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Although the question of whether a particular private act can be considered state action has plagued the United States Supreme Court since the Civil Rights Cases, the Court never has discussed directly the state action issue in the context of debtor-creditor relationships. As a result, the lower courts considered various factors in determining whether state action exists in debtor-creditor cases. These factors include whether: (1) the applicable statute changed the common law; (2) the applicable statute codified the common law; (3) there was a relationship between the property taken and the debt; (4) there was a private contract between the debtor and creditor that indicated which particular self-help remedy would be used; and (5) whether the private taking of the property traditionally was done by the state. Thus, the lower courts never reached a consensus as to what constitutes state action in debtor-creditor cases.

1. 109 U.S. 3 (1883).
4. See cases cited in note 3 supra. The confusion in these debtor-creditor state action cases is exemplified by the opinions in Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), in which a hotel manager seized a tenant's belongings as security for unpaid rent. The majority opinion by Judge Weigel found state action for this seizure by looking at three factors. First, he stated that the state statute permitting such a seizure had completely changed the common law, but that the common law analysis should not be dispositive in finding state action. Id. at 429-31. Second, state action was to be found because there was no relationship between the property seized and
When differing conclusions regarding state action in relation to U.C.C. § 7-210, were reached by the Second and Ninth Circuits, the Supreme Court granted certiorari to settle the conflict. In Flagg Brothers, Inc. v. Brooks the Court, despite a vigorous dissent by Justice Stevens, held that a state statute permitting a warehouseman’s private sale of goods entrusted to him for storage was not an action that could be attributed to the state itself.

The purpose of this Note is to analyze the Flagg opinion in light of the traditional state action analysis used by the Supreme Court. Inconsistencies with prior case law as well as an alternative means of deciding the case will be discussed. Finally, Flagg’s impact on state action debtor-creditor cases will be evaluated.

FACTS AND PROCEDURAL HISTORY

The city marshal of Mount Vernon, New York, evicted Shirley Brooks from her apartment and arranged for her possessions to be stored in the Flagg Brothers, Inc. warehouse. After a series of disputes over the stor-
age charges, Flagg sent a letter to Brooks demanding payment of the outstanding balance within ten days. If payment was not made within that time, Flagg informed Brooks that the stored goods would be sold. Following further unsatisfactory negotiations, Brooks filed this class action in the Southern District of New York under 42 U.S.C. § 1983. Plaintiff sought damages, an injunction enjoining the threatened sale of her belongings, and

12. The sale would be pursuant to N.Y.U.C.C. § 7-210 (McKinney 1964) which provides, in pertinent part:

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.
(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.
(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

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

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


Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privilege, or immunity secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Jurisdiction in this suit was invoked pursuant to 28 U.S.C. § 1343(3) (1976) which provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the
a declaration that a warehouseman's sale pursuant to N.Y.U.C.C. § 7-210 would violate the Due Process Clause of the Fourteenth Amendment. The defendant moved to dismiss the action for failure to state a claim upon which relief could be granted. The district court found no state action and dismissed the complaint. The Second Circuit Court of Appeals reversed.

In the district court plaintiff argued that state action existed for three reasons. First, she asserted that the warehouseman, by enforcing his own lien, was performing what was traditionally a public function. The court rejected this argument because the lien involved satisfaction of a debt relating to the goods executed upon, and because New York had allowed warehousemen to enforce their own liens since 1879. Second, plaintiff claimed that N.Y.U.C.C. § 7-210 acted as an extensive state regulation which transformed the private act into a public one. This claim was discarded by the district court on the grounds that the United States Supreme Court had effectively foreclosed this type of reasoning. The district court also refused to accept the plaintiff's argument that because the statute changed the common law, state action therefore existed. The court held that a mere change was insufficient to constitute a finding of state action.

The Court of Appeals, however, held that state action had been established. It noted that the delegation of governmental power to the

Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

15. Brooks also had challenged N.Y.U.C.C. § 7-209 (McKinney 1964), which authorizes imposition of the warehouseman's lien and retention of stored goods until the debt is satisfied. However, she did not pursue this issue beyond the district court level. Brooks v. Flagg Bros., Inc., 553 F.2d at 769.

16. The original complaint named as defendants the Mount Vernon city marshal (who was later dismissed from the case by the consent of all the parties), Henry Flagg, and Flagg Bros., Inc., individually and as representatives of a proposed defendant class consisting of warehousemen doing business in New York. These parties have the authority to impose liens and subject goods to sale without affording the owner of the goods a prior opportunity to be heard pursuant to N.Y.U.C.C. §§ 7-209 and 7-210 (McKinney 1964). 553 F.2d at 768. The American Warehousemen's Association, the International Association of Refrigerated Warehouses, Inc., and the Attorney General of New York were granted motions to intervene as party defendants.


20. Id. at 1063.

21. Id. at 1062.


23. Id. at 1062.

24. Id. at 1065-66.
warehouseman combined with expansion of the creditor's common law remedies was sufficient to "thrust the state's involvement in the challenged activity over the threshold of state action." This conclusion was based on two Second Circuit dissenting opinions and on the common law as it existed in New York prior to 1879. Since this decision conflicted with an earlier Ninth Circuit pronouncement, the United States Supreme Court agreed to resolve the conflict.

The Supreme Court agreed with the district court and held that the complaint should be dismissed. Writing for the majority, Justice Rehnquist stated that since the warehouse sale was merely permitted, rather than mandated, the state was insufficiently involved to justify a determination of state action. Furthermore, the Court reasoned that since alternative means of dispute settlement existed, state action was not present.

26. Shirley v. State Nat'l Bank, 493 F.2d 739, 747 (2d Cir.), cert. denied, 419 U.S. 1009 (1974) (Kaufman, C.J., dissenting); Bond v. Dentzer, 494 F.2d 302, 312 (2d Cir.), cert. denied, 419 U.S. 837 (1974) (Kaufman, C.J., dissenting). Judge Kaufman would find state action when a state delegates a portion of its sovereign monopoly power over binding conflict resolution. The Shirley and Bond majorities did not find state action because the statutes in those cases merely codified the common law and the contracts underlying the debt specifically authorized the creditor remedies in question.

27. Under the common law, in the absence of an express agreement authorizing sale upon default, the warehouseman could only retain goods to coerce payment. He could not sell the goods and apply the proceeds to the debt. R. Brown, THE LAW OF PERSONAL PROPERTY §§ 108 & 119 at 519, 588-89 (2d ed. 1955). The Court of Appeals agreed with the District Court that, standing alone, an alteration in the common law remedy was not dispositive of the state action inquiry. Brooks v. Flagg Bros., Inc., 553 F.2d at 772.

28. Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976). Melara also involved the extra-judicial sale of stored goods to enforce a warehouseman's lien under CAL. U. COMM. CODE § 7-210 (West). The Ninth Circuit held there was no state action because the enactment of § 7-210 read with the regulation of the private activity under it did not significantly involve the state in private warehouseman's lien enforcement. Id. at 806-08.


31. See notes 34-39, 47-49, and accompanying text infra.

32. See notes 40-46, 50-57, and accompanying text infra. In a strongly worded dissent, Justice Stevens, basing his reasoning on the line of cases beginning with Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), argued that because those cases indicated the Court's recognition of the significance of the state's role in controlling the debtor-creditor relationship, state action was present in Flagg. 436 U.S. at 168-79 (Stevens, J., dissenting). See North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). The issue in all of these cases was whether a hearing was required before a debtor's property could be taken, but state action was never discussed directly. The majority distinguished these cases by saying that there was state action because a state official was affirmatively involved in the seizing of the debtor's property. 436 U.S. at 160-61 n.10. See note 76 infra.
Prior Supreme Court cases had analyzed the state action requirement using two tests—the authorization test and the public function test. When examining for state action under the authorization test, a determination must be made as to whether the state has authorized or encouraged an act to occur. Under this test, it is required that the state become affirma-

33. These were the only state action tests applicable to the facts in Flagg. Two other tests are the government control test and the symbiotic relationship test. Under the government control test, state action is present whenever the state regulates a private entity in such a way as to give that private actor a monopoly. For example, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), when a private liquor licensee refused to serve a drink to a black, the appellee argued that there was state action in the refusal because the state regulated the issuance of licenses. The Court concluded that this did not constitute state action and indicated that in order for state action to be present, the regulation would have to confer upon the licensee a monopoly in the dispensing of liquor in a given area of the state. Id. at 176-77.

The symbiotic relationship theory is set forth in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), in which a privately run restaurant in a building leased from the Authority refused to serve the plaintiff because of his race. Aggregating the government powers given the Authority, the mutual benefits received between the restaurant and the Authority, and the fact that the restaurant was an integral part of the public building, the Supreme Court found state action since “[t]he state has so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . .” Id. at 725. But the symbiotic relationship theory is very limited since the holding in Burton was explicitly limited to situations in which a state leases public property. Id. at 726. See also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974). Since the Supreme Court has never extended this theory, and there is no lease of public property in Flagg, the symbiotic relationship test does not apply. Neither the majority nor dissenting opinions discussed this theory.

It also has been suggested that Burton is either limited to situations of racial discrimination, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), or was a decision applicable to that case only and therefore not good authority today, Yackle, The Burger Court, “State Action” and Congressional Enforcement of the Civil War Amendments, 27 ALA. L. REV. 479, 497, 516 n.157 (1975) [hereinafter cited as Yackle], or that the Court recognized that there existed an express agreement between the state and the restaurant to discriminate. 46 Burke & Reber, supra note 3, at 1050. The facts in Flagg do not apply to any of these interpretations either. For a general discussion on all the tests, see Comment, State Action and Public Utilities—Jackson v. Metropolitan Edison Co., 24 DEPAUL L. REV. 1023, 1024-30 (1975).

34. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345, 355-57 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-79 (1972); Reitman v. Mulkey, 387 U.S. 369, 375-81 (1967). The problem before the Flagg Court was to determine the meaning of “authorize” and “encourage.” While the majority concluded that they have been defined to require that the state must be affirmatively involved in the private act, see note 49 infra. Justice Stevens, in his dissent, implied that if a state statute passively allows a private act to occur, then the state has authorized or encouraged it, and state action is present. 436 U.S. at 170 (Stevens, J., dissenting). See Reitman v. Mulkey, 387 U.S. 369 (1967) (see note 38 infra); Evans v. Newton, 382 U.S. 296, 305-11 (1966) (White, J., concurring); Burton v. Wilmington Parking Auth., 365 U.S. 715, 726, 728-29 (1961) (Stewart, J., concurring) (Harlan and Whittaker, J.J., dissenting). However, a majority of the Supreme Court has never accepted this argument. See generally 46 Burke & Reber, supra note 3, at 1096-1109.
tively involved with the private act—a requirement which may be met by the state either compelling or becoming overtly involved in the private act.

35. 46 Burke & Reber, supra note 3, at 22-23, 48-52; Glenn & Novak, A Functional Analysis of the Fourteenth Amendment "State Action" Requirement, 1976 SUP. CT. REV. 221, 228 (the traditional view of state action is that the Fourteenth Amendment is applicable only if the state has acted in some positive manner); Lewis, The Meaning of State Action, 60 COLUM. L. REV. 1083 (1960); Quinn, State Action: A Pathology and a Proposed Cure, 64 CAL. L. REV. 146 (1976); Winter, Poverty, Economic Equality, and the Equal Protection Clause, 1972 SUP. CT. REV. 41, 52; Yackle, supra note 33, at 521; Note, Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1069-72 (1969); Comment, Power of Sale Foreclosure After Fuentes, 40 U. CHI. L. REV. 206, 217 (1972); Comment, Utility Terminations: Pay Now and Litigate Later (in the State Courts), 27 U. FLA. REV. 855, 866 (1975).

36. A compelling act is one that forces an occurrence. BLACK'S LAW DICTIONARY 353 (Rev. 4th ed. 1968). In Shelly v. Kraemer, 334 U.S. 1 (1948), a state court enforced a racially restrictive property agreement. The Court found state action because the state made available the full coercive power of government to deny property rights to blacks. Id. at 19. Through a series of cases in which discrimination in serving blacks in restaurants occurred, there was state action when the discrimination arose either from statutory authority or a custom having the force of law. Adickes v. S.H. Kress & Co., 393 U.S. 144 (1970); Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963). For a good discussion on this area, see 46 Burke & Reber, supra note 3, at 1082-91. In Moose Lodge, state action was found because the state statutorily required the Lodge to follow their own bylaws—one of which was discriminatory. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177-79 (1972). Finally, in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court said that state action could not be found because of state regulation unless the state ordered a particular practice. Id. at 357.

The lower courts also have looked for the affirmative act of compulsion in order to find state action. See, e.g., Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1170-71 (5th Cir. 1975) (state regulation of power of sales that house buyers give in a deed of trust is not encouragement of the sale); Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974) (no state action when a car dealer repossessed a car pursuant to a statute since the statute only permitted the act); Oiler v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972) (same).

37. An overt act is one in which the state either participates directly or in concert with the private actor. The Court held that state action was present when a private security guard, who had been deputized by the state, arrested blacks for trespassing in the amusement park in which he was privately employed. Griffin v. Maryland, 378 U.S. 130 (1964). In Evans v. Newton, 382 U.S. 296 (1966), when a park which refused access to blacks was transferred from a trust left to the city of Macon, Georgia to a private trust, the city's continued maintenance and control of the park mandated a finding of state action. An overt act also was present in United States v. Price, 383 U.S. 787 (1966), because state officials had "participated in every phase of the alleged venture" of the killing of three civil rights workers. Id. at 795. The Supreme Court also found state action in a government commission's investigation of complaints concerning radio programs being played on buses. Public Utilities Comm'n v. Pollack, 343 U.S. 451 (1952). In addition, the lower courts seek an overt state act on which to predicate state action. See, e.g., Cannon v. University of Chicago, 559 F.2d 1083, 1069 (7th Cir. 1977), cert. granted, 98 S.Ct. 3142 (1978) (no state action is present when a private medical school receives state funds because the state was not directly involved in the challenged conduct); Melara v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976) (state action would be present in a warehouseman's sale pursuant to the same U.C.C. statute in question in Flagg, if there had been direct action in the sale by a state official); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 675 (W.D. Va. 1972) (a state statute which allows the use of self-help to repossess property sold under installment sales contracts, but does not require the interaction of any state agent, is not state action).
In addition, the affirmative act must amount to "significant involvement" by the state in order for state action to be established. A possible exception to the requirement of an affirmative act is Reitman v. Mulkey, 387 U.S. 369 (1967), in which an amendment to the California State Constitution was passed by the electorate. The amendment prohibited the State or its subdivisions from blocking the right of any person to discriminate in real estate transactions. Before adopting this amendment, California had had statutes which forbade this type of conduct. Id. at 374. The Reitman Court affirmed the California Supreme Court's conclusion that state action was present because the passing of the amendment overriding the statutes had significantly involved the State in the private discrimination. Id. at 373-81. One commentator has suggested that since the California state constitutional amendment made it impossible for any governmental agency to act, this amendment was unconstitutional. Thus, if a local town wanted to pass a fair housing ordinance it would be precluded from doing so because of the state constitutional amendment. This indicates that the California amendment was more than a neutral act. Black, Foreward: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 75-78 (1967) [hereinafter cited as Black]. Black's theory for distinguishing Reitman has found wide acceptability in the lower courts. See, e.g., Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 931 (1st Cir.), cert. denied, 419 U.S. 1001 (1974) (where a bank, pursuant to state law, set-off a credit card debt against a checking account in the bank, there was no state action based on Reitman, because the state legislature was able to regulate the practice); Bond v. Dentzer, 494 F.2d 302, 310 (2d Cir.), cert. denied, 419 U.S. 837 (1974) (a state statute permitting wage assignments between lenders and employers without the state being otherwise involved, did not constitute state action under Reitman because the state legislature was free to act and indeed had acted to prohibit wage assignments in certain cases); Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968) (same). See also 47 Burke & Reber, supra note 3, at 51; Yackle, supra note 33, at 503-04; Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 COLUM. L. REV. 656 (1974); Note, Self-Help Repossession: The Constitutional Attack, The Legislative Response, and The Economic Implications, 62 GEO. L.J. 273 (1973). But see Boland v. Essex County Bank & Trust Co., 361 F. Supp. 417 (D. Mass. 1973) (by enacting U.C.C. §§ 9-503 & 9-504, which provide for the repossession and disposition of collateral after default by the borrower, Massachusetts significantly encouraged self-help repossessions and had thus become significantly involved in them within the meaning of Reitman); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (a hotelkeeper imposing a lien on a boarder's belongings pursuant to state statute is an action encouraged and only made possible by explicit state authorization and thus establishes state action under the authority of Reitman). Even under Black's analysis of Reitman there could be no state action in Flagg because there was nothing preventing the New York Legislature or a local governmental unit from passing more restrictive laws concerning the warehouseman's sale.

A second method by which some lower courts have distinguished Reitman is to indicate that California was involved to a great degree in the challenged conduct because the state constitutional amendment would have authorized what had been expressly prohibited by statute. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974); Johnson v. Associates Fin., Inc., 365 F. Supp. 1380 (S.D. Ill. 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972). See also Note, State Action and the Constitutionality of UCC § 9-503, 30 WASH. & LEE L. REV. 547, 558-60 (1973). There would be no state action in Flagg under this approach either. New York had statutorily allowed the private enforcement of the warehouseman's sale since 1879. See Brooks v. Flagg Bros., Inc., 404 F. Supp. at 1065 n.17. Therefore, N.Y.U.C.C. § 7-210 (McKinney 1964) did not authorize what had been expressly prohibited by statute.

The final manner in which Reitman has been limited is in the suggestion that the Reitman Court found state action under the facts present in that case only because there was racial discrimination involved. See, e.g., Anastasia v. Cosmopolitan Nat'l Bank, 327 F.2d 150, 155-56 (7th Cir. 1957), cert. denied, 424 U.S. 928 (1976); Turner v. Impala Motors, 503 F.2d 607 (6th
The premise of the public function theory is that some private entity has what amounts to governmental powers because it may take away Constitutional rights from the public. The Supreme Court has held that a private act constitutes a public function when it is an activity "traditionally exclusively reserved to the state." Until Flagg, the Court had not defined this phrase. Prior cases provided an imperfect analytical guide, classifying only two

Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Adams v. Southern Cal. Nat'l Bank, 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), cert. denied, 419 U.S. 1001 (1974). See also Black, supra, at 82; 46 Burke & Reber, supra note 3, at 1079-82; Comment, Power of Sale Foreclosure After Fuentes, 40 U. CHI. L. REV. 206, 218 (1972). Even though the lower courts have made this interpretation, the Supreme Court has never adopted the notion "that different standards should apply to state action analysis when different constitutional claims are presented." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373-74 (1974) (Marshall, J., dissenting). No state action can be found in Flagg under this interpretation of authorization in Reitman because there was absolutely no racial discrimination in the private execution of the warehouseman's lien on Brooks' belongings.

Burke & Reber suggest that passive state authorization was not the basis of the Reitman decision and that this notion should not be considered in determining state action in other cases. 46 Burke & Reber, supra note 3, at 1077, 1099.

39. In all of the cases cited in notes 36 and 37 supra, a simple ministerial act did not predicate the finding of state action. Instead, there was affirmative state involvement at some decision making level which affected the private act in question. See note 49 infra. Even Justice Douglas, who was fond of finding state action, emphasized in his Moose Lodge dissent that the ministerial act of receiving a permit from the state was not enough to constitute state action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 180 (1972) (Douglas, J., dissenting). Likewise, in Flagg Justice Stevens stressed that ministerial acts have never been enough to constitute state action. 436 U.S. at 173-74 (Stevens, J., dissenting). Contra, Garner v. Tri-State Dev. Co., 382 F. Supp. 377 (E.D. Mich. 1974) (ministerial acts of sheriff or registrar of deeds comprise state action). Justice Stevens claims, however, that in deciding that state action was present in the Sniadach cases under the authorization test, the majority is saying that the purely ministerial actions of the clerks issuing writs in each case constitutes state action. 436 U.S. at 173-74. The majority, in contrast, declared that state action was present not because the writs were issued, but because they ordered either garnishments or seizures by sheriffs. 436 U.S. at 160-61 n.10.

In making their arguments, Justice Stevens seems to have ignored, while Justice Rehnquist seems to have applied, the reasoning of Burton v. Wilmington Parking Auth., 365 U.S. 715 (1964). Therein the Court stated: "Only by sifting facts and weighing circumstances can a nonobvious involvement of the State in private conduct be attributed its true significance." Id. at 722. This language indicates that a court, in searching for state action, should go beyond the surface of what the state obviously has done. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 360-61 (1974). For example, in applying this Burton test to a writ, a court would have to examine the function and result of the writ. In a writ of garnishment, the issuance of the writ is also an ordering by the state to a private entity to hold funds. Since the ordering of an act is "compelling," see note 36 supra, there is state action under the authorization test for the issuance of a writ of garnishment. In a writ of replevin, there is the ordering of the sheriff to seize goods. This constitutes an overt involvement by the state, see note 37 supra, and therefore fits into the authorization test.

types of private acts as state action under the public function theory. The first type concerned First Amendment free speech rights in a company-owned town. In *Marsh v. Alabama*, the Court held that where a privately owned town had assumed all the characteristics of any other town, the town's refusal to allow a Jehovah's Witness to distribute literature in its business district amounted to state action.42

Elections are the second area in which a public function has been found. Where blacks were excluded from participating in state regulated primaries conducted by private political organizations,43 the Court asserted that such specified voter qualifications constituted state action if the state statutorily prescribed and regulated the remaining primary procedures.44 Moreover, even when no state regulation of any kind occurred, state action was found when the winners of privately conducted racially restricted primaries consistently won the general election.45 These decisions indicate that a public function is present when a private entity, on its own initiative,46 acts in the role of the state.

The *Flagg* majority had little problem disposing of the authorization test of state action. Plaintiff argued that state action was present because by enacting section 7-210, New York had authorized and encouraged the sale of her goods by the warehouseman.47 In analyzing the facts of *Flagg* under the authorization test for state action, the Court looked for some form of compulsion by the state in the warehouseman's sale.48 The majority determined

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42. Id. at 502.
46. See note 76 infra. The Court briefly extended public function beyond the scope of *Marsh* and the election cases in *Amalgamated Food Employees Union v. Logan Valley Plaza*, Inc., 391 U.S. 308 (1968), in which the state enforced a private shopping center's refusal to allow labor picketers to picket a store located on its premises. In determining that state action existed, the Supreme Court noted that the shopping center was the equivalent of the business district of *Marsh* and that the picketers would have been unable to express their ideas to the public unless they were allowed to do so in the shopping center itself. *Id.* at 317-23. In addition, the Court stated that state action was present because the exercise of the picketers' First Amendment rights was for a purpose consonant with the use of the private property. *Id.* at 319-20. This holding, however, was subsequently limited by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), which stated that *Logan Valley* was not dependent upon the notion that the shopping center was the equivalent of the business district in *Marsh*, and instead declared that the facts present in *Logan Valley* constituted state action because there were no other reasonable opportunities for the pickets to convey their message and the picketing was related to the purpose of the shopping center. *Id.* at 561-63. In a more recent shopping center case, the Court said in *Hudgens v. NLRB*, 424 U.S. 507 (1976), that, indeed, *Lloyd* had intended to overrule *Logan Valley* and limit *Marsh* to situations in which the private entity had taken over all, and not merely some, of the attributes of a town. *Id.* at 513-21.
47. 436 U.S. at 164.
48. See notes 34-39 and accompanying text *supra*. 
that since the state merely permitted, but did not require, the sale to occur, the amount of state involvement was insufficient to constitute "authorization." 49

The public function test was more problematic for the Court. The difficulty stemmed from the necessity that the private act be one that is "traditionally exclusively reserved to the state" in order for state action to be found.50 In considering the requirements of this phrase with respect to the warehouseman’s sale, the Court examined whether the sale was traditionally performed by the state51 and whether there was "exclusivity."52 The Court declared that the traditional aspects of an act should be a necessary but noncontrolling factor in making a public function determination.53 Therefore,

49. 436 U.S. at 164-66. The majority based its decision primarily on the three most recent authorization cases of Evans v.- Abney, 396 U.S. 435 (1970), Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In Evans v. Abney, 396 U.S. 435 (1970), the State of Georgia explicitly allowed a testator to include, if he chose, racial restrictions for a park to be left to a city in his will. Id. at 440. The Supreme Court found no constitutional violations in this statutory provision since the decision to have the racially restricted park was a private one made exclusively by the testator and was not compelled or ordered by the state. Id. at 440-45.

The Court further relied on Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which a private organization (Moose Lodge), which had received a liquor license from the state, refused to serve a black guest a drink. The Supreme Court held that the issuance of the liquor license, which permitted the dispersal of liquor by private actors, did not constitute encouragement of the discrimination. Id. at 172-77. State action was found in Moose Lodge only because a State Liquor Control Board Regulation required all private liquor licensees to follow their own by-laws in order to keep their licenses. Since the Lodge had a discrimination rule, it had no choice but to discriminate. Therefore, state action was present in Moose Lodge only because the state compelled the Lodge to follow the discrimination rule the Lodge had established on its own initiative. Id. at 177-79.

Finally, the Court looked to Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), in which no state action was found when the plaintiff had her electric service terminated by the power company. The Supreme Court specifically rejected the argument that state action should be found because state law established the right to terminate service. Id. at 354-55. The power company filed a tariff with the state which provided for the right to terminate service. This provision became effective when the State did not disapprove it. See Pa. Stat. Ann. tit. 66, § 1148 (Purdon 1959) (amended 1976); Pa. P.U.C. TARIFF REGULATIONS § II, “Public Notice of Tariff Changes” (current version at 52 Pa. Code. § 23.41 (1978)). The language of Jackson shows that the State must order the act in question for there to be state action. Id. at 357.

There was no state action in Flagg under the authorization test because the requisite state involvement was not present although New York allowed the warehouseman to sell the debtor’s goods without judicial process. In order to meet the requirements of the authorization test, the state would have had to compel the warehouseman to sell the goods, because state action does not occur when the initiative to exercise the method allowed by state law comes from the private actor and not the State. Id. at 357. Also, since no state official acted overtly in the sale, this part of the authorization test is not met in Flagg.

50. See note 40 and accompanying text supra.

51. The entire public function case history, see notes 40-46 and accompanying text supra, implicitly required that the state must have performed the act in question at some time.

52. 436 U.S. at 157-64.

53. Id. at 157-58. In addition, the Court stated that "to rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a
it concentrated on whether there was exclusivity in the means by which the sale was effectuated. The majority held that in light of *Marsh* and the election cases no exclusivity, and therefore no public function, existed in *Flagg* because the warehouseman’s sale was not the *only* means of resolving the dispute. The Court pointed out that the debtor could have posted a bond to prevent the sale from occurring or sought a waiver of the warehouseman’s right to sell the goods at the time of authorization of storage. It also noted that the debtor could have obtained a legal remedy for any violations by the warehouseman of section 7-210. Thus, it appears that *Flagg* defined “exclusivity” to mean that the private act must be one that precludes *any* possible alternative conduct on the part of the complaining party.

**CRITICISM**

In analyzing the facts in *Flagg* with respect to the public function test, the Court did not closely examine prior cases. For example, the finding of no exclusivity due to the existence of *any* possible alternative, rather than the presence of a “meaningful” alternative, conflicts with the election cases’ decisions. Furthermore, the inclusion of debtor remedies for creditor violations of state law in the category of alternatives that will preclude the finding of a public function is in disaccord with *Marsh* and the election cases. In those cases, where similar remedies were available to the debtor state action was nonetheless established.

remedy found perfectly permissible in another.” *Id.* at 162-63. See *Evans v. Newton*, 382 U.S. 296, 300 (1966) (the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions). This idea has found support at lower court levels. See, e.g., *Anastasia v. Cosmopolitan Nat’l Bank*, 527 F.2d 150, 150, 155-56 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976) (a state statute changing the common law is part of the continuing legislative function to define creditors’ rights); *Davis v. Richmond*, 512 F.2d 201, 203 (1st Cir. 1975) (same); *Adams v. Southern Cal. First Nat’l Bank*, 492 F.2d 324, 330 (9th Cir.), cert. denied, 419 U.S. 1006 (1974) (if state action could be found by a state statute changing the common law, then it would be arguable that state action could be found for all individual wrongs under 28 U.S.C. § 1983). Commentators also advocate this notion. See, e.g., 46 Burke & Reber, *supra* note 3, at 1107; Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen’s Liens*, 54 B.U.L. Rev. 542, 552-53 n.78 (1974). Cf. *Parks v. “Mr. Ford,”* 556 F.2d 132, 138-39 (3rd Cir. 1977) (state action should not turn solely on common law origins, but it still should be strong evidence in making the analysis). The traditional part of the public function test is met because under the common law only the state and not the warehouseman could sell a debtor’s goods. *Brooks v. Flagg Bros., Inc.*, 553 F.2d 764, 771 (2d Cir. 1977). See note 27 *supra*.

54. 436 U.S. at 157-84.
55. *Id.* at 160. The Court noted that in both *Marsh* and the election cases, the acts the private entities prohibited were the only conduct available to the plaintiff in each situation. *Id.* See notes 40-46 and accompanying text *supra*.
57. 436 U.S. at 160.
58. See notes 60-70 and accompanying text *infra*.
59. See notes 71-76 and accompanying text *infra*. 
In construing the limits of *Marsh* and the election cases, the Court defined "exclusivity" too broadly by requiring that *any* possible alternative conduct be precluded in order for a public function to be established.\(^{60}\) The majority ignored the fact that in the election cases there existed the possibility for those blacks prevented from voting in the racially restricted primaries to vote in the general elections. Yet, despite the presence of this alternative, state action was still deemed present.\(^{61}\) Therefore, the *Flagg* requirement that *all* alternatives be precluded in order for exclusivity to be established does not appear to be valid in light of the Court's prior reasoning.

A more sound definition of exclusivity, which yields the same conclusion as *Flagg*, is reached by examining the election cases in greater detail. Earlier decisions indicated that blacks must have a voice in every facet of the election process.\(^{62}\) The Court elaborated on this in *Terry v. Adams*,\(^{63}\) in which a private political organization selected Democratic primary candidates through a non-regulated racially restricted pre-primary—the winners of which had won the general election for over fifty years. This was held to constitute state action. The Court concluded that since the pre-primary was the only election of importance, the private political organization had become the only effective part of the entire electoral process.\(^{64}\) Thus, even though a black could have voted in the general election, such an alternative would have been meaningless.\(^{65}\) It may be inferred, therefore, that a public function should only be found when there are no *meaningful* alternatives available in a given situation.\(^{66}\) Under such a definition, exclusivity could be established even when some alternative conduct still exists in a given case—a situation which indeed occurred in the election cases.

In applying this suggested test of "meaningful alternatives" to the facts in *Flagg*, it must be determined whether alternatives such as posting a bond to replevy goods, or seeking a waiver of the creditor's right to sell the goods, are indeed meaningful.\(^{67}\) The Court's view of meaningfulness of alternatives, as

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\(^{60}\) See notes 50-57 and accompanying text *supra*.

\(^{61}\) See notes 43-45 and accompanying text *supra*.


\(^{63}\) 345 U.S. 461 (1953).

\(^{64}\) *Id.* at 469 (Opinion of Black, J.); *Id.* at 484 (Opinion of Clark, J.).

\(^{65}\) *Id.* at 469-70. See note 62 *supra*.

\(^{66}\) Similarly, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), noted in dicta that alternatives to free speech restrictions must be reasonable. See note 46 *supra*.

\(^{67}\) These alternatives would appear to be totally meaningless since it is very difficult to obtain concessions from a creditor. Moreover, the ability of one faced with the possibility of an auction, because of nonpayment of a bill, to raise sufficient funds to post a bond is often a formidable task. 436 U.S. at 166-67 (Marshall, J., dissenting); See also Beal v. Doe, 432 U.S. 438, 455-57 (1977) (Marshall, J., dissenting); United States v. Kras, 409 U.S. 434, 458-60 (1973) (Marshall, J., dissenting). See notes 88-90 and accompanying text *infra*. Another alternative mentioned by the Court was that N.Y.U.C.C. § 7-210 (McKinney 1964) provided a damage remedy against the warehouseman for violations of its provisions. 436 U.S. at 160. See notes 71-76 and accompanying text *infra*. 

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defined in *United States v. Kras*, 68 indicates that the concept has been broadly interpreted. In *Kras*, a penurious debtor wished to have the court filing fee waived in order to petition for bankruptcy. The Supreme Court, stating that the debtor could have sought to negotiate the debts with his creditors, refused to waive the fee. 69 By analogy, it seems that if the alternatives in *Kras* are meaningful, then the alternatives available in *Flagg* should likewise be considered meaningful. Therefore, since there are meaningful alternatives available in *Flagg*, there can be no state action under this suggested interpretation of the public function test. 70

In addition to broadening the election cases' use of exclusivity, *Flagg* also extended this public function requirement beyond its prior limits by declaring that the state's provision of a remedy to the debtor precluded the finding of a public function. 71 Past Supreme Court cases regarding public function do not justify such an expansion. For example, in *Marsh* the fact that the state remedy of wrongful imprisonment was available to the Jehovah's Witness 72 did not prevent the Court from finding state action under the public function theory. Additionally, the ability to contest the results of an election or seating of a legislator did not impose such a barrier in the election cases. 73 Thus, these cases indicate that "post-act" remedies will not prevent the finding of a public function. Instead, only present alternatives available to the complaining party for resolution of the controversy before the situation resolves itself will preclude the use of this theory. Under the majority's extension, however, it will be virtually impossible for state action to be found under the public function test since there is always a remedy available to every individual who considers himself injured. 74 Certainly, the remedies that were available in *Marsh* and the election cases would force the majority to say that *Flagg* has sub silentio overruled the finding of state action in those decisions. 75 Thus, until further elucidation by the Supreme Court, public function may have died a quiet death. 76

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69. Id. at 445-46.
70. Thus, whether the *Flagg* test of any alternative or the suggested approach of "meaningful" alternative is used, the ultimate result will be the same for the warehouseman's sale: no state action may be found under the public function test.
74. Marbury v. Madison, 1 Cranch 137 (1803).
75. Even though such a finding may be implicit in *Flagg*, no court would be bound by such a sub silentio ruling. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 38 (1952); Arant v. Lane, 245 U.S. 166, 170 (1918); Cross v. Burke, 146 U.S. 82, 87 (1892).
76. A question raised by the dissent of Justice Stevens was whether the warehouseman's sale constituted a public function based on the line of cases beginning with Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). See North Ga., Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972). In each of those cases, in which the state, pursuant to a creditor's request, either ordered garnishments or seized a debtor's goods, the issue was whether a hearing was required before a
debtor's property could be taken. Even though a finding of state action was necessary before the procedural due process question was stated, the Supreme Court never explicitly stated why state action was present. Lower courts which have used Sniadach and its progeny to make state action determinations in debtor-creditor areas have viewed those cases as standing for the notion that state action was present only because the state was affirmatively involved in each act. See Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1170 (5th Cir. 1975); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 928, 930 (1st Cir.), cert. denied, 419 U.S. 1001 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 741 (2d Cir.), cert. denied, 419 U.S. 1009 (1974); Bichel Optical Labs., Inc. v. Marquette Nat'l Bank, 487 F.2d 906, 907 (8th Cir. 1973); Kirch v. Chrysler Credit Corp., 367 F. Supp. 436, 438 (E.D. Tenn. 1973); Johnson v. Associates Fin., Inc., 365 F. Supp. 1380, 1381 (S.D. Ill. 1973); Greene v. First Nat'l Exch. Bank, 348 F. Supp. 672, 674 (W.D. Va. 1972). But see Hall v. Garson, 430 F.2d 430, 440 (5th Cir. 1970) (the issuance of the writ by a clerk was not all that important in determining the presence of state action in Sniadach). See also 46 Burke & Reber, supra note 3, at 1043; Note, Self-Help Repossession: The Constitutional Attack, The Legislative Response, and The Economic Implications, 62 GEO. L.J. 273, 288 n.91 (1973). But see Quinn, State Action: A Pathology and a Proposed Cure, 64 CAL. L. REV. 146, 177 (1976) (after Sniadach, a state may not leave pre-judgment seizure of contested property in private hands without subjecting those private parties to the limitations of the Fourteenth Amendment). In fact, language in Fuentes v. Shevin, 407 U.S. 67, 79 n.12 (1972), has been interpreted to mean that there is no state action when a creditor proceeds without affirmative state aid. Davis v. Richmond, 512 F.2d 201, 202 n.3 (1st Cir. 1975). But see Note, Self-Help Repossession: The Constitutional Attack, The Legislative Response, and The Economic Implications, 62 GEO. L.J. 273, 288 n.91 (1973) (the Supreme Court expressed no opinion on whether self-help is state action for the purposes of 28 U.S.C. § 1983). Only a few courts, however, have used the Sniadach cases as being conclusive in determining whether state action exists in debtor-creditor areas. See cases listed supra. The vast majority of lower courts do not refer to those cases but rather use state action debtor-creditor tests of their own design. See notes 3-4 and accompanying text supra.

The majority explicitly rejected any possibility of finding a public function in Flagg based on the line of cases beginning with Sniadach. 436 U.S. at 157, 160-61 n.10. Instead, they interpreted the finding of state action in those cases as based on the state's affirmative involvement in each action. Id. By examining the meaning of "traditionally exclusively reserved to the state," it may be seen that the circumstances in those cases did not meet the requirements of this public function test. In each of the Sniadach cases the debtor could have posted a bond to free his seized property. North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 601 n.1; Mitchell v. W.T. Grant Co., 416 U.S. at 607; Fuentes v. Shevin, 407 U.S. at 73 n.6, 75 n.7; Sniadach v. Family Fin. Corp., 395 U.S. at 347 (Black, J., dissenting). Therefore, because the seizures were not the only method of resolving those disputes, there is either some alternative under the majority's interpretation of exclusivity or there is a meaningful alternative under the suggested approach. See notes 50-70 and accompanying text supra. Since there are such alternatives, the typical method of using the public function test could not have applied and, therefore, Sniadach and its progeny do not act as public function precedent for debtor-creditor cases such as Flagg.

Justice Stevens, however, argued that a public function could be found in the warehouseman's sale based on Sniadach and its progeny. He stated there was a public function because those cases recognized the state's role in defining and controlling the debtor-creditor relationship. 436 U.S. at 174 (Stevens, J., dissenting). This argument is based primarily on language in Fuentes which stressed that the statutes in question abdicated state control over state power to private use. Id., citing Fuentes v. Shevin, 407 U.S. 67, 93 (1972). This analysis, however, is inappropriate for two reasons. First, the Supreme Court has not found a public function where the state gives up some power voluntarily. For example, in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1964), even though the Supreme Court said the state effectively had abdicated its responsibilities, it held state action existed only because the state had placed its power behind the challenged conduct and had become a joint participant in it. Id. at 724-26. See note 33 supra. Public function instead has been deemed present only in the
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*Flagg* is significant because it establishes for the first time the tests which should be used in making a state action analysis in the debtor-creditor area.

situation where the private entity has assumed the state power on its own and the state was inactive in the initial decision to restrict rights. For example, the company in *Marsh*, without any state participation, restricted the ability to distribute literature on its streets. Similarly, in the election cases, the private political organizations decided on their own the voter qualifications in the primaries. See notes 40-46 and accompanying text *supra*. The *Sniadach* cases differ, however, because the state had affirmatively participated in the initiation of each of the seizures or garnishments. In each of the *Sniadach* cases the creditor came to the state and asked for a writ of garnishment or replevin. The state then either ordered garnishments or had a sheriff seize the debtor's property. Therefore, these debtor-creditor cases do not fit into the public function mold.

Secondly, Justice Stevens misread the term "state power" as used by the Supreme Court in *Fuentes*. He interpreted the *Fuentes* Court's use of "state power" to mean only the general power of the state to control the overall debtor-creditor relationship. 436 U.S. at 174 (Stevens, J., dissenting). Stevens spoke in terms of the state power to order binding, nonconsensual resolution of a conflict between a debtor and creditor. *Id.* To support this, Justice Stevens cited this partial paragraph from *Fuentes*:

Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters.

*Id.* at 174-75, citing *Fuentes* v. Shevin, 407 U.S. 67, 93 (1972). However, by looking more closely at *Fuentes*, the term "state power" can be seen to include within its scope a comprehension of how the power was to be used. In the final line of the above quoted paragraph, which Justice Stevens did not cite in his dissent, the Court wrote that "[t]he State acts largely in the dark." *Id.* at 93 (emphasis added). The act performed by the State in *Fuentes* was the sheriff's seizure of a debtor's goods. With the inclusion of this last line, the quoted paragraph from *Fuentes* simply indicates that when the state acts affirmatively, it must obey the requirements of the Fourteenth Amendment. Moreover, the *Fuentes* Court explicitly stated that the issue in that case was only whether a hearing was necessary when "the State authorizes its agents to seize property..." *Id.* at 80 (emphasis added). See *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672, 674-75 (W.D. Va. 1972). Neither in *Fuentes* nor in any of the other *Sniadach* cases did the Supreme Court ever deemphasize the role of the states' affirmative actions. Thus, it is this presence of an affirmative state act in the line of cases beginning with *Sniadach*, and not some expanded view of public function, that must be used as precedent for finding state action in debtor-creditor cases.

Furthermore, if Justice Stevens' "control" theory was correct, then in *Moose Lodge* the issuance of liquor licenses by Pennsylvania would be the State's method of controlling to whom liquor should be sold and state action would have to be found. But the *Moose Lodge* Court rejected this type of reasoning. *Moose Lodge* No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). Moreover, even if Justice Stevens' interpretation for finding state action in *Fuentes* is correct, there are two points that he overlooks in making the analogy to *Flagg*. First, in *Fuentes*, the state did not place complete power in the hands of the creditor. The statutes in *Fuentes* merely put the ability to invoke state power within the creditor's grasp. *Fuentes* v. Shevin, 407 U.S. 67, 93 (1972) (emphasis added). The state still had to become involved in the repossession in *Fuentes* by actually seizing the goods. There was, however, no such involvement by the state in the warehouseman's sale. Thus, *Flagg* may be distinguished from *Fuentes*. Secondly, the Court in *Fuentes* explicitly stated that the holding was a narrow one and should be limited to its fact situation. *Id.* at 96-97.
Since *Flagg* was analyzed only in terms of past Supreme Court state action holdings, future debtor-creditor cases requiring state action analyses should now be based only on the traditional Supreme Court tests, and not on other factors previously considered in the lower courts.\(^7\)

Moreover, although the Court now allows a warehouseman to sell a debtor’s goods without first providing a hearing on the validity of the debt, the language of the decision does, indeed, set some limitations with respect to how far a state may allow a creditor to act.\(^7\) For example, if a state enacts a statute permitting a creditor to retain proceeds of a lien sale exceeding the amount of the debt, state action could be found.\(^8\) It is clear that *Flagg* is limited to creditor remedies\(^8\) which were available at the time of the decision.\(^8\) The Uniform Commercial Code, which currently regulates debtor-creditor dispute resolution, indicates that creditor remedies are confined to the amount of the debt in question.\(^8\) Therefore, keeping monies over the value of the debt is not a creditor remedy meeting the requirements of *Flagg*, but rather would be available under a grant of punitive damages. This is something that would fall under the public function theory of state action since the awarding of punitive damages is solely a function of a court.\(^8\)

\(^7\) See notes 3-4 and accompanying text *supra*.

\(^8\) The Court wrote that the entire field of creditor remedies is outside the scope of the public function test, but also stated that this does not mean the entire area of debtor-creditor dispute resolution is beyond constitutional constraints. 436 U.S. at 162 n.12 and accompanying text. In addition, if there is an affirmative significant act by the state, state action will be found under the authorization test. See notes 34-39 and accompanying text *supra*.

\(^9\) Justice Stevens argued that no state action could be found in this situation under the majority’s reasoning since the state permits but does not compel the act in an area not exclusively reserved to the state. 436 U.S. at 170 (Stevens, J., dissenting).


\(^8\) In addition to stating that the entire area of debtor-creditor dispute resolution was not beyond constitutional constraints, the Court also pointed out that the sale under N.Y.U.C.C. § 7-210 (McKinney 1964) was not generally different from any other existing creditor remedy and was what a warehouseman would tend to do even in the absence of the state statute. 436 U.S. at 162 n.12.

\(^8\) At the present time 49 of the 50 states and the District of Columbia have adopted the Uniform Commercial Code. See, e.g., U.C.C. § 9-504, which provides that a secured creditor can sell collateral after a debtor’s default. This code section states that a creditor may keep monies obtained for the value of the debt (plus expenses incurred) but is liable to the debtor for any surplus received.

\(^8\) See, e.g., *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505 (1932); *Ross v. Leggett*, 61 Mich. 445, 28 N.W. 695 (1886); *Cabakov v. Thatcher*, 37 N.J. Super. 249, 177 A.2d 298 (1955); *Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956). Even though the debtor could post a bond in order to get a hearing on the debt, if the court determined the debt was valid, the creditor could sell the goods pursuant to the statute and automatically could collect monies over the value of the debt without any judicial interference in determining the amount of those punitive damages. But since punitive damages are only awarded at a jury’s discretion and not as a matter of right, see cases cited *supra*, state action would be found under the public function test. The debtor would, therefore, be entitled to a hearing on this excess money. The public function test
Furthermore, based on *Flagg*, a state could not permit finance companies or individuals to enter private homes to seize property.\(^{84}\) The majority stated that this type of conduct would constitute state authorization of private breach of the peace, which did not occur in *Flagg*.\(^{85}\) Thus, the Court indicated that state action would be found in this set of circumstances under the authorization test.\(^{86}\) By stating that a breach of peace will constitute state action under the authorization test, the Court has left the outcome of future seizure cases to depend on the particular jurisdiction's definition of breach of peace. This is not a very definite standard, and the ultimate result in such debtor-creditor state action cases likely may be left entirely to the discretion of the courts if there is no specific breach of peace statute.\(^{87}\)

The holding in *Flagg* should be viewed from two policy perspectives: equitable and commercial. On an equitable basis, the decision is unfair to debtors. As Justice Marshall in his dissent suggested, the alternatives which the majority states are available to debtors represent an "indifference to the realities of life for the poor."\(^{88}\) Thus, for example, if a debtor could afford to post a bond, the debt perhaps could have been paid.

Commercial necessity, however, overwhelmingly required *Flagg* to be decided as it was, for if state action had been found there almost certainly would have been present a violation of the Due Process Clause and a hear-

84. 436 U.S. at 170 (Stevens, J., dissenting). See note 79 supra.

85. 436 U.S. at 160 n.9.

86. Even though the Court did not explain why it made this statement, it is obvious that it was based on the fact that the Uniform Commercial Code allows a creditor to seize goods from a debtor without judicial process as long as he does not breach the peace. See, e.g., U.C.C. § 9-503. A breach of the peace could not go under the public function theory, since a debtor could still seek a waiver of the creditor's right to repossess, which is one of the explicit alternatives which the Court found to negate a public function in *Flagg*. 436 U.S. at 160.

87. For example, in Hall v. Carson, 430 F.2d 430 (5th Cir. 1970), state action was found when a landlord enforced a statutory landlord's lien by entering a tenant's dwelling without judicial authorization and seizing a television set belonging to the tenant. The same court, however, held that no state action was present when a salesman acting pursuant to a state statute repossessed a car by towing it away from in front of the purchaser's house without giving notice to the buyer or invoking official process. James v. Pinnix, 405 F.2d 206 (5th Cir. 1974). A point distinguishing the two cases is that it is generally more difficult to peacefully enter into a debtor's home to seize the goods than it is to seize a car on the street. Similarly, the Ninth Circuit, in Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975), found state action while the First Circuit, in Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975), did not find state action in similar cases involving hotelkeepers seizing, without notice or judicial procedure, the personal property of lodgers who failed to pay rent. The *Davis* court believed that the hotelkeeper's seizing was something to be expected in the ordinary course of private affairs, id. at 203, but the *Culbertson* court did not agree. 528 F.2d at 432.

88. 436 U.S. at 166 (Marshall, J., dissenting).
ing would have been required. By requiring hearings for a warehouseman's sale, and by extension, for all other debtor-creditor disputes, either the availability of credit in this country would be reduced or the expense of securing it would be increased. Therefore, on a pragmatic level, the commercial necessity argument outweighs the equity argument.

With respect to current judicial philosophy, Flagg marks a continuance of the Burger Court's policy to curtail the state action concept. Even though there are apparent inconsistencies with prior cases, the Court's ultimate finding of no state action was justifiable. Flagg established the tests to be used to find state action in debtor-creditor cases, but how the tests will be applied by the lower courts is yet unclear. In light of the reluctance of most courts to find state action, however, the best advice that can be given a debtor is to pay the bill.

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89. This conclusion is arrived at by looking at Sniadach and its progeny. See note 76 supra. In each of those cases a creditor would go to the state and ask for a writ of garnishment or writ of replevin. The holding of each decision was that unless there was a judicial determination of the validity of the debt in question prior to the seizure of the debtor's property, the Fourteenth Amendment was violated. Since a judge does not examine any aspect of a warehouseman's sale pursuant to U.C.C. § 7-210, due process would be violated here also.

90. Fuentes v. Shevin, 407 U.S. 67, 102-03 (1972) (White, J., dissenting); see Cook v. Lilly, 208 S.E.2d 784 (W. Va. Sup. Ct. App. 1974) (recourse to law increases the cost of doing business and has a potentially negative effect upon industry and commerce); Plante v. Industrial Nat'l Bank, 12 U.C.C.R.S. 739 (R.I. Super. Ct. 1973) (the credit structure of the United States would not be improved by tearing it down in order to attempt to correct imperfections that might from time to time be susceptible of improvement). But see Watson v. Branch County Bank, 380 F. Supp. 945 (D.C. Mich. 1974) (commercial interests are outweighed by the severe damage done to the debtor's human rights protected by the due process clause). See also Johnson, Denial of Self-Help Repossession: An Economic Analysis, 47 S. Cal. L. Rev. 82 (1973) (denial of self-help repossession seems to promise little added protection to the few who need it, but imposes a substantial incremental cost on those who can least afford it). But see Daver & Gilhoal, The Economics of Constitutionalized Repossession: A Critique For Professor Johnson, and A Partial Reply, 47 S. Cal. L. Rev. 116 (1973).
