Civilian Thoughts On U.C.C. Section 9-503 Self-Help Repossession: Reasoning In A Historical Vacuum

Bruce V. Schewe
CIVILIAN THOUGHTS ON U.C.C. SECTION 9-503 SELF-HELP REPOSSESSION: REASONING IN A HISTORICAL VACUUM

For some time the Uniform Commercial Code has provided the rules of sales and security devices in forty-nine states of the union. Only Louisiana, steeped in the civilian heritage of Roman, Spanish, and French law, has stood alone in not adopting articles two and nine as its positive law. This posture, however, due in part to the pressures of uniformity, appears to be changing. In the near future the sales provisions of the U.C.C. may become part of Louisiana's law. And once article two is adopted, the security interest provisions of the U.C.C. surely will follow. The transition, however, may not be smooth. One problem area is found in the U.C.C. sections con-

7. From a methodological standpoint, it is uncertain even now, when substantial portions of the U.C.C. comprise Louisiana law, whether the commercial laws are to be read as a true code. Chancellor Hawkland has written that civilian techniques should be employed in reading the U.C.C. Hawkland, Uniform Commercial “Code” Methodology, 1962 U. Ill. L.F. 291. In addition, Professor Franklin noted that, “The Uniform Commercial Code . . . is largely the work of Llewellyn, who had close ties with German civil law. . . .” Franklin, The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach, 40 Tul. L. Rev. 487, 516 (1966). Moreover, Professor Franklin stated that the U.C.C. “r[e]present[s] the most self-conscious attempt to veer Anglo-American legal method from method based on prior judicial determinations to formulated law in which such texts not only have the force of law, but enjoy the role of sources of law.” Id.
8. Presumably, if the entire U.C.C. is enacted in Louisiana the traditional rules of civilian interpretation will be applicable. Oddly enough, the use of civil law methodology with respect to the Louisiana commercial laws will likely retard the reaching of the goal of uniformity in America, which was the primary basis for the U.C.C.'s adoption.
This article traces the jurisprudential treatment of section 9-503 in common law jurisdictions, which consists principally of cases raising questions regarding the constitutionality of creditors' self-help repossession. Additionally, a forecast is projected that, notwithstanding the constitutional analysis heretofore invoked in federal and state courts, a creditor's self-help repossession, if ever permitted in Louisiana, would be subject to a successful challenge under the federal or state constitutions.

Section 9-503: A Source of Confusion

Prior to the formulation of the U.C.C., the parties to a secured transaction permissibly could stipulate the remedy of self-help repossession in favor of the creditor in the event of the debtor's default. In fact, this creditor's device had been accepted as a part of the common law. Of course, some restrictions accompanied the exercise of the repossession right. For example, self-help repossession has been denied to creditors when their debtors filed in bankruptcy. More significantly, the self-help repossession had to be accomplished without breaching the peace.

8. U.C.C. § 9-503 (1978 version): Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under § 9-504.

11. Repossession should be understood in the broad sense of creditors acting to dispossess debtors of collateral without judicial order. Actually, not every secured creditor who engages in self-help is perfecting a repossession. For example, a chattel mortgagee that seizes upon the secured property without judicial approval is not necessarily repossessing, since the mortgagee may not have ever had possession of the collateral. Nevertheless, the principles noted in this article apply to the chattel mortgagee's self-help conduct.
12. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 44.1, at 1212 (1965).
13. 2 F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 574-77 (2d ed. 1898).
15. For an excellent survey of the historical and contemporary meanings of a breach of the peace, see Comment, Breach of the Peace and Section 9-503 and the
Placed in the context of article nine of the U.C.C., the self-help repossession provision arms the creditor with great power. Article nine’s rules apply to all transactions intended to create a security interest in personal property or fixtures, and to the sales of accounts, contractual rights, or chattel paper. When a debtor is “in default” under a security agreement, the secured party has the right to exercise remedies stated under part five of article nine.

Clearly, the scheme is creditor-oriented and, undoubtedly, self-help repossession is susceptible to abuse in practice. Still, self-help repossession is precluded even though the security may be located in a public place. Additionally, the "crude two-factor formula of creditor entry and debtor response must...be refined by...a consideration of third party response, the type of premises entered and possible creditor deceit in procuring consent."
possession is a significant component to modern commercial financing, ultimately benefiting both borrower and creditor alike. The secured creditor enjoys the capacity to prevent the debtor from removing the collateral beyond the reach of judicial process without first obtaining court approval. The borrowing public, in turn, is

1964); G. Gilmore, supra note 12, at § 43.4, at 1197; J. White & R. Summers, supra note 15, at § 26-3, at 1088-89, one fundamental issue appears to be overlooked. If the creditor improperly and in "bad faith" accelerates the obligation placing the debtor in default, the judicial determination of bad faith is not likely to be made until after the debtor has been dispossessed of his encumbered property. Admittedly, an action for money damages against the creditor, under a wrongful seizure theory, is available. However, unless the debtor is able to secure the issuance of a restraining order or an injunction, the creditor will sell the property, U.C.C. § 9-504 (1978 version), and the debtor will forever lose the collateral. On this ground alone, self-help repossession and sale constitutes undesirable policy.

20. Professor Spak reports that "[T]he popular belief is that requiring notice and a hearing before repossession would be too costly, and as a result, finance companies and banks would cease loaning to credit risks." Spak, The Constitutionality of Repossession By Secured Creditors Under Article 9-503 of the Uniform Commercial Code, 10 Hous. L. Rev. 855, 866 (1973).


22. U.C.C. § 9-105(1)(c) (1978 version) defines collateral as "the property subject to a security interest."


Nineteen sixty-nine was a momentous year. In that year the United States put a man on the moon, and in that year the creditor met the Constitution. Since then, the United States Supreme Court and a host of lower courts have, with increased frequency, measured the law of creditor's rights against the requirements of due process set forth in the fourteenth amendment. Clark & Landers, Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution, 59 Va. L. Rev. 355, 355 (1973). However, since the due process requirements of the fourteenth amendment apply only to states, the salient issue is whether a creditor's self-help repossession is conduct that may be termed "state action." If so, the fourteenth amendment limitations apply. If not, only the private law of the states controls the creditor's conduct.
benefited since the creditor's self-help repossession more readily facilitates the availability of less expensive credit.24

Accepting the contention that U.C.C. section 9-503 encourages socially desirable results,26 one of which is low-cost consumer credit, the creditor still may not utilize its provisions if to do so runs afoul of the Constitution. In light of the Supreme Court's pronouncements in the prejudgment seizure and garnishment area,25 the fourteenth

24. See Burke & Reber, State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment, 47 S. Cal. L. Rev. 1 (1973); Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S. Cal. L. Rev. 82, 90-105 (1973); Mentschikoff, Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis, 14 Wm. & Mary L. Rev. 767, 772 (1973); White, The Abolition of Self-Help Repossession: The Poor Pay Even More, 1973 Wis. L. Rev. 503. Anthony Thompson reports that at the time the Burke and Reber article was published they were with a Los Angeles law firm, Sheppard, Mullin, Richter & Hampton, which "had filed briefs on behalf of creditors in many cases challenging creditor's remedies . . . ." Thompson, Piercing the Veil of State Action: The Revisionist Theory and a Mythical Application to Self-Help Repossession, 1977 Wis. L. Rev. 1, 51 n.263. Hence, their position is not surprising.

However, not all commentators agree that the intervention of the courts between the foreclosing creditor and the defaulting debtor results in the general rise of credit prices. See Krahmer, Clifford & Lasley, Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study, 4 Tex. Tech. L. Rev. 23 (1972).

25. Not all agree that the lowered price of credit for the borrowing public justifies the social costs imposed by self-help. Professor Crandall has argued that self-help repossession "encourages a kind of sleazy practice that serves to lessen public respect in our system of law and to create a real possibility for violence—two real societal costs." Crandall, Proposal for Consumer Credit Reform: A Definition of Default, A Right to Cure, and a Right to Notice and an Opportunity For a Hearing Before Repossession, 13 Gonz. L. Rev. 1, 31-32 (1977).

amendment's bedrock standard of fundamental fairness requires that the prejudgment seizure writ issue only on judicial order with a probable cause hearing slated shortly thereafter. In contrast, the U.C.C. permits the creditor to (1) declare when the debtor is in default, (2) repossess the property of the debtor subject to the lien or privilege, and (3) sell the property at a public or private sale—all without any order or writ issuance from a court.

At first glance, section 9-503 appears to be a delegation to the creditor of the state's power to seize an individual's property. The repossessing creditor acts in a manner traditionally associated with the state, and acts under color of state law. Consequently, the due process prohibitions regarding prejudgment seizures should be applicable, with the effectiveness of section 9-503 thoroughly negated. Albeit logical, this approach has not been enunciated by the vast majority of courts that have addressed the issue. Instead, the prevalent


35. See, e.g., Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Gary v. Darnell, 505 F.2d 741 (8th Cir. 1974); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974); Gibbs v. Titleman, 502 F.2d 1107 (3d Cir.), cert. denied, 419 U.S. 1039 (1974);
ing view is that the creditor's self-help repossession does not demand fourteenth amendment due process scrutiny; the state action requisite is absent. By examining the state action doctrine one can understand the reasons section 9-503 has, by and large, with-


36. One contention for ruling section 9-503 unconstitutional is that state action can be found in the legislature's approval, through enactment of the statute, of self-help repossession. Huffmire, supra note 26, at 330. Such legislative approval of the self-help remedy effectively delegates the state's traditional "authority to repossess to private individuals." Id. Nevertheless, the recitation by the federal court for the Western District of Virginia, in Green v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972), is typical:

The Fourteenth Amendment can control only the actions of states, not private individuals. Therefore, because the operation of the statute involved does not require the aid, assistance, or interaction of any state agent, body, organization or function, the state has not deprived the plaintiff of his property.

Similarly, one writer has posited that "the single bar to successful attacks on the constitutionality of section 9-503 would seem to be the lack of the requisite 'state action.'" Del Duca, supra note 26, at 345.

Another argument raised to avoid a finding of state action is that since the secured creditor's right to recover goods upon default arises from the security agreement, it cannot be said that the state has acted in a private contract between individuals." Spak, supra note 20, at 865. For "if the contract recites the right to repossession upon default without a breach of peace, the state has not acted in the matter at all." Id.

stood constitutional examination in the common law states, but at the same time why its future in Louisiana is doubtful.

Rejecting the Revisionists—A Realistic State Action Lesson

Phrased in language proscribing a state from depriving an individual of his life, liberty, or property without due process of law, the fourteenth amendment to the United States Constitution does not restrain private conduct that would be prohibited if engaged in by state actors. Absent a means of defining private behavior to be that of the state, the fourteenth amendment affords no protection.

However, the distinction between state conduct and private action is not always clear. In many instances a private individual properly may be characterized as a state actor. Many actions that seem at first impression to be wholly private actually are interwoven with governmental policy. In addition, due to traditional notions regarding certain roles in which the state has exclusively acted, a private actor filling such a role may be treated as a state for purposes of the fourteenth amendment. Out of the need to classify that which should be subject to the strictures of the fourteenth amendment, the state action doctrine has been developed by the Supreme Court. The result of an application of the state action doctrine is to say that ostensibly private conduct is that of a state, with the attendant constitutional sanctions.

Professor Gunther has pointed out that the primary inquiry in state action analysis is whether the private actor is either "suffi-
ciently entangled with or sufficiently like the state" to consider his conduct the act of the state. Simply stated, the state action doctrine is reducible to (1) the "nexus" approach, which seeks to find sufficient points of contact between the private actor and the state to justify the placing of constitutional restraints on the private actor or demanding state disengagement, and (2) the "public function" analysis, which examines whether private action is appropriately "state-like" to impose the constitutional restrictions. Furthermore, once the state action barrier has been cleared, a constitutional right guaranteed by the fourteenth amendment must be at issue. The circumstances of the foreclosing creditor provides an illustration of both the constitutional right involved and the state action concept. Until a few years ago replevin was the usual creditor's remedy: the U.C.C. stated that when the collateral could not be privately repossessed without breaching the peace, the creditor might proceed by action. The action was instituted through filing a replevin suit, giving a replevin bond, and entering an affidavit of right to possession of the security. In short, replevin normally did not require a judicial hearing prior to the issuance of the clerk's writ and seizure by the sheriff.

42. G. Gunther, supra note 27, at 916.
45. Generally the claim will be presented by way of an action brought under 42 U.S.C. § 1983. Section 1983 provides that money damages and injunctive relief are proper remedies against any person depriving others of constitutional rights under color of state law. The claimant must show, in the words of Mr. Justice Rehnquist, a deprivation "of a right 'secured by the Constitution and the law' of the United States." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)). Furthermore, there must be a demonstration that the state actor "deprived... this right acting 'under color of any statute' of the State... ." Id. "It is clear that these two elements denote two separate areas of inquiry." Id. (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).
49. Id.
However, opinions from the Supreme Court first indicated and then confirmed that replevin was unconstitutional in that it deprived the debtor of his property without a judicial hearing or order. Subsequently, the Court appeared to take a step back from its extension of procedural due process rights to a debtor. But in view of a more recent pronouncement, the constitutional limits on prejudgment seizures may be summarized by stating that when a creditor causes a judicial writ to issue for the seizure of a debtor's property, the debtor must be given an opportunity to be heard. The fourteenth amendment's guarantee of procedural due process is triggered by the fact that a court, an arm of the state, issues the seizure writ which is executed by a sheriff, a state officer. Certainly the state is enmeshed in the creditor's remedial procedure, replevin, and the state action doctrine is applicable.

In the context of section 9-503, forceful arguments can be marshalled that a secured creditor employing the self-help remedy may be categorized under both prongs of the state action doctrine. On the one hand, the seizing creditor is utilizing his statutory right to repossess. The "nexus" test seems satisfied since the creditor is


52. Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974). In Mitchell, the Supreme Court upheld Louisiana's sequestration procedures, LA. CODE CIV. P. arts. 3501 & 3571, a remedy akin to common law replevin. The determining distinction seemed to be Louisiana's requirement of a judicial order before the sheriff would be issued the writ of fieri facias. Yet some writers, including Professor L'Enfant, questioned whether Mitchell sub silentio overruled Fuentes v. Shevin, 407 U.S. 67 (1972). L'Enfant, supra note 26, at 453-54. Precisely, Professor L'Enfant argued: "Although the Court chose to speak of Fuentes and Mitchell as distinguishable cases, it seems more accurate to say that Mitchell marks a considerable departure from Fuentes." Id. at 454-55.


54. Mr. Justice White, writing the W.T. Grant Co. v. Mitchell opinion, reasoned "that a hearing must be had before one is finally deprived of his property . . . ." 416 U.S. at 611. The rule "has been '[w]here only property rights are involved, mere postponement of the judicial [i]nquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" Id. (quoting Phillips v. Commissioner, 283 U.S. 589, 596-97 (1931)).


56. See text at notes 42-44, supra.
operating with the approval of the state legislature. On the other hand, the creditor, in seizing the security for sale, is carrying out a task that traditionally has remained within the province of state agents, chiefly the sheriff. Therefore, the "public function" element of state action examination appears satisfied.

The argument that the repossessing creditor is a state actor for purposes of the fourteenth amendment was accepted in the federal court for the Southern District of California. Only a few months prior to the Supreme Court's *Fuentes v. Shevin* opinion, *Adams v. Egley* held that a creditor repossessing under section 9-503 represented conduct of the sort traditionally performed by the state. The district court relied on the encouragement theory of state action as articulated in *Reitman v. Mulkey*. The U.C.C. sections at issue were read as setting forth a "state policy," and security agreements which incorporated the statutory rules were "embodiment[s] of that policy." Statutorily endorsed self-help was cited as unconstitutional primarily because the U.C.C. did not limit self-help repossession to "secured transactions between parties of equal bargaining power." On appeal, however, a panel of the Ninth Circuit perceived the problem quite differently. Judge Trask, as the

---

64. 338 F. Supp. at 617.
65. Id.
67. 338 F. Supp. at 618.
68. Id. at 621.
court's writer, noted that even prior to the enactment of the U.C.C. the creditor's self-help procedure had been "recognized and permitted as a part of the common law." Still, the court correctly realized that the sole fact of common-law statutory confirmation was not the determining factor in state action analysis. Instead, the pertinent guide was said to be state involvement-plus—"significant state involvement." The court distinguished Reitman by opining that the significant state involvement test meant something similar to the

70. 492 F.2d at 330. Undoubtedly, the argument that U.C.C. sections 9-503 and 9-504 do not create any new rights in the secured creditor, but merely restate the common law position, is the strongest one for the absence of state action. And "[m]ost courts consider Section 9-503 to be merely a codification of the common law right to repossess ...." Huffmire, supra note 26, at 330. "It is argued that repossession by the secured creditor is a private matter and unlike replevin does not require the assistance of the state or its agents and involves neither the court nor the sheriff." Id.

On a different ground the Federal District Court for the Northern District of California failed to find state action in a factual circumstance similar to Adams. Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972). The Oller court distinguished Reitman v. Mulkey, 387 U.S. 369 (1967), as a racial discrimination matter which demanded the strictest examination under the fourteenth amendment. 342 F. Supp. at 23. Known somewhat loosely as a revisionist theory of state action, see Thompson, supra note 24, at 22, the analysis employed in Oller is ultimately fruitless and circular. While it is true that any form of racial discrimination is subjected to the inevitably fatal strict scrutiny, see, e.g., Regents of the University of Cal. v. Bakke, 438 U.S. 265 (1978), state action is a requisite for application of the fourteenth amendment. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Washington v. Davis, 426 U.S. 229 (1976). A more satisfactory approach is to determine the state action question separately from the question of the strength of the federal claim.

71. Wisely, the Adams panel did not rest its decision solely on the grounds that the U.C.C. does not grant a secured creditor rights not existing at common law. A powerful argument can be framed that the fact of the California state legislature's adoption of sections 9-503 and 9-504, alone, should constitute state action. See note 58, supra, and accompanying text. Secured creditors could, hypothetically, be unaware of their common law rights and might be encouraged through the statutory permission to engage in self-help when they otherwise might not. Furthermore the principal postulate for striking section 9-503 is that "state action can be found in enactment of the statute by the legislature which lends its approval to self-help repossession and delegates its traditional ... authority to repossess to private individuals." Huffmire, supra note 26, at 330.

72. 492 F.2d at 330 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972)). See also Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). The panel read the Supreme Court's Evans v. Abney, 396 U.S. 435 (1970), ruling as a rejection of a broad state action formula, "even in the racial area." 492 F.2d at 381 n.15. The rationale was practical: "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." Id. at 331.

73. 492 F.2d at 332.
"symbiotic relationship" present between the state-lessor and the private discriminator lessee in Burton v. Wilmington Parking Authority. The Ninth Circuit discerned at least two differentiating features. Initially, "the State in Reitman was involved to a far greater degree in the challenged conduct . . . ." With regard to the self-help issue, the adoption of the U.C.C. "did not reverse the law as it had been prior to the enactment of the Code, but merely codified existing law for the most part."

Secondly, "and consistent with the reasoning of several other courts," the Adams panel doubted that resolution of the state action quagmire in a prejudgment self-help repossession instance was controlled properly by a racial discrimination decision. "[T]hese creditor remedies were based on economically reasoned grounds of very long standing, which appear to have been the topic of extensive research and legislative investigation." The court dismissed the debtor's allegation that by "putting into statutory form existing private remedies, the State conclusively and significantly involves itself in the private conduct." The debtors had failed to state a federal cause of action.

Despite criticism of the decision as a product of tortured reason-

75. As Professor Gunther notes, "[t]he term 'discriminator' is used . . . as shorthand for the private actor engaging in allegedly unconstitutional behavior. Bear in mind, however, that discrimination is not the only focus of the 14th Amendment." G. Gunther, supra note 27, at 916.
77. 492 F.2d at 332.
78. Id.
79. Id.
81. 492 F.2d at 333. The court succinctly stated that "[u]nlike Reitman, there has been no finding that it was the intent of the State in passing § 9-503 to authorize any conduct that would violate the Fourteenth Amendment." Id.
82. Id.
83. Id.
84. "We reverse in Adams and affirm in Hampton, noting that the proper ground for dismissing in Hampton was failure to state a federal cause of action, rather than that the federal court lacked subject-matter jurisdiction." Id. at 339 (citing Bell v. Hood, 327 U.S. 678 (1946)).
ing, the Adams court's analysis of the creditor's self-help remedies available before the enactment of the U.C.C. seems correct. If the U.C.C. only restated in sections 9-503 and 9-504 the common practice in California, then another reference to Reitman is appropriate. In an attempt to limit the boundaries of its ruling, the Reitman majority carefully noted that the fourteenth amendment did not bar a state from putting into "statutory form an existing policy of neutrality with respect to private discriminations." Hence in cases challenging sections 9-503 and 9-504, an examination of the history of creditors' remedies in the jurisdiction, including self-help repossessions, before the advent of the U.C.C. is necessary.

Adams' second means of distinguishing Reitman, however, that a racial discrimination case should not govern the result in the litigation of the constitutionality of a secured creditor's self-help remedy, is really a confusion of the merits with what should be a preliminary inquiry—the state action examination. An initial finding of state action does not mean that the strict scrutiny analysis of race discrimination cases is invoked on the merits. Rather, the debtor's only fourteenth amendment guarantee, assuming state action to be present, is the procedural right to notice and an opportunity to be heard when his property is taken. Remarkably, the Adams court recognized the flaw in its reasoning when Judge Trask wrote that "it may be argued that state action is a 'jurisdictional' question to be considered separate from substantive matters . . . ." Yet, the court persisted in making the distinction. Since the state action determination is involved in finding private conduct to be under color of state law for jurisdictional purposes, the better view appears to be to separate completely the state action inquiry from the procedural or substantive constitutional protections.

Be that as it may, Adams' influence was widespread and swiftly felt; it became the precedent for seven other circuits. In view of

85. Thompson, supra note 24, at 50.
88. 492 F.2d at 333 n.23.
91. Anthony Thompson wrote that "[w]ithin 15 months of the original opinion the Courts of Appeal for the First, Second, Third, Fifth, Sixth, Eighth, and District of Columbia Circuits had relied on Adams." Thompson, supra note 24, at 52-53.
the contemporary inclination to extend procedural due process protections to debtors in debtor-creditor disputes, the Supreme Court's persistent refusal to grant certiorari in section 9-503 cases is somewhat surprising.\textsuperscript{93} Three years ago, however, the Court took what appears to be the inevitable step in upholding the constitutionality of the U.C.C. authorized self-help measures.\textsuperscript{94}

In \textit{Flagg Brothers, Inc. v. Brooks}\textsuperscript{95} the high Court declined to accept the claim that a sale of stored property under U.C.C. section 7-210, to enforce a warehouseman's lien, was subject to procedural due process strictures.\textsuperscript{96} The federal district court had concluded that the warehouseman's conduct was not attributable to the state.\textsuperscript{97} Reversing, the Second Circuit Court of Appeals ruled that state involvement with the proposed sale existed.\textsuperscript{98} The divided circuit panel reasoned that in "enacting [section] 7-210 New York . . . delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution, . . . [and] also let him, by selling stored goods, execute a lien and thus perform a function which has traditionally been that of the sheriff."\textsuperscript{99}

The issue was presented squarely to the Court; Mr. Justice Rehnquist, predictably authoring the majority opinion,\textsuperscript{100} noted that

\begin{itemize}
  \item[95.] 436 U.S. 149 (1978).
  \item[96.] \textit{Id} at 166.
  \item[97.] Finding that the warehouseman's conduct was not attributable to the state, the district court dismissed the suit for want of jurisdiction. 28 U.S.C. § 1343(3) (1976).\textsuperscript{100} Brooks \textit{v. Flagg Bros., Inc.}, 404 F. Supp. 1059 (S.D.N.Y. 1975). Judge Werker wrote: "[t]he court must conclude that plaintiffs have failed to show sufficient state involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a federal district court . . . ." \textit{Id} at 1066-67.
  \item[98.] \textit{Brooks v. Flagg Bros., Inc.} 553 F.2d 764 (2d Cir. 1977).
  \item[99.] \textit{Id} at 771.
  \item[100.] Although the question was not framed in the creditor's self-help context, Mr. Justice Rehnquist had tipped his hand that the state action doctrine should be circumscribed in \textit{Jackson v. Metropolitan Edison Co.}, 419 U.S. 345 (1974). The \textit{Jackson} petitioner challenged the constitutionality of Metropolitan Edison's authority to cut off her electric power, pursuant to a tariff filed with the State Public Utilities Commission, without meeting procedural due process requirements. In essence, the petitioner invited the expansion of the state action principle into a broad notion "that all businesses 'affected with the public interest' are state actions in all their actions." \textit{Id}.
\end{itemize}
certiorari was granted to address the "important question ... concerning the meaning of 'state action' as that term is associated with the Fourteenth Amendment." The burden was not an easy one for the debtors; they had to establish not only that Flaggs Brothers acted under color of the challenged statutes, but also that its behavior could otherwise be linked to the state.

The Court commented that while a private person may cause a deprivation of a constitutionally protected right, "he may be subject to liability under [section] 1983 only when he does so under color of law." Rejecting the contention that New York delegated to Flaggs Brothers power traditionally exercised by the state, the majority recited a different view as to the meaning of the public function arm of the state action doctrine. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" The exclusive state function approach is

at 353. Mr. Justice Rehnquist retorted, "[w]e decline the invitation for reasons stated long ago in Nebbia v. New York ...." Id. (citation omitted).

While Flaggs Brothers did not question the constitutionality of section 9-503, in light of the Jackson opinion, the words of one author seem particularly prophetic: "And if the High Court ever gets the case [whether sections 9-503 and 9-504 are constitutional], the opinion upholding self-help repo [sic] will surely be written by Mr. Justice Rehnquist!" Clark, supra note 26, at 311 (emphasis added). Nor was Professor Spak far from the mark: "If and when repossession under UCC 9-503 is heard by the Supreme Court, Justices Powell and Rehnquist, who did not sit for Fuentes, may very well join the Fuentes dissent in holding repossession to be constitutional." Spak, supra note 20, at 867 n.84.

101. 436 U.S. at 155.
102. The Court outlined the two essential elements for a section 1983 claim. First, a demonstration that a right secured by the Constitution and laws of the United States has been deprived is required. Id. In addition, the debtors had to "show that Flaggs Brothers deprived them of this right acting 'under color of any statute' of the State of New York." Id. (citation omitted). The "two elements denote two separate areas of inquiry." Id. at 155-56 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970)).
104. 436 U.S. at 156.
105. Id. at 157. The Court recognized that "[w]hile as a factual matter any person with sufficient physical power may deprive a person of his property," id., only a "private person whose action 'may be fairly treated as that of the state itself' ... may deprive him of an interest encompassed within the Fourteenth Amendment's protection . . . ." Id. (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Fuentes v. Shevin, 407 U.S. 67, 84 (1972)). In the Flaggs Brothers case the warehouseman's conduct could not "be fairly construed as that of the state of New York. 436 U.S. at 157.
106. 436 U.S. at 158. Speaking of both the "nexus" test and the "public function" standard for state action analysis, Mr. Justice Rehnquist stated that the "two branches of the public function doctrine have in common the feature of exclusivity." Id. at 159 (emphasis added).
dramatic in its potential impact.107 Since the proposed sale by Flagg Brothers, pursuant to section 7-210, was not the sole manner of resolving the "purely private dispute,"108 New York could "hardly be said to have delegated an exclusive prerogative of the sovereign."109 A very plausible reading of the Flagg Brothers opinion is as the Supreme Court's statement that all forms of debtor-creditor self-help disputes are beyond the fourteenth amendment's reach for want of state action.110 The Court's analysis "requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that . . . [the] entire field of activity is outside the scope of Terry and Marsh."111 With practical policy considerations seemingly playing a significant role in the result, the Court concluded that the "sovereign-function cases do not support a

107. From the majority's citations it may be inferred that future state actions applications, with regard to public functions, will be severely limited. After all, very few functions have been historically reserved to the state. The authority to conduct elections is one area. See, e.g., Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932). Additionally, the "municipal-function" theory of Marsh v. Alabama, 326 U.S. 501 (1946), still appears viable. Beyond these rather limited illustrations of public functions, the potential for any expansion appears bleak. See, e.g., Hudgens v. NLRB, 424 U.S. 507 (1976).

108. 436 U.S. at 160.

109. Id. The Court was terse in its conclusion: "Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function." Id. at 161.

110. Rubin, Developments in the Law, 1979-1980—Security Devices, 41 LA. L. REV. 389, 397 (1981). Particularly, the Court wrote: "Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures . . . . The proposed sale . . . in this case is not a significant departure from traditional private arrangements." 436 U.S. at 162 n.12. In addition, "[t]he fact that such a judicial review of a self-help remedy is seldom encountered bears witness to the important part that such remedies have played in our system of property rights." Id. at 161 n.11. One might question whether importance is a proper consideration in state action analysis. Undeniably, the judiciary engages in a weighing or balancing of competing interests when deciding the merits of a case. But since the state action determination is primarily jurisdictional, see note 70, supra, the remarks regarding the policy of self-help seem unwise. Perhaps the Court is presently of the view that North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1974), Fuentes v. Shevin, 407 U.S. 67 (1972), and Sniadach v. Family Finance Co., 395 U.S. 337 (1969), were decided incorrectly. Unwilling to overrule North Georgia, Fuentes, and Sniadach, the Flagg Brothers Court achieves the same result in refusing to find state action. Yet, it must be remembered that Flagg Brothers may be distinguished from the prejudgment seizure cases; "[i]n Flagg Brothers the warehouseman was already in possession of the merchandise and the goods secured a legal not a consensual lien . . . ." Rubin, supra, at 397 n.52.

111. 436 U.S. at 162.
finding of state action here."\textsuperscript{111} Furthermore, \textit{Flagg Brothers} stands for the proposition that in enacting section 7-210 New York did not encourage the self-help sale nor did it become intertwined with the creditor's conduct. Section 7-210 was viewed as state acquiescence in private behavior; "the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale."\textsuperscript{112} Consequently, the statutory refusal to intervene in the debtor-creditor dispute was said to be no different from a prescriptive statute "whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time."\textsuperscript{113}

Analytically, \textit{Flagg Brothers} is correct in discerning a distinction between the settlement of disputes between creditors and debtors and the problems of conducting elections\textsuperscript{114} or running company towns.\textsuperscript{115} However, the strongest part of the Court's examination is also, in some respects, its weakest. At one and the same time the Court stated that looking to historical examples is proper in deciding whether repossession and sale were matters left exclusively in the hands of the state,\textsuperscript{116} while also stating that the "historical antecedents"\textsuperscript{117} of a particular practice will not control the decision.\textsuperscript{118} To do so "would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another."\textsuperscript{119} Such a statement fails to evaluate the importance of reviewing the history of resolving private commercial disputes in the different jurisdictions. The ordering of rights between debtors and creditors, insofar as the granting of privileges and respective rankings is concerned, is a matter for state ruling, not federal law. If the traditional view in a state prior to the adoption of the U.C.C. was that a creditor could not exercise self-help measures, then suggesting that the adoption of the U.C.C. did not delegate state power to private individuals is fanciful.

\textsuperscript{112} Id. at 163.
\textsuperscript{113} Id. at 166.
\textsuperscript{114} Id.
\textsuperscript{117} See text at notes 105-10, supra.
\textsuperscript{118} 436 U.S. at 162.
\textsuperscript{119} Mr. Justice Rehnquist noted that "even 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." \textit{Id.} at 163.
\textsuperscript{120} 436 U.S. at 162-63.
Mr. Justice Marshall's dissent was incisive and direct. He perceived the state action test adopted by the Court as requiring decisions as to what functions have been "traditionally exclusively reserved to the State." Necessarily, the practice in the jurisdiction from which the case arose required examination; "[s]uch an issue plainly cannot be resolved in a historical vacuum." Mr. Justice Marshall's thesis appears completely sound. If the Court intended sub silentio to send out a message that it "will reject future constitutional challenges to prejudgment private seizures and sales," then the opinion should have stated so. Certainly the Flagg Brothers situation was distinguishable from earlier problems raised in North Georgia Finishing, Inc. v. Di-Chem, Inc., Fuentes v. Shevin, and Sniadach v. Family Finance Corp. In each of those instances a state official was active in the deprivation of the debtor's property; the state action was obvious. Merely because the state's role in a section 7-210 problem or section 9-503 instance is indirect does not relieve the judiciary of its responsibility as overseers of the creditor collection process. The bench should inquire into the claim of a debtor that a creditor, acting with authority traditionally exercised by the state, has repossessed and sold his encumbered property absent the incidents attached to fundamentally fair conduct. The fourteenth amendment prohibits states or private persons acting in the capacity of the state from taking an individual's property without due process. In the formula of fourteenth amendment state action analysis, state action is not assumed to be constant or identical in every

---

121. 436 U.S. at 166 (Marshall, J., dissenting).
122. Id. at 167 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (emphasis in original)). In short, Mr. Justice Marshall announced that he was "troubled by the Court's cavalier treatment of the place of historical factors in the 'state action' inquiry." 436 U.S. at 167 (Marshall, J., dissenting).
123. 436 U.S. at 167 (Marshall, J., dissenting). Mr. Justice Marshall's critique is instructive:
By ignoring . . . history, the Court approaches the question before us as if it can be decided without reference to the role that the State has always played in lien execution by forced sale. In so doing, the Court treats the state as if it were, to use the Court's words, "a monolithic, abstract concept hovering in the legal stratosphere." . . . The state action doctrine, as developed in past cases, requires that we come down to earth and decide the issue here with careful attention to the State's traditional role.

Id.
128. See note 38, supra.
129. See note 33, supra.
state. What might have been sanctioned traditionally in one jurisdiction might have been denied in another. The very reason for the adoption of the U.C.C., uniformity, plainly reminds that the commercial practices in the several states varied significantly. Even in jurisdictions that draw on the common law as the institutional source, significant historical variations on the self-help issue may exist. Clearly, if a state looks to a system of law with different conventions from the common law, an exacting study of the traditional functions reserved to the state is demanded before it can be resolved that the U.C.C. only restates the prevalent practice.

The Civilian Heritage

The fundamental tenet prohibiting the taking of the law into one's own hands can be traced to Spanish and, ultimately, to Roman origins. Savigny may have best articulated the rationale for the civil law's abhorrence of self-help. Discussing the possessory actions available to the person physically controlling a thing, Savigny disagreed with the commentators who explain the possessory remedies as derivatives of a presumption of ownership. He posited that the basis for the possessory actions was not a presumption of ownership theory, since possessory actions are accorded to persons surely not the owner. In fact, persons with possession may

---

130. Louisiana, for instance, looks to the continental civil law for reference as well as drawing on Roman sources. See A. Yiannopulos, supra note 4, at §§ 25-26.
132. Digest, Book XLIII, Title XVI, 1(g).
133. V. Savigny, Treatise on Possession or the Jus Possessionis of the Civil Law 26-27 (6th ed. E. Perry trans. 1848). Savigny wrote that "[p]ossession appears . . . as the mere dominion in fact over a subject . . . as a matter wholly indifferent in law." Id. at 27 (emphasis added). The presumption of ownership concept has "no legal foundation, for in naked possession, it is no more probable that the possessor has the property than that he has it not." Id. at 28.
134. Savigny points out that "possessioh has been regarded not as a special right, but provisional ownership . . . introduced merely for the purpose of regulating the practive suits respecting the right of property." Id. at 26. This view is described as in "error" for "an owner is not to be confounded with a possessor . . . et ideo non denegatur ei interdictum uti possidetis qui cepit rem vindicare. Non enim videtur possessioni renuntiasse, qui rem vindicavit." Id. at 26-27.
135. Id.
136. "The ground of the fiction or presumption consists therefore . . . solely in the legal title, and as none such occurs in bare possession, the above ground is wanting to it for a legal presumption as to property." Id. at 29. Irrespective of title, all possessors are entitled to the position of a defendant in a suit upon property "which relieves him of the burden of proof." Id. See La. Code Civ. P. art. 3456.
have legal protections from those entitled to possess137 and even against the true owner.138

Thus, the civilian possessor rights, Savigny argued, operated to the benefit of the person solely because he is in possession.139 Possession is a fact, and the law aids the person physically detaining the thing because of this fact, not by reason of a presumed right to possess.140 For policy reasons, the law provides refuge for the person, the factual possessor; the action is for the benefit of the person and not the property. In denying self-help, admittedly, the factual status quo is maintained. But, even more importantly, the individual liberty of persons and the maintenance of public order are guaranteed.141

Louisiana’s system reflects a view of civilianism similar to that held by Savigny.142 For instance, Civil Code article 3454(1)143 states: “Rights, which are common to all possessors in good or bad faith, are that: 1. They are considered provisionally as owners of the thing which they possess, so long as it is not reclaimed by the true owner or person entitled to reclaim it, and, even after such reclamation, until the right of the person making it is established . . . .”144 The positive law145 demands a judicial determination of rights before one with the right to possess will be placed in possession. Support for this approach exists in other civil law systems.146

---

137. V. Savigny, supra note 133, at 31-32.
138. Id. at 32.
139. Savigny attributed the possessory remedies and protections “to the inviolability of the person, and to the connection which exists between the person and the thing arising from the natural subordination of the latter.” Id.
141. Possessory rights protect the inviolability of the person; “[t]he person must, at all times, be secured against violence . . . .” V. Savigny, supra note 133, at 27.
143. Civil Code article 3454 is located in the articles treating possession. Possession is recognized as resulting from a fact and “confers on the possessor certain rights with regard to the thing possessed . . . .” La. Civ. Code art. 3450. Possession may either be in good faith, La. Civ. Code art. 3451, or in bad faith. La. Civ. Code art. 3452. Primarily the distinction is made for purposes of acquisitive prescription and not to lessen the protections the law affords to possession. The rights which are common to all possessors are guaranteed by article 3454.
Men are at times so daring as to seize forcibly, by way of pledge or payment,
In Louisiana, the long-standing rule is that a secured creditor cannot seize encumbered property absent legal process. If the creditor fails to utilize the judicial remedy and acts on his own, liability arises for damages caused pursuant to a tort theory under Civil Code article 2315. Early decisions, such as Reed v. Shreveport Furniture Co. and Elders v. Montgomery-Ward & Co., concluded that a chattel mortgagee cannot foreclose without legal process, "and if he does he is liable for his tortious conduct . . . ." The second circuit affirmed the district court's awarding of damages in Elders and noted that the debtor's "furniture was taken without any legal process . . . and was done without authority of law." For such actions no excuse existed and the creditor was "responsible to plaintiffs for the damages caused in bringing upon them the inconvenience, embarrassment, and humiliation they have shown."

Similarly, Louisiana cases treating the enforcement of the lessor's privilege have shunned consistently self-help. Lessors per-

property belonging to persons indebted to them, and although the latter may be their debtors, we hold that they act in an outrageous manner; for judges are appointed in certain districts in order that men may obtain justice by their decisions, and may not have the power to exact it themselves. Wherefore, we decree that if any person violates this law by removing property from the house or control of his debtor, if he had any right to the property which he removed he shall lose it for these reasons . . . .

The policy is clear: the right to possess is subservient to the fact of possession. The person seeking to enforce his right to possess must resort to the courts. Article 320 of the Civil Code of Austria expresses the principle in a similar manner: "A valid title gives only the right to possess property, not possession itself. A person who has only the right to possess may not, in case of refusal put himself into possession arbitrarily; he must seek possession by order from the ordinary judge . . . ."


149. LA. CIV. CODE art. 2315 provides: "Every act of man that causes damage to another obliges him by whose fault it happened to repair it."

150. 7 La. App. 134 (2d Cir. 1927).

151. 172 So. 191 (La. App. 2d Cir. 1937)

152. Daggett, supra note 147, at 249.

153. 172 So. at 194 (emphasis added).

154. Id. at 195.

155. Id.

sonally evicting lessees and seizing tenants' property have been ruled responsible in damages. Several writers have termed the judicial stance as "reasonable in light of the generous remedies available in the courts." And the secured creditor is not without his remedies. In lieu of self-help repossession, the secured creditor in Louisiana may utilize the writ of sequestration to insure the integrity of the collateral until a judgment can be obtained and a sale authorized.

**Louisiana's Sequestration Writ—A Post-Mitchell Appraisal and Precursor to the Applicable Analysis**

The writ of sequestration supplies one of the two prejudgment security measures for Louisiana creditors. As a provisional or conservatory measure, sequestration is accessory to the principle action. Since sequestration is a harsh remedy, however, it is available only in the cases specifically authorized by law; the writ "run[s] counter to the fundamental concept that a person's property should not be taken from him before he is given an opportunity for proper adjudication of his rights." A writ properly issues when the creditor pleads that it is within the power of the defendant to conceal, remove from the court's jurisdiction, dispose of, or waste the property in which the petitioner claims an interest. Prior to the enactment of the Code of Civil Procedure in 1960, the plaintiff, applying for the issuance of the sequestration writ, had to swear

---

729, 140 So. 837 (2d Cir. 1932); Pelletier v. Sutter, 10 La. App. 662, 121 So. 364 (Orl. Cir. 1929). "It is a well-established policy of the civil law to discourage the efforts of an individual to enforce a right in a manner which avoids the use of the judicial process." Comment, supra note 147, at 882.

157. See, e.g., Boniel v. Block, 44 La. Ann. 514, 10 So. 869 (1892); Thayer v. Littlejohn, 1 Rob. 140 (La. 1841); Pirkle & Williams v. Shreveport Jitney Jungle, 19 La. App. 729, 140 So. 837 (2d Cir. 1932); Pelletier v. Sutter, 10 La. App. 662, 121 So. 364 (Orl. Cir. 1929).

158. Comment, supra note 147, at 883.

159. LA. CODE CIV. P. arts. 3501 & 3571.

160. It must be remembered that the writ of sequestration is a prejudgment procedural device. Until the creditor has prevailed on the merits of the action the security may not be sold. To this rule there is one exception. Code of Civil Procedure article 3513 states that perishable property may be adjudicated and "[t]he proceeds of such a sale shall be held by the sheriff subject to the orders of the court."

161. The writ of attachment is the other provisional remedy. See LA. CODE CIV. P. arts. 3541-46.

162. See, e.g., Louisiana State Rice Milling Co. v. Potter, 179 La. 197, 153 So. 690 (1934); Williams v. Duer, 14 La. 531 (1840).

163. LA. CODE CIV. P. art. 3571.

164. Johnson, supra note 23, at 3.

165. LA. CODE CIV. P. art. 3571.
that he had "good reason to fear" that the defendant would deprive him of the property in question.\(^{166}\) Subsequently, the Third Circuit Court of Appeals made it clear that "the new Code of Civil Procedure requires only that it be within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or to remove the property from the parish."\(^{167}\) Unlike the creditor's self-help procedure permitted by the U.C.C.,\(^{168}\) a writ of sequestration is issued only in conjunction with the filing of a verified petition stating the nature of the claim, the grounds on which the writ is based, and the amount involved if the action is for a sum of money.\(^{169}\) Furthermore, the plaintiff is required to furnish security in the event that the defendant suffers damages as a result of a wrongful sequestration.\(^{170}\) The defendant may move to dissolve the writ and the court may award attorney's fees in addition to damages whether the writ is dissolved at a motion hearing or after trial on the merits.\(^{171}\)

Not dissimilar to other jurisdiction's prejudgment seizure provisions, the writ of sequestration has been subjected to constitutional scrutiny.\(^{172}\) However, the United States Supreme Court's determination was decidedly different: the writ as issued in Louisiana's procedural scheme was held not to offend due process.\(^{173}\) In Mitchell v. W.T. Grant Co.,\(^{174}\) the creditor instituted suit for collection of the unpaid balance on a sale of household appliances.\(^{175}\) Alleging in the ex parte sequestration application that the creditor held a vendor's lien on the property and that it was within the defendant's power to dis-


\(^{167}\) Montagne v. Tinker, 197 So. 2d 154, 156 (La. App. 3d Cir. 1967).

\(^{168}\) U.C.C. §§ 9-503, 9-504 (1972 version).

\(^{169}\) LA. CODE CIV. P. art. 3501.

\(^{170}\) LA. CODE CIV. P. art. 3501. However, "[a] writ of sequestration to enforce a lessor's privilege shall issue without the furnishing of security." LA. CODE CIV. P. art. 3575 (emphasis added).


\(^{175}\) The petition "alleged the sale by Grant to Mitchell of a refrigerator, range, stereo, and washing machine, and an overdue and unpaid balance of the purchase price for said items in the amount of $574.17." 416 U.S. at 601.
pose of or conceal the property, the writ issued.\textsuperscript{176} The defendant moved to dissolve the writ,\textsuperscript{177} arguing that the seizure violated the due process clauses of the state\textsuperscript{178} and federal\textsuperscript{179} constitutions.\textsuperscript{180} Rejecting the defendant's argument, the Supreme Court held that the Louisiana writ of sequestration is not violative of procedural due process, as it effects a "constitutional accommodation of the respective interests of buyer and seller."\textsuperscript{181}

Distinguishing Louisiana's sequestration regime from the pre-judgment wage garnishment statute at issue in \textit{Sniadach v. Family Finance Corp.}\textsuperscript{182} and the pre-judgment replevin statutes involved in \textit{Fuentes v. Shevin},\textsuperscript{183} the Court emphasized that the creditor's remedies in Louisiana demanded judicial oversight.\textsuperscript{184} The \textit{Mitchell} Court's rationale was significant. The majority noted that Louisiana law did not admit of prejudgment creditors' remedies without a court order and, in light of the particular sequestration statute at issue, sufficient protections were thought to be guaranteed to the debtor. Procedural due process was satisfied notwithstanding the \textit{ex parte} nature of the writ hearing. For present purposes, \textit{Mitchell} is important in illustrating the means by which the Supreme Court reached its decision. The majority seemed swayed by the Louisiana scheme which interposes the judiciary between the creditor and the

176. \textit{Id.}
180. 416 U.S. at 602. The debtor based his argument that the seizure was unconstitutional on the twin grounds "that it had occurred without prior notice and opportunity to defend ... [his] right to possession of the property." \textit{Id.} In addition, the debtor claimed that the items seized were exempt from seizure under state law. \textit{Id.} See \textit{La. R.S.} 13:3881 (Supp. 1960 & 1980).
181. 416 U.S. at 610. Mr. Justice White, writing for the Court, noted that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." \textit{Id.} (quoting \textit{Stanley v. Illinois}, 405 U.S. 645, 650 (1972); \textit{Cafeteria & Restaurant Workers Union v. McElroy}, 367 U.S. 886, 895 (1961)).
184. The majority wrote that "Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end." 416 U.S. at 605 (emphasis added). Moreover, the Court realized that one of the reasons for the sequestration writ "was that official intervention would forestall violent self-help and retaliation." \textit{Id.} at 606 (citing \textit{Millar, Judicial Sequestration in Louisiana: Some Account of Its Sources}, 30 Tul. L. Rev. 201, 206 (1956)).
debtor.\textsuperscript{185} The question presented was whether the constitutional procedural guarantees of due process had been afforded the debtor deprived of his property prior to judgment. State action and the applicability of the fourteenth amendment was not an issue. The writ was executed by a sheriff\textsuperscript{184} upon court order.\textsuperscript{187} Given that the statutory scheme in Louisiana satisfied due process restrictions, a fair implication from \textit{Mitchell} is that the Louisiana procedure benefited from the state's traditional rule prohibiting self-help.\textsuperscript{185}

However, should U.C.C. sections 9-503 and 9-504 be enacted in Louisiana, a secured creditor could act as never before permitted, seizing and selling the collateral without judicial approval.\textsuperscript{189} Certainly, when the creditor unilaterally determines the default of the debtor, beginning the process of repossession and sale, the procedural protections of due process, such as prior notice and an opportunity to be heard,\textsuperscript{190} are not satisfied. Yet, unless the private creditor's use of the statutory repossession plan is sufficient state action to trigger the invocation of the fourteenth amendment, due process is not a concern.\textsuperscript{191} As previously noted,\textsuperscript{192} the general view in the common law states is that the passage of the U.C.C. with sections 9-503 and 9-504 is not significant enough state involvement in the creditor's remedies to demand application of the fourteenth amendment.\textsuperscript{186}

\begin{itemize}
  \item \textsuperscript{185} The Court reflected that [the trial court also ruled that "the provisional seizure enforced through sequestration" was not a denial of due process of law. "To the contrary," the trial judge said, "plaintiff insured defendant's right to due process by proceeding in accordance with Louisiana Law as opposed to any type of self-help seizure which would have denied defendant possession of his property without due process." 416 U.S. at 603 (emphasis added).
  \item \textsuperscript{186} \textsc{La. Code Civ. P.} arts. 321-31. Article 321 of the Louisiana Code of Civil Procedure directs the sheriff to "execute writs, mandates, orders and judgments" upon order of the court.
  \item \textsuperscript{187} \textsc{La. Code Civ. P.} art. 3501.
  \item \textsuperscript{188} See note 185, supra. Concurring in \textit{Mitchell}, Mr. Justice Powell stated that "[the] determination of what due process requires in a given context depends on a consideration of both the nature of the governmental function involved and the private interests affected." 416 U.S. at 624 (Powell, J., concurring) (citing Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970); Cafeteria & Restaurant Workers Union v. McElroy, 387 U.S. 886, 895 (1961)). With the issue framed in this fashion, Mr. Justice Powell concluded that the Louisiana sequestration scheme satisfied the necessary prerequisites of procedural due process. 416 U.S. at 627 (Powell, J., concurring).
  \item \textsuperscript{189} The legislative sanction of self-help probably would be argued to be a delegation of the state's authority to private persons. Huffmire, \textit{supra} note 36, at 330.
  \item \textsuperscript{191} See, \textit{e.g.}, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978).
  \item \textsuperscript{192} See notes 61-92, \textit{supra}, and accompanying text.
\end{itemize}
Sections 9-503 and 9-504 have been read as restating the common commercial practice. A similar rationale for upholding the sections if incorporated into Louisiana law seems implausible. Self-help historically has been rejected. A reference to one instance in which the Civil Code permits the creditor to act without judicial authorization dramatizes the extent to which self-help is a concept totally without precedent in this state.

Article 3165 of the Civil Code provides one circumstance in which the creditor may sell his security absent a judicial order: the pledgee's right of private sale. The power of private sale, however, is applicable only with respect to the possessory security of pledge. The civil law's disdain for private disruption of peaceable possession is not contradicted in this instance; the pledgee is the possessor of the security. In addition, the pledgee is under a fiduciary duty to act fairly toward the pledgor. The pledgee must act "reasonably in disposing of the property of the pledgor and the slightest hint of self dealing or overreaching will cast in doubt the validity of his actions no matter how lawful they may technically appear to be." By noting the strict limitations on the pledgee's right of private sale, one can reason that the restrictions exist due to the civil law's general denial of non-judicial creditor's remedies. Even in the instance when the creditor has possession of the security, the right of private sale must be contractually conferred upon the pledgee; "[t]he pledgor is presumed to have waived nothing except what is specifically waived." So the "jurisprudence is settled that in the absence of an express waiver of the right to notice, the pledgor is entitled, after demand for and default in payment, to reasonable notice of the intention of the pledgee to sell the pledged property."
In view of the strictures placed upon the pledgee's power of private sale by the Civil Code and the Louisiana courts, and considering the civilian abhorrence of creditor self-help, it may be forcefully argued that the procedural meaning of due process in this jurisdiction includes judicial protection of debtors from privately initiated seizures and sales. Thus, irrespective of a state action determination, necessary to trigger the prohibitions of the fourteenth amendment, sections 9-503 and 9-504 of the U.C.C. could be challenged as impermissible under the Louisiana Constitution. Article I, section 2 of the state constitution states that "No person shall be deprived of . . . property, except by due process of law." Embodied in the terse constitutional language, as in article I, section 4, is a strengthening of the protections of private property. Considering the dual realities that the reach of the Louisiana Constitution is not limited to governmental actions and that "self-help" is shunned by the courts, U.C.C sections 9-503 and 9-504 probably could not withstand scrutiny, if enacted.

Conclusion

If state action, a necessary prerequisite for the implementation of the due process protection of the United States Constitution, means conduct traditionally associated with the government in a particular jurisdiction then it should be of no moment that in the majority of other states a practice has been privately controlled. Insofar as state action is truly a useful concept, the history of each state should be reviewed to properly apply either the "nexus" or the "public function" tests. That Louisiana may be the only United States jurisdiction in which creditors do not enjoy self-help powers should not alter the result that, under the accepted state action standards, creditors now may not be legislatively charged with such

more, the lex commissoria, a stipulation in the contract of pledge whereby the pledgee may take the ownership of the collateral in the event of the pledgor's default, is prohibited in Louisiana. Alcolea v. Smith, 150 La. 482, 90 So. 769 (1921).


201. LA. CONST. art. I, § 4 provides, in part, that "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property."


204. See notes 41, 43, supra, and accompanying text.

205. See note 44, supra, and accompanying text.
privileges. Indeed the conclusion is logical; Louisiana's heritage has denied the concept of self-help. In this regard Louisiana is different from common law jurisdictions. Enacting U.C.C. Sections 9-503 and 9-504 would not constitute a legislative codification of the prevailing rule in Louisiana.

Nevertheless, the prevailing stance taken by the United States Supreme Court seems to be one of ignoring historical practices in the individual states. Consequently, sections 9-503 and 9-504 possibly may be held constitutional in any jurisdiction. Reasoning that commercial uniformity is needed is admirable; however, seeming business exigencies should not be permitted to circumvent constitutional limitations. Announcing that the "historical antecedents" of a jurisdiction in question will not determine the state action examination greatly damages the analytical approach.

In Louisiana the incorporation may never occur. In the short run the utility of such an enactment is dubious since it would likely prove to be the catalyst for rounds of litigation. Assuming that the Federal Constitution is interpreted so as to uphold 9-503 and 9-504, difficulties would remain under article I, section 2 of the Louisiana Constitution. Unshackled by the state action limitation and as "a flexible provision which gives the courts significant leeway in developing standards of reasonableness," article I, section 2 may be viewed as an articulation of the civilian ideas of protection of private property. If a Louisiana creditor, acting under the authority of the U.C.C. in a manner historically associated with the government, engages in self-help, such conduct should be deemed to be violative of the tenets of civilian due process.

Bruce V. Schewe*

207. Id. at 162.

* B.S.; J.D., Louisiana State University (May, 1981). The author gratefully acknowledges the insightful comments of Chancellor William Hawkland, Professor Alain Levasseur, and Assistant Professor Alejandro Garro of the Paul M. Hebert Law Center.