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Parks v. Mr. Ford and the Development of a Rational Approach to Resolving Inconsistencies in Results of Due Process Attacks on Creditors' Remedies

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PARKS v. "MR. FORD" AND THE DEVELOPMENT OF A RATIONAL APPROACH TO RESOLVING INCONSISTENCIES IN RESULTS OF DUE PROCESS ATTACKS ON CREDITORS' REMEDIES

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I. INTRODUCTION

THE RECENT Third Circuit en banc decision in the case of *Parks v. "Mr. Ford"*[1] elicited a spectrum of opinions[2] on the issue of state action in creditors' remedies. The specific remedies challenged in *Parks* were the detention and sale aspects of the repairman's lien in Pennsylvania. The court's discussion, however, included references to creditors' remedies cases in other contexts. Part II of this article describes the *Parks* opinions in detail.[3] Part III enumerates the inconsistencies among the decisions in the creditors' remedies cases throughout the country, discusses the landmark decisions in this area of the law, highlights the crucial factors in these decisions, and recommends factors that the author feels should be emphasized by a court confronted with the issue of the presence of state action in creditors' remedies.[4] The article concludes with speculation on the effect of the *Parks* decision which, according to the author, may be considerable.[5]

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Mr. Scholl argued both Swarb v. Lennox, 405 U.S. 191 (1972) and Parham v. Cortese, 407 U.S. 67 (1972) (companion case to Fuentes v. Shevin) before the Supreme Court for the consumer-plaintiffs and was also counsel for the consumer-plaintiffs in Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974) and Parks v. "Mr. Ford," 556 F.2d 132 (3d Cir. 1977).

1. 556 F.2d 132 (3d Cir. 1977).

2. Five separate opinions were filed in this decision. *See* note 13 *infra.* The *Parks* plurality included Judge Van Dusen who has since retired and been replaced by former district judge Judge Higginbotham. Judge Higginbotham's views on state action in the context of creditors' remedies is uncertain. He avoided the issue when possibly confronted with it in *Younger v. Plunkett,* 395 F. Supp. 702 (E.D. Pa. 1975). The only clue is his relatively expansive expression of due process in *Isaacs v. Board of Trustees of Temple Univ.,* 385 F. Supp. 473 (E.D. Pa. 1974), the reasoning of which was adopted by the majority of the Third Circuit in *Braden v. University of Pittsburgh,* 552 F.2d 948, 962-63 (3d Cir. 1977) (en banc).

3. *See* notes 6-61 and accompanying text *infra.*

4. *See* notes 62-239 and accompanying text *infra.*

5. *See* note 240 and accompanying text *infra.*

II. PARKS v. "MR. FORD"

Five Pennsylvania residents brought suit under section 1983 of the Civil Rights Act of 1871[6] against automobile repairmen who had retained possession of the owners' automobiles subsequent to the plaintiffs' refusal to pay the amounts which the repairmen charged for repairs.[7] Pennsylvania common law confers upon a repairman the right to retain possession of items that he repairs until he is paid for his work.[8] Pennsylvania statutes grant to a repairman the right

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6. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

7. Parks v. "Mr. Ford", 386 F. Supp. 1251 (E.D. Pa. 1975). Plaintiff Gilbert Parks claimed that he took his car to Ford's Speed Shop on or about February 4, 1972, and authorized the replacement of a transmission seal, a job he estimated would cost $30. *Id.* at 1253. After being notified that the bill was $203, Parks refused to pay and Ford retained possession. *Id.* Eventually, Ford recovered a judgment against Parks for $125. *Id.* Parks paid the judgment, regained possession of the automobile and sought damages for the alleged improper detention. *Id.*

Plaintiff Hattie Ellerbe had her 1960 Chevrolet automobile towed to Bradley's Automobile Service on or about January 30, 1972. *Id.* She claimed that she asked for an estimate and was subsequently notified that the repairs had been completed and the charges totaled $493.02. *Id.* After Ellerbe refused to pay, Bradley's counsel informed her that Bradley was retaining the vehicle, asserting a repairman's lien. *Id.* Bradley placed the car on the street, where Ellerbe later found it stripped of its wheels and other parts. *Id.* Ellerbe maintained that she was entitled to damages. *Id.*

Plaintiff Lewis Williams brought his car to Erwin Chevrolet, Inc. in April, 1972. *Id.* Williams claimed that Erwin agreed to install a starter motor that Williams had purchased elsewhere for a labor charge of $12. *Id.* Erwin allegedly installed a rebuilt motor and billed Williams $48.55. *Id.* After Williams' refusal to pay, Erwin retained possession and notified Williams that the automobile would be placed in storage. *Id.* at 1253-54. Although Williams regained possession of his vehicle through agreement of counsel, he sought damages for the allegedly improper detention. *Id.* at 1254.

Plaintiff Lois Dillon brought her automobile to North Penn Motors on or about June 25, 1971. *Id.* Plaintiff's vehicle was repaired after a delay due to a labor dispute. *Id.* However, she was also billed an additional $198 for replacement of wheels and tires which had been stolen from the car while in North Penn Motors' lot, and she refused to pay for the wheels and tires. *Id.* Dillion furnished bond and took possession of the car pursuant to an order of Judge Masterson. *Id.* Both Dillon's right to possession and her claim for damages were in dispute. *Id.*

In September, 1972, plaintiff William Muldowney, Jr. authorized International Cycles, Inc. to repair a gasket and an oil pump on his motorcycle, provided the cost did not exceed $50. *Id.* In April, 1973, Muldowney was notified that the motorcycle had been rebuilt and the bill was $400. *Id.* Muldowney refused to pay and International retained possession. *Id.* Subsequently, International lost its lease and Muldowney's motorcycle was broken down into pieces of metal by the new owner. *Id.* Plaintiff claimed damages and abandoned his vehicle as worthless. *Id.*

8. Wilson v. Malenock, 128 Pa. Super. Ct. 544, 194 A. 508 (1937).

to sell the items retained under his common law lien.[9] Plaintiffs asserted that the retention and sale elements of these repairman's liens violated their due process rights under the fourteenth amendment[10] by permitting repairmen to deprive plaintiffs of use or ownership of their property without prior judicial determination of the validity of the underlying claim.[11] The United States District

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9. PA. STAT. ANN. tit. 6, §§ 11-14 (Purdon 1963) provide:

§ 11. Procedure for sale of personal property under common law lien

Hereafter where any person, corporation, firm, or copartnership may have what is known as a "common law lien" for work done or material furnished about the repair of any personal property belonging to another person, corporation, firm, or copartnership, it shall be lawful for such person, corporation, firm, or copartnership having said common law lien, while such property is in the hands of the said person, corporation, firm or copartnership contributing such work and material, to give notice in writing to the owner of the amount of indebtedness for which said common law lien is claimed for the labor and material that has entered into the repair, alteration, improvement, or otherwise, done upon the said property. If the said claim for work or material is not paid within thirty days the said person, corporation, firm or copartnership to which said money is due, may proceed to sell the said property, as hereinafter provided: Provided, however, that the owner of said property, if he disputes said bill, may issue a writ of replevin, as provided by law, within the said thirty days, and the said dispute shall be settled in said action of replevin.

§ 12. Notice of sale

The notice hereinbefore provided for shall contain an itemized statement setting forth the work and material furnished for the repair, alteration, or improvement of the said personal property, and shall be verified by oath of the claimant; and if said claim is not paid within said thirty days then the said claimant may sell the said property at public sale by giving ten days' notice thereof in the same manner as personal property is sold by sheriff or constable.

§ 13. Disposition of proceeds

After satisfying the lien and any costs that may accrue, any residue remaining shall on demand, within six months, be paid to the owner of the property; and if such residue is not demanded within six months from the date of the sale, the same shall be deposited by the person making the sale with the treasurer of the county, together with a statement of the claim and the costs of enforcing the same, as copy of the published notice, and of the amounts received for the goods at said sale. Said residue shall by the county treasurer be credited to the general revenue fund of the county, subject to the right of the owner, or his personal representatives, to reclaim the same at any time within three years from the date of the deposit with the county treasurer.

§ 14. Title on sale

All sales of property made under this act shall be as conclusive to the title conveyed as if sold by a sheriff or constable.

Id.

It should be noted that the Pennsylvania statutes do not codify the repairman's detention lien. This lien is assumed to exist in the common law of Pennsylvania, as § 11 makes clear. Section 11 merely adds the right to sell to the common law right to detain and the following sections establish the sale procedure. *See* PA. STAT. ANN. tit. 6, §§ 11-14 (Purdon 1963).

10. The fifth amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment makes this guarantee applicable to the states. *See* U.S. CONST. amend. XIV, § 1.

11. Parks v. "Mr. Ford", 386 F. Supp. 1251, 1252-53 (E.D. Pa. 1975).

Court for the Eastern District of Pennsylvania granted summary judgment against each plaintiff, concluding that neither the retention nor the sale of a motor vehicle by a repairman was action "under color of" Pennsylvania law.[12] On appeal, the United States Court of Appeals for the Third Circuit, sitting en banc,[13] affirmed in part and reversed and remanded in part, holding that: 1) the retention of a customer's vehicle by a repairman pursuant to the common law repairman's lien did not constitute state action under color of state law as required by section 1983; 2) state action is present when a repairman sells a customer's vehicle pursuant to Pennsylvania's statutes; and 3) the Pennsylvania statutes authorizing sale of a vehicle by a repairman do not satisfy the due process requirements of the fourteenth amendment.

Judge Garth began the plurality opinion by observing that, in *Magill v. Avonworth Baseball Conference,*[14] the Third Circuit had identified three categories of cases in which private parties were held to be involved in state action: 1) where state courts enforce a private agreement; 2) where the state is significantly involved with a private party; and 3) where there was private performance of a public function.[15] He dismissed the first category because "the defendants never invoked the assistance of state courts to enforce their liens."[16] Turning to the second category, Judge Garth initially distinguished *Fuentes v. Shevin*[17] and *Sniadach v. Family Finance Corp.*[18] because no state official is involved, however ministerially or insignificantly, in repairman's actions.[19] The court determined that *Hunter v. Erickson*[20] and *Reitman v. Mulkey*[21] were "readily distinguishable" since the private activity in the repairman's lien situation "does not involve racial discrimination."[22] The third category of state action cases was distinguished principally on the basis of *Gibbs v. Titelman,*[23] because the actions of the repairmen were not tradition-

12. *Id.* at 1269-1270. A motion for reconsideration was also denied by the district court. Parks v. "Mr. Ford", 68 F.R.D. 305 (E.D. Pa. 1975).

13. Judge Garth wrote an opinion for a plurality of the court. Judges Adams, Gibbons and Hunter concurred and wrote separate opinions. Chief Judge Seitz concurred in part and dissented in part and filed an opinion in which Judge Aldisert joined.

14. 516 F.2d 1328, 1330-31 (3d Cir. 1975).

15. 556 F.2d 132, 135 (3d Cir. 1977) (plurality opinion), *citing id.*

16. 556 F.2d 135 (plurality opinion) (footnote omitted).

17. 407 U.S. 67 (1972). *See* notes 98-102 and accompanying text *infra.*

18. 395 U.S. 337 (1969). *See* notes 75-81 and accompanying text *infra.*

19. 556 F.2d at 136-37 (plurality opinion).

20. 393 U.S. 385 (1969). *See* notes 211-13 and accompanying text *infra.*

21. 387 U.S. 369 (1967). *See* notes 208-10 and accompanying text *infra.*

22. 556 F.2d at 137 (plurality opinion).

23. 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974). In *Gibbs,* the Third Circuit held that self-help repossession of automobiles under the Uniform Commercial

ally reserved to the state since the retention lien existed at common law.[24]

In contrast, Judge Garth found state action in the repairman's power to sell.[25] He was impressed with the language in two of the repairman's lien statutes that expressly stated that the repairman may proceed in the same manner as a sheriff or constable in conducting the lien-enforcement sale.[26] Judge Garth found significance in the fact that "the garageman's power to sell property retained under his common law lien, unlike the lien itself, was not authorized prior to the enactment of the statute in 1925 and arises solely from that legislation."[27]

Having found state action present in the sales provisions, Judge Garth next concluded that the entirely extrajudicial sale process was violative of due process[28] on the basis of the standards set forth in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[29] *Fuentes*,[30] and *Jonnet v. Dollar Savings Bank of New York*.[31]

In a concurring opinion, Judge Hunter, the author of the *Gibbs* opinion, underscored his understanding that the fact that the retention lien was established by Pennsylvania common law rather than by statute was irrelevant.[32] A different conclusion, noted Judge Hunter, would result in the same conduct entailing different due process consequences in different jurisdictions simply because of the existence of a state statute.[33] He also rejected reliance upon the statutory language granting the repairman the same powers in execution as a sheriff or constable.[34]

Rather, Judge Hunter narrowed the distinction between the detention and sale features of the Pennsylvania repairman's lien law

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Code did not involve state action. *Id.* at 1113. *See* note 138 and accompanying text *infra*.

24. 556 F.2d at 138-39 (plurality opinion).

25. *Id.*

26. *Id.* at 141 (plurality opinion). *See* text of PA. STAT. ANN. tit. 6, §§ 12, 14 (Purdon 1963) *supra* note 9.

27. 556 F.2d at 141 (plurality opinion) (footnote omitted). Assuming *arguendo* that Judge Garth was correct in concluding that the common law history of the lien is significant, he is surely correct about the common law history of the sale provision. The common law never provided the repairman with a right to sell the property subject to his lien. *See* Younger v. Plunkett, 395 F. Supp. 702, 707 n.6 (E.D. Pa. 1975); R. BROWN, THE LAW OF PERSONAL PROPERTY § 119, at 588-89 (2d ed. 1955); G. PATTON, BAILMENT IN THE COMMON LAW, 186-87 (1952).

28. 556 F.2d at 142-43 (plurality opinion).

29. 419 U.S. 601 (1975). *See* notes 105-07 and accompanying text *infra*.

30. 407 U.S. 67 (1972). *See* notes 98-102 and accompanying text *infra*.

31. 530 F.2d 1123 (3d Cir. 1976). *See* note 233 *infra*.

32. 556 F.2d at 163 (Hunter, J., concurring).

33. *Id.*

34. *Id.* at 164 (Hunter, J., concurring).

to one factor: the common law history of detention.[35] Consistent with his opinion in *Gibbs,* Judge Hunter maintained that common law heritage was the touchstone, and perhaps the only legitimate consideration, in resolving the application of "the public function inquiry" in state action cases.[36]

Judge Gibbons' concurring opinion was far removed from the reasoning of Judges Garth and Hunter. He began by attributing the success of creditors' state action arguments in cases challenging consumer remedies to judicial disquiet that resulted "from a judicial philosophy favorably disposed toward the protection of creditors" and "from a political philosophy of distrust of national lawmaking through the fourteenth amendment and of confidence only in the fairness and wisdom of local solutions."[37] Judge Gibbons believed that the creditors'-remedies cases had "obvious distinctions" from the other cases in which the Supreme Court found no state action to be present.[38]

Judge Gibbons then developed his theory of state action, maintaining that state action was not a "unitary concept" that could be confined to a few categories of cases.[39] He observed that the state may act in many roles, specifically listing those of principal, delegator of functions, coercer, sanctioner and facilitator of transactions, and lawgiver.[40] In his discussion of the state as coercer, Judge Gibbons rejected the plurality's finding that state action considerations should vary between cases involving racial discrimination and all others.[41] In his discussion of the state as sanctioner and facilitator of transactions, he rejected the plurality's reliance on the presence of a court action by the repairman as necessary to establish state action, since the state may sanction and facilitate apart from court action.[42] In his discussion of the state as lawgiver, Judge Gibbons "emphatically disagree[d]" with the position that the common law heritage of a particular state procedure was significant in resolving the state action issue.[43] He pointed out that the enactment of the fourteenth amendment in 1867 established a "new form of scrutiny" of state laws, concluding that "the creation of law

35. *Id.* at 163 (Hunter, J., concurring).
36. *Id.*
37. *Id.* at 149 (Gibbons, J., concurring) (footnotes omitted).
38. *Id.* at 150 (Gibbons, J., concurring).
39. *Id.* at 150–51 (Gibbons, J., concurring).
40. *Id.* at 151 (Gibbons, J., concurring).
41. *Id.* at 152 (Gibbons, J., concurring). *See id.* at 137 (plurality opinion).
42. *Id.* at 154–55 (Gibbons, J., concurring).
43. *Id.* at 155 (Gibbons, J., concurring).
44. *Id.* at 155–56 (Gibbons, J., concurring).

is state action" and that only conduct defined by the state as remaining within the scope of private ordering does not involve state action.[44]

Thus, Judge Gibbons determined that state action was present in both the repairman's detention lien and sale procedure.[45] The state's involvement in certification in the post-sale transfer, a factor upon which the plurality expressly refused to rely,[46] was, according to Judge Gibbons, sufficient in itself to establish state action.[47] Nevertheless, he concurred in the result reached by Judge Garth.[48] Describing the issue as "extremely close," Judge Gibbons found that the initial consensual possession of the property by the repairman rendered the subsequent detention pursuant to the lien not violative of due process.[49]

Chief Judge Seitz and Judge Aldisert joined in most of Judge Gibbons' opinion. However, they would have gone one step further and held the repairman's detention lien violative of due process of law, as well as infused with state action.[50] They reasoned that none of the saving characteristics present in the *Mitchell v. W.T. Grant Co.*[51] procedure were present in the instant case.[52] They differed with Judge Gibbons in their characterization of the repairman as a bailee of the property repaired, who must, under ordinary circumstances, return the chattel upon the owner's request.[53]

In his separate concurrence, Judge Adams presented an approach quite distinct from the other judges. He found state action in both the detention and sale features of the lien because the private

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45. *Id.* at 157-59 (Gibbons, J., concurring).

46. Judge Garth stated, "In holding that action is inherent in sales conducted under the Pennsylvania statutory scheme, we do not rely at all upon the fact that state employees in the Bureau of Motor Vehicles . . . issue a certificate of title for the vehicle in the garageman's name." *Id.* at 141 (plurality opinion).

47. *Id.* at 158 (Gibbons, J., concurring). *Gibbs* was distinguished because possession in *Gibbs* was secured pursuant to a contract right rather than pursuant solely to a statute as in *Parks*. *Id.* at 158-59 (Gibbons, J., concurring).

48. *Id.* at 162 (Gibbons, J., concurring).

49. *Id.* at 161 (Gibbons, J., concurring).

50. *Id.* at 164-65 (Seitz, C.J., concurring and dissenting in part).

51. 416 U.S. 600 (1974). According to Chief Judge Seitz, the Louisiana attachment statute present in *Mitchell* contained the following procedural safeguards:

> (1) the remedy was limited to goods in which a security interest had been retained, thus simplifying the issue of the creditor's right to possess; (2) a judge rather than a clerk issued the writ; (3) the creditor was required to file an affidavit alleging specific facts based upon personal knowledge entitling it to possession; and (4) the creditor was required to prove its claim at an immediate postseizure hearing if the writ was not to be dissolved.

556 F.2d at 165 (Seitz, C. J., concurring and dissenting in part). *See* text accompanying notes 104-07 *infra*.

52. 556 F.2d at 165-66 (Seitz, C. J., concurring and dissenting in part).

53. *Id.* at 166 (Seitz, C. J., concurring and dissenting in part).

parties were engaged in a public function — the resolution of conflicts.[54] He opined that Judges Garth and Hunter had erred in concentrating too fully on the particular conduct rather than "the broader generic category of resolution of conflicts."[55] He accepted Judge Gibbons' point that the enactment of the fourteenth amendment rendered irrelevant the common law origin of the procedure at issue, although he expressly rejected Judge Gibbons' reasoning that the public function analysis is not applicable because the repairman acts solely for his own benefit.[56] Instead, adhering to a public function analysis, Judge Adams found both the detention and sale aspects of the repairman's lien indistinguishable for state action purposes from the creditor's remedies attacked in *Fuentes*[57] and *Sniadach*[58] because the governmentally approved machinery of conflict resolution was present.[59]

However, Judge Adams concurred in the result because he was not convinced that there was proof on the *Parks* record that the detention lien violated due process.[60] He maintained that empirical data, absent from the *Parks* record, weighing the interests of the repairman and customer was necessary before a decision could be made.[61]

III. THE DEVELOPMENT OF A RATIONAL APPROACH IN RESOLVING INCONSISTENCIES IN RESULTS OF DUE PROCESS ATTACKS ON CREDITORS' REMEDIES

A. *The Inconsistencies*

Subsequent to the *Parks* decision, it is possible to make the following observations about creditors' remedies in Pennsylvania on the basis of direct precedent from recent federal decisions:

1. It is unconstitutional for a creditor to take back consumer goods in which he has a security interest, after filing a bond and a court action, with the help of a sheriff,[62] but it is not unconstitutional for a creditor to take back the goods himself, without filing a bond

54. *Id.* at 146 (Adams, J., concurring).
55. *Id.* at 144 n.5 (Adams, J., concurring). *See id.* at 152 (Gibbons, J., concurring).
56. *Id.* at 145 (Adams, J., concurring).
57. *See* notes 98-102 and accompanying text *infra.*
58. *See* notes 75-81 and accompanying text *infra.*
59. 556 F.2d at 146 n.12 (Adams, J., concurring).
60. *Id.* at 143 (Adams, J., concurring).
61. *Id.* at 143 n.1 (Adams, J., concurring).
62. *See* Fuentes v. Shevin, 407 U.S. 67 (1972) (companion case to Parham v. Cortese).

and without court supervision which might temper an unconscionable seizure.[63]

2. It is unconstitutional for a repairman to sell goods which he holds pursuant to his lien (the *Parks* holding), but it is not unconstitutional for either a warehouseman[64] or an innkeeper[65] to sell goods which he retains pursuant to his almost identical common law lien.

3. A repairman is not involved in state action when he retains a customer's property; however, he is involved in state action if he attempts to sell that property, even if the sale invokes no participation of state officials.[66]

An examination of other circuit court decisions only reinforces the inconsistencies. The Ninth Circuit has held that an innkeeper's detention and sale of a customer's property pursuant to a statutory lien involves state action,[67] while a warehouseman's sale of a customer's property pursuant to a statutory lien does not.[68] In the Second Circuit, it appears that a warehouseman[69] and a repairman[70] are involved in state action when enforcing their liens, while in the Seventh Circuit neither are held to engage in state action.[71]

These inconsistencies which appear merely from an examination of the decisions of the circuit courts of appeals represent the tip of an iceberg of inconsistency in the lower courts.[72] Although a majority of the lower courts have stricken summary liens, a sizeable

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63. *See* Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 US. 1039 (1974).

64. *See* Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974).

65. *See* Washington v. Saxe, *order filed,* C. A. No. 74-593 (M.D. Pa., Dec. 27, 1974).

66. *See* Parks v. "Mr. Ford", 566 F.2d 132 (3d Cir. 1977).

67. *See* Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975).

68. *See* Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976).

69. *See* Brooks v. Flagg Bros., 553 F.2d 764 (2d Cir.), *cert. granted,* 98 S. Ct. 54 (1977).

70. *See* Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973).

71. *See* Anastasia v. Cosmopolitan National Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), *cert. denied,* 425 U.S. 971 (1976) (warehouseman); Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975) (repairman).

72. The inconsistencies which have developed in the findings of state action in the lien and repossession cases have prompted a series of legal commentary, most of it critical of the decisions in the repossession cases. *See, e.g.,* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond,* 28 RUTGERS L. REV. 541, 572-86 (1975); Clark & Landers, Sniadach, Fuentes, *and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355, 377-83 (1973). Three articles are especially worthwhile because they posit new ideas and approaches to the resolution of the issues in the lien and repossession cases. *See* Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Right Cases *and State Action Theory,* 12 HARV. C.R.—C.L.L. REV. 297 (1977); Yudaf, *The Legal Status of Private Repossession,* 122 U. PA. L. REV. 954 (1974); Comment, *State Action: A Pathology and a Proposed Cure,* 64 CALIF. L. REV. 146 (1976).

minority have not.[73] However, courts which have held various liens unconstitutional have consistently refused to find the requisite state action present when considering creditors' repossession.[74]

B. *The Due Process Attacks on Creditors' Remedies*

The seminal case involving due process attacks on creditors' remedies is *Sniadach v. Family Finance Co.*[75] In *Sniadach,* the Supreme Court struck down a Wisconsin statute which permitted a creditor to obtain a prejudgment wage garnishment from his debtor's employer.[76] Justice Douglas, in his majority opinion, spoke

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73. Innkeeper's lien detentions and sales have been held unconstitutional by some courts. *See, e.g.,* Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Brinkley v. Merrill, *judgment filed,* No. C-258-73 (D. Utah, Oct. 3, 1973); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973). *Contra,* Washington v. Saxe, *order filed,* C.A. No. 74-593 (M.D. Pa., Dec. 27, 1974).

Other courts have held unconstitutional repairman's lien seizures *and* sales. *See, e.g.,* Lee v. Cooper, C.A. No. 74-104 (D.N.J., March 21, 1974); Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D.W. Va. 1973); Ford v. Dean's O.K. Tire Store, Inc., *judgment filed,* CIVIL-LV 1974 (D. Nev. 1973).

Several courts have held sales unconstitutional while not discussing seizures. *See, e.g.,* Swiggett v. Watson, 441 F. Supp. 241 (D. Del. 1977); Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975); Howard v. Four-Star Maintenance, Inc., *judgment filed,* No. 74-A-427 (D. Colo., Dec. 19, 1974); Whitmore v. New Jersey Div. of Motor Vehicles, 137 N.J. Super. 492, 349 A.2d 560 (1975); Sharrock v. Dell Buick-Cadillac, Inc., 56 App. Div. 2d 446, 393 N.Y.S.2d 166 (1977). Still other courts have held lien sales unconstitutional while expressly not holding detention liens unconstitutional. *See, e.g.,* Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974) (three-judge court); Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1973). *Contra,* Daniels v. Frassica, *order filed,* C.A. No. 73-2946-F (D. Mass., Nov. 15, 1974). Unlike the *Parks* majority, both the *Caldwell* and *Adams* courts found state action to be present, but held, like Judges Gibbons and Adams in *Parks,* that due process was not violated.

Landlord's liens have been stricken in many cases. *See, e.g.,* Adams v. Joseph F. Sanson Inv. Co., 376 F. Supp. 61 (D. Nev. 1974); Stroemer v. Shevin, 399 F. Supp. 993 (S.D. Fla. 1973); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972) (three-judge court); MacQueen v. Lambert, 348 F. Supp. 1334 (M.D. Fla. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971).

Also closely related are the decisions that have held the Pennsylvania landlord's distraint provisions unconstitutional. *See, e.g.,* Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975) (three-judge court); Stots v. Media Real Estate Co., 355 F. Supp. 240 (E.D. Pa. 1973); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972) (three-judge court); Santiago v. McElroy, 319 F. Supp. 384 (E.D. Pa. 1970) (three-judge court).

74. *See, e.g.,* Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Turner v. Impala Motors, 503 F.2d 697 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied,* 419 U.S. 1039 (1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974), *cert. denied,* 419 U.S. 1034 (1974); Nowlin v. Professional Auto Sales, 496 F.2d 16 (8th Cir.), *cert. denied,* 419 U.S. 1006 (1974); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974); Benschoter v. First Nat'l Bank, 218 Kan. 114, 542 P.2d 1042 (1975), *appeal dismissed for want of substantial federal question,* 425 U.S. 928 (1976).

75. 395 U.S. 337 (1969).

76. *Id.* at 342.

largely of the hardships and inequities worked by the particular Wisconsin procedure, stating:

> The result is that a prejudgment garnishment of the Wisconsin type may as a practical matter drive a wage-earning family to the wall. Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process.[77]

A more solid foundation for attacks on other creditors' remedies appeared in Justice Harlan's concurrence, which focused on the deprivation of a wage-earner's wages without notice or prior hearing.[78] Such due process requirements prior to a property deprivation were, according to Justice Harlan, derived "from concepts which are part of the Anglo-American legal heritage . . . ."[79]

The contours of Justice Douglas' opinion were initially difficult to determine. The opinion may be read as applicable only to wages, to deprivations of income, to only those deprivations which can be found to drive persons "to the wall," or to any property deprivations which precede the entry of a judgment. Nowhere is there any discussion of state action; despite the very slight ministerial involvement of any state officer,[80] state action was presumed to be present by the Court.[81]

In Pennsylvania, the first post *Sniadach* attacks on creditors' remedies were launched against confessions of judgment and extrajudicial rent distraint, since these procedures were the most oppressive remedies present in the state at that time. In *Swarb v. Lennox*,[82] a class action was brought challenging the Pennsylvania confession of judgment procedure which permitted a creditor to extract from a debtor, by means of a contract clause uniformly buried in all consumer creditor documents and leases then utilized in Pennsylvania, authority for the creditors' attorney or the prothonotary to enter an ex parte judgment against the debtor prior to any

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77. *Id.* at 341-42 (footnote omitted) (citation omitted).
78. *Id.* at 342-44 (Harlan, J., concurring).
79. *Id.* at 342-43 (Harlan, J., concurring).
80. The creditor's lawyer requested a writ of garnishment from the clerk of the court, who then issued the writ which the creditor's lawyer served upon the garnishee. *Id.* at 338.
81. Even Justice Black's dissent did not mention the possibility that state action was not present. *See id.* at 344-51 (Black, J., dissenting).
82. 314 F. Supp. 1091 (E.D. Pa. 1970) (three-judge court), *aff'd*, 405 U.S. 191 (1972).

default and which could serve as the basis for an execution sale of the debtor's property upon the creditor's or landlord's ex parte averment of default.[83] The court framed the issue as whether the debtors had knowingly waived their due process rights guaranteed in *Sniadach*.[84] The *Swarb* court concluded that the plaintiffs had proven that confessions were not validly waived only as to the class of persons whose income was less than $10,000, or married persons whose combined income was less than $10,000 annually.[85]

The seminal distraint case in Pennsylvania is *Santiago v. McElroy*.[86] The plaintiffs in *Santiago* challenged a statutory scheme that permitted a landlord to make a prejudgment extrajudicial seizure of a tenant's belongings for alleged nonpayment of rent.[87] A right to so distrain was routinely included in all Pennsylvania leases then in use. Addressing the significance of the lease agreement, Judge Lord stated:

> We take judicial notice of the fact that form leases are put before tenants on an "accept this or get nothing" basis, . . . and that tenants — who need housing — are compelled to sign. There is no freedom of contract — there is merely a freedom to adhere to the terms of the contract written by the landlord.[88]

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83. 314 F. Supp. at 1093-94.

84. *See id.* at 1095, 1100.

85. *Id.* at 1102-03. The court based its decision on a study by Dr. David Caplovitz, prepared for a work later published as D. CAPLOVITZ, CONSUMERS IN TROUBLE (1974). 314 F. Supp. at 1097. The study found that consumers almost never realized the effect of confession clauses or even that confession clauses appeared in their contracts. *Id.* However, since 96% of the persons in the study earned less than $10,000 annually, the court limited relief to individuals earning less than $10,000. *Id.* at 1098-99.

A question remains, however, as to whether the record justifies drawing a distinction between persons earning less than or more than $10,000 annually. It is submitted that the distinction was based on the court's rather peculiar reading of the record, in which only two of the three panelists joined. *See id.* at 1102-03 (Weiner, J., dissenting).

It is further submitted that a sounder approach was adopted in an almost identical Delaware case challenging confessions. *See* Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971), *vacated,* 405 U.S. 971, *reinstated,* 359 F. Supp. 124 (D. Del. 1972). In *Osmond,* over the dissent of Judge Van Dusen, the Circuit Judge on the *Swarb* panel, the court held that the failure of the statutory scheme to provide a means of determining the validity of the waiver rendered the scheme unconstitutional as applied to all parties. 327 F. Supp. at 1356-57.

In the appeal which followed on behalf of individuals excluded from the scope of the *Swarb* holding (mortgagors and parties earning more than $10,000 annually), the Supreme Court affirmed, holding that confessions were not unconstitutional per se and that the district court decisions would not be further reviewed in view of the one-sided nature of the appeal. 405 U.S. at 200. Thus, the Court avoided review of the logic of the distinctions created by the *Swarb* district court.

86. 319 F. Supp. 284 (E.D. Pa. 1970).

87. *Id.* at 285.

88. *Id.* at 294.

Turning to the statutes, the court concluded that distraint sales, which were performed by state officials, unconstitutionally deprived the tenants of their property.[89]

The very difficult issue of the effect of contractual provisions expressly authorizing the use of confession and distraint were hence overcome in *Swarb* and *Santiago,* in the former principally because a significant number of the protected debtors were held to have been shown not to have understood the confession clauses,[90] and in the latter because the provisions were found to be an adhesion contract.[91]

The state action issue was never raised in *Swarb,* presumably because the defendants were state officials and the suit represented a direct attack on entry and execution on state court judgments by the defendants.[92] It was raised in *Santiago,* but avoided because the district court considered only distraint *sales,* which were performed by the state officials.[93]

The Supreme Court decisions in *Lynch v. Household Finance Corp.*[94] and *Fuentes v. Shevin,*[95] both decided early in 1972, appeared to establish a trend toward eliminating roadblocks to due process attacks on creditors' remedies. In *Lynch,* the Court discredited the property rights—personal rights distinction that some courts had read into section 1343(3) of the federal judicial code.[96] A contrary result would have probably halted future due process attacks in

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89. *Id.* at 295. Although the *Santiago* court did not address the issue of the constitutionality of distraint levies, subsequent attacks on distraint levies succeeded, rather surprisingly, without any real difficulty with the state action issue. *See, e.g.,* Ragin v. Schwartz, 393 F. Supp. 152 (W.D. Pa. 1975) (three-judge court); Stots v. Media Real Estate Co., 355 F. Supp. 240 (E.D. Pa. 1973); Musselman v. Spies, 343 F. Supp. 528 (M.D. Pa. 1972) (three-judge court).

90. 314 F. Supp. at 1100.

91. 319 F. Supp. at 294.

92. 314 F. Supp. at 1093.

93. 319 F. Supp. at 292.

94. 405 U.S. 538 (1972).

95. 407 U.S. 67 (1972).

96. 405 U.S. at 543. Section 1343(3) states in relevant part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

28 U.S.C. § 1343(3) (1970).

The *Lynch* Court held that "[n]either the words of § 1343(3) nor the legislative history of that provision distinguishes between personal and property rights." 405 U.S. at 543.

federal courts on creditors' remedies on jurisdictional grounds.[97] By striking down the Florida and Pennsylvania statutes authorizing prejudgment replevin seizures in *Fuentes*,[98] the Supreme Court broadened the scope of *Sniadach*. The *Fuentes* decision emphasized that a temporary taking constituted a property deprivation requiring due process protections in all but certain enumerated exceptional circumstances.[99] It clarified the *Sniadach* language relating to wages and made clear that all property, even household goods of relatively modest worth, was subject to due process protection.[100] Finally, the Court made a strong statement, reminiscent of that by Judge Lord in *Santiago*,[101] that the execution of the consumer credit contracts involved did not constitute a waiver of due process rights by the consumers.[102]

In *Mitchell v. W.T. Grant Co.*,[103] the Court upheld the constitutionality of the Louisiana sequestration procedure, seemingly indistinguishable from the replevin procedures considered in *Fuentes*.[104] The Court thus appeared to overrule *Fuentes* or at least to distinguish it out of significance. However, eight months later, the Court expressly restored the vitality of *Fuentes* in *North Georgia*

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97. Section 1343(3) dispenses with the $10,000 minimum amount in controversy required by § 1331, the general federal-question provision. *Compare* 28 U.S.C. § 1343(3) (1970) *with* 28 U.S.C. § 1331 (1970).

98. 407 U.S. at 96.

99. The *Fuentes* Court observed that "it is now well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Id.* at 84-85. As examples of the exceptional circumstances under which the Court had permitted "outright seizure," the *Fuentes* Court listed seizure "to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Id.* at 91-92 (footnotes omitted).

100. Although the Court noted that "there may be many gradations in the 'importance' or 'necessity' of various consumer goods," it maintained that "if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions." *Id.* at 89-90.

101. *See* text accompanying note 88 *supra*.

102. 407 U.S. at 95. The Court stated:

> There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

Id.

103. 416 U.S. 600 (1974).

104. The statutes involved in *Fuentes* authorized writs ordering seizure of a debtor's possessions upon the the ex parte application of creditors. No pre-seizure notice or pre- or post-seizure hearing opportunity was provided. 407 U.S. at 69-70. The Louisiana procedure challenged in *Mitchell* was similar, but it did provide for procedural safeguards. *Id.* at 616-18. *See* note 51 *supra*; text accompanying notes 105-07 *infra*.

Finishing Inc. v. Di-Chem, Inc.[105] In *Di-Chem,* the Court explained the ruling in *Mitchell* as attributable to the unique "saving characteristics" of the Louisiana statute applied in the earlier case,[106] and struck down a Georgia statutory scheme, lacking these characteristics, very similar to those attached in *Fuentes.*[107] Hence, it was *Mitchell* rather than *Fuentes* that was limited in application to its facts.[108]

Ironically, the Supreme Court decided *Moose Lodge No. 107 v. Irvis*[109] on the same day as *Fuentes.* Although it was certainly not apparent at the time, *Moose Lodge* was destined to be one of the principal authorities invoked to prevent the extension of attacks on creditors' remedies.[110] In *Moose Lodge,* the Court refused to find the lodge's discriminatory membership and guest policies violative of the fourteenth amendment because the Court rejected the contention that the state's regulation of the lodge's liquor license constituted the requisite state action.[111] In *Moose Lodge* and *Jackson v. Metropolitan Edison Co.,*[112] in which the Court refused to find violative of due process a utility's policy of prehearing termination of service for alleged unpaid bills because of the absence of state action,[113] the

105. 419 U.S. 601 (1975).

106. *Id.* at 607. *See* note 51 *supra* for a catalogue of these "saving characteristics."

107. *Id.* The Court considered significant the fact that the Georgia statute involved in *Di-Chem* allowed a clerk of the court to issue a writ of garnishment on the basis of a creditor's conclusory allegations and that no provision was present for an early post-seizure hearing. *Id.*

108. Another potential legal development that could result in a limitation upon attacks on creditors' remedies emerged from the dissenting opinions of Justice White, joined by the Chief Justice and Justice Blackmun, in *Fuentes* and *Lynch.* 407 U.S. at 97 (White, J., dissenting); 405 U.S. at 556 (White, J., dissenting). In both cases, the dissent urged that the considerations of comity, equity and federalism enunciated in Younger v. Harris, 401 U.S. 37 (1971), and its companion cases, should bar the relief sought since state proceedings were ongoing at the time the plaintiffs initiated their actions in federal court. 407 U.S. at 98 (White, J., dissenting); 405 U.S. at 560 (White, J., dissenting). The full extent of the application of *Younger* to attacks on creditors' remedies is uncertain but it clearly did have an impact in two recent Supreme Court decisions. *See* Trainor v. Hernandez, 431 U.S. 434 (1977) (attack on Illinois' prejudgment attachment proceeding barred by *Younger*); Juidice v. Vail, 430 U.S. 327 (1977) (challenge to state civil contempt proceeding against debtors who failed to appear barred by *Younger*). However, neither Justice White nor any other member of the Court mentioned *Younger* in the *Swarb* opinions, where, since the plaintiffs sought directly to enjoin entry and execution upon certain state court judgments, it would seem most likely to have applied. *See* 405 U.S. at 191. Thus, the *Younger* doctrine has properly not been extended to the point where it is a significant bar to attacks on creditors' remedies. Of course, it has no application in attacks on purely extrajudicial remedies, such as liens and repossession.

109. 407 U.S. 163 (1972).

110. For examples of cases in which *Moose Lodge* was cited as authority by courts finding that state action was absent from creditors' remedies, *see* note 114 *infra.*

111. 407 U.S. at 177.

112. 419 U.S. 345 (1974).

113. *Id.* at 358-59.

Court developed the framework for subsequent decisions in which courts refused to hold creditors' remedies unconstitutional because state action was lacking.[114]

Following *Fuentes, Di-Chem, Moose Lodge* and *Jackson,* it is apparent that state action is the principal barrier to due process attacks on creditors' remedies, at least those involving extrajudicial liens and repossession. The courts have responded to these decisions in various ways,[115] since none of these cases is decisive of the issue. After refusing to review numerous repossession cases,[116] the Supreme Court recently granted certiorari in *Brooks v. Flagg Brothers, Inc.,*[117] in which the Second Circuit found state action present in an attack on the sale provisions of the warehouseman's lien law.[118] Thus, the Court may now be prepared to clear up the thicket of inconsistency which has arisen[119] in light of the emergence of the state action issue in the five years since its decision in *Fuentes.*

C. *The Considerations Deemed Relevant by the Courts in Deciding the State Action Issue in Various Creditors' Remedies*

The considerations deemed relevant by the circuit courts of appeals that have determined the presence or absence of state action in due process attacks in lien or repossession cases can be divided into five categories: 1) state participation; 2) presence of state statute; 3) presence of parties' contract; 4) common law history; and 5) existence of a "roving commission" for the creditor.

1. *State Participation*

On a superficial level, the creditors' remedies cases appear to consistently hold that a remedy which is enforced by the participation of state officials is, for that reason alone, infused with state

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114. *See, e.g.,* Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Turner v. Impala Motors, 503 F.2d 697 (6th Cir. 1974); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739 (2d Cir.), *cert. denied,* 419 U.S. 1009 (1974).

115. *See* note 73 and accompanying text *supra.*

116. The Court did give plenary consideration to one repossession case. *See* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974). However, the Court used this case only as a tool to resolve a "standing" issue related to three-judge courts and carefully avoided any discussion of the merits of the underlying repossession case. *Id.* at 101.

117. 553 F.2d 764 (2d Cir.), *cert. granted,* 98 S. Ct. 54 (1977).

118. 553 F.2d at 772.

119. *See* notes 62-71 and accompanying text *supra.*

action.[120] This would explain the result in *Fuentes* in which state action was never raised as an issue.[121] Similarly, it can be argued that in *Sniadach,* the state action issue was not even raised because of the very slight state official participation.[122] However, state participation may be present in many different forms. Therefore, while on the surface state participation seems an objective and simple means to measure state action, this surface simplicity is somewhat illusory.

For example, it can be argued that any state regulation relevant to a certain activity is state participation. However, *Moose Lodge* restricts this principle by holding that state regulation sufficient to establish state action in the conduct of the regulated party per se must be directly involved with the challenged activity.[123] The Court emphasized this holding by noting that state action was involved in enforcement of a state regulation requiring the lodge to adhere to its own discriminatory bylaws.[124] The *Moose Lodge* Court rejected the argument that the state's regulation of the lodge's liquor license was sufficient to establish state action in the lodge's discriminatory policies.[125]

Because public utilities are so closely regulated, the *Jackson* Court's holding that no state action was involved in the public utility's actions[126] strongly reaffirms the *Moose Lodge* limitation that regulation not directly relevant to the challenged activity fails to establish state action. The *Jackson* Court rejected the argument that the state's tacit approval of the utility's termination policies by allowing them to go into effect was sufficient to establish state action.[127] Although it seems difficult to distinguish the state's alleged "failure to act" in *Jackson* from its "action" in producing a writ of garnishment for the creditor on demand in *Sniadach* or from the prothonotary's entry of a writ of replevin in *Fuentes,* it must be noted that *Jackson* is not a creditors' remedy case in the ordinary sense. In *Jackson,* the customer had no ownership of the electricity supplied by the utility, and no detention or seizure of property

120. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Pa. 1970).

121. Under both the Pennsylvania and Florida statutes challenged in *Fuentes,* the property was seized by a state officer. 407 U.S. at 75-78.

122. *See* note 80 *supra.*

123. 407 U.S. at 179.

124. *Id.* at 177-79.

125. *Id.* at 176-77.

126. 419 U.S. at 358.

127. *Id.* at 357.

occurred.[128] It is therefore difficult to apply *Jackson* to the creditors' remedies cases.

There is little or no state participation or regulation of the innkeeper's or warehouseman's lien. However, repairman's lien sales, at least as applied to motor vehicles, and motor vehicle repossession sales, are instances involving some degree of state participation, since state officials must transfer the titles after the sale to allow the sellers to legally effect a sale. Nevertheless, the repossession cases have routinely rejected the argument that this direct state participation is relevant on the issue of state action.[129]

It is therefore submitted that direct state participation has not been a particularly important factor in resolving the state action issue. Rather, the courts seem to assume that the enforcement of a

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128. The utility company simply discontinued service to plaintiff's home because of asserted delinquency in payments due for service. *Id.* at 347.

129. Judge Garth's reasoning in *Parks* is typical of the reasoning employed in the repossession cases:

> If the role played by state employees in issuing new certificates of title to garagemen who foreclose on their liens were enough to infuse those foreclosures with state action, then obviously there would be state action as well whenever a new or used car is purchased and a new certificate of title is issued. By the same logic, the service which state employees perform in recording deeds and mortgages would seem to inject state action into virtually every real estate transaction.

556 F.2d at 141 (plurality opinion). Apparently, Judge Garth believed that these were situations in which a state action finding would be improbable or against public policy. However, it is submitted that a finding of state action in the situations mentioned by Judge Garth would be no more improbable than the finding that state action was present when state participation was invoked in a purely private dispute in the form of judicial actions as in *Sniadach* and *Fuentes*. In fact, it seems clear that constitutional violations effected in sales of merchandise or transfers of real estate are infused with state action. *See* Shelley v. Kraemer, 334 U.S. 1 (1947).

In *Gibbs*, (*see* note 138 and accompanying text *infra*), the Third Circuit reasoned that the title transfer was insignificant for state action purposes because: 1) the title transfer occurred after "the alleged deprivation" of the repossession had taken place; and 2) the title transfer did not determine ownership, but was merely for the purpose of registration. 502 F.2d at 1113 n.17. The second point is countered by a Pennsylvania statute requiring any owner of a vehicle to have a certificate of title for it (*see* PA. STAT. ANN. tit. 75, § 201(a) (Purdon 1971)) and by cases holding that title does "establish the person entitled to possession." Speck Cadillac-Olds, Inc. v. Goodman, 373 Pa. 83, 88, 95 A.2d 191, 193 (1953). *See also,* Summers Estate, 424 Pa. 195, 198, 226 A.2d 197, 199 (1967); Majors v. Majors, 153 Pa. Super. Ct. 175, 178, 33 A.2d 442, 444 (1943), *aff'd*, 349 Pa. 334, 37 A.2d 528 (1944). The first point is countered by the observation that the seizure and sale consummated by a title transfer effect different property deprivations. While the title transfer may not be relevant to the seizure deprivation, it is certainly relevant to the sale deprivation. *See* Swiggett v. Watson, 441 F. Supp. 241 (D. Del. 1977) (Director of Division of Motor Vehicles enjoined from transferring titles of vehicles sold pursuant to Delaware Lien Law, which court declared unconstitutional).

seizure by state officials, in a manner similar to *Fuentes*,[130] is the only state participation which merits consideration.[131]

2. *Presence of State Statute*

A state statute is present to establish or support nearly every creditors' remedy which has been subjected to due process attack.[132] The notable exception is the repairman's detention lien in *Parks*, which is a creature of common law.[133] This distinction was not cited as an important factor in any of the *Parks* opinions. Furthermore, Judge Hunter devoted much of his opinion to expressly rejecting the significance of this issue.[134]

However, in the absence of a clear declaration of state policy through other manifestations, the presence of a state statute might be a significant factor in measuring state involvement. The *Parks* court appears to have properly not considered the presence of the state statute to be a decisive issue since the state policy of recognition of the common law lien was clear.[135] In *Jackson*, however, where the state statute and common law practice were absent, this factor might be a clue to the result, since prehearing utility terminations are not expressly sanctioned by constant judicial or administrative enforcement as are the repairman's lien or repossession situations.

3. *Presence of Parties' Contract*

A contract is typically not present in the repairman or innkeeper situations. It is always present in the repossession cases, yet, among the repossession cases, only one court has placed any reliance on this factor.[136] Similarly, in *Fuentes* the Supreme Court refused to rely

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130. The prejudgment replevin laws in *Fuentes* authorized summary seizure of goods by state agents upon the *ex parte* application of an individual who posted a security bond for double the value of the property to be seized. 407 U.S. at 73-78.

131. This is perhaps best illustrated by the district court in *Parks*. The court found the nonofficial seizure by constables acting as private landlords' agents to be direct state participation but refused to find such participation in the official act of a state officer's title transfer. 386 F. Supp. at 1260-65.

132. *See, e.g.*, PA. STAT. ANN. tit. 6, §§ 11-14 (Purdon 1963). For the text of these statutes, *see* note 9 *supra*.

133. 556 F.2d at 134.

134. *See id.* at 163 (Hunter, J., concurring).

135. The *Parks* court cited Wilson v. Malenock, 128 Pa. Super. Ct. 544, 194 A. 508 (1937), as indicating that the Pennsylvania common law permitted repairmen to retain repaired items until payment is made. 556 F.2d at 134.

136. *See* Shirley v. State Nat'l Bank of Conn., 493 F.2d 739, 741-42 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

on the parties' contract to establish an effective due process waiver in a similar context.[137]

However, in certain situations, the significance of the parties' contract has been emphasized. In *Gibbs* the Third Circuit panel expressly declined to determine the presence of state action where a contract authorizing repossession was not present.[138] It is submitted, however, that the importance of this factor was eroded by the failure of the court to discuss the issue except in one qualifying footnote.[139]

In *Smith v. Bekins Moving & Storage Co.*,[140] Judge Van Artsdalen also emphasized the significance of the existence of a contract.[141] It is submitted, however, that the vitality of *Smith* is questionable subsequent to *Parks*.[142]

In his concurring opinion in *Parks*, Judge Adams discussed the presence of the parties' contract.[143] According to Judge Adams, "in the absence of a close nexus between the state and the contract in question, it would seem that action taken pursuant to a contractual right is not state action."[144] It was on this basis that Judge Adams distinguished between *Gibbs* and *Parks*.[145]

4. *Common Law History*

The single factor most often discussed by the courts in the resolution of the state action issue in challenges to creditors' remedies must surely be the common law history of the remedy in question.[146] It is fair to say that in the opinions of Judges Garth and

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137. 407 U.S. at 94-96.

138. 502 F.2d at 1113 n.15a. The *Gibbs* court specifically noted that it was "not faced with reaching a determination of 'state action' where the documents on which repossession is predicated are silent as to default and repossession remedies." *Id.*

139. *See id.*

140. 384 F. Supp. 1261 (E.D. Pa. 1974).

141. *Id.* at 1263-64.

142. *Smith* involved a Pennsylvania statute which permitted a warehouseman to enforce his lien on stored property to satisfy unpaid charges by selling the property at a public or private sale. *Id.* at 1262. This provision, which was upheld by the *Smith* court, was very similar to the statute declared unconstitutional by the *Parks* court. *Compare* PA. STAT. ANN. tit. 12A, § 7-210 (Purdon 1970) *with* PA. STAT. ANN. tit. 6, §§ 11-14 (Purdon 1963).

143. *See* 556 F.2d at 147 n.18 (Adams, J., concurring).

144. *Id.*

145. *Id.*

146. *See, e.g.*, Melara v. Kennedy, 541 F.2d 426 (9th Cir. 1976); Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); Washington v. Saxe, *order filed*, C.A. No. 74-593 (M.D. Pa., Dec. 27, 1974) (common law counterpart to warehouseman's lien crucial to court's analysis).

Other courts have emphasized that the absence of a common law counterpart to a statutory lien was important to a finding that state action was present. *See, e.g.*, Brooks v. Flagg Bros., 553 F.2d 764 (2d Cir.), *cert. granted*, 98 S. Ct. 54 (1977);

Hunter in *Parks,* and therefore in the minds of the majority of the Third Circuit bench, it is *the* important distinction between the detention and sale in *Parks,* and hence the determinative issue as to the presence of state action there.[147]

Despite this considerable reliance upon the common law history as an element for determining the presence of state action in cases involving creditors' remedies, such reasoning has frequently been criticized. In *Parks,* both Judges Adams and Gibbons insisted that the enactment of the fourteenth amendment created a new scale for measurement of state law.[148] Thus, the common law history of a procedure prior to the adoption of the fourteenth amendment would not be relevant in considering procedures attacked on the basis of the amendment.[149] Judge Hunter's statement in *Parks* that the common law history is relevant to determine whether a procedure involves a "traditional state function"[150] has some surface appeal. However, in the final analysis, Judge Hunter's continued reliance on the past as a determinative factor of the validity of present laws comes face to face with Justice Douglas' statement in *Sniadach*: "The fact that a procedure would pass muster under a feudal regime

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Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Hall v. Garson, 430 F.2d 430, 439-40 (5th Cir. 1970), *on remand,* 468 F.2d 845 (5th Cir. 1972).

The repossession cases frequently relied heavily upon the common law heritage of repossession in refusing to find state action. For example, in *Gibbs,* Judge Hunter, consistent with his position in *Parks,* rejected the "comprehensive state regulation" argument because the pertinent statutes had made repossession more difficult than it had been prior to their enactment. 502 F.2d at 1110-12. He rejected the "delegation of state function" argument in the following language: "[T]he chief obstacle to concluding that self-help repossession involves a traditional state function is the fact . . . that in one form or another the common law very early recognized repossession as a private remedy." *Id.* at 1114. *See also* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 334 (9th Cir.), *cert. denied,* 419 U.S. 1006 (1974).

147. Judge Garth stated that "when private individuals engaged in a particular activity long before the enactment of the Fourteenth Amendment, that circumstance is strong evidence that the activity in question is not one '*traditionally* exclusively reserved to the State.'" 556 F.2d at 138-39 (plurality opinion) (emphasis in original) (citations omitted), *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1975).

Judge Hunter recognized that the public function inquiry of the state action analysis "can be affected in a limited way by the common law origin of a particular right." 556 F.2d at 163 (Hunter, J., concurring).

148. According to Judge Adams, "The inescapable fact is that promulgation of the fourteenth amendment substantially changed the legal landscape, and requires that once-sacrosanct customs be examined anew." 556 F.2d at 146 (Adams, J., concurring) (footnote omitted).

Judge Gibbons agreed, stating that "the Supreme Court has, by application of the due process clause of the fourteenth amendment, significantly altered the relative power positions of debtors and creditors." *Id.* at 149 (Gibbons, J., concurring).

149. *See* 556 F.2d at 146 (Adams, J., concurring); *id.* at 149 (Gibbons, J., concurring).

150. *See* notes 35 & 36 and accompanying text *supra.*

does not mean it gives necessary protection to all property in its modern forms."[151]

A strong case for the irrelevance of the common law history of a creditors' remedy in the determination of whether a procedure is infused with state action was made by the First Circuit in *Davis v. Richmond.*[152] The *Davis* court conceded that the inkeeper's lien laws, as applied to the plaintiff, were in derogation of the common law.[153] It nevertheless concluded that the requisite state action was not present, quoting the following portion of a law review article written by Messrs. William Burke and David Reber:[154]

> To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct, pursuant to the identical state statute or judicial law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstance of the age and history of the law.[155]

Furthermore, assuming *arguendo* that the common law history of a procedure is and should be relevant, it is frequently difficult, as Judge Hunter noted in *Parks,* to determine the exact status of a procedure at a given point in history.[156] Problems exist as to what point in time during the development of the "common law" should be focused on and the determination of the precise status of the law at that point.

5. *Existence of a "Roving Commission" for the Creditor*

Another factor which may be relevant in the inquiry as to whether state action is present in the use of a particular creditor's

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151. 395 U.S. at 340.

152. 512 F.2d 201 (1st Cir. 1975).

153. *Id.* at 203.

154. Burke & Reber, *State Action, Congressional Powers and Creditors' Rights: An Essay on the Fourteenth Amendment,* 47 S. CAL. L. REV. 1, 47 (pt. 2) (1973) [hereinafter cited as Burke & Reber (pt. 2)]. Mr. Burke was the author of an *amicus curiae* brief for the creditors in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

155. 512 F.2d at 204, *quoting* Burke & Reber (pt. 2), *supra* note 154, at 47.

156. 556 F.2d at 163 (Hunter, J., concurring). For example, the history of repossession at common law is unclear. The status of acceptance of self-help repossession at various points in the development of the law has changed from: 1) acceptance at Greek and Roman law, to 2) prohibition in early English common law, to 3) increasing tolerance in England since the 18th century, to 4) extremely detailed and restrictive regulation under the Uniform Conditional Sales Act, adopted in many states, including Pennsylvania, in the early 20th century, to 5) the unrestricted loose procedural setting established in the Uniform Commercial Code. *See* McCall, *The Past as Prologue: A History of the Right to Respossess,* 47 S. CAL. L. REV. 58 (1973).

remedy is its creation of a so-called "roving commission" to the creditor to seize or continue unconsented retention of property which, as in execution on a judgment by state officers, which is not subject to a security interest or has no direct relation to the debtor's obligation.[157] The existence of a "roving commission" is, however, frequently not a factor in these decisions. Certainly the warehouseman exercises no roving commission since he merely retains and sells the goods which are stored with him. Yet, the Second Circuit found state action to be present in a warehouseman's lien in *Flagg Brothers*.[158] In both the landlord and repairman situations roving can be said to occur.[159] A landlord may seize a tenant's property, the value of which may far exceed any rent owed. Similarly, a repairman may retain an expensive automobile for non-payment of a small repair charge.

Since the concept of the "roving commission" and its effect on a finding of state action is not discussed or analyzed by the Third Circuit in *Parks* or *Gibbs,* it does not appear to have been a factor in these cases.

6. *Summary and Analysis*

From the foregoing, it would appear that the basis upon which courts most frequently rely in analyzing state action is the common law history of the particular creditor's remedy. It is submitted, in light of the reasons why the common law history is not a cogent or logical factor upon which to focus,[160] that the courts' emphasis on this issue explains in part the confusion in state action determinations.[161]

Participation by a state official is often mentioned in distinguishing such cases as *Swarb*[162] and *Fuentes,*[163] where there is direct involvement of state officials in the execution of the remedy, from the lien cases. However, other forms of state participation have frequently been overlooked.[164] If "state participation" is defined to mean only direct state involvement in the execution process, it is

157. *See, e.g.,* James v. Pinnix, 495 F.2d 206 (5th Cir. 1974).
158. 553 F.2d at 766.
159. The roving commission concept was invoked most notably by the Fifth Circuit in distinguishing repossession from the landlord's lien which it declared unconstitutional in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), *on remand,* 468 F.2d 845 (5th Cir. 1972).
160. *See* notes 152-56 and accompanying text *supra.*
161. *See* notes 62-74 and accompanying text *supra.*
162. *See* notes 82-85 and accompanying text *supra.*
163. *See* notes 98-102 and accompanying text *supra.*
164. *See* notes 130-31 and accompanying text *supra.*

submitted that the courts should not focus upon it in analyzing state action.

Presence of a state statute[165] and the existence of a "roving commission"[166] have not, per se, been especially significant factors in the decisionmaking process. Nor, it is submitted, should they be, except to the somewhat limited extent that they reveal state involvement in the procedures.

In *Parks,* Judge Adams relied on the presence of a contract between debtor and creditor as a factor which should militate against a finding of state action.[167] However, the adhesive nature of the creditor-debtor relationship renders this factor of little practical value in resolution of the state action issue. The Supreme Court in *Fuentes*[168] and the three-judge court in *Santiago*[169] took judicial notice of the adhesion contracts present in such a relationship. It is suggested that in such a context, where the creditor can exact almost anything from the debtor in a form contract, the state's pronouncements limiting the creditor's range of action, either by its statutes or common law, will be more significant than the presence of a contract.

Analysis of these considerations leads to the conclusion that none of them, as they have been discussed by the courts, should be the most significant issue in the determination of the presence of state action in creditors' remedies. It is therefore important to identify the proper issues and develop a decision making process that will focus upon them.

D. *The Considerations Upon Which the Courts Should Focus in Resolving the Issue of the Presence of State Action in Creditors' Remedies*

1. *The Policy Issue Involved*

The basic policy issue in the entire string of due process challenges to creditors' remedies is the desirability of creating national minimum due process standards for creditors' remedies. The opposite ends of the spectrum regarding the merits of this policy

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165. *See, e.g.,* text accompanying note 134 *supra.*
166. *See, e.g.,* text accompanying note 151 *supra.*
167. *See* text accompanying note 144 *supra.*
168. *See* text accompanying note 102 *supra.*
169. *See* text accompanying note 91 *supra.*

question are expressed by Burke and Reber,[170] on one hand, and Judge Gibbons in *Parks*,[171] on the other.

On the basis of their strong views regarding what they consider the principles of federalism, Burke and Reber urge against the extension of a national minimum due process standard to additional creditors' remedies.[172] Freedom from federal intervention, according to these authors, "allows citizens to order their relationships free from federal constitutional interference," promotes self-help, which they submit is at the core of private ordering, and leaves lawmaking strictly to the state legislatures and Congress, which they deem better able to adjust the complex economic factors which must be considered.[173]

In direct contrast, Judge Gibbons views the "judicial lawmaking" of the creditors' remedy—due process cases as imposing a welcome and necessary "national minimum due process" standard for debtor-creditor transactions.[174]

It is submitted that the question of the desirability of creating a national minimum due process standard for creditors' remedies has already been properly answered by the Supreme Court in *Sniadach*,[175] the extension of that decision in *Fuentes*,[176] the reaffirmation of *Fuentes* in *Di-Chem*,[177] and the rejection of the potential jurisdictional limitations upon such cases in *Lynch*.[178] These cases, it is submitted, reveal the proper judicial conclusion that state procedural schemes establishing creditors' remedies have consistently overlooked the due process violations that result from

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170. Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pt. 1) 46 S. CAL. L. REV. 1003, [hereinafter cited as Burke & Reber (pt. 1)]; Burke & Reber (pt. 2), *supra* note 154. Burke and Reber suggest that, with the exception of matters involving racial discrimination: 1) findings of state action be limited to instances where the state is involved in direct action or participation with private parties; 2) the public function doctrine be extended only to cases involving election primaries, instances where there is an attempted circumvention of prior holdings of state action by property transfers or other manipulation, and cases where there has been a stifling of speech by parties assuming government characteristics; and 3) action by private parties pursuant to state statutes should involve those parties in state action only where the statute compels the private party, rather than merely permits the party, to act in a certain manner. Burke & Reber (pt. 1), *supra*, at 1041-91.

171. *See* notes 37-49 and accompanying text *supra*. Judge Gibbons would find state action in any private party's utilization of a state-sanctioned creditor's remedy. 556 F.2d at 155-56.

172. Burke & Reber (pt. 2), *supra* note 154, at 53-56.

173. *Id.* at 52.

174. 556 F.2d at 149 (Gibbons, J., concurring).

175. *See* notes 75-81 and accompanying text *supra*.

176. *See* notes 98-100 and accompanying text *supra*.

177. *See* notes 105-07 and accompanying text *supra*.

178. *See* notes 96 & 97 and accompanying text *supra*.

permitting creditors to utilize heavyhanded remedies against alleged debtors in proceedings in which the creditors are allowed to make interested *ex parte* decisions on the merits of their claims. Enforcement of one-sided state laws and procedures have made the development of a national minimum due process standard not only desirable, but necessary.

Unquestionably, the philosophical direction of the Supreme Court has changed since the *Sniadach* decision in 1969. However, the contemporary Court decided *Di-Chem* by a rather comfortable six-to-three majority. The Court has expressed no tendency to undercut its prior decisions in this area, with the possible exception of *Jackson.*[179] It should be noted however, that the *Di-Chem* decision was rendered after the decision in *Jackson.*

It is possible that the Court could strike upon the state action issue as the means of restricting the development of nationalization of due process standards for creditors' remedies. However, this would not appear the most logical place for the courts to develop a restrictive policy, since, it is submitted, there is little logical distinction between a creditor's seizure of a debtor's property with the ministerial assistance of state officials and a creditor's seizure, and even sale, of that property himself.

2. *The Relevant Supreme Court State Action Decisions*

The emphasis by Judge Adams in *Parks* upon the basic similarity of all prejudgment creditors' remedies — that they all permit a delegation of the conflict resolution machinery to the creditor — is the logical starting point in the resolution of the state action issue in the creditors'-remedies cases. As Judge Adams stated, "Conflict resolution is now seen as one of the core attributes of the sovereign."[180]

Judge Adams' language is consistent with the observations of Justice Harlan in *Boddie v. Connecticut.*[181] Concluding that the failure of the states to provide a mechanism for obtaining divorces in *forma pauperis* was violative of due process, Justice Harlan stated that

> no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members,

179. *See* notes 112-14 and accompanying text *supra.*
180. 556 F.2d at 146 (Adams, J., concurring) (footnote omitted).
181. 401 U.S. 371 (1971).

> enabling them to . . . settle their differences in an orderly, predictable manner. . . .
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> . . . Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable. . . . Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.[182]

The conclusion which follows from the foregoing is that the establishment of a formalized system for taking property from one person and giving it to another is, by necessity, a monopoly of the state. Otherwise, enforcement by interested parties would result, exacerbating conflicts, encouraging unrestrained self-help, and possibly resulting in the occurrence of civil disorder. A corollary to this result is that the state's procedures must be within the bounds of justice or due process of law. In recognition of this principle, states have uniformly established judicial systems requiring that parties seeking to deprive others of property first obtain a judgment and then effect execution upon that judgment through state officers to forcibly seize the property of another.

The conclusion that state action is lacking in a particular context begins with the observation that the fourteenth amendment does not pertain to the actions of private individual's interests. This principle was initially enunciated in the *Civil Rights Cases.*[183] However, in the *Civil Rights Cases,* the principal dichotomy drawn was between acts of purely private discrimination and acts which, while private in one sense, were supported by state authority.[184] An act was said to be a private wrong, beyond the scope of the fourteenth amendment, "if not sanctioned in some way by the State, or not done under State authority," or "unless protected in these wrongful acts by some shield of State law or State authority . . . ."[185]

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182. *Id.* at 374-75. This language is similar to earlier statements of the Court. *See* Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930); Hovey v. Elliott, 167 U.S. 409, 417 (1897). *See also* Watson v. Branch County Bank, 380 F. Supp. 945, 961-73 (W.D. Mich. 1974), for a complete analysis of this issue in the context of repossession.

183. 109 U.S. 3 (1883).

184. Justice Bradley stated that "it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Id.* at 17.

185. *Id.* It is submitted that the presence of a state statute or the existence of a clear state policy at common law, as exists in state procedures establishing creditors'

The same distinction reappeared in *Shelley v. Kraemer.*[186] In *Shelley,* the Court held that, while private enforcement of racially restrictive covenants did not constitute state action, the enforcement of such covenants by the state courts constituted "full and complete" state action.[187]

The *Moose Lodge*[188] Court made the same private-public distinction in its state action analysis. The Court first noted that "Moose Lodge is a private club in the ordinary meaning of that term."[189] Despite this, the Court found state action in the state's enforcement of its neutral regulation which required the Moose Lodge to adhere to its own discriminatory policies.[190]

The private-public distinction favors the conclusion that state action is present in the enforcement of creditors' remedies. Creditors are not private clubs or institutions, but typically open their doors to the public. The private racial discrimination held insufficient to come within the scope of the fourteenth amendment was the most basic sort of private conduct protected by the right of freedom of association. In contrast, the particularly public nature of the credit industry and of the exercise of conflict resolution, a "core attribute" of the state,[191] would appear to be at the opposite end of the private-public dichotomy expressed by the Court in the *Civil Rights Cases, Shelley* and *Moose Lodge.*

The Supreme Court has consistently found state action present whenever the state has placed its own power or authority behind the conduct of a private party. Such an analysis is the foundation of the Supreme Court's decisions in *Shelley* and in *Barrows v. Jackson.*[192] A unanimous *Shelley* Court held that state action was present because the enforcement of the racially restrictive covenants by the state courts, though included in private agreements, constituted state action.[193] The *Barrows* Court considered whether damages could be awarded against a party who breached a racially restrictive covenant.[194] The Court held that damages could not be awarded constitutionally because the result "would be to encourage the use of

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remedies, clearly sanctions a creditor's acts. The acts should thus be treated as accomplished under state authority.

186. 334 U.S. 1 (1948).
187. *Id.* at 19.
188. *See* notes 109-11 and accompanying text *supra.*
189. 407 U.S. at 171.
190. *Id.* at 179.
191. *See* text accompanying note 180 *supra.*
192. 346 U.S. 249 (1953).
193. 334 U.S. at 19-20.
194. 346 U.S. at 251.

restrictive covenants. To that extent, the state would act to put its sanction behind the covenants."[195]

The judicial enforcement power of the state held sufficient to draw an otherwise private contractual agreement into the arena of state action in *Shelley* and *Barrows* is comparable to the state power present in the enforcement of creditors' remedies. Because of the presence of legislative enactments or a clear common law policy, it is unnecessary to litigate the creditor's right to exercise and enforce his remedies to ascertain the stance of the state in a particular matter; clearly, the state will enforce the creditor's use of these remedies. Hence, it is submitted that the existence of the laws and statutes more clearly "encourage[s] the use" of the particular creditor's remedy than the state court's action of enforcing racially restrictive covenants in *Shelley* and *Barrows*.[196]

That the source of the state's expression of power is insignificant was made apparent by a line of Supreme Court cases that overturned criminal convictions of parties who engaged in "sit-ins" in defiance of racial discrimination in public places in the South. In *Peterson v. City of Greenville*,[197] the Court was faced with segregation at a lunch counter that was mandated by a city ordinance prohibiting integration of the races.[198] Alternative to its holding that the mandatory state statute rendered the private discrimination state action, the *Peterson* Court found that, even if the store's manager had acted independently of the ordinance and without knowledge of it, state action would be present in the state's enforcement of the ordinance in the manner of *Shelley*.[199]

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195. *Id.* at 254.

196. The Court reached a conclusion analogous to that reached in *Shelley* and *Barrows* in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the Court held

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court — that "The Fourteenth Amendment is directed against State action and not private action." That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. *See* e.g., Alabama Code, Tit. 7 §§ 908-917. The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised.

Id. at 265.

197. 373 U.S. 244 (1963).

198. *Id.* at 245-47.

199. *Id.* at 248.

In the next case, *Lombard v. Louisiana,*[200] the defendants were convicted of "criminal mischief" for attempting to integrate a lunch counter.[201] Unlike *Peterson,* there was no state statute or city ordinance requiring segregation. Nevertheless, the Court held that state action was present because several city officials were found to have encouraged the arrests by inflammatory public statements which were said to make the arrests " 'conform to state policy and practice' as well as local custom."[202]

The Supreme Court extended *Peterson* and *Lombard* in *Robinson v. Florida.*[203] The *Robinson* Court held that state statutes requiring separate restrooms in places where food was served "embody a state policy putting burdens upon any restaurant which serves the two races, burdens bound to discourage the serving of both races together."[204] On that basis, the Court held that sufficient state action existed to overturn on federal constitutional grounds the defendants' convictions of a misdemeanor for remaining in a restaurant after being ordered to leave.[205]

The Court has thus made clear that the state's power of enforcement of racial segregation is more significant than the means by which it exercises that power. A direct prohibition of integration by the state, while certainly sufficient to put the weight of the state behind discrimination by private parties in public places, was held, in the final analysis, not to be the exclusive method by which the state could do so. State action or statutes which encouraged discrimination no more directly than the state enforcement of creditors' remedies were held sufficient to infuse conduct by private parties with state action.

Perhaps the strongest expressions of the importance of focusing upon the practical effect of a state enactment rather than its wording in determining whether the enactments are subject to federal constitutional attack are the Supreme Court decisions of *Reitman v. Mulkey*[206] and *Hunter v. Erickson.*[207] In *Reitman,* the Court considered a California constitutional amendment which prohibited the state from enacting any law which would restrict the right of any person to sell, lease, or rent real property to whomever he chose.[208] On its face, the amendment merely guaranteed to private

200. 373 U.S. 267 (1963).
201. *Id.* at 268.
202. *Id.* at 270-73.
203. 378 U.S. 153 (1964).
204. *Id.* at 156.
205. *Id.* at 156-57.
206. 387 U.S. 369 (1967).
207. 393 U.S. 385 (1969).
208. 387 U.S. at 370-71.

persons the right to dispose of their own real property as they wished. However, Justice White, writing for the Court, held that the practical effect of the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State."[209] The Court thus struck down the amendment as violative of the federal constitution.[210]

The *Hunter* Court considered a city charter amendment which repealed all prior ordinances and prevented the enactment of any future ordinances pertaining to the regulation of housing on the basis of race unless the regulation was approved by a majority of the city's voters.[211] Unlike the constitutional amendment in *Reitmen,* the city charter amendment before the *Hunter* Court did not foreclose entirely the future enactment of open-housing laws. Rejecting the city's argument that the charter amendment neither created a right to discriminate nor encouraged discrimination nor banned open-housing laws, the Court found that the city "unquestionably wields state power"[212] and struck down the city charter amendment on constitutional grounds.[213]

Reitman and *Hunter* represent perhaps the best examples of a focus by the Supreme Court upon the actual weight a state puts behind certain policies rather than upon the literal manner in which the state does so. Neither enactment considered by the Court commanded discrimination, nor, on their face, did they encourage it. However, in the context in which they were placed they did permit, and thus encourage, discrimination. It is submitted that in the creditors' remedies context, the state's actions are even more clearly committed to the creditor than in the foregoing cases. The enforcement of creditors' remedies is most often pursuant to state statutes or a clearly defined common law policy which, unlike the *Reitman* or *Hunter* situation, are far from neutral.

An analysis similar to that established in *Reitman* and *Hunter* was applied in a nonracial context in *Public Utilities Commission v. Pollak.*[214] In *Pollak,* plaintiffs sought to enjoin a private municipal transit authority from the use of radio transmission in its vehicles on the ground that the transmissions violated their constitutional rights.[215] Although it refused to grant the plaintiffs the relief which

209. *Id.* at 381.
210. *Id.*
211. 393 U.S. at 386-87.
212. *Id.* at 389 (footnote omitted).
213. *Id.* at 393.
214. 343 U.S. 451 (1952).
215. *Id.* at 453.

they sought on the merits, the Court first considered the state action issue and found that state action existed.[216] In so finding, the *Pollak* Court relied solely on the fact that the Public Utilities Commission, a government agency, had formally investigated the feasibility of radio transmissions on public transportation and that "the action of the Commission in permitting such operation . . . amounts to sufficient Federal Government action to make the First and Fifth amendments applicable thereto."[217]

While the *Pollak* decision was not overruled in *Jackson,*[218] it was certainly limited by that case. The only distinction between the cases appears to be that the failure of the Pennsylvania Public Utility Commission to even investigate the termination policies of the *Jackson* defendant was distinct from the formal investigation procedures employed by the Public Utility Commission in *Pollak.* This distinction leads to the conclusion that the state can prevent a court's finding state action by turning its back on even the most egregious conduct by private entities under its regulation. Also, constitutional scrutiny of identical conduct by utilities in different states would vary according to the attention that a state's regulatory body had given to the particular conduct, thus permitting states too callous to even consider the issue to insulate their utilities' procedures from constitutional attack.[219]

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216. *Id.* at 462.

217. *Id.* at 462-63. The Court refused to rely on the fact that the transit company, while private, operated a public utility or that it had a monopoly in the operation of the transport system. *Id.* at 462.

218. *See* notes 112-14 and accompanying text *supra.*

219. In the past two years, the Pennsylvania Public Utility Commission has shown great interest in the termination policies of utilities under its regulatory authority. On January 31, 1976, the Commission, in response to several newspaper stories of deaths caused by utility terminations, enacted interim regulations requiring prior approval from the Commission before a termination could be effected. 6 PA. BULL. 162-63 (Jan. 31, 1976). After lengthy hearings on this issue, the Commission enacted a more detailed interim order regulating terminations on April 18, 1977. 7 PA. BULL. 1174-76 (Apr. 3, 1977). The Commission still has under advisement a very detailed set of proposed regulations specifically addressing, *inter alia,* termination procedures. 6 PA. BULL. 2988-3001 (Dec. 4, 1976).

If the distinction between *Pollak* and *Jackson* suggested here is correct, it may be that the prehearing termination practice of the same utility which was the defendant in *Jackson,* is now subject to constitutional scrutiny. Furthermore, it is submitted that a state's approach to creditors' remedies is more similar to that of the regulatory body in *Pollak* than in *Jackson.* Enactment of a state statute permitting a creditor to exercise a certain remedy would appear to constitute the state's placing its imprimatur on the remedy. Also, the enforcement of a creditor's remedies by state administrative and judicial action would appear to surpass the state involvement present in *Pollak.* Therefore, sufficient state power is manifested behind its enforcement of creditors' remedies to infuse such remedies with state action. From this experience, perhaps a logic to the Court's reasoning in *Jackson* can be perceived. If an issue is significant enough to cause public disquiet, the state will ultimately be forced to act upon it.

Therefore, it is submitted that sufficient state power is manifested behind enforcement of creditors' remedies to infuse nearly all such remedies with sufficient state action to render the fourteenth amendment's prerequisites applicable in measuring the legality of these remedies. This conclusion follows from an analysis based on considerations used by the Supreme Court in other state action decisions[220] rather than the artificial considerations utilized by the courts in the recent decisions in the creditors' remedies cases.[221]

3. *A Critique of Treating Racial Discrimination Cases as a Special Class of State Action Cases*

Attempts have been made to distinguish many of the foregoing cases from creditors' remedies cases because they involved racial discrimination, which is not an issue in the latter.[222] The acceptability of treating the principles established in the discrimination cases as applicable to creditors' remedies may be viewed most logically by analyzing the possible policy behind doing so. Black persons are in the minority in the United States. Therefore, the white majority, if allowed to treat blacks or to contract with blacks as they wished, could easily relegate blacks to second class status. Without state and federal intervention, this phenomenon has resulted in gross racial discrimination in such basic commodities as housing and employment opportunities. If the state or the federal government refused to intervene on behalf of blacks, the weakness of the blacks' bargaining position would result in even greater discrimination.

The debtor-creditor relationship is somewhat analogous in one respect — the parties do not have equal bargaining power. Left free from state control, but not free from state enforcement of contracts and state laws, the debtor is not only vulnerable to, but has consistently been the victim of, overreaching by the creditor.[223] In *Fuentes,* the Supreme Court recognized, as did the district court in *Santiago,*[224] the presence of contracts of adhesion in the creditor-

220. *See* notes 180-219 and accompanying text *supra.*

221. *See* notes 120-31 and accompanying text *supra.*

222. *See* 556 F.2d at 137 (plurality opinion); Burke & Reber (pt. 1), *supra* note 170; Burke & Reber (pt. 2), *supra* note 154. *But see* 556 F.2d at 154 (Gibbons, J., concurring) (no "hierarchy of constitutional values" requiring different state action considerations when discrimination based on race and sex is involved).

A distinction between cases involving discrimination based on race and all other cases in the determination of state action has not been adopted by the Supreme Court even in cases where such a distinction would have been possible. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See also* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Convention, 412 U.S. 94 (1973).

223. *See* note 88 and accompanying text *supra.*

224. *Id.*

debtor context.[225] Therefore, if the state refused to intervene on behalf of debtors, the weakness of the debtors' bargaining position would not permit them to further their interests. Like blacks, the rights of debtors can be protected only by state intervention.

Such reasoning rebuts Judge Adams' argument in *Parks* that the contract is significant,[226] at least in the typical creditor and individual consumer-debtor context.[227] The *Shelley* Court recognized that the state's enforcement of a "mere" private agreement that furthered racial discrimination was, under such circumstances, state action.[228] It is submitted that in the creditor and individual consumer-debtor context, the same considerations apply. The creditor can often exact whatever best serves his interest in a contract with a consumer.[229] In this situation, it cannot be logically argued that the existence of a contract setting forth his remedy should shield the creditor from constitutional attack in enforcing that remedy.

As a postscript, it should be stated that certain considerations could change the finding that state action exists in a situation where a creditor's remedy is at issue. If the creditor and debtor are dealing at arm's length and both execute a bargained for agreement that is not an adhesion contract, when Judge Adams' point concerning the significance of a contract between the parties is indeed meaningful. In such a case, it would be legitimate to conclude that the creditor's power flows from the parties' contract.[230]

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225. 407 U.S. at 95-96.

226. *See* 556 F.2d at 147 n.18 (Adams, J., concurring).

227. It is submitted that repairmen are generally in a weaker bargaining position than creditors who finance purchases of motor vehicles. For this reason, they are unable to obtain adhesion contracts from their customers. There is a certain irony to winning a case against a modest repairman having a relatively weak bargaining position, while losing to a corporate giant having a much stronger bargaining position on the ground that the former, but not the latter, is involved in state action.

228. *See* note 187 and accompanying text *supra.*

229. This raises a troubling point with respect to the reasoning of the district court in *Swarb v. Lennox,* 314 F. Supp. 1091 (E.D. Pa. 1970) (three-judge court). If a creditor drafts contract forms which make the confession clauses so conspicuous that the debtor does understand their significance, he may possibly argue that the consumer has knowingly, voluntarily, and intelligently waived his due process rights by executing the contract. This argument might successfully evade the court's holding in *Swarb. See* notes 82-85 and accompanying text *supra.*

However, it is submitted that this alleged waiver would not be voluntary if the consumer could not avoid entering into an adhesion contract. *See* Fuentes v. Shevin, 407 U.S. 67, 95 (1972); Santiago v. McElroy, 319 F. Supp. 284, 294 (E.D. Pa. 1970) (three-judge court). For this reason, the approach of the *Swarb* court is less than satisfying in comparison to the results in Osmond v. Spence, 327 F. Supp. 1349 (D. Del. 1971), *vacated,* 405 U.S. 971, *reinstated,* 359 F. Supp. 124 (D. Del. 1972) (*see* note 85 *supra*) and may not be the final word on confessions of judgment in Pennsylvania.

230. As a result, those court decisions which appear to create a rule of law for business transactions different from that for consumer transactions may have a

4. *Some Final Thoughts on Due Process Requirements*

The concurring opinions of Judges Adams and Gibbons in *Parks,* juxtaposed to the opinion of Chief Judge Seitz, remind that the state action issue, while prominent in most recent challenges of creditors' remedies, is not the only issue present. There is also a due process issue upon which difference of opinion exists.

Judge Gibbons found that the initial consensual nature of the repairman's possession of a vehicle which he detains saved the detention lien from constituting a violation of due process.[231] Judge Adams was unimpressed with the consensual nature of the initial possession, but indicated that the interests of repairman and customer as revealed through empirical data had to be weighed before a decision on the due process issue could be made.[232]

It is submitted that both of these approaches depart from the approach to the due process issue in creditors' remedies challenges used by the Third Circuit in *Jonnet v. Dollar Savings Bank of New York*[233] and by the Supreme Court.[234] While there should always be a degree of balancing attempt, the determinative factor in the due process issue should be whether the detention lien has the *Mitchell* "saving characteristics" enumerated in *Di-Chem.*[235] Clearly, the detention lien contains none of those "saving characteristics," and has fewer protections for the vehicle owner than the procedures considered in either *Fuentes* or *Di-Chem.*[236]

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sound basis. *Compare* D. H. Overmayer Co. v. Frick Co., 405 U.S. 174 (1972), *with* Swarb v. Lennox, 405 U.S. 191 (1972). The Second Circuit in *Flagg Brothers* made this distinction when it restricted its decision to U.C.C. § 7-210(2), the provision dealing with consumer transactions, as opposed to U.C.C. § 7-210(1), which deals with commercial warehousing. 553 F.2d at 774-75. However, such a gross generalization (business versus consumer) may be overbroad, since adhesion contracts exist in the business world as well as in consumer transactions. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (successful due process challenge of a creditor's remedy by a business).

231. 556 F.2d at 161 (Gibbons, J., concurring). *See* Cockerel v. Caldwell, 378 F. Supp. 491, 498 (W.D. Ky. 1974) (three-judge court); Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

The Seventh Circuit in Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied,* 420 U.S. 934 (1975), after finding state action absent from a detention lien, also held that the lien did not violate the debtor's due process rights. 503 F.2d at 994-95. *But see* Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D. W. Va. 1973); Ford v. Dean's O.K. Tire Store, Inc., *judgment filed,* CIVIL-LV 1974 (D. Nev., 1973) (Feb. 9, 1973).

232. 556 F.2d at 143 n.1. (Gibbons, J., concurring).

233. 530 F.2d 1123 (3d Cir. 1976), *noted in* The Third Circuit Review, 22 VILL. L. REV. 606 (1977).

234. *See* notes 75-81 & 105-114 and accompanying text *supra.*

235. 419 U.S. at 606-07. *See* text accompanying notes 106 & 107 *supra.*

236. Under the statute in *Fuentes,* the creditor at least had to file a security bond for double the amount of the property and file a complaint initiating a court action for

It is further submitted that the consensual nature of the repairman's initial possession should be irrelevant. As Chief Judge Seitz observed, the repairman is only a bailee of the items repaired.[237] Upon the owner's demand for return of the items, the repairman would be a converter of the property repaired but for the lien. At that point, the property interest of the repairman in the property is that of a security device. This interest is not as great as that of the owner, who frequently has an immediate need for the item repaired. Thus, it is difficult to understand why Judge Gibbons concluded that the single element of initial consensual surrender outweighed the absence of all of the *Mitchell* "saving characteristics" enumerated in *Di-Chem.*

Judge Adams' concern is legitimate; the practical economic effect of a court's decision should never be irrelevant. However, establishing this effect may be so difficult that its determination may turn almost exclusively on the allocation of the burden of proof. Judge Adams apparently concluded that the parties challenging the creditor's remedy have the burden of showing that abolition of the remedy challenged will not have a significant economic impact contrary to the public interest.[238] In contrast, the plaintiffs in *Sniadach* and *Fuentes* prevailed in the absence of any evidence on the economic consequences of the abolition of the remedies challenged. It thus appears that subsequent to showing that the *Mitchell* "saving characteristics" are absent from a creditors' remedy, the burden should shift to the creditor to establish that the perpetuation of his otherwise unconstitutional remedy is saved by its peculiar value to the public interest.

One other response to Judge Adams is the fact that the historic reason for the development of the common law lien — the absence of a remedy on an implied contract at common law, making the lien the lienholder's only means of collecting obligations due him—[239] is no longer viable. The lienholder can now both exercise his lien *and* proceed in assumpsit in such accessible forums as small claims courts. Since its common law rationale has disappeared, it is submitted that the possessory lien is an example of a common law

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repossession. 407 U.S. at 74. In *Di-Chem,* a creditor had to file a bond for double the amount of the property and make an affidavit before the clerk of court stating the amount claimed to be due. 419 U.S. at 602-03.

237. 556 F.2d at 166. (Seitz, C.J., concurring and dissenting in part).

238. *See id.* at 143 n.1. (Adams, J., concurring).

239. *See* Younger v. Plunkett, 395 F. Supp. 702, 707-708 (E.D. Pa. 1975); R. BROWN, *supra* note 27, at § 107, at 510-11; Ames, *The History of Assumpsit* (pt. 2), 2 HARV. L. REV. 53, 58 (1888).

precedent which, its rationale having passed from the scene, can pass as well without upsetting the social order.

IV. CONCLUSION

The direct effect of the *Parks* decision, halting sales but not halting prejudgment detentions by repairmen, appears modest. Sales by repairmen have always been far rarer than lien detentions. The leverage of even a short detention by a repairman upon an owner who desperately needs the item repaired is frequently enough to provide the repairman with an unfair advantage over the customer. However, a repairman who could previously sell a detained vehicle which occupied space, can no longer do so. This may encourage repairmen to return vehicles they would have otherwise retained.

The most substantial impact of *Parks* is unlikely to be its effect on the repairman's lien laws. The case presented provocative challenges to the detention lien and the sale and elicited the most throughtful and diverse judicial consideration of the state action issues involved in the creditors' remedies cases to date. It may serve as a stepping stone to abolition of other creditors' remedies and even a reconsideration of at least the sale aspect of repossession.[240]

Parks will undoubtedly serve as a catalyst for the Supreme Court's weighing of similar issues in *Flagg Brothers*. As such, it could spur the Court to the full consideration that the *Flagg Brothers* case deserves. If so, the *Parks* opinions could be among the most important statements on the constitutionality of creditors' remedies.

V. AUTHOR'S POSTSCRIPT

On May 15, 1978, the United States Supreme Court decided *Flagg Bros., Inc. v. Brooks*,[241] reversing the Second Circuit's finding that state action existed in the warehouseman's lien sale. The decision was 5-3, with Justice Rehnquist writing the majority opinion. Justice Brennan took no part in the decision.

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240. Judge Hunter, the author of the *Gibbs* opinion, suggested in *Parks* that the fact that the repairman's sale concerned "the power to determine finally — as opposed to temporarily — the ownership rights in a chattel," was an important consideration. 556 F.2d at 164 n.2 (Hunter, J., concurring). He further suggested that *Gibbs* was distinguishable because it "did not reach the private party's power to sell a repossessed chattel; it dealt only with a temporary deprivation." *Id.* This statement indicates that the *Gibbs* panel considered only the challenge to the initial seizure rather than the sale.

A successful attack on the repossession sale would have a significant impact. With no power to dispose of vehicles seized, repossession creditors would be likely to exhaust storage space and diminish their aggressiveness in utilizing repossession.

241. 98 S. Ct. 1729 (1978).

Justice Rehnquist focused upon the absence of state participation in distinguishing the Court's prior decisions in *Sniadach* through *Di-Chem.*[242] Without discussing most of the cases cited in this article, the Court devoted much of its opinion to answering the arguments that 1) the power to sell was such that it should properly be reserved to the state; and 2) the state encouraged the warehouseman's actions. The first argument was rejected by the Court's reasoning that only delegation of powers "exclusively" reserved to the state triggers a finding of state action.[243] The Court also rejected the second argument, holding that state compulsion rather than acquiescence was necessary for a finding of state action based upon encouragement.[244]

The hope that *Parks* would revitalize due process attacks on oppressive creditors' remedies appears to be extinguished by the preemptive scope of *Flagg Bros. Parks* did not serve as a catalyst to the Court in *Flagg Bros.*, as the majority did not even cite it. Nevertheless, it is submitted that the *Flagg Bros.* Court rendered an unsound and incomplete analysis of the state action issue, more reminiscent of the shallow repossession decisions than the diverse, thoughtful opinions in *Parks.*

242. *Id.* at 1734.
243. *Id.* at 1735-37.
244. *Id.* at 1737-38.