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Stae Action and Warehouseman's Liens: One Self-Help Remedy Avoids the Constitution

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Justice Clark predicted, "rubberstamp warrants from a willing magistrate that will degrade the fourth amendment."[60]

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STATE ACTION AND WAREHOUSEMAN'S LIENS: ONE SELF-HELP REMEDY AVOIDS THE CONSTITUTION

Flagg Bros., Inc. v. Brooks, 98 S. Ct. 1729 (1978)

Respondent Brooks stored her household goods with petitioner warehouseman upon eviction from her apartment.[1] When Brooks defaulted on the storage charges, petitioner proposed to sell the goods pursuant to New York Commercial Code section 7-210,[2] which permits a warehouseman's summary sale of his customer's goods upon nonpayment. Brooks then brought a section 1983[3] class action seeking damages and declaratory and injunctive relief from the threatened sale.[4] The district court dismissed the action, finding inadequate

60. Camara v. Municipal Ct., 387 U.S. 541, 548 (1967) (Clark, J., dissenting).

1. The City Marshal first arranged for storage of Brooks' household goods by petitioner Flagg Brothers, Inc., and Brooks later consented to these arrangements. Flagg Bros., Inc. v. Brooks, 98 S. Ct. 1729, 1732 (1978). Brooks alleged that she asked to call someone to store her goods, but the City Marshal replied negatively. Brooks v. Flagg Bros., Inc., 553 F.2d 764, 766 (2d Cir. 1977). She then authorized petitioner to store the goods, "believing that she had no choice." *Id.* at 767.

2. N.Y.U.C.C. §7-210 (McKinney 1976). The statute provides for and regulates the enforcement of the warehouseman's lien granted in §7-209. Subsection 1 of §7-210 sets out procedures for the public or private sale of goods stored by "a merchant in the course of his business" while subsection 2 provides for public sale of all other goods. Subsection 2 requires notification of "[a]ll persons known to claim an interest in the goods," which must include the goods' description, an itemized statement of the charges, and a "demand for payment within a specified time not less than ten days after receipt of the notification." *Id.* §7-210(2)(a)-(c). Upon expiration of this time, the sale must be advertised in a prescribed manner. *Id.* §7-210(2)(f). Any person with an interest in the goods may redeem them before the sale occurs. *Id.* §7-210(3). Subsection 9 states that "[t]he warehouseman is liable for damages caused by failure to comply with the requirements for sale . . . and in case of willful violation is liable for conversion." *Id.* §7-210(9).

3. 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."

4. Brooks sought a declaration that the threatened sale violated the due process and equal protection clauses of the fourteenth amendment. 98 S. Ct. at 1732. District Judge Gurfein permitted Gloria Jones, whose goods were also stored by Flagg Brothers, to intervene as a party plaintiff. *Id.* The Attorney General of New York, the American Warehousemen's Association,

state involvement to support federal jurisdiction or a section 1983 claim.[5] The Second Circuit reversed, ruling that New York's "delegation of distinctly governmental power" to petitioner and "expansion of his common law remedies" supplied the state action necessary for federal jurisdiction.[6] The Supreme Court overturned this decision and HELD, that the warehouseman's proposed sale of his debtor's goods pursuant to state statute was not state action and therefore was inappropriate for fourteenth amendment scrutiny under section 1983.[7]

Purely private acts are not subject to fourteenth amendment limitation.[8] The state action doctrine, established in the *Civil Rights Cases*,[9] recognizes that most constitutional guarantees restrict only governmental acts. The distinction between state and private action, however, is sometimes unclear.[10] State action is easily found when state officials directly participate in the challenged conduct. Courts recognize a less obvious state action when the state becomes significantly involved in private behavior.[11] The identification of this involvement

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and the International Association of Refrigerated Warehouses, Inc. also intervened in defense of the statute. *Id.*

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

6. Brooks v. Flagg Bros., Inc., 553 F.2d 764, 771 (2d Cir. 1977). The Second Circuit concluded that the quoted factors were sufficient "to thrust the state's involvement in the challenged activity over the threshold of state action." *Id.* However, the court suggested in its dicta that the governmental function delegated to the warehouseman was broader than mere lien execution. Rather, the statute had "drastically change[d] the balance of power between debtor and creditor" and had "delegated to the warehouseman a portion of [the state's] sovereign monopoly over binding conflict resolution." *Id.* at 771-72. Judges in other circuits have likewise espoused the view that binding conflict resolution is a traditional state function. See Parks v. "Mr. Ford," 556 F.2d 132, 143 (3d Cir. 1977) (Adams, J., concurring) (garageman's lien); Shirley v. State Nat'l Bank of Conn., 493 F.2d 739, 747 (2d Cir.) (Kaufman, C.J., dissenting) (self-help repossession), *cert. denied*, 419 U.S. 1009 (1974); Bond v. Dentzer, 494 F.2d 302, 312 (2d Cir.) (Kaufman, C.J., dissenting) (filing of wage assignments), *cert. denied*, 419 U.S. 37 (1974).

7. 98 S. Ct. 1729 (1978).

8. The Civil Rights Cases, 109 U.S. 3, 17 (1883).

9. *Id.* The Court observed that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Id.* at 11.

10. The Supreme Court has maintained that state action can be found "only by sifting facts and weighing circumstances" of each case. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (state action found in refusal to serve blacks by restaurant leasing portion of public parking facility). Confusion as to the meaning of state action is often expressed. Justice Harlan, dissenting in *Burton*, stated that "[t]he Court's opinion, by a process of first undiscriminately throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of 'state action'." *Id.* at 728.

11. Private conduct cannot violate the fourteenth amendment "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Id.* at 722. Recently, the Supreme Court described the necessary involvement as "a sufficiently close nexus between the state and the challenged action . . . so that the action of the latter may be fairly treated as that of the state itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (no state action in private utility's summary termination of a customer's electricity).

is the thrust of the state action doctrine, initially used by the Supreme Court to deal with racial discrimination.[12] Recent litigation over debtors' due process rights has forced the doctrine's application to the debtor-creditor relationship.[13]

An intensified constitutional scrutiny of creditors' remedies began in 1969 with *Sniadach v. Family Finance Corp.*,[14] in which the Supreme Court found a Wisconsin procedure authorizing wage garnishment before notice and hearing violative of the debtor's due process rights.[15] A subsequent series of cases[16] dealt with due process standards for several statutory creditors' remedies, including garnishment, sequestration and replevin. Because each of these remedies involved at least minimal participation by a state official, the state action issue was not raised; presumably, the official's conduct supplied the state action prerequisite to due process scrutiny.[17]

State action became an issue in lower court examinations of debtors' due process rights when challenges to creditors' self-help remedies emerged.[18] By

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12. *See*, Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment* (pts. 1-2) 46 S. CAL. L. REV. 1003, 1035-36 (1973); Thompson, *Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession*, 1977 WIS. L. REV. 1, 14-17 (1977). The authors observe that the primary purpose of the fourteenth amendment was to eradicate racial discrimination; development of the state action doctrine therefore centered around that area.

13. It has been suggested that a lesser degree of state involvement is necessary to constitute state action in a racial discrimination case than in other constitutional challenges. *See, e.g.*, Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (suggesting the argument that "racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts"). The Supreme Court has never made this distinction, but has analyzed each state action case by similar tests. Yet the Court has balked at finding state action in due process challenges to "private" actions. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

14. 395 U.S. 337 (1969).

15. The statute challenged in *Sniadach* provided for summary garnishment of a debtor's wages upon issuance of a summons by the clerk of the court at the creditor's request. *Id.* at 338-39. Stressing that the garnishment procedure could "drive a wage-earning family to the wall," the Court found the statute unconstitutional. *Id.* at 341-42.

16. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (Georgia garnishment statute held unconstitutional); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (Louisiana sequestration procedure held constitutionally valid); Fuentes v. Shevin, 407 U.S. 67 (1972) (Pennsylvania and Florida replevin procedures held unconstitutional). Numerous commentators have analyzed the effect of this series. *See* Griffith, *The Creditor, the Debtor, and the Fourteenth Amendment*, 28 MERCER L. REV. 663 (1977); Newton, Fuentes *"Repossessed" Reconsidered*, 28 BAYLOR L. REV. 497 (1976); Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Remedies: From* Sniadach *to* North Georgia Finishing, 8 LOY. L.A.L. REV. 339 (1975).

17. This basis for state action in the *Sniadach* line of cases has been assumed by most commentators and was expressly relied upon by the Court in the instant case. See text accompanying notes 55-56 and 65-68 *infra*.

18. A wide range of self-help remedies have come under constitutional attack since the *Sniadach* decision. Among those challenged are self-help repossession, mortgagee's power of sale, and bankers, Landlord' and articans' liens. *See generally* Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment* (pt. 3), 47 S. CAL. L. REV. 1 (1973). The bulk of self-help demedy litigation has been in the area of self-help repossession of secured property. See note 43 *infra*.

definition, a self-help remedy involves no state participation. It is thus shielded from due process requirements under traditional doctrine absent a showing of significant state involvement. Many self-help procedures, including the warehouseman's lien, are rooted in common law.[19] Historically a warehouseman could retain his non-paying customer's goods but had no right to sell them.[20] Today, however, most states have enacted legislation permitting a sale of the goods upon the creditor-warehouseman's unilateral determination of the existence and amount of the debt.[21] If the goods are wrongfully sold, the debtor may seek "private" relief, such as replevin and damages.

The state action concept[22] most applicable to self-help remedies and most successful in the lower federal courts is the public function theory.[23] The theory suggests that when a state delegates traditionally governmental powers or activities to private individuals, those persons must act within constitutional bounds. The Supreme Court used this reasoning to find state action in *Nixon v. Condon*,[24] one of the "white primary"[25] cases, when Texas delegated to

19. A warehouseman's lien is a type of possessory lien. A possessory lien is simply the right of one in possession of the personal property of another to retain the goods until a debt between the partie is paid. R. BROWN, THE LAW OF PERSONAL PROPERTY 390 (3d ed. 1975). For a general discussion of possessory liens, *see* R. BROWN, *supra*; 1 L. JONES, A TREATISE ON THE LAW OF LIENS (3d ed. 1914). At common law, artisans who "added" value to the goods of another could claim a specific possessory lien on those goods. R. BROWN, *supra*, at 394. The justification was that one who had added his labor and materials to goods should be able to retain them to secure payment. *Id.* at 398. Certain other persons, including warehousemen, who provided services without literally "adding to" the value of the property could also claim a possessory lien. L. JONES, *supra*, at 981.

20. The creditor could sell the goods only pursuant to a statute or to a "special agreement between him and his debtor." R. BROWN, *supra* note 19, at 446. Sale would constitute conversion. *Id.*

21. The Uniform Commercial Code provides for both retention and sales remedies. U.C.C. §§7-209 to 210. For a brief overview of these provisions as adopted in New York, see note 2 *supra*.

22. The Supreme Court has insisted that it finds state action "only by sifting facts and weighing circumstances." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Yet most courts and commentators tend to categorize state action theories into separate formulas. *See, e.g.*, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

23. Several commentators have suggested that either the public function concept or some form of the "encouragement-authorization" theory of state action is also applicable to possessory lien enforcement. *See* Brown, *The Due Process Challenge to Possessory Lien Enforcement*, 10 TULSA L.J. 415, 424-25 (1974); Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions — The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226, 1237-42 (1975); Note, *Possessory Liens: The Need for Separate Due Process Analysis*, 16 WM. & MARY L. REV. 971, 990-1000 (1975).

24. 286 U.S. 73 (1932).

25. The white primary cases involved states' attempts to prevent blacks from participating in the election process. *See generally* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1089-94 (1960). The first case in the white primary series ruled that a Texas statute denying blacks the right to voe in Democratic primaries was unconstitutional state action. Nixon v. Herndon, 273 U.S. 536 (1927). In a subsequent case, however, the Court found no state action in the Texas Democratic convention's exclusion of blacks from Democratic primaries on its own initiative. Grovey v. Townsend, 295 U.S. 45 (1935). *Grovey* was soon overruled by Smith v. Allwright, 321 U.S. 649 (1944). There, the Court held that the state could

political parties the power to determine voter qualifications.[26] The Court later applied the public function theory to a less evident state involvement in *Terry v. Adams*.[27] In that case, the private Jaybird Association excluded blacks from its political primaries, and the Jaybird candidates almost always ran unopposed in the later Democratic primaries and general elections.[28] The Court reasoned that a state can neither constitutionally exclude blacks from state primaries nor "permit within its borders the use of any device that produces an equivalent of the prohibited election."[29] The concept was also used in *Marsh v. Alabama*,[30] in which a Jehovah's Witness was arrested while distributing literature on the sidewalks of a company-owned town.[31] Finding that the town performed functions similar to those of any other American town, the Court held that first amendment protections were equally viable in the company town.[32]

The expansion of this potentially broad doctrine anticipated by some members of the Court and commentators has not occurred.[33] In fact, the Court's later decisions in *Marsh*-like situations have indicated an increasingly restrictive application of the doctrine. In *Hudgens v. NLRB*,[34] the Court nearly abrogated the *Marsh* rationale by ruling that a large private shopping center could prevent union members from picketing their employer's store located within the center.[35] Additionally, the Court considered but refused to follow a public

not nullify the right to vote by "casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." *Id.* at 664 (1944).

26. After the *Nixon v. Herndon* decision, Texas immediately enacted a new statute allowing political parties to determine the qualifications of its members and of those who could vote in the party. Nixon v. Condon, 286 U.S. 73, 82 (1932). The Court in *Condon* found that the state's delegates, who had qualified only white Democrats, had "discharged their official functions in such a way as to discriminate between white citizens and black." *Id.* at 89.

27. 345 U.S. 461 (1953).

28. *Id.* at 463.

29. *Id.* at 469. The opinion of the Court emphasized that the procedures effectively violated the purpose of the fifteenth amendment by precluding blacks from participating in the process of electing officials who controlled vital matters. *Id.* at 470.

30. 326 U.S. 501 (1946).

31. *Id.* at 503-04.

32. The town, owned by Gulf Shipbuilding Corporation, was said to have "all the characteristics of any other American town." *Id.* at 502.

33. The Court applied a rationale similar to the public function concept in Evans v. Newton, 382 U.S. 296 (1966). There, the Court ruled that a once-public park could not constitutionally exclude blacks even though it was now privately managed. *Id.* at 302. The park was also tax-exempt and city-maintained. *Id.* at 301. The Court's broad language disturbed Justice Harlan, who argued that under the majority's theory private schools might become subject to the fourteenth amendment's requirements, as could "privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity." *Id.* at 322.

34. 424 U.S. 407 (1976). For comment on *Hudgens* see Shauer, Hudgens v. NLRB *and the Problems of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977); Note, Hudgens v. NLRB—*A Final Determination of the Public Forum?*, 13 WAKE FOREST L. REV. 139 (1977); 28 U. FLA. L. REV. 1032 (1976).

35. An examination of the line of cases culminating in *Hudgens* indicates a growing unwillingness to use the public function rationale. In Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316-17 (1968), the Court relied on *Marsh* to rule that a shopping center could not prohibit constitutionally the peaceful picketing of a supermarket that em-

function rationale in *Jackson v. Metropolitan Edison Co.*,[36] which involved a private utility's summary termination of a subscriber's service.[37] Rejecting the argument that the utility performed a governmental function, the Court noted that the case would have been different if it had dealt "with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain."[38]

Although the Supreme Court has limited the theory, the federal circuit courts have applied the public function concept to certain self-help remedies. The Fifth Circuit initiated this rationale in *Hall v. Garson*,[39] which involved a landlord's lien statute permitting satisfaction of unpaid rent through summary seizure of the tenant's personal goods.[40] The court found significant state involvement because the state had delegated to "the landlord and his agents authority that is normally exercised by the state and historically has been a state function."[41] Other federal courts split on the question of state action in the execution of landlord's and innkeeper's liens.[42] In contrast, the circuits have

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ployed non-union workers. However, in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court dissolved an injunction allowing antiwar handbilling in a large shopping center in a decision arguably inconsistent with *Logan Valley*. The dissent in *Lloyd* contended that the decision was "an attack not only on the rationale of *Logan Valley*, but also on this Court's longstanding decision in *Marsh v. Alabama*. . . ." *Id.* at 571 (Marshall, J., dissenting). The 1976 decision in *Hudgens* overruled *Logan Valley* by finding that a shopping center was not the functional equivalent of a town. 424 U.S. at 518-21.

36. 419 U.S. 345 (1974). The court acknowledged *Nixon v. Condon*, *Terry v. Adams*, *Marsh v. Alabama*, and *Evans v. Newton* as authority for the state function concept. *Id.* at 352.

37. The plaintiff asserted that the summary termination of her electric service violated her fourteenth amendment due process rights. *Id.* at 348.

38. *Id.* at 353. Commentators have suggested that *Jackson* has restricted future application of most traditional state action theory. *See, e.g.*, Note, *State Action after* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315 (1977).

39. 430 F.2d 430 (5th Cir. 1970).

40. The statute involved in *Hall* gave the landlord a lien on the personal goods of his tenant and provided for execution of that lien by non-judicial summary seizure. *Id.* at 433.

41. *Id.* at 439. The court noted that the action, which involved "the entry into another's home and the seizure of another's property, was an act that possesses many, if not all, of the characteristics of an act of the State." *Id.* On remand, the district court denied injunctive relief and dismissed the complaint. Hall v. Garson, 468 F.2d 845, 847 (5th Cir. 1972). Subsequently the Fifth Circuit again reversed, indicating that the landlord's lien statute did not provide adequate procedural protection. *Id.* at 847-48.

42. The Ninth Circuit also recognized state action in a landlord's execution of his statutory lien but did not agree expressly with *Hall's* state function reasoning. Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975). The First and Seventh Circuits held contra. Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) (legislative extension of common law innkeeper's lien to landlord's lien not state action but simply an expansion of a traditional private remedy); Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150 (7th Cir. 1975) (expressly disagreeing with *Hall*, reasoning that an innkeeper's lien is not a function "traditionally and exclusively" that of the state), *cert. denied*, 424 U.S. 928 (1976). For comment on these decisions and the constitutional validity of innkeeper's and landlord's lien statutes, *see* Note, *A Proposal for a Constitutional Innkeepers' Lien Statute*, 24 BUFFALO L. REV. 369 (1975); Note, *Evolving Concepts of the Innkeeper's Lien*, 61 CORNELL L. REV. 587 (1976). At common law an innkeeper could claim a lien on the personal belongings of his guests to secure the price of lodging "[b]ecause of the obligation of innkeepers to receive all travelers for whom they

agreed unanimously that there is no state action in a creditor's statutory repossession of goods sold to his debtor.[43]

As uncertainty over the constitutionality of self-help remedies increased, federal circuits also disagreed on whether state action was present in the sale provisions of warehouseman's and repairman's lien statutes.[44] Three circuits

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have accommodations and because of the extraordinary responsibility of the innkeeper for the goods of the guest." R. BROWN, *supra* note 19, at 420-21. State statutes later extended this lien to hotelkeepers, boardinghouse keepers, and landlords, even though these persons had no such rights at common law.

43. The circuits have held unanimously that this procedure is a purely private commercial remedy, and the Supreme Court has repeatedly denied certiorari. *See, e.g.*, Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Adams v. S. Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). For comment concerning the constitutionality of self-help repossession, see Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Burke & Reber (pt. 3), *supra* note 18; Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUT. L. REV. 541 (1975); Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 49 VA. L. REV. 355 (1973); Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974).

44. The earliest cases unanimously upheld the lien statutes against constitutional challenge. *See, e.g.*, Willis v. Lafayette-Phoenix Garage Co., 202 Ky. 554, 260 S.W. 364 (App. 1924) (garageman's lien); Dininny v. Reavis, 178 App. Div. 922, 165 N.Y.S. 97, (1917) (garageman's lien). The pioneer case in recent years was Magro v. Lentini Bros. Moving & Storage Co., Inc., 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd* 460 F.2d 1064 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972). There, a New York federal district court assumed state action and distinguished Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), to find a warehouseman's statutory sale provision valid. The court interpreted *Sniadach* strictly, reasoning that because the debtor had parted voluntarily with his household goods for an extended period, the deprivation "cannot be held to have the same disastrous effect as those 'specialized types of property' . . . in *Sniadach*." 338 F. Supp. at 467. Adding that the debtor could bring suit for any wrongful conduct, that the warehouseman had an interest in satisfying his claim quickly, and that costs would increase if a hearing were required, the court found no due process violation. *Id.* at 468. The same year the same court found *Magro* controlling a challenge to New York's garageman's lien law. Hernandez v. European Auto Collision, Inc., 346 F. Supp. 313 (E.D.N.Y. 1977), *rev'd*, 487 F.2d 378 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972). In the cases that followed, several lower courts found that provisions of repairman's and warehouseman's lien statutes did violate due process rights. *See, e.g.*, Tedeschi v. Blackwood, 410 F. Supp. 34 (D. Conn. 1976) (statute allowing police officer to have automobile towed and permitting sale in satisfaction of towing and storage charges violates owner's due process rights); Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974) (repairmen's lien—sale provision); Mason v. Garris, 360 F. Supp. 420 (N.D. Ga. 1973) (garageman's lien—sale provision); Straley v. Gassaway Motor Co., Inc., 359 F. Supp. 902 (S.D.W. Va. 1973) (garageman's lien—retention and sale provisions). *Contra*, Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974) (warehouseman's lien — sale provision). Several state courts have also dealt with the question. *See, e.g.*, an extensive opinion by the California Supreme Court in Adams v. Department of Motor Vehicles, 11 Cal. 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974). The first circuit court decision to consider state action in warehouseman's or repairman's liens was Phillips v. Money, 503 F.2d 990 (7th Cir. 1974) *cert. denied*, 420 U.S. 934 (1975). There, the Seventh Circuit Court of Appeals rejected several state action theories, concluding in part that the creditor's action was not "a subrosa exercise of the state's police power." *Id.* at 993. *Phillips*, however, treated only the Statute's retention provision.

found the necessary state involvement, concluding that by authorizing the creditor to sell his customer's goods summarily, the state had expanded the creditor's common law remedies and had given him governmental powers.[45] In contrast, the Ninth Circuit held that the warehouseman's "narrowly confined" sale remedy was not state action.[46] The Ninth Circuit felt that the absence of common law origin was "of dubious worth."[47]

The Court[48] in the instant case effectively removed the warehouseman's statutory sale remedy from due process scrutiny by finding insufficient state involvement in petitioner's proposed sale. The remedy, said the Court, was purely private; New York had neither delegated a traditionally governmental power to the warehouseman[49] nor unconstitutionally authorized or encouraged his conduct through legislative enactment.[50]

The Court emphasized that two distinct elements were necessary to support a claim under section 1983. First, plaintiff must show deprivation of a right "secured by the Constitution and laws."[51] Second, the deprivation must be under color of state law.[52] Although the Court had suggested in prior decisions that the "under color of state law" element was the equivalent of the state action requirement for a fourteenth amendment claim,[53] the majority distinguished the two concepts in the instant case. It concluded that, even assuming petitioner warehouseman had acted under color of state law, re-

45. Parks v. "Mr. Ford," 556 F.2d 132 (3d Cir. 1977) (garageman's lien); Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc., 554 F.2d 356 (8th Cir. 1977) (warehouseman's lien); Brooks v. Flagg Bros., Inc., 553 F.2d 764 (2d Cir. 1977), *rev'd*, 98 S. Ct. 1729 (1978) (warehouseman's lien). For comment on the instant decision in the Second Circuit, see 46 GEO. WASH. L. REV. 500 (1978); 17 WASHBURN L.J. 407 (1978); 8 CUM. L. REV. 553 (1977); 9 RUT.-CAM. L.J. 179 (1977).

46. Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976). In *Melara*, plaintiff's household goods were stored with defendant company under a written contract, an element not present in the circuit court cases finding state action. *Id.* at 803. The *Melara* court resolved the state action issue by analyzing several factors identifying state involvement. The court asserted that the statute had been in effect for over 120 years. *Id.* at 806. The lack of common law origin was considered "of dubious worth." *Id.* at 805. The warehouseman's power was found to be "narrowly confined," because of the direct relationship between the debt and the property. *Id.* at 807. The court also felt that the contract gave "notice" of the sale. *Id.*

47. *Id.* at 805.

48. 98 S. Ct. 1729 (1978).

49. *Id.* at 1737.

50. *Id.* at 1738.

51. *Id.* at 1733.

52. *Id.* The Court felt that a finding of what conduct constituted "action under color of state law" was unnecessary, because there had been no allegation of a "deprivation of any right 'secured by the Constitution and laws' of the United States." *Id.* However, the Court acknowledged that to act under color of state law for purposes of section 1983, an individual must at least " 'act with the knowledge of and pursuant to the staute,' " citing its decision in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). 98 S. Ct. at 1733.

53. The Court had previously stated that action under color of state law was equivalent to the requirement of state action in a fourteenth amendment challenge. *See* United States v. Price, 383 U.S. 787, 794 n. 7 (1966). This equivalence of concepts was expressed or assumed in most lower court decisions as well. *See, e.g.*, Anastasia v. Cosmopolitan Nat'l Bank of Chicago, 527 F.2d 150, 153 (7th Cir. 1975) *cert. denied*, 96 S. Ct. 1143 (1976); Adams v. S. Cal. First Nat's Bank, 492 F.2d 344, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 10006 (1974).

spondent Brooks had not been deprived of fourteenth amendment rights.[54] Asserting that "any person with sufficient physical power may deprive a person of his property,"[55] the Court reaffirmed the principle that only the state can violate fourteenth amendment rights. Emphasis of this elementary principle enabled the majority to distinguish the *Sniadach* line of cases, which consistently contained an element of "overt official involvement."[56]

The argument that debtor-creditor dispute resolution was a governmental function delegated to the warehouseman was rejected in an analysis that further restricted the doctrine while offering examples of possible future applications. The Court stressed that although "many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.' "[57] The "white primary" and *Marsh* cases[58] were cited as illustrative of this exclusivity element.[59] In contrast, the proposed sale pursuant to section 7-210 was "not the only means of resolving this purely private dispute."[60] Noting that respondents could have sought replevin, damages, or a contractual waiver of the warehouseman's rights, the Court suggested that several functions had "a greater degree of exclusivity" than the instant sale, including "education, fire and police protection, and tax collection."[61]

The Court likewise dismissed the notion that mere statutory enactment of the warehouseman's sale remedy made it state action.[62] Stressing that the state permitted but did not compel the sale, the majority viewed the legislation as a

54. 98 S. Ct. at 1733.

55. *Id.* at 1734.

56. *Id.*

57. *Id.*

58. See notes 24-33 *supra* and accompanying text.

59. 98 S. Ct. at 1734-35. The Court stressed the later limitation of *Marsh* in *Hudgens*. See text accompanying notes 34-36 *supra*.

60. *Id.* at 1735.

61. *Id.* at 1735-37. The Court saw this collection of remedies as a "system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world. . . ." *Id.* at 1735.

62. The argument was that the state "authorized and encouraged" the warehouseman's action by enacting section 7-210. *Id.* at 1737. In challenges in lower courts, plaintiffs have sometimes based this argument on the Supreme Court's decision in Reitman v. Mulkey, 387 U.S. 369 (1967). There the Court struck down a section of the California constitution that prohibited the state from denying individuals the right to discriminate in private housing. Finding that the right to racially discriminate had become "embodied in the state's basic charter," the Court stated that the section would authorize and "significantly encourage and involve the State in private discriminations." *Id.* at 381. A small number of federal district courts broadly applied *Reitman* to self-help remedies. *See, e.g.*, Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ken. 1974); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972). In contrast, circuit courts and most commentators restrict *Reitman* in several ways, finding it inapplicable to self-help remedies. *See, e.g.*, Parks v. "Mr. Ford," 556 F.2d 132, 137 (3d Cir. 1977) (*Reitman* not controlling because it involved racial discrimination); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 332 (9th Cir. 1973) (the repossession statute merely codified long-standing remedy while the state in *Reitman* repealed existing laws barring discrimination), *cert. denied*, 419 U.S. 1006 (1974); Black, *"State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 84 (1967). Most importantly, the Supreme Court has never applied *Reitman* outside of its own fact situation, not even mentioning it in the instant case.

refusal to act.[63] Thus New York was "in no way responsible for [petitioner's] decision."[64]

Emphasizing the "significance of the State's role in defining *and controlling* the debtor-creditor relationship,"[65] the dissenting Justices criticized the majority opinion as inconsistent with the *Sniadach* line of cases.[66] The dissenters found it "baffling" that the same lack of sufficient state participation invalidating the remedies in those cases shielded the broader power in the instant case from constitutional review.[67] To the dissenters, state action in the *Sniadach* line could not have been premised on the "purely ministerial acts" of the "minor governmental functionaries."[68] Furthermore, in the instant case, the state had acted "in the most effective and unambiguous way a State can act" in authorizing and regulating petitioner warehouseman's proposed sale.[69] More importantly, New York had delegated to petitioner the governmental function of "binding, nonconsensual resolution of a conflict between debtor and creditor."[70] In the dissenter's view, the warehouseman's conduct was exactly the type of activity requiring due process limitations.[71] Otherwise, the state could "enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge."[72]

The ease with which the Court could have found state action in the instant

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63. 98 S. Ct. at 1738. The Court saw this statutory refusal to act as equivalent "in principle" to a statute of limitations or a simple denial of judicial relief. *Id.*

64. *Id.*

65. *Id.* at 1743. Justice Marshall and Justice White joined Justice Stewart in his dissenting opinion.

66. The dissent pointed out that *Shevin* involved "the *private* use of state power to achieve a nonconsensual resolution of a commercial dispute." *Id.* The present case was seen as giving private parties a "governmental power that is equally, if not more, significant than the power exercised in *Shevin* or *North Georgia Finishing*." *Id.*

67. *Id.* at 1742.

68. *Id.* The dissent noted that in North Georgia Finishing, Inc. v. Di-chem, Inc., 419 U.S. 601 (1975), the only state involvement was a court clerk's issuance of a "writ of garnishment based solely on the affidavit of the creditor." 98 S. Ct. at 1742. The majority's wisdom in holding that ministerial roles of state agents was state action was questioned. *Id.* at 1743.

69. *Id.* at 1741. The statute "specifically authorizes petitioner to sell respondents' possessions; it details the procedures that petitioner must follow; and it grants petitioner the power to convey good title to goods that are now owned by respondents to a third party." *Id.* The dissent disagreed that there was a strict distinction between state permission and compulsion for state action purposes. *Id.*

70. *Id.* at 1744. The dissent saw no exclusivity requirement in previous cases and pointed out that the requirement was not even followed in the instant opinion. *Id.* at 1742. Rather, the question has been "whether the State has delegated a function traditionally and historically associated with sovereignty." *Id.* at 1741.

71. *Id.* at 1744.

72. *Id.* at 1741. In a separate dissenting opinion, Justice Marshall expressed remorse at the majority's "attitude of callous indifference to the realities of life of the poor." *Id.* at 1739. He urged that the alternatives pointed out by the majority were not actual economic alternatives to many persons in respondents' position. *Id.* Justice Marshall asserted that resolution of those functions that were " '*traditionally* exclusively reserved to the State' " could not occur "in a historical vacuum." *Id.* Rather, the Court should consider "the role that the State has always played in lien execution by forced sale." *Id.* at 1740.

case suggests a predetermined "hands-off" decision.[73] The public sale of personal property without the owner's consent could have fallen effortlessly into the rationale of the public function cases, and the Court's rejection of the theory was neither convincing nor internally consistent. Absent the statutory remedy, the creditor would have to go to court and request a sheriff's sale. The statute in the instant case therefore gives the warehouseman the power to perform a function traditionally executed by a state agent. In a broader view, the state has authorized the creditor to resolve unilaterally a commercial dispute in which he is interested.[74] This power to order binding conflict resolution and thereby determine the title to property is, as the dissent suggested,[75] a function usually reserved to the state and thus controlled by due process restrictions.

In ousting the warehouseman's proposed sale from the public function rationale, the Court required that the function be "exclusively performed" by the state.[76] Because the parties could seek alternative relief, the majority reasoned that the sale remedy was not exclusively governmental.[77] However, any search for exclusivity should logically focus on the particular conduct challenged. Whether alternative actions are exclusively governmental should not be dispositive.[78] The particular action questioned in the present case — lien execution — has historically been performed by the state. Finally, the Court disregarded its own exclusivity requirement by suggesting that "such functions as education, fire and police protection, and tax collection"[79] fit within the doctrine. Education is traditionally provided by both government and private parties.

Fair criticism of the instant decision requires initial recognition of the

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73. The particular balance of personal rights and commercial considerations in any state action case make it difficult to follow a strictly theoretical state action analysis. The Court in the instant case, however, employed a mechanical state action determination as it has done consistently in its state action decisions. Yet policy factors emerged subtly in the opinion. The Court stated, for example, that "if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it." *Id.* at 1737. Some commentators recognize that traditional state action cases often seem inconsistent because courts appear to apply mechanical tests but in fact balance the rights and conduct of the parties. *See, e.g.*, Glennon & Novak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 227. The authors analyze the major state action decisions in terms of this balancing of rights. For comment proposing abandonment of the threshold determination of state action and substitution of a more direct fourteenth amendment analysis, see Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CAL. L. REV. 146 (1976); Thompson, *supra* note 12.

74. See note 6 *supra*.

75. See text accompanying notes 70-72 *supra*.

76. 98 S. Ct. at 1734.

77. *Id.* at 1735.

78. *See* 98 S. Ct. at 1742 n.8 (Stewart, J., dissenting). Justice Stewart in dissenting insisted that "[t]he question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering damages for such activity." *Id.* He added that the availability of such remedies "may be relevant" in determining the due process question but is not pertinent to the state action issue. *Id.*

79. *Id.* at 1737. In his dissent, Justice Stewart also questioned this list of state functions in relation to the exclusivity requirement. *Id.* at 1742 n.10.

Court's concern for the delicate balance of the commercial relationships involved. Yet a finding of state action in the case would not have obscured the line between state and private conduct drawn in the *Civil Rights Cases*, nor would it have required drastic modifications of the sale remedy to the detriment of the creditor. In the due process analysis that would have followed a state action finding, the warehouseman would have substantial interests to protect. Because the property may be of a kind that depreciates or spoils, outstanding claims must be satisfied quickly and economically.[80] Burdensome restrictions could result in an increase in cost or a refusal of credit. When these interests are balanced against those of the debtor, who may suffer the loss of valuable goods, a court might find the existing statute valid or require the addition of relatively simple safeguards such as the creditor's posting bond before sale.[81]

Nevertheless, the Court restricted potentially applicable public function cases to their own facts to find no state involvement in the warehouseman's sale. Rather than finding that the delegated powers were state action which complied with due process, the Court chose to completely remove creditor's self-help remedies from the careful examination characteristic of the *Sniadach* line of cases. Although the Court has used the state action doctrine to expose the racial discrimination problem to constitutional scrutiny, it apparently feels that sensitive commercial issues are preferably left to state legislation.

By announcing an outwardly objective state action decision as to the challenged warehouseman's remedy, the Court has most likely "privatized"[82] other self-help creditors' remedies and thus severed them as well from constitutional examination.[83] The Court in the present case expressly rejected the common law/statutory distinction that has previously controlled state action determinations involving self-help remedies in some lower courts.[84] As a state action de-

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80. Brown, *supra* note 23, at 419. *See also* Note, *At the Crossroads of Due Process*—Jones v. Banner Moving & Storage, 39 ALBANY L. REV. 277, 284 (1975).

81. Two circuits have examined the due process question in the garageman's and warehouseman's liens area: Parks v. "Mr. Ford," 556 F.2d 132 (3d Cir. 1977); Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc., 554 F.2d 356 (8th Cir. 1977). Both courts found the statutes invalid after comparing them with the remedies analyzed in the *Sniadach* line of cases.

82. In his concurring opinion in Parks v. "Mr. Ford," 556 F.2d 132, 148 (3d Cir. 1977), Judge Gibbons suggested that creditors and judges have attempted to "privatize" entire areas of self-help and thus to insulate themselves from constitutional scrutiny. *Id.* at 149-50.

83. The Court refused to analyze carefully the challenged provisions in relation to analogous self-help provisions but instead considered them broadly: "Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh*." 98 S. Ct. at 1736-37. However, the Court added that commercial dispute resolution was not a "category of human affairs that is never subject to constitutional restraints." *Id.* at 1737 n.12. Because of the Court's broad analysis of state action in the instant procedure and the similarity of most oher self-help remedies in historical development and the conduct involved, it is very unlikely that the court would reach a different result in relation to them.

84. *Id.* at 1737. The Court urged that "[t]o rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another." *Id.* For similar viewpoints see Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976); Burke & Reber (pt. 3), *supra* note 18, at 47; Note, *Procedural*

cision, the case will join the Court's other state action pronouncements in supplying limited precedential value except in similar fact situations. Furthermore, when viewed with the *Jackson v. Metropolitan Edison Co.* decision, this case further reflects the Court's reluctance to find state action with its ensuing constitutional limitations when due process rather than racial discrimination is involved.

K. ALEXANDRA KRUEGER

Due Process — Post-Fuentes Constitutionality of Garageman's Liens, 54 B.U.L. REV. 542, 552 (1974).