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STATE ACTION NECESSARY TO INVOKE STATE DUE PROCESS
Helfinstine v. Martin, 561 P.2d 951 (Okla. 1977)

In *Helfinstine v. Martin*,[1] the Oklahoma Supreme Court refused to extend state due process protection beyond that afforded by the federal constitution by upholding the constitutionality of self-help repossession under section 9-503 of the Uniform Commercial Code.

Plaintiff purchased a pickup truck in Florida and returned with it to Oklahoma after executing an installment sales agreement giving the finance company a secured interest in the vehicle.[2] When plaintiff subsequently defaulted on the contract, defendant, as creditor's agent, repossessed the truck under a contract provision providing the seller with "all the rights and remedies of a Secured Party under the Uniform Commercial Code."[3] Plaintiff filed suit in Oklahoma state court alleging wrongful repossession of the vehicle and asking for actual and punitive damages.[4] The jury returned a verdict in his favor, but the court granted defendant's motion for judgment notwithstanding the verdict.[5] The Oklahoma Court of Appeals reversed,[6] finding the statutory self-help authority of section 9-503 of the Oklahoma Uniform Commercial Code[7] a violation of the Oklahoma Constitution because it allowed a secured creditor to take possession of a debtor's property without due process of law. The Oklahoma Supreme Court vacated the court of

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1. 561 P.2d 951 (Okla. 1977).

2. The *Helfinstine* facts are typical of § 9-503 cases. *See* Note, *Self-Help Repossession: The Constitutional Attack, The Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273, 278-79 (1973). One commentator suggests that self-help repossession is rarely used outside of automobile sales because the possibility of breaching the peace to retake a "soiled arm chair" is hardly worth the risk. *See* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503.

3. In addition to the broad inclusion of all statutory rights and remedies, the contract specifically allowed for repossession by the creditor "wherever the same may be found with free right to entry." 561 P.2d at 953 n.1.

4. Plaintiff asked the court to order defendants to return his truck to him and to cancel the security agreement. If the truck was not returned to him, the plaintiff asked the court for its value and $50,000 punitive damages. *Id.* at 953.

5. *Id.*

6. Helfinstine v. Martin, 47 OKLA. B.A.J. 973 (Ct. App. 1976).

7. OKLA. STAT. ANN. tit. 12A, § 9-503 (West 1963). The relevant portion reads: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

appeals decision, reinstated the trial court judgment, and *held*: The due process provision of the Oklahoma Constitution, like the fourteenth amendment, is designed to protect citizens from arbitrary and unreasonable action by the state. Self-help repossession although authorized by the state legislature, does not involve the state to the extent necessary to invoke Oklahoma due process protection.[8]

The due process clause of the fourteenth amendment[9] requires that notice[10] and an opportunity to be heard[11] be given to a debtor prior to depriving him[12] of a possessory interest[13] in his personal property.[14] Although variance in form is tolerated,[15] these procedural require-

8. 561 P.2d 951, 958-60 (Okla. 1977).

9. U.S. CONST. amend. XIV, § 5: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

10. Notice is required to give meaning to the opportunity to be heard. Obviously, an opportunity to defend offered to a party who is not given notice, is a sham. Windsor v. McVeigh, 93 U.S. 274, 277-78 (1876); *accord*, McVeigh v. United States, 78 U.S. (11 Wall.) 259 (1870).

11. The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972). *See* Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Hovey v. Elliot, 167 U.S. 409 (1896); Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1863).

12. Even a temporary, non-final deprivation of property is sufficient: "The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." Fuentes v. Shevin, 407 U.S. 67, 86 (1972). *Accord*, Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

13. Fourteenth amendment protection extends to "any significant property interest." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). *See* Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (lack of full title in replevied goods); Bell v. Burson, 402 U.S. 535, 539 (1971) (protection extended to statutory entitlement to a driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (public assistance payments).

14. In *Fuentes*, the principle was extended to secured transactions. Although a conditional sales contract gave the creditor a secured interest, the court found that the deprivation of the debtor's "continued use and possession" warranted due process safeguards. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

15. Fuentes v. Shevin, 407 U.S. 67, 82 (1972); *accord*, Boddie v. Connecticut, 401 U.S. 371, 378 (1971) ("depending upon the importance of the interests involved and the nature of the subsequent proceedings"); Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) ("tailored to the capacities and circumstances of those who are to be heard"); Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950) ("appropriate to the nature of the case").

ments must occur at a "meaningful time and in a meaningful manner."[16] Postponement of the notice and hearing until after the seizure of the property is permitted only when an important governmental or public concern outweighs the property owner's interests.[17] Although these requirements may be waived,[18] the waiver must be "voluntarily, intelligently, and knowingly" made[19] and, "at the very *least*, be clear."[20] Where there is a showing of potential danger to the goods in question, the Supreme Court has sanctioned statutes providing relief for the creditor if "narrowly drawn to meet any such unusual condition."[21] Consequently, statutory creditor remedies authorizing the state to seize an individual's property upon an ex parte showing[22] and without mini-

16. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Because the Court has never found that "a wrong may be done if it can be undone," a meaningful time generally means prior to any deprivation. Stanley v. Illinois, 405 U.S. 645, 647 (1972). *See* Bell v. Burson, 402 U.S. 535, 542 (1971); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970); Opp Cotton Mills v. Administrator, 312 U.S. 126, 152 (1941).

17. *See* Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (to protect the public from misbranded drugs); Fahey v. Mallonee, 332 U.S. 245 (1947) (to guard against economic disaster resulting from bank failure); Phillips v. Commissioner, 283 U.S. 589 (1931) (to secure government taxes); Stoehr v. Wallace, 255 U.S. 239 (1921) (to aid war effort). *Compare* Yudof, *Reflections on Private Repossessions, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974), *with* White, *supra* note 2.

18. Most often the taking is effected under a contract which purports to waive the debtor's legal rights. *See* Fuentes v. Shevin, 407 U.S. 67, 94 (1972). One commentator suggests that invalidating § 9-503 may be a futile attempt to afford the debtor due process if all it leads to is more precise waiver provisions. McDonnell, Sniadach, The Replevin Cases *and Self-Help Repossession—Due Process Tokenism?*, 14 B.C. INDUS. & COM. L. REV. 437 (1973).

19. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972). The Court in *Overmyer* found the contractual waiver of due process rights valid after noting that the two corporations had bargained and drafted the provisions themselves, but said: "Where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the provision, other legal consequences may ensue." *Id.* at 188. The Court reiterated these principles in Swarb v. Lennox, 405 U.S. 191 (1972).

20. Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (emphasis original). Clarity seems to be the overriding factor, for the Court refused to ask whether the waiver was "knowing or voluntary" when no mention of rights, or waiver thereof, was contained in the contract.

21. *Id.* at 93 (quoting Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969)).

22. The replevin statutes struck down in *Fuentes* allowed the creditor to obtain a writ with mere rubber-stamp approval by a court clerk of an ex parte application:

> Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure.

mal judicial supervision[23] are unconstitutional.[24]

Under the fourteenth amendment, due process is required only of action in which the state is significantly involved.[25] State action may not be immediately apparent, however: only by "sifting the facts"[26] may a court determine whether the "close nexus"[27] necessary to find state action exists between the state and the seemingly private behavior. Federal courts have consistently held that the mere codification of self-

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> There is not even a requirement that the plaintiff provide any information to the court on these matters. The state acts largely in the dark.

Id. (footnotes omitted).

23. In Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), a Louisiana sequestration statute was upheld and distinguished from the procedures in *Fuentes*; *see* note 22 *supra*. In *Mitchell*, the statute required that a sworn affidavit of the facts be presented to a judicial officer, who made a "probable" determination, as well as prompt mandatory review of the seizure. Some courts and commentators suggested that *Mitchell* overruled *Fuentes* until North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), reaffirmed the latter by noting these procedural distinctions. *See id.* at 608 (Stewart, J., concurring): "It is gratifying to note that my report of the demise of Fuentes v. Shevin [in *Mitchell* dissent] seems to have been greatly exaggerated." (footnotes omitted). *See* Mitchell v. W. T. Grant Co., 416 U.S. at 623, 634 (concurring and dissenting opinions); Note, *Replevin and Non-Judicial Repossession in Light of* Fuentes v. Shevin, 3 MEM. ST. L. REV. 125 (1972); Note, *Creditor Remedies and Due Process: Comparing* Mitchell *and* Fuentes, 10 URB. L. ANN. 243 (1975); Note, *Provisional Remedies and Due Process in Default*—Mitchell v. W. T. Grant Co., 1974 WASH. U.L.Q. 653.

24. *E.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment in pending suit); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (garnishment of wages); Hall v. Garson, 468 F.2d 845 (5th Cir. 1972) (landlord's lien); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972) (garnishment of bank account).

25. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967). For the historical development of the state action doctrine, see Cooper v. Aaron, 358 U.S. 1 (1958); Shelley v. Kraemer, 334 U.S. 1 (1948); Twining v. New Jersey, 211 U.S. 78 (1908); The Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1879). *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973).

But see Adickes v. S. H. Kress & Co., 398 U.S. 144, 203 (1970) (Brennan, J., concurring and dissenting) ("When private action conforms with state policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action."); Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967) (state has codified what inevitably will encourage private individuals to discriminate); Evans v. Newton, 382 U.S. 296, 299 (1966) ("[W]hen private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations.").

26. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

27. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

help repossession, a common law remedy,[28] does not constitute sufficient state action to invoke due process scrutiny.[29] Although a less burdensome state action barrier is often recognized where invidious racial discrimination occurs,[30] the courts fear total emasculation of the state action concept if the same interpretation is applied in section 9-503 situations.[31] Presumably, increased federal judicial intervention

28. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 573 (2d ed. 1899); *Cf.* Turner v. Impala Motors, 503 F.2d 607, 612 (6th Cir. 1974) ("Were we to rely upon the mere fact of codification, we would in part be making available to a complex matrix of human behavior, as regulated by statutes, the scope of federal remedies."). *But see* Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969) ("The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern form."); Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531, 569-70 (1975) (rejects the mere codification argument; sees § 9-503 as state authorization for a tort—conversion). *See also* 26 MERCER L. REV. 1421 (1975); 44 U. COLO. L. REV. 389 (1973).

29. *E.g.*, Gary v. Darnell, 505 F.2d 741 (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.), *cert. denied*, 419 U.S. 1034 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Shirley v. State Nat'l Bank, 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.), *cert. denied*, 419 U.S. 1006 (1974). Most of the challenges to § 9-503 in the cases cited above also sought federal relief by virtue of the Civil Rights Act of 1866. 42 U.S.C. § 1983 (1970) provides for a cause of action for deprivation of constitutional rights by a person acting "under color of any state law," and 28 U.S.C. § 1343(3) (1970) authorizes original federal jurisdiction for these cases. The criteria necessary to apply the Act or the fourteenth amendment have been held to be synonymous. *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966).

30. The self-help repossession cases distinguish Reitman v. Mulkey, 387 U.S. 369 (1967), on the ground that the fourteenth amendment and the Civil Rights Act of 1866 were promulgated to protect citizens from invidious discrimination according to race. The challengers to § 9-503 alleged that *Reitman* held state authorization for potentially wrongful private conduct sufficient to find state action. *See, e.g.*, Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 332-33 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Kirksey v. Theilig, 351 F. Supp. 727, 731-32 (D. Colo. 1972). *But see* Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974): "Since Congress has not chosen to distinguish between constitutionally protected rights in [42 U.S.C.] § 1983, this court can only assume that the amount of state involvement . . . for a deprivation of one constitutional right would equal the amount of state involvement necessary for another constitutional right." 369 F. Supp. at 49 (citations omitted).

31. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974). A few federal courts overcame the threshold state action obstacle and reached the procedural due process question. They found that by enacting § 9-503 the state had become significantly involved with the property deprivation and had allowed the creditor to perform a function traditionally identified with

through increased acceptance of constitutional attacks in situations in which the state is not significantly involved, decreases the role of state and local governments in the federal scheme.[32]

The lack of actual state involvement in the property seizure distinguishes self-help repossession from those creditor remedies which have been invalidated under the fourteenth amendment.[33] Under section 9-503, "unless the parties otherwise agree,"[34] the creditor may effect self-help repossession without the state assistance[35] common to other creditor remedies. The anomalous result is that judicial scrutiny is denied, and repossession statutes are upheld, primarily because there is less official supervision.[36]

Virtually every state has a due process provision closely resembling that of the fourteenth amendment.[37] Nevertheless, since the Warren

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the state. These courts have been unable to distinguish § 9-503 repossession procedures from remedies which have been struck down because they failed to provide for notice and hearing. *See* Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974); Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973); *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974).

One state has effectively repealed § 9-503 in consumer transactions. *See* Wisconsin Consumer Act, WIS. STAT. §§ 421-427 (1971). *See also* Del Duca, *Pre-Notice, Pre-Hearing, Pre-Judgment Seizure of Assets—Self-Help Repossession Under U.C.C. § 9-503, Its Antecedents and Future*, 79 DICK. L. REV. 211 (1975); Rendleman, *supra* note 28; 3 MEM. ST. L. REV. 125 (1972); 44 U. COLO. L. REV. 389 (1973).

32. Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 480 (1975) (suggests that the Burger Court's retreat from Warren-era activism and broad state action interpretations is predicated on a belief that the state action threshold to fourteenth amendment application is a key to the preservation of federalism).

33. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (creditor was issued a writ by the clerk of the court which was ultimately executed by the sheriff, an agent of the state).

34. *See* note 7 *supra*.

35. In fact, at common law, it was considered "a breach of the peace" if the creditor was to intimidate the debtor by "securing the aid of an officer who pretends to act *colore officii*." Waggoner v. Koon, 67 Okla. 25, 168 P. 217 (1917).

36. *See* Watson v. Branch County Bank, 380 F. Supp. 945, 973 (W.D. Mich. 1974); Northside Motors, Inc. v. Brinkley, 282 So. 2d 617, 627 (Fla. 1973) (dissenting opinion) (decided on fourteenth amendment grounds); R. ANDERSON, ON THE UNIFORM COMMERCIAL CODE § 9-503 (Cum. Supp. 1972-73); Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 912 (1975); Rendleman, *supra* note 28, at 571; Spak & Spak, *Constitutional Attacks on Creditors' Self-Help Repossession Rights Under U.C.C. Section 9-503—Developments in Illinois Secured Transactions*, 24 DE PAUL L. REV. 378 (1975).

37. Many state constitutions provide that: "No person shall be deprived of life,

Court's expansion of individual rights protection under federal law,[38] civil rights plaintiffs have failed to utilize state constitutional provisions.[39] State due process violations, if alleged, are generally presented simultaneously with federal fourteenth amendment arguments.[40] Consequently, most state courts, satisfied that the Federal Constitution adequately protects their citizens' rights, find their own state due process clauses coextensive in scope with the fourteenth amendment:[41] A showing of significant state involvement[42] is necessary to raise the state due process issue[43] even though none of the state provisions contains a definitive state action requirement.[44]

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liberty or property without due process of law." *See, e.g.*, ALAS. CONST. art. I, § 7; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 25; ILL. CONST. art. II, § 2; IOWA CONST. art I, § 9; MICH. CONST. art. I, § 17; Mo. CONST. art. I, § 10; N.Y. CONST. art. I, § 6; OKLA. CONST. art. II, § 7; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10. *See also* note 9 *supra.*

38. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970).

39. Linde, *Without Due Process—Unconstitutional Law in Oregon*, 49 ORE. L. REV. 125, 133-35 (1970).

40. *See, e.g.*, cases cited note 41 *infra.*

41. *See, e.g.*, Manford v. Singh, 40 Cal. App. 700, 181 P. 844 (1919); Anderson v. City of St. Paul, 226 Minn. 186, 32 N.W.2d 538 (1948); State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 179 A. 116 (Ct. Err. & App. 1935). *See generally* Mazor, *Notes on a Bill of Rights in a State Constitution*, 1966 UTAH L. REV. 326.

42. *See* notes 25-27 *supra* and accompanying text.

43. *See, e.g.*, Bennett v. Arizona State Bd. of Pub. Welfare, 95 Ariz. 170, 388 P.2d 166 (1964); Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W.2d 428 (Mo. 1975); Washington Nat'l Ins. Co. v. Board of Review of Unemployment Compensation Comm'n, 1 N.J. 545, 64 A.2d 443 (1949); Antinore v. State, 79 Misc. 2d 8, 356 N.Y.S.2d 794 (Sup. Ct. 1974).

44. *See* Project Report, *Toward An Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 297 n.143 (1973). *Compare* OKLA. CONST. art. II, § 7, *with* U.S. CONST. amend. XIV, § 5.

State courts support this interpretation of their state due process clauses by drawing an analogy to the identical language of the due process clause of the fifth amendment of the United States Constitution: "[N]or shall any person . . . be deprived of life, liberty or property without due process of law." *See* state constitutional provisions cited in note 37 *supra.* Although the fifth amendment contains no explicit restriction on its application, it has consistently been held to limit only the actions of the federal government. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833); *accord*, United States v. Lanza, 260 U.S. 377 (1922); Withers v. Buckley, 61 U.S. (20 How.) 84 (1857).

For examples of state court decisions using this analogy, see Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974); Helfinstine v. Martin, 561 P.2d 951 (Okla. 1977).

A number of state courts,[45] however, have reevaluated their bills of rights provisions because of the recent deference by the Supreme Court toward state actions.[46] An increasing number of these courts rely upon their state constitutions for individual rights protection.[47] Because these courts view fourteenth amendment requirements as minimum standards[48] which may be "enlarged or modified"[49] according to local conditions, state due process standards are continuously changing. Cognizant[50] that the Supreme Court will not review state court decisions relying on adequate and independent non-federal grounds,[51] state courts are encouraged to maintain active regulatory roles,[52] independent of the federal government, and necessary to the

45. *See* notes 48-49, 54 *infra* and accompanying text.

46. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 766 (1972), *noted in* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974). *See also* cases cited in Wilkes, *supra* at 423 nn.12-24 and accompanying text.

47. United States v. Miller, 425 U.S. 435, 454 (1976) (Brennan, J., dissenting). Brennan, *supra* note 38, at 498-99. In California, where the courts are particularly receptive to state constitutional rights protection, lawyers routinely raise both federal and state constitutional arguments. *See* Karst, Book Review, 28 STAN. L. REV. 829 (1975).

48. Baker v. City of Fairbanks, 471 P.2d 386, 401 (Alas. 1970); People v. Disbrow, 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368-69 (1976); State v. Santiago, 53 Haw. 254, 265, 492 P.2d 657, 664 (1971) ("[T]his court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections . . . than those given by the United States Constitution." (citation omitted)); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Commonwealth v. Tripplett, 462 Pa. 244, 341 A.2d 62 (1975).

49. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

50. *See* Falk, *The State Constitution: A More Than "Adequate" Non-federal Ground*, 61 CALIF. L. REV. 273 (1973); Wilkes, *supra* note 46.

51. The Supreme Court has said:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state ground. . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court . . . our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) (citations omitted; *accord*, Scripto, Inc. v. Carson, 362 U.S. 207 (1960); Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Sutter Butte Canal Co. v. Railroad Comm'r, 279 U.S. 125 (1929); American Ry. Express Co. v. Kentucky, 273 U.S. 269 (1927); Berea College v. Kentucky, 211 U.S. 45 (1908); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 543-45 (3d ed. 1976). *But see* Bice, *supra* note 46 (author would permit review of any federal question which arises and is *part* of the grounds for decision in the state court).

52. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951).

continued vitality of the federal system.[53]

Only the New Jersey and West Virginia Supreme Courts have previously determined the constitutionality of section 9-503 on state constitutional grounds,[54] and both have failed to extend state due process protection to the debtor-victim of self-help repossession. Significantly, neither court found that insufficient state action precluded due process scrutiny of the actual repossession procedures.[55] The New Jersey court in *King v. South Jersey National Bank*,[56] after finding insufficient state action for fourteenth amendment purposes,[57] neglected to apply traditional state due process standards in holding that self-help repossession did not abridge a citizen's "unalienable" rights.[58] In

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53. Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919, 924 (1957). *See also* Project Report, *supra* note 44, at 286: "To relieve state courts of their obligation to rethink the decisions of federal courts is to deprive the people of their double security and remove one of the very justifications for a federal system."

54. *See* notes 56-61 *infra* and accompanying text. In Johnson v. Atlantic Discount Co., No. 75-2045-SP (Palm Beach County Ct. Nov. 10, 1976), a Florida trial court cited the Oklahoma Court of Appeals decision in *Helfinstine* and struck down § 9-503 on Florida constitutional grounds. The Florida due process clause, the same as the Oklahoma provision, *see* note 37 *supra*, was read literally by the trial judge:

> [D]ue process, especially as used in the Florida Constitution, fundamentally means the obligation of Government to provide for the rule of law in society.
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> . . . The states should very jealously guard the rights of their citizens. The framers of the Constitution of the State of Florida did not shirk this responsibility. They did not limit their guarantee of protection of the right of life, liberty or property from government bodies only. . . . Unlike the 14th Amendment to the Federal Constitution, there is no provision that "no state shall . . . [.]" In the Florida Constitution our citizens are protected not only from infringement by Government, but also from our fellow man. Florida has guaranteed the rule of law in society. This Court construes [the state due process clause] as meaning that Florida has recognized its responsibility to its citizens and will protect their rights from infringement by other persons. At the very least, it means that the Legislature may not suffer, much less sanction, a self-help repossession without notice and opportunity for hearing.

55. Both courts, in discussing the repossession itself, were intent on upholding the statute. That state action was not an obstacle indicates some deviation from fourteenth amendment standards, however.

56. 66 N.J. 161, 330 A.2d 1 (1974).

57. *Id.* at 170-76, 330 A.2d at 7-8.

58. Although the New Jersey constitution does not contain a due process clause, its "natural and unalienable" rights provision has been construed to include due process protection. *E.g.*, Pennsylvania-Reading Seashore Lines v. Board of Pub. Util. Comm'rs, 5 N.J. 114, 124-26, 74 A.2d 265, 270-71, *cert. denied*, 340 U.S. 876 (1950); Maxwell v. Goetschius, 40 N.J.L. 383, 391 (Sup. Ct. 1878).

This construction apparently was overlooked by the majority in *King*. Nevertheless,

Cook v. Lilly,[59] on the other hand, the West Virginia Supreme Court forecast that requiring "intricate procedures" for repossession would generate increased business costs that would potentially have a negative effect on industry and commerce.[60] The court reasoned that the legislature's presumed recognition of this possibility, evidenced by the enactment of section 9-503, justified sacrificing the debtor's state due process rights to alleviate the burden on creditors.[61]

Article two, section seven of the Oklahoma Constitution requires that no person be deprived of property without due process of law. Like the fourteenth amendment, procedural due process under Oklahoma law requires notice and an opportunity to be heard.[62] Oklahoma courts have recently held that a showing of state action is necessary to invoke state due process protection,[63] but the extent of involvement remains unclear.[64] At common law, Oklahoma recognized self-help repossession authorized by the specific terms of the contract[65] and effected without a breach of the peace.[66] In addition, the Oklahoma Constitution has a unique provision expressing state public policy that any contractual waiver of constitutional rights is void.[67]

In *Helfinstine v. Martin*,[68] the Oklahoma Supreme Court followed

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there is an excellent discussion of the potential use of New Jersey constitutional grounds for invalidating § 9-503 in the dissenting opinion. 66 N.J. at 180, 330 A.2d at 11.

59. — W. Va. —, 208 S.E.2d 784 (1974).

60. *Id.* at —, 208 S.E.2d at 787.

61. *Id.* The *Cook* court considered Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), a "dramatic retreat" from the policies of Fuentes v. Shevin, 407 U.S. 67 (1972). This has subsequently proved to be an erroneous assumption because in North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Supreme Court relied on *Fuentes* and distinguished *Mitchell*. *See* note 23 *supra*.

62. Greco v. Foster, 268 P.2d 215 (Okla. 1954); *In Re* White's Estate, 175 Okla. 439, 52 P.2d 1074 (1935); Oklahoma Gas & Elec. Co. v. Wilson & Co., 146 Okla. 272, 288 P. 316 (1930).

63. *See* City of Edmond v. Wakefield, 537 P.2d 1211 (Okla. 1975); State v. Parham, 412 P.2d 142 (Okla. 1966).

64. The court in City of Edmond v. Wakefield, 537 P.2d 1211 (Okla. 1975), stated only that the state due process clause was "designed to protect citizens from arbitrary and unreasonable action by the state . . . ." (citation omitted).

65. *See, e.g.*, Kroeger v. Ogsden, 429 P.2d 781 (Okla. 1967); Ben Cooper Motor Co. v. Amey, 143 Okla. 75, 287 P. 1017 (1930).

66. Firebaugh v. Gunther, 106 Okla. 131, 233 P. 460 (1925); Waggoner v. Koon, 67 Okla. 25, 168 P. 217 (1917).

67. OKLA. CONST. art. XXIII, § 8. This is the only provision of its kind in a state constitution. *See* LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. 1960).

68. 561 P.2d 951 (Okla. 1977).

previous fourteenth amendment analysis and upheld the constitutionality of section 9-503 by reading an equally stringent state action requirement into the state due process clause.[69] The court found mere codification of a widely used common law remedy which does not involve any state official insufficient to warrant state constitutional protection.[70] The court rejected not only the debtor's due process arguments but also his allegation that incorporation of self-help repossession into the sales agreement violated the Oklahoma constitutional section voiding contractual provisions which abridge fundamental rights.[71] If the benefits of notice and hearing were previously unavailable to the defaulting debtor, reasoned the court, no new creditor rights are created by the contract and thus any waiver is inconsequential.[72]

The court's adherence to prior fourteenth amendment analyses of section 9-503 in its application of the state due process clause is unfortunate. More particularly, it is irresponsible to summarily deny the existence of *any* state involvement when state law authorizes the repossession. The cases decided under the fourteenth amendment hold the state's involvement *insufficient* to warrant federal intervention; they do not claim, however, that there is *no* state action.[73] The state action doctrine, restricting application of the fourteenth amendment, is a direct result of historic concern for state autonomy in the federal system. There is no reason to assume that state constitutional drafters contemplated similar restrictive interpretations.[74] In fact, Federal Bill of Rights protections were drawn from corresponding state constitutional provisions.[75]

The Oklahoma Court of Appeals recognized the debtor's need for protection from creditors exercising their statutory right to self-help repossession.[76] The existence of the remedy at common law was

69. *Id.* at 958.

70. *Id.* at 954-55.

71. *Id.* at 958-60.

72. *Id.*

73. *See* cases cited note 29 *supra* and accompanying text.

74. In Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974), the California Supreme Court expressed its belief that the drafters of the California Constitution had the fifth amendment limitations in mind.

In *Helfinstine*, the Oklahoma Supreme Court did not make any attempt to discern the drafters' intentions. A restrictive interpretation of the state due process clause was made without question. 561 P.2d at 958.

75. *See* Brennan, *supra* note 38, at 501 (citing Brennan, *The Bill of Rights and the States*, in THE GREAT RIGHTS (E. Cahn ed. 1963)).

76. Helfinstine v. Martin, 47 OKLA. B.A.J. 973 (1976).

properly irrelevant in the court's ultimate determination. Although it is uncertain from the decision whether any state action was required to invoke state due process,[77] the court clearly did not apply federal standards. It may have deemed legislative authorization or codification sufficient where the change wrought by enactment extinguishes any remnants of procedural rights, "unless the parties otherwise agree."[78] Alternatively, the court of appeals may have adopted one commentator's view that the concentration of economic power in American society creates a need for bill of rights protection from quasi-governmental corporations as well as the state.[79] Because the appeals court failed to articulate standards for applying the state's due process clause, the state supreme court was able to avoid evaluating the benefits derived from a broader state constitutional interpretation.

Although the precise scope of state due process is unclear, federal limitations do not necessarily prescribe the extent of state constitutional protection.[80] On the contrary, because the Supreme Court frequently hesitates to expand federal rights in deference to principles of federalism,[81] states are obligated to assume an active role "designed to adapt our law and libertarian tradition to changing civilization:"[82]

> [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[83]

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77. The decision by the court of appeals is void of any statement of the holding or any reasoning to support the final outcome. *Id.* One must assume, however, that state action was deemed necessary because of precedent (*see* cases cited note 63 *supra*) and that the court refused to apply strict federal standards to the state due process clause.

78. The court of appeals found it "pernicious" that § 9-503 allows the debtor to enjoy his right to due process only by convincing the creditor to "otherwise" agree. *Id.* at 975. *See* note 7 *supra.*

79. Countryman, *supra* note 38, at 473-74. *See* Note, *The Theory of State Constitutions*, 1966 UTAH L. REV. 542.

80. *See* notes 45-49 *supra* and accompanying text.

81. Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125, 163 (1969).

82. Note, *The Role of a Bill of Rights in a Modern State Constitution*, 45 WASH. L. REV. 453 (1970).

83. Brennan, *supra* note 38, at 491.

State bills of rights which continue to imitate federal guarantees will become superfluous, eroding the state's vitality in the federal process.[84] Moreover, emerging state court prominence in the struggle for individual freedoms should lessen the concerns of those who view the Court's "Federalism"[85] as an impediment to human rights protection.[86]

It is understandable that the Oklahoma Supreme Court refused to extend state constitutional protection to the debtor in section 9-503 circumstances. This unprecedented court action is more likely to occur in a state which has previously enlarged its state constitutional safeguards beyond those offered by federal law. When that state steps forward and the debtor's rights are restored, state constitutions will once again emerge as a source of protection for individual liberties.

84. Note, *supra* note 82.
85. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).
86. Brennan, *supra* note 38, at 503.