Flagg Bros. and State Action: Foreclosing the Fourteenth Amendment

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Flagg Bros. and State Action: Foreclosing the Fourteenth Amendment

INTRODUCTION

Aggrieved debtors in recent years have challenged the constitutionality of various creditor remedies1 under section 1983.2 To prevail in a section 1983 action, the debtor must establish that a constitutionally protected right was violated under color of state law.3 Accordingly, the debtor alleges that the creditor, acting pursuant to state law,4 has violated the fourteenth amendment5 by depriving the


2. The full text of 42 U.S.C. § 1983 (1976) reads as follows:

Civil action for deprivation of rights. 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 proceedings, for redress.

Section 1983’s jurisdictional counterpart, 28 U.S.C. § 1343 (1976), provides in relevant part:

Civil rights and elective franchise. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

3. Under color of state law has been defined as follows:

"Under color of" law focuses on whether the person who committed the deprivation acted or purported to act by authority conferred by the state . . . . If the § 1983 defendant is a private individual, color of law means, at least, that he must have acted “with the knowledge of and pursuant to” a state statute, ordinance, regulation, custom or usage. If the defendant is a public official, however, it is enough that he acts by virtue of his official position, since he is clothed with power that flows from the state.


4. For the purposes of this discussion, state law comprises both statutory and common law.

5. U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No
debtor of his property without due process of law. The fourteenth amendment, however, prohibits only deprivations by the state.\textsuperscript{4} To establish the requisite state action, a nexus between the state and the private creditor's conduct must exist.\textsuperscript{7} Absent state action, no violation of a constitutional right occurs, and the court must dismiss the section 1983 suit. This dismissal precludes resolution of the ultimate issue whether the creditor's remedy comports with minimum due process standards.\textsuperscript{8}

A difficult question concerning state action arises when a private warehouseman, in accordance with section 7-210 of the Uniform Commercial Code,\textsuperscript{9} attempts to foreclose his possessory lien on a

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State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. "Individual invasions of individual rights is not the subject matter of the [fourteenth] amendment." The Civil Rights Cases, 109 U.S. 3, 11 (1883). "[T]he prohibitions of the amendment are against State laws and acts done under State authority." Id. at 13. This private-public dichotomy underlies the concept of state action. Although the fourteenth amendment requires state action, it does not attempt to define the concept.

The language of the Fourteenth Amendment . . . does not refer to the existence of acts of commission by state governments as being a prerequisite to the application of its substantive restrictions. The Amendment reads that "no State shall make or enforce . . . deprive . . . or deny" certain rights. It says nothing about what state action (or inaction) will constitute a "making or enforcing," "depriving" or "denying."


7. See notes 43 to 49 infra and accompanying text.


9. U.C.C. § 7-210, Enforcement of Warehouseman's Lien, provides in its entirety:

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has
debtor's stored goods. This statute authorizes a warehouseman to sell goods entrusted to him in order to collect delinquent storage payments. The sale does not require either prior judicial authorization or direct participation by any state official. This lack of overt state involvement complicates the state action inquiry.

Judicial response to the question of state action under section 7-

sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:
(a) All persons known to claim an interest in the goods must be notified.
(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.
(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.
(d) The sale must conform to the terms of the notification.
(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.
(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion.

This provision has been adopted by 49 states and the District of Columbia.

10. A possessory lien arises where the creditor has the right to possession of the debtor's property until the underlying debt is satisfied. BLACK'S LAW DICTIONARY (rev. 4th ed. 1968).
210 has been mixed. To resolve this conflict, the United States Supreme Court granted certiorari in *Flagg Bros. v. Brooks.* This comment will examine the Supreme Court’s analysis of state action in a commercial setting. The procedural due process issue left unresolved by *Flagg* will also be discussed. Finally, the article will consider the potential impact of the decision on other creditor remedies.

**BACKGROUND**

Several courts have addressed the issue whether the warehouseman's right of summary sale, as authorized by section 7-210, constitutes a deprivation of property without due process of law. Analysis typically starts at the threshold requirement of state action. In *Melara v. Kennedy,* the Ninth Circuit concluded that the private warehouseman's conduct did not constitute state action. In *Melara,* the debtor contested his liability for storage costs because his household goods were stored without his knowledge. In compliance with section 7-210, the storage company sent the debtor a foreclosure of lien notice. The debtor then commenced suit under section 1983, challenging the proposed extra-judicial sale of his goods as a violation of due process.

The *Melara* court noted that the due process question need not be reached unless the proposed sale equalled state action. Because the debtor challenged the conduct of a private individual, the court adopted a higher standard for state action than it would have if the case had involved a public official. When a party challenges private

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15. 541 F.2d 802 (9th Cir. 1976).
16. *Id.* at 803. In *Melara,* a conservator sold the debtor's home. Subsequently, the household furnishings were entrusted to defendant storage company. It is unclear whether the conservator or the agent for the purchaser of the home placed the goods in storage; only the conservator had actual authority to do so. Because the storage may have been unauthorized, a bona fide dispute concerning the debtor's liability existed.
17. *Id.* at 804.
conduct, the level of state involvement should be "significant." The court concluded that a sale under section 7-210 did not meet this standard. The court initially reasoned that mere statutory authorization of the summary sale did not suffice. Although the statute expanded the warehouseman's common law rights, this fact was also not determinative. Moreover, because the extra-judicial sale required neither seizure of property nor entry into a dwelling, the state had not delegated any public function to the warehouseman.

In contrast to *Melara*, the Eighth Circuit in *Cox Bakeries, Inc. v. Timm Moving & Storage, Inc.* held that the warehouseman's consummated foreclosure sale constituted state action. The court predicated its finding of state action on two bases. First, section 7-210 was a recent statutory enactment which substantially altered the common law. Second, by sanctioning the warehouseman's right of sale, the state delegated to the creditor the public function of lien execution. Having found state action, the court declared that when a state authorizes a creditor to resolve legal disputes unilaterally, the creditor's conduct must conform to the requirements of due process.

The court's state action analysis in *Cox* relied primarily on the reasoning of the Second Circuit in *Brooks v. Flagg Bros.* After

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19. 541 F.2d at 808.
20. The state may employ various means to sanction private conduct. It may do so by statute or judicial decision.
21. 541 F.2d at 804, 805-06. In addition, the court emphasized that the challenged statute had existed in some form for more than 120 years. *Id.* at 806.
22. *Id.* at 807-08. Cf. Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970) (seizure of property after entry into dwelling constitutes public function).
Additional factors which the *Melara* court considered relevant to the state action issue include: the contractual basis of the creditor-debtor relationship; lack of any "symbiotic relationship" between the state and the creditor; and state regulation of the warehouse industry. 541 F.2d at 806-07.
23. 554 F.2d 356 (8th Cir. 1977).
24. *Id.* at 359. In *Cox*, a dispute regarding storage charges arose between a bakery owner and a warehouseman who stored the bakery equipment. The disagreement culminated in the sale of the equipment.
25. The court noted that, in contrast to the situation in *Melara*, the challenged statute has existed only since 1967. *Id.* at 358.
26. The court stressed that the state cast the warehouseman in "the traditional roles of judge, jury and sheriff." *Id.*
27. *Id.* at 360. After intimating that the statute offends due process standards, the court remanded the case for determination of that issue. *Id.* at 361.
28. 553 F.2d 764 (2d Cir. 1977).
defaulting in rent payments, Shirley Brooks was evicted from her apartment by a city marshal. A representative of the Flagg Brothers moving and storage company accompanied the marshal to remove the household furnishings.\(^29\) The company ultimately moved Brooks's belongings from the apartment to its warehouse, although the voluntary nature of this transfer was controverted.\(^30\)

After a dispute over storage rates, Brooks refused to pay the total amount requested by Flagg Brothers.\(^31\) Flagg Brothers took steps to foreclose its lien when attempts to resolve the disagreement failed. The company sent Brooks a letter\(^32\) demanding that she settle her account within ten days, and informing her that failure to pay would result in sale of her stored possessions.

To prevent the proposed sale, Brooks initiated a section 1983 class action alleging that the section 7-210 foreclosure would deprive her of property without due process of law.\(^33\) The district court dismissed the case, holding that the proposed sale did not constitute state action.\(^34\) The Court of Appeals, however, concluded that the

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\(^29\) The marshal's sole responsibility was to supervise the eviction of the tenant along with her possessions. To effectuate the eviction, the marshal apparently had the authority to contract with a private moving and storage company such as Flagg Brothers. Once the tenant's goods were moved from the apartment to the sidewalk, the marshal's authority terminated. See Petition for Certiorari, App. at 98a-99a. Cf. Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872, 877 (E.D. Wis. 1977) (sheriff empowered by statute to store evicted tenant's goods giving rise to warehouseman's lien).

\(^30\) According to Flagg Brothers, Brooks requested storage services upon learning that her displaced belongings would remain on the sidewalk. Brooks, however, claimed that the city marshal led her to believe that she had to store her possessions with Flagg Brothers. 553 F.2d at 766-67.

\(^31\) Brooks maintained that after taking possession, Flagg Brothers increased the original storage rate and tacked on additional charges. Id. at 767.

\(^32\) This letter complied with the requirements of U.C.C. \(^7\)-210. See note 9 supra.

\(^33\) The relief sought included money damages, an injunction, and a declaratory judgment that the threatened sale violates due process in contravention of the fourteenth amendment. 404 F. Supp. 1059, 1060 (S.D.N.Y. 1975). Gloria Jones, who also had a very restricted income and had been evicted for nonpayment of rent, joined as a second named plaintiff. Unlike Brooks, however, Jones contended that she never expressly consented to the storage of her goods by Flagg Brothers. Brooks v. Flagg Bros., 63 F.R.D. 409, 412-14 (S.D.N.Y. 1974).

The suit originally named as defendants Flagg Brothers, Inc., the president of the company, and the city marshal. Subsequently, additional defendants intervened: the Attorney General of the State of New York, the American Warehousemen's Association, and other warehousemen's organizations. Id. at 414-16. Brooks later dismissed the city marshal from the suit, leaving only private defendants. 553 F.2d at 768 n.6.

Originally Brooks alleged that Flagg Brothers conspired with the city marshal to obtain the storage contract. Verified Complaint, reprinted in Petition for Certiorari, App. at 14a. Had Brooks pursued this conspiracy argument, state action might have been easier to establish. See Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872 (E.D. Wis. 1977) (finding state action on basis of "concert of action" between evicting sheriff and warehouseman).

\(^34\) In particular, the court determined that the warehouseman's conduct did not constitute state action under the theories of public function, state encouragement, or state regulation of the warehouse industry. 404 F. Supp. at 1062-66.
state's involvement in the warehouseman's proposed sale fulfilled the threshold requirement of state action. This holding rested on two theories: (1) state delegation of a governmental function to the warehouseman, and (2) substantial expansion of the warehouseman's common law rights. This affirmative finding of state action stood in direct opposition to Melara, even though both cases involved an identical statutory provision and indistinguishable facts. To resolve this conflict as well as to address the "important question" of when private conduct constitutes state action, the United States Supreme Court granted certiorari in Flagg Bros. v. Brooks.

THE SUPREME COURT DECISION
ELEMENTS OF A SECTION 1983 ACTION

The Court began its analysis by differentiating the two components of a section 1983 action: (1) violation of a right secured by the Constitution or federal law, and (2) action "under color of" state law. Without defining either element, the Court attempted to articulate "the essential distinction" between these components.

To clarify this difference, the Court focused on the nature of the constitutional right, the violation of which comprises the first element. The Constitution safeguards some rights against both governmental and private interference. Most rights, though, including due process, are protected from only governmental violation. To vindicate rights in the first category, a claimant need only demonstrate that an infringement occurred. Proof of state action is not required to establish a constitutional violation. To redress infringements of rights shielded from only governmental intrusion, however, the aggrieved party must establish both that an infringement occurred and that it constituted state action.

35. 553 F.2d 767, 771 (2d Cir. 1977).
36. The court acknowledged this disparity but was "unpersuaded" by Melara's state action analysis. Id. at 774. In each case, the debtor alleged that U.C.C. § 7-210, by empowering the warehouseman to sell the stored goods unilaterally, contravened due process under the fourteenth amendment. Furthermore, each debtor challenged the amount of storage charges demanded by the moving and storage company.
38. 436 U.S. at 156.
39. An example of such a right is the thirteenth amendment right to be free from slavery or involuntary servitude. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-39 (1968).
40. 436 U.S. at 156.
41. Id. at 155.
Whichever class of rights a party asserts, he must satisfy the second element of a section 1983 action by establishing that the violation occurred under color of state law. Thus when the right at issue is protected only from governmental interference, there must be both state action and action under color of law.

The relevance of this bifurcated requirement depends on whether a public official or a private party committed the alleged "governmental intrusion." Where a state official causes or sanctions a deprivation of property, for instance, state action and action under color of state law merge, and both are satisfied. The difference between the two concepts, therefore, should not affect section 1983 suits involving direct participation by government officials. The distinction becomes important in cases where no public official acts directly. Here, the two concepts of state action and under color of state law do not merge. Private conduct is attributable to government only when both requirements are satisfied. Mere statutory authorization for a private deprivation of property should meet the under color of law requirement. However, the additional burden of proving a distinct state action element may frustrate section 1983 suits challenging deprivations by private creditors.

After asserting the need to meet both criteria in Flagg, the Court peremptorily dismissed the under color of law inquiry and focused instead on the more stringent requirement of state action. Section 7-210 clearly authorized Flagg Brothers to sell the stored goods. This authorization presumably satisfied the under color of state law component.

42. Due process falls within this category. To prove a violation of due process, therefore, both state action and action under color of state law must be shown.


44. 436 U.S. at 157 n.5.

45. Id. at 157.

46. Prior to Flagg, courts generally regarded action under color of state law as equivalent to state action. "In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." United States v. Price, 383 U.S. 787, 794-95 n.7 (1966) (emphasis added). Moreover, one court considered under color of state law to be a more stringent requirement than state action. Hagopian v. Consolidated Equities Corp., 397 F. Supp. 934, 936 (N.D. Ga. 1975). In Flagg the Court announced that the two concepts are analytically distinct and that an affirmative finding of conduct under color of state law no longer suffices to establish state action. 436 U.S. at 156. But see Ruffler v. Phelps Memorial Hosp., 453 F. Supp. 1062, 1067 (S.D.N.Y. 1978) (cited Flagg but stated that under color of law and state action are equivalent).

47. The Court, however, never specifically resolved whether under color of state law re-
posed sale by the private warehouseman constituted state action. Accordingly, the Court examined two doctrines of state action whereby the sale might be attributed to the State: public function and state encouragement.48

STATE ACTION

The Public Function Doctrine

The public function doctrine provides that when the state delegates a governmental power to a private entity, that party becomes an extension of the sovereign and is subject to the same constitutional constraints as states.50 Prior to Flagg, courts generally designated a function as governmental in nature where it was traditionally associated with the sovereign.51 Relying upon Jackson v. Metropolitan Edison Co.,52 the Flagg Court construed the public function doctrine more restrictively. Under the Court's interpretation, the public function doctrine applies only where the private entity exercises "powers traditionally exclusively reserved to the

quires more than private action taken with knowledge of and pursuant to state statute. 436 U.S. at 156. See note 3 supra.


49. This theory arose in Reitman v. Mulkey, 387 U.S. 369, 375 (1967).

50. The basic theory underlying the doctrine was enunciated in Evans v. Newton, 382 U.S. 296, 299 (1966):

Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action . . . . We have also held that . . . when 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.

Justice Harlan criticized the public function doctrine in his dissent:

It substitutes for the comparatively clear and concrete test of state action a catchphrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States.

Id. at 322.


State." The Court concluded that a section 7-210 sale does not meet this exclusivity test. In focusing on exclusivity, the Court did not adequately examine two bases whereby the sale could have been characterized as a public function: binding conflict resolution and lien enforcement.

53. Id. at 352 (emphasis added). Under the Flagg Court's narrow construction, only two categories of private activity fulfill this two-fold "traditionally exclusive" requirement: primary elections and the operation of a company town. 436 U.S. at 163. See note 48 supra. In discussing public function cases, the Court did not acknowledge that Evans v. Newton, 382 U.S. 296 (1966), established the maintenance of a city park as a public function. The Court, however, did intimate that a third category might qualify under this test: the private exercise of traditional police functions. 436 U.S. at 163 n.14.

54. The Court contrasted the warehouseman's sale with previously recognized public functions:

Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under § 7-210 is not the only means of resolving this purely private dispute. Id. at 159-60.

55. The concept of binding conflict resolution as a function of the sovereign derives from Boddie v. Connecticut, 401 U.S. 371 (1971). In Boddie, the Court held that in the context of divorce proceedings, dispute resolution constituted a public function because judicial "process [was] not only the paramount dispute-settlement technique, but, in fact, the only available one." Id. at 377. Chief Judge Kaufman, dissenting in both Shirley v. State Nat'l Bank, 493 F.2d 739, 747 (2d Cir.), cert. denied, 419 U.S. 1009 (1974) and Bond v. Dentzer, 494 F.2d 302, 312 (2d Cir.), cert. denied, 419 U.S. 837 (1974), advocated extending Boddie's holding to creditor-debtor cases. Justice Stevens espoused this view in his dissent to Flagg. 436 U.S. at 178-79 n.17.

Flagg Brothers argued that Boddie applies only where the sole means of resolving disputes is through an instrumentality of the state. Two private parties cannot terminate their marriage contract without resort to judicial process; commercial disputes, however, may be resolved without judicial interference. Brief for Petitioner Flagg Brothers at 13.


At common law, when a bailee had a possessory lien, he could retain the bailed chattels until the debt was paid. Yet he had no right to sell unless afforded such a right by express contractual agreement or by statute. In addition, a bailee who wanted to foreclose a possessory lien by selling the chattels had to obtain a judgment against the bailor. Disposing of chattels without resort to judicial process constituted conversion. Moreover, the sheriff, not the bailee, executed the judgment against the bailor by selling the goods. See Brief for Respondents at 23-25; Brooks v. Flagg Bros., 533 F.2d 764, 771-72 (2d Cir. 1977).

But see Brooks v. Flagg Bros., 404 F. Supp. 1059, 1063 (S.D.N.Y. 1975), where the court declared: "[E]xecution on goods lawfully in a warehouseman's possession, to satisfy charges arising out of such possession, is not traditionally a function of the sheriff." (emphasis in original).
1. Binding Conflict Resolution

The Court rejected the contention that section 7-210 delegates to the warehouseman the public function of final nonconsensual dispute resolution. By authorizing the warehouseman to sell his customer's goods to recover storage costs, the state grants him the power of settling a private commercial dispute. Yet the Court noted that the foreclosure sale is not the exclusive means of resolving the conflict. The Court observed that prior to entrusting her goods to Flagg Brothers, Brooks could have negotiated a waiver of the warehouseman's statutory right of sale. Further, if the storage is unauthorized, a debtor may seek to replevy his possessions. Additionally, section 7-210 allows recovery against a warehouseman who violates the statute's mandatory procedures.

A major weakness in the Court's reasoning stems from its failure to consider whether the suggested alternatives are in fact "available" to debtors such as Brooks. The obvious inequality of bargaining power between Flagg Brothers and Brooks would probably have prevented her from securing a waiver of the right of sale. To institute a replevin action, moreover, a debtor must post, at a minimum, a double bond. When the debtor is economically disadvantaged, procurement of this bond is virtually impossible. Finally, the damage remedy in 7-210 applies only to violations of the section's provisions. In Flagg, however, Brooks did not allege a deviation from the statutory procedures; she attacked the statute itself. Consequently, the damage remedy offered by section 7-210 is irrelevant. Despite the dubious availability of these alternatives, the Court attached much significance to their mere existence.

From the presence of these remedies, the Court inferred that dispute settlement between creditors and debtors is not traditionally an exclusive state prerogative. This conclusion suffers from a basic
analytical defect. The state has discretion to fashion various methods of resolving commercial disputes. Nevertheless, the state's power to resolve disputes may be exclusive, regardless of the method chosen to exercise it. Because of its emphasis on methods rather than power, the Court never fully addressed the issue of binding, nonconsensual dispute settlement. The debtors in Flagg urged that a warehouseman exercises a public function in a 7-210 sale because the statute delegates to him a portion of the "state's monopoly over techniques for binding conflict resolution." The statute empowers a warehouseman to determine both the existence and amount of a debt, and to sell property in satisfaction of that debt. The creditor may sell stored goods even where the debtor objects. To aggravate this nonconsensual aspect, the sale may finally terminate the debtor's property interest. Thus the warehouseman exercises over the debtor powers of both judgment and execution. The Court, however, circumvented analysis of the sale as a binding nonconsensual method of settlement by refusing to acknowledge the power to resolve commercial disputes as a public function.

65. In dissent, Justice Stevens highlighted this conceptual incongruity. He maintained that the availability of alternate remedies is relevant to the issue of due process rather than to the state action question.

As I understand the Court's notion of "exclusivity," the sovereign function here is not exclusive because there may be other state remedies, under different statutes or common-law theories, available to respondents. Ante, at 159-160. Even if I were to accept the notion that sovereign functions must be "exclusive," the Court's description of exclusivity is incomprehensible. The question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity.


67. Although U.C.C. § 7-210 does not explicitly authorize the warehouseman to sell the stored goods over the debtor's objection, the statute also does not contain any clause requiring the debtor's consent to the sale. The only provision within the statute for preventing the foreclosure sale is subsection (3), which prohibits the sale if the debtor pays "the amount necessary to satisfy the lien and the reasonable expenses incurred under this section." Cf. Gibson v. Dixon, 579 F.2d 1071, 1073-74 (7th Cir. 1978) (debtor's filing of notarized affidavit of defense compels creditor to obtain judicial validation of his lien). In practice, most New York warehouseman's contracts contain provisions allowing sale in case of default. See Brooks v. Flagg Bros., 404 F. Supp. 1059, 1065 n.17 (S.D.N.Y. 1975). If the debtor signs such a contract, arguably he consents to the sale. Flagg's holding, however, does not rest on whether such contract existed. 436 U.S. at 169 n.2 (Stevens, J., dissenting).

68. A bona fide purchaser of the foreclosed goods takes free of any rights of the debtor against whom the lien was valid. U.C.C. § 7-210(5). The provision is silent regarding the consequences of foreclosure on an invalid lien.

69. Lower courts had previously rejected the concept of binding conflict resolution in the
2. Lien Enforcement

Although the circuit court advanced lien enforcement as an alternate ground for finding a public function, the Supreme Court virtually ignored the concept. At common law, only the sheriff could execute a lien. The debtor thus contended that through enactment of section 7-210 the state delegated the sheriff's traditional role to the private warehouseman.

The Court could have utilized two factors in determining whether a particular function is "traditionally" public: the origin of the function—whether it developed by common law or by statute; and age—the period of time during which private parties have performed the particular function. The opinion cursorily dismissed the historical origin of the warehouseman's foreclosure sale as irrelevant. The Court correctly reasoned that the origin of the right of sale does not decide the state action issue. When a state sanctions a practice, it assumes responsibility for that practice, whether adopted by statute or by common law. The Court also based its rejection of "historical antecedents" on the inconsistent holdings in *Melara* and *Cox*. However, in those cases the right of sale was statutorily created, so that origin could not account for the conflicting holdings.

The disparity in result derived from the substantial discrepancy in the ages of the challenged statutes. The Court's disapproval of the contradictory results in *Melara* and *Cox* apparently discards age as immaterial. Since the Court found neither origin nor age relevant, it should have identified what factors denote a "traditional" commercial sector as a public function. See, e.g., Davis v. Richmond, 512 F.2d 201, 205 (1st Cir. 1975); Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1173 (5th Cir. 1976); Gibbs v. Titelman, 502 F.2d 1107, 1113 (3d Cir.), cert. denied sub nom. Gibbs v. Garver, 419 U.S. 1039 (1974).

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70. 553 F.2d 764, 771 (2d Cir. 1977).


72. Brief for Respondents at 21.

73. "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 [the public function doctrine]. This is true whether these commercial rights and remedies are created by statute or decisional law." 436 U.S. at 162.

74. *Id.* at 162-63.

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


77. The statutory right of sale has existed in California for over 120 years. *Melara* v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976). In contrast, North Dakota enacted the statute authorizing the warehouseman's sale in 1967. Cox Bakeries, Inc. v. Timm Moving & Storage Co., 554 F.2d 356, 358 (8th Cir. 1977).
public function. Without an alternative to age or origin, the Court’s test must be applied in an “historical vacuum.”

The Court’s concern with the Melara-Cox dichotomy reflects a valid desire to avoid divergent outcomes where the constitutionality of a uniform statute is at issue. Yet under the Court’s public function test, inconsistency cannot be avoided. Whenever courts must look to the “traditional” nature of a practice, results will vary according to each state’s history. Uniformity can be achieved in the context of the warehouseman’s sale only by invoking early English common law, under which the sheriff conducted all foreclosure sales. If the Court in Flagg had looked to common law, the warehouseman’s conduct would qualify as a traditional, exclusive public function. The Flagg Court, however, declined to rely on early common law to obviate potentially disparate results.

The Court’s failure to at least consider early common law, combined with its fear of inconsistent results, leads to an anomaly with regard to the public function test. The Court will find a public function when a private entity exercises “powers traditionally exclusively reserved to the State.” Neither English common law nor more recent historical antecedents, however, may be used to determine whether lien enforcement is traditionally an exclusive state prerogative.

3. Absence Of Force

In rejecting the doctrine of public function, the Court further relied on the absence of any statutory authorization for the use or threat of force. Under lien enforcement, the debtor argued that the sale itself constituted a public function because the sheriff traditionally executed liens. Yet the sheriff’s traditional role may not

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78. Justice Marshall disapproved of the Court’s approach:
I am also troubled by the Court’s cavalier treatment of the place of historical factors in the “state action” inquiry. While we are, of course, not bound by what occurred centuries ago in England, the test adopted by the Court itself requires us to decide what functions have been “traditionally exclusively reserved to the State.” Such an issue plainly cannot be resolved in a historical vacuum. New York’s highest court has stated that “[i]n [New York] the execution of a lien . . . traditionally has been the function of the Sheriff.” Numerous other courts, in New York and elsewhere, have reached a similar conclusion.
436 U.S. at 167-68 (Marshall, J., dissenting) (citations omitted).

79. See notes 51-53 supra and accompanying text.

80. “[W]e are disinclined to decide the issue of state involvement on the basis of whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England.” 436 U.S. at 163 n.13 (citing Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975)).

81. 436 U.S. at 160 n.9.

82. Brief for Respondents at 21.
have been as much supervision of the foreclosure sale as it was the use or threat of force when a debtor opposed the sale. Similarly, in examining binding conflict resolution, the Court intimated that a crucial distinction exists between nonconsensual dispute resolution in general, and that which is implemented by the threat or use of force.

An exchange between the majority and dissenting justices reveals the relevance of a private use of force in the public function analysis. In dissent, Justice Stevens hypothesized that Flagg's holding precludes a court from finding state action even where the state authorizes any individual "with sufficient physical power" to appropriate the property of a weaker neighbor. The majority countered this apprehension by emphasizing that section 7-210 "does not involve state authorization of private breach of the peace." The Court further distinguished the warehouseman's power to sell property legally within his possession and the "power to order legally binding surrenders of property." The warehouseman already in possession does not "order" his debtor to "surrender" anything; therefore, he has no need to use or threaten force. The majority's comments implied that statutory authorization of the use or threat of force is a significant factor when applying the public function doctrine to creditor-debtor controversies. Accordingly, had section 7-210 authorized an actual seizure of the debtor's goods, or sanctioned breach of the peace, the Court might have decided the state action issue differently.


84. 436 U.S. at 170 (Stevens, J., dissenting).

85. Id. at 160 n.9. In this respect, the statute at issue in Flagg differs markedly from that involved in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). In Hall, the challenged statute authorized a landlord to enforce his lien for unpaid rent by entering the tenant's apartment and peremptorily seizing any of the tenant's personal belongings. Id. at 432-33. When such entry and seizure lacks the tenant's consent it is a breach of the peace. In Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), however, the court rejected the creditor's "unauthorized entry" as a basis for finding a public function.

The warehouseman's sale is analogous to self-help repossession, which also does not involve a breach of the peace. In James v. Pinnix, 495 F.2d 208 (5th Cir. 1974), the court distinguished self-help repossession from a "roving commission" to satisfy a debt through entry and seizure. Id. at 208.

86. The warehouseman, of course, has no authority to take any property which the debtor has not previously placed in storage.

87. 436 U.S. at 161-62 n.11.
State Action Through Encouragement

The Court next examined whether New York encouraged the proposed sale sufficiently to justify attributing the warehouseman's conduct to the state. The debtor argued that by affording the creditor an expeditious and inexpensive means of foreclosing his lien, the state in effect encouraged the creditor to choose this method. 88 The Court's analysis reiterated that a statute which permits but does not compel a practice does not supply the requisite state action. 89

The State does not compel the warehouseman to foreclose his lien unilaterally; neither does it prevent or punish him for adopting such conduct. The Court correctly identified the crux of the debtor's complaint as whether this state inaction qualifies as encouragement. 90 The Flagg Court engaged in faulty reasoning in rejecting state inaction as a basis for encouragement. 91 First the Court characterized section 7-210 as a statutory refusal to intervene in a private

88. The debtor submitted that:

[B]y authorizing the summary sale of goods, section 7-210 has granted warehousemen a power which, from their standpoint, is an economically and strategically attractive alternative to either commencing an action for monetary damages, proving a claim and obtaining and enforcing a judgment, or obtaining judicial foreclosure on the lien . . . .

Brief for Respondents at 33. Cf. Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594 (E.D. Mich. 1974), rev'd 527 F.2d 23 (6th Cir. 1975), where the district court found that the statute authorizing extra-judicial mortgage foreclosures significantly encouraged their use. Of approximately 8,600 mortgage foreclosures in 1972, only 52 were judicial. Id. at 597.

89. 436 U.S. at 165. The Court cited Evans v. Abney, 396 U.S. 435 (1970) to support the proposition that mere acquiescence by the state does not convert private conduct into state action. But cf. Reitman v. Mulkey, 387 U.S. 369 (1967). The Reitman decision set forth the principle that the mere existence of a statute might constitute state action where it has sufficient impact on private conduct. Yet this principle has been limited to situations involving racial discrimination. See note 110 infra. The encouragement theory of state action has not escaped criticism. "By focusing on 'encouragement' the Court, I fear, is forging a slippery and unfortunate criterion by which to measure the constitutionality of a statute . . . ." Reitman, 387 U.S. at 393 (Harlan, J., dissenting).

90. 436 U.S. at 166. Commentators have theorized that a state's inaction may operate as an affirmative act.

It should be clear that a state may be connected to the asserted deprivation by its tolerance of the challenged practice as well as by its positive acts. To illustrate, assuming that a right to do something is protected by "due process," how may a state "deprive any person" of that right? Obviously it could do so in three formally different but substantively similar ways . . . . Third, observing that absent laws to the contrary, a practice of some nongovernmental persons will exist in a form which limits or eliminates the right, the state could do nothing. Despite traditional theory it seems hard to contend that the state has done less "depriving" of the right in the third alternative.

Glennon & Nowak, supra note 6, at 229 (emphasis added).

91. 436 U.S. at 164-66. It is unclear whether the Court's holding that state inaction does not equal state encouragement is limited to a commercial setting or applies to racial discrimination as well.
warehouseman’s sale. The Court then equated this statutory refusal with denial of judicial relief, finding it immaterial which of these forms state inaction assumes. Finally, the Court expressed concern that if mere denial of judicial relief were sufficient encouragement for state action, the distinction between “private” and “public” would be obliterated.

The initial flaw in this analysis of state inaction lies in the Court’s presumption that the state can remain truly “neutral” in the face of allegedly objectionable conduct. This presupposition slights a crucial factor: the state cannot not decide. When the state is confronted with a challenge to allegedly improper conduct, it must “act” whether by legislative fiat or judicial decision. Failure to respond when so confronted would constitute an affirmation of the status quo; thus the state would no longer be neutral.

A further deficiency is the Court’s assertion that the form of state inaction is irrelevant to the encouragement inquiry. The Court correctly reasoned that even in the absence of statutory authorization the first time the aggrieved debtor challenged the sale in court, the state would have to act by judicial decision. This reasoning, however, begs the question whether a warehouseman would even contemplate summarily selling the debtor’s property absent express statutory authorization. Thus by legislatively “refusing to intervene,” the state may have initiated and thereby encouraged a practice which might not otherwise have arisen.

Furthermore, judicial action may be ambiguous. Since a court may deny relief for a variety of reasons, the mere fact that a debtor fails to recover does not necessarily mean that the state sanctions the challenged conduct. In contrast, by enacting a statute that allows a particular practice, the state clearly condones that practice.

92. Id. at 165.
93. Id.
94. Id.
95. In theory, a state can be neutral. In some circumstances, however, a state’s theoretical “neutrality” may actually be a form of bias. The state may refuse to intervene because of a bias favoring the persons whose conduct is challenged, or a disinclination to aid the complaining parties.
96. The Court itself indirectly acknowledged this. 436 U.S. at 165.
97. The Court observed that it is “immaterial that the State has embodied its decision not to act in statutory form.” Id.
98. Id.
100. Grounds for denying relief which do not go to the merits of the case include statutes of limitations, failure of process, and want of prosecution.
For these reasons, a statute explicitly creating the right of sale constitutes greater state encouragement than mere denial of judicial relief after the sale has occurred. Thus, failure to differentiate between forms of state inaction may be conceptually inadequate.

The Court's effort to buttress its claim that a statutory refusal to act equals a judicial denial of relief disclosed an additional infirmity. The Court reasoned that section 7-210 is "no different in principle from an ordinary statute of limitations." This analogy, however, is inapposite. Policy considerations giving rise to a statute of limitations are totally distinct from those underlying the doctrine of state action. A statute of limitations embodies principles of finality and repose which are irrelevant to state action. In contrast, the doctrine of state action comprises principles "quasi-jurisdictional" in nature. The sole commonality between a statute of limitations and state action is that both may bar judicial review of the substantive claim for relief. Due to the overriding differences between the two concepts, the Court's reliance on this comparison is misplaced.

Finally, the Court's concern that finding encouragement in the mere denial of judicial relief would contravene the "essential dichotomy" between private and public conduct lacks merit. Under this dichotomy, governmental activities must conform to the strictures of the fourteenth amendment while purely private conduct escapes these constraints. It is questionable whether this dichotomy retains any validity. However marginal, state involvement pervades almost every aspect of modern society, thus leaving few purely private activities. Even assuming this dichotomy has validity, denial of

101. 436 U.S. at 166.
102. "Statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise." Johnson v. Railway Express Agency, 421 U.S. 454, 473 (1975) (Marshall, J., concurring in part and dissenting in part).
104. 436 U.S. at 165 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349 (1974)). The dichotomy contrasts state deprivations of guaranteed rights, which the fourteenth amendment prohibits, and private conduct, against which the amendment offers no protection.
105. This dichotomy originated in The Civil Rights Cases, 109 U.S. 3 (1883).
107. Governmental funding, whether state or federal, supports many private institutions,
judicial relief does not always amount to the state authorization necessary to transform a private taking into a public deprivation of property.

In discarding statutory authorization as a basis for state action, the Court did not articulate what level of state involvement would amount to encouragement. Additionally, the overall deficiencies in the Court's analysis weaken its resolution of the encouragement question.

TWO-TIERED STATE ACTION ANALYSIS

The Flagg Court's failure to find state action clearly reflects a restrictive interpretation of public function and state encouragement. Yet the Court cautioned that its holding does not impair the precedential value of state action decisions arising in the context of racial discrimination. By differentiating these cases, the Court implicitly endorsed the premise that standards of state action may vary according to the right allegedly abridged. Under this approach, racial discrimination cases require a lower level of state involvement than debtor-creditor disputes. This variation reflects differing federal priorities. The judiciary's desire to eradicate racial discrimination prompted a liberal interpretation of state action. In contrast, the more restrictive application of state action in the creditor-debtor context derived from a concern for creditors' rights.

such as schools and hospitals.

There are, however, some areas of conduct which are so private that constitutional prohibitions should not apply. See Thompson, Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession, 1977 Wis. L. Rev. 1, 25-27 [hereinafter cited as Thompson].

Several courts have endorsed a "sliding scale" approach to state action. See, e.g., Jackson v. Statler Foundation, 496 F.2d 623, 635 (2d Cir. 1974); James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 333 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974). The Court of Appeals in Flagg found state action even though it adopted this sliding scale analysis: "[T]he criteria for finding state action in equal protection cases involving charges of racial discrimination are easier to meet than those formulated in cases such as that at bar." Brooks v. Flagg Bros., 553 F.2d 767, 770 (2d Cir. 1977).

In a line of cases beginning with Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972), the Court formulated due process standards for creditors' remedies which served to expand debtors' rights. Judge Gibbons, concurring in Parks v. "Mr. Ford," 556 F.2d 132, 149-51 (3d Cir. 1977), suggests that the doctrine of state action was borrowed from discrimination cases and applied to cases involving debtor-creditor disputes in an attempt to counterbalance this growing judicial preference for debtors' rights.

Those courts seeking to limit the effect of Sniadach and its progeny relied on footnote 12
By apparently adopting this two-tiered standard, the Flagg Court renders it difficult to establish state action in constitutional challenges to creditor remedies. The Court's refusal to construe the encouragement doctrine expansively in a commercial setting comports with the tendency of lower federal courts to limit its application to racial cases. Further, the Court has previously restricted the theory's scope even within the area of race discrimination. In contrast, failure to extend the public function doctrine to creditor remedies is more questionable. Unlike state encouragement, this theory has been applied outside the racial arena. Precedent exists, moreover, for using public function analysis specifically in debtor-creditor controversies.

**DUE PROCESS**

The Court's restrictive view of state action produces an anomalous result. In prior cases delineating due process standards for creditor remedies, lack of adequate state supervision of the challenged procedure violated due process. After Flagg, lack of state control


115. Lower courts have found lien enforcement to be a public function. See, e.g., Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

refutes the existence of state action. Thus, the very factor that previously rendered creditor remedies unconstitutional under a due process analysis now precludes constitutional review of section 7-210.117 As a result of Flagg, a low level of state involvement constitutes state action, but contravenes due process guarantees. A slightly lower level of state involvement, however, negates state action, and thus obviates further judicial scrutiny.

Had the Court undertaken a due process analysis of section 7-210, it would have considered whether the statute satisfied the minimum procedural safeguards of notice118 and opportunity to be heard.119 Although section 7-210 clearly prescribes notice to the debtor120 the statute does not expressly afford any hearing. Consequently, section 7-210 may exceed the permissible bounds of due process.

In Flagg, the warehouseman argued that even though section 7-210 does not explicitly mandate a hearing, it supplies adequate procedural safeguards.121 After receiving notice, the debtor has at least twenty days in which to redeem his goods or challenge the sale.122 The creditor contended that during this period the debtor, by initiating suit, may obtain a hearing on the merits of any defense to the lien foreclosure.123 Yet two considerations weaken the creditor’s argument. First, requiring the debtor to commence suit to secure a hearing places the burden of defeating the creditor’s claim

1039 (1974); Shirley v. State Nat’l Bank, 493 F.2d 739, 743 n.5 (2d Cir. 1974). Moreover, the Seventh Circuit in Gibson v. Dixon, 579 F.2d 1071, 1077 (7th Cir. 1978), recently held that the “minor involvement” of a state official acting in a purely ministerial capacity did not constitute state action.

117. 436 U.S. at 173-75 (Stevens, J., dissenting).


119. The hearing required by due process “must be granted at a meaningful time and in a meaningful manner.” Fuentes v. Shevin, 407 U.S. 67, 80 (1972). The type of hearing may vary depending on the circumstances; a hearing before a judge is not always necessary. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 16 (1978). Apparently the timing of the hearing is also variable. Although Fuentes required a hearing “at a time when the deprivation can still be prevented,” 407 U.S. at 81, in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court held that due process may be satisfied without a prior hearing if there are adequate alternative procedural safeguards, including an immediate post-seizure hearing. See generally Catz & Robinson, supra note 116.

120. U.C.C. § 7-210(2)(a)-(c).

121. Such protections include: the notice requirement; the delay between notice and sale which gives the debtor time to redeem his goods; the requirement that the sale be held at the nearest suitable place to avoid transportation costs; the surplus realized on sale going to the debtor; and the damage liability for the warehouseman’s failure to comply with the section. See note 9 supra.

122. U.C.C. § 7-210(2)(f).

123. Brief for Petitioner Attorney General Lefkowitz at 21.
on the debtor. Agruably, since it is the creditor who seeks to deprive the debtor of property, it is he who should carry the burden of proving his claim. Whether this shift in the burden of proof is consonant with due process has not been resolved. The question is whether the burden of proof should be on the debtor or the creditor. Whether this shift in the burden of proof is consonant with due process has not been resolved.

Second, states often require debtors to post bond prior to suit. As a practical matter, many debtors are unable to post sufficient security. Whether the Constitution permits denial of the debtor’s right to a hearing solely because he is economically disadvantaged also remains unsettled.

Because the Court disposed of Flagg on the state action issue it never addressed these important due process questions. Had the Court found state action, it might also have discovered a due process violation. But by finding no state action, the Court circumvented any due process analysis and thus absolved the creditor from complying with procedural safeguards. A major ramification of the Flagg decision is that its state action analysis operates to curtail federal due process scrutiny of self-help creditor remedies.

124. Several courts have held that placing the burden on the debtor violates due process. See, e.g., Parks v. “Mr. Ford,” 556 F.2d 132 (3d Cir. 1977); Stypmann v. City of San Francisco, 557 F.2d 1338 (9th Cir. 1977); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976). Contra, Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), cert. denied, 420 U.S. 934 (1975). In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court noted that the burden of proof at the post-seizure hearing was on the creditor. Id. at 618. This factor apparently influenced the Court’s decision to uphold Louisiana’s sequestration statute in the face of a due process attack.

125. 436 U.S. at 166-67 (Marshall, J., dissenting).


128. The Court may thus have reinforced the creditor’s rights at the expense of the debtor. Brooks contended that U.C.C. § 7-210 favors warehouseman as a “special interest group.” Brief for Respondents at 30-31. Flagg Brothers, however, characterized the provision as a “consumer-oriented statute beset with pitfalls for the warehouseman who elects to use it.” Brief for Petitioner Flagg Brothers at 27-28.

129. Although Justice Stevens expressed apprehension that Flagg’s holding will preclude due process scrutiny of creditor remedies even in state courts, 436 U.S. at 177 n.15, the result in Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 379 N.E.2d 1169 (1978) indicates otherwise. In Sharrock, New York’s highest state court held that the state’s Lien Law, which empowered a garageman to sell unilaterally a bailed automobile, violated the due process clause of the state constitution. The court reached this conclusion after determining that, in light of Flagg, the lack of state action in the sale precluded review under the due process clause of the United States Constitution.
OTHER CREDITOR REMEDIES

The issue of state action will not foreclose due process inquiry in all categories of creditor remedies. For example, when an officer of the state directly participates in the taking of a debtor's property, state action clearly exists. When, however, the creditor proceeds against the debtor without any overt state assistance, state action is more difficult to assess.

In several categories of creditor remedies, the state action question may bar judicial review of due process. One category is that of self-help repossession under the UCC. Such repossession arguably exhibits greater indicia of state action than foreclosure of a warehouseman's lien, because repossession requires a seizure of

130 A rather specialized category is that of utility terminations. See, e.g., Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 346 (1974); Palmer v. Columbia Gas, 479 F.2d 153 (6th Cir. 1973); Lucas v. Wisconsin Electric Power Co., 466 F.2d 638 (7th Cir.), cert. denied, 409 U.S. 1114 (1972). In these cases, the debtor challenges the utility's termination of service for nonpayment of bills. The Court has found state action only where the state rather than a private party owns the utility company. Thus, the fortuitous circumstance of ownership controls whether the utility's termination procedures must comport with due process standards. The Flagg decision does nothing to diminish reliance on ownership as indicative of state action in this context.

Another area, which has received little attention, is extra-judicial mortgage foreclosures. See, e.g., Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978). See generally Nelson, Constitutional Problems With Power of Sale Real Estate Foreclosure: A Judicial Dilemma, 43 Mo. L. Rev. 25 (1978). In this category, a mortgage contract will provide that, upon default, the mortgagee may sell the encumbered property without resort to judicial process. As in the utility context, state action often turns on whether the mortgagee is a private entity or a governmental agency. Where the mortgagee is a governmental agency, the courts find state action and hold that due process requires a judicial hearing prior to foreclosure. A different outcome results, however, where the mortgagee is a private party. In this situation, the courts conclude there is no state action. Compare Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975) (no state action) with Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976) (state action). As state action is contingent upon the mortgagee's identity, Flagg's decision has little relevance to this area.

property. Yet this distinction is immaterial since the UCC explicitly confines self-help repossession to situations involving no breach of the peace. The decision in Flagg, because it involved a similar remedy, reinforces the conclusion that self-help repossession does not constitute state action.

The state action limitation may also be employed in the area of lien foreclosures. The impact of Flagg's state action analysis on such foreclosures is difficult to anticipate because they span a multitude of factual configurations. One generalization, however, can be advanced: state action may depend on who has possession of the property subject to the lien. Where the creditor already has possession, Flagg's holding renders it unlikely that state action will be found. In contrast, Flagg does not affect cases finding state action where the lienor gains possession of property through unauthorized entry into the debtor's premises.

CONCLUSION

Within the last decade, various creditor remedies have come under constitutional attack as violative of due process. One such remedy is the warehouseman's foreclosure sale under section 7-210. In adjudicating these claims, courts have divided on the threshold question of state action. Faced with contradictory holdings, the Court in Flagg determined that the warehouseman's sale lacks sufficient government involvement to constitute state action. This determination foreclosed any decision on the merits of the due process challenge.

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132. See notes 81-87 supra and accompanying text.
133. "In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . ." U.C.C. § 9-503. Practically, this limitation confines the utility of self-help repossession to the automobile financing industry. Since automobiles are frequently left unattended in public places, they can be "peacefully" possessed more readily than other property. The possibility of repossession of a washing-machine or other household furnishing without the debtor's consent and without a breach of the peace is considerably less likely. See generally Mentschikoff, Peaceful Repossession Under the U.C.C.: A Constitutional and Economic Analysis, 14 WM. & MARY L. REV. 767, 782 (1973).
134. See Gibson v. Dixon, 579 F.2d 1071 (7th Cir. 1978). The Seventh Circuit specifically relied on Flagg to reject several theories under which the repossession sale of an automobile might be attributable to the state. "While the decision is not free from ambiguity, it cannot be doubted after Flagg Bros. that the availability of this creditor's remedy under state law does not by itself mean that the sale constitutes state action." Id. at 1077 (citations omitted).
136. See Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). "[T]he action taken, 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. at 438. Contra, Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975).
In holding that no state action existed, the Court rejected all theories by which the warehouseman's conduct might have been attributed to the state. As a consequence, it will be burdensome to establish state action in the context of creditor self-help remedies. Only one basis for state action may retain vitality: the use or threat of force in implementing the remedy. Overall, *Flagg*'s holding may dissuade aggrieved debtors from bringing suit in federal courts, forcing them to pursue alternative forums.

The Court's restrictive analysis of state action is not without precedent. Much of the Court's reasoning, however, is conceptually deficient. In particular, the *Flagg* Court failed to enunciate a workable test for ascertaining state action in subsequent cases. This omission significantly undermines the decision's precedential value.

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