State Action: A Pathology and a Proposed Cure

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The author of this Comment views the state action doctrine from two perspectives. In the normative analysis of Part I the author studies the role of the doctrine since its origin and concludes that the values fostered by the doctrine today may best be served by discarding the traditional doctrine in favor of a direct balancing of competing rights. Then, recognizing that the latter approach will not soon be adopted by the courts, the author addresses Part II to practitioners, arguing that the state function theory of state action may fruitfully be used as a vehicle for broadening the judicial view of what constitutes "state action," thereby eventually prompting the adoption of the direct balancing approach advocated in Part I.

The fourteenth amendment provides in pertinent part: "No State shall . . . 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." Since the Supreme Court first addressed this amendment it has held that only *state* action of a particular character is prohibited, and that individual invasion of individual rights is not proscribed by the amendment.[1] Thus, the state action doctrine is quasi-jurisdictional. Before the courts can reach the merits of alleged violations of the due process or equal protection clauses, there must first be a finding of "state action." Without such a finding—*i.e.*, if the action is "merely" private—the case is not governed by the fourteenth amendment.

Some contours of the state action doctrine are clear. A state, like a corporation, is only an intellectual legal entity and can operate only through its officials. "State action" therefore is readily found when actions are taken directly by state judicial, executive, or legislative officials[2] that allegedly infringe upon the due process or equal protection

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1. The Civil Rights Cases, 109 U.S. 3, 11 (1883). United States v. Cruikshank, 92 U.S. 542 (1876), and Virginia v. Rives, 100 U.S. 313 (1879) contain similar language and predate *The Civil Rights Cases*, but the latter is considered the leading case on the origin of the state action doctrine.

2. *See* Virginia v. Rives, 100 U.S. 313, 318 (1879); *Ex parte* Virginia, 100 U.S. 339, 347 (1879).

rights of the complaining party. Indeed, state action is found even where the official is acting beyond his authorized duties.[3]

However, the present state action doctrine includes much more than direct, palpable action by state officials. Although the typical controversy arises in the absence of congressional legislation,[4] there is almost always a state statute that has some relevance to the controversy. The fundamental issue therefore becomes whether the "mere" existence of state legislation rises to a level of state involvement in the controversy sufficient for a finding of "state action," or whether the action is "merely private."[5]

The distinction made here in the abstract may be clarified by an example. If a state statute denies a tax exemption to a war veteran who refuses to swear that he is not a member of a subversive organization,[6] the legislation clearly is state action. The state is directly involved in the controversy. It has mobilized its coercive power to enforce its own explicit goals. If, however, the state grants a tax exemption to a private foundation as part of a general category of such exemptions, the actions of the private foundation—under the state action doctrine—are not automatically considered those of the state. In the former case the state acts directly. In the latter, the state is "acting" only indirectly, if at all, through its tax benefit for the private foundation. Nevertheless, if the state participation or involvement in the controversy is "significant" enough, state action will be found.[7]

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3. *E.g.*, United States v. Raines, 362 U.S. 17, 25 (1960); *see* United States v. Price, 383 U.S. 787 (1966); Screws v. United States, 325 U.S. 91 (1945). *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1086-89 (1960), for a discussion of the rationale for such a holding.

4. The only issue under the fourteenth amendment state action doctrine as to congressional legislation is whether Congress has exceeded the legislative powers granted by section five of the fourteenth amendment. This was the issue in *The Civil Rights Cases*. If the validity of congressional legislation is admitted, a plaintiff must seek protection from seemingly "private" actions from the fifth amendment, not the fourteenth. *See, e.g.*, Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), and text following note 91 *infra*. Moreover, since the great majority of legislation affecting a particular person in the United States will originate from the state in which he or she resides, it is not surprising that the great majority of state action cases involve state legislation. A large number of these cases involve state authorized procedures for the execution of possessory liens or similar creditor remedies. *See, e.g.*, the cases collected in S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTCETION 33-35, 44 (2d ed. 1975) [hereinafter cited as RIESENFELD].

5. For purposes of clarity, the various actions of a state that impinge ou the private sector, typically regulation and legislation, will be denominated "actions of the state." "State action" will be a term of art reserved for the couclusiou that the seemingly private action taken in the particular controversy may fairly be ascribed to the state so as to bring the private conduct within the ambit of the fourteenth amendment.

6. *See* Speiser v. Randall, 357 U.S. 513 (1958).

7. *See* Jackson v. Statler Fouudation, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975).

The Court's search for some jurisdictional quantum of "actions" by the state as a necessary antecedent to invoking the protections of the fourteenth amendment is criticized by this Comment as originating from ideas which the Court itself has discarded, as inconsistent with the Court's approach to other areas of constitutional law, and as ignoring the rights of the complaining party. Thus, the state action doctrine often leads to anomalous and unjust results. While the ultimate philosophical position of the Comment is similar to that of earlier commentators,[8] the pathway taken to the position—examining the values the Court seeks to foster under this doctrine, arguing closely from a spectrum of case law, and integrating many of the more recent Supreme Court decisions into its analysis—is fundamentally different. Moreover, the turn taken by the Court in *Moose Lodge No. 107 v. Irvis*,[9] and *Jackson v. Metropolitan Edison Co.*,[10] justifies a fresh analysis of the doctrine.

The first part of the Comment is exclusively normative and is therefore addressed to individuals interested in a theoretical view. It explores the origins of the state action doctrine and asks *why* the Supreme Court embraces it. In seeking an answer to this question, Part I explores the values that the doctrine embodied originally and the uses made of the doctrine today. Part I argues that when the Court seeks to determine whether there is state action in the controversy it protects values which the Court itself has justifiably discarded and which are at odds with the Court's approach in other areas of constitutional law. Part I concludes that the more appropriate approach to the fourteenth amendment is a direct balancing of the competing rights and interests of the parties in the controversy.

However, recognizing that such an expansive approach toward state action will not soon be adopted by the Court, Part II of the Comment takes a pragmatic approach and attempts to illustrate how a practitioner might at least broaden the judicial view of state action beyond its present horizon. This part of the Comment argues that the state function theory of state action is a useful vehicle for such an expansion of the state action doctrine. To illustrate this thesis, Part II attempts to demonstrate how the state function theory can be used to bring the creditors' remedy of self-help repossession within the confines of the fourteenth amendment. Finally, the Comment concludes with the hope that the continued expansive use of the state function theory of state action in other areas of constitutional law will eventually result

8. *See, e.g.*, Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 479-81 (1962) [hereinafter cited as Henkin].

9. 407 U.S. 163 (1972).

10. 419 U.S. 345 (1974).

in the marriage of its normative analysis to its pragmatic analysis. That is, it is hoped that expansive use of the state function theory of state action in areas beyond self-help repossession will eventually lead to the Court's forthright adoption of the theoretical basis for such a broad view of state action—the direct balancing of competing rights.

I

STATE ACTION

A. The Birth of a Doctrine: Underlying Values Then and Now

The state action doctrine was spawned in 1883 in the murky waters of *The Civil Rights Cases*,[11] where the Court struck down the Civil Rights Act of 1875, which prohibited racial discrimination in public accomodations. The Act was held beyond the power of Congress under either the thirteenth or fourteenth amendments. As to the fourteenth amendment the Court held: "It is state action of a particular kind that is prohibited. Individual invasion of individual rights is not the subject matter of the Amendment."[12] Since the Court addressed itself to the "subject matter" of the fourteenth amendment it would appear that it was defining the ambit of the fourteenth amendment per se. Thus, presumably neither Congress, pursuant to enforcing the amendment under section five, nor the Court, in its review of cases under the amendment, has power to regulate "individual invasion of individual rights." However, the Court focused only on the limitations the fourteenth amendment placed on Congress. After quoting the fourteenth amendment's language, the Court explained that Congress had no power to regulate individual conduct—which was characterized as "direct and primary" legislation—under the amendment because it forbade only the state, not individuals, from denying the equal protection of the law. Congress could enact only "corrective" legislation under the amendment to make void state legislation and "state action of every kind."[13]

Fundamental to the Court's reasoning was a due regard for a robust federalism, a concern characteristic of late 19th and early 20th century American jurisprudence. Indeed, there is a marked similarity between the state action doctrine espoused in *The Civil Rights Cases* and the approach toward the tenth amendment in the commerce clause area as typified by *Hammer v. Dagenhart*.[14] In *Dagenhart*, the Court

11. 109 U.S. 3 (1883).

12. *Id.* at 11.

13. *Id.* The Court also noted that to give Congress plenary control over individuals in such a direct manner would be "repugnant to the tenth amendment." *Id.* at 15. See the discussion at text accompanying note 14 *infra*.

14. 247 U.S. 251 (1918).

sought to determine whether Congress' enactment of a statute regulating maximum working hours under its commerce clause power invaded the domain of state power protected by the tenth amendment. Because the Court in *Dagenhart* found such an "invasion," the statute was struck down as void, just as it was in *The Civil Rights Cases.*

This approach in the commerce clause area has long been disapproved.[15] Indeed, the Civil Rights Act of 1964,[16] which prohibits discrimination in public accomodations much like the Civil Rights Act of 1875, has been upheld under the commerce clause.[17] The argument that implicitly has won favor in the Court since 1936[18] as congressional power under the commerce clause has been expanded is that the role of the Court should be severely limited where the issue presented is the extent to which congressional enactments impinge on states' rights.[19] Since states are well represented in both Houses of Congress and are in a particularly strong position to protect themselves in the Senate, the political process may usually be depended upon to produce a fair judgment in matters of states' rights. This argument would appear to apply equally well to *The Civil Rights Cases* as to *Dagenhart*: the former protected states' rights through the state action doctrine; the latter protected states' rights through a restrictive view of congressional power under the commerce clause. Both cases struck down congressional legislation and both today are effectively overruled on the issue of the extent of congressional power vis-à-vis the states.[20]

Perhaps in light of its expansion of congressional power under the commerce clause in areas involving civil rights, the Court has recently shown dissatisfaction with the original limitation placed upon congressional power under the thirteenth and fourteenth amendments by *The*

15. *See* United States v. Darby, 312 U.S. 100 (1941) (*overruling Dagenhart*).

16. 42 U.S.C. §§ 2000 *et seq.* (1970).

17. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The Court made note of the commerce power of Congress in *The Civil Rights Cases* but, consistent with the jurisprudence of that era, thought it inapplicable to the controversy. The commerce clause issue was not raised by the parties to those cases, and with good reason: "Has Congress power to make such a law? Of course, *no one* will contend that the power to pass it was contained in the constitution before the addition of the [thirteenth, fourteenth, and fifteenth amendments]." 109 U.S. at 10 (emphasis added).

18. The year 1936 marked a clear change in position by the Court, under the "court-packing" pressure of President Franklin Delano Roosevelt, to one of liberal deference toward congressional legislation.

19. *See* Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 39-41 (1967), for a more detailed treatment of this argument [hereinafter cited as Choper].

20. United States v. Darby, 312 U.S. 100 (1941), overruled *Dagenhart.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), effectively overruled the result in *The Civil Rights Cases.*

Civil Rights Cases. In *Katzenbach v. Morgan*,[21] a case involving a New York literacy test for voting, the Court gave Congress broad powers to decide what state action violates the equal protection clause of the fourteenth amendment, even though a recent Court decision, affirming another state's literacy test for voting, seemingly conflicted with the congressional action. In *Jones v. Alfred H. Mayer Co.*,[22] the Court took an expansive view of Congress' thirteenth amendment enforcement powers, thereby impliedly overruling much of *The Civil Rights Cases* on this issue.

To the extent that Congress is allowed to extend its enforcement powers under the fourteenth amendment by determining for itself what constitutes a violation of the fourteenth amendment, the state action doctrine can no longer be viewed by the Court as an inherent limitation of the fourteenth amendment.[23] Moreover, since Congress can now use its commerce clause powers to enact legislation that is virtually identical to the legislation struck down in *The Civil Rights Cases*, the original basis of the state action doctrine—the protection of a robust federalism against congressional overreaching—is discredited.[24] Yet despite the recent destruction of virtually every foundation of *The Civil Rights Cases*, the Court continues to cite this opinion as the precedential basis for limiting judicial review under the fourteenth amendment.[25] Absent a finding of state action, the Court must dismiss the case rather than proceed to a decision on the merits because only state action violates the fourteenth amendment.

The *Civil Rights Cases* was not directly concerned with the scope of judicial review. At most it was concerned with the scope of the fourteenth amendment per se.[26] That is, the holding of *The Civil Rights Cases* may be read as stating that the fourteenth amendment permits neither Congress nor the Court to intrude into the area of "private" discrimination—an area reserved to the states. But, if Congress can do today what it was forbidden to do by *The Civil Rights Cases*, it would appear that the Court's view of the fourteenth amendment has changed. Indeed, if Congress may today intercede in this area of "private" conduct, it would appear as a matter of historical precedent that a fortiori the courts may intercede, because *The Civil Rights Cases* was

21. 384 U.S. 641 (1966).

22. 392 U.S. 409 (1968).

23. For the prior construction of the fourteenth amendment, see the discussion at text accompanying note 12 *supra.*

24. See text accompanying notes 16-17 *supra.* Indeed, this is especially true since virtually no activity is immune to congressional regulation under the commerce clause power today. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

25. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

26. See text following note 12 *supra.*

a paradigm of the robust exercise of judicial power prevalent in the late 19th and early 20th centuries. The Court's use of the state action doctrine enabled it to intercede in a controversy and strike down congressional legislation in *The Civil Rights Cases*. Yet today the Court cites the same case as the precedential basis for its refusal to hear the merits of a case. The dramatic change in the function of the state action doctrine from its use as a vehicle for active judicial intervention to its use as an impediment to judicial review is made more apparent when one considers that much of the first eight amendments of the Constitution have been held applicable to the states through the fourteenth amendment due process clause.[27] Thus, the state action doctrine is a substantial barrier to judicial review of alleged infringements of most constitutional rights.

If the Court wishes to develop a state action doctrine which gives great leeway to congressional enforcement of the fourteenth amendment but which at the same time severely restricts judicial intervention in the same area, it would seem that it should explicitly indicate its broad, new interpretation of the enforcement powers of Congress, either under section five of the fourteenth amendment or under the commerce clause, rather than cite *The Civil Rights Cases* for such a proposition. As noted previously,[28] the controversies that presently come before the courts in the state action context do not involve congressional legislation. The most important question in litigation involving the due process and equal protection clauses becomes: Should a court refuse to hear the merits of the case until (if ever) Congress legislates on the matter? The presumed rationale for such judicial restraint is to allow intrusion into states' rights only by Congress, since Congress affords the states some degree of protective political representation.[29]

However, where the issue is one of alleged infringement of individual rights, it would seem that the courts should intervene. This seems especially true where constitutional rights are allegedly infringed. The constitutional guarantees were conceived as ironclad safeguards for individuals and politically impotent minorities. The politically powerful generally find protection in the political process through ordinary legislation without resorting to the Constitution. However, the political process depended upon for fairness in the context of protecting states' rights when judging congressional legislation is less

27. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968). The first eight amendments have uniformly been interpreted as limiting only the actions of the federal government since Barron v. Baltimore, 32 U.S. (7 Pet.) 242 (1833). However, most of these amendments have been held applicable to the state through the fourteenth amendment due process clause.

28. See text accompanying note 4 *supra*.

29. See text accompanying note 19 *supra*.

suited for the protection of individual rights. Legislatures, whether state or federal, may often be guided by powerful lobbies to the detriment of politically less powerful groups. Legislatures, even more often, will simply overlook the needs of the politically less powerful in the name of political expedience. The task of protecting such individual rights against the tyranny of the politically powerful or even against malign neglect, sensibly falls upon a body that is not as subject to political pressures as the other branches of government, namely, the courts. Indeed, this would appear to be the great justification for judicial review in a democratic system.[30]

Perhaps in recognition of the foregoing argument, where the issue is one of alleged infringement of individual rights, the Court itself has recently recognized that it should take on a more, not less, active role in reviewing both congressional and state legislation. When Congress enacted legislation under its commerce clause powers dealing with the administration of food stamps, the legislation was not immunized from rigorous judicial review if it potentially infringed upon rights of association and privacy.[31] Similarly, state legislation dealing with mandatory pregnancy leaves for teachers, or dealing with residency requirements for welfare benefits, was subject to rigorous judicial review if the legislation potentially infringed upon constitutional rights.[32]

It is difficult to understand why the Court intervened in these latter cases to strike down legislation but refused to intervene in other cases where the state was arguably no less responsible. For example, in *Jackson v. Metropolitan Edison Co.*,[33] the Court refused to find state action and thus denied review of the service termination procedures of a public utility which were alleged to violate due process, even though the utility was granted a partial monopoly by the state and its

30. *See* Choper, *supra* note 19.

31. *See, e.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1974). In these cases the Court used an expanded "rational basis" test or its newly formulated "irrebuttable presumption" test in order to overturn legislation that formerly would have survived judicial review. This was done presumably because of the infringement of rights of association and privacy, although this was not made explicit.

32. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969). *LaFleur* used the "irrebuttable presumption" test to strike down a state's mandatory pregnancy leave presumably because of the overtones of sex discrimination. In *Thompson* the Court invalidated residency requirements for welfare benefits as unconstitutional infringements on the right to travel. Indeed, even in purely economic areas involving no palpable individual rights, state legislation is subject to a balancing test to determine whether it imposes an undue burden on interstate commerce. *See* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

33. 419 U.S. 345 (1974).

termination procedures were implicitly approved by the state.[34] Perhaps the distinction between these cases lies in the difference between "direct" and "indirect" actions of the state noted earlier.[35] But how can such a distinction have constitutional significance? What values are fostered by such an approach? The Court has struck down actions of the state which clearly are designed to further important state goals, such as the imposition of residency requirements to qualify for grants of a state's limited welfare funds. Yet actions of the state which are tentative and indirect and which do not appear to protect important state interests, as in *Jackson*, are allowed to stand even though important individual rights may be impaired. If the Court is seeking to foster federalism by its judicial restraint, it would seem to do the least harm if it intervened in the latter cases. Yet it is the former cases, the "direct" actions of a state which the Court strikes down. Whatever may be the true rationale for this approach, it is submitted that it does not foster a healthy federalism.

It is sometimes suggested that the rationale underlying the present use of the state action doctrine is that it leaves "private" transactions free of judicial interference while at the same time protecting individual conduct from an excessively intrusive grasp of state power.[36] Only if the state intrudes too far into the "private" domain will the Court find "state action" and intervene. Absent such intrusion, private affairs are left to private resolution. However, such protection against judicial interference is overly broad and leads to anomalous results. Very often the state action doctrine today serves to vindicate a party who, if state action were found, would almost certainly be held to be violating constitutional rights.[37] It is really only the allegedly injuring party who benefits from judicial restraint. For example, it is obvious that in *Jackson v. Metropolitan Edison Co.* the Court was not protecting any of Jackson's interests by refusing to hear the merits of her case concerning termination of utility service.

The aforementioned freedom from the excessively intrusive eye or hand of state government is precisely what is protected by the rights of privacy and association. These rights would be more properly protected by a direct balancing approach common to other areas of constitutional law rather than by the state action doctrine. There seems to be little justification for protecting the interests of an allegedly injuring party by denying judicial review for want of state action when, as is

34. See text accompanying notes 82-85 *infra*.

35. See text accompanying notes 6-7 *supra*.

36. *See* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (Pts. 1-2), 46 So. CAL. L. REV. 1003, 1034 (1973); Burke & Reber (Pts. 3-4), 47 So. CAL. L. REV. 1, 52 (1973).

37. See Part II section C *infra* for a further discussion.

often the case, the action taken by the private party would be forbidden by the fourteenth amendment if "state action" were found. While the state action doctrine may indeed protect certain privacy or associational interests of one party, it may also completely ignore the interests of the complaining party. The assertion of one fundamental right often affects the exercise of another and the courts have long undertaken the difficult task of accomodating competing rights and interests. The present state action doctrine is a clumsy and unjustifiable limit on judicial review if it, in very real effect, vindicates unconstitutional conduct as well as it protects constitutional conduct—and accomplishes both ends without addressing the competing fundamental rights involved.[38]

B. A Proposed Solution

The more appropriate inquiry in regard to alleged fourteenth amendment violations is whether or not to hold the state responsible for the "deprivation" or "denial" in question, not whether there is state "action" in the controversy.[39] This certainly does no violence to the language of the fourteenth amendment, whose prohibitions make no reference to "actions" by the state. If there are no substantial rights of an allegedly injuring party being asserted, such as a right to privacy or, perhaps, to absolute testamentary transfer,[40] the state interest in sustaining the disputed actions is de minimis. That the state vindictates the actions of the injuring party through the vehicle of denying judicial relief to the injured party rather than by legislative or other "state action" should be irrelevant. A state's enforcement of a legislative provision in aid of the injuring party, or, what is effectively identical, its refusal to vindicate the rights of an injured party, may both rise to the level of a "deprivation" or "denial" under the due process or equal protection clauses, respectively, for which the state can be held responsible under the fourteenth amendment. Recognition of this fact would protect substantial rights openly and directly via a balancing approach similar to that invoked in other areas of constitutional law.[41]

Any argument that to embrace such a direct balancing approach would overburden the courts seems unconvincing. The present ad hoc approach under the state action doctrine, which results in fine "distinctions" between analogous cases, appears to incite litigation rather than foreclose it. This follows from the quasi-jurisdictional nature of the state action doctrine. The merits of a plaintiff's claim are never

38. See text accompanying notes 47-53 *infra* for an illustration of the balancing approach.

39. The analysis which follows relies in part on Henkin, *supra* note 8.

40. See text accompanying notes 47-53 *infra*.

41. See notes 31-32 *supra* and 46 *infra*.

reached if no state action is found. Similarly situated plaintiffs are therefore encouraged to find distinctions in the quality of state involvement in their controversy so that they may argue the merits.[42] However, under the proposed balancing approach, once the Court has balanced the relevant rights in a particular case, analagous cases would be much more readily decided the same way because the cases would be decided on the merits of the competing rights involved, thereby more accurately guiding potential plaintiffs and forestalling suits, or at least promoting administrability of the cases at the lower levels of the state and federal judiciaries.[43] Finally, this direct balancing approach is little different from what the Court does today, albeit covertly, in the guise of a "rational basis" test,[44] an "irrebuttable presumption" doctrine,[45] or generally in the area of the "fundamental" right to travel.[46]

Since the balancing of rights necessarily depends on particular fact situations, there appears to be little value in listing detailed criteria of what rights should be balanced against other rights and which should prevail. The identification of constitutional or other highly valued rights and of the nuances involved in a particular situation is best done in an advocacy context and there seems to be no safe generalization as to which rights should prevail over others. Indeed, an advantage of the balancing approach is its facility for recognizing special interests in particular fact situations. Thus, an illustration of the direct balancing approach in a particularly difficult couplet of actual cases should prove illuminating. The cases selected to illustrate the suggested direct balancing approach are *Evans v. Newton*[47] and *Evans v. Abney*.[48]

Evans v. Newton involved a tract of land which was willed in trust to the city officials of Macon, Georgia as a segregated park. The park was to be controlled by a white Board of Managers. When the city ultimately desegregated the park, the individual managers brought suit against the city asking that the city be removed as trustee and seeking the appointment of private trustees to enforce the racial limitations of the will. The city, which had alleged that it could not legally enforce

42. *See* the cases collected in RIESENFELD, *supra* note 4, at 33-35, 44.

43. *See, e.g.*, text accompanying notes 153-54 *infra*.

44. *E.g.*, United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1974); Eisenstadt v. Baird, 405 U.S. 438 (1972). See note 31 *supra*.

45. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1974). See notes 31-32 *supra*.

46. *Compare* the one year residency requirement for welfare benefits, struck down in Shapiro v. Thompson, 394 U.S. 618 (1969), *and* for non-emergency hospital care, struck down in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), *with* the one year residency requirement for lower state university tuition upheld per curiam in Starns v. Malkerson, 401 U.S. 985 (1971), *cited with approval in* Vlandis v. Kline, 412 U.S. 441, 452-53 n.9 (1973).

47. 382 U.S. 296 (1966).

48. 396 U.S. 435 (1970).

segregation, asked to resign as trustee after black citizens intervened with the claim that the racial limitations of the will violated federal law. The Georgia courts accepted the city's resignation as trustee and appointed three new trustees. The United States Supreme Court held that the benefits and services provided by a park are municipal in nature, and on the facts of the case, held that the park was subject to the constraints of the equal protection clause. Therefore, the park could not be operated on a segregated basis. On remand, the Georgia courts held that the testator's trust wholly failed, that the *cy pres* doctrine was inapplicable to the case, and that the park property therefore reverted to the testator's heirs. The Court affirmed this decision in *Evans v. Abney*.

Evans v. Newton involved, as to the defendant, the long recognized right of testamentary transfer. Balanced against this was the intervening black plaintiffs' interest in being allowed access to public areas without discrimination. Whether state officials continue to be the actual trustees of the park, or whether they "only" enforce the trespass convictions of blacks who enter the park, the question under the balancing approach would be the same: Is the state's interest in enforcement of the testator's command consistent with the fourteenth amendment? In other words, this analysis bows to *Shelley v. Kraemer*,[49] *AFL v. Swing*,[50] and *New York Times Co. v. Sullivan*,[51] in which the only "state action" found was court enforcement of a private suit. Once an issue comes before a court, the court, an agency of the state, must decide whom to vindicate. The court's decision should be considered "state action" whether or not there was "state action" *ante litem*. When a court refuses to hear the merits of a case brought by a plaintiff who allegedly has been the victim of discrimination, it is enforcing the rights of the discriminator just as effectively as if it were to convict the plaintiff of trespass. The question should be solely whether either judicial action is permissible under the fourteenth amendment.[52]

Evans v. Newton involved no rights of association or privacy of the testator, who was quite dead. The only right asserted was the testator's right to dispose of his property as he saw fit. This right could

49. 334 U.S. 1 (1948).
50. 312 U.S. 321 (1941).
51. 376 U.S. 254 (1964).
52. The answer is not always no. For example, if a state were to pass a law stating that "any homeowner or lessee may refuse entrance to his or her dwelling for any reason whatsoever," this would clearly be state action even under the present doctrine. However, a person bringing suit for being excluded pursuant to this statute should lose on the merits even if the homeowner admits that the person was excluded solely on the basis of race. The homeowner's interests in privacy and association in the confines of his home would seem to outweigh any interests a person would have in being admitted to a private home in which he was not welcome.

well be respected without enforcing it absolutely. Indeed, even if the court considers the associational interests of the living beneficiaries of the will, the park users, as ancillary to this testamentary right, it would not aid the testator's case since any white person, under the terms of the will, was free to use the park. The white beneficiaries' only associational interest was in avoiding contact with blacks. The state interest in enforcing a testator's rights against a claim of racial discrimination in such a park was therefore weak. The black plaintiffs, under this analysis, could not be convicted of trespass consistently with the fourteenth amendment even if private trustees brought the suit.

However, if the issue, as in *Evans v. Abney*, is whether the testator's estate should be returned to his heirs because his wishes were wholly frustrated by subsequent integration of the park, the state interest in enforcement is different. The right of absolute testamentary transfer has long been recognized under Anglo-American law. A plaintiff in this case must ask the state to prevent the reversion of the estate to the heirs of the testator and to force the testator's property to be used for an integrated park contrary to his wishes. The equities in such a case have shifted and state enforcement of the testamentary right seems consistent with the fourteenth amendment. That is, such enforcement is state action, but it is constitutionally permissible state action.[53]

C. *A Missed Opportunity*

The Court seemed destined to embrace the direct balancing approach when it decided *Burton v. Wilmington Parking Authority*.[54] In *Burton* a restaurant which leased a portion of a municipally-owned parking building was held to be subject to the fourteenth amendment because "the State has so far insinuated itself . . . that it must be recognized as a joint participant in the challenged activity."[55] The Court also noted that "[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attrib-

53. Therefore, Evans v. Abney, 396 U.S. 435 (1970), is both correct under the proposed analysis and consistent with its counterpart, *Evans v. Newton*. Whether or not one agrees with the Court's resolution of a particular case under the proposed analysis, at least the real issues will have been directly considered rather than shunted aside under the talisman of "no state action." If the issue arises in court, no inquiry into state action should be made. Whatever the court does will vindicate one party to the detriment of the other. Once the issue is presented in court, the state is presented with the question: who should prevail? The allowing of one party or the other to prevail is only through the choice made by the state. The sole issue, therefore, is whether the choice made by the state is constitutionally permissible under the fourteenth amendment.

54. 365 U.S. 715 (1961).

55. *Id.* at 725.

uted its true significance."[56] Thus, the Court found "state action" in a privately owned restaurant. Moreover, the "sifting facts" language indicated that the Court refused to limit its review powers further than this broadly ad hoc approach.

The *Burton* approach seemed to be firmly entrenched when the Court, for a period of 11 years, found "state action" in every case in which its existence was an issue and then proceeded to balance the competing rights of the parties. Indeed, even *Evans v. Abney*[57] is not inconsistent with this statement. The Court implicitly found that there was state action in the refusal of Georgia courts to apply the *cy pres* doctrine, the result of which was the reversion of the park to the testator's heirs. The Court held only that such state action was not violative of the fourteenth amendment:

> Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.[58]

It thus appeared that the Court would eventually acknowledge that raising a due process or equal protection issue resolved, per se, the state action issue in the affirmative, leaving the courts free to balance directly the competing rights involved.[59] However, with the passage of the Civil Rights Act of 1964,[60] most discrimination in public accommodations became subject to legislative control. Consequently, the state action issue arose in more limited contexts and the impetus for a more comprehensive state action formulation became less compelling.

The development of a more comprehensive and coherent formulation of the state action doctrine was apparently halted by *Moose Lodge No. 107 v. Irvis*[61] and *Jackson v. Metropolitan Edison Co.*[62] In *Moose Lodge*, the Court found that Pennsylvania's licensing of Moose Lodge to serve liquor was not state action and, as a result, the club's refusal to serve a black person because of his race was not reviewable under

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56. *Id.* at 722.
57. 396 U.S. 435 (1970).
58. *Id.* at 446.
59. *See* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208, 213 (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961), which advocate a similar approach.
60. 42 U.S.C. §§ 2000 *et seq.* (1964).
61. 407 U.S. 163 (1972).
62. 419 U.S. 345 (1974).

the fourteenth amendment.[63] However, the Court did enjoin enforcement of regulation section 113.09 of the Liquor Control Board of Pennsylvania, which required Moose Lodge to adhere to its explicitly racist constitution. The Court, citing *Shelley v. Kraemer*,[64] held that such coercion was admittedly state action violative of the fourteenth amendment. Thus, despite the neutral terms of the regulation, which was promulgated to prevent the awarding of liquor licenses to bogus private clubs, the enforcement of such a regulation against Moose Lodge was enjoined.

The Court's explanation of *Shelley* as the basis for its latter holding seems unnecessarily restrictive. Writing for the majority, Justice Rehnquist seemed to go out of his way to limit *Shelley* to holding that state action is found only in state coercion of discrimination.[65] While such a reading of *Shelley* is possible,[66] it hardly seems to be the focus of the fourteenth amendment equal protection clause, namely discrimination, voluntary or not. It is difficult to reconcile a holding of no "state action" when a court gives effect to a voluntary restrictive covenant by refusing to hear the merits of a case brought by a black plaintiff against the white covenantors who abide by the covenant, with a holding that there is "state action" when a court attempts to enforce the covenant by ordering specific performance or by awarding damages against a party who refuses to abide by it.[67] Moreover, such a view of *Shelley* does not explain either *AFL v. Swing*,[68] or *New York Times Co. v. Sullivan*,[69] in which the only state action found was court enforcement of private claims in "voluntary" plaintiff suits.

The more reasonable view of *Shelley* is that once an issue comes before a court, the state must choose whom to vindicate and that the vindication of either party is "state action." The only issue then is whether the choice made is consistent with the fourteenth amendment, the resolution of which is accomplished by balancing the rights involved under that amendment's equal protection or due process clauses. Under this approach, the court's refusal to vindicate Irvis' right to nondis-

63. The Court distinguished *Burton* in discussing this point. See text accompanying notes 72-79 *infra* for an analysis.

64. 334 U.S. 1 (1948). *Shelley* involved a suit by parties to a racially restrictive covenant for rescission of a sale by another covenantor to a black buyer. The Court held that to enforce the covenant as requested would be state action violative of the fourteenth amendment.

65. *See* 407 U.S. at 179.

66. *See* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959).

67. *See* Barrows v. Jackson, 346 U.S. 249 (1953); *see generally* Henkin, *supra* note 8.

68. 312 U.S. 321 (1941).

69. 376 U.S. 254 (1964).

criminatory service was state action in the form of the enforcement of the discrimination by Moose Lodge. On the merits, however, the result in *Moose Lodge* may have been correct under the proposed theory. If Moose Lodge were a truly private club, the interests of the club members in associating only with fellow members would appear to be a right of association that could prevail over the interest of Irvis in receiving nondiscriminatory service in a private club.[70] Private clubs are arguably more like homes than parks when a right of association is to be weighed against the interest in nondiscrimination.[71]

The Court's treatment of *Burton* in *Moose Lodge* presents more serious problems. In its finding of no "state action" in Pennsylvania's licensing of Moose Lodge, the Court distinguished *Burton* as follows: "[W]hile Eagle [the restaurant in *Burton*] was a public restaurant in a public building, Moose Lodge is a private social club in a private building."[72] Yet, on closer analysis the "symbiotic relationship"[73] emphasized in support of *Burton*'s finding of state action seems paralleled by *Moose Lodge*. The Court failed to mention, in either majority or dissent,[74] that Pennsylvania monopolizes the sale of liquor to all hotels, restaurants and private clubs.[75] The state thus profits from the revenues of, and is provided with a distribution system for, its liquor sales in exchange for licensing these establishments. To paraphrase *Burton*: neither can it be ignored, especially in view of Moose Lodge's explicitly racial constitution, that profits earned by such discrimination contribute to the financial success fo the state.[76] It is difficult to see why this

70. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (Douglas, J., dissenting).

71. The Pennsylvania supreme court found that Moose Lodge was not a private club, but a place of public accomodation in terms of access to its premises; the right of association with members only was undercut by the Lodge's liberal guest policies. Therefore, as a place of public accomodation it was forbidden by state law from discriminating on the basis of race. Pennsylvania Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107, 448 Pa. 451, 294 A.2d 594, *cert. denied*, 409 U.S. 1052 (1972). In any event, the proposed analysis would go to the heart of the issues presented and would have avoided the harmful precedential value *Moose Lodge* has on the state action issue.

72. 407 U.S. 163, 175 (1972).

73. *Id. See* 365 U.S. 715, 724-25.

74. Justice Douglas did focus on the limited number of liquor licenses Pennsylvania issued and the slightly longer hours of sale allowed to private clubs over public establishments, but failed to note the direct benefits the state received from the sale of liquor. *See* 407 U.S. at 182-83 (Douglas, J., dissenting).

75. *See* Irvis v. Scott, 318 F. Supp. 1246, 1249 (M.D. Pa. 1970).

76. Compare the *Burton* language: "Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency." Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

is not precisely the "symbiotic relationship" which Justice Rehnquist found lacking in Moose Lodge.[77]

The trend away from *Burton* begun in *Moose Lodge* was underscored in the recent Court decision of *Jackson v. Metropolitan Edison Co.*[78] Justice Rehnquist again wrote for the same 6-3 majority as in *Moose Lodge*. Petitioner Jackson had brought suit in federal district court under the Civil Rights Acts,[79] seeking damages for termination of her service by Metropolitan and an injunction requiring the utility to continue providing power to her residence until she had been afforded notice, a hearing, and an opportunity to pay any amounts found due. Jackson was denied both remedies.

It is difficult for this author to justify much of the *Jackson* opinion even under prevailing doctrine. First, the Court cited with approval the "state function" cases, and then proceeded to remove *Jackson* from the ambit of such cases, at least partly because the utility in *Jackson* is a "natural monopoly."[80] Yet, one of the "state function" cases cited with approval by the Court, *Marsh v. Alabana*,[81] involved a company town whose existence was due to the free play of economic forces, *i.e.*, a "natural monopoly" in the Court's terms. Moreover, if a public park run by private trustees can be considered a state function sufficient for a finding of state action,[82] it is difficult to see why the heavily regulated utility should not also be characterized as a state function.[83] During much of the 20th century, when electricity and oil and gas heat became essential to modern life, such power has been provided through state operated facilities or through heavily regulated private utilities. Such utilities, providing an essential of modern life tantamount to police and fire protection, would appear to be precisely the traditional government function which the state may not leave in the hands of the private sector without subjecting the latter to requirements imposed by the fourteenth amendment which the state would have to meet if it provided the service.

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77. *See The Supreme Court—1971 Term*, 86 HARV. L. REV. 50, 70, 73-74 (1972), for a similar analysis.

78. 419 U.S. 345 (1974).

79. 42 U.S.C. § 1983 (1970). The color of state law requirement of this statute has been held to involve the same requirement as the state action doctrine. United States v. Price, 383 U.S. 787 (1966). See text accompanying notes 87-90 *infra*.

80. 419 U.S. at 351-52 & n.8.

81. 326 U.S. 501 (1946).

82. *See* Evans v. Newton, 382 U.S. 296 (1966).

83. The Court in *Jackson* also expressed puzzlement as to whether sufficient state involvement in the public utility was actually found in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952). Whatever doubts Justice Rehnquist may have had should have been laid to rest by *Evans v. Newton*, which cited *Pollak* for the proposition that a public utilities transit system was a state function sufficient for a finding of state action.

The *Jackson* Court's analysis of *Burton* is also troublesome. If a private restaurant's mere leasing of premises within a publicly owned and financed facility, which apparently is the "guts" of *Burton*, subjects the restaurant to the strictures of the fourteenth amendment, it is difficult to see how a heavily regulated utility supplying an essential of modern life, which enjoys at least a partial monopoly with the active support of the state, thereby partially relieving the utility of the rigors of economic competition while relieving the state of the onus of providing such service, and whose termination procedure was implicitly approved by the state when its tariff was approved,[84] should not be equally subject to the fourteenth amendment. Indeed, it appears clear that *Burton* would fail to meet the *Jackson* test. The Court, dividing to conquer, distinguished each element of state involvement in *Jackson* from particular case precedents, rather than view the sum of "all these activities"[85] as an integrated whole as was done in *Burton*.

The analysis applied in *Jackson* could limit findings of state action to only those cases in which the state clearly motivates and approves of the private conduct in question[86]—*i.e.*, to only those cases in which an individual is a state official performing authorized duties. This suggests a basic misunderstanding of the state action doctrine even in the Court's own terms, for the state action doctrine has never been so limited. Most of the cases cited with approval in *Jackson* involved no specific state approval or authorization of the private action in question, at least to the extent required in *Jackson*. Perhaps the most specific rejection of such a requirement occurred in *Screws v. United States*.[87] Interpreting section 242 of Title 18 of the United States Code, the Court noted: "If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words 'under color of any law' were hardly apt words to express the idea."[88] The constitutional significance of this holding was made clear by *United States v. Price*[89] when the Court stated that the statutory language "under color of law" has "consistently been treated as the same thing as the 'state action' required by the Fourteenth Amendment."[90] Indeed, both *Jackson* and *Moose Lodge* arose under section 1983 of Title 42 of the United States Code, which contains the "under color of law" language.

Thus, in the absence of direct actions by state officials, the issue before the Court becomes whether there are sufficient "actions" of the

84. 419 U.S. at 354-55.
85. *Burton*, 365 U.S. at 724.
86. *See* cases cited at note 3 *supra* and also the accompanying text.
87. 325 U.S. 91 (1945).
88. *Id.* at 111.
89. 383 U.S. 787 (1966).
90. *Id.* at 794 n.7.

state involved with the private conduct so that a finding of "state action" may be made. Only after such a quasi-jurisdictional threshold is passed may the Court inquire whether the "private" activity violates the fourteenth amendment. For example, once the state had significantly involved itself with the private restaurant in *Burton* the "private" conduct of the restaurant operators became subject to the fourteenth amendment. However, the allegedly injuring party does not lose all rights and interests by virtue of the state's involvement. The individual or entity allegedly violating constitutional rights has by choice or necessity become so involved with the state as to subject the actions under review to the limitations of the fourteenth amendment; that is, the alleged violator "stands in the shoes" of, and is held to the responsibility of, the state. The alleged violator may nevertheless prevail if the interests supporting and justifying the alleged deprivation of constitutional rights are sufficiently weighty.

Justice Rehnquist apparently recognized these implications of the state action doctrine in his discussion of *Public Utilities Commission v. Pollak*:[91]

> It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the "state" for First Amendment purposes, or whether it merely assumed, *arguendo*, that it was and *went on to resolve* the First Amendment question adversely to the bus riders.[92]

While it is rather late to be so doubtful about *Pollak*,[93] Justice Rehnquist does note that finding state or federal action does not end the inquiry. The Court not only held in *Pollak* that Capital Transit was subject to the first amendment through the fifth amendment due process clause, but also went on to hold that the action of the utility was not violative of the first amendment.[94] Thus, not all "state action" is unconstitutional.

The inquiries as to whether there is state action and, if so, whether it violates the Constitution, are distinct, but they are often blurred—even by the Court—because the finding of state action has typically occurred in contexts where the "private" conduct in question would clearly be violative of the fourteenth amendment. But this is not always so, as *Pollak* and *Evans v. Abney*[95] demonstrate. Thus, it is clear that the purpose of the state action doctrine, except insofar as palpable

91. 343 U.S. 451 (1952).

92. Jackson v. Metropolitan Edison Co., 419 U.S. at 356 (emphasis added).

93. See note 83 *supra*.

94. The federal government action analyzed in *Pollak* as to the fifth amendment due process clause is tantamount to the state action inquiry as to the fourteenth amendment due process clause.

95. See text accompanying notes 56-58 *supra*.

direct action by state officials is involved, is solely to determine whether conduct that ordinarily is private will be subject to the strictures of the fourteenth amendment. Even if state action is found, the conduct may nevertheless be upheld if it is constitutionally permissible.

While *Jackson* is highly questionable even under existing doctrine, in terms of the direct interest analysis suggested by this Comment, *Jackson* would clearly be wrong. The state action issue is resolved because a judicial choice of whom to vindicate is state action. The question then becomes whether the courts can enforce the termination of power by the utility without notice and a hearing consistently with the due process clause of the fourteenth amendment. The answer should be no. The interest of the utility is the minimization of administrative expense, while the petitioner seeks due process protection for a denial of a virtual necessity of modern life. The "partial" monopoly status of the utility impedes access to any realistic alternatives for the petitioner. In terms of petitioner's due process rights for a deprivation of "property,"[96] the case seems indistinguishable from *Goldberg v. Kelly*,[97] which dealt with the denial of welfare benefits, and *Fuentes v. Shevin*,[98] which dealt with the replevin of household goods.

The direct interest analysis approach would also appear to be better equipped to handle the different equities presented by Justice Marshall's hypotheticals—whose merits, he correctly argues, would never be reached under the *Jackson* rationale.[99] Metropolitan's termination of service to, or even its refusal to extend service to minorities or welfare recipients would not be subject to review on the merits since there would be no state action in the controversy. Under a direct balancing approach, however, the different equities of the cases would call for differing remedies. On the facts in *Jackson*, for example, minimal mailed notices and an opportunity to see a company officer, together with a post-termination hearing, might be held to satisfy due process.[100]

Jackson makes quite clear, however, that the Court will not lend a sympathetic ear to an argument that the Court should have developed

96. The Court in *Jackson* avoided the issue of whether Metropolitan's termination was a deprivation of Jackson's "property" by finding no state action in the controversy. This is an unsettled issue the practitioner can use to advantage, though it is irrelevant to the normative discussion here. See the discussion at note 152 *infra*.

97. 397 U.S. 254 (1970).

98. 407 U.S. 67 (1972).

99. 419 U.S. at 373-74.

100. See text accompanying notes 138-39 *infra*. Indeed, although this is much more suspect, the Court could have found that Jackson, who was a singularly unsympathetic plaintiff, lost ("constructively waived") her rights through her attempted fraud of Metropolitan. *See* 419 U.S. at 347. Such a decision, though suspect, would at least have been on the merits, thereby avoiding the harmful precedential value *Jackson* may have as to Justice Marshall's hypotheticals. *See id.* at 373-74.

Burton into the direct balancing approach suggested here. In light of *Jackson*, the practitioner who is sympathetic to the normative position of Part I is faced with the difficult task of attempting to expand the present Court's view of state action. Thus, Part II of this Comment will attempt to show how the state function theory of state action is a useful vehicle for such purposes. As a specific example, Part II will attempt to show how the state function theory of state action can include within its ambit the creditors' remedy of self-help repossession. The reader would do well to remember that Part II will be addressed to the practitioner and attempts to work with the state action doctrine as it is, not as it should be. It is hoped that Part II will illustrate how the use of the state function theory to expand the judicial view of state action could eventually lead to the adoption of the direct balancing approach advocated in Part I. That is, it is hoped that Part II will form the first tentative step toward bridging the gap between the present state action doctrine and the direct balancing approach of Part I. While self-help repossession is a rather particular example of this use of the state function theory, it is an important and prevalent example of present litigation under the state action doctrine.[101] Moreover, it was felt that a rigorous, particular illustration of the expansive possibilities of the state function theory would be more helpful than a cursory generalization of how to use the state function theory. At the very least, it is hoped that the analysis of Part II will be useful to the practitioner in its own right.

II

THE STATE FUNCTION THEORY AS A BRIDGE BUILDER

Accepting the vitality of the present state action doctrine, one notes that various "private" actions are nevertheless held ascribable to the state and therefore subject to judicial review under the fourteenth amendment.[102] One theory emerging from these cases views the state action issue as essentially a problem of delegation; this is the "state function" theory. It is this theory that will be explored for its potential as a convenient common law tool for expanding the present state action doctrine.[103]

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101. *See, e.g.*, the cases collected in RIESENFELD, *supra* note 4, at 44. The analysis in Part II as to self-help may also be readily analogized to the numerous situations involving state authorized procedures, without notice and a hearing, for the execution of possessory liens. *See, e.g.*, RIESENFELD 33-35 and the cases collected therein.

102. Perhaps the most far-reaching decisions in this regard are the following: Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); and Shelley v. Kraemer, 334 U.S. 1 (1948).

103. One might wonder why *Burton* is not used to bridge the gap between the present doctrine and the one proposed. The answer is two-fold. First, a "sifting facts"

A. The State Function Theory

The underlying rationale of the state function cases is that a state may not delegate to the private sector a substantial degree of control over a traditional governmental function without subjecting the private sector to the requirements of the fourteenth amendment. Specific approval by the state of the private actions involved is not a requisite to the finding of state action under this theory. Indeed, the use of the courts by the private sector for a single trespass action will be enjoined though no finding is made other than that a private company town could not enforce the trespass conviction if it were a true municipality.[104] Such reasoning will even extend to a shopping plaza if sidewalks, which were formerly open to protected first amendment activity, are totally usurped by a private plaza.[105]

The state function theory of state action began with the white primary cases. These cases involved attempts by southern states to remove themselves farther and farther from the electoral process so as to avoid a finding of state action, which would subject the racially discriminatory provisions of the state election laws to judicial review under the fourteenth amendment.[106] *Nixon v. Herndon*[107] disabused Texas of the idea that primaries are private affairs beyond the command of the fourteenth amendment when it held that a Texas statute, which explicitly barred Negroes from participation in Democratic primaries, was state action violative of equal protection. Texas responded by enacting a statute authorizing political parties to declare through their executive committees who should be qualified voters. This removed the state from direct regulation of the electoral process in an attempt to frustrate judicial review of the electoral process. However, the resultant Negro exclusion was held violative of the fourteenth amendment in *Nixon v.*

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analysis is fairly straightforward and the competent practitioner needs no guidance on how to make it. The more important consideration, however, is that since *Burton* is so open-ended it is as easy to argue against as well as for an analogy to it. *Moose Lodge* and *Jackson* evince an attempt by the present Court to distinguish *Burton* into oblivion by holding that *Burton* was not analogous. The author therefore considers the state function theory of state action to be a better vehicle for building this bridge, though this theory is not without its own difficulties in the *Jackson* context. See the discussion at note 152 *infra*.

104. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

105. *See* Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). The availability of sidewalks in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), served to distinguish that case, as well as the "unrelatedness" of the first amendment activity.

106. *See* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1089-92 (1960) for a more detailed treatment of this area. It is well to point out that many of the state function cases cited in this part of this Comment retain their vitality. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 351 (1974).

107. 273 U.S. 536 (1927).

Condon.[108] State action was found in the state's delegation to the party executive committee of power ordinarily exercised by the party's state convention. The Court held that such delegation of a state function could not insulate the state from its responsibilities under the fourteenth amendment.

Thereafter, the Democratic convention in Texas, without specific statutory authorization, excluded Negroes from primaries under its "inherent" power to exclude party members. This procedure was unanimously upheld in *Grovey v. Townsend*[109] on the theory that no "state action" was involved, notwithstanding that the primary was required and closely regulated by state law. The Court held that state regulation of the primary was neutral and incidental and only determined the right to be a participating member of a private political organization. It did not directly disenfranchise the Negro.

Grovey, severely undermined with the recognition in *United States v. Classic*[110] that the primary in some states effectively controls the electoral choice and is therefore protected under the right to vote, was overruled in *Smith v. Allwright*,[111] where the Court noted:

> *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state *delegation* to a party of the power to fix the qualifications of primary elections is *delegation of a state function* that may make the party's action the action of the State.[112]

The South's final attempt at thwarting a finding of state action was rejected in *Terry v. Adams*,[113] where elections held several months prior to the state primaries were held to be state action although they were privately financed and conducted by the Jaybird Association, a voluntary private organization formed in 1889 and operating in only one Texas county. The Court found state action despite the fact that Negroes theoretically could vote and elect candidates in the primaries and general elections. Justice Clark's concurring opinion, joined by a

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108. 286 U.S. 73 (1932).
109. 295 U.S. 45 (1935).
110. 313 U.S. 299 (1941).
111. 321 U.S. 649 (1944).
112. *Id.* at 660 (emphasis added).
113. 345 U.S. 461 (1953). Although technically *Terry* is a fifteenth amendment case, the wording of the fifteenth amendment as to the necessity of state action makes it equally good precedent in fourteenth amendment cases. The Court to date has refused to make its state action inquiry depend on the right involved. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974), *citing Terry* with approval nondiscriminatively with fourteenth amendment cases on the state action issue.

plurality of the Court, adverted to the concept of delegation in the state function theory of state action:

> Accordingly, when a state structures its electoral appratus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.[114]

Since the state function theory deals with state action generally, it is not limited to equal protection cases. It may be used in any fourteenth amendment context,[115] and requires no specific approval by the state of the private conduct. Thus, in *Marsh v. Alabama*,[116] the Court held that a company-owned town was subject to the strictures of the fourteenth amendment. The Court found state action simply on the ground that towns, however owned, are public, *i.e.* state-like, entities. Therefore, the state's trespass laws could not be used by the town to impose criminal trespass sanctions on a Jehovah's witness for her exercise of religious freedom under the first amendment. The state function theory has been extended to a shopping plaza,[117] to a transit system,[118] and to a park.[119]

In the approach taken by the Court in finding state action under the state function theory, no claim is made that the state directly discriminates or otherwise directly violates the constitutional rights of indi-

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114. 345 U.S. 461, 484 (1953).

115. The approach taken in this Comment assumes that no different standard of review will be applied for finding state action when one constitutional right is involved as opposed to another. This uniform standard is what the Court has applied to date—at least on the surface. Some judges, however, have sought differing standards for finding state action. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring and dissenting); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2d Cir. 1973). This search for differing standards evinces the balancing process that is really taking place under the state action doctrine and it has nothing to do with finding "state action"—either the state is "significantly involved" in a controversy, or it is not. Any balancing of competing rights should be done openly, subject to the fourteenth amendment's ambit—the approach proposed in Part I.

116. 326 U.S. 501 (1946).

117. Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). The Court stated:

> [T]he State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

Id. at 319. This case was distinguished in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which decided the issue specifically left open in *Logan Valley*. 391 U.S. at 320 n.9. See note 105 *supra*.

118. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), *distinguished in* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

119. Evans v. Newton, 382 U.S. 296 (1966).

viduals as, *e.g.*, in *Nixon v. Herndon*[120] or *Speiser v. Randall.*[121] The private conduct involved is limited by the proscriptions of the fourteenth amendment because significant governmental functions, such as the determination of voting rights or the operation of a town or park have been "delegated" to private individuals. The Court has never defined what a state function is, and indeed its language often sweeps very broadly.[122] At the very least it would appear that those functions which are so necessary for the welfare of a community that local governments have traditionally provided them, such as police and fire protection, would appear to be state functions. The practitioner, however, should not be very concerned with precise definitions of state function. The flexibility of the doctrine is exactly why it is a useful vehicle for an expansion of the Court's view of state action. The following two sections seek to give an illustration of how to use the state function theory for such an expansion by demonstrating that prejudgment seizures and self-help repossession are state functions governed by the fourteenth amendment.

B. Prejudgment Seizures—A State Function

Sniadach v. Family Finance Corp.,[123] for the first time in the history of American jurisprudence, extended due process protections to temporary prejudgment seizures of property.[124] Family Finance, without prior notice or a hearing, had garnished one-half[125] of Sniadach's weekly wage of $63.18 through an ex parte writ issued by a court clerk pursuant to Wisconsin law. The Court held that failure to provide Sniadach with notice and a hearing for even a temporary deprivation of her wages pending a trial on the merits was violative of due process. The majority opinion, written by Justice Douglas, focused on wages as a "specialized type of property presenting distinct problems in our economic system."[126] The concurring opinion of Justice Harlan, however,

120. 273 U.S. 536 (1927).

121. 357 U.S. 513 (1958).

122. See text accompanying note 154 *infra.*

123. 395 U.S. 337 (1969).

124. Formerly, the courts held that due process requirements of notice and a hearing applied only to permanent seizures of property. Temporary prejudgment seizures were held not violative of due process so long as there eventually was a hearing on the merits before such deprivation became permanent. *See* McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd mem.*, 279 U.S. 820 (1929). *See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

125. Today, the Federal Consumer Protection (Truth in Lending) Act would limit garnishment in most cases to one-fourth of the weekly wage. In Sniadach's case, however, the Act would have completely protected $60 per week from garnishment. Under the Act, therefore, only $3.18 would have been accessible to the creditor, even *after* the adversary hearing. *See* 15 U.S.C. § 1673 (1968).

126. 395 U.S. 337, 340 (1969).

simply stated that "since this deprivation cannot be characterized as de minimis, she must be accorded the usual requisites of procedural due process: notice and a prior hearing."[127]

Whether *Sniadach* would be limited to prejudgment wage garnishment or extended to other prejudgment remedies depended largely, therefore, on whether the Court adhered to the position of Justice Douglas or Justice Harlan. The Court seemingly opted for the Harlan position in *Fuentes v. Shevin*,[128] which struck down on due process grounds the prejudgment seizure by a sheriff, acting under an ex parte writ of replevin, of household goods bought under a conditional sale agreement. The *Fuentes* majority was not impressed by two distinct factual differences from *Sniadach*: first, the prejudgment seizure involved household goods, not wages; second, the creditor in *Fuentes* was a secured creditor seizing his collateral, unlike the unsecured creditor in *Sniadach*. *Fuentes* stated in sweeping terms that before the state, in aid of a creditor, may deprive a debtor of any significant property interest, including temporary use and enjoyment, procedural due process required the giving of notice and an opportunity for a hearing. Exceptions to this principle were justifiable only in "extraordinary circumstances."[129]

The simplicity and breadth of the *Fuentes* decision, however, has not gone unqualified. In *Mitchell v. W.T. Grant Co.*,[130] W.T. Grant made a conditional sale of household goods to Mitchell, who became delinquent in payment. W.T. Grant thereupon offered an affidavit to a state judge in Louisiana asserting Mitchell's delinquency and praying for sequestration. To prevent alienation by the debtor,[131] the judge issued the writ without notice or a prior hearing. Mitchell's goods were then seized by a constable pending a hearing on the merits.

Justice White, who wrote the dissenting opinion in *Fuentes*, wrote the majority opinion in *Mitchell*, joined by Justices Powell and Rehnquist, who did not hear the *Fuentes* case. Justice White emphasized that under a conditional sale agreement both the buyer and seller had interests in the property sold until the agreement was fulfilled and that due process must take account of both interests.[132] He found *Mitchell* distinguishable from *Fuentes* in that judicial supervision over state power was preserved because: (1) a judge rather than a clerk issued the writ; (2) the affidavit in *Mitchell* required more specific informa-

127. *Id.* at 342.
128. 407 U.S. 67 (1972) (4-3 decision).
129. *Id.* at 90.
130. 416 U.S. 600 (1974).
131. In Louisiana, at the time of decision, a creditor lost his interest in secured goods if they were sold to a third party.
132. 416 U.S. at 604.

tion than the vague statutes struck down in *Fuentes* while similarly requiring adequate security to be posted by the creditor to protect the debtor from loss; and (3) Louisiana law provided for an immediate post-seizure hearing in which the creditor had to prove his allegations, unlike the *Fuentes* statutes. In conclusion, the Court held that this procedure achieved a constitutional accommodation of the interests of both buyer and seller.

The latest chapter in the Court's development of the procedural due process requirements relating to the prejudgment seizure of property is *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[133] which involved a secured creditor. The Court, again through Justice White, made it clear that *Fuentes* was not rendered moribund by *Mitchell*. In *North Georgia*, an ex parte writ issued by a clerk upon the posting of security was found constitutionally defective on procedural due process grounds. The Court again used the broad stroke of the *Fuentes* brush: "Any significant taking of property by the State is within the purview of the Due Process Clause."[134] *Mitchell* was distinguished on the grounds that there a judge rather than a clerk issued the ex parte writ and that Louisiana law entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued.[135]

The tortuous odyssey which began with *Sniadach* six years ago yields grudgingly, if at all, to a coherent analysis. Thus far, however, some things are clear. Due process requirements in prejudgment seizures of property are not limited to unsecured creditors or to wages. *Fuentes* and *North Georgia* stand for this at least. In the secured creditor context, moreover, a salient feature that distinguishes the procedure sustained in *Mitchell* from those struck down in *Fuentes* and *North Georgia* was that a judge rather than a clerk issued the ex parte writ.[136]

The cases following *Sniadach* reflect the balancing of competing interests which must be accomplished once the state action question is resolved, thereby making the fourteenth amendment due process

133. 419 U.S. 601 (1975).

134. *Id.* at 606. The Court was reciting the *Fuentes* language here. *See* 407 U.S. 67, 86 (1972).

135. 419 U.S. at 606-07.

136. Admittedly, *Mitchell* also involved a Louisiana law that provided for an immediate adversary hearing after the seizure and this factor also weighed in the creditor's favor. However, both these elements go, not to *whether* judicial review is required, but to the *kind* of judicial review required. *Mitchell* did not decide whether, in the secured creditor context, ex parte judicial review prior to the prejudgment seizure is sufficient of itself, or whether a full adversary hearing immediately after the prejudgment seizure alone will be sufficient. *Mitchell* stands for the optimum since both are provided.

clause applicable. *Sniadach* requires a full adversary hearing in an unsecured creditor context, at least where the creditor seeks prejudgment seizure of the debtor's wages. However, in a secured creditor context, where both the creditor and debtor have possessory interests in the secured chattel until the conditional sale agreement is fulfilled, a full adversary hearing prior to the prejudgment seizure is not required by due process under *Mitchell*. What *Mitchell* and *North Georgia* taken together indicate, however, is that judicial review, perhaps immediately after the seizure or perhaps only ex parte, is still required by the due process clause. The simplest view would be this: an ex parte proceeding with judicial review in the secured creditor context is permissible (*Mitchell*); an ex parte proceeding without judicial review is not (*Fuentes*).

If one accepts this analysis, *Sniadach* and its progeny make sense. *Sniadach*, per Justice Harlan, would stand for the proposition that prejudgment seizure of contested property, however temporary, is essentially an invocation of governmental power requiring judicial review. The only variation on this theme since *Sniadach* is the question of how much, and perhaps when, judicial review is required. The answer to these queries is arrived at only after the Court balances interests in the seized property, if any, against those of the debtor. In *Sniadach* there was an unsecured creditor who had no possessory interest in the seized property. The debtor's interest in her garnished wages, on the other hand, obviously was substantial if not overwhelming. Thus a full adversary[137] hearing before a judge presumably is required prior to the seizure in any unsecured creditor context. The cost to the unsecured creditor in obtaining such a hearing is offset in this balancing test both by his lack of legal possessory interest in the wages and their fundamental importance to the debtor.

In the secured creditor context, however, the creditor and the debtor each have possessory interests in the seized chattels. While household goods are important to the debtor they are arguably not as important as wages. More fundamentally, the household goods, unlike earned wages, are not the sole property of the debtor until he fulfills the conditional sale agreement. The seller's interests in the goods are guaranteed by the conditional sale agreement that the buyer signed. In this context, the balance has shifted somewhat toward the creditor, but not to the exclusion of judicial review altogether. Judicial review remains fundamental to due process. *Fuentes* tells us judicial review is required prior to the seizure, but *Mitchell* and *North Georgia* tell

137. The requirements of such adversary hearings have never been explicitly set forth by the Court in terms of what burden of proof the creditor must carry.

us an ex parte proceeding rather than an adversary proceeding before a judge will suffice—at least where an immediate post seizure adversary hearing is also provided. While admittedly an ex parte proceeding before a judge may not differ significantly in practice from an ex parte proceeding before a clerk, the practical effects of requiring the former rather than the latter may be more ameliorative than might be apparent.[138] In any event, the urgent requirement of judicial review in the prejudgment seizure of contested property still applies even if due process allows judicial review in a full adversary hearing to be postponed until *immediately* after the seizure.[139]

The inherent importance of some form of judicial review in the concept of due process was hinted at in *Fuentes*,[140] but received its clearest expression by Justice Harlan in *Boddie v. Connecticut*:

> At its core, the right to due process reflects a fundamental value in our American constitutional system. . . .
>
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. . . .
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system.[141]

When Justice Harlan wrote the broadly sweeping concurring opinion in *Sniadach* two years earlier—a view that has since come to be adopted by the Court—he was speaking to the same "core" value of due process. Due process, he said, requires that prejudgment seizure of contested property, however temporary, be processed through the

138. The practical effect of requiring merely ex parte judicial scrutiny may be tantamount to requiring an adversary hearing since judges may subject ex parte affidavits to more careful scrutiny than do clerks. The use of judges may also encourage the development of stricter standards within the ex parte context. For example, a clear and detailed showing of probable cause may be required. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

139. Recall that *Mitchell* required both prior ex parte judicial review and an immediate post-seizure adversary hearing.

140. *See* note 142 *infra*.

141. 401 U.S. 371, 374-75 (1971).

common law model of orderly dispute settlement—the courts. Accordingly, the element of judicial supervision is the common theme running through *Sniadach* and its successors. *Sniadach* announced that due process protections extended to prejudgment as well as post-judgment seizures of property. *Fuentes* and succeeding cases emphasized the importance of judicial supervision over prejudgment seizures. Thus far, judicial review of some sort has been required prior to any seizure but it may be sufficient that such review take place immediately after the seizure. In any event, the emphasis on the requirement of judicial review since *Sniadach* indicates that prejudgment seizure of contested property involves much more than a private conflict.

It seems that the Court is impliedly stating that prejudgment seizure of contested property is such an extreme procedure that it is now recognized as inherently a governmental function whose exercise is subject to traditional judicial review under the state action doctrine. Generally, any exercise of state police power, for example in a criminal action, requires judicial review. Similarly, if a sheriff enters a home and seizes appliances without prior judicial review the Court has said the state would be acting "in the dark."[142] That is, such an exercise of state power requires the traditional prior check of judicial review in order for it to comport with due process requirements. Later cases only indicate that the scope and timing of judicial review may vary but that nevertheless such review is essential to due process in any prejudgment seizure of contested property. Such review will foster the core value of due process—the orderly resolution of disputes.

In other words, when due process requires judicial review of prejudgment seizures of contested property, it is speaking at the same time to the governmental character of the activity. Permanent deprivations of property were always recognized as governmental in character and due process could therefore be invoked because the state action requirement was met. The Harlan analysis in *Sniadach*, which was vindicated by *Fuentes* and *North Georgia*, is that prejudgment seizure of property is also inherently governmental. Before *Sniadach*, due process was thought not to reach these "private seizures" so long as a trial on the merits was later held. After *Sniadach* and *Fuentes*, however, the governmental character of this activity is recognized—the state action requirement of the fourteenth amendment is satisfied—and due process protections may be invoked.

142. The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another . . . . [N]o state official reviews the basis for claim to repossession . . . . The States act largely in the dark. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).

Admittedly, this is a broad reading of *Sniadach* and its successors, especially since, as the next section will show, the state action issue in these cases was surmounted easily by a more pedestrian and traditional analysis. A more restrictive view of these cases on the state action issue, however, leads to startling inconsistencies in the due process protections afforded in other prejudgment seizures of property—for example, self-help repossession.

C. *Self-help Repossession*

Self-help repossession is the paradigm of prejudgment seizure of contested property and should also be characterized as a governmental or state function requiring judicial review under the proposed *Sniadach* rationale.[143] If prejudgment seizure of property is a state function requiring judicial review to preserve the core value of due process, it is also a function the state may not leave delegated to court clerks, or a fortiori to private individuals unfettered by legal process, without subjecting the "delegees" to the strictures of the fourteenth amendment.[144] Indeed, the dangers feared in *Fuentes*[145] are more prevalent in the context of self-help repossession. In spite of *Sniadach* an area of prejudgment seizure of property not circumscribed by due process protections remains delegated by the state to private individuals.[146] These individuals resort to stealth and force rather than the orderly resolution of disputes by judicial review.[147] Those creditors who do resort to some

143. The present state action doctrine has proven to be a fertile stream for the spawning of a plethora of litigation on self-help repossession. *See, e.g.*, Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971).

144. A similar discussion of the non-delegable aspects of the state function theory of state action in a landlord-tenant context is found in Hall v. Garson, 430 F.2d 430 (5th Cir. 1970), *reaff'd*, 468 F.2d 845 (5th Cir. 1972).

145. See note 142 *supra*.

146. Perhaps the clearest judicial expression of the relationship of the state function theory of state action to self-help repossession is found in the following statement:

> California's regulatory scheme, by delegating to private persons power to resort to self-help, saves the state the expense that it would otherwise incur in using its own governmental personnel to seize the property and in providing notice and hearing before the state's judicial and quasi-judicial officers. The state cannot avoid the impact of the Fourteenth Amendment by thriftily abdicating these functions to private persons. It cannot do so by expressly delegating a part of them to creditors or their nominees.

Adams v. First Nat'l Bank, 492 F.2d 324, 342 (9th Cir. 1973) (Hufstedler, J., dissenting from the denial of a hearing en banc).

147. Discussion of the evils of self-help repossession and subsequent UCC authorized deficiency judgments are found in: Clark, *Default, Repossession, Foreclosure and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972); Enstrom, *Kill the Automobile Deficiency Judgment*, 56 A.B.A.J. 364 (1970); Shuchman, *Profit on Default: An Archival Study of Automobile Repossession and Resale*, 22 STAN. L. REV. 20 (1969).

form of judicial process are simultaneously found to have invoked state action because they used state officials—a court clerk and sheriff typically—and to have violated due process because they have not done enough.[148] Meanwhile, creditors who resort to no judicial process whatsoever, and more flagrantly violate individual rights, are insulated from judicial review because no state action is found.[149]

This result is compelled by the present state action doctrine because of its inherent temporal arbitrariness. In both *Fuentes* and the self-help repossession case that is brought to court by an injured plaintiff, the state is responding to privately instituted requests for state assistance. The state must choose whom to vindicate in both cases. Yet in *Fuentes*, when the creditor sought some form of orderly dispute settlement—a writ of replevin enforced by a sheriff—there was state action because the state "acted" *before* the suit was brought into court. The Court was then able to find a violation of due process because the creditor used the wrong state officials. However, when the state, for example, refuses to hear the merits of a plaintiff's request that his car, which was repossessed for no apparent reason, be returned, the creditor's actions are enforced, but under existing doctrine there is no state action and therefore no violation of due process because the state did not aid the creditor until *after* the suit was brought into court.

The way out of such an inequitable morass under the present state action doctrine is for the Court to recognize that when *Sniadach* called for judicial review of prejudgment seizure of property it was speaking indirectly to the state function theory of state action. Much as *Nixon v. Herndon*[150] said that blacks may not be barred from voting in primaries by state statute, *Sniadach* said that prejudgment seizure of property could not be enforced by state officials without prior notice and a hearing. Just as *Terry v. Adams*[151] said that a state may not leave its primaries or even pre-primaries in private hands without subjecting the "delegees" to the ambit of the fourteenth amendment, the Court should similarly hold that a state may not, after *Sniadach*, leave prejudgment seizure of contested property in private hands without subjecting these "delegees" to the ambit of the fourteenth amendment.[152]

148. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

149. *See, e.g.*, Adams v. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). Since self-help repossession is authorized under UCC § 9-503 in most states it must be done "without breach of the peace." This effectively restricts such a remedy to automobile repossession where the automobile owner cannot afford to have a locked garage because virtually any unauthorized entry of a household constitutes a breach of the peace under modern judicial standards.

150. 273 U.S. 536 (1927).

151. 345 U.S. 461 (1953).

152. On this pragmatic level, Jackson v. Metropolitan Edison Co., 419 U.S. 345

The extent of protection afforded the plaintiff in a self-help repossession context would be influenced by the fact that courts would be dealing with a secured creditor with a palpable title claim to the property. Perhaps an ex parte judicial review prior to the seizure or an immediate post-seizure hearing would be sufficient for due process, but *Mitchell* seems to require both.[153] In any event the outcome would be more open to rational support—a balance of the interests involved in self-help repossession would be similar to the process used in other areas of constitutional law. Additionally, the suit would not be dismissed without reaching the merits, and thus the creditor will not be covertly vindicated as he is under present doctrine. Any theory which openly forces judicial inquiry into the merits of a case improves the rationality of the judicial institution, which is certainly the bedrock of the respect this undemocratic institution is accorded by the American people.

CONCLUSION

Under the direct balancing approach of Part I, self-help repossession would not be a conundrum. The interests of plaintiff and defendant would be evaluated directly in light of the fourteenth amendment. The state action issue would be resolved when either party brought the case to court and compelled the state to choose whom to vindicate. Its choice would be state action. The issue, therefore, would be what balance must be struck in light of the commands of the fourteenth amendment. Since the debtor's lack of protection in self-help repossession cases would be even more complete than in *Sniadach* or *Fuentes*, and since the creditor would have acted with even less regard for an important value fostered by due process—the orderly resolution of disputes

(1974), does not reach such an argument. The governmental function of forceful deprivation of contested property is not involved in *Jackson*, assuming the traditional governmental function of forced entry into the residence is unnecessary to terminate service. *See* Hall v. Garson, 430 F.2d 430, *reaff'd*, 468 F.2d 845 (5th Cir. 1972). The occupant has no possessory interest in the power lines leading to the residence. Thus, *Jackson* is the inverse of *Sniadach*. Since the unsecured creditor in *Sniadach* had no direct possessory interest in the wages of the debtor, the Court required a full adversary hearing before the creditor could reach the wages in satisfaction of his unsecured debt. Before such a hearing, with its requisite notice, was instituted, the debtor was entirely free to dispose of the wages. Similarly, since the debtor in *Jackson* has no direct possessory interests in the power lines outside the residence, a utility is entirely free to disconnect them for breach of contract. When a debtor asks a court to restore this power, he is in the identical position to the unsecured creditor in *Sniadach*. At this point, the governmental function of depriving the utility of contested property is triggered, and the debtor in *Jackson*, like the creditor in *Sniadach*, must go through an adversary hearing *before* the Court will aid him. The point is that the governmental function theory espoused here is consistent with, and does not reach *Jackson*, and, conversely, *Jackson* is consistent with, and does not reach this theory.

153. See text accompanying notes 130-32 *supra*.

—the debtor should be entitled to protection under the fourteenth amendment. Indeed, if direct interest analysis had been adopted by the Court at the time of *Sniadach*, this conclusion would have been clear and the plethora of self-help litigation might have been avoided.

However, in light of the recent turn by the Court toward a restrictive view of state action, it would be quite difficult for the practitioner to successfully argue the merits of the direct balancing approach of Part I of this Comment. Therefore, the state function theory of state action has been examined in Part II of this Comment for its potential as a vehicle for the expansion of the Court's view of state action. Self-help repossession was used as an illustration of such an attempted expansion —the first step in building a bridge from the present state action doctrine to the direct balancing approach. It is hoped that similar expansions of the Court's view of state action will be effected by using the state function theory in other areas of constitutional law. Eventually, perhaps, such use of the state function theory will lead to the Court's continuous citing of this language in *Marsh v. Alabama*:

> The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[154]

The Court may eventually indicate that this language was an inchoate form of the direct balancing approach which would then be adopted by the Court[155] as the only requirement of the fourteenth amendment. The Court would then take on the burden of protecting individual rights more fully and openly under the fourteenth amendment, in a mauner consistent with other areas of constitutional law. The first Justice Harlan, the lone dissenter in *The Civil Rights Cases*,[156] will at last have been vindicated and the direct balancing approach will prevail in this most important area of constitutional law.

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154. 326 U.S. 501, 506 (1946).

155. Perhaps *Burton* will be restored to full health as an incidental beneficiary of the Court's hopefully renewed willingness to find state action and it will become the vehicle which will lead to a direct balancing approach. The author's concern is the destination, not the route.

156. 109 U.S. 3, 26 (1883) (Harlan, J., dissenting).