exclusivity, Justice Stevens focused on the *tradition* of the state's exercise of power to resolve debtor-creditor disputes. Like Judge Bryan in the Court of Appeals, he emphasized the relative novelty of the self-help remedy and its departure from the practice at common law. As Judge Bryan noted, however, New York had permitted creditors' self-help since 1879.¹²⁹

¹²⁶ As Justice Marshall pointed out in dissent, the requirement of posting a bond of twice the value of the goods effectively precluded Mrs. Jones from replevying her goods: "While the Court is technically correct that respondent 'could have sought' replevin, it is also true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding eviction and the seizure of her household goods by the warehouseman." *Id.* 167.

¹²⁷ *Id.* 159 (quoting *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)).

¹²⁸ Indeed, all of the "municipal" functions of Chickasaw are sometimes performed by private entities. Assume that the land encompassed by Chickasaw is owned by two corporations—one a land development company on whose property live all the people in the vicinity; the other a shopping complex (like Logan Valley) on which are situated the only businesses in the vicinity. Is either corporation performing an exclusively public function? Does the function become exclusively public if the two enterprises fall into the same hands? The situation in *Marsh*, like that in *Terry*, can be characterized in terms of either theoretical or practical alternatives. Residents of Chickasaw were free to do their shopping in Mobile and other municipalities, and could, if they had cared to, have stepped outside of the property owned by the Gulf Shipbuilding Corporation to hear Mrs. Marsh's religious messages.

¹²⁹ 553 F.2d at 772 & n.14.

The assertion that a century-old remedy is inconsistent with tradition seems fairly persuasive evidence that this criterion is no more determinate than the concepts of "government function" and "exclusivity" relied on by Justice Rehnquist.¹³⁰

Because it is not possible to describe the essence or scope of the government function or the exclusivity with which it is performed with any degree of specificity,¹³¹ the public function doctrine invites manipulation. It *does* serve as a proxy for decisions on the merits, but not in any defensible way. And in *Flagg Brothers*, the Court used the finding of no state action to deny the plaintiffs' procedural due process claims without addressing them on the merits.¹³²

The final approach to state action, which I term "formalist," would apply the fourteenth amendment only to state officials acting directly against the complainant, and would deem "private" all action by people other than officials. This strategy might reflect the view that the Constitution should be concerned only with abuses of power visibly engaged in by the government; it might seem to offer a clarity or certainty of application noticeably missing from the other approaches. As with other formalist legal strategies, however, the certainty is deceptive. For example, the formalist would almost surely wish not to find state action where a state official (such as a judge or sheriff) enforced "consensual" private ordering; this exception itself requires creating a criterion of consent.¹³³ Consider, also, how the formalist would respond to misconduct by the police if the state contracted with "private" agencies to perform all law-enforcement and peace-keeping functions. I

¹³⁰ See *supra* text accompanying notes 122-28.

¹³¹ For further illustration of this point, compare *Metropolitan Edison*, described *supra* note 122, with *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Court held that the Federal Labor Standards Act could not constitutionally be applied to various state and municipal employees on the ground that the federal provisions would

significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. *Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens.*

Id. 851 (emphasis added).

¹³² See also Judge Friendly's comments on *Metropolitan Edison*, 130 U. PA. L. REV. 1289, 1291 (1982).

¹³³ Cf., e.g., *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (discussed *supra* note 111).

shall not multiply examples. The point is that any simple formalist strategy would rapidly be qualified—probably along the lines suggested by the first three approaches.

* * *

In sum, the Court's state action doctrine seems a crude substitute for addressing and accommodating the concerns to prevent abuse of power on the one hand, and to protect individual autonomy and federalist values on the other. The doctrine does serve an important ideological function: it reflects and reinforces the ideas of natural spheres of individual autonomy and a natural regime of property rights. If this is inconsistent with a purely positivist theory of the state, the answer is—*pace* Justice Rehnquist—that American constitutional jurisprudence has never adopted any pure political theory, that it has comfortably embraced contradictory theories. Whatever its pragmatic virtues, however, this Whitmanesque capacity to encompass contradictions invites manipulation and mystification. The state action doctrine seems a case on point. The doctrine has seldom been used to shelter citizens from coercive federal or judicial power. More often, it has been employed to protect the autonomy of business enterprises against the claims of consumers, minorities, and other relatively powerless citizens.