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FLAGG BROTHERS, INC. V. BROOKS THE PUBLIC FUNCTION DOCTRINE IN RETREAT

INTRODUCTION

Since the *Civil Rights Cases*,[1] it has been clear that the prohibitions of the fourteenth amendment do not apply to purely private conduct, rather, they apply only to conduct attributable to a state. Thus, in order to subject seemingly private activity to the restraints of the fourteenth amendment, courts have had to determine whether the challenged conduct constituted "state action."[2]

The Supreme Court has indicated that the "under color of state law" provision of section 1983 of the Civil Rights Act of 1871[3] and the state action requirement of the fourteenth amendment are equivalent.[4] Claims brought under this statute and its jurisdictional counterpart[5] have resulted in the Court's leading decisions on the issue of what private activity constitutes state action.[6] However, the Court has had great difficulty in drawing a

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1. 109 U.S. 3 (1883).
2. *E.g.* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); *see* text accompanying notes 73-74 *infra*.
3. 42 U.S.C. § 1983 (1976). Section 1983 provides:

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

4. Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966).
5. 28 U.S.C. § 1343(3) (1976) 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 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. . . .

6. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (due process attack on state authorized prejudgment sale of encumbered goods by warehousemen); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (due process attack on termination practices of privately owned utility); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (equal protection attack on racially discriminatory practices of restaurant leasing space in a state owned building; state action found).

definitive line between state and private action.[7] State action has readily been found where public officials have lent the weight of their offices to the actions of private individuals.[8] However, when public officials have not provided the imprimatur of state involvement in private transactions, the Court has developed three primary approaches to find state action.[9]

The "public function" doctrine subjects certain activities to the protections of the fourteenth amendment regardless of state involvement. Private operation of a company owned town,[10] administration of a party primary,[11] pre-primary elections[12] and management of a park[13] have all been deemed public functions subject to constitutional regulation without a finding of any state participation in the challenged activities. In a recent case involving a public utility company's termination of service, the Court explained that for an activity engaged in by a private party to be found to be a "public function," "powers traditionally exclusively reserved to the State" must be exercised by that private party.[14]

The second area where state action has been found occurs when a state has either "authorized or encouraged" a certain

7. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the Court noted that devising a formula for determining state action in nonobvious situations was impossible. The Court advocated a case by case analysis "by sifting facts and weighing circumstances" to determine whether state action exists. *Id.* at 722. This principle was affirmed in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); *accord*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972). *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, ch. 14 (1978).

8. North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975) (writ of garnishment issued by state officer so authorized or court clerk on affidavit of plaintiff or his attorney, containing only conclusory allegations); Fuentes v. Shevin, 407 U.S. 67 (1972) (private party obtained prejudgment writ of replevin through summary *ex parte* application to a court clerk by posting double value bond; sheriff then required to execute writ by seizing the property); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (clerk of the court issues summons at the request of creditor's lawyer and later serves garnishee, setting in motion the machinery whereby wages are frozen).

9. Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 [hereinafter cited as Glennon & Nowak].

10. Marsh v. Alabama, 326 U.S. 501 (1946).

11. Nixon v. Condon, 286 U.S. 73 (1932).

12. Terry v. Adams, 345 U.S. 461 (1953); *see also* Smith v. Allwright, 321 U.S. 649 (1944) (state political party convention was held subject to constitutional regulation).

13. Evans v. Newton, 382 U.S. 296 (1966). *But see* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 n.8 (1978) (stating that *Evans* had been decided upon a "finding of ordinary state action under extraordinary circumstances").

14. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

private activity.[15] In *Reitman v. Mulkey*,[16] the case defining this doctrine, the Supreme Court held that a state constitutional amendment, prohibiting the legislature from restricting an individual's right to refuse to sell or lease real property as he chose, violated the equal protection clause of the fourteenth amendment.[17] The Court found that the amendment had been pushed through in response to the Unruh[18] and Rumford Acts,[19] which had prohibited racial discrimination in the sale or rental of any private dwelling.[20] In so finding, the Court reasoned that the amendment "would encourage and significantly involve the State in private racial discrimination."[21] However, in subsequent decisions the Court has declined to expand *Reitman*.[22]

Burton v. Wilmington Parking Authority[23] established the third primary approach of finding state action—the "symbiotic relationship" doctrine.[24] In *Burton*, a privately owned restaurant that leased space in a publicly owned and operated building refused to serve blacks. The Court closely examined and weighed the facts before concluding that Delaware had been a "joint participant" in the restaurant's operation.[25] The rendering of mutual benefits between a private actor and the state will support a finding that a "symbiotic relationship" exists. This relationship is characterized as state action.[26]

The concept of state action has been developed primarily in

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15. Reitman v. Mulkey, 387 U.S. 369, 375 (1967).
16. *Id.*
17. *Id.* at 373.
18. CAL. Civ. CODE § 51-52 (West 1959).
19. CAL. Health & Safety CODE § 35700-35744 (West 1963) (the Rumford Fair Housing Act has been amended since 1963, and its present version may be found in the West supplemental pocket part under the above same citation).
20. Reitman v. Mulkey, 387 U.S. 369, 374 (1967).
21. *Id.* at 381.
22. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (state statute authorizing a warehouseman's prejudgment sale of encumbered goods held not to constitute state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-77 (1972) (regulatory scheme enforced by state liquor board does not sufficiently involve state to constitute state action); Adickes v. S.H. Kress & Co., 398 U.S. 144, 148, 167 (1970) (state statute allowing freedom of choice with whom to do business not enough for finding of state action; likewise for local custom unless accompanied by persistent practices of local officials). *See generally* Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) [hereinafter cited as Black, *"State Action"*].
23. 365 U.S. 715 (1961).
24. Both Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174-75 (1972) cited *Burton* as defining the state action theory of symbiotic relationships.
25. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-26 (1961).
26. *Id.*; Melara v. Kennedy, 541 F.2d 802, 806 (9th Cir. 1976).

the area of racial discrimination where the basis of the claim has been a denial of equal protection.[27] However, where equal protection is not the basis of the claim and racial discrimination is not involved, the courts will more narrowly construe the state action concept.[28]

In recent years there has been a steady increase in due process[29] attacks on creditors' self-help remedies.[30] Of the three primary approaches to a finding of state action the "public function" and "authorized and encouraged" doctrines have predominated,[31] with the public function approach being the more successful.[32]

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27. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (held private club's racially discriminatory practices not state action solely because of state granting club a liquor license); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (local custom of racial discrimination by restaurants not state action unless accompanied by persistent practices of state officials); Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment allowing persons to decline to rent or sell to whomever they choose was state action); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (restaurant leasing space in state owned and operated building refused to serve blacks; held state action); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of restrictive covenants was held state action). *See, e.g.*, Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1010 (1973) [hereinafter cited as Burke & Reber]; Black, *"State Action"*, *supra* note 19, at 70-71. *See generally* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

28. Jackson v. Statler Foundation, 496 F.2d 623, 634-35 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (action brought against charitable foundation alleging racial discrimination); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 333 n.24 (9th Cir. 1974), *cert. denied*, 419 U.S. 1006 (1974) (debtor's vehicles repossessed without warning, brought action alleging violation of due process under the fourteenth amendment). *Accord*, Burke & Reber, *supra* note 25, at 1034-41. *See generally* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 658 (1974).

29. U.S. CONST. amend. XIV provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

30. Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1, 3 (1973).

31. This is true because the state usually does not derive any benefit from aiding the creditor and thus a symbiotic relationship can not be found. In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), the state was receiving rental payments from a restaurant tenant and a symbiotic relationship was held to exist. The Court has cited *Burton* as defining the doctrine of symbiotic relationships on numerous occasions. *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357-58 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174-75 (1972).

32. The "authorized and encouraged" rationale of Reitman v. Mulkey, 387 U.S. 369 (1967), has been widely criticized by commentators who have suggested that this rationale would only be applicable in cases involving racial discrimination. *See* Black, *"State Action"*, *supra* note 22, at 81-82; Burke & Reber, *supra* note 27, at 1078-80. Consequently, some courts have balked at the idea of using this doctrine to find state action in non-racial

Resolution of the presence of state action precedes[33] any determination of the constitutional challenge.[34] Regardless of the merits of the plaintiff's substantive claim, a debtor's suit will be dismissed if the court finds that the challenged activity does not constitute state action.[35] Only when a creditor's conduct is termed state action are prior notice and an opportunity to be heard constitutionally required by due process prior to depriving a debtor of his property.[36]

Among the creditor's self-help remedies that have been challenged as denying procedural due process are innkeeper's and landlord's liens,[37] repossessions under sections 9-503 and 9-504 of the Uniform Commercial Code,[38] repairman's and garage-

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cases. Flagg Bros., Inc. v. Brooks, 553 F.2d 764, 770-71 (2d Cir. 1977), *rev'd on other grounds*, 436 U.S. 149 (1978). *See generally* Annot., 32 A.L.R. Fed. 431, §§ 1-5 (1977).

33. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1974).

34. *E.g.*, Flagg Bros., Inc. v. Brooks, 553 F.2d 764, 769 (2d Cir. 1977), *rev'd on other grounds*, 436 U.S. 149 (1978); Melara v. Kennedy, 541 F.2d 802, 804 (9th Cir. 1976).

35. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). In *Jackson*, the Court did not reach the due process question because it initially determined that the furnishing of utility services was neither a state function nor a municipal duty. *See, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (dismissed Brooks' due process claim without reaching the substantive merits, when determined that Flagg's action was purely private).

36. *See generally* Burke & Reber, *supra* note 27; Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

37. Held to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to a state statute; *e.g.*, Culbertson v. Leland, 528 F.2d 426 (9th Cir. 1975); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Johnson v. Riverside Hotel, Inc., 399 F. Supp. 1138 (S.D. Fla. 1975); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

Held not to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to a state statute; *e.g.*, Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975); Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn. 1971), *aff'd on other grounds*, 450 F.2d 487 (2d Cir. 1971).

38. Held to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to U.C.C. §§ 9-503 and 9-504; *e.g.*, Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974), *rev'd mem.*, 516 F.2d 902 (6th Cir. 1975) (9-503); Boland v. Essex County Bank & Trust, 361 F. Supp. 917 (D. Mass. 1973) (9-503, 9-504, and state's installment sales laws).

Held not to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to U.C.C. § 9-503 and 9-504; *e.g.*, Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974) (9-503); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974) (9-503); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974) (9-503, 9-504); Gary v. Darnell, 505 F.2d 741 (6th Cir. 1974) (9-503); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir. 1974) (9-503, 9-504), *cert.*

man's liens,[39] and execution on a warehouseman's lien pursuant to section 7-210.[40] The decisions have been inconsistent and virtually impossible to reconcile[41] because the lower courts have been forced to apply principles developed by the Supreme Court under different circumstances.[42]

The Supreme Court granted certiorari in *Flagg Brothers, Inc. v. Brooks*[43] to resolve the conflict regarding the constitutionality of statutory, private creditor self-help remedies in which state officials had not participated. The specific issue in

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denied, 419 U.S. 1006 (1974); Nichols v. Tower Grove Bank, 497 F.2d 404 (8th Cir. 1974) (9-503, 9-504); Gibbs v. Titleman, 502 F.2d 1107 (3d Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974) (9-503, 9-504 and Penn. Motor Vehicle Sales Finance Act); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1974) (9-503, 9-504), *cert. denied*, 419 U.S. 1006 (1974); Johnson v. Associates Fin. Inc., 365 F. Supp. 1380 (S.D. Ill. 1973) (9-503, 9-504); Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (E.D. Tenn. 1973) (9-503); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972) (9-503, 9-504); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972) (9-503, 9-504 and provisions of Colorado's motor vehicle laws); Green v. First Nat'l Exch. Bank, 348 F. Supp. 672 (W.D. Va. 1972) (9-503); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971) (9-503).

39. Held to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to a state statute; *e.g.*, Tedeschi v. Blackwood, 410 F. Supp. 34 (D. Conn. 1976) (garageman's lien); Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974) (garageman's lien); Straley v. Gassaway Motor Co., 359 F. Supp. 902 (S.D. W. Va. 1973) (repairman's lien, implicit state action).

Held not to be action under color of state law within the meaning of 42 U.S.C. § 1983 (1976) when a private person acted pursuant to a state statute; *e.g.* Parks v. "Mr. Ford", 386 F.2d 1251 (7th Cir. 1974) (repairman's lien); Phillips v. Money, 503 F. Supp. 990 (E.D. Pa. 1974).

40. Flagg Bros., Inc. v. Brooks, 553 F.2d 764 (2d Cir. 1977) (state action found), *rev'd*, 436 U.S. 149 (1978); Cox Bakeries of N.D. v. Timm Moving & Storage, Inc., 554 F.2d 356 (8th Cir. 1977) (state action found); Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976) (no state action); Magro v. Lentini Bros. Moving & Storage Co., 338 F. Supp. 464 (E.D.N.Y. 1971) (the court did not consider the state action question, assumed state action existed and found no denial of fourteenth amendment rights. The court erred in this approach because the state action issue must be resolved before reaching the constitutional challenge, *see* note 32 and accompanying text *supra*). U.C.C. § 7-210. The challenged statute in *Flagg* provides in pertinent part:

> § 7-210. *Enforcement of Warehouseman's Lien*
> (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.
> (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. . . .

N.Y. U.C.C. § 7-210 (62½ McKinney 1964) (The omitted portions of the statute deal primarily with the notice which a warehouseman must give the owner of encumbered goods before selling them.).

41. *See* notes 35-38 and accompanying text *supra*. *See generally* Annot., 32 A.L.R. Fed. 431, §§ 12-20 (1977).

42. Burke & Reber, *supra* note 27, at 1040-41.

43. *Cert. granted*, 434 U.S. 817 (1977).

Flagg was whether a state statute which authorized a private creditor to permanently deprive a debtor of his property without his consent must meet the requirements of the due process clause of the fourteenth amendment.

FACTS AND DISTRICT COURT RULING

In 1973, Shirley Herriot Brooks was evicted from her apartment building by the City Marshall of Mount Vernon, New York. Believing she had no choice, Ms. Brooks agreed to store her possessions with Flagg Brothers, Inc.[44] A dispute arose over storage charges and Ms. Brooks was informed that unless she paid her account, her goods would be sold pursuant to New York Commercial Code section 7-210(2).[45] She then brought a class action under 42 U.S.C. section 1983 and its jurisdictional counterpart, 28 U.S.C. 1343(3), seeking damages, injunctive relief, and a declaration that section 7-210(2) violated her due process rights as guaranteed by the fourteenth amendment.

The district court found that Flagg Brothers' proposed sale of Ms. Brooks' goods pursuant to section 7-210(2) would not constitute state action and dismissed the action on two grounds.[46] First, Ms. Brooks had failed to show sufficient state involvement to confer subject matter jurisdiction upon the court under section 1343(3). Second, plaintiff failed to state a claim upon which relief could be granted under section 1983.[47]

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44. The city marshall removed Ms. Brooks and her possessions from her apartment. When Ms. Brooks stated that she wished to call someone to store her goods, the marshall informed her that she could not do this and that the man accompanying the marshall, defendant Henry Flagg, president of defendant Flagg Bros., Inc., would store her furniture. 553 F.2d 764, 766-67 (1977). The city marshall had originally been joined as a defendant but was let out of the case for some unexplained reason. Had the plaintiff chosen to keep the marshall in the case she almost certainly would have prevailed in satisfying the state action requirement. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

45. *See* note 40 *supra.*

46. 404 F. Supp. 1059, 1066-67 (S.D.N.Y. 1975).

47. *Id.* at 1061. The Supreme Court, in reversing the Second Circuit, stated that it agreed with the district court for dismissing the action for want of subject matter jurisdiction under § 1343(3). 436 U.S. 149 (1978). The Court then acknowledged that the district court had also dismissed the action because the plaintiff had failed to state a claim for relief under § 1983 and proceeded to examine the adequacy of respondents' claim for relief under § 1983. In this manner the Court apparently overlooked the error of the district court's dismissal. State action is a necessary element of both § 1343(3) and § 1983. *See* notes 3, 5 *supra.* However, only a "substantial" *allegation* of state action is necessary to confer subject matter jurisdiction on a federal district court under § 1343(3), Hoggans v. Lavine, 415 U.S. 528, 536-39 (1974); whereas a *finding* of state action is a necessary element of a valid claim for relief under § 1983. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The district court appears to have based its dismissal of

THE DECISION OF THE SECOND CIRCUIT

On appeal, Ms. Brooks asserted that Flagg Brothers' proposed conduct would constitute state action on either of two grounds: the state had delegated a uniquely governmental power, and, by enacting section 7-210, New York had authorized and encouraged Flagg Brothers' proposed action. The Second Circuit agreed with Ms. Brooks' first contention that New York had delegated an essentially public function, basing its decision upon an historical analysis of warehousemen's remedies and the practical impact of the change in the common law caused by the enactment of section 7-210.[48] The court acknowledged that the Supreme Court had not addressed the particular question of whether a state's delegation of authority to private creditors constituted state action, and relied upon the Supreme Court's reasoning in *Jackson v. Metropolitan Edison Co.*,[49] a case involving a due process challenge of the termination practices of a privately owned utility company.[50]

THE OPINION OF THE SUPREME COURT

The Majority Opinion

The Court announced that the only issue involved was whether Flagg Brothers' proposed action, taken pursuant to section 7-210(2), was fairly attributal to the State of New York. In

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Brooks' action, for jurisdictional grounds, upon a *finding* that Flagg's proposed conduct would not *actually* constitute state action. 404 F. Supp. 1059 (S.D.N.Y. 1975). Having once assumed jurisdiction to determine the sufficiency of Brooks' § 1983 claim, the district court should not have dismissed the action on jurisdictional grounds as the Supreme Court made clear in Hoggans v. Lavine, 415 U.S. 528, 538-542 (1974):

> §§ 1343(3) and 1983 unquestionably authorized federal courts to entertain suits to redress the deprivation, under color of state law, of constitutional rights. It is also plain that the complaint formally alleged such a deprivation. The District Court's jurisdiction, a matter of threshold determination, turned on whether the question was too insubstantial for consideration. "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction". [citation omitted]

48. 553 F.2d 764, 770-73 (2d Cir. 1977).
49. 419 U.S. 345, 352-53 (1974).
50. 553 F.2d 764, 770-73 (2d Cir. 1977).

deciding that it was not, the Court rejected both the "public function" and the "authorized and encouraged" arguments advanced by Ms. Brooks.

The Public Function Doctrine

In dealing with Ms. Brooks' "primary contention . . . that New York . . . [had] delegated to Flagg Brothers a power 'traditionally exclusively reserved to the State'," [51] the Supreme Court relied heavily upon the language of *Jackson v. Metropolitan Edison Co.* [52] in explaining that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State'." [53] The *Flagg* Court made it clear that only those activities *exclusively* reserved to the state could be considered public functions, [54] but that a power or activity which had been *traditionally* reserved to the state was not enough. [55] The Court specifically rejected an historical analysis of warehousemen's remedies as being of no value. [56]

The Court outlined the activities which it had deemed to be public functions in prior decisions. Included by the *Flagg* Court were: the operation and government of a company owned town, [57] and the administration of party primary [58] and pre-primary elections. [59] The Supreme Court found that running through these cases was the "common . . . feature of exclusivity" which distinguished them from the situation in *Flagg*. [60] Specifically, the elections involved in the cases above had been the only meaningful ones held in that state, and the streets of the company owned town had been the only ones available for the purpose of exercising first amendment rights. Thus, the *Flagg* Court found distinguishing features of "exclusivity" under these facts. [61] In determining that the settlement of

51. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

52. 419 U.S. 345, 352 (1974). "We have, of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State."

53. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978).

54. *Id.* at 159.

55. *Id.* at 160.

56. *Id.* at 162-63.

57. Marsh v. Alabama, 326 U.S. 501 (1946).

58. Smith v. Allwright, 321 U.S. 649 (1944) (racially restrictive policies of party convention held unconstitutional); Nixon v. Condon, 286 U.S. 73 (1932) (racially restrictive policies of party primary election held unconstitutional).

59. Terry v. Adams, 345 U.S. 461 (1953).

60. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 (1978).

61. *Id.* at 159-60.

debtor-creditor disputes was not a function exclusively reserved to the state, the *Flagg* Court found it to be decisive that alternative means of relief had been available to Ms. Brooks.[62] The Court therefore concluded "that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."[63]

State Authorized and Encouraged Action

The *Flagg* Court dealt briefly with Ms. Brooks' second contention, namely, that New York had authorized and encouraged Flagg Brothers' proposed conduct by enacting section 7-210. The Court explained that a statute or regulation must do more than simply allow a certain activity before state action will be found, stating that recent cases had rejected the prior notion that state acquiescence would impose fourteenth amendment restraints on private action.[64] The *Flagg* Court indicated that unless a statute or regulation "compelled" private action, the resulting transaction would not be attributable to the state.[65] Certain private action could be legislatively permitted without being subject to fourteenth amendment restraints.[66] Section 7-210 did not require Flagg Brothers to sell Ms. Brooks' goods in order to satisfy their possessory lien; it merely allowed them to do so at their discretion. Therefore, the Court held that New York's enactment of section 7-210 did not constitute state action.[67]

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62. *Id.* at 161-62.

63. *Id.* at 161. The Court cautioned, however, that it was not asserting that dispute resolution between debtors and creditors was wholly beyond Constitutional constraint. *Id.* at 173 n.12.

64. *Id.* at 164, citing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

65. 436 U.S. 149, 165 (1978).

66. *Id.* The Court relied upon Evans v. Abney, 398 U.S. 435 (1970), to illustrate this principle. In *Evans*, realty was allowed to revert to the settlor's heirs after it was determined that the land could not be used for a racially restricted park as the settlor had directed. The Georgia court, in allowing the property to revert, had refused to apply *cy-pres* to delete certain terms of the trust. Rather, they recognized that state law allowed a settlor to set trust terms and conditions as he saw fit. The Supreme Court affirmed, finding no state action.

67. 436 U.S. 149, 166 (1978). Justice Rehnquist felt that since all property rights are determined by state law,

> [i]t would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state officials or state process were ever involved in enforcing that body of law.

Id. at 160 n.10.

The Dissent[68]

Justice Stevens, dissenting, disagreed with the Court's analytical approach and the standards that it had applied to Ms. Brooks' state action arguments. Justice Stevens insisted that an historical analysis had previously been used primarily in determining whether a state had delegated a public function, and that the *Flagg* Court's standards of "exclusivity" and "compulsion," as applied to the "public function" and "authorized and encouraged" doctrines respectively, were inflexible and therefore unworkable.[69]

Acknowledging that there was little support for the proposition that statutory authorization alone was sufficient to establish state action, Justice Stevens found that it was not necessary to consider this argument[70] because, he contended, New York had delegated a public function to Flagg Brothers by enacting section 7-210. In support of this conclusion, Justice Stevens cited the line of cases beginning with *Sniadach v. Family Finance Corp.*,[71] which had invalidated certain state statutes authorizing summary creditor remedies. He disagreed with the majority's distinction of these cases on the basis of official state involvement. Justice Stevens argued that in these cases the Court had looked to the nature of the powers delegated, and not to the ministerial acts of minor state officials, in determining that these statutes had granted state authority to the private creditors. He therefore thought it relevant that no state officials had participated in *Flagg* because a warehouseman's power under section 7-210 was broader than that authorized in these previous cases.[72] Consequently, Justice Stevens felt that the *Flagg* Court's decision was "fundamentally inconsistent with, if not foreclosed by"

68. Justice Marshall wrote a short dissent, 436 U.S. 149, 166-68 (1978), expressing the sentiment that the Court was showing "indifference to the realities of life for the poor." He also felt that the Court should have given more weight to an historical analysis of warehousemen's remedies at common law in determining whether New York's delegation of power constituted a public function. However, Justice Marshall also joined Mr. Justice Stevens' more substantial dissent and for that reason I consider directly only the latter.

69. *Id.* at 167-68.

70. *Id.* at 171. Justice Stevens stated: "While members of this Court have suggested that statutory authorization alone may be sufficient to establish state action, it is not necessary to rely on those suggestions in this case because New York has authorized the warehouseman to perform what is clearly a state function."

71. 395 U.S. 337 (1969) (garnishment procedure held unconstitutional). The other cases he cited are North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment procedure held unconstitutional); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin procedure held unconstitutional).

72. 436 U.S. 149, 176 (1978).

these prior decisions.[73]

ANALYSIS

Ms. Brooks' Authorized and Encouraged Argument

The Court's summary consideration and dismissal of Ms. Brooks' contention that Flagg Brothers' action was attributable to the State, because New York had "authorized and encouraged" it by enacting section 7-210, was correct. Ms. Brooks relied upon the language of *Reitman v. Mulkey*[74] in phrasing her allegation. However, subsequent Supreme Court decisions had rejected the *Reitman* rationale that legislative acquiescence would impose fourteenth amendment restraints on private action.[75]

In *Jackson v. Metropolitan Edison Co.*,[76] the Court was faced with the same contention in considering whether the legislatively approved termination practices of a public utility company constituted state action. In deciding that the company's action was private and therefore not subject to the restraints of the fourteenth amendment, the Court found it decisive that the State "ha[d] not put its own weight on the side of the proposed practice by *ordering* it."[77] The *Flagg* Court's language and reasoning closely paralleled that of *Jackson.*

Numerous lower court decisions have rejected the contention that the "authorization and encouragement" rationale of *Reitman* represents a sufficient basis for finding state action in private creditor remedy cases.[78] Even the Second Circuit, while deciding that state action was present in *Flagg*, concluded that the reasoning of *Reitman* was an inappropriate basis for finding state action.[79]

The Supreme Court's holding in *Flagg* that private action will not be attributable to the state unless a statute or regulation

73. *Id.* at 169.

74. 387 U.S. 369, 375 (1967).

75. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1978) ("where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmit a practice initiated by the utility and approved by the commission into 'state action'"). *See also* Evans v. Abney, 396 U.S. 435, 458 (1970) (trust property allowed to revert in accordance with state law when racially restrictive purposes for the property were frustrated; held not state action).

76. 419 U.S. 345 (1974).

77. *Id.* at 357 (emphasis added).

78. *E.g.*, Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, 155-56 (7th Cir. 1975), *cert. denied*, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201, 203 n.4 (1st Cir. 1975); Bond v. Dentzler, 494 F.2d 302, 309-310 (2d Cir. 1974), *cert. denied*, 419 U.S. 837 (1974).

79. *See* 553 F.2d 764, 770-71 (2d Cir. 1977), *rev'd*, 436 U.S. 149 (1978).

compels that action, is well supported by case law.[80] Commentators have suggested that the "authorized and encouraged" rationale of *Reitman* would only be applicable in cases involving racial discrimination.[81] The *Flagg* Court does not address this possibility but only makes it clear that in the commercial arena, legislative authorization and encouragement of private activities will not constitute state action.[82]

Ms. Brooks' Public Function Argument

The public function doctrine was never envisioned as a means to protect constitutional rights in all instances of state delegation of authority.[83] The focus of inquiry in determining whether an activity was a public function, and therefore subject to the restrictions of the fourteenth amendment, has always centered on the nature of the activity involved.[84] The standard previously used by the Court in making this determination was whether the delegated power was one which had been *traditionally* reserved to the state.[85] In *Flagg*, the Court appears to have adopted a new standard based upon an activity's *exclusive* state nature. A careful historical analysis of the public function doctrine's evolution is necessary in order to fully evaluate the merit of the *Flagg* Court's reasoning.

The public function doctrine has gone through three stages of development. The seeds of the idea that in a modern society certain activities must be constitutionally controlled, regardless of who is administering them, first surfaced in Justice Harlan's dissent in the *Civil Rights Cases*.[86] However, it was not until

80. *See* notes 75-79 and accompanying text *supra*.

81. *See* Burke & Reber, *supra* note 27, at 1078-80; Black, "*State Action*", *supra* note 22, at 82-83.

82. The *Flagg* Court does not specifically refer to Reitman v. Mulkey, 387 U.S. 369 (1967), in refuting its reasoning. Perhaps this is because the Court wishes to preserve the rationale of *Reitman*, should it be needed later.

83. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-58 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-54 (1974). *See* Terry v. Adams, 345 U.S. 461, 469 (1953); Marsh v. Alabama, 326 U.S. 501, 506-508 (1946); Smith v. Allwright, 321 U.S. 649, 661-65 (1944).

84. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (administration of a municipal park); Marsh v. Alabama, 326 U.S. 501 (1946) (operation of a company owned town); Nixon v. Condon, 286 U.S. 73 (1932)(administration of primary elections).

85. *See* note 84 *supra*.

86. 109 U.S. 3, 37-62 (1883) (Harlan, J., dissenting). Justice Harlan reasoned that certain activities are so inately concerned with the public interest that they should be subject to Congressional legislation regardless of who administered these activities.

thirty years later, in 1927,[87] that the Supreme Court adopted this concept in the line of cases concerning private party primary election procedures in Texas.[88]

In these *White Primary Cases*,[89] the Court looked to the spirit and purpose of the fourteenth and fifteenth amendments to invalidate the racially exclusionary practices of various private Texas Democratic organizations.[90] The fact that elections had always been traditionally associated with state sovereignty was considered of great importance by the Court in reaching its decisions. The Court reasoned that the manifest purposes of these amendments should not be frustrated by the fact that private persons, rather than state officials, were responsible for the questioned practices.[91]

In 1946, the Court was again presented with a problem involving the alleged abuse of a sovereign function by a private party. In *Marsh v. Alabama*,[92] the Gulf Shipbuilding Corporation owned the entire town of Chickasaw, Alabama. Gulf had refused to allow Jehovah's Witnesses to distribute leaflets in the town's streets. A member of the group did so anyway and was arrested and convicted under the state criminal trespass law. In reversing the defendant's conviction and invalidating Gulf's restrictive practices, the Court reasoned that "[s]ince these facilities . . . [were] built and operated primarily to benefit the public and since their operation . . . [was] essentially a *public function*" the guarantees of the first and fourteenth amendments were applicable.[93]

The seeds of the public function doctrine were planted in the *White Primary Cases* and *Marsh v. Alabama*. However, these cases had dealt only with elections and private government of a town, activities peculiarly related to state sovereignty. In the second stage of the doctrine's development, uncertainty

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87. *See* Nixon v. Herndon, 273 U.S. 536 (1927) (racially exclusive practices of democratic party primary elections held unconstitutional).

88. *See* Terry v. Adams, 345 U.S. 461 (1953) (pre-primary election procedures held unconstitutional); Smith v. Allwright, 321 U.S. 649 (1944) (party convention's racially restrictive policies held unconstitutional); Nixon v. Condon, 286 U.S. 73 (1932) (primary election procedures held unconstitutional).

89. *See* notes 87-88 *supra*.

90. Terry v. Adams, 345 U.S. 461 (1953) (In *Terry*, the Court noted that the primary election involved was the only election which had counted but decided the case according to the spirit of the fifteenth amendment. *Id.* at 469-70). The *Flagg* Court cites *Terry* as defining one branch of the public function doctrine. 436 U.S. 149, 158 (1978).

91. *Id.*

92. 326 U.S. 501 (1946).

93. *Id.* at 506 (emphasis added).

reigned as the Court groped for consistency in its application of the reasoning of *Marsh* to different and less sovereign activities.

In *Evans v. Newton*[94] the Court decided that the prohibitions of the fourteenth amendment applied to the racially exclusive administration of a park by private trustees. The park had been created in a testamentary trust by Senator Bacon for the use of white people only. In explaining why the fourteenth amendment's prohibitions applied to the park, the Court relied in part on the fact that the City of Macon was involved in the maintenance of the park,[95] and alternately upon a designation of the park's operation as a public function.[96] The Court reasoned that the predominant character and purpose of the park was municipal, but nevertheless declined to base its decision solely on a public function analysis.

When the Court subsequently applied and relied solely upon the public function rationale of *Marsh* in dealing with two cases involving large shopping centers,[97] contradictory decisions resulted.[98] The Court realized that a new device existed by which certain private activities could be constitutionally regulated, but there was little agreement as to the extent or method for application of the public function doctrine.[99]

The third stage of development and crystalization of the public function doctrine occured in *Jackson v. Metropolitan Edison Co.*.[100] In *Jackson*, a privately owned utility company had, pursuant to Pennsylvania law, summarily terminated the electrical service of Catherine Jackson for nonpayment of her electric bills. Ms. Jackson brought a section 1983 action alleging that Edison was performing a public function and that her rights to procedural due process under the fourteenth amendment had been violated. The Court did not reach the due process question because it determined that the furnishing of utility services was

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94. 382 U.S. 296 (1966).

95. *Id.* at 301. "So far as this record shows, there has been no change in municipal maintenance and concern over this facility."

96. *Id.* at 301. "The service rendered even by a private park of this character is municipal in nature."

97. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

98. In *Logan*, the Court had relied upon the rationale of *Marsh* in holding that a large shopping center was the equivalent of a municipal corporation. In *Lloyd*, the Court held that a shopping center, larger and significantly more independent than that in *Logan*, was not the equivalent of a municipality. In Hudgens v. NLRB, 424 U.S. 507 (1976), Justice Stewart writing for the majority, acknowledged that *Lloyd* had impliedly overruled *Logan* despite the fact that *Lloyd* had distinguished *Logan*. Justice Stevens had dissented in *Lloyd*.

99. *See* note 98 *supra*.

100. 419 U.S. 345 (1974).

neither a state function nor a municipal duty, and therefore was not subject to the restraints of the fourteenth amendment.[101]

The *Jackson* Court surveyed past Supreme Court decisions[102] in which state action had been found on public function grounds, and determined that these cases had all involved the exercise, by a private entity, "*of powers traditionally exclusively reserved to the State*."[103] In using this standard, the Court relied heavily on an *historical inquiry* into the nature of utility services at *common law*. Citing two Pennsylvania Supreme Court decisions,[104] the Court stated that "[t]he Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty."[105] The *Jackson* Court therefore ruled that the Metropolitan Edison Co. was not performing a public function and affirmed the dismissal of Ms. Jackson's claim by the Third Circuit.[106]

The Court in *Jackson* solidified the public function doctrine by surveying its past decisions and deriving a standard by which private activities were to be judged. The *Jackson* Court made it clear that in examining a challenged activity under the public function doctrine, an historical analysis should be used in determining whether a power exercised by a private entity was one "traditionally exclusively reserved to the State" and therefore subject to fourteenth amendment restraint.[107]

The Flagg Court's Interpretation of the Public Function Doctrine

In ruling that Flagg Brothers' proposed prejudgment sale of Ms. Brooks' possessions would not constitute state action under the public function doctrine, the Court focused solely on the "exclusively" portion of the *Jackson* formula and specifically eschewed an historical analysis of the challenged activity.[108] The

101. *Id.*

102. Evans v. Newton, 382 U.S. 296 (1966) (municipal park); Terry v. Adams, 345 U.S. 461 (1953) (election); Marsh v. Alabama, 326 U.S. 501 (1946) (company town); and Nixon v. Condon, 286 U.S. 73 (1932) (election) were the cases cited by the *Jackson* Court. Justice Rehnquist, writing for the majority in *Flagg*, distinguished *Evans* as resting upon a finding of ordinary state action rather than the public function doctrine.

103. 419 U.S. 345, 352 (1974) (emphasis added).

104. Bailey v. City of Philadelphia, 184 Pa. 594, 39 A. 494 (1898); Girard Life Ins. Co. v. City of Philadelphia, 88 Pa. 393 (1879).

105. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

106. Jackson v. Metropolitan Edison Co., 483 F.2d 754 (3d Cir. 1973).

107. 419 U.S. 345, 352 (1974).

108. 436 U.S. 149, 157-58 (1978). The dissenters would have placed the emphasis on the word "traditional". *Id.* at 167-68 (Marshall, J., dissenting) (citing *Jackson*).

Flagg Court explained its analytical approach by stating that "rel[iance] upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another."[109] In support of this proposition the *Flagg* Court cited two apparently contradictory circuit court decisions on the constitutionality of section 7-210.[110] In each of these cases the circuit courts had based their decisions on an historical analysis of warehousemen's remedies. However, the nature of the respective inquiries differed.

In one of the cases,[111] the Ninth Circuit looked to long standing *state statutes* which had allowed the private foreclosure of a warehouseman's lien, while in the other,[112] the Eighth Circuit based its decision upon an assessment of a warehouseman's rights under the *common law*. The two circuits' decisions were contradictory but their historical references differed as well. Because of these varying analyses, the *Flagg* Court's citation of these cases for the proposition that ambiguity must result if "historical antecedents" were relied upon, seems suspect.[113]

In *Jackson v. Metropolitan Edison Co.*,[114] the Court had relied upon the Pennsylvania Supreme Court's analysis of the *common law* in holding that the furnishing of utility services was neither a state function nor a municipal duty.[115] A similar analysis of a warehouseman's rights at the common law by the *Flagg* Court would have removed any possibility of the ambiguity that the Court apparently feared.

It seems clear that at common law, although a warehouseman acquired a possessory lien upon the goods being stored

109. 436 U.S. 149, 162-63 (1978).

110. Cox Bakeries of N.D. v. Timm Moving & Storage, 554 F.2d 356 (8th Cir. 1977) (action under § 7-210 held to be state action); Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976) (action under § 7-210 held not to be state action).

111. Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976). The *Melara* court downplayed the fact that a warehouseman could not sell encumbered goods to satisfy a lien at common law. The forerunner of CAL. COM. CODE § 7-210 (West 1964) was 1851 Cal. Stats., ch. 12, 170 enacted in 1851, authorizing public sale by a warehouseman of encumbered goods upon which three months storage was due.

112. Cox Bakeries of N.D. v. Timm Moving & Storage, 554 F.2d 356 (8th Cir. 1977). The *Cox* court relied upon the Second Circuit's decision in *Flagg* and attempted to distinguish *Melara* as resting upon an analysis of long standing state statutes. The *Cox* court looked to the common law in deciding the state action question. *Id.* at 359.

113. *See* note 109 *supra*.

114. 419 U.S. 345, 353 (1974).

115. *See* notes 104 and 105 *supra*.

with him, he could not sell the goods to satisfy the debt.[116] A warehouseman had to first go into court and obtain a judgment against his debtor by proving not only his lien claim, but also the amount of the charges.[117] If the debtor refused to pay the judgment, the warehouseman was required to obtain a writ of execution and deliver it to the sheriff, who would then sell the goods.[118]

By enacting section 7-210, New York effectively delegated to Flagg Brothers the traditional roles of judge, jury and sheriff without providing for any judicial supervision or other safeguards. Surely it cannot be sensibly contended that the statutorily authorized exercise of the authority embodied in these offices does not constitute "the exercise . . . of powers traditionally exclusively reserved to the State."[119]

In lieu of an historical analysis, and the result such an analysis would seem to require, the *Flagg* Court focused solely on the "exclusively" portion of the *Jackson* formula.[120] In determining that the settlement of debtor-creditor disputes was not a function exclusively reserved to the state, the *Flagg* Court found it to be decisive that alternate means of relief had been available to Ms. Brooks.[121] The alternate remedies cited by the *Flagg* Court as being available to respondent in New York were

116. R. BROWN, THE LAW OF PERSONAL PROPERTY §§ 13.1 and 14.1 (3d ed. 1975).

117. *Id. See generally* Patton, *Warehouse Receipts, Bills of Lading and Other Documents of Title: A Comparison of the Texas Law and Article Seven of the Uniform Commercial Code*, 32 TEX. L. REV. 321 (1954).

118. *Id. See also* Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973), "execution of a lien, be it a conventional security interest . . . writ of attachment . . . or a judgement lien . . . traditionally has been the function of the Sheriff." 33 N.Y.2d at 17, 300 N.E.2d at 713, 347 N.Y.S.2d at 175.

119. Jackson v. Metropolitan Edison Co. 419 U.S. 345, 352 (1974).

120. 436 U.S. 149, 158 (1978). "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State'." *Id.* (citing *Jackson*).

121. 436 U.S. 149, 159-63 (1978). In support of its reasoning the Court cited Terry v. Adams, 345 U.S. 461 (1953), a Texas white primary case, and Marsh v. Alabama, 326 U.S. 501 (1946). While it is true that the elections involved in *Terry* had been the only meaningful ones held in the state and the streets of the company owned town in *Marsh* had been the only ones available for the purpose of exercising first amendment rights, the respective Courts in *Terry* and *Marsh* had not considered it to be decisive that alternate forums for the exercise of these rights had not been available to the claimants and did not make their decisions on this basis. Rather, the Courts looked to the fundamental purposes of the amendments relied upon and reasoned that these purposes should not be frustrated by the fact that private persons rather than state officials were responsible for the questioned practices. The *Flagg* Court seemingly misconstrued the basis for the decisions of these Courts.

replevin[122] and an action for damages under subsection nine of the challenged statute.[123] However, these remedies appeared to be of little help.[124] Replevin was available only if respondent's goods had been wrongfully taken,[125] and clearly New York's enactment of section 7-210 sanctioned Flagg Brothers' actions. In order to maintain an action for damages under section 7-210(9), Ms. Brooks would have had to prove a violation of the provisions of the challenged statute. However, Flagg Brothers' conduct had been in conformity with section 7-210. Even accepting the *Flagg* Court's proposition that available alternative relief obviates the exclusivity necessary for an activity to be considered a public function, it is difficult to see how any such relief was available to Ms. Brooks.

By holding that the existence of such alternative remedies precludes labeling an execution sale under section 7-210 a public function, the Court introduced a new criterion for, and seriously restricted the scope of, this doctrine. It is difficult to imagine a situation wherein one could not obtain alternate relief equally as meaningful as that which the Court found available in *Flagg*. The Court moreover intimated that in order to state a claim upon which relief may be granted, a plaintiff must allege that state law bars other relief.[126] Under the *Flagg* Court's standards, the burden of proving this allegation will certainly weigh heavily upon future claimants.

The Practical Effect of the Flagg Court's Decision

Although the *Flagg* Court's application of the public function rationale is suspect, its decision reflects a practical awareness of the needs of both debtors and creditors. Any restriction of creditor remedies would be likely to curtail the availability of

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122. 436 U.S. 149, 160 (1978). *See* McKINNEY'S FORMS CPLR, § 10:337.

123. 436 U.S. 149, 160 (1978). U.C.C. § 7-210(9) provides:

> 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.

The Court also suggested that Ms. Brooks could have sought "a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage." 436 U.S. 149, 160 (1978). The Court stated, "Respondent Brooks has never *alleged* that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage." *Id.* (emphasis added). Nevertheless, such action would have affected only the terms of the storage contract and could not be said to have provided a remedy, unless one adheres to the "ounce of prevention . . ."maxim.

124. 436 U.S. 149, 167 (1978) (Marshall, J. dissenting).

125. *See* note 113 *supra*.

126. 436 U.S. 149, 160 (1978) ("Respondent Brooks has never *alleged* that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage") (emphasis added).

credit to those considered marginal risks, while at the same time increasing the cost of such credit to the borrower.[127] The Court perhaps felt that the economic ramifications of a decision favorable to Ms. Brooks were sufficient to override her constitutional right to procedural due process.

By deciding *Flagg* as it did, the Court signified that it is comfortable with the position debtor-creditor dispute resolution presently occupies. It is doubtful that future due process challenges of statutory summary creditor remedies will meet with much success unless the challenged statute officially involves the state in the questioned practice. For this reason, states may view the *Flagg* decision as a vehicle for reducing the congestion in their courts by delegating further summary remedies to creditors. At some time the Supreme Court will be called upon to decide at what point the constitutional right to due process outweighs practical economic considerations.

CONCLUSION

In *Flagg*, the Court outlined a new test in determining that New York's delegation of authority had not constituted a public function. Before private action will be termed a public function, a state must delegate a function traditionally and exclusively reserved to itself, and by so doing remove all remedies from those persons affected.[128] In *Flagg*, the second part of this test was not satisfied and the Court therefore concluded that New York had not delegated a public function by enacting section 7-210.

A more equitable and farsighted decision could have been reached by holding section 7-210 unconstitutional on due process grounds. Although notice is required by section 7-210, the statute fails to provide the owner with a hearing before his goods are sold in satisfaction of the warehouseman's lien.[129] The requirement that section 7-210 provide for an informal arbitration hearing in order to pass constitutional muster would have served to protect the owner's property interests while at the same time allowing the continued expedition of business transactions.

As we have progressed through the twentieth century, the

127. Kripke, *Consumer Credit Regulation: A Creditor Oriented Viewpoint*, 68 COLUM. L. REV. 445, 478-86 (1968). *But see* Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 91 n.37 (1972) ("[W]ith the exception of automobiles and other major durables, the low value of the repossessed goods combined with the low default rate of consumer debtors make the value of repossession an insignificant factor in the consumer credit industry").

128. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157-64 (1978).

129. *See* note 40 *supra*.

line between state and private action has become less distinct. Our relations with the private sector have come to affect our rights and lives to at least the extent of our involvement with local government. To continue to recognize a distinction between state and private action where none practically exists, frustrates the manifest concerns of the due process clause.

William R. Black